

RANADIA V./ GULINODOS : TELDERSWEDSTRIJD 1990.

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I. INLEIDING.

A. SAMENVATTING VAN DE CASUS.

De Ranadiaanse Republiek en de Republiek van Gulinodos zijn buurstaten.

Een groot deel van Ranadia ligt onder het zeepeil, en wordt beschermd door dijken. De rivieren die doorheen Ranadia naar de zee vloeien, hebben bijna allemaal hun bron in Gulinodos.

Gans het territorium van Gulinodos is bedekt met tropische regenwouden, ongeveer 40% van de tropische wouden ter wereld.

Het merendeel van de houtproduktie wordt verscheept en verhandeld langs de Ranadiaanse havens. Het gebruik van de rivieren en havens wordt beheerst door het Trade Transit Treaty van 1936 tussen Ranadia en Gulinodos.

In het begin van de zestiger jaren wordt Ranadia bedreigd door een ernstig luchtvervuilingsprobleem. Om dit tegen te gaan, worden de Ranadiaanse bedrijven verplicht een keuze te maken tussen twee alternatieven. Eén ervan schrijft het bouwen van schoorstenen met een hoogte van ten minste 100 meter voor, om de rookverspreiding te bevorderen.

In 1986 wijt Gulinodos de vermindering van het Barlubbavisbestand in haar meren aan de vervuiling door de Ranadiaanse schoorstenen. Aan Ranadia wordt gevraagd hun milieupolitiek te wijzigen. De Ranadiaanse regering verwerpt echter elke aansprakelijkheid voor de gebeurtenissen in Gulinodos, aangezien wetenschappers geen causaal verband kunnen aantonen tussen de hogere schouwen en het geringer aantal vissen.

Op het einde van de jaren tachtig stimuleerde de Gulinodese regering een versnelde exploitatie van het regenwoud. De rampzaligste ontginningstechnieken werden gebruikt, zodat gans de watercyclus verstoord werd. Daaropvolgende gronderosie zorgde voor stortvloeden, en grote kwantiteiten modder belandden in de Ranadiaanse havens en rivieren.

In 1988 werden de Ranadiaanse dijken zwaar beschadigd, en een twaalfstal personen verloren er het leven bij.

Door het steigende waterpeil, vergroot het risico op overstromingen nog steeds.

Ranadia vraagt aan Gulinodos om de houtverwerking te verminderen, en om een gezamenlijke commissie op te richten om de watercyclus te beheren. Gulinodos verwerpt echter deze voorstellen.

In juli 1988 zegt Ranadia het Trade Transit Treaty op, en legt bijzondere heffingen op voor de import, export of behandeling van houtprodukten.

In mei 1989 beslist de Gulinodese regering om deze zaak voor het Internationaal Gerechtshof te brengen. Ranadia verzet zich hiertegen niet.

B. SAMENVATTING VAN DE VOORNAAMSTE RECHTSVRAGEN.

Deze memorie werd geschreven ter verdediging van Ranadia.

Het **eerste probleem** betreft de eventuele aansprakelijkheid van Ranadia voor de schade die de uitwasemingen van haar industrie beweerdelijk toebrachten aan het visbestand van Gulinodos. De "state responsibility" of internationale aansprakelijkheid steunt op dezelfde elementen als art. 1382 B.W.: fout, schade en oorzakelijk verband.

De *fout* moet bestaan uit de schending van een internationaalrechtelijke verplichting (vanuit een verdrag of een gewoonte). In uitzonderlijke gevallen, zoals bijvoorbeeld kernongevallen of olievervuiling, geldt echter "strict liability" of foutloze aansprakelijkheid. Bewijs van schade en oorzakelijk verband volstaan in zulke gevallen. Bepaalde auteurs trachten de foutloze aansprakelijkheid te verruimen tot elke milieuschade.

Aangezien deze extrapollatie voor Ranadia nadelig zou zijn, wordt erop gewezen dat er nog geen foutloze aansprakelijkheid bestaat voor luchtvervuiling, wegens gebrek aan een gewoonte of een verdrag.

Als **tweede vraag** werd onderzocht of een industriële activiteit in een bepaald land internationaalrechtelijk gesanctioneerd kan worden wegens de schadelijke gevolgen in een ander land. In de beroemde *Trail Smelter Case* werd dit mogelijk geacht. Canada werd toen veroordeeld tot het betalen van schadevergoeding aan de Verenigde Staten, juist omwille van schadelijke industriële uitwasemingen.

Aangezien dit precedent nadelig was voor Ranadia, moest aange-toond worden dat de *Trail Smelter Case* in dit geval niet toepasselijk of relevant was.

Ranadia heeft de Conventie aangaande Grensoverschrijdende Luchtvervuiling (C.G.L., 1980) ondertekend, maar niet geratificeerd.

