

BEFORE THE
INTERNATIONAL COURT OF JUSTICE
April, 1977

ADJUDICATION
BETWEEN

KINGDOM OF SHANGRI-LA, Applicant
and
UNITED REPUBLIC OF PANDORA, Respondent

MEMORIAL FOR RESPONDENT

Team No. 9

Denise A. Bradley
Everett B. Carson
Steven A. Hammond
Deborah A. Keefe
Thomas Maher

TABLE OF CONTENTS

	Page
Index of Authorities	i
Jurisdiction	v
Statement of Facts	vi
Questions Presents	vii
Summary of Argument	viii
Argument and Authorities	
I. The Agreement to Cooperate is Subject to the Laws in Force in Both Countries. Hence Future Cooperation Between the Parties is Subject to Limitations Under Pandoran Law on Nuclear Fuel Shipments to Other Countries.	1
II. Article X(A)(2) of the Cooperation Agreement Between Pandora and Shangri-La Prohibits Shangri-La's use of Material Supplied by Pandora in Connection with any Nuclear Explosive Device Whether "Peaceful" or Not.	5
III. If Shangri-La Reprocesses any Fuel Supplied to it by Pandora, Pandora will be Justified in Discontinuing Further Nuclear Cooperation	7
IV. Because of its Obligations Under Customary Law, Pandora is Justified in Terminating Nuclear Fuel Shipments to Shangri-La.	9
V. The Provisions of the NPT Have Emerged as Peremptory Norms of International Law, and Thus Control the Obligations of both Pandora and Shangri-La with Respect to Further Nuclear Cooperation	14
Conclusion	18

INDEX OF AUTHORITIESTREATIES AND OTHER INTERNATIONAL AGREEMENTS

Agreement Between Pandora and Shangri-La for the Application of Safeguards by the I.A.E.A., <u>done</u> Aug. 1, 1969, <u>Compromis</u> , Annex B (<u>in force</u> , Aug. 30, 1969)	7
Agreement for Cooperation Between Pandora and Shangri-La Concerning Civil Uses of Atomic Energy, <u>done</u> June 12, 1963, <u>Compromis</u> , Annex A (<u>in force</u> Aug. 8, 1963) (hereinafter cited as Agreement for Cooperation)	1, 6, 7, 9
Agreement for Cooperation Between the United States and Argentina Concerning Civil Uses of Atomic Energy, <u>done</u> July 29, 1955, 1955 2 U.S.T. 2537 (<u>in force</u> July 29, 1955)	10
Agreement for Cooperation Between the United States and Brazil Concerning Civil Uses of Atomic Energy, <u>done</u> Aug. 3, 1955, 1955 2 U.S.T. 2583 (<u>in force</u> Aug. 3, 1955).	10
Agreement for Cooperation Between the United States and Israel Concerning Civil Uses of Atomic Energy, <u>done</u> July 12, 1955, 1955 2 U.S.T. 2641 (<u>in force</u> July 12, 1955).	10
Agreement for Cooperation Concerning Civil Uses of Atomic Energy Between the United States and Belgium, <u>done</u> June 15, 1955, 1955 2 U.S.T. 2551 (<u>in force</u> July 21, 1955).	10
Agreement for Cooperation Concerning Civil Uses of Atomic Energy Between the United States and Canada, <u>done</u> June 15, 1955, 1955 2 U.S.T. 2595 (<u>in force</u> July 21, 1955).	10
The Antarctic Treaty, <u>done</u> Dec. 1, 1959, 1961 12 U.S.T. 794 (<u>in force</u> June 23, 1961).	12
Charter of the United Nations, <u>done</u> June 26, 1945, 1945 3 U.S.T. 1153 (<u>in force</u> Oct. 24, 1945).	15
Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater, <u>done</u> Aug. 5, 1963, 1963 14 U.S.T. 1313 Part 2 (<u>in force</u> Oct. 10, 1963).	12

Treaty on the Non-Proliferation of Nuclear Weapons, done July 1, 1968 T.I.A.S. 6839, 729 U.N.T.S. 161 (in force for Pandora, March 5, 1970) (hereinafter cited as NPT). 3, 6, 9, 12

Treaty on Principle Governing the Activities of States in Outer Space, done Jan. 27, 1967, 1967 18 U.S.T. 2410 Part 3 (in force Oct. 10, 1967). 12

Vienna Convention on the Law of Treaties, open for signature May 23, 1969, U. N. Doc. A/Conf/39/27 (1969), 8 INT'L LEGAL MATERIALS 679 (1969). 1, 13

UNITED NATIONS MATERIALS

Final Declaration of the Review Conference of the Parties to the treaty on the Non-Proliferation of Nuclear Weapons, U.N. Doc. NPT/Conf/30/Rev. 1 (1975). 3

