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

FEBRUARY 1987

HARMONIA,

APPLICANT,

v.

MERCADIA,

RESPONDENT.

MEMORIAL FOR RESPONDENT

Team No. 11-5

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STATEMENT OF JURISDICTION

The Governments of Harmonia and Mercadia have submitted their dispute, by special agreement as provided in the compromis, to the International Court of Justice pursuant to Article 40, section 1 of the Statute of the International Court of Justice. The Court has jurisdiction to adjudicate this case pursuant to Article 36 of the Statute of the International Court of Justice, I.C.J. STAT., Art. 36, Para. 1.

STATEMENT OF FACTS

Harmonia is a relatively poor country with very little existing industry(R.1) and over several years has accumulated a large foreign debt. Approximately one-third of the country's foreign exchange earnings are generated by the tourist industry. (R.2) Potential economic development can be found in Harmonia's natural resources.

Harmonia is bordered on the west by the sea and on the east by a landlocked country. The Morningstar Mountains, which provide runoff water during spring to the Lakota River, extend from the northern portion of the country into Mercadia, Harmonia's southern neighbor. (R.1) The Lakota River, which lies west of these Mountains, drains the fertile coastal lowlands of both of these countries.

Mercadia, is a developing country with an established industrial base. (R.2) Capitol City, in southern Mercadia, is the center of Mercadian industry and has experienced overcrowding and urban blight. (R.2) In light of this, Mercadia has passed regulations forbidding rural populations from relocating to the cities. (R.2)

Prior to 1983, the city of Trantor, a Harmonian provincial capital, was the only inhabited area located in the semi-arid highlands east of the mountains.(R.4) Trantor lies on Lake Lydia, a pristine mountain lake.(R.4) The Lake is spring fed by the Galala Aquifer whose recharge area is located in the Mercadian highlands to the south.(R.5) Lake Lydia had clean beaches and good fishing, which were preserved by Trantor's

efficient high standard waste treatment system.(R.4-5) It also provided drinking water to the surrounding area. (R.5)

In an attempt to utilize its resources, Harmonia planned to begin processing large deposits of valuable bauxite,(R.2) located in the far norther regions of the country. (R.1) In 1979, Harmonia announced a five year plan to develop its bauxite industry. The Lakota High Dam was constructed as part of that plan. The Dam, located several kilometers north of the Mercadian border, stabilizes the spring runoff from the Morningstar Mountains and produces the hydro-electric power necessary to process bauxite. (R.2) This electricity is also used to operate the modern irrigation facilities at the new agricultural area, created near the sea coast, north of the Dam. (R.2) In an additional attempt to utilize its resources, the area around Lake Lydia has been marked for future tourist development. (R.2)

Mercadia protested Harmonia's building of the Lakota High Dam and called for a meeting of the Foreign Ministers. (R.3) Mercadia asserted that the Old Ones needed the water in the Lakota River in order to continue to use their outdated inundation methods of irrigation. The Old Ones are a small group of people existing by means of subsistence agriculture. (R.3) At a meeting discussing the construction of the Dam, the Mercadian Foreign Minister steadfastly refused to compromise and insisted upon the full unrestricted flow of the Lakota. (R.3) The Harmonian Foreign Minister explained that the water was better used to produce electricity. However, even after nine months of talks, the Mercadians refused to move from their

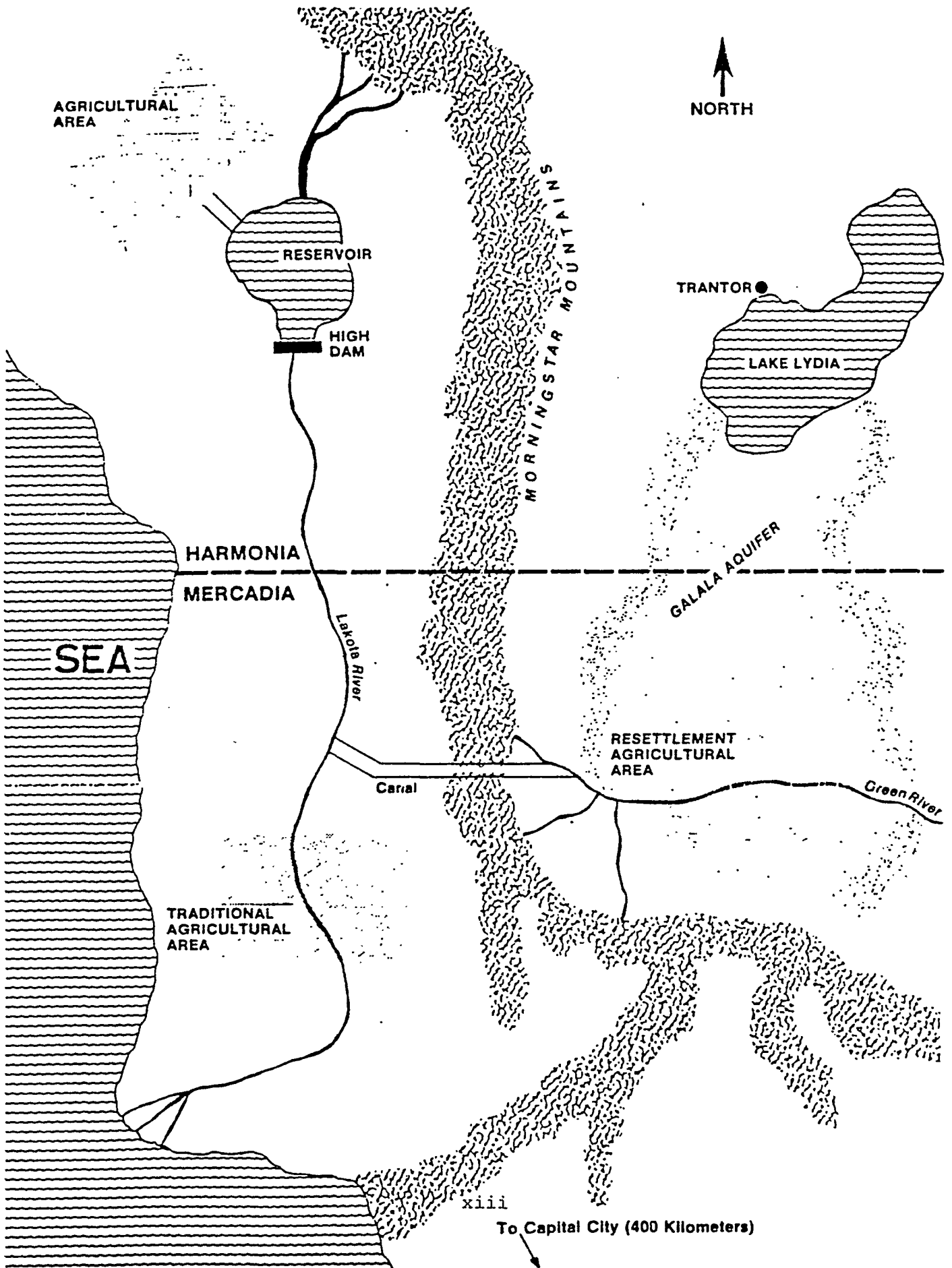
original position. (R.4) Construction of the Lakota High Dam began on schedule and was completed in the summer of 1983 without incident. (R.4)

