THE 1987 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE

February 1987

Government of Harmonia

Applicant

v.

Government of Mercadia

Respondent

MEMORIAL FOR THE RESPONDENT

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TABLE OF CONTENTS

INDEX OF AUTHORITIES.......iv

STATEMENT OF JURISDICTION.......xi

STATEMENT OF FACTS.......xi

QUESTIONS PRESENTED.......xiii

SUMMARY OF ARGUMENT.......xiv

ARGUMENT AND AUTHORITIES.......1

I. HARMONIA'S UNILATERAL APPROPRIATION OF THE WATERS OF THE LAKOTA RIVER CONTRAVENED ITS INTERNATIONAL DUTY OF PEACEFUL RESOLUTION OF DISPUTES.......1

A. Harmonia Violated the International Duty to Seek Prior Agreement Respecting Diversion of International Rivers.......1

1. The duty to seek prior agreement derives from the recognized sources of international law.......1

a. State practice establishes this duty as international custom.......1

b. Subsidiary and auxiliary sources of international law confirm this principle.......3

2. Harmonia breached the obligation to reach agreement.......4

B. Harmonia Violated the International Legal Duty to Seek Objective Settlement of International Drainage Basin Disputes.......5

1. International custom requires objective settlement of river disputes.......5

2. Additional sources of law confirm this principle.......6

3. Harmonia obligated itself to submit to objective settlement of this dispute.......7

II. HARMONIA'S CONSTRUCTION OF THE DAM CONTRAVENED INTERNATIONAL STANDARDS OF UTILIZATION OF THE WATERS OF INTERNATIONAL RIVERS....7

A. There Exists a Community of Interests Among Co-Riparian States....8

1. The community of interests principle prohibits Harmonia from asserting territorial sovereign rights to the use of the Lakota River....8

B. Under Customary International Standards of Equitable Utilization, Harmonia's Damming of the Lakota River Was Illegal....8

1. Equitable sharing is a basic customary principle with regard to the international law of rivers....9

2. The guiding principles of equitable uitlization should not be rigidly applied to justify Harmonia's actions....10

3. In any event, the guiding principles of equitable utilization favor Mercadia's preexisting use....10

C. Under General Principles of International Law, Harmonia Abused Its Rights to Use of the Lakota River....11

1. Riparian states must refrain from interfering with co-riparian rights....11

2. The abuse of rights doctrine condemns Harmonia's assertion of unlimited rights to the Lakota River....12

III. WHETHER OR NOT DELICTUAL, HARMONIA'S CONSTRUCTION AND OPERATION OF THE LAKOTA DAM CAUSED COMPENSABLE INJURY....13

A. Harmonia Is Internationally Responsible for Its Breach of International Obligations....13

1. The disruption of the Mercadian use constituted substantial harm....13

B. Even Absent International Delictual Responsibility, Harmonia Is Under a Duty to Compensate Mercadia for Disrupting Mercadia's Existing Use....14

IV. MERCADIA'S USE OF ITS AGRICULTURAL RESOURCES IS THE LEGAL ACT OF A SOVEREIGN STATE....15.

A. Mercadia Possesses Sovereign Rights Over Its Land and Water Resources....15

1. Sovereignty, a fundamental principle of international law, presumes the exclusive power of a state to deal with its resources as it wishes....15

2. The presumption of sovereignty over resources can only be overcome by a convincing showing of positive international law subjecting the sovereign to an obligation to another state....16

B. No International Custom Prohibits the Pollution of Groundwaters....16

1. Creation of international custom requires consistent state practice..16

2. There exists no international custom regarding water pollution....17

a. International and national state practice do not support a finding of custom....17

3. There is virtually no evidence of international custom specifically related to groundwater....18

a. Treaties do not support a finding of international custom....18

b. Non-treaty practice does not support a finding of international custom....18

c. National practice does not support a finding of international custom....19

4. Evidence of groundwater custom cannot be inferred from state policies concerning surface waters....19

a. States do not consistently include groundwaters within regimes directed at controlling surface waters....20

b. Groundwaters have historically been and continue to be treated differently than surface waters by most countries....20

C. Subsidiary Means of Establishing Positive Norms of International Law Do Not Establish a Prohibition Against Pollution of Groundwater..............21

1. Judicial decisions do not prohibit pollution of groundwater..............21

2. The writings of publicists do not prohibit pollution of groundwater....22

D. Assuming, Arguendo, That Mercadia Should Consider the Effect of the Use of Its Territory Upon Harmonia, Principles of Equitable Utilization Favor Mercadia's Use..............22

V. MERCADIA'S ACTIONS AFFECTING THE GALALA AQUIFER ARE JUSTIFIED ACCORDING TO EQUITABLE PRINCIPLES..............23

A. The Court May Employ Principles of Equity..............23

B. The Equitable Doctrine of "Clean Hands," Which Has Been Recognized as a Principle of International Law, Precludes Harmonia From Complaining of Mercadia's Actions..............24

CONCLUSION..............24

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JURISDICTION

The parties have agreed to submit their dispute to this Tribunal pursuant to Article 36, paragraph 1, of the Statute of the International Court of Justice. Neither party disputes this Tribunal's jurisdiction.

STATEMENT OF FACTS

Mercadia and Harmonia are coastal countries with similar climates and certain shared geologic features. The Lakota River flows south along the coast from Harmonia into Mercadia. Paralleling the Lakota are the Morningstar Mountains, which separate the fertile coastlands from the semi-arid interior highlands to the east. East of the mountains, beneath the Mercadian highlands lies the Galala Aquifier. This aquifer spreads northward across the Harmonian border where it eventually feeds a spring beneath Lake Lydia. Both Mercadia and Harmonia are developing countries. In order to reduce problems of overcrowding and urban unemployment, the Mercadian government has effected a program of maintaining rural populations in rural areas.

For centuries the Lakota River has been used to irrigate the lands of the Old Ones, an ancient rural ethnic people. This land represents the ancestral roots and spititual homeland of Mercadian culture. The Old Ones, whose population approximates 100,000, are poorer than most Mercadians. Until recently they used the traditional ditch method of irrigation to capture the springtime runoff of the Lakota for support of their subsistence agriculture.

The conflict originated in the spring of 1979, when Harmonia announced the construction of the Lakota High Dam in conjunction with a five-year plan to develop a bauxite mining and processing industry. Harmonia maintained that the dam was necessary to supply electricity for the new industry. Harmonia was aware that the dam would also affect the flow of the Lakota such that it would be insufficient to

continue to support the agriculture of the Old Ones. Mercadia objected to the Harmonian proposal and demanded that springtime runoff levels be guaranteed. Harmonia responded that its electrical needs were more important than the maintenence of Mercadian irrigation uses. Mercadia in turn responded that the dam would force it to move the Old Ones to the area east of the mountains. After nine months of negotiations without compromise, Harmonia began construction, completing the dam in 1983.

