

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

April Term, 1987

HARMONIA

Applicant

v.

MERCADIA

Respondent

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MEMORIAL FOR THE RESPONDENT

---

CHAN CHEN YEE  
WILFRED JAYARAJ DORAY  
ROSALINDANTOINETTELAZAR  
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 two neighbouring coastal States. Mercadia, a developing State with a population of 7 million, lies south of Harmonia. Its coastal area is a fertile lowland which is fed by the Lakota River. The river originates in Harmonia and empties into the sea from Mercadia.

Mercadia has used the waters of the Lakota River for centuries to irrigate the farms of a traditional agricultural area in the fertile lowlands. This area is the home of the Old Ones, an ancient rural ethnic group of approximately 100,000 persons. This home of the Old Ones is the ancestral and spiritual homeland of the people of Mercadia. It is the only area in the country where the country's traditional culture remains. Being physically isolated from the urban areas of Mercadia, the Old Ones have been dependent on the Lakota River for their livelihood. Mercadia's need to preserve its spiritual and ancestral homeland is coupled with its recent policy requiring rural populations to remain in rural areas. This programme was instituted to combat the acute problem of overcrowding and unemployment in its urban areas as a result of heavy migrations from the rural areas.

#### **Harmonia's Construction of the Lakota River High Dam**

Harmonia is also a developing country and has a population of 4 million. Despite the fact that it has already incurred a substantial foreign debt, Harmonia in March 1979, announced its plans to build a major hydro-electric dam on the Lakota River, several kilometres north of the border with Mercadia. This dam was to provide electric power for a proposed bauxite mining and processing industry and irrigation for the creation of a new agricultural area. This

proposed agricultural area would use ultra-modern pumping and sprinkler systems which require electric power.

An objective study of the effects of the construction revealed that the dam would drastically reduce the flow of the Lakota River into Mercadia and that this reduced flow would no longer be sufficient to support the livelihood of the Old Ones.

Fearing that Harmonia would initiate its massive construction project without regard for Mercadia's interests, Mercadia immediately requested a meeting with Harmonia. Mercadia did not demand that Harmonia abandon its plan to build the dam but asked for an assurance from Harmonia that the Old Ones would continue to receive the natural flow of the Lakota River during spring so as to ensure the survival of their crops. Mercadia informed Harmonia that if the Old Ones were denied the natural flow of the Lakota River during spring, Mercadia would be forced to move them to the Green River Valley, a semi-arid highland, and thereby lose its only link with its ancestral and spiritual homeland. The Valley is fed by the Green River which by itself is incapable of providing sufficient water to support the agricultural needs of the Old Ones. However, Harmonia claimed that its proposed use of the Lakota River was far more important than the irrigation of the sacred lands of the Old Ones. Mercadia continued negotiations in its effort to preserve the livelihood of the Old Ones and its ancestral and spiritual identity but in vain.

Harmonia proceeded with its plans. The dam was completed in the summer of 1983. Mercadia was then forced to move the Old Ones to the Green River Valley. In order to supplement the waters of the Green, Mercadia had to build a diversion canal connecting the Lakota to the Green.

### **The Alleged Pollution of the Galala Aquifer**

Located near the resettlement area of the Old Ones is the Galala Aquifer. This aquifer traverses the border between Mercadia and Harmonia and feeds Lake Lydia in Harmonia. The recharge area of the aquifer is located near the resettlement area. However, the location of this recharge areas was unknown to Mercadia.

It appears that concentrations of pesticides together with phosphates from farming and human habitation had permeated into the Galala Aquifer. This has resulted in some pollution of the waters of Lake Lydia. However, there is no evidence that the water and the fish have become unfit for human consumption.

In December 1985, Harmonia demanded that Mercadia cease immediately all actions causing the pollution of the Galala Aquifer. However, Mercadia disclaims responsibility for the pollution caused by the normal activities of the resettled Old Ones.

### **Submission**

On 1 March 1986, Mercadia and Harmonia agreed to submit the present dispute to the International Court of Justice. Both parties are members of the United Nations and do not have any reservations to the jurisdiction of the Court.

QUESTIONS PRESENTED

1. Whether Harmonia is responsible and liable under international law to Mercadia for its act of diverting and reducing the flow of the Lakota River into Mercadia.
  
2. Whether Mercadia is responsible and liable under international law to Harmonia for the pollution of the Galala Aquifer.

SUMMARY OF ARGUMENTS

The present dispute concerns two issues in international law, namely:

1. Can a State sharing an international river with another State simply dam the river for its own use and thereby deprive its co-riparian of any reasonable and equitable use of the river?
2. Whether a State should be held responsible and liable for the inevitable minor pollution of aquifers by normal everyday human activities of private individuals such as the use of fertilisers and pesticides for farming on one's land.

In the first issue, Harmonia is prohibited under international law from altering the natural flow of the Lakota River or utilising it to the detriment of Mercadia's existing uses of the river.

In any case, the international river is recognised by the international community as a water resource to be shared in a reasonable and equitable manner by all the States it traverses. No State is allowed, in its utilisation of the waters of the river, to deprive its co-riparians of their reasonable and equitable share in the beneficial uses of the river.

Harmonia's damming of the Lakota River deprived the Old Ones of Mercadia of their sole means of livelihood and by forcing them to be resettled elsewhere, it forced Mercadia to break its only link with its ancestral and spiritual homeland and thereby lose its cultural heritage. When Harmonia dammed the Lakota River, it knew that Mercadia would thereby be deprived of its reasonable and equitable use of the Lakota River.

Therefore, Harmonia is responsible and liable to Mercadia for its diversion and reduction of the Lakota River flow into Mercadia.

