
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

AGENTS FOR MERCADIA

Brett Robert Chapman
Karen L. Greenberg
Jeffrey J. Ludwikowski
Bill H. Seki
Matt A. Tsukazaki

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

FEBRUARY 1987

HARMONIA,

APPLICANT,

v.

MERCADIA,

RESPONDENT.

MEMORIAL FOR RESPONDENT

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	iii
STATEMENT OF JURISDICTION.....	vii
STATEMENT OF FACTS.....	viii
QUESTIONS PRESENTED.....	xii
SUMMARY OF ARGUMENT.....	xiii
ARGUMENT.....	1
I. HARMONIA'S UNILATERAL ACTIONS IN THE CONSTRUCTION OF THE LAKOTA HIGH DAM ARE IN VIOLATION OF INTERNATIONAL LAW.....	1
A. <u>The Diminution in the Natural Flow of the Lakota River Resulting From Harmonia's Construction of the Lakota High Dam Has Unlawfully Injured Mercadia</u>	1
1. Under the Principle of Territorial Integrity, Mercadia Has the Right to the Continued Flow of the Lakota River at Naturally Occurring Levels.....	1
2. Harmonia Has an Obligation Not to Use Its Territory in Such a Manner as to Cause Injury to Mercadia.....	3
B. <u>As the First State to Appropriate the Waters of the Lakota to a Beneficial Use, Mercadia Has Acquired a Right to Its Continued Flow at Naturally Occurring Levels</u>	7
C. <u>Assuming Arguendo, That Mercadia Does Not Have a Right to the Natural Flow of the Lakota River, Its Use for Irrigation Is Protected Under the Principle of Equitable Utilization</u>	10
1. Equitable utilization represents a rule of international law.....	10
2. Mercadia's cultural heritage is protected under the principle of equitable utilization.....	13

II.	MERCADIA'S ACTIONS AFFECTING THE GALALA AQUIFER ARE CONSISTENT WITH INTERNATIONAL LAW.....	14
A.	<u>Mercadia Has No Obligation To Take Action Preventing Pollution From Entering the Territory of Mercadia.....</u>	14
1.	There is no binding authority which places a responsibility on Mercadia to refrain from injuring Harmonia's territory.....	15
a)	United Nation declarations and resolutions on pollution are not legally binding on Mercadia.....	15
b)	Judicial decisions do not impose a legal obligation on Mercadia to prevent pollution of the Galala Aquifer.....	16
c)	General principles of international law do not establish the extent and nature of Mercadia's responsibility for the pollution of the Galala Aquifer.....	17
2.	Under the principle of absolute territorial sovereignty, Mercadia has the unqualified right to use its territory without considering the interests of Harmonia.....	18
B.	<u>Under the Principle of Equitable Utilization, Mercadia Has No Duty to Refrain From the Pollution of the Galala Aquifer.....</u>	20
1.	Harmonia's territory has not been substantially injured.....	20
2.	Mercadia's use of the Resettlement Area is reasonable and equitable and thus protected.....	20
	CONCLUSION.....	23

INDEX OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>Arizona v. California</u> , 283 U.S. 423 (1931).....	8
<u>Barcelona Traction Case</u> , 1970 I.C.J. 3.....	14
<u>Corfu Channel (U.K. v. Albania)</u> , 1949 I.C.J. 4; 43 Am. J. Int'l. L. 588 (1949).....	6,16
<u>Fisheries Case (U.K. v. Norway)</u> , 1951 I.C.J. 116.....	9
<u>The International Commission of the River Oder</u> (Germany v. Poland) 1929 P.C.I.J. (ser. A) No. 23.....	12
<u>Lake Lanoux Arbitration (France v. Spain)</u> , 24 Int'l. L.R. 101 (1957).....	2,17
<u>North Sea Continental Shelf Case</u> , 1969 I.C.J. 3.....	15
<u>Nuclear Test Cases (Australia v. France; New Zealand v. France)</u> 1973 I.C.J. 100.....	6
<u>Report of the Helmand River Delta Commission</u> , Afghanistan and Iran, Feb. 1951, Paras. 208, 212, Reprinted in, Int'l Law Ass'n., <u>Principles of Law and Recommendations on the Uses of International Rivers</u> , 95 Amer. Branch Report (1958).....	8
<u>Societie Energie Electrica Du Littoral Mediterranean v. Compagnia Imprese Elettriche Liguri</u> , Italy, Court of Cassation (United Sections), February 13, 1939, 3 Whiteman, <u>Ann. Dig.</u> 120-122 (No. 47).....	10
<u>Trail Smelter Arbitration (Canada v. United States)</u> , 9 I.L.R. 31.....	5,16
 <u>Treaties</u>	
<u>Declarations and Resolutions of the United Nations Water Conference</u> , Mar Del Plata, March 1977 U.N. Doc. <u>E/Cone.</u> 70/29.....	10
<u>Exchange of Notes Regulating the Use of the Nile Waters for Irrigation Signed at Cairo, May 7, 1929, Gr. Brit.- Egypt, Gr. Brit. T.S. No. 17</u>	8
<u>Inter-American Bar Ass'n, 1 Proceedings of the Tenth Conference, Buenos Aires, Nov. 1957 (1958)</u>	9,10

Seventh International Conference of American States, Declaration Concerning the Industrial and Agricultural Uses of International Rivers, Montevideo Dec. 24, 1933, 28 Am. J. Int'l. L. Supp. 60 (1934).....	10
Treaty Between United States and Mexico Involving the Upper Rio Grande, 1906, 455 U.S.T. 2953.....	7
Treaty on the River Plate Basin, signed at Brasilia on 23 April 1969 Between Argentina, Bolivia, Brazil, Paraguay and Uruguay, <u>Published in VIII International Legal Materials, Current Documents</u> , 905 (1969).....	10
<u>Treatises and Books</u>	
J. Barros and D. Johnston, <u>The International Law of Pollution</u> (1974).....	18
H. Bokor-Szego, <u>The Role of the United Nations in International Legislation</u> (1978).....	5,14
H. W. Briggs, <u>The Law of Nations</u> (1952).....	14
I. Brownlie, <u>Principles of Public International Law</u> (2d. ed. 1973).....	1,18
J. Castaneda, <u>Legal Effect of the United Nations Resolutions</u> (1969).....	4
M. Huber, <u>Ein Beitrag Zur Lehre von ker Gebietshoheit an Grenzflussen</u> (Zeitschrift pur Volkerrecht und Bundes-staatsrecht 1907), 29 (English Translation in Berber, <u>Rivers in International Law</u> (1959)).....	2
P. C. Jessup, <u>A Modern Law of Nations</u> (1948).....	4
J. G. Lammers, <u>Pollution of International Watercourses</u> (1984).....	Passim
Lipper, <u>Equitable Utilization, in The Law of International Drainage Basins</u> (1967).....	11,12
I. L. Oppenheim, <u>International Law</u> (H. Lauterpacht 8th Ed. 1955).....	2
2 Rousseau, <u>Droit International Public</u> (1974).....	1
Seidl-Hohenveldern, <u>Austrian Views on International Rivers</u> (1902).....	6
P. Stainov, <u>The International Aspects of River Pollution Control (From the Standpoint of Socialist States)</u> (1964).	14

