

THE 1987 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE

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State of Harmonia

Applicant

v.

State of Mercadia

Respondent

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

The states of Harmonia and Mercadia submit the present dispute to this Court pursuant to Article 36. paragraph 1 of the Statute of the International Court of Justice.

STATEMENT OF FACTS

Harmonia and Mercadia are two coastal countries sharing similar geological and climatological attributes. (C.1) Harmonia lies north of Mercadia. (C.1) The coastal and interior regions of the two countries are separated by the Morningstar Mountains. (C.1) The Lakota River flows north to south through the western coastal region, its headwaters located in Harmonia and its terminus in Mercadia. (C.1)

Harmonia is an economically underdeveloped country with virtually no industrial base. (C.1) In addition, Harmonia has a very substantial foreign debt. (C.2) Mercadia is an economically advanced developing country with an established industrial base. (C.2)

As part of a five-year development plan, Harmonia plans to utilize its large deposits of bauxite by creating a bauxite

mining and processing industry. (C.2) It is estimated that the bauxite industry will generate an amount equal to approximately one-third of Harmonia's current foreign exchange earnings.

(Clarifications. 1) Because bauxite smelting requires significant amounts of electricity, Harmonia's plans included the construction of a hydro-electric dam on the Lakota River. (C.2)

The Lakota High Dam would provide the electricity needed for Harmonia's industrial development. (C.2) The availability of electricity would also permit the development of a new agricultural area by supporting a modern, electrically-powered irrigation system. (C.2)

While construction of the dam would result in a restricted flow of water to Mercadia, no other structural plans would provide the electricity necessary to Harmonia's development goals. (C.4)

Mercadia objected to Harmonia's development plan, demanding that Harmonia change its plan to permit the same volume of water to escape as would naturally flow into the Lakota in the spring. (C.3) Mercadia based its objection on the impact that a restricted flow would have on the Old Ones, a rural ethnic group of approximately 100,000 individuals. (C.3) The Old Ones engaged in subsistence farming just south of the Harmonia-Mercadia border. (C.3) Their ditch method of irrigation utilized the spring runoff of the Lakota. (C.3) The restricted flow of the Lakota would not provide a sufficient flow of water to support the Old Ones' subsistence agriculture. (C.3)

During nine months of meetings, Mercadia steadfastly refused any offer short of the full flow of the Lakota. (C,4) The meetings ended without an agreement being reached, and Harmonia proceeded to construct the Lakota High Dam. (C,4)

After construction of the dam, Mercadia moved the Old Ones to the semi-arid region east of the Morningstar Mountains. (C,4) As part of an effort to restrict heavy migration from rural to urban areas, Mercadia required rural populations to remain in rural areas. (C,2) The Green River flows through this region of Mercadia. (C,1) The Green originates in the Morningstar Mountains in Mercadia and flows through Mercadia to the interior of the continent. (C,1) In order to supplement the inadequate flow of the Green's waters, Mercadia built a diversion canal through the mountains connecting the Green with the Lakota. (C,4)

Prior to the relocation of the Old Ones, Trantor, a Harmonian provincial capital with a population of 150,000, was the only major habitation east of the Morningstar Mountains. (C,4 and Clarifications p.5) Trantor is located on Lake Lydia, a lake with clean beaches and good fishing. (C,4-5) Trantor has always maintained a high standard of waste treatment, preserving the pristine quality of the lake's waters. (C,5) Lake Lydia is fed by springs charged by the Galala Aquifer. (C,5) The Galala underlies the entire area east of the Morningstar Mountains, and is recharged near the resettlement area of the Old Ones. (C,5)

As part of its economic development plan, Harmonia planned

to expand its tourist industry by developing the area around Trantor. (C,2 and 5) Harmonia currently depends on its tourist industry for approximately one-third of its foreign exchange earnings. (C,2)

As a result of the Old Ones' use of pesticides, phosphates and concentrations of pesticides have polluted the Galala Aquifer. (C,5) The pollution of the Galala has resulted in the pollution of Trantor's drinking water, the formation of algae in Lake Lydia, and the presence of toxics in the lake fish. (C.5)

Mercadia disclaims all responsibility for the pollution, and refuses to take any action. (C,5)

QUESTIONS PRESENTED

I.

Does Mercadia's pollution of the Galala Aquifer violate international law?

II.

Is Mercadia liable for the damage resulting from pollution of the Galala Aquifer?

III.

Did Harmonia breach any legal duty to Mercadia by building the Lakota High Dam?

IV.

Can Mercadia claim Harmonia liable for its utilization of the Lakota River?

SUMMARY OF ARGUMENT

The pollution of the Galala Aquifer by citizens of Mercadia has resulted in substantial harm to the rights and interests of Harmonia. The pollution has impaired Harmonia's use of Lake Lydia as a source of drinking water, and threatens to prevent the development of the area surrounding the Lake for tourism. Harmonia is an economically underdeveloped country with a substantial foreign debt; its tourist industry currently accounts for one-third of its foreign exchange earnings, and expansion of this industry is crucial to its future development.

