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CONFIDENTIAL

THE PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

THE WATER RESOURCES CASE

Harmonia

v.

Mercadia

Memorandum for Judges*

THE CONTENTS OF THIS BRIEF MAY NOT BE SHOWN TO, READ BY, OR IN
ANY OTHER WAY MADE AVAILABLE TO STUDENT PARTICIPANTS IN THE 1987
PHILIP C. JESSUP INTERNATIONAL LAW MOOT COMPETITION.

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Introduction

This bench brief provides a review of the arguments likely to be presented by the participants. It is urged that the judge with little background in international law, read the entire memorandum, paying particular attention to the section on sources of international law. Others should skip this section. The coverage is not meant to be exhaustive. Some participants may present arguments not considered herein. Creative, well-founded arguments are to be encouraged. Similarly, those who chose not to make all the arguments set out below should not automatically be scored down, but should be judged according to the arguments made and according to the reasons they may give for not making other arguments.

Participants will not have equal access to all of the source materials on the subject. Therefore, participants should not be unduly penalized for having different sources as long as those presented properly support the arguments made. It is also possible that one team may have a disproportionate amount of law on its side. This should not effect the judge's decision. Participants should be judged on the force of the argument they make with the law available.

Overview of the Problem

The 1987 Jessup Problem concerns the use of transboundary water resources. The claims which are the focus of the problem on the one hand derive from the diversion of an international river and on the other from the pollution of a transboundary aquifer. Although the international rules which govern trans-

boundary rivers are relatively well developed, those which deal with international groundwater resources are not. The participants must, therefore, argue by analogy when dealing with the groundwater issue. A second theme of the problem is the balance between pollution prevention and the maximum beneficial use of water resources. As the world's fresh water resources are put under increasing pressure from consumptive uses, the conflict between pollution prevention and maximum use will escalate.

Harmonia will claim that Mercadia violated international law by polluting the Galala Aquifer. Mercadia will claim that Harmonia violated international law by the diversion of the Lakota River which resulted from its hydroelectric project. In order to argue their cases, the participants will need to properly combine the rules governing transnational pollution with those governing the uses of international rivers and extend them to international groundwaters.

Sources of International Law

On the national level the formal sources of law are the constitution, if a country has one, legislation, and judicial decisions, in those nations which follow the doctrine of stare decisis. In order to establish whether a particular rule is the law, one would look to the constitutional, legislative or judicial process from which the rule came.

The situation is similar in international law. When one wishes to know whether a given rule is international law, one must turn to the sources of international law. Article 38 of the

Statute of the International Court of Justice is the most authoritative enumeration of the sources of international law. This article, which controls the sources of law that may be used by the participants in this competition, reads as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

In addition, Article 59 provides:

The decision of the Court has no binding force except between parties and in respect of that particular case.

Although there is some disagreement whether the sources are listed in hierarchical order, in practice an international court would give precedence to a treaty provision binding on the parties over a rule of customary international law, unless the customs were preemptory rule of international law. In the same way, a custom will take precedence over a general principle of law. Judicial decisions and the teachings of publicists are merely subsidiary means for determining the rules of international law. This means that they can be cited as evidence that a given rule is international law.

International conventions (treaties) under subsection (a) can be both multilateral and bilateral and states must generally be a party to a treaty to be bound by it. However, treaties may also be a statement of pre-existing custom or may be a source of new custom to the extent that a very large number of states adhere to the treaty or accept its provisions without becoming parties to the treaty. Participants who cite a treaty in support of their argument should be clear about how they are using the treaty.

International custom develops from the practice of states. This official government conduct can inter alia include official statements, diplomatic exchanges, national court decisions, or legislation dealing with international matters. To qualify as a custom, the practice must be widespread and consistent. It must also be engaged in as a legal obligation. Participants should be able to establish these elements for any international custom alleged.