Journals

Caponera, <u>Patterns of Cooperation in International Water Law: Principles and Institutions</u> , 25 Nat. Resources J. 563 (1985).....	11
Caponera and Alheritiere, <u>Principles for International Groundwater Law</u> , 18 Nat'l Resources J. 589 (1978).....	15
Griffin, <u>The Use of Waters of International Drainage Basins Under Customary International Law</u> , 53 Am. I.C.J. Int'l. L. 50 (1959).....	6
Sohn, <u>The Stockholm Declaration on the Human Environment</u> , 14 Harv. Int'l. L. J. 423 (1973).....	19
<u>Decision Involving the Question of Territorial Rights Over a River Flowing Into a Lower-Lying State</u> , 7 Am. J. Int'l. L. 653 (1913).....	6
<u>The Utilization of the Nile Waters</u> , 8 Int'l. and Comp. L.Q. 523 (1959).....	12
<u>United Nations Documentation</u>	
U. N. Charter Art. 10.....	15
22 U.N.C.I.O. Docs. 70 (1945).....	15
G.A. Res. 626, 7 U. N. AOR Supp. (No. 20) at 18, U.N. Doc A/2361 (1953).....	1,19
<u>Integrated River Basin Development</u> , U.N. Doc. E/3066 (1958).....	9
U.N. Doc. A/AC/97/5 Rev. 2, E/3511, A/AC/97/13 (1962)...	19
<u>Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage, Adopted by the United Nations Educational, Scientific and Cultural Organization General Conference at its 17th Session, Paris, Nov. 16, 1972, Printed in U.N.E.S.C.O. Conventions and Recommendations of UNESCO Concerning the Protection of the Cultural Heritage</u> , 163 (1972).....	7
<u>Report of the United Nations Stockholm Conference on the Human Environment</u> , U.N. Doc. A/Conf. 48/14 (1972)...	3,19
<u>Statement by the Australian delegate in the discussion of the Stockholm Declaration by the General Assembly's second committee</u> , U.N. Doc. A/C .2/SR. 1468 (1972).....	4

<u>Recommendation Concerning the Safeguarding and Contemporary Role of Historic Areas, Adopted by UNESCO at its 19th Session held at Nairobi, Nov. 26, 1976</u> <u>Reprinted in, Conventions and Recommendations of UNESCO Concerning the Protection of the World Cultural and Natural Heritage, 191 (1976).....</u>	13
<u>First Report on the Law of the Non-Navigational Uses of International Watercourses, U.N. Doc. A/CN. 4/367 (1983).....</u>	10,11
<u>Miscellaneous</u>	
<u>The Act Regarding Navigation and Economic Cooperation Between the States of the Niger Basin, Oct. 26, 1963, Para. 3 (Preamble), in 1963 Annuaire de Droit International 883.....</u>	12
<u>Black's Law Dictionary 1551 (4th Ed. 1968).....</u>	3,17
<u>Cano, The Juridical Status of International (Non-Maritime) Waters in the Western Hemisphere, cited in C. B. Bourne, 3 Can. Yrbk. Int'l. L. 187, 203 (1965).</u>	3
<u>International Law Ass'n., Helsinki Rules on the Uses of Waters of International Rivers, Report of the Fifty-Second Conference Held at Helsinki, (1966).....</u>	Passim
<u>Int'l. Law Ass'n., Report of the 48th Conference (New York), (1959).....</u>	8
<u>Principles of Law Governing the Uses of International Rivers, 1958 Am. Branch Report, Int'l. Law Ass'n. xi, Principle II.....</u>	8

STATEMENT OF JURISDICTION

The Governments of Mercadia and Harmonia 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, Art. 40, section 1.

STATEMENT OF FACTS

Mercadia is a coastal country bordered on the west by the sea and on the east by a landlocked country.(R.1) It shares its northern border with the country of Harmonia.(R.1) Originating in Harmonia, the Lakota River runs southward and crosses into Mercadia.(R.1) The Morningstar Mountain Range, lying east of the Lakota River, separates the fertile coastal lowlands from the semi-arid highlands.(R.1) These mountains provide water to the Lakota River.(R.1)

Mercadia is an economically developing country with an industrial base located in its urban area, which is in the far southern region of the country.(R.2) The urban area has experienced heavy migration from Mercadia's rural population, resulting in overcrowding and unemployment.(R.2) This has prompted the government to institute a program requiring rural people to remain in rural areas.(R.2)

The Old Ones, Mercadia's rural ethnic group of 100,000, once resided along the Lakota River, south of Harmonia.(R.3) This relatively poor area is the ancestral and spiritual homeland of the Mercadians.(R.3) It was the only area where this traditional culture remained.(R.3) For centuries, the Old Ones utilized the waters of the Lakota for the traditional method of irrigation farming.(R.3)

In 1979, Harmonia announced a plan to build the Lakota High Dam north of the Mercadian border.(R.2) The Dam was a part of Mercadia's five-year plan to develop its bauxite industry.(R.2) Electricity produced from this Dam would also be

used to maintain a new agricultural area north of the Dam site.