In 1983, Mercadia moved the Old Ones to the semi-arid highlands east of the mountains, near the Green River.(R.4) This new agricultural settlement is near the recharge area of the Galala Aquifer. (R.5) In order to supplement the waters of the Green River, a diversion canal was built through the mountains.(R.4) Water from the Lakota River was pumped from the lowlands up to the Green River resettlement area.

The Old Ones have utilized modern pesticides in their farming.(R.5) These pesticides, along with phosphates from human habitation, have contaminated the Galala Aquifer.(R.5) As a result, Trantor's drinking water is contaminated; algae has formed in Lake Lydia and toxins have been found in the lake fish. (R.5)

Harmonia sent a formal letter of protest to Mercadia in December of 1985. A demand was made that all activities which pollute the Galala Aquifer cease. However, Mercadia has ignored Harmonia's demand and has denied all responsibility. (R.5)

Harmonia and Mercadia are both members of the United Nations. Harmonia submits the following matter by special agreement to this court for adjudication.



AGRICULTURAL AREA



RESERVOIR

HIGH DAM

TRANTOR

LAKE LYDIA

MORNINGSTAR MOUNTAINS

HARMONIA

MERCADIA

SEA

Lbobe River

GALALA AQUIFER

RESETTLEMENT AGRICULTURAL AREA

Canal

Green River

TRADITIONAL AGRICULTURAL AREA

xiii

To Capital City (400 Kilometers)

QUESTIONS PRESENTED

1. Whether, under international law, Mercadia is responsible for polluting the Galala Aquifer, rendering it liable for the resulting damages to Harmonia's territory?
2. Whether Harmonia's diversion of the Lakota River is consistent with international law?

SUMMARY OF ARGUMENT

Mercadia is responsible under international law for the pollution of the Galala Aquifer and is liable for the resulting damage to Lake Lydia. International law recognizes the responsibility of every State for extraterritorial harms which occur as a result of its actions. Mercadia relocated the Old Ones from their traditional homeland to the resettlement area in the Galala Aquifer recharge area. The use of this area for farming and human habitation resulted in the introduction of pesticides and phosphates into the aquifer. The resulting contamination of drinking water, the formation of algae and the development of toxins in the lake fish, has substantially harmed Harmonia. By permitting and maintaining conditions within its territory which cause extraterritorial injuries, Mercadia has violated international law.

The use of the resettlement area is also inconsistent with the principle of equitable utilization. Equitable utilization is a rule of international law which recognizes the right of each basin State to share in the use of a shared water source. Since the pollution poses a health threat to Harmonia's citizens and is highly dangerous to Lake Lydia's waters, it is unreasonable per se. Mercadia therefore has a duty to abate the pollution.

Should an equitable utilization balancing test be required, the reasonable use of the waters by Harmonia and the substantial injuries suffered from the pollution outweigh any claimed use by Mercadia. This Court should declare that Mercadia has violated

its obligations under international law and is liable for the injuries sustained by Harmonia.

Additionally, this Court should declare that the construction of the Lakota High Dam is consistent with international law. A State's sovereignty entitles it to the unqualified right to exploit any river flowing through its territory. The Lakota High Dam is constructed totally within Harmonian sovereign territory, and is thus within Harmonia's recognized rights as a sovereign State.

Harmonia's utilization of the Lakota River to generate hydro-electric power is further protected under the principle of equitable utilization. Equitable utilization is a rule of international law which recognizes the right of all co-basin States to a reasonable and equitable share in the waters of a successive river. The benefits deriving from the Lakota High Dam will accrue to all of the Harmonian people, while those generated by the Mercadian use benefit only a relatively small group. The hydro-electricity will enable Harmonia to develop its industry, implement modern farming methods and repay its substantial foreign debt. Therefore, Harmonia's use of the Lakota River is both equitable and reasonable, and is entitled to protection.

ARGUMENT

I. UNDER INTERNATIONAL LAW, MERCADIA IS RESPONSIBLE FOR POLLUTING THE GALALA AQUIFER AND IS LIABLE FOR THE RESULTING DAMAGE TO HARMONIA'S TERRITORY.

