

2002 General List No. 107

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

**THE CASE CONCERNING THE SHIPMENT AND PROCESSING OF
HIGHLY-ENRICHED URANIUM**

**REPUBLIC OF SANDIA,
APPLICANT,**

v.

**THE UNITED COMMONWEALTH,
RESPONDENT.**

MEMORIAL FOR THE APPLICANT

**2002 Stetson International Environmental
Moot Court Competition**

TABLE OF CONTENTS

INDEX OF AUTHORITES.....	v
STATEMENT OF JURSDICTION.....	viii
QUESTIONS PRESENTED.....	ix
STATEMENT OF FACTS.....	x
SUMMARY OF ARGUMENT.....	xii
I. RESPONDENT VIOLATED NUMEROUS TREATY OBLIGATIONS REQUIRING RESPONDENT TO PROVIDE ADEQUATE NOTICE AND CONSULTATION PRIOR TO PROCEEDING WITH ACTIVITY THAT MAY CAUSE AN ADVERSE TRANSBOUNDARY IMPACT AND RESPONDENT IS UNABLE TO SATISFY A NATIONAL SECURITY EXCEPTION PROHIBITING ENFORCEMENT OF ITS TREATY OBLIGATIONS.	1
A. Respondent Violated Numerous Treaty Obligations When Respondent Failed To Provide Sandia With Sufficient Notice, Information, And Consultations Before Proceeding With Activity That Could Potentially Cause An Adverse Transboundary Impact.	1
1. <u>Respondent is bound by the terms of the applicable treaties.</u>	2
2. <u>A reasonable interpretation of the treaties relied upon by Sandia imposes an obligation on Respondent to provide Sandia with adequate notice, information, and consultation before proceeding with activity that may cause an adverse transboundary impact.</u>	2
3. <u>Respondent’s failure to provide Sandia with adequate notice and consultation before re-commencing the operations of the Chellystone facility after experiencing nuclear accidents and authorizing the transfer of HEU through transboundary waters was a violation of Respondent's treaty obligations.</u>	3
a. Respondent violated numerous treaty obligations when it recommenced operations of its nuclear blending facility after experiencing nuclear accidents because it failed to first provide Sandia with adequate notice and consultation.	3

b.	Respondent violated numerous treaty obligations when it proceeded with the unilateral agreement to transfer HEU through the Sea of Sandia because it failed to provide Sandia with timely notice and consultation.	4
B.	Respondent Is Bound By The Aforementioned Treaties And Cannot Satisfy A National Security Exception To Avoid These Obligations.	5
1.	<u>This Court has jurisdiction to review the substantive merits of Respondent’s invocation of the national security exception.</u>	6
2.	<u>Respondent fails to avoid its obligation under Espoo because Respondent fails to establish a national security threat sufficient to justify the invocation of the exception and Respondent fails to demonstrate that the protective measures qualify as an accepted legal practice.</u>	7
a.	Respondent cannot establish a reasonable threat to national security because Respondent generally relies on the threat of terrorism without further evidence of a direct threat.	7
b.	The measures taken by Respondent to protect its national security do not qualify as accepted legal practices because Respondent failed to apply IAEA safeguards.	8
3.	<u>Respondent fails to escape its remaining treaty obligations because Respondent cannot prove the state of necessity exception under the Doctrine of State Responsibility as Respondent cannot establish an imminent peril and its wrongful act seriously impairs Sandia's essential interest.</u>	9
II.	RESPONDENT VIOLATED CUSTOMARY LAW COMPELING RESPONDENT TO PRESERVE AND PROTECT THE ENVIRONMENT BECAUSE RESPONDENT FAILED TO CONDUCT PRECAUTIONARY MEASURES BEFORE AUTHORIZING ACTIVITIES WHICH COULD THREATEN IRREVERSIBLE HARM TO THE SEA OF SANDIA AND SANDIA'S ENVIRONMENT.	10
A.	The Transfer Of HEU Would Violate Respondent's Obligations Pursuant To The UNCLOS And The Precautionary Principle Because The Transfer Could Threaten Irreversible Harm To The Sea Of Sandia And Sandia's Environment.	11
1.	<u>Respondent is required to protect and preserve the Sea of Sandia's marine environment according to the UNCLOS, and Respondent's proposed actions would violate these obligations.</u>	11

2.	<u>Respondent's proposed transfer of HEU would violate the precautionary principle because it would threaten irreversible harm to the Sea of Sandia and Sandia's environment.</u>	12
a.	Respondent is bound by the precautionary principle because the principle has achieved the status of customary law.	13
b.	The precautionary principle imposes an obligation on Respondent to guarantee that its activities do not cause irreversible damage to the Sea of Sandia or Sandia's environment.	14
B.	This Court Should Intercede And Grant Interim Measures To Suspend Respondent's Operations Until Respondent Conducts An Environmental Impact Assessment.	15
C.	This Court Should Compel Respondent To Conduct An EIA Prior To Proceeding With The Transfer Of HEU Because Respondent Must Prove That This Activity Will Not Threaten Irreparable Damage To The Sea Of Sandia Or Sandia's Environment Before It May Proceed.	16
1.	<u>This Court should compel Respondent to conduct an EIA before commencing with the transfer of HEU because Respondent is obligated to prove its activities will not cause permanent, environmental harm pursuant to the precautionary principle.</u>	16
2.	<u>This Court should require Respondent to conduct an EIA because Respondent is independently obligated to perform an EIA pursuant to Espoo, CBD, and general principles of customary law.</u>	17
a.	Respondent is required to conduct an EIA prior to undertaking a transboundary transfer of HEU according to Espoo and CBD. ...	17
b.	Respondent is required to conduct an EIA pursuant to general principles of customary law.	18
	CONCLUSION AND PRAYER FOR RELIEF.	20

