2005 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

THE REPUBLIC OF APPOLLONIA V. THE KINGDOM OF RAGLAN

THE CASE CONCERNING THE VESSEL *THE MAIRI MARU*

BENCH MEMORANDUM

CONFIDENTIAL

FOR JUDGES EYES ONLY

SHEARMAN & STERLING INTERNATIONAL ROUNDS
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2005 Philip C. Jessup International Law Moot Court Competition

BENCH MEMORANDUM

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PART 1: GENERAL INFORMATION

I. Introduction

The purpose of this bench memorandum is to provide judges in the Philip C. Jessup International Law Moot Court Competition with the basic factual and legal issues in the 2005 Jessup Problem (the "Compromis"). This Bench Memorandum should be read in conjunction with the Compromis and the Corrections and Clarifications to the Compromis. The Compromis is intended to present the competitors with a balanced problem, such that each side has strengths and weaknesses in its case. The Compromis contains a number of legal issues that are relevant to more than one claim for relief, and participants will often be required to argue in favor of a rule of law in support of one claim and distinguish the same rule with respect to another claim. Judges should note and question any internal inconsistencies that may arise in a competitor's or team's argument.

This memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Compromis. Judges should not be surprised when, in evaluating either a Memorial or an oral argument, they see arguments or authorities not discussed in this memorandum. This does not suggest that such arguments are not relevant or credible.

II. Synopsis of the Facts

The following is a summary of the people, places and events in the Compromis.

STATES AND THE GEOGRAPHY

Appollonia (Applicant in this case) is a small, technologically-advanced, coastal nation.

Raglan (Respondent in this case) is an underdeveloped archipelagic nation, lying halfway between Appollonia and Maguffin.

Maguffin (not a party to this case) is a large, developed island nation located about 1440 kilometers off the coast of Appollonia.

The Norton Shallows is an area of ocean containing a small group of uninhabited sandbars, unclaimed by any nation and located about 250 nautical miles southeast of the Raglanian archipelagic baselines (and outside of Raglan's Exclusive Economic Zone). Private Raglanian companies have long utilized the Shallows for sport fishing, diving, and eco-tourism industries, providing Raglan with more than the equivalent of 80 million Euros in tax revenue annually.

Sand Deep is a 9000-meter trench located on the High Seas less than a kilometer southeast of the Norton Shallows.

PEOPLE AND ORGANIZATIONS

The Mairi Maru is a privately-owned, Appollonian-flagged vessel. One of the largest double-hulled ocean-going cargo ships in Appollonia, *The Mairi Maru* has been used several times for the transportation of MOX from Appollonia to Maguffin.

Mr. Thomas Good is a private citizen of Raglan. He is one of 100 Raglanian citizens selected and trained as pilots as part of an anti-piracy program. He is selected by the Raglanian Royal Navy to pilot *The Mairi Maru* through Raglan's archipelagic waters and, once aboard, takes control of the ship.

Mr. Robert Price is the Prime Minister of Raglan.

Mrs. Judith Stark is the President of Appollonia.

Ms. Antoinette Ybarra is Appollonia's Minister of Energy.

Mrs. Ernestine Navorocki is Appollonia's Minister of Foreign Affairs.

Maguffin Atomic Recycling Company, Ltd. (MARC). MARC is a privately-owned company in Maguffin which operates several nuclear power facilities in that country.

The Insurers of Lading and Shipping Association (ILSA) is the leading international association of insurers and underwriters of merchant vessels.

The Regional Organisation of Nations (RON) is an intergovernmental assembly. Both Appollonia and Raglan are members.

INTERNATIONAL ORGANIZATIONS

International Maritime Organization (IMO) is a U.N. agency established in 1948 to promote safe, secure and efficient shipping on clean oceans; the IMO Convention entered into force in 1958 and currently has 164 Member States. Approximately 40 conventions and protocols have been adopted by the organization

International Maritime Bureau (IMB) is a non-profit organization established in 1981 as a specialized division of the International Chamber of Commerce. The organization acts as a focal point in the fight against all types of maritime crime and malpractice

Piracy Reporting Center (PRC) is managed by the IMB to raise awareness of piracy "hotspots" by publishing a weekly piracy report, and to investigate incidents of piracy and armed robbery at sea and in port; funded by voluntary sponsors

International Atomic Energy Agency (IAEA) is a U.N. agency established in 1957; headquartered in Vienna, and is the monitoring organization for, among other things, the Non-Proliferation Treaty.

International Law Commission (ILC) was established by the U.N. General Assembly in 1947 to promote the progressive development of international law and its codification. It consists of 34 members who serve in their individual capacity.

International Tribunal for the Law of the Sea (ITLOS) is an independent judicial body under the United Nations Convention for the Law of the Sea established to adjudicate disputes arising from the interpretation and application of UNCLOS.

CHRONOLOGY OF EVENTS

1990	A geographical survey by Appollonia State University reveals significant uranium deposits beneath Appollonia's inland desert.
1995	Appollonia's Ministry of Energy builds a nuclear reactor. The reactor is owned and operated by the Appollonian government and supplies a substantial majority of the electric power needs of the country.
1995	Appollonia's Ministry of Energy orders that plutonium produced by the reactor be mixed with depleted uranium to produce fresh mixed oxide fuel (MOX) to be used as a fuel source.
1995	Bands of pirates begin preying upon ships traveling in the Raglanian Archipelago. Attacks increase over the next several years.
1996	Appollonia concludes a "Safeguards Agreement" with the International Atomic Energy Agency (IAEA) concerning the operation of the reactor and the nuclear materials.
Apr 1997	The Ministry of Energy enters into a five-year agreement to sell surplus MOX to MARC. Under the agreement, the Ministry of Energy shipped MOX to its resident agent in Maguffin, who then transferred ownership of the MOX to MARC. The agreement was duly reported to the IAEA by both Appollonia and Maguffin, as were all shipments made pursuant to it.
1998	The International Maritime Bureau reports that in 1997, there were 40 pirate attacks against ships in the Raglanian Archipelago.
30 Sep 1998	ILSA issues a "five-point warning" (on a scale of one to five) to its members concerning shipping through the Raglanian Archipelago. ILSA considers the routes to present an unreasonable risk of loss. ILSA states that over 150 million Euro worth of cargo had been lost as a result of attacks on shipping in the previous two months. The warning has been reviewed on a quarterly basis.
1999	After the ILSA warning, the amount of shipping into Raglanian ports and traveling through the archipelago plummets. According to Raglan's Ministry of Economy, Raglan loses the equivalent of 80 million Euro in revenues. Appollonia continues to ship MOX via private carriers through the archipelago during this period, without reported incident.
31 Jul 1999	After inspecting Appollonia's nuclear program, the IAEA issues a report. It

	concludes that Appollonia complied with international standards, but notes concerns regarding the MOX export procedures. The report chides Appollonia for not giving notice to Raglan that MOX is transported through its territorial waters or exclusive economic zones, and for shipping MOX without adequate safeguards on private vessels through pirate-infested waters.
20 Aug 1999	Energy Minister Ybarra replies to the IAEA Report, stating that Appollonia's navy is not equipped to protect the MOX shipments. She says private carriers are more effective at transporting and protecting MOX. She notes that, in order to maintain security, Appollonia does not publicize the shipments, and that there had been no attacks against MOX shipments to Maguffin in the previous two years.
15 Oct 1999	Prime Minister Price unveils a comprehensive anti-piracy program, consisting of providing Raglanian naval personnel to pilot ships traveling through the archipelago upon request. Under the plan, vessels utilizing pilots fly a specially-designed flag, indicating they are under Royal Navy protection. He promises that the Royal Navy will electronically monitor the progress of piloted ships, the pilots will be in touch with the Raglanian Royal Navy throughout their voyage, and the Navy will respond to distress calls from such pilots within 30 minutes. The program takes effect immediately, and is immensely popular. In the program's first two years, no vessel piloted by a Royal Navy officer was attacked by pirates.
2001	Observing a decrease in pirate attacks since 1999, ILSA reduces its warning to a "four-point warning," and indicates that it might consider a further reduction. The few pirate attacks that have occurred since 1999 happen only at night, and only in the sparsely populated western edge of the Raglanian Archipelago.
30 Nov 2001	Prime Minister Price announces that the Royal Navy is no longer able to provide enough officers to meet every request for an escort. The Navy trains about 100 private Raglanian citizens to serve as pilots. Paid by the Raglanian government, these pilots are assigned by the Royal Navy and are able to request armed intervention by the Navy if and when needed.
26 Jul 2002	*The Mairi Maru*, laden with MOX and manned by a small crew, leaves port in Appollonia on a course for Maguffin. Its course will take it through the center of the Raglanian Archipelago, on a route (and on a daytime schedule) intended to minimize the risk of pirate attack. Only Appollonia's Ministry of Energy, the IAEA headquarters, and *The Mairi Maru*'s Captain and First Officer are aware that the vessel is carrying MOX. The captain does not request a Raglanian naval pilot as he approaches Raglan's territorial waters.
Later that day	Before it enters Raglan's Exclusive Economic Zone, *The Mairi Maru* is delayed for several hours by a severe storm.
Three hours before dusk	*The Mairi Maru* nears Raglan's archipelagic waters. The Captain radios the Raglanian Royal Navy and requests a pilot.
Two hours later	The assigned pilot, a private contractor named Thomas Good, arrives with two assistants aboard a privately-owned and -operated vessel hired by the Royal

	Navy for that purpose. They board the ship on the High Seas, and Mr. Good hoists the specially-designed anti-piracy flag.
27 Jul 2002 2200 hours	*The Mairi Maru* enters Raglan's archipelagic waters.
27 Jul 2002 2300 hours	Mr. Good reveals to the Captain that he has a small explosive device and demands that the Captain surrender control of the ship. The Captain agrees, and Mr. Good and his assistants lock the crew in the galley. Mr. Good navigates the ship to a rendezvous location, where he meets with confederates. They remove all navigation and communication equipment from *The Mairi Maru*. They then disable the aft propeller shaft, making it impossible to steer the ship. They do not disturb the MOX. Mr. Good and the other attackers then disembark, leaving *The Mairi Maru* adrift on a south-easterly course.
Several hours later	*The Mairi Maru* leaves Raglan's archipelagic waters.
28 Jul 2002	A storm alters the course of *The Mairi Maru*, which runs aground on one of the sandbars in the Norton Shallows. The ship's hulls rupture, as does the secure compartment holding the MOX canisters. The canisters, also damaged, leak over 50 kilograms of highly radioactive MOX pellets onto the sandbar and into the surrounding waters. In the hours following the crash, members of the crew are able to free themselves from the galley.
29 Jul 2002	A Raglanian patrol boat spots *The Mairi Maru* while training nearby. Crew members note a large number of dead fish and sea birds in the vicinity. The Captain of *The Mairi Maru* reports the leaking radioactive materials to the patrol vessel, which immediately retreats to a safe distance, radios naval headquarters, and radios for medical support, which arrives within the hour. Several members of crew of *The Mairi Maru* die, and others exhibit acute radiation syndrome. Doctors rescue the surviving crew of *The Mairi Maru*, and recover the bodies of the dead.
31 Jul 2002	Prime Minister Price sends a message to President Stark, revealing the presence of radioactive materials, dead fish and sea birds in an area of up to 15 kilometers from the wreck of *The Mairi Maru*.
4 Aug 2002	Prime Minister Price informs President Stark that Raglan will scuttle the vessel, stating this is Raglan's "only choice," since noxious material is leaking into the water and rapid cleanup is impossible.
Later that week	Raglan notifies the International Maritime Organisation that it is going to scuttle the vessel. Raglan secures the MOX canisters to prevent further pollution, tows *The Mairi Maru*, and sinks it to the bottom of Sand Deep. Prime Minister Price promptly informs President Stark. Raglan begins decontamination efforts immediately prior to the removal and scuttling of *The Mairi Maru*.
28 Oct 2002	The owners and insurers of the vessel sue the government of Raglan in Raglanian civil court for compensation for the loss of *The Mairi Maru*, claiming

	15 million Euros for the loss of the ship. All plaintiffs are corporations registered and headquartered in Appollonia. The trial court dismisses the action, relying upon the judicial immunity of the Raglanian armed forces in civil suits for national defense activities. On appeal, the decision is upheld by the Supreme Court.
1 Nov 2002	Surviving crew members of *The Mairi Maru* (and families of the dead) sue Raglan in a Raglanian civil court, alleging negligence in protecting *The Mairi Maru* while it was in Raglanian archipelagic waters. All plaintiffs are citizens and residents of Appollonia. The trial court dismisses the action on the same theory of judicial immunity as the insurers' and owners' suit. On appeal, the Raglanian civil court of last resort summarily affirms the trial court's determination.
5 Apr 2003	President Stark signs into law "The Commemoration of The Mairi Maru Act of 2003 (COMMA)," which cancels all student exchange programs between Appollonia and Raglan and suspends the issuance of new student visas to Raglanian citizens seeking to study in Appollonia.
28 May 2003	Prime Minister Price announces that Raglan's national football team is withdrawing from the 2004 Olympic qualifier tournament which Appollonia will host.
1 Jul 2003	The Regional Organisation of Nations adopts a non-binding resolution calling upon Appollonia and Raglan to resolve their differences and end the dispute. President Stark and Prime Minister Price agree to bring the case before the International Court of Justice. Maguffin declines to participate.
1 Jun 2004	Nearly two years later, the contamination is concentrated within a radius of 30 kilometers from the sandbar where the vessel ran aground. Traces of radiation are detected as close as 25 kilometers from Raglan's Exclusive Economic Zone. Raglan's cleanup efforts continue.