The pollution of the Galala Aquifer was caused by normal activities of private individuals, namely, the Old Ones. As their acts are not attributable to Mercadia, Mercadia cannot be held responsible for their pollution of the aquifer.

International law has yet to recognise an international obligation to prevent or abate all transboundary environmental harm regardless of attribution to the State. Only in exceptional circumstances have States recognised an obligation to prevent or abate transboundary harm. Firstly, where ultrahazardous activities are engaged as harm caused by such activities is foreseeable. Secondly, where the State has actual knowledge of serious injury being caused by activities within its control or territory. However, these circumstances do not exist in the present case.

Firstly, the use of pesticides and phosphates for farming are clearly not ultra-hazardous activities. Secondly, Harmonia has not suffered serious injury as the pollution of the Galala Aquifer has not reached an intolerable or unacceptable level. Moreover, Mercadia had no actual knowledge that the activities of the Old Ones were resulting in the pollution.

In any case, states have yet to recognise a duty to prevent pollution of aquifers as they are not sufficiently familiar with the nature and movement of groundwater.

Mercadia is also not responsible for the pollution under the rules relating to equitable utilisation of shared resources. Firstly, the aquifer is not recognised as a shared resource. Secondly, the activities of the Old Ones that resulted in the pollution are not uses of the aquifer.

Even if the equitable utilization rule applies, Mercadia is not responsible for the pollution of the Galala Aquifer as Harmonia

has not shown that it has suffered serious injury or that it has been deprived of a reasonable and equitable use of the aquifer. Harmonia has not shown that the fish and the waters of Lake Lydia are no longer fit for human consumption.

Finally, as Harmonia is in the first place responsible for forcing the Old Ones to be resettled in the Green River Valley, Harmonia is in all respects also responsible for the resulting pollution of the Galala Aquifer.

ARGUMENTS AND AUTHORITIES

I. HARMONIA IS RESPONSIBLE AND LIABLE UNDER INTERNATIONAL LAW TO MERCADIA FOR ITS ACT OF DIVERTING AND REDUCING THE FLOW OF THE LAKOTA RIVER INTO MERCADIA.

A. Harmonia is prohibited under international law from interfering with or reducing the flow of the Lakota River to the detriment of Mercadia's existing uses of the river.

1. No State has absolute sovereignty over the waters of an international river within its territory.

A State has, within its territory, the right to utilise the waters of an international river flowing through its territory. However, its right to do so is limited by the right of utilisation of other States through which the international river also flows.<sup>1</sup>

The proposition that a State has, within its territory, the absolute freedom to utilise the waters of an international river traversing its territory regardless of the consequences to the other States sharing the same watercourse<sup>2</sup> has been widely rejected.<sup>3</sup> It

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1. For a rejection of the proposition that a State has absolute sovereignty over the waters of an international river within its territory, see *infra* notes 4 and 5.

2. This proposition, commonly known as the 'Harmon Doctrine', was advocated by the Attorney-General of the United States, M. Harmon in 1895 in a dispute with Mexico over the diversion of the Rio Grande River within U.S. territory. He argued that an upper riparian State like the U.S. had no obligation towards a lower riparian like Mexico in respect of transboundary rivers like the Rio Grande. See Official Opinions of the Attorney Generals of the U.S., Vol. XXI 280-283 (1898).

3. *Infra* notes 4 and 5.

does not find support in State practice<sup>4</sup> and eminent jurists have vehemently criticised it.<sup>5</sup>

2. A State cannot alter the natural flow of an international river or utilise it to the detriment of a co-riparian's existing uses of the river.

It is a well-established rule of international law that a State cannot stop or divert the flow of an international river or utilise it to the detriment of a co-riparian's existing use of the river unless the co-riparian consents thereto.<sup>6</sup>

4. Even the U.S. which developed and promoted the Harmon Doctrine has rejected it, see D.R. DEENER, THE UNITED STATES ATTORNEY GENERALS AND INTERNATIONAL LAW 253-257 and 308-309 (1957). See also The Helsinki Rules on the Uses of Waters of International Rivers, INT'L L. ASSN., REPORT OF THE FIFTY-SECOND CONFERENCE, (HELSINKI 1966) 477, 486 (1966) (hereinafter "Helsinki Rules"); D.A. CAPONERA, THE LAW OF INTERNATIONAL WATER RESOURCES, FOOD AND AGRICULTURE ORGANISATION OF THE UNITED NATIONS U.N. FAO 7 (1980); The Law of Non-navigational Uses of International Watercourses (Third Report), 2 Y. B. INT'L L. COMM. II 65, 75 (1982). See also *infra*, n. 5.
5. C.B. Bourne, The Right of Utilization of International Rivers, 3 CAN. Y. B. INT'L L. 187 (1965); J. Lipper, Equitable Utilization in A.H. GARRETSON, R.D. HAYTON AND C.J. OLMSTEAD (eds.), THE LAW OF INTERNATIONAL DRAINAGE BASINS 15-88 (1967); C. Eagleton, Use of the Waters of International Rivers, 33 CANB. B. REV. 1018 (1955); P. Sevette in Legal Aspects of Hydro-Electric Development of Rivers and Lakes of Common Interest, (1952), U.N. Doc. E/ECE/136, discussed the views of twenty-five authors on the subject and found that only three of them took the view that riparians are unrestricted in their right to use the waters of international rivers.
6. This is commonly known as the minimum flow doctrine or the principle of absolute territorial integrity. See I H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 474-475 (8th Ed. 1955). See especially Art. 2 of the Madrid Declaration on International Regulation regarding the Use of International Watercourses for Purposes other than Navigation, 24 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, 365 (1911); Art. 2 of the Declaration of the Seventh Pan-American Conference on the Industrial and Agricultural Use of International Rivers adopted at Montevideo on December 24 1933, 28 AM. J. INT'L L., Supp., 59 (1934) (hereinafter "1933 Montevideo Declaration"); Declaration of Buenos Aires, 1 INTER-AMERICAN BAR ASSOCIATION, (Proceedings of the 10th Conference), 246-248 (1958).

