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

SHANGRI-LA,

Applicant

v.

PANDORA,

Respondent

APRIL TERM

1977

On Submission to the
International Court of Justice

MEMORIAL FOR THE APPLICANT

Team No. 9
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JURISDICTION

The parties have agreed to the jurisdiction of the International Court of Justice pursuant to article 36, paragraph 1 of Statute of the Court and have stipulated to the facts and the agreements in the Compromis.

QUESTIONS PRESENTED

1. Whether under principles of international law Pandora can justify its termination of nuclear fuel shipments made under its agreement with Shangri-La?

2. Whether Shangri-La was obligated by the terms of any treaty or principle of international law to place under international safeguards nuclear material, equipment and devices which were not received from Pandora?

3. Whether Pandora could, consistently with its treaty obligations to Shangri-La, refuse to approve reprocessing in facilities to which safeguards could be effectively applied?

4. Whether the development or production by Shangri-La of a nuclear explosive device for peaceful purposes only would constitute a violation of its treaty obligations or international law?

STATEMENT OF FACTS

Applicant, the Kingdom of Shangri-La (Shangri-La), and respondent, the United Republic of Pandora (Pandora), are parties to a bilateral agreement Concerning the Civil Uses of Atomic Energy (bilateral agreement) signed in 1963.[1] Under the terms of that treaty, Pandora has transferred to Shangri-La two nuclear reactors which currently provide 20% of Shangri-La's electric generating capacity.[2] These reactors have been fueled under the terms of the bilateral agreement since the commencement of their operations in 1971 and 1972 respectively.[3] Shangri-La also has two indigenously developed reactors which have never been subject to international safeguards.[4]

In 1969 Pandora, Shangri-La, and the International Atomic Energy Agency (IAEA) entered into an Agreement for the Application of Safeguards by the IAEA to the Pandora-Shangri-La Cooperation Agreement (trilateral agreement).[5] This agreement only applied to the material and equipment

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[1] Agreement for Cooperation Between the Government of the United Republic of Pandora and the Government of the Kingdom of Shangri-La Concerning Civil Uses of Atomic Energy, done June 12, 1963, Compromis, Annex A (in force, August 8, 1963) (hereinafter cited as bilateral agreement).

[2] Compromis, at 2.

[3] Id.

[4] Id., at 1.

[5] Agreement between the United Republic of Pandora and the Kingdom of Shangri-La for the Application of Safeguards by the International Atomic Energy Agency, done August 1, 1969, Compromis, Annex B (in force August 30, 1969) (hereinafter cited as trilateral agreement).

subject to safeguards under the bilateral agreement.[6] Under the trilateral agreement, the IAEA was given the responsibility to determine if there was any noncompliance with safeguard requirements and to request the government concerned to remedy such noncompliance.[7] The trilateral agreement is to remain in force during the term of the bilateral agreement unless terminated sooner by any party on six months notice.[8] No notice of termination has been given by either party.

Pandora acceded to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) in 1970.[9] In January, 1971, Shangri-La's embassy received a note from Pandora's foreign ministry stating that Pandora understood the bilateral agreement to preclude the use of safeguarded material or equipment in connection with nuclear explosive devices for peaceful purposes.[10] Shangri-La replied that it did not share this understanding.[11] The issue was not raised again until after Pandora adopted legislation in 1976 prohibiting nuclear fuel shipments to any country unless it first agrees not to use such fuel for any nuclear explosive device.[12]

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[6] Compromis, at 1.

[7] Compromis, Annex B, §21.

[8] Id., §31.

[9] Compromis, at 1.

[10] Id.

[11] Id., at 1-2.

[12] Id., at 3.

In 1971 Shangri-La informed Pandora that it intended to develop a reprocessing facility to recycle spent fuel from its reactors. Pandora urged Shangri-La to abandon the plan, claiming lack of economic justification and potential proliferation dangers. Pandora did not claim, however, that safeguards could not be effectively applied.[13] In July, 1976, with the reprocessing plant nearing completion, Shangri-La requested Pandora's approval to reprocess fuel under IAEA safeguards.[14]

At an August 20, 1976, news conference, Pandora's President stated, "we have determined that [safeguards] can be effectively applied." He concluded that Pandora had "no other legal option...but to approve" Shangri-La's request.[15] Nonetheless, on September 20, 1976, Pandora informed Shangri-La that it was denying approval for reprocessing and would terminate further nuclear shipments if fuel it supplied was reprocessed by Shangri-La. At the same time, Pandora demanded as a condition for continued nuclear cooperation that Shangri-La place all its nuclear activities under IAEA safeguards and agree not to develop peaceful nuclear explosive devices.[16]

Shangri-La contested the legal basis of Pandora's demands and rejected them. On September 30, 1976, Pandora terminated all nuclear fuel shipments, leaving Shangri-La with only an eleven month fuel inventory for its reactors. In an effort to find some basis for continued nuclear cooperation, Pandora and

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[13] Id., at 2.

[14] Id.

[15] Id.

[16] Id., at 3.

Shangri-La agreed to submit the controversy to this Court and stipulated to the text of the bilateral and trilateral agreements.[17]

[17] Id., at 4.

SUMMARY OF ARGUMENT

Under the terms of the bilateral agreement, Pandora was obligated to transfer fuel for Shangri-La's power reactors. Pandora's termination of nuclear fuel transfers constituted a breach of this duty and was not justified by a material breach by Shangri-La of either the bilateral or trilateral agreements. Specifically, neither the proposed reprocessing of fuel in an IAEA safeguarded facility in Shangri-La nor the potential development of nuclear explosive devices for peaceful purposes only was prohibited by either agreement with Pandora.

