

2002 General List No. 107

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**IN THE  
INTERNATIONAL COURT OF JUSTICE  
AT  
THE PEACE PALACE, THE HAGUE  
THE NETHERLANDS**

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**REPUBLIC OF SANDIA,  
APPLICANT**

**v.**

**UNITED COMMONWEALTH,  
RESPONDENT**

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**MEMORIAL FOR RESPONDENT**

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2002 Stetson International Environmental  
Moot Court Competition

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## **STATEMENT OF JURISDICTION**

The Governments of the United Commonwealth (UC) and the Republic of Sandia (Sandia) submit the following dispute to the International Court of Justice (ICJ), pursuant to Article 40, paragraph 1 of the Statute of the ICJ. The UC acknowledges this Court's authority under Article 36, paragraph 6 of the Statute of the ICJ to determine its own jurisdiction.

For the reasons described herein, the UC respectfully disputes this Court's jurisdiction over the issues of whether the UC is required to conduct an Environmental Impact Assessment (EIA) or consult with Sandia regarding the UC's Chellystone operations and importation of Tuvastan highly enriched uranium (HEU).

## **QUESTIONS PRESENTED**

Whether the UC is subject to this Court's compulsory jurisdiction in a disagreement over whether the UC is required to conduct a new EIA or consult with Sandia, where the UC asserts that taking such actions would prejudice its national security interests.

Whether the UC is required to conduct a new EIA or consult with Sandia, where doing so would require the UC to divulge detailed information about the international shipment of nuclear materials that are an attractive target for rogue states and terrorist organizations.

Whether the UC would violate international law by continuing its Chellystone facility operations and importing HEU from Tuvastan, where doing so would secure the HEU and eliminate its usefulness as fuel for nuclear weapons.

## STATEMENT OF FACTS

This case concerns a State's sovereign right to formulate and implement its own energy, environmental, and national security policies without interference from other States. The UC, Respondent, is a developed nation of 300 million people. (R. at 7.) It has a diversified economy, and relies on nuclear power for forty percent of its energy needs. (R. at 7.) Sandia, Applicant, is a developing country with a population of five million people. (R. at 7.) Sandia has declared itself to be a "Nuclear Free Zone," and prohibits nuclear power plants and weapons within its territorial sea. (R. at 7.) Sandia is situated twenty miles from the UC's western coast. (R. at 7.) Each State claims a territorial sea of ten miles—up to the median line between the countries. (R. at 7.)

Both States are members of the United Nations (UN) and the International Atomic Energy Agency (IAEA). (R. at 7.) Both are parties to the Convention on Nuclear Safety (CNS) and the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste (Joint Convention). (R. at 7.) Both are parties to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), the United Nations Convention on the Law of the Sea (UNCLOS), the Rio Declaration on Environment and Development (Rio Declaration), and the Convention on Biological Diversity (CBD). (R. at 7.)

For years, the UC engaged in a nuclear arms race with the Union of Democratic Republics (UDR). (R. at 7.) As a result, the UC stockpiled hundreds of nuclear weapons. (R. at 7.) When the UDR dissolved into twelve separate states in 1992, the UC was able to reduce its number of nuclear weapons. (R. at 7-8.) This created twenty-two tons of excess HEU. (R. at 8.) The UC decided to construct a facility in Chellystone—twenty miles from Sandia—to "down blend" the HEU into low-enriched uranium for use as fuel in nuclear power plants. (R. at 8.)

Prior to this decision, the UC conducted an EIA for the construction and operation of the Chellystone facility. (R. at 8.) The UC also notified Sandia and requested its comments. (R. at 8.) Sandia opposed the Chellystone facility, arguing that it would threaten Sandia's national security and economy. (R. at 8.) In its final EIA of December 1994, the UC determined that the project's environmental risks were "minimal" and recommended that the facility be constructed in Chellystone. (R. at 8.) In 1998 and early 1999, the Ministry reported to the International Atomic Energy Agency (IAEA) that three "incidents" and one low-level "accident" had occurred at the Chellystone facility. (R. at 8-9.) Accordingly, the UC suspended operations at Chellystone for six months to fully review operating procedures. (R. at 9.) No incidents have occurred at Chellystone in the years since. (R. at 9.)