Therefore, in the present case, since the Old Ones of Mercadia have used the Lakota River for centuries to irrigate their farms, Mercadia has acquired a right in the river which cannot be denied. It has obtained the right to demand the same flow of the Lakota River for the needs of its Old Ones.

As such, Harmonia does not have the right to divert and reduce the flow of the river or use it to the detriment of the Old Ones existing use of the river without Mercadia's consent.

B. In any case, Harmonia has a duty under international law to ensure that its use of the Lakota River does not deprive Mercadia of its right to a reasonable and equitable share in the beneficial uses of the river.

1. Under customary international law, every state through which an international river flows has, within its territory, a right to a reasonable and equitable share in the beneficial uses of the river.

The international river has come to be recognised by the international community as a water resource that is to be shared by all the States through which it flows.<sup>7</sup>

As such, it has become a well established rule of customary international law that every State through which the river flows is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters.<sup>8</sup>

7. Caponera, *supra* n. 4 at 8; Helsinki Rules, *supra* n. 4, at 480; 1933 Montevideo Declaration, *supra* n. 6; Draft Proposition on the Law of International Rivers, ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE, REP. OF THE FOURTEENTH SESSION 99 (1973); Declarations and Resolutions of the United Nations Water Conference at Mar del Plata (1977), text (English) in E/CONF.70/29, 51; Resolution on the Use of International Non-Maritime Waters, 49 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL II, (Salzburg Session), 381 (1961) (hereinafter "the 1961 Salzburg Resolution").

8. *Ibid.*

This rule finds clear support in wide and uniform State practice coupled with *opinio juris*,<sup>9</sup> in the decisions of international and domestic tribunals<sup>10</sup> and in the writings of eminent jurists.<sup>11</sup>

This rule is most clearly reflected in Art. IV of the Helsinki Rules on the Uses of International Rivers<sup>12</sup> adopted by the International Law Association in 1966. The International Law Association has stated that the Helsinki Rules are declaratory of rules of customary international law.<sup>13</sup>

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9. For an overview of State practice, see *The Law of Non-Navigational Uses of International Watercourses*, *supra* n. 4 at 75-87. The Helsinki Rules have been incorporated in numerous international water resources agreements in the Senegal, Lake Chad, Kagera, Gambia and the Lower Mekong Basins. Numerous other treaties on the management and utilisation of international rivers reveal international recognition of the 'equitable utilization' rule. Examples are the Indus Waters Treaty of 1960 between India and Pakistan, 419 U.N.T.S. 125; 1959 Nile Waters Agreement between Egypt and Sudan, 312 U.N.T.S. 274; 1977 Bangladesh-India Agreement on Sharing of the Ganges Waters 17 INT'L LEG. MAT. (No. 1) 103.
  10. See especially the judgment of the P.C.I.J. in *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder* (1929) P.C.I.J. Ser. A, No. 23; *Lake Lanoux Case*, (1957) I.C.J. 101; *The Diversion of Water from the Meuse*, (1937) P.C.I.J. Ser. A/B, No. 70, Ser. C, No. 81. Examples of the numerous municipal decisions affirming the rule are *Societe Energie Electrique du Littoral Meditteraneeen v. Campagna Imprese Elettriche Liguri* (1938-1940) ANN. DIG. & REP. INT'L LAW CASES 121; *Kansas v. Colorado*, 206 U.S. REP. 100 (1921); *Wurttemberg and Prussia v. Baden (Donauversinkung case)*, 4 ANN. DIG. INT'L L. CASES (Case No. 86) 128, 131 (1927-1928). *Report of the Indus (Rau) Commission* quoted in M. WHITEMAN, 3 DIGEST OF INTERNATIONAL LAW 943 (1964).
  11. *Supra* n. 5.
  12. Helsinki Rules, *supra* n. 4, at 486.
  13. *Ibid.*, at 482. The Helsinki Rules are a product of ten years of research by a representative body of international water law specialists. The rules were incorporated by the Int'l L. Comm. in its Draft Articles on *The Law of Non-Navigational Uses of International Watercourses*, *supra* n. 4. The Draft Articles are a product of thorough study of State practice on the subject.

Therefore, since the Lakota River flows through both Harmonia and Mercadia, Mercadia is entitled as much as Harmonia to a reasonable and equitable share in the beneficial uses of the waters of the river.

2. If a State, in its use of the waters of an international river within its territory, deprives its co-riparians of their right to a reasonable and equitable share in the beneficial uses of the river, that State becomes responsible under international law.

The logical corollary of the rule that every State is entitled to a reasonable and equitable share in the beneficial uses of the international watercourse is the rule that every state has an obligation under international law to ensure that its utilization of the waters of the international river within its territory does not deprive other States sharing the river of their right to a reasonable and equitable share in the beneficial uses of the waters. If a State breaches this obligation, it becomes responsible under international law<sup>14</sup> and has the obligation to make reparation to the injured co-riparian State.<sup>15</sup>

This equitable utilisation rule comprises a series of reciprocal rights and duties,<sup>16</sup> namely :

- a. A right to a reasonable and equitable use of the international river<sup>17</sup>

14. The Helsinki Rules, *supra* n. 4 at 480 for Principle 4 of the Agreed Principles of International Law. See also *The Law of Non-navigational Uses of international Watercourses*, 2 Y.B. INT'L L. II 82, 94 (1984); and Proposition IX of the Draft Proposition of the Asian-African Legal Consultative Committee, *supra* n. 7.

