

IN THE INTERNATIONAL COURT OF JUSTICE

February 1977

Between:

KINGDOM OF SHANGRI-LA

Applicant

and

UNITED REPUBLIC OF PANDORA

Respondent

MEMORIAL FOR THE RESPONDENT

Team 31
Agents for the United Republic of Pandora:

R. Anand
J. Hill

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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.

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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 constitute a material breach of the bilateral agreement. Furthermore, the bilateral agreement precludes the use of Pandorian-origin materials in connection with any nuclear explosive device, "peaceful" or not.

Pandora is justified under international law in making further fuel shipments to Shangri-La conditional on compliance with the two requirements stated in its diplomatic note of September 20, 1976. Shangri-La's rejection of these conditions therefore constituted a material breach of its obligations to Pandora, and this material breach justified Pandora's termination of fuel shipments.

In the alternative, if Pandora was not justified in placing conditions on further nuclear shipments, the bilateral agreement should be rendered inoperative by virtue of the clausula rebus sic stantibus or by reason of conflict with rules of jus cogens. Pandora's obligation to supply fuel under the agreement should thereby be extinguished.

It follows that Pandora is entitled to relief. Such relief should take the form of specific performance of the bilateral agreement as interpreted by Pandora; in the alternative, the agreement should be declared null and void.

ARGUMENTS AND AUTHORITIES

I. THE REPROCESSING BY SHANGRI-LA OF PANDORIAN-ORIGIN FUEL WOULD 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 Agency² to the United Republic of Pandora-Kingdom of Shangri-La Cooperation Agreement³ 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. It is binding upon the contracting parties and must be performed by them in good faith.

B. Pandora was legally justified in denying Shangri-La's request to reprocess Pandorian-origin fuel under I.A.E.A. safeguards.

1. Pandora's denial was justified under the bilateral and trilateral agreements as interpreted according to 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 thereof in their context and in

-
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. 1 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).

the 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 withhold permission to reprocess where it finds the reprocessing facility "unacceptable"; it clearly reserves to Pandora a veto power exercisable even without explanation; furthermore, it may not be invoked by Shangri-La absent proof that material received from Pandora⁸ "requires" reprocessing.

The interaction of Arts. X, XI and XII of the bilateral agreement with s. 6 of the trilateral agreement does not deprive Pandora of its right unilaterally to assess the adequacy of safeguards. The application of safeguards under Art. XI is suspended, pursuant to Art. XII, only "during the time and to the extent that ... Pandora agrees that the need to exercise such rights is satisfied by a safeguards agreement to be negotiated between the Parties and the Agency." (emphasis added) In consequence, although the trilateral

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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. Available evidence indicates that not only is reprocessing not "required", it is not even economically advisable. Leonard Ross has written, "In economic terms, plutonium recycling has become so expensive that it no longer makes much sense ... Even the nuclear industry agrees that a reprocessing plant makes no economic sense for countries with fewer than 50 reactors." Ross, "How 'atoms for peace' become bombs for sale", The New York Times Magazine, December 5, 1976, at 120.

agreement does empower the I.A.E.A. to apply Agency safeguards to materials subject to Art. XI(B)(2) of the bilateral agreement, that power may be withdrawn should Pandora determine that the need for safeguards is not satisfied by the trilateral agreement. The I.A.E.A. is only granted the power to exercise the safeguards deemed by Pandora to be needed.

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

Treaty obligations should be carried out "according to the common 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 ensure a supply of materials to meet Shangri-La's fuel needs but, at the same time, to ensure that Shangri-La will be unable to divert Pandorian-origin materials for military purposes.

This is evidenced by Art. II of the bilateral agreement which directs that, "Subject to the provisions of this Agreement ... the Parties shall cooperate with each other in the achievement of the uses of atomic energy for peaceful purposes." (emphasis added) This direction to cooperate must

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 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.

always be subject to Pandora's right under Art. XII of the bilateral agreement unilaterally to assess adequacy of safeguards.

Moreover, it is not at all evident that the reprocessing of Pandorian-¹² origin fuel is a peaceful application of atomic energy. Indeed, Pandora upheld the spirit and purpose of the two agreements by rejecting Shangri-La's request to reprocess.

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

"... ut res magis valeat quam pereat ... is a major principle in the¹³ light of which the intention of the parties must be interpreted ..."
Art. VIII(F) of the bilateral agreement would be rendered nugatory were it so interpreted as to deprive Pandora of the absolute right to withhold permission to reprocess.

d. The subsequent practice of parties to a treaty is indicative of their true intentions.

