

**The Republic of Sandia, Applicant**

**v.**

**The United Commonwealth, Respondent**

# **RECORD**

**Seventh Annual  
International Environmental  
Moot Court Competition  
2002`**



NOTIFICATION, DATED 17 MAY 2002, ADDRESSED TO  
THE MINISTER FOR FOREIGN AFFAIRS OF THE REPUBLIC OF SANDIA  
AND  
THE MINISTER FOR FOREIGN AFFAIRS OF THE UNITED COMMONWEALTH

The Hague, 17 May 2002.

On behalf of the International Court of Justice, and in accordance with Article 26 of the Rules of Court, I have the honor to acknowledge receipt of the joint notification dated 3 May 2002. I have the further honor to inform you that the case of the Republic of Sandia, Applicant v. the United Commonwealth, Respondent, has been entered as 2002 General List No. 107. The written proceedings shall consist of memorials to be submitted to the Court by each Party on or before 8 October 2002. Oral proceedings are scheduled for 1-2 November 2002.

/s/ \_\_\_\_\_  
Registrar  
International Court of Justice

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JOINT NOTIFICATION, DATED 3 MAY 2002, ADDRESSED TO  
THE REGISTRAR OF THE COURT

The Hague, 3 May 2002.

On behalf of the Republic of Sandia and the United Commonwealth, and in accordance with Article 40, paragraph 1, of the Statute of the International Court of Justice, we have the honor to transmit to you an original copy of the English texts of the Special Agreement Between the Republic of Sandia and the United Commonwealth for Submission to the International Court of Justice of Differences Between Them Concerning the Shipment and Processing of Highly-Enriched Uranium, signed at Tallinn, Estonia, on 3 May 2002.

For the Republic of Sandia:

For the United Commonwealth:

/s/ \_\_\_\_\_  
L. Ignalina  
Minister for Foreign Affairs

/s/ \_\_\_\_\_  
U. Pripyat  
Minister for Foreign Affairs

SPECIAL AGREEMENT  
BETWEEN  
THE REPUBLIC OF SANDIA  
AND  
THE UNITED COMMONWEALTH  
FOR SUBMISSION TO THE  
INTERNATIONAL COURT OF JUSTICE  
OF DIFFERENCES BETWEEN THEM  
CONCERNING THE SHIPMENT AND PROCESSING OF HIGHLY-ENRICHED URANIUM

The Republic of Sandia and the United Commonwealth, hereinafter referred to as the Parties,

Recalling that the Parties are Members of the United Nations and that the Charter of the United Nations calls on Members to settle international disputes by peaceful means,

Emphasizing that the Parties have common concerns about the proper protection and accountability of fissile material,

Observing that the Parties are Member States of the International Atomic Energy Agency,

Acknowledging that the Parties are Parties to the Convention on Environmental Impact Assessment in a Transboundary Context,

Taking into account that the Parties are State Parties to the United Nations Convention on the Law of the Sea,

Considering that the Parties are Contracting Parties to the Convention on Biological Diversity,

Recognizing that differences have arisen over the transboundary shipment of highly-enriched uranium from Tuvastan to the United Commonwealth, and over the down blending of this highly-enriched uranium to low-enriched uranium at the United Commonwealth's Chellystone facility,

Noting that the Parties have been unable to settle their differences through negotiation,

Desiring that the International Court of Justice, hereinafter referred to as the Court, resolve these differences in an expeditious fashion,

Desiring further to define the issues to be submitted to the Court,

Have agreed as follows:

#### Article I

The Parties shall submit the questions contained in Annex A of this Special Agreement to the Court pursuant to Article 40, paragraph 1, of the Statute of the International Court of Justice.

#### Article II

1. The Parties shall request the Court to decide this matter on the basis of the rules and principles of general international law, as well as any applicable treaties.
2. The Parties shall also request the Court to decide this matter based on the Agreed Statement of Facts, which is attached as Annex A, which is an integral part of this Agreement.
3. The Parties shall also request the Court to determine the legal consequences, including the jurisdiction of the Court and the rights and obligations of the Parties, arising from any Judgment on the questions presented in this matter. The Parties shall neither address nor request the Court to address the issue of monetary damages.