INDEX OF AUTHORITIES

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Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.	1, 2, 17, 18
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Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800.	<i>passim</i>
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U.N. GAOR, 37th Sess., Supp. No. 51 U.N. Doc. A/37/51 (1982). 14
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1945 I.C.J. 4 (April 9) (Merits). 14
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1997 I.C.J. 7 (Sept. 25). 7, 9, 10, 19
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1986 I.C.J. 14 (June 27). 5, 6
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96 Am. J. Int'l L. 291 (2002). 3, 4, 16, 19

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STATEMENT OF JURISDICTION

The Governments of the Republic of Sandia and the United Commonwealth have brought their case before this Court by notification of the Special Agreement as provided for in Article 40, paragraph 1 of the International Court of Justice, notwithstanding United Commonwealth's position that this Court does not have jurisdiction regarding matters of national security. Having submitted their dispute to this Court, Article 36, paragraph 1 of the Statute of the Court provides that this Court's jurisdiction extends to all questions which the parties refer to the Court. Additionally, Article 36, paragraph 6 of the Statute of the Court recognizes the Court's power to determine its own jurisdictional authority.

QUESTIONS PRESENTED

- I. Whether the United Commonwealth is liable for numerous treaty violations when it failed to provide the Republic of Sandia with adequate notice, information, and consultation before resuming the operations of its nuclear blending facility and unilaterally authorizing the transfer of highly-enriched uranium through the Sea of Sandia claiming that it was precluded from presenting the information based on the national security exception.
- II. Whether the United Commonwealth violated customary international law when it failed to take the necessary precautionary measures before proceeding with activities which could threaten irreversible harm to the Sea of Sandia and to the Republic of Sandia's environment.

STATEMENT OF FACTS

The Republic of Sandia ("Sandia") is a developing island nation that lies approximately twenty miles west of the United Commonwealth ("Respondent"). (R. at 7). Sandia and Respondent are separated by the Sea of Sandia, each claiming a territorial sea up to the median line. (R. at 7). Sandia has a special relationship with, and a concern for, the marine environment of its Sea. (R. at 7). Sixty percent of Sandia's population lives along its eastern coast. (R. at 7). Sandia relies on the fisheries and tourism industries which make up a significant portion of Sandia's economy. (R. at 7-10).

Respondent is a large, developed nation with a diversified economy. (R. at 7). In 1993, Respondent announced plans to construct a nuclear blending facility at Chellystone, located on its western coast, approximately twenty miles from Sandia. (R. at 8). The facility was built to down-blend 22 tons of highly-enriched uranium ("HEU") which could be used to make approximately 500 nuclear warheads. (R. at 8). Respondent conducted an environmental impact assessment ("EIA") prior to the construction of the facility and subsequently contacted Sandia about the proposed project. (R. at 7-8). Sandia was vigorously opposed to the proximity of the facility because Sandia relies heavily on its marine environment and Sandia is a "Nuclear-Free Zone." (R. at 7-8).

Despite Sandia's opposition, Respondent constructed the facility and began operations in August 1997. (R. at 8). The facility experienced four nuclear accidents/incidents in 1998 and 1999, measuring between level 2 and level 4 on the IAEA's Nuclear Event Scale. (R. at 8-9). As a result of the incidents, Respondent suspended the facility's operations for six months. (R. at 9).

Respondent entered into an agreement with the government of Tuvalu in July 2001, wherein Respondent agreed to purchase 2 metric tons of HEU. (R. at 9). Respondent made arrangements to ship the HEU to its Chellystone facility through the Sea of Sandia. (R. at 9).

Upon learning of the HEU importation agreement from a newspaper article, Sandia sent Respondent a letter objecting to the transboundary transfer. (R. at 9-10). Sandia stressed that it relies heavily on its marine environment and even the threat of a radioactive release would have a deleterious effect on Sandia's economy. (R. at 10). Respondent replied and asserted that it has fully satisfied its substantive obligations as established by applicable treaties and customary law. (R. at 11-13). Furthermore, Respondent claims that in light of certain terrorist threats, it should be precluded from treaty obligations due to concerns for its national security. (R. at 12).

On May 3, 2002, Sandia petitioned this Court to adjudicate its dispute with Respondent. (R. at 15). Sandia formally requests the Court to compel Respondent to suspend its current operations and activities until an additional EIA is conducted and Respondent complies with notice and consultation requirements. (R. at 15).

SUMMARY OF ARGUMENT

The International Court of Justice ("ICJ") should find Respondent in violation of its binding treaty obligations. Respondent violated its obligations by failing to provide Sandia with the requisite notice, information, and consultation prior to engaging in activity that may cause an adverse transboundary impact. Respondent reinitiated operations at its nuclear blending facility after the facility experienced nuclear accidents and unilaterally authorized the transboundary transport of HEU without providing Sandia with the vital information and consultation Sandia is due. Respondent should be held liable for the treaty violations because Respondent fails to establish a valid national security exception which would preclude liability. Respondent's invocation of the national security exception is unequivocally within this Court's jurisdiction to review, and the ICJ should find Respondent's invocation improper.