General principles of law common to the major legal systems are the third source cited. International law rules derived in this way are accepted as a source of law on the assumption that if states have universally applied these principles in their domestic law, they have consented to be bound by them internationally. Rules alleged to be "general principles" should not be accepted as such unless their existence is recognized commonly.

Although the teaching of publicists and judicial decisions are given equal weight in subsection (d), in practice judicial decisions are more authoritative. And, understandably, decisions of international tribunals generally hold more weight on ques

tions of international law than do decisions of national courts. Thus, if the International Court of Justice (ICJ) finds that some rule has become customary international law, that holding, for all practical purposes, establishes the customary rule in spite of Article 59.

The writing of publicists (scholars) is also a "subsidiary means" of establishing international law. This source includes individual "highly qualified publicists" as well as the works of organizations such as the International Law Commission (ILC) and the International Law Association (ILA).

The resolutions of international organizations are not formally binding in character unless provided for in the treaties establishing the organizations. This is true of UN General Assembly (UNGA) Resolutions. Some resolutions can, however, become declarative of international law. Since how states act in international organizations is state practice, consistent declaratory actions in organizations are quite authoritative. Let us presume that a UNGA Resolution declares a rule of international law and it is adopted by an overwhelming majority of states representative of the major state groupings.

If, in addition, the rule is repeated in many later resolutions and is relied upon in other contexts as expressive of a rule of international law, then the rule enunciated has achieved the character of international law. Participants citing resolutions of international organizations as international law should be prepared to establish how these resolutions achieved this status.

Issue I: Were the actions of Mercadia which resulted in the pollution of the Galala Aquifer a breach of Mercadia's international obligations?

As there is no treaty covering the dispute herein, Harmonia will rely primarily upon international custom in its argument. There is also some question whether underground waters are covered specifically by such sources as the ILA's Helsinki Rules. In the first instance, Harmonia will probably argue that there is a general international prohibition against transfrontier pollution. In support of this position they will cite Principle 21 of the Stockholm Declaration (11 I.L.M. 1416) which establishes that states have "...the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States...." Other likely evidence cited will be Article 30 of the Charter of Economic Rights and Duties of States (14 I.L.M. 251), the Trail Smelter Arbitration, (3 RIAA 1905), Article 19(3) of the ILC's Draft Articles on State Responsibility (which identifies massive pollution of the atmosphere and high seas as international crimes) and the 1979 Convention on Long-Range Transboundary Air Pollution, (18 I.L.M. 1442) among others. A claim that Principle 21 is declarative of customary international law is likely, citing the fact that it was adopted by a 112 to 0 vote.

Mercadia will respond that although Principle 21 was adopted by the UNGA, the Declaration is not binding international law. The Trail Smelter decision will be distinguished in that Canada had accepted liability prior to the decision and that the tribunal relied on US law. Mercadia will claim the other examples

are not sufficiently widespread nor consistent in their terms to be evidence of custom.

Harmonia will argue that there is sufficient evidence of state practice in treaties which contemplate groundwater pollution within obligations to prevent fresh water or marine pollution to constitute a customary obligation not to pollute international groundwaters. Examples cited will include the 1980 Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources, Article 194(3) of 1982 Law of the Sea Convention, as well as many bilateral treaties such as those cited in Teclaff, et al., Transboundary Ground Water Pollution, 19 NAT. RES. J. 629 (1979). Mercadia will counter with the argument that although there are many treaties which mention groundwater in relation to surface or marine pollution, the concern with groundwaters is tangential to the purpose of the treaties, and at best only concerns groundwaters as mechanisms by which surface waters are polluted. In the case at bar, the surface waters are polluting the aquifer.

Harmonia will contend that international codification efforts such as those by the ILA and the ILC are expressive of the customary international law of international water resources and prohibit pollution of such resources. They will point to Article X of the ILA's Helsinki Rules which obligates a State to "...prevent any new form of pollution or any increase in ... existing pollution" of the waters of an international drainage basin. They will also refer to the draft version of Article 9 of the ILC's Law of Non-Navigational Uses of International Watercourses

which prohibits any "appreciable harm" to the interests of other watercourse states.

