IN THE INTERNATIONAL
COURT OF JUSTICE

2002 GENERAL LIST NO. 107

REPUBLIC OF SANDIA,

APPLICANT

v.

THE UNITED COMMONWEALTH,

RESPONDENT

MEMORIAL FOR RESPONDENT

2002 INTERNATIONAL ENVIRONMENTAL
MOOT COURT COMPETITION

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Kevin R. Gray, International Environmental Impact Assessment: Potential for a Multilateral Environmental Agreement, 11 Colo. J. Int'l. L. & Pol'y 83, 101 (Winter 2000)....................11-12

James E. Hickey, Refining the Precautionary Principle in International Environmental Law, 14 Va. Envtl. L.J. 423, 431-438 (Spring 1995) 17

John H, Knox, The Myth and Reality of Transboundary Environmental Impact Assessment, 96 Am. J. Int'l L. 291, 304 (April 2002)....................10

Christopher Stone, Is There a Precautionary Principle?, Envt'l L. Rep. 10790 (July 2001) 16

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STATEMENT OF JURISDICTION

The Governments of the United Commonwealth and the Republic of Sandia submit the following dispute to the International Court of Justice, pursuant to Article 40, paragraph 1 of the Statute of the International Court of Justice. Accordingly, this Court has jurisdiction to adjudicate the questions presented by the parties.

QUESTIONS PRESENTED

1. Does the International Court of Justice have jurisdiction over a claim that the UC has not followed proper procedures by excluding Sandia from its decision to accept a shipment of HEU from a highly unstable nation when the UC, after taking into account the high risk of terrorist attacks should the material fall into the wrong hands, decided that the release of certain information would place its citizens in grave danger?

2. Under international law, has the UC followed applicable procedures when it involved potentially affected populations in the process of deciding a location for a facility to down-blend highly enriched uranium, suspended operations in that facility when the need arose and chose to accept a shipment of HEU for down-blending in order to ensure that said HEU would not be sold on the black market and potentially used in furtherance of terrorism?

STATEMENT OF THE FACTS

The United Commonwealth (UC), with no influence from other nations, made a prudent decision to reduce the number of nuclear weapons in their care. To achieve this goal, the UC chose to down-blend 22 tons of highly-enriched uranium (HEU) in their stores to low-enriched uranium (LEU) at a facility that was to be built. This LEU would then be used to generate electricity at commercial power plants. (R. at 8.) In addition, the UC also took it upon themselves to ensure the safety of the region by purchasing HEU from Tuvastan, a politically and economically unstable nation because of concerns that the HEU possessed by Tuvastan would fall into the hands of terrorists or rouge states. (R. at 9.)

The UC is a developed nation with a large population and a diversified economy. The Republic of Sandia, UC's neighbor to the West across the 20-mile stretch of the Sea of Sandia, is a developing island nation with a small population. Sandia has declared themselves a "Nuclear Free Zone" which prohibits nuclear power plants and weapons within their borders and territorial seas. Both nations have agreed to claim territorial seas to the median line (10 miles each) of the Sea of Sandia. (R. at 7.)

The UC consulted with their neighbor, Sandia, in siting and building the down-blending facility by conducting an Environmental Impact Assessment (EIA). During the EIA process, Sandia participated by submitting comments on the proposed project. Sandia voiced its opposition to the project stating that it would pose unacceptable risks although the completed EIA concluded that the risks would be "minimal." The decision was ultimately made to build the facility on the western coast of the UC. Construction was completed and operations began at the Chellystone facilities in July and August 1997. (R. at 8.)

In August 1999, the UC Ministry of Energy made the decision to suspend operations at the Chellystone facility due to some safety concerns. (R. at 9.) The UC was acting cautiously in briefly

halting operations because in this 18-month period no event occurred posing “serious offsite risk.” (R. at 8-9.) Operations recommenced six months later and to this date, there have been no other such incidents at the facility. (R. at 9.)

The government of Tuvastan approached the UC in May 2001 with about two metric tons of HEU which they possessed but had no means of securing. Tuvastan's inability to pay its soldiers had created a concern that maintaining adequate security would be impossible and the HEU “could be sold on the black market to rogue states or terrorist organizations.” The UC resolved to assist with the security of the HEU shortly thereafter by agreeing to take possession of the HEU in exchange for financial compensation. (R. at 9.)

