IN THE INTERNATIONAL COURT OF JUSTICE

February 1977

Between:

KINGDOM OF SHANGRI-LA

Applicant

and

UNITED REPUBLIC OF PANDORA

Respondent

MEMORIAL FOR THE APPLICANT

Team 31

Agents for the Kingdom of Shangri-La:

J. Fried
J. Hill

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TREATIES, INTERNATIONAL AGREEMENTS AND STATUTES

JURISDICTION

The parties submit the present dispute to this Court by special agreement, pursuant to Art. 40 of the Statute of the International Court of Justice, which provides:

> 1. Cases are brought before the Court, as the case may be, either by notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

Moreover, Art. 36 of the Statute of the International Court provides that the jurisdiction of the Court comprises all cases which the parties refer to it.

It must therefore follow that the Court has jurisdiction to resolve the present dispute. In addition, by virtue of Arts. 36 and 38 of the Statute, the Court may settle all the questions presented.

STATEMENT OF FACTS

The parties have agreed to the Statement of Facts which has been filed before the Court.

QUESTIONS PRESENTED

I

Whether Pandora is obligated to resume fuel shipments to Shangri-La.

II

Whether Shangri-La must accept I.A.E.A. safeguards on all its nuclear activities.

III

Whether Pandora has the authority unilaterally to refuse reprocessing approval.

IV

Whether Shangri-La is precluded from using Pandorian-origin material for any nuclear explosive device, "peaceful" or not.

V

Whether the bilateral and trilateral agreements are null and void, in accordance with the doctrine of rebus sic stantibus or of jus cogens.

VI

The nature of the remedy, if any, to which either party may be entitled.

SUMMARY OF ARGUMENT

The reprocessing by Shangri-La of Pandorian-origin fuel would not constitute a material breach of the bilateral agreement. Furthermore, the bilateral agreement does not preclude the use of Pandorian-origin materials in connection with a peaceful nuclear explosive device.

International law provides no justification for Pandora's termination of nuclear fuel shipments to Shangri-La. Pandora is therefore in material breach of both bilateral and trilateral agreements. Such material breach entitles Shangri-La to relief from Pandora; the relief should take the form of specific performance of the bilateral agreement as interpreted by Shangri-La.

ARGUMENT AND AUTHORITIES

I. THE REPROCESSING BY SHANGRI-LA OF PANDORIAN-ORIGIN FUEL WOULD NOT CONSTITUTE A MATERIAL BREACH OF THE 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.[1]

A. The bilateral agreement and the Agreement between the United Republic of Pandora and the Kingdom of Shangri-La for the Application of Safeguards by the International Atomic Energy Agency[2] to the United Republic of Pandora-Kingdom of Shangri-La Cooperation Agreement[3] are legally binding upon the States under general principles of international law.

A treaty is an international agreement concluded between states in written form and governed by international law.[4] It is binding upon the contracting states and must be performed by them in good faith.[5]

B. Pandora wrongly denied Shangri-La's request to reprocess Pandorian-origin fuel under I.A.E.A. safeguards.

1. Pandora's denial violated the provisions of the bilateral and trilateral agreements as interpreted under general principles of international law.

a. The whole of the treaty is to be taken into consideration.

A treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the

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1. Hereinafter referred to as the bilateral agreement, the text of which is attached to the agreed statement of facts.

2. Hereinafter referred to as the I.A.E.A.

3. Hereinafter referred to as the trilateral agreement, the text of which is attached to the agreed statement of facts.

4. Vienna Convention on the Law of Treaties, Art. 2, 63 A.J.I.L. 875 (1969).

5. Id. Art. 26; according to Oppenheim, a customary rule of international law provides that treaties are legally binding. I L. Oppenheim, International Law 794 (7th ed., H. Lauterpacht, ed., 1948); see also Lord A. McNair, The Law of Treaties 493 (2nd rev. ed. 1961); and Kearney and Dalton, "The Treaty on Treaties", 64 A.J.I.L. 561 (1970).

light of its object and purpose.[6] The wording of Art. VIII(F) of the bilateral agreement, when given its usual meaning in the language of every day life,[7] indicates that Pandora may not unilaterally assert that Shangri-La's reprocessing plant is unacceptable and that safeguards cannot be effectively applied.[8] Art. VIII(F) prescribes that there shall be a "joint determination" (emphasis added) that the safeguard provision can be effectively applied.

The interaction of Arts. X, XI and XII of the bilateral agreement with s. 6 of the trilateral agreement does not modify the plain meaning of Art. VIII(F) by giving to Pandora the power unilaterally to assess the adequacy of safeguards. The application of safeguards under Art. XI was suspended, pursuant to Art. XII, once the trilateral agreement required the I.A.E.A. to apply Agency safeguards to materials subject to Art. XI (B)(2) of the bilateral agreement.

b. The spirit of the treaty and not its mere literal meaning is to be observed.