Mercadia will respond, first that the Helsinki Rules are merely the opinion of publicists, no matter how well known, and by themselves do not establish a customary rule. In addition, Mercadia will argue that, although the Rules speak of an international drainage basin as including surface and underground waters, under Article II of the Rules, a drainage basin is "...determined by the watershed limits of the system of waters... flowing into a common terminus." Mercadia will contend that the Galala is not governed under the Helsinki Rules because it is not flowing water. Secondly, even if it were flowing water, the terminus for the Galala would appear to be different than that of the Green River.

Harmonia will counter Mercadia's argument concerning the non-application of the Helsinki Rules by citing the fact that the Final Report of the Committee on International Water Resources Law of the ILA, which was adopted without modification at the ILA's 1986 Seoul Conference, promulgated four additions to the Helsinki Rules specifically dealing with groundwaters. Article 1 provides in part that

"Those States are basin States within the meaning of the Helsinki Rules whether or not the aquifer and its waters form with the surface waters part of a hydraulic system flowing into a common terminus."

Article 2 of the same report includes in the Helsinki international drainage basin concept aquifers not intersected by an international boundary as long as they are part of the basin's hydraulic system, as well as those aquifers intersected by an

international boundary, but not part of the hydraulic system. Harmonia will also cite Article 3 of the report which requires basin states prevent or abate pollution of international groundwaters.

Mercadia will respond that even if the existent Helsinki Rules are expressive of customary international law, the new Rules dealing with groundwaters are no more than the opinion of publicists on what the international law governing transboundary aquifers should be. They might even argue that the need to develop such rules indicates further that the Helsinki Rules did not include transboundary aquifers. Mercadia will also attack the reference to the ILC rules as merely a very preliminary draft form of model international law rules.

Mercadia will contend that even if the customary nature of the Helsinki Rules were to be accepted, the prohibition against pollution is not absolute. Article X of the Helsinki Rules qualifies the prohibition on pollution with the words only if "[c]onsistent with the principles of equitable utilization..." of the waters of the international drainage basin. And, therefore, before Harmonia can invoke the prohibition in Article X, it must show Mercadia's acts were inconsistent with the principles of equitable utilization.

Harmonia will argue that in addition to the breach of international obligations already established, Mercadia's actions which resulted in the pollution of the Galala Aquifer deprived Harmonia of its share of the beneficial uses of the underground waters. Harmonia will claim that the doctrine of "equitable utilization" has become customary international law. As it is

formulated in Article IV of the Helsinki Rules, it entitles each basin state to "a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin." The ILC included a similar doctrine in Article 8 of its draft articles on The Law of the Non-navigational Uses of International Watercourses, and Harmonia will argue that the principle is also evident in the Lake Lanoux case (53 A.J.I.L. 156). The proposition that the same principle has been applied to other shared international resources will be supported by reference to the North-Sea Continental Shelf cases (1969 I.C.J. Rep. 4), the English Channel arbitration (18 I.L.M. 397), the Fisheries Jurisdiction case (1979 I.C.J. Rep. 3) as well as, Articles 74 and 83 of the Convention on the Law of the Sea (21 I.L.M. 1261).

Mercadia will contend that the Helsinki Rules and the ILC draft rules do not apply to groundwaters such as exist in this case and that the other examples of the proposition apply to maritime resources and not resources so intimately associated with a nation's sovereignty as waters underlying its territory. Mercadia might argue that it is entitled to an absolute right to use the waters within its territory without any recognition of Harmonia's claims, a proposition which is generally called the Harmon Doctrine. Although the Doctrine had significant support until the middle of this century¹, by 1966 it had lost support as a rule of customary international water law. Mercadia will argue that although the Harmon Doctrine no longer applies to surface waters, it can be argued that it applies to underground waters. Since there is no custom which applies to the sharing of underground waters, it is necessary to look to the general principles

of law recognized by nations for a rule. Mercadia will argue that in most countries, under the legal regimes covering groundwater, groundwater rights are usually appurtenances to the land. Support for this proposition can be found in the references cited in Hayton, The Law of International Aquifers, 22 Nat. Res. J. 71 (1982).