Prevention of transboundary pollution is an established principle of international law. State practice recognizes the duty of every State to use a common water resource equitably and efficiently, and to avoid pollution which substantially injures a neighboring State. Mercadia's use of the Aquifer as a run-off for pesticides and phosphates violates both of these principles. Harmonia uses the Aquifer, and the Lake fed by it, to support human habitation. Moreover, its use does not endanger the continuity of the Aquifer as a renewable natural resource. Mercadia's current use will destroy the Aquifer for all purposes other than as a disposal for chemical waste, and will result in the continued pollution of Lake Lydia.

Mercadia's pollution of the Galala is in no way justified by Harmonia's construction of the High Dam. While Mercadia initially raised objections to the reduction in the flow of the

river caused by the Dam. it subsequently consented to Harmonia's claim and acceded to Harmonia's use of the river. Mercadia abandoned its inefficient system of inundation irrigation and has since implemented alternative methods.

There is no evidence that relocation of the Old Ones away from their traditional homeland was a necessary or appropriate response to diminution of the water flow. Similarly, Mercadia offers no evidence that it could not have implemented more efficient methods of irrigation to sustain the region's agriculture utilizing a diminished, but consistent, flow of water. Mercadia has offered no reasons for not committing the resources expended on relocation and construction of the diversion canal to a modernization of the irrigation in the Lakota River valley.

Mercadia failed to negotiate in good faith in demanding absolute unimpaired flow of the river regardless of the correlative rights of other users of the watercourse. Because international law allocates the water of international rivers on the basis of comparative efficiency of use and need, Harmonia was justified in asserting superior utilization and completing the Dam as planned. Harmonia's plan for industrialization requires that it be allowed to advance legitimate and legal development rights.

Regardless of the effect of past conduct and claims by the parties, Harmonia is entitled to continued utilization, free of liability, of the Lakota River. Harmonia's use of the river is a reasonable, necessary, and beneficial use of a common water

resource, and is well suited to natural conditions present in the river basin.

I. MERCADIA'S POLLUTION OF THE GALALA AQUIFER VIOLATES ESTABLISHED PRINCIPLES OF INTERNATIONAL LAW.

The two major principles underlying the customs and principles of international watercourse law regarding transboundary pollution are: (1) the duty of every State to avoid causing substantial harm to another State through pollution of an international watercourse; and (2) the doctrine of "equitable utilization." Both the International Law Commission (ILC) and the independent International Law Association (ILA), have worked towards the codification of international law in this area. In 1966 the ILA adopted the Helsinki Rules on the Uses of International Rivers.¹ The ILC has relied upon the Helsinki Rules in formulating its draft conventions on international water law, most recently in 1984.²

A. International law prohibits transboundary pollution of an international watercourse which results in substantial harm to another State.

1. "International watercourses" include groundwaters such as the Galala Aquifer. The term "international watercourse," as used by the ILC in the 1984 set of draft articles on non-navigational uses of international watercourses, includes

¹ Report on the Fifty-Second Conference of the International Law Association held at Helsinki, August 14 to 20, 1966 at 484 (1967) (hereinafter cited as Helsinki Rules).

² Non-Navigational Uses of Int'l Watercourses, 1 Y.B. ILC 95, 1984, U.N. Doc. A/Cn.4/SER.A/1984 (hereinafter cited as 1984 ILC draft). Although not yet formally adopted by the ILC, the 1984 draft is a source of international law, not only as the work of a highly qualified publicist (then Special Rapporteur Jens Evensen), but also as a compilation of custom and general principles of international law (38(1)(b) and (c) of the Statute of the ICJ).

aquifers and groundwater, as well as surface waters.³

In this case, the watercourse encompasses Lake Lydia, the Galala Aquifer which feeds the Lake, and the Aquifer's recharge area near the Green River resettlement area in Mercadia. In addition, the "international drainage basin" approach of the Helsinki Rules also includes aquifers such as the Galala, with underground waters flowing into a common terminus (Lake Lydia).⁴

2. International custom recognizes a State duty to prevent pollution which substantially injures another State. Frequently repeated provisions in international conventions and treaties are evidence of customary international law.⁵ Article 38 of the Vienna Convention on the Law of Treaties also recognizes that a treaty provision may become binding on a third state as a customary rule of international law.⁶

Numerous treaty provisions prohibit pollution of an international watercourse, which causes substantial harm to other States. "Well over 100 treaties . . . indicate that there are

³ S. McCaffrey, An Update on the Contributions of the International Law Commission to International Environmental Law, 15 *Env'tl. L.* 667, 674 (1985). See also J. Evensen, Special Rapporteur, First Report on the Law of the Non-Navigational Uses of International Watercourses, Commentary to Article I, U.N. Doc. A/CN.4/367/Corr. 1.