Treaty obligations must be carried out "according to the common

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6. Vienna Convention on the Law of Treaties, Art. 31, supra note 4; see also Merrills, who stated, "The whole tenor of Article 31 makes it clear that the terms of a treaty are to be interpreted in the light of the treaty as a whole ..." Merrills, "Two Approaches to Treaty Interpretation", 55 Australian Y.B. Int'l L. 57 (1969); Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 109 (1953); Advisory Opinion on the I.L.O. [1926] P.C.I.J., ser. B, No. 13, at 23; and Diversion of Water from the Meuse [1937], P.C.I.J., ser. A/B, No. 70, at 21-23.

7. L. Oppenheim, supra note 5, at 858.

8. There is no evidence that I.A.E.A. safeguards currently in force in Shangri-La are not being effectively applied or that they could not be effectively applied to a reprocessing plant. The safeguards follow the Pandorian-origin fuel wherever it goes to prevent its diversion for military purposes.

and real intention of the parties at the time the treaty was concluded, that is to say, the spirit of the treaty and not its mere literal meaning." [9] The plain terms rule "cannot be allowed to obstruct the essential quest in the application of treaties ... for the real intention of the contracting parties in using the language employed by them."[10]

The "object and purpose"[11] of the bilateral and trilateral agreements are to promote the application of atomic energy for peaceful purposes. This is evidenced by Art. II of the bilateral agreement, as well as by Art. III of the Statute of the I.A.E.A.[12]

This conclusion is supported by Shangri-La's commitment under Art. X of the bilateral agreement and s. 2 of the trilateral agreement to refrain from using material obtained from Pandora to further any military purpose. There is insufficient evidence to indicate that the reprocessing of Pandorian-origin fuel is not a peaceful application of atomic energy.[13]

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9. B. Cheng, supra note 6, at 114.

10. Lord McNair, supra note 5, at 366.

11. Vienna Convention on the Law of Treaties, supra note 4; see also Lord McNair, who observed that the court has a duty to bear in mind "the overall aim and purpose of the treaty", supra note 5, at 380; and W. Friedmann, O. Lissitzyn and R. Pugh, Cases and Materials on International Law 389, where it is stated that title is an accepted indicator of treaty purpose.

12. I.A.E.A. Stat., opened for signature Oct. 26, 1956, [1957] 276 U.N.T.S. 3.

13. The spread of nuclear power has been spurred on by a growing demand for electrical power, by the escalating price of oil and by fears of a shortage of easily accessible fossil fuel; see W. Epstein, The Last Chance: Nuclear Proliferation and Arms Control 37 (1976); reprocessing fuel would enable Shangri-La to exploit potential uses of peaceful nuclear explosions, such as mining and excavation operations, see Id. at 175 and Reford, "Problems of Nuclear Proliferation", Behind the Headlines (1975), Vol. XXXIV, No. 1, at 12-13.

Pandora has therefore violated the spirit and thwarted the purpose of the two agreements by arbitrarily dismissing Shangri-La's request to reprocess.

c. A treaty is to be interpreted so that it becomes effective.

"The activity of the International Court has shown that alongside the fundamental principle of interpretation ... that effect is to be given to the intention of the parties, beneficent use can be made of another hardly less important principle, namely, that the treaty must remain effective rather than ineffective."[14]

Quite clearly, the insertion of Art. VIII(F) into the bilateral agreement anticipated Shangri-La's need to reprocess fuel. If the article were so interpreted that Pandora could unilaterally and without explanation refuse to permit reprocessing, even when required by Shangri-La, it would be rendered absurd and meaningless.

C. The oral declaration made by the Pandorian President is legally binding upon Pandora.

1. It is a customary rule of international law that the president of a Republic represents the State in its international relations.

"The head of State, as its chief organ and representative in the totality of its international relations, acts for his State in its international intercourse, with the consequence that all his legally relevant acts are considered acts of his State."[15]

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14. H. Lauterpacht, The Development of International Law by the International Court 227-8 (1958); see also L. Oppenheim, supra note 5, at 861; and G. Haraszti, Some Fundamental Problems of the Law of Treaties 166 (1973).

15. 1 L. Oppenheim, International Law 587 (5th ed., H. Lauterpacht, ed., 1937); see also Smith, who cites a 1794 Report in which the King's Advocate stated, "... Contracts entered into with the immediate and apparent Head of State ... have been held to be safely entered into, and to be binding nationally ..." Report from Sir J. Marriott to the Earl of Halifax November 30, 1764, in H. Smith, 1 Great Britain and the

Clearly then, the President's declaration that Pandora was legally obliged to approve the reprocessing of fuel by Shangri-La must be considered a declaration of the Republic of Pandora itself.

2. Pandora is estopped from contradicting the oral declaration.

Estoppel is "a rule of common sense and can fairly be described as one of the "general principles of law recognized by civilized nations" and therefore a proper source of a rule of international law ..."[16] The rationale of estoppel is expressed by the maxim allegans contraria non audiendus est: 'You cannot blow hot and cold.'[17]

The declaration, attributable to Pandora, was an unambiguous statement of fact. Pandora should, therefore, now be estopped from denying its own interpretation of the bilateral agreement.