In 2001, Tuvastan (a former UDR State) notified the UC that it possessed two metric tons of HEU. (R. at 9.) Because economic conditions were extremely poor and Tuvastan was unable to pay its soldiers in a timely manner, the Tuvastan government could not properly safeguard the HEU. (R. at 9.) The HEU was at risk of being sold on the black market to rogue states or terrorist organizations. (R. at 9.) The UC agreed to assist Tuvastan with the security of its HEU, and to later take custody of that HEU. (R. at 9.) To promote national security, the UC agreed to ship the HEU to the Chellystone facility for down blending. (R. at 9.)

In August of 2001, Sandia objected to the proposed importation of HEU and the continued operations of the Chellystone facility, demanding that the UC consult with Sandia on this issue and conduct an EIA. (R. at 9-11.) The Parties could not resolve these issues and agreed to submit the matter to this Court. (R. at 15.)

## SUMMARY OF ARGUMENT

This Court has no jurisdiction to determine the EIA or consultation issues because the UC has invoked the Espoo Convention's national security exception, and that invocation is not reviewable by this Court. Even if this Court were to review that invocation, it should still not find jurisdiction because the HEU importation is a national security matter. The Tuvastan HEU is already at risk of being acquired by terrorist organizations or rogue states to fuel their nuclear weapons. That risk would intensify if information about its transportation were disclosed.

Even if this Court decides to reach the merits, it should find that international law does not require the UC to prepare a new EIA or consult with Sandia. The Espoo Convention does not require any action regarding the Chellystone facility because it is an existing (not a proposed) facility, and there has been no major change in its activities. The Espoo Convention does not require any action regarding the importation of Tuvastan HEU because the UC's national security is at stake. Further, no other international agreements require the UC to consult or prepare an EIA. Finally, there is no customary international law regarding EIA or consultation.

Sandia asserts that the UNCLOS, viewed in light of the precautionary principle, prohibits the UC's proposed transportation of Tuvastan HEU and continued Chellystone operations. However, the precautionary principle has not reached the status of customary international law. Even if this Court were to apply the precautionary principle, it should still find that the UC has fully complied with that principle because the UC's actions will prevent environmental degradation. The Chellystone facility prevents the risk of environmental harm presented by HEU by down blending it to LEU—which cannot be used to fuel nuclear weapons. The importation of Tuvastan HEU prevents the risk of environmental harm presented by the presence of two tons of HEU in an unsecure environment.

## ARGUMENT

I. THIS COURT HAS NO JURISDICTION TO DETERMINE THE ENVIRONMENTAL IMPACT ASSESSMENT (EIA) OR CONSULTATION ISSUES BECAUSE THE UNITED COMMONWEALTH HAS INVOKED THE NATIONAL SECURITY EXCEPTION TO THE CONVENTION ON ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY CONTEXT (ESPOO CONVENTION).

**A. This Court should examine only the Espoo Convention because it specifically addresses EIA.**

Because the Espoo Convention specifically addresses EIA and consultation, this Court should not examine other agreements or general international law. The principle of *lex specialis derogat gene ralis* dictates that a treaty with rules that are more specific on an issue should prevail over a treaty with more general rules. Sabrina Safrin, *Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements*, 96 American Journal of International Law 606, 624, n. 146 (2002). Further, this Court has stated that because treaty rules are *lex specialis*, a State should not assert a claim under general international law when a treaty already provides rules for that claim. *Case Concerning Military and Paramilitary Activities in and Against Nicar. (Nicar. v. United States)*, 1986 I.C.J. 14, 137 (June 27); *Interpretation of the Agreement of 25 March 1951 Between the WHO AND Egypt*, 1980 I.C.J. 73, 162 (Dec. 20) (separate opinion of Judge Ago). Here, the Espoo Convention specifically addresses EIA and consultation, where other treaties merely include a single provision for EIA in the larger context of the subject matter they cover. This Court should find that the Espoo Convention is *lex specialis* in the EIA and consulting issues, and resolve those issues under the Espoo Convention or not at all.

**B. This Court has no jurisdiction to decide the merits of this issue because the UC has invoked the national security exception to the Espoo Convention.**

The UC has not consented to this Court's jurisdiction over the EIA or consultation issues because divulging this sensitive information would prejudice the UC's national security. This

“Court cannot decide a dispute between States without the consent of those States to its jurisdiction.” *Case Concerning Oil Platforms (Iran v. United States)*, 1996 I.C.J. 803, 891 (Dec. 12) (dissenting opinion of Judge Oda). *See also S. S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser.A) No. 10 at 18 (Sep. 7). A sovereign State may consent to this Court’s jurisdiction by special agreement, by a general declaration, or by agreement to a treaty or convention that provides for the Court’s jurisdiction. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, (art. 36, paras. 1-2); *Oil Platforms*, 1996 I.C.J. at 891. There was no special agreement or general declaration in this case.