Omitted from this timeline are a number of diplomatic exchanges which occurred between Appollonia and Raglan after the scuttling of *The Mairi Maru*. These exchanges, which are exposition to indicate possible legal arguments, are contained in paragraphs 21 to 29 of the Compromis. These arguments will be evaluated later in this Memorandum.

MAP

[MAP EXCLUDED IN THIS DRAFT]

Prayers for Relief of Each Party

Appollonia requests that the ICJ adjudge and declare:

(a) Raglan is responsible for the attack upon and wreck of *The Mairi Maru* and all consequences thereof by virtue of (1) its failure to respond appropriately to pirate activities in its archipelagic waters and (2) the acts of Thomas Good, which are imputable to Raglan;

(b) 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;

(c) 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

(d) Appollonia did not violate any obligations owed to Raglan under international law in transporting MOX through the waters of the Raglanian Archipelago.

Raglan requests that the ICJ adjudge and declare:

(a) Raglan is not responsible for the attack on *The Mairi Maru* and owes no compensation to Appollonia for any injury resulting therefrom;

(b) Raglan did not violate any obligation owed to Appollonia under international law in the scuttling of *The Mairi Maru*;

(c) Appollonia violated international law by transporting MOX through Raglan's archipelagic waters without prior notification to or the consent of that state; and

(d) Appollonia is responsible for the damage to the sandbar and the surrounding waters as a result of its unlawful shipment of MOX, and must compensate Raglan for both the resulting injury to its fishing and tourist industries and the cost of decontaminating the area.

III. Sources of International Law

This section is an introduction to public international law for judges who might not have professional experience or training in the field. There are important distinctions between international law and domestic legal systems. The most significant for the international law moot judge is the rigid definition of what sources of law are acceptable before the Court.

A. General

The conduct and rules of the International Court of Justice (the "ICJ") are governed by the Statute of the International Court of Justice (the "ICJ Statute"). Under Article 38(1) of its Statute, the International Court of Justice may consider the following sources of international law in order to decide disputes before it:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;
> (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Commentators disagree as to whether these sources are listed in order of importance.

Judges from common-law systems should note the status of precedent. Article 59 of the ICJ Statute deprives decisions of the Court any status as precedent, stating, "The decision of the Court has no binding force except between the parties and in respect of that particular case." In practice, the ICJ often cites its prior decisions, and those of its predecessor, the Permanent Court of International Justice, as persuasive authority, pursuant to Article 38(1)(d). Additionally, the Court frequently evaluates rules of customary international law in its opinions and subsequently relies upon those evaluations in later decisions.

Decisions by other tribunals are dealt with in the discussion in Subsection E ("Decisions and Publicists") *infra.*

Resolutions of the United Nations General Assembly are not, of themselves, binding before the Court. Although Resolutions may be evidence of customary international law, the General Assembly's position in international law is not analogous to that of a domestic legislature, and resolutions of the General Assembly do not create positive international law.

B. Treaties

Treaties are agreements between and among States, by which parties obligate themselves to act, or refrain from acting, according to the terms of the treaty. Rules regarding treaty procedure and interpretation are defined in the 1959 Vienna Convention on the Law of Treaties[1] (the "VCLT").

The fundamental principle relating to treaties, reiterated in Article 26 of the VCLT, is that of *pacta sunt servanda:* "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." In other words, once a State becomes a party to a treaty, it is bound by that treaty.

Article 34 of the VCLT adds that a treaty is generally not binding on a State which is not party to the treaty, and does not create rights or obligations for such a State. Article 18 tempers this rule with respect to States that have signed – but not yet ratified – a treaty: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty...." pending ratification, unless it has "made its intention clear not to become a party to the treaty." For example, a State which has signed but not ratified a treaty forbidding testing of nuclear weapons would not be held to the minute procedural details of the treaty; however, actual nuclear-weapons testing by the State would probably be seen as a violation of international law, constituting a breach of the "object and purpose" of the treaty.

Even if a State is not party to a treaty, a treaty may serve as evidence of customary international law. Article 38 of the VCLT recognizes this "back-door" means by which a treaty may become binding on non-parties. Judges should be aware, however, that situations arise where some provisions of a treaty – for example, many provisions of the International Covenant on Civil and Political Rights -- may reflect or codify customary international law, while other parts do not.

C. Customary International Law

The second source of international law is customary international law. A rule of customary international law is one that, whether or not it has been codified in a treaty, has binding force of law because the community of States treats it and views it as a rule of law. In contrast to treaty law, a rule of customary international law is binding upon a State whether or not it has affirmatively assented to that rule.

In order to prove that a given rule has become a rule of customary international law, one must prove two elements: widespread state practice and *opinio juris* – the mutual conviction that the recurrence (of state practice) is the result of a compulsory rule.

"State practice" is the material element of customary international law, and simply means that a sufficient number of states behave in a regular and repeated manner consistent with the customary norm. As alluded to above, State practice may also be shown when a sufficient number of States sign, ratify, and accede to a convention. There is some dispute among commentators as to whether the practice of a small number of states in a particular region can create "regional customary international law" or whether the practice of particularly affected states, e.g. in the area of space law or antitrust law, can create custom that binds states which

[1] 1155 U.N.T.S. 331 (1969), *available at* http://fletcher.tufts.edu/multi/texts/BH538.txt. (hereinafter, the "VCLT").

later become affected by these issues, although the ICJ appears to have acknowledged the possibility.[2]

O*pinio juris* is the psychological or subjective element of customary international law. It requires that the State action in question be taken out of a sense of legal obligation, as opposed to mere expediency. Put another way, *opinio juris*, is the "conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it."[3]

Customary international law is shown by reference to treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and the practice of international organizations. Each of these items might be employed as evidence of State practice, *opinio juris*, or both.

With respect to the burden of proof, in *The North Sea Continental Shelf Cases*, the ICJ stated that the party asserting the existence of a rule of customary international law bears the burden of proving the existence of such a rule.

D. General Principles of Law

The third source of international law consists of "general principles of law." Such principles are gap-filler provisions: on occasion, the ICJ must have recourse to rules typically found in domestic courts and domestic legal systems in order to address procedural and other issues.

The bulk of recognized general principles are procedural in nature, for example, the laws regarding burden of proof and admissibility of circumstantial evidence. Many others, for example estoppel, waiver, unclean hands, necessity, and *force majeure,* may sound to a common-law practitioner as equitable doctrines. The principle of general equity in the interpretation of legal documents and relationships is one of the most widely cited general principles of international law. The ICJ has upheld the application of equitable principles generally in, among other cases, the *North Sea Continental Shelf Cases* (1969); its predecessor, the Permanent Court of International Justice, recognized equitable principles as part and parcel of international law in *The Diversion of Water from the Meuse.*[4]

It is important to note, however, that "equity" in this sense is a source of international law, brought before the court under Article 38(1)(c) of the Statute of the ICJ. It is an *inter legem* application of equitable principles, and not a power of the Court to decide the merits of the case *ex aequo et bono*, a separate matter treated under Article 38(2) of the Statute.

E. Decisions and Publicists

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[2] *North Sea Continental Shelf Cases, (F.R.G. v. Den.), 1969 I.C.J. 1 (1969).*

[3] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

[4] P.C.I.J. Ser. A/B, No. 70, 76-78 (1937)

The final source of international law is judicial decisions and teachings of scholars. This category is described as "a subsidiary means of finding the law." Judicial decisions and scholarly writings are, in essence, research aids for the Court, used for example to support or refute the existence of a customary norm, to clarify the bounds of a general principle or customary rule, or to demonstrate state practice under a treaty.

Judicial decisions, whether from international tribunals or from domestic courts, are useful to the extent they address international law directly or demonstrate a general principle.

"Teachings" refers simply to the writings of learned scholars. Many student competitors make the mistake of believing that every single published article constitutes an Article 38(1)(d) "teaching." However, the provision is expressly limited to teachings of "the most highly qualified publicists." For international law generally, this is a very short list, and includes names like Grotius, Lauterpacht, and Brownlie. Within the context of a specific field of international law – for example, environmental law or law of the sea – there are additional experts who would be regarded within their field as "highly qualified publicists."

IV. Burdens of Proof

In the *Corfu Channel Case*,[5] the ICJ set out the burdens of proof applicable to cases before it. The Applicant normally carries the burden of proof with respect to factual allegations contained in its claim, by a preponderance of the evidence. The burden falls on the Respondent with respect to factual allegations contained in a cross-claim.

In this case, each party has exclusive control of the evidence regarding certain aspects of the case and has not produced it or stipulated to it in the Compromis. In such a situation, the Court may take liberal inferences of fact against that party. Appollonia, for instance, has exclusive control over evidence regarding safeguards relating to the transportation of the MOX. However, there is very little detail in the *Compromis* about this matter, leaving Raglan and the Court to draw inferences regarding those safeguards. Raglan, on the other hand, has exclusive control over evidence regarding its response to piracy in its waters, the way it selected and trained Thomas Good, and the way its navy handled Good's attack on *The Mairi Maru*, but there is little detail in the *Compromis*. Appollonia and the Court are left to draw inferences about these matters.

Participants cannot be held responsible for the lack of information in the *Compromis*. They can only be held responsible for the quality of their argument in light of this lack of detail. Judges should not dwell on the evidentiary gaps unless the competitors have themselves drawn implausible or unsupportable inferences.

V. Issues of Standing

[5] *Corfu Channel Case (Merits) (U.K. v. Alb.)*, 1949 I.C.J. Rep. 4.

Both parties in this case must address immediate questions of standing. For example, before reaching Appollonia's claims for loss of *The Mairi Maru*, Appollonia must demonstrate that it has standing. Likewise, before reaching the substantive issues with respect to Raglan's claim against Appollonia for the damage to the Norton Shallows, Raglan must show that it has standing to espouse the claim.

A. Nationality Rules for Standing (also "Diplomatic Protection" or "Espousal")

The first basis of standing is the notion of "diplomatic protection," namely, the right of a State to seek redress for harms caused to its nationals. The traditional and firmest basis for establishing standing under this doctrine is the nationality of the harmed individuals. That is, a State is accorded standing to seek redress for harm to its nationals, wherever they might be found. In principle, state sovereignty dictates that a State is free to designate as its "national" any person it sees fit.

However, in the key case dealing with the issue, the *Nottebohm Case*,[6] the Court focused on a "genuine link," rather than formal notions of citizenship or nationality. The Court held that a State must demonstrate a sufficiently close nexus between the claiming state and the individual. Therefore, "mere nationality" (*e.g.* a State designating an otherwise unrelated person a "national" for the purpose of establishing standing in a case) is insufficient. The Court pointed to various factors that would establish a genuine link.

The students may also cite one of two more recent cases concerning diplomatic protection. In the *Barcelona Traction Case*,[7] the ICJ held that only the state of incorporation, and not the state of the nationality of shareholders, is permitted to espouse a claim on behalf of a corporation before the ICJ. On the other hand, in the much later *Elettronica Sicula Case (ELSI)*,[8] the ICJ permitted the United States to pursue a claim of damage to an Italian corporation (ELSI), which was wholly owned by two U.S. corporations.

The Compromis states that the commercial actors in the Norton Shallows were all citizens of Raglan. Therefore a straight claim for damage to ships and tangible property would not be controversial. However an aspect of the damage claim in the instant case relates to loss of commercial revenues in an area that is not the territory of any state and injury to the geographical area itself, when again, Raglan does not own the territory. Students may attempt to argue the nexus analysis of *Nottebohm* bootstrapped to *Barcelona Traction* and *Elettronica Sicula*.

B. Standing Pursuant to *Erga Omnes* Principles

If standing cannot be established on the "genuine link" basis of *Nottebohm*, the claiming State may attempt to establish standing based upon the doctrine of obligations *erga omnes* –

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[6] *Nottebohm Case (Liechtenstein v. Guatemala)* 1955 ICJ 4.
[7] *Barcelona Traction,Light and Power Company, Limited (Belg. v. Sp.)*, Second Phase, Judgment, 1970 I.C.J. Rep. 32 (1970).
[8] *Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. Rep. 3 (1989).

obligations which are owed to the international community as a whole. In dicta in the *Barcelona Traction Case*, the ICJ stated,

> "By their very nature [obligations *erga omnes*] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection."

A number of ICJ cases, usually dissents and concurrences, have addressed not just the question of *erga omnes* obligations but also the factors that would allow an obligation to rise to this level.[9] The wide divergence of opinions on the Court should give the competitors plenty to talk about and should be a rich source for questions from the bench.

In addition to the short list of *erga omnes* obligations enumerated by the ICJ in *Barcelona Traction* (including prohibitions against genocide, acts of aggression, slavery and racial discrimination), the Court has also added the obligation to respect the right to self-determination.[10] The Court has recognized the theoretical existence of such a right in the context of large-scale environmental injury in the *Gabcikovo-Nagymaros Case*.[11]

Once an *erga omnes* obligation has been established, a State trying to enforce the obligation must establish that its claim is an *actio popularis* – a legal claim brought by one State on behalf of the community of States.[12] Because the obligation the State seeks to enforce is not owed directly to it, the State must demonstrate that the obligation is actionable and is brought on behalf of the international community. This will be problematic for the competitor.

While the ICJ has recognized *erga omnes* obligations, it has flatly refused to recognize a right of action based upon such obligations in practice. At the root of this reluctance is a concern regarding unwarranted and excessive interference with State sovereignty. The doctrine is regarded as prohibiting a contravening practice, rather than giving rise to a cause of action for redress.