Pandora's breach of its treaty obligations to Shangri-La is not justified by any international convention, principle of international law, custom, or any other principle of law recognized by civilized nations. Subsequent domestic legislation and subsequent treaties to which Shangri-La is not a party do not alter Pandora's international obligations to Shangri-La. Furthermore, there is no principle of jus cogens which would invalidate or terminate either treaty with Shangri-La.

Finally, even if Pandora's termination of fuel shipments was otherwise justified, its action was nevertheless in violation of international law because it was not taken in accordance with any provision for termination stipulated in its treaties with Shangri-La.

ARGUMENT

I. PANDORA'S TERMINATION OF FUEL SHIPMENTS TO SHANGRI-LA CONSTITUTES A BREACH OF ITS TREATY OBLIGATIONS TO SHANGRI-LA AND IS NOT JUSTIFIED BY ANY MATERIAL BREACH BY SHANGRI-LA OF ITS TREATY OBLIGATIONS.

A. Under the bilateral agreement, Pandora had a duty to ship or to allow shipment of nuclear fuel to Shangri-La.

The Court's task in interpreting the bilateral agreement is to "giv[e] effect to the expressed intentions of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances."[1] The Vienna Convention on the Law of Treaties[2] (Vienna Convention) similarly provides that a court should interpret the "terms of the treaty in their context and in the light of its object and purpose."[3] Therefore, the Court, in interpreting the bilateral agreement between Pandora and Shangri-La, should look to the language of that agreement, the agreement's object and purpose and the circumstances surrounding its conclusion.

The general duty assumed by the parties under Article II of the bilateral agreement is to "cooperate...in the achievement of the uses of atomic

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[1] A. McNAIR, LAW OF TREATIES 365 (1961) (emphasis in original) (hereinafter cited as McNAIR); see, H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 40-60 (1958).

[2] Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/Conf. 39/27 (1969), in 8 Int'l Legal Materials 679 (1969), (hereinafter cited as the Vienna Convention). While the Vienna Convention has not received sufficient ratifications to enter into force, a majority of its articles codify existing rules of customary international law and it is a useful source of authority within Article 38 of the Statute of the International Court of Justice. See also, Compromis, December 3, 1976, Addendum, at 2.

[3] Vienna Convention, supra note 2, art. 31. Although "surrounding circumstances" are not included within Article 31, Article 32 specifies that such circumstances should be examined "in order to confirm the meaning resulting from the application of Article 31."

"energy for peaceful purposes." Shangri-La could achieve the uses of atomic energy in one manner only--through the use of nuclear reactors for the production of power. This necessitates the shipment of Pandoran fuel and materials. Therefore, Pandora is obligated to ship fuel to Shangri-La in order to discharge its duty to cooperate.

Furthermore, the parties intended that the duty to cooperate expressed in Article II would take specific forms. Had the parties intended to declare only a general duty to cooperate without specifying how that cooperation would occur, all of the treaty's provisions except Article II would have been unnecessary. Instead, the parties clearly contemplated that Pandora's cooperation would include the transfer of nuclear fuel to Shangri-La. Such transfer was, in fact, the treaty's raison d'être.

Articles dealing with nuclear material "transferred under this agreement" pervade the bilateral agreement.[4] These articles are incorporated by reference into Article II, which makes the duty to cooperate "subject to the other provisions of the agreement." These provisions establish that the parties intended for Shangri-La to achieve the uses of atomic energy through the shipment of Pandoran fuel. Thus, Pandora's duty to cooperate includes the duty to ship, and Pandora's failure to discharge that duty constituted a material breach of the bilateral agreement.

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[4] Agreement Between Pandora and Shangri-La Concerning the Civil Uses of Atomic Energy, done June 12, 1963, Compromis, Annex A (in force, Aug. 8, 1963), arts. VIII E, VIII F, IX, X A(2) and XI B(2), (hereinafter cited as bilateral agreement).

Article VII A of the bilateral agreement provides that "[u]ranium... may be transferred by [Pandora] or authorized persons under its jurisdiction to [Shangri-La] or authorized persons under its jurisdiction...." The use of the modal auxillary "may" does not make Pandora's duty discretionary rather than mandatory. This article speaks to who "may" transfer, not whether such transfers shall occur. This provision accommodated Pandora's practice of allowing the exporting of nuclear fuel by its private companies under contracts with foreign purchasers.[5] The language of Article VII A is thus consistent with the other treaty provisions which contemplate shipment of fuel as a necessary element of Pandora's duty to cooperate.[6]

The involvement of private companies also brings into proper perspective the language of Article II which makes cooperation subject, in part, to "the applicable laws, regulations, and license requirements in force" in the respective countries. Private companies engaged in the production, sale and

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[5] The fact that this practice contributed to Pandora's becoming the second rank exporter of nuclear facilities and materials underscores the economic motivation for Pandora's assumption of the duty to ship as part of its duty to cooperate.

