

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

April Term, 1987

HARMONIA

Applicant

v.

MERCADIA

Respondent

MEMORIAL FOR THE APPLICANT

CHAN CHEN YEE
WILFRED JAYARAJ DORAY
ROSALINDANTOINETTE LAZAR
WONG SIEW HONG

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JURISDICTION

The Governments of Harmonia and Mercadia have submitted the following dispute for settlement by the International Court of Justice pursuant to paragraph 1 of Article 36 of the Statute of the International Court of Justice. The parties have not qualified the jurisdiction or competence of the Court.

SUMMARY OF FACTS

Harmonia and Mercadia are neighbours. Harmonia, which has a population of 4,000,000, lies north of Mercadia. It is a developing country with a very substantial foreign debt. At present, one third of its foreign exchange earnings are generated by the tourist industry because it has virtually no industrial base. Mercadia, with a population of 7,000,000, is also a developing country. But it is more economically advanced with a well established industrial base.

THE LAKOTA HIGH DAM

The source of Lakota River lies in the Morningstar Mountains in Harmonia. It is the major source of water in the coastal lowlands of the two countries. On its way to the sea, the Lakota River flows through an isolated and largely uninhabited area of Mercadia.

To aid in its overall economic development, Harmonia decided to develop a major bauxite mining and processing industry to exploit its substantial deposits of the mineral. It is estimated that this industry should earn at least one third of Harmonia's foreign exchange. The processing of the bauxite requires large amounts of electricity. The building of the Lakota High Dam was therefore announced in 1979 as part of the necessary industrial infrastructure, since the Dam is the most economically feasible means of supplying the electricity needed for the development of the bauxite industry.

The Dam stabilizes the runoff of the Lakota River during spring. It provides hydroelectric power to the planned industrial development as well as water for the irrigation of a new agricultural area. The new agricultural area uses electricity to power its modern pumping and sprinkling systems.

There is a traditional agricultural area south of the border between the two countries. It is the home of an ancient rural ethnic group, of approximately 100,000 individuals, known as the Old Ones. The Old Ones practiced subsistence agriculture and have always used the traditional ditch, or inundation, method of irrigation. An objective study showed that the flow of the Lakota would not be sufficient to support their subsistence agriculture after the Dam is built. However, the necessary structure of the High Dam precluded any greater flow of the Lakota.

The Government of Mercadia responded to the announcement of the Harmonian development plans by requesting an immediate meeting of the Foreign Ministers. At the meeting, they demanded that the plans be changed to allow for the full flow of the Lakota during spring. They refused to accept any compromise during the nine months that the talks lasted. The talks therefore ended without agreement and the planned development of the Dam went ahead.

THE POLLUTION OF THE GALALA AQUIFER AND LAKE LYDIA

After the completion of the Dam in 1983, the Government of Mercadia moved the Old Ones to the area adjoining the Green River. The resettlement area lies in the semi arid highlands east of the Morningstar Mountains. The Green is a small river, incapable by itself of providing sufficient water for the needs of the Old Ones. A diversion canal had to be built through the Mountains connecting the Lakota to the Green, in order to supplement the latter. Once resettled, the Old Ones ceased use of the inundation, or ditch method of irrigation.

Prior to the resettlement, the only major inhabited area on this side of the Mountains is Trantor, a Harmonian provincial

capital. It is located on the shores of Lake Lydia, which has a population of approximately 150,000 people.

The resettlement area of the Old Ones is sited near the recharge area of the Galala Aquifer, which flows northwards to sustain Lake Lydia in Harmonia. The Lake's water was in pristine condition due to the high standards of treatment adopted by the Harmonians. The beaches were clean and the fishing was good. It had been earmarked for development as a future tourist resort.

The Old Ones used pesticides at the new area, something that they did not do at their old settlement. Concentrations of the pesticides, together with phosphates from farming and the habitation of the Old Ones seeped into the Aquifer. These toxins caused pollution to Lake Lydia. This resulted in the contamination of the drinking water of Trantor, the poisoning of fishes and the proliferation of algae in the Lake.

When Harmonia informed Mercadia and protested against this in 1985, the Government of Mercadia refused to take any measures to control the pollution. It even disclaimed all responsibility.

SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE

Both Mercadia and Harmonia are members of the United Nations. On March 1, 1986, the parties agreed to submit the present dispute to the International Court of Justice. There are no reservations to the jurisdiction of this Court.

QUESTIONS PRESENTED.

1. Whether Mercadia is responsible and liable to Harmonia in respect of the pollution damage caused to Lake Lydia and the Galala Aquifer.

2. Whether Harmonia's use of the waters of the Lakota River is contrary to established principles of international law.

SUMMARY OF ARGUMENTS

I. PRELIMINARY

The fundamental dispute in the present case concerns two issues of state sovereignty - firstly, the sovereignty of a state over the natural resources within its territory and secondly, the limitation placed on sovereignty when activities within one state's territory cause pollution damage to another state.

II. THE POLLUTION OF LAKE LYDIA AND THE GALALA AQUIFER

The international law concerning transfrontier pollution damage engages the liability of Mercadia when activities within its territory cause pollution harm to Harmonia. This liability is established without any question of international wrongfulness and Mercadia is obliged to prevent further damage; as well as to abate and to repair existing damage.

Regardless of the legality of the polluting activities, Mercadia has the duty to ensure that they do not cause pollution damage to Harmonia. Liability is engaged when such damage results.

That such liability is a rule of international law deriving from the principle of *sic utere tuo ut alienum non laedas* is without dispute. It is evidenced by widespread and uniform *opinio juris*, the writings of publicists and it has been applied in both international and municipal tribunals.

The requisite elements of liability are clearly present in this case as there is clearly transboundary pollution emanating from activities within Mercadia, which have caused, and are continuing to cause pollution damage to Harmonia.

Furthermore, strong and cogent policy considerations favour the imposition of liability on Mercadia. The ultimate aim of the international law of pollution is the preservation of the international environment. The liability of Mercadia to abate and prevent pollution damage is necessary because long term and unabated continuance of the pollution would only lead to the poisoning of Lake Lydia, endangering the lives of the inhabitants of Trantor in addition to causing an ecological disaster in the Lake. Further, the imposition of liability would also give expression of the principle that the polluter pays, and that the innocent victim should not be left to bear his own losses.