Het Weens Verdragenverdrag bepaalt dat een staat zich moet onthouden van elke handeling die het doel en de geest van een ondertekend verdrag zou aantasten.

Het doel van de C.G.L. werd onderzocht. De C.G.L. is slechts een algemeen en vaag kader van principen, dat geenszins industriële ontwikkeling verbiedt. Deze restrictieve interpretatie van de C.G.L. liet toe de negatieve invloed ervan op de juridische positie van Ranadia te beperken.

De schade kon moeilijk weerlegd worden, wat niet het geval is voor het *oorzakelijk verband*. Tot nog toe waren het enkel Gulinodese wetenschappers die het verband tussen de Ranadiaanse rook en de vissterfte vaststelden. Geen enkel internationaal onderzoek gaf op dit punt uitsluitel. Voor Ranadia kon er dus besloten worden dat er geen "clear and convincing evidence" bestond.

Hiernaast moet er ook rekening gehouden worden met de "circumstantial evidence", of bewijs door omstandigheden. De gebruikelijke windrichting, de hoogte van de schoorstenen en de afwezigheid van andere buurlanden is natuurlijk bezwarend voor Ranadia. Bewijs door omstandigheden geldt slechts enkel indien *alle* omstandigheden leiden naar één enkele conclusie. Ter verdediging van Ranadia werd hier naar voren gebracht dat er naast de industrie ook andere oorzaken kunnen bestaan voor waterverzuuring. Vulkanen produceren ook SO₂, en de Gulinodese vulkanen waren actief ten tijde van de vissterfte.

Het **derde punt** is de vraag van Ranadia om een gezamenlijke commissie op te richten en te belasten met het beheer van rivieren en wouden als fundamente van de hydrologische cyclus. Eigenlijk komt het erop neer dat Ranadia enige inspraak zou kunnen hebben over het beleid van rivieren en wouden in Gulinodos. De rechters moesten dus overtuigd worden dat er een plicht tot samenwerking bestond.

De enige rechtsbron die een plicht tot samenwerking zou kunnen rechtvaardigen, was in dit geval de gewoonte. Twee elementen moeten bewezen worden: statenpraktijk en opinio iuris.

Voor de statenpraktijk werd verwezen naar tientallen commissies die reeds overal ter wereld opgericht zijn om drainagebassins te beheren (vb. Rijn, Zambeze,...).

De rechtsovertuiging werd afgeleid van VN-resoluties en verklaringen van internationale organisaties, waarbij telkens benadrukt werd dat een algemene samenwerkingsplicht bestaat.

Subsidiair werd ook verwezen naar de goede trouw, die Gulinodos verplicht te handelen na consultatie van Ranadia indien er gemene belangen op het spel staan.

Tenslotte werd ook de plicht van evenredig gebruik van een rivier aangehaald. Uitgaande van een ruime interpretatie impliceert zulks dat een stroomopwaartse staat een rivier niet onbruikbaar mag maken voor een stroomafwaartse staat.

Natuurlijk werd niet vergeten een algemene oproep te doen voor het behoud van regenwouden.

II. TEKST VAN DE MEMORIE.

A. RANADIA HAS NOT VIOLATED ITS OBLIGATIONS UNDER INTERNATIONAL LAW.

1. Ranadia is not responsible for the decline of the Barlubba fish production.

In the early 1960's Ranadia had to change its industrial policies because of local smog problems, and so a three-option plan was elaborated. The construction of higher chimneys, one of the options, was chosen by a large part of the industries. Having lately suffered from the acidification of its lakes, Gulinodos tries to impute the responsibility for such damages on Ranadia.

a. Gulinodos cannot invoke strict liability for environmental damages.

State practice and Courts fail to support the concept of liability for lawful activities ¹.

At present, there is neither a customary rule nor a general principle of international law which provides a system of strict liability for environmental damages ².

(1) BROWNLIE, I., *System of the Law of Nations: State Responsibility*, 1983, p. 50; WIL-LISCH, J., *State Responsibility for Technological Damage in International Law*, 1987, p. 273.

(2) SPRINGER, A.L., *The International Law of Pollution*, 1983, p. 132; KISS, A.C., *Droit international de l'environnement*, 1989, p. 111; DUPUY, P.M., *La responsabilité internationale des états pour les dommages d'origine technologique et industrielle*, 1976, p. 26; QUENTIN-BAXTER, "Second Report on International Liability for the Harmful Consequences arising out of Acts not prohibited by International Law, DOC. A/CN.4/346", *Yearbook I.L.C.*, 1981, vol. II, 2t part., p. 110.

Gulinodos cannot rely upon the *Trail Smelter* arbitration nor the *Corfu Channel* case, to refute this principle since state responsibility was grounded upon the breach of an obligation under international law³.

Further, Principle 21 of the Stockholm Declaration⁴ does not introduce a liability without fault while states agreed that the idea of fault should prevail⁵ and strongly opposed to the idea that Principle 21 could be interpreted as imposing an absolute or strict liability⁶.

