1977 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

MEMORANDUM FOR JUDGES

This memorandum has been specially prepared for the use of judges of the 1977 Jessup Competition. This memorandum MUST NOT BE SEEN BY ANY CONTESTANT in the 1977 Jessup Competition. The memorandum is not intended to cover all issues which may be raised in an oral argument, but most important issues are included.

American Society of International Law
Association of Student International
Law Societies
2223 Massachusetts Avenue, N.W.
Washington, D.C. 20008 U.S.A.
(202) 265-4313 (202) 667-3998

I. JURISDICTION AND FACTS

There is no question of jurisdiction. The parties have submitted the dispute to the Court by special agreement pursuant to articles 36 and 40 of the Statute of the International Court of Justice.

There are no questions of fact. The parties have stipulated that the facts, as set out in the 1977 Jessup problem, are accurate. The parties have also stipulated that the bilateral Pandora-Shangri-La Cooperation Agreement and the trilateral I.A.E.A.-Pandora-Shangri-La Safeguards Agreement are accurately set forth in annexes A and B, respectively, of the 1977 Jessup problem.

II. NOTE ON THE INTERPRETATION OF TREATIES

Many of the following issues involve questions of treaty interpretation. With regard to all such issues, it is important to keep in mind various rules of construction, canons, etc., related to the interpretation of treaties.

Treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the teaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, opened for signature, May 22, 1969, art.31, para. 1, U.N. Doc. A/CONF.39/27 (1969) [hereinafter cited as Vienna Convention]. The "context" shall include (in addition to the text):

> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Id. art. 31, para. 2.

In addition to the context, there must be taken into account any subsequent agreement between the parties concerning the treaty, any subsequent practice of the parties concerning the treaty, and any relevant rules of international law applicable to the relations of the parties. Id. art.31, para. 3. A special meaning shall be given to a term if it is established that the parties so intended.Id. art.31, para.4.

In the event that application of article 31 of the Vienna Convention leaves the meaning ambiguous, obscure, or absurd, or in order to confirm the meaning resulting from the application of article 31, recourse may be had to supplementary means of intepretation, including the preparatory work of the treaty. Id. art. 32

The Vienna Convention should be treated as a reflection or evidence of customary international law rather than a binding legal obligation on Pandora or Shangri-La.

III. IS SHANGRI-LA's INTENT TO REPROCESS PANDORIAN ORIGIN FUEL A MATERIAL BREACH OF THE BILATERAL COOPERATION AGREEMENT?

A. What Is A Material Breach Of An International Agreement?

Point one of the September 20, 1976 Pandorian diplomatic note raises the question of a material breach of the Cooperation Agreement by Shangri-La. If Shangri-La is to be guilty of a material breach it must be shown that Shangri-La violated a provision "essential to the accomplishment of the object or purpose of the treaty." Vienna Convention, art. 60, para.3(b).

B. Is Shangri-La's Intention To Reprocess A Breach Of The Cooperation Agreement?

1. Does the bilateral treaty contemplate reprocessing?

Yes, the parties clearly contemplated the possibility of reprocessing by allowing for reprocessing pursuant to article VIII, paragraph F of the Cooperation Agreement, which states in part that "reprocessing... shall be performed in facilities acceptable to both parties upon a joint determination that the provisions of Article XI [related to safeguards] may be effectively applied."

2. What standard shall be used in determining whether reprocessing is permissible?

Resolution of the question of what the standard was to be used to determine if reprocessing was permissible involves an interpretation of the language of article VII, paragraph F of the Cooperation Agreement, just mentioned. Possible interpretations include:

(a) A one step process is involved. If a joint determination can be made that the safeguard provisions of article XI can be effectively applied, then there is no discretion left with the parties as to whether the reprocessing plan is acceptable.

(b) A two step process is involved. First, the aforementioned determination must be made. Second, both parties must then agree upon the acceptability of reprocessing independent of the issue of safeguardability. Either party may deny the acceptability for any good faith reason, such as the fear that the material will not be used for peaceful purposes.

The resolution of the issue of which standard applies lies in treaty interpretation, as indicated in part II.

3. Has Shangri-La breached this standard?

If the "one step" interpretation is adopted, then a showing of good faith compliance by Shangri-La (as by its agreement to apply I.A.E.A. safeguards) may lead to a finding of no breach. If a "two step" interpretation is adopted, then a showing of a good faith denial of acceptance by Pandora may lead to a finding of breach.