The UC has consented to this Court’s jurisdiction by its agreement to the Espoo Convention, but not concerning national security matters. “It is clear that, where a treaty excludes from its regulated reach certain areas, those areas do not fall within the jurisdictional scope of the treaty.” *Nicar.*, 1986 I.C.J. at 307 (dissenting opinion of Judge Schwebel). The Espoo Convention provides that it will not affect a Party’s rights to implement national regulations in order to protect information that, if supplied, would prejudice national security. Convention on Environmental Impact Assessment in a Transboundary Context, *adopted at Espoo*, Feb. 25, 1991, *reprinted in* 30 I.L.M. 802, 804, [hereinafter Espoo Convention]. The Espoo Convention does not provide for any court to review a State’s invocation of this exception. *See generally id.* Even if this Court decides to review the UC’s invocation of the exception, it must find that the UC has not consented to its jurisdiction in this matter because the UC’s importation of Tuvastan HEU is a matter of national security, and the UC’s national security would be prejudiced by release of information about the HEU transportation.

**1. The invocation of the national security exception is not reviewable by any international tribunal.**

This Court should find that it has no jurisdiction over the EIA and consulting issues

because the invocation of the national security exception is not reviewable by any international tribunal. Judicial review would require a court to define a State’s “national security interests.” However, every State “has the sovereign right to define its own national security interests without foreign interference.” 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, 415-16 (2001). Professor Cann advances several arguments for why security exceptions (particularly the GATT exception) should be reviewable, but even he concedes that the reason they are not reviewable is undeniable. States would not enter multilateral agreements, whether to promote free trade, protection of the environment, or other important goals, if they were required to compromise their national security. *Id.* at 416. Without a mechanism to protect State sovereignty from external threat, agreements such as the Espoo Convention would cease to exist. *See id.* The UC agreed to the Espoo Convention because it reasonably expected that its national security information—as determined by the UC— would be protected.

The national security exception to the Espoo Convention is not reviewable because it employs a subjective standard. While this Court has found jurisdiction in cases where a national security exception was invoked, those exceptions were reviewable because they employed an objective standard. In *Oil Platforms* and *Nicaragua*, this Court examined identical national security exceptions, which provided that “the present treaty shall not preclude the application of measures . . . necessary to protect [a Party’s] essential security interests.” *Oil Platforms*, 1996 I.C.J. at 811; *Nicar.*, 1986 I.C.J. at 115-16. This Court instructed that the text of those security exceptions could either be interpreted as excluding security measures from the Court’s jurisdiction, or as providing a defense on the merits. *Oil Platforms*, 1996 I.C.J. at 811. This

Court interpreted those security exceptions to only provide a defense on the merits. *Id.* This Court implied that it would not have had jurisdiction if those treaties, like the GATT, had instead used the phrase “it considers necessary,” because the phrase “it considers” creates a subjective standard. *Id.* With such a subjective standard, only the State invoking the exception could define its own security interests. When the treaties involved eliminated the phrase “it considers,” the subjective standard was replaced by an objective standard. With this objective standard, this Court could define “security interests.”

Unlike the exceptions in *Oil Platforms* and *Nicaragua*, the national security exception to the Espoo Convention employs a subjective standard. The exception here is for information that, if supplied, would be “prejudicial to . . . national security.” Espoo Convention, *supra*, 30 I.L.M. at 804. “Prejudicial” does not equate to “necessary.” “Prejudicial” is a much more subjective term, and as such, determining what is “prejudicial” must be left to the State invoking the exception. Further, unlike the treaties in *Oil Platforms* and *Nicaragua*, the Espoo Convention does not incorporate the term “essential.” To be protected, the information need only be about national security, not “essential security interests.” Indeed, the information would be protected if it merely prejudiced industrial or commercial secrecy. Because the Espoo Convention’s exception does not employ an objective standard, the UC—not this Court—is in the best position to define its own national security interests.