15. Chorzow Factory Case, *infra* n. 29.

16. Caponera, *supra* n. 4 at 8.

17. *Ibid.*

Where a dispute arises between States over conflicting uses of the waters of an international river, each State's reasonable and equitable share in the uses of the waters of the river is to be determined in light of all the relevant factors.<sup>18</sup>

The factors that may be considered to determine reasonable and equitable utilization are found in Arts. V to VIII of the Helsinki Rules.<sup>19</sup>

b. A duty not to cause substantial injury to co-riparian States.

A State is, in its use of the international river within its territory, under a duty to ensure that such use does not cause substantial injury to the interests of its co-riparians in the same water resource.<sup>20</sup> An injury is substantial if there has been material interference with or prevention of a reasonable use of the shared resource.<sup>21</sup>

18. Art. V(1) of the Helsinki Rules, *supra* n. 4 at 488.

19. *Ibid.*, at 488-492.

20. Caponera, *supra*, n. 4 at 8; Art. 1(a) of Articles on the Relationship between Water, Other Natural Resources and the Environment and Art. 6 of the Regulation of the Flow of International Watercourses, INT'L L. ASSN., REPORT OF THE FIFTY-NINTH CONFERENCE (BELGRADE 1980) 359. See also *Donauversinking* case, *supra* n. 10.

21. Helsinki Rules, *supra* n. 4, at 500.

- c. A duty to inform, consult and co-operate on the use of the shared water resource so as not to cause damage to legitimate interests of each co-riparian State in the river.<sup>22</sup>

Where a dispute over conflicting uses of the waters of the international river arises, the concerned States are obliged under international law to negotiate on the basis of good faith and good neighbourly relations to reach a compromise with respect to their conflicting uses of the shared river.<sup>23</sup>

- C. **Harmonia breached its international obligation not to deprive Mercadia of its right to a reasonable and equitable share in the beneficial uses of the Lakota River when it diverted and reduced the flow of the river into Mercadia.**

1. Harmonia has denied Mercadia of its reasonable and equitable use of the waters of the river.
- a. Mercadia's existing use was reasonable and equitable.

The Lakota River had been a lifeline to the Old Onés since time immemorial. They had always depended on the waters of the river, the only one in the agricultural area, for the survival of their crops.

Their dependence on the waters of the river became an established existing use over time.<sup>24</sup> Moreover, their use was

22. Caponera, *supra* n. 4 at 8. This rule has been embodied in a number of international instruments: Art. 4 of the 1923 Geneva Convention relating to the Development of Hydraulic Power Affecting More than One State, and Protocol of Signature, 36 L.N.T.S. 77 (1923); 1933 Montevideo Declaration, *supra* n. 6; Art. 3 of the G.A. Res. 3281, *infra* n. 43; G.A. Res. 3129 (XXVIII) on Cooperation in the Field of the Environment Concerning Natural Resources Shared by Two or More States, 28 U.N. GAOR Supp. 30, at 48, U.N. Doc. A/9030 (1973); Art. XXX of the Helsinki Rules, *supra* n. 4 at 522; Art. 6 of the 1961 Salzburg Resolution, *supra* n. 7; and 1977 Declarations of the U.N. Water Conference, *supra* n. 7.

23. *Ibid.*

24. An existing reasonable use is entitled to significant weight as a factor for determining reasonable and equitable use of a

indispensable because it was a basis of life as opposed to Harmonia's use.<sup>25</sup>

The banks of the river on which the Old Ones lived were the spiritual and ancestral homeland of the people of Mercadia. It was the only area in Mercadia where the traditional culture of the country was preserved. As such, the Old Ones have obtained a right in international law to remain there and to preserve their traditional way of life.<sup>26</sup> Therefore, the Old Ones are entitled to continue using the inundation method of irrigation as it is an integral part of their cultural heritage. They have also a right of claim to natural resources like the Lakota River which they have traditionally used.<sup>27</sup>

Harmonia's act of building the dam forced Mercadia to lose its only link with its spiritual and ancestral homeland when the Old Ones had to be resettled elsewhere. There is no practical compensation for a nation's loss of its cultural and spiritual heritage.

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shared water resource: Arts. V(2)(d) and VII of the Helsinki Rules, *supra* n. 4 at 488-490, 492.

25. *Ibid.*, at 491, and Art. V(2)(f) at 488. Under Art. V(2)(f), the fact that the population is dependent on the waters of the river is a relevant factor in the determination of a reasonable and equitable use of the shared water resource.
26. Arts. 1(b) and 11-13 of the ILO's Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, INTERNATIONAL LABOUR ORGANISATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, (1919-1981), 858 (1982) recognise the right of ownership of indigenous populations over the lands they traditionally occupy and their customary laws regarding land use and inheritance.
27. The World Conference to Combat Racism and Racial Discrimination, held at Geneva in 1978, U.N. Doc. A/CONF.92/40 14 (1978), endorsed the right of indigenous peoples to maintain their traditional structure of economy and culture and their special relationship with their land and stressed that their land, land rights and natural resources should not be taken away from them.

- b. Harmonia's use is in excess of its entitlement to a reasonable and equitable share in the beneficial uses of the river.

Admittedly, Harmonia's proposal to build the dam may be essential to develop a major bauxite mining and processing industry. However, the building of a dam to supply hydro-electric power is not the only available source of electric power for the proposed industry.

Harmonia's creation of a new agricultural area may be necessary. However, to thereby deprive the Old Ones of Mercadia of their agricultural needs is inequitable and unreasonable. Moreover, the use of ultra-modern irrigation methods that have to be generated by electricity is also unwarranted.

Therefore, Harmonia does not require the water to such an extent as to deprive the Old Ones of their required water flow during spring.

As such, on the balance of equities, it is reasonable and equitable for Harmonia to reduce its use of the waters of the Lakota River so as to accommodate Mercadia's existing use.

