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NUCLEAR PROLIFERATION: BEST MEMORIALS, NEW ENGLAND REGION, 1977 PHILIP C. JESSUP MOOT COURT COMPETITION*

The ostensibly incongruous goals of promoting peaceful nuclear technology while simultaneously curtailing the proliferation of nuclear weapons has resulted in often insurmountable international tensions surrounding the transfer of nuclear technology. The 1977 Jessup Problem poses just such a situation, in which two fictitious countries engaged in nuclear cooperation have reached an impasse as to their respective rights and obligations regarding the expansion of an incipient nuclear industry. The following memorials explore the conflicting interpretations accorded international agreements as they exist between a nuclear weapon State and a non-nuclear power.

STATEMENT OF FACTS

In 1963, the United Republic of Pandora, one of the world's leading nuclear powers, and the Kingdom of Shangri-La, a small country between India and China, entered into a bilateral cooperation agreement in which Pandora agreed to assist Shangri-La in the development of a peaceful nuclear energy industry. In exchange, Shangri-La agreed to safeguards, designed to ensure against the proliferation of nuclear weapons, on all materials and equipment transferred from Pandora to Shangri-La. In 1964, contracts were executed between Shangri-La and private Pandorian corporations for the transfer to Shangri-La of two power reactors. In addition, Pandorian corporations agreed to long-term fixed-commitment fuel supply contracts. In 1968, a trilateral agreement between Pandora, Shangri-La, and the International Atomic Energy Agency [hereinafter referred to as IAEA] was executed in which Pandora's right to ensure effective safeguards on material shipped to Shangri-La was transferred to the IAEA. Both Pandora and Shangri-La are members of the IAEA.

Pandora became a party to the Treaty on Non-Proliferation of Nuclear Weapons [hereinafter referred to as NPT] on March 5, 1970. In January 1971, Pandora informed Shangri-La by means of a diplomatic note that "Peaceful Nuclear Explosions"

* These briefs were submitted to the Jessup Competition by the Brooklyn Law School participants and were awarded the New England Regional Prize for Best Memorials. The introductory sections have been modified and combined; the arguments have been reproduced in their entirety with minor editorial changes.

[hereinafter referred to as PNE's] are inconsistent with Pandora's interpretation of Shangri-La's obligations under the Bilateral Agreement and that as a signatory to the NPT, Pandora would be required to reject any contrary interpretation. Shangri-La never formally refuted Pandora's interpretation of the Bilateral Agreement. Upon China's nuclear test in 1974, Shangri-La's Prime Minister stated that Shangri-La would not preclude any of its nuclear options.

Shangri-La informed Pandora in 1971 that it had decided to construct a small, wholly indigenous reprocessing plant. In response, Pandora argued that construction of the reprocessing plant could not be justified economically, and that the plant would create great proliferation dangers. In July 1976, Shangri-La completed construction of the reprocessing plant and requested permission to reprocess Pandorian-origin fuel under IAEA safeguards.

On August 20, 1976, the President of Pandora stated in response to a question at a televised press conference that "[w]e have no doubts about the integrity of the Kingdom of Shangri-La. Shangri-La has committed itself to apply safeguards to the reprocessing plant, and we have determined that they can be effectively applied. We have no other legal option, therefore, but to approve reprocessing of fuel supplied by the United Republic of Pandora."

On September 20, 1976, Pandora informed Shangri-La, by means of a diplomatic note, that it would not approve use of Shangri-La's reprocessing plant for the reprocessing of Pandorian-origin fuel. Pandora also stated that all fuel shipments to Shangri-La would be terminated unless Shangri-La accepted IAEA safeguards on all its nuclear activities and agreed to accept the interpretation of the obligations between the parties in Pandora's 1971 diplomatic note. Shangri-La rejected all of Pandora's conditions and fuel shipments were terminated.

The parties submitted the dispute to the International Court of Justice in an effort to establish a basis for continued nuclear cooperation.

MEMORIAL FOR SHANGRI-LA: ARGUMENT

I. PANDORA HAS NO RIGHT UNDER THE TERMS OF THE BILATERAL

AGREEMENT TO PREVENT SHANGRI-LA FROM REPROCESSING
PANDORIAN-ORIGIN FUEL.

A. *Pandora must approve reprocessing in Shangri-La if it determines in good faith that the safeguard provisions in Article XI(B)(2) can be effectively applied.*

Pandora cannot arbitrarily deny Shangri-La the right to reprocess Pandorian-origin fuel because Article VIII(F) of the Bilateral Agreement requires Pandora to find reprocessing "acceptable" if it determines that the safeguard provisions of Article XI(B)(2) can be effectively applied. This is the only conclusion that follows logically from the use of the treaty interpretation provisions of the Vienna Convention on the Law of Treaties¹ [hereinafter referred to as Vienna Convention], which is a reflection of customary international law.²

Article VIII(F) of the Bilateral Agreement states that "reprocessing of alteration shall be performed in facilities acceptable to both parties upon a joint determination that the provisions of Article XI may be effectively applied." The "ordinary meaning"³ of these words is that acceptability is contingent solely upon the effective application of safeguards listed in Article XI.

Article XI(A) defines the spirit in which the safeguards are to be administered. The exact nature of the safeguards which must be applied are indicated in Article XI(B)(2). Application of the legal principle *expressio unius est exclusio alterius*⁴ requires that the safeguard provisions listed in Article XI(B)(2) be deemed exclusive. The listing of specific rights in this article excludes, by implication, those not listed. Since the parties obviously made a substantial effort to list the specific safeguard rights of the parties in Article XI(B)(2), it is logical to assume that they listed all the safeguards they thought were necessary.

This interpretation is supported by the interplay of Article VIII(F) and Article XI, which indicates that the construction of

1. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27 [hereinafter cited as Vienna Convention]. See also S. ROSENNE, *THE LAW OF TREATIES: GUIDE TO LEGISLATIVE HISTORY OF VIENNA CONVENTION* (1970).

2. Stipulation of Record, Correction No. 13 (Letter of Dec. 3, 1976). See Report of the International Law Commission on its Eighteenth Session, 21 U.N. Doc. A/6309/Rev. 1, at 52 (1966); Advisory Opinion on the Employment of Women During the Night, [1932] P.C.I.J. ser. A/B, No. 50, at 365, 380.

3. Vienna Convention, art. 31(1).

4. See generally A. McNAIR, *THE LAW OF TREATIES* (1961).

a reprocessing plant in Shangri-La is the type of activity the parties contemplated when they entered into the Bilateral Agreement. Article XI concerns only the safeguard rights of Pandora as to nuclear facilities in Shangri-La. Article VIII(F) states that for reprocessing to be "acceptable" the provisions of Article XI must be effectively applied. Therefore, the parties must have agreed that, at some point, there would be a reprocessing plant in Shangri-La. Otherwise the reference to Article XI in Article VIII(F) would be superfluous.

This interpretation is supported by the "object and purpose" of the agreement and the "context" of the clauses in question.⁵ Article II of the Bilateral Agreement states, "the Parties shall cooperate with each other in the achievement of the uses of atomic energy for peaceful purposes." Article XI states that the parties have a common interest in assuring that nuclear material is used only for "civil purposes." These clauses, taken together, indicate that this treaty has two purposes: nuclear cooperation for peaceful purposes, and the prevention of the proliferation of nuclear weapons. Both of these purposes are promoted by providing for reprocessing while providing for safeguards. The parties would not have planned the construction of a facility that did not promote the peaceful uses of nuclear energy, and the definition of safeguards in Article I(9) of the Bilateral Agreement indicates that the purpose of safeguards is to prevent the proliferation of nuclear weapons.

The ordinary meaning of the Bilateral Agreement is not ambiguous or obscure, nor does it lead to a result which is manifestly absurd or unreasonable. Consequently, no reason exists for the Court to refer to any of the contextual means of interpretation in Article 32 of the Vienna Convention, except perhaps to confirm the interpretation of the treaty urged by Shangri-La. However, even if the Court were, for any reason, to refer to contextual materials, it would find that the interpretation of the treaty urged by Shangri-La is the meaning the parties intended. Such a contextual approach to treaty interpretation does not mean that the text of the treaty should be ignored. Rather, the contextual material should be used to make the text clear.⁶

Shangri-La is aware that it is argued by some that small reprocessing plants must have a military purpose because they

5. Vienna Convention, art. 31(1).

6. See note 2 *supra*.

are not commercially justified. However, long-term energy security does not require immediate commercial justification. Leading authorities have pointed out that the demand for plutonium for research and for the next generation of power reactors has caused many States to construct reprocessing plants.⁷ There are a number of important possible peaceful uses of plutonium that are being researched. These include the development of breeder reactors and the use of plutonium to enrich uranium.⁸ Breeder reactor research is particularly important to a nation like Shangri-La which has no local source of fuel.⁹ A successful breeder reactor program could lead to energy self-sufficiency because breeder reactors produce more special fissionable material than they consume.¹⁰ That Shangri-La might successfully perfect, for example, breeder reactor technology is more than a speculative proposition; Shangri-La has outstanding nuclear scientists both at its Nuclear Physics Institute and its Eternal Light University.¹¹

What all these factors indicate in sum is that at the time of the signing of the Bilateral Agreement both parties recognized the principle that the fear of nuclear weapons proliferation should not be used as an excuse for preventing non-nuclear weapon States from developing sophisticated peaceful uses of nuclear energy.