In absence of a custom, a non-fault based responsibility can only be based upon a convention, as was demonstrated in the Gut Dam arbitration⁷. Such an agreement did not exist between Gulinodos and Ranadia.

In the present case, there is no automatic activation of Ranadia's liability upon the simple occurrence of damage, originating in its territory⁸.

Hence, the common system of state responsibility is applicable and Gulinodos has to demonstrate the violation of an obligation under international law⁹.

b. Ranadia did not act contrary to international law.

(i) Ranadia did not violate an obligation to prevent or abate transboundary air pollution.

Following governmental instructions, a large part of Ranadia's industries constructed higher chimneys. It is alleged that their SO₂ emissions caused the acidification of Gulinodos' lakes.

(3) The Corfu Channel case, Judgment, *I.C.J. Reports*, 1949, p. 22 ; Trail Smelter arbitration, decision, 1938, *R.I.A.A.*, III, p. 1911-1937 ; DUPUY, P.M., *La responsabilité internationale des états pour les dommages d'origine technologique et industrielle*, 1976, p. 32, 189 ; HANDL, G., "State Liability for Accidental Transnational Damage", *A.J.I.L.*, 1980, p. 537.

(4) Report of the UN Conference on the Human Environment, *I.L.M.*, 1972, p. 1416.

(5) SOHN, L.B., "The Stockholm Declaration", *H.I.L.J.*, 1973, p. 423 and 427 ; HANDL, G., "State Liability for the Accidental Transnational environmental damage by Private Persons", *A.J.I.L.*, 1980, p. 525 and 536 ; LAMMERS, J.G., "Balancing the Equities in International Environmental Law", in *The Future of the International Law of the environment*, in *R.C.A.D.I. (colloque)*, 1985, p. 153 and 157.

(6) *UN Doc.*, A/CONF. 48/P.C. 12, Ann. 15, [0015] 65 (1971).

(7) Canada-United States settlement of Gut Dam claims arbitration, 1969, *I.L.M.*, 1968, p. 118 ; CARREAU, D., *Droit international*, 1988, p. 408 ; ZEMANEK, K. and SALMON, J., *Responsabilité internationale*, 1987, p. 27.

(8) GRAEFRATH, B., "Responsibility and Damages caused", in *R.C.A.D.I.*, 1984, vol. II, p. 112.

(9) Art. 1 Draft Articles on State Responsibility, *Yearbook I.L.C.*, 1979, Vol. II, 9 ; BROWN-LIE, I., *Principles of Public International Law*, 1973, p. 418-419.

There is no rule forbidding environmental harmful activities, especially concerning air pollution¹⁰.

Though there is an emerging consensus that pollution of the environment should be countered, a customary duty to prevent and abate all transboundary pollution is missing¹¹, since there is no substantial state practice¹².

The Trail Smelter arbitration¹³ is the only case that ever dealt with noxious fumes¹⁴ and did not establish a general principle, since Canada's responsibility was already assumed in the prior compromise referring the matter to the tribunal¹⁵. Further, the tribunal did not apply international law but the domestic law of the United States¹⁶. Finally, the decision was only meant to be valid "between the parties concerned, considering the specific circumstances"¹⁷.

Furthermore, the 1972 Stockholm Declaration¹⁸ has no compelling effect¹⁹. Principle 21 of the Declaration is not a rule of customary international law imposing a duty to prevent, but is merely intended to encourage states to elaborate clear rules which protect the environment²⁰,

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- (10) DUPUY, P.M., "International Liability of states for Damage caused by transfrontier pollution", in O.E.C.D., *Legal Aspects of Transfrontier Pollution*, 1977, p. 353; KISS, A.C., "Survey of Current Developments in International Environmental Law", in *IUCN Environmental Policy and Law Paper*, 1976, p. 57; VAN LIER, I., *Acid Rain and International Law*, 1980, p. 100.
 - (11) ANDO, N., "The law of Pollution in International Rivers and Lakes", in ZACKLIN, R. and CAFLISCH, L., *The Legal Regime of International Rivers and Lakes*, 1981, p. 331 and 342-343; FALK, R., KRATOCHWIL, F. and MENGLOVITZ, S.H., *International law: A contemporary Perspective*, 1985, p. 603.
 - (12) VAN LIER, I., *Acid Rain and International Law*, 1980, p. 97; POP, I., *Voisinage et bon voisinage*, 1980, p. 164.
 - (13) Trail Smelter arbitration, 1938, 1941, R.I.A.A., III, p. 1911-1982.
 - (14) DUPUY, P.M., *La responsabilité des états pour les dommages d'origine technologique et industrielle*, 1976, p. 33; WILLISCH, J., *State Responsibility for Technological Damage in International Law*, 1987, p. 58-59.
 - (15) Art. I Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail, April 15, 1935, R.I.A.A., III, p. 1907-1910.
 - (16) Art. IV Convention for Settlement of Difficulties Arising from operation of Smelter at Trail, April 15, 1935, R.I.A.A., III, p. 1907-1910.
 - (17) Trail Smelter arbitration, 1938, R.I.A.A., III, p. 1965-1966.
 - (18) Report of the UN Conference on the Human Environment, *I.L.M.*, 1972, p. 1416.
 - (19) DUPUY, P.M., "International Liability of states for Damages caused by Transfrontier Pollution", in O.E.C.D., *Legal Aspects of Transfrontier Pollution*, 1977, p. 235; ZEMANEK, K. and SALMON, J., *Responsabilité internationale*, 1987, p. 12; SPRINGER, A.L., *The International Law of Pollution*, 1983, p. 134.
 - (20) SOHN, L.B., "The Stockholm Declaration", *H.I.L.R.*, 1979, p. 423, 426-427 and 513-514; FALK, R., KRATOCHWIL, F. and MENDLOTVITZ, S.H., *International Law: A Contemporary Perspective*, 1985, p. 604.