G. A. Res. 2373, 22 U.N. GAOR Supp. 16/F at 5-7, U. N. Doc. A/6716 (1968). 13

Nuclear Tests Case (Australia v. France) 1974 I.C.J. 253 8

Nuclear Test Case (New Zealand v. France) 1974 I.C.J. 457 8

STATUTES

International Atomic Energy Agency Statute, 1957 8 U.S.T. 1093 10

TREATISES

I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (1966) 12

P. JESSUP, A MODERN LAW OF TREATIES (1968) 17

H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW (rev. ed. 1958) 1

A. MCKNIGHT, NUCLEAR NON-PROLIFERATION: I.A.E.A. AND EURATOM 80 (1970) 19

A. MCNAIR, THE LAW OF TREATIES (1961) 1, 2, 5, 7

NUCLEAR PROLIFERATION: PROSPECTS FOR CONTROL (BORSKEY & WILLRICH, ed. 1970) 8, 13

D. O'CONNELL, 1 INTERNATIONAL LAW (2d ed. 1970)	13
RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF UNITED STATES (1965)	1
SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (1973)	16, 18
T. TAYLOR & M. WILLRICH, NUCLEAR THEFT: RISKS AND SAFEGUARDS 227 (1947)	78
TUNKIN, THEORY OF INTERNATIONAL LAW (1975)	14
U. S. DEPT. OF STATE, TREATIES IN FORCE (1976)	12, 13
U. S. DEPT. OF STATE, THE UNITED STATES AND THE UNITED NATIONS: REPORT BY THE PRESIDENT TO THE CONGRESS FOR THE YEAR 1946 (1947)	11
M. WILLRICH, NON-PROLIFERATION TREATY: FRAMEWORK FOR NUCLEAR ARMS CONTROL (1969)	5, 16, 10, 13
<u>ARTICLES AND REPORTS</u>	
Baxter, <u>Multinational Treaties as Evidence of Customary International Law</u> , BRIT. Y. B. INT'L L. 275 (1965-6).	10
Bunn, <u>The Nuclear Non-Proliferation Treaty, 1968</u> WISC. L. REV. 766 (1968)	5, 12
Comment, <u>Legal Implications of Indian Nuclear Development</u> , 4 DENVER J. INT'L L. & P. 237 (1974)	6, 16
Firmage, <u>Treaty on the Non-Proliferation of Nuclear Weapons</u> , 63 AM. J. INT'L L. 711 (1969).	5, 14
Gorove, <u>Controls Over Atom-For-Peace: U. S. Bilateral Agreements with Other Nations</u> , 4 COL. J. TRANSNAT'L L. 181 (1966)	4, 9
Hogg, <u>The International Court: Rules of Treaty Interpretation</u> , 43 MINN. L. REV. 369 (1959)	6
J. Martin, <u>United States Discusses Major Arms Control Issues Before U. N. General Assembly</u> , DEPT. STATE BULL. 824 (1975)	8
Schwarzenberger, <u>International Jus Cogens</u> , 43 TEX. L. REV. 455 (1965)	15
Verdross, <u>Jus Dispositivum and Jus Cogens in International Law</u> , 60 AM. J. INT'L L. 55 (1966).	15, 16, 20

Waldock, (Second) Report on the Law of Treaties,
2 Y. B. INT'L L. COMM'N 36, (1963) 15

MISCELLANEOUS

Carter and Brezhnev, The Game Begins, TIME
MAGAZINE, Vol. 109, no. 6 (2/7/77), 40-42 17

JURISDICTION

The Kingdom of Shangri-La and the United Republic of Pandora have agreed to the jurisdiction of the International Court of Justice pursuant to Article 36, paragraph 1 of the Statute of the Court.

STATEMENT OF FACTS

The facts as stipulated by the parties are incorporated by reference in Respondent's memorial.

QUESTIONS PRESENTED

- I. Is the United Republic of Pandora acting in accord with the provisions of 1963 and 1969 Agreements between Pandora and Shangri-La by terminating further nuclear cooperation under present circumstances?

- II. Is the United Republic of Pandora acting in accord with governing principles of international law by terminating nuclear cooperation with Shangri-La, whom it legitimately fears may construct a nuclear explosive device in the near future?

SUMMARY OF ARGUMENT

The United Republic of Pandora and The Kingdom of Shangri-La come before this court seeking adjudication of a dispute regarding their respective obligations under the terms of an Agreement for Cooperation concerning civil uses of atomic energy signed in 1963. Pandora respectfully insists that, in accord with the provisions of the Agreement, Pandora has no further duty to ship nuclear materials unless Shangri-La reaffirms its original guarantee that no Pandora origin fuel would be used for any nuclear explosive device. The 1963 Agreement, a supplementary 1969 Agreement, and Shangri-La's equivocal position regarding its development of nuclear weapons capability have also made it legally impossible for Pandora to continue cooperation unless Shangri-La implements a complete safeguard system on its nuclear fuel cycle and refrains from domestically reprocessing any irradiated fuel.

Pandora believes that the 1963 and 1969 Agreements were entered into during a period in which international law encompassed a customary rule prohibiting the proliferation of nuclear weapons. That rule was formally embodied in the treaty on the Non-Proliferation of Nuclear Weapons, and has subsequently emerged as a norm with the character of jus cogens within the international legal system. By terminating further cooperation with Shangri-La under the present circumstances, Pandora has acted in accord with its treaty obligations and governing principles of international law.

I. THE AGREEMENT TO COOPERATE IS SUBJECT TO THE LAWS IN FORCE IN BOTH COUNTRIES. HENCE FUTURE COOPERATION BETWEEN THE PARTIES IS SUBJECT TO LIMITATIONS UNDER PANDORAN LAW ON NUCLEAR FUEL SHIPMENTS TO OTHER COUNTRIES.

The principle of *pacta sunt servanda* is well established as a rule of international law.¹ Interpretation of this principle usually leads to the conclusion that the domestic legislation of a party to a treaty cannot affect the responsibilities of the parties under the treaty.² Application of this principle to the Agreement for Cooperation between Pandora and Shangri-La, however, shows that the Agreement to Cooperate is affected by recently enacted legislation³ of Pandora that limits future nuclear fuel shipments.

A treaty should be interpreted in accordance with the ordinary meaning of the terms in their context and in light of the treaty's object and purposes.⁴ The actual intention of the parties as expressed in the language must be given effect.⁵ Article II of the Agreement for Cooperation provides in Part A:

"Subject to the provisions of this Agreement, the availability of personnel and materials, and the applicable laws, regulations, and license requirements in force in their respective countries, the Parties shall cooperate with each other in the achievement of the uses of atomic energy for peaceful purposes."⁶

The actual intention of the parties as expressed in the language of this provision is that future cooperation is subject to applicable laws in force in each country at that future time.