**2. The importation of Tuvastan’s highly enriched uranium (HEU) is a national security matter which would be prejudiced if its details were made public.**

Even if this Court decides to review the UC’s invocation of the security exception, it should still determine that it has no jurisdiction over this dispute because importing the Tuvastan HEU is a “national security” matter that would be prejudiced if its details were made public. The Espoo Convention provides that it “shall not affect the right of Parties to implement national . . .

regulations . . . protecting information the supply of which would be prejudicial to . . . national security.” *Id.*

**i. Importing the Tuvastan HEU is clearly a matter of national security.**

The importation of Tuvastan HEU is a national security matter because the HEU is unprotected in its current location. The Tuvastan government cannot adequately safeguard its HEU, and as long as the HEU remains in Tuvastan’s possession, it is at risk of being acquired by rogue states or terrorist organizations. (R. at 9.) The two metric tons of Tuvastan HEU could be used to fuel up to 50 nuclear warheads. (R. at 8.) This represents a national security threat of devastating proportions. The UC is not alone in characterizing HEU issues as matters of national security. The United States considers protecting the HEU it is purchasing from Russia to down blend for peaceful purposes essential to its national security. Executive Order 13159, Blocking Property of the Government of the Russian Federation Relating to the Disposition of Highly Enriched Uranium Extracted From Nuclear Weapons, 65 Fed. Reg. 39279 (June 21, 2000). President Clinton characterized the risk of nuclear proliferation created by the Russian HEU as “an unusual and extraordinary threat to . . . national security. *Id.* See also Presidential Notice, Continuation of Emergency With Respect to Property of the Russian Federation Relating to the Disposition of Highly Enriched Uranium Extracted From Nuclear Weapons, 66 F.R. 32207, June 11, 2001 (continuing the national emergency with respect to the Russian HEU); Presidential Notice, Continuation of the National Emergency with Respect to the Risk of Nuclear Proliferation Created by the Accumulation of Weapons-Usable Fissile Material in the Territory of the Russian Federation, 67 F.R. 42181, June 18, 2002 (same); Barry Kellman, *Conference Proceedings: Nuclear Arms Control, Non-Proliferation and Disarmament in the Post-Cold War Security Environment: Panel I: History and Evaluation of Nuclear Weapons: The Role of*

*Nuclear Weapons in Deterring Chemical and Biological Weapons Attacks: National and Non-National Threats*, 31 Case W. Res. J. Int'l L. 619, 622 (1999) (“Th[e] quantity [of HEU] must be reduced quickly to diminish the risk of theft and diversion.”). It is clearly a widely held belief that securing HEU is a “national security” matter.

**ii. Divulging information about the Tuvastan HEU would prejudice national security.**

Releasing information about the HEU transportation would prejudice the UC’s national security because public access to that information would greatly increase the risk of rogue states or terrorist organizations hijacking or attacking the transporting ships. Webster’s defines “prejudicial” as damaging or detrimental. Webster’s New Explorer Dictionary 410 (Merriam-Webster, Inc. 1999). The increased risk of nuclear proliferation or terrorist acts would be a serious detriment to the national security of the UC and the world.

**II. INTERNATIONAL LAW DOES NOT REQUIRE THE UC TO PREPARE A NEW EIA OR CONSULT WITH THE REPUBLIC OF SANDIA (SANDIA).**

Even if this Court finds that it has jurisdiction to entertain this dispute, it should still find that international law does not require the UC to prepare a new EIA or consult with Sandia. The UC already conducted an EIA and consulted with Sandia regarding the Chellystone operations, and no circumstances require that those actions be repeated. The importation of Tuvastan HEU does not require an EIA or consultation because while some international agreements provide for EIA, none require the UC to disclose its national security information. Further, EIA has not reached the status of customary international law.

**A. The Espoo Convention does not require the UC to consult or prepare a new EIA.**

- 1. The Espoo Convention does not require the UC to take any action regarding the Chellystone facility because the Chellystone facility is not a “proposed activity,” and there has been no major change in its activities.**

Sandia has no legal basis under the Espoo Convention for its demands regarding the Chellystone facility because that facility is not a proposed activity, and the UC has not proposed any major change in its operations. The Espoo Convention provides that an EIA shall be completed with regard to a proposed activity or major change to an activity listed in Appendix I. Espoo Convention, *supra*, 30 I.L.M. at 803. However, the Chellystone facility is not a “proposed activity.” It is an existing facility, which has been in operation since 1997—before the Espoo Convention entered into force. Further, the importation of Tuvastan HEU will not effect a “major change” to the Chellystone operations. Chellystone will continue to do what it has been doing for years—down blend HEU originally produced to fuel weapons of mass destruction into LEU to meet the UC’s energy needs. Additionally, the UC conducted an EIA on the project in 1994, and consulted with Sandia, even though it was under no obligation to do so at that time.