(R.2) An objective study of the effects of the Dam indicated that the flow of the Lakota would no longer be sufficient to support the Old Ones' traditional methods of irrigation.(R.3)

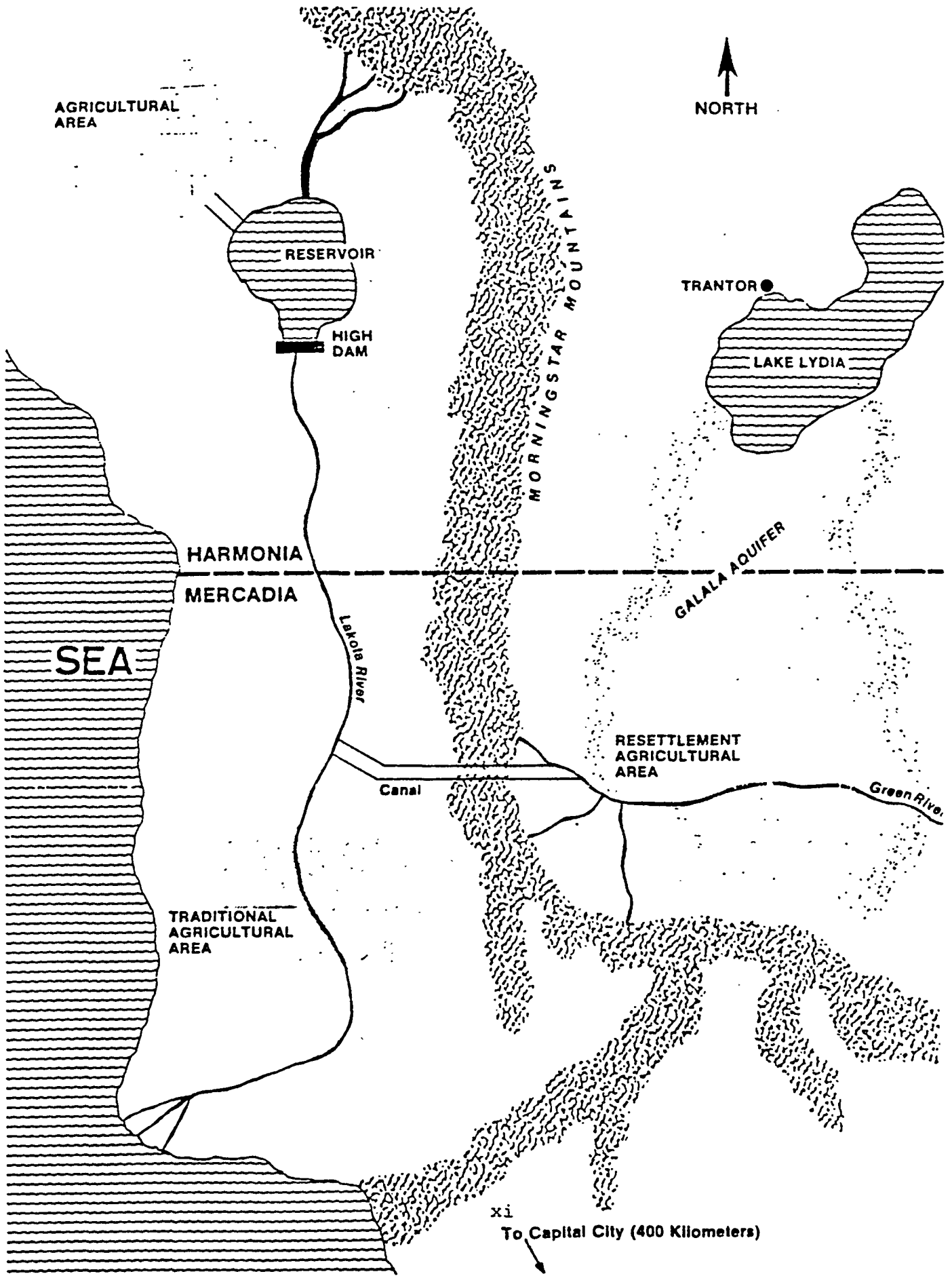
Mercadia immediately responded to Harmonia's plans by requesting a meeting of Foreign Ministers.(R.3) The Mercadian Foreign Minister emphasized that the same volume of water in the Lakota which naturally occurs during the spring was needed.(R.3) However, the Harmonian officials claimed their use of the water for hydroelectricity would be more valuable than the use by the Old Ones.(R.4) No agreement could be reached after nine months of negotiations.(R.4) Harmonia, nevertheless, went ahead with construction of the Dam which was completed in 1983.(R.4)

Because of the construction of the Lakota High Dam, Mercadia relocated the Old Ones to an area east of the Morningstar Mountains, slightly south of Harmonia's border.(R.4, C.No.2) The Green River, the only river in the area, is incapable of providing sufficient water to maintain the Old Ones.(R.4) To supplement the waters of the Green, the Mercadian Government built a diversion canal through the mountains connecting the Lakota with the Green River.(R.4) This enabled the Old Ones to farm in their new resettlement area. The Galala Aquifer underlies this area east of the Morningstar Mountains and extends northward into Harmonia.(R.5) Its recharge area is located near the resettlement area.(R.5) This fact was unknown to the Mercadian government at the time of relocation.(C.No.18)

Normal use of pesticides by the Old Ones and phosphates from farming and human habitation have found their way into the Aquifer. (R.5)

Lake Lydia, which lies in Harmonia, is fed by springs charged by the Galala Aquifer. (R.4) Trantor, a Harmonian provincial capital, is located on the shores of Lake Lydia. (R.4) Trantor utilizes the Lake for its drinking water and the area has been marked for future tourist development. (R.5) The waters of the lake are maintained by an existing waste treatment system at Trantor. (R.5) Pollutants found in Lake Lydia have been traced to the farming practices of the Old Ones. (R.5) In December of 1985, Harmonia protested to Mercadia, demanding that any actions causing pollution of the Galala Aquifer cease. (R.5)

Both countries are members of the United Nations. (R.5) Mercadia and Harmonia agreed to submit their dispute to the International Court of Justice. (R.5)



QUESTIONS PRESENTED

1. Whether Harmonia violated international law by unilaterally diverting the waters of the Lakota River, rendering her liable to Mercadia for all resulting harm?
2. Whether Mercadia's actions with respect to the Galala Aquifer were consistent with international law.

SUMMARY OF ARGUMENT

Harmonia's damming of the Lakota River is in contravention of three recognized rules of international law. First, international law recognizes the right of every State to the continued flow of the waters of an international river at naturally occurring levels. The Lakota High Dam, which substantially diminishes the flow of water reaching Mercadia, is in violation of this rule.