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[9] *See, e.g., South-West Africa,* 1962 ICJ Reports 319 (Preliminary Objections) and 1966 ICJ Reports 6 (Second Phase), *Nuclear Test Cases,* 1974 ICJ Reports 253 (Aust. v. Fr.) and 1974 ICJ Reports 456 (New Zealand v. Fr.), *Military and Paramilitary Activities in and against Nicargua,* 1996 ICJ Reports 226, *Reservations to the Genocide Conventions*, 1951 ICJ Reports 15 (prohibition against genocide is *jus cogens*), *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, 35 ILM 809 (1996) (certain fundamental human rights applicable in armed conflict are "intransgressible").

[10] *East Timor Case* (Port. v. Aust.), 1995 ICJ Rep. 4.

[11] *Gabcikovo-Nagymaros Case* (Hung. v. Slov.), 1997 ICJ 7.

[12] See, e.g., Dissenting Opinion of Judges Onyeama, Dillard, Jiminez de Arachaga, and Waldock, in the *Nuclear Test Cases (N.Z. v. Fr.)*, *supra* note 12. ("Although we recognize that the existence of a so-called *actio popularis* in international law is a matter of controversy, the observations of this Court in [*Barcelona Traction*] suffice to show that the question is one that may be considered as capable of rational legal argument and a proper subject of litigation before this Court.")

One source of law in this area is the Articles on State Responsibility,[13] a longtime project of the International Law Commission (ILC), an expert committee charged by the United Nations with development of principles of international law. The Articles are intended to codify the international law principles of state responsibility. The Articles have never been presented in a form susceptible of state signature or ratification; but they were approved by the General Assembly by Resolution in 2001. A competitor seeking to base an argument on the Articles must argue either that the specific provision cited is a codification of existing customary law, or that the work of the ILC, a commission of experts on the topic of state responsibility, is deserving of consideration as a "most highly qualified publicist" under Article 38(1)(d) of the Statute of the ICJ. If the student chooses the latter route, the bench should be mindful that Article 38(1)(d) is merely "supplemental" to the other sources of international law.

If a competitor introduces the Articles on State Responsibility as a source of international law, the competitor must explain which Article or Articles (s)he is relying upon. The panel should not allow the competitor to use evidence which demonstrates that one Article is a codification of custom in support of the customary status of another Article.

Article 42 of the Articles on State Responsibility recognizes standing to bring an action based upon an *erga omnes* obligation:

> "A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to" *inter alia* a group of States including that State, or the international community as a whole, and the breach of the obligation: (i) specifically affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation."[14]

Raglan may argue that endorsement of the Articles by the United Nations General Assembly strengthens the argument for allowing *actio popularis* in some circumstances, and that Raglan is specially affected as the primary commercial actor in the Norton Shallows.

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[13] State Responsibility: Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading, U.N. GAOR Int'l L. Comm'n, 53d Sess., U.N. Doc. A/CN.4/L.602/Rev.1 (2001) (hereinafter "Articles on State Responsibility").

[14] Articles on State Responsibility, art. 42.

PART 2: LEGAL ANALYSIS

This legal analysis is divided into five sections, based upon the four claims (and counterclaims) of the parties. The first three sections concern Raglan's liability: firstly, whether Appollonia has standing to bring the claim against Raglan; secondly, Raglan's responsibility for the attack on *The Mairi Maru*; and thirdly, Raglan's responsibility for the scuttling of the vessel. The fourth and fifth sections concern Appollonia's liability: firstly, whether Raglan has standing to make a counterclaim; and secondly, whether Appollonia is liable for transporting MOX through Raglan's waters.

Please note that there are important issues of standing in this year's Compromis. Therefore, judges are *urged* to be familiar with the general issues raised in Part 1, Section V ("Issues of Standing"), *supra* as well as noting the specific discussion of standing in Sections I and IV *infra*.

I. Appollonia's standing to bring claims for losses to its nationals

As a procedural matter, Appollonia must establish its standing to bring its claims for losses caused to its nationals. This is a preliminary matter which should be addressed before further argument by Appollonia.

Appollonia has brought claims against Raglan for the consequences of an attack on *The Mairi Maru*, a privately-owned vessel which flew the flag of Appollonia:[15] the damage to and loss of *The Mairi Maru* and its cargo and the personal injury and death caused to members of the crew. Appollonia also brings claims for the loss of the vessel and cargo (including the MOX) arising from Raglan's scuttling of *The Mairi Maru*. Appollonia is claiming on behalf of the owners, insurers, crew members, and families of deceased crew members, all nationals of Appollonia.[16]

Only States may be parties to cases before the ICJ. However, under the doctrine of "diplomatic protection," a State may bring a claim on behalf of its nationals (*see* discussion of the relevant principles *supra* in Part I, Section V on "Issues of Standing," *supra*). In order to exercise diplomatic protection, the protected nationals must exhaust local remedies available in the accused State. In this case the owners, insurers and surviving crew members and family members clearly exhausted their local remedies in Raglan.[17]

Raglan should not expend effort to challenge Appollonia's standing. Establishing standing is merely a procedural requirement to be fulfilled by Appollonia; the facts in the *Compromis* provide no real basis for Raglan to dispute Appollonia's standing.

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[15] *Compromis*, para. 14.
[16] *Compromis*, paras 30-31.
[17] *Compromis*, paras. 30-31.

II. Piracy and the Attack on The Mairi Maru

A. Whether a Pirate Attack Occurred (and Why It Matters)

We can expect Appollonia to argue that the actions of Thomas Good (and his companions) amount to piracy. In such a case, we can expect Raglan to try to refute this analysis. However, it is possible that Appollonia will choose to argue, in the alternative, that Thomas Good and his companions committed some other kind of wrong for which Raglan is responsible. The Compromis leaves these options open to Appollonia. Characterizing the conduct as piracy or some other wrong will have consequences for both parties.

1. The relevance of characterizing the conduct as "piracy"

The commentary to Article 53 of the VCLT indicates that the prohibition of piracy is a *jus cogens* norm. If Appollonia is able to establish that Thomas Good is indeed a pirate under international law, then it will argue that Raglan cannot avail itself of any of the defenses it might attempt to invoke under the VCLT, including *force majeure*, unclean hands, or estoppel. Appollonia will argue that the supervening nature of these norms precludes Raglan escaping responsibility for their violation. If Appollonia cannot or does not establish that Thomas Good's conduct constitutes piracy, and instead bases its argument on some other wrong for which Raglan is responsible, then Raglan may be able to rely on one or more defenses in order to avoid liability. Therefore it is crucial to determine what Mr. Good committed.

2. Definitions of "piracy"

The first international treaty on the subject was the 1958 Convention on the High Seas,[18] which defined piracy as:

> (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article. [19]

Appollonia is a party to the High Seas Convention.

The United Nations Convention on the Law of the Sea (UNCLOS),[20] signed in 1982, repeated the definition of piracy found in the High Seas Convention.[21] Raglan is a party to UNCLOS.

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[18] Convention on the High Seas, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311 (the "High Seas Convention")

[19] *Id.*, art. 15.

[20] U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 ("UNCLOS").

The fact that Appollonia and Raglan are parties to different treaties which contain the same definition of "piracy" suggests that they agree on the definition of "piracy". Article 38(1)(a) of the ICJ Statute states that the Court shall apply "international conventions . . . establishing rules expressly recognized by the contesting states." Raglan will argue that each contesting state must recognize the conventions in their entirety in order for them to be treated as rules that bind both states. In any case, Appollonia faces tremendous technical difficulties in making its case under the UNCLOS and High Seas Convention definitions of "piracy".

(i) Territorial issues – where the conduct occurred

Mr. Good boarded *The Mairi Maru* on the high seas. *The Mairi Maru* entered Raglan's archipelagic waters at 2200 hours,[22] and no act of violence or detention took place until 2300 hours[23], while still in archipelagic waters.[24] If the relevant conduct was the act of violence/detention rather than the boarding, then an issue arises whether Mr. Good's actions fall within the geographic requirement for piracy – *i.e.* that they took place *on the high seas* or *outside the jurisdiction* of any state.

Raglan is a party to UNCLOS, which provides that Raglan has sovereignty over its archipelagic waters.[25] Those waters are enclosed by baselines, from which the territorial sea (up to 12 nautical miles[26]) and contiguous zone (up to 24 nm[27]) are measured. Appollonia is not a party to UNCLOS, but is party to the Convention on the Territorial Sea and Contiguous Zone, which has similar (though more restrictive) provisions relating to the territorial sea and contiguous zone, but does not expressly recognize the concept of archipelagic waters. The applicable rules of custom are unclear. Competitors may attempt to question the extent of Raglan's jurisdiction over the waters in which the act of violence/detention by Mr. Good occurred. However, there is not enough information to allow for debate about whether Raglan had jurisdiction over the relevant waters.

The most appropriate inference to be drawn is that the act of violence/detention occurred within Raglan's jurisdiction. Competitors should focus on whether the relevant conduct was the boarding on the high seas or the acts of violence/detention. If Appollonia succeeds in arguing that the relevant conduct was the boarding on the high seas, then argument should move to the next technical issue: whether the transport vessel on which Mr. Good arrived fits the requirements of piracy. If Raglan succeeds in establishing that the relevant conduct was the acts of violence/detention within its archipelagic waters, then Raglan will have shown that the conduct cannot be "piracy" under the UNCLOS or High Seas Convention definitions.

(ii) Vessel issues – the type of vessel that transported Thomas Good

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[21] UNCLOS, art. 101.
[22] *Corrections and Clarifications*, Clarification 3.
[23] *Compromis*, para 17.
[24] *Corrections and Clarifications*, Clarification 3.
[25] UNCLOS, art 49
[26] UNCLOS, arts 3 and 48.
[27] UNCLOS, arts 33 and 48.

Both the High Seas Convention and UNCLOS require the pirate to have been either a member of the crew, or a passenger, of a "private ship". Appollonia will argue that the transport vessel from which Thomas Good boarded *The Mairi Maru* fits that requirement, since it is privately owned and operated[28]. However, the transport vessel was hired by the Royal Raglanian Navy, and as such it might not be considered a mere private ship while it was transporting a government trained pilot to assist *The Mairi Maru* as part of the Raglanian pilot program.

Complicating matters further, UNCLOS adds an extra requirement by defining a "pirate ship" as a ship "intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101."[29] The persons in dominant control of the transport vessel were the private operators of the vessel, not Mr. Good. Those private operators had been hired by the Raglanian Royal Navy for the purpose of delivering a pilot to *The Mairi Maru.*[30] The argument is clearly in Raglan's favor that Mr. Good did not board *The Mairi Maru* from a "pirate ship".

Raglan will argue that Mr. Good's actions do not meet the definition of "piracy" as defined by the different treaties which it and Appollonia have each ratified.

Furthermore, Raglan may point out that the definition of "piracy" in its domestic criminal code matches the UNCLOS definition.[31] Since Mr. Good's actions fall short of the UNCLOS definition, he cannot be punished under Raglan's domestic code. As a result, Raglan might argue that it cannot treat this incident as an act of piracy. However, inadequate domestic legislation is no defense for failing to comply with a rule under international law.

3. "Piracy" under customary international law today

Appollonia will also argue that the definition of piracy has evolved under customary international law. Appollonia will also argue that a technicality should not prevent justice from prevailing and that the Court should recognize a broader customary definition which has evolved in response to modern piracy.

Some competitors may choose to rely on custom entirely, and forgo reliance on the definition of "piracy" in UNCLOS and the High Seas Convention. This approach is likely to be more effective for Appollonia than one based on UNCLOS or the High Seas Convention.

In recent years, there have been attempts to broaden the definition of piracy. For example, the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime

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[28] *Corrections and Clarifications*, Clarification 3.
[29] UNCLOS, art. 103.
[30] *Corrections and Clarifications*, Clarification 3.
[31] *Corrections and Clarifications*, Clarification 3.

Navigation[32] does not contain the requirements that a "pirate ship" be involved or that the attack occur on the high seas.[33]

In the wake of vicious pirate attacks in the 1980s and early 1990s, the International Maritime Bureau (IMB) of the International Chamber of Commerce established the Piracy Reporting Centre. For purposes of its statistics and reports, the IMB uses a broader definition of piracy than the one found in UNCLOS, one that includes "an act of boarding any vessel with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of that act."[34]

The International Maritime Organisation (IMO) uses the UNCLOS definition of piracy. However, it often equates piracy with "armed robbery against ships." For example, the IMO's published "Recommendations to Governments" for preventing and suppressing piracy and armed robbery against ships do not distinguish between measures that should be taken against piracy and those against armed robbery. [35]

Raglan will argue that the definition of piracy should not be expanded and that customary rules are reflected in the definitions under the High Seas Convention and UNCLOS. In a dissenting opinion in the *Lotus* case, decided in 1927 by the Permanent Court of International Justice, Justice Moore stated, "nations have shown the strongest repugnance to extending the scope of the offence [of piracy], because it carried with it not only the principle of universal jurisdiction but also the right of visit and search on the high seas in time of peace."[36]

4. Arguments irrespective of whether Thomas Good committed "piracy"

Even if Good did not commit "piracy," Appollonia may rely on more generic arguments about Raglan's failure to deal with piracy in the vicinity of its waters. The essence of these arguments

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[32] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *opened for signature* Mar. 10, 1988, 1678 U.N.T.S. 222 (the "Maritime Safety Convention"). As of November 30, 2004, there were 114 contracting parties to the Maritime Safety Convention.

[33] *Id.*, art. 3. Article 3(1) reads : "Any person commits an offence if that person unlawfully and intentionally:

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or . . .

(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

[34] *See, e.g.*, "Piracy and Armed Robbery Against Ships," ANNUAL REPORT 2003, ICC International Maritime Bureau.