Harmonia may argue that the pollution of the Galala Aquifer constitutes an "abuse of rights" by Mercadia. The doctrine refers to a situation in which the exercise of sovereign rights by a State is so unreasonable as to make the action contrary to international law. Harmonia may point to the Latin maxim "sic utere tuo ut non alienum laedes" (one must so use his own as not to do injury to another) as support for the doctrine. Reference can also be made to the Corfu Channel case (1949, I.C.J. Rep. 1) in which the Court recognized "every State's obligation not to allow knowingly its territory to be used contrary to the rights of others." Mercadia will claim no knowledge on the part of the State that the pollution would occur.

Issue 2: Is Mercadia internationally responsible and liable for its actions resulting in transboundary pollution?

Harmonia will argue that under the Draft Articles on State Responsibility of the ILC, State responsibility requires that there be an international obligation between the States in question, that there must be a breach of that obligation which is attributable to the State against which the claim is brought, and that there be damage (16 I.L.M. 1249). The pollution actions will be attributed to Mercadia either on the theory that the

government relocation program caused the pollution or that the government failed to act diligently in not preventing the acts of the Old Ones which resulted in the pollution. Mercadia will, of course, deny that the relocation process necessarily caused the pollution and further, that the government, while responsible for relocating the Old Ones, had nothing to do with their farming activities which resulted in the pollution. The use of pesticides by the Old Ones was normal for both Mercadia and Harmonia. Furthermore, neither government was aware of the location of the recharge area at the time of the relocation.

Harmonia may claim that the standard of liability to be applied is that of strict liability. This would diffuse Mercadia's argument of exoneration by third party action. In support of Harmonia's theory one can cite the lack of concern for fault apparent in the Corfu Channel case, the Trail Smelter arbitration, the Lake Lanoux arbitration and Principle 21 of the Stockholm Declaration. Mercadia will contend that the strict liability standard is still de lege ferenda and that the fault liability standard is the standard followed in state practice, in the decisions of arbitral tribunals and in the decisions of the ICJ. For conflicting views on this issue see van Lier, Acid Rain and International Law (1981); Goldie, Liability for Damage and the Progressive Development of International Law, 14 Int. and Comp. L.Q. 1201 (1965); and Williams, Public International Law Governing Transboundary Pollution, 26 U. of Queens J. Int'l L. 112 (1986).

Mercadia should make a strong argument that the fundamental principle of international water law is maximum utilization and

that this is objectified in the doctrine of "reasonable and equitable utilization." The agents for Mercadia should stress that in both the list of factors to be considered in determining whether a use is reasonable and equitable under the Helsinki Rules or under the ILC Draft Rules, pollution resulting from such a use is only one of eleven factors to be considered as a whole in deciding the question. And, in fact, under the Helsinki Rules, the standard of environmental damage is "substantial injury." Harmonia might counter by citing Article I of the Institute of International Law's 1979 Athens Resolution on the Pollution of Rivers and Lakes and International Law which defines pollution as an "alteration in the composition or quality of waters which affects the legitimate uses of such waters, thereby causing injury." (58 Annuaire de l'Institut de Droit International, Tome 2, p. 201). For the same proposition agents for Harmonia might cite Article 9 of the ILC Draft Articles which prohibits activities causing "appreciable harm" to other water-course States (UN Doc. A/CN.4/399, March 11, 1986, p. 21).

As for factual arguments, Harmonia will contend that it suffered substantial injury by pollution of drinking water which is critical to the continued existence of the capitol. It will also argue that the presence of algae and toxics are irreparable harm, as is the pollution of the aquifer. Mercadia will point out that the compromis speaks of formation of algae in the water of Lake Lydia but gives no evidence of its effect on tourism. Also, although there are toxics in the fish, there is no indication of fish kills or of any negative health effects due to ingestion of lake fish.