Second, it is a generally recognized principle of international law that a State cannot use its territory in such a manner as to cause injury to its neighboring States. The reduced flow of the Lakota River has necessitated the relocation of the Old Ones away from their ancestral homeland. This relocation has resulted in a substantial injury to Mercadia's efforts to preserve its cultural heritage. Preservation of a state's heritage is internationally recognized as a legitimate interest, and its injury through the actions of Harmonia is a violation of international law.

Finally, Mercadia has, through centuries of continuous use, acquired a vested right to continued receipt of the Lakota River's waters at naturally occurring levels. Creation of right through priority of appropriation is a rule of international law. Thus, construction of the Lakota High Dam, which interferes with this right, was in violation of international law.

Notwithstanding Harmonia's violation of international law, Mercadia's use of the Lakota River is protected under the principle of equitable utilization. Equitable utilization is a

rule of international law which recognizes the right of each co-basin State to a reasonable and equitable share in the utilization of a shared water source. Continued receipt of the natural flow of the Lakota River is necessary to the preservation of Mercadia's cultural heritage. The preservation of Mercadia's cultural heritage is internationally recognized as valid and will benefit all the Mercadian people, and is therefore entitled to protection.

Furthermore, Mercadia is not responsible under international law for the pollution of the Galala Aquifer. A State's sovereignty entitles it to an unqualified right to exploit its natural resources without concern for surrounding States. The pollution is a result of Mercadia's need to relocate the Old Ones, necessitated by Harmonia's construction of the Lakota High Dam. Since this relocation was to a location within Mercadia's exclusive jurisdiction, it has no responsibility to abate any pollution. Additionally, there are no international laws defining the substantive rights and duties of States sharing transboundary aquifers. In the absence of defined duties, Mercadia has no obligation to prevent the pollution.

Mercadia's use of the Galala Aquifer region for the protection of its cultural heritage is protected under the principle of equitable utilization. The validity of a State's protection of its heritage is a recognized principle of international law, and is therefore entitled to protection.

This Court should therefore declare that Harmonia is responsible under international law for the injuries to Mercadia

resulting from the diminution in the flow of the Lakota River. Further, this Court should declare that Mercadià has no obligation under international law to prevent pollution of the Galala Aquifer.

ARGUMENT

I. HARMONIA'S UNILATERAL ACTIONS IN THE CONSTRUCTION OF THE LAKOTA HIGH DAM ARE IN VIOLATION OF INTERNATIONAL LAW.

A. The Diminution in the Natural Flow of the Lakota River Resulting From Harmonia's Construction of the Lakota High Dam Has Unlawfully Injured Mercadia.

1. Under the Principle of Territorial Integrity, Mercadia Has the Right to the Continued Flow of the Lakota River at Naturally Occurring Levels.

It is the right of each co-basin State to demand the continued flow at naturally occurring levels of a successive river¹ passing through its territory. This right derives from the universally recognized principle of State sovereignty.² Sovereignty is the legal personality of a State accompanied by independence and refers to various rights, indefeasible except by special grant.³ It is the essence of Statehood and the basis by which a State acts both internally and within the international community.⁴ State sovereignty acknowledges the right of a State to exercise absolute control over natural resources occurring within its territory.⁵ A co-basin State's usurpation or hinderance of the flow of water entering a State interferes with that State's territorial jurisdiction and thus its sovereignty.

¹ A successive river is one which flows through or into two or more States.

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

³ Id.

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

⁵ G.A. Res. 626, 7 U.N. GAOR Supp. (No. 20) at 18, U.N. Doc. A/2361 (1953).

Correlative with this right of territorial sovereignty is the duty of each State not to alter or diminish the flow of a successive river reaching a lower riparian State.⁶

The right of a State to territorial integrity through the undiminished flow of successive rivers is a principle of international law supported by the writings of qualified publicists who state that:

The flow of not-national, boundary, and international rivers is not within the arbitrary power of one of the riparian States, for it 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. For this reason a State is . . . forbidden to stop or divert the flow of a river which runs from its own [territory] to a neighboring State⁷

This rule finds additional support in the writings of Max Huber who states that "[e]very State must allow rivers, over which it does not exercise unrestricted territorial sovereignty . . . to follow their natural course; it may not divert the water to the detriment of one or more of the other States with rights to the river or interrupt or artificially increase or diminish its flow."⁸ Each State has a right to demand physical integrity

⁶ Lake Lanoux Arbitration (France v. Spain), Int'l L. Rep. 101,111-2 (1957).

⁷ I L. Oppenheim, International Law 474-5 (8th Ed. Lauterpacht 1955).

⁸ Huber, Ein Beitrag Zur Lehre von der Gebietshoheit an Grenzflüssen (Zeitschrift für Volkerrecht und Bundes-Staatsrecht 1907), 29 at 160 (English translation in Berber, Rivers in International Law 20 (1959)).

in that part of the waterway under its jurisdiction.⁹ This requires that "its volume should not be modified."¹⁰

Under this principle of territorial integrity, Mercadia is entitled to the natural flow of the Lakota River which it has enjoyed for centuries. However, the objective study on the construction of the Lakota High Dam indicates that its operation would significantly diminish the flow of water reaching Mercadia.¹¹ Therefore, Harmonia has breached its international duty by violating Mercadia's right to territorial integrity.

2. Harmonia Has an Obligation Not to Use Its Territory in Such a Manner as to Cause Injury to Mercadia.

The maxim sic utere tuo ut atienum non laedas, which means "use your property in such a manner as not to injure that of another,"¹² is a principle of international law restricting the manner in which a State may use its own territory. Principle 21 of the Declaration of the United Nations Conference on the Human Environment¹³ (hereinafter the "Stockholm Declaration") specifically addressed the issue of State responsibility for damage inflicted beyond its own territorial limits. It 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

⁹ Cano, The Juridicial Status of International (Non-Maritime) Waters in the Western Hemisphere, cited in, C.B. Bourne, 3 Can. Yrbk. Int'l. L. 187, 203 (1965).
¹⁰ Id.

¹¹ Clarifications to Compromis #15.

¹² Black's Law Dictionary 1551 (4th Ed. 1968).

¹³ Report of the United Nations Stockholm Conference on the Human Environment, U.N. Doc. A/Conf. 48/14 (1972).