When the meaning of a treaty provision is ambiguous, the relevant conduct of the contracting parties after the conclusion of the treaty has a high probative value as to the intention of the parties at the time of its conclusion.¹⁴

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12. It should be noted that "all the initial processes in the production of fissionable materials and certain subsequent processes are identical whether their intended use or purpose is peaceful or military ... There is no essential difference between the technology of a nuclear explosion intended for peaceful purposes and that of one intended for waging nuclear war." W. Epstein, The Last Chance: Nuclear Proliferation and Arms Control 221 (1976).
 13. H. Lauterpacht, The Development of International Law by the International Court 228 (1958); see also L. Oppenheim, supra note 5, at 861; and G. Haraszti, Some Fundamental Problems of the Law of Treaties 166 (1973).
 14. Lord McNair, supra note 5, at 424; see also the Vienna Convention on the Law of Treaties, Art. 31, supra note 4, where it is stated that in the interpretation of a treaty, there shall be taken into account any subsequent practice in its application which establishes the agreement of the parties regarding its interpretation.

Pandora's right unilaterally to reject reprocessing was at least impliedly acknowledged by Shangri-La's request for reprocessing approval. Moreover, Pandora registered its objections to Shangri-La's reprocessing plans in 1971, when construction of the reprocessing plant commenced.

C. The oral statement made by the Pandorian president is not legally binding upon Pandora.

1. It is not a customary rule of international law that such statements create legal obligations.

"The head of State ... acts for his State in its international intercourse, with the consequence that all his legally relevant acts are considered acts of his State." ¹⁵ (emphasis added) The President's statement clearly was not a "legally relevant act". It was an impromptu remark made during a press conference televised only within Pandora.

2. Pandora is not estopped from contradicting the statement.

The essential rationale of estoppel "is to preclude a party from benefiting from his own inconsistency to the detriment of another party who has in good faith relied upon a representation of fact made by the former party." ¹⁶ The representation must be clear and unambiguous, ¹⁷ directed to the party which pleads the estoppel ¹⁸ and relied upon to the detriment of the party to

15. 1 L. Oppenheim, International Law 587 (5th ed., H. Lauterpacht, ed. 1937).

16. Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence", 33 B.Y.B.I.L. 177 (1957).

17. Id. at 188.

18. Id. at 185; see also Schwarzenberger, who stated that, "To be effective, the intent of a power to commit itself by way of a unilateral act must be declared to the addressee." G. Schwarzenberger, International Law 552 (1957).

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whom the representation is made. The President's remark was not intended to be relied upon, nor was it relied upon by Shangri-La.

20
In Eastern Greenland, it was decided that an oral declaration may, under certain circumstances, be binding. However, there was in that case an element of mutuality which does not exist here. 21 Moreover, in the Nuclear Tests cases, this Court explicitly stated that an oral undertaking will not be binding unless there is an intent to be bound. 22

An admission should not lightly be presumed against a State and should be considered only within its general context; superficial contradictions and inconsistencies should not be given much importance. 23 With the minor exception of the President's remark, Pandora has consistently registered opposition to Shangri-La's reprocessing plans.

19. Bowett, supra note 16, at 193.

20. Eastern Greenland Case [1933] P.C.I.J., ser. A/B, No. 53, at 71.

21. Elkind, "Footnote to the Nuclear Test Cases: Abuse of Right -- A Blind Alley for Environmentalists", 9 Vand. J. Transnat'l L. 57 (1976); see also Franck, "Word Made Law: The Decision of the I.C.J. in the Nuclear Test Cases", 69 A.J.I.L. 717 (1975).

22. Nuclear Tests Case (Australia v. France) [1974] I.C.J. 253, at 267; Nuclear Tests Case (New Zealand v. France) [1974] I.C.J. 457, at 472.

23. Fisheries Case (U.K. v. Norway) [1951] I.C.J. 116, at 138; see also the Nuclear Tests cases, where it was observed that, "When states make statements by which their freedom of action is to be limited, a restrictive interpretation is called for." Nuclear Tests cases, supra note 22, at 267, 473; and note that Schwarzenberger stated that it is even more justifiable in the case of a unilateral act to choose, in case of doubt, an interpretation which imposes the lesser restriction on the freedom of subjects of international law. Schwarzenberger, supra note 18, at 558.

II. THE BILATERAL AGREEMENT PRECLUDES THE USE OF PANDORIAN-ORIGIN MATERIALS IN CONNECTION WITH ANY NUCLEAR EXPLOSIVE DEVICE, "PEACEFUL" OR NOT.