A. Every State is Responsible Under International Law For Extraterritorial Harms That Occur as a Result of Its Actions.

According to Oppenheim, the doctrine of State responsibility "is a rule of international law that no State is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighboring State."¹ General international law imposes responsibility on a State for conduct which is both attributable to the State under international law and which constitutes a breach of an international obligation.²

1. The conduct of the Old Ones is attributable to Mercadia.

Transboundary pollution caused by private persons is attributable to a State if such persons' conduct is considered conduct of the State, and the State is negligent in the prevention or abatement of such pollution.³ The Mercadian government maintained the Old Ones as a symbol of Mercadia's traditional and cultural heritage. Mercadia relocated the Old Ones from the Lakota River to the Agricultural Resettlement Area on the Green

¹ 1 L. Oppenheim, International Law 474-75 (H. Lauterpacht 8th Ed. 1955)

² Draft Articles on State Responsibility, [1973] 2 Y.B. Int'l Law Comm'n 169, U.N. Doc.A/CN.4/246/1973.

³ J.G. Lammers, Pollution of International Watercourses 588 (1984).

River.⁴ Since the resettlement is located at the Galala Aquifer's recharge area, the Old Ones' presence has resulted in the introduction of pesticides and phosphates into the region.⁵ Thus, the pollution caused by the Old Ones' farming methods is attributable to the Mercadian Government.

2. Mercadia has an obligation under international law to prevent the pollution on its territory from injuring Harmonia.

State responsibility for pollution of international watercourses will arise when a State has violated an international obligation to prevent such pollution.⁶ To provide rules dealing specifically with the rights and obligations of States sharing transboundary groundwaters, jurists have turned to general principles, State practice and legal thought on laws related to international watercourses.⁷ A review of general international law establishes that the pollution of the Galala Aquifer and resulting pollution of Lake Lydia is a violation of Mercadia's obligations and duties under international law.

- a) United Nations conferences and resolutions establish that Mercadia violated its obligations under customary international law.

The Declaration of the United Nations Conference on the Human Environment⁸ (hereinafter "Stockholm Declaration") specifically

⁴ R.4.

⁵ R.5.

⁶ See supra notes 2, 3.

⁷ Caponera, Patterns of Cooperation in International Water Law: Principles and Institutions, 25 Nat. Resources J. 563, 565 (1985).

⁸ Report of the United Nations Stockholm Conference on the Human Environment, U.N. Doc. A/Conf. 48/14 (1972).

addresses the issue of State responsibility for damage beyond a State's territorial limits. The Stockholm Declaration represents "the first comprehensive international political consensus on environmental issues"⁹ and reflects existing rules of customary international law.¹⁰ Principle 21 provides 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.¹¹

This principle's specific language, "in accordance with the Charter of the United Nations and the principles of international law. . . ," constitutes a clear recognition on the part of the community of States that the axioms contained in Principle 21 are generally recognized norms of international law.¹² Principle 21 acknowledges the sovereign right of States to exploit their natural resources. However, it also recognizes the correlative duty of States not to inflict damage beyond the limits of their national jurisdiction.¹³

The United Nations General Assembly expressly commended Principle 21 as having affirmed the basic rules governing

⁹ Statement by the Australian delegate in the discussion of the Stockholm Declaration by the General Assembly's Second Committee, U.N. Doc. A/C. 2/SR. 1468(1972).
¹⁰ J.-G. Castel, International Law 726 (3d ed. 1976).
¹¹ Supra note 8, at 7.
¹² Id.
¹³ See J.G. Lammers, supra note 3, at 332.

international responsibility of States regarding the environment.¹⁴ General Assembly Resolution 2995¹⁵ emphasizes that "[i]n the . . . exploitation . . . of their natural resources, States must not produce significant harmful effects in zones stretched outside their national jurisdiction."¹⁶ Principle 21 has been reaffirmed in subsequent resolutions by the General Assembly.¹⁷

In 1974, the Organization for Economic Co-Operation and Development (hereinafter "OECD") Council of Ministers adopted recommendations of principles concerning transfrontier pollution.¹⁸ The OECD stated that "in accordance with their responsibilities under Principle 21 . . . [States] should refrain from carrying out . . . activities which might create a significant risk of transfrontier pollution."¹⁹

Further, the United Nations Water Conference held in Mar Del Plata in March 1977²⁰ adopted a number of resolutions designed to

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- 14 International Responsibility of States in Regard to the Environment, G.A. Res. 2996, 30 U.N. GAOR Supp. (No. 38), U.N. Doc. A/8730(1972).
- 15 Cooperation between States in the Field of the Environment, G.A. Res.2995, 30 U.N. GAOR Supp. (No. 38), U.N. Doc. A/8730(1972).
- 16 Id.
- 17 See Lammers supra note 3, at 334; see also, Cooperation in the Field of the Environment concerning Natural Resources Shared by Two or More States, Report of the Executive Director of U.N.E.P., U.N. Doc. UNEP/GC/44 (1975); Economic Decalartion adopted by the Fourth Conference of Heads of State or Government of Non-Aligned Countries, U.N. Doc. A/9300(1973).
- 18 Recommendations on Principles Concerning Transfrontier Pollution, 14 Int'l. Legal Materials 242(1975).
- 19 Id.
- 20 Report of the United Nations Water Conference, U.N. Doc. E/CONF. 70/29(1977).

promote assessment, use, planning and management of water resources. With regard to international cooperation in the development of "shared water resources," the Conference declared that "[s]uch cooperation, in accordance with the Charter of the United Nations and principles of international law, must be exercised on the basis of the equality, sovereignty and territorial integrity of all States, and taking due account of the principle expressed, inter alia, in Principle 21 of the [1972 Stockholm] Declaration."²¹

- b) Custom, as evidenced by treaty provisions and judicial decisions, establishes that Mercadia may not maintain conditions within its territory which injure the territory of Harmonia.

It is accepted legal doctrine that the existence of customary rules of international law may be inferred from similar provisions in a number of treaties.²² The majority of treaty provisions regarding protection of international watercourses against pollution similarly state that the pollution of these watercourses causing damage to interests of other states is in principle not permitted.²³

In the Trail Smelter Arbitration,²⁴ the Tribunal addressed the question of whether Canada must pay for damage to the United States caused by the fumes from a smelter in Canadian territory. In a broad pronouncement of a principle of general international

²¹ Id. at Rec. 38.