C. If Shangri-La's Intention To Reprocess Is Interpreted To Be A Breach, Is It A Material Breach?

The materiality of the breach must be interpreted, as indicated before, on the basis of whether the reprocessing provision was "essential to the accomplishment or purpose of the treaty." Vienna Convention, art.60 para. 3(b). This must be determined by examining the treaty as a whole and through other methods of interpretation indicated in part II. Objects and purposes may include, among others,the assurance of a nuclear fuel supply to Shangri-La, the promotion of only peaceful uses of nuclear energy, etc. In this regard several interpretations are possible.

(a) The reprocessing provision is not a key clause of the treaty, and a breach of the provision is therefore not material. Article XI, paragraph B(5) of the Coopèration Agreement deals with the subject of breach and it does not cover the reprocessing clause. The object and purpose of the treaty is the provision of nuclear technology and fuel to Shangri-La for electricity. A breach of the reprocessing clause is not material or important in relation to the treaty as a whole.

(b) The reprocessing provision is a key clause of the treaty and a breach of the provision is therefore material. The object and purpose of the treaty is reciprocal civil nuclear cooperation. In order to ensure such cooperation it is important to limit the use to peaceful purposes.

In order to do the latter, the reprocessing provision must be complied with, as reprocessing produces plutonium which may be used for the production of nuclear weapons.

Note: The question of materiality and breach are closely related. Even if the Pandora argument as to materiality of the provision is accepted, Shangri-La may still be in compliance with the treaty if there was no breach of the provision.

C. Do Other Factors Exist Which Preclude Pandora From Asserting That Shangri-La's Intent To Reprocess Is A Breach?

1. Is Pandora bound by its President's 1976 statement that it was legally bound to approve reprocessing by Shangri-La?

The Pandorian president stated in August 1976 that because Pandora had committed itself to applying safeguards, that Pandora had no legal option but to approve the reprocessing. The question presented is whether Pandora is bound by such statement. The International Court of Justice has stated that unilateral declarations by appropriate authorities in a country may bind that country (Nuclear Tests Case (Australia v. France), [1974] I.C.J. 253,267) if such was the intent of the declarer at the time and under the circumstances (id. at 268). Other publicists have indicated that under international law such a statement may create binding obligations. See, e.g., Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence," 33 BRIT. YB. INT'L L. 177 (1957).

Decisions of the I.C.J. have no binding force except between the parties and in respect of the particular case. I.C.J. STATUTE art. 59. Judicial decisions and the teaching of "the most highly qualified publicists"

may, however, be used as subsidiary means for the determination of rules of international law. Id. art. 38, para.1(d). There is evidence in the writings of publicists and in the Nuclear Tests Cases (and perhaps in another case to be mentioned later) that such a rule exists. The Court may examine the rule as applied in the Nuclear Tests Cases in order to see if it should apply in this case. Issues which should arise are:

(a) Is there in fact a rule of international law as indicated in the Nuclear Tests Cases; i.e., is it indeed well recognized that unilateral declarations may create legal obligations. The I.C.J. in the Nuclear Tests Case did not illustrate examples when such declarations had become obligations. The parties in this case should present or deny the existence of such illustrations.

(b) If the rule of law exists, are the situations in which the rule previously have been applied different than the situation between Pandora and Shangri-La? For example, the French statements regarding nuclear tests were not made in reference to a treaty between France and Australia, as were the statements in the Pandora-Shangri-La situation. If the cases are different should the same rule of law apply?

(c) If the situations are reasonably similar, and if the rule of law exists, did the Pandorian president have the intent to so bind his country, as the I.C.J. indicated was the case in the Nuclear Tests Cases?

(d) Are there any other reasons why the rule of law should not apply in this case?

(e) Does the fact that Pandora indicated in 1971 that (1) there was

no justification for the construction of a reprocessing plant, (2) that the proliferation dangers were great, and (3) that Shangri-La should abandon the plan, affect the outcome?

2. Is Pandora estopped from asserting the breach?

It has been contended by publicists that there has been developing in international law a rule similar to the common notion of estoppel: a country may not make a statement allowing or concurring in an action of another country and later claim that such action is invalid when the other country has changed its position in reliance upon the statement or concurrance. See, e.g., LORD MCNAIR, THE LAW OF TREATIES ch. XXIX (2d ed. 1961) [hereinafter referred to as MCNAIR]. Such an estoppel rule is said to have been applied in the Eastern Greenland Case, [1933] P.C.I.J. Ser.A/Bm No. 53. It is even asserted that actual detrimental reliance is not required by the Eastern Greenland case. See MCNAIR at 487.