A. Art. X(A)(2) of the bilateral agreement precludes such use of Pandorian-origin material.

Art. X(A)(2), by specifically prohibiting the use of material for any military purpose, must impliedly be taken to prohibit the use of atomic energy for "peaceful" nuclear explosions inasmuch as there is no essential difference between the technology required for "peaceful" and military nuclear explosions.²⁴

B. This interpretation is confirmed by the 1971 note.

"Interpretation by one of the contracting states cannot be wholly indifferent for the purpose of the elucidation of the correct meaning of a treaty ...".²⁵ Certainly, the 1971 note must be taken as an accurate representation of Pandora's reasonable understanding of the bilateral agreement.

C. In any event, Shangri-La acquiesced in Pandora's interpretation of Art. X(A)(2).

Acquiescence is a general principle accepted by international law as forming part of the law of nations.²⁶ It takes the form of silence or absence

24. W. Epstein, supra note 12, at 221.

25. G. Harastzi, supra note 13, at 76; see also the Corfu Channel (Merits) Case [1949] I.C.J. 4, at 25, where this Court considered the subsequent attitude of the parties in determining their mutual intentions; and see Lord McNair, supra note 5, at 424.

26. North Sea Continental Shelf Cases [1969] I.C.J. 3, at 127.

of protest in circumstances which generally call for a positive reaction
signifying a rejection.²⁷ There is general agreement among publicists that
"when one party to a treaty discovers that other parties to a treaty are
placing upon it an interpretation which in the opinion of the former it
cannot bear ... the former party should at once notify its dissent ..."²⁸

Shangri-La's failure properly to communicate any disagreement it may have had
with the content of the note at the time of its receipt must estop it from
disputing the same now.

In any event, even had Shangri-La promptly repudiated the content of the
note, such repudiation is not conclusive upon this Court, here interpreting
the treaty.²⁹

III. PANDORA IS JUSTIFIED IN MAKING FURTHER FUEL SHIPMENTS TO SHANGRI-LA CON-
DITIONAL ON COMPLIANCE WITH THE TWO REQUIREMENTS STATED IN THE DIPLOMATIC
NOTE OF SEPTEMBER 20, 1976.

A. Pandora's action is justified by the express provisions of the two
agreements.

1. The imposition of conditions on further fuel transfers is
sanctioned by the bilateral agreement.

Art. VII of the bilateral agreement makes transfers of nuclear fuel
subject to such "terms and conditions as may be agreed". This phraseology

27. MacGibbon, "The Scope of Acquiescence in International Law", 31 B.Y.B.I.L.
143 (1953).

28. Lord McNair, supra note 5, at 429; see also MacGibbon, supra note 27, at
146, where it is stated that, "The failure of one party to protest
against acts of the other party in which a particular interpretation of
the terms of the treaty is clearly asserted affords cogent evidence of
the understanding of the parties of their respective rights and obligations
under the treaty;" and see the Fisheries Case, supra note 23, at 138.

29. Lord McNair, supra note 5, at 431.

clearly envisions the periodical readjustment of these "terms and conditions" if such a need arises, and makes continued shipments subject to agreement on such "terms and conditions". This interpretation is reinforced by the permissive (rather than mandatory) nature of the provision for transfer: "uranium ... may be transferred" (emphasis added), subject to agreement on terms. Thus, in the absence of agreement by Shangri-La on the two conditions, Pandora is not obliged to continue nuclear transfers.

2. Pandora is justified in demanding universal application of safeguards in Shangri-La.

It has been established that Pandora's right to assess safeguards did not pass unqualified to the I.A.E.A. Pandora is justified in demanding that safeguards be extended to all of Shangri-La's nuclear activities so as to ensure compliance with the "military purpose" guarantees in Art. X of the bilateral
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agreement.

3. Pandora is justified in demanding adherence to the interpretation in its diplomatic note of January 1971.

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As shown above, the bilateral agreement precludes the use of Pandorian-origin material in connection with any nuclear explosive device, "peaceful" or otherwise.

B. In the alternative, Pandora's action is justified by the terms of the agreements as interpreted in light of customary law.

1. Treaty provisions must be interpreted in light of general international law existing at the time the treaty was concluded.