If there is any ambiguity in the meaning of the words of a treaty, the interpretation causing the least interference with the sovereign rights of the parties should be given effect.⁷ If there were an ambiguity in the words of Article II, the sovereignty of each party would suffer least interference if the Agreement to

Cooperate did not interfere with the enforcement of the parties' domestic legislation. The meaning of the words in Article II is, however, sufficiently clear to show that the parties contemplated future cooperation subject to laws, regulations, and license requirements in force in the future, and subject to future availability of personnel and materials. If the parties had intended to make future cooperation subject only to applicable laws in force at the time the Agreement became effective, use of the language "now in force" would have clearly expressed such an intent. The absence of a tense adverb to modify "in force" shows an intent that the parties "shall cooperate" subject to laws in force at the time cooperation is occurring.

The object and purposes of the Agreement as expressed in the language of the Agreement support this interpretation. The object of the Agreement is to make shipments of nuclear fuel from Pandora to Shangri-La permissible so long as Shangri-La applies certain safeguards and promises to limit its use of the fuel. Pandora cannot promise this type of cooperation at any time that it lacks available materials and personnel, and it cannot make shipments contrary to its own laws, regulations, and license requirements governing such shipments. Nor can Shangri-La accept shipments on terms contrary to its own laws, regulations, and license requirements. Each state reserves its sovereign right to determine the scope of future cooperation by providing in the Agreement that the cooperation be subject to applicable provisions of domestic legislation passed after the Agreement becomes effective.

Because the validity of the terms of the Agreement is based on the consent of both parties, neither party can change the meaning of provisions of the Agreement by an arbitrary unilateral act.⁸ The

parties must have intended that cooperation be subject only to laws, regulations, and license requirements having a significance independent of the Agreement and based on strong domestic policy. Otherwise the cooperation of each party would be subject to the arbitrary whim of the other.

Pandoran law now prohibits fuel shipments to any country unless 1) that country joins the NPT or puts its entire fuel cycle under IAEA safeguards and 2) agrees not to use the fuel directly or indirectly for any nuclear explosive device.⁹ This law is based on a valid interpretation of Pandora's obligations under the NPT.¹⁰ The NPT which is also a law of Pandora is based on a strong Pandoran policy, expressed in the Agreement for Cooperation, against the further proliferation of nuclear weapons and the avoidance of nuclear disaster. Therefore, it is not an arbitrary unilateral attempt by Pandora to change the meaning of the treaty.

As a nuclear weapon state party to the NPT, Pandora has undertaken

"not in any way to assist, encourage, or induce any non-nuclear-weapon state to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices."¹¹

Pandora would risk a violation of its obligations under the NPT by transferring fuel to a non-nuclear weapon state without an agreement by that state to put its entire fuel cycle under IAEA safeguards and not to use the fuel transferred directly or indirectly for any nuclear explosive device.

Pandora's risk of violating its NPT obligations is especially great in transferring fuel to Shangri-La. Shangri-La has increased the risk of diversion of the fuel to weapons manufacture by con-

struction of a fuel reprocessing plant.¹² It has refused to join the NPT until all the countries in its region do.¹³ The minority party of its parliament has urged development of nuclear explosives and its defense minister has stated that Shangri-La must keep its nuclear option open.¹⁴ If Pandora continues to ship fuel to Shangri-La and Shangri-La does produce a nuclear explosive device, Pandora has indirectly assisted Shangri-La in the manufacture of the device. If Pandora origin fuel, either in its original or reprocessed form, is used, the assistance is clear. Even if wholly indigenous fuel is used, Pandora has provided Shangri-La with the opportunity to develop the knowledge of fissionable materials needed for nuclear explosive device manufacture and has supplied fuel for Shangri-La's civilian power requirements, thereby freeing Shangri-La to use other fuel in development of explosives.¹⁵ Only if safeguards are applied to Shangri-La's entire fuel cycle can Pandora be assured that this diversion of fuel will not occur. Unless Shangri-La intends to divert materials to military purposes, application of the safeguards is not unduly burdensome. The IAEA controls, such as maintenance of operating records, submission of accountability reports, and inspection, are similar to the controls required for efficient management anyway.¹⁶

Because Pandora has an obligation under the NPT not to assist in the manufacture of nuclear weapons or other explosive devices by non-weapon states, it must obtain an assurance from Shangri-La that it will not use fuel transferred to it by Pandora for any nuclear explosive device. An agreement by Shangri-La that it will not use the fuel for nuclear weapons manufacture is not sufficient to assure Pandora that it will not unwittingly assist Shangri-La in the development of other explosive devices.

Since future cooperation is subject to laws in force in Pandora and the Pandoran law limiting fuel shipments is not an arbitrary unilateral attempt to change the meaning of the Agreement to Cooperate, Pandora is justified in refusing to ship fuel to Shangri-La until Shangri-La qualifies for fuel shipment under the law.

II. ARTICLE X (A)(2) OF THE COOPERATION AGREEMENT BETWEEN PANDORA AND SHANGRI-LA PROHIBITS SHANGRI-LA'S USE OF MATERIAL SUPPLIED BY PANDORA IN CONNECTION WITH ANY NUCLEAR EXPLOSIVE DEVICE WHETHER "PEACEFUL" OR NOT.

Under Article X(A)(2) of the Agreement for Cooperation, Shangri-La guarantees that no material, including equipment and devices, transferred to it pursuant to the Agreement for Cooperation, and no special nuclear material produced through the use of such material, equipment, or devices, will be used "for atomic weapons, or for research on or development of atomic weapons or for any other military purpose."¹⁷ Article I defines "atomic weapon" as "any device utilizing atomic energy..., the principal purpose of which is for use as or for development of, a weapon, a weapon prototype, or a weapon test device."¹⁸

Interpretation of Article X(A)(2) should be influenced by the fact that Pandora's diplomatic note of January, 1971,¹⁹ stating Pandora's interpretation of Shangri-La's guarantee in the Cooperation Agreement, was given no formal diplomatic protest by Shangri-La.²⁰ Shangri-La's failure to issue a formal protest is strong evidence of Shangri-La's acquiescence to Pandora's interpretation of the Agreement.