[6] This interpretation is fully supported by a comparative examination of other bilateral treaties involving the same subject as the bilateral agreement. In the United States-Japan Bilateral Agreement for Atomic Energy Cooperation, done February 26, 1968, 683 U.N.T.S. 179, 220 (in force, July 10, 1968), the same "may" language appears in Article VI B. Yet Article VII A of that same treaty states that "[d]uring the period of this agreement the United States [Atomic Energy] Commission will supply to the Government of Japan... all of Japan's requirements for [special nuclear fuel] in the power reactor program described in the Appendix to this Agreement." (emphasis added). Bilateral treaties are evidence of customary international law. See, D'Amato, Treaties as a Source of General Rules of International Law, 3 Harv. Int'l L. Club Bull. 1 (1962).

shipment of nuclear material must of necessity be subject to extensive regulation. During the forty year period of the bilateral agreement, it was to be expected that regulation of such things as the safety and security of nuclear material in shipment would change.[7] The law enacted by the Pandoran legislature is clearly of a different order because it attempts to eliminate rather than regulate fuel transfers.[8] As an attempt to avoid Pandora's international obligations, this domestic law can not be pleaded before an international tribunal as an excuse for nonfulfillment of Pandora's obligations under international law.[9]

B. An interpretation of "cooperation" in Article II as including a duty to ship is supported by the subsequent actions of the parties.

Under principles of international law accepted by this Court,[10] "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its application"[11] may be taken into account in interpreting the treaty. The shipment of fuel itself is the best example of subsequent action which shows that the duty to cooperate was intended

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[7] The same is true with respect to the varying availability of "personnel and materials" which is also addressed in Article II of the bilateral agreement, supra note 4.

[8] Compromis, at 3.

[9] Fisheries Case (1951) I. C. J. 181 (dissenting opinion of Sir Arnold D. McNair). See discussion of pacta sunt servanda, Memorial Part II A and II C, at 14-16.

[10] International Status of Southwest Africa, (1950) I. C. J. 135; North Atlantic Coast Fisheries Case, Scott, HAGUE REPORTS (1916) 190.

[11] Vienna Convention, supra note 2, Art. 31 (3) (b).

to include a duty to ship. Thirteen months after the bilateral agreement entered into force, Shangri-La and private companies sanctioned to act on behalf of Pandora under Article VII A entered into long term requirements contracts for the supply of nuclear fuel to Shangri-La. This shipment of fuel continued uninterrupted from the time Shangri-La's reactors began operating until Pandora unilaterally terminated fuel shipments under the treaty.

Prior to such termination, the President of Pandora stated in August, 1976, that Pandora had "no other legal option" but to approve the reprocessing of fuel by Shangri-La.[12] He thus admitted that termination of fuel shipments was not a legal option available to Pandora. In other words, Pandora was legally obligated to allow the shipment of fuel to continue.[13] A foreign government is entitled to rely upon the word of the Chief Executive.[14]

The subsequent actions of Shangri-La are also instructive in determining whether the parties intended Pandora's duty to cooperate to include a duty to ship. The reactors operated with Pandoran origin fuel supply one-fifth of the electric power essential to domestic and industrial users in Shangri-La and Shangri-La does not have local sources of nuclear fuel.[15] It is evident, therefore, that Shangri-La would not have allowed its reliance

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[12] Compromis, at 2.

[13] Furthermore, Shangri-La contends that the statement of Pandora's President was ipso facto sufficient to create a duty to ship, even if no prior duty existed. See Nuclear Test Case, Australia v. France (1974) I. C. J. 253, 267-268; Franck, Word Made Law, The Decision of the International Court of Justice in the Nuclear Test Cases, 69 A. J. I. L. 612 (1975).

[14] Testimony of Judge Hackworth, Subcommittee of the Senate Commerce Committee, 78th Cong., 2d Sess., at 230 (1944).

[15] Compromis, at 2, Dec. 2, 1976 Addendum, at 1.

on Pandoran fuel to grow to so critical a level had Shangri-La thought that the shipments could be unilaterally terminated by Pandora. To hold otherwise would be to suggest that Shangri-La willingly submitted to the hegemony of Pandora.

In sum, the subsequent action of both Pandora and Shangri-La support the conclusion that Pandora had a duty to ship or allow shipment of nuclear fuel under the bilateral agreement. Pandora's failure to discharge that duty is therefore a material breach of the treaty.

C. Pandora's refusal to allow continued shipments of special nuclear material to Shangri-La was not justified by any material breach by Shangri-La of its treaty obligations toward Pandora.

1. Shangri-La has at all times been in compliance with its treaty obligations.

Article XI B (5) of the bilateral agreement gave Pandora the right to terminate in the event that Shangri-La failed to comply with its guarantees under Article X that 1) safeguards would be maintained on Pandoran origin fuel and hardware and that 2) no material transferred under the bilateral agreement would "be used for atomic weapons, or for research on or development of atomic weapons, or for any other military purpose."[16]

The record does not show noncompliance by Shangri-La with either of these guarantees, nor does it evidence a claim by Pandora of such noncompliance. The trilateral agreement with the IAEA granted that organization the power to apply and police the safeguards and to determine and remedy

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[16] Id., Annex A, art. X A (1) and (2)

noncompliance by Shangri-La.[17] Again, the record is devoid of any evidence that the IAEA has found Shangri-La to be in noncompliance with the safeguards.

2. Under the bilateral agreement, Shangri-La is permitted to reprocess Pandoran origin fuel in its safeguarded reprocessing facility.