Sandia, upon learning of this arrangement, became concerned that the shipment of HEU from Tuvastan to the UC would cause damage to the Sea of Sandia and affecting its economy. (R. at 9.) In a letter from the Sandian Minister of Foreign Affairs, dated August 2001, Sandia made two objections. First, Sandia claimed that the UC had a duty to notify and consult with them on the proposed shipment and, in effect, to conduct an EIA. (R. at 9.) Second, Sandia's substantive claim is that activities at the Chellystone facility and the proposed importation of HEU violates international law including provisions of United Nations Convention on the Law of the Sea (UNCLOS) and other international legal principles including the precautionary principle. (R. at 9-10.)

In a subsequent letter to Sandia, the UC noted its fulfillment of the duty to notify, consult and conduct an EIA by their voluntary commitment to the original EIA. (R. at 11.) Further, UC holds that it satisfied its commitments under UNCLOS and disputes the “characterization of the precautionary principle as a rule of customary international law.” (R. at 12.)

Upon the inability to reach an agreement, the governments of Sandia the UC submitted this matter to the International Court of Justice. In this agreement, the UC retains the argument concerning the jurisdiction of the International Court of Justice regarding matters of national security. (R. at 15.)

SUMMARY OF THE ARGUMENT

The UC is under no obligation to conduct an EIA for the planned project between the UC and Tuvastan because doing so would conflict with the national security interests of the UC. The Convention on Environmental Impact Assessment in a Transboundary Context (hereinafter Espoo Convention) provides an express waiver to the general requirement of an EIA. When national security is at stake, a nation is allowed to withhold sensitive information that is needed for an EIA, but would otherwise compromise its national security interests. Here, any EIA required of the UC would essentially provide terrorists with the missing link to a devastating attack on one of the UC's nuclear facilities. Furthermore, any information withheld by the UC will not adversely affect any of its neighboring countries. Therefore, the UC may exercise the broad discretion that the national security exception provides and exempt itself from any EIA requirement.

Should this Court deem the exception to be inapplicable to the UC, the UC has complied with customary international law and treaties, such as the Espoo Convention, the Convention on Biological Diversity, and the United Nations Convention on the Law and the Sea. The Espoo Convention was not in effect at the time the Chellystone facility was built. However, assuming, *arguendo*, that the Espoo Convention is retroactively applied, the UC has already conducted an EIA during the siting and construction phase of the project. The importation of HEU from Tuvastan is not a major change to the Chellystone site, therefore the former EIA is still valid.

The UC has also complied with the requirements of the Convention of Biological Diversity and UNCLOS. Both conventions grant broad discretion to a nation that must determine whether it is necessary to divulge information that may compromise its sovereignty. Under either convention, any

requirement to provide information would just increase the already unacceptable level of danger that pervades the two nations.

The continued operation of the Chellystone facility does not reach the level of actual environmental harm or damage, so the UC is not violating UNCLOS. The UC has continued to meet its obligation to prevent, reduce, and control pollution of its waters. The voluntary suspension of operations at Chellystone is evidence of the fulfillment of this duty. Furthermore, application of the precautionary principle due to the possibility that the adverse effects are not fully understood is mistaken. This principle has yet to become customary international law, and therefore, such a rule is not binding on the UC.

ARGUMENT

I. THE ICJ LACKS JURISDICTION OF THIS MATTER BECAUSE THE NATIONAL SECURITY CONCERNS OF THE UC ARE PARAMOUNT TO ANY EIA REQUIREMENTS OF THE ESPOO CONVENTION.

Every nation has a duty of international responsibility and recognizes that no state may cause or permit the use of its territory in a manner contrary to the right of other states, as a corollary breach of this duty entails international responsibility. Trail Smelter Arbitration (U.S. v. Can.), 3 U.N.R.I.A.A. 1938 (1941). However, it is a nation's inherent sovereign right to ignore this canon of international environmental law in order to protect its citizens by making its national security interests its first priority. The Convention on Environmental Impact Assessment in a Transboundary Context, as well as many other international treaties, recognizes such an exception. See Convention on Environmental Impact Assessment in a Transboundary Context, *opened for signature* February 25, 1991, art. 2(8), 30 I.L.M. 800 [hereinafter Espoo Convention]; General Agreement on Tariffs and Trade, *entered into force* January 1, 1948, art. 21, 55 U.N.T.S. 187 [hereinafter GATT].[1]

The International Court of Justice ("ICJ") lacks jurisdiction over this matter because the UC may invoke the national security exception of the Espoo Convention. Generally, the ICJ lacks automatic jurisdiction; instead, it must be granted jurisdiction by, *inter alia,* a treaty, such as the Espoo Convention. Statute of the International Court of Justice, *entered into force* October 24, 1945, art. 36(1), 1976 Y.B.U.N. 1052. However, Article 2 of the Espoo Convention specifically denies the ICJ jurisdiction in this matter because the UC's national security interests are at stake.