B. *Pandora, through the unilateral declaration of its president, has irrevocably approved use of the reprocessing plant.*

On August 20, 1976, the President of Pandora conducted a news conference carried by nationwide television in Pandora. The Kingdom of Shangri-La submits that the unequivocal unilateral statement by the President of Pandora, quoted in the stipulation of record,¹² irrevocably bound Pandora to the following interpretation of its treaty obligations:

1. Pandora had determined that safeguards could be effectively applied; and
2. Therefore, Pandora had no legal option but to determine that the reprocessing plant is acceptable.

7. A. McNIGHT, *ATOMIC SAFEGUARDS: A STUDY IN INTERNATIONAL VERIFICATION* 198 (1971).

8. *Id.* at 194-95.

9. Stipulation of Record, Correction No. 3 (Letter of Dec. 3, 1976).

10. W. EPSTEIN, *THE LAST CHANCE* 38 (1976).

11. Stipulation of Record at 1.

12. *Id.* at 2-3.

This is the precise interpretation of Pandora's treaty obligations urged in "A" above.

International law has long recognized that a nation may bind itself by means of unilateral declarations.¹³ Recently, in the *Nuclear Test Cases (Australia v. France)*,¹⁴ the majority opinion of the Court stated:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. . . . An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of negotiations, is binding.¹⁵

At the press conference, the President of Pandora clearly stated that Pandora is committed to a particular legal proposition. The statement by the President of Pandora was publicly made. Therefore, the only issue before this Court is the intent with which the statement was made.

In the *Nuclear Test Cases*, the Court relied heavily on statements by the French President and Minister of Defense at press conferences in determining that France had bound itself to discontinue the testing of nuclear explosives in the South Pacific.¹⁶ The statements of the President of France in the *Nuclear Test Cases* and the statement of the President of Pandora in this case were made under similar circumstances. The legal consequences should be the same.

Shangri-La does not argue that all public statements by States should be legally binding. But, as Thomas Franck has pointed out,¹⁷ the intention of the speaker must in part be determined by the state of mind of the listener. At a nationally televised press conference of the President of one of the world's leading nuclear powers, the world is listening very carefully. Under these circumstances, the President of a nation, the prime spokesman of State policy, "must be taken to intend the natural consequences of his words just as actors are assumed, in law, to intend

13. I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 511-12 (1966); Garner, *The International Binding Force of Unilateral Oral Declarations*, 27 AM. J. INT'L L. 493 (1933). See Legal Status of Eastern Greenland, [1932] P.C.I.J., ser. A/B, No. 53, at 22.

14. [1974] I.C.J. 253.

15. *Id.* at 267.

16. *Id.* at 265-67.

17. Franck, *Word Made Law: The Decision of the ICJ in the Nuclear Test Cases*, 69 AM. J. INT'L L. 612 (1975).

the natural consequences of their acts."¹⁸

Based on the same principles of international law this Court used to determine that France was bound by the statements of its high officials, this Court should determine that Pandora is bound by the statement of its President.

C. If Pandora discontinues further nuclear cooperation because of Shangri-La's use of the reprocessing plant, Pandora will have violated international law by terminating the Bilateral Agreement without justification.

If Pandora discontinues further nuclear cooperation, it will have effectively terminated the Bilateral Agreement since Pandora's only obligation under the agreement is to cooperate.¹⁹ Such a termination, because of Shangri-La's use of the reprocessing plant, would clearly be arbitrary because the Bilateral Agreement does not give Pandora the right to terminate the treaty under the circumstances outlined in the stipulation of record.

This action would be arbitrary for two reasons. First, Pandora has failed to demonstrate why the safeguard provisions in Article XI(B)(2) cannot be effectively applied in light of the fact that Shangri-La has agreed to the imposition of IAEA safeguards on the facility. Second, through the unilateral declaration of its President, Pandora has irrevocably committed itself to the proposition that the safeguard provisions can be effectively applied and that Pandora has no legal option but to approve reprocessing. Any attempt to alter this position would violate international law.

International law does not permit termination of treaties without justification. Judge De Castro of this Court has stated: "The true position is that a declaration of termination or suspension must be objectively justified to be valid."²⁰ Dictum to the contrary in the *South West Africa Case*²¹ has been severely criticized.²² Herbert W. Briggs has pointed out that the Vienna Con-

18. *Id.* at 616-17.

19. Stipulation of Record, Annex A, art. II at 1.

20. Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, [1972] I.C.J. 46, 133n. (separate opinion of Judge De Castro) [hereinafter cited as ICAO Council, Judgment].

21. Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16 [hereinafter cited as South West Africa Case].

22. Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the*

vention rules on treaty interpretation, which the Court in the *South West Africa Case* said in many respects codify customary international law,²³ do not recognize a unilateral right to terminate treaties.²⁴ Briggs points out that, in cases since *South West Africa*, the Court has rejected claims of "a unilateral right of denunciation of jurisdictional treaties on grounds of breach, duress, changed conditions, or the nature of the treaty."²⁵

Pandora has failed to provide "objective justification"²⁶ for its threat to discontinue further nuclear cooperation. Pandora will therefore violate international law if it carries out its threat.

II. PANDORA HAD NO RIGHT TO TERMINATE FUEL SHIPMENTS TO SHANGRI-LA.

A. *The NPT does not prohibit Pandora from fulfilling its obligations to Shangri-La.*

The NPT does not apply to obligations incurred by its adherents before the entry into force of the Treaty. Article 28 of the Vienna Convention codified the principle of customary international law that "[u]nless a different intention appears from the treaty or is otherwise established its provisions do not bind a party . . . before the date of entry into force of the treaty."²⁷ Pandora became a party to the NPT on March 5, 1970, over five years after the contractual obligation to ship fuel to Shangri-La was incurred by private Pandorian corporations pursuant to the Bilateral Agreement.

These fuel contracts were provided for in Article VII of the Bilateral Agreement "[u]nder terms and conditions as may be agreed."²⁸ Pandora had the opportunity to set down any conditions it wished before allowing the fuel contracts to be signed pursuant to the terms of the Bilateral Agreement. After the present long-term fuel contracts expire, Pandora will again have the opportunity, consistent with the objects and purposes of the Agreement, to set any conditions it wishes on future fuel

International Court of Justice. 68 AM. J. INT'L L. 51 (1974).

23. *South West Africa Case*, *supra* note 21, at 47.

24. Briggs, *supra* note 22, at 56. See also Nahlik, *The Grounds of Invalidity and Termination of Treaties*, 65 AM. J. INT'L L. 736 (1971).

25. Briggs, *supra* note 22, at 67.

26. ICAO Council, Judgment, *supra* note 20, at 133n. (separate opinion of Judge De Castro).

27. Vienna Convention, art. 28.

28. Stipulation of Record, Annex A.

contracts. The United States, a major supplier nation, has almost identical terms in its bilateral agreements. When the United States decided to terminate fuel contracts under its bilateral agreements, it adopted a "fold-in" policy in which these agreements were honored but not renewed when they expired.²⁹ If this policy was considered as obligatory upon the United States, it is probative of the contention of Shangri-La that this practice is the only reasonable interpretation of the terms of the Bilateral Agreement. It is the position of Shangri-La that whatever restrictions Pandora is obligated to put on future fuel contracts, as a signatory to the NPT, the present fuel contracts are unaffected by the mandates of the NPT. This position is supported by leading publicists.

It is an accepted rule of treaty law that termination of a treaty, for whatever cause and in whatever way, can only affect its continuing obligations, and cannot *per se* affect or prejudice any right already definitively and finally accrued under it, or undo or reverse anything effected by any clause of an executed character in the treaty.³⁰

Subsequent State practice is an accepted method of determining the intent of the parties³¹ and Pandora has established, by its conduct, that the NPT was not, in Pandora's interpretation, meant to affect pre-existing contractual obligations, such as the shipping of fuel to Shangri-La.

In interpreting a treaty, the conduct or action of the parties thereto cannot be ignored. If all the parties to a treaty execute it, or permit its executing in a particular manner, that fact may reasonably be taken into account as indicative of the real intention of the parties or of the purpose which the instrument was designed to serve.³²

Pandora allowed its domestic corporations to commence the shipment of fuel to Shangri-La in 1971. Of critical importance is the fact that this was subsequent to Pandora becoming a party to the

29. M. WILLRICH, *NON-PROLIFERATION TREATY: FRAMEWORK FOR NUCLEAR ARMS CONTROL* 59-60 (1969).

30. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 269 (1957). See also A. McNAIR, *supra* note 4, at 532.

31. A. McNAIR, *supra* note 4, at 425.

32. Harvard Research in International Law, *Draft Convention of the Law of Treaties*, art. 19, 29 AM. J. INT'L L. 937, 966 (Supp. 1935).