3. Judicial decisions affirm that the oral declaration created legal obligations, even if not relied upon by Shangri-La.

The World Court has decided on several occasions that declarations made by way of unilateral acts may have the effect of creating legal obligations

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Law of Nations 2-10 (1932); Moore cites a message from United States Secretary of State Jefferson to French Minister Genet in which Mr. Jefferson stated that as the President was the only channel of communication between the United States and foreign nations, it was from him alone "that foreign nations ... are to learn ... the will of the nation ..." November 22, 1793, Am. State Papers, For. Rel. I 184, in J. Moore, 4 A Digest of International Law 680 (1906); W. Hall, International Law 311 (4th ed., 1895); W. Phillimore, 2 Commentaries Upon International Law 127-8 (2nd ed., 1871), in 7 B.D.I.L. 3; and F. Wharton, 1 A Digest of the International Law of the United States 582-5 (1886).

16. Lord McNair, supra note 5, at 485.

17. Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence" 33 B.Y.B.I.L. 177 (1957); see also the Anglo-Norwegian Fisheries Case [1951] I.C.J. 116, at 139.

even when such declarations are made orally and are not subsequently relied upon.[18] In the Nuclear Tests cases, this Court established that such declarations may give rise to legal rights even when made outside the context of formal negotiations and to the world at large; a reply or reaction from other States is not required for the declaration to take effect.[19]

4. The writings of highly qualified publicists also confirm that the oral declaration gave rise to legal obligations.

Under Anglo-American law, reliance is necessary to render oral declarations legally binding: there must be acts or abstentions based on the assumption that the unilateral promisor will keep his word.[20] In international law, however, "... each state must now recognize that what it solemnly says it will do, or, more important, what it says it will not do, becomes a part of that trellis of reciprocal expectations on which the fragile international system grows[21] ... perhaps reliance has become a meaningless concept in a tight little global community ..."[22]

5. In any event, the oral declaration is at least an affirmation of Shangri-La's interpretation of the bilateral agreement.

"Where one or other of the ... essentials of a binding estoppel is absent, the representation, whether by words or conduct, does not lose

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18. Eastern Greenland Case [1933] P.C.I.J. ser. A/B, No. 53, at 71; Nuclear Tests Case (Australia v. France) [1974] I.C.J. 253, at 267-270; Nuclear Tests Case (New Zealand v. France) [1974] I.C.J. 457, at 472-474.

19. Nuclear Tests cases, id. at 269, 474.

20. Franck, "Word Made Law: The Decision of the I.C.J. in the Nuclear Test Cases", 69 A.J.I.L. 617 (1975).

21. Id. at 616.

22. Id. at 620; see also Lord McNair, supra note 5, at 487; and Garner who affirms the binding force of oral declarations: Garner, "The International Binding Force of Unilateral Oral Declarations", 27 A.J.I.L. 493, at 496-7 (1933).

all value for, although lacking conclusive effect, it may still be adduced in evidence as an admission to show a lack of consistency or weakness in a party's position."[23]

It is emphasized that the Court's primary objective must be to give a treaty that construction which most closely conforms with the parties' own intentions and understanding of the terms thereof; Pandora should be bound by the interpretation it has itself given to the bilateral agreement.

II. THE BILATERAL AGREEMENT DOES NOT PRECLUDE THE USE OF PANDORIAN-ORIGIN MATERIALS IN CONNECTION WITH A PEACEFUL NUCLEAR EXPLOSIVE DEVICE.

A. Article X(A)(2) of the bilateral agreement only precludes the use of Pandorian-origin material for military purposes.

Art. X(A)(2), by specifically prohibiting the use of material for research on or development of atomic weapons or for any other military purpose, impliedly sanctions the use of atomic energy for peaceful purposes. This interpretation receives express confirmation in Art. II of the bilateral agreement.

B. The 1971 note delivered to the deputy chief of mission of the Shangri-La embassy does not alter the plain meaning of Art. X(A)(2).

1. It is a customary rule of international law that a treaty may not be revised, nor special meaning given to a term thereof, without the consent of all parties.

Art. 39 of the Vienna Convention on the Law of Treaties[24] provides

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23. Bowett, supra note 17, at 195.

24. Vienna Convention on the Law of Treaties, supra note 4; see also the International Law Commission's commentary, where it is stated that, "The Commission ... considers that the very nature of the legal relations established by a treaty requires that every party should be consulted in regard to any amendment or revision of the treaty." Int'l L. Comm'n, Reports, [1966] 2 Y.B. Int'l L. Comm'n 233, A/6309/Rev. 1 (1966).

that, "A treaty may be amended by agreement between the parties." (emphasis added) Further, Art. 31(4) confirms that a special meaning shall be given to a term in a treaty only if it is established that the parties so intended.[25] Additionally, "... recourse to the concordant practice of the parties may be had for the interpretation of a given provision of the treaty only insofar as it reflects the intention of the parties at the conclusion of the treaty ... If this were not the case, then any difference between interpretation and modification of a treaty might be blurred."[26]

The 1971 note does not reflect the mutual intention of the parties at the conclusion of the bilateral agreement. Rather, the interpretation therein mirrors Pandora's attempt to modify the treaty in a manner that was not contemplated by either party when it came into effect.[27] Shangri-La, of course, has not consented to such a material modification.