The ICJ should find Respondent's failure to take precautionary measures before undertaking activity, which could threaten irreversible harm to the Sea of Sandia and Sandia's environment, a violation of customary law. Respondent and Sandia are contracting parties to the United Nations Convention on the Law of the Sea ("UNCLOS") which imposes a responsibility to ensure that States protect and preserve the marine environment. This concept was expanded and codified as the precautionary principle, which imposes an obligation on States to take all precautionary measures necessary to ensure that the activities within their control do not threaten irreversible harm to other States or common areas. Respondent's failure to take precautionary measures, specifically an EIA, before unilaterally authorizing the transboundary transfer of HEU through the Sea of Sandia was a violation of customary law because it threatens irreversible harm to the Sea of Sandia and Sandia's environment.

ARGUMENT

I. RESPONDENT VIOLATED NUMEROUS TREATY OBLIGATIONS REQUIRING RESPONDENT TO PROVIDE ADEQUATE NOTICE AND CONSULTATION PRIOR TO PROCEEDING WITH ACTIVITY THAT MAY CAUSE AN ADVERSE TRANSBOUNDARY IMPACT AND RESPONDENT IS UNABLE TO SATISFY A NATIONAL SECURITY EXCEPTION PROHIBITING ENFORCEMENT OF ITS TREATY OBLIGATIONS.

[S]*ic utere tuo, ut alienum non laedas* or the 'principle of good neighborliness'. . . [is a fundamental tenant of] [i]nternational law which does not allow states to conduct activities within their territories, or in common spaces, without regard for the rights of other states or for the protection of the global environment.

Patricia W. Birnie & Alan E. Boyle, International Law and the Environment, 89 (1992).

Respondent is bound by its treaty obligations to provide Sandia with adequate notice and consultation, and Respondent can only avoid these responsibilities by satisfying the national security exception. Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, art. 2, 6-7, 30 I.L.M. 800, at 803-07 [hereinafter Espoo].

A. Respondent Violated Numerous Treaty Obligations When Respondent Failed To Provide Sandia With Sufficient Notice, Information, And Consultation Before Proceeding With Activity That Could Potentially Cause An Adverse Transboundary Impact.

Respondent was under a binding obligation to provide Sandia with adequate notice, information, and consultation before undertaking activity that may cause an adverse impact on the Sea of Sandia or Sandia's environment. Espoo, supra, art. 2, 6-7, 30 I.L.M. at 803-07; Convention on Nuclear Safety, Sep. 20, 1994, art. 17, 33 I.L.M. 1514, at 1519 [hereinafter CNS]; Convention on Biological Diversity, June 5, 1992, art. 14, 17, 31 I.L.M. 818, at 827-29 [hereinafter CBD]; Statute of the International Atomic Energy Agency, Oct. 26, 1956, art. 8, 8 U.S.T. 1093, at 16 [hereinafter Statute of IAEA]; Rio Declaration on Environment and Development, June 14, 1992, principle 19, 31 I.L.M. 874, at 879 [hereinafter Rio].

1. Respondent is bound by the terms of the applicable treaties.

Respondent's treaty obligations are binding for two reasons. First, Respondent is bound by the terms of the treaties because Respondent assented to be bound. (R. at 4-7); Vienna Convention on the Law of Treaties, May 23, 1969, art. 12, 8 I.L.M. 679, at 684 [hereinafter VCLT]; (R. at 10). Second, Respondent is bound by the treaties because each had entered into force by December 1997. VCLT, supra, at art. 24, 8 I.L.M. at 689; United Nation's Treaty Collection, <http://untreaty.un.org> (visited Oct. 5, 2002).

2. A reasonable interpretation of the treaties relied upon by Sandia imposes an obligation on Respondent to provide Sandia with adequate notice, information, and consultation before proceeding with activity that may cause an adverse transboundary impact.

Once the Court concludes that the parties are bound by the terms of a treaty, the Court must interpret the meaning of the treaty in good faith and “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Id. at art. 31, 8 I.L.M. at 691-92.

A common sense and good faith reading of the treaties relied upon by Sandia indicates that when Respondent proposes to conduct activity likely to cause an adverse transboundary impact, it is required to provide Sandia with adequate notification, information, and consultation as early as possible so that Sandia may evaluate and make its own assessment as to the likely impact on its territory. Rio, supra, principle 19, 31 I.L.M. at 879; Espoo, supra, art. 2, 6-7, 30 I.L.M. at 803-07, CBD, art. 14, 17, 31 I.L.M. at 827-29; CNS, supra, art. 17, 33 I.L.M. at 1519.¹

¹ CNS is binding because the blending facility is civilian in nature given that Respondent consented to the mandate of the IAEA. Article XI of the Statute of the IAEA states that it will not provide assistance to further a member state's military purpose. Article XII states that the IAEA will only approve nuclear facilities if it is assured that the facility will not further any military purpose. Thus, in consenting to the authorization of the IAEA, Respondent demonstrated that its facility was civilian in nature. Statute of the IAEA, supra, 8 U.S.T. 1093.

Each Convention not only articulates a general notice obligation, but it also forces Respondent to take “due account” of Sandia’s views in its final decision on the proposed activity. See John H. Knox, The Myth and Reality of Transboundary Environmental Impact Assessment, 96 Am. J. Int’l L. 291, 303 (2002).

The aforementioned treaties require Respondent to provide Sandia with sufficient and timely notification, information, and consultation because Respondent's actions may have an adverse transboundary impact. Birnie & Boyle, supra, at 362.

3. Respondent’s failure to provide Sandia with adequate notice and consultation before re-commencing the operations of the Chellystone facility after experiencing nuclear accidents and authorizing the transfer of HEU through transboundary waters was a violation of Respondent's treaty obligations.