NPT in 1970. This clearly indicates that at the time fuel shipments were commenced and up until the present dispute, Pandora interpreted the NPT as not precluding the fulfillment of the contractual obligation to Shangri-La.

B. *The rights of Shangri-La cannot be abrogated by a treaty that it is not bound to honor.*

Shangri-La is not a party nor has it consented to be bound by the NPT.

Treaties impose no legal obligations on non-parties, *pacta tertiis nec nocent nec prosunt*.³³ It is a well established principle of customary international law that when there are parties to an earlier agreement who were not included as signatories to a later agreement on the same subject matter, the obligations and rights of the States are governed by the earlier agreement.³⁴ Therefore, the rights and obligations of the respective States cannot be modified unless such modification is specified in the agreements in which both States have concurred, or the NPT has the force of customary international law.

1. The Bilateral Agreement contained no right of revision.

There is no right of modification in the Bilateral Agreement. Although Article II of the agreement dictates that cooperation is subject to "the applicable laws, regulations and license requirements in their respective countries," this cannot be reasonably interpreted as giving an absolute right of modification. This Article must be interpreted in light of the fact that the Bilateral Agreement was not self-executing. The signing of the Agreement did not obligate the parties to transfer any materials until the terms and conditions for the transfer of power reactors and fuel were agreed upon pursuant to Article VII. However, when Pandora agreed to the terms and conditions for the shipment of the power reactors and long-term fuel contracts, it made a determination that the requirements of its internal law were met and that the Agreement could be executed.

33. T. ELIAS, *THE MODERN LAW OF TREATIES* 55 (1974).

34. R. ROXBURGH, *INTERNATIONAL CONVENTIONS AND THIRD STATES* 19 (1917); G. SCHWARZENBERGER & E. BROWN, *A MANUAL OF INTERNATIONAL LAW* 130 (6th ed. 1976); Dahl, *Application of Successive Treaties Dealing with the Same Subject Matter*, 17 *INDIAN Y.B. INT'L AFFAIRS* 279 (1974).

Internal law cannot take precedence over an international agreement when the intent to do so is not clearly stated.

Where the conflict is between a rule of internal law and a rule of international law that has direct effects in the internal legal system, the rule established by the treaty must prevail; the preeminence of the treaty results from the very nature of international treaty law.³⁵

There is nothing in Article II to suggest that a continuous right to terminate existing obligations existed if the internal law of Pandora changed.

The principle of *in dubio mitius* dictates that if the intent of the parties is unclear "that meaning is to be preferred which is less onerous for the party assuming an obligation."³⁶ Shangri-La increased its dependence on the fuel from these reactors for its electrical power. Such action would be inconsistent with Shangri-La's national interests if at any time Pandora could stop fuel shipments. Pandora never informed Shangri-La of such an interpretation but let Shangri-La continue to become increasingly dependent on Pandorian fuel.

Pandora also violated its obligation to act in good faith. A signatory State from the time it signs an agreement is under a good faith obligation "not to do anything . . . which will diminish the value of any property or other rights" of another signatory.³⁷ The legislature of Pandora had sufficient knowledge that its action was in conflict with the obligations Pandora owed to Shangri-La by virtue of the Bilateral Agreement at the time the limiting legislation was enacted. It is clear that no State can be bound by any new obligations to which consent was refused, *ex consensu advenit vinculum*.³⁸ By attempting to impose new obligations on Shangri-La before fulfilling its existing contractual obligations, Pandora has clearly violated customary international law.

35. *Etat Belge v. S.A. "Fromagerie Franco-Suisse Le-Ski,"* [1971] *Journal des Tribunaux* 460, 473-74, 2 *COMM. MKT. REP.* (CCH) ¶ 8141, at 7620 (CCH trans.). See Note, *Conflicts Between Treaties and Subsequently Enacted Statutes in Belgium: Etat Belge v. S.A. "Fromagerie Franco-Suisse Le-Ski,"* 72 *MICH. L. REV.* 118, 124 (1975). See also I. SINCLAIR, *THE VIENNA CONVENTION AND THE LAW OF TREATIES* 89 (1973).

36. 1 L. OPPENHEIM, *INTERNATIONAL LAW* 953 (8th ed. H. Lauterpacht 1961); see Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 32 *BRIT. Y.B. INT'L L.* 176 (1957).

37. A. McNAIR, *supra* note 4, at 204.

38. E. HOYT, *THE UNANIMITY RULE IN THE REVISION OF TREATIES: A RE-EXAMINATION* 251 (1959).

2. The NPT is not customary international law.

The NPT fails to meet two criteria necessary for status as customary international law.³⁹ The criterion of practice over a considerable time derived from a feeling of obligation among nations has not been met by the signatories of the NPT. Aside from the fact it has only been in force a few years, nations who are signatories have the right to withdraw upon three months' notice.⁴⁰

The second criterion is that there must be general acquiescence in the practice by other States. Certainly this is not true in the region of the world where Shangri-La is situated. Almost all of the States of the Near East, such as the People's Republic of China, India, Pakistan, Bangladesh, and Burma have rejected the NPT as discriminatory and ineffectual.⁴¹

Shangri-La is in favor of a reduction of both the horizontal and vertical proliferation of nuclear weapons. At such time when the other States in the Near East are also willing to commit themselves to the principle of non-proliferation and when the nuclear States begin to take serious steps to reduce vertical proliferation, Shangri-La would be ready to recognize the NPT and adhere to its dictates. Shangri-La shares the view of the United States authority Morton A. Kaplan:

If the treaty is simply used as a pretext to forcibly prevent other nations from acquiring nuclear weapons still further damage to the bases of international law can be expected. In an era of nuclear development, a stable international legal system is needed. Some method of checking the spread of nuclear arms must be found which will, at the same time, preserve the integrity of the international system. The Nuclear Non-Proliferation Treaty appears to be misconceived for both these purposes and actually presents a threat to the prospects for a successful system of international law.⁴²

39. Hudson, *Working Paper on Art. 24 of the Statute of the International Law Commission*, [1950] 2 Y.B. INT'L L. COMM'N 24, 26; U.N. Doc. ACN.4/16 (1950).

40. Treaty on the Non-Proliferation of Nuclear Weapons, done July 1, 1968, art. X(1), [1970] 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 (effective Mar. 5, 1970).

41. O. MARWAH & A. SCHULZ, *NUCLEAR PROLIFERATION AND THE NEAR-NUCLEAR COUNTRIES* 335-36 (1975) (app. C).

42. Kaplan, *The Nuclear Non-Proliferation Treaty: Its Rationale, Prospects and Possible Impact on International Law*, 18 J. PUB. L. 1 (1969).

C. *Article XII(A) of the Bilateral Agreement does not give Pandora the right to terminate fuel shipments to Shangri-La.*

Any right that Pandora may have had to determine the adequacy of the safeguards imposed by the IAEA was eliminated by the Trilateral Agreement. Article XII(A) of the Bilateral Agreement provides that Pandora's Article XI safeguard rights will be "suspended" with the following proviso: "during the time and to the extent that the Government of the Republic of Pandora agrees that the need to exercise such rights is satisfied by a safeguards agreement to be negotiated between the Parties and the Agency." By signing the Trilateral Agreement, Pandora agreed, in Section 6, that its bilateral safeguard rights are "suspended." The proviso was not included in the Trilateral Agreement.

It is an accepted rule of international law that when States enter into two separate treaties on the same subject matter, the subsequent treaty controls as to any conflicts between the provisions of the two conflicting treaties.⁴³ Since a conflict exists between these two treaties regarding the viability of the proviso in the Bilateral Agreement, the later treaty, which eliminates the proviso, should prevail.

This interpretation is supported by Section 31 of the Trilateral Agreement which grants either party the right to terminate the Trilateral Agreement only after giving the other parties six month's notice. This is in marked contrast to the proviso in Article XII(A) which, in effect, gave Pandora the right to terminate the Trilateral Agreement at any time. It is apparent that the six-month termination clause in the Trilateral Agreement is inconsistent with the proviso in the Bilateral Agreement. However, the six-month termination clause is consistent with the fact that the proviso was omitted from the Trilateral Agreement.

A noted authority⁴⁴ reports that the interpretation of the Trilateral Agreement urged here is consistent with the interpretation of the word "suspend" in most IAEA trilateral agreements. It means that the safeguard rights of the supplying country are suspended as long as the IAEA is capable of providing the necessary safeguards. Therefore, Pandora does not have the right under Article XII(A) of the Bilateral Agreement to terminate fuel shipments to Shangri-La.

43. A. McNAIR, *supra* note 4, at 219; I. SINCLAIR, *supra* note 35. See Vienna Convention, art. 30(3).

44. A. McKNIGHT, *supra* note 7, at 119-20.

D. *Pandora has committed an international tort by stopping fuel shipments to Shangri-La.*

Pandora has committed an international tort by ordering its private corporations to stop fuel shipments to Shangri-La. Georg Schwarzenberger, eminent British publicist, gives an illustration of the applicability of the doctrine.