#### Article III

1. The proceedings shall consist of written pleadings and an oral hearing.
2. The written pleadings shall consist of memorials to be submitted simultaneously to the Court by the Parties.

#### Article IV

1. The Parties shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.
2. Immediately after the transmission of the Judgment, the Parties shall enter into negotiations on the modalities for its execution.
3. If the Parties are unable to reach agreement within three months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment.

Article V

This Special Agreement shall enter into force upon signature.

DONE at Tallinn, Estonia, this third day of May 2002, in two copies, each in the English language, and each being equally authentic.

FOR THE REPUBLIC OF SANDIA:

FOR THE UNITED COMMONWEALTH:

/s/  
L. Ignalina  
Minister for Foreign Affairs

/s/  
U. Pripyat  
Minister for Foreign Affairs

ANNEX A  
AGREED STATEMENT OF FACTS

1. The United Commonwealth (UC) is a developed country with a population of approximately 300 million people. It has a very diversified economy and relies significantly on nuclear power, which satisfies forty percent of its energy needs.
2. The Republic of Sandia is a developing country with a population of approximately five million people. It is an island nation that lies approximately 20 miles to the west of the UC. Sixty percent of the population of the Republic of Sandia lives along its eastern coast. The Republic of Sandia has declared itself to be a "Nuclear Free Zone," thereby prohibiting nuclear weapons and nuclear power plants within its territory and territorial sea.
3. The UC and the Republic of Sandia are separated by the Sea of Sandia. Each nation claims a territorial sea up to the median line in the Sea of Sandia between the two countries.
4. Both nations are parties to the Vienna Convention on the Law of Treaties.
5. As Members of the United Nations, the UC and the Republic of Sandia are parties to the Statute of the International Court of Justice.
6. Both nations are State Parties to the United Nations Convention on the Law of the Sea.
7. Both nations are Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, also known as the Espoo Convention.
8. Both nations are Member States of the International Atomic Energy Agency (IAEA), and are Contracting Parties to the Convention on Nuclear Safety and the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste.
9. Both nations are Contracting Parties to the Convention on Biological Diversity and have signed the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. Neither nation has ratified the Cartagena Protocol.
10. Both nations agreed to the Rio Declaration on Environment and Development, which was adopted at the 1992 United Nations Conference on Environment and Development.
11. The UC has hundreds of nuclear weapons. Up until 1992, the UC had engaged in an nuclear arms race with the Union of Democratic Republics (UDR). In 1992, the UDR dissolved into 12 separate states.

12. As a result of the UDR's break up, the UC was in a position to reduce the number of its own nuclear weapons. On 15 March 1993, UC President C. River announced that 25 metric tons of fissile material, including 22 tons of highly-enriched uranium (HEU), was in excess of the UC's national security needs. This amount of HEU could be used to make approximately 500 nuclear warheads.
13. In the 15 March 1993 announcement, the President stated that the excess HEU would be "down blended" at a UC government-operated facility to produce low-enriched uranium (LEU). The LEU would then be sold, primarily to commercial operators of nuclear power plants in the UC, to be used for producing electricity.
14. After President River's announcement, the UC Ministry of Energy conducted a national search for an appropriate site for a blending facility. The UC Ministry of Energy selected Chellystone as its preferred site. Chellystone is located on the west coast of the UC.
15. The UC Ministry of Energy conducted an environmental impact assessment (EIA) for the construction and operation of the Chellystone facility in 1994. The UC Ministry of Energy notified the government of Sandia about the proposed project and requested comments.
16. In response to the request for comments on the proposed project, Sandian Prime Minister T. Misland wrote to President River declaring that Sandia was "most vigorously opposed" to the siting of the facility in Chellystone. Prime Minister Misland emphasized that the proposed site would be only 20 miles off the coast of Sandia and would pose "a grave and unacceptable risk to the national security and economic interests of Sandia."
17. On 1 December 1994, the UC Ministry of Energy issued its final EIA concerning the proposed Chellystone site. The EIA concluded that the environmental risks of such a project were "minimal" and recommended that the blending facility be constructed in Chellystone.
18. Construction of the Chellystone blending facility was completed in July 1997. The facility began blending operations in August 1997.
19. In January 1998, the UC Ministry of Energy reported to the IAEA that a "serious incident" (level 3 on the IAEA's International Nuclear Event Scale) had occurred at the Chellystone facility.
20. In May 1998, the UC Ministry of Energy reported to the IAEA that another "serious incident" (level 3) and an "incident" (level 2) had occurred at the Chellystone site.