It will be necessary, in resolving this issue, to consider the same possibilities as indicated previously (with regard to the Nuclear Tests Cases, rule) with special emphasis placed upon the fact that construction of the reprocessing plant has been continuing for 5 years with the knowledge of both parties, and upon both the 1971 Pandora protest and the 1976 Pandoran president's statement.

IV. ARE THE CONDITIONS PLACED BY PANDORA ON FUTURE NUCLEAR FUEL SHIPMENTS TO SHANGRI-LA A MATERIAL BREACH OF THE COOPERATION AGREEMENT?

A. Is Pandora's Demand That Shangri-La Agree Not To Use The Fuel Directly For Any Nuclear Explosive Device A Material Breach?

1. Can the demand be justified under the provisions of the Cooperation Agreement?

Article X, paragraph A(a) includes a "guarantee" that Shangri-La shall not use any of the nuclear material for "atomic weapons, or for research on or development of atomic weapons, or for any other military purpose." Article II provides that the parties shall cooperate "in the achievement of the uses of atomic energy for peaceful purposes." Article XI provides that all relevant equipment or devices "be used solely for civil purposes."

Pandora's demand prohibits the use of "any nuclear explosive device." The issue is raised whether that broad prohibition is acceptable on the basis of the just mentioned provisions. A treaty interpretation question is thus presented. Possible interpretations include:

(a) The Cooperation Agreement prohibits nuclear explosive devices for military purposes only. Civil uses for peaceful purposes are acceptable. Such a prohibition is not permissible within the intent of the parties, and thus constitutes a breach. The only permissible measures are safeguard measures to ensure that the nuclear explosive devices are used for peaceful civil purposes.

(b) There is no real difference between the technology required for nuclear explosive devices for "peaceful" or "civil" purposes as opposed to "military" purposes. As a result, a broad prohibition against the use of <u>any</u> explosive nuclear device is permissible under the Cooperation Agreement in order to <u>ensure</u> that the device is not used for military purposes.

2. Has Shangri-La nevertheless acquiesced to Pandora's interpretation of the Cooperation Agreement?

When a party to a treaty discovers that the other party places a different interpretation upon the treaty, the first party may be deemed, under international law, to have acquiesced to the other party's interpretation, and is thus bound thereby. This will not be the case if the first party notifies its dissent to the other party and publishes a reasoned explanation of its own explanation. See MacGibbon, "The Scope of Acquiesence in International Law," 31 BRIT.YB INT'L L. 168 (1953); MCNAIR at 429-30. It may be necessary that the acquiescence be a long standing one. See Fisheries Case (United Kingdom v. Norway), [1951] I.C.J. 116.

This raises the following issues:

(a) Was the Pandorian Foreign Ministry's January 1971 interpretation as delivered to the deputy chief of mission at the Shangri-Law embassy in Pandora such an interpretation by Pandora that Shangri-La was obligated to respond or else to acquiesce?

(b) Was Shangri-La's failure to formally respond (it informally denied the interpretation) an acquiescence?

(c) Was the subsequent continuation of construction of the reprocessing plant of relevance in this regard, as related to notice, protest, etc?

(d) If there was an acquiescence, was its duration sufficient to bind Shangri-La?

3. Can the demand be justified under the provisions of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)?

The NPT (729 U.N.T.S. 161 (1969)) binds its parties from assisting other countries in the acquisition of "nuclear explosive devices." NPT. art.1.

Pandora is a party to the NPT; Shangri-La is not. The question presented is whether a state can be bound by a treaty to which it is not a party. Such is possible in limited circumstances, evidence of which may be presented by the Agent of Pandora and denied by the Agent of Shangri-La, based on the facts in the Jessup problem. These include:

(a) Has Shangri-La consented to be bound by the NPT? Vienna Convention art. 34.

(b) Have the two countries amended their Cooperation Agreement in this regard? Id. art. 39.

If one of these circumstances is not shown, then Vienna Convention article 30, paragraph 4(b) should apply. The provision provides that when a later treaty relates to the same subject matter as an earlier treaty, and when one state is party to both treaties, but the second state is party to only one treaty, "the treaty to which both states are parties governs their mutual rights and obligations."