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[1] Article 21 of GATT states in pertinent part:

> [n]othing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests....

The UC and the Republic of Sandia are parties to the Espoo Convention, and therefore, must abide by all of its provisions, including the national security exception. The agreement between the UC and Tuvastan, in which the UC has agreed to take control of Tuvastan's HEU, and eventually down-blend the HEU into safer LEU at the Chellystone facility, has clear national security implications for both the UC and Sandia. Any imposed requirement on the UC to draft an EIA on the project will publicize sensitive information jeopardizing the safety of the operation and the citizens of both countries, especially during this time of heightened awareness due to the September 11 attacks.

Analysis of the invocation of the national security exception contained in other treaties demonstrates that the UC's national security interests are compelling. Sandia's concern that the national security exception is overly broad is misconstrued because the UC is clearly acting within the bounds of the exception. A clear and present danger upon the western world and its nuclear facilities has surfaced since the September 11 terrorist attacks. Therefore, it is imperative that the UC acts quickly to take the HEU out of the hands of an unstable country like Tuvastan. Foreign policy is not what drives the UC's refusal to draft an EIA, but its responsibility to protect its citizens and its sovereignty.

A. The Language Of Paragraph 8 Is A Mandatory Protection Of A Nation's Sovereignty, And Not Permissive And/Or Conditional.

It is the UC's right to bypass the EIA requirement of the Espoo Convention due to its national security concerns. Article 2, paragraph 8 of the Espoo Convention states:

> [t]he provisions of this Convention *shall not* affect the right of Parties to implement national laws, regulations, administrative provisions or accepted legal practices protecting information the supply of which would be prejudicial to industrial and commercial secrecy or national security. (Emphasis added).

The exception grants a nation the right to consider both its monetary and security interests before agreeing to abide by the EIA requirements of the Espoo Convention. The drafters chose language

mandatory in nature, eliminating the ability of other nations to second-guess a nation's decision to restrict available information.

When a national security exception is provided for in a treaty, it must be given equal weight with the substantive portions of the treaty. In Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), this Court, when considering the applicability of GATT's national security exception, stated:

> [a]n act cannot be said to be one calculated to deprive a treaty of its object and purpose, or to impede its due performance, if the possibility of that act has been foreseen in the treaty itself, and it has been expressly agreed that the treaty 'shall not preclude' the act, so that it will not constitute a breach of the express terms of the treaty.

The UC's invocation of the national security exception cannot be deemed contrary to the spirit of the treaty if it is invoking an express provision of the treaty. The exception language was not given more or less weight than the substantive language by the treaty drafters. Because the treaty expressly provides for the protection of a nation's security interests, the UC has acted permissibly in refraining from disclosing information through an EIA.

B. National Security Exceptions In Other Treaties, Such As GATT, Are Similar To Espoo's Exception And Would Exempt UC From Drafting An EIA.

The utilization of the exception in the context of other international treaties shows that the UC's decision is clearly protected. Among the many international agreements that contain the exception is GATT. Generally, the purpose of GATT is to breakdown political barriers to promote free trade. Article 21 of GATT, the national security exception, states that:

> [n]othing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests….

Due to the extensive reliance on Article 21 by those nations who signed GATT, there has been much discussion of the validity of GATT's national security exception.

Generally, the national security exception is invoked at the nation's discretion. Due to the broad discretion that a national security exception gives to a nation, this Court and the international community frowns upon a nation's "cowboy behavior" in utilizing the exception. Raj Bhala, National Security and International Trade Law: What the GATT Says and What the U.S. Does, 19 U. Pa. J. Int'l Econ. L. 263, 273 (Summer 1998). When determining the validity of the reliance on Article 21, this Court has utilized a two-part test: 1) whether the risks run by the security interests are reasonable, and 2) whether the measures presented as being designed to protect these interests are not merely useful but necessary. Military and Paramilitary Activities, 1986 I.C.J at 117, 136. A nation will satisfy such a test if it can demonstrate that the perceived threat is, "a credible threat judged from the objective standpoint of a reasonable, similarly-situated government, coupled with the articulation of specific types of dangers…and not [a nation's] unduly restrictive self-defense argument…." Bhala, supra, at 275.