A sovereign State is responsible for all its organs, but only for its own organs. It is not responsible for spontaneous acts of individuals or private organisations in a democratic State without connivance by the government that does not amount to a breach of a treaty of commerce with the country whose exports are subjected to the boycott. If, however, the government encouraged or promoted such a boycott, it would commit a breach of treaty.⁴⁵

Since the breach of the contractual obligation to Shangri-La stems directly from the official actions of the government of Pandora, it would be inappropriate for the Court to ignore the tortious conduct of Pandora. This was an action that was unsupported by any principle of international law.

III. SHANGRI-LA RETAINS THE RIGHT TO DEVELOP ANY PEACEFUL USE OF NUCLEAR POWER.

A. *Peaceful Nuclear Explosions are not prohibited pursuant to any of the agreements or treaties common to both States.*

Under the terms of the Bilateral Agreement, Shangri-La agreed that none of the materials transferred from Pandora to Shangri-La would be used for "atomic weapons, or for any other military purpose."⁴⁶ Atomic weapon is defined in the agreement as "any device utilizing atomic energy . . . the *principal* purpose of which is for use as, or for development of, a weapon, a weapon prototype, or a weapon test device."⁴⁷ This definition clearly does not preclude Shangri-La from exploring the potential of PNE's. PNE's can be used for weapon development or another military purpose but this is not their *principal* purpose.

Contextual means of interpretation support this conclusion.

45. G. SCHWARZENBERGER & E. BROWN, *supra* note 34, at 145.

46. Stipulation of Record, Annex A, art. X(A)(2), at 2.

47. *Id.*, art. I(3), at 1 (emphasis added).

The Statute of the IAEA,⁴⁸ to which both States are signatories, had two objectives: the promotion of the peaceful use of the atom and protection against diversion for military purposes.⁴⁹ Pandora, by unilaterally declaring that Shangri-La is prohibited from exploring an option it believes to offer long-range economic benefits, is usurping the first function while not directly serving the second function of the very agency it helped to establish.

B. *Prohibitions upon non-nuclear nations from research into the possible economic benefits of PNE's violate a fundamental precept of international law.*

Shangri-La has a fundamental right to develop its natural resources and PNE development offers real and substantial benefits in this area. The Soviet Union is already reaping these economic advantages.

The editor of the scientific journal, *Nature*, Dr. David Davies, reported in an article recently that the Soviet Union has exploded more than 70 nuclear devices since 1967 to build canals, increase the flow from oil fields, store water and put out oil well gushes. In the *New Times* of Moscow in February 1975, Igor Dmitriyev has confirmed that with a PNE the Soviet Union had blasted a 50,000 cubic meter underground reservoir to store gas condensate. The Soviet experts claim that this new nuclear method cut construction costs to one-third.⁵⁰

The Republic of Pandora had not declared its intention to halt research on the development of PNE's and, pursuant to the terms of the NPT, demands that any benefits that accrue from such research flow from the industrial nations to the Third World States. Pandora's refusal to allow Shangri-La to further its course of independent national development is in violation of the principles expressed in General Assembly Resolution 1803.

6. International co-operation for the economic development of developing countries, whether in the form of public or private

48. Statute of the International Atomic Energy Agency, done Oct. 26, 1956, [1957] 8 U.S.T. 1093, T.I.A.S. No. 3873, 276 U.N.T.S. 3, as amended, Oct. 4, 1961, [1963] 14 U.S.T. 135, T.I.A.S. No. 5284, 471 U.N.T.S. 334.

49. Bunn, *The Nuclear Non-Proliferation Treaty*, 1968 Wis. L. Rev. 766, 767.

50. K. Subrahmanyam, *India's Nuclear Policy*, in NUCLEAR PROLIFERATION AND THE NEAR-NUCLEAR COUNTRIES 125, 142 (O. Marwah & A. Schulz eds. 1975).

capital investments, exchange of goods and services, technical assistance, or exchange of scientific information shall be such as to further their independent national development. . . .⁵¹

General Assembly Resolution 1803 is directed toward the development of natural resources of Third World countries and this is the major use of PNE's. Aside from excavation projects, there is "great potential value in the fracturing of deep-seated shale so as to free deposits of oil and gas."⁵² At least one highly qualified publicist has determined that this principle of self-determination has the status of a *jus cogens* in international law.⁵³ Such a determination by this Court would lead to only one conclusion: that General Assembly Resolution 1803 is a preemptory norm of international law with which treaties may not conflict.⁵⁴

Judge Ammoun of this Court has expressed the view that General Assembly resolutions, such as General Assembly Resolution 1803, have taken on the character of a subsidiary source of international law and cites the "views to this effect of Messrs. Lach, Mohammed Sami Abdelhamid, Falk, Pechuta, McWhinney, and Asomuah."⁵⁵

C. *The obligations and rights of the parties to the Bilateral Agreement are unimpaired by the diplomatic note of January 1971.*

Pandora did not change the fact that the Bilateral Agreement puts no restriction on Shangri-La's right to develop PNE's by sending a diplomatic note to that effect to Shangri-La. A unilateral interpretation of an international agreement, whether made by the executive, legislative, or judicial organs of one of the contracting States, is not binding upon the other contracting States.⁵⁶ While it may be possible to acquiesce to an interpretation of a treaty, this is not the situation here. Shangri-La expressed its disapproval of the Pandorian note, albeit unofficially.

There is nothing in the wording of the Treaty to indicate an

51. G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) 15, U.N. Doc. A/5217(1963).

52. A. McKNIGHT, *supra* note 7, at 80.

53. I. BROWNIE, *supra* note 13, at 500.

54. See A. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, in *International Law in the Twentieth Century* 217 (L. Gross ed. 1969).

55. Barcelona Traction Case (Second Phase), [1970] I.C.J. 253, 302 n.31 (separate opinion of Judge Ammoun).

56. P. JESSUP, *A MODERN LAW OF NATIONS* 143 (1948); 1 *JURIS-CLASSEUR DE DROIT INTERNATIONAL* fasc. 12-C, para. 7 (1962).

intention on the part of the signatories to prohibit PNE's. The United States of America, which is another major nuclear supplier nation, uses identical terms and conditions in its "Agreements for Cooperation."⁵⁷ William H. Donnelly, a United States specialist on nuclear affairs, reported before the United States Congress:

The agreements for cooperation are silent about the use of U.S.-supplied materials and equipment to develop so-called peaceful nuclear explosives. . . . Although all agreement nations are committed to use transferred items solely for civil purposes and not to use them for atomic weapons or for military purposes, there is no prohibition on peaceful nuclear explosives. The definition of atomic weapons in the agreement does not include such devices.⁵⁸

This contextual factor indicates that Pandora's diplomatic note was not a reasonable interpretation of the Bilateral Agreement but a revision of it. Consistent with the principle of *pacta sunt servanda*, "no international agreement can be validly revised with effect for all parties unless approval has been given by all."⁵⁹ Shangri-La has clearly not given its approval to this revision and indeed has indicated a contrary intent, informing the officer delivering the note that "we do not share this understanding."⁶⁰

Shangri-La wishes to re-emphasize its position. It does not intend at the present time to experiment with the uses of PNE's. But we reserve the right to do so in the future if such experiments are determined by Shangri-La to be in its economic interests. A holding by this Court rejecting our position would, in our opinion, significantly hamper our independent national development and force us to be dependent on the benevolence of the developed countries for our economic progress.

D. *The use of economic sanctions to coerce Shangri-La into surrendering its peaceful nuclear option is an act of aggression.*

Pandora is guilty of what one leading commentator has labeled as "indirect or ideological aggression."⁶¹ It is clear the term

57. See STAFF OF SENATE COMM. ON GOVERNMENT OPERATIONS, 94TH CONG., 2D SESS., UNITED STATES AGREEMENTS FOR COOPERATION IN ATOMIC ENERGY: AN ANALYSIS (Comm. Print 1976).

58. *Id.* at 19.

59. I. DETTER, *ESSAYS ON THE LAW OF TREATIES* 734 (1967).

60. Stipulation of Record at 1.

61. W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 262 (1964).

aggression is not limited to physical attack; the infringement of economic right can have the same result.

Also to be considered as an act of aggression shall be . . . unilateral action to deprive a State of the economic resources derived from the fair practice of international trade, or to endanger its basic economy, thus jeopardizing the security of that State or rendering it incapable of acting in its own defence and co-operating in the collective defence of peace.⁶²

It is a matter of record that the electrical power provided by the power reactors fueled by Pandorian-origin fuel supplies twenty percent of the electrical power essential to the industry of Shangri-La.⁶³ Armed with the knowledge of the potentially devastating effects of the closing of these power plants, Pandora is attempting to blackmail Shangri-La into compromising its rights under the Bilateral Agreement between the two countries. In the diplomatic note of September 20, 1976, Pandora stated it "would no longer transfer fuel to Shangri-La unless Shangri-La . . . agreed to the interpretation in the United Republic of Pandora's note of January 1971."⁶⁴ In that earlier diplomatic note, Pandora attempted to revise the Bilateral Agreement to preclude Shangri-La from developing PNE's.⁶⁵ Shangri-La never consented to such a revision and will not be coerced into doing so now. Pandora is committing an act of aggression this Court cannot ignore.