²² S.S. Wimbledon (Germany v. U.K.), 1923 P.C.I.J. (ser. A) No. 1, at 25 (August 17).

²³ See supra note 3, at 123.

²⁴ Trail Smelter, (U.S. v. Canada) 9 I.L.R. 315 (1938).

law, the Tribunal concluded that:

[n]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or person therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.²⁵

Although the arbitration arose from the damage caused by air pollution, the reasoning of the Tribunal is equally applicable to cases involving water pollution.²⁶

This principle on transboundary injuries has been reaffirmed in decisions by the International Court of Justice (hereinafter "ICJ"). In the Corfu Channel Case,²⁷ the ICJ concluded that "[it is] every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."²⁸ Even though the issue was not one of pollution, the analogy is clear. The case sets forth the basic role of State responsibility for acts done within its territorial waters, and this includes polluting activities.²⁹ In the Nuclear Test Cases,³⁰ the ICJ addressed the territorial sovereignty claim of both Australia and New Zealand and noted that a duty of reparation is owed by a State causing injury to another State's territory.³¹

25 Id. at 317 .

26 See J.G. Lammers supra note 3 at 522.

27 Corfu Channel (U.K. v. Albania), 1949 I.C.J. 4; 43 Am.J.Int'l.L. 558 (1949).

28 Id. at 22.

29 5 C. Odidi-Okidi, Regional Control of Ocean Pollution: Legal and Institutional Problems and Prospects 82 (1978).

30 Nuclear Test Cases (Australia v. France, New Zealand v. France) 1973 I.C.J. 100.

31 Id. at 131.

- c) General principles of international law impose an obligation on Mercadia to refrain from inflicting environmental harm.

The principles relied upon in the Stockholm Declaration and in the aforementioned judicial and arbitral decisions were based on the maxim sic utere tuo ut alienum non laedas which means "use your property in such a manner as not to injure that of another."³² Sic utere tuo "[i]s one of the general principles of law recognized by civilized States which the [ICJ] is bound to apply. . . ."³³ It recognizes that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to international law.³⁴ Where an activity causes transnational effects, it ceases to be within the exclusive competence of that State and becomes a matter of international concern.³⁵

The principle of sic utere tuo derives from various doctrines which place restraints upon the exercise of territorial rights.³⁶ The doctrine of abuse of rights requires that a State "not use its rights in such a manner that its antisocial effects outweigh the legitimate interests of the owner of the right."³⁷ Further, good neighborliness implies that in the exercise of sovereignty,

³² Black's Law Dictionary 1551 (4th ed. 1968).

³³ See supra note 1, at 346-7.

³⁴ Survey of International Law, 34 U.N. Doc. A/CN. 4/1 Rev. (1949).

³⁵ Handl, Territorial Sovereignty and the Problem of Transnational Pollution, 69 Am.J.Int'l.L. 50,55 (1975).

³⁶ Id.

³⁷ Friedmann, The Uses of "General Principles" in the Development of International Law, 57 Am.J.Int'l.L. 279, 289 (1963).

rights cannot be separated from the social context in which they are being asserted.³⁸ It is only in the concrete circumstances of a specific situation that rights may find their exact delimitation.³⁹

3. Mercadia has breached its obligation under international law by allowing the pollution of the Galala Aquifer to injure Harmonia's territory.

The aforementioned principles establish that Mercadia has an obligation to exercise restraint in the use of its territory so as not to harm the interests of Harmonia. The Old Ones' resettlement at the Galala Aquifer's recharge area has caused serious injury to the territory and citizens of Harmonia. The pesticides from farming and the phosphates from human habitation have polluted both the aquifer and Lake Lydia.⁴⁰ The pollution of the aquifer feeding Lake Lydia has resulted in the contamination of Trantor's drinking water, the formation of algae in the lake and the presence of toxins in lake fish.⁴¹ The contaminants in the drinking water present a serious health threat to Harmonia's citizens by introducing the potential for transmission of disease. The formation of algae and toxins in the fish preclude Harmonia's use of the lake region for tourist development. Since one-third of Harmonia's exchange earnings are generated by tourism, the pollution of Lake Lydia has a devastating effect on Harmonia's economy. Additionally, Harmonia's effective and efficient waste

38 See supra note 35, at 56.

39 Id.

40 R.5.

41 R.5.

treatment system has been defeated.⁴² Consequently, Mercadia has violated its obligation by failing to prevent the pollution of the Galala Aquifer by the Old Ones.

B. Under the Principle of Equitable Utilization, Each State's Use of a Shared Water Source Must Be Reasonable and Equitable in Relation to the Entire Basin System.

1. The principle of equitable utilization represents a rule of international law.

Under the principle of equitable utilization, each State is entitled within its own territory to a reasonable and equitable share in the beneficial use of the waters of a transboundary aquifer.⁴³ This principle is a rule of international law supported by the practice of States⁴⁴ and the writings of qualified publicists.⁴⁵ The principle has been endorsed by the United Nations, which has taken the position that "[an] international watercourse system and its waters shall be developed, used and shared by system States in a reasonable and equitable manner on the basis of good faith and good neighborly relations. . . ."46

42 Id.

43 See infra note 47.

44 See, e.g., Treaty on the River Plate Basin, signed at Brasilia on 23 April 1969 between Argentina, Bolivia, Brazil, Paraguay and Uruguay, printed in VIII Int'l. L. Materials, Current Documents, 905 (1969); Societe Energie Electrique du Littoral Mediterranee v. Compagnia Imprese Elettriche Liguri, Italy, Court of Cassations, Feb. 13, 1939, 3 Whiteman, Ann. Dig. 120-2 (No. 47).