Upon the dam's completion, Mercadia moved the Old Ones to their present home in the semi-arid region above the Galala Aquifer, adjoining the Green River. Since the Green River was insufficient to support the Old Ones' needs, the Mercadian government was forced to build a diversion canal through the mountains connecting the Lakota with the Green. Pesticides used by the Old Ones in farming their new land, along with phosphates incident to farming and habitation have entered the aquifer. As a result, the drinking water of the Harmonian town of Trentor has been contaminated and toxins have been discovered in Lake Lydia fish. Mercadia has disclaimed all responsibility for the pollution.

The parties agreed to submit these disputes to this Tribunal in March of 1986.

QUESTIONS PRESENTED

I. Whether Harmonia's construction of the dam violated its duty to peacefully resolve the dispute with Mercadia.

II. Whether Harmonia's construction of the dam contravened international standards of utilization of the waters of international rivers.

III. Whether Harmonia's construction of the dam caused Mercadia compensable injury.

IV. Whether Mercadia's pollution of the groundwater shared with Harmonia is the legal act of a sovereign state.

V. Whether Mercadia's refusal to desist its polluting activity is justified according to the equitable principle of "clean hands."

SUMMARY OF ARGUMENT

I. The law of international rivers requires that a state contemplating a new utilization of a shared river has an obligation, as a condition precedent to the lawful utilization of the river, to resolve any dispute by mutual agreement with any affected state, and, in the absence of agreement, to seek a solution through other objective means. Harmonia had knowledge that its proposed construction of the Lakota High Dam would adversely impact Mercadia's preexisting agricultural use. Nonetheless, Harmonia proceeded in the absence of agreement improperly to determine that the construction of the dam was lawful. Harmonia breached both its obligation to negotiate in good faith, and, by proceeding unilaterally to decide the issue, its obligation to seek objective settlement of the dispute.

II. The substance of the international law of rivers dictates that the rights of states are limited in relation to the waters of a shared river. This "community of interests" approach establishes two subsidiary principles. First, riparian states must insure an

equitable allocation of the uses and benefits of the waters of an international river. Second is the obligation to refrain from causing appreciable harm to other states using the river. A state can not summarily extinguish the rights of other riparian states. By appropriating the waters of the Lakota River for hydro-electric purposes, Harmonia deprived Mercadia of its equitable share in the use of the Lakota River for agricultural purposes. Moreover, Harmonia can not overcome the presumption in favor of existing uses. Alternatively, Harmonia's unilateral action unfairly injured the existing lawful interest of Mercadia. Under either of these approaches to international rivers, the damming of the Lakota River was a violation of international law.

III. Harmonia should be declared internationally responsible for its breach of the foregoing international legal prinicples. International responsibility arises as a result of the violation of any international obligation. Even if Harmonia's construction of the dam is not held delictual, the international legal principle of equitable utilization requires Harmonia to compensate Mercadia for the impairment of Mercadia's use.

IV. International law presumes both state sovereignty over natural resources and freedom of state action. Therse presumptions are restricted only to the extent that a positive rule of international law has been established which imposes an obligation upon the acting state to refrain from exercising its sovereignty. The objecting state bears the burden of establishing a restriction upon state action. Harmonia cannot cite any international custom of either pollution law or groundwater law which would obligate Mercadia to conduct its agricultural policies in such a way that the shared groundwaters of both countries will be protected. Nor is such an obligation imposed on Mercadia by any other source of international law. Even assuming, for argument, that Harmonia can establish such an obligation, principles of equitable utilization favor Mercadia's present use of its lands.

V. The equitable principle of "clean hands" prescribes that one who does not fulfil his obligations vis a vis another may not then accuse the other of a similar deliquency. This equitable doctrine, which has been recognized in the context of international adjudication, is available to this Tribunal as a general principle of legal interpretation within the definition of Article 38, paragraph 1(c) of the Statute of the International Court of Justice. Accordingly, Harmonia's interference with Mercadia's use of the common waters of the Lakota River precludes its complaint of interference by Mercadia with the shared Galala groundwaters.

ARGUMENT AND AUTHORITIES

I. HARMONIA'S UNILATERAL APPROPRIATION OF THE WATERS OF THE LAKOTA RIVER CONTRAVENED ITS INTERNATIONAL DUTY OF PEACEFUL RESOLUTION OF DISPUTES.

A. Harmonia Violated the International Duty to Seek Prior Agreement Respecting Diversion of International Rivers.

The duty of prior agreement in international river diputes as a rule of international law derives from the principle of limited sovereignty over shared rivers.[1] Duties of prior negotiation and agreement serve to restrict a riparian state's discretion to adversely affect the legal rights of co-riparian states. It is universally agreed, therefore, that the unique characteristics and problems of each international watercourse dictate that disputes with regard to utilization be resolved by agreement of the parties, reached after consultation and negotiation,[2] rather than on the basis of a general international law of rivers.[3]

1. The duty to seek prior agreement derives from the recognized sources of international law.

In the absence of a relevant treaty or convention, international custom, resolutions of international organizations, relevant judicial decisions, and the teachings of publicists establish this international rule of law.[4]

a. State practice establishes this duty as international custom.

State practice establishes the obligatory nature of the duty to seek agreement.[5] "With few exceptions, co-basin states in fact have consulted and negotiated with each

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[1] See infra Part II.A.

[2] Bourne, Procedure in the Development of International Drainage Basins: The Duty to Consult and Negotiate, 1972 Can. Y.B. Int'l L. 212, 212.

[3] J. Brierly, The Outlook for International Law 43 (1944).

[4] Statute of the International Court of Justice, art. 38, para. 1.

[5] See Economic Comm'n for Europe, Legal Aspects of Hydro-Electric Development of Rivers and Lakes of Common Interest, U.N. Doc. E/ECE/136 (1952) [hereinafter Economic Comm'n Study].

other when problems have arisen about the exploitation of their common water resources and sooner or later have thus settled the most bitter disputes by agreement."[6] States have reached international solutions concerning utilization and development in about twenty recent international river basin disputes.[7] One example of such state practice occurred in 1976 following India's damming of the Ganges River at Farakka. The parties "decided to meet urgently . . . for negotiations with a view to arriving at a fair and expeditious settlement."[8] This practice is confirmed by the enormous number of international treaties dealing with the utilization of international watercourses.[9] Moreover, provisions in many of these treaties explicitly impose obligations to consult and negotiate, to undertake to resolve water disputes by agreement, or to undertake not to make any changes affecting another state without the consent of that other party.[10] These provisions are strongly corroborative of the opinio juris sive necessitatis (opinio juris) necessary to elevate state practice to international customary law,[11] and are examples of generalizable treaty provisions that generate customary law.[12] The instances where states have proceeded with

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[6] Bourne, supra note 2, at 220.