21. In August 1999, the UC Ministry of Energy reported to the IAEA that an “accident without significant off-site risk” (level 4) had occurred at the Chellystone site.
22. In August 1999, the UC Ministry of Energy suspended operations at the Chellystone facility for six months. After a review of operating procedures, blending operations then re-commenced. No nuclear incident or accident has occurred at the Chellystone facility since August 1999.
23. Tuvastan is a newly independent state, achieving its independence after the dissolution of the UDR in 1992.
24. In May 2001, the government of Tuvastan notified the UC government that the Tuvastan Ministry of Defense had in its possession approximately two metric tons of HEU. The HEU had been produced, as part of the UDR’s “Project Shark,” to be used to power the UDR Navy’s nuclear submarines. When the UDR dissolved, the Tuvastan Ministry of Defense took custody of the HEU.
25. The government of Tuvastan expressed its concern about its ability to safeguard the HEU properly. Economic conditions in Tuvastan were very poor, and the Ministry of Defense was unable to pay its soldiers in a timely manner. The government of Tuvastan noted the risk that some of the HEU under the Ministry of Defense’s custody could be sold on the black market to rogue states or terrorist organizations.
26. The governments of UC and Tuvastan concluded an agreement in July 2001, in which the UC agreed to assist with the security of the HEU presently on the territory of Tuvastan. The UC and Tuvastan also agreed that the UC would eventually take custody of the HEU. UC would financially compensate Tuvastan for the HEU, which would be shipped to the Chellystone facility to be down blended to LEU. The first shipment (by sea) was scheduled for January 2002.
27. In August 2001, upon learning of the UC-Tuvastan agreement, the Sandian Minister for Foreign Affairs sent a letter to the UC Minister for Foreign Affairs, which stated in part:

The government of Sandia is deeply troubled by the UC’s unilateral decision to import HEU into the Chellystone facility. As your government is well aware, Sandia has strenuously objected to, and continues to strenuously object to, the operation of this facility. Our concerns have only increased in light of the troubled history of the facility.

The people of Sandia have a special relationship with and concern about the marine environment. The fisheries and tourism industries make up a significant

portion of the economy of Sandia. This concern is heightened by the fact that the Chellystone site is so close to Sandia's territorial sea and that the international transport of the HEU would be even closer to Sandia's territorial sea. A possible accident at Chellystone or in the Sea of Sandia would have a devastating impact on the marine environment and, consequently, on the economy of Sandia. Even the threat of a radioactive release will have a deleterious effect on Sandia's tourism industry.

At this point, the government of Sandia raises two objections to the proposed importation of HEU.

First, we raise a procedural objection. The government of Sandia first learned about the proposed HEU importation from a newspaper article. Repeated requests by the Sandian Ministry for the Environment for additional information and consultations have received no response. The lack of notification and refusal to consult about a proposed activity that has significant transboundary impacts violates numerous international legal obligations. In particular, the government of Sandia wishes to remind the government of the United Commonwealth of its duties to notify and consult pursuant to:

1. the Rio Declaration, Principle 19;
2. the Espoo Convention, Articles 2, 6, and 7;
3. the Convention on Biological Diversity, Article 14;
4. the Convention on Nuclear Safety, Article 17; and
5. the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste, Article 6.

The government of Sandia therefore calls upon the government of the United Commonwealth to conduct a new environmental impact assessment, taking into account the safety history of the Chellystone site and the risks associated with the proposed international transport of HEU from Tuvastan. Such an assessment process must include consultations with the government of Sandia. The government of Sandia also seeks confirmation that the importation of HEU and continued blending operations at the Chellystone facility will not continue until a new environmental impact assessment is completed.