In addition, when Mercadia knowingly allowed its territory to be used in such a manner as to cause environmental harm to Harmonia despite being notified of the damage, it is acting in violation of international law and must be held responsible under the rules of State Responsibility.

III. THE DAMMING OF THE LAKOTA RIVER

The sovereignty of a state to deal with its own natural resources is a fundamental principle of international law. Harmonia's damming of the Lakota is an exercise of this sovereignty. In any case, it is an equitable use of the river.

The sovereignty of Harmonia over the river is not limited by any accepted or recognized regime of international law. The burden of proving the contrary lies on Mercadia. The so-called minimum flow doctrine finds no place in international law. Similarly, the rule of equitable utilization does not form part of international law.

Even if it is assumed that the principle of equitable utilization is a rule of international law, it does not entitle Mercadia to an identical share of the waters. It merely requires the

riparians to share in the beneficial uses of the river in an equitable and reasonable manner to be determined on a balance of all relevant factors and circumstances.

On the whole, the relevant factors favour the Harmonian position. The Harmonian use of the river is an optimal utilization of limited resources whilst the Mercadian use is both unreasonable and inequitable.

International law does not require the prior consent of Mercadia before Harmonia can embark on any project respecting the Lakota. Nevertheless, Harmonia negotiated in good faith with Mercadia for nine months to find a fair compromise; the failure of the negotiations was caused wholly by Mercadia's obstinacy. To accede to Mercadia's uncompromising demand for the full flow of the river during spring is tantamount to granting it a right to veto Harmonia's actions.

As such, Harmonia's damming of the Lakota is not an internationally wrongful act for which it can be held responsible. Further, in the absence of environmental damage, Harmonia is not liable to Mercadia for any economic loss involved in the relocation of the Old Ones.

Hence, Harmonia is neither responsible nor liable to Mercadia in respect of the damming of the Lakota River.

ARGUMENTS AND AUTHORITIES

I. MERCADIA IS INTERNATIONALLY LIABLE AND RESPONSIBLE FOR CAUSING POLLUTION DAMAGE TO HARMONIA

A. INTERNATIONAL LAW IMPOSES LIABILITY ON MERCADIA WHEN ACTIVITIES WITHIN ITS TERRITORY CAUSE POLLUTION DAMAGE TO HARMONIA

The Trail Smelter Arbitration¹ affirmed the fundamental principle of international law that no state may allow its territory to be used for acts causing pollution damage to the territory of other states².

Under the rule in that case, Mercadia is liable to Harmonia when activities within Mercadian territory cause transboundary pollution damage to the territory of Harmonia³. Liability in this case entails a compound duty on Mercadia to prevent further damage as well as to abate and to repair existing damage⁴. The appropriate remedy in these circumstances is thus the grant of an injunction against further damage⁵.

That this proposition forms part of international law is firstly supported by the community of nations when it endorsed

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1. 3 R.I.A.A. 1905 at 1960 (1941). In this case, Canada was held liable when a commercial smelting plant caused environmental damage to territory in the United States by the emission of sulphur fumes.
 2. This principle has been applied by this court, albeit in another context, in the Corfu Channel Case I.C.J. 4, 22 (1949). See also the SS Lotus P.C.I.J. Ser.A, No. 10, 68 (1927) and the Island of Palmas Case II R.I.A.A. 829, 838 (1928).
 3. *Suora*, n.1.
 4. *Ibid.*, at 1978; also Art. 1, Quentin Baxter, *Draft Articles on International Liability for the Injurious Consequences of Acts Not Prohibited by International Law* (the Int'l L. Comm's study on this area shall hereinafter be referred to as *Injurious Consequences*): 2 Y.B. INT'L L. COMM. II 77 (1984).
 5. This Court clearly has the jurisdiction to grant such a remedy: *Case of Diversion of Water from the River Meuse* F.C.I.J. Ser. A/B No. 70, 4, 73 and 76 (1937).

Principle 21 of the Stockholm Declaration on the Human Environment⁶. The Declaration stated that "States have ... the responsibility to ensure that activities within their jurisdiction...do not cause damage to the environment of other States...". This was strongly reaffirmed by Art 30 of the Charter on the Economic Rights and Duties of States⁷ when the General Assembly accepted the duty to protect the international environment for present and future generations.

Subsequent uniform and consistent state practice provide further, specific evidence amounting to clear *opinio iuris* of this acceptance⁸ in the application of this principle to air and water pollution⁹, including groundwater pollution¹⁰.

6. Rep. of the U.N. Conference on the Human Environment, 11 INT'L LEG. MAT. 1416 (1972). The Declaration was adopted a vote of 114-0 at the Conference and 113-0 at the U.N. Gen Ass. It is now a statement of international law: see R.M.M. WALLACE; INTERNATIONAL LAW (1986); Kiss, The International Protection of the Environment in R. St. J. MACDONALD & D.M. JOHNSTON (eds.), THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 1069, 1074-75 (1984).
7. G.A. Res. 3281 (XXIX) 14 INT'L LEG. MAT. 251 (1975). This Resolution was adopted by a vote of 120-6. See also the Nairobi Declaration on the State of Worldwide Environment, 21 INT'L LEG. MAT. (1982) and G.A. Res. 2996 (XXVII). U.N.G.A. Off. Rec. 27th Sess. Supp. No. 30, 42 (1972). These affirmations constitute clear evidence of customary international law: see *Nicaragua v US* I.C.J. 99-100 (1986).
8. See eg the Nordic Convention on Environmental Protection 13 INT'L LEG. MAT. 591 (1974); the U.N. Prog of Action in the Field of the Environment 17 INT'L LEG. MAT. 1091 (1978).
9. See eg the Int'l Convention on Long-Range Transboundary Air Pollution, 18 INT'L LEG. MAT. 1442 (1979), Arts. 139(1),(2), Arts. 235 and 263 of the 1982 Geneva Convention on the Law of the Sea, 21 INT'L LEG. MAT. 1261 (1982). Earlier state practice is documented in 2 Y.B. INT'L L. COMM. II (1974) and D.A. CAPONERA, THE LAW OF INTERNATIONAL WATER RESOURCES, UN FAO (1980).
10. Treaty practice is documented in L.A. Teclaff & E. Teclaff, Transboundary Groundwater Pollution: Survey and Trends in Treaty Law 19 NAT. RES. J. 629, 642 (1979) ; A.E. Utton, International Groundwater Law 22 NAT. RES. J. 95, 109-110

Secondly, the principle has also been reaffirmed in the *Lake Lanoux Arbitration*¹¹ as well as in numerous judicial pronouncements¹².