[7] Nanda, Emerging Trends in the Use of International Law and Institutions for the Management of International Water Resources, in Water Needs for the Future 15, 20 (V. Nanda ed. 1977).

[8] 13 U.N. Monthly Chronicle, Dec. 1976, at 35.

[9] See generally the approximately 300 treaties on the non-navigational uses of international rivers published in United Nations Legislation Series, Legislation, Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes then Navigation, U.N. Doc. No. ST/LEG/SER.B/12 (1963) [hereinafter U.N. Legislation Series]; U.N. Secretary-General's Supplementary Report, Legal Problems Relating to the Non-Navigational Uses of International Watercourses, U.N. Doc. A/CN.4/274 (1974).

[10] Bourne, supra note 2, at 222.

[11] Statute of the International Court of Justice, art. 38, para. 1 (b). See 1 Hyde, International Law Chiefly as Applied by the United States, 10 (2d ed. 1945).

[12] A. D'Amato, The Concept of Custom in International Law (1971); Baxter, Treaties and Customs, 129 Recueil des Cours 69 (1970).

utilizations without first reaching agreement with an objecting co-riparian state are rare.[13]

b. Subsidiary and auxiliary sources of international law confirm this principle.

Further evidence of opinio juris, as well as independent evidence of the emergence of a customary rule of law, is the frequent repetition in resolutions, declarations, and recommendations adopted by intergovernmental organizations and nongovernmental organizations charged with the codification and progressive development of international law.[14] One outstanding example of such a source for the principle of prior agreement is found in Article 3 of the United Nations Charter of Economic Rights and Duties of States:[15] "In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of prior information and consultations in order to achieve optimum use of such resources without causing damge to the legitimate interests of others."[16] Another example is found in the Introduction to the Helsinki Rules of the International Law Association (Helsinki Rules).[17]

This Tribunal has established precedent for the view that customary international law may require states to enter into negotiations with a view to arriving

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[13] Bourne, supra note 2, at 220.

[14] S. Rosenne, Practice and Methods of International Law 111 (1984); see also Tunkin, General Theory of Sources of International Law, 19 Indian J. Int'l L. 474, 482 (1979).

[15] G.A. Res. 3281, U.N. GAOR, Supp. (No. 31), U.N. Doc. A/9631 (1974).

[16] Id. art. 3.

[17] International Law Ass'n, Helsinki Rules on the Uses of the Waters of International Rivers, in Report of the 52d Conference 518 (1967) [hereinafter Helsinki Rules]; see also Convention of Geneva Relating to the Development of Hydraulic Power Effecting More Than One State, Dec. 9, 1923, art. 4, 36 L.N.T.S. 77 (1925); Institute de Droit International, Salzburg Rules on the Utilization of Non-Maritime International Waters (Except for Navigation), in 49 [II] Annuaire de l'Institute de Droit International 381, 381-84 (1961) [hereinafter Salzburg Resolution]; Inter-American Bar Ass'n, Principles of Law Governing the Uses of International Rivers and Lakes, Resolutions of the 10th Annual Conference, Resolution 2 (1957) [hereinafter Buenos Aires Resolution].

at an agreement. In the North Sea Continental Shelf cases,[18] the Court held that the parties were under an obligation to delimit areas of their continental shelves by negotiating in good faith with a view to arriving at an agreement about the matter.[19] The delimitation of a continental shelf is analogous to the apportionment of the beneficial uses of the waters of an international river; therefore, negotiation should be analogously obligatory. Moreover, the tribunal in the Lake Lanoux Arbitration,[20] while relying principally on the provisions of a relevant treaty, suggested that a duty to consult and negotiate in matters concerning international rivers was an international custom: "International practice reflects a conviction that States ought to strive to conclude such agreements."[21]

Finally, the teachings of publicists overwhelmingly advocate direct negotiations leading to agreements between co-riparian states.[22] Although also a subsidiary means for the determination of international law, the principle of prior agreement, often proposed by publicists, has been incorporated into the corpus of international custom and in treaty rules of international law.

2. Harmonia breached the obligation to reach agreement.

Despite Mercadia's objections, Harmonia steadfastly refused to moderate its position concerning the construction of the dam, although it was fully aware of the certain obliteration of the extant Mercadian agricultural use. Under this analysis,

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[18] (W. Ger. v. Den., W. Ger. v. Neth.),1969 I.C.J. 3.

[19] Id. at 46-47, 53-54.

[20] Lake Lanoux Arbitration (Fr. v. Spain), 1957 Int'l L. Reps. 101.

[21] Id. at 129.

[22] See, e.g., F. Berber, Rivers in International Law 270 (1959); H.A. Smith, The Economic Uses of International Rivers 152-53 (1931); Economic Comm'n Study, supra note 5, at 211 (1952); W. Griffin, U. S. Dep't of State, Memorandum on Legal Aspects of the Use of Systems of International Waters, S. Doc. No. 118, 85th Cong., 2d Sess. 90-91 (1958); Kulz, Further Water Diputes Between India and Pakistan, 18 Int'l & Comp. L.Q. 734 (1969).

Harmonia's abuse of the obligation to reach agreement with Mercadia demands that its unilateral actions not be condoned by this Court.

B. Harmonia Violated the International Legal Duty to Seek Objective Settlement of International Drainage Basin Diputes.

A necessary corollary of the obligation to seek agreement is that when states cannot discharge this obligation to agree, a state cannot proceed with a project that might interfere with a co-riparian state's beneficial uses of the waters of the river, but must resort to some objective means of settlement.[23] International law imposes an obligation on co-riparian states to do so. In the absence of such a positive rule of law, the obligation of co-basin states to seek agreement would be meaningless, because an illegal utilization of the waters of an international river could be thrust upon the lower riparian state as a fait accompli.

1. International custom requires objective settlement of river disputes.

A customary duty to submit international water diputes, after the failure of the states otherwise to reach agreement, to objective means of settlement has arisen among co-riparian states in resolving disputes over the utilization of international rivers.

Objective means of settlement of an international water dispute may include mediation, conciliation, or the creation of special joint commissions. "States have indeed had a rich experience with international joint commissions."[24] Eighty-nine international bodies have been created by states to deal with administration of non-

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[23] See Arechaga, International Legal Rules Governing Use of Waters from International Watercourses, 2 Inter-Am. L. Rev. 329, 332 (1960); Griffin, supra note 22; Griffin, The Use of Waters of International Drainage Basins under Customary International Law, 53 Am. J. Int'l L. 50, 79-80 (1959); Laylin & Bianchi, The Role of Adjudication in International River Disputes: The Lake Lanoux Case, 53 Am. J. Int'l L. 30 (1959); Laylin & Clagett, The Allocation of Water of International Streams, in Economics and Public Policy in Water Resource Development 424, 435-39 (1964).