(R. at 8, 11.)

2. **Any duties imposed by the Espoo Convention do not apply to the importation of Tuvastan HEU because the UC's national security is at stake.**

i. **The UC is not required to prepare an EIA or consult with Sandia because the transportation of HEU is not listed in Appendix I.**

The Espoo Convention does not require the UC to prepare a new EIA or consult with Sandia because the transportation of HEU is not listed as a "proposed activity." Sandia demands that the UC consult and prepare a new EIA. However, the Espoo Convention only requires consultation and EIA with regard to "proposed activities listed in Appendix I." Espoo Convention, *supra*, 30 I.L.M. at 804. The transportation of HEU (or any materials) is not listed in Appendix I, so the UC is not required to consult or prepare an EIA for that transportation.

ii. **The UC is not required to enter into discussions to determine whether the importation of Tuvastan HEU should be treated as if it were listed in Appendix I because such discussions would jeopardize national security.**

The UC has no duty to discuss with Sandia whether the importation of Tuvastan HEU should be treated as if it were a listed activity because such discussions would jeopardize the UC's national security. When a concerned Party initiates, the Espoo Convention requires the other party to "enter into discussions on whether [a] proposed activit[y] *not listed* in Appendix I is . . . likely to cause a significant adverse transboundary impact and thus should be treated as if it . . . were so listed." *Id.* (emphasis added). Sandia may argue that this provision obliges the UC to enter into discussions. However, the UC has not entered into discussions with Sandia because that obligation is excused by the Espoo Convention's national security exception. That exception provides that the Espoo Convention "shall not affect the right of Parties to implement national . . . regulations . . . protecting information the supply of which would be prejudicial to . . . national security." *Id.*

Importing the Tuvastan HEU is clearly a matter of national security. Tuvastan cannot

properly safeguard its HEU. (R. at 9.) If left unprotected, the Tuvastan HEU could be used by rogue states or terrorist organizations to fuel nuclear warheads, which represents a national security threat—to not only the UC, but also the entire international community. See M. Bunn & G. Bunn, *Reducing the Threat of Nuclear Threat and Sabotage*, at [http://www.iaea.org/worldatom/Press/Focus/Nuclear\\_Terrorism/bunn02.pdf](http://www.iaea.org/worldatom/Press/Focus/Nuclear_Terrorism/bunn02.pdf) at 3. If the UC made the details of its HEU transportation public, it would greatly increase the risk of rogue states or terrorist organizations hijacking or attacking the transporting ships. One expert has warned that “vessels carrying [radioactive] material may be subject to bomb threats, sabotage, hijacking, and unauthorized visitors [so] it is essential that distribution of voyage specific information be kept to an absolute minimum.” Raul A. F. Pedrozo, *Transporting Nuclear Cargoes by Sea*, 28 J. Mar. L. & Com. 207, 221 (1997). Disclosing information about the importation of Tuvastan HEU would be a serious detriment to national and world security.

**B. The Rio Declaration on Environment and Development does not impose any substantive duties on member States.**

The Rio Declaration does not require the UC to prepare a new EIA or consult with Sandia because it does not impose any substantive duties on member States. The Rio Declaration is non-binding “soft law.” Kevin R. Gray, *International Environmental Impact Assessment, Potential for a Multilateral Environmental Agreement*, 11 Colo. J. Int’l L. & Pol’y 83, 91 (2000). Its provisions for consultation and EIA are merely aspirational and do not require the UC to take any action.

**C. The UC has complied with the Convention on Biological Diversity (CBD) because the UC has implemented national EIA procedures and entered into a multilateral agreement regarding consultation.**

- 1. The UC has complied with the CBD regarding EIA because the UC has already introduced national EIA procedures.**

The UC's introduction of national EIA procedures satisfies the CBD's requirements regarding EIA. Sandia alleges that the CBD imposes a duty on the UC to prepare an EIA in this case. However, the CBD only provides that a party, "as far as possible and appropriate, shall *[i]ntroduce appropriate procedures* requiring [EIA] of its proposed projects." Convention on Biological Diversity, United Nations Conference on Environment and Development, June 5, 1992, *reprinted in* 31 I.L.M. 822, 827 (emphasis added). The UC has satisfied these requirements by implementing its own EIA procedures, as evidenced by the EIA prepared for the Chellystone facility. The decision whether to prepare an EIA is determined under the UC's national EIA procedures.