2. Harmonia has caused substantial damage to Mercadia.

There is no doubt that Harmonia's diversion and reduction of the Lakota River flow into Mercadia has caused substantial damage to Mercadia.

Its Old Ones were immediately deprived of the required water flow for their crops after centuries of dependence on the river. In resettling the Old Ones, Mercadia also suffered irreparable damage when it was forced to break its only link with its ancestral and spiritual homeland and lose its spiritual and cultural heritage. Mercadia was also forced to build a diversion canal from the Lakota River to the resettlement area of the Old Ones to supplement the

waters of the Green River so as to support the Old Ones agricultural needs. In doing so it incurred great costs.

3. Harmonia has breached its duty to consult, negotiate and co-operate in good faith to reach a fair solution.

In its negotiations with Harmonia, all Mercadia asked from Harmonia was an assurance that the Old Ones would continue to receive their usual flow of the Lakota River during spring for the survival of their crops. Mercadia was prepared to allow Harmonia to use the waters of the river at other times of the year for its hydro-electric power production and if necessary, for its new agricultural area.

It would not be detrimental to Harmonia to regulate the Lakota River flow during spring so as to allow the Old Ones to receive the required flow for their crops. Nevertheless, Harmonia was not prepared to accept this reasonable and fair solution to the dispute.

Furthermore, Harmonia did not conduct the negotiations for a reasonable period of time but proceeded to construct its dam only after nine months of negotiations. Therefore, it is submitted that Harmonia clearly breached its obligation to negotiate in good faith to reach an agreement with Mercadia when it proceeded to build the dam with full knowledge that Mercadia would thereby suffer substantial damage.

**II. MERCADIA IS NOT RESPONSIBLE AND LIABLE UNDER INTERNATIONAL LAW TO HARMONIA FOR THE POLLUTION OF THE GALALA AQUIFER.**

- A. Mercadia is not internationally responsible for the pollution of the Galala Aquifer as the activities of the Old Ones that resulted in the pollution are not attributable to it.**

It is a well established rule of international law that a State becomes responsible under international law when it has committed an internationally wrongful act.<sup>26</sup> The State then becomes liable to make reparation to the injured State.<sup>27</sup>

A State is deemed to have committed such an act only when there has been a breach of an international obligation by acts (which include omissions) that are attributable to the State.<sup>28</sup>

An act is only attributable to the State when the act itself was committed by an organ of that State acting in that capacity<sup>29</sup> or by an agent acting on behalf of the State.<sup>30</sup>

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28. Corfu Channel Case (1949) I.C.J. 4; United States Diplomatic and Consular Staff in Tehran Case (US v Iran) (1980) I.C.J. 3; Nicaragua v United States (1986) I.C.J. 99,100. See Art. 1, Draft Articles on State Responsibility 2 Y.B. INT'L L. COMM. II, 9 (1979) and I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 418-419 (2nd ed. 1973); B. Graefrath, Responsibility and Damage Caused 185 RECUEIL DES COURS 19, 20, 34 (1984 I).
29. Chorzow Factory Case (Indemnity) (Merits) (Germany v Poland) P.C.I.J. Ser. A, No. 17 p.29 at 31, 46-48; ; G. SCHWARZENBERGER, INTERNATIONAL LAW 653, 658 (3rd ed. 1957).
30. Art. 3, Draft Articles, *supra* n. 28. See also United States Diplomatic and Consular Staff in Tehran Case (US v Iran), *supra* n. 28 and Graefrath, *supra* n. 28 at 34.
31. Arts. 5-7, Draft Articles, *supra* n. 28; Graefrath, *supra* n. 28 at 40. See also Caire Claim (France v Mexico) 5 R.I.A.A. 516 (1929) (Translation).
32. Art. 8, Draft Articles, *supra* n. 28. See also the decision in the Attorney-General of the Government of Israel v Eichmann District Court of Jerusalem (1961) 36 IS. L. REP. 5 and the basis for the award in the Union Bridge Co. Claim (United States v Great Britain) 6 R.I.A.A. 138 (1924).

In the present case, the pollution of the Galala Aquifer resulted from the normal farming activities of private individuals, namely, the Old Ones, on their own land. They were not acting as agents or organs of Mercadia, and as such, their acts cannot be attributed to Mercadia.

Therefore, Mercadia cannot be held internationally responsible for the pollution of the Galala Aquifer.

**B. Only in exceptional circumstances is the State responsible and liable for transboundary harm caused by private acts of individuals within its territory but these circumstances do not exist in the present case.**

1. There is no rule of international law that a State has a duty to prevent or abate all transboundary pollution.

In the absence of a treaty obligation or a rule of customary international law, a State cannot be held responsible for all transboundary pollution caused by activities within its control or territory.

In the present case, there is no treaty between Mercadia and Harmonia which imposes an international obligation on Mercadia not to cause transboundary pollution.

Though there may be a consensus within the international community that pollution of the environment ought to be prevented, there has yet to be recognised a rule of customary international law that imposes on a State a duty to prevent and abate all transboundary pollution.<sup>33</sup>

Harmonia cannot prove the required wide and uniform State practice coupled with *opinio juris* to prove the existence of such a

33. N. Ando, The Law of Pollution in International Rivers and Lakes in R. ZACKLIN AND L. CAFLISCH (eds.), THE LEGAL REGIME OF INTERNATIONAL RIVERS AND LAKES 331, 342-343, 346 (1981); R. FALK, F. KRATOCHWIL AND S.H. MENDLOVITZ, INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 603 (1985).

rule,<sup>34</sup> a breach of which engages the responsibility of the State and the duty to make reparation.