Nuclear explosive devices of potential use in peaceful applications are indistinguishable on technical grounds from nuclear weapons.²¹ Indeed, the production of these devices requires a

technology more sophisticated than that required to produce nuclear weapons.²² For these reasons, the NPT prohibits the proliferation of these devices as well as nuclear weapons.²³ Thus if Shangri-La produces a "peaceful" nuclear explosive device it will have the capability of producing a nuclear weapon as well.

The purpose of the Agreement for Cooperation, as expressed in the language of the Agreement, was to increase Shangri-La's production of nuclear power for civilian purposes while avoiding Pandoran participation in the further proliferation of nuclear weapons. The purposes of the Agreement will be substantially impaired by Pandoran participation in the further proliferation of nuclear weapons if Shangri-La uses fuel made available by Pandora to produce any nuclear explosive device. Therefore a guarantee by Shangri-La that it will not use the fuel to produce any nuclear explosive device must be implied in its guarantee not to use the fuel for atomic weapons or for any military purpose.²⁴

Moreover, Shangri-La could produce a nuclear device, declare it to be for peaceful purposes, and yet serve a military purpose as well. The subjectivity of the principle purpose test of Article I of the Cooperation Agreement²⁵ is demonstrated by India's insistence that its development of a nuclear explosive device is for peaceful purposes and cannot be considered a weapon.²⁶ Yet strategically India has gained a great military advantage by its detonation of a nuclear explosive device, which advantage is illustrated by the concern the Indian explosion caused Shangri-La.²⁷

Thus the Agreement for Cooperation must be interpreted to include a guarantee by Shangri-La that it will not use the fuel transferred under the Agreement for atomic weapons or for peaceful nuclear explosive devices.

III. IF SHANGRI-LA REPROCESSES ANY FUEL SUPPLIED TO IT BY PANDORA, PANDORA WILL BE JUSTIFIED IN DISCONTINUING FURTHER NUCLEAR COOPERATION.

Article VIII(F) of the Cooperation Agreement provides that when any irradiated fuel elements containing fuel material received from Pandora are to be altered in form or content, such reprocessing shall be performed in facilities "acceptable to both parties upon a joint determination that the provisions of Article XI may be effectively applied."²⁸

Article XII(A) of the Agreement for Cooperation between Pandora and Shangri-La provides that "safeguard rights" given Pandora by Article XI are suspended only "to the extent that" Pandora "agrees that the need to exercise such rights is satisfied" by the anticipated safeguard agreement with the IAEA.²⁹ While Pandora agreed in the Trilateral Agreement for Application of Safeguards to suspend its right "to apply safeguards" itself,³⁰ it never agreed to suspend its more basic "safeguard right" to determine whether the safeguards that are being applied, whether by Pandora or by the IAEA, are adequate to prevent nuclear weapons proliferation. Thus it retained its rights under Article VIII(F) to make a joint determination with Shangri-La that the reprocessing facility is acceptable because safeguards can be effectively applied to it.

When Shangri-La announced its intention to build a reprocessing plant in 1971, Pandora urged Shangri-La to abandon the plan because the proliferation dangers of a reprocessing plant would be great, and there was no economic justification for building a plant.³¹ While the President of Pandora in a domestic television news conference stated that Pandora had no other legal option but to approve reprocessing,³² he was mistaken. Moreover, his statement is not legally

binding on Pandora, because Pandora lacks the requisite intent to be bound.³³ The statement was not made to the international community as a whole, but only informally to citizens of Pandora, and does not constitute an undertaking possessing legal effect.³⁴ In its diplomatic note of September 20, 1976, Pandora denied approval of the reprocessing facility.³⁵ There is ample justification for Pandora's finding that the reprocessing plant was unacceptable, in spite of Shangri-La's willingness to apply IAEA safeguards to it.³⁶

The risk of diversion from the reprocessing plant is greater than the risk of diversion from the nuclear reactor. While the spent fuel from a nuclear reactor is not suitable for weapon production, the plutonium that is extracted from it by a reprocessing plant is.³⁷ Diversion could occur by gradual removal of undetectable amounts or by a secret diversion of a sufficient quantity for weapons manufacture.³⁸ Fission explosives can be made with a few kilograms of plutonium and their design and fabrication are not technically difficult.³⁹

Moreover, small reprocessing plants like the one Shangri-La has built are uneconomical.⁴⁰ Nuclear fuel costs represent only a small portion of total nuclear energy costs and recycled plutonium can satisfy only about 20 percent of total reactor fuel requirements.⁴¹ Shangri-La's persistence in construction of the reprocessing plant, in spite of Pandora's discouragement and the lack of economic justification for building the plant, during a period that the government of Shangri-La is keeping its nuclear option open, makes the risk of diversion that Pandora would take by approving the plant even greater.

Nor can IAEA safeguards absolutely prevent diversion of the plutonium from the reprocessing plant and its use in weapons manufacture. Safeguards can only lessen the probability of illicit diversion to military purposes and increase the likelihood that any misuse will become known soon after the diversion.⁴² IAEA inspectors cannot verify every inventory report, but only make test checks based upon scientific sampling techniques.⁴³

Thus Pandora was justified in finding the reprocessing plant unacceptable because safeguards cannot be effectively applied to it to prevent further proliferation of nuclear weapons. A determination by both parties that the safeguards can be effectively applied to a reprocessing plant must be made before the plant can be used to reprocess irradiated fuel elements containing fuel material received from Pandora. Therefore, if Shangri-La reprocesses any of the spent fuel produced from fuel received from Pandora, it has materially breached the Agreement for Cooperation, and Shangri-La will be justified in discontinuing further nuclear cooperation.

IV. BECAUSE OF ITS OBLIGATIONS UNDER CUSTOMARY LAW, PANDORA IS JUSTIFIED IN TERMINATING NUCLEAR FUEL SHIPMENTS TO SHANGRI-LA.