Nuclear accidents within a blending facility and transboundary movement of nuclear fuels are both activities which have been recognized and defined as activities that may potentially cause adverse transboundary impacts. Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, Sept. 5, 1997, art. 2, 36 I.L.M. 1431, at 1439; Convention on Early Notification of a Nuclear Accident, Oct. 27, 1986, art. 1, IAEA Doc. INFCIRC/335; Birnie & Boyle, at 362 (stating that principles of notice and consultation have historically been applied to the operations of a nuclear installation and to activities between shared water-ways (citing Lac Lanoux Arbitration)).

a. Respondent violated numerous treaty obligations when it recommenced operations of its nuclear blending facility after experiencing nuclear accidents because it failed to first provide Sandia with adequate notice and consultation.

In 1998 and 1999, the nuclear blending facility had four incidents which registered on the IAEA’s Nuclear Event Scale. (R. at 8). As a result, the facility’s operations were suspended for six months. (R. at 9). None of the incidents were reported to Sandia. (R. at 9). Sandia was

unable to independently evaluate the safety of the operations at the facility or make its own assessment of potential adverse impacts the nuclear accidents may have had on its territory. (R. at 8-10).

Not only did Respondent not take “due account” of Sandia’s views regarding the nuclear incidents in Respondent’s final decision on whether to recommence the facility’s operations, but Respondent failed to satisfy the basic requirement of informing Sandia that the incidents occurred. (R. at 8-9); see Knox, supra, at 303.

b. Respondent violated numerous treaty obligations when it proceeded with the unilateral agreement to transfer HEU through the Sea of Sandia because it failed to provide Sandia with timely notice and consultation.

In 2001, Respondent formed an agreement with Tuvastan wherein Respondent agreed to take custody of Tuvastan’s HEU. (R. at 9). Respondent agreed to purchase the HEU and subsequently transport it through transboundary waters--within 10 miles of Sandia, a nuclear free zone. (R. at 9). Respondent did not inform Sandia about its intentions to transfer the HEU even though the transboundary movement of HEU would pass through the Sea of Sandia putting Sandia's territorial sea at risk. (R. at 9).

Sandia only learned of the transboundary movement through a newspaper article. (R. at 10). The potentially devastating impact from the transboundary transfer of HEU on Sandia’s environment and economy drove Sandia to repeatedly request further information. (R. at 9-10).

Sandia was deeply troubled by the unilateral decision for two reasons. First, Sandia has “strenuously objected” to the nuclear blending facility since its inception, and Sandia’s concerns about the facility’s operations were amplified considering its troubled history. (R. at 9-10). Second, Sandia heavily relies on its marine ecosystem for its survival, and a possible incident at

the nuclear facility or in the Sea of Sandia would have a “devastating impact on the marine environment and, consequently, on the economy of Sandia.” (R. at 9-10).

Despite its treaty obligations to provide such notification, Respondent has refused to grant Sandia’s requests. (R. at 11-13). Respondent’s continued refusal to provide notice and consultation is unjustified and a violation of its treaty obligations. See Birnie & Boyle, supra, at 362.

B. Respondent Is Bound By The Aforementioned Treaties And Cannot Satisfy A National Security Exception To Avoid These Obligations.

Respondent contends that the national security exception provides immunity from its treaty violations and asserts that the invocation of this exception is beyond the scope of this Court's jurisdiction to review. (R. at 15). Neither contention can be supported. Espoo, supra, art. 2(8), 30 I.L.M. at 803; Military and Paramilitary Activity (Nicar. v. U.S.), 1986 I.C.J. 14, at 116 (June 27).

The ICJ has determined that the invocation of the national security exception is within its jurisdiction to review. Id. Respondent cannot escape liability from the aforementioned treaty obligations because it is unable to satisfy the two part test for the national security exception set forth in Espoo. Espoo, supra, art. 2(8), 30 I.L.M. at 803. Furthermore, Respondent is unable to preclude its wrongful conduct as to its remaining treaty obligations because Respondent cannot meet the state of necessity exception. Draft Articles, U.N. GAOR, 56th Sess., Supp. (No. 10), U.N. Doc. A/56/10 (2001). As a result, this Court should hold Respondent in violation of its binding treaty obligations to give notice and consultation. VCLT, supra, art 12, 8 I.L.M. at 684-88.

1. **This Court has jurisdiction to review the substantive merits of Respondent's invocation of the national security exception.**

This Court has the jurisdiction to review Respondent's invocation of the national security exception. Military and Paramilitary Activity (Nicar. v. U.S.), 1986 I.C.J. 14, at 115-17 (June 27). The ICJ addressed this exact issue in Paramilitary Activity when the U.S. invoked a national security exception under the 1956 Treaty of Friendship. Id. In order to determine whether the exception was reviewable, the Court looked to the language of the treaty. Id. at 116. The exception contains language that creates a reviewable, non-self-determinative exception. Id. “[T]he Court clearly expressed its willingness to examine the actual substance of the security interest and the merits of invoking a security exception.” 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, 428 (2001). The Court noted that “whether various actions could be justified as ‘necessary’ was not a question for the ‘subjective judgment’ of the invoking party.” Id.

Respondent is attempting to invoke Article 2(8) of Espoo claiming that the importation of HEU from Tuvastan is a matter of national security and that its invocation is not reviewable by this Court. (R. at 12). The language of Espoo is similar to the 1956 Treaty in that neither exception is self-determinative. Espoo, supra, art. 2(8), 30 I.L.M. at 803. Accordingly, the exception in Espoo is reviewable. See Military and Paramilitary Activity, 1986 I.C.J. at 116.