"In many a case of treaty interpretation the effect of the treaty will depend on our view as to the position of customary international law on the

30. See argument at section II of this memorial.

31. See argument at section I. B of this memorial.

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question." Under the Statute of this Court, where there is ambiguity in the
interpretation of a provision, i.e., where no rule is "expressly recognized by
the contesting states", recourse must be had to customary law. 33

2. The Non-Proliferation Treaty was a treaty declaratory of
customary law. 34

Generalizable provisions from multilateral treaties may be accepted as
valid evidence of customary law. 35 Express references in the preamble to the
NPT, 36 as well as acceptance of the provisions of the NPT as binding by the
vast majority of states, 37 indicate that it was meant to "express and define
for more accurate reference the principles of law already existing." 38 This
view is confirmed by the previous history of international law relating to
nuclear non-proliferation. 39

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32. H. Lauterpacht, supra note 13, at 28; see also The Kronpins Gustaf Adolf
[1931-32] Ann. Dig., Case No. 205 and Vienna Convention on the Law of
Treaties, Art. 31(3)(c), supra note 4.
33. Art. 38.
34. U.N. Doc. A/7016/Add. 1, hereinafter referred to as the NPT..
35. Baxter, "Multilateral Treaties as Evidence of Customary Law", 41 B.Y.B.I.L.
275, at 298 (1966).
36. Supra note 34, paragraphs four, five and seven.
37. The final vote was 95 for, 4 against and 21 abstaining; the only sub-
stantive objection voiced against the major provisions was that they did
not extend far enough in ensuring non-proliferation. Y.B.U.N., 1968, at
9-11.
38. Judgment of the International Military Tribunal (Nuremberg) for the Trial
of German Major War Criminals, September 30 and October 1, 1946, at 40.
39. W. Epstein, supra note 12, at 46; for examples of international initiatives
adopting the rules embodied in Arts. I-III of the NPT, see Firmage, "A
Treaty on the Non-Proliferation of Nuclear Weapons", 63 A.J.I.L. 711,
at 713-21 (1969) and Y.B.U.N., 1965, at 72.

3. The NPT sanctioned the imposition of the two conditions announced by Pandora.

If the express bilateral treaty provisions did not ban all nuclear explosions and permit the imposition of safeguards on all facilities within Shangri-La, then the treaty was silent on these points. This void must be filled by the relevant customary law, as codified by the NPT.⁴⁰ Clearly, the latter treaty dictates compliance with the conditions laid down by Pandora. Thus, Shangri-La is required by customary law to comply with the conditions imposed by Pandora.

C. If the bilateral agreement is inconsistent with the NPT, the latter must prevail.

1. The NPT must prevail as lex superior over the bilateral agreement.

(a) The lex prior principle is only one of several rules to be applied in deciding the priority of inconsistent treaties.

In general, the latter of two treaties entered into by a state is not rendered invalid by reason only of a conflict between their provisions.⁴¹ The lex prior principle "is an intelligible criterion, but ... it has to be weighed against, and reconciled with, other principles which may be relevant".⁴² Among these principles is the hierarchic rule of lex superior, which accords priority to certain multilateral instruments which constitute quasi-legislative enactments of the world community.⁴³

40. Arts. I and II deal with nuclear explosions, Art. III with safeguards.

41. Oscar Chinm Case [1934] P.C.I.J., ser. A/B, No. 63; G. Schwarzenberger, supra note 18, at 472.

42. Jenks, "The Conflict of Law-Making Treaties", 30 B.Y.B.I.L. 401, at 445 (1953).

43. Dahl, "The Application of Successive Treaties Dealing with the Same Subject-Matter", 17 Indian Y.B. of Int'l Affairs 279 (1974).

(b) The lex superior principle has been accepted in international law.

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Both this Court and the Vienna Convention have recognized the superior status which is accorded to the U.N. Charter by international law. That this status is not exclusive to the Charter can be seen from the travaux préparatoires of the Vienna Convention and from several instances of quasi-legislation.

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(c) The NPT satisfies the test of lex superior.

It is submitted that the true test of lex superior is that international law accords priority to those treaties "partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community or which must be deemed to have been concluded in the public interest."

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The NPT satisfies both branches of this test. It represents an international consensus recognizing the urgent need to take measures to prevent

44. Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations [1949] I.C.J. 185.

45. Supra note 4, Art. 30.

46. Reports on the Law of Treaties by Lauterpacht, [1953] 2 Y.B. Int'l L. Comm'n 156, U.N. Doc. A/CN.4/63; Lauterpacht, [1954] 2 Y.B. Int'l L. Comm'n 133, U.N. Doc. A/CN.4/87; Fitzmaurice, [1958] 2 Y.B. Int'l L. Comm'n 27, 41, U.N. Doc. A/CN.4/115; Waldock, [1963] 2 Y.B. Int'l L. Comm'n 53, U.N. Doc. A/CN.4/156 and Add. 1-3; see also Dehaussy, "Le Problème de la classification des Traités", in Recueil en Hommage à Paul Guggenheim 305 (1968), at 324.