[35] Piracy and Armed Robbery Against Ships, IMO MSC/Cir.622/Rev.1, 16 June 1999, par. 21 (hereinafter "IMO Recommendations")

[36] *S.S. Lotus (Fr. v. Turk.)*, P.C.I.J. Series A, No. 10, Sep. 7, 1927.

is that Raglan allowed an environment to develop in which Good was able to carry out his activities. These arguments are explored in more detail below.

5. Arguments irrespective of whether Thomas Good committed "piracy"

In the National Rounds, several teams raised an unusual (and incorrect) argument, in effect claiming piracy as a *defense* to state responsibility. Respondent claims that Good's acts constitute piracy, but that piracy is subject to individual criminal responsibility and, therefore, the possibility of state responsibility is excluded. Respondent may cite the fact that pirates are legally *hostis humani generis* — "enemies of all mankind" — and do not enjoy the protection of their national State. Respondent may claim that the national government cannot therefore be held responsible for piratical acts.

There is *no legal foundation* for this claim.[37] While piracy is subject to individual criminal responsibility, there is no support for the claim that this excludes the possibility of attribution to a State. The legal regimes governing State responsibility and individual criminal responsibility are separate. A piratical act may simultaneously create individual criminal responsibility in the pirate *and* State responsibility in a State.

B. State Responsibility

In order to prevail on its first claim for relief, Appollonia must attach responsibility to Raglan. Appollonia will make both a direct and a vicarious argument for responsibility:

1. that Raglan failed to respond appropriately to pirate attacks in its waters; and
2. that the acts of Mr. Good are attributable to Raglan.

1. Direct Responsibility for State Action or Inaction

It is axiomatic in international law that a State becomes directly responsible when it breaches a duty or responsibility owed to another State. Appollonia will argue that Raglan has directly violated obligations owed to Appollonia by failing to adequately deal with piracy in its waters. Appollonia has publicly accused Raglan of inadequately policing its waters for pirates and negligence in screening civilian pilots who take part in its piloting program.[38]

(i) General principles

Article 1 of the Articles on State Responsibility provides that "every internationally wrongful act of a State entails the international responsibility of that State." Article 2 provides that a State commits an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to it and constitutes a breach of its international obligations. Article 3

[37] The argument has its genesis in a mis-reading of Judge Moore's dissenting opinion in the *Lotus Case*, *supra* note 36. Moore noted only that a pirate *loses the protection* of their flag State and are subject to capture and prosecution by any State that might find him. *Lotus* at p.70. Moore said nothing about State responsibility.
[38] *Compromis*, para. 25.

states that how a state characterizes an act under its domestic law is immaterial if international law provides that it is unlawful. Both parties will invoke the *Corfu Channel*[39] case with respect to what they reasonably should/could have known about Mr. Good's activities and whether that knowledge leads to liability.

Raglan will rely on the language by the Court that says "it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew or ought to have known, of any unlawful acts perpetrated therein, nor yet that it necessarily knew or should have known the authors." Appollonia will reply that Raglan (like Albania in *Corfu Channel*) is the sole repository of all relevant information, and bears the burden of demonstrating whether it met its obligations in screening and training Mr. Good.

(ii) Raglan's duties regarding piracy

The issue of whether Thomas Good committed "piracy" in this case has been explored above. Whether the particular conduct in this case is "piracy" or not, the more general question of Raglan's responsibility for pirate activities in the vicinity of its waters must be addressed.

(a) Source of the duties – treaty or custom?

Raglan does not owe Appollonia any direct treaty duty. Article 14 of the High Seas Convention, to which Appollonia is a party, requires states to cooperate to repress piracy. Raglan is not a party to that convention. However, it is a party to UNCLOS, and Article 100 of UNCLOS contains an identical obligation. To bind Raglan, therefore, Appollonia must show that these treaty provisions represent a codification of customary international law.

Appollonia will argue that the current State practice, particularly Singapore, Indonesia and the Philippines, indicates that certain specially-affected States are increasingly cooperating and stepping up enforcement. Raglan will argue that, although there may be evidence of state cooperation, this does not reflect a uniform, consistent, widespread state practice. Raglan will also argue that there is little indication that States undertake these actions out of a perceived international legal obligation (*opinio juris*) rather than, say, for economic reasons (i.e. encouraging shipping to continue in the region).

Appollonia may respond that Raglan's ratification of UNCLOS, which mirrors the duty in the High Seas Convention regarding cooperation, suggests that Raglan agrees that the obligation exists. Article 38(1)(a) of the ICJ Statute states that the Court shall apply "international conventions . . . establishing rules expressly recognized by the contesting states." Furthermore, the inclusion of an identically-worded obligation in UNCLOS in 1982 points to a customary rule having emerged since the High Seas Convention was adopted in 1958. Appollonia should raise other evidence of custom regarding piracy, such as the recent developments discussed above regarding the definition of piracy and the fact that the commentary to Article 53 of the VCLT indicates that the prohibition of piracy is a *jus cogens* norm.

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[39] *Corfu Channel, supra* note 5.

(b) Scope of the duties regarding piracy

Although several conventions speak of the need to prevent piracy, there is little concrete guidance as to what constitutes adequate prevention measures or, for that matter, what constitutes piracy.

Appollonia will argue that Raglan did not properly screen its pilots and neglected its duty to suppress piracy committed in its waters. One author has urge that "suppression of piracy within national jurisdiction is a duty and obligation of a coastal State on behalf of the interest of the entire international community as well as for its own interest."[40] The negotiating history of Article 14 of the High Seas Convention states, "Any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law."[41] However, the language of Article 14 itself is more vague: "All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."

In 1999, the U.N. General Assembly urged all States "to take all necessary and appropriate measures to prevent and combat incidents of piracy and armed robbery at sea."[42] Again, this statement is of a general nature.

Among its anti-piracy recommendations mentioned above, the IMO recommended that "every piracy or armed robbery threat area should be adequately covered by Coast Earth Stations which are continuously operational," and "States with adjacent coastal waters affected by pirates and armed robbers should develop or maintain coordinated patrols by both ships and aircraft."[43] Appollonia may argue that these (admittedly non-binding) recommendations show that Raglan's actions were insufficient.

Raglan will claim that it could have done nothing further against piracy committed in its waters. The anti-piracy program was launched in 1999 and was "immensely successful."[44] No pirate attacks occurred on vessels piloted by a Raglanian Royal Navy officer.[45] As an underdeveloped archipelagic nation, Raglan will argue that this is more than sufficient to discharge its duty. Competitors should be prepared to give examples of State practice with respect to combating piracy in order to advance their respective positions of what the minimum or maximum requirement is.

(iii) If the conduct by Thomas Good is something other than piracy

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[40] Zou Keyuan, "Piracy, Ship Hijacking and Armed Robbery in the Straights," 3 *Sing. J. Int'l & Comp. L.* 524, 530 (1999).
[41] Malvina Halberstam, "Terrorism on the High Seas: The Achille Lauro, Piracy, and the IMO Convention on Maritime Safety," 82 *Am. J. Int'l L.* 269 (1988), at note 59 & accompanying text.
[42] G.A. Res. 32, U.N. GAOR, 53rd Sess., ¶22, U.N. Doc. A/53/L.35 (1998), *quoted in* Timothy H. Goodman, "Leaving the Corsair's Name to Other Times:" How to Enforce the Law of Sea Piracy in the 21st Century Through Regional International Agreements, 31 *Case W. Res. J. Int'l L.* 139 (1999).
[43] IMO Recommendations, *supra* note 33, at para. 25.
[44] *Compromis*, para. 12.
[45] *Id.*

If Appollonia fails to prove that Good committed piracy, it may argue that Raglan is responsible for some other violation of international law. Appollonia may argue that Article 3 of the Maritime Safety Convention defines "hijacking" or some similar international crime, rather than piracy. Good's actions fall squarely within the terms of Article 3. Appollonia will argue that Raglan was obliged to prevent or prosecute such crimes. The key element of Appollonia's argument is not that Good engaged in unlawful conduct, but that Raglan was obliged to respond, and either failed to act or acted inadequately.

International law has long recognized that States owe a minimum degree of vigilance to ensure domestic peace and social order.[46] When a State neglects this duty or fails to take sufficient measures when it has warning that a serious problem exists, it may incur liability for failure to prevent injurious acts, failure to prosecute or failure to apply proper civil penalties. This reasoning is used in *Corfu Channel*, where the ICJ held that Albania should have taken steps to issue a warning and failure to do so resulted in responsibility.

(iv) General arguments regardless of whether there was piracy or some other wrong

Whether Mr. Good's conduct is "piracy" or some other criminal delict, Appollonia may argue that Raglan has had ample warning and has neither acted appropriately to prevent the injury nor to bring Mr. Good to justice. Raglan will reply that it not only acted to control the pirates but that it acted successfully. No one knows where Good is at present, and Raglan will claim that it is therefore impossible to prosecute him.

Apart from potential deficiencies in the screening process which allowed Good to become a pilot in the first place, Appollonia will point to the fact that, under the piloting program, the Raglanian Royal Navy was supposed to constantly monitor *The Mairi Maru* and should have been in constant contact with Good.[47] As soon as the vessel deviated off course,[48] the Royal Navy should have noticed and acted. As soon as the navigation and communications equipment was removed,[49] the loss of communication with Mr. Good should have been noted by the Royal Navy, and action taken. There is no evidence that the Royal Navy responded to these events until July 29, when a Royal Navy patrol boat found the grounded ship on the sandbar.

(v) Potential defenses for Raglan – if there was no piracy

If Good's acts were not piracy, Raglan may rely on the facts to support certain defenses under the VCLT. One such defense is unclean hands, *e.g.* that Appollonia failed to disclose it was carrying particularly hazardous cargo or failed to require that *The Mairi Maru* take a larger crew or further anti-piracy measures.

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[46] *British Claims in the Spanish Zone of Morocco Arbitration (U.K. v. Sp.)*, 2 RIAA 617(1929)
[47] *Compromis*, para 11.
[48] *Compromis*, para 18.
[49] *Compromis*, para 18.

2. Indirect Responsibility for the Actions of Private Persons

Article 5 of the Articles on State Responsibility attributes conduct to a state by a person or entity "which is empowered by the law of that State to exercise elements of the governmental authority. . . provided the person or entity is acting in that capacity in the particular instance."[50] The Commentary to Article 5 states that the Article is intended to take para-State entities into account. Examples given include private security firms contracted by the government to act as prison guards and airlines which may be given powers related to immigration control or quarantine laws. Appollonia will argue that Good's actions can be attributed to Raglan even though he was a private contractor.

The ICJ established a legal standard for attributing the acts of private actors to a State in *Military and Paramilitary Activities in and against Nicaragua.*[51] For private conduct to be attributed to the State "it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[52] The inquiry focuses on what the government did with respect to prospective conduct. Given that Good was a participant in the Raglanian Pilot Program, Appollonia may argue that Raglan had effective control over him. However, Raglan will reply that its control only extended to authorized, as opposed to unauthorized, acts. Competitors may also debate the details of what happened here, in terms of how far Raglan was in effective control of Mr. Good: his transport to *The Mairi Maru*, the Royal Navy's monitoring and communications with Mr. Good while he was piloting, and the Royal Navy's ability to respond to wrongful conduct committed by Good.

Appollonia will argue that Mr. Good was hired by Raglan to exercise governmental authority: the private pilots were used by Raglan after Raglan was unable to provide enough Royal Navy pilots. Mr. Good was transported by a vessel hired by the Raglanian Navy and carried and flew the specially-designed flag for the naval protection program.[53] Therefore, Appollonia will argue that the attack took place in Mr. Good's capacity as a pilot. Appollonia will argue that it does not matter that the person exceeds his or her authority or contravenes instructions.[54] Private pilots, such as Thomas Good, were paid by the Royal Navy. Furthermore, there is no evidence that Raglan took steps to screen the pilots that it hired for the program. The burden of proof falls to Raglan to show that such steps were taken.[55]

Raglan will reply that Mr. Good acted outside the scope of his duties as a pilot, and Raglan cannot be held responsible for his unlawful acts. Appollonia will argue that a number of cases have found liability even if the act was allegedly ultra vires. For example, in the *Thomas H. Youmans Case* before the Mexican-American Claims Commission, [56] Mexico could not escape responsibility for murders committed by Mexican soldiers on the ground that these acts were

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[50] *Id.*, art. 5.
[51] *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* , 1986 I.C.J. 14, 114 (Jun. 27).
[52] *Id.* at para. 115.
[53] Corrections and Clarifications, Clarification 9.
[54] Articles on State Responsibility, Article 7.
[55] *Corfu Channel*, supra note 5.
[56] *Thomas H. Youmans Case* (U.S. v. Mex.) 4 RIAA 110 (1926)

outside the scope of the soldiers' competency given that the soldiers at the time were on duty and their commander was present. In the *Jean-Baptiste Caire Cases*,[57] Mexico was again held responsible for murders committed by two soldiers as part of an extortion scheme even though their commanders had no knowledge of what they had done because they acted as "apparent officers" of the Mexican State and/or "exercised powers or measures connected with their official character." Raglan will seek to distinguish these cases from the present case, where Thomas Good is an acknowledged "private contractor"[58] rather than a direct member of the military.

Raglan will also argue that Good took part in a planned criminal operation which began well before boarding *The Mairi Maru* and at no time was acting in his capacity as a pilot; this is not a case of a state actor or pseudo-state actor committing acts which begin *intra vires* and finish *ultra vires*. Raglan will also argue that, on the strict terms of Article 5 of the Articles on State Responsibility, Good may have had governmental authority but he was never "acting in that capacity in the particular instance", and therefore his actions cannot be attributed to Raglan.