4. Can the demand be justified under any other rule of international law?

The issue may arise as to whether the rules embodied in the NPT actually reflect (or codify) rules of customary international law. Evidence may be presented (or denied) that customary international law binds Shangri-La according to the provisions in the NPT. Thus the Court must decide whether the practice of states reflects such rules. In this regard evidence may be presented that the NPT embodies peremptory norms of general international law (jus cogens) which bind all states and renders void any treaty (such as the Cooperation Agreement) to the contrary. Vienna Convention art. 53. A peremptory norm is one "accepted and recognized by the international community of states, as a whole as a norm from which no derogation is permitted." Id.

5. If the NPT or some other rule of international law is applicable to Shangri-La, does such proscribe Shangri-La's use of any nuclear explosive device?

The Court must decide in this circumstance whether the NPT (or other rule) is intended to prohibit the use of any nuclear explosive device, or whether such devices are permissible if used for peaceful civil purposes. This is again a question of treaty interpretation

and the practice of state parties since the entry into force of the NPT, as the Agents may show.

6. If the demand was justifiable, is Shangri-La's refusal to meet the demand a material breach?

If the demand is justifiable, then Shangri-La's refusal is a breach. In order to determine if the breach was material, the object and purpose of the treaty must be examined, as before.

B. In View Of Its Obligations Under the NPT, Is Pandora's Demand That Shangri-La Agree To Place Its Enitre Fuel Cycle Under I.A.E.A. Safeguards A Material Breach?

Article III, paragraph 2 of the NPT provides that each state party (e.g., Pandora) shall not provide fuel to a non-state party (e.g., Shangri-La) "unless the source or special fisionable material shall be subject to...[I.A.E.A.] safeguards." In determining whether the demand is justifiable, it is necessary for the Court to undergo a similar analysis as that in the preceding section (concerning Pandora's demand that the fuel not be used for any nuclear explosive device). In this analysis the practice of state parties to the NPT since the entry in force of the NPT is of especial importance, and should be delineated by the Agents. The acquiescence analysis is of minor importance, as Shangri-La has clearly contested the 1976 Pandorian demands.

C. In View of Article XII, Paragraph A Of The Cooperation Agreement, Is Pandora's Demand That Shangri-La Agree to Place Its Entire Fuel Cycle Under I.A.E.A. Safeguards A Material Breach?

Article XI of the Cooperation Agrement grants Pandora the right to demand the application of safeguards to materials and equipment supplied by Pandora. Article XII, paragraph A suspends such right, but only "to the extent that...Pandora agrees that the need to exercise such rights is satisfied by [the trilateral safeguards Agreement]." Consequently Pandora demands, on the basis of this suspension provision, that safeguards be placed on the entire Shangri-La fuel cycle. The demand is placed in issue on the basis of section 6 of the I.A.E.A.-Pandora-Shangri-La Agreement, whereby Pandora agrees to suspend its rights under article XI, during the time that the specified materials are listed in the I.A.E.A.'s inventory. The latter is still the case. The resulting apparent conflict must be resolved on the basis of an interpretation of the two treaties.

Under international law, when the parties to an earlier treaty are also parties to a later treaty, the earlier treaty applies only to the extent that its provisions are compatible with the provisions of the later treaty. Vienna Convention art. 30, para. 3. This rule applies even though the later treaty (as in this case) includes a third party (the I.A.E.A.). Id. art. 30, para. 4. The interpretation of the provisions should consider the following:

(a) Can the provisions be read consistently?

(b) What has been the practice (if any) of other states in regard to similar provisions in civil nuclear cooperation agreements?

(c) Can any intent or agreement on the part of both parties be shown that displaces the normal treaty conflict rule above?

(d) Is such treaty conflict rule actually accepted by the over-

whelming majority of states?

(e) Was either provision intended to permit one party to unilaterally modify other provisions in the treaty (e.g., the fuel supply commitment)?

(f) Does Shangri-La's willingness to apply I.A.E.A. safeguards to the reprocessing cycle affect the issue?

If it is found that the demand is not justifiable, and Pandora thus guilty of breach, the same methods as before must be used to determine materiality.

D. In View Of Article II of the Cooperation Agreement (Subjecting The Agreement To The Laws In Force In The Countries), Is Pandora's Demand That Shangri -La Agree To Place Its Entire Fuel Cycle Under I.A.E.A. Safeguards A Material Breach?

A generally accepted principle of international law is that the provisions of municipal law cannot prevail over the provisions of a treaty. See MCNAIR at 100-01. If,however, the treaty in question provides for the application of municipal law, then the municipal law is incorporated into the treaty, in a sense. The extent of the effect of municipal law on the treaty thus becomes a question of interpretation of the treaty.