45 First Report on the Law of the Non-Navigational Uses of International Watercourses, U.N. Doc. A/CN.4/367 (1983).

46 Id.

The Helsinki Rules,⁴⁷ as adopted by the International Law Association, (hereinafter "ILA") incorporated the key principle of equitable utilization. Article IV of these Rules provides that each basin State is entitled to a reasonable and equitable share in the beneficial use of the water of an international drainage basin.⁴⁸ Seeking to accommodate the multiple and diverse uses of international watercourses,⁴⁹ this Article imposes an obligation on co-basin States to reconcile their interests.⁵⁰ Any claim to the rightful use of a shared water basin system must be judged in regard to the particular, social, environmental and economic context in which the right is being asserted.⁵¹ A reasonable and equitable share of two competing uses is to be determined in light of all relevant factors.⁵² Reasonableness depends upon the natural features of the water basin, and equity depends upon the circumstances surrounding the use within the basin system.⁵³ While Article V of these Rules articulates relevant factors to be taken into consideration,⁵⁴ the list is not exhaustive nor are priorities assigned. The

47 International Law Association, Report of the Fifty-Second Conference Held at Helsinki 447 (1966).

48 Id. art.IV at 486.

49 See J.G. Lammers supra note 3, at 545.

50 G. Handle, The Principle of "Equitable Use" as Applied to Internationally Shared Resources: Its Role in Resolving Potential International Disputes Over Transfrontier Pollution, Transfrontier Pollution and the Role of States, 1981 Organization for Cooperation and Econ. Dev. 98,103.

51 Id.

52 See supra note 47, at art. V(1) at 488.

53 See Caponera supra note 7 at 567.

54 See supra note 47, at 488.

weight given to each factor is to be determined by comparison with that of each other relevant factor.⁵⁵

2. Equitable Utilization specifically prohibits the pollution of the Galala Aquifer.

The Helsinki Rules are expressly applicable to all systems of waters, including underground waters extending over two or more States.⁵⁶ Under these Rules pollution is defined as "any detrimental change resulting from human contact in the natural composition, content or quality of the waters of an international drainage basin."⁵⁷ Consistent with the principle of equitable utilization, Article X of these Rules imposes an obligation on States to prevent new, or increases in existing, water pollution which causes substantial injury.⁵⁸ Further, a State should take all reasonable measures to abate existing pollution so that no substantial damage is caused to the territory of a co-basin State.⁵⁹ In 1982, the ILA made this provision an affirmative duty to abate all existing pollution.⁶⁰ Although the pollution results from the conduct of private persons within its own territory, a State is responsible for all pollution which causes substantial injury in the territory of a co-basin State.⁶¹

55 See supra note 3 at 543.

56 Id. Art. II at 484.

57 See supra note 47, at 494.

58 Id. at 496.

59 Id.

60 International Law Association, Report of the Sixtieth Conference held at Montreal 535, et seq. (1982).

61 See supra note 47, art. X, comment d at 500.

- a) Pollution of the aquifer substantially injures Harmonia.

The pollution of the Galala Aquifer and Lake Lydia satisfies the definition of water pollution set forth in Article IX of the Helsinki Rules. The pollution is caused by pesticide use in farming and phosphates from human habitation by the Old Ones.⁶² This conduct is attributable to Mercadia.⁶³ The introduction of pesticides and phosphates into the region has produced detrimental change to the composition and quality of both the aquifer's and lake's waters. This pollution has continued to substantially injure Harmonia. A substantial injury is one that "materially interferes with or prevents a reasonable use of the water."⁶⁴ Harmonia's use of Lake Lydia for drinking water and tourism is reasonable and requires contaminate free water. Therefore, Mercadia's pollution of the aquifer represents a material interference with that use.

- b) Mercadia has an absolute duty to abate the pollution.

While substantial injury exists, the scope of Mercadia's obligation must be determined under the principle of equitable utilization.⁶⁵ The pollution of the Galala Aquifer imposes a health risk to the residents of Trantor. The combined effects from the loss of drinking water, the formation of algae and toxins in the fish seriously endangers their health.⁶⁶ Under the

⁶² R.5.

⁶³ See supra text accompanying notes 3-5.

⁶⁴ See supra note 47, art. X comment c, at 500.

⁶⁵ See supra note 47, at 496.

⁶⁶ R.5.

Helsinki Rules⁶⁷ and the Montreal Rules on Transboundary Pollution,⁶⁸ pollution which endangers human health is unreasonable per se. Similarly, under the Montreal Rules on Water Pollution,⁶⁹ the pollution is legally unjustified, since it is highly dangerous to the waters of the aquifer and lake. Such type of conduct causing the pollution is deemed inconsistent with the principle of equitable utilization. Therefore, Mercadia has an absolute duty to abate the pollution.

- c) Mercadia's use of the resettlement area is not reasonable and equitable and is outweighed by the injuries suffered by Harmonia.

Assuming arguendo, that there is no absolute duty to abate, the principle of equitable utilization establishes that Harmonia's use of the waters are still entitled to protection. Mercadia claims that the damming of the Lakota River necessitated the need to relocate the Old Ones, so as to protect their cultural heritage. This claim is totally unfounded for the old ways are not being maintained. The centuries old inudation method of irrigation has been abandoned,⁷⁰ and the Old Ones have now adopted the modern practice of the use of pesticides.⁷¹ Thus, the presence of the Old Ones produces no cultural benefit to Mercadia and is an unnecessary waste of the Aquifer's water.⁷²

67 See supra note 47, at art. X comment (e).

68 See supra note 60, at art.IV.

69 Id. at Art.I, 13.

70 Clarifications to the Compromis #25.

71 Clarifications to the Compromis #24.

72 See supra note 47, at Art. V(2)(i) at 488.

Furthermore, the geography and hydrology of the basin⁷³ is unsuitable for farming and for human habitation. Steps could have been taken to determine a location more appropriate than the aquifer recharge area. For example, the Green River did not contain sufficient water to maintain the agricultural needs of the Old Ones. The diversion canal constructed to augment its flow could have been used to divert water from the Green River to the Lakota River. This would have allowed the Old Ones to remain at their ancestral home, thus avoiding the substantial injury suffered by Harmonia.⁷⁴