III. The Scuttling of The Mairi Maru

Appollonia's claim regarding the scuttling of *The Mairi Maru* is a claim for damages. Appollonia is exercising its right of diplomatic protection on behalf of the owners and insurers of the vessel. Appollonia claims that Raglan illegally scuttled *The Mairi Maru* and is therefore responsible for the loss of the vessel and the cargo, including the MOX. Raglan denies that it violated any obligation owed to Appollonia or its citizens – relying perhaps on the doctrine of "necessity."

As a preliminary matter, Raglan may argue that the mere scuttling of *The Mairi Maru* does not entitle Appollonia to recover damages for the entire value of the ship and its cargo. Raglan will point out that *The Mairi Maru* and its cargo are not under its control, and Appollonia is free to recover both the ship and its cargo from Sand Deep. Appollonia can reply (correctly) that Raglan deliberately placed the vessel at the bottom of the trench, which is 9000 meters deep. Recovery of *any* material from a depth of 9000 meters is unprecedented in human history, and is technologically impossible.[59]

A. Duties regarding release of toxic or hazardous substances

Raglan has signed and ratified the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter[60] and UNCLOS. These two treaties contain rules that are relevant for assessing the appropriateness of Raglan's scuttling of *The Mairi Maru* and therefore effectively dumping the nuclear materials on board.

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[57] *Jean-Baptiste Caire Cases*, (Fr. & Mex. Mixed Claims Commission 1929), 5 Ann. Digest 146

[58] *Compromis*, para 16.

[59] The deepest humans have ever dived is 10,915 meters. That record, set in 1960, has stood for over forty years. By comparison, the *Titanic* sits at a depth of about 3800 meters, and the Russian submarine *Kursk* sank to a depth of only 108 meters. The deepest known point on Earth, in Marianas Trench, is at about 10,923 meters.

[60] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 138. (hereinafter "London Convention")

Appollonia is likely to rely on the rules in these two treaties. However, Appollonia has neither signed nor ratified either instrument. If Appollonia relies on these rules, it must establish that the provisions of the London Convention and UNCLOS have become customary international law.

1. UNCLOS

(i) Definition of "dumping"

UNCLOS and the London Convention define "dumping" to include "any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea" and "any deliberate disposal at sea of vessels, aircraft, platforms or other man-made structures at sea."[61] This definition would cover even the scuttling of a vessel with waste materials on board.

(ii) Duty to prevent or minimize pollution from dumping

UNCLOS contains general provisions regarding dumping, such as:

- Article 210:"States shall adopt laws and regulation to prevent, reduce and control pollution of the marine environment by dumping."[62]
- Article 194: States are required "to minimize to the fullest possible extent: (a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping."[63]

While UNCLOS does not specifically mention processed radioactive byproducts such as MOX, "there is no doubt that this broad definition also covers nuclear waste."[64]

2. The London Convention

Although it shares the same definition of "dumping" as UNCLOS, the London Convention contains more specific provisions regarding what can and cannot be dumped and how this is to be done.

(i) General prohibition on dumping radioactive materials

Rather than generally instructing states to prevent pollution, the London Convention requires Contracting Parties to prohibit the dumping of wastes listed in Annex I, which includes "radioactive wastes or other radioactive matter."[65]

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[61] UNCLOS, art. 1(1)(5)(a); London Convention, art. III(1).
[62] UNCLOS, art. 210(1).
[63] UNCLOS, art. 194(3)(a).
[64] James Waczewski, "Legal, Political, and Scientific Response to Ocean Dumping and Sub-Seabed Disposal of Nuclear Waste," 7 *J. Transnat'l L. & Pol'y* 97 (1997).
[65] London Convention, art. IV.

(ii) Exception for emergencies, after consultation with affected states

The London Convention allows derogations from this prohibition in case of "emergencies, posing unacceptable risk relating to human health and admitting no other feasible solution."[66] However, in order to invoke the emergency clause, a State must first abide by certain consultation requirements. The requirement requires that such a State must:

> "consult any other country or countries that are likely to be affected and the [IMO] which, after consulting other Parties, and international organizations as appropriate, shall . . . promptly recommend . . . the most appropriate procedures to adopt. The Party shall follow these recommendations to the maximum extent feasible consistent with the time within which action must be taken and with the general obligation to avoid damage to the marine environment and shall inform the [IMO] of the action it takes."[67]

(iii) Amendments banning dumping of radioactive materials at sea

Although the London Convention is more specific than UNCLOS, some commentators found it "deficient in that it merely sketches international implementing measures."[68] Members of the London Convention have discussed and implemented stronger measures:

- In 1983, delegates of the London Convention voted to suspend all radioactive dumping while the matter was studied and in 1985, when the study proved inconclusive, voted to continue the suspension.[69] However, not all delegates were in favor of the suspension. The United States and Great Britain, among others, voted against it.[70]
- In 1993, a permanent ban on the ocean dumping of radioactive waste at sea was adopted.[71] Russia did not accept the ban and lodged a reservation in 1994.[72]

As of November 30, 2004, there were 81 parties to the London Convention. Parties include the States specially affected by the issue of radioactive waste disposal, including the United States, United Kingdom, Ireland, Russia, Norway, France, Japan and Belgium.[73]

The Compromis is silent regarding Raglan's position on the subsequent adoptions, protocols and amendments to the London Convention. Therefore, it may be assumed that Raglan did not sign the 1996 Protocol or adopt the amendments; however it also did not deposit any reservations.

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[66] London Convention, art. V.
[67] *Ibid.*
[68] Alexandre Kiss, "The International Control of Transboundary Movement of Hazardous Waste," 26 *Tex. Int'l L.J.* 521 (1991).
[69] Waczewski, *supra* note 60, at 107.
[70] *Ibid.*
[71] *Ibid*; Report of the Sixteenth Consultative Meeting of Contracting Parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, Dec. 15, 1993.
[72] *Id.* at 107.
[73] International Maritime Organisation, "Status of Conventions by Country" web page, *available online at* http://www.imo.org/includes/blastDataOnly.asp/data_id%3D10793/status.xls.

B. Raglan's compliance with applicable rules of international law

1. Does Raglan owe any obligation to Appollonia?

As mentioned above, if Appollonia attempts to rely on the rules in the London Convention or UNCLOS to enforce an obligation against Raglan regarding the scuttling, it must show that the relevant rules represent customary international law.

Raglan will argue that these detailed rules are only applicable as between the parties to the treaties, and that the rules simply do not fit the requirements of customary international law. Unless Appollonia can succeed in showing these rules are customary, or that other rules apply, then Raglan owes no obligation to Appollonia whatsoever regarding the scuttling.

2. Has Raglan complied with the London Convention in any event?

If the London Convention rules apply, Appollonia will argue that the complete ban on ocean dumping of radioactive waste has become customary international law, as Russia is the only country which signed the London Convention but does not agree to such a ban. It will argue that, since the Compromis is silent on the point, it may be assumed that Raglan did not deposit any reservations and so does not object to the amendments which imposed the ban.

Raglan will argue that, even if the London Convention rules apply, it is not bound by the ban on dumping radioactive waste and that it may still invoke the exception for emergencies (after consultation). Raglan will argue that the Compromis is silent regarding Raglan's position on the subsequent adoptions, protocols and amendments to the London Convention which imposed the ban. Therefore, it should be assumed that Raglan did not sign the 1996 Protocol or adopt the amendments, and that, contrary to Appollonia's position, it cannot be assumed that Raglan did not lodge any reservations or does not otherwise oppose the amendments.

(i) Presence of an emergency

Raglan will therefore argue that it was permissible for it to scuttle *The Mairi Maru* because the vessel posed an unacceptable risk to human health (the prevailing ocean currents were likely to transport radioactive waste towards Raglan from the area of the sandbar, and despite the scuttling traces of radiation have still been found within 25 kilometers of Raglan's EEZ[74]). Raglan will argue that scuttling was the only feasible solution.

The memorandum sent by Raglan to the International Maritime Organisation and entitled "London Convention Article V Notification"[75] indicates that Raglan has not waived its rights under Article V to issue a special permit as an exception to prohibition against dumping materials listed in Annex I of the London Convention. Raglan also declared that its "only choice

[74] *Corrections and Clarifications*, Clarifications 12 and 13.
[75] *Corrections and Clarifications*, Clarification 8.

is to put this material on the deep ocean floor, out of the reach of winds and currents, where it will not present a continuing danger."[76]

(ii) Consultation with Appollonia

Raglan will also argue that it consulted with Appollonia, and that Appollonia was unwilling to take any responsibility for the damage.[77] Further, Raglan notified Appollonia and the IMO after the ship was scuttled.[78]

3. Defenses for Raglan

Raglan may raise several defenses against the claims by Appollonia.

(i) Necessity

In the *Gabcikovo-Nagymaros* case,[79] the ICJ cited Article 33 of the Articles on State Responsibility for the proposition that a state of necessity exists when there is a grave danger to the ecological preservation of the territory of a State. The ICJ also noted that "safeguarding the ecological balance has come to be considered an essential interest of all States."

Raglan can argue that it scuttled the ship because there was such a grave threat to the Norton Shallows and that since this interest is now considered the interest of all States, the threat need not be only to the territory of Raglan but could also be on the high seas. There is much language in the main decision and several of the separate opinions in the *Gabcikovo* case to support this position.

(ii) Appollonia's unclean hands

Raglan may also argue that Appollonia comes before the Court with unclean hands, as it created the situation by shipping MOX through Raglanian waters without notifying Raglan.

(iii) Appollonia's acquiescence to the scuttling

Finally, Raglan may argue that Appollonia acquiesced in the scuttling of *The Mairi Maru*. The consultation requirement of Article V of the London Convention is designed to allow interested States to acquiesce in the scuttling of a vessel or to propose alternative solutions. Raglan notified Appollonia of its intention to scuttle and only thereafter sunk the vessel. The argument turns on whether Raglan gave Appollonia appropriate time to reply; the Compromis indicates only that the scuttling occurred "later that week."[80]

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[76] *Compromis*, para. 24.
[77] *Compromis*, para. 23.
[78] *Compromis*, para. 24 (notification to Appollonia), *Corrections & Clarifications*, Clarification 8 (notification to the IMO).
[79] *Gabcikovo-Nagymaros*, *supra* note 14.
[80] *Compromis*, para. 24.

C. Scuttling as an Impermissible "Armed Attack"

Appollonia may argue that Raglan's scuttling of *The Mairi Maru* was a use of force against the sovereign territory of Appollonia (akin to an invasion of the Appollonian mainland), and therefore Raglan is liable for all consequent damages from its unlawful attack. In the *Lotus Case*, the PCIJ stated, "[A] ship on the high seas is assimilated to the territory of the State the flag of which it flies."[81] Appollonia will argue that this interpretation renders *The Mairi Maru* a "floating island" of Appollonian territory, and that Raglan's unilateral sinking of that territory is a violation of the United Nations Charter, which prohibits "the threat or use of force against the territorial integrity . . . of any State."[82]

Raglan will point out that such a broad reading of the "floating island" notion of sovereignty has been criticized by courts[83] and commentators[84] alike. Article 92 of UNCLOS recognizes that ships are subject to the "exclusive jurisdiction" of the flag State,[85] but does not speak to territorial sovereignty. While the United States takes an expansive view of its extraterritorial jurisdiction, at least one U.S. court has rejected the notion that U.S. ships are "a kind of floating United States territory, where application of [U.S. law] would not be extraterritorial."[86] Furthermore, Raglan will point out that States board and inspect foreign-flagged vessels for routine health, safety and other regulatory purposes, a practice which undercuts an argument that such vessels are analogous to the sovereign territory of the flag State. Raglan will argue that such a minor interference into Appollonia's national interests is justified by the environmental threat posed to Raglan's own territory.

IV. Raglan's Standing to Claim for Damages to Norton Shallows

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[81] *Lotus Case, supra* note 36, at 25. NATO includes in the definition of armed attack an attack "on the forces, vessels or aircraft of any of the Parties." Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey of Oct. 17, 1951, 3. U.S.T. 43, T.I.A.S. No. 2390. Ian Brownlie, a universally respected commentator, once argued , "The conditions in which forcible measures of self-defence are justified are: (a) the occurrence of a resort to force which affects the state or ships . . . under its protection (if these are attacked on or over the high seas. . .)" BROWNLIE, INTERNATIONAL LAW & THE USE OF FORCE BY STATES 433 (1963). However, Brownlie later reversed his position, stating, "The view that a ship is a floating part of state territory has long fallen into disrepute." BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 317 (4th ed. 1990).

[82] U.N. Charter, art. 2(4).

[83] *See, e.g., Scharrenberg v. Dollar Steamship Co.*, 245 U.S. 122, 127 (U.S. Sup. Ct. 1917) ("It is, of course, true that for purposes of jurisdiction a ship, even on the high seas, is often said to be part of the territory of the nation whose flag it flies: But in the physical sense this expression is obviously figurative."); *Chenng Chi Cheung v. R. [1939] A.C. 160* (Opinion of Lord Atkin rejecting the floating island theory).

[84] *See, e.g.*, SINGH & MCWHINNEY, NUCLEAR WEAPONS & CONTEMPORARY INTERNATIONAL LAW 98 (1989). ("[A] mere attack on a vessel or an aircraft . . . would not *ipso facto* give rise to the right of self-defence, unless it was a part of a general armed attack or the commencement of hostilities." The Reporter to the U.S. Restatement observers, "[t]he notion that a ship is a floating part of the territory of the flag state is generally recognized as fiction," and noting that "a person born on board a United States ship is not born 'in the United States' for purposes of citizenship." RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW at 502, note 3.