REQUEST FOR RELIEF

Considering that Pandora has illegally refused to allow the reprocessing of fuel in Shangri-La;

Considering that Pandora has illegally attempted to restrict the development of peaceful nuclear explosive technology;

Considering that Pandora has illegally terminated all fuel shipments to Shangri-La;

Shangri-La respectfully requests the Court to:

1. *Order* Pandora to abide by its original determination and deem the reprocessing plant "acceptable" within the meaning of Article VIII(F) of the Bilateral Agreement; or, in the alternative,
2. *Order* Pandora to make an objective, good faith determi-

62. Report of the Secretary-General on the Question of Defining Aggression at para. 441, U.N. Doc. A/2211 (1952).

63. Stipulation of Record at 2.

64. *Id.* at 3.

65. See text accompanying notes 56-60 *supra*.

nation of whether the safeguard provisions of Article XI(B)(2) can be effectively applied; and

3. *Order* Pandora to provide for the fulfillment of the long-term fuel contracts; and

4. *Declare* that Shangri-La has the right to develop all aspects of peaceful nuclear technology including PNE's; and

5. *Provide* any and all additional relief this Court deems equitable.

MEMORIAL FOR PANDORA: ARGUMENT

I. TO MINIMIZE THE DANGERS OF NUCLEAR PROLIFERATION, PANDORA HAS RETAINED THE RIGHT IN THE BILATERAL COOPERATION AGREEMENT TO FIND UNACCEPTABLE A REPROCESSING FACILITY WHERE EFFECTIVE SAFEGUARDS ARE ABSENT.

A. *The Bilateral Agreement requires that a joint determination be reached as to the effectiveness of proposed safeguards prior to any reprocessing of Pandorian-origin fuel.*

Article VIII(F) of the Bilateral Agreement provides that when special nuclear material transferred from the United Republic of Pandora to the Kingdom of Shangri-La is to be reprocessed, this reprocessing is to take place only in a facility "acceptable to both parties upon a joint determination that the provisions of Article XI may be effectively applied."¹ This language is crucial to the fulfillment of the primary objectives of the Bilateral Agreement. These objectives are clearly set forth by the parties in Articles II and XI of the Bilateral Agreement.² Article II of the Bilateral Agreement provides, in part, that "the Parties shall cooperate with each other in the achievement of the uses of atomic energy for peaceful purposes."³ Article XI, which is also specifically referred to in Article VIII(F) above, provides, in part, that

A. The Government of the United Republic of Pandora and the Government of the Kingdom of Shangri-La emphasize their common interest in assuring that any material, equipment or devices made available to the Government of the Kingdom of

1. Stipulation of Record, Annex A, at 2.

2. *Id.* at 1, 3.

3. *Id.* art. II, at 1.

Shangri-La or any authorized persons under its jurisdiction pursuant to this Agreement shall be used solely for civil purposes.⁴

When construing treaty language, it is an accepted principle of international law that words and phrases used are to be given their ordinary meaning. If there is any doubt as to the meaning of the provision, it is appropriate to look to the objectives of the agreement and the meaning of the instrument taken as a whole.⁵ The function of international tribunals in interpreting treaties has been often stated by leading commentators on the law of treaties to be "to give effect to the intention of the parties as expressed in the words used by them in the light of the surrounding circumstances."⁶ The Vienna Convention on the Law of Treaties⁷ [hereinafter referred to as Vienna Convention] proposes the same approach to treaty interpretation. Article 31 contains the fundamental principle that a treaty should be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purposes."⁸ Additional principles to be followed in interpreting the language of a given provision of an agreement are set forth under Article 31. The primary approach prescribed by the Vienna Convention is as follows: concentrating on the actual text of the agreement; relying on the ordinary meaning of words; taking the treaties as a whole; and striving to give effect to the intention of the parties. Thus Article 31 of the Vienna Convention manifestly intends the terms of a treaty to be interpreted in light of the treaty as a whole, as well as the other factors mentioned in Article 31.¹⁰ Articles 31 and 32 of the Vienna Convention¹¹ on treaty interpretation are thereby intended to be de-

4. *Id.* at 3.

5. 5 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 221-23 (1943).

6. A. McNAIR, *THE LAW OF TREATIES* 383 (1961); I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 71 (1973).

7. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27 [hereinafter cited as Vienna Convention]. See also S. ROSENNE, *THE LAW OF TREATIES: GUIDE TO LEGISLATIVE HISTORY OF VIENNA CONVENTION* (1970).

8. Vienna Convention, art. 31(1).

9. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 33 *BRIT. Y.B. INT'L L.* 203 (1957); Merrills, *Two Approaches to Treaty Interpretation*, [1968-69] *AUSTL. Y.B. INT'L L.* 55, 56 (1971).

10. Merrills, *supra* note 9, at 57.

11. Vienna Convention, arts. 31, 32.

claratory of "the comparatively few general principles which appear to constitute general rules for interpretation of treaties."¹²

It is therefore proper to look to the language of Articles II and XI of the Bilateral Agreement in order to fully understand the ramifications of the language used in Article VIII(F). Clearly, interpreting the language of Article II cumulatively with the language of Article XI, the Bilateral Agreement has an unambiguous bipartite purpose. The parties agree to cooperate with each other in the achievement of the peaceful uses of atomic energy and ensure that any material transferred from Pandora to Shangri-La is to be used solely for civil purposes. The parties have agreed to aid each other in the development of peaceful nuclear technology provided that the danger of nuclear weapons proliferation is controlled. Article VIII(F) must be read in light of these objectives. Therefore, pursuant to the commitment outlined by Article VIII(F), Shangri-La can only remove and store spent fuel pending the required joint determination. Additional probative force is given to this argument by the fact that the same interpretation has been attributed by the United States to identical language used in bilateral nuclear cooperation agreements between the United States and various participating nations.¹³

The Vienna Convention, Article 32, provides that such extrinsic sources may be viewed as corroborative of the meaning resulting from the application of Article 31.¹⁴ Therefore, the "effective" safeguarding mechanisms required to be agreed upon prior to reprocessing of Pandorian-origin fuel are *not* expressly provided for within the confines of the existing agreement. Rather, what Article VIII(F) does, in effect, is to provide for a *further* determination as to what would constitute effective safeguards should any Pandorian-origin fuel be destined for reprocessing.

12. International Law Commission, *Commentary*, 61 AM. J. INT'L L. 248, 350 para. 5 (1967); [1966] 1 Y.B. INT'L L. COMM'N 206, U.N. Doc. A/CN.4/SER.A/1966.

13. See STAFF OF SENATE COMM. ON GOVERNMENT OPERATIONS, 94TH CONG., 2D SESS., UNITED STATES AGREEMENTS FOR COOPERATION IN ATOMIC ENERGY: AN ANALYSIS (Comm. Print 1976); *Hearings on Nuclear Proliferation Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 2d Sess. 19 (1976) [hereinafter cited as *Hearings*].

14. Vienna Convention, art. 32.

B. *The Trilateral Agreement does not limit Pandora's prerogative to determine the acceptability of Shangri-La's Reprocessing facility.*

The reference made to Article XI in Article VIII(F) cannot be construed to imply that a simple extension of the existing safeguarding measures (including those provided for by the Trilateral Agreement) would suffice to secure the reprocessing plant. The civil use guarantee under Article XI¹⁵ is not superseded by the entry into force of the Trilateral Agreement.¹⁶ On the contrary, Section 2 of the Trilateral Agreement reiterates this guarantee.¹⁷

Articles XI and XII of the Bilateral Agreement provide that "safeguards rights" shall be those safeguards enforced by the International Atomic Energy Agency [hereinafter referred to as IAEA] pursuant to the Trilateral Agreement "during the time and to the extent that the Government of the Republic of Pandora agrees that the need to exercise such rights is satisfied by a safeguards agreement to be negotiated between the Parties and the Agency."¹⁸ The need extends to the non-proliferation guarantees given as part of the safeguarding system in Article XI as well as the safeguards themselves. The term "safeguards" as used by the parties is defined in Article I of the Bilateral Agreement to mean: "a system of controls designed to assure that any materials, equipment and devices committed to the peaceful use of atomic energy are not used to further any military purpose."¹⁹ These provisions (Articles I(9), VIII(F), XI(A), and XII) when viewed together, indicate that Shangri-La's manifestation of its willingness to permit "IAEA safeguards in the reprocessing plant"²⁰ does not, by itself, constitute compliance with the requirements of Article VIII(F). Rather, a system of controls must be designed to effectively ensure that nuclear materials supplied by Pandora, which are committed to peaceful uses,²¹ are not used to further any military purpose. Any other interpretation of these provisions would result in the frustration of the declared objective

15. See text accompanying notes 1-14 *supra*.

16. Stipulation of Record, Annex B.

17. *Id.* at 1.