which is stressed by Principle 22²¹.

There is no treaty which obliges Ranadia to prevent or abate air pollution. Ranadia's signature of the 1980 EEC Convention on Long-Range Transboundary Air Pollution does not entail a specific obligation. The EEC Convention explicitly requires ratification, which Ranadia never did²². According to Article 14 of the Vienna Convention on the Law of Treaties²³ a state is not bound by such an unratified treaty. Moreover, the EEC Convention expressly precludes the notion of responsibility and does not impose reduction goals²⁴. Consequently, the maintenance of smokestacks cannot be considered as a frustration of the purpose and objective of this treaty.

It is thus submitted that Ranadia's industrial policy was not contrary to international law, in the absence of a relevant customary or treaty rule.

(ii) There was no foreseeability of the transfrontier damage.

In the Corfu Channel case, the Court held that "it cannot be concluded from the mere fact of the control exercised by a state over its territory that that state necessarily knew or ought to have known, of any unlawful act perpetrated therein"²⁵.

Article 198 of the 1982 Convention on the Law of the Sea supports this ruling²⁶.

The large distance between the contaminated area in Gulinodos and the Ranadian industries²⁷, not situated near the border with Gulinodos, implies that a direct damage by SO₂ fumes is impossible²⁸. Consequently, since the damage was not foreseeable, Ranadia had no duty to consult

(21) HANDL, G, *State Liability for Accidental Transnational Damage*, p. 536; KISS, A.C., and SICAULT, J.-D., "La conférence des Nations Unies sur l'environnement", *A.F.D.I.*, 1972, p. 613.

(22) Art. 15 Convention on Long-Range Transboundary Air Pollution of 13 Nov. 1979, *I.L.M.*, 1979, p. 1442.

(23) Art. 14 Vienna Convention on the Law of Treaties, May 1969, *UN Doc.*, A/CONF/39/27.

(24) Footnote in the Convention on Long-Range Transboundary Air Pollution, *I.L.M.*, 1979, p. 1445; SMITH, G.P., "The United Nations and the Environment: Sometimes a Great Notion", *T.I.L.J.*, 1984, p. 355; FRAENKEL, A., "The Convention on Long-Range Transboundary Air Pollution: the Challenge of International Cooperation", *H.I.L.J.*, 1989, p. 456.

(25) Corfu Channel case, Judgment, *I.C.J. Reports*, 1949, p. 18.

(26) Art. 198 of the United Nations Convention on the Law of the Sea, December 10, 1982, *UN Doc.*, A/CONF. 62/122 cocc. 3 and cocc. 8.

(27) Clarification nt 13.

(28) Trail Smelter arbitration, 1933, *R.I.A.A.*, III, p. 1911; POP, I, *Voisinage et bon voisinage*, 1980, p. 187.

or inform²⁹. Acid rain, the only way by which the sulphur emissions could have any transboundary impact, was a notion at that time not even introduced and not fully understood yet³⁰.

Hence, not only the lack of foreseeability but also the absence of knowledge preclude Ranadia from responsibility.

(iii) *Ranadia acted in conformity with the principle of due diligence and good neighbourliness.*

*** Ranadia showed sufficient due diligence.**

In the absence of a specific agreement, the analysis of a state's responsibility for transfrontier damage has to be grounded upon the duty of due care³¹, which, according to the Alabama arbitration, has to be exercised "in proportion to the risk"³².

Some activities are qualified by the international community as ultra-hazardous, involving a significant or exceptional risk of transnational damage³³.

In the present case, Ranadia's industrial plants activity cannot be considered abnormally dangerous³⁴.

Moreover, Ranadia included 2 alternative options and checked the results of its policy. Consequently, Ranadia gave proof of an environmental consciousness and of reasonable diligence³⁵.