[85] UNCLOS, art. 92(1).

[86] *Kollias v. D & G Marine Maintenance,* 29 F.3d 67, 72 (2d Cir. 1994).

A. Preliminary Note

The final two pleadings concern Raglan's claims against Appollonia. Raglan asks the Court for two relevant forms of relief:

> (1) a declaration that Appollonia's transportation of MOX without prior notification to or consent of Raglan violates international law; [87] and
> (2) a declaration that Appollonia is responsible for the damage to the sandbar and the surrounding waters as a result of its unlawful shipment of MOX, and that Appollonia must therefore compensate Raglan for both (a) injury to its fishing and tourist industries and (b) the cost of decontaminating the Norton Shallows.[88]

Appollonia will respond in the first instance that it did not owe any obligation to Raglan concerning the MOX. Appollonia will further argue that, even if any obligation was breached, Raglan does not have standing to seek compensation for economic losses resulting from acts that occurred outside of its territorial waters and its exclusive economic zone.

The obligations concerning transportation of MOX will be addressed in Section V, *infra*. This section will focus on Raglan's standing to claim damages.

Appollonia's first argument will be that since there is no treaty or customary obligation that requires notice and consent it may rely on the default rule of innocent passage under customary international law. Appollonia has a right to innocent passage through Raglan's archipelagic waters and does not need to seek Raglan's consent under that principle which was recognized in the *Corfu Channel* case by the ICJ and is reflected in the Geneva Convention on the Territorial Sea and Contiguous Zone, and in UNCLOS.

B. Standing

In discussing standing, it may be useful at the outset for the bench to assume, *arguendo*, that Appollonia has committed an internationally wrongful act, and ask oralists for both Appollonia and Raglan to focus on whether, even in that case, Raglan would have standing to make a claim for compensation.

1. Exhaustion of Local Remedies

If Appollonia does not object that Raglan has not exhausted locally-available remedies in Appollonia, exhaustion is not an issue.

(i) Nature of the claim – is it for harm done to Raglan or to Raglanian nationals?

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[87] *Compromis*, para. 38(c).
[88] *Compromis*, para. 38(1)(d).

Raglan's claim for relief is for damages, at least in part, resulting from injury to its fishing and tourist industries in the Norton Shallows. Unless Raglan is able to characterize this as a direct injury to the State, this claim falls under the doctrine of "diplomatic protection," discussed in Part I, Section V, *supra*, on "Issues of Standing." If the injury is not directly to the state, Raglan may need to show that its nationals (individuals and companies) exhausted their local remedies in Appollonia.

Raglan can avoid an exhaustion of local remedies argument if it characterizes the claim as direct harm to Raglan itself rather than to its nationals. After all, Raglan's prayer for relief is for injury to the fishing and tourist industries, rather than any given individuals or companies. Even so, Raglan memorials and oralists should be prepared to deal with a local remedies argument from Appollonia.

> *(ii) If the claim is on behalf of Raglanian nationals, how does the doctrine of exhaustion of local remedies apply here?*

No Raglanian nationals brought suit in Appollonian courts for damages resulting from the contamination of the Norton Shallows. Appollonia may argue that, in order for Raglan to bring a suit on behalf of its nationals, those nationals must first resort to local remedies, unless such local remedies would be unavailable or futile.[89]

If Appollonia raises the issue of Raglan's exhaustion of local remedies, Raglan might argue that the doctrine does not apply when the wrongdoing occurs outside the sovereign jurisdiction of the accused state (in this case, Appollonia)[90]. Raglan will point to the *Interhandel Case*, where the Court said that the rule:

> "...has been generally observed in cases in which a State has adopted the cause of its national where rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means."

Raglan might draw inferences from the facts which indicate that such a suit would be barred in Appollonian courts. Raglan may point out that it is unlikely that Appollonian courts could exercise jurisdiction, since the relevant acts (scuttling) occurred outside of Appollonia. In addition, Raglan may argue that sovereign immunity may attach, since the acts are more governmental than commercial in nature, given that nuclear power is a highly regulated industry.

Raglan may also argue that any suit would be futile. Raglan will argue that statements by the government of Appollonia throughout this dispute indicate that the Raglan plaintiffs would not get a fair hearing before Appollonian judicial institutions.

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[89] Interhandel Case (Switzerland v. U.S.) 1959 I.C.J. 6 (Judgment), at 27.

[90] See Meron, "The Incidence of the Rule of Exhaustion of Local Remedies in International Law", 35 BYIL 93 (1959); AMERASINGHE, *supra* note 87.

Finally, Raglan may argue that Appollonia waived or is estopped from raising the standing and exhaustion defenses, since it agreed in the Compromis to have these issues resolved by the ICJ. Appollonia may respond that since the Court cannot issue advisory opinions in a case brought under its contentious jurisdiction, the court would have to dismiss any case that is not ripe for international adjudication, regardless of the indicated wishes of the parties.

As to the factual allegations made by Raglan, Appollonia will point out that there simply is no evidence in the Compromis supporting these allegations. Appollonia will say that there is no evidence that the law in Raglan would prohibit these suits under traditional notions of sovereign immunity, since they involve commercial acts, and there is no evidence that the courts are not independent of the government of Appollonia.

Overall, the material in the Compromis is insufficient to demonstrate, one way or the other, whether Raglanian nationals have exhausted their local remedies in Appollonia or whether such remedies are futile. Both Appollonia and Raglan will need to address who bears the burden of proof under the doctrine of exhaustion of local remedies, if the rule applies here, and whether that burden has been discharged on these facts.

2. Harm to Raglan

Under international law, as in most legal regimes, a claimant must demonstrate *not only* that the culprit has committed a wrongful act, but also that the act committed has caused harm to the claimant.

(i) Damage to the Norton Shallows

The harm done to Raglan does not concern its beaches or its coastal fisheries, but rather the beaches and coastal fisheries located in a remote region on the High Seas. To the extent that Raglan is making a claim for damage to the sandbar and the Norton Shallows generally, it faces difficulties because no harm has occurred to its sovereign territory. It is true that private Raglanian firms have made use of the Norton Shallows – indeed, *only* Raglanian firms conduct business there.[91] However, Raglan does not have sovereignty in any sense over the Shallows – its regulatory and legislative authority extend only to the conduct of its own citizen-firms in the area. It is a long-established rule that no state may assert sovereignty over the High Seas. Furthermore, Raglan, as a party to the United Nations Convention on the Law of the Sea 1982, may not assert sovereignty over regions of the High Seas.[92]

Appollonia's threshold argument is therefore that, since the harm was caused to the Norton Shallows (a region located on the High Seas[93]), Raglan has not suffered any actionable harm.

The traditional conception of the High Seas was that it was *res nullius*. Therefore, any State could appropriate unto itself the resources of the High Seas, so long as it was first to take them.

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[91] *Clarifications & Corrections*, Clarification 6.
[92] See UNCLOS, art. 89.
[93] *Clarifications & Corrections*, Correction 4.

After the Stockholm Declaration, UNCLOS, and other treaties and expressions of the views of the international community, the High Seas are seen as *res communis* and therefore not subject to appropriation to the use by any one State to the exclusion or injury of other States.

Raglan may attempt to invoke *Gabcikovo-Nagymaros* regarding a general duty to prevent harm to the environment. Appollonia will argue that Raglan cannot use the *Gabcikovo* standard to claim for damages to the Norton Shallows; in this case, Raglan should counter that there are traces of radiation as close as 25 kilometers from Raglan's EEZ.[94]

(ii) Damage to Raglan's fishing and tourist industries

Raglan may be on stronger ground regarding injury to its fishing and tourist injuries, since these injuries are more directly connected to Raglan.

It is important to note that the claim regarding injury to Raglan's fishing and tourist industries is not specifically for loss to any particular individuals or companies. There would be little problem with Raglan's standing to bring a claim for direct physical injury or physical damage suffered by Raglanian citizens or companies other than the issue of exhaustion of local remedies; however, the claim is more generic. On that basis, Appollonia will argue that Raglan has no standing to claim for the consequential economic losses that arise from the damage to the Norton Shallows, since the damaged area does not fall within Raglan's jurisdiction. Appollonia will argue that Raglan is limited to claiming for any direct physical or personal harm to Raglanian citizens and companies.

3. Articles on State Responsibility

Raglan may draw the Court's attention to the Articles on State Responsibility for rules regarding standing.

(i) Article 42: "specially affected states"

Article 42 of the Articles outlines the situations in which a State may claim damages for another's breach of an international obligation. In this case, if Raglan relies on a general obligation owed by Appollonia to the international community (as opposed to relying on an obligation directly and individually owed to Raglan), then Raglan would be entitled to invoke Appollonia's breach of international law only if the breach "specially affects" Raglan.[95] In order to be considered "specially affected" Raglan must demonstrate that it is "affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed."[96]

In explaining the concept of "specially affected" States, the official commentary to the Articles explicitly mentions the example of pollution of the High Seas. In such a situation, the

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[94] *Corrections & Clarifications*, Clarification 12.
[95] Articles on State Responsibility, art. 42(b)(i).
[96] Commentaries to the Draft Articles, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), chp. IV.E.2, at 300.

commentators include among the class of specially affected States those "whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed."[97]

The question will therefore turn in large part upon the nature of the breach which Raglan alleges. If Raglan alleges Appollonia's failure to notify it of MOX shipments through its waters, then it is most certainly a "specially affected State" – the MOX shipments regularly traveled through its territorial and archipelagic waters and exclusive economic zone. However, Raglan will then have to demonstrate a causal link between this failure to notify and the harm done to the Norton Shallows.

Raglan may allege some shortcoming in Appollonia's safeguarding of the MOX aboard *The Mairi Maru*. The IAEA has noted with concern Appollonia's practice of sending MOX on private vessels without escort.[98] Furthermore, Raglan may suggest that the fact that the MOX canisters leaked after *The Mairi Maru* merely collided with a sandbar indicates that the materials were not properly stored. In this latter claim, Raglan should remind the Court that Appollonia is a member of the IAEA, and any number of IAEA instruments require that highly radioactive materials be stored in canisters which can survive much more than a small crash. If Raglan relies on this breach, it has a claim to being "specially affected" by the breach since, once again, Appollonia regularly shipped MOX through the Raglanian Archipelago.

If Raglan successfully characterizes itself as "specially affected" under Article 42, then it is entitled to reparation under the Articles regime.[99] Reparation includes restitution (restoring the injured party to the *status quo ante*[100]) and compensation (the actual financial losses caused by the breach[101]

(ii) Article 48: Any state may invoke a breach of international law

Raglan may attempt to rely upon Article 48 of the Articles, which states that *any State* may invoke a breach of international law if "the obligation breached is owed to the international community as a whole."[102] Article 48 would allow Raglan to bring a claim against Appollonia even if Raglan has not specifically suffered harm.

However, when a State relies upon its membership in the international community (as opposed to its own individual standing), Article 48(2) of the Articles restricts the State's rights to relief.

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[97] *Id.* at 299.

[98] Compromis, para. 9.

[99] Articles on State Responsibility, art. 31(1). "The responsible State is under obligation to make full reparation for the injury caused by the internationally wrongful act."

[100] Articles on State Responsibility, art. 35. *See also* the Permanent Court of International Justice's decision in *Factory at Chorzów, Merits, 1928, P.C.I.J. Series A, No. 17*, p. 48. (A breaching State is under an "obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible.")

[101] Articles on State Responsibility, art. 36. *See also* the International Court of Justice's discussion in *Gabčikovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p.7, at p.81, para. 152. ("[I]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.")

[102] Articles on State Responsibility, art. 48(1)(b).

Article 48(2) states that such a claimant may *only* demand of the breaching State (a) cessation of the internationally wrongful act, and (b) performance of the obligation described.[103]

V. Appollonia's Shipments of Radioactive Materials

Raglan's fourth prayer for relief asks the Court to declare Appollonia liable for the damage to the sandbar and the surrounding waters as a result of its "unlawful shipment of MOX." Raglan asks the Court to compensate Raglan for the injury to its fishing and tourism industries, and for the cost of the cleanup of the region.

Raglan's likely argument will focus on two alleged breaches by Appollonia: the duty to prevent harm and the duty to notify (and perhaps to obtain consent from) Raglan. Raglan will likely not be able to show any particular treaty, binding upon Appollonia, which imposes either of these obligations. Raglan will fail to show a treaty obligation because the two States are simply not party to the same environmental or shipping treaties. However, several international instruments exist on the duty to prevent harm and the duty to notify which contain rules that Raglan could argue represent customary international law. Raglan's best argument will be to demonstrate that Appollonia owes some customary law obligation to Raglan.

At the outset, oralists should recognize that if Raglan has failed to show that it has standing to make this claim (Section IV *supra*), then the argument as to liability is moot.

A. Duty to Prevent Harm

The following are some of the potential sources of treaty or customary obligations which impose a duty on Appollonia to prevent harm to the Norton Shallows. As noted above, Raglan will most likely invoke any rules contained in international instruments as rules of customary international law, rather than treaty obligations.

1. General customary obligation to prevent harm to the environment

In *Gabcikovo-Nagymaros*,[104] the ICJ described an obligation to prevent harm. The ICJ reiterated its conclusion from the *Nuclear Weapons Case*[105] that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."