Article II of the Cooperation Agreement provides that the Agreement is subject to "the applicable laws, regulations, and license requirements in force" in the two countries. The September 1976 Pandorian statute requires the application of I.A.E.A. safeguards to the entire fuel cycle. In interpreting the intent of the state parties with regard to this provision, a number of issues are raised:

(a) Does the language apply only to legislation, etc., in force at the time of the entry into force of the treaty or does it apply to any legislation at any time that the treaty is still in effect?

(b) Was the intent that only subsidiary matters be regulated by the laws, regulations, and licensing requirements, or is the very basis of the treaty -- nuclear cooperation -- subject thereto?

(c) Was it within the knowledge and intent of the parties that since licensing requirements, etc., constantly change in most countries, that it would be necessary for each country to change the requirements after the entry into force of the agreement?

(d) If the latter is so, did the parties intend any limitations as to the extent of change (e.g., only to subsidiary matters, as indicated in (b)?

(e) Since there is no corresponding provision in the trilateral agreement to correlate to article II of the bilateral agreement, was the intent then that the "subject to the applicable laws..." language did not contemplate changing from the more limited safeguards scheme in the trilateral to the full safeguards scheme possible in the bilateral (i.e., the trilateral agreement, as the later treaty, may be inconsistent with the bilateral, and thus the trilateral safeguards scheme only should apply, and the latter scheme is not "subject to the applcable laws..."). In considering this proposition does the fact that section 31 of the trilateral agreement allows for a termination of the trilateral agreement (under certain conditions) have any relevance to the question of the intent of the parties to supersede the intent of the bilateral agreement (note that this issue also applies to the apparent conflict between article XII, paragraph A of the bilateral and section 6 of the trilateral, discussed earlier in part IV, sections A and B (of this memorandum). The question of the NPT's application to Pandora's obligations also arises, in that if one safeguards scheme is not appropriate, then does the NPT scheme become relevant? Thus the issues in part IV, sections A and B become relevant

to this issue.

If a breach is found, the considerations concerning materiality apply.

E. In View Of The Termination Provisions Of The Trilateral Agreement, Is Pandora's Demand That Shangri-La Agree To Place Its Entire Fuel Cycle Under I.A.E.A. Safeguards A Material Breach?

Even if Pandora has a justifiable claim against Shangri-La, the question arises as to whether Pandora's method was justifiable. Section 21 of the trilateral agreement establishes a scheme for "any noncompliance" with the trilateral agreement. Section 31 provides for a termination procedure. Several considerations in interpretation are thus raised:

(a) Should these trilateral procedures be the exclusive means of dealing with any alleged noncompliance, rather than the procedures agreed to in articles XI and XII, paragraph A, discussed in part IV, section C of this memorandum?

(b) Does the language in part 2(b) of the September 1976 Pandora diplomatic note have any relevance in this regard (the note alleged that Pandora had a right under article XII, paragraph A of the bilateral agreement to determine if the trilateral safeguards were adequate)?

(c) Thus, which agreement controls in regard to noncompliance?

If it is found that an improper procedure was used, is such a material breach?

F. Are Pandora's Demands Justified Under The Doctrine Of Rebus Sic Stantibus?

Under the doctrine of rebus sic stantibus, an unforeseen fundamental

change of circumstances since the conclusion of a treaty may be invoked as a ground for terminating or withdrawing from a treaty only if the existence of the original circumstances was an essential basis of the treaty, and if the effect of the change is to radically transform the extent of obligations still to be performed under the treaty. Vienna Convention art. 62. If Pandora can establish such a fundamental change in circumstances, such can justify its action if the Court has found that otherwise Pandora would be in breach.

V. WHAT ARE THE CONSEQUENCES OF A MATERIAL BREACH BY EITHER PANDORA OR SHANGRI-LA?

If the Court finds that either party is in material breach, then the Court has several options.

(a) It can declare that the treaty is terminated.

(b) It can order the payment of actual or moral damages. Chorzow Factory Case, [1928] P.C.I.J. ser. A, No.9.

(c) Whether the Court can order the specific performance of a treaty is a difficult question. While the Statute of the I.C.J. does not confer an express power of specific performance, it has been said that such power is implicit. C.W. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 419 (1964). In the Free Zones Case, [1932] P.C.I.J. Ser.A/B, No. 46, the P.C.I.J. ordered the French government to perform a specific act in accordance with a treaty. The Agents, if either requests specific performance, should address themselves to the issues involved with this question; i.e., whether there is in fact an international law of specific performance, whether it applies to the performance of treaty obligations, whether the rule is applicable in this case, etc.