Principle 21<sup>35</sup>, of the Stockholm Declaration<sup>36</sup>, is not a rule of customary international law that imposes a duty on States to prevent transboundary harm.<sup>37</sup> It is merely a general principle of international law that reflects the international community's concern with the need to protect the environment and seeks to balance this need with a State's sovereign right to exploit its own resource. As it is based on the maxim of *sic utere tuo ut alienum non laedas*, Principle 21 is only intended to act as a starting point for States to subsequently develop clear rules of international law that impose a duty on States to prevent transboundary harm. This

34. **Asylum Case (Columbia v Peru) (1950) I.C.J. 206; North Sea Continental Shelf Case (Germany v Denmark; Germany v Netherlands) (1969) I.C.J. 3, 44 (para 77).**
35. Principle 21, *infra* n. 36 at 1420, states that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."
36. Report of the U.N Conference on the Human Environment 11 INT L LEG. MAT. 1416 (1972).
37. L.B. Sohn, The Stockholm Declaration 14 HARV. INT L L.J. 423,427 (1973): "The view prevailed that the Declaration should merely outlines broad goals and objectives and should not formulate legally binding provisions."
38. Sohn *ibid.*, at 486; FALK, KRATOCHWIL & MENDLOVITZ, *supra* n. 33 at 604.
39. **The Law of Non-Navigational Uses of International Watercourses**, *supra* n. 4 at 93. This maxim has also been epitomised by the I.C.J. in the Corfu Channel Case, *supra* n. 28.
40. Sohn, *supra* n. 37 at 426, 434, 493, 513-514. The maxim does not constitute independent legal rules, see G. Handl.

interpretation of the principle is borne out by Principle 22<sup>41</sup> which gives written expression to the recognition by States of a vague duty to co-operate further to develop the law relating to transboundary environmental harm.<sup>42</sup> Subsequent State practice also confirms this position under present international law.<sup>43</sup>

Although Principle 21, on the face of it, purports to suggest notions of liability without fault, it does not do so because States have agreed that any subsequent development of a rule of law on the prevention of transboundary harm should, as a general rule, be based on the notion of liability with proof of fault.<sup>44</sup>

During the debates within the Preparatory Committee charged with the drafting of the Declaration, there was strong opposition by several delegates that the principle could be interpreted as imposing

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41. Principle 22, *supra* n. 36 at 1420, states that "States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction."
42. Sohn, *supra* n. 37 at 495.
43. See for example OECD Council Recommendation on Principles concerning Transfrontier Pollution 14 INT'L LEG. MAT. 242 (especially Recommendation III at 243); Art. 30 of G.A. Res. 3281 (XXIX) on the Charter of Economic Rights and Duties of States, 14 INT'L LEG. MAT. 251 (1975); Art. 3 of the U.N. Convention on Long Range Transboundary Air Pollution 18 INT'L LEG. MAT. 1442 (1979).
44. Sohn, *supra* n. 37 at 494; G. Handl, State Liability for the Accidental Transnational Environmental Damage by Private Persons 74 AM. J. INT'L L. 525, 536 (1980); J.G. Lammers, Balancing the Equities in International Environmental Law in THE FUTURE OF THE INTERNATIONAL LAW OF THE ENVIRONMENT, HAGUE ACADEMIE DE DROIT INTERNATIONAL (COLLOQUE) 153, 157 (1985).

an absolute or strict liability.<sup>45</sup> Instead, there was an insistence that negligence remained a pre-requisite before the liability of a State could be successfully invoked.<sup>46</sup>

2. International law has only recognised a duty to prevent or abate transboundary harm caused by ultra-hazardous activities.

State practice reveals that States have only recognised an obligation to prevent environmental harm by ultra-hazardous activities.<sup>47</sup>

Ultra-hazardous activities are activities which pose an exceptional risk of transboundary harm or have been known to cause substantial damage.<sup>48</sup> As such, the international community has recognised the need to regulate this kind of activities.<sup>47</sup> International law therefore imposes an obligation to prevent or abate transboundary harm from such activities as harm is foreseeable.<sup>50</sup>

State practice also reveals that there may be liability without fault in such cases where transboundary harm is caused by ultra-

45. Handl, *ibid.*

46. *Ibid.*

47. For e.g., the 1972 Convention on Liability for Damage caused by Objects launched into Outer Space 10 INT'L LEG. MAT. 965 (1971); the 1963 Vienna Convention on Civil Liability for Nuclear Damage 2 INT'L LEG. MAT. 727, 737 (1963). See FALK, KRATOCHWIL & MENDLOVITZ, *supra* n. 33 at 619-622 for a review of treaty practice. See also C.W. Jenks, Liability for Ultra-hazardous Activity in International Law, 117 RECUEIL DES COURS 99,105,122,177 (1966 I); J.M. Kelson, State Responsibility and the Abnormally Dangerous Activity, 13 HARV. INT'L L.J. 197, 243 (1972); Handl, *ibid.* at 552-559.

48. Handl, *ibid.*, at 554 for examples of ultra-hazardous activities accepted as such by State practice. See also Jenks, *ibid.* at 107.

49. L.F.E. Goldie, International Principle of Responsibility for Pollution, 9 COLUM. J. TRANSNAT L. 283, 309 (1970); Lammers, *supra* n. 20 at 158 and Jenks, *ibid.*

50. Jenks, *ibid.* at 173; Handl, *supra* n. 44 at 556.

hazardous activities.<sup>51</sup> A State may therefore be liable to compensate notwithstanding the fact that the activities are not attributable to it.<sup>52</sup>

Pesticides and fertilisers containing phosphates are essential for farming and are therefore widely used by farmers throughout the world. States have never characterised the use of pesticides and fertilisers for farming as an ultra-hazardous activity. Neither have they recognised the use of soap and detergents containing phosphates as an ultra-hazardous activity. Therefore, the activities of the Old Ones that resulted in the pollution of the Galala Aquifer are clearly not ultra-hazardous activities. As such, Mercadia could not have conceivably foreseen the effects of the Old Ones activities on the Galala Aquifer and Lake Lydia. Mercadia is therefore not negligent in allowing the Galala Aquifer to be polluted. Mercadia cannot then be held responsible and liable for the pollution.