(29) HANDL, G., "State Liability for Accidental Transnational Environmental Damage by Private Persons", *A.J.I.L.*, 1980, p. 556; RAUSCHNING, D., "Interim Report of the Committee on Legal Problems of Continuous and Instantaneous Long Distance Air Pollution", *I.L.A. Reports*, 1986, p. 211, §27.

(30) WETSTONE, G.S. and ROSENCRANZ, A., *Acid Rain in Europe and North America: National Responses to an International Problem*, 1984, p. 3; VAN LIER, I., *Acid Rain and International Law*, 1980, p. 95; FRAENKEL, A., "The Convention on Long-Range Transboundary Air Pollution: Meeting the Challenge of International Cooperation", *H.I.J.L.*, 1989, p. 453.

(31) PINTO-DOBERNIG, I.R., "Liability for the Harmful Consequences of Instances of Transfrontier Pollution not Prohibited by International Law", *Ö.Z.F.Ö.R.*, 1987, p. 106.

(32) Alabama arbitration, 1872, Moore, J.B., *Arbitrations*, 1898, Vol. I, p. 653.

(33) Convention on Civil Liability for Oil Pollution Damage Resulting from the Exploration and Exploitation of Seabed Mineral Resources, December 17, 1976, *I.L.M.*, 1977, p. 1450; Vienna Convention on Civil Liability for Nuclear Damage, May 21, *I.L.M.*, 1963, p. 727; Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, December 17, 1971, *I.L.M.*, 1971, p. 277; Convention on International Liability for Damage Caused by Spaced Objects, June 29, 1971, *U.N.T.S.*, vol. 961, 187; HANDL, G., "State Liability for Accidental Transnational Environmental Damage", *A.J.I.L.*, 1980, p. 564; JENKS, W., "Liability for Ultra-Hazardous Activities in International Law", *R.C.A.D.I.*, 1966, Vol. I, p. 1071.

(34) FELSKE, B.E., "Sulphur dioxide Regulation and the Canadian Non-Ferrous Metals Industry", *Technical Report Nt 3*, 1981, p. 25.

(35) SPRINGER, A.L., *The International Law of Pollution*, 1983, p. 13; DUPUY, P.M., "International Liability of States for Damages caused by Transfrontier Pollution", in

*** Ranadia respected the principle of good neighbourliness.**

It is generally accepted that neighbouring states have to take into account each other's interests ³⁶.

Ranadia has immediately granted information at the request of Gulinodos of the first sign of a possible transboundary impact. Consequently, Ranadia took into account Gulinodos' interests and provided for the help that could be expected at that stage.

c. Ranadia cannot be held responsible nor expected to change its policy because of the absence of a causal link.

(i) Gulinodos does not prove a causal link.

A worldwide intensive scientific research only led to the conclusion that the decline of the barlubbafish-production was due to the acidification of the water in the lakes. Only Gulinodos' scientists point at the Radianian plants, but no solid proof of this is given.

Under current international law, state responsibility for wrongfulness can only be engaged if a tight causal nexus between the damage suffered and the alleged violation is proved ³⁷.

The importance of the causality was stressed ³⁸ in the Nuclear Tests case and numerous others among which the Trail Smelter arbitration requiring a "clear and convincing evidence" ³⁹.

Accordingly, proof of causality is required to obtain a policy change from an alleged pollutor ⁴⁰.

O.E.C.D., *Legal Aspects of Transfrontier Pollution*, 1977, p. 353; KISS, A.C., *Droit international de l'environnement*, 1988, p. 106.

(36) Art. 74 UN Charter; VAN LIER, I., *Acid Rain and International Law*, 1980, p. 109; SÖRENSEN, M., "Principes de droit international public", in *R.C.A.D.I.*, 1960, Vol. III, p. 194.

(37) VAN LIER, I., *Acid Rain and International Law*, 1980, p. 115; STRAUS, M., "Causation as an Element of State Responsibility", *Law and Policy in International Law*, 1984, p. 833; BOLLECKER-STERN, B., *Le préjudice dans la théorie de la responsabilité internationale*, Paris, Pedone, 1973, p. 373.

(38) Wimbledon case, *P.C.I.J.*, 1923, Ser. A, nt 1, p. 32; Nuclear tests case, *I.C.J. Reports*, 1974, p. 388.

(39) Armstrong Cock Company arbitration, Italian-United States Conciliation Commission, 1953, *R.I.A.A.*, XIV, p. 165; Palumbo arbitration, March 1956, *R.I.A.A.*, XIV, p. 255-256; Buzau-Neohiassi Railroad, July 7, 1959, *R.I.A.A.*, III, p. 1839; I.R. Clark (U.S.A.) v./ United Mexican States, arbitration, 1928, *R.I.A.A.*, p. 415; Trail Smelter arbitration, 1941, *R.I.A.A.*, III, 1965.