47. Lord McNair supra note 5, at 257-71.

48. Lauterpacht (1953), supra note 46, at 156.

nuclear war which would affect the entire world community; it therefore "must be deemed to have been concluded in the public interest". Furthermore, to accord such a status to the NPT would not be "such as to interfere seriously with the interests of [Shangri-La] or seriously to impair the original purpose of the treaty."⁴⁹

2. Alternatively, the bilateral agreement is rendered void by the jus cogens character of the NPT.

(a) International law recognizes the existence of certain rules possessing the character of jus cogens.

Art. 64 of the Vienna Convention states:

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm, becomes void and terminates.⁵⁰

In drafting this provision, the International Law Commission recognized the unanimity among states regarding "the existence of rules of jus cogens in the international law of today".⁵¹ The concept "derives from, and is deeply embedded in, particular systems of private law", in which "certain types of contract are, by their very nature, injurious to society and therefore contrary to public policy".⁵² "In both East and West, writers on international

49. Id. at 156.

50. Supra note 4.

51. Int'l L. Comm'n Report, [1966] 2 Y.B. Int'l L. Comm'n 247, U.N. Doc. A/6309/Rev. 1; see also Suy, "The Concept of Jus Cogens in Public International Law", in Papers and Proceedings of the Lagonissi Conference on International Law 68 (1967), hereinafter cited as Lagonissi Conference Records: "There are many cases where states have had recourse to ... jus cogens in contesting the validity of an international agreement or position"; for examples, see Schwelb, "Some Aspects of International Jus Cogens as Formulated by the I.L.C.", 61 A.J.I.L. 948 (1967).

52. I. Sinclair, The Vienna Convention on the Law of Treaties 110 (1973); as an example of a jus cogens provision in domestic law, see Art. 6 of the Code Napoléon.

law are virtually unanimous in their acceptance of the idea of an international
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jus cogens". Finally, the concept has been applied by the World Court (in
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both majority and individual opinions) and by other international
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tribunals.

(b) The substantive provisions of the NPT represent jus
cogens principles.

"There is no simple criterion by which to identify a general rule of inter-
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national law as having the character of jus cogens". Nevertheless, it is
recognized that within this "irreducible minimum of public international
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law" are those rules which represent elaborations of the general goal of
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maintaining "international peace and security" under the system of the U.N.
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Charter.

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53. Suy, Lagonissi Conference Records, supra note 51, at 48; see also I. Sinclair, supra note 52, who asserts at p. 114 that Suy's conclusion is justified by the "preponderant body of opinion among publicists."
54. Reservations to the Genocide Convention Case [1951] I.C.J. 23-24.
55. See, for example, Judge Shucking in Wimbledon [1923] P.C.I.J., ser. A, No. 1, at 47 and in Oscar Chinn Case, supra note 41, at 149-50; Judge Moreno Quintana in Guardianship of Infants Case [1958] I.C.J. 106-07.
56. 10 Law Reports of Trials of War Criminals 141 (1946).
57. Int'l. L. Comm'n Report, supra note 51, at 247-8.
58. Abi-Saab, in Lagonissi Conference Records, supra note 51, at 9.
59. U.N. Charter, Arts. 1 and 2.
60. See generally Lagonissi Conference Records, supra note 51, at 13-14, 73, 82, 111; Dagenais, "Atomic Safeguards and Treaty Deterrence", 8 Cornell Int'l L.J. 211, at 226 (1975); cf. Magaresevic, Lagonissi Conference Records, supra note 51, at 98: "Jus cogens is a dynamic concept ... which [can] serve as a vehicle for peaceful change in international relations;" one of its functions therein is "to generalize the rule ... in Art. 103 of the Charter."

It is submitted that the NPT represents rules of jus cogens formulated by the nations of the world in fulfillment of their Charter obligation to "maintain international peace and security".⁶¹ This obligation is specifically mentioned in the final preambular paragraph of the NPT, and it is clear that the primary objective of this treaty is to prevent "the devastation that would be visited upon mankind by a nuclear war ... and to avert the danger of such a war".⁶² Thus, any treaty inconsistent with the "measures [taken] to safeguard the security of peoples"⁶³ must be rendered void⁶⁴ as conflicting with the peremptory norm of international law embodied in the Charter.

D. In the alternative, Pandora may require adherence by Shangri-La to the conditions established by the Pandorian legislature.