⁴ Helsinki Rules, supra note 1, Article II, comment (b).

⁵ R. R. Baxter, Multilateral Treaties as Evidence of Customary International Law, 41 *B.Y.I.L.* 275, 300 (1965-66). See also B. Vitanyi, The International Regime of River Navigation (1979), p. 134.

⁶ Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27, May 23, 1969, reprinted in 63 *Am. J. Int'l. L.* 875 (1969).

principles limiting the power of States to use systems of international waters without regard to injurious effects on neighboring States."⁷

International custom recognizes a State obligation to ensure that its use of both surface and groundwaters does not effect an alteration in the environment so as to cause appreciable harm to water quality.⁸ The 1984 ILC draft has codified this principle to provide that States must prevent the pollution of the waters of an international watercourse which may cause "appreciable harm" to the rights and interests of other States.⁹

3. International Law recognizes the need to protect the environment from further pollution. Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration") provides: "States have ... 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."¹⁰ This Principle has become established as an

⁷ W.L.Griffin, U.S. Dept. of State, Memorandum of Legal Aspects of the Use of the Systems of Int'l Waters, Senate Doc. No. 118, 85th Congress, Second session (1958), reprinted in J.G. Lammers, Pollution of Int'l Watercourses (1984).

⁸ Statute for the River Uruguay, February 26, 1975, Argentina-Uruguay, Article 35, - U.N.T.S. -, reprinted in 2 Y.B. ILC 182. para. 157 (1983), U.N. Doc. A/CN.r/367/Corr. 1.

⁹ 1984 ILC draft, supra note 2, Article 23(1).

¹⁰ Report of the U.N.Conference on the Human Environment, U.N. Doc. A/CONF/14, at 2-65, and Corr. 1 (1972), Principle 21, reprinted in 14 Harv. Int'l. L.J. 423 (1973).

expression of opinio iuris; States have come to recognize that its practice is rendered obligatory by the existence of a rule of law requiring it.¹¹

Bilateral and multilateral treaties have extended this principle of State responsibility for injurious uses to the area of pollution demonstrating that states now recognize an obligation to prevent pollution of international watercourses.¹² Recommendation 35 of the Mar del Plata Action Plan, drafted at the 1977 United Nations Water Conference, stresses the need to preserve the aquatic environment and to protect ecosystems from pollution.¹³ Article 35 of the River Uruguay Statute expresses this principle using the "appreciable harm" liability standard of Article 23(1) of the 1984 ILC draft, requiring that the parties ensure that "the use of groundwater and of the river's tributaries do not ... cause appreciable harm to the regime of the river or the quality of its waters."¹⁴

4. Mercadia's pollution of the Galala has resulted in substantial harm to the rights and interests of Harmonia. An injury is substantial if it "materially interferes with or

¹¹ G. Handl, Territorial Sovereignty and the Problem of Transnational Pollution, 69 Am. J. Int'l. L. 50, at 66-67 (1975).

¹² Evensen, supra note 3, Commentary to Article 23.

¹³ Report of the U.N. Water Conference, Mar del Plata, p. 25, March 1977, Sales No. E.77.II.E.12, part 1.

¹⁴ Supra, note 8. See also Treaty on the River Plate and its Maritime Outlet, - U.N.T.S. - , 13 I.L.M. 251, 259-60 (1974), reprinted in 2 Y.B. ILC (Part two) 299, (1974).

prevents a reasonable use of the water" of an international watercourse.¹⁵ Mercadia's pollution of the Galala Aquifer has materially interfered with Harmonia's reasonable use of the waters of Lake Lydia.

The pollution of Lake Lydia threatens the viability of Trantor as a place of human habitation. In addition, it seriously impairs Harmonia's economic future by preventing development of the area around Trantor for tourism. This impairment is substantial; Harmonia currently depends on tourism for approximately one-third of its foreign exchange earnings, and plans to develop that industry.

Mercadia is responsible for the injury to Harmonia "regardless of whether the pollution results from public activity of the State . . . or from conduct of private parties within its territory."¹⁶ In light of the foregoing principles of State responsibility for the harmful effects of pollution, Mercadia has acted in violation of international law, and is responsible for the injuries its polluting activities have caused.

B. The doctrine of "equitable utilization" prohibits inefficient and unreasonable uses of international waters.

1. Equitable utilization weighs all benefits and detriments flowing from a use of an international watercourse. The doctrine of equitable utilization provides that each watercourse

¹⁵ Helsinki Rules, supra note 1, Article X, comment (c).