(40) McCORMICK, J., *Acid Rain: The Global Threat of Acid Pollution*, 1985, p. 86; FRAENKEL, A., "The Convention on Long-Range transboundary Air Pollution: Meeting the Challenge of International Cooperation", *H.I.L.J.*, 1989, p. 461.

When a state is heavily dependent upon high sulphur fuels for power generation, as Ranadia is, it cannot be expected to construct new installations if solid proof of its harming conduct is not available ⁴¹.

Recent sophisticated techniques and precise indications of the World Meteorological Organisation, of which Gulinodos is a member, can provide with solid proof to track air pollution ⁴².

Consequently, Gulinodos' failure to furnish solid proof, all methods being available, can only convince this Court of the absence of any causal link.

(ii) Other sources have to be taken into account.

In Gulinodos, recent volcanic activity has contributed to sulphur dioxide emissions. Some volcanos project even more sulphur into the atmosphere than a dozen of industrial complexes do ⁴³.

Moreover, the Cratiowa volcano is situated in the South of Gulinodos, occupying a central position between Ranadian plants and Gulinodos' acidified lakes.

Furthermore, the acidity of an aquatic ecosystem, as Gulinodos' lakes, needs not necessarily to be due to acid percipitation, but can be caused by a natural acidification process or by changes in forestry methods ⁴⁴.

Finally, there are other industrialized countries on the continent emitting SO₂.

Consequently, the presence of other sources gives Ranadia a rightful position to deny its responsibility and to abstain from a hurried policy change, at least until further research would establish the required causal link.

(41) WETSTONE, G.S. and ROSENCRANZ, A., *Acid Rain in Europe and North-America*, 1984, p. 67 and 72.

(42) LEVIN, A.L., *Protecting the Human Environment*, 1977, p. 45 ; RAUSCHNING, D., "Interim Report of the Committee Legal Problems of Continuous and Instantaneous Long-Distance Air Pollution", *I.L.A. Reports*, 1986, p. 207, §20 ; *State v. Inland Steel Co*, nt. 72, CH 259, *Ill. Cir. Ct., Cook County*, Jan. 27, 1976 ; Memorandum of Understanding between the United States and Canada, August 23, 1983, *I.L.M.*, 1983, p. 1017 ff ; FISCHER, J.M., "The Availability of Private Remedies for Acid Rain Damage", *E.L.Q.*, 1981, p. 450.

(43) Statement of Richard Frunkhouser, *New York Times*, August 8, 1983.

(44) VAN LIER, I., *Acid Rain and International Law*, 1980, p. 23 ; BOLIN, B., "Air Pollution across National Boundaries : The impact of sulphur in Air and Percipitation", in *Swedens' case Study for the United Nations conference on the Human Environment*, 1972, p. 46-47.

2. The taxation of tropical timber and the denunciation of the treaty are not contrary to international law.

In 1936, a treaty between Ranadia and Gulinodos granted to Gulinodos a right of trade transit and use of Ranadian port facilities, and imposed some duties.

Recently however, Gulinodos started a large-scale deforestation, which seriously deteriorates the navigation conditions of Ranadian rivers and ports, and even threatens the country with a global inundation. Ranadia asked Gulinodos to change its timber production policies and to accept cooperative action to maintain the water conditions, but these demands were obstinately rejected.

Ranadia then denounced the 1936 Treaty and imposed taxes on the import, export and handling of timber.

a. Gulinodos has no right of free transit under customary or treaty law.

No general or local custom, nor a treaty entitles Gulinodos to free transit through Ranadian rivers and ports.

Gulinodos cannot claim a right of transit over foreign territory or use of foreign ports upon a general rule of customary law. As rivers and ports belong to the internal waters of a state, transit rights only exist upon an express consent of the transit state.

Even if Gulinodos was considered to be a landlocked state, which is doubtful because it owns a coastline of about 30 kilometers, it still has no right of access through Ranadia on any customary basis ⁴⁵.

Neither is Ranadia bound to grant free access to Gulinodos by any multilateral treaty. The 1958 Convention on the High Seas does not impose an obligation on transit states to grant free transit, but on the contrary expressly requires the conclusion of a special treaty before such right is recognized ⁴⁶.

(45) *Explanatory paper to the Draft Articles, doc A/AC 138/93*, Third UN Conference on the Law of the Sea, New York, 1975, p. 206-207; MPAZI-SINJELA, A., *Landlocked states and the UNCLOS regime*, 1983, p. 47; CAFLISCH, L., "Landlocked states and their access to and from the sea", *B.Y.I.L.*, 1978, p. 100; SULEIMAN, N.A., "Free access: the problem of landlocked states and the 1982 UN Convention on the law of the sea", *S.A.Y.I.L.*, 1984, p. 161; MILIC, M., "Access of Land-Locked States to and from the Sea", *Case West. Res Y.I.L.*, 1981, p. 515.