Article VII F of the bilateral agreement specifically provides for the reprocessing of Pandoran origin nuclear material, subject only to the requirement that it "be performed in facilities acceptable to both parties upon a joint determination that the provisions of Article XI may be effectively applied." In 1971 Shangri-La informed Pandora that it intended to develop a reprocessing facility to which safeguards could be effectively applied.[18] Shangri-La's action was consistent with the aspirations of developing nations to share in the economic and technological development enjoyed by the more industrialized states. This desire finds explicit recognition in the NPT which makes specific provision for safeguarded reprocessing facilities[19] and expresses the "inalienable right" of all States to develop nuclear technology for peaceful purposes.[20]

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[17] Agreement Between Pandora and Shangri-La for the Application of Safeguards by the IAEA, done Aug. 1, 1969, Compromis, Annex B (in force, Aug. 30, 1969) (hereinafter cited as trilateral agreement), §§4, 20, 21.

[18] Compromis, at 2. In 1976 the Pandoran President stated that Pandora had determined that safeguards could be effectively applied. Id.

[19] Treaty on the Non-Proliferation of Nuclear Weapons, done July 1, 1968, U. S. T.. 6839, 729 U. N. T. S. 161 (in force for Pandora, March 5, 1970) (hereinafter cited as NPT), art. III (3).

[20] Id., art IV (1): "Nothing in this Treaty shall be interpreted as affecting the inalienable rights of all the parties... to develop research, production and use of nuclear energy without discrimination...."; accord, Final Document of the Conference of Non-Nuclear Weapon States, Resolution J, U.N. Doc. A/Conf. 35/10, 16-17.

Pandora, however, opposed the establishment of the facility, claiming lack of economic justification and potential dangers of proliferation.[21] Pandora's position is not supported by the bilateral agreement because the term "requires" in Article VIII F clearly refers to physical requirements relating to the usefulness of nuclear material as fuel and not to economic justification. This article fulfills its function of assuring mutual acceptability of reprocessing facilities if the full content of the term "acceptable" is considered to be a determination that safeguards may be effectively applied. This was the interpretation given this clause by Pandora's President when he stated that Pandora had "no other legal option...but to approve" reprocessing in Shangri-La's facility once he determined that safeguards could be effectively applied.[22]

As a result of subsequent legislation,[23] Pandora now asserts that effectively safeguarded facilities may still be considered unacceptable.[24] Pandora, however, can point to no language in the agreement which would provide objective standards by which to measure acceptability. When, as here, a fundamental aspect of its sovereignty was implicated, clearly no State would accept such a limitation without providing for very specific criteria by which

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[21] Compromis, at 2, 3. This paternalistic attitude is analagous to the attitudes of certain industrial nations toward the development of India's steel industry and the Aswan High Dam in Egypt.

[22] Compromis, at 2. The public statement by an authorized official may be sufficient to create an obligation binding in international law. Authorities cited note 13, supra.

[23] Compromis, at 3.

[24] Diplomatic note from Pandora to Shangri-La, Sept. 20, 1976. Compromis, at 3.

the limitation was to be measured and applied.

At the very least, Article VIII F must be read as a mutual obligation in the nature of a pacta de contra hendo which requires Pandora and Shangri-La to reach an agreement on reprocessing facilities.[25] The record establishes that Pandora not only failed to negotiate the issue in good faith but, by unilaterally terminating fuel shipments, has effectively prevented negotiation on the acceptability of Shangri-La's reprocessing facilities.[26] In any event, mere disagreement with respect to proposed reprocessing facilities does not justify Pandora's breach in the absence of actual or imminent reprocessing in such facilities.

3. Neither the bilateral nor trilateral agreement limits Shangri-La's right to develop a peaceful nuclear explosive device.

The record is devoid of evidence which would establish noncompliance with Shangri-La's guarantee not to use any safeguarded material or equipment for atomic weapons or any other military purpose.[27] It does not even appear that Pandora has or could make such a claim.[28] There is disagreement,

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[25] McNAIR, supra note 1, at 27.

[26] On August 20, 1976 Pandora's President stated that Pandora had no legal option but to approve the proposed reprocessing plant. Compromis, at 2. However, Pandora's diplomatic note of September 20, 1976, stated that Shangri-La's reprocessing facilities were not acceptable. Id., at 3. When Shangri-La protested, Pandora terminated fuel shipments on Sept. 30, 1976.

[27] Compromis, Annex A, art. X A (2).

[28] Allegedly inconsistent terms of subsequent multilateral treaties to which Shangri-La is not a party do not alter Shangri-La's and Pandora's obligations under their treaties to one another. See Memorial, infra, Part II B.

however, upon whether this guarantee extends to peaceful nuclear explosive devices for civil purposes only. This disagreement, however resolved, can not be considered to constitute noncompliance by Shangri-La in the absence of evidence that Shangri-La has used safeguarded material or equipment for research, development or production of peaceful nuclear devices.

Under both the bilateral and trilateral agreements, Shangri-La guaranteed not to use any nuclear material or equipment, which it received from Pandora,[29] for "atomic weapons, or for research and development of atomic weapons or for any other military purpose."[30] Under the principle of interpretation of ejusdem generis,[31] when specific things are enumerated, followed by a general phrase, the general words (in this instance "any other military purpose") should be construed as limited to things of the same kind as those enumerated. The specifically enumerated item, "atomic weapon," is defined in the bilateral agreement as a "device..., the principal purpose of which is for use as...a weapon...."[32] This definition is particularly instructive because of its focus on purpose. This demonstrates an awareness that the physical characteristics of the device are of little assistance in determining whether it is a weapon. Rather, it is the purpose for which the

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[29] Compromis, Annex A, arts. X A (2), XI A, X B (2) (4); Id., Annex B, §§6, 10.