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51. Handl, *ibid.* at 553-555; FALK, KRATOCHWIL & MENDLOVITZ, *supra* n. 33 at 619. This of course is only for certain of such activities but nevertheless be the exception to the general requirement of fault. see E.M de Archega, International Law in the Past Third of a Century 159 RECUEIL DES COURS 272, 273 (1966 I).

52. Handl, *ibid.*

3. International law requires a State to cooperate to prevent or abate transboundary harm only if the harm is of a serious nature and the State has actual knowledge that such harm is being caused.
  - a. A State may also be responsible and liable for transboundary harm if it had actual knowledge of serious injury being caused by activities within its territory or control.

Mere damage is insufficient to engage State responsibility.

The damage has to be of a serious nature.<sup>53</sup> International law as applied in the **Trail Smelter Arbitration**<sup>54</sup> only imposes a liability on the State to inform, negotiate and co-operate to prevent and abate transboundary harm only "when the case is of serious consequences and the injury is established by clear and convincing evidence."<sup>55</sup>

If an obligation to prevent even the most minor pollution is imposed, all activities within the territory or control of a state would seriously be curtailed if the State is to avoid responsibility and liability at all. This would inevitably lead to denying every State its sovereign right to control activities within its territory and the use of natural resources within its territory.<sup>56</sup>

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53. G.A. Res. No. 2995 (1972) on the Co-operation between States in the Field of Environment, U.N.G.A. OFF. REC. 27th Session (Supp.) No. 30 at 42 requires "significant" harmful effects; Art. 1 of the U.N. Convention on Long Range Transboundary Air Pollution, *supra* n. 43, defines air pollution in terms of "deleterious effects"; **Law of Non-Navigational Uses of International Watercourses**, *supra* n. 4 at 98-100, 103 post. See also M.C.W. Pinto, Reflections on International Liability and Injurious Consequences, NETH. Y. B. INT'L L. 17, 35 (1985); Lammers, *supra*, n. 44 at 155-156.

54. 3 R.I.A.A. 1905 (1941).

55. *Ibid.*, at 1960.

56. Lammers, *supra*, n. 44 at 155. See *supra* n. 38.

Furthermore, the Trail Smelter Principle imposes the obligation on the State to prevent or abate serious transboundary harm only if it has actual knowledge<sup>57</sup> that such harm is resulting from acts within its territory or control.

If the State has knowledge of serious transboundary harm being caused by activities within its control or territory but fails to prevent the increase or abate such harm, its omission amounts to an internationally wrongful act for which it becomes internationally responsible and liable.<sup>58</sup>

In any case, the duty to prevent and abate transboundary pollution under the Trail Smelter Principle does not extend to aquifer pollution. States have not recognised such a duty with respect to aquifers<sup>59</sup> as they are not familiar enough with the nature and movement of groundwater.<sup>60</sup>

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57. The element of "knowledge" was subsequently added to the Trail Smelter Principle by the I.C.J. in the Corfu Channel Case, *supra* n. 28 at 22.

58. See para 23 of the Interim Report of the Committee on the Legal Problems of Continuous and Instantaneous Long-Distance Air Pollution presented at the Seoul Conference (1986) of the Int'l L. Assn.

59. L.A. Teclaff and E. Teclaff, Transboundary Groundwater Pollution: Survey and Trends in Treaty Law 19 NAT. RES. J. 629, 661 (1979); A.E. Utton, The Development of International Groundwater Law 22 NAT. RES. J. 95, 110 (1982); D. A. Caponera and D. Alheritiere, Principles for International Groundwater Law 18 Int'l. RES. J. 589, 618 (1978).

60. Teclaff and Teclaff, *ibid.*, at 661.

- b. Mercadia is not responsible and liable in the present case as Harmonia has not shown that it has suffered serious injury and that Mercadia had knowledge of such injury being caused.

In its claim against Mercadia, Harmonia has further not shown by clear and convincing evidence that it has suffered substantial or serious damage. The alleged loss of the proposed tourist development project at Lake Lydia is not an actual damage.<sup>61</sup> Whether or not it is a loss has yet to be ascertained. In any case, it is too remote to be considered an injury.

Furthermore, no precise definition exists under international law as to what constitutes pollution and what the unacceptable or intolerable limits are.<sup>62</sup> Until these limits are determined, Mercadia is and ought not to be held internationally liable for the pollution of the Galala Aquifer.

Therefore, the mere presence of toxic substances in the fish in Lake Lydia and the presence of algae and pollutants in the lake are by themselves insufficient to establish serious injury. There is no evidence that the fish and the waters of Lake Lydia are no longer fit for human consumption or that the level of pollution has become unacceptable or intolerable by international standards.

In the present case, although Harmonia is seeking to hold Mercadia responsible and liable for the pollution of the Galala Aquifer, it has not adduced evidence of the nature and extent of the pollution damage caused to the aquifer.

In any case, even if Harmonia has suffered serious damage, Mercadia had no knowledge that the normal activities of the Old Ones

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61. LAUTERFACHT, *supra* n. 6 at 352-354.

62. Ando, *supra* n. 33 at 342.

in the resettled area were causing the alleged pollution damage to the Galala Aquifer and subsequently, Lake Lydia.

C. Mercadia is also not internationally responsible and liable for the pollution of the Galala Aquifer under the rules relating to equitable utilisation of shared resources.