In order for Respondent to escape liability under its remaining treaty and customary law violations regarding notice and consultation, Respondent would have to establish that a state of necessity existed at the time the violations occurred. Draft Articles, supra, at art. 25. This Court

and the International Law Commission also utilized language establishing that the invocation of a state of necessity is reviewable. Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, at 39-46 (Sept. 25); Draft Articles, supra, at art. 25. Thus, this Court has the jurisdiction to review the actual substance and reasonableness of the Respondent's perceived national security threat. See Cann, supra, at 429.

2. Respondent fails to avoid its obligation under Espoo because Respondent fails to establish a national security threat sufficient to justify the invocation of the exception and Respondent fails to demonstrate that the protective measures qualify as accepted legal practice.

Respondent has invoked the national security exception to Espoo to justify its failure to comply with the notice and consultation requirements. (R. at 12). In order for Respondent to fairly raise the national security exception, it must show an existing threat prejudicial to national security and that the protective measures taken qualify as an “accepted legal practice.” Espoo, supra, art. 2(8), 30 I.L.M. at 803.

a. Respondent cannot establish a reasonable threat to national security because Respondent generally relies on the threat of terrorism without further evidence of a direct threat.

Respondent asserts that the HEU currently in Tuvastan may be potentially “acquired by a rogue state or terrorist organization” to justify its invocation of the national security exception. (R. at 13). Unfortunately, the use of terror as a means to reach political and ideological goals is not a new phenomenon. M.N. Shaw, International Law, 725 (3rd ed. 1991). Terrorism is a threat that is global in nature, affecting the entire international community. S.C. Res. 1269, U.N. SCOR, 54th Sess., 4053d mtg., U.N. Doc. S/RES/1269 (1999).

Respondent has no tangible grounds, or any direct evidence, indicating an imminent terrorist threat. See Espoo, supra, art. 2(8), 30 I.L.M. at 803. Therefore, this Court should

determine that Respondent's reliance on a generalized threat--a threat that is shared by a majority of nations--without more, cannot be the basis of invoking a national security exception. See id.

b. The measures taken by Respondent to protect its national security do not qualify as accepted legal practices because Respondent failed to apply IAEA safeguards.

Even if this Court were to find that Respondent is protecting a valid national security interest, Respondent would still be bound to act according to accepted legal practices and follow IAEA safeguards. Statute of IAEA, supra, art. XII, 8 U.S.T. at 23-28. Respondent has severed all communications with Sandia regarding the importation of HEU from Tuva arguing it is necessary to protect its national security interest. (R. at 14).

At a minimum, Respondent must apply IAEA safeguards to the transboundary movement of HEU. Statute of IAEA, supra, art. XII, 8 U.S.T. at 23-28. The international community abides by this requirement as was recently demonstrated by the transfer of HEU from Serbia to the Russian Federation. Philip T. Reeker, Project Vinca: Highly Enriched Uranium Removed from Belgrade Reactor in a Multinational Public/Private Project, <http://www.state.gov/r/pa/prs/ps/2002/12961.htm> (visited Oct. 5, 2002). In light of the international community's adherence to these requirements, safeguards set forth by the IAEA constitute "accepted legal practice." See Espoo, supra, art. 2(8), 30 I.L.M. at 803.

This Court cannot allow Respondent to invoke the national security exception under Espoo because Respondent's failure to ensure that IAEA safeguards were taken in the transfer of HEU is in violation of internationally accepted practices. See id.

3. **Respondent fails to escape its remaining treaty obligations because Respondent cannot prove the state of necessity exception under the Doctrine of State Responsibility as Respondent cannot establish an imminent peril and its wrongful act seriously impairs Sandia's essential interest.**

Respondent has violated its treaty obligations to provide Sandia with notice and consultation and has failed to establish that an exception can be met. Espoo, supra, art. 2(8), 30 I.L.M. at 803. The only remaining avenue for Respondent to avoid international liability for its treaty violations lies in the assertion of the state of necessity. Draft Articles, supra, at art. 25.

The Draft Articles allow for avoidance of liability for an otherwise wrongful act where the State committing the wrong can establish that the act “is the *only* way for the State to safeguard an essential interest against a grave and imminent peril; and does not seriously impair an essential interest of the State ... toward which the obligation exists.” Draft Articles, supra, at art. 25 (emphasis added). The ICJ has acknowledged that the state of necessity exception is “rarely admissible.” Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, at 40 (Sept. 25).

In order for Respondent to succeed under the state of necessity exception, it would have to establish the existence of a grave and imminent peril. See Draft Articles, supra, at art. 25. As articulated above, the vague threat of terrorism, without more, certainly does not meet this high threshold. See Gabikovo-Nagymaros Project, 1997 I.C.J. at 40.

Furthermore, Respondent must demonstrate that its invocation of the state of necessity does not seriously impair Sandia's essential interests. Draft Articles, supra, at art. 25. By failing to provide Sandia with proper notice and consultation, as required by Respondent's treaty obligations, Respondent's actions directly threaten Sandia's economy, the marine environment, and also Sandia's very existence. See (R. at 10).

As a matter of policy, this Court cannot allow Respondent to proceed with the importation of HEU without regard to its notice and consultation obligations. To do so, limits the effectiveness of treaty obligations and could lead to global instability. Philippe Sands, Principles of International Environmental Law, 141 (vol. 1 1994).