(46) Art. 3 Convention on the High Seas, April 29, 1958, *U.N.T.S.*, vol. 150 (1963), p. 82-167; MONNIER, J., "Le droit d'accès à la mer et la liberté de transit terrestre", in *Traité nouveau du droit de la mer*, DUPUY, R. and VIGNES, D. (ed.), 1985, p. 446.

In vain Gulinodos would invoke Articles 124 to 132 of the 1982 Convention on the Law of the Sea. This Convention has not entered into force yet, nor can the articles concerning access to the sea for landlocked states be considered as customary rules. These articles, adopted in favour of the landlocked states as a result of the package negotiation at UNCLOS III, reflect no existing nor emerging customary rule, accepted as law by the transit states⁴⁷.

Finally, there is no proof of a local custom between Ranadia and Gulinodos entitling the latter to a free transit. The mere fact that transit was allowed for some years does not demonstrate any conviction that a right of transit would exist even in the absence of the 1936 Treaty⁴⁸.

Consequently, the 1936 treaty served as the only basis upon which Gulinodos did enjoy free transit rights through Ranadian territory.

b. Moreover, transit rights are submitted to conditions which Gulinodos fails to observe.

By causing dangerous floods and dikebursts in Ranadia, Gulinodos seriously obstructs Ranadian rivers and ports and threatens its territorial integrity.

Transit rights are submitted to the duty not to hamper navigation nor to violate the legitimate interests of the transit state⁴⁹.

In the Right of Passage case, this court held that a transit state's power of regulation and control of the passage entitled India to refuse further transit to Portugal since this state created tension in Indian territory⁵⁰.

(47) SYMONIDES, J., "Geographically disadvantaged states under the 1982 Convention of the Law of the Sea", *R.C.A.D.I.*, Vol. 208, 1988, p. 389; ARECHAGA, E.J., "Customary international law and the Conference on the Law of the Sea", in *Essays in honour of judge Manfred Lachs*, 1984, p. 577; SULEIMAN, N.A., "Free access : the problem of landlocked states and the 1982 UN Convention on the Law of the Sea", *S.A.Y.I.L.*, p. 161.

(48) Right of Passage over Indian Territory case, Judgment, *I.C.J. Reports*, 1960, p. 6 ; North Sea Continental Shelf case, Judgment, *I.C.J. Reports*, 1969, p. 44 ; Asylum case, Judgment, *I.C.J. Reports*, 1950, p. 120 ; HAGGEMACHER, P., "La doctrine des deux éléments du droit coutumier dans la pratique de la Cour Internationale de Justice", *R.G.D.I.P.*, 1986, p. 35 ; LACHS, M., "The Development and General Trends of International Law in Our Time", *R.C.A.D.I.*, 1980, Vol. 169, p. 178.

(49) VITANYI, B., *The International Regime of River Navigation*, 1979, p. 317 ; BRUHACS, J., "Some Problems of International Law Relating to the Utilization and the Protection of Divided Water Ressources with Special Regard to the Danube Basin", in *Questions of International Law*, HARAZSTI, G. (ed.), II, 1981, p. 34.

(50) Right of Passage case, *I.C.J. Reports*, 1960, p. 6 ; COT, J.P., "L'affaire du droit de Passage en territoire Indien", *A.F.D.I.*, 1960, p. 336.

The rights of a transit state to close rivers and ports in order to protect its legitimate interests is further confirmed by state practice⁵¹ and is expressly laid down in multilateral conventions granting free access⁵².

Moreover, states enjoying transit rights are under the obligation to cooperate in the maintenance of good navigation conditions⁵³ in order to guarantee equitable utilization⁵⁴.

Therefore, even if Gulinodos were to prove a right of free transit without taxes, Ranadia would still be entitled to refuse this transit.

c. Ranadia did not act contrary to international law by denouncing the 1936 Treaty.

The 1936 Treaty Concerning Rights of Trade Transit and Use of Port Facilities has been legally denounced by Ranadia.

The 1936 Treaty contains an implicit right of denunciation. It is an established rule of customary law that parties have the right to denounce their treaty obligations, if this right is implied by the intent of the parties or the nature of the treaty⁵⁵.