[24] Bourne, Mediation, Conciliation and Adjudication in the Settlement of International Drainage Basin Disputes, 1971 Can. Y.B. Int'l L. 114, 118.

naviagational utilization of their international water resources, and in the resolution of their differences about those resources.[25] State practice, as evidenced by international treaty, demonstrates that "a very high proportion of the international watercourses of the world are covered by formal agreements for compulsory adjudication or third party determination."[26] One commentator notes that "many states have considered international water disputes to be justiciable and were willing to submit them to binding third party determination . . . . [C]o-basin states have seemed to accept the idea of adjudication of these disputes."[27]

2. Additional sources of international law confirm this principle.

Various other sources support the obligation of objective settlement of international disputes, not the least of which is Article 33 of the Charter of the United Nations.[28] Significantly, Article 33 is expressly referred to in the Helsinki Rules: "Consistently with the Charter of the United Nations, States are under an obligation to settle international diputes as to their legal rights or other interests by peaceful means . . . ."[29] Further, Articles Thirty-one through Thirty-four of the Helsinki Rules

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[25] See U.N. Legislation Series, supra note 9.

[26] Clagett, Survey of Agreements Providing for Third-Party Resolution of International Water Disputes, 55 Am. J. Int'l L. 645, 646 (1961).

[27] Bourne, supra note 2, at 144.

[28] U.N. Charter, art. 33, para. 1 ("The parties to any dispute, the continuance is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.").

[29] Helsinki Rules, supra note 17, art. XXVII, para. 1. One of the "Agreed Recommendations" of the International Law Association Committee on the Uses of the Waters of International Rivers is that in the eventuality of a failure of consultations to produce agreement, the parties chould seek a solution in accordance with the procedures, other than consultation, set out in Article 33. Id. Agreed Recommendation 1.

recommend a hierarchichal method of objective dispute settlement.[30] Resolutions and recommendations of various intergovernmental agencies,[31] and the teachings of publicists[32] confirm this obligation to seek objective settlement of international water diputes.

3. Harmonia obligated itself to submit to objective settlement of this dispute.

Harmonia constructed the Lakota High Dam in the face of Mercadia's open objection to its interference with Mercadian existing agricultural use. Following nine months of negotiations, Harmonia was obliged, under the general principle of good faith,[33] to submit this dispute to objective means of settlement. Harmonia's failure to seek out some objective means of dispute settlement prior to its construction of the dam patently violates international law.

II. HARMONIA'S CONSTRUCTION OF THE DAM CONTRAVENED INTERNATIONAL STANDARDS OF UTILIZATION OF THE WATERS OF INTERNATIONAL RIVERS.

Should this Tribunal find proper Harmonia's failure to reach agreement or settlement with Mercadia, Harmonia yet violated international law by restricting Mercadia's rightful use of the Lakota River. The construction of the Lakota High Dam failed to recognize Mercadian equitable share in the use of the water, and constituted an abuse of Harmonia's own utilization rights.

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[30] Id. arts. XXXI-XXXIV; see also International Law Comm'n, The Law of the Non-Navigational Uses of International Watercourses, U.N. Doc. No. A/CN.4/367, Ch. V (Settlement of Disputes) [hereinafter I.L.C. Draft Convention], in Documents of the 35th Session, [1983] 1 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1983/Add.1, at 155 [hereinafter 1983 I.L.C. Yearbook].

[31] See, e.g., Institute de Droit International, International Regulations Regarding the Use of International Watercourses for Purposes Other Than Navigation, art. 11, para. 7., in 24 Annuaire de l'Institute de Droit International 365 (1911); Salzburg Resolution, supra note 17, at 382; Buenos Aires Resolution, supra note 17, art. I, para. 3.

[32] See authorities cited supra note 23.

[33] See Goldie, Equity and the International Management of Transboundary Resources, 25 Nat. Resources J. 665, 667 (1985).

A. There Exists a Community of Interests Among Co-Riparian States.

One of the few principles of substantive international water law upon which there has been general international agreement is the general rule that the rights of states are limited in relation to the waters of a shared river.[34] The Permanent Court of International Justice noted that this "community of interests" approach to the utilization of rivers is the basis of a common legal right, "the essential features of which are the perfect equality of all riparian states in the uses of the whole course of the river and the exclusion of any preferential privelege of any of the riparian States in relation to the others."[35]

1. The community of interests principle prohibits Harmonia from asserting territorial sovereign rights to the use of the Lakota River.

This rule does not recognize the unlimited sovereignty position known as the "Harmon Doctrine," under which a state was at liberty to utilize the water flowing within its jurisdiction how it pleased,[36] nor the theory of absolute territorial integrity, which absolutely prohibited a state from impairing the natural flow of a river.[37] The consequences of the rule whereby international rivers are deemed to be shared resources are that states must equitably share in the utilization of such rivers, or that states are prohibited from managing such waters in such a way as to cause damage to other states.[38]

B. Under Customary International Standards of Equitable Utilization, Harmonia's Damming of the Lakota River Was Illegal.

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[34] See FAO, The Law of International Water Resources 12 (1980) [hereinafter FAO Study].

[35] Territorial Jurisdiction of the International River Oder Commission (U.K. et al. v. Pol.) 1929 P.C.I.J. (ser. A) No. 23, at 5.

[36] See 21 Op. Att'y Gen. 274, 282 (1895).

[37] See 1 Oppenheim, International Law 474-75 (Lauterpacht 8th ed. 1955).

[38] FAO Study, supra note 34, at 13.

International law, in the context of water resources, does not establish fixed norms from which to extract specific legal principles. Rather, nations have seen fit to proceed on a flexible "legal standards" basis in order "'to allow adaptation to the unique aspects' of each individual watercourse."[39] This approach has found expression in the concept of "equitable utilization,"[40] which entitles each riparian state to a reasonable and equitable share in the beneficial uses of a shared river. The principle of equitable utilization does not mean that each riparian state is entitled to an identical share in the uses of the waters; rather, "the economic and social needs of all co-basin States must be taken into consideration."[41] The Lakota High Dam has allowed Harmonia to appropriate all the waters of the Lakota River for its own use, to the exclusion of the only Mercadian use. Harmonia clearly has failed to take the needs of Mercadia into account.

1. Equitable sharing is a basic customary principle with regarto the international law of rivers.

Equitable sharing has received recognition as such in the Helsinki Rules of the International Law Association[42] and the draft convention on the law of the non-navigational uses of international watercourses of the International Law Commission (I.L.C. Draft Convention).[43] Equitable sharing is recognized therein as "a codification of prevailing principles of international law following from customary international law, as evidenced by general State practice and general principles of law . . . ."[44]

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[39] 1983 I.L.C. Yearbook, supra note 30, at 170.