Contrary to Mercadia's uses, Harmonia's use of the water basin system is reasonable and equitable. It is critical to Harmonia's social and economic well-being.⁷⁵ The lake provides drinking water for the residents of Trantor.⁷⁶ As a result of the relocation of the Old Ones and the pollution of the Aquifer and Lake Lydia, Harmonia's citizens are subject to health risks, and Harmonia's economy is damaged. Harmonia recognized its obligation to keep the Lake and Aquifer clean. It operated an efficient waste treatment system that maintained the purity of the Aquifer. As a result of the pollution, the waters are no longer suitable for any use.

The balancing of these competing uses establishes that the claims for continued use of the resettlement area by the Old Ones

⁷³ Id. at Art. V(2)(a) and (b) at 488.

⁷⁴ Id. Art.V(2)(k).

⁷⁵ Id. Art.V(2)(e).

⁷⁶ R.5.

is not consistent with the principle of equitable utilization. Any desire to maintain the old ways must yield in light of the resulting health dangers imposed on Harmonia. Consequently, this Court should declare that Mercadia's use is not reasonable and equitable under Article's IV and X of the Helsinki Rules and hold Mercadia liable for the resulting damage to Harmonia's territory.

II. HARMONIA'S DIVERSION OF THE LAKOTA RIVER IS CONSISTENT WITH GENERAL INTERNATIONAL LAW.

A. The Doctrine of Extinctive Prescription Bars Mercadia's Assertion of a Claim Against Harmonia.

Mercadia's claim against Harmonia was not brought within a reasonable time and is therefore barred by the doctrine of extinctive prescription. This is a rule of international law which provides that a State's neglect to assert a claim within a reasonable time operates as a bar to a later assertion of that claim.⁷⁷ Harmonia notified Mercadia of its plans to construct the Lakota High Dam in 1979. Although aware of Harmonia's ongoing construction, Mercadia failed to assert any claim until two years after the Dam's completion.⁷⁸ In light of the substantial time spent on the construction of the Lakota High Dam,⁷⁹ Mercadia's neglect to commence a timely action in this Court bars maintenance of this suit.

⁷⁷ See supra note 1, at 349; I. Brownlie, Principles of Public International Law 156-64 (2d Ed. 1973); see generally, J.L. Brierly, The Law of Nations 62-3 (1963).
⁷⁸ R. 4.
⁷⁹ Id.

B. Under the Principle of Absolute Territorial Sovereignty, a State Has the Ungualified Right to Use the Waters of a Successive River Flowing Through Its Territory

Assuming that Mercadia's claim is not barred by extinctive prescription, Harmonia is entitled to exercise absolute territorial sovereignty. Sovereignty is the legal personality of a State accompanied by independence and refers to various rights, indefeasible except by special grant.⁸⁰ It is the essence of Statehood, providing the basis by which a State acts both internally and within the international community.⁸¹ A basic component of this sovereignty is the absolute "right of a State to control the exploitation of resources within its territory."⁸² In Resolution 626, the United Nations General Assembly states that "the right of people freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations."⁸³ The General Assembly adopted a detailed resolution declaring that "[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."⁸⁴

80 I. Brownlie, Principles of Public International Law 111 (2d ed. 1973).

81 2 Rousseau, Droit International Public, 56-68(1974).

82 Sohn, The Stockholm Declaration on the Human Environment, 14 Harvard Int'l L.J. 423,486 (1973).

83 G.A. Res. 626, 7 U.N. GAOR Supp.(No. 20) at 18, U.N. Doc. A/2361 (1953).

84 G.A. Res. 1803, 17 U.N. GAOR Supp.(No. 17)at 15, U.N. Doc. A/5217 (1963).

The General Assembly has further declared that a State may "freely dispose of [its] natural wealth and resources without prejudice to any obligations . . . based on . . . principles . . . of international law."⁸⁵ Harmonia's construction of the Lakota High Dam is in recognition of its duty to act in the interests of its citizens and is consistent with recognized international law regarding the exploitation of a State's natural resources.

A State's absolute sovereignty over its natural resources includes the right to exploit the waters of an international river flowing through its territory. In the absence of an agreement between co-basin States, "the waters of such a river are within the national territory of the State through which they flow, and thus subject to its exclusive control."⁸⁶ As consistently stated by the United States in its dealings with Canada and Mexico, an upper riparian State "may claim the right to divert at will and without restraint such waters as [it] may require" regardless of the effect produced upon the lower riparians.⁸⁷ The absolute sovereignty of a State over the waters of a successive river⁸⁸ finds support in the writings of qualified publicists who state that there is no rule of custom governing water relations between independent States,⁸⁹ and

⁸⁵ G.A. Res. 2200, Annex., 21 U.N. GAOR Supp. (No. 16) at 49,53, U.N. Doc. A/6316 (1967).

⁸⁶ H.W. Briggs, The Law of Nations 274 (1952).

⁸⁷ C.C. Hyde, International Law Chiefly as Interpreted and Applied by the United States 565 (1945).

⁸⁸ A successive river is one which flows through or into two or more States.

⁸⁹ F. Berber, Rivers in International Law 265 (1939).

that there are no general principles of international law which prevent an upper riparian from diverting these waters for its own uses.⁹⁰ In a decision involving territorial rights over a successive river, an Austrian Court adhered to this principle in dismissing the claims of the lower riparian State.⁹¹ Harmonia has acted in accordance with the recognized right of a sovereign State to exploit its natural resources. Any position short of such an absolute right would constitute an impermissible infringement upon Harmonia's sovereignty, and thus would violate international law.