1. The rules relating to the equitable utilisation of a shared water resource<sup>63</sup> do not apply here.<sup>64</sup>

a. The activities causing the pollution of the aquifer are not uses of the aquifer.

In the first place, for the present case to fall within the ambit of the equitable utilisation rule, Harmonia must prove that the pollution of the aquifer was caused by Mercadia's use of the aquifer.<sup>65</sup>

In the present case, the activities of the Old Ones do not involve a use of the aquifer. The pollution of the aquifer was caused by the mere seepage of phosphates and pesticides into the aquifer. The Old Ones did not use nor intend the Galala Aquifer to be used as a means of waste disposal.<sup>66</sup> The discharge of pollutants into the Galala Aquifer and their passage into Lake Lydia are entirely fortitious.

b. Furthermore, the equitable utilisation rule does not apply to aquifers.

Harmonia cannot discharge its burden of proof that the 'equitable utilization' rule applies to aquifers. States have yet to recognise the aquifer as a shared water resource capable of conscious

63. See text *supra* accompanying notes 7 to 23.

64. Lammers, *supra*, n. 44 at 163.

65. Helsinki Rules, *supra* n. 4 at 499.

66. An example of use of water is the use of rivers as a means of sewage disposal, *ibid.*, n. 4 at 500.

utilisation.<sup>67</sup> As such, the rules relating to the equitable utilisation of shared water resources do not extend to aquifers.

2. In any case, Mercadia has not breached the equitable utilisation rule.

To hold Mercadia responsible under the equitable utilization rule, Harmonia must prove that it has suffered substantial injury, that it has been denied of a reasonable and equitable use of the waters of the Galala Aquifer, and that Mercadia has breached its duty to inform and consult on its alleged use of the aquifer.<sup>68</sup>

Mercadia has not breached the duty to inform and consult Harmonia on its alleged use of the Galala Aquifer as it had no knowledge of the effects of the Old Ones activities on the aquifer.

An injury is substantial if there has been material interference with or prevention of a reasonable use of the shared resource.<sup>69</sup> Harmonia has not shown that its use of the waters of the Galala Aquifer and Lake Lydia has been substantially interfered with and that it has thereby suffered substantial injury. It has not established that the waters of Lake Lydia are no longer drinkable or that the fish in the lake are no longer fit for human consumption.

It is accepted that a State is not to be held responsible for minor pollution that may be inevitably caused by its equitable and reasonable use of the shared resource.<sup>70</sup> Therefore, Mercadia is not obliged to ensure that the pristine condition of the waters of Lake Lydia should be maintained if its use of the Galala Aquifer is reasonable and equitable.

67. Caponera and Alheritiere, *supra* n. 59 at 610.

68. See text *supra* accompanying notes 17-23.

69. *Supra* n. 21.

70. Helsinki Rules, *supra* n. 4 at 500.

In the present case, Mercadia's alleged use of the Galala Aquifer is reasonable and equitable. The farming activities of the Old Ones are essential for their livelihood. The use of pesticides by the Old Ones is a normal activity. Harmonia itself uses the same pesticides for its farming activities.<sup>71</sup>

Furthermore, Harmonia is in the first place responsible for forcing Mercadia to resettle the Old Ones in the Green River Valley. The resettlement of the Old Ones was caused by Harmonia's refusal to allow Mercadia to have an equitable share in the use of the Lakota River. Harmonia knew that the Old Ones would have to be resettled in the Green River Valley if it reduced the flow of the Lakota River into Mercadia. To now demand that the Old Ones cease their normal farming activities in their re-settled home is against all fairness and justice.

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71. See Clarifications to the Compromise, para. 22.

CONCLUSION AND PRAYER FOR RELIEF

CONSIDERING THAT Harmonia is prohibited under international law from interfering with or reducing the flow of the Lakota River to the detriment of Mercadia's existing uses of the River,

CONSIDERING FURTHER THAT Harmonia deprived Mercadia of its right to a reasonable and equitable share in the beneficial uses of the Lakota River when it diverted and reduced the flow of the River into the Mercadia,

CONSIDERING THAT the activities of the Old Ones that resulted in the pollution of the Galala Aquifer are not attributable to Mercadia,

CONSIDERING THAT the present case is not one where a State can be held responsible and liable for transboundary harm caused by acts not attributable to it.

CONSIDERING FURTHER THAT the pollution of the Galala Aquifer does not amount to a violation of the international rules relating to equitable utilisation of shared resources.

The Government of Mercadia respectfully requests this Honourable Court to:

1. DECLARE that Harmonia is responsible and liable under international law to Mercadia for its act of diverting and reducing the flow of the Lakota River into Mercadia.
2. DECLARE that Mercadia is not responsible and liable under international law to Harmonia for the pollution of the Galala Aquifer.

3. GRANT to Mercadia such further relief as this Honourable Court may deem fit, and
4. DENY to Harmonia all relief requested by it in the present proceedings.

RESPECTFULLY SUBMITTED,

CHAN CHEN YEE

WILFRED JAYARAJ DORAY

ROSALIND ANTOINETTE LAZAR

WONG SIEW HONG

CERTIFICATE

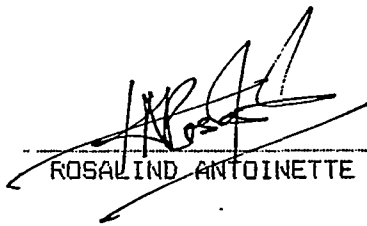
We hereby certify that this memorial complies with the OFFICIAL  
RULES of this competition.



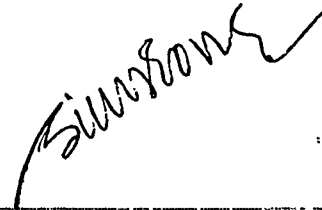
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