**2. The UC has complied with the CBD regarding consultation because the UC is a Party to the Espoo Convention.**

The UC has satisfied the CBD's requirements regarding consultation because the UC has concluded a multilateral agreement on consultation—the Espoo Convention. Sandia contends that the CBD imposes a duty on the UC to consult in this case. However, the CBD merely provides that where appropriate, a party shall, "[p]romote . . . consultation . . . by encouraging the conclusion of bilateral, regional or multilateral arrangements." *Id.* at 828. This provision imposes no direct duty to consult. It only imposes a duty to enter into other agreements to consult. The Espoo Convention is a multilateral agreement that provides for consultation under appropriate circumstances. The UC satisfied its duty by agreeing to that convention.

Even if the CBD did impose a direct duty, it would only require EIA or consultation "where appropriate." It would be inappropriate for the UC—in contravention of its own regulations—to divulge information that compromises its own national security.

**D. The Convention on Nuclear Safety does not require the UC to prepare a new EIA or consult with Sandia because the Chellystone facility is a blending facility, not a nuclear power plant.**

The CNS does not impose any duties on the UC because Chellystone is not a nuclear power plant. Sandia argues that the CNS requires the UC to prepare an EIA and consult in this case. However, the CNS provides only that a party shall implement appropriate procedures for EIA and consulting regarding “nuclear installations”. The CNS defines “nuclear installation” as “any land-based civil nuclear power plant.” *Convention on Nuclear Safety, adopted at Vienna, Sep. 20, 1994, reprinted in 33 I.L.M. 1518, 1519.* Because the Chellystone facility is a blending facility—not a nuclear power plant—Sandia has no legal basis for its demands under the CNS.

**E. The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste does not require the UC to prepare a new EIA or consult with Sandia because highly enriched uranium is neither spent fuel nor radioactive waste.**

The Joint Convention does not impose any duties on the UC because the UC is dealing with HEU, not spent fuel or radioactive waste. The Joint Convention includes requirements for EIA and consultation, but only for a proposed spent fuel management facility or a proposed radioactive waste management facility. *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, adopted at Vienna, Sep. 5, 1997, reprinted in 36 I.L.M. 1436, 1441, 43.* The Chellystone facility is neither. It is a blending facility that deals with viable nuclear fuel, not spent fuel or radioactive waste.

**F. Customary international law requires neither environmental impact assessment nor consultation.**

Customary international law does not impose a duty on the UC to consult or prepare an EIA, because states do not practice EIA and consultation in a uniform or consistent manner that evinces their acceptance of those principles as binding law. This Court has instructed that for a principle to be recognized as customary international law,

“State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the

provision invoked—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”

*North Sea Continental Shelf Cases (F.R.G. v. Den.)*, 1969 I.C.J. 3, 42-44 (Feb. 20). As one scholar explained, the “variance of states' EIA requirements . . . undermines the authority of EIA as a binding legal obligation.” See Gray, *supra*, at 84. Further, in the context of nuclear materials, many States have taken very strong positions that consultation should not be required. For example, a recent expert panel convened to consider an amendment to the Convention on the Physical Protection of Nuclear Material concluded that its amendment “should clearly exclude . . . [a] requirement to submit reports to the international community on the implementation of physical protection [of nuclear materials].” *International Atomic Energy Agency General Conference: Measures to Improve the Security of Nuclear Materials and Other Radioactive Materials*, 41 I.L.M. 737 (Sep. 14, 2001). This shows that States have not uniformly practiced or recognized EIA and consultation as a binding rule of law.