The Preamble of the NPT includes a broad statement of purpose to which signatory nations necessarily subscribe. The aspirations expressed in the Preamble are:

"the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons and the liquidation of all their existing stockpiles (and) the establishment and maintenance of international peace and security...with the least diversion for armaments of the world's human and economic resources."⁴⁴

This embodies a basic policy decision, potentially by the entire world community, to prevent the spread of nuclear weapons to additional

states as a means of maintaining international peace and avoiding nuclear war.⁴⁵ The importance of this policy necessitates its recognition as a principle of customary international law.

A multilateral treaty may be regarded as declaratory of customary international law in either of two senses - as incorporating and giving recognition to a rule of customary international law that existed prior to the conclusion of the treaty or, alternatively, as being the original formulation of a rule of international law which subsequently secured the general assent of States and thereby was transformed into customary law.⁴⁶ Because the NPT deals with an area of the law which was developing at the time the NPT came into force, it is both declaratory of existing international law (in as much as it codified state practice in its state of development at the time) and formulative of a standard of conduct by which states would subsequently be expected to abide.

Although Pandora and Shangri-La obviously could not have contemplated the specific provisions of the NPT when they entered into the Cooperation Agreement in 1963, they did specifically agree to safeguard provisions and restrictions upon use of transferred nuclear materials which strongly resemble those later embodied in the NPT. Nor were the safeguard and restriction provisions of the 1963 Agreement unique to that particular transaction or to those parties. As early as 1955 the United States concluded similar Agreements for Cooperation with Argentina,⁴⁷ Belgium,⁴⁸ Brazil,⁴⁹ Canada,⁵⁰ Israel,⁵¹ and several other non-nuclear weapon states. Each of these Agreements included safeguard provisions and peaceful use restrictions.

When the safeguard provisions of the Cooperation Agreement were replaced by those in the 1968 Trilateral Agreement, the parties re-

affirmed their mutual commitment to peaceful use of the transferred material. They also minimized the possibility of diversion by placing IAEA safeguards upon any transferred nuclear material.

Pandora strongly supports the rules and safeguards against proliferation of nuclear weapons contained in the NPT. Since these rules and safeguard provisions were a part of state practice well before the NPT came into force, Pandora submits that they were a part of an emerging norm of customary international law at least as early as 1955, and that by 1963 a norm of customary law requiring both complete cycle safeguards and peaceful, non-explosive use assurances was in effect. Therefore Pandora bears no obligation of further nuclear cooperation unless Shangri-La agrees to adhere to that norm.

Pandora also urges the Court to take judicial notice of the international concern regarding the dangers of nuclear proliferation and possible nuclear war during the period since the obliteration of Nagasaki and Hiroshima. While the provisions contained in the NPT are not a complete circumscription of the possibility of the spread of weapons and potential nuclear war, this Treaty and other legal efforts by the community of nations to control nuclear armaments are indicative of a general norm of customary law which opposes the overall expansion of nuclear weapons technology.

The NPT was not the first step toward nuclear arms control. The United States made a strong effort to remove nuclear technology from the military sphere in 1946.⁵² When these efforts failed, the United States and other United Nations Members created the IAEA⁵³ in order to have an effective international agency which could provide safe-

guards against the diversion of peaceful nuclear material and facilities to military purposes. A further step in arms control was the Antarctic Treaty,⁵⁴ which went into force on December 1, 1959, and created the first internationally agreed upon nuclear free zone.

After much testing in the atmosphere throughout the 1950's and a near collision during the Cuban missile crisis in October, 1962, the United States and the Soviet Union saw clearly that avoidance of nuclear war between them was a necessary condition for their mutual survival.⁵⁵ The Partial Test Ban Treaty was signed on August 5, 1963, prohibiting testing of weapons in the atmosphere, in outer space, and under the sea.⁵⁶

"By prohibiting nuclear testing everywhere but underground the treaty eliminated the easiest, cheapest, and ordinarily most productive form of testing - in the atmosphere."⁵⁷

In 1967 the Outer Space Treaty banned the placement of weapons in outer space or on celestial bodies.⁵⁸ These international legal controls over the testing of nuclear weapons as well as the arms control measures contained in the NPT are evidence of state practice giving rise to a customary principle of International Law that the spread of nuclear weapons be curbed.

The NPT originated in the United Nations General Assembly Resolution on the "prevention of the wider dissemination of nuclear weapons" which was adopted unanimously on December 4, 1961.⁵⁹ In general these resolutions are not binding on member states, but "when they are framed as general principles, resolutions of this kind provide a basis for the progressive development of the law and the speedy consolidation of customary rules."⁶⁰ It therefore cannot

be denied that the need for the norm of customary law which the Pandora urges here was unanimously recognized in the United Nations in 1961.

The Draft Treaty itself was approved by the General Assembly by a vote of 95-4, with 21 abstentions, on June 12, 1968.⁶¹ The strength of that vote of approval presents the Court with further evidence of the level of support for the provisions for nuclear arms control embodied in the specific language of the NPT.

As of January 1, 1975, there had been accession, notification, or succession to the NPT by 106 members of the world community.⁶²

"The more states which subscribe to a treaty, and the more its provisions reflect the juridical conscience of mankind, the more will it be a stimulus to the creation of law."⁶³ Pandora views the accession of so many of the nations of the world to the NPT and the willingness of virtually all the other nations to abide by its terms as strong evidence that non-proliferation has emerged as a rule of customary international law.⁶⁴ As one publicist has stated:

The role of the multilateral treaty in the making of customary law is not to be underestimated. The moral persuasiveness of the rules, and the political pressure underlying their acceptance, may be such that their transition from conventional to customary law is immediate, or almost so.⁶⁵

Some of the nations which have not ratified the treaty⁶⁶ undoubtedly have the capability of manufacturing nuclear weapons, but have elected not to do so. Only India, a non-nuclear weapon state when the NPT entered into force, has since exploded a device, which explosion brings that state into the nuclear weapons state group.⁶⁷

"To the extent that the Treaty created a climate in which a state does not sign for one of a number of reasons but, nevertheless, decides not to develop nuclear weapons, the Treaty has fulfilled most of its functions."⁶⁸

State practice subsequent to the entry into force of the NPT so nearly constitutes unanimous adherence to the treaty's purpose and terms, it is clear that the world community recognizes it as a customary principle of international law. In light of the importance of this principle, and the ongoing efforts of the world community to strengthen it, Pandora's insistence that the Cooperation Agreement be applied consistently with the NPT is justified.