18. Stipulation of Record, Annex A, art. XII, at 4 (emphasis added).

19. *Id.* art. 1(9), at 1. See also Statute of the International Atomic Energy Agency, Oct. 26, 1956, art. III(A)(5), [1957] 8 U.S.T. 1093, T.I.A.S. No. 3873, 276 U.N.T.S. 3, as amended, Oct. 4, 1961, [1963] 14 U.S.T. 135, T.I.A.S. No. 5284, 471 U.N.T.S. 334.

20. Stipulation of Record at 2.

21. *Id.*, Annex A, art. X(A)(2), at 2.

of both the Bilateral and Trilateral Agreements. "When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the object and purpose of the treaty demand that the former interpretation should be adopted."²² An examination of the proliferation dangers surrounding the operation of a reprocessing plant is appropriate to determine what type of safeguards could be effectively applied, thereby providing an objective standard as to the acceptability of a given reprocessing facility.

The requirement for safeguards is designed to impose constant regulation on the international community whereby nuclear energy is to be utilized in a manner consistent with international nuclear security. The objectives of safeguards is repeatedly declared to be insurance against the use of any nuclear materials to further any military purpose.²³ Circumstances may arise in which a particular State is tempted to disregard its peaceful use assurances. The rationale behind the existing IAEA safeguards system (primarily a system of record-keeping and follow-up inspections) is that any violation of peaceful use guarantees will be detected and called to the attention of the international community well before the violator can attain nuclear weapons capability.²⁴ The delinquent State is thereby exposed to international pressure which would frustrate his illicit purposes.²⁵

Where the nuclear fuel cycle in a given State is limited only to reactors and the low-enriched uranium which fuel them, material accounting and inspection safeguards can provide the necessary margin of security against possible proliferation dangers. The spent fuel produced by the reactors is still many time-consuming steps from a useable nuclear explosive. This is not the case where the State has a reprocessing plant, in which plutonium separation occurs. A nuclear reactor produces plutonium from which bombs can be made, but a bomb cannot be made until the plutonium has been separated and recovered in a repro-

22. [1966] 2 Y.B. INT'L L. COMM'N 50, U.N. Doc. A/CN.4/SER.A/1966.

23. P. Szasz, *International Atomic Energy Agency Safeguards*, in INTERNATIONAL SAFEGUARDS AND NUCLEAR INDUSTRY 86 (M. Willrich ed. 1973); Firmage, *The Treaty on the Non-Proliferation of Nuclear Weapons*, 63 AM. J. INT'L L. 711, 725 (1969); See also Bunn, *The Nuclear Nonproliferation Treaty*, 1968 WIS. L. REV. 766.

24. See generally INTERNATIONAL SAFEGUARDS AND NUCLEAR INDUSTRY (M. Willrich ed. 1973).

25. Szasz, *supra* note 23, at 88; *Hearings, supra* note 13, at 7 (statement of Dr. Victor Gilinsky, Comm'r, U.S. Regulatory Comm'n).

cessing plant.²⁶ It is in these plants that plutonium is available in pure form and is most susceptible to diversion for explosive military uses.²⁷ Therefore, there is inadequate time available for the international community to take effective action in the event fuel is diverted for illicit purposes. Moreover, the value of accounting and inspection safeguards at this stage in detecting transfers of fuel from peaceful to military purposes is at best improbable.²⁸ Application of IAEA accounting and inspection safeguards to Shangri-La's reprocessing plant alone would be wholly ineffective; additionally, it would not comply with provisions permitting reprocessing under Article VIII(F). Further, there is no legitimate commercial justification for unleashing such a threat against international security. There would be no significant conservation factor in such a reprocessing facility. Dr. Gilinsky, Commissioner of the United States Nuclear Regulatory Commission, places the conservation factor at a savings ranging between ten and thirty percent of the uranium used if it were not recycled,²⁹ indicating that such a savings is at best minimal.

The former Secretary of State of the United States, Dr. Kissinger, in addressing the United Nations General Assembly on the dangers of nuclear proliferation on September 22, 1975 stated:

The greatest single danger of unrestrained nuclear proliferation resides in the spread under national control of reprocessing facilities for the Atomic Materials in nuclear power plants.³⁰

Pandora has both the right and duty under the provisions of the Bilateral Cooperation Agreement to veto the reprocessing of Pandorian-origin fuel until such time as safeguards can be effectively applied.

C. Reprocessing of Pandorian-origin fuel by Shangri-La would constitute a material breach of the Cooperation Agreement and would mandate a termination of any further nuclear cooperation.

Since Pandora has rightfully determined that the reprocessing plant is unacceptable because of the lack of effective safe-

26. M. WILLRICH, *GLOBAL POLITICS OF NUCLEAR ENERGY* 37 (1971).

27. V. Gilinsky, *Diversion by National Governments*, in *INTERNATIONAL SAFEGUARDS AND NUCLEAR INDUSTRY* 159 (M. Willrich ed. 1973).

28. See generally *Hearings*, *supra* note 13 (statement of Dr. Gilinsky).

29. *Hearings*, *supra* note 13, at 19.

30. *Reproduced in 1975 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 856 (1975) (Dep't of State Publication No. 8865).

guards, any reprocessing or any attempt to reprocess Pandorian-origin fuel by Shangri-La constitutes a breach of Shangri-La's obligation under Article VIII(F). The enforcement of this Article is crucial to the fulfillment of the purpose of the Cooperation Agreement viewed in its entirety. The proliferation dangers necessarily resulting from the illegitimate reprocessing of Pandorian-origin fuel would constitute a clear breach of the civil purpose guarantee in Article XI(A). Therefore, under the terms of Article XI(5), Pandora has the right to "suspend or terminate this Agreement and to require the return of any materials, equipment and devices."³¹

The express provisions of the Agreement *per se* secure to Pandora the right to unilaterally terminate said agreement upon breach of the essential assurances previously given by Shangri-La. Pandora may therefore cease all nuclear cooperation with Shangri-La should it attempt to reprocess any Pandorian-origin fuel.

II. THE GENERALLY ACCEPTED PRINCIPLES OF INTERNATIONAL LAW GOVERNING THE INTERPRETATION OF TREATIES FOSTER A CONSISTENT READING OF THE NPT AND THE BILATERAL COOPERATION AGREEMENT.

A. *Internationally recognized principles of treaty interpretation requirement that treaties be viewed as a whole to determine their meaning.*

An examination of Pandora's rights and obligations under the Treaty on the Non-Proliferation of Nuclear Weapons³² [hereinafter referred to as NPT] and those expressed in the Cooperation Agreement demonstrate clearly that an interpretation of these two treaties, side by side, can give rise to no justifiable conflict in their simultaneous application if each treaty is viewed in its entirety.

An overall examination of the corpus of each treaty is the internationally recognized approach to treaty interpretation as espoused by the International Law Commission of the United Nations and endorsed by the Vienna Conference on the Law of Treaties.³³ Professor Charles Cheney Hyde reaches the same

31. Stipulation of Record, Annex A, art. XI(5), at 4.

32. Treaty on the Non-Proliferation of Nuclear Weapons, done July 1, 1968, [1970] 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 [hereinafter cited as NPT].

33. Merrills, *supra* note 9, at 57.

result, stating that "it is usually held that if the general purposes of a treaty conflict with the literal signification of any of its terms the former should prevail."³⁴ Looking then, to the body of each agreement the only conclusion to be reached is that the general purposes of the two agreements are in complete accord.

It is postulated as a general principle of international law that not only may successive treaties be interpreted consistently, so as to circumvent any need to apply antiquated and often inviable measures of retribution, but that it is preferable to do so, *i.e.*, there exists a presumption against conflict and an inclination toward interpretations creating cumulative legal effects.³⁵ Article 26 of the Draft Articles on the Law of Treaties, by negative implication, reaches the same result.³⁶ Given this framework, it is essential then to enumerate the pertinent obligations of Pandora under the NPT to determine generally the objectives of this treaty in an effort to mesh those objectives cumulatively with those of the Bilateral and Trilateral Agreements.

The NPT divides its obligations between two categories of States: those classified as nuclear weapon States and those as non-nuclear weapon States. Under the NPT, "a nuclear weapon state is one which has exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967."³⁷ As a signatory and nuclear weapon State, Pandora is prohibited from transferring "to any recipient whatsoever nuclear weapons or other nuclear explosive devices."³⁸ Pandora is also similarly prohibited from aiding or encouraging any non-nuclear weapon State from manufacturing or otherwise acquiring such devices.³⁹ Coupled with these prohibitions, the NPT obligates nuclear weapon States to facilitate the development of nuclear energy throughout the world and to make available to non-nuclear weapon States "the potential benefits from any peaceful applications of nuclear explosives."⁴⁰ Additionally, under Article VI, the NPT requires nuclear

34. C. Hyde, *Concerning the Interpretation of Treaties*, in *INTERNATIONAL LAW IN THE TWENTIETH CENTURY* 211 (L. Gross ed. 1969).

35. Dahl, *The Application of Successive Treaties Dealing with the Same Subject Matter*, 17 *INDIAN Y.B. INT'L AFF.* 279, 304 (1974).