Although the International Tribunal for the Law of the Sea (ITLOS) found a duty to consult in the *MOX Plant Case*, this Court should find the circumstances here do not justify imposing that duty on the UC. *MOX Plant Case (Ir. v. U.K.) Request for Provisional Measures*, (International Tribunal for the Law of the Sea) *reprinted in* 41 I.L.M. 405 (Dec. 3, 2001). In the *MOX Plant Case*, Ireland sought provisional measures ordering the U.K. to suspend authorization of the U.K.'s proposed mixed-oxide (MOX) production facility at Sellafield, and prohibit any transportation of radioactive materials to or from that facility. *Id.* at 410. The ITLOS held that those provisional measures were unnecessary, but imposed alternative measures requiring the U.K. to consult with Ireland regarding the possible safety consequences of the MOX plant. *Id.* at 416. There are several reasons why this Court should not impose that duty on the UC. First, the Chelystone facility has been in operation for several years, where the

Sellafield facility has not yet begun production. Second, the UC completed an EIA and consulted with Sandia years ago regarding the Chelystone facility, unlike the U.K., which never consulted with Ireland. Third, the Sellafield facility will *produce* nuclear fuel, while the Chelystone facility merely *down blends* existing nuclear fuel into a safer, more productive form. Finally, unlike the UC, the U.K. did not contend that its operations affected national security.

In the two cases where this Court commented on the status of EIA in international law, it has been unable state that EIA is a customary principle of international law. In these cases, two judges argued that EIA *should* be required by international law, but neither could conclusively establish that EIA *is* a customary principle of international law. In one case, Judge Palmer explained that States have a duty to establish that an “activity does not involve any unacceptable risk to the environment [before undertaking the activity]. An EIA is simply a means of establishing a process to comply with that international legal duty.” *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (N. Z. v. Fr.) Case*, 1995 I.C.J. 288, 411 (Sep. 22) (dissenting opinion of Judge Palmer). Judge Palmer could only state that a duty exists to not cause unacceptable risk—not that a duty exists to perform EIA. In the same case, Judge Weeramantry stated that EIA as a principle is “gathering strength and international acceptance, and has reached the level of general recognition at which this Court should take notice of it.” *Id.* at 344 (dissenting opinion of Judge Weeramantry). *See also Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, 111 (Sep. 25) (separate opinion of Vice-President Weeramantry). Judge Weeramantry could only state that this Court *should* take notice of EIA—he could not state that this Court *must* do so. Judge Palmer further refers to EIA as an “emerging” principle of law, *id.* at 411, which falls short of the standard established by this Court for a principle to be customary

international law. *See North Sea Continental Shelf*, 1969 I.C.J. at 42-44. The inability of either of these judges to proclaim that EIA is customary international law should lead this Court to conclude that it is not.

### **III. THE UC'S PROPOSED TRANSPORTATION OF TUVASTAN HEU AND CONTINUED CHELLYSTONE OPERATIONS WILL NOT VIOLATE INTERNATIONAL LAW.**

The UC's proposed transportation of HEU and continued Chellystone operation do not violate the UNCLOS because these activities will not have the natural effect of harming the marine environment. Sandia, however, has violated the UNCLOS by unjustifiably interfering with the UC's sovereign rights. Sandia argues that the risk created by the UC's activities will violate Article 192 of the UNCLOS, which provides that "states have the obligation to protect and preserve the marine environment," because that provision must be interpreted in light of the precautionary principle. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 20, 1982, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261, 1308. However, the precautionary principle is not a customary principle of international law, and even if it were, the UC's proposed actions fully satisfy the precautionary principle.

#### **A. Sandia's demand that the UC not proceed with the HEU importation and Chellystone operations violates the UNCLOS.**

Sandia's demand that the UC not proceed with the importation of HEU and blending at the Chellystone facility violates the UNCLOS because it unjustifiably interferes with the UC's sovereign rights. The UNCLOS provides that "in taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights." *Id.* at 1308. The UNCLOS provides that a coastal State's sovereign rights extend to the limits of its territorial sea. *Id.* at 1274. Sandia and the UC agree that the UC's territorial sea extends ten miles from its coastline. (*See R.* at 7). Because the UC's proposed actions will occur within its territorial sea, Sandia's demands interfere with the UC's sovereign rights. Nothing suggests that the mere transportation

of Tuvastan HEU or continued Chelystone operations poses a level of risk that justifies Sandia's interference.