¹⁶ Id., Article X, comment (d)

State is entitled to a reasonable and equitable share of the uses of the waters of an international watercourse.¹⁷ The doctrine serves to encourage uses that provide maximum benefit to the watercourse States, while minimizing any resulting detriments and discouraging unreasonable uses. The doctrine has gained "overwhelming support" in the international community.¹⁸

2. State practice emphasizes beneficial uses of water and the avoidance of pollution. States recognize the avoidance of pollution as an integral part of equitable utilization.¹⁹ As applied by States, the doctrine of equitable utilization emphasizes the need to prevent pollution and to improve water quality.²⁰ "The basic objective of all water resource use and development . . . is to ensure the best use of water and to avoid its pollution in each country."²¹ This emphasis on pollution avoidance indicates an emerging concept: a polluting use can virtually never be a reasonable or equitable use.

3. The injury suffered by Harmonia as a result of Mercadia's pollution of the Galala outweighs any benefit that

¹⁷ 1984 ILC draft, supra note 2, Article 6(1); see also Helsinki Rules, supra note 1, Article IV.

¹⁸ C. B. Bourne, International Law and Pollution of International Rivers and Lakes, 21 U. Toronto L.J. 193, 195 (1971).

¹⁹ Report of the U.N. Conference on the Human Environment, Supra, note 10, Recommendation 51.

²⁰ Report of the U.N. Water Conference, Supra, note 13, Recommendation 35.

²¹ United Nations Conference on the Human Environment, Recommendation 51, supra, note 10.

Mercadia may derive from its polluting activity. Among the relevant factors to be considered in determining the reasonableness of a particular use is whether the watercourse is polluted as a consequence of that use.²² The pollution caused by the Old Ones threatens an important source of drinking water. This source is irreplaceable. A polluting use is a destructive and wasteful use. Harmonia's need for the clean waters of the Galala far outweighs any benefit that Mercadia might derive from the destruction of a valuable and irreplaceable resource.

Other relevant factors to be considered are the economic needs of each State²³, and the ability of a State to obtain international financing.²⁴ Harmonia is an economically underdeveloped country with a substantial foreign debt, and relies on the tourist industry for approximately one-third of its foreign exchange earnings. As part of a five-year development plan, Harmonia planned to expand its tourist industry by developing the area around Trantor. The Galala's pollution threatens the viability of this plan, thereby endangering Harmonia's economic future. Thus, Harmonia's entire future is threatened. The sole Mercadian activity involving the Galala's watercourse is the subsistence farming of the Old Ones. This activity does not contribute to Mercadia's economy.

Another factor to be considered is the size of the

²² 1984 ILC draft, supra note 2, Article 8(h).

²³ Helinski Rules, supra note 1, Article V(2)(e).

²⁴ Id., Article IV, comment (b).

population affected by a particular use.²⁵ The population of Harmonia as a whole relies on the development of the area around Trantor to improve the future economic outlook of their country. In addition, the 150,000 residents of Trantor depend on the lake fed by the Galala as a source of fresh water. In Mercadia, only the 100,000 Old Ones have any connection with the waters of the Galala.

II. MERCADIA IS LIABLE TO HARMONIA FOR INJURY RESULTING FROM POLLUTION OF THE GALALA AQUIFER.

- A. For its actions in violation of international law, Mercadia is required to cease pollution of the Aquifer and pay compensation to Harmonia.

In the Chorzow Factory case, the Permanent Court of International Justice stated that, in dealing with unlawful acts or omissions, "reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."²⁶ Mercadia, for the violation of international law set forth above, is obligated to make proper reparation to Harmonia and, insofar as possible, restore Lake Lydia to its pre-pollution state. This necessitates ordering the Old Ones to immediately cease all activities which pollute the Aquifer, and directing payment of compensation to Harmonia for the damage already incurred.

²⁵ Id., Article V(2)(f).

²⁶ Chorzow Factory (Indemnity) (1928), P.C.I.J., Series A, no. 17, p.47.

The Helsinki Rules also require ceasing the pollution and paying compensation to the injured State, declaring that where a State fails to prevent forms of water pollution which cause substantial injury in the territory of another State (as required by Article X(1)(a)), "the State responsible shall be required to cease the wrongful conduct and compensate the injured co-basin State for the injury that has been caused to it."²⁷ Under this Rule, Mercadia must cease the pollution of the Aquifer, and must pay compensation. "The recognized manner of reparation for injury of a physical nature is pecuniary compensation, and its measure extends at least to damages for the actual loss."²⁸

B. Mercadia is strictly liable to Harmonia for damages caused by its pollution of the Aquifer.

There is general agreement among commentators that under modern state practice, states may be held strictly liable for transboundary pollution which causes substantial damage, "even if the state has done all that it could to prevent the damage."²⁹

In the Trail Smelter Arbitration,³⁰ liability was imposed on a Canadian smelter for damages caused by its fumes in the United States. In reaching its decision, the tribunal relied upon principles of water law, analogizing fumes to water pollution,

²⁷ Helsinki Rules, supra note 1, Article XI(1).

