Rainbow Warrior

(NEW ZEALAND *v.* FRANCE)

France-New Zealand Arbitration Tribunal. 30 *April* 1990

(Jiménez de Aréchaga, *Chairman*; Sir Kenneth Keith and Professor Bredin, *Members*)

SUMMARY: The facts: - In July 1985 a team of French agents sabotaged and sank the *Rainbow Warrior*, a vessel belonging to Greenpeace International, while it lay in harbour in New Zealand. One member of the crew was killed. Two of the agents, Major Mafart and Captain Prieur, were subsequently arrested in New Zealand and, having pleaded guilty to charges of manslaughter and criminal damage, were sentenced by a New Zealand court to ten years' imprisonment.[1] A dispute arose between France, which demanded the release of the two agents, and New Zealand, which claimed compensation for the incident. New Zealand also complained that France was threatening to disrupt New Zealand trade with the European Communities unless the two agents were released.

The two countries requested the Secretary-General of the United Nations to mediate and to propose a solution in the form of a ruling, which both Parties agreed in advance to accept. The Secretary-General's ruling, which was given in 1986, required France to pay US $7 million to New Zealand and to undertake not to take certain defined measures injurious to New Zealand trade with the European Communities.[2] The ruling also provided that Major Mafart and Captain Prieur were to be released into French custody but were to spend the next three years on an isolated French military base in the Pacific. The two States concluded an agreement in the form of an exchange of letters on 9 July 1986 ("the First Agreement"),[3] which provided for the implementation of the ruling. Under the terms of the First Agreement, Major Mafart and Captain Prieur were to be

> ... transferred to a French military facility on the island of Hao for a period of not less than three years. They will be prohibited from leaving the island for any reason, except with the mutual consent of the two governments.

The actual transfer took place on 23 July 1986.

Following concern about Major Mafart's health, a French medical team advised that he be evacuated to France for treatment on 10 December 1987. On 11 December France sought New Zealand's consent to this "urgent, health-related transfer" but New Zealand's request that its own medical team should also examine Mafart before he was repatriated was denied when France refused to allow a New Zealand military aircraft carrying a doctor to land at Hao. On 14 December 1987 Mafart left Hao, without the consent of New Zealand. Following medical treatment in Paris, Mafart was permitted to remain in France. New Zealand doctors who examined Mafart after his return to Paris agreed that he

[1] *R v. Mafart and Prieur*, 74 *ILR* 241 at 243.
[2] *Rainbow Warrior*, 74 *ILR* 241 at 256.
[3] *Ibid.* at 274.

could not have been satisfactorily examined in Hao but denied that the evacuation was an emergency measure and concluded that Mafart's health was not such as to preclude his being returned to Hao after the treatment had been concluded.

Captain Prieur was repatriated in May 1988. On 3 May 1988 the French authorities notified New Zealand that she was expecting her first child and asked consent to her repatriation. New Zealand again requested that an independent medical examination be made. France acceded to this request and a New Zealand doctor was due to arrive in Hao on 6 May. On 5 May, however, the French authorities notified New Zealand that Captain Prieur's father was dying of cancer and that her immediate evacuation had thus become necessary. She was repatriated on 5 May 1988 without the consent of New Zealand and never returned to Hao.

The 1986 Agreement contained provision for arbitration of any dispute arising out of the agreement. After New Zealand invoked this provision, France and New Zealand concluded a further agreement on 14 February 1989 ("the Supplementary Agreement"), designating the three arbitrators and dealing with the procedure for the arbitration.

Submissions of the Parties: - The New Zealand Government sought the following relief:

(a) A declaration that the French Republic

(i) breached its obligations to New Zealand by failing to seek in good faith the consent of New Zealand to the removal of Major Mafart and Captain Prieur from the island of Hao;

(ii) breached its obligations to New Zealand by the removal of Major Mafart and Captain Prieur from the island of Hao;

(iii) is in breach of its obligations to New Zealand by the continuous absence of Major Mafart and Captain Prieur from the island of Hao;

(iv) is under an obligation to return Major Mafart and Captain Prieur promptly to the island of Hao for the balance of their three-year periods in accordance with the conditions of the First Agreement.

(b) An order that the French Republic shall promptly return Major Mafart and Captain Prieur to the island of Hao for the balance of their three-year periods in accordance with the conditions of the First Agreement.

New Zealand based its submissions on what, it maintained, were clear breaches by France of the terms of the First Agreement, which could not be justified by reference to any of the grounds recognized by the law of treaties for departing from the terms of a treaty. France, on the other hand, argued that even though its actions had not been in strict accordance with the letter of the First Agreement, its international responsibility was not engaged because the international law of State responsibility recognized notions of *force majeure* and distress which exonerated France. France therefore submitted that the Tribunal should reject these requests.

Held: - (1) According to Article 2 of the Supplementary Agreement, the Tribunal was required to reach its decision on the basis of

> ... the Agreements concluded between the Government of New Zealand and the Government of the French Republic by Exchange of Letters of 9 July 1986, this Agreement and the applicable rules and principles of customary international law.

Both the customary international law of treaties and the law of State responsibility were thus relevant. From the law of treaties, codified in the Vienna Convention on the Law of Treaties, 1969, the principle *pacta sunt servanda* and the provisions relating to the consequences of material breach and the expiry of agreements were particularly relevant. However, international law made no distinction between contractual and tortious liability. It followed that the violation by a State of a treaty obligation gave rise to State responsibility and had therefore to be evaluated in the light of the principles of the law of State responsibility, including the determination of the circumstances which might exclude wrongfulness (pp. 547-51).