Under this standard, Raglan has the stronger argument. Appollonia controlled the MOX manufacture and shipment and failed to conduct either with due care, resulting in damage to

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[103] *Id.*, art. 48(2)(a) & (b).
[104] *Gabcikovo-Nagymaros*, *supra* note 14.
[105] *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226

territory outside its territory. Raglan can also rely upon the *Trail Smelter Arbitration*[106] and the *Lac Lanoux Arbitration*[107] for the proposition that States must take due care to ensure that their activities affecting the environment do not cause transboundary harm.

There is considerable scope for Raglan to argue a generic, customary obligation on Appollonia to prevent harm to the environment. However, the challenge for Raglan will be to:

- distil a relevant rule from the wide range of environmental treaties (to which it is not a party), resolutions and academic writing on this subject;
- show consistent, uniform and widespread state practice complying with such a rule; and
- show that any such compliance is driven by *opinion juris*, i.e. a belief that the rule is a binding legal obligation rather than, say, driven by political or economic motives or expediency.

Raglan will find it difficult to meet these three requirements. Appollonia should be in a good position to challenge any allegation that there is a general, customary obligation to prevent harm to the environment.

2. The Convention on the Physical Protection of Nuclear Material[108]

Appollonia is party to the Convention on the Physical Protection of Nuclear Material,[109] a treaty which concerns the international transportation of nuclear materials used for peaceful purposes.[110] It is a treaty primarily directed at protecting nuclear materials from theft or diversion to unlawful ends. The obligations contained in the Physical Protection Convention are clarified by the IAEA informational document, "The Physical Protection of Nuclear Materials and Nuclear Facilities."[111]

(i) Does Appollonia owe an obligation to Raglan?

Raglan faces several hurdles in invoking the Physical Protection Convention. First, Raglan is neither party to nor a signatory of the Physical Protection Convention.[112] Article 34 of the VCLT states that treaties do not create obligations or rights in non-party States,[113] unless the parties to the Convention intend to accord rights to non-party States.[114] Raglan might argue that the obligations to safeguard nuclear materials are, like human rights obligations, obligations *erga omnes* – owed to the world at large. However, the Physical Protection Convention refers throughout its text to technical obligations owed by States Parties *to other* States Parties, and in

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[106] *Trail Smelter Arbitration* (U.S. v. Can.) 3 RIAA 1911 (1938)
[107] *Lac Lanoux Arbitration* (Fr. v. Spain) 12 RIAAA 281 (1957)
[108] Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. No. 11,080, 1456 U.N.T.S. 124 (hereinafter "Physical Protection Convention").
[109] *Compromis*, para. 35.
[110] Physical Protection Convention, art. 2(1).
[111] IAEA informational document, "The Physical Protection of Nuclear Materials and Nuclear Facilities," INFCIRC/225/Rev.4.
[112] *Compromis*, para. 35.
[113] VCLT, *supra* note 1, art. 34.
[114] *Id.*, art. 36(1).

fact requires States Parties in many circumstances to deny passage of nuclear materials from non-parties into or through their territory.[115]

Furthermore, the harm caused by Appollonia's alleged breach of the Physical Protection Convention was not the kind sought to be prevented by that agreement. The Physical Protection Convention seeks to "avert the potential dangers posed by the unlawful taking of nuclear material."[116] Here, the damage caused was environmental, caused by an attack on the vessel in which the MOX was apparently not the target.

(ii) If Appollonia owes a duty, what is the duty?

If the Court is satisfied that Raglan may invoke the Physical Protection Convention, then Appollonia's obligations derive from Article 4(1), which requires that it not "export or authorize the export of nuclear material unless [it] has received assurance that such material will be protected during the international nuclear transport at the levels described in Annex I."[117] Annex I sets out several provisions on the protection and prevention of nuclear materials.

(iii) Standard of safety

The Physical Protection Convention sets several standards for securing nuclear materials. The Convention divides nuclear materials into three categories, loosely based upon their risk of weaponization.[118] The bench should avoid technical arguments about which category MOX falls into; at the very least, this MOX is a Category II material, since it contains depleted uranium.[119]

For Category II materials (such as depleted uranium), the Convention requires "storage within an area under constant surveillance by guards or electronic devices, surrounded by a physical barrier with a limited number of points of entry under appropriate control"[120]

(iv) Has Raglan complied with the standard?

The Physical Protection Convention favors Raglan on these facts. The Compromis indicates only that the MOX was contained in a locked hold, with no indication as to other precautions taken.

3. The Articles on Prevention of Transboundary Harm

Raglan may argue that the relevant standard is contained in the Articles on Prevention of Transboundary Harm from Hazardous Activities.[121]

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[115] Physical Protection Convention, arts. 4(2) & 4(3).
[116] Physical Protection Convention, preamble para. 3.
[117] Physical Protection Convention, art. 4(1).
[118] Physical Protection Convention, Annex II. Category I requires the highest level of safeguards, while Category III requires only nominal safeguards.
[119] *Compromis*, para. 4.
[120] Physical Protection Convention, Annex I, art. 1(b).

The Transboundary Harm Articles were adopted by the International Law Commission (ILC) in 2001, and do not have the force of law as a treaty. They may, however, be useful to the Court as a writing of a leading publicist, since the ILC is recognized by the United Nations as a leader in the progressive development of international law.

Although the Articles have been adopted by the International Law Commission, they are more realistically viewed as developing international law, rather than codifying it. The history of the Transboundary Harm Articles indicates that they have always been, and still are, considered highly controversial, and are far from being widely-accepted by states as representing customary international law. Against this background, Raglan must be prepared to explain how the Transboundary Harm Articles can represent customary international law.

(i) Do the Transboundary Harm Articles apply here?

The Transboundary Harm Articles concern "activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences."[122] A risk of transboundary harm is one which has a "high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm."[123]

Raglan's first challenge comes from the definition of "transboundary harm." The Transboundary Harm Articles define that term to mean harm to "territory of or . . . under the control or jurisdiction of [another State]."[124] As discussed in the previous section, Raglan's claim derives from harm done to the Norton Shallows, an area which is outside its territorial waters and its Exclusive Economic Zone (EEZ).

Appollonia may argue that Raglan's fourth claim derives from harm done to the Norton Shallows, a region on the High Seas which is not within the "control or jurisdiction" of *any* State. However, Raglan should correctly reply that the Transboundary Harm Articles do not focus on the territory where harm actually occurs, but rather, on the territory which is *at risk* of being harmed. That is, Appollonia has an obligation under the Articles not because the Norton Shallows were harmed, but because the MOX shipments traveled through Raglan's territorial and archipelagic waters and EEZ, putting those territories at risk.

(ii) What is the duty under the Transboundary Harm Articles and was it breached?

If the Court is satisfied that this situation falls within the Articles, then Appollonia has two relevant obligations: first, to "take all appropriate measures to prevent significant transboundary

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[121] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, excerpt from the Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10* (A/56/10), chp. V.E.1 (hereinafter "Transboundary Harm Articles")
[122] Transboundary Harm Articles, art. 1.
[123] *Id.*, art. 2(a).
[124] *Id.*, art. 2(c).

harm or at any event to minimize the risk thereof"[125]; and second, to "provide the State likely to be affected with timely notification of the risk and the assessment [of such risk]."[126]

The first obligation suggests Appollonia must meet a very broad standard. Under the Articles, Appollonia must "take *all appropriate measures* to prevent significant transboundary harm or at any event to minimize the risk thereof."[127] The facts strongly favor Raglan on this point. However, Raglan must be prepared to explain what this obligation specifically required in this case and how Appollonia has breached it.

The second obligation is discussed in Subsection B, *infra*, regarding the Duty to Notify.

4. The Stockholm Declaration[128]

The Stockholm Declaration is a proclamation of principles regarding the preservation and enhancement of the human environment.[129] However, the Stockholm Declaration is merely a summary declaration of a conference, and contains no provision for signature or ratification.

Raglan is likely to rely upon Principle 7, which provides, "States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."[130]

However, Raglan faces a significant problem in invoking Principle 7. Although some provisions of the Stockholm Declaration have now become part of customary international law,[131] the question of whether there is sufficient State practice and *opinion juris* in support of the customary status of Principle 7 remains open.[132]

5. The Non-Proliferation Treaty (NPT)[133]

Any argument by Raglan based upon the NPT should be unsuccessful. However, several teams have evinced an intention to run an NPT argument.

(i) Does Appollonia owe any duty to Raglan?

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[125] *Id.*, art. 3.
[126] *Id.*, art. 7.
[127] Transboundary Harm Articles, art. 3. (emphasis added)
[128] Declaration of the United Nations Conference on the Human Environment, June 16, 1972, U.N. Doc. A/CONF.48/14 & Corr. 1 (1972) (hereinafter "Stockholm Declaration").
[129] *Id.*, Preamble.
[130] *Id.*, Principle 7.
[131] For example, Principle 21. See ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 62 (2000).
[132] For one article in favor, *see* Moira L. McConnell & Edgar Gold, "The Modern Law of the Sea: Framework for the Protection and Preservation of the Marine Environment?" 23 *Case W. J. Int'l L.* 83, 89-90 (1991).
[133] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (hereinafter "NPT")

Although Appollonia is party to the NPT, Raglan is neither party to nor a signatory of the treaty.[134] Therefore, Raglan faces the same problems with respect to the NPT that it does with respect to the Physical Protection Convention. Although the purpose of the NPT is non-proliferation of weapons and divertible nuclear materials, the negative (proliferation) and positive (reporting) obligations contained in the treaty are not explicitly owed to third-party States. Appollonia should refute any allegation that it owes any duty to Raglan under the NPT rules.

(ii) Has Appollonia complied with the NPT in any event?

Even if Raglan succeeds in invoking the NPT, it will be difficult for Raglan to demonstrate that Appollonia has violated any obligations. There is nothing in the Compromis to suggest that Appollonia is pursuing a nuclear weapons program, as prohibited by Article II.[135] Article III merely requires that States Parties negotiate and accept safeguards agreements with the International Atomic Energy Agency (IAEA). The Compromis and Clarifications state that Appollonia has negotiated and complied with IAEA Safeguards Agreements both with respect to its nuclear reactor[136] and the MOX export program.[137] Overall, the facts favor Appollonia.

6. UNCLOS

Raglan is party to the UNCLOS, but Appollonia is not.[138] Appollonia is, however, party to two predecessor conventions to UNCLOS 1982.[139] The two States are therefore not in direct privity with one another with respect to any of the obligations or rights contained in any of these conventions.

However, the widespread acceptance of UNCLOS[140] and the 1958 conventions create a strong basis to argue that some of the provisions common to each reflect customary international law. If Raglan successfully argues that a given provision common to the 1982 and 1958 conventions codifies international custom, Appollonia cannot argue that it is not bound by the provision, since it has ratified the 1958 conventions. It is possible that provisions which only appear in UNCLOS but do not appear in the 1958 Conventions may still represent customary international law.

Raglan may try to invoke Article 23 of UNCLOS. Article 23 requires that ships carrying nuclear materials traveling through the territorial sea of another State "carry documents and observe special precautionary measures established for such ships by international agreements."[141] This Article appears to be useful to Raglan, but in reality it does not advance Raglan's case far.

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[134] *Compromis*, para. 35.
[135] NPT, art. II.
[136] *Compromis*, para. 3.
[137] *Corrections & Clarifications*, Clarification 1.
[138] *Compromis*, para. 35.
[139] Specifically, the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205, and the High Seas Convention.
[140] As of 16 November 2004, 146 States had ratified UNCLOS, and an additional 11 had signed it. United Nations Treay Section, *available online at* http://www.un.org/Depts/los/reference_files/status2004.pdf.
[141] UNCLOS, art. 23.

Raglan must still refer to other international instruments as sources of obligations. As already noted above, Raglan will not be able to invoke any treaty directly against Appollonia.

On the facts, Raglan is on firmer ground with Article 194, which provides that states are required take measures to prevent, reduce and control pollution of the marine environment. Such measures include those required "to minimize to the fullest possible extent: (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels."[142] There is a strong argument that if Appollonia owed this duty, it has breached it. Raglan's use of Article 194 against Appollonia may be quite interesting if Appollonia has attempted to use Article 194 against Raglan with respect to the scuttling of *The Mairi Maru*.

B. Duty to Notify

Raglan complains that Appollonia did not notify it about the shipment of MOX aboard *The Mairi Maru*, and in fact has never notified it about *any* MOX shipments through its territorial waters and EEZ.[143] Raglan must prove that Appollonia has an obligation to inform it and/or to obtain its prior consent.

On the facts, Appollonia may respond that Raglan had notice of the MOX shipments as early as July 31, 1999. On that date, the IAEA issued its final report on the MOX shipments, mentioning Raglan (and its pirate-infested waters) by name.[144] Appollonia's Foreign Minister in fact raised this argument in her August 2002 cable to her Raglanian counterpart.[145] Overall, these facts are weak evidence that Appollonia gave appropriate notification to Raglan about the shipment.

1. Transboundary Harm Articles

See the discussion above on whether the Transboundary Harm Articles can be invoked by Raglan.

If they can be invoked by Raglan, the Transboundary Harm Articles require States engaging in risk to "provide the State likely to be affected with timely notification of the risk and the assessment [of such risk]."[146] The facts described above strongly favor Raglan.

2. Basel Convention[147]

The Basel Convention contains provisions on notification which Raglan will be very eager to introduce into its argument.

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[142] UNCLOS, art. 194(3)(b). See also Art 194(2).
[143] *Compromis*, para. 28.
[144] *Compromis*, para. 9.
[145] *Compromis*, para. 29.
[146] Transboundary Harm Articles, art. 7.
[147] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, March 22, 1989, 28 I.L.M. 649 (1989) (hereinafter "Basel Convention").

(i) Does the Convention apply here?