[30] Id., Annex A, art. X A (2).

[31] McNAIR, supra at 394-99; Serbian Loans Case, (1929) P. C. I. J., Ser. A, Nos. 20/21 at 30.

[32] Compromis, Annex A, art. I (3) (emphasis added).

device is used or developed which is determinative.

By including within the definition of weapons only those devices whose "principle" purpose was military, the parties expressed a clear awareness of the distinction between peaceful and military uses of explosive devices and did not seek to limit Shangri-La's development of the former. Therefore, Shangri-La's guarantee not to use Pandoran origin nuclear material for any military purpose must not be read to exclude peaceful explosive devices from Shangri-La's "inalienable right" to use atomic energy for peaceful purposes.[33]

To the extent that Pandora may argue that a latent ambiguity exists in this area, the principle of in dubio mitius provides that where there is an ambiguity, the preferred meaning is that which offers less interference with the sovereignty of the obligated party.[34]

This interpretation is supported by the subsequent action of the parties. In 1969, six years after the bilateral agreement entered into force, Shangri-La and Pandora entered into a trilateral agreement with the IAEA. Under the trilateral agreement Shangri-La was again restrained only from using Pandoran origin nuclear material for any "military purpose."[35] In 1968 the NPT, which contains an express prohibition against the acquisition of nuclear

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[33] Authority cited note 20 supra.

[34] McNAIR, supra at 462 (1961); Advisory Opinion upon the Interpretation of Article 3 (2) of the Treaty of Lausanne (1925) P.C.I.J., Ser. B., No. 12 at 6, 25.

[35] Compromis, Annex B, §§2, 4.

"explosive devices" by non-nuclear weapon states, was adopted in draft form by the General Assembly of the United Nations.[36] Therefore, the parties can not deny having been aware of the distinction between atomic weapons and peaceful explosive devices when they entered into the trilateral agreement in 1969. The continued restriction on nuclear development in terms of purpose only, rather than in terms of physical characteristics as in the NPT, clearly supports a construction of both the bilateral and trilateral agreements which does not prevent Shangri-La from developing explosive devices for peaceful purposes only.

This construction is consistent with the desire of Shangri-La as a developing nation to have maximum access to advanced technologies in order to close the gap between itself and the industrialized states.[37] The fact that devices developed for peaceful purposes might have a possible military application does not justify maintaining the disparity between rich and poor nations. The production of a steel mill can be used either for home appliances or weapons; that of a truck factory for the distribution of essential civilian commodities or of military supplies. If the potential for abuse of atomic devices is somewhat greater, so also is the potential for beneficial uses.[38]

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[36] NPT supra note 19, art. II. G.A. Res. 2373 (1968), 9 U.N. Resolutions 335 (1975).

[37] See G.A. Res. 3281 (Charter of Economic Rights and Duties of States), U.N. Doc. OPI/542 (1975).

[38] Furthermore, the specter of proliferation which Pandora seeks to raise must be viewed realistically against Shangri-La's limited ability to develop a militarily significant number of atomic weapons or a sophisticated delivery system.

Shangri-La's refusal to renounce the "nuclear option" with respect to unsafeguarded materials does not justify Pandora's refusal to continue fuel shipments. Shangri-La lies between China and India, both of which possess nuclear weapons and neither of which has submitted to the regimen of the NPT.[39] In the face of such powerful nuclear armed neighbors, it is essential that Shangri-La keep the nuclear option open. A "strategy of option"[40] may by itself serve a deterrent function even absent any present intention to develop nuclear weapons. The vague assurances of collective security contained in the NPT[41] are of no comfort to Shangri-La which borders the two states whose policies least follow those enunciated in the NPT.

Pandora's attempt to impose the terms of its note of September 20, 1976, threatens not only the immediate economic stability of Shangri-La,[42]

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[39] U.S. DEPT. of STATE, TREATIES IN FORCE 396 (1976).

[40] The phrase is adopted from a description of Japanese foreign policy with respect to Chinese nuclear capability. S. WILLIAMS, NUCLEAR NON-PROLIFERATION IN INTERNATIONAL POLITICS: THE JAPANESE CASE (1972); see, Comment, Legal Implications of Indian Nuclear Development, 4 DENVER J. INT'L LAW & POL. 237, 254-55 (1974) (hereinafter cited as Indian Nuclear Development).

[41] NPT supra note 19, Preamble; see Indian Nuclear Development, supra note 40, at 250-52.

[42] Compromis, 2, 4. The use of economic leverage by Pandora contravenes the declaration of the U.N. Conference on the Law of Treaties, which "(s)olemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another state to perform any act relating to the conclusion of a treaty in violation of the principle of the sovereign equality of States and Freedom of consent." U.N. Doc. A/Conf. 39/26 (1969), 8 Int'l Legal Materials 733 (1969).

but its continued security as well. Therefore, Shangri-La's refusal to accede to Pandora's demands did not constitute a breach of Shangri-La's treaty obligations such as to justify Pandora's unilateral termination of nuclear fuel shipments.