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.¹⁴

This principle acknowledges the sovereign right of States to exploit their natural resources. However, this right is balanced with the duty to ensure that such exploitation inflicts no damage beyond the limits of that State's national jurisdiction. The Stockholm Declaration represents "the first comprehensive international political consensus on environmental issues."¹⁵ While these declarations do not create law, they recognize and declare it. The purpose of incorporating customary rules and general principles into resolutions is to fix, clarify and make precise their form and scope, not to attribute legal value to them.¹⁶ Declaratory resolutions that incorporate and formulate general principles of law have a full probative legal value.¹⁷ As stated by Professor Philip C. Jessup, a former member of this Court, the declarations embodying these principles "are persuasive evidence of the existence of the rule of law which they enunciate."¹⁸

The recognition and formal expression of a customary rule or

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

¹⁵ 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).

¹⁶ J. Castaneda, Legal Effect of the United Nations Resolutions 168 (1969).

¹⁷ P.C. Jessup, A Modern Law of Nations 46 (1948).

¹⁸ Id. at 172.

a general principle is a part of positive international law.¹⁹ When these resolutions contain norms of international law, their acceptance by a majority vote constitutes evidence of government opinions.²⁰ Principle 21's specific language, "in accordance with the Charter of the United Nations and the principles of international law . . . ,"²¹ constitutes a recognition on the part of the community of States that these principles are generally recognized norms of international law.

The Trail Smelter Arbitration²² between Canada and the United States involved the question of whether Canada must pay for the damage inflicted upon the United States by fumes from a Canadian smelter. In a broad pronouncement of a principle of international law, the Tribunal concluded that "no State has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another or the property or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."²³ Although this decision was based upon damage inflicted by airborne pollutants, the Tribunal's reasoning is applicable to international injuries generally.²⁴

This principle has been reaffirmed in decisions by the

¹⁹ J. Castaneda, supra note 16, at 172.

²⁰ H. Bokor-Szego, The Role of the United Nations in International Legislation 50-51 (1978).

²¹ See supra, note 14 and accompanying text.

²² Trail Smelter Arbitration (Canada v. United States), 9 I.L.R. 315 (1938)

²³ Id. at 317.

²⁴ See, J.G. Lammers, Pollution of International Watercourses 588 (1984).

International Court of Justice (hereinafter "ICJ"). In the Corfu Channel Case,²⁵ the ICJ was asked to decide whether Albania was responsible under international law for the injuries incurred by the United Kingdom, when mines in the territorial waters of Albania damaged British ships and crewmen. 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."²⁶ In the Nuclear Test ²⁷ Cases, the ICJ addressed the territorial sovereignty claim of both Australia and New Zealand against France, and acknowledged that a duty of reparation is owed by a State causing injury to another State's territory.²⁸

This recognized international duty implicitly rejects the Harmon Doctrine as it applies in the context of a successive river. That doctrine, which permits a State to injure its neighboring States with impunity, is not a rule of international law.²⁹ The Harmon Doctrine has never been applied in its absolute form in an international dispute.³⁰ Even its principal proponent, the United States, has consistently followed a practice of recognition and accommodation of the interests of its neighboring

²⁵ Corfu Channel (U.K. v. Albania), 1949 I.C.J. 4; 43 Am. J. Int'l. L. 588 (1949).

²⁶ Id. at 22.

²⁷ Nuclear Test Cases (Australia v. France; New Zealand v. France) 1973 I.C.J. 100.

²⁸ Id. at 131.

²⁹ Griffin, The Use of Waters of International Drainage Basins Under Customary International Law, 53 Am. J. Int'l. L. 50,59 (1959); see also, Seidl-Hohenveldern, Austrian Views on International Rivers, 192 (1962).

³⁰ Decision Involving the Question of Territorial Rights Over a River Flowing Into A Lower-Lying State, 7 Am. J. Int'l, . L. 653 (1913) (municipal law decision).

States regarding the use of international rivers.³¹

Harmonia's construction of the Lakota High Dam materially altered the flow of the Lakota River into Mercadia and has precluded the Old Ones' continued practice of their traditional ways.³² These actions were knowingly taken in light of an objective study carried out by a fully qualified third party consultant.³³ The centuries old practice of inundation irrigation is an integral part of the heritage which the Old Ones represent. Diminution in the flow of the Lakota prohibits this traditional irrigation method and has necessitated relocation of the Old Ones away from their ancestral and spiritual homeland, resulting in "a definite loss and an irreversible impoverishment"³⁴ of Mercadian heritage. This substantial injury has thereby violated Harmonia's international obligation not to impose harm upon neighboring States.

- B. As the First State to appropriate the Waters of the Lakota to a Beneficial Use, Mercadia Has Acquired a Right to Its Continued Flow at Naturally Occurring Levels.

The State which is first to appropriate a specific quantity of

³¹ See, e.g., Treaty Between United States and Mexico Involving the Upper Rio Grande, 1906, 455 U.S.T. 2953, (reciting the Harmon doctrine, but based on comity and equity).

³² R.3.

³³ Clarifications to Compromis #19.

³⁴ Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, adopted by the United Nations Educational, Scientific and Cultural Organization (hereinafter UNESCO) General Conference at its 17th Session, Paris, Nov. 16, 1972, printed in U.N.E.S.C.O. Conventions and Recommendations of UNESCO concerning the protection of the Cultural Heritage, 163,167(1972).

water from a successive river and put it to a beneficial use acquires a perpetual right to the continued flow of that same quantity.³⁵ This doctrine of prior appropriation is a principle of international law.³⁶

In its report concerning the contemplated diversion of the Indus River in the province of Punjab, the Indus (Rau) Commission expressly recognized the legal significance of a prior appropriation, stating that "priority of appropriation gives superiority of right."³⁷ Similarly, in an Exchange of Notes Regarding the Use of the Nile, the United Kingdom expressly recognized Egypt's claim of legal right by virtue of prior appropriation and agreed not to "infringe [upon] Egypt's natural and historical rights in the waters of the Nile. . . ." ³⁸

A similar dispute was addressed by the Helmand River Delta Commission when Iran's historic use of the River was threatened by Afghanistan's construction of a hydro-electric dam.³⁹ Recognizing the validity of rights acquired through priority of appropriation, the Commission ordered that the rate of storage be modified to

³⁵ See, e.g., Arizona v. California, 283 U.S. 423, 459 (1931).

³⁶ Int'l Law Ass'n, Report of the 48th Conference (New York), ix, resolution 2 (1959); see also, Principles of Law Governing the Uses of International Rivers, 1958 Am. Branch Report, Int'l Law Ass'n, xi, principle II.

³⁷ 1 Report of the Indus (Rau) Comm. 10-11 (1942).