Second, we raise a substantive objection. Proceeding with the international transport and the blending operations of the HEU from Tuvastan would violate the United Commonwealth's obligations pursuant to the U.N. Convention on the Law of the Sea. Article 192 of UNCLOS demands that the United Commonwealth "protect and preserve the marine environment." The obligation to protect and preserve the marine environment must be interpreted in light of other international legal principles (see UNCLOS Article 293), the most pertinent of which in this case is the precautionary principle. The precautionary principle has risen to the level of customary international law. See Commission of the European Communities, Communication from the Commission on the Precautionary Principle 11 (2002) (noting that the principle has "become a full-fledged and general principle of international law"). The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, which the United Commonwealth has signed, is only the most recent example of the elevation of this principle to a rule of international law.

The precautionary principle calls on states to act prudently and not to take actions that threaten irreversible harm to the environment. In this case, the effects of an accident at the Chellystone facility or on the Sea of Sandia would cause grave environmental harm that would remain for generations. Accordingly, when the precautionary principle fleshes out the obligation to preserve and protect the marine environment, it is clear that the government of the United Commonwealth must not proceed with the importation of HEU and operations at the Chellystone facility. Other, more prudent options may very well be available, which further underscores the need for dialogue. Accordingly, the government of Sandia renews its request to consult with the government of the United Commonwealth concerning these matters.

28. On 5 September 2001, the UC Minister for Foreign Affairs responded with a letter that stated, in part:

With respect to the procedural claims, the government of the United Commonwealth wishes to make several observations. First, an EIA was conducted before the Chellystone facility was constructed. The United Commonwealth fully considered the views of the government of Sandia, even though the Espoo Convention had not yet entered into force. Second, the blending of HEU, whatever its source, is not a new activity at the Chellystone

facility. The possible environmental impacts of this activity have already been considered in the 1994 EIA. Third, to the extent that the Espoo Convention may be applicable (which we submit is not the case), the government of the United Commonwealth invokes Article 2, paragraph 8. The importation of HEU from Tuvastan is a matter of national security. As such and in accordance with its regulations, the government of the United Commonwealth may not release information regarding the transport of HEU from Tuvastan. It is further noted that the invocation of the national security exception is not reviewable by any international tribunal. It is a matter for the Party of origin (the United Commonwealth) to decide.

With respect to the Convention on Biological Diversity, it is noted that the requirement to perform EIAs is qualified by the phrase "as far as possible and as appropriate." This language provides flexibility to governments to withhold information for national security reasons. As noted above, it is simply not "appropriate" to release any information about the Tuvastan HEU.

The government of the United Commonwealth also points out the inapplicability of the Convention on Nuclear Safety and the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste. The first applies to the safety of "nuclear installations," a defined term, which means "any land-based civil nuclear power plant." The Chellystone facility is a blending operation; it is not a power plant. The second does not specifically apply to military operations. Although the blending operations are conducted by civilian Ministry of Energy employees, the entire operation qualifies as a military or national security action. Moreover, the second convention only covers "spent fuel" and "radioactive waste." The HEU from Tuvastan is neither. It is actually unused (not spent) fuel, and it is certainly not waste as it has an economic value when down blended.

The government of the United Commonwealth submits that it has fully satisfied its substantive obligations under the UN Convention on the Law of the Sea as well. In this regard, the government of the United Commonwealth observes that the government of Sandia has expressed concerns about the mere risk of environmental harm. The mere risk or possibility of harm is not equivalent to environmental harm or damage itself. The obligation to protect and preserve the marine environment, which must be read in context of the entire text of

UNCLOS, establishes at most a duty of due diligence on states to protect the marine environment. The Chellystone facility is operated in accordance with the United Commonwealth's strict environmental laws. If an incident occurs, it is immediately reported to the International Atomic Energy Agency. When necessary to protect the environment, the government of the United Commonwealth does suspend operations. It is, of course, in our interest as well for the facility to operate as safely as possible.