²⁸ Id., Article XI, comment (c).

²⁹ A. Springer, The International Law of Pollution (1983), p. 134. See also Lammers, at 660, supra note 7.

³⁰ 3 U.N.R.I.A.A. 1905 (1941).

and held that "under the principles of international law ... no 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 persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."³¹ Liability was imposed even though no issue of fault was tried in the case, and without any proof that Canada had been negligent. The holding amounts to an imposition of strict liability for transfrontier pollution causing substantial harm.³²

The reparation in Trail Smelter was not limited to the payment of compensation to the United States. The tribunal held that the "Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington;"³³ to accomplish this, the tribunal imposed a smoke-abatement system on the smelter and provided in its final award for further compensation should damage be done in the future.³⁴ The same principle should apply in this case. To merely direct Mercadia to pay pecuniary compensation to Harmonia, without requiring that the pollution be ceased or abated, would "have the same material

³¹ Id. at 1965.

³² L.F.E. Goldie, International Principles of Responsibility for Pollution, 9 Columbia Journal of Transnational Law 283, 306-07 (1970).

³³ Trail Smelter, p. 1966.

³⁴ J. Read, The Trail Smelter Dispute, 1 The Canadian Yearbook of International Law 220-21 (1963).

consequences as a servitude on the territory"³⁵ of the affected State.

III. HARMONIA VIOLATED NO LEGAL OBLIGATION OR DUTY TO MERCADIA WHEN IT BUILT THE LAKOTA DAM.

A. Mercadia cannot make its claim regarding use of the Lakota River under color of any treaty or agreement.

1. No treaty or agreement exists between Harmonia and Mercadia regarding use of the Lakota River. Harmonia has neither acceded control over the uses of the Lakota by means of a treaty or through tacit forbearance.³⁶ "... (T)he rule according to which States may utilize the hydraulic force of international watercourses only on condition of a prior agreement between the interested States cannot be established either as a custom, or even as general principle of law."³⁷

2. Disputes not regulated by treaty provisions are governed by rules of customary international law.³⁸ No international custom exists regarding the use and sharing of international rivers, due to the differences in conditions and topography that characterizes world river systems.³⁹ Therefore, the validity of Mercadia's claim must depend on the conduct of the parties to the

³⁵ Helsinki Rules, supra note 1, Article XI, comment (e).

³⁶ B. Chauhan, Settlement of International Water Law Disputes in International Drainage Basins 217 (1981).

³⁷ Lake Lanoux Arbitration, (Fr. v. Spain) Int'l L. Rep. 101 (1958), reprinted in part in, 53 Am. J. Int'l L. 156 (1959).

³⁸ I. Brownlie, Principles of Public International Law 601 (3rd ed. 1979).

³⁹ Id at 619.

dispute and their comparative uses of the Lakota River.

3. Mercadia's abandonment of its use of the Lakota River is not the result of Harmonia's construction of Lakota Dam.

a. Mercadia's response was disproportionate to the impact of the Dam on the flow of the Lakota River. Mercadia raises this dispute over the Lakota River as an affirmative defense to its pollution of the Galala Aquifer. There is no evidence, other than the measures taken by Mercadia, that the Old Ones' need for water could not have been satisfied through modernization of irrigation or other means short of mass migration. The Old Ones, in their new home, employ irrigation techniques other than their traditional inundation method.⁴⁰ Mercadia offers no reason as to why it did not take such active measures to preserve the Old Ones in their traditional homeland.

b. Mercadia's relocation of the Old Ones contradicts an avowed policy of preserving rural populations in traditional homelands. Moving an indigenous population away from a traditional agricultural region is inconsistent with an avowed government policy to preserve Mercadia's rural population and suggests that the dispute over Lakota Dam is merely a "straw man" offered in defense of illegal pollution of the Galala Aquifer.

4. Mercadia did not negotiate in good faith when it first raised its objection to the Dam. Parties to a dispute should negotiate in good faith "with a view to arriving at a fair and

⁴⁰ Clarifications p.3

equitable solution...."⁴¹ Maintaining an intransigent attitude in demanding uninterrupted flow of the river to support wasteful inundation agriculture is not an exercise of good faith in negotiation. Harmonia has a right to initiate hydraulic projects subject only to a duty to review counter-proposals made by Mercadia. While review of alternative proposals advanced by a lower riparian is encouraged, the initiating state retains the right to give preference to its own project.⁴² There is no evidence that Harmonia did not evaluate Mercadia's demand that the spring flood of the Lakota continue unabated. Therefore, Harmonia breached no existing duty by completing and utilizing the Lakota Dam hydroelectric project as planned.