Thirdly, that this principle is one generally recognized by civilized nations is undisputable. It is rooted in the Roman Law doctrine of *sic utere tuo ut alienum non laedas* and it finds expression today not only in Common¹³, Civil¹⁴ and Socialist legal systems, but also in Islamic law¹⁵.

Fourthly, the teachings of eminent jurists also affirm that this principle is firmly rooted as a rule of international law¹⁶.

It is thus submitted that clear rules of international law impose an obligation on Mercadia to ensure that its territory is not used in such a manner as to cause pollution damage to Harmonia¹⁷; to

(1982).

11. *Spain v France* 23 INT'L L. REP. 101 (1957).
12. See eg *W. Poro v Hauleries du Bassin de Lorraine* 11 OBERSLANDESGERICHT SAARBRUCKEN OLG 752 (1958), noted in Goldie, *Transfrontier Pollution - From Concepts of Liability etc* 12 SYR. J. INT'L COM. & L. 185, 212 (1985), also the case against the *Mines Domaniales de Potasse d'Alsace* summarised in English: 15 NETH. Y. B. INT L L. 471 (1984), *Societe Energie Electrique du Littoral Mediterranien v Compagnia Imprese Electriche Ligon* 3 ANN. DIG. OF INT'L L. 1050-1051 and *Wurtemberg & Prussia v Baden* 1 G.H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 597-599 (1940);
13. See eg the doctrine of nuisance and the rule in *Rylands v Fletcher* L.R. 3 H.L. 338 (1868).
14. See, eg Art. 1384 of the French *Code Civile* and Art. 826 of the German *Das Burgerliche Gesetzbuch (BGB)*.
15. Quentin-Baxter, *4th Rep on Injurious Consequences*, 2 Y.B. INT'L L. COMM. II 74 (1984).
16. *Ibid.*, I H. LAUTERPACHT, *OFFENHEIM'S INTERNATIONAL LAW* 290-291, 365 (8th Ed., 1955), J.G. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 186-7 (9th Ed., 1984), W.E HOLDER & G.A. BRENNAN, *THE INTERNATIONAL LEGAL SYSTEM* 662 (1970).
17. J. BARROS & D.M. JOHNSTON, *THE INTERNATIONAL LAW OF POLLUTION* 69 (1974). U.N. Sec. Gen. s Survey of Int'l L 34 U.N. Doc. A/CN.4/1 Rev. 1 at para 57 (1949). See also Arts. IX

this end, Mercadia is further under an obligation to promptly warn Harmonia of the danger of any such damage and to enter into consultation on the matter¹⁸.

1. **International Law does not require the presence of serious or irreparable damage before liability is established.**

The imposition of liability on Mercadia is dependent upon the existence of pollution damage caused to Harmonia; it is not predicated upon the extent of the pollution damage caused¹⁹. Irreparable damage need not exist before liability is imposed. To otherwise postpone liability until such damage has actually occurred would defeat the very purpose of imposing liability, which is the protection and preservation of the international environment for the present and future generations²⁰.

It is therefore submitted that the degree of damage sufficient to engage liability must be tested by reference to the extent of the

& X Helsinki Rules on the Usages of Int Drainage Basins. Rep. of 52nd Conference. (Helsinki). INT'L L. ASSN. 494-501 (1966).

18. Principle 22 Stockholm Declaration, *supra* n.6; G.A. Res. 3281: *supra*, n.7. See also: Barboza, **1st Report on Injurious Consequences**, U.N. Doc. A/CN.4/402, 8-13 (1986).

19. See Art. 2(b) European Convention on Long Range Air Pollution, 18 INT'L LEG. MAT. 138 (1979); Schwebel, 3rd Report on the Law of Non Navigational Uses of Int'l Watercourses (the Int'l L. Comm's study is hereinafter "Non-Navigational Uses") 2 Y.B. INT'L L. COMM. I 65, 100 at para 138 (1982); Evenson, 1st Report on Non Navigational Uses 2 Y.B. INT'L L. COMM. I 155, 173 at para 101 (1983); Kiss, *supra* n.6; Handl, Territorial Sovereignty and the Problems of Transboundary Pollution Harm 69 AM. J. INT'L L. 50, 73 (1975). The *dicta* in the Trail Smelter Arbitration at 1960, requiring serious damage should be confined to the facts of that particular case because such damage had already been suffered by the territory of the United States.

20. *Supra*, n.6. See also R.A. FALK, S.H. MENDLOVITZ & F. KRATOCHWIL, INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE, 611 (1985).

deterioration in the environment of Lake Lydia²¹. On the present facts, the groundwater of the Galala Aquifer has been contaminated by toxins used by the Old Ones in their agricultural activities, and the environment of Lake Lydia has suffered a substantial and radical degradation from its previously pristine condition. Its formerly clean beaches are now befouled and the drinking water of Trantor is contaminated. Further, the Lake is now beset with algae, and the fishes in the Lake are poisoned. Such a drastic deterioration of, and damage to, the ecosystem of Lake Lydia is clearly sufficient to engage the liability of Mercadia.

In any case, international law allows for the engagement of liability where serious and irreparable damage is likely to occur²². In the long term, continued and unabated pollution to the Galala Aquifer and Lake Lydia would lead only to the ultimate and total destruction of the environment there. Furthermore, the cumulative and residual effects of the toxic pollutants pose a very real and serious danger to the health and lives of the inhabitants of Trantor who are dependant on the waters of Lake Lydia.

2. Mercadia is Not Entitled to Deny Liability on the Ground that the Pollution Damage is Caused by Normal Activities.

International law imposes liability on Mercadia for pollution damage caused to Harmonia irrespective of the nature of the activity causing the damage²³. As such, Mercadia's liability for the pollution damage is engaged notwithstanding that the pollution damage

21. Magraw, Transboundary Harm: The International Law Commission's Study of "International Liability" 80 AM. J. INT L. L. 305, 322 (1986).