³⁸ Exchange of Notes Regulating the Use of the Nile Waters for Irrigation signed at Cairo, May 7, 1929, Gr. Brit.-Egypt, Gr. Brit. T.S. No. 17.

³⁹ Report of the Helmund River Delta Commission, Afghanistan and Iran, Feb. 1951, paras. 208, 212, reprinted in Int'l. Law Ass'c, Principles of Law and Recommendations on the Uses of International Rivers, 95 Amer. Branch Report (1958).

accommodate Iran's traditional use of inundation irrigation.⁴⁰ Thus, the practice of States recognizes the validity of the principle of prior appropriation as international law.

Moreover, a decision of the I.C.J. has also recognized the validity of the principle of prior appropriation. In the Fisheries Case, Norway's prior and longstanding claim to disputed territorial waters was held conclusive against a competing claim of right by the United Kingdom.⁴¹

The United Nations' Integrated River Basin Development Report⁴² recognized the widespread use of prior appropriation in the practice of States. The Report noted that "historic uses and priority of appropriation have, in many cases, come to have an almost sacred significance, irrespective of the benefits actually derived, or whether the water is being put to the best use."⁴³ A similar position was taken by the Inter-American Bar Association who recognized "the right of each State to the maintenance of the status of its existing beneficial uses"⁴⁴

For centuries, Mercadia has utilized the waters of the Lakota to irrigate crops grown by the Old Ones.⁴⁵ This prior and longstanding appropriation of the Lakota's waters to a beneficial use gives Mercadia a legally cognizable right to continued

40 Id.

41 Fisheries Case (U.K. v. Norway), 1951 I.C.J. 116.

42 Integrated River Basin Development, U.N. Doc. E/3066 (1958).

43 Id. at 38.

44 Inter-American Bar Ass'n, 1 Proceedings of the Tenth Conference, Buenos Aires 14-21, Nov. 1957 246-8 (1958).

45 R.3.

enjoyment of that same quantity of water. Harmonia's actions in constructing the Lakota High Dam therefore violate international law by depriving Mercadia of its right, acquired through priority of appropriation, to the full flow of the Lakota River.

C. Assuming Arguendo, That Mercadia Does Not Have a Right to the Natural Flow of the Lakota River, Its Use for Irrigation Is Protected Under the Principle of Equitable Utilization.

1. Equitable utilization represents a rule of international law.

The principle of equitable utilization is a rule of international law supported by the practice of States⁴⁶ and the writings of qualified publicists.⁴⁷ It has been adopted by the International Law Association (hereinafter "ILA"), in the Helsinki Rules, as evidence of a general principle of international law regarding utilization of international watersystems.⁴⁸ This

⁴⁶ See, e.g., Treaty on the River Plate Basin, signed at Brasilia on 23 April 1969 Between Argentina, Bolivia, Brazil Paraguay and Uruguay, published in VIII International Legal Materials, Current Documents, 905(1969); Societe Energie Electrique du Littoral Mediterranee v. Compagnia Imprese Elettriche Liguri, Italy, Court of Cassations (United Sections), February 13, 1939, 3 Whiteman, Ann. Dig. 120-122 (No. 47).

⁴⁷ First Report on the Law of the Non-Navigational Uses of International Watercourses, U.N. Doc. A/CN.4/367 (1983); Declarations and Resolutions of the United Nations Water Conference, Mar Del Plata, March 1977 U.N. Doc. E/CONE.70/29 at 51; 1 Inter-American Bar Association, Proceedings of the Tenth Conference, 246-8, Buenos Aires (Buenos Aires 1958); Seventh International Conference of American States, Declaration concerning the Industrial and Agricultural Uses of International Rivers, Montevideo, Dec. 24, 1933, 28 Am. J. Int'l. L. Supp. 60 (1934).

⁴⁸ International Law Ass'n, Helsinki Rules on the Uses of Waters of International Rivers, Report of the Fifty-Second Conference Held at Helsinki, 447 (1966).

principle is endorsed by the United Nations, which has taken the position that "[a]n 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"49

Article IV of the Helsinki Rules provides that each co-basin State has the right to share equitably in the utilization of an international river.⁵⁰ The purpose of equitable utilization is the accommodation of the multiple and diverse uses sought by all co-basin States.⁵¹ All such States are under an obligation to reconcile their interests with those of other potentially affected States.⁵² Any claim to the rightful use of a successive river must therefore be judged in regard to the particular social, environmental and economic context of the entire drainage basin in which it is being asserted.⁵³

To warrant protection, a use must be both reasonable and equitable.⁵⁴ Reasonableness depends upon the natural features of the river, and equity depends upon the circumstances surrounding

49 First Report on the Law of the Non-Navigational Uses of International Watercourses, U.N. Doc. A/CN.4367 at 31, (1983).

50 See supra note 48, at Ch. 2, Art. IV ("Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial use of the water of an international drainage basin.).

51 Lipper, Equitable Utilization, in The Law of International Drainage Basins, 45 (1967).

52 See supra, note 48, at Ch. 2, Art. IV comment (a).

53 Id.

54 Id.; see also, Lipper, supra note 51, at 63.

the use to which the river is put.⁵⁵ In determining the apportionment of a river's waters between several competing States, all relevant factors must be taken into consideration.⁵⁶ While Article V of the Helsinki Rules articulates several relevant factors, the list is not exhaustive and no particular priorities are assigned.⁵⁷ The weight accorded to a particular factor is to be determined by comparison with each other relevant factor.⁵⁸

Equitable utilization acknowledges that each co-basin State has an equal right to the utilization of a successive river's waters.⁵⁹ This equality of right, however, does not mean a right to an equal share in all circumstances.⁶⁰ Due to the finite quantity of a river's water, apportionment among competing uses often necessitates the modification of one State's use.⁶¹ Harmonia's appropriation of the full flow of the Lakota River must be modified to accommodate Mercadia's equitable right to share in the river's benefits.

55 Caponera, Patterns of Cooperation in International Water Law: Principles and Institutions, 24 Nat. Resources J. 563, 567 (1985)

56 See supra, note 48, at Ch. 2, Art. V(1).

57 See supra, note 48, at Ch. 2, Art. V(2).

58 Id.

59 See supra, note 48, at Ch. 2, Art. IV Comment (a).

60 See, e.g., Lipper, supra note 51, at 45; The International Commission of the River Oder (Germany. v. Poland) 1929 P.C.I.J. (ser. A) No. 23, at 27; The Utilization of the Nile Waters 8 Int'l. and Comp. L.Q. 523, 536, 558 (1959); The Act Regarding Navigation and Economic Cooperation Between the States of the Niger Basin, Oct. 26, 1963, para. 3 (preamble), in 1963 Annuaire de Droit International 883.