V. THE PROVISIONS OF THE NPT HAVE EMERGED AS PEREMPTORY NORMS OF INTERNATIONAL LAW, AND THUS CONTROL THE OBLIGATIONS OF BOTH PANDORA AND SHANGRI-LA WITH RESPECT TO FURTHER NUCLEAR COOPERATION.

Pandora and Shangri-La view their respective obligations under International Law from two widely divergent perspectives. In nineteenth century terms, Shangri-La views the legal structure which governs this dispute from the positivist's perspective, while Pandora views the governing law from the naturalist's position. The naturalists believed, as Pandora here urges, that there are "generally recognized human laws" or "imperative norms of international law" which states may not violate either by treaty provisions or by renunciation.⁶⁹

Pandora submits that its obligations under the 1963 Bilateral Agreement must be construed not to conflict with the imperative norm of international law embodied in the NPT. This imperative norm dictates that both nuclear weapon states and non-nuclear weapon states scrupulously guard against the proliferation of nuclear weapons. This imperative norm is of such importance to world order and, in fact, to the survival of mankind, that it has become a part of jus cogens within the international legal framework.

While some publicists still dispute the existence and applicability of jus cogens within the present international legal

system,⁷⁰ the strength of this position is rapidly diminishing. The existence of jus cogens has been substantially strengthened by the inclusion of the term in several provisions of the Vienna Convention on The Law of Treaties.⁷¹ In early support of the inclusion of draft articles, which provided for the invalidity of treaties which contravene principles of jus cogens, Professor Waldock stated:

Imperfect though the legal order may be, the view that in the last analysis there is no international public order - no rule from which states cannot at their own free will contract out - has become increasingly difficult to sustain.... The Commission will therefore, it is believed, be fully justified in taking the position in the present articles that there are certain rules and principles from which States cannot derogate by merely bilateral or regional treaty arrangements.⁷²

The very existence of the United Nations and of this Court bids recognition of the existence of a legal order among nations. While it is true that the United Nations Organization is still imperfect, nevertheless the fundamental principles of the Charter⁷³ are the most important part of the constitutional law of the present international community.⁷⁴ The very first purpose of the United Nations, expressed in Article I of the Charter, is "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace...." Pandora believes that the 106 nations who have acceded to the NPT have done so precisely to serve that purpose.

While a list of rules of general international law having the character of jus cogens has never been compiled, a very important group of norms of this type are all those created for humanitarian purposes by various treaties.⁷⁵ "Such conventions are not created in the interest of the individual states, but in the interest of

humanity as a whole."⁷⁶ Pandora asserts that the Non-Proliferation Treaty entered into force primarily for humanitarian purposes, and because of the grave concern among nations that proliferation would lead to greater danger of nuclear war. The history of the efforts of the world community at curbing the spread of nuclear arms⁷⁷ is certainly strong evidence that non-proliferation has been recognized by our community as a rule of law "necessary to international life and deeply rooted in the international conscience."⁷⁸ Even though there are a large number of nations who have not actually signed the Non-Proliferation Treaty, the fact that only one country, India,⁷⁹ has acted in violation of the principles contained in the NPT is indicative of the recognition and acceptance of non-proliferation in the world community.

Pandora is fully aware that Shangri-La is not willing to concede that the provisions of the NPT now constitute principles of jus cogens. To accept that premise is to accept Pandora's preconditions to further shipment of nuclear fuel: complete safeguarding of Shangri-La's nuclear fuel cycle and an unequivocal assurance that Shangri-La will not utilize any transferred material to manufacture nuclear explosive devices. Pandora is also acutely aware of Shangri-La's concern for its own sovereign right of self defense, given Shangri-La's geographical position between two nations who already possess nuclear weapons and who have both refused to sign the NPT. However, this does not excuse Pandora's obligation under the NPT not to contribute in any way to the wider spread of nuclear weapons.

"In the final analysis, it is the content of the rules in an international convention which will be decisive in the determination of whether or not they have the attributes of jus cogens."⁸⁰

The text of the Non-Proliferation Treaty contains a preamble which is strong evidence of the humanitarian purposes of the treaty. These purposes are humanitarian in the broadest possible sense of the term; they are designed in aid of man's preservation of humanity. The operative provisions of the NPT contain measures designed to prevent both horizontal proliferation (Articles I, II, and III) and vertical proliferation (Article VI). It has already been stated that India is the only nation known to have violated Article II. Progress toward curbing vertical proliferation has been slow, but the United States and Soviet Union continue efforts to limit strategic arms.⁸¹

Failure of this court to recognize the NPT as jus cogens would be, in a very real sense, an affirmation of the sovereign right of all non-nuclear weapon states to obtain nuclear weapons unless prohibited by individual accession to the NPT. Pandora fully understands that by petitioning the court to rule in its favor on this issue, it is asking the court to limit certain sovereign rights of both nuclear weapon and non-nuclear weapon states who have not already voluntarily undertaken limitations by accession to the NPT. However, unlimited sovereignty is no longer automatically accepted as the most desirable attribute of states.⁸²

"Sovereignty, in its meaning of an absolute, uncontrolled state will, ultimately free to resort to the final arbitrament of war, is the quicksand upon which the foundations of traditional international law are built."⁸³

Imposition of safeguard requirements and peaceful use restrictions upon Shangri-La, in exchange for continued nuclear cooperation by Pandora, is a minimal limitation upon Shangri-La's right of sovereignty when considered in light of the overwhelming importance of the international law expressed in the NPT: nuclear arms control for the purpose of prevention of potential nuclear conflict.