36. 21 U.N. GAOR, Supp. (No. 9) 3, U.N. Doc. No. A/6309/REV. 1 (1966); International Law Commission, *Commentary*, 61 *AM. J. INT'L L.* 248, 346 para. 9 (1967).

37. NPT, art. IX, para. 3.

38. *Id.* art. 1.

39. *Id.*

40. *Id.* art. V.

weapon States to negotiate in good faith toward the common goal of complete nuclear disarmament.

The Treaty is designed to accomplish these objectives by requiring non-nuclear weapons States to accept international safeguards and controls on their peaceful nuclear programs.⁴¹ The safeguards are to be administered by the IAEA.⁴²

With these general obligations and objectives it is obvious that the NPT is primarily concerned with reducing the threat of nuclear war, while simultaneously providing for the advancement of the peaceful uses of nuclear energy.⁴³ An in-depth reading of the Bilateral Agreement evinces the same essence of purpose by consistently using phrases replete with language such as, *inter alia*: "the peaceful use of atomic energy";⁴⁴ "for peaceful purposes";⁴⁵ "[n]o material . . . will be used for atomic weapons . . . or for any other military purpose";⁴⁶ and "any material . . . shall be used solely for civil purposes."⁴⁷ Read in its entirety, this Bilateral Agreement reduces to precisely the same propositions of curtailment of nuclear weaponry and the advancement of peaceful nuclear uses as does the NPT, *i.e.*, the two treaties stand for identical objectives.

In light of Professor Hyde's position⁴⁸ and the international preference against conflict⁴⁹ it is clear that any inconsistencies arising from a literal interpretation of specific terms must give way to the stated congruency of purposes expressed by the two treaties. Pandora asserts that its request in the diplomatic note of September 20, 1976 for IAEA safeguards on all Shangri-La's nuclear activities is in complete compliance with Pandora's obligations under the NPT and is justified by this consistent reading of the Bilateral Cooperation Agreement.

41. *Id.* art. III.

42. *Id.*

43. See generally Ehrlich, *The Non-Proliferation Treaty and Peaceful Uses of Nuclear Explosives*, 56 VA. L. REV. 587 (1970).

44. Stipulation of Record, Annex A, art. 1, at 1.

45. *Id.* art. XI, at 1.

46. *Id.* art. X, at 2.

47. *Id.* art. XI, at 3.

48. C. Hyde, *supra* note 34, at 211.

49. Dahl, *supra* note 35, at 311.

B. Any distinction between PNE's and nuclear weapons is purely literal and lacks any validity given the identical technological processes needed for their respective development.

Pandora further submits that it can and will proceed to demonstrate that any literal inconsistency between the terms of the NPT and the Bilateral Agreement is devoid of ordinary meaning, and is at best, only a literal distortion designed with the intention to frustrate the express purposes of the Agreement. Referring specifically to the NPT language prohibiting "nuclear weapons or other nuclear explosive devices,"⁵⁰ it becomes apparent that any claim of discrepancies will focus on the Bilateral Agreement's literal silence on the use of development of peaceful nuclear explosions [hereinafter referred to as PNE's]. Pandora is ready to admit this literal deficiency, but asserts that it has no meaning whatsoever; for the NPT specifically makes no distinction between nuclear weapons and PNE's. It is unquestioned and accepted by the majority of nations, that, from a technological standpoint, no meaningful difference exists between a bomb and a plowshare device.⁵¹ The distinction was dismissed rather pointedly in a recent *New York Times* article which declared that a PNE is "a device distinguishable from a nuclear weapon only by those who think that Molotov cocktails are made with vodka."⁵² Pandora respectfully restates its position that PNE's do not exist as entities distinct from weapons, and that any distinction between PNE's and weapons is artificial. The true identity of an explosive device unfolds only upon explosion, which, needless to say, is too late. Hence, the Bilateral Agreement need not literally mention PNE's so as to proscribe their use or development.

Pandora further asserts that, even literally, the Bilateral Agreement does present a bar to the use or development of PNE's. An inspection of the specific language of the Bilateral Agreement reveals that: Article XI(B)(2)(c)(ii) requires that "any . . . material . . . be subject to all the safeguards provided for in this Article and the guarantees set forth in Article X";⁵³ Article X(A)(2) bars the use of such material for the "development of

50. NPT, arts. I, II, III.

51. M. WILLRICH, *NON-PROLIFERATION TREATY: FRAMEWORK FOR NUCLEAR ARMS CONTROL* 69-70 (1969); Firmage, *supra* note 23, at 722.

52. Ross, *How "Atoms for Peace" Became Bombs for Sale*, *N.Y. Times*, Dec. 5, 1976, § 6 (Magazine), at 39, col. 2.

53. *Sipulation of Record, Annex A*, at 3.

atomic weapons, or for any other military purpose";⁵⁴ and Article I(9) reiterates this restriction in defining safeguards as a system to assure that any materials "are not used to further any military purpose."⁵⁵ The Vienna Convention, as a reflection of customary international law on treaty interpretation, instructs the interpreter to first examine Article 31 to determine the ordinary meaning of terms and then Article 32 for a contextual approach to verify a meaning derived under Article 31 or to dispel any ambiguity or obscurity that would create an absurd or unreasonable result.⁵⁶

Pandora submits that the Bilateral Agreement's repeated mention of the prohibition on any nuclear material being used or developed as a "weapon" or for "any military purpose" is specific enough to include a restriction on the use or development of PNE's. By the "ordinary meaning of terms" doctrine of Article 31, Pandora finds no difficulty whatsoever in attributing a "military purpose" to a nuclear explosive device in the possession of an otherwise non-nuclear State. Pandora recognizes that should this analysis still present some ambiguity, Article 32, as the second stage of interpretation, permits going outside the text of a treaty to resolve any conflicts.⁵⁷

It is Pandora's purpose now to seek such resolution by drawing an analogy to the implications of India's 1974 explosion of its PNE. Assuming *arguendo* that PNE's are a distinct entity, is it plausible to assume that no military purpose was achieved by such action, even if complete good faith is assumed on the part of the actor? Is it plausible to assume that such an action would not be viewed by the actor's immediate neighbors and in fact the whole world as a demonstration of nuclear capability? Can India deny in retrospect that its fear of Chinese nuclear blackmail prompted its action?⁵⁸ Can India be heard to deny that its action placed the same pressure on Pakistan to explore a nuclear option?⁵⁹

54. *Id.* art. X(A)(2), at 2.

55. *Id.* art. I(9), at 1.

56. See text accompanying notes 1-14 *supra*; see also Merrills, *supra* note 9, at 61.

57. Article 32 of the Vienna Convention confirms a meaning derived under Article 31 or dispels any ambiguity or obscurity that would create an absurd or unreasonable result. See Merrills, *supra* note 9, at 56-61.

58. See Kapur, *Nuclear Weapons and Indian Foreign Policy: A Perspective*, 27 *WORLD TODAY* 379, 380-81 (1971).

59. See Comment, *Legal Implications of Indian Nuclear Development*, 4 *DEN. J. INT'L L. & POL.* 237, 253 (1974).

Pandora submits that the only reasonable conclusion to these questions is an answer in the negative and that the scenario drawn above is completely analogous to the situation in which Shangri-La finds itself immersed. Pandora proposes that Shangri-La cannot deny its physical and economic posture concerning the pressures being placed upon it by its two overpowering neighbors. These pressures are substantiated by the facts wherein Shangri-La's parliament urged the development of nuclear explosives, and its defense minister declined to quash these sentiments and instead left open the nuclear option.⁶⁰

Article 32 of the Vienna Convention suggests that ambiguities be resolved so as to foster a reasonable result. Pandora contends that within this context no other reasonable meaning can be ascribed to the terms of the Bilateral Agreement but that the possession of or capacity to develop PNE's does in fact further a "military purpose."

Pandora respectfully submits that coupled with the foregoing argument of contextual interpretation under Article 32, there exists authority for the additional argument that Pandora's diplomatic note of January 1, 1971, excluding the use of PNE's under Article X(A)(2) of the Bilateral Agreement, is significant evidence of an acceptable interpretation of the Treaty.⁶¹ Furthermore, Shangri-La's failure to formally refute this determination resulted in Shangri-La's acquiescence in this interpretation.⁶²

Before leaving this issue of PNE's it is important that the Court recognize that Pandora is not suggesting that a violation of the Bilateral Agreement will only occur upon Shangri-La's acquisition of a nuclear explosive device, but that the nuclear capability itself is sufficient to create this same effect. The maxim that the threat is often more powerful than its execution is quite applicable to this situation.⁶³

The threat inherent in the mere capability has been capsulized by Willrich, thusly:

The important security issues arising out of the nuclear generation of electric power are derived both from the very large amount of plutonium that will be produced . . . and from the

60. Stipulation of Record at 2.

61. C. Hyde, *supra* note 34, at 208.

62. Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), [1962] I.C.J. 6.