22. Art. 1, Draft Articles on Injurious Consequences *supra*, n.4. Kiss, *supra* n.6, at 1069 documents the relevant state practice.

23. Jenks, Liability for Ultrahazardous Activities 117 RECUEIL DE COURS 166 (1966), Goldie, *supra*, n.12.

is caused by everyday activities like farming, and not by ultrahazardous activities.

First, ultrahazardous activities are those which carry the risk of significant damage, though the risk of such damage may be in fact *de minimis*²⁴. International law clearly imposes a higher, absolute standard of liability for damage caused by such activities²⁵. It is fallacious for Mercadia to argue on this ground that no liability exists whatsoever for pollution damage caused by any other activities. Indeed, Canada was found liable in the Trail Smelter Arbitration for the pollution damage caused by the smelting of bauxite, which cannot be considered an ultra-hazardous activity.

Secondly, the fundamental aim of protecting the environment is illusory if liability is only engaged where irreparable pollution damage is caused by ultra-hazardous activities of Mercadia or its agents. To so restrict liability would be futile, and indeed, would defeat the very policy itself.

Thirdly, to restrict liability only to ultra-hazardous activities would be contrary to cogent policy considerations because pollution from 'normal' activities, such as the use of pesticides, fertilizers and detergents, form the primary sources of pollution today²⁶.

24. Handl, Liability as an Obligation Established by a Primary Rule of Int'l Law 16 NETH. Y.B. INT'L L 49 (1985).

25. Absolute liability imposes a higher standard and admits of no exceptions to liability save where damage has been self-induced by an act of gross negligence: See eg, Art. 2 Convention for Damage by Space Objects 14 INT'L LEG. MAT. 43 (1975); also Jenks, Goldie *supra* at n.12, FALK, MENDLOVITZ & KRATOCHWIL *supra* n.20 at 61.

26. R.A. FALK & L.E. BLACK, THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: THE STRUCTURE OF THE INTERNATIONAL ENVIRONMENT (1972); BARROS & JOHNSTON, *supra* n.17 at 10 et seq.

3. Mercadia Is Liable For Acts of Private Individuals Within its jurisdiction

Liability was imposed on Canada in the Trail Smelter Arbitration even though the pollution damage did not flow from acts of the State or its agents. It therefore follows that Mercadia's liability for the pollution damage caused to Harmonia is engaged notwithstanding that the damage flowed from acts of private individuals²⁷.

This is buttressed by the fact that liability for pollution damage is a function of the control that Mercadia exercises over the territory from which the harm arose²⁸. The requirement of attribution under the technical rules of State Responsibility flows from the fact that the activity in question is to be impugned as an internationally wrongful act committed by the state²⁹, thereby entailing State Responsibility. In cases of transboundary pollution, international law recognizes that liability does not necessarily require that the polluting activity be characterized as wrongful under international law³⁰. Thus, the rules of State Responsibility are not engaged in the present case.

It is thus submitted that Mercadia is liable for the pollution damage caused by the harmful activities of private individuals under its jurisdiction.

27. Schwebel, Art. 8(2) of Draft Arts on Non Navigational Uses, 2 Y.B. INT'L L. COMM. II 122 (1982).

28. *Supra*, n.24.

29. Art. 3, Draft Articles on State Responsibility, 2 Y.B. INT'L L. COMM. II 90 (1979) defines an internationally wrongful act as one where conduct is attributable to the State and which constitutes a breach of an international obligation of the State. See generally Graefrath, Responsibility and Damages Caused 185 RECUEIL DES COURS I 19 (1984).

30. Handl, *supra* n.24.

4. International law Does Not Require Actual Knowledge of the Pollution Harm before liability is established

The rule in *Trail Smelter* engages liability without the requirement of knowledge of the pollution on the part of the Government of Mercadia³¹. Again, this is because liability for pollution damage is a function of control. It is therefore submitted that Mercadia engages strict liability³² for the pollution damage caused by the Old Ones³³.

Alternatively and in any case, liability is engaged when:

- a. the pollution which arose is of the kind typically associated with that activity; and
- b. that activity carries a foreseeable risk of transfrontier pollution³⁴.

It is clear that both these elements are fulfilled in the present case firstly because the contamination of Lake Lydia arose from the presence of toxins which are clearly of the kind that is associated with farming activities and human habitation.

Secondly, and with respect to the element of foreseeability, international law allows Harmonia a liberal recourse to inferences of facts and circumstantial evidence to establish whether the activity

31. See also the *Gut Dam Case* 8 INT L LEG. MAT. 118 (1959) where strict liability was imposed on Canada for flood damage caused to U.S. territory.

32. Handl, State Responsibility for Accidental Transnational Environmental Damage by Private Persons, 74 AM. J. INT L L. 527 (1980); Kiss, *supra* n.6 at 1077.

33. FALK, MENDLOVITZ AND KRATOCHWIL, *supra* n.20 at 616-617, Goldie, International Principles of Responsibility for Pollution 9 COLUM. J. TRANSNAT L L. 283, 306 (1970) and also Goldie, *supra* at n.12.

34. Handl, *supra* n.24 at 69.

may foreseeably give rise to pollution damage³⁵. On the present facts, the risk of such toxic pollutants seeping into and contaminating the Galala Aquifer should have been apparent when the Old Ones were relocated atop the Galala Aquifer, near the recharge area. This risk is compounded by the fact that the Old Ones are now using pesticides, something which they have not done before³⁴. Thus, the risk of the toxic pollutants flowing northwards with the Aquifer to cause damage to Lake Lydia is clear.

Thus, it is submitted that Mercadia is not entitled to rely on its lack of actual knowledge of the pollution damage to escape liability.

B. STRONG POLICY CONSIDERATIONS FAVOUR THE IMPOSITION OF LIABILITY ON MERCADIA

Firstly, Mercadia is both physically and economically more capable of controlling the pollution. Being the source state from which the damage emanated, it is clearly better placed to prevent the harm³⁷. Furthermore, Mercadia, being more economically advanced than Harmonia, is better able to bear the cost of repairing the damage³⁸.