C. The Doctrine of Prior Appropriation Does Not Preclude Harmonia's Utilization of the Lakota River for the Generation of Hydro-Electric Power.

The doctrine of prior appropriation, whereby the first State to appropriate the waters of an international river to a beneficial use acquires the right to its continued flow at existing levels,⁹² is not a rule of international law. The concept has been rejected by qualified publicists⁹³ and has not

⁹⁰ J. Simsarian, The Diversion of International Waters 105 (1939).

⁹¹ Decision Involving the Question of Territorial Rights Over A River Flowing Into a Lower-Lying State, (Imperial Royal Admin. Ct., Austria). 7 Am. J.Int'l L.653 (1913).

⁹² See, e.g., Arizona v. California, 298 U.S. 558,566 (1936); Arizona v. California, 283 U.S. 423,459 (1931).

⁹³ Niles, Legal Background of the Colorado River Controversy, 1 Rocky Mt. L. Rev. 73,96,99 (1928-9); Lasky, From Prior Appropriation to Economic Distribution of Water by the State-Via Irrigation Administration, 1 Rocky Mt. L. Rev. 161 (1928-9).

been followed by States.⁹⁴ It condones waste and prevents economic development.⁹⁵ Rather than representing an absolute right, priority of appropriation merely constitutes one of many factors to be considered in the utilization of international rivers.⁹⁶ Thus, Mercadia's historic and longstanding use of the Lakota River for irrigation purposes⁹⁷ does not act as a bar to the subsequent hydro-electric development by Harmonia.

Although not constituting a vested right, under certain circumstances an existing use has been afforded a preferred position in subsequent developments.⁹⁸ Such a preference is appropriate only when there is an irreconcilable conflict between

⁹⁴ See, e.g., Convention of Geneva Relating to the Development of Hydraulic Power Affecting More Than One State, Dec. 9, 1923, art. 2. 36 L.N.T.S. 75,81 (1925); Treaty Between Germany and France, Aug. 14, 1925, art 13, 75 L.N.T.S. 103, 268 (1928); Treaty Between United Arab Republic and Republic of Sudan, Nov. 8, 1959, 453 L.N.T.S. 51 (1963).

⁹⁵ See supra note 93.

⁹⁶ See, Vung-Zang Faung, Legal Problems Arising From the Diversion of International Waters 135-6 (1953) (N.Y.U. unpublished dissertation stating priority of appropriation is only one of many factors); Legal Aspects of the Hydro-Electric Development of Rivers and Lakes of Common Interest, U.N. Doc. No. E/ECE/136 at 36 (1952) (No absolute veto because of priority of appropriation); H. A. Smith, The Economic Uses of International Rivers 143 (1931); Hosni, The Nile Regime, 17 *Revue Egyptienne de droit International* 70,95 (1961).
⁹⁷ R. 3.

⁹⁸ Lipper, Equitable Utilization in The Law of International Drainage Basins 52 (1967) (Creates a "preferred right"); see also, Treaty Between United Arab Republic and Republic of Sudan, Nov. 8, 1959, 453 U.N.T.S 51 (1963); Treaty Between Denmark and Germany, Apr. 10, 1922, art. 17, 10 L.N.T.S. 73, 187, 209 (1922).

an existing and a proposed use.⁹⁹ Where there are two existing uses, the preference has no application.¹⁰⁰ A use is deemed existing immediately upon commencement of construction and is not limited to physical completion of the project.¹⁰¹ Harmonia began construction of the Lakota High Dam in 1980, creating an "existing use" five years prior to the instant litigation.¹⁰² Further, construction of the dam was completed in 1983, three years before suit was brought.¹⁰³ Under either view, the Lakota High Dam was an existing use at the time litigation began, thus rebutting any Mercadian claim of priority.

D. A Use Must Be Reasonable and Equitable To Be Afforded Protection Under the Principle of Equitable Utilization.

1. Equitable utilization represents a rule of international law.

As previously demonstrated, equitable utilization represents a rule of international law which recognizes that each co-basin State has an equal right to the utilization of a shared water source.¹⁰⁴ This equality of right, however, does not necessarily

99 Lipper, Equitable Utilization in The Law of International Drainage Basins 47 (1967).

100 Id. at 58.

101 See supra note, 47 at Ch. 2, Equitable Utilization, Art VIII (2)(a); Wyoming v. Colorado, 259 U.S. 419, 495 (1922); Arizona v. California, 283 U.S. 423, 463 (1931).

102 R. 3.

103 R. 4.

104 See supra, notes 43-64 and accompanying text; see also, Andrassy, Principles of Law and Recommendations on the Uses of International Rivers, 70 Am. Branch Report, Int'l. L. Ass'c. (1958).

constitute a right to an equal share in all circumstances.¹⁰⁵ Although the goal of equitable apportionment is the accomodation of all reasonable uses, where the competing uses are mutually exclusive, the benefits derived from one State's utilization may so clearly eclipse those of competing States as to require their termination.

2. Harmonia's construction of the Lakota High Dam is reasonable and equitable, outweighing Mercadia's use of the Lakota River for irrigation purposes.

Mercadia claims that its use of the Lakota River for the purpose of preserving the traditional farming methods of the Old Ones is reasonable and equitable, and therefore entitled to protection. However, the benefits derived from such a use do not outweigh those derived from the Lakota High Dam, and therefore the Mercadian use must yield. Diversion of international rivers for hydro-electric purposes has been recognized as having a priority among competing uses.¹⁰⁶ While acknowledging the need for cooperation among all co-basin States, the Geneva Convention for the Development of Hydraulic Power Affecting More Than One State¹⁰⁷ has taken the position that "the present convention in no way affects the right belonging to each State, within the

¹⁰⁵ Connecticut v. Massachusetts, 282 U.S. 660,670 (1931); see also, Batstone, The Utilization of the Nile Waters, 8 Int'l and Comp. L.Q. 523,536,558 (1959); Lipper, supra note 99, at 45.