63. Kapur, *supra* note 58, at 381.

relatively small amount required for explosives Less than ten kilograms could destroy a medium-sized city. A small fraction of the plutonium output diverted from a modest nuclear power program could create grave new threats to international security and domestic tranquility⁶⁴

J. Martin, Jr., the United States Ambassador to the Conference of the Committee on Disarmament, echoed the same fear stating that:

The critical question is not whether we can accept the stated intentions of any country, but whether a world in which many states have the capability to carry out nuclear explosions—and in which all therefore fear the nuclear weapons capability of others—would not be vastly less secure than a world that has successfully contained the spread of nuclear explosive technology.⁶⁵

Pandora submits, based on the foregoing discussions, that its request in the September 20, 1976 diplomatic note for IAEA safeguards on Shangri-La's entire nuclear activity represents the only viable solution to the proliferation dangers inherent in the nuclear capability Shangri-La now possesses. Pandora concludes that in view of its consistent obligations under the Bilateral Agreement and the NPT it is left with no other choice but to cease its fuel shipments or have Shangri-La submit to its request.

Finally, Pandora proposes that in the alternative, should the foregoing arguments not find favor with the Court, there exists authority for the proposition that Shangri-La be bound by Pandora's requests since the NPT reflects customary international law, thereby binding non-party States:

Treaties, particularly multilateral treaties, are often cited by noted writers and judges as evidence of customary international law.⁶⁶

State practice both prior to and following the NPT's enactment indicates that there is an emerging norm of international law against the development of nuclear weapons by non-nuclear States. This practice has generally been evidenced first, by the unilateral renunciations of the right to manufacture nuclear

64. M. Willrich, *Worldwide Nuclear Industry*, in *INTERNATIONAL SAFEGUARDS AND NUCLEAR INDUSTRY* 69 (M. Willrich ed. 1973).

65. 72 DEP'T STATE BULL. 458 (1975).

66. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 *BRIT. Y.B. INT'L L.* 275 (1966).

weapons voiced by West Germany⁶⁷ and India;⁶⁸ second, by certain multilateral treaties designating particular nuclear free zones;⁶⁹ and third, by the specific limitation on nuclear weapons testing formalized by the entrance into force of the Limited Test Ban Treaty.⁷⁰

Hence, the NPT is both declaratory of existing customary international law and legislative in that it adds to the law of nuclear non-proliferation. The Treaty's widespread acceptance⁷¹ must be considered as persuasive evidence that the NPT is presumptively representative of customary international law because it is for the most part a continuation and extension of previous efforts to control nuclear proliferation.⁷²

III. THE STATEMENT MADE BY THE PRESIDENT OF PANDORA DURING THE NEWS CONFERENCE DOES NOT OBLIGATE PANDORA TO APPROVE SHANGRI-LA'S REQUEST TO REPROCESS PANDORIAN-ORIGIN FUEL UNDER IAEA SAFEGUARDS IN THE REPROCESSING PLANT.

A. The Unilateral Declaration should not be given conclusive effect so as to bind Pandora under international law.

The statement made by the President of the United Republic of Pandora at the news conference did not constitute a legal commitment to approve reprocessing of Pandorian-origin fuel. A unilateral declaration regarding foreign policy of a State, alone, is insufficient to constitute an irrevocable commitment enforceable against the declarant under international law. In the *Nuclear Tests Cases*,⁷³ the International Court of Justice held that the repeated public declarations of French government officials that France would terminate atmospheric nuclear explosions, taken as a whole, constituted a binding international commitment to

67. Willrich, *West Germany's Pledge Not to Manufacture Nuclear Weapons*, 7 VA. J. INT'L L. 91 (1966).

68. Kapur, *supra* note 58.

69. See, e.g., Antarctic Treaty, art. V, para. 1, done Dec. 1, 1959, [1961] 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71. See also Treaty on the Prohibition of Nuclear Weapons on the Seabed, done Feb. 11, 1971, [1972] 23 U.S.T. 701, T.I.A.S. No. 7337.

70. Treaty Banning Nuclear Weapon Tests, done Aug. 5, 1963, [1963] 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

71. The treaty entered into force with ninety-seven signatures and forty-seven ratifications. Smith, *NATO Nuclear Information Sharing Arrangements on the NPT: Collective Defense Confronts Arms Control*, 13 ATOM. ENERGY L.J. 311, 341 (1972).

72. Baxter, *supra* note 66.

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

cease atmospheric nuclear testing. Although the Court relied upon the unilateral declarations made by the French government officials as creating legal obligations, the Court's decision failed to advocate a general principle of international law. Rather, the Court narrowly limited the rights of States "listening-in" on such declarations to invoke international obligations upon the declaring State.

When it is the intention of the State making the declaration that it should be bound according to its terms, that intention confers on the declaration the character of a legal undertaking.⁷⁴

The Court further noted that in any such case

[t]he intention is to be ascertained by the interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.⁷⁵

The Court has thus indicated that the intent of the declarant State to irrevocably bind itself must be clearly determinable from the act itself. Pandora has not made such an unqualified commitment by virtue of the President's statement. Such statements cannot be held to talismanically invoke binding obligations. It is therefore essential that the President's statement be considered in light of other factors at the time. The President first stated that Shangri-La committed itself to apply safeguards to the reprocessing plant, and that Pandora had concluded that it would be possible to apply an effective safeguard system. Logic and good faith require that these remarks be read as prerequisites to the proposition sought to be enforced. The statement declared that only after an effective safeguard system was implemented would Pandora recognize a responsibility to approve reprocessing.⁷⁶ This statement does not contain the unqualified promise of Pandora to approve reprocessing of Pandorian-origin fuel in Shangri-La. The statement, when regarded as a whole, only indicates that the government of Pandora has determined to permit reprocessing if and when adequate safeguards are effectively applied.

By finding the French declarations to be binding, the International Court of Justice also held that France has made an international commitment to cease atmospheric nuclear testing. In so opining, the development of an international norm of non-

74. Nuclear Tests Case (Australia v. France), [1974] I.C.J. at 267.

75. *Id.*

76. Stipulation of Record at 2.

proliferation of nuclear explosives was further defined.⁷⁷ Therefore, in light of the Court's prevailing position, it would be incongruous to argue that the Court should now find resultant from the casual, equivocal remarks of the President of Pandora, a commitment to aid Shangri-La in the reprocessing of nuclear fuel with less than the strictest safeguards. This would be directly contrary not only to the prior position of this Court, but also to the commitments of the international community to nuclear non-proliferation.

IV. PANDORA HAS NO ABSOLUTE OBLIGATION TO SUPPLY FUEL TO SHANGRI-LA.

Neither the Bilateral nor the Trilateral Treaty provides for the shipment of fuel from Pandora to Shangri-La. Such fuel shipments were made pursuant to contractual arrangements between Shangri-La and private Pandorian corporations. Under Article II of the Bilateral Agreement, nuclear cooperation between the two States is subject to the internal laws of both countries. While the Treaty itself is immune from changes in the municipal laws of Pandora, the contractual obligations are not.

While treaties are transactions between subjects of international law, public contracts are consensual engagements between subjects of international law. Thus, the presumption is in favour of such contracts being governed by municipal law.⁷⁸

Therefore the fuel shipments themselves are dependent on the internal laws of Pandora.

A. *The Court does not have jurisdiction to order Pandora to ship fuel to Shangri-La.*

Pandora has an inherent right, under a sovereign State's police power, to restrict the activities of subjects acting within its territory. It is doubtful whether an express provision in the treaty is even necessary for Pandora to have the power to prohibit a Pandorian corporation from shipping fuel to Shangri-La.

[I]n international law the express exemption from the effects of future legislation is redundant. Such exemption cannot and

77. Comment, 4 DEN. J. INT'L L. & POL. *supra* note 59, at 239; M. WILLRICH, *supra* note 51.

78. G. SCHWARZENBERGER & E. BROWN, A MANUAL OF INTERNATIONAL LAW 123 (6th ed. 1976).

ought not to preclude the genuine exercise of a state's police power.⁷⁹

It is the position of Pandora that while this Court has the power to review any treaty obligations of Pandora it does not have jurisdiction to review contractual agreements to which the government of Pandora was not a party. Since Pandora is not a party to the fuel shipment agreements with Shangri-La, the Court does not have jurisdiction to order Pandora to ship fuel to Shangri-La.

CONCLUSION

For the foregoing reasons set forth in this memorial, Respondent respectfully requests that the International Court of Justice render its decision in favor of the United Republic of Pandora finding that:

1. Pandora has rightfully determined the reprocessing facility to be unacceptable.
2. Any reprocessing of Pandorian-origin fuel by Shangri-La would constitute a material breach of the Bilateral Agreement by Shangri-La, and would justify Pandora's termination of all future nuclear cooperation.
3. Under the existing agreements, Shangri-La is prohibited from developing or manufacturing any nuclear explosive devices.
4. Pandora may rightfully require that Shangri-La place its entire nuclear fuel cycle under IAEA safeguards to prevent further nuclear proliferation.

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79. J. Mann, *State Contracts and State Responsibility*, in *INTERNATIONAL LAW IN THE TWENTIETH CENTURY* (L. Gross ed. 1969)