[40] See generally Lipper, Equitable Utilization, in The Law of International Drainage Basins 15 (A. Garretson, R. Hayton & C. Olmstead eds. 1967).

[41] Manner, The Present State of International Water Resources Law, in The Present State of International Law 131 (M. Bos ed. 1973).

[42] Helsinki Rules, supra note 17.

[43] See 1983 I.L.C. Yearbook, supra note 30 (emphasis added).

[44] Id. at 170.

Consequently, Harmonia's failure to accord Mercadia its equitable share of the Lakota River is a breach of international law.

2. The guiding principles of equitable utilization should not be rigidly applied to justify Harmonia's actions.

Even conceding the application of the "Helsinki factors,"[45] which are at best suggested general guidelines rather than principles of international law, there is no reason judicially to favor the Harmonian hydro-electric use over the Mercadian consumptive use. The rules of equitable utilization are, in the first instance, meant as guides to serve "the especially salutary purpose of facilitating the drawing of treaties, which all authorities agree is the ideal way to settle river disputes."[46] It would be paradoxical and unfair to apply these factors--meant to guide states in reaching prior agreements[47]--as post hoc justifications for Harmonia's unilateral decision to abrogate Mercadia's preexisting beneficial use. Such unrestricted and discretionary action is contrary to the theory and purpose underlying the principle of equitable sharing.

3. In any event, the guiding principles of equitable utilization favor Mercadia's preexisting use.

Although there is no per se doctrine of prior appropriation in the international law of rivers, the most important single principle is that existing uses occupy a considerably preferred position over projectied uses in equitable utilization.[48] This

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[45] Helsinki Rules, supra note 17, art. V; see also I.L.C. Draft Convention, supra note 30, art. 8.

[46] Lipper, supra note 40, at 66; see also Menon, Water Resources Development of International Rivers With Special Reference to the Developing World, 9 Int'l Law. 441, 462 (1975) (development problems cannot be solved by purely national action).

[47] Caponera, Patterns of Cooperation in International Water Law: Principles and Institutions, 25 Nat. Resources J. 564, 568 (1985); I.L.C. Draft Convention, supra note 30, art. 8, para. 2.

[48] Lipper, supra note 40, at 50-56.

position has received wide recognition in the practice of states,[49] and by courts,[50] publicists,[51] and international organizations.[52]

Harmonia will strongly assert that its economic needs far outweigh the factors that favor the Mercadian position (for example, the social needs of Mercadia, and the Mercadian population dependent on the waters of the Lakota[53]). It is to be remembered, however, that economic considerations are but one of the factors that are to be taken into account. Moreover, to be protected, the use need not be the most beneficial to which the water could be put, or be maximally effecient in minimizing waste.[54] On balance, the preexisting agricultural use must tip the balance in Mercadia's favor.

C. Under General Principles of International Law, Harmonia Abused Its Rights to Use of the Lakota River.

1. Riparian states must refrain from interfering with co-riparian rights.

In the law of international rivers, a relevant general principle of international law is that there shall be no abuse of rights.[55] This doctrine concedes to the delictual state certain rights in the use of an international river, as it must under the customary doctrine of beneficial sharing. However, this principle dictates that such rights are not unlimited: "Under the . . . general rules of international law with respect to the use

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[49] See, e.g., Documents of the 30th Session, [1978] 2 Y.B. Int'l L. Comm'n 255, U.N. Doc. No. A/CN.4/SER.A/1978 (Part 1) (comments of Libya); see also the views of Iran, Syria, and Jordan, discussed in J. Lammers, The Pollution of International Watercourses 302-07 (1984)

[50] See, e.g., Nebraska v. Wyoming, 325 U.S. 589 (1945); see also the principles applied by the Rau Commission in the dispute between the Indian Provinces of Sind and Punjab, discussed in Laylin & Bianchi, supra note 23, at 32-33.

[51] See, e.g., J. Lammers, supra note 49, at 364.

[52] Helsinki Rules, supra note 17, art. V (2) (j); United Nations, Integrated River Development, U.N. Doc. E/3066, at 38 (1958).

[53] See Helsinki rules, supra note 17, art. V.

[54] Lipper, supra note 40, at 46.

[55] FAO Study, supra note 34, at 16.

of water of international rivers, an international question or issue arises when one state so uses its territory as to produce harm in the territory of another state."[56] The obligation of a state to refrain from interfering with the flow of a river to the appreciable detriment of other riparian states has its source in this principle.[57] As stated by one commentator: "In accordance with the principles of contemporary international law, riparian states are precluded from taking unilateral action prejudicial or injurious to the lawful interests of a co-riparian state."[58]

The doctrine does not say anything about the specific content and extent of the rights; it merely says that whatever those rights are, they must not be used in such a manner that their injurious effects outweigh the legitimate interests of the affected state.[59] Its existence in international law derives from its wide recognition in municipal legal systems,[60] and has been adopted in principle both by the Permanent Court of International Justice[61] and the International Court of Justice.[62] Consequently, it has attained the status of a "general principle of law" under Article 38(1)(c) of the Statute of the International Court of Justice.[63]

2. The abuse of rights doctrine condemns Harmonia's assertion of unlimited rights to the Lakota River.

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56 Dep't of Economic and Social Affairs, Management of International Water Resources: Institutional and Legal Aspects, U.N. Doc. No. ST/ESA/5 (1975).

57 H. Lauterpacht, The Development of International Law by the International Court 346 (1958).

58 Menon, supra note 46, at 449; see also H. A. Smith, supra note 22, at 149.

59 W. Friedmann, The Changing Structure of International Law 198 (1964).

60 1 Oppenheim, supra note 37, at 162; 5 Whiteman, Digest of International Law 224 (1965).

61 See, e.g., Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46, at 167.

62 Anglo-Norwegian Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 142.

63 See Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals121-23 (1953).

In the Fisheries Jurisdiction cases,[64] this Tribunal enunciated the policy of international law regarding the illegality of abusing rights. The Court refused to recognize transformation of a right for a purpose which would deny another state's valid and subsisting rights.[65] "A . . . State entitled to a preferential right is not free, unilaterally and according to its own uncontrolled discretion, to determine the extent of those rights. The characterization of . . . rights as preferential implies a certain priority, but cannot imply the extinction of concurrent rights of other States . . . ."[66] Harmonia's common legal right in the waters of the Lakota River does not permit it legally to extinguish Mercadia's at least equal rights in the use of the River. To judicially approve Harmonia's unilateral appropriation would be, in effect, allowing Harmonia to sit as a judge in its own case.