61 See supra, note 37.

2. Mercadia's cultural heritage is protected under the principle of equitable utilization.

Harmonia's diversion of the full flow of the Lakota River is not equitable in light of Mercadia's legitimate interest in the protection of its cultural heritage. The Old Ones are the spiritual ancestors of all Mercadians.⁶² Their practice of traditional farming and irrigation methods in the ancestral homeland along the Lakota River represents the only area in which traditional Mercadian culture survives.⁶³ In the Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas, UNESCO expressly recognized the legitimacy of a State's protection of its cultural heritage, stating that it is a general principle of international law that "[h]istoric areas and their surroundings should be regarded as forming an irreplaceable universal heritage."⁶⁴ Preservation of a nation's cultural heritage is to be given the utmost deference and protection.⁶⁵ The way of life practiced by the Old Ones represents Mercadia's only link with its past. Further, the benefits derived from preservation of this heritage accrue to all the Mercadian people. Thus, Mercadia's utilization of the Lakota River is reasonable and

62 R.3.

63 Id.

64 Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas, adopted by UNESCO at its 19th session held at Nairobi, Nov.26, 1976, reprinted in, Conventions and Recommendations of UNESCO concerning the protection of the World Cultural and Natural Heritage, 191,197 (1976).

65 Id. at 196.

equitable, and outweighs Harmonia's claim to the full flow of the Lakota River.

II. MERCADIA'S ACTIONS AFFECTING THE GALALA AQUIFER ARE CONSISTENT WITH INTERNATIONAL LAW.

A. Mercadia Has No Obligation to Take Action Preventing Pollution From Entering the Territory of Harmonia.

Under general international law a State will, in principal, only incur responsibility for conduct which is both attributable to the State under international law and which constitutes a breach of an international obligation of the State.⁶⁶ As emphasized in the Barcelona Traction Case,⁶⁷ a State is entitled to the exact observance of rules of international law only when the State has a clearly defensible legal interest.⁶⁸ There is no general international water law which binds States to substantive obligations and responsibilities in connection with international water pollution.⁶⁹ Presently, international law imposes no obligation upon a State to prevent pollution from occurring within its own territory. Additionally, there is no customary international law that establishes rules which are applicable in settling concrete disputes regarding water pollution.⁷⁰

⁶⁶ J.G. Lammers, Pollution of International Watercourses, 588(1984).

⁶⁷ 1970 I.C.J. 3.

⁶⁸ Id. at 32, para. 35.

⁶⁹ H.W. Briggs, The Law of Nations 274 (1952); P. Stainov, The International Aspects of River Pollution Control (From the Standpoint of Socialist States) 139,140 (1964).

⁷⁰ Id.

1. There is no binding authority which places a responsibility on Mercadia to refrain from injuring Harmonia's territory.

Before a rule becomes customary international law, there must be general acceptance of the rule as indicated by uniform State practice accompanied by opinio juris sive necessitatis.⁷¹ In a survey of international groundwater law, it was determined that the "[c]riteria [by] which it is possible to derive from international State practice with regard to international law principles governing 'shared' groundwater resources are fragmentary" and that "international judicial decisions have as yet little relevance."⁷² The survey also concluded that references to groundwater in international treaties "are too scant and too limited in scope to propose them in terms of customary law."⁷³

- a) United Nations declarations and resolutions on pollution are not legally binding on Mercadia.

Article 10 of the United Nations Charter⁷⁴ provides that resolutions, except those relating to the internal function of the United Nations, are of a recommendatory character and do not create obligations for Member States. They cannot in themselves be regarded as works of international law or as sources of obligations under international law. The San Francisco Conference which drafted the United Nations Charter took a strong stand to

⁷¹ North Sea Continental Shelf Case, 1969 I.C.J. 3, 251.

⁷² Caponera and Alheritiere, Principles for International Groundwater Law, 18 Nat'l. Resources J. 589, 610 (1978).

⁷³ Id. at 610.

⁷⁴ U.N. Charter art. 10.

the effect that the General Assembly should have no legislative authority.⁷⁵ Since the declarations and resolutions of the United Nations General Assembly have no legally binding effect, they can not impose an obligation on Mercadia to prevent pollution within its own territory.

- b) Judicial decisions do not impose a legal obligation on Mercadia to prevent pollution of the Galala Aquifer.

No judicial or arbitral decision has established the substantive rights and duties of States regarding pollution of international waters.⁷⁶ In the Trail Smelter Arbitration,⁷⁷ the Tribunal's judgment does not establish a principle for liability since Canada had already accepted liability under the terms of the Compromis.⁷⁸ Additionally, the principle established by the Tribunal requires that the "case [be] of serious consequence and the injury be established by clear and convincing evidence".⁷⁹ The resulting harms to Harmonia do not have a detrimental effect. Lake Lydia's waters still provide some valuable uses to Harmonia.⁸⁰ Furthermore, Harmonia has not proven injury based on the requisite standard of clear and convincing evidence. In the Nuclear Test Cases,⁸¹ the ICJ found no reason to deal with the

75 22 U.N.C.I.O Docs.70 (1945).

76 See Lammers supra note 66, at 528.

77 Trail Smelter (U.S. v. Canada) 9 Int'l. L. R. 315 (1938).

78 Id.

79 Id. at 317.

80 See infra page 20.

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

merits of the case since France had ceased its testing.⁸² However, in his opinion, Judge Ignacio-Pinto wrote that there was "[n]o existing legal means in the present state of the law which would authorize a State to come before the Court asking it to prohibit another State from carrying out on its own territory such activities, which involve risks to its neighbors."⁸³ In the Lake Lanoux Arbitration,⁸⁴ although it specifically referred to pollution as an international problem, this question never came before the Tribunal. The Tribunal was simply called upon to decide whether the effects of certain projected works for the utilization of waters of an international river would be such as to amount to a violation of treaty provisions imposing various restrictions on the use of waters of Lake Lanoux.⁸⁵

The Nuclear Test Case and Lake Lanoux Arbitration cannot be accepted as having created a legally binding obligation that States are responsible for harms emanating from their territory. Their reasoning was not adequately based on customary international law or general principles of law.⁸⁶ Hence, Mercadia is not responsible for the resulting harm to the territory of Harmonia.