This Court should declare that Respondent violated the aforementioned treaty obligations and rule that Respondent cannot avoid responsibility for these wrongs by asserting a national security or state of necessity exception. See Gabikovo-Nagymaros Project, 1997 I.C.J at 46.

II. RESPONDENT VIOLATED CUSTOMARY LAW COMPELLING RESPONDENT TO PRESERVE AND PROTECT THE ENVIRONMENT BECAUSE RESPONDENT FAILED TO CONDUCT PRECAUTIONARY MEASURES BEFORE AUTHORIZING ACTIVITIES WHICH COULD THREATEN IRREVERSIBLE HARM TO THE SEA OF SANDIA AND SANDIA'S ENVIRONMENT.

[When] a State complains to the Court of possible environmental damage of an irreversible nature which another State is committing or threatening to commit, the proof or disproof [of potential environmental damage] may present difficulty to the claimant as necessary information may largely be in the hands of the State causing or threatening the damage. The law cannot function in protection of the environment unless a legal principle is evolved to meet this evidentiary difficulty, and environmental law has responded with . . . the precautionary principle.

Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288, at 342 (Sept. 22).

The precautionary principle imposes an obligation on States to take precautionary measures to ensure that activities within a State's control do not cause damage to the environment of other States. Rio, supra, principle 2, 31 I.L.M. at 876. The most effective precautionary measure a State can perform to ensure its activities do not cause damage is an EIA. Nuclear Tests, 1995 I.C.J. at 344.

A. The Transfer Of HEU Would Violate Respondent's Obligations Pursuant To The UNCLOS And The Precautionary Principle Because The Transfer Could Threaten Irreversible Harm To The Sea Of Sandia And Sandia's Environment.

As a general rule, States have the sovereign right to exploit their own resources. *Id.* at 336. This right, however, is not absolute. *Id.* States are not permitted to cause significant harm to other States. Birnie & Boyle, *supra*, at 95. The precautionary principle calls for States to prevent actions that may cause environmental damage and to take all precautionary measures necessary to ensure that no harm occurs. *Id.* at 96.

1. Respondent is required to protect and preserve the Sea of Sandia's marine environment according to the UNCLOS, and Respondent's proposed actions would violate these obligations.

The UNCLOS sets forth an obligation for all parties to “protect and preserve the marine environment.” UNCLOS, Dec. 10, 1982, art. 192, 21 I.L.M. 1245, at 1308. The UNCLOS acknowledges a State's fundamental right to exploit its resources in accordance with its environmental policies, however, States may only exploit their resources to the extent that it does not harm the environment. *Id.* at art. 193, 21 I.L.M. at 1308.

Respondent is bound by the UNCLOS for two reasons. First, Respondent expressed its consent to be bound by the treaty, and the treaty was entered into force before the aforementioned controversy arose. (R. at 7); UNCLOS, *supra*, 21 I.L.M. 1261 (entered into force in November 1994). Second, Respondent is bound by the principles espoused by the UNCLOS because it is generally viewed as a codification of customary law which is binding upon all members of the international community. Birnie & Boyle, *supra*, at 255.

The UNCLOS imposes an obligation to protect and preserve the marine environment with due diligence. UNCLOS, *supra*, art. 192-96, 21 I.L.M. at 1308. The due diligence duty

compels parties to take all necessary measures to thwart environmental harm through the “best practical means.” Birnie & Boyle, supra, at 256.

Respondent violated its obligation to act with due diligence to protect and preserve the environment when it unilaterally agreed to transfer HEU through the Sea of Sandia without initially taking precautionary measures to ensure its safety. See, UNCLOS, supra, art. 192-96, 21 I.L.M. at 1308. HEU is extremely dangerous due to its low background radiation level, and if it is mishandled, a nuclear explosion could ensue. Alan J. Kuperman, The Scope of a Fissile Material Convention, Nuclear Control Inst., *1, (1998). Considering the deleterious effects a nuclear explosion would have on the environment, Respondent is required to take all precautionary measures possible to ensure that the environment is protected and preserved. See id.

2. Respondent's proposed transfer of HEU would violate the precautionary principle because it would threaten irreversible harm to the Sea of Sandia and Sandia's environment.

Other than a duty to act with due diligence, the obligation to protect the marine environment remains vague in the text of the UNCLOS. George K. Walker, et al., Definitions For the 1982 Law of the Sea Convention, 32 Cal. W. Int'l L. J. 343, 368 (2002). To determine what the UNCLOS specifically requires by "prevention of harm," it is necessary to read it in connection with other international agreements. Id. at 370.

The precautionary principle has been utilized to flesh out the obligations set forth in the UNCLOS. Birnie & Boyle, supra, at 257. The precautionary principle imposes an obligation on States to ensure that the activities within its control do not cause damage to the environment of common areas or other States. Rio, supra, principle 2, 31 I.L.M. at 876.

a. Respondent is bound by the precautionary principle because the principle has achieved the status of customary law.

The precautionary principle stems from the general principles of the UNCLOS, but it has gained acceptance in other international treaties as well. Richard B. Bilder, The Precautionary Principle and International Law, 91 Am. J. Int'l L. 210, 210 (1997). While the precautionary principle is articulated in numerous international treaties, it is primarily a tenet of customary law. Id.

According to the VCLT and the Statute of the ICJ, a general principle of international law may become binding on a State when the principle is recognized as customary law. VCLT, supra, art. 38, 8 I.L.M. at 693; Statute of the I.C.J., June 26, 1945, art. 38, 59 Stat. 1055, T.S. No. 993.