Despite the broad discretion granted by the exception, if this Court is guided by the criteria espoused by various scholars, it should still deem the UC's actions acceptable. In the context of the GATT exception, several criteria will be considered, including: 1) respecting the rights of sovereignty and nonintervention; 2) consideration of relative impact; and 3) the likelihood of success. 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 (Summer 2001). When met, these criteria reflect "substantial and quite encompassing decision-making process." Id. at 438.

1. The UC's refusal abide by the requirements of the Espoo Convention, thereby releasing sensitive information, is reasonable and necessary to protect against an attack on its citizens.

The UC's use of the national security exception is both reasonable and necessary to protect its security interests at home. This Court laid down the reasonable and necessary test in Military and Paramilitary Activities, (Nicar. v. U.S.) 1986 I.C.J. 14. In that case, the United States imposed an embargo on Nicaragua in order to facilitate the overthrow of the current Nicaraguan government. Id. Nicaragua than challenged the embargo, arguing that the United States was violating GATT. Id. at 18. The United States justified its actions based on GATT's national security exception. Id. at 23.

This Court held that the actions of the United States were not justified, because they were not necessary to the security interests of the nation. Id. at 141. The attacks on Nicaraguan ports and oil facilities by the United States were not shown to have a direct causal link to the interests of the United States and its people.

The threat to the UC is dissimilar to that of the United States in Military and Paramilitary Activities. The actions taken by the UC are reasonable considering the relatively minimal impact the nondisclosure will cause, especially when compared to the United States' nation-wide embargo placed upon a small country like Nicaragua. Furthermore, the UC's actions provide direct safety to those citizens on home soil. The threat that the UC looks to protect is not in other country, but within its borders. The UC is taking steps that are objectively necessary to ensure the safety of its citizens.

2. The decision of the UC conforms to the purpose of the national security exception because it conforms to the principles of international law by having no impact on other nations' sovereignty and it has a high likelihood of success.

The UC's actions were the target if what the treaty drafters intended when including the national security exception in the Espoo Convention. Although the exception has been subject to abuse in the GATT context, the UC's security interests are valid, necessary, and real. By invoking the exception, the UC has at all times: 1) respected Sandia's right of sovereignty and nonintervention; 2) considered its relative impact on Sandia; and 3) weighed its decision to invoke the exception with its likelihood for success.

Sandia's sovereign rights will not be affected by the UC's utilization of the exception. Sandia has already had the opportunity to participate in the siting and construction plans of the Chellystone facility. By keeping information about the HEU transport confidential, the UC is not interfering with Sandia's sovereignty, but, in fact, it is indirectly protecting it by thwarting a devastating terrorist attack.

Further, the prior EIA of the Chellystone facility provided Sandia with all of the information that it should deem relevant to its interests. Therefore, any information withheld by the UC will have minimal impact on Sandia's interests. The minimal impact on Sandia must be compared to the benefit that nondisclosure entails. The UC and the rest of the Western world must be on extremely high alert for the unconventional threats now posed by terrorists. An impoverished and unstable nation, Tuvastan may be unable to prevent the sale of its HEU to a rogue nation. Instead, with the operation undertaken by the UC, the HEU will be in safe hands. Any delay caused by the requirement to conduct an EIA could prove too costly for the UC and the rest of the world.

The threat of such rogue states obtaining HEU as well as any nuclear facilities being targets to such attacks forces the UC to place its national security concerns above to any EIA requirement. Although mindful of the concerns of the Sandian government and its people, the decision to bypass the EIA requirement is ultimately at the discretion of the UC. The environmental impact of the Chellystone

facility has already been considered by the UC as is evidenced by the EIA already conducted. The UC is disregarding the concerns of the Sandian government, but a direct threat to the UC people must take precedence over all other concerns, especially in the light of the exigency of the situation.

II. THE UNITED COMMONWEALTH NEITHER NEEDS TO CONDUCT A NEW ENVIRONMENTAL IMPACT ASSESSMENT NOR ENTER INTO NEGOTIATIONS WITH THE REPUBLIC OF SANDIA REGARDING THE CONTINUED OPERATION OF THE CHELLYSTONE FACILITY AND THE PROPOSED SHIPMENTS OF HIGHLY ENRICHED URANIUM.