Ruling in favor of Pandora on this issue requires the Court to recognize a newly emerged norm of jus cogens. However,

"(I)f (jus cogens) is developed with wisdom and restraint in the overall interest of the international community, it could constitute a useful check upon the unbridled will of individual states."⁸⁴

An opportunity for such development is presented by this dispute and Pandora urges the court to recognize the NPT as the literal expression of a peremptory norm with the character of jus cogens. By doing so the Court will assist the development of a more peaceful world order.

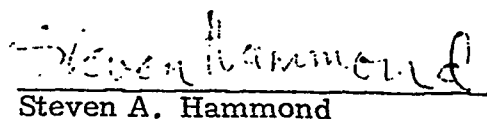
CONCLUSION

As a result of the foregoing analysis, both Questions Presented must be answered affirmatively. Pandora respectfully requests that the Court declare 1) that Pandora need not ship nuclear fuel to Shangri-La until Shangri-La puts its entire fuel cycle under IAEA safeguards and agrees not to develop any nuclear explosive device with the fuel shipped and 2) that Shangri-La cannot reprocess spent fuel produced from fuel received from Pandora.

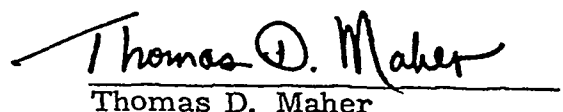
Respectfully submitted,


Denise A. Bradley


Everett B. Carson


Steven A. Hammond


Deborah A. Keefe


Thomas D. Maher

1. Vienna Convention on the Law of Treaties, open for signature May 23, 1969, U.N. Doc. A/Conf. 39/27 (1969), in 8 INT'L LEGAL MATERIALS 679 (1969) (hereinafter cited as Vienna Convention); A. MCNAIR, THE LAW OF TREATIES 493 (1961) (hereinafter cited as MCNAIR).

2. Vienna Convention, supra note 1, art. 27; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 140 (1965).

3. Compromis at 3.

4. Vienna Convention, supra note 1, art. 31.

5. MCNAIR, supra note 1, at 366.

6. Agreement for Cooperation Between Pandora and Shangri-La Concerning Civil Uses of Atomic Energy, done June 12, 1963, Compromis, Annex A (in force Aug. 8, 1963) (hereinafter cited as Compromis, Annex A).

7. MCNAIR, supra note 1, at 462-3; H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 300-306 (rev. ed. 1958).

8. MCNAIR, supra note 1, at 493-4.

9. Compromis at 3.

10. This interpretation of the obligations of parties to the N.P.T. is shared by other parties to the treaty. Final Declaration of the Review Conference of Nuclear Weapons, U.N. Doc. NPT/Conf./30/Rev. 1 (1975), took note of "the considered view of many Parties to the Treaty that the Safeguards required under Article III, 2 should extend to all peaceful nuclear activities in importing states" and urged that safeguards be applied to all peaceful nuclear activities in importing states not Party to the treaty.

11. Treaty on the Non-Proliferation of Nuclear Weapons, done July 1, 1968, 729 U.N.T.S. 161 (in force for Pandora, March 5, 1970) (hereinafter cited as N.P.T.), art. I.

12. See Memorial, infra, Part III.

13. Compromis at 2.

14. Id.

15. S. Gorove, Controls Over Atoms-for-Peace: U.S. Bilateral Agreements With Other Nations, 4 COL. J. TRANSNAT'L L. 181, 185 (1966) (hereinafter cited as Atoms-for-Peace).

16. Id. at 204.

17. Compromis, Annex A.

18. Id.

19. Compromis at 1.

20. MCNAIR, supra note 1, at 427.

21. M. WILLRICH, NON-PROLIFERATION TREATY: FRAMEWORK FOR ARMS CONTROL 69-70 (1969) (hereinafter cited as WILLRICH); Firmage, Treaty on the Non-Proliferation of Nuclear Weapons, 63 AM. J. INT'L L. 711, 722 (1969) (hereinafter cited as Non-Proliferation); Bunn, The Nuclear Non-Proliferation Treaty, 1968 WISC. L. REV. 766, 722 (1968) (hereinafter cited as Nuclear Non-Proliferation).

22. WILLRICH, supra note 21, at 70.

23. NPT, supra note 11, arts. I, II.

24. Hogg, The International Court: Rules of Treaty Interpretation, 43 MINN. L. REV. 369, 409-41 (1959).

25. Compromis, Annex A.

26. Comment, Legal Implications of Indian Nuclear Development, 4 DENVER J. INT'L L. & P. 237, 240 n. 19 (1974) (hereinafter cited as Indian Nuclear Development).

27. Compromis at 2.

28. Compromis, Annex A.

29. Id.

30. Agreement Between Pandora and Shangri-La for the Application of Safeguards by the I.A.E.A., done Aug. 1, 1969, Compromis, Annex B (in force, Aug. 30, 1969) (hereinafter cited as Compromis, Annex B) 6.

31. Compromis at 2.

32. Id.

33. Nuclear Tests Case (Australia v. France) 1974 I.C.J. 253, 267; Nuclear Tests Case (New Zealand v. France) 1974 I.C.J. 457, 472-3.