Issue 3: Was Harmonia acting in violation of its international obligations with respect to its appropriation of the waters of the Lakota River?

Mercadia may, as did Harmonia, use the doctrine of "abuse of rights" to condemn Harmonia's diversion of the Lakota, citing both the maxim sic utere tuo ut alienum non laedas and the Corfu Channel case. Harmonia will contend that no serious harm would have had to result from the diversion except for Meradia's intractibility.

Mercadia may also take a hard-line approach maintaining that Harmonia's actions violate the doctrine of prior appropriation. Although there is some question of the uniformity of the doctrine (see the North-Sea Continental Shelf cases), there is some evidence of support in the writings of publicists. Mercadia may cite Garretson et al., the Law of International Drainage Basins 19 (1967) and Laylin, Principles of Law Governing Use of Internatioanl Rivers, 10 Inter-American Bar Ass'n Conf. Rep. 12 (1957). Wyoming v. Colorado, 259 U.S. 419 (1922) and Nebraska v. Wyoming, 325 U.S. 589 (1945) are two U.S. Supreme Court cases which have applied the doctrine. Harmonia may point out that the doctrine has been included in the list of factors defining "equitable utilization" found in Article V of the Helsinki Rules.

Mercadia will probably fall back on the "equitable utilization" doctrine of Article V of the Helsinki Rules, even though it would have earlier denied their applicability to international groundwaters. Mercadia will point to the same sources which were used earlier to support Harmonia's contention that the Rules are

custom, that is, the Lake Lanoux case, the North-Sea Continental Shelf case and the Fisheries Jurisdiction case, among others. Mercadia will do well to point out that factors are to be taken as a whole (Article V(3)) and that no use is entitled to any preference over any other use (Article VI).

The non-exhaustive list of factors is as follows:

- " a. The geography of the basin, including in particular the extent of the drainage basin in the territory of each basin State;
- b. The hydrology of the basin, including in particular the contribution of water by each basin State;
- c. the climate affecting the basin;
- d. the past utilization of the waters of the basin, including in particular existing utilization;
- e. the economic and social needs of each basin State;
- f. the population dependent on the waters of the basin in each basin State;
- g. the comparative costs of alternative means of satisfying the economic and social needs of each basin State;
- h. the availability of other resources;
- i. the avoidance of unnecessary waste in the utilization of waters of the basin;
- j. the practicability of compensation to one or more of the co-basin States as a means of adjusting conflict among uses; and
- k. the degree to which the needs of the basin State may be satisfied without causing injury to a co-basin State."

As for factor (a), although both Harmonia and Mercadia will mention the factor, as the map indicates, the size of the areas drained by the Lakota River in both countries is similar.

Since the Lakota's headwaters are in the Morningstar Mountains of Harmonia, this factor will weigh in Harmonia's favor.

Since the climate is similar across the basin, this factor will favor neither country.

Factor (d), past utilization of the basin waters, will favor Mercadia since the Old Ones have, for centuries been the primary users of the waters for their subsistence agriculture. Since this is one of the factors most strongly in favor of Mercadia, Harmonia may do well to cite Article 8 of the Rules which states, in part, that "an existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accomodate a competing incompatible use."

As for the economic and social needs of each basic state, Mercadia will argue that the Lakota is crucial for the continued existence of the Old Ones in their traditional homeland. In addition, the resulting relocation destroyed one of the cultural treasures of Mercadia, the continued existence of the Old Ones in their homeland. The effects will continue into the far future and will rob the population of Mercadia of its heritage.