International environmental law is a rapidly evolving creature. Thousands of bilateral and multilateral treaties have been negotiated and adopted in just a few short decades, making compliance with each applicable covenant an onerous task. Nevertheless, it is the goal of the United Commonwealth to abide by the agreements to which it is a party and to respect and protect the global environment.

A. The United Commonwealth Is Under No Duty To Further Negotiate With The Republic Of Sandia Or Conduct A New Environmental Impact Assessment According To The Convention On Environmental Impact Assessment In A Transboundary Context, The Convention On Biological Diversity Or The United Nations Convention On The Law Of The Sea.

The UC made every effort to involve the Republic of Sandia in the siting and construction of the Chellystone blending facility while also attempting to balance that involvement with the exercise of national sovereignty. In addition, the UC's decision not to involve Sandia in the transportation of HEU from Tuvastan is justified by both the invocation of national security and the terms of treaties to which both nations are parties, specifically, the Espoo Convention, the Convention on Biodiversity, and the Convention on the Law of the Sea, the texts of which each support the UC's defense against Sandia's accusations.

1. The Convention does not require the UC to conduct a new Environmental Impact Assessment to consider the shipment of the highly enriched uranium from Tuvastan.

The Espoo Convention outlines the procedures and dispute resolution process involved in conducting Environmental Impact Assessments. Having entered into effect on September 10, 1997,

one month after operations began at the Chellystone facility, its regulations were not binding on the UC at the time the facility was built and remain unenforceable for the continued operations of the facility.[2] However, should this Court find that retroactive application is appropriate, it should be noted that the UC complied with its obligation to conduct an initial EIA, but under these circumstances, the transportation of HEU falls outside of Espoo's scope.

a. The United Commonwealth fulfilled it obligations under Espoo by conducting the original Environmental Impact Assessment.

Article 2 of the Espoo Convention makes clear that its textual provisions are to be applied to only those proposed activities that are either explicitly listed in Appendix I or that the parties have agreed are "likely to cause a significant transboundary impact and thus should be treated as if…they were so listed." Espoo Convention, supra, art. 2, ¶¶ 4-5, 30 I.L.M. 800. Among the listed activities are "[i]nstallations solely designed for the production or enrichment of nuclear fuels, for the reprocessing of irradiated nuclear fuels or for the storage, disposal and processing of radioactive waste." Id., App. I, ¶ 3, 30 I.L.M. 800. Although the activities listed in Appendix I, paragraph 3 do not unequivocally include down-blending processes, it may be inferred from the phrase "reprocessing of irradiated nuclear fuels." Acting on this broad interpretation, the United Commonwealth voluntarily conducted an Environmental Impact Assessment for the siting and construction of the Chellystone facilities. The requirements of Espoo were followed in so much as the United Commonwealth conducted the EIA prior to the final decision to undertake the construction of the Chellystone facility. Id., art. 2, ¶ 3, 30 I.L.M. 800. Also, in conducting the EIA, the United Commonwealth allowed the Sandian government

[2] Vienna Convention on the Law of Treaties, Article 28 states "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that treaty." Vienna Convention on the Law of Treaties, *entered into force* January 27, 1988, art. 28, 1155 U.N.T.S. 331.

"an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures..." in compliance with Article 2, paragraph 6. Id., art. 2, ¶ 6, 30 I.L.M. 800.

Even though the UC conducted the assessment, there is no duty for the UC to follow the suggestions proposed in the report. John H, Knox, The Myth and Reality of Transboundary Environmental Impact Assessment, 96 Am. J. Int'l L. 291, 304 (April 2002). Espoo only provides procedural requirements and stops short of posing any substantive obligations. The United Commonwealth conducted the EIA according to the provisions of the Espoo Convention but has no duty, under this convention, to consider the objections included in the assessment made by the Republic of Sandia.

b. The United Commonwealth is not obligated to conduct a second Environmental Impact Assessment taking into consideration the shipment of highly-enriched uranium because it is neither a major change in operation nor is it an activity listed in Appendix I of Espoo.