1. The subject-matter of the bilateral agreement indicates that it is to be governed by municipal law.

While it is true that most agreements between states are subject only to international law, "there are inter-state arrangements ... which are 'commercialized', i.e., ... brought under the influence of some municipal system of law."⁶⁵ Either expressly⁶⁶ or by implication, the states are free

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61. U.N. Charter, Art. 1; see also Amerisinghe in Lagonissi Conference Records, supra note 51, at 107, where he specifically contemplates a treaty designed to prevent the threat of nuclear war in his discussion of the peace and security criterion of jus cogens rules.
62. Second preambular paragraph, supra note 34; see also Dagenais, supra note 60, at 226: "Jus cogens 'aims at the protection of the interests of international society as a whole rather than those of individual states', and a treaty which only attempts to ensure the peaceful development of atomic energy is furthering that aim ..."
63. Second preambular paragraph of the NPT, supra note 34.
64. U.N. Charter, Art. 103.
65. Mann, "The Law Governing State Contracts", 21 B.Y.B.I.L. 11 (1944).
66. See, for example, Art. 12 of the Loan Agreement entered into between Denmark and Malawi, (1966) 586 U.N.T.S. 3.

to agree upon the application of municipal law.⁶⁷

The bilateral agreement provides for the supply of nuclear fuel to Shangri-La by Pandorian firms engaged in a profitable commercial activity. It thus partakes of the nature of a commercial contract and would normally be subject to domestic law.⁶⁸

*2. The provisions of the bilateral agreement confirm that it is to be governed by municipal law.

Art. II of the bilateral agreement expressly makes cooperation under the agreement "subject to ... the applicable laws, regulations and licence requirements in force in [Pandora and Shangri-La]." It is not restricted to the law as fixed at the time when the agreement entered into force,⁶⁹ and its plain meaning makes the supply of fuel subject to Pandorian law.

This interpretation is confirmed by Art. VII, whose permissive (rather than mandatory)⁷⁰ nature emphasizes that performance of the commercial transaction depends on the ability of the private firms to make shipments. Thus, as a pre-requisite to further nuclear shipments, Shangri-La must comply with the Pandorian legislation of September 1976.

67. F. A. Mann, Studies in International Law 254 (1973); see also Mann, supra note 65, at 27-8, where he notes that inferences are to be drawn from the nature of the transaction and the wording of the agreement; for an example, see H. Lauterpacht, Private Law Sources and Analogies of International Law 184 (1927).

68. It follows that Art. 27 of the Vienna Convention, dealing with the consequences of a conflict between municipal and international law, is inapplicable: Art. 2 of the Convention restricts its application to international agreements "governed by international law."

69. Cf. Mann, supra note 65, at 23, where in respect of such commercial treaties he denies the proposition that "a state cannot, by the exercise of its legislative power, modify its international engagements".

70. See argument at section III.A.1. of this memorial.

IV. IN THE ALTERNATIVE, THE BILATERAL AGREEMENT IS RENDERED INOPERATIVE BY VIRTUE OF THE CLAUSULA REBUS SIC STANTIBUS.

A. The clausula is an acknowledged principle of international law.

1. The clausula is enshrined in conventional international law.

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The clausula was codified in 1928 by the Havana Convention on Treaties and most recently by the Vienna Convention, which provides in Art. 62:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.⁷²

2. The clausula is firmly entrenched in customary international law.

"This principle, and the conditions and exceptions to which it is subject, have been embodied in Art. 62 of the Vienna Convention ... which may in many respects be considered as a codification of existing customary law..."⁷³

The doctrine has frequently been invoked in state practice,⁷⁴ and is in many respects "as necessary for international law and international intercourse as the very rule pacta sunt servanda."⁷⁵

71. 22 A.J.I.L. Supp. 39 (1928), Art. 10.

72. Supra note 4.

73. Fisheries Jurisdiction Case [1973] I.C.J. 3, at 18.

74. Baker, "The Obligatory Jurisdiction of the P.C.I.J.", 6 B.Y.B.I.L. 100 (1925); several examples are cited in Lissitzyn, "Treaties and Changed Circumstances (Rebus sic stantibus)", 61 A.J.I.L. 895 (1967).

75. 1 L. Oppenheim, supra note 5, at 844.

3. The clausula has received the sanction of judicial decisions.

The World Court has considered the clausula on several occasions.⁷⁶ In recent cases it has been most categorical in its acceptance of the doctrine:

International law admits that a fundamental change in the circumstances which determine the parties to accept the treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty.⁷⁷

4. The clausula has been widely accepted by publicists.

"Introduite de bonne heure dans la doctrine, cette théorie est acceptée aujourd'hui par la plupart des auteurs."⁷⁸

B. The bilateral agreement should be terminated by virtue of the clausula, as formulated in Art. 62 of the Vienna Convention.

1. A regional political situation free of nuclear weapons capability was an essential basis of the consent embodied in the bilateral agreement.

"When evidence as to the parties' intentions and expectations specifically related to the new situation is lacking ... the task of the interpreter is to decide what would have been the reasonable expectations of the parties had they foreseen the new situation. This decision must be made in the light of the purposes and objectives of the treaty".⁷⁹ It is clear that the main objective of the bilateral agreement was the transfer of nuclear facilities and materials under conditions which would assume that they were "not used to further any military purpose". (Art. I(9)).