B. Harmonia's construction of Lakota Dam is a lawful exercise of sovereignty over water resources within its borders.

1. State sovereignty is a foundational principle of international law. One fundamental aspect of state sovereignty is "the supremacy of State power inside the country...."⁴³ Harmonia asserts its sovereignty to promote a beneficial use of the water. In contrast, Mercadia would attempt to raise the doctrine to bar a claim arising out of its destruction of the

⁴¹ Non-navigational Uses of Int'l Watercourses. supra note 2, art.32.

⁴² Convention of Geneva Relating to the Development of Hydraulic Power Affecting More Than One State. Dec.9, 1923, art.5. 36 L.N.T.S. 75 (1925).

⁴³ G. Elian, The Principle of Sovereignty Over Natural Resources 6 (1979).

Galala Aquifer, an assertion that is properly limited in international law.⁴⁴ "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their natural development and of the well-being of the people of the state concerned."⁴⁵ Construction of the Lakota Dam is a legal exercise of sovereignty in furtherance of internal policies to which Harmonia has committed precious resources.

2. Creation of hydraulic projects is recognized to be an instrument of sovereign policy in the 1923 Convention of Geneva. Article 1 of the 1923 multilateral convention declares that "(the present convention) in no way alters the freedom of each state...to carry out on its territory all operations for the development of hydraulic power which it desires."⁴⁶

3. Sovereignty over natural resources and unimpeded right of development is of particular concern to developing countries.

a. Underdevelopment threatens sovereignty. Mercadia's insistence that it dictate utilization of the Lakota River relegates Harmonia to the status of a vassal state. Developing countries are experiencing a widening, not reduction, in the gap

⁴⁴ J.Lipper, Equitable Utilization, in The Law of International Drainage Basins (Garretson ed.) 18 (1967).

⁴⁵ Permanent Sovereignty Over Natural Resources, G.A.Res.1803, 17 U.N.GAOR.(17), U.N. Doc.A/5217 (1962).

⁴⁶ Convention of Geneva Relating to the Development of Hydraulic Power Affecting More Than One State. Dec. 9, 1923, art. 5. 36 L.N.T.S. 75 (1925).

between rich and poor nations.⁴⁷ The United Nations General Assembly recognized the special need for developing countries to attain permanent sovereignty over natural resources "in the spirit of international cooperation in the field of economic development...."⁴⁸ Practical application of the principle of sovereignty, however, is made difficult because it is founded and dependent upon equality among States. Successful between equally developed States, this principle has not worked in practise in favor of developing countries where "...the legal system has proved itself to be a bulwark of conservatism and of the established commercial interests in the developed countries."⁴⁹

b. The United Nations assigns more developed States a duty to assist less developed countries. Recognizing that developing countries face inherent obstacles to development and trade vis-a-vis the industrialized countries, the United Nations Charter of Economic Rights and Duties of States Resolution assigns to developed countries a duty to "co-operate with developing countries to help expand and transform their economies...."⁵⁰ Article 25 of the Charter obliges developing countries to "...pay

⁴⁷ Elian at 185

⁴⁸ Permanent Sovereignty Over Natural Resources, supra at note 44.

⁴⁹ C. Okolie, International Law Perspectives of the Developing Countries 62 (1978).

⁵⁰ Charter of Economic Rights and Duties of States, art.13. G.A.Res.3281, U.N.GAOR, Supp.(31), U.N.Doc. A/9631 (1974).

special attention to the particular needs and problems of the least developed...with a view to helping them overcome their particular difficulties and thus to contribute to their economic and social development."⁵¹

c. Mercadia's raising Harmonia's dam project as a defense to its pollution of Galala Aquifer constitutes bad faith in neighbor state relations and impedes Harmonia's legitimate development goals. Harmonia stands at the threshold of industrialization, having allocated monies raised through revenues and a substantial foreign debt to development of its tourism and emerging bauxite industries. Harmonia is injured on the one hand by transboundary pollution of its waters, and further by Mercadia's interference in legitimate development rights to the Lakota River. Mercadia justifies its interference by asserting rights over waters whose use it has abandoned on behalf of a population it has moved across the continent.

C. Mercadia gave up its existing use of the river and ceded to Harmonia the right to develop hydroelectric power from the flow of the Lakota River.

1. Mercadia through its conduct accedes to Harmonia's use of the river. "Acquiescence, recognition, or implied consent may have the result of conceding lawfully held rights to a usurper"⁵² Although no rule of law lays down a time limit, lapse of

⁵¹ Id., Article 25.

⁵² Brownlie at 637.

time in seeking redress may bar an international claim.⁵³ The Helsinki Rules provide that "(a)n existing use will lose its status as such through its abandonment, which results from the discontinuance of the use coupled with the intention to relinquish it. This intention may be expressed or it may be implied from the relevant conduct."⁵⁴ Mercadia's abandonment of traditional homelands and construction of major public works elsewhere indicates a discontinuance of use as well as an intention to relinquish that use.