The shipment of HEU to the Chellystone facility is not a "major change" to the activities of the facility nor is it a listed activity under Appendix I, either of which would possibly require a second EIA. Article 1, paragraph 5 of the Espoo Convention specifies that any major change to ongoing activities is also regulated and subject to consultation with the potentially affected State. The shipment at issue cannot constitute a major change in the activity because transportation of HEU has been part of Chellystone's operations from the beginning. The sole difference between this shipment and the

transportation of 25 metric tons of HEU already is its source. However, under GATT, the source of the material should not be considered in determining that it is a major change to operations.[3]

The shipment of HEU to the Chellystone facility is not an activity listed in Appendix I, which would require a second EIA, as if it were a brand new project. Appendix I only considers installations for the production or enrichment of nuclear fuels, the reprocessing of irradiated nuclear fuels and the storage, disposal and processing of radioactive waste. The shipment of HEU does not fall into either of these options because Chellystone does not produce or enrich fuel, in fact, down-blending is the very opposite of enrichment nor has the HEU being accepted been irradiated yet, and finally, neither HEU nor LEU is considered waste.

When an activity is not listed in Appendix I, but a Party is concerned that it may cause transboundary pollution, the Convention provides for limited means of treating the activity as if it were listed in Appendix I. Kevin R. Gray, International Environmental Impact Assessment: Potential for a Multilateral Environmental Agreement, 11 Colo. J. Int'l. L. & Pol'y 83, 101 (Winter 2000) ("Where a project does not fall under the projects enumerated in Annex I, an affected party can require an EIA if the project may cause significant adverse transboundary impact.").

Article 2, paragraph 5 of the Espoo Convention states:

> Concerned Parties shall, at the initiative of any such Party, enter into discussions on whether on or more proposed activities not listed in Appendix I is or are likely to cause a significant adverse transboundary impact and thus should be treated as if it or they were so listed. *Where those Parties so agree*, the activity or activities shall be thus treated. General guidance for identifying criteria to determine significant adverse impact is set forth in Appendix III.[4] (Emphasis added).

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[3] Discriminating against a product based solely on its origin is prohibited under GATT, Article III, paragraph 4. Accordingly, the HEU from Tuvastan and the HEU from the UC should "be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, transportation, distribution or use." GATT, supra, art. 3, ¶ 4, 55 U.N.T.S. 194.

[4] Appendix III reads:

The requirement is that the parties must agree that the activity should be treated as if listed in Appendix I. When determining whether the proposed activity would have transboundary impact the criteria in Appendix III is useful but not dictating. Not only is the language of Appendix III permissive, explaining that the concerned Parties "may consider" the listed factors in determining the likelihood of significant adverse impact, but there is no contingency guaranteeing agreement in the case of a stalemate, which is all but inevitable. The disagreement is turned over to an inquiry commission but ultimately the parties have to come to an agreement. Gray, supra, at 101. The requirement for such treatment has not been met in this case and consequently it is not necessary to treat the shipment of HEU as if it were listed.

In complying with the stipulations of Espoo, the United Commonwealth and the Republic of Sandia attempted negotiations concerning the shipment of the HEU but an agreement was not reached. There is no requirement in Espoo demanding an agreement be reached; therefore, the UC has no further duty to consult with Sandia.

2. The United Commonwealth satisfied the requirements of the Convention on Biological Diversity because an Environmental Impact Assessment would be

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In considering proposed activities to which Article 2, paragraph 5, applies, the concerned Parties may consider whether the activity is likely to have a significant adverse transboundary impact in particular by virtue of one or more of the following criteria.

(a) Size: proposed activities which are large for the type of the activity;
(a) Location: proposed activities which are located in or close to an area of special environmental sensitivity or importance (such as wetlands designated under the Ramsar Convention, national parks, nature reserves, sites or special scientific interest, or sites of archaeological, cultural or historical importance); also, proposed activities in locations where the characteristics of proposed development would likely to have significant effects on the population;
(a) Effects: proposed activities with particularly complex and potentially adverse effects, including those giving rise to serious effects on human or on valued species or organisms, those which threaten the existing or potential use of an affected area and those causing additional loading which cannot be sustained by the carrying capacity of the environment.

The concerned Parties shall consider for this proposed activities which are located close to an international frontier as well as more remote proposed activities which could rise to significant transboundary effects far removed from the site of development.

> inappropriate considering the circumstances and the shipment of highly-enriched uranium is not likely to have a significant adverse effect on biological diversity.