III. WHETHER OR NOT DELICTUAL, HARMONIA'S CONSTRUCTION AND OPERATION OF THE LAKOTA DAM CAUSED COMPENSABLE INJURY.

A. Harmonia Is Internationally Responsible for Its Breach of International Obligations.

It is a gerneral principle of law that international legal responsibility arises whenever there is a violation of an international obligation, whatever its origin.[67] State responsibility arises as the result of a state's unlawful act, or as a result of an unlawful failure to act.[68] Harmonia is internationally responsible under both of these formulations.

1. The disruption of the Mercadian use constituted substantial harm.

[64] Fisheries Jurisdiction (U.K. v. Ice.),1974 I.C.J. 3.
[65] Id. at 27-28.
[66] Id.
[67] Chorzow Factory (Ger. v. Pol.),1927 P.C.I.J. (ser. A) No. 9, at 21 (Jurisdiction).
[68] G. Tunkin, Theory of International Law 382 (1974).

When an existing regime of water use is completely superseded by a new one, there is a clear case of injury to the existing use.[69] As noted in the Helsinki Rules, "a diversion of water that denies a co-basin state an equitable share is in violation of international law."[70] Harmonia's unilateral action in constructing the Lakota High Dam, resulting in the displacement of the Old Ones, was a violation of its international duty under the principle of equitable sharing, as well as an abuse of rights in interfering with the lawful interests of Mercadia. In addition, Harmonia's failure to discharge its obligation of peaceful settlement or agreement prior to utilization was an unlawful failure to act.

B. Even Absent International Delictual Responsibility, Harmonia Is Under a Duty to Compensate Mercadia for Disrupting Mercadia's Existing Use.

The international law of equitable utilization recognizes that in certain circumstances, an existing use may have to give way.[71] However, it is also recognized that "an equitable utilization may cause substantial harm or injury to a neighboring state."[72] An utilization is permissible only if it assures the other state of its share of the advantages of the shared waters, or provides for adequate compensation for any loss or damage.[73] In any event, compensation is required if it is reasonable under the circumstances of the dispute.[74]

The International Law Association's commentary to the Helsinki Rules illustrates the principle under which compensation should be awarded when an irrigating state is deprived of its existing use by an upstream state that wishes to

[69] Bush, Compensation and Utilization of International Rivers and Lakes: The Role of Compensation in the Event of Permanent Injury to Existing Uses of Water, in The Legal Regime of International Rivers and Lakes 311 (R. Zacklin & L. Caflisch eds. 1981).

[70] Helsinki Rules, supra note17, art. X comment b.

[71] Lipper, supra note 40, at 64.

[72] Id. at 45.

[73] See, e.g., Salzburg Resolution, supra note 17, art. 4, at 382.

[74] J. Lammers, supra note 49, at 354-65; see also Helsinki Rules, supra note 17, art. V(2)(j).

utilize water for hydro-electric purposes. "Under these facts, [the hydro-electric state] would, in all likelihood, be required to pay [the irrigating state] in part for discontinuance or impairment of use."[75]

Assuming, arguendo, that the the Mercadian use might not prevail in a determination of a reasonable and equitable sharing of the Lakota River, it is unquestionably reasonable to require such compensation. In exercising its alleged equitable rights over the waters of the Lakota River--knowingly to the detriment of a downstream use--Harmonia incurred an obligation to compensate for impairment of that use. Therefore, such compensation is, under international law, compelled.

IV. MERCADIA'S USE OF ITS AGRICULTURAL RESOURCES IS THE LEGAL ACT OF A SOVEREIGN STATE.

A. Mercadia Possesses Sovereign Rights Over Its Land and Water Resources.

1. Sovereignty, a fundamental principle of international law, presumes the exclusive power of a state to deal with its resources as it wishes.

A foundational principle of international law is state sovereignty. Professors Schwarzenberger and Brown have described legal sovereignty in several "governing rules," the third of which states: "Unless the territorial jurisdiction of a State is excluded or limited by rules of international law, its exercise is exclusively the concern of the State in question."[76] One fundamental aspect of state sovereignty, therefore, is the supremacy of state power inside the country.[77] Thus, territorial sovereign rights are at their height when asserted within the limits of national jurisdiction. The right

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[75] Id. art. V comment.

[76] G. Schwarzengberger & E.D. Brown, A Manual of International Law 52 (6th ed. 1976) [footnotes omitted].

[77] G. Elian, The Principle of Sovereignty Over Natural Resources 6 (1979).

of sovereignty over natural resources is considered a universal principle of international law,[78] and has been elevated to the status of jus cogens.[79]

2. The presumption of sovereignty over resources can only be overcome by a convincing showing of positive international law subjecting the sovereign to an obligation to another state.

Restrictions upon the independence of states should not be presumed.[80] Absent a limitation imposed by international law upon the exercise of sovereignty, Mercadia retains plenary rights over use and exploitation of land and water resources under its control. Activities in regard to which international law does not subject a state to any international obligation vis-a-vis another state are matters of domestic jurisdiction, which may be presented as an objection to the validity of an international claim.[81] Associated with the concept of state freedom of action is the notion that where one state complains of another state's acts, the complaining state bears the burden of showing the illegality of those acts.[82] Harmonia can cite no definitive principle of international law regarding Mercadia's use so as to overcome Mercadia's substantive defense.

B. No International Custom Exists Prohibiting the Pollution of Groundwaters.

1. Creation of international custom requires consistent state practice.

Article 38 of the Statute of the International Court of Justice states that the Court "shall apply . . . international custom, as evidence of a general practice accepted as law."[83] International custom is established by the actual practice of states acting on

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[78] Id. at 12.

[79] I. Brownlie, Principles of Public International Law 513 (3d ed. 1979).

[80] Lotus Case (Fr. v. Turk.),1927 P.C.I.J. (ser. A) No. 10, at 18.

[81] Waldock, The Plea of Domestic Jurisdiction Before International Legal Tribunals, 1954 Brit. Y.B. Int'l L. 96, 97-98.

[82] A. D'Amato, supra note 12, at 179-85 (discussing Anglo-Norwegian Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116).

[83] Statute of the International Court of Justice, art. 38, para. 1.

the conviction that the particular practice is obligatory.[84] The actual conduct of states is the principal element of customary international law.[85] Nor are "humanitarian" considerations sufficient in themselves to generate legal rights and obligations.[86] To the contrary, the Court is, in its own words, "a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form."[87]

2. There exists no international custom regarding water pollution.

a. International and national state practice does not support a finding of custom.

International practice is far from consistent. The standards of international environmental law create, at best, a patchwork system of normative restraints on environmental interference.[88] Moreover, "[n]o general principle of international law prevents a riparian state . . . from polluting its waters."[89] In the face of inconsistent state practice, the principle of national sovereignty remains one of the most pervasive features of international environmental protection law.[90]

National practice within federal unions also fails to disclose sufficient evidence of consensus among states in the area of general principles regarding water pollution. In the words of one commentator:

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[84] J. Brierly, The Law of Nations: An Introduction to the International Law of Peace 59-61 (H. Waldock 6th ed. 1963); Sohn, "Generally Accepted" International Rules, 61 Wash. L. Rev. 1073 (1986).