Secondly and relatedly, the imposition of liability aims at allocating the cost of adequate protection³⁹ against pollution harm.

35. *Corfu Channel Case supra* n.2 at 33. Mercadia is under an obligation of prevention: Art. 23 *Draft Articles on State Responsibility, supra* n.29.

36. See Clarification 23 to the *Compromis* (hereinafter, "*Clarifications*").

37. Glickman, *Keep your Pollution to Yourself etc* 25 VA. J. INT'L L. 693, 726 (1985).

38. *Ibid.*, at 723.

39. This is known as the "Polluter-Pays Principle": See eg, OECD Recommendations Regarding the Implementation of the "Polluter-Pays" Principle, 13 INT'L LEG. MAT. 138 (1974), and which have found legislative expression in France, Germany and Japan, amongst other countries.

Elementary considerations demand that Mercadia, as the polluter, should pay for whatever environmental damage that was caused to Harmonia. Conversely, Harmonia as the innocent victim of the pollution damage, should not be left to bear its own loss⁴⁰.

Thirdly, the protection and conservation of the natural environment is a universal concern deriving from man's obligations as custodian of the earth⁴¹. As such, the imposition of an international liability on those states which breached their obligations would serve to affirm the commitment of international law towards its goal of environmental protection. It is thus submitted that the balance of relevant factors and policy considerations strongly favour the imposition of liability on Mercadia, in order to prevent further neglect and abuse of the Galala Aquifer.

It is further submitted that the present situation is a proper case for the grant of an injunction requiring Mercadia to refrain from causing further pollution damage to Harmonia. This is because the nature of the pollution and its cumulative effects from Mercadia's continued use of the toxic pollutants are such that mere monetary compensation is insufficient⁴².

40. Barboza, 1st Report on Injurious Consequences, *suara* n.18 at para 20.

41. Caldwell, Concepts in the Development of Int'l Environmental Policies 13 NAT. RES. J. 190, 200 (1973).

42. Lester, River Pollution in International Law 57 AM. J. INT'L L. 828, 847 (1963).

C. IN ANY CASE, MERCADIA'S REFUSAL TO ABATE THE POLLUTION DAMAGE IS A VIOLATION OF INTERNATIONAL LAW FOR WHICH IT IS RESPONSIBLE.

1. Mercadia's Refusal to Take Abative Measures to Control the Pollution Damage is an Internationally Wrongful Act.

State Practice and the writings of jurists clearly hold Mercadia to be acting in violation of its international obligations when it *knowingly* allows its territory to be used in such a manner as to cause environmental damage to Harmonia⁴³. Thus, Mercadia's actions were internationally wrongful when it refused to prevent and abate the pollution damage caused by the Old Ones despite being notified by Harmonia of the damage in March 1986.

2. Mercadia is Responsible to Harmonia for this Breach of International Law.

An internationally wrongful act entails the responsibility to make reparations⁴⁴. Mercadia is required to restore the *status quo* prior to the breach⁴⁵. Where this is not possible, as in cases of physical harm, monetary compensation is the recognized form of reparation⁴⁶.

43. Corfu Channel Case *supra* n.2; Sette-Camara, Pollution of International Rivers 186 RECUEIL DE COURS 117, 174 (1984); 1 LAUTERPACHT, *supra* n.16 at 365; & WHITEMAN, DIGEST OF INTERNATIONAL LAW 264 *et seq.*

44. Chorzow Factory Case (Indemnity) (Merits) F.C.I.J. Ser. A No. 17, 29, 31, 46-48 (1928).

45. *Ibid.*

46. M.M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW (1937-1943), 1 LAUTERPACHT, *supra* n.16 at 352-354, Eagleton, The Measure of Damages in International Law 39 YALE L. J. 52 (1929).

II. HARMONIA'S DAMMING OF THE WATERS OF THE LAKOTA RIVER IS NOT A VIOLATION OF INTERNATIONAL LAW

A. HARMONIA HAS ABSOLUTE SOVEREIGNTY OVER THE WATERS OF THE LAKOTA RIVER THAT FLOW WITHIN ITS TERRITORY.

1. Customary International Law Entitles Harmonia Absolute and Exclusive Sovereignty Over That Part of the Lakota River that Flows Within its Territory.

The absolute sovereignty that a state enjoys over the natural resources within its territory is a fundamental principle of international law which has been affirmed by the international community both in the United Nations Resolution on the Permanent Sovereignty over Natural Resources⁴⁷ and the Charter on the Economic Rights and Duties of States⁴⁸. Any restriction on this sovereignty cannot be presumed; the burden lies on Mercadia to prove positively that clear rules of international law binding on Harmonia⁴⁹ qualify Harmonia's sovereignty⁵⁰. Thus, the waters of the Lakota being a natural resource, international law entitles Harmonia to an absolute sovereignty over that part of it within Harmonia⁵¹.

Firstly, customary international law, as evidenced by the practice of the most interested states, such as the United States⁵²,

47. Art. 1 & 2, G.A. Res. 1803 (XVII) G.A.O.R. Supp. 17, 15, adopted by 87 votes to 2, with 12 abstentions. See further, G.A. Res. 2158 (XXI), 25 November 1966 adopted by 104 votes to 0, with 6 abstentions.

48. *Supra*, n.7: Art 2(1).

49. The practice of developing states must be proved in this case: *Asylum Case (Colombia v Peru)* I.C.J. 266 (1950)

50. The proposition in these cases being he who alleges must prove: *Ibid.*, the *SS Lotus*. *supra*. n.2.

51. See G. SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 89 (6th ed., 1976); STARKE, *supra* n.16 at 184.

52. On the US-Mexico dispute over the Rio Grande River, see: I MOORE, *DIGEST OF INT'L LAW* 654: Arts. IV & V, Agreement on the Rio Grande River 1906 (US-Mexico) 34 Stat. 2953. U.S. T.S. No. 455; Griffin, The Use of Waters of International Drainage Basins Under Customary International Law 53 AM. J. INT'L L. 50

the Soviet Union⁵³, Ethiopia⁵⁴ and India⁵⁵, clearly establishes that the utilization of an international river within a state's territory is an expression of sovereignty.