As the title indicates, the Convention on Biological Diversity, adopted in Rio de Janeiro in 1992, focuses on "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of [its] utilization." Convention on Biological Diversity, *concluded at Rio de Janeiro* Jun. 5 1992, art. 1, 31 I.L.M. 818. Sandia would remind the UC of its duties under Article 14 of this convention, but the fact is that the UC has heeded the call of the drafters by complying with each applicable directive.[5] At this time, an EIA regarding the shipment of HEU is inappropriate and therefore the UC is not compelled by the Convention on Biological Diversity to perform such a function.

The Convention on Biodiversity calls for the introduction of appropriate procedures including an EIA for proposed activities that are likely to have significant adverse effects on biological diversity. Here, neither the continued operation of the Chellystone facility nor the shipment of HEU is likely to have significant adverse affects on the biological diversity of the area. Furthermore, the Convention on Biodiversity specifically recognizes that each participating nation has its own set of environmental laws that it is entitled to observe and that sovereignty plays a large, and appropriate role in international politics. See Id., pmbl., para. 4; Id., art. 3. This is evidenced by the fact that the entire article and the duties discussed therein are qualified. Contracting parties are required to abide by the requirements "as

[5] Article 14 of the Convention on Biological Diversity is entitled "Impact Assessment and Minimizing Adverse Impacts" and explains the procedure that a Party of Origin should follow in proposing an activity that is likely to have a significant adverse effect on biodiversity.

far as possible and as appropriate." That caveat applies not only to Article 14 and EIAs, but a Party's duty to cooperate with other nations under Article 5 as well.[6]

Specifically, it should be noted that, Article 14's duty to involve the potentially affected public in the EIA is explicitly at the discretion of the Party of Origin as well. Again, the Convention on Biodiversity calls for such action only where it is appropriate.[7] In this case, involving the public in the decision to ship HEU from Tuvastan would create just the problem that Sandia seeks to avoid. Making it known that HEU was going to be shipped, and publicizing the methods and routes of shipments, would make it much easier for that information to fall into the wrong hands, i.e. those rogue nations of terrorists, thereby making interference with or hijacking of the transport vehicle a more likely occurrence. This increases the possibility of consequences much worse than transboundary pollution. By restricting access to the information of shipment, the UC is fulfilling its duty to protect the global environment.

3. The UC was not obliged to notify Sandia of the shipment under the United Nations Convention on the Law of the Sea because notification was not practicable under the circumstances.

"Article 206 of the United Nations Convention of the Law of the Sea calls for an assessment of activities that have potential effects on the marine environment." Gray, supra, at 91-92. While this obligation might initially sound non-discretionary, it is qualified with the phrase, "as far as practicable." United Nations Convention on the Law of the Sea, *concluded at Montego Bay* December 10, 1982, art. 206, 21 I.L.M. 1261 [hereinafter UNCLOS]. Even the requirements in Article 204, governing the monitoring of the risks of pollution contains permissive language by only requiring what is practicable.

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[6] Article 5 states in pertinent part: "Each Contracting Party shall, as far as possible and as appropriate, cooperation with other Contracting Parties directly…."

[7] "…and, where appropriate, allow for public participation in such procedure."

Id., art. 204. This demonstrates the drafters' intent to build flexibility into the agreement by allowing Parties to assert state sovereignty when necessary. The UC decided that sharing the information at issue was not practicable because such action would have increased an already unacceptable threat of grave destruction. The UC was fully within its rights under UNCLOS when it evaluated this delicate situation and used its discretion in keeping the information at issue confidential. The UC fulfilled its obligations under the strict interpretation of the convention without compromising spirit of the agreement.

B. The Continued Operation Of The Chellystone Facility And The Continued Shipment Of Highly Enriched Uranium Do Not Violate The United Nations Convention On The Law Of The Sea Or The Precautionary Principle.

1. The United Commonwealth is not violating the United Nations Convention on the Law of the Sea because Sandia is concerned only about a mere risk of environmental harm which is not equivalent to actual environmental harm or damage, a requirement under the Convention.

While UNCLOS has several provisions concerning the pollution of the marine environment, they uniformly maintain that states are to "prevent, reduce and control pollution." Id., art. 194 ¶¶ 1, 4, arts. 195, 196. The Convention requires there be some actual threat of pollution not a mere threat of pollution risk. Article 194, paragraph 1, requires states to take all measures necessary to prevent, reduce and control pollution of the marine environment. If this were to be read literally, there would be a prohibition on any activity that posed the slightest risk. The drafters could not have had intended this effect because it is contrary to other notions in the Convention such as encouraging navigation in territorial waters. Instead of creating a working set of rules, this would just prohibit activities in the sea, probably not, what the drafters had in mind.