34. Id.
35. Compromis at 3.
36. Compromis at 2.
37. T. TAYLOR & M. WILLRICH, NUCLEAR THEFT: RISKS AND SAFEGUARDS 227-8 (1974) (hereinafter cited as TAYLOR).
38. Gilinsky, Military Potential of Civilian Nuclear Power in NUCLEAR PROLIFERATION: PROSPECTS FOR CONTROL 41, 51 (1970).
39. TAYLOR, supra note 37, at 167.
40. J. Martin, United States Discusses Major Arms Control Issues Before U.N. General Assembly, DEPT. STATE BULL. 824, 829 (1975).
41. Id.
42. Atoms-for-Peace, supra note 15 at 185.
43. A. MCKNIGHT, NUCLEAR NON-PROLIFERATION: I.A.E.A. AND EURATOM 80 (1970).
44. NPT, supra note 11.
45. WILLRICH, supra note 21, at 31.
46. Baxter, Multilateral Treaties as Evidence of Customary International Law, 41 BRIT. Y.B. INT'L L. 275, 277 (1965-6).
47. Agreement for Cooperation Between the United States and Argentina Concerning Civil Uses of Atomic Energy, done July 29, 1955, 1955 2 U.S.T. 2537 (in force July 29, 1955).
48. Agreement for Cooperation Concerning Civil Uses of Atomic Energy Between the United States and Belgium, done June 15, 1955, 1955 2 U.S.T. 2551 (in force July 21, 1955).
49. Agreement for Cooperation Between the United States and Brazil Concerning Civil Uses of Atomic Energy, done Aug. 3, 1955, 1955 2 U.S.T. 2583 (in force Aug. 3, 1955).
50. Agreement for Cooperation Concerning Civil Uses of Atomic Energy Between the United States and Canada, done June 15, 1955, 1955 2 U.S.T. 2595 (in force July 21, 1955).
51. Agreement for Cooperation Between the United States and Israel Concerning Civil Uses of Atomic Energy, done July 12, 1955, (1955 2 U.S.T. 2641 (in force July 12, 1955)).

52. Brief discussions of the Baruch Plan may be found in two articles regarding non-proliferation. WILLRICH, supra note 21, at 1-2; and Nuclear Non-Proliferation, supra note 21 at 766-7. The Baruch Plan itself may be found in U. S. Dept. of State, The United States and the United Nations: Report by the President to the Congress for the Year 1946, at 169-78 (1947).

53. International Atomic Energy Agency Statute, 1957 8 U.S.T. 1093 Part 1 .

54. The Antarctic Treaty, done Dec. 1, 1959, (1961) 12 U.S.T. 794 (Part 1) , (in force June 23, 1961).

55. WILLRICH, supra note 21, at 53.

56. Treaty Banning Nuclear Weapon Tests in The Atmosphere, in Outer Space and Underwater, done Aug. 5, 1963, (1963) 14 U.S.T. 1313 (Part 2) (in force Oct. 10, 1963). On Jan. 1, 1976, there had been ratification by 104 nations. U. S. Dept. of State, Treaties in Force 395 (1976).

57. Nuclear Non-Proliferation, supra note 21, at 768.

58. Treaty on Principles Governing the Activities of States in Outer Space, done Jan. 2, 1967, (1967) 18 U.S.T. 2410 (Part 3) , (in force Oct. 10, 1967).

59. WILLRICH, supra note 21, at 61.

60. I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 57 (1966) .

61. G. A. Res. 2373, 22 U.N. GAOR Supp. 16A, at 5-7, U.N. Doc. A/6716 (1968).

62. U.S. Dept. of State, Treaties in Force (395) 1976 (hereinafter referred to as DEPT. OF STATE).

63. D. O'CONNELL, 1 INTERNATIONAL LAW 23-4 (2nd Ed. 1970) (hereinafter cited as O'CONNELL).

64. See fn. 79 and the accompanying text.

65. O'CONNELL supra note 63 at 23.

66. Japan, Brazil, South Africa, Israel, and Egypt are among those which have not signed. DEPT. OF STATE, supra note 62.

67. A nuclear explosive device is tantamount to a nuclear weapon. See note 21, supra.

68. Fisher, Global Dimensions in NUCLEAR PROLIFERATION: PROSPECTS FOR CONTROL 7 (B. Borskey and M. Willrich, ed. 1970).

69. See statements of Vattel and Bluntschli discussed in G. TUNKIN, THEORY OF INTERNATIONAL LAW 147-8 1947 .

70. G. Schwarzenberger takes particular issue with the concept of jus cogens. See: Schwarzenberger, International Jus Cogens? 43 Tex. L. Rev. 455 (1965); Schwarzenberger, The Problem of International Public Policy, 18 CURRENT LEGAL PROBLEMS 191 (1965). Other sources of this point of view are noted in Verdross, Jus Dispositivum and Jus Cogens in International Law, 60 AM. J. INT-L L. 55, 58 (1966) (hereinafter cited as Jus Dispositivum).

71. Article 53: A treaty is void if, at the time of its conclusion, it conflicts with a peremptory law of international law jus cogens . For purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Article 64: If a new peremptory law of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. Vienna Convention, supra note 1.

72. Waldock, (Second) Report on the Law of Treaties, 2 Y. B. INT'L L. COMM'N 36, 52 (1963).

73. Charter of The United Nations, done June 26, 1945 3 U.S.T. 1153 (in force Oct. 24, 1945).

74. Jus Dispositivum, supra note 70, at 58.

75. Id.

76. Id. at 59.

77. Memorial at 14-16.

78. Mr. Yassun, a member of the International Law Commission in 1963, stated that to have the character of jus cogens a rule must be "found necessary to international life and deeply rooted in international conscience." 1 Y. B. INT'L L. COMM'N 63 (1963). Noted in Jus Dispositivum, note 70, at 57.

79. On May 18, 1974, India detonated a nuclear explosive device. Indian Nuclear Development, supra note 26, at 237.

80. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 122-3(1973). (hereinafter cited as SINCLAIR).

81. TIME MAGAZINE, vol. 109, no. 6 (2/7/77), 40-42.

82. P. JESSUP, A MODERN LAW OF TREATIES 1 (1968).

83. Id.

84. SINCLAIR, supra note 80, at 131.