Harmonia will counter with the plea that it is a developing nation, far poorer than Mercadia, with substantial foreign debt and virtually no industrial base. The Dam is necessary for the electricity for bauxite developemnt, economic development which will possibly increase foreign exchange earnings by 33%. In addition the High Dam will stabilize the waters of the Lakota and will provide irrigation for an area similar in size to that farmed by the Old Ones, but far more productive since it uses

modern irrigation methods. Harmonia will characterize the conflict as one between social need and an overwhelming economic benefit.

The estimate of population dependent upon the waters of the basin in each basin State will depend upon indirectness of the dependence. For example, Mercadia can argue that the 100,000 Old Ones were the only inhabitants prior to the construction of the Dam and agricultural area. The compromis is silent on the number of Harmonians who have recently moved to the Lakota Vallley. If one looks to economic dependence on the waters of the basin, then Harmonia can claim all of its inhabitants are dependent upon the bauxite industry, possibly all ~~4~~⁴¹,000,000 Harmonians. Mercadia will probably reply to such an extension of the dependence doctrine with a claim of its entire population at least dependent for their cultural ties on the lives of the Old Ones.

Mercadia will argue that it has no alternative means of satisfying its social needs. Without the Lakota in its original state, the Old One's lifestyle would change. Harmonia would argue that only the High Dam would provide electricity, stabilize the spring run-off and provide water for irrigation. They might add the suggestion that Mercadia could keep the Old Ones at their ancestral home by installing modern irrigation systems.

Mercadia will argue that without the High Dam construction, the Old One's farmland would not have been wasted. Harmonia will counter with a claim that its new agricultural area and the new bauxite industry are the result of the project. The agents for Harmonia might also comment upon the wasteful irrigation methods

of the Old Ones.

The last factor will probably weigh in favor of Mercadia. If the objective study is to be believed the High Dam could not have been built without reducing the flow of the Lakota to its present level. The deciding factor here is how much difference modern irrigation would make even under the current conditions.

Mercadia may claim that Harmonia violated its obligation not to begin construction of the High Dam until a settlement had been reached. Mercadia will cite the 1933 Declaration of Montevideo (28 A.J.I.L. 59, 1934) and the 1957 Buenos Aires Resolution (10 Inter-American Bar Ass'n Proceedings, 82, 1957) in support. Mercadia will also cite the duty prescribed in the Lake Lenoux arbitration to negotiate in good faith. Mercadia will argue that Harmonia was not willing to make changes in the High Dam and thereby breached her duty of good faith. It will also be the position of Mercadia that it was Mercadia which called for the meeting of Ministers, not Harmonia.

Harmonia will argue to the contrary, there is no duty to settle, that only a duty to negotiate is now custom. Support for this rule can be found in Article 6 of the Report of the Sixtieth ILA Conference in Montreal 1982 and by the North-Sea Continental Shelf case and the Fisheries Jurisdiction cases. Harmonia will further argue that the consent of a co-basin State is not necessary before implementation of a projet. Agents may support this contention by reference to Article 6 of the ILA's 1982 Rules on Water pollution in an International Drainage Basin which does not require consultation to "unreasonably delay" implementation.

Issue 4: Is Harmonia internationally responsible and liable for its appropriation of the waters of the Lakota River?

Mercadia will contend that Harmonia breached the international obligations mentioned above and that the actions resulting in the appropriation of the Lakota were attributable to the State's Five-Year Plan, the project was entirely financed by Harmonia and the Dam was State-owned and managed. Mercadia will also maintain that the effects were a "substantial injury." Included in the damages are the loss of the Old Ones' homeland, the economic costs of relocation and the costs of construction of the canal through the Morningstar Mountains.

Harmonia will respond by denying the violation of any international obligation. And, if a breach of an obligation were to be found, the standard of liability to be used would be a fault standard. Under this standard, Harmonia would seek exoneration by third party action. It would contend that it was Mercadia that moved the Old Ones and that the move was not necessary. Harmonia would argue that the move was only made necessary by Mercadia's refusal to explore other reasonable means of maintaining the Old Ones' agricultural livelihood.