76. See, for example, Free Zones Case [1932] P.C.I.J. ser A/B, No. 46, at 156-58; Advisory Opinion on Namibia [1971] I.C.J. 16, at 47.

77. Fisheries Jurisdiction Case, supra note 73, at 18.

78. Ch. Rousseau, Droit International Public Approfondi 73 (1961); Int'l L. Comm'n Report, supra note 51, at 256; H. Lauterpacht, supra note 67, at 46.

79. Lissitzyn, supra note 74, at 896.

Given that it was a non-nuclear Asia into which the materials and facilities were to be sent, it is not surprising that deterrence analysis⁸⁰ (which inevitably dominates the negotiation of such treaties) dictated safeguards which are no more stringent than the "outmoded American, Canadian and international ... systems"⁸¹ of the 1960's. Even "in the heady atmosphere of 1968, ... it was felt that the danger of nuclear proliferation had been put to rest."⁸² Thus, the Indian nuclear explosion of 1974, and the delicate power balance which resulted from it, were not foreseen by Pandora and Shangri-La;⁸³ indeed, their absence was an underlying basis of the treaty.

2. The effect of the changed nuclear power balance in Shangri-La's region was to impose excessively burdensome obligations upon Pandora.

Art. 62(1)(b) of the Vienna Convention may be applied to put "an end to obligations which come to be felt so burdensome that attempts to exact their performance threaten general stability and peace."⁸⁴

80. M. Willrich, Non-Proliferation Treaty: Framework for Nuclear Arms Control 26 (1969).

81. Dagenais, supra note 60, at 217.

82. W. Epstein, supra note 12, at 229.

83. Not until 1974 was it thought that "a relatively poor developing country could use atomic fission for an underground explosion ... that had definite potential for warlike purposes": W. Epstein, supra note 12, at 231.

84. Lissitzyn, supra note 74, at 897; see also Williams, "The Permanence of Treaties", 22 A.J.I.L. 89, at 99 (1928), interpreting a comparable provision of the League of Nations Charter, and Stein and Carreau, "Law and Peaceful Change in a Subsystem", 62 A.J.I.L. 577, at 620 (1968), favouring application of the clausula "in the interest of justice and the maintenance of peace."

"The Indian nuclear explosion changed all the rules of nuclear non-proliferation and nuclear arms control, as well as the structure of international relations." ⁸⁵ Amidst concern in Shangri-La over threats to its security, the minority party urged the development of nuclear explosives. Shangri-La's refusal to join the NPT has been based on the status of China and India as non-parties to that treaty. "The fact is that each time a country goes nuclear, it increases the incentives or pressures for its neighbours ... ⁸⁶ to do so." In view of the similarity between the safeguards in the ⁸⁷ bilateral treaty and those in the Canada-India treaty which permitted this dangerous nuclear situation it would be a clear threat to the "general ⁸⁸ stability and peace", "tantamount to abandoning the control of proliferation", ⁸⁹ to compel the continuance of nuclear transfers to Shangri-La under the bilateral treaty.

V. SHANGRI-LA'S MATERIAL BREACH OF THE BILATERAL AGREEMENT JUSTIFIED THE TERMINATION OF PANDORIAN FUEL SHIPMENTS.

A. Shangri-La's rejection of the conditions announced on September 20, 1976 constituted a breach of its obligations to Pandora.

It has been shown that Shangri-La was bound under international law to ⁹⁰ adhere to the conditions placed on further fuel shipments by Shangri-La. Its failure to do so represents a breach of its obligations to Pandora.

85. W. Epstein, supra note 12, at 221.

86. Id. at 231.

87. [1963] Can. T.S. No. 10; 529 U.N.T.S. 45 (No. 7655).

88. See text to note 84, supra.

89. Bull, "Rethinking Non-Proliferation", 51 Int'l Affairs 175, at 186 (1975).

90. See argument at section III of this memorial.

B. Shangri-La's conduct constituted a material breach.

It is a principle of international law that "material breach of a treaty ... consists in ... the violation of a provision essential to the accomplishment of the object or purpose of the treaty." ⁹¹ This criterion ⁹² has been accepted by state practice, ⁹³ by judicial decisions in international courts ⁹⁴ and by the vast majority of publicists.

Shangri-La's refusal to abide by the conditions enunciated by Pandora represents a violation of Art. II, which committed Shangri-La "to cooperate with [Pandora] in the achievement of the uses of atomic energy for peaceful purposes." Without such cooperation, fuel cannot safely be transferred to Shangri-La, and thus the object and purpose of the treaty is defeated.