The Basel Convention excludes from its scope wastes which, because they are radioactive, are subject to other international control systems (namely, the provisions of the IAEA).[148] As a result, its provisions are not strictly applicable to MOX (either because it is not a waste, or because it is a radioactive waste).

Furthermore, while Raglan is party to the Basel Convention, Appollonia is not.[149] While the Basel Convention explicitly extends rights to States which are not parties,[150] it does not create obligations for non-party States.

If the Court allows Raglan to introduce the Basel Convention, the Convention contains a strong duty-to-warn provision.

(ii) The duties: to warn and obtain consent

Article 4(2)(f) of the Convention clearly requires prior notification of a shipment of hazardous wastes to transit States. States Parties must "[r]equire that information about a proposed transboundary movement of hazardous wastes . . . be provided to the States concerned . . . to state clearly the effects of the proposed movement on human health and the environment."[151] The Basel Convention sets out, at Annex V.A, specific information which must be conveyed in this notice. Article 6(4) states that an exporting State "shall not allow the transboundary movement to commence until it has received the written consent of the State of transit."[152]

(iii) Has Appollonia breached the duty with respect to Raglan?

In this case, Raglan is clearly a State of transit. At least 20 MOX shipments have traveled through the Raglanian Archipelago,[153] as did *The Mairi Maru.*[154] Appollonia would therefore owe a duty to Raglan to warn it about the shipment and obtain consent.

If Appollonia owed Raglan the relevant duties, then the facts show Appollonia has breached those duties. In its efforts to achieve security for the shipments by keeping them secret, Appollonia has not met the stringent notice requirements of Annex V.A, and has not obtained the prior consent of Raglan under Article 6(4).

3. UNCLOS

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[148] Basel Convention, art. 1(3).
[149] *Compromis*, para. 35.
[150] Basel Convention, art. 7.
[151] Basel Convention, art. 4(2)(f). This requirement of prior notification is amplified in art. 6(1), concerning transboundary movement between States Parties.
[152] Basel Convention, art. 6(4).
[153] *Compromis*, paras. 8 & 10.
[154] *Compromis*, para. 14.

See the discussion above about how UNCLOS might apply in this case.

Once again, Article 23 may be relevant. That Article requires that ships carrying nuclear materials traveling through the territorial sea of another State "carry documents and observe special precautionary measures established for such ships by international agreements."[155] Again, however, Article 23 is of limited use since it relies on other international agreements.

Article 43 may be more useful in the context of notification and consent, because it provides that "User States and States bordering a strait should by agreement cooperate: (b) for the prevention, reduction and control of pollution from ships."[156]

Raglanian Prime Minister Price alludes to a requirement to notify and seek consent in his statement that "had we known in advance of Appollonia's plans, Raglan would have either denied *The Mairi Maru* access to Raglanian waters or provided, in addition to the pilot, armed naval escort vessels to ensure its safe passage."[157] It is not clear from the Compromis that *The Mairi Maru* abided by these requirements. As the State in whose possession all relevant materials would necessary reside, the burden of persuading the Court rests with Appollonia on this question.

4. Defenses for Appollonia

Article 45 of the Articles on State Responsibility state that an injured State may not invoke another State's responsibility if (a) the injured State has waived the claim, or (b) the injured State has acquiesced in the lapse of the claim.[158] Appollonia may attempt to invoke Article 45 here.

(i) Acquiescence in lapse of claim

Proceeding from the position that Raglan had notice of the MOX shipments in July 1999 (as a result of the IAEA report), Appollonia will call attention to the fact that Raglan did not complain about any individual shipment, or about the practice in general, until after the wreck of *The Mairi Maru*. It will argue that this constitutes acquiescence in the lapse of a claim.

In evaluating whether Raglan has acquiesced in the lapse of the claim (a defense similar to the common-law defense of laches), the Court will evaluate whether Appollonia has been disadvantaged by Raglan's delay. International courts have been loathe to apply a hard-and-fast time limit to international claims generally.[159] Instead, Appollonia will need to demonstrate, on the facts or through creative inference, that it has in some way been prejudiced by this four-year delay.

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[155] UNCLOS, art. 23.
[156] UNCLOS, art. 43(b).
[157] *Compromis*, para. 22.
[158] Articles on State Responsibility, art. 45.
[159] For example, the I.C.J. upheld Germany's claim against the United States, even though Germany had waited several years to take action after it became aware of the basis of the claim. *LaGrand (Germany v. United States of America), Provisional Measures, I.C.J. Reports 1999*, p. 9, and *LaGrand (Germany v. United States of America), Merits,* judgement of 27 June 2001, paras. 53-57.

(ii) Waiver of claim

Appollonia may also argue that Raglan's silence represents a waiver of Raglan's claims. While waiver may be inferred from the conduct of the injured State, the conduct must be unequivocal.[160] In this case, Raglan's silence is far from unequivocal.

[160] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, I.C.J. Reports 1992,* p.240, at p.247, para. 13.

PART 3: POSSIBLE QUESTIONS FOR ORALISTS

INTERNATIONAL LAW GENERALLY

1. Is there any priority or hierarchy of the sources of international law mentioned in Art. 38?
2. If a State has conflicting obligations under these two treaties (or under a treaty on the one hand and customary international law on the other), which obligation controls? What principles does the Court use to determine which obligation controls?
3. What is customary international law? What are the elements of customary international law?
4. *When a student attempts to assert that a given rule is or is not an obligation under customary international law, the court should ask the student to demonstrate (1) widespread and consistent practice by States consistent with that rule, and (2) that the State practice is, in fact, motivated by a sense of obligation* (opinion juris)?
5. *Whenever a student enunciates a standard of law, (s)he should be pressed to enunciate where the standard comes from and why it binds the parties?*
6. What is *opinio juris*? How is it proven?
7. Where can we find evidence of State practice? What State practice is relevant?
8. Is this Court bound by its prior decisions?
9. Do Resolutions of the U.N. General Assembly create binding obligations?
10. What are *travaux preparatoires*? When are the records of the drafting and negotiations of the treaty relevant?
11. What specific remedies is your Party looking for? Is this Court permitted by its Statute to grant those remedies?
12. If this Court determines (notwithstanding, of course, Agent's compelling arguments) that the paucity of facts allows multiple, conflicting inferences, what should this Court do then?
13. What is the standard of proof with respect to this issue? Which party bears the burden of proof?

SUGGESTED QUESTIONS -- CONCERNING PIRACY

Topic	Questions to ask Appollonia	Questions to ask Raglan
Does Raglan owe a duty to Appollonia?	Has the High Seas Convention 1958 duty become customary or did it in fact codify custom?	Has the UNCLOS 1982 duty become customary or did it in fact codify custom?
	What conclusions should we draw from the fact that Art 14 of the High Seas Convention 1958 and Art 100 of UNCLOS 1982 are virtually identical?	What conclusions should we draw from the fact that Art 14 of the High Seas Convention 1958 and Art 100 of UNCLOS 1982 are virtually identical?
	Isn't Raglan's duty limited to merely co-operating with other states to suppress piracy, rather than taking active steps to implement anti-piracy measures?	Doesn't the duty to co-operate with other states to repress piracy implicitly require Raglan to take active steps to implement anti-piracy measures?
	Has the nature of the duty re piracy changed since 1958? How does that affect Appollonia's position?	Has the nature of the duty re piracy changed since 1982? How does that affect Raglan's position?
Was there any "piracy" here?	What are the elements of piracy?	What are the elements of piracy?
	Weren't the relevant unlawful acts by Thomas Good committed within archipelagic waters, rather than the High Seas?	Isn't it sufficient for Thomas Good to have boarded the target vessel on the High Seas, thus tainting the rest of his actions as piracy?
	Doesn't the Navy-commissioned purpose of the vessel which transported Thomas Good to *The Mairi Maru* mean that it is not a "private vessel"? Surely it cannot be described as a "pirate ship"?	Isn't the requirement for a "private vessel" simply that the vessel not be owned and operated by a government or military agency?
	Doesn't the private vessel have to be in the control of Thomas Good or those knowingly assisting Thomas Good in his unlawful conduct?	Isn't it sufficient that Thomas Good boarded *The Mairi Maru* from the transport vessel, with the motives and conduct of the vessel's crew being irrelevant?
	If there is no piracy, do you still have a claim against Raglan?	
Were Raglan's actions sufficient?	What does "repressing piracy" mean?	What does "repressing piracy" mean?
	How do we measure the adequacy of the regime that Raglan has put in place to deal with piracy? What is the standard?	Doesn't Raglan have to have measures in place which *actively* seek to repress piracy (e.g. patrolling and chasing down pirates), rather than being passive like the piloting program (which depends on requests for pilots)?
	Isn't the success of the piloting program sufficient to meet the duty?	If Raglan outsources its anti-piracy work to the private sector, does this

		call for a higher level of care?
	Has Appollonia come to this Court with "clean hands"?	Regardless of the technical rules regarding piracy, wasn't Raglan at least under a general obligation to ensure safety of vessels in its waters?
Thomas Good	You agreed in the Compromis that Thomas Good is a "private contractor". If that is so, what is the specific rule of international law for imputing Thomas Good's conduct to Raglan?	Thomas Good was only able to come on board *The Mairi Maru* because he was a pilot provided under the official Royal Navy piloting program. Doesn't this mean he is effectively a representative of the Navy?
	It looks like Thomas Good had this attack planned well-before he boarded *The Mairi Maru*. How can the Royal Navy be responsible for his conduct? How could it have stopped him?	If the Royal Navy was supposed to be monitoring piloted vessels, wouldn't it have been alerted to problems when *The Mairi Maru* deviated off course?
		If the Royal Navy saw that the ship was going off course, shouldn't it have responded? If it didn't see the ship had gone off course, isn't this a failure in the Navy's protection of piloted vessels?

SUGGESTED QUESTIONS -- CONCERNING SCUTTLING

For Appollonia:

1. How can the Court apply the London Convention and UNCLOS when Appollonia is not a party and does not recognize either?
2. Can Raglan be held to the London Convention protocols and amendments when it only signed and ratified the initial treaty?
3. What is the legal significance of Russia's refusal to be bound by the prohibition of dumping radioactive material?
4. What customary international, if any, exists regarding dumping?
5. Was Raglan's notification to the IMO and Appollonia regarding the scuttling sufficient to discharge any obligation it had?
6. Wasn't Raglan's conduct necessary in these circumstances?
7. By not taking any action, didn't Appollonia basically acquiesce to Raglan's attempts at protecting itself?
8. In any case, can Appollonia complain about the scuttling in these circumstances when it does not appear to have acted with "clean hands" itself?

For Raglan

1. Is Raglan obliged to follow any protocols or procedures (safety, notification, etc) when scuttling a vessel at sea? If so, what are the protocols and procedures? If you say that no procedures apply, how is this consistent with international environmental law and the law of the sea?

2. If Raglan has some obligations, how are these obligations affected when the vessel contains toxic or hazardous substances?
3. What happens to the rights of innocent property owners who lose property when a vessel is scuttled (e.g. vessel owners, cargo owners)? Surely they are entitled to some compensation?
4. Did you give Appollonia adequate time to deal with the vessel before you decided to scuttle it?

SUGGESTED QUESTIONS -- CONCERNING RAGLAN'S STANDING

For Appollonia:

1. Do you understand Raglan to be claiming damages for harm it has suffered as a state, or for harm suffered by its nationals under the doctrine of diplomatic protection?
2.. Would Appollonian courts have jurisdiction to hear a suit by Raglanian nationals for damage to the fishing and tourism industries in the Norton Shallows? Since there are no facts in the Compromis about this, what happens with the burden of proof on this point?
3. Do the statements of Appollonia's government indicate that, even had Raglanian nationals brought suit for damage to the Norton Shallows, they would not have received a fair trial?
4. If we ignore the local remedies rule, do you accept that Raglan or Raglanian nationals have suffered harm for which they could receive compensation? If not, are you saying there was no harm here or just that no damages can be claimed?
5. Could Raglan claim damages for harm to the environment in a general sense? If not, are you saying that states may damage the global commons without being held accountable to anyone?

For Raglan:

1. Is Raglan's fourth claim one on behalf of itself or on behalf of its nationals or both?
2. If some portion of Raglan's claim is on behalf of its nationals, have those nationals exhausted local remedies in Appollonian court? *Follow-up:* Since they have not, how can Raglan bring a claim on behalf of its citizens?
3. On what basis may Raglan assert a claim for damage to the Norton Shallows, a region that is on the High Seas and under the jurisdiction of no country?

SUGGESTED QUESTIONS -- CONCERNING MOX SHIPMENTS

For Appollonia

1. Do you accept that shipping radioactive materials through another state's waters poses some risk to that state?
2. If this Court accepts that there is some risk in shipping radioactive materials like MOX, how are states expected to deal with this risk when they enter other states' waters? Are there any obligations that you acknowledge?
3. Is Appollonia subject to any general obligation to prevent harm to the environment? How far does that obligation extend?
4. Is there a general obligation to prevent harm to other states? How far does that obligation extend?

For Raglan

1. Wasn't *The Mairi Maru* simply exercising its right to innocent passage through Raglan's waters?
2. Is Appollonia bound by a "duty to notify" under international law? In what contexts does such a duty exist?
3. Was Appollonia required to obtain Raglan's consent before shipping the MOX through Raglan's archipelagic waters? If so, on what basis?
4. Does a "standard of care" exist with respect to activities such as MOX shipping? If so, what standard of care is Appollonia required to meet in shipping this MOX?
5. Are you asserting any general obligation on Appollonia to prevent the kind of harm to the environment that occurred here?