¹⁰⁶ See, e.g., Treaty Between the United States and Canada, Jan. 17, 1961, T.I.A.S. No.8680.

¹⁰⁷ Convention of Geneva Relating to the Development of Hydraulic Power Affecting More Than One State, Dec 9, 1923, art. 2, 36 L.N.T.S. 75,81 (1925).

limits of international law, to carry out on its own territory any operations for the development of hydraulic power which it may consider desirable."¹⁰⁸ Equitable apportionment imposes a duty upon all co-basin States to negotiate in good faith with regard to the goal of maximizing the benefits derived from a successive river.¹⁰⁹ When notified of the Harmonian plans to construct the Lakota High Dam, Mercadia made no attempt to negotiate a reasonable position.¹¹⁰ Rather, in breach of its duty of good faith and good neighborly relations, Mercadia at all times demanded the full and undiminished flow of the Lakota River.

Although equitable apportionment does not require a use to be the most efficient possible, it is a significant factor in weighing the equities.¹¹¹ A use which is so inefficient as to constitute a reckless or deliberate waste is not entitled to protection.¹¹² The standard of efficiency to which a State is held will vary with its stage of development and with its financial and technical resources.¹¹³ The African Convention on

108

Id.

109 First Report on the Law of the Non-Navigational Uses of International Watercourses, U.N. Doc. A/CN.4/367, art. 7, at 33 (1983).

110 R. 3,4.

111 See supra note 47, at Ch. 2, Art. IV (b).

112 Lipper, supra note 99, at 46; see also, Nebraska v. Wyoming, 325 U.S. 589,618 (1945); Washington v. Oregon, 297 U.S. 517,527 (1936).

113 Id., at 46; see also, 1. Report of the Indus (Rau) Commission 52 (1942).

the Conservation of Nature and Natural Resources¹¹⁴ has adopted the duty of efficient usage as a fundamental principle, stating that "[t]he contracting States shall undertake to adopt the measures necessary to ensure conservation, utilization and development of . . . water . . . in accordance with scientific principles and with due regard to the best interest of the people."¹¹⁵ Mercadia's continued use of the Lakota's waters for the wasteful inundation method of irrigation, in light of their ability to implement more efficient methods, is tantamount to a reckless waste of water. As such, it is not worthy of protection.

Another significant factor in determining the equities of a particular case is the extent of a State's population deriving benefits from each of several competing uses.¹¹⁶ Mercadia's subsistence level farming directly benefits only the relatively small number of Old Ones.¹¹⁷ In contrast, Harmonia's entire population stands to benefit from the power generated by the Lakota High Dam. The industry developing from the smelting of bauxite will provide the jobs and foreign capital necessary to place Harmonia among the ranks of developing nations and to repay its substantial foreign debt.¹¹⁸ This is a status already

114 African Convention on the Conservation of Nature and Natural Resources, Algiers, Sept. 15, 1968, Organization of African Unity, C.M./232.

115 Id.

116 See supra note 47, at Art V(2)(f).

117 R. 3.

118 R. 2.

enjoyed by Mercadia¹¹⁹ and is an interest recognized as worthy of protection.¹²⁰ Additionally, the modern farming methods made possible by the hydro-electric power¹²¹ will provide food for a substantial portion of Harmonia's population.

Finally, the degree of a State's dependence upon a particular river must be considered in apportioning the finite quantity of that river's water among competing co-basin States.¹²² Harmonia's development as an industrialized nation is predicated upon the exploitation of its bauxite reserves. The Lakota High Dam presents the only practical source of the electric power necessary for such an industry.¹²³ Conversely, Mercadia enjoys several alternatives in the preservation of its cultural heritage. The canal constructed by Mercadia could have been used to augment the reduced flow of the Lakota permitting irrigation at the original homeland of the Old Ones. Moreover, Mercadia can use its technical and financial resources to modernize the irrigation methods employed by the Old Ones so as to be compatible with the Lakota's reduced flow.

In light of these alternatives, any injury resulting to Mercadia by reason of the existence of the Lakota High Dam is of a minimal nature. The slightness of injury must be considered in any balancing of the equities. "A State has no right to oppose the hydro-electric development of a section of international

119 R. 2.

120 6 U.N. GAOR Supp. (No. 20) at 20, U.N. Doc. A/2119 (1952).

121 R. 2.

122 See supra note 47, at Art. V(2)(h).

123 Clarifications to the Compromis #8.

waterway situated in the territory of another State if this will entail only slight injury to itself."¹²⁴ Thus, Mercadia's opposition to Harmonia's developmental efforts on the basis of its adverse effect upon the Old Ones is not sufficient to overcome the substantial benefits which derive from the Lakota High Dam.

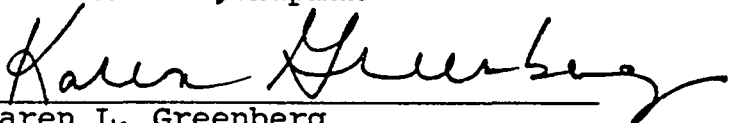
CONCLUSION

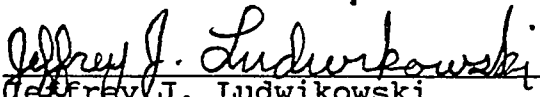
The Government of Harmonia respectfully asks this court to adjudge as follows:

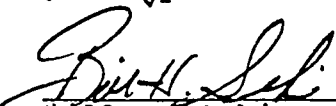
1. Declare that Mercadia is internationally responsible and liable for illegally polluting the Galala Aquifer;
2. Declare that Harmonia acted consistently with international law in diverting the Lakota River.

Respectfully submitted,


Brett Robert Chapman


Karen L. Greenberg


Jeffrey J. Ludwikowski


Bill H. Seki


Matt A. Tsukazaki