Secondly, and conversely, no state practice displaces the right of Harmonia, as the upper riparian state to exercise its sovereign rights over the waters. This is consonant with the fact that no rule of international law forbids a state from exercising its legitimate rights⁵⁶.

Thirdly, this position is well supported in the opinions and writings of learned jurists⁵⁷.

(1959). On the US-Canadian dispute over the Columbia River, see: Boundary Waters Treaty 1909 (US-Canada), 59 Stat. 1219, T.S. No. 994; Scott, Canadian-American Boundary Waters Treaty: Why Art II 4 CAN. B. REV. 532 (1936); Martin, The Diversion of Columbia River Waters, PROC. AM. SOC. INT'L L. 5 (1957); R.H. Mackay, The International Joint Commission between the U.S. & Canada, AM. J. INT'L L. 292 (1928); BOURNE, INTERNATIONAL LAW AND THE DIVERSION OF THE COLUMBIA RIVER IN CANADA, 17-25 (1956). Generally, see R.A. FALK, B.H. WESTON & A.A. D'AMATO, INTERNATIONAL LAW AND WORLD ORDER 766 (1980), *et seq.*

53. See Baskin, Int'l Juridical Questions Regarding the Utilisation of Rivers SOV. Y.B. INT'L L. 252 (1961).
54. Ethiopia maintains that its natural rights to the water of the Nile River in her territory are undeniable and unquestionable: Report on the Nile Question, FAO Tech. Assistance Mission to Ethiopia, 13 Sept. 1955; Garretson, Nile River System, 54 AM. SOC. INT'L L. PROC. 136, 142 (1960).
55. India maintains this position in its dispute with Pakistan over the Indus River, see: F.J. Berber, The Indus Water Dispute, THE INDIAN Y. B. INT'L L. 46 (1957); Treaty on the Sharing of the Indus River (India-Pakistan) 54 U.N. T.S. 45; the Agreement on the Sharing of the Ganges Water (India-Pakistan), 17 INT'L LEG. MAT. 103 (1978); also, The Joint Statement on Canal Waters Dispute, 4 May, 1948 (pub., May 1958); Laylin, The Indus River System - Comments, 54 AM. SOC. INT'L L. PROC. 144 (1960).
56. Corfu Channel Case, *supra* n.2, Lake Lanoux Arbitration, *supra* n.11. See also, Convention on the Development of Hydraulic Power Affecting More Than One State, 36 L.N.T.S. 77 (1923).
57. See generally F.J. BERBER, RIVERS IN INTERNATIONAL LAW (1959); H.W. BRIGGS, THE LAW OF NATIONS 274 (2nd ed.,

2. **Harmonia's sovereignty over the Lakota River is not limited by International Law.**

Given that Harmonia enjoys absolute sovereignty over part of the Lakota river, it follows that Mercadia, as the lower riparian state, has no legal claim to any consideration of its interests⁵⁸. It is thus submitted that Harmonia's sovereignty over the River is not proscribed by any binding rules of international law.

a) **International Law does Not Recognize Mercadia's Demand to the Full Flow of the Lakota River**

Customary international law as evidenced by the uniform practice of states⁵⁹, and the writings of learned jurists⁶⁰ does not recognize Mercadia's right to demand a full flow of the Lakota⁶¹.

Mercadia is only granted sovereignty over what is within its boundaries. To confer on Mercadia a right to demand a full flow of the river is totally inconsistent with, and contrary to, the principle of territorial sovereignty; to admit Mercadia's claim would amount to granting it extraterritorial jurisdiction beyond its boundaries. As such, international law only recognizes Mercadia's right over waters of the Lakota that actually flow within its territories.

1952); Bains, The Diversion of Int'l River 1 INDIAN J. INT'L L. 38 (1960-61).

58. See BERBER, *ibid*; Bains, *ibid*; Raju, Principles of Law Governing the Diversion of International Rivers, 2 INDIAN J. INT'L L. 370 (1962).

59. See the Report of the Indus River Commission, 3 WHITEMAN, DIGEST OF INTERNATIONAL LAW 943; Berber, The Indus Water Dispute, *supra* n.55.

60. *Supra*, n.57. In particular, see Bains at 41.

61. This is commonly known as the "Minimum Flow Doctrine": BERBER, *supra* n.57.

Thus, it is submitted that Harmonia has an unrestricted right⁶² to the use of the water flowing through its territory⁶³.

b) The Principle of Equitable Utilisation is not a rule of International Law Binding on Harmonia.

The principle of equitable utilisation regards an international river as a shared resource⁶⁴. It gives every basin state in the international drainage basin, an equal and correlative right to a reasonable and equitable share in the beneficial uses of the waters. Such a reasonable and equitable share is to be determined in the light of all relevant factors in each particular case, taking into consideration, the economic and social needs of the co-basin states for the use of the waters and *vice versa*. The fundamental objective of this principle is for the co-riparian states to strive for an optimal utilisation of the river.⁶⁵.

It is submitted that the principle of equitable utilisation is not accepted as part of customary international law binding on Harmonia⁶⁶. This is firstly evident from the opposition exhibited to

62. Harmonia is under international law legally free to behave as it pleases: H. Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 306 (1972).

63. See J. SIMASARIAN, *THE DIVERSION OF INTERNATIONAL WATERS* 111 (1939).

64. See Schwebel, *Art. 7, Draft Articles on Non Navigational Uses* 2 *Y.B. INT'L L. COMM.* I 159, 180 (1980); *The Helsinki Rules, supra n.17* at 484-505; Laylin, *Principles of Law Governing the Use of International Rivers: Contribution from the Indus Basin*, 51 *AM. SOC. INT'L L. PROC.* 20, 23-26 (1957).

65. See *Art 6, Draft Articles on Non Navigational Uses* 2 *Y.B. INT'L L. COMM.* I 65, 85 (1982); also, generally, the *Int'l L. Comm's work on Non-Navigational Uses, supra n.19, n.27*.

66. If the contrary is alleged, it must be positively proven by Mercadia: *The SS Lotus, supra n.2*.

this doctrine by the major river states⁶⁷. On the other hand, there is a singular lack of uniform state practice affirming its existence.