(2) Of the principles which the International Law Commission, in its Draft Articles on State Responsibility, had recognized as grounds for excluding wrongfulness, three - *force majeure* (Article 31), distress (Article 32) and necessity (Article 33) - might be relevant to the present case.

(a) *Force majeure* was cast in absolute terms and applied only where circumstances rendered compliance by a State with an international obligation impossible. It did not apply where, as here, circumstances merely made compliance more difficult or burdensome (pp. 551-3).

(b) Distress had to be distinguished from the more controversial notion of necessity. What was involved in distress was a choice between departure from an international obligation and a serious threat to the life or physical integrity of a State organ or of persons entrusted to its care. Necessity, on the other hand, was concerned with departure from international obligations on the ground of vital interests of State. For distress to be applicable in the cases of Major Mafart and Captain Prieur, three conditions were required:

(i) the existence of exceptional medical or other circumstances of an elementary nature of extreme urgency, provided that a prompt recognition of the existence of those circumstances was subsequently obtained from, or demonstrated by, the other Party;

(ii) the re-establishment of the original situation of compliance in Hao as soon as the circumstances of emergency had disappeared; and

(iii) a good faith attempt to obtain the consent of New Zealand under the terms of the First Agreement (pp. 553-5).

(3) Applying these criteria to the case of Major Mafart,

(a) (by two votes to one, Sir Kenneth Keith dissenting) it appeared that his initial evacuation, albeit that it was carried out without the consent of New Zealand, was not wrongful, since subsequent examinations showed that he required medical treatment not available in Hao (pp. 355-7 and 559).

Per Sir Kenneth Keith (dissenting): Notwithstanding the apparently absolute language of the First Agreement, the evacuation of Major Mafart would have been justified in circumstances of extreme distress, where his life was in danger. The facts did not, however, disclose a need to act with such urgency. France could, and should, have facilitated a proper medical assessment by New Zealand in the performance of its good faith obligations under the First Agreement (pp. 580-3).

(b) (unanimously) there was, however, a breach of France's obligations in the decision not to return Major Mafart to Hao after 12 February 1988, when he was found to have recovered after his treatment. The fact that he was not fit for military service overseas, in terms of French military law, was no justification for the decision since his assignment on Hao was not a normal military assignment and it was not necessary for compliance with the First Agreement that he perform any military duties at all while on Hao (pp. 557-60).

(4) In the case of Captain Prieur,

(a) (unanimously) France had committed a material breach of the First Agreement by not endeavouring in good faith to secure the consent of New Zealand to Captain Prieur's immediate repatriation;

(b) (unanimously) consequently there had been a material breach by France in removing Captain Prieur from Hao; and

(c) (unanimously) France committed a material breach of the First Agreement in failing to return Captain Prieur to Hao. The fact that Captain Prieur might have been entitled to leave under French military law was no justification, since a State was not entitled to rely upon its own domestic law as grounds for failure to comply with its international obligations (pp. 560-6).

(5) (by two votes to one, Sir Kenneth Keith dissenting) France's obligations regarding the two agents under the First Agreement came to an end on 22 July 1989, three years after the agents were handed over by New Zealand. France had committed an uninterrupted and continuing breach in respect of each agent until that date but that meant that the obligation must also have been in continuing and uninterrupted operation throughout that period, with the result that the period of operation of the obligation had now ceased. It could not, therefore, be said that France was currently in breach of the Agreement (pp. 565-8).

Consequently, New Zealand's request for an order that France return the two agents to Hao had to be rejected. The remedy which New Zealand sought was essentially an order for the cessation of wrongful conduct. Such an order was no longer appropriate now that France's obligations had come to an end (pp. 570-3).

Per Sir Kenneth Keith (dissenting): The terms of the First Agreement, its context and its object all led to the conclusion that the Agreement required Major Mafart and Captain Prieur to spend three years, whether continuous or aggregated, on the island of Hao. It had to be remembered that this was a substitute for a lengthy prison sentence imposed for a very serious crime. The Tribunal's reasoning in support of the conclusion that the obligation came to an end on 22 July 1989, a date not mentioned in the Agreement, was unconvincing (pp. 583-90).

(6) (unanimously) The Parties were agreed that the concept of damage in the law of State responsibility extended to non-material damage. In the present case, France's violation of its obligations under the First Agreement had caused non-material damage of a moral, political and legal nature (pp. 568-70).

Monetary compensation was not, in principle, excluded in respect of nonmaterial damage and the Tribunal had the power to make an award of monetary compensation. This power would not, however, be exercised in the present case, since New Zealand had not sought an award of monetary compensation (pp. 574-5).

A declaration by an international tribunal that a respondent State had committed a violation of its 'international obligations towards a claimant State was a widely accepted

form of satisfaction in respect of such a violation -Accordingly, the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constituted in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand (pp. 575-7).

(7) (unanimously) The Tribunal recommended that, in order to promote the process of reconciliation between them, France and New Zealand should establish a fund to promote close and friendly relations between the citizens of the two countries and that the Government of the French Republic should make an initial contribution of US $2 million to that fund (pp. 577-8).