[85] S. Rosenne, supra note 14, at 55.

[86] South West Africa Case, 1966 I.C.J. 6, 34.

[87] Id.

[88] A. Springer, The International Law of Pollution 32 (1983); accord Goldie, Development of an International Environmental Law--An Appraisal, in Law, Institutions, & the Global Environment 104, 105 (J. Hargrove ed. 1972).

[89] H. Briggs, The Law of Nations 274 (1952).

[90] Hargrove, Toward an International Law of Environmental Protection, in Law, Institutions, & the Global Environment 93, 93 (J. Hargrove ed. 1972).

> [R]elatively little information has become available on the rights and duties of states of federal unions . . . specifically concerning pollution of water courses. That materal considered by itself can therefore hardly be regarded sufficient to allow the abstraction of general principles of national law specifically relating to such pollution.[91]

3. There is virtually no evidence of international custom specifically related to groundwater.

a. Treaties do not support a finding of international custom.

Only a "handful" of international treaties refer to groundwater specifically, and within these, groundwater is usually treated as a secondary issue which is mentioned almost in passing.[92] Professors Caponera and Alheritiere have stated that, "[i]n international treaties, references to groundwater are scanty and too limited in scope to propose them in terms of customary law.[93]

b. Non-treaty practice does not support a finding of international custom.

In the international sphere, almost no non-treaty based practice relating to underground water has been discovered.[94] Nor has any international tribunal ever heard a dispute concerning use of groundwater.[95] This vacuum moved one scholar to conclude recently that international law has not developed much regarding groundwater.[96] In a similar vein, a United Nations panel of experts had occasion to

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[91] J. Lammers, supra note 49, at 496.

[92] Rogers & Utton, The Ixtapa Draft Agreement Relating to the Use of Transboundary Groundwaters, 25 Nat. Resources J. 713, 718 (1985).

[93] Caponera & Alheritiere, Principles for International Groundwater Law, 18 Nat. Resources J. 589, 618 (1978).

[94] J. Lammers, supra note 49, at 376.

[95] Ando, The Law of Pollution Prevention in International Rivers and Lakes, in The Legal Regime of International Rivers and Lakes 331, 333 (R. Zacklin & L. Caflisch eds. 1981); see also Caponera & Alheritiere, supra note93, at 618.

[96] B. Chahaun, Settlement of International Water Law Disputes in International Drainage Basins 102 (1981).

remark that international principles relating to groundwater were inadequate.[97] Even as recently as 1985 commentators noted the "striking absence" of law dealing with transboundary groundwaters.[98] In the absence of a cognizable international groundwater regime it can hardly be said that state practice has created a custom restricting Mercadia's use or pollution of its transboundary groundwaters.[99]

c. National practice does not support a finding of international custom.

National practice has not produced more than a limited amount of information regarding interference with groundwater.[100] The scarcity of laws regarding groundwaters is hardly remarkable given the relative lack of interest in the issue. One author notes that:

> . . . because law, and governments, respond (with few exceptions) only to felt needs of a society[,] it comes as no surprise that traditionally there has been a failure to focus on the regulation and management of groundwater use in most legal systems. Demand for regulatory action simply has not been insistient.[101]

Some commentators have also disregarded groundwater. For example, in his 1970 treatise on international law, of the twelve pages devoted to discussion of sovereignty over various types of inland waters, Professor Verzijl did not once refer to groundwater.[102]

4. Evidence of groundwater custom cannot be inferred from state

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[97] U.N. Dep't of Economic & Social Affairs, Management of International Water Resources: Institutional and Legal Aspects--Report of the Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development, at 27, U.N. Doc. ST/ESA/5 (1975).

[98] Rogers & Utton, supra note 92, at 713.

[99] See Teclaff, Principles for Transboundary Groundwater Pollution Control, 22 Nat. Resources J. 1065, 1065 (1982).

[100] J. Lammers, supra note 49, at 497.

[101] Hayton, The Groundwater Legal Regime as Instrument of Policy Objectives and Management, 2 Annales Jusris Aquarium 272, 274 (1976).

[102] 3 J. Verzijl, International Law in Historical Perspective 18-29 (1970).

policies concerning surface waters.

Pollution standards which may have developed with respect to surface waters cannot be applied in the case of groundwaters, for international law develops at different rates in different fields. International rules on various subjects are frequently in different stages of evolution, being more numerous and better assessed in certain fields than in others.[103]

a. States do not consistently include groundwaters within regimes directed at controlling surface water pollution.

State practice concerning surface waters does not support a finding of practice regarding groundwater. Some states have even taken explicit steps to distinguish between ground and surface waters. For example, in their response to an International Law Commission questionnaire on the aspects of international watercourses, both Colombia and Nicaragua limited their definitions of "international watercourse" to rivers, thus excluding underground waters.[104] Finland and the United States also excluded groundwaters from their definition of "international watercourse."[105]

b. Groundwaters have historically been and continue to be treated differently than surface waters by most countries.

Groundwaters have historically been treated as a separate regime in most countries, being perceived as an incident to ownership of the land.[106] It is not surprising, then, that states continue to insist on their sovereignty over groundwaters.[107] States, in most instances, have resisted "any implication of state responsibility for pollution of, or other damage to, transnational aquifers."[108] As noted

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[103] A. Springer, supra note 88, at 37-38.
[104] See [1976] Y.B. Int'l L. Comm'n 17-18, 26, 38, U.N. Doc. A/CN.4/SER.A/1976.
[105] See id. at 19, 30.
[106] Teclaff, supra note 99, at 1065.
[107] Hayton, The Law of International Aquifers, 20 Nat. Resources J. 71, 77 (1982).
[108] Id.; see also Bush, supra note 69, at 323.

in the commentary to the I.L.C. Draft Convention, this concern was reflected by opposition to the inclusion of physical land areas within the concept of the "international drainage basin" for fear that such and expansive definition might restrict uses of lands within drainage basins.[109]

C. Subsidiary Means of Establishing Positive Norms of International Law Do Not Establish a Prohibition Against Pollution of Groundwater.