2. Shangri-La did not acquiesce in Pandora's attempt to modify the bilateral agreement.

Shangri-La may not be deemed to have acquiesced in Pandora's

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25. Vienna Convention on The Law of Treaties, supra note 4; see also Friedmann, supra note 11, at 375, where it is stated that a unilateral interpretation of an international agreement, whether made by the executive, legislative, or judicial organs of one of the states, is not binding upon other contracting states; this view is affirmed by E. Hoyt, The Unanimity Rule in the Revision of Treaties 1 (1959).

26. G. Haraszti, supra note 14, at 143; see also the Advisory Opinion on the Treaty of Lausanne [1925] P.C.I.J., ser. B, No. 12, at 24; the Jesse Lewis (The David J. Adams) Claim, in which the Tribunal said the fundamental principle of the juridical equality of States is opposed to the subjection of one State to an interpretation of a treaty by another State. 6 U.N. Rep. Int'l Arbitral Awards 85, in Friedmann, supra note 11, at 375.

27. Lord McNair has observed that it would be a breach of the obligation of mutual good faith for a party to make use of an ambiguity in order to put forward an interpretation which it was known to the negotiators of the treaties not to be the intention of the parties. Lord McNair, supra note 5, at 465; furthermore, interpreters cannot consider an attitude that manifests itself after a considerable lapse of time

interpretation of Art. X(A)(2) of the bilateral agreement unless such acquiescence had not been negatived by protests reserving the Kingdom's rights or was incapable of reasonable explanation.[28] However, Shangri-La did make known its disagreement with the content of the note at the time of its receipt, notwithstanding that such protest may not have been relayed through proper diplomatic channels.

The doctrine of acquiescence must be strictly interpreted in international law[29] and courts have generally confined its application to instances of long-continued acquiescence.[30] It is significant to note that acquiescence has seldom formed the sole reason for the judicial determination of a dispute.[31]

In the alternative,Shangri-La may not be deemed to have acquiesced inasmuch as acquiescence must be imputable to a government and not merely individuals.[32] The government ofShangri-La did not receive constructive notice of the contents of the note merely as a result of its delivery to an embassy representative.

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27. Cont'd... following the conclusion of a treaty. C. Hyde, 2 International Law Chiefly as Interpreted and Applied by the United States 1475-6, in Haraszti, supra note 14, at 143.

28. Lord McNair, supra note 5, at 518.

29. MacGibbon, "The Scope of Acquiescence in International Law", 31 B.Y.B.I.L. 168 (1953).

30. Anglo-Norwegian Fisheries Case, supra note 17, at 138.

31. MacGibbon, supra note 29, at 154.

32. Lord McNair, supra note 5, at 518.

III. PANDORA IS NOT JUSTIFIED UNDER INTERNATIONAL LAW IN TERMINATING FUEL SHIPMENTS TO SHANGRI-LA.

A. The terms of the bilateral and trilateral agreements give no justification for Pandora's refusal to continue fuel shipments.

1. Article VII imposes an obligation on Pandora to supply fuel.

"Terms and conditions" have been agreed by virtue of the conclusion of fixed commitment fuel supply contracts in September, 1964. As "may be agreed" refers to such terms and conditions only. Further, the fuel supplied is being used for power application.

2. Articles X and XI of the bilateral agreement and the trilateral agreement give no justification for termination of supply.

As shown above,[33] Shangri-La has not violated Art. X(A)(2) of the bilateral agreement. Pandora's diplomatic note is of no effect in this regard.[34] Pandora's rights under Art. XI have been suspended.[35] Shangri-La need not submit all its materials to I.A.E.A. safeguards, nor refrain from peaceful nuclear explosions.[36]

B. Pandorian municipal law gives no justification for Pandora's refusal to continue fuel shipments.

1. Article II of the bilateral agreement does not render the agreement subject to subsequently enacted municipal law.

a. The agreement is subject only to applicable laws in force at the time of enactment.

Art. II(A) states that neither party, by undertaking to cooperate, would be in violation of pre-existing municipal law. To interpret the

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33. See Part II(A) of this memorial.

34. See Part II(B) of this memorial.

35. See Part I(B) of this memorial.

36. See Part II(A) of this memorial.

clause otherwise would allow unilateral abrogation by either party through the device of municipal law.[37]

b. Municipal law not recognized by the agreements may not be pleaded by Pandora.

It is a "cornerstone of the jurisprudence of this court"[38] that municipal law which is contrary to international law cannot be pleaded as an excuse for the non-fulfillment by a State of its obligations under international law. This principle has been recognized by this Court,[39] by the UN General Assembly [40] and by publicists.[41]

c. The bilateral agreement should not be regarded as merely a commercial contract.

The agreement must be seen as more than just a commercial contract for purchase and sale. Both states have viewed the pacts as treaties for international cooperation, regarding atomic energy as a matter of

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37. Vienna Convention on the Law of Treaties, Art. 31, supra note 4.