Secondly, an examination of existing treaties⁶⁸ shows that there is insufficient consistency among them to infer general principles of law or *opinio juris* binding on all states⁶⁹. This shows that no regime under customary international law exists to regulate the use of rivers outside of these treaty regimes⁷⁰ due to the special circumstances inherent in each case⁷¹. They were entered into in the interest of preserving good international relations and thus cannot amount to *opinio juris*. It is thus submitted that this doctrine does not deprive Harmonia of its sovereign rights guaranteed by international law.

Thirdly, the work of the International Law Commission on the law of non-navigational uses of international watercourses⁷² has also not been accepted as a rule of international law binding on all states. It is only a tentative study on the subject with a view to

67. See text at p. 12, 13 *et seq.*

68. For a review of the treaties, see 2 Y.B. INT'L L. COMM. II 265 (1974); Doc. A/CN.4/274: UN Legislation, Texts and Treaty Provisions concerning the Utilisation of International Rivers for Other Purposes than Navigation, Legal Problems Relating to the Utilisation and Use of Rivers, U.N. Doc. A/5409; BERBER, *supra* n.57.

69. The obligations set out in the treaties must be of a general or universal character before it can amount to state practice: the *Asylum Case* *supra* n.49 at 277.

70. BERBER, *supra* n.57; Raju, *supra* n.58.

71. *Per* Judge Read: the *Nottebohm Case*, I.C.J. 41 (1955).

72. See G.A. Res. 2669 (XXV) of 8 Dec. 1970. For a report on the Commission's work, see Schwebel, 3rd Report on Non-Navigational Uses, 2 Y.B. INT'L L. COMM. I 65 (1982); Evenson, 1st Report on Non-Navigational Uses, 2 Y.B. INT'L L. COMM. I 155, (1983).

codification and progressive development⁷³. Even then, many members of the Commission felt that the subject was not ripe for codification⁷⁴. As such, they are at most draft frameworks drawn to facilitate the procedure for future negotiations between riparian states⁷⁵.

Fourthly, there are no direct decisions by international tribunals concerning the customary principles on the non-navigational use of river waters⁷⁶.

B. IN ANY CASE HARMONIA'S ACTIONS ARE NOT IN VIOLATION OF THE PRINCIPLE OF EQUITABLE UTILIZATION.

1. Harmonia's damming of the Lakota River is a Reasonable and Equitable Share in the Beneficial Uses of the River Waters.

Accepting *arguendo*, that the principle of equitable utilisation is a limitation of Harmonia's sovereignty, it is submitted that Harmonia's actions in respect of the damming of the Lakota River is not a violation of this principle in the light of all the relevant factors⁷⁷ in this case. It is submitted that the damming of the Lakota River is both reasonable and equitable with regard to the beneficial use to which Harmonia is entitled.

73. Para 1, G.A. Res. 2669 (XXV), *ibid.* Evenson considered the Commission's work on the subject to be a codification of international law: *ibid.*, at 169.

74. See generally, 2 Y.B. INT'L L. COMM. II 160 (1979), para 133 at 166; 1 Y.B. INT'L L. COMM. II 159 (1980), para 9 at 161.

75. *Ibid.*, para 11 at 161.

76. The Case Relating to the Territorial Jurisdiction of the Int'l Commission of the River Oder. P.C.I.J. Ser. A, No.23 (1929) concerned the rights of navigation on that river. The Case of Diversion of Water from the Meuse *supra* n.5 concerned the interpretation and application of a treaty and not upon the application of customary international law.

77. The relevant factors are found in Art. V, Helsinki Rules, *supra*, n.17; Art. 8 of the Draft Arts. on Non-Navigational Uses, 2 Y.B. INT'L L. COMM. I 101 (1984).

Firstly, the damming was an optimal economic utilisation of the river waters since it was for both industrial and agricultural purposes⁷⁸.

Secondly, this utilisation of the Lakota River is both crucial and necessary for Harmonia's economic survival and development. Harmonia is a developing country with a very substantial foreign debt. The planned industrial development of its bauxite deposits would greatly help in the development its economy⁷⁹, since it is estimated that the industry should earn at least one-third of its foreign exchange⁸⁰. The industry requires large amounts of electricity. The Lakota is the only major water source in the region. Given Harmonia's economic position, the Lakota High Dam is the most economically feasible means of supplying the electricity needed for the development of the bauxite industry⁸¹.

Thirdly, the principle does not mean that the riparian states are entitled to an identical share of the waters⁸². Therefore, the mere fact that Harmonia may be using up a larger share of the water than Mercadia is not, *per se*, a violation of the principle.

2. Mercadia's demand for the use of the waters of the Lakota River is unreasonable and inequitable.

On the other hand, Mercadia's agricultural use of the Lakota River was not an optimal utilization of the river waters.

78. Art V(2)(i), Helsinki Rules, *ibid*; Art 8(1)(e), Draft Arts. on Non Navigational Uses, *ibid*.

79. Art V(2)(e), Helsinki Rules, *ibid*; Art. 8(1)(b) of the Draft Arts, *ibid*.

80. Clarification 6.

81. Clarification 8; Art. V(2)(g), Helsinki Rules, *ibid*.

82. See Commentary on the Helsinki Rules, *ibid*, at 484.

Firstly, the inundation method of irrigation is most inefficient and grossly wasteful. It is inappropriate, considering Mercadia's financial resources. Mercadia should have attempted a more efficient means of irrigation in place of the antiquated methods⁸³.

Secondly, even if the original settlement area was part of the cultural heritage of Mercadia, there is nothing to indicate that the particular irrigation methods adopted by the Old Ones form part of their culture, whereupon it must be preserved. In any case, the Old Ones had abandoned the inundation method when they moved to the Green River resettlement area⁸⁴.

Thirdly, the use of the Lakota River for agricultural purposes is not crucial to Mercadia in any sense⁸⁵. In the first place, Mercadia's economy is industrial based. It does not depend on its agriculture for its economic survival or development. In any case, Mercadia has alternative sources of water in the form of the Green River⁸⁶. Furthermore, the Old Ones did not use the waters for human consumption⁸⁷.