Article 38 of the Statute of the International Court of Justice instructs the Court to apply "judicial decisions and the teachings of the most highly qualified publicists of the various nations."[110] These sources of law are relegated to the position of "subsidiary means."[111] Moreover, the application of judicial decisions is expressly limited by Article 59, which states that decisions of the Court have "no binding force except between the parties."[112]

1. Judicial decisions do not prohibit pollution of groundwater.

No international tribunal has ever heard a case concerning transboundary groundwaters or transboundary water pollution. Nevertheless, Harmonia is likely to argue by analogy the decision of the tribunal in the Trail Smelter arbitration.[113] The dispute involved: (1) the amount of money damages owed by a Canadian smelter to the State of Washington for injuries sustained as a result of transboundary air pollution; and (2) whether the smelter could continue its polluting activity. With regard to the first issue, Canada's liability was assumed in the compromis.[114] Canada'a admission of liability is thus a primary element of the case.[115] Mercadia has not

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[109] See1983 I.L.C. Yearbook, supra note 30, at 167-68.
[110] Statute of the International Court of Justice, art. 38.
[111] Id.
[112] Id. art. 59.
[113] Trail Smelter (U.S. v. Can.) 3 R. Int'l Arb. Awards 1905 (1938).
[114] Rubin, Pollution by Analogy: The Trail Smelter Arbitration, 50 Or. L. Rev. 259, 259, 264 (1971).
[115] See id. at 264.

admitted liability. Regarding the second issue, the decision is based solely upon United States case law[116] (to which Canada agreed to be bound in the compromis[117]), examined within the "limitations of sovereignty inherent in the Constitution of the United States."[118] Because the sovereignty of states of a federal union is limited relative to the sovereignty asserted by subjects of international law,[119] the decision has little force in a true international context.

2. The writings of publicists do not prohibit pollution of groundwater.

"[N]o other element in this hierarchy [of sources of law] deserves to be treated with so much reserve as writers on international law."[120] As with other elements of the hierarchy, publicists' writings must be scrutinized for the "international outlook" of the author.[121] Although publicists interested in environmental issues generally disapprove of pollution, these views are progressive rather than corroborative of present state conduct.[122] Significantly, the progressive concept of the "international drainage basin" introduced by the Helsinki Rules was narrowed at the insistence of states uneasy about the effect of such a concept upon their control over uses of land within the basin.[123]

D. Assuming, Arguendo, That Mercadia Should Consider the Effect of the Use of Its Territory Upon Harmonia, Principles of Equitable Utilization Favor Mercadia's Use.

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[116] Id. at 267.

[117] Trail Smelter (U.S. v. Can.) (Compromis art. IV), 3 R. Int'l Arb. Awards 1905,1908 (1938).

[118] Id. at 1964.

[119] Rubin, supra note 114, at 267-71.

[120] 1 Schwarzenberger, International Law 36 (3d ed. 1957).

[121] Id. at 30.

[122] E.g., Dupuy, International Liability of States for Damage Caused by Transfrontier Pollution, in O.E.C.D., Legal Aspects of Transfrontier Pollution 345, 352 (1977) (general principles which would attach liability for transfrontier pollution have "little weight in legal proceedings[,]" but may make headway in the future).

[123] See supra note 109 and accompanying text.

Even those who would impose an obligation to consider the indirect pollution of groundwater still admit that pollution which is the by-product of beneficial use is not prohibited per se.[124] Rather, such obligation is subject to principles of equitable utilization of the shared groundwater.[125] Significantly, according to Article VII of the Helsinki Rules, a basin state "may not be denied the present reasonable use of the waters of an international drainage basin to reserve for a co-basin State a future use of such waters." [126] Mercadia's agriculture uses are prima facie reasonable and may not therefore be displaced in order to provide for Harmonia's uncertain future development of opportunities in tourism. Moreover, Mercadia's use directly supports a dependent local population and is therefore preferred.[127]

IV. MERCADIA'S ACTIONS AFFECTING THE GALALA AQUIFER ARE JUSTIFIED ACCORDING TO EQUITABLE PRINCIPLES.

A. The Court May Employ Principles of Equity.

Equity is an "essential and all-pervading principle of interpretation" in both civil and common law countries.[128] Scholars have concluded that Article 38, paragraph 1(c) of the Statute of the International Court of Justice, which empowers the Court to apply "general principles of law recognized by civilized nations,"[129] includes equity as it has developed as a generally recognized principle of interpretation.[130] General principles

[124] Helsinki Rules, supra note 17, art. X, comment c; Dupuy, supra note 121, at 353 (some residual transfrontier will aways be lawful); J. Lammers, supra note 49, at 346-47.

[125] Helsinki Rules, supra note 17, art. X.

[126] Id. art VII. Existing use is also given weight in Article V(2)(d).

[127] Id. art. V(2)(f).

[128] W. Friedmann, supra note 59, at 197.

[129] Statute of the International Court of Justice, art. 38, para. 1(c).

[130] See W. Friedmann, supra note 59, at 197; H. Lauterpacht, Private Law Sources and Analogies of International Law at para. 28 (1927);

of equity were employed by the Permanent Court in Diversion of Waters From the River Meuse.[131] Cases before this Tribunal may also be cited.[132]

B. The Equitable Doctrine of "Clean Hands," Which Has Been Recognized as a Principle of International Law, Precludes Harmonia From Complaining of Mercadia's Actions.

A fundamental principle of equity is the doctrine of "clean hands,"[133] a doctrine also expressed by the maxim inadimplenti non est adimplendum (one who fails to fulfill his side of the bargain cannot require the other party to perform) as well as by the phrase "he who seeks equity must do equity."[134] The doctrine was recognized by Judge Anzilotti in the River Meuse Case,[135] in which the Netherlands sued Belgium for diversion of waters from a common river. The Netherlands' claim was rejected because it had previously done exactly the same. According to similar logic, Harmonia cannot simultaneously exercise dominion over shared surface waters and complain of Mercadia's unintended use of shared groundwaters.

CONCLUSION

Mercadia respectfully requests this Court to declare: (1) that Harmonia acted in violation of international law with respect to its appropriation of the waters of the Lakota River; and (2) that Harmonia is internationally responsible and liable for these

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[131] (Neth. v. Belg.),1937 P.C.I.J. (ser. A/B) No. 70.

[132] E.g., The Nuclear Test Cases (Aust. v. Fr.), 1974 I.C.J. 253, 265-71 (reliance); Eastern Greenland, 1933 P.C.I.J. (ser. A/B) No. 53, at 36-37, 69-73 (same); North Sea Continental Shelf Cases (W. Ger. v. Den, W. Ger. v. Neth.), 1969 I.C.J. 3, 53-54 (proportionality); Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 18, 43-44, 75-76 (same).

[133] See generally 1 Pomeroy, Equity Jurisprudence 398 (3d ed. 1905).

[134] W. Friedmann, supra note 59, at 198.

[135] (Neth. v. Belg.),1937 P.C.I.J. (ser. A/B) No. 7, at 70. The Judge there remarked that the principle was "[s]o just, so equitable, so universally recognized, that it must be applied in international relations also." See Goldie, supra note 33, at 665.

actions. Mercadia further requests that its actions affecting the Galala Aquifer be declared consistent with international law.

Respectfully submitted,

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Douglas Ende

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Robert Mitchell

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Jessica Ryan