For a general theory to rise to the level of customary law, it must amount to a "settled practice" and it must be accompanied by *opino juris sive necessitates*--the general recognition that the State is bound by the rule. Ian Brownlie, Principles of Public International Law, 6-7 (5th ed. 1998). Customary law can also be established by treaties, conventions, or United Nations Resolutions. Arthur M. Weisburd, Customary International Law: The Problem of Treaties, 21 Vand. J. Transnat'l L. 1, 10 (1988). A treaty is not simply a binding agreement among its States, but it may also demonstrate the status of international practice. Id.

The precautionary principle has surpassed the mere obligation to protect and preserve and has become deeply imbedded in international law. Id. It has amounted to a "settled practice" as evidenced by the overwhelming acceptance espoused by numerous international treaties. Stockholm Declaration of the Human Environment, June 16, 1972, Un.Doc. A/Conf.48/14/rev.1; Rio, supra, principle 15, 31 I.L.M. at 879; see generally Espoo, supra, art. 2(1), 30 I.L.M. 803. The principle has also received favorable recognition by the ICJ and the UN General Assembly

Resolutions. See Corfu Channel (U.K. v. Alb.), 1945 I.C.J. 4, at 22 (April 9) (Merits); G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1982). Its acceptance is accompanied by the general recognition of States that the principle is binding, customary law. Bilder, supra, at 210. Therefore, Respondent is bound by the obligations of the precautionary principle. See, VCLT, supra, art. 38, 8 I.L.M. at 694.

b. The precautionary principle imposes an obligation on Respondent to guarantee that its activities do not cause irreversible damage to the Sea of Sandia or Sandia's environment.

States have the responsibility to ensure that activities within their control do not cause damage to the environment. Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288, at 336 (Sept. 22). Responsibility for environmental damage is no longer imposed simply for injuries that occur *ex post facto*. Birnie & Boyle, at 95. Rather, the precautionary principle calls for States to *prevent* actions that may cause environmental damage. Id. at 96.

When a State is engaged in an activity that is deemed ultra-hazardous, the precautionary principle is invoked, and the State proposing the activity bears the burden of proof to show it will not cause irreversible environmental harm. Id. at 98. Modern nuclear technology inherently falls within the definition of ultra-hazardous activity given the unavoidable risks and radioactive contamination it may cause. Id. at 345. It is logical for the burden of proof to shift to the State seeking to proceed because it is often difficult for the innocent State to prove the dangers of the activity. Nuclear Tests, 1995 I.C.J. at 342. The necessary information pertaining to the project is usually only in the hands of the State threatening the potentially dangerous activity. Id.

Because of HEU's highly volatile and potentially explosive nature, it is an ultra-hazardous substance. See Kuperman, supra, at *1. Consequently, it is logical for the Court to rest the burden of proof on Respondent because the transfer of HEU is deemed to be an "ultra-

hazardous activity," and Sandia is not in a position to prove the environmental safety of the transfer since Respondent refuses to share the necessary information pertaining to the project.

See Nuclear Tests, 1995 I.C.J. at 342.

B. This Court Should Intercede And Grant Interim Measures To Suspend Respondent's Operations Until Respondent Conducts An EIA.

This Court should grant interim measures and suspend Respondent's operations until Respondent is able to assess the potential environmental danger that could result in a transfer of HEU. See Nuclear Tests, 1995 I.C.J. at 335-56. Respondent is required to prevent irreversible environmental harm. Id. at 342. Respondent is unable to assure this Court that the transfer of HEU will not result in grave, environmental damage unless Respondent conducts an EIA--a precautionary measure specifically meant to assess potential harm. See David A. Wirth, The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa, 29 Geo. L. Rev. 599, 629-30 (1995).

Respondent's assertion that Sandia has no evidence to justify its request to stop Respondent's operations until an EIA is conducted is erroneous. (R. at 12). HEU is an extremely dangerous substance. Kuperman, supra, at *1. Even the threat of radioactive release could have a lethal effect on Sandia's economy. (R. at 10). Furthermore, this Court has stated that a lack of "scientific certainty" cannot be used as a justification for postponing precautionary measures to prevent environmental harm. Nuclear Tests, 1995 I.C.J. at 344.

Considering the deleterious effects a nuclear explosion would have on the environment, Respondent should be required to halt its operations until it can take all precautionary measures possible to ensure that the environment will not be irreparably harmed. See id.

C. This Court Should Compel Respondent To Conduct An EIA Prior To Proceeding With The Transfer Of HEU Because Respondent Must Prove That This Activity Will Not Threaten Irreparable Damage To The Sea Of Sandia Or Sandia's Environment Before It May Proceed.

Merely finding a precautionary principle and UNCLOS violation is insufficient because Respondent's proposed activity involves nuclear-weapon's grade uranium; this Court should require more from Respondent. See Knox, supra, at 294-95. The sole method of preventing Respondent from acting in a manner that harms the environment is to compel Respondent to conduct an EIA--a process that scrutinizes the anticipated environmental effects of a proposed project. See Wirth, supra, at 629.

Not only is an EIA a logical extension of the precautionary principle, but Respondent is independently required to conduct an EIA pursuant to treaty and customary law. See id.

1. This Court should compel Respondent to conduct an EIA before commencing with the transfer of HEU because Respondent is obligated to prove its activities will not cause permanent, environmental harm pursuant to the precautionary principle.