Article 194, paragraph 4, states effectively the role disputing States are to play when in conflict. When a State is in the pursuance of their duties under this Convention, other States are to "refrain from

unjustifiable interference with activities carried out by" the State. Id., art. 194, ¶ 4. In our situation, the UC has a duty to prevent, reduce and control pollution and Sandia has a companion duty not to "unjustifiably interfere." The UC has shown by its voluntarily suspending operations at the facility for safety considerations and maintaining the confidentiality of the of the shipment to prevent widespread environmental destruction its dedication to preventing, reducing and controlling pollution.

2. Because the precautionary principle is only "soft law" and has not reached the status of customary international law, the United Commonwealth is not bound by the concept.

At its broadest interpretation, the precautionary principle "declares that where potential adverse effects not fully understood, the activities shall not proceed." Christopher Stone, Is There a Precautionary Principle?, Envt'l L. Rep. 10790 (July 2001) (internal quotations omitted). Because the majority of nations do not adhere to this principle widely and is it not practiced by nations out of legal obligation, it is only a non-binding international principle and has not yet become customary international law. For a general principle to gain acceptance as customary international law, a two-prong test, consisting of a subjective and an objective prong, must be satisfied. To satisfy the objective part of the test, the precautionary principle must be practiced by a large number of states often evidenced by diplomatic correspondence or domestic legislation. The subjective part of the test requires that these nations practice the principle out of legal obligation and not because they think it is the right or moral thing to do. To establish this the principle must be uniform and consistent and have a significant duration. David Hunter, et al., International Environmental Law and Policy, pp. 311-12 (2d ed. 2001).

The precautionary principle has not become custom international law predominantly because the subjective part of the test has not been satisfied. What makes the precautionary principle troubling is its inconsistency and lack of uniformity. The varying language used to express the principle in different

agreements has caused its application to become unpredictable. Stone, supra, at 12. Principle 15 of the Rio Declaration, for instance, requires "full scientific certainty" of all consequences before an activity is to be carried out. Following this requirement would prohibit almost any type of development because when embarking on any new project full scientific certainty is virtually impossible. Id. at 1. Surely, the Parties to the Rio Declaration did not want to prohibit all development especially considering that the drafters carefully included sustainable development language that requires a balancing between environmental concerns and developmental concerns. There are endless examples of how agreements diverge in their explanation and application of the principle. James E. Hickey, Refining the Precautionary Principle in International Environmental Law, 14 Va. Envtl. L.J. 423, 431-438 (Spring 1995). Due to the great inconsistencies among the various international documents, nations have had to interpret the meaning based on the facts of individual circumstances, which has created further discrepancy. International Environmental Law Anthology 22 (Anthony D'Amato and Kirsten Engel eds., 1996).

Although, the precautionary principle is not considered customary international law, the commentators have designated it a special place in international law, as illustrated in the Bluefin Tuna Cases. Southern Bluefin Tuna Cases (New Zealand v. Japan), 38 I.L.M. 1624, 1641 (1999). In that case, the court said that while it cannot be disputed that the precautionary principle has been accepted for international action, it cannot be said that "customary international law recognizes a precautionary principle" and that "no authoritative judicial decision unequivocally supports the notion." Id. at 1641. Since there is not a uniform concept of the precautionary principle, it is a far stretch to say that it has developed into customary international law. Although general principles may have an impact on international law, they do not carry the weight and binding ability of customary law. Therefore, since the

precautionary principle is not to be considered customary international law it is not binding on the UC. The UC had no obligation to attempt to conform to a general principle of international law that is racked with contradictions and leads to illogical conclusions.

CONCLUSIONS AND PRAYER FOR RELIEF

In consideration of the aforementioned, the United Commonwealth respectfully requests this Honorable Court to:

1) **declare that** the Court does not have jurisdiction to decide this issue of national security; and,

2) **declare that** the United Commonwealth has conducted all the necessary environmental impact assessments required by it under the applicable international treaties.

Respectfully Submitted,

/s/________________________________

Agents for the United Commonwealth

AFFIDAVIT

We have read the Rules of the International Environmental Moot Court Competition. Our memorial submitted was prepared in accordance with the Competition Rules; we have not received any unauthorized assistance. Please print each team member's name under the signature, as you would like the name to appear on participation certificates.

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Memorial Number:	16