II. PANDORA'S BREACH OF ITS TREATY OBLIGATIONS TO SHANGRI-LA IS IN VIOLATION OF GENERAL PRINCIPLES OF INTERNATIONAL LAW.

A. Pandora bears a heavy burden of proof to overcome the fundamental principle of pacta sunt servanda.

No principle of international law is more universally acknowledged than the sovereign equality of nations.[43] The rules of sovereignty promote the peaceful coexistence of states on a footing of equality.[44] Cooperation based on equality is the only way of assuring the successful execution of treaties, which depend on mutual or corresponding limitations of the exercise of sovereignty.[45] A necessary corollary of sovereignty is the principle of pacta sunt servanda, for unless treaties must be obeyed, strength rather than equality would be the basis of international law.[46]

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[43] The Antelope, 10 Wheat 66, 122, 6 L. Ed. 2d 268; Charter of the United Nations, done June 26, 1945, [1945] 3 U. S. T. 1153 (in force Oct. 24, 1945), c. 1, art. 2, par. 1; McWhinney, The New Countries and the New International Law, 60 AM. J. INT'L. 1 (1966).

[44] Schwarzenberger, The Problem of International Public Policy, 18 CURRENT LEGAL PROBLEMS 204 (1965) (hereinafter cited as Schwarzenberger).

[45] Id.

[46] Vienna Convention, supra note 2, art. 26; Harvard Research of International Law, Treaties, 29 AM. J. INT'L L. 778, 780 (Spec. Supp. 1935); see also, Friedlander, Power Politics and the Rule of Law, Professor Schwarzenberger Reconsidered. 24 DE PAUL L. REV. 836, 841-842 (1975).

As a general rule, a State may not avoid or modify its obligations under a treaty except with the consent of the other parties.[47] Thus, under general principles of international law, Pandora may avoid its obligations toward Shangri-La only if it can establish that they have been terminated or suspended.[48] In this endeavor Pandora bears a heavy burden of proof to overcome the principles of sovereign equality of States and of pacta sunt servanda.[49]

There are four basic categories of causes of treaty termination:[50] 1) Objective circumstances specified in the treaty itself; 2) objective circumstances for which there is no provision in the treaty; 3) concordant action of the parties; 4) action of one party only. The first and third categories actually affirm the principle of pacta sunt servanda. Since it is not claimed that Shangri-La has consented to a modification of the treaties in question, only if Pandora can establish the occurrence of objective circumstances specified in the treaties themselves may its action be found to be in accord with the principle of pacta sunt servanda. The record fails to establish the occurrence

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[47] Vienna Convention, supra note 2, art. 39; I. DETTER, ESSAYS ON THE LAW OF TREATIES, 73 (1967) (hereinafter cited as DETTER).

[48] Shangri-La does not understand Pandora to claim that either of the agreements is invalid because something must have existed at the moment of their conclusion to render them invalid. Nahlik, The Grounds of Invalidity and Termination of Treaties, 65 AM. J. INT'L L. 736, 73 (1971) (hereinafter cited as Nahlik). The participation of the IAEA in the trilateral agreement and the enforcement by it of the safeguards established in the bilateral agreement makes the possibility of invalidity exceedingly unlikely.

[49] E. g., Vienna Convention, supra note 2. Article 42 is the equivalent of a presumption in favor of the validity and binding force of treaties. Nahlik, supra note 48, at 746.

[50] Vienna Convention, supra note 2, arts. 54-64; Nahlik, supra note 48, at 746.

of any objective terminating circumstance listed in either of the treaties.[51]

B. Subsequent actions by Pandora do not alter its treaty obligations.[52]

In its Diplomatic Note of January, 1971, Pandora indicated that its obligations under the NPT may have influenced its interpretation of its pre-existing treaties with Shangri-La, which is not a party to the NPT. Such a position violates international law because it ignores the fact that a state may not avoid or modify its obligations under a treaty except with the consent of the other contracting parties.[53] States can not avoid their treaty obligations by the simple expedient of concluding an inconsistent treaty with other parties.[54] Such a position eviscerates the principle of pacta sunt servanda.

Thus, in cases where parties to a later treaty do not include all the parties to an earlier one, the Vienna Convention, for example, provides that "as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."[55] No exception is recognized for general multilateral

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[51] Compromis, Annex A, art. XI B (5). See Memorial, supra, Part I C.

[52] For the effect of subsequent action by Shangri-La, see Memorial, supra, Part I B.

[53] Vienna Convention, supra note 2; DETTER, supra note 47.

[54] See Vienna Convention, supra note 2, art. 30 (4) (b).

[55] Id.

treaties which conflict with bilateral treaties.[56]

Even if, assuming arguendo, Pandora's obligations under the NPT are in conflict with its treaty obligations to Shangri-La, Pandora is required to readjust its obligations consistent with international law. Breach of its treaty obligations to Shangri-La is not permissible.[57]

Nor does the subsequent domestic legislation of Pandora modify its treaty obligations to Shangri-La. A necessary corollary of the principle of pacta sunt servanda is that domestic legislation can not be invoked as a reason for non-compliance with an international obligation.[58] In the event of a conflict between a State's municipal law and its international obligations, the government or the executive must either find a solution or face the consequences of the State's responsibility under international law.[59]

Neither can Pandora's diplomatic notes of January 1971 or September 20, 1976, provide a basis for terminating or modifying Pandora's treaty

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[56] Id. Even though this rule may tend to complicate treaty relationships and to impede the replacement of out-of-date treaties, termination of treaties by any form of unilateral or majority decision is impermissible. Special Rapporteur Waldock, (Second)Report on the Law of Treaties, 2 Y.B. INT'L L. COMM'N 70 (1963), U.N. Doc. A/CN. 4/156 (1963) (hereinafter cited as Waldock).