C. Pandora was entitled to suspend fuel shipments.

"That a right of unilateral denunciation or termination of a treaty on the grounds of prior material breach by another party exists is attested to by jurists and confirmed by State practice." ⁹⁵ The Vienna Convention provides that:

A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.⁹⁶

91. Vienna Convention, Art. 60(3)(b), supra note 4.

92. D. W. Greig, International Law 387 (1970).

93. Briggs, "Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice", 68 A.J.I.L. 51, at 53 (1974); see also Advisory Opinion on Namibia, supra note 76, at 16.

94. Briggs, supra note 93, at 52-53.

95. I. Sinclair, supra note 52, at 103; see generally, B.P. Sinha, Unilateral Denunciation of Treaty Because of Prior Violation by Other Party (1966).

96. Art. 60(1), supra note 4.

Thus, Shangri-La's material breach gave Pandora the right to suspend fuel shipments. Pandora was therefore not in breach of the bilateral agreement.

D. In the alternative, Pandora's obligations under the bilateral agreement were extinguished under international law.

Even if Pandora's refusal to continue fuel shipments constituted a material breach of the terms of bilateral agreement, the latter were rendered void by the emergence of jus cogens⁹⁷ or lex superior⁹⁸ embodied in the NPT,⁹⁹ or alternatively, by virtue of a fundamental change of circumstances.

VI. PANDORA IS ENTITLED TO RELIEF

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

At international law, the breach of a conventional¹⁰⁰ or customary¹⁰¹ engagement involves an obligation to make reparation in an adequate form.¹⁰² In the case of a conventional obligation, there is no need for this to be stated in the convention itself.¹⁰³

97. See argument at section III.C.2 of this memorial.

98. See argument at section III.C.1 of this memorial.

99. See argument at section IV of this memorial.

100. 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 fulfill a treaty obligation involves international responsibility". [1950] I.C.J. 228.

101. Corfu Channel (Merits) Case, supra note 25, at 23-26.

102. Chorzow Factory cases, supra note 100.

103. Chorzow Factory (Jurisdiction) Case, supra note 100.

There has been as yet no material damage to Pandora but Pandora has
suffered a "moral injury" ¹⁰⁴ in the affront to its sovereignty by Shangri-La's
refusal to implement in good faith the provisions of the bilateral agreement.

B. Pandora 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." ¹⁰⁵

The World Court decided in the Certain German Interests in Polish
Upper Silesia Case ¹⁰⁶ and affirmed in the Chorzow Factory (Interpretation)
Case ¹⁰⁷ 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. ¹⁰⁸ Indeed, specific performance
would appear to be "the normal method of giving effect to a declaratory
judgment." ¹⁰⁹

104. W. Friedmann, supra note 11, at 843.

105. Chorzow Factory (Merits) Case, supra note 100, at 41: see also I. Vasarhelyi, Restitution in International Law 10, 74 (1964).

106. [1926] P.C.I.J., ser. A, No. 7, at 19.

107. [1927] P.C.I.J., ser. A, No. 13, at 20-21; see also Lord McNair, supra note 5, at 574.

108. See the Free Zone Case, supra note 76, at 172.

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

2. Pandora is entitled to such relief.


Shangri-La has placed itself in flagrant breach of conventional and customary international law by refusing to accept I.A.E.A. safeguards on all its nuclear facilities, by insisting on an alleged right to reprocess Pandorian-origin fuel and by asserting that the bilateral agreement sanctions "peaceful" nuclear explosions. Only specific performance of the bilateral agreement, rather than monetary compensation, can prevent further injury to Pandora.

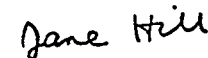
CONCLUSION

It is respectfully requested that this honourable Court:

1. Grant Pandora declarations that the bilateral agreement authorizes Pandora to demand the imposition of I.A.E.A. safeguards on all Shangri-La's nuclear activities; that it authorizes Pandora unilaterally to refuse reprocessing approval; and that it precludes the use of Pandorian-origin material for any nuclear explosive device, "peaceful" or not.
2. Order specific performance of the bilateral agreement as so interpreted.
3. In the alternative, in accordance with the doctrine of rebus sic stantibus or of jus cogens, Grant Pandora a declaration that the bilateral and trilateral agreements are null and void and Order the return of materials referred to in Art. XI(b)(ii) of the bilateral agreement.
4. Grant Pandora such further and other relief as this honourable Court may deem just.

All of which is respectfully submitted,


Raj Anand


Jane Hill

Agents for the United Republic of Pandora.