38. Vienna Convention on the Law of Treaties, Art. 27, supra note 4; see also G. Schwarzenberger, 1 International Law 69 (3rd ed., 1957).

39. Exchange of Greek and Turkish Populations [1925] P.C.I.J., ser. B, No. 10; Case Concerning Treatment of Polish Nationals [1932] P.C.I.J., ser. A/B, No. 44; Free Zones Case [1932] P.C.I.J., ser. A/B, No. 46; Alabama Claims Arbitration Moore 1 Int. Arb. 485, at 656.

40. Draft Declaration on Rights and Duties of States, Int'l L. Comm'n, Report, [1949] Y.B. Int'l L. Comm. U.N. Doc. A/CN. 4/W. 8 (1949) 286; Resolution 375 (IV) G.A.O.R. 4th Sess. Resolutions, 66.

41. Fitzmaurice, The General Principles of International Law, 92 Hague Recueil (1957, II) 5, 70-80; Harvard Research in International Law (1935), Pt. III, Law of Treaties; Int'l L. Comm'n, Report, supra note 24, at 219; C. Fenwick, International Law 109 (1965); Schwarzenberger, supra note 38, at 67-68; Friedmann, supra note 11, at 149.

national importance. Thus, as "treaties", they are properly governed by international law.[42]

C Pandora may not rely on its subsequent ratification of the Non-Proliferation Treaty[43] to demand more onerous obligations from Shangri-La.

1. A treaty does not create obligations or rights for a third state without its consent.

Shangri-La has consistently refused to consent to the rights and obligations that would be accorded to it under the NPT, and thus cannot be bound by its terms.[44]

2. The NPT does not determine Pandora's obligations to Shangri-La.

As between a State party to two 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.[45] This principle has been accepted by international courts,[46] state practice[47] and renowned international

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42. Vienna Convention on the Law of Treaties, Art. 2(1)(a), supra note 4.

43. Non-Proliferation Treaty, U.N. Doc. A/7016/Add. 1 (hereinafter referred to as NPT).

44. Vienna Convention on the Law of Treaties, Art. 34, supra note 4; D. Harris, International Law 596 (1973): "'Pacta tertiis nec nocent nec prosent' undoubtedly reflects customary international law."

45. Vienna Convention on the Law of Treaties, Art. 30(4)(b), supra note 4; Statute of the I.C.J., Art. 38(1)(a), in D. Harris, supra note 44, at 756.

46. Austro-German Customs Union Case [1931] P.C.I.J., ser. A/B, No. 41, at 52; Costa Rica v. Nicaragua (1916) in 11 A.J.I.L. 181 (1917), (Central American Court of Justice); S.S. Wimbledon [1923] P.C.I.J., ser. A., No. 1.

47. See Lauterpacht, "The Covenant as Higher Law", 17 B.Y.B.I.L. 54 (1936).

publicists.[48] Pandora's obligations to the signatories of the NPT are not relevant to its obligations to Shangri-La.[49]

3. The NPT is not lex superior.

The NPT cannot be said to be an objective regime and is not viewed by the parties to it as such.[50] The Vienna Convention Arts. 35 and 36 exhaustively define the circumstances in which a treaty may be regarded as lex superior.

4. The NPT, if applicable, imposes obligations on Pandora only.

Art. III(2) of the NPT imposes an obligation on Pandora not to supply fuel unless its own fuel is subject to I.A.E.A. safeguards, a requirement here fulfilled by the trilateral agreement. Arts. II, III(1) and III(4) impose additional obligations only on nuclear-weapon states "Party to the Treaty". Shangri-La is not a party to the treaty.

D. Pandora may not rely on the NPT as customary law to demand more onerous obligations from Shangri-La.

1. The NPT cannot be considered customary international law.

a. The NPT is not evidence of a "general practice accepted as law"[51] existing prior to its enactment.

An onus rests on the party asserting a rule of international customary law to affirmatively show through State practice that the alleged

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48. Id. at 54; G. Schwarzenberger, supra note 38, at 475; Jenks, "The Conflict of Law-Making Treaties", 30 B.Y.B.I.L. 401 (1953); Int'l L. Comm'n Report, supra note 24, at 214-7.

49. Vienna Convention on the Law of Treaties, Art. 30(5), supra note 4.

50. Bull, "Rethinking Non-Proliferation", 51 Int. Aff. #2, at 175 (1975): "...the three recalcitrant nuclear powers and the larger number of non-nuclear-weapon states that are skeptical about the treaty or hostile to it..."

51. Statute of the I.C.J., Art. 38(1)(b), supra note 45.

custom is regarded as opinio juris.[52] Material sources of state practice[53] prior to 1968 conclusively show the contrary here.[54] It is precisely because no uniform, obligatory state practice existed prior to the treaty that the NPT was finally concluded.

b. The NPT is not the fons et origo of any rule of international law which may have subsequently received the general assent of States.