If there remained a claim to the Lakota River following the exchange of notes, Mercadia did not pursue it. Neither did Mercadia attempt to remain in the Lakota basin and modernize the irrigation system there. Mercadia should therefore not be allowed to raise the Dam issue as a defense by virtue of its own acquiescence.⁵⁵

D. Mercadia states no cause of action upon which relief may be granted.

1. Mercadia cannot prove substantial injury arising from Harmonia's construction of the Lakota Dam. A complaining state must assert substantial injury which "materially interferes with or prevents a reasonable use of the water."⁵⁶ Even if Mercadia

⁵³ Id. at 505.

⁵⁴ Helsinki Rules, supra note 1, Article IV.

⁵⁵ Brownlie at 165

⁵⁶ Helsinki Rules, supra note 1, Article X. See also: The Lake Lanoux Arbitration; reprinted in part in, Law of International Drainage Basins (Garretson ed.) 112 (1966)

had not moved the Old Ones, and waived its claim to existing use of the Lakota River, the effect of the Dam has been to create a reservoir that assures a consistent flow through the Lakota Dam spillway, not a complete curtailment of water as suggested by Mercadia's behavior. In fact, the Lakota Dam's control over the flood waters may provide benefits of safety and predictability to downstream users. Overall improvement in efficiency and enhanced agricultural policy does not constitute substantial injury for which a remedy is appropriate.

IV. HARMONIA'S SOVEREIGNTY OVER DEVELOPMENT RIGHTS TO THE LAKOTA RIVER ARE UNIMPAIRED BY CORRELATIVE RIGHTS ASSERTED BY MERCADIA.

A. Mercadia enjoys no absolute right to continued uninterrupted flow of the Lakota River.

1. An international tribunal has never ruled in favor of the "territorial integrity" of a lower riparian to demand continued flow of a river in any dispute.⁵⁷ The 1925 Nile Commission hearings regarding disputed use between Egypt and the Sudan rejected the Egyptian position that it had an absolute right to the natural flow of the waters.⁵⁸ Granting to the lowest riparian a complete monopoly over the flow of the waters at the expense of an upstream state would ignore equally

(requiring that plaintiff state prove that it has suffered damage).

⁵⁷ Lipper at 18.

⁵⁸ Nile Comm. Report, annexed to Exchange of Notes between Great Britain and Northern Ireland and Egypt, 93 L.N.T.S. 43,48,64 (1929).

important rights of the upstream state to the use of the water.⁵⁹

2. Mercadia's demand for continued unimpaired flow serves no constructive purpose. In light of the fact that Mercadia has terminated its existing use of the Lakota River for inundation irrigation, Harmonia's need and efficient application of the uses of the river for hydroelectric power and modern sprinkler irrigation should take priority.

B. Even if Harmonia's sovereign rights to the Lakota River are limited by equal entitlement by Mercadia, conditions justify Harmonia's continued use of Lakota Dam.

1. Harmonia's use of the Lakota river is consistent with the principle of equitable utilization. Where there exist equal claim and entitlement to the waters of an international river between two states, the waters are to be divided on the basis of equitable utilization.⁶⁰ Each state need not receive an identical share.⁶¹ Article V of the Helsinki Rules proposes appropriate criteria for allocation of shared water among contesting States.⁶²

2. Under accepted principles of equitable utilization Mercadia's adherence to inundation irrigation properly gave way.

a. Inundation irrigation is an inefficient use of water resources. "Bad irrigation wastes water, increases soil erosion,

⁵⁹ Kansas v. Colorado, 206 U.S. 46, 100 (1907) (dictum).

⁶⁰ See: definition pp.5-6.

⁶¹ Helsinki Rules, supra note 1, Article IV.

⁶² Id., art V.

speeds the spread of water related diseases and encourages the over-use of pesticides."⁴³ A United States Federal Court has held that in order to be protected, the use must be of a beneficial nature- i.e. that which is socially or economically valuable.⁴⁴ While inundation is the oldest irrigation technique and is still practised by some States, available evidence indicates that it can lead to "desertification" of cropland through waterlogging, erosion and salinization.⁴⁵

b. Mercadia has the means to be more efficient in its use of the Lakota River. A user of a shared water resource should not be wasteful when it has the means to reduce inefficiency.⁴⁶ An important factor to be considered is whether the use of the water is within the financial ability of the state involved versus the potential value of the proposed use.⁴⁷ Mercadia moved the Old Ones and built a diversion canal across the Morningstar mountains at great expense. In apparent recognition that inundation irrigation is inefficient, Mercadia is utilizing irrigation methods other than inundation which make use of the flow of the Lakota diverted by means of the canal.

⁴³ Earthscan. Cropland or Wasteland, Press briefing document #38.