[57] McNAIR, supra note 1, at 222-3; Lauterpacht, (First)Report on the Law of Treaties, 1953 2 Y.B. INT'L L. COMM'N 90, U.N. Doc. A/CN. 4/63 (1953).

[58] E.g., U.N. Conference on the Law of Treaties, Doc. A/CONF. 39/27 (1969); RESTATEMENT (SECOND) OF FOREIGN RELATIONS OF THE U.S. (1965), Part III, §§140, 145. Municipal law which is contrary to international law can not even be pleaded before an international tribunal as an excuse for the nonfulfillment by a state of its obligations under international law. Fisheries Case, supra note 9.

[59] K. HOLLOWAY, MODERN TRENDS IN TREATY LAW 324 (1967).

obligations. The Government of Shangri-La or its representatives contested or rejected the contentions contained in both notes. Therefore, the mutual consent necessary to modify the agreement was absent.[60]

C. Other possible bases for termination are not applicable.

The remaining three bases for treaty termination fall within the category of objective circumstances outside of the treaty.[61] Supervening impossibility of performance,[62] rebus sic stantibus,[63] and jus cogens are all doctrines of limited utility, the availability of which is more theoretical than practical.[64] Of the three doctrines, Pandora might conceivably rely upon only the emergence of a preemptory norm of general international law, or jus cogens, after the bilateral and trilateral agreements entered into force.[65]

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[60] Authorities cited note 47 supra.

[61] Nahlik, supra note 48, at 747.

[62] Vienna Convention, supra note 2, art. 61. It is generally thought to require the permanent disappearance or destruction of an object, such as an island.

[63] Id., art. 62. This doctrine has never been adopted by the International Court. Lissitzyn, Treaties and Changed Circumstances (Rebus Sic Stantibus), 61 AM. J. INT'L L. 895 (1967). Since this doctrine is susceptible to being used more flexibly and subjectively than any other, it is subject to almost universal distrust. Waldock, supra note 50, at 80. A state may not rely upon the doctrine "merely to excuse the breach of a treaty which a state finds...inconvenient to fulfill." J. BRIERLY, THE LAW OF NATIONS 244 (4th ed. 1949).

[64] Briggs, The Attorney General Invokes Rebus Sic Stantibus, 36 AM. J. INT'L L. 89, 90 (1936).

[65] Vienna Convention, supra note 2, art. 64. Jus cogens is defined as "a norm accepted and recognized by the international community of states as a whole from which no derogation is permitted...." Id., art. 53 (emphasis added).

However, the question of how far international law recognizes the existence of rules having the character of jus cogens is controversial.[66] Some publicists deny that any rule can properly be regarded as a jus cogens.[67] Absent any central international authority with the power to formulate rules akin to those of public policy on the national level, jus cogens may "undermin[e] the sanctity of the pledged word. . . ."[68] Jus cogens has been mentioned only infrequently in the opinions of this Court, and then only in the opinion of an individual concurring or dissenting justice.[69] Even those who acknowledge its existence as a principle of international law admit that its content is highly uncertain and controversial.[70] Therefore, with the possible exception of such crimes as slave trade, piracy, and genocide,[71] the availability of jus cogens as a justification for the breach of treaty obligations is

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[66] Compare, Schwarzenberger, supra note 44, at 203 with Vienna Convention, supra note 2, arts. 53, 64. These articles of the Vienna Convention, in contrast to articles which merely codify existing principles, represent an attempt by the Convention to develop the law and therefore are not sufficient to establish jus cogens as a controlling principle in light of the fact that the Vienna Convention has not entered into force.

[67] Schwarzenberger, supra note 44.

[68] Id., at 214; see, Elkind, French Nuclear Testing and Article 41--Another Blow to the Authority of the Court? 8 VAND. J. TRANSNAT'L L. 39 (1974).

[69] I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 119 (1973) (hereinafter cited as SINCLAIR).

[70] Id., at 121; Kearney & Dalton, The Treaty on Treaties, 64 AM. J. INT'L L. 495 (1971).

[71] SINCLAIR, supra note 69, at 123.

severely circumscribed.[72]

The NPT does not establish any principles having the character of jus cogens because it fails to evidence the existence of a norm, its principles are not recognized by the "community of states as a whole," and its operation is subject to the "supreme interests" of natural sovereignty.[73]

As of January 1, 1975, nearly forty of the current 145[74] members of the United Nations had not consented to the NPT.[75] Among the states in this group are China, Japan, France, India and Pakistan.[76] Whether considered in terms of the number of states, population, area, or any other standard, it is immediately apparent that the NPT does not establish a norm of jus cogens.

Moreover, the NPT, by recognizing and affirming the distinction between nuclear and non-nuclear weapon states, is inherently unequal.[77]

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[72] Waldock, supra, at 52-53. The extremely limited nature of the jus cogens exception to pacta sunt servanda is apparent from the restrictive approach to binding customary law enunciated by this Court in the North Sea Continental Shelf Cases, (1969) I.C.J. 3. A principle must be extensive and virtually uniform to be considered part of customary international law. The standard for jus cogens obviously must be even more exacting, especially when invoked to override the provisions of an otherwise valid treaty.

[73] NPT, supra note 19, Article X; see note 65 supra.

[74] U.S. DEPT. OF STATE, TREATIES IN FORCE 441 (1976). Plus Angola, which was admitted in Nov., 1976.

[75] Id., at 396. There had been ratifications, accession, or notification of succession to the NPT deposited by 106 states.