The government of the United Commonwealth takes issue with the characterization of the precautionary principle as a rule of customary international law. First, its recitation in the Rio Declaration does not afford it such status. The Rio Declaration expresses goals and aspirations, not necessarily binding international mandates. While your letter noted that some in the international community have suggested that the precautionary principle is a rule of law, others take an opposite view. *E.g. Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan), 38 I.L.M. 1624, 1640-42 (1999) (separate opinion of Judge Laing) (rejecting Australia's claim that the precautionary principle is customary international law); Christopher D. Stone, *Is There a Precautionary Principle?*, 31 *Env'tl. L. Rep.* 10790 (2001).

Furthermore, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity has yet to enter into force, so it is difficult to see how that document affects the status of the precautionary principle. Finally, and perhaps most important, we note that, in any event, the United Commonwealth's actions are entirely consistent with the precautionary principle. Given the risk of the HEU in Tuvastan being acquired by rogue states or terrorist organizations, it would be imprudent not to act.

29. On 3 November 2001, the Sandian Minister for Foreign Affairs sent a letter to the UC Minister for Foreign Affairs, which stated in part:

The horrific attacks on the United States on September 11 have reinforced the need for assessment and consultations regarding the Chellystone facility and proposed HEU importation. Terrorists may not only acquire nuclear material; they may target a nuclear facility, such as Chellystone, or a shipment of nuclear material. The IAEA Director General, in a Special Session addressing the need to prevent terrorists from acquiring nuclear material and to protect nuclear facilities from being targeted, stated:

Because radiation knows no frontiers, States need to recognise that safety and security of nuclear material is a legitimate concern of all States. Countries must demonstrate, not only to their own populations, but to their neighbours and the world, that strong security systems are in place. The willingness of terrorists to commit suicide to achieve their evil aims makes the nuclear terrorism threat far more likely than it was before September 11.

Accordingly, the government of Sandia renews its request for information and consultation.

30. On 13 December 2001, the UC Minister for Foreign Affairs responded with a letter that stated, in part:

It is the position of the government of the United Commonwealth that the September 11 attacks emphasize the need for increased secrecy and security regarding the shipments and processing of HEU. Accordingly, the government of the United Commonwealth declines to provide any additional information on this matter.

31. On 27 December 2001, the Sandian Minister for Foreign Affairs sent a letter to the UC Minister for Foreign Affairs, that stated in part:

While sympathetic to the claim of national security, the government of Sandia points out that it has security concerns as well. Moreover, the invocation of national security does not necessarily preclude further review. *See e.g.* Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 *Yale J. Int'l L.* 413 (2001) (discussing reviewability of security exceptions).

It is in both countries' interests to resolve this matter. The Espoo Convention, the Convention on Biological Diversity, and the U.N. Convention on the Law of the Sea all provide for the International Court of Justice to resolve disputes. While our claims are not necessarily limited to those conventions, the government of Sandia proposes that we submit the entire dispute to the ICJ.

32. After continued discussions, the government of the Republic of Sandia and the government of the United Commonwealth signed an agreement on 3 May 2002 that submits the matter to the International Court of Justice.
33. The 3 May 2002 agreement shall not be interpreted as waiving or prejudicing any argument that the UC may make concerning the jurisdiction of the International Court of Justice regarding matters of national security. The UC will not, however, raise any other jurisdictional arguments in these proceedings.
34. The Republic of Sandia opposes the claims in paragraph 35 of this Annex and seeks an order of the International Court of Justice declaring that (1) the UC's refusal to prepare a new EIA and consult with the Republic of Sandia concerning the transboundary shipment of HEU and the continued operation of the Chellystone facility are violations of international law, and (2) the proposed HEU shipments and continued operation of the Chellystone facility are violations of the UC's international obligation to protect and preserve the marine environment.
35. The UC opposes the claims in paragraph 34 of this Annex and seeks a decision of the International Court of Justice declaring that the Court has no jurisdiction to consider the EIA and consultation claims because the UC has invoked its national security interests. In the alternative, and without prejudice to its jurisdictional arguments, the UC seeks an order declaring it needs neither to prepare a new EIA nor enter into consultations with the Republic of Sandia. Finally, the UC seeks an order declaring that the proposed transboundary shipments of HEU and the continued operation of the Chellystone facility do not violate international law.