Although the NPT has obtained 111 signatories, 15 have not yet ratified, and 44 States, including nuclear and non-nuclear powers, have not signed. Acquiescence by States in refusals to submit to a given practice or in a contrary practice by other states affords cogent evidence that the practice is not international custom.[55] State practice subsequent to 1968 shows such acquiescence.[56]

c. Even if the NPT manifests customary law, such law is not binding on Shangri-La.

A regional or local practice may be recognized as a regional customary law if it is in accordance with constant and uniform usage practiced by the States in question,[57] and accepted as regulating their relations.[58]

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52. The Case of the S.S. Lotus (France v. Turkey) [1927] P.C.I.J., ser. A, No. 10.

53. I. Brownlie, Principles of Public International Law 5 (2nd ed., 1973).

54. W. Epstein, supra note 13, at 65; Keesing Research Report on Disarmament, Negotiations and Treaties 1946-1971 (1972), regarding U.N. Resolutions, 42-119; E.N.D.C. 262-271.

55. MacGibbon, "Customary Law and Acquiescence", 33 B.Y.B.I.L. 118 (1957).

56. Disarmament, supra note 54, at 251 ff.; W. Epstein, supra note 13, at 91, 255.

57. Asylum Case (Columbia v. Peru) [1950] I.C.J. 266.

58. Right of Passage Case [1957] I.C.J. 125.

The State practices of Communist China, India and Shangri-La show a uniformity in custom contrary to the NPT. Thus, consistency of state practice by Shangri-La in repudiating the custom, i.e. "State Protest", precludes application of the customary rule to Shangri-La.[59]

E. Pandora is not entitled to rely on provisions of the NPT as manifesting any rule of jus cogens to demand further obligations from Shangri-La.

1. The doctrine of jus cogens is inapplicable to the NPT.

a. There is no agreement as to criteria applicable in identifying such rules.

Customary international law has not succeeded in identifying the material content of jus cogens rules.[60] Cognizance has been taken only of their effect on state practice[61] and on treaties in conflict with them.[62]

b. Jus cogens refers only to rules necessary for maintenance of the international legal order.

The most that can be said of agreement regarding jus cogens is that since the international legal system requires rules governing the coexistence and cooperation of States, such rules can only have validity and effectiveness by virtue of conformity with a "solid substratum" of

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59. Asylum Case, supra note 57.

60. Papers and Proceedings of the Lagonissi Conference on International Law (1967)(hereinafter cited as Jus Cogens): "The I.L.C. tried without success to define the material context of jus cogens."

61. Vienna Convention of the Law of Treaties, Art. 53, supra note 4.

62. Id. Art. 64.

"international public policy" whose non-observance would make attempts at cooperation and coexistence illusory.[63] Such peremptory norms must thus necessarily be general[64] and be recognized by international practice and judicial decisions.[65] The NPT is not of such a character in that it is not necessary to the maintenance of legal order, as a rule concerning boundaries, for example, would be.

2. Even if the NPT manifests a rule of jus cogens, its provisions cannot be regarded as peremptory norms of international law having the character of jus cogens.

a. The NPT is not itself a general rule of international law.

The NPT is a chosen means by which the majority of the international community have compromised on an expression of support for international peace.[66] Specific provisions supporting or consistent with a rule of public policy, whether municipal or international, are not of the character of a peremptory norm. Further, the NPT contains provision for amendment,[67] re-examination,[68] withdrawal and termination,[69] evidencing State practice not to consider the NPT as a rule from which States may not depart.

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63. Jus Cogens, supra note 60, at 70.

64. Id. at 53, as per the view of the I.L.C.

65. Id. at 53.

66. Non-Proliferation Treaty, supra note 43, Preamble.

67. Id. Art. VIII(1).

68. Id. Art. VIII(3).

69. Id. Art. X.

3. The bilateral and trilateral agreements do not conflict with any peremptory norm.

a. The agreements are consistent with any potentially applicable rule of jus cogens.

Both agreements explicitly state Shangri-La's adherence to such alleged peremptory norms as prohibition of the use of force, maintenance of international peace and security and non-proliferation of nuclear weapons.

b. Judicial restraint in application of the doctrine is necessary.

The Court must be cautioned against allowing States to refer to jus cogens unilaterally in order to escape their international obligations or in order to deny the validity of agreements between third States, given the general character and lack of precision of jus cogens.[70]

F. Pandora is not entitled to rely on the doctrine rebus sic stantibus to demand further obligations from Shangri-La.

1. The doctrine is inapplicable.

a. Publicists have not agreed on the scope of the doctrine.

Definitions of the doctrine provided by publicists "vary from one another in such a fundamental way, despite superficial similarities; that one may safely say there is no definition upon which a majority of writers agree."[71]

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70. Jus cogens, supra note 60, at 74: "Any unilateral application ... would destroy the very foundation of the international legal system which ... it is the aim of the introduction of the notion of the jus cogens to stabilize and reinforce."