⁴⁴ Washington v. Oregon, 297 U.S. 517, 527 (1936). See also: Helsinki Rules, supra note 1, Comment to Article IV at 487.

⁴⁵ FAO/UNESCO. Irrigation, Drainage and Salinity, (1973).

⁴⁶ Wyoming v. Colorado, 259 U.S. 419, 484 (1922)(dictum).

⁴⁷ Id.

3. Harmonia's use of the Lakota River is consistent with the Helsinki Rules Article V criteria comparing efficiency and use.

a. The Lakota Dam better utilizes the natural conditions in the river basin. Article V lists as relevant the geography of the basin, including the extent of the drainage basin in each state, contribution by each state to the water flow, climate affecting the basin and the population dependent upon the waters.⁶⁸ The waters that flow into Mercadia emanate from the Morningstar Range in Harmonia, whose runoff establishes a defined channel far above where the Lakota flows into Mercadia.⁶⁹ Benefits accrue and serve the interests of the entire population of Harmonia. Conditions in the basin support the view that those uses that are most efficient should be preserved.

b. Mercadia's past utilization cannot overcome Harmonia's existing utilization.⁷⁰ In international law there is no doctrine of prior appropriation as internally applied by states.⁷¹ "An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use."⁷² This is a formal rejection of the "prior in time is prior in

⁶⁸ Helsinki Rules, supra note 1, Article V(2)(a).

⁶⁹ Compromis p. 6.

⁷⁰ Helsinki Rules, supra note 1, Article V(2)(d).

⁷¹ Lipper at 58.

⁷² Helsinki Rules, supra note 1, Article VIII.

right" doctrine which has served to disadvantage those states that have undertaken their industrial development at a later time than their neighbors.⁷³ Harmonia's proposed use promises a more efficient utilization of the waters in expanding both its industrial and agricultural base.

c. Harmonia's use is justified in light of its economic and social needs.⁷⁴ The United Nations Council on Trade and Development was created in order that developing countries such as Harmonia advance "beyond aid" and achieve a stage of development not subject to the whims and political strings attached to foreign aid.⁷⁵ The Charter of the U.N. Conference on Trade and Development (UNCTAD) states that more developed countries should "cooperate in measures taken by developing countries for diversifying their economies" and should "...encourage appropriate adjustments in their own economies.." to achieve this end.⁷⁶ In addition, the Charter provides that special rights are accorded developing countries to protect their infant industries.⁷⁷

Harmonia must exploit its natural wealth in bauxite deposits, and utilize the most advanced method of irrigation in

⁷³ Helsinki Rules, supra note 1, Comment to Article VII.

⁷⁴ Helsinki Rules, supra note 1, Article V(2)(e).

⁷⁵ Okolie at 51.

⁷⁶ Conference on Trade and Development, principle 5, 1964 U.N.Y.B. 198 (1964).

⁷⁷ Id., Special Principle 4.

order to satisfy its own needs for food and compete successfully in world commodities markets. Attaching liability to a modernization project conferring benefits to Harmonia without substantial injury to Mercadia would undermine the intent of UNCTAD.

d. Harmonia's use avoids unnecessary waste of water:^{7°} The final, and dispositive, criteria cited in the Helsinki Rules involves the comparative efficiency in use of the waters of an international river, particularly where there is a scarcity of water resources. The Helsinki Commission anticipated a dispute with dimensions similar to those involved here. Article IV states that the balancing criteria are designed to hold states to a duty of efficiency commensurate with their financial resources.^{7°} Thus, since Mercadia is more industrialized, it has a duty to be more efficient than inundation irrigation. The comment to Article IV hypothesizes:

Thus, State A, an economically advanced and prosperous state which utilizes the inundation method of irrigation, might be required to develop a more efficient and less wasteful system forthwith ... Irrigation, although an existing use, may nevertheless be required to give way since the weight of the factors favors the hydro-electric use.^{8°}

On the basis of recognized international principles and out of fairness to the special needs of developing countries, Mercadia

^{7°} Helsinki Rules, supra note 1, Article V(2)(i).

^{7°} Helsinki Rules, supra note 1, Article IV.

^{8°} Helsinki Rules, supra note 1, Comment to Article IV.

should not be allowed to raise Harmonia's actions relating to Lakota Dam as an affirmative defense to its pollution of the Galala Aquifer.

CONCLUSION

In accordance with the equities and authorities presented above, Harmonia respectfully requests this Court to:

- 1) Declare Mercadia's pollution in violation of international law;
- 2) Order Mercadia to undertake measures to stop pollution of the Galala Aquifer;
- 3) Award Harmonia damages for injury resulting Mercadia's pollution of the Aquifer;
- 4) Declare the Lakota Dam to be a reasonable and equitable use of the Lakota River.

Respectfully submitted,

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