[76] Id.

[77] NPT, supra at note 19, arts. I and II; Indian Nuclear Development, supra note 40.

Non-nuclear weapon parties accepted unequal restrictions on their sovereignty only as a quid pro quo for the as yet unfulfilled commitment by nuclear weapons states to disarm.[78] In juxtaposition to the inherent inequality of the NPT, the doctrine of jus cogens affirms the sovereign equality of States. Jus cogens must "not exist to satisfy the needs of individual states, but the higher order of the whole international community."[79]

In addition, the NPT contains a renunciation provision allowing states to withdraw upon three months notice. It specifically recognizes a state's sovereign right to withdraw from the NPT in "the supreme interests of its country."[80] Such a sovereign right is inconsistent with the requirement that "no derogation [be] permitted from the norm sought to be established as jus cogens."[81]

A conclusion that the NPT establishes a rule of jus cogens must also be measured against the principles with which it competes. By definition, it must be of sufficient force in international law to override the principle of pacta sunt servanda. It can do so only by confirming, rather than denying, the sovereign equality of states. In the instant case, it must also be of sufficient force to override the fundamental right of states to provide for their

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[78] Indian Nuclear Development, supra note 40.

[79] Advisory Opinion on Genocide Case, (1951) I.C.J. 23.

[80] NPT, supra note 19, Article X.

[81] Vienna Convention, supra note 2, Article 53; see note 65 supra.

own defense which, in the last analysis, is essential to sovereign equality. Shangri-La borders on China and India, both of which are nuclear weapon states and neither of which is a party to the NPT. In these circumstances Pandora bears a virtually impossible burden of proof in establishing the NPT as a jus cogens.

The single aspect of the NPT which might properly be considered as evidence of a principle of customary law or of a jus cogens is the "inalienable right" of all parties to develop research, production and use of nuclear energy for peaceful purposes.[83] The conditions which Pandora has tried to impose on Shangri-La clearly violate this inalienable right to which both parties subscribe.

III. EVEN IF SHANGRI-LA WAS IN BREACH OF ITS TREATY OBLIGATIONS, PANDORA'S UNILATERAL TERMINATION WAS NEVERTHELESS IN VIOLATION OF INTERNATIONAL LAW BECAUSE IT WAS NOT DONE IN ACCORDANCE WITH ANY PROVISION FOR TERMINATION IN THE AGREEMENTS WITH SHANGRI-LA.

The bilateral agreement provided that the safeguard rights accorded to Pandora would be suspended during the time and to the extent that such rights were satisfied under an agreement with the IAEA.[84] Such an agreement was concluded and was in force when Pandora unilaterally terminated fuel shipments under the bilateral agreement.

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[82] Schwarzenberger, supra note 44, at 202.

[83] NPT, supra note 19, Article IV 1. Text cited supra, note 20.

[84] Compromis, Annex A, art. XII A.

The safeguard rights assumed by the IAEA were those listed in Article XI B of the bilateral agreement.[85] Among these rights was Pandora's right to suspend or terminate the bilateral agreement in the event of Shangri-La's noncompliance with its Article X guarantees.[86] The trilateral agreement gave the IAEA the power to apply, police, and to determine and remedy noncompliance.[87] Since the primary purpose of safeguards is to prevent the use of safeguarded material or equipment "for any military purpose,"[88] enforcement of Shangri-La's guarantee not to use safeguarded items for atomic weapons or any other military purposes must have been transferred to the IAEA. Thus, Pandora's right under Article XI B(5) to suspend or terminate in the event of noncompliance was suspended while the trilateral agreement was in force.

Furthermore, the trilateral agreement provided that it should remain in force during the term of the bilateral agreement unless terminated sooner by any party upon six months' notice.[89] There is nothing in the record to indicate that Pandora ever notified the IAEA of its intention to terminate or gave Shangri-La six months' notice thereof. Therefore, the termination of fuel shipments was in violation of Pandora's treaty obligations to both Shangri-La and the IAEA.

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[85] Id., Annex A, art. XII A; id., Annex B, §6.

[86] Id., Annex A, art. XI B(5); id., Annex B, §6.

[87] Id., Annex B, §§4, 20, 21.

[88] Id., Annex A, art. I(9).

[89] Id., Annex B, §31.

REMEDIES

In presenting this controversy for resolution by this Court, the parties have bound themselves to recognize the jurisdiction of the Court to establish the nature or extent of the reparation to be made for the breach of an international obligation.[90] Shangri-La requests this Court to declare that the conditions set forth in Pandora's diplomatic note of September 20, 1976, are violative of international law and that Pandora's termination of fuel shipments constituted a material breach of the bilateral agreement.[91] In addition, Shangri-La requests an assessment of damages in compensation for the economic injury it suffers as a result of Pandora's breach.[92] Damages, however, will be inadequate unless the Court also directs Pandora to resume shipments of fuel for Shangri-La's power reactors.

CONCLUSION

Pandora's termination of nuclear fuel shipments to Shangri-La and its refusal to approve reprocessing in Shangri-La's facility violated international law. Pandora's demands that Shangri-La accept safeguards on all its nuclear activities and that Shangri-La eschew the development of peaceful nuclear explosive devices are without foundation in international law.

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[90] I. C. J. Statute, art. 36, para. 2(d).

[91] The power to declare such relief is "indisputable." Northern Cameroons Case, (1963) I. C. J. 37.

[92] Corfu Channel Case, (1949) I. C. J. 129.

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