**B. The precautionary principle is not customary international law.**

The UC's proposed actions do not violate international law because the precautionary principle is not customary international law. This Court has instructed that for a principle to be customary international law, States must practice that principle extensively, uniformly and so as to evince their belief that they are bound by that principle. *North Sea Continental Shelf*, 1969 I.C.J. at 42-44. Numerous authorities hold that the precautionary principle is not customary international law. Most recently, in the *Mox Plant Case*, Judge Wolfrum stated, "[i]t is still a matter of discussion whether the precautionary principle . . . has become part of international customary law." *Mox Plant Case*, 41 I.L.M. at 428 (separate opinion of Wolfrum). Additionally, in the *Southern Bluefin Tuna Cases*, Judge Laing explains that "no authoritative judicial decision unequivocally supports the notion [that the precautionary principle is customary international law]; doctrine is indecisive, and domestic juridical materials uncertain or evolving." *Southern Bluefin Tuna Cases (N. Z. v. Japan), Cases Nos. 3 and 4*, (International Tribunal for the Law of the Sea) *reprinted in* 38 I.L.M. 1624, 1641 (Aug. 27, 1999). (separate opinion of Judge Laing). In the same case, Judge Shearer comments that "whether [the precautionary] principle can of itself be a mandate for action, or provide definitive answers to all questions of environmental policy must be doubted." *Id.* at 1650 (separate opinion of Judge Shearer). One scholar has similarly concluded that "we can lay to rest the claim that the precautionary principle has entrenched itself in customary international law." Christopher Stone, *Is There A Precautionary Principle?*, 31 *Env'tl L. Rep.* 10790 (2001). Professor Stone explains that because "more clarity is possible," the "principle is so shapeless," and "has different versions,"

the precautionary principle is not customary international law, “or at least not in any significant sense.” *Id.* This Court should find that the precautionary principle is not customary international law because its many different versions and lack of general acceptance do not meet the standard set out by this Court in *North Sea Continental Shelf*.

**C. The UC’s actions fully comply with the precautionary principle.**

Even if this court finds that the precautionary principle is customary international law, the UC’s actions fully satisfy that principle. The precautionary principle finds its origins in the Rio Declaration, which states: “in order to protect the environment, the precautionary approach shall be widely applied to States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Jun. 14, 1992, U.N. Doc. A/CONF.151/5, *reprinted in* 31 I.L.M. 874, 879 [hereinafter Rio Declaration].

**1. The UC’s continued Chellystone operations comply with the precautionary principle because those operations are cost-effective measures to prevent environmental degradation.**

The UC’s continued Chellystone operations fully satisfy the precautionary principle because those operations are cost-effective measures to prevent environmental degradation. Sandia alleges that the Chellystone operations violate the precautionary principle because those operations may irreversibly damage the environment. However, discontinuing those operations would constitute a much greater violation of the precautionary principle. HEU is commonly used to fuel nuclear warheads, but when it is down blended into LEU, it can no longer serve that purpose. Since 1997, the Chellystone facility has down blended twenty-two tons of HEU, which could have made approximately 500 nuclear warheads. (R. at 8.) The environmental devastation

that could have been caused by those nuclear warheads is inconceivable. The Chellystone operation is a measure to prevent precisely the threat of environmental degradation envisioned by the precautionary principle.

**2. The proposed importation of Tuvastan HEU complies with the precautionary principle because that importation is a cost-effective measure to prevent environmental degradation.**

The importation of Tuvastan HEU fully satisfies the precautionary principle because the importation prevents a serious risk of environmental degradation. Sandia alleges that importing the Tuvastan HEU would violate the precautionary principle because the shipment of HEU through the UC's territorial sea might damage the Sandian marine environment and economy. (R. at 10.) Although Sandia's concerns should not be taken lightly, the transportation of HEU to be down blended serves the greater interest of preventing the harm that could result to humans if the HEU is left unprotected. Principle One of the Rio Declaration pronounces, "human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." Rio Declaration, *supra*, 31 I.L.M. at 876. Improperly protected HEU poses a serious threat not only to human beings, but also to the rest of the environment. The threat of serious irreversible harm that the UC seeks to prevent is the creation and use of nuclear warheads that could result from the inadequate protection of Tuvastan's HEU. In this situation, the precautionary principle requires "cost-effective measures to prevent environmental degradation." The UC has met this requirement by agreeing to ship the HEU to the UC where it will be well protected and down blended to LEU so that it will never be used to create nuclear warheads. Sandia's demands to prevent the shipment and down blending of HEU is would irresponsibly postpone actions that are required by the precautionary principle.

## CONCLUSION

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

1. declare that this Court does not have jurisdiction to adjudicate the dispute over EIA and consultation; and in the event the Court finds jurisdiction, to
2. declare that the Republic of Sandia's demand for consultation and EIA has no basis in international law; and to
3. declare that the United Commonwealth will not violate international law by its continued operation of the Chellystone facility and importation of Tuva stan HEU.

Respectfully submitted,

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Agents for the United Commonwealth