71. Hill, "The Doctrine of Rebus Sic Stantibus in International Law", 9 U. of Mo. Studies 7 (1934); Shaker, "Fundamental Change in Circumstances or the I.L.C. and the Doctrine Rebus Sic Stantibus", 23 Revue Egyptienne de Droit International 109, at 117; H. Lauterpacht, Private Law Sources and Analogies of International Law 170 (1927).

b. State practice manifests no uniformity of acceptance of the doctrine.

The doctrine has never been invoked by a state without being challenged by other states.[72]

c. International tribunals have refrained from delimiting the scope of the doctrine.

This Court expressly refrained from pronouncing on the doctrine in the Free Zones case,[73] and recognized only that the doctrine may be applied under certain unspecified conditions in the Fisheries Jurisdiction case.[74]

2. In any event, there has been no fundamental change in circumstances.

a. If the doctrine is to be applied, its scope must be defined within narrow limits.[75]

The Vienna Convention Art. 62 defines the limits of application of the doctrine. Circumstances which served as an essential basis for the consent of the parties must have changed unforeseeably so as to radically transform the extent of the obligations to be performed.

b. Any change in circumstances here was foreseeable, and therefore did not change the basis for agreement.

The provisions of both the bilateral and trilateral agreements show Pandora's awareness, at the time of signing, of the dangers of diversion of nuclear materials to military purposes[76] and of the need for I.A.E.A. safeguards.[77]

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72. Hill, supra note 71, at 90.

73. Supra note 39, at 156-158.

74. [1973] I.C.J. 3, at 18.

75. Int'l L. Comm'n, Report, supra note 24, at 257.

76. Bilateral agreement, Arts. II, X(B)(2) and XI(A); trilateral agreement, ss. 2 and 4.

77. Bilateral agreement, Art. XI(B).

India's 1974 explosion could not have come as a great surprise,[78] and adds no greater threat to fulfillment of the agreements in question than existed at the time of signing.

c. The extent of Pandora's obligations remains unchanged.

Any change in circumstances here would not adversely affect Pandora's obligation to supply fuel for power application or to cooperate in the achievement of the uses of atomic energy for peaceful purposes, given that the I.A.E.A. safeguards continue in place.

d. A party may not unilaterally denounce a treaty by application of the doctrine.

The I.L.C. has recognized the risk to security of treaties that unilateral invocation would present,[79] noted that state practice showed

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78. Report of the Hoover Institute of the U.S. Arms Control and Disarmament Agency, Arms Control Arrangements for the Far East, (Jan. 1967) points out that China exploded a nuclear device in 1964, (with no additional concern expressed to Shangri-La by Pandora at the time). The threat of Sino-Indian conflict was evident in 1963, a border war and expressions of fear of Chinese nuclear capability having already occurred in 1962 (p. 71). It was recognized as early as 1964 that India was technologically capable of producing its own plutonium devices (p. 110) and that such a development was likely if Chinese threats were to continue (p. 112). In 1965 an argument was made for Indian development of a tactical nuclear capability (by Raj Krishna, "India and the Bomb", Indian Quarterly Vol. 21, No. 2, at 119), leading U.S. policy experts to conclude in 1966 that "Efforts to forestall nuclear proliferation within the region should be focused on India" (p. 113). It is noted in Disarmament, supra note 54 that India refused to sign the NPT, abstained on the U.N. Resolution endorsing the treaty (p. 245) and the Security Council Resolution on security assurances to non-nuclear States (p. 253) and objected to the treaty during political debate on the NPT (p. 252, comments of Mr. Hussain) and the earlier U.S. - Soviet draft (p. 273).

79. Int'l L. Comm'n, Report, supra note 24, at 257.

"a strong disposition to question the right of a party to denounce a treaty unilaterally on this ground"[80] and pointed out the doctrine "... would seldom or never have relevance for treaties of limited duration or which are terminable upon notice"[81] such as the bilateral and trilateral agreements.

IV. PANDORA IS IN MATERIAL BREACH OF BOTH BILATERAL AND TRILATERAL AGREEMENTS.

A. Shangri-La is not in material breach of either the bilateral or trilateral agreement.

1. Shangri-La has not violated any provision of the agreements.

Neither the express terms of the agreements,[82] nor the municipal law of Pandora,[83] nor customary international law[84] require Shangri-La to submit all of its nuclear material to I.A.E.A. safeguards, to join the NPT, or to refrain from using Pandorian-origin material for a peaceful nuclear explosive device. Further, Pandora may not allege violation of jus cogens[85] nor invoke the doctrine rebus sic stantibus.[86] In any event, Shangri-La has not used any Pandorian fuel directly or indirectly for any nuclear explosive device.

2. In the alternative, if Shangri-La is in breach, such violation is not material.

If it is determined that Shangri-La is under an obligation to submit all its nuclear materials to I.A.E.A. safeguards or to join the NPT, failure

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80. Id. at 77; Nationality Decrees Case [1923] P.C.I.J., ser. C, No. 2, at 187.