- c) General principles of international law do not establish the extent and nature of Mercadia's responsibility for the pollution of the Galala Aquifer.

82 Id.

83 Id.

84 Lake Lanoux, 24 Int'l. L. R. 101 (1957).

85 Id. at 302-3.

86 See Lammers supra note 66, at 529.

The maxim sic utere tuo⁸⁷ has been argued to be a principle recognizing restrictions on the use of waters in situations involving pollution.⁸⁸ However, its persuasiveness must be limited. Without specific criteria to determine the existence and extent of a State's responsibility for pollution, it cannot be invoked to establish Mercadia's responsibility for the injury suffered by Harmonia.⁸⁹ There is considerable uncertainty about the existence and application of the maxim.⁹⁰ Sic utere tuo has been said to be "mere verbiage," "no help to decision," and "utterly useless as a legal maxim."⁹¹ Even where recognized, the principle has not been strictly construed so as to literally prohibit every injury regardless of nature or extent.⁹² Since this principle does not impose any substantive duty on States concerning water pollution, it is ineffective to establish any obligation on Mercadia.

2. Under the principle of absolute territorial sovereignty, Mercadia has the unqualified right to use its territory without considering the interests of a Harmonia.

Sovereignty is the legal personality of a State accompanied by independence and refers to various rights, indefeasible except by special grant.⁹³ The right of a State to control the

⁸⁷ See supra text accompanying note 12.

⁸⁸ See Lammers supra note 66, at 570.

⁸⁹ J. Barros and D. Johnston, The International Law of Pollution 70 (1974).

⁹⁰ See Lammers supra note 66.

⁹¹ See sources cited in Blacks Law Dictionary, supra note 12.

⁹² See Lammers supra note 66, at 571.

⁹³ I. Brownlie, Principles of Public International Law 111 (1973).

exploitation of resources within its territory is one of the basic components of State sovereignty.⁹⁴ In Resolution 626, the United Nations General Assembly pointed out 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."⁹⁵ The General Assembly adopted a detailed resolution on the subject 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."⁹⁶

Principle 21 of the Stockholm Declaration reiterated the generally accepted principle that a State has the sovereign right to exploit its own resources.⁹⁷ This right is in accordance with the United Nations Charter and the principles of international law.

The resettlement area chosen by Mercadia is under its sole and exclusive jurisdiction. Therefore, the principle of absolute territorial sovereignty prevents the imposition of an obligation upon Mercadia to prevent the pollution of its territory.

⁹⁴ Sohn, The Stockholm Declaration on the Human Environment, 14 Harv. Int'l. L. J. 423,486 (1973).

⁹⁵ G.A. Res. 626, 7 U.N. GAOR Supp. (No. 20) at 18, U.N. Doc. A/2361 (1953).

⁹⁶ U.N. Doc. A/AC/97/5 Rev. 2, E/3511, A/AC/97/13 (1962).

⁹⁷ See supra note 13.

B. Under the Principle of Equitable Utilization, Mercadia Has No Duty to Refrain From the Pollution of the Galala Aquifer.

1. Harmonia's territory has not been substantially injured.

Article X of the Helsinki Rules⁹⁸ provides that, "consistent with the principle of equitable utilization of the waters of an international drainage basin, a State must prevent any new form of water pollution or any increase in the degree of existing water pollution. . .which would cause substantial injury in the territory of a co-basin State." Mercadia has no obligation under Article X unless Harmonia can establish that the pollution has caused substantial injury. A substantial injury is one that "materially interferes with or prevents a reasonable use of the waters".⁹⁹

Although the pollution has affected Lake Lydia, it has not materially interfered with Harmonia's use. Harmonia is still able to use the lake region for its planned tourist development. The formation of algae and the toxins in the fish do not materially interfere with this development. Additionally, while purity levels in the drinking water have declined, there is no indication that the water is unfit for human consumption. Where no substantially injury exists, Mercadia has no duty under Article X.

2. Mercadia's use of the Resettlement Area is reasonable and equitable and thus protected.

Regardless of the nature of the injury suffered by Harmonia,

⁹⁸ See supra note 48, at 499, Article X Comment (b).

⁹⁹ See supra note 48 at 500, Article X Comment (c).

the duty under Article X is still not absolute, for it must be reconciled with the principle of equitable utilization. The principle of equitable utilization is enunciated in Article IV, which provides that "[e]ach basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin."¹⁰⁰ In determining what is a reasonable and equitable use, all relevant factors are construed together.¹⁰¹

Equitable utilization contemplates a balancing of Mercadia's interests in preserving its cultural heritage and Harmonia's inability to use Lake Lydia for future tourist development. As stated by Comment C to Article IV of the Helsinki Rules, "a State that engages in a use. . .causing pollution is not required to take measures with respect to such pollution that would deprive it of equitable utilization."¹⁰²

Harmonia violated international law by damming the Lakota River, forcing the evacuation of the Old Ones from their ancestral home.¹⁰³ Relocation was necessary to preserve Mercadia's cultural heritage. With the increased migration of citizens from rural to urban areas¹⁰⁴ and the loss of cultural identity, Mercadia's need to maintain the life style of the Old Ones became critically important.

Furthermore, Harmonia's anticipated development of Lake Lydia

100 See supra note 48, at 486.

101 See Lammers supra note 66, at 543.

102 See supra note 48, at 499.

103 R.4.

104 R.2.

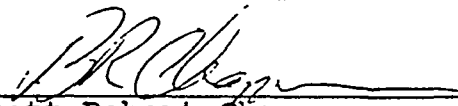
is a future use. Under Article VII of the Helsinki Rules, in light of any existing beneficial uses, such future use is not regarded as a protected use. Therefore, no present injury exists. Additionally, Harmonia is not precluded from any present use.

CONCLUSION


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

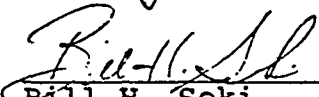
1. Declare that Harmonia is internationally responsible and liable for illegally appropriating the waters of the Lakota River;
2. Declare that Mercadia acted consistently with international law with regard to the Galala Aquifer.

Respectfully submitted,


Brett Robert Chapman


Karen L. Greenberg


Jeffrey J. Ludwikowski


Bill H. Seki


Matt A. Tsukazaki