The precautionary principle specifically creates an obligation for Respondent to diligently control its activities and ensure they do not damage the environment. See Nuclear Tests, 1995 I.C.J. at 345. Because the precautionary principle calls for States to prevent actions that may cause environmental damage, precautionary measures must necessarily be taken to ensure that no actual harm occurs. Birnie & Boyle, supra, at 96.

Precautionary measures must be taken to anticipate and prevent environmental harm. Birnie & Boyle, supra, at 97. An EIA is the most effective precautionary measure Respondent could perform because it is the most successful method of assessing and thwarting environmental harm. See Nuclear Tests, 1995 I.C.J. at 344.

Given the nature of Respondent's proposed activity and the deadly effect HEU could have on the environment, the precautionary principle insists that Respondent conduct an EIA before it can proceed. See id.

2. **This Court should require Respondent to conduct an EIA because Respondent is independently obligated to perform an EIA pursuant to Espoo, CBD, and general principles of customary law.**

The international community has accepted an EIA as a legitimate method for protecting the environment. Cyril Kormos, et al., U.S. Participation in International Environmental Law and Policy, 13 Geo. Int'l Env'tl. L. Rev. 661, 668 (2001). The assumption that conducting an EIA undermines another country's sovereignty is becoming more difficult to maintain as environmental issues become increasingly global. Id.

a. **Respondent is required to conduct an EIA prior to undertaking a transboundary transfer of HEU according to Espoo and CBD.**

Espoo and CBD each create a duty to conduct an EIA when a party is engaged in an activity that is likely to have a significant transboundary impact. Espoo, supra, art. 2(5), 30 I.L.M. at 803; CBD, supra, art. 14, 31 I.L.M. at 827. Respondent is bound by the terms of Espoo and CBD as articulated above.

Espoo maintains that one State can require another to conduct an EIA for a proposed activity which may have an adverse transboundary impact if the proposed activity is listed in Appendix I or falls within the criteria set forth in Appendix III. Espoo, art. 2(3)-(5), 30 I.L.M. at 803. The transfer of HEU falls under the ambit of criteria set forth in Appendix III. See id., Appendix I, III, 30 I.L.M. at 812-14. In Appendix III, the Convention considers whether an activity is likely to have a significant, adverse transboundary impact by virtue of one or more of the following criteria: size, location, and proposed effect--giving special attention to activities

that are close to an area of special environmental sensitivity or importance. Id., Appendix III, 30 I.L.M. at 814.

Respondent is prepared to transfer 2 metric tons of HEU (enough uranium to construct 45.5 nuclear-warheads) through the Sea of Sandia--within ten miles of Sandia's coastline. (R. at 9). Sandia has a special relationship with the Sea, and even the threat of radioactive release will have a deleterious effect on Sandia's tourism industry--consequently, on its economy. (R. at 9-10). Transferring HEU is undoubtedly an activity falling under the parameters of Appendix III, thereby obligating Respondent to conduct an EIA prior to proceeding with the transfer. See Esposo, supra, Appendix III, 30 I.L.M. at 814.

CBD similarly establishes an obligation which compels Respondent to conduct an EIA. CBD, supra, art. 14, 31 I.L.M. at 827. It requires an EIA if a State is planning to engage in a project that will likely have significant adverse effects on biological diversity to avoid or minimize the adverse effects of a potentially devastating project. Id.

Even the UNCLOS recognizes the necessity for an EIA and concludes that Respondent has an obligation to conduct an EIA when it believes that the activities under its control may cause substantially harmful changes to the marine environment. UNCLOS, supra, art. 206, 21 I.L.M. at 1309.

In light of the hazardous nature of HEU and the lethal effect it could trigger, this Court should order Respondent to conduct an EIA before proceeding with its arranged shipment. See Shaw, supra, at 596.

b. Respondent is required to conduct an EIA pursuant to general principles of customary law.

A State's duty to conduct an EIA to ensure that activities within its control do not cause damage to the environment of other States is considered to be the cornerstone of international

customary law. Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, at 41 (Sept. 25).

If an EIA is not required, “the substantive prohibition on transboundary harm would be largely meaningless, except perhaps as a basis for *post hoc* determination of compensation owed to the affected state [because if] a state does not know whether an activity might cause transboundary harm, it cannot take steps to avoid the harm.” Knox, supra, at 295-96.

Rio calls for States to conduct an EIA when a proposed activity is likely to have a significant adverse impact on the environment. Rio, supra, principle 17, 31 I.L.M. at 879. Rio goes a step further to insist that States discourage and prevent the transboundary transfer of any substances that can cause severe environmental harm. Id., principle 14, 31 I.L.M. at 878. While Rio is precatory in nature and not binding *per se*, it does express goals and aspirations which evidence binding principles of customary law. Wirth, supra, at 613.

In view of the international acceptance of the EIA doctrine, the nature of Respondent's proposed activity, and the devastating effect it could have on Sandia's environment, Respondent should be required to conduct an EIA before proceeding with such activity to ensure that no harm is caused by the transfer.

CONCLUSION AND PRAYER FOR RELIEF

In consideration of the aforementioned, the Republic of Sandia respectfully requests this honorable Court to:

1. **declare that** Respondent's invocation of the national security exception was improper and Respondent's failure to provide Sandia with adequate notice and consultation violates international law; and
2. **grant interim measures and declare that** Respondent is obligated to conduct an EIA prior to proceeding with the transfer of HEU through the Sea of Sandia.

Respectfully Submitted,

Team 05

Agents for the Republic of Sandia.