81. Int'l L. Comm'n, Report, supra note 24, at 258.

82. See Part III(A) of this memorial.

83. See Part III(B) of this memorial.

84. See Part III(D) of this memorial.

85. See Part III(E) of this memorial.

86. See Part III(F) of this memorial.

to do so does not constitute a material breach. Customary international law[87] views a material breach as "violation of a provision essential to the accomplishment of the object or purpose of the treaty." Shangri-La has consistently maintained its desire and ability to cooperate with Pandora in the achievement of uses of atomic energy for peaceful purposes. Such objectives have been obtained under the present safeguards system. Although more stringent requirements may enable the parties to better achieve their objectives, such obligations are not essential to such achievement.

B. Pandora is in material breach of the bilateral and trilateral agreements by refusing to continue its fuel shipments.

1. The supply of fuel is essential to the accomplishment of the object or purpose of the agreements.

The primary obligation undertaken by Pandora in the bilateral agreement is to supply fuel to Shangri-La. It is the very means by which the parties are able to cooperate with each other for the peaceful use of atomic energy. Termination of such supply must be considered material to effective execution of both the bilateral and trilateral agreements.

2. Pandora's repudiation is not sanctioned by the Vienna Convention.

Art. 60(3)(a) recognizes as material breach a repudiation not sanctioned by the Convention. The repudiation is not justified by the doctrine of jus cogens[88] nor the doctrine of rebus sic stantibus[89].

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87. Vienna Convention on the Law of Treaties, Art. 60(3)(b), supra note 4.

88. See Part III(E) of this memorial.

89. See Part III(F) of this memorial.

and therefore is not sanctioned by the Convention. Since Shangri-La is not in material breach,[90] Pandora is not entitled to invoke breach as a ground for determining the treaty or suspending its operation pursuant to Art. 60(1). Thus, Pandora's repudiation of its obligation to supply fuel pursuant to Art. VII of the bilateral agreement constitutes material breach.

C. The reprocessing of Pandorian fuel by Shangri-La would not constitute material breach.

1. It is the responsibility of the Agency, not Pandora, to apply safeguards and determine "acceptability".

S.4 of the trilateral agreement gives the I.A.E.A. responsibility to apply safeguards. The fuel supplied from Pandora comes within the inventory as defined by s. 10, and there is no evidence before this Court that the Agency has called upon Shangri-La for the remedy of any non-compliance under s.21.

2. The trilateral agreement limits Pandora's right to terminate.

Pandora is only entitled to terminate the agreement on six months' notice under s. 31. This right to terminate is exhaustive, and supercedes any right of termination given to Pandora under Art. XI of the bilateral agreement.

V. SHANGRI-LA IS ENTITLED TO RELIEF.

A. Pandora is under a duty to make reparation to Shangri-La.

At international law, the breach of a conventional[91] or customary[92]

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90. See Part IV(A) of this memorial.

91. Chorzow Factory (Jurisdiction) Case [1927] P.C.I.J., ser. A, No. 9, at 21; affirmed in Chorzow Factory (Merits) Case [1928] P.C.I.J., ser. A., No.17, at 27-29; see also Interpretation of the Peace Treaties (second phase), where this Court stated, "... refusal to fulfil a treaty obligation involves international responsibility". [1950] I.C.J. 228.

92. Corfu Channel (Merits) Case [1949] I.C.J. 23-26.

engagement involves an obligation to make reparation in an adequate form.[93] In the case of a conventional obligation, there is no need for this to be stated in the convention itself.[94]

There has been as yet no material damage to Shangri-La, but Shangri-La has suffered a "moral injury"[95] in the affront to its sovereignty by Pandora's unilateral actions and failure to implement in good faith the provisions of the bilateral agreement.

B. Shangri-La is entitled to a restoration of the status quo ante.

1. The International Court of Justice may grant such relief.

Reparation must, as far as possible, "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[96]

The World Court decided in the Certain German Interests in Polish Upper Silesia case[97] and affirmed in the Chorzow Factory (Interpretation) Case[98] that it has authority to give a declaratory judgment.

Moreover, an international court or tribunal has authority to require the specific performance of its decision.[99] Indeed, specific performance would appear to be "the normal method of giving effect to a declaratory

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93. Chorzow Factory case, supra note 91.

94. Chorzow Factory (Jurisdiction) Case, supra note 91.

95. Friedmann, supra note 11, at 843.

96. Chorzow Factory (Merits) Case, supra note 91, at 41; see also I Vasarhelyi, Restitution in International Law 10, at 74 (1964).

97. [1926] P.C.I.J., ser. A., No. 7, at 19.

98. [1927] P.C.I.J., ser. A, No. 13 at 20-21; see also Lord McNair, supra note 5, at 574.

99. See the Free Zones Case, supra note 39, at 172.

judgment."[100]

2. Shangri-La is entitled to such relief.

Pandora has placed itself in flagrant breach of conventional and customary international law by terminating fuel shipments to Shangri-La, by arbitrarily rejecting Shangri-La's request to reprocess fuel and by attempting unilaterally to modify the bilateral agreement. Only specific performance of the bilateral agreement, rather than monetary compensation, can prevent further injury to Shangri-La.

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100. C. Jenks, The Prospects of International Adjudication 419 (1964).