That Mercadia's use of the Lakota River existed prior to Harmonia's is, *per se*, insufficient to justify Mercadia's continued

83. Art. V(2)(i), Helsinki Rules, *ibid*.

84. Clarification 25.

85. Art. V(2)(g), Helsinki Rules, *supra* n.17.

86. Art. V(2)(h), Helsinki Rules, *ibid*; Art. 8(1)(i) of the Draft Articles, *supra* n.77.

87. Art. V(2)(f), Helsinki Rules, *ibid*.

inequitable and unreasonable use⁸⁸. In any case, the fact remains that Mercadia has abandoned the use of the river⁸⁹.

It is submitted that, on a balance of the factors involved⁹⁰, the total economic benefit accruing to the whole region and to the international community at large from Harmonia's use, far outweighs any disadvantages that resulted to Mercadia.

3. Further, Harmonia has Given Due Regard to Mercadia's rights

Harmonia gave formal notice of its planned use of the Lakota River prior to the construction of the dam. For nine months, it negotiated in good faith with Mercadia to find a fair compromise⁹¹. It was Mercadia's obstinacy and unreasonableness in refusing to accept any offer by Harmonia short of full flow in spring that caused the negotiations to end without any agreement.

It is submitted that Harmonia is thus fully justified in continuing with its original plans despite Mercadia's dissent. International law does not give Mercadia the right to veto Harmonia's

88. Ethiopia has never recognised the historical rights of Egypt and Sudan to use the Nile. See Report on the Nile Question, *supra* at n.54; Eagleton, International Rivers 48 AM. J. INT'L L. 287 (1954).

89. Art. V(2)(d), Helsinki Rules, *ibid.*

90. Art. V(3), *ibid.*; Art. 8(1) of the Draft Arts. *supra* n.77.

91. Art. XXX, Helsinki Rules, *ibid.* See generally, CAPONERA, *supra*, n.9 at 8; The Convention on the Development of Hydraulic Power, *supra* n.56; Declaration, 7th Pan-American Conference on the Industrial and Agricultural Use of International Rivers, Montevideo, 28 AM. J. INT'L L. (Supp) 59 (1934); Art. 3, Charter of Economic Rights and Duties, *supra* n.7; Art. 6, Resolution on the Use of International Non-Maritime Waters, 49 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL II, 381 (Salzburg, 1961); Declaration and Resolutions of the UN Water Conference at Mar del Plata E/CONF.70/29, 51 (1977).

activities in respect of the utilisation of the river waters, whether or not injury is caused to the state⁹².

The consent of the lower riparian state is not required in the exercise of the upper riparian's sovereign rights⁹³. Any requirement for Mercadia's prior consent will amount to a diminution of Harmonia's sovereignty. It will also relegate Harmonia's sovereignty to a mere privilege to be granted or denied at the whims and fancies of Mercadia. Furthermore, it may stand in the way of maximum utilisation of the water by means of modern techniques which the upper riparian state may have avail to.

It is thus submitted that Harmonia has not violated any international obligation for which it can be held internationally responsible⁹⁴.

C. FURTHER, HARMONIA IS NOT LIABLE TO MERCADIA FOR DAMMING THE LAKOTA RIVER

It is further submitted that Harmonia is not liable to Mercadia. There had been no allegation of environmental damage for which Harmonia can be liable⁹⁵. In any case, Harmonia cannot be liable for any economic cost that arose from the resettling of the Old Ones. These costs flowed purely from the sovereign and independent decision of the Mercadian Government. There had been nothing on the facts to indicate that the Old Ones could not have

92. See conclusion of the study in Legal Aspects of the Use of Systems of International Waters with reference to the Columbia-Kootenay River System under Customary International Law and the Treaty of 1909, Memo. of the State Dept, S.Doc.No. 118, 85th Cong., 2nd Sess., April 21, 1958. See also, Laylin, Principles of Law, etc supra n.64; Bourne, Utilisation of International Rivers, 3 CAN. Y.B. INT L L. 187 (1965)

93. Lake Lanoux Arbitration. *supra* n.11 at 128, 130.

94. Art.3, Draft Arts. on State Responsibility, *supra* n.29.

95. *Supra* n.4.

continued living in their homeland by adopting different methods of irrigation, which they did, in fact, when in the Green River.

CONCLUSION AND PRAYER FOR RELIEF

CONSIDERING THAT Mercadia is obliged to prevent further pollution damage to the Galala Aquifer and Lake Lydia, as well as to abate and repair such existing damage;

CONSIDERING FURTHER THAT Mercadia is responsible for its refusal to prevent and to abate further pollution damage to Harmonia;

CONSIDERING THAT Harmonia's use of the Lakota River is a valid expression of its sovereignty;

CONSIDERING THAT in any event, Harmonia's damming of the Lakota for its economic and agricultural needs is an equitable utilization of the river;

The Government of Harmonia respectfully requests this Honourable Court to:

1. **DECLARE** Mercadia liable to Harmonia for causing the pollution damage to the Galala Aquifer and Lake Lydia.
2. **DECLARE** Mercadia responsible for its refusal to take preventive and abative measures when it had knowledge of the pollution damage.
3. **ORDER** Mercadia to take immediate actions to cease further use of the polluting agents;
4. **ORDER** Mercadia to take measures to abate and repair the existing pollution damage suffered by Harmonia;
5. **DECLARE** that Harmonia's use of the Lakota River is not a violation of international law;

6. DENY to Mercadia all relief requested by it in the present proceedings.

RESPECTFULLY SUBMITTED,

CHAN CHEN YEE

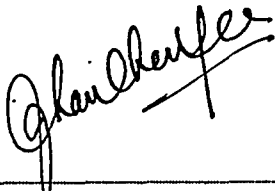
WILFRED JAYARAJ DORAY

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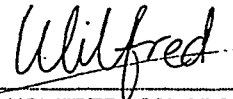
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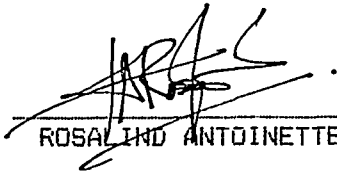
We hereby certify that this memorial complies with the OFFICIAL
RULES of this competition.



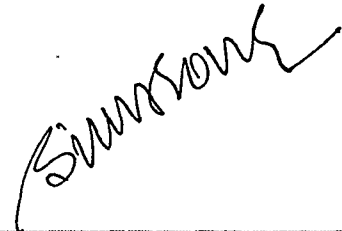
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