In particular, the right of unilateral denunciation is generally recognized to be inherent of treaties of Friendship, Commerce and Navigation⁵⁶ under which the 1936 treaty between Gulinodos and Ranadia must be ranged. As such treaties contain a regulation of mutual amicable and commercial relations, parties are entitled to break the treaty

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- (51) Saudi Arabia v./Aramco Decision, 1958, in DEGAN, V.D., "Internal Waters", *N.Y.I.L.*, 1986, p. 314; HUSSAIN, I., "Pakistan's attitude towards the question of free access to the sea for landlocked states", *A.V.R.*, 1984, p. 502.
- (52) Artt. 125 and 130 United Nations Convention on the Law of the Sea, Dec. 10, 1982, *UN Doc.*, A/CONF. 62/122; art. 12 New York Convention on transit trade of landlocked States, July 8, 1965, *U.N.T.S.*, vol. 597 (1967), p. 3-137; art. 16 Geneva Convention on the High Seas, April 29, 1958, *U.N.T.S.*, Vol. 150 (1963), p. 89-167; Art. 7 and 10 Barcelona Statute on the Regime of Navigable waterways of International Concern of April 20, 1921, *L.N.T.S.*, Vol. 7, p. 35.
- (53) Art. 130 United Nations Convention on the law of the Sea; Dec. 10, 1982, *UN Doc.*, A/CONF. 62/122; Art. 18 Helsinki Rules on the Use of Waters in International Rivers, *I.L.A.*, *Report of the Fifty-Second Conference*, Helsinki, 1966, p. 510.
- (54) River Oder case, *P.C.I.J.*, Ser. A, nt 23, 1929, p. 26-27; WESTON, B., FALK, R. and D'AMATO, A., *International law and world order*, 1980, p. 285; Art. 18 Helsinki Rules on the Uses of Waters of International Rivers, *I.L.A. Reports* 1966, p. 510.
- (55) Fisheries Jurisdiction case, Pleadings, *I.C.J. Reports*, 1973, p. 254 ff.; WIDDOWS, K., "The Unilateral Denunciation of Treaties Containing No Denunciation Clause", *B.Y.I.L.*, 1982, p. 98; McNAIR, *The Law of Treaties*, 1986, p. 511.
- (56) WALDOCK, II, A/CN 4/156, *Yearbook I.L.C.*, 1963, vol. II, p. 36; WALDOCK, VI, A/CN 4/186, *Yearbook I.L.C.*, 1966, vol. 2, p. 51; DETTER, I., *Essays on the law of treaties*, 1967, p. 87; SCHERMERS, G. and VAN HOUTTE, H., *Internationaal en Europees Recht*, 1987, p. 108.

off when these relations change due to the unfriendly behaviour of the other party, as is confirmed by state practice ⁵⁷.

A fundamental change of circumstances entitles Ranadia to end the treaty. In 1936, free transit and use of ports was granted to Ranadia while this navigation did not entail difficulties nor high costs to Ranadia. The devastating timber production and trade of Gulinodos, which causes dramatic floods and mud increases in Ranadia, now forces Ranadia to spend high costs on dredging and dike restoration. As Gulinodos is not willing to change its production policy, these expenses will be permanent. According to the *Fisheries Jurisdiction* case, such changed circumstances which result in a radical transformation of the extent of the obligations, entitle the affected party to withdraw from its further treaty obligations, under a rule of customary law ⁵⁸.

Moreover, Ranadia was fully justified to terminate the treaty after a prior breach by Gulinodos.

The 1936 Treaty, while granting a right of transit and use of port facilities, imposes the duty to maintain the navigability of watercourses and ports. Almost every treaty of navigation expressly states positive obligations to take measures to upkeep good navigation conditions, or even imposes joint actions and cooperation to this end ⁵⁹.

Even without such express provisions, Gulinodos is under the treaty obliged to refrain from all activities which may be detrimental to navigation facilities ⁶⁰.

Gulinodos has clearly violated its essential treaty obligations, by obstructing and hampering the navigability of the rivers and ports, and ob-

(57) Denunciation by Bolivia of the 1840 treaty of Friendship, Navigation and Commerce with Great Britain, Denunciation by China of the treaty of Friendship, Navigation and Commerce with Belgium; DETTER, I., *Essays on the Law of treaties*, 1967, p. 87; BASTID, S., *Traité dans la vie internationale*, 1985, p. 202.

(58) Fisheries Jurisdiction case, Judgment, *I.C.J. Reports*, 1973, p. 18; Free zones of Upper Savoy and the District of Gex case, *P.C.I.J.*, (1932), Ser. A/B, p. 156-158; Right of passage case, Dissenting opinion Judge Moreno Quintana, *I.C.J. Reports*, 1960, p. 88-93; United States Diplomatic and Consular Staff in Tehran, Pleadings, *I.C.J. Reports*, 1980, p. 28; CAHIER, P., "Le changement fondamental des circonstances et la Convention de Vienne de 1969 sur le droit des traités" in *Le Droit International à l'heure de sa codification*, p. 167 ff.; HARAZSTI, G., "Treaties and the fundamental change of circumstances", *R.C.A.D.I.*, 1975, Vol. 146, p. 1-94.

(59) For example: Treaty of Separation between Belgium and the Netherlands of 1839, 1851 Treaty of Commerce and Navigation between the Netherlands and the German Zollverein; cited by VITANYI, B., *The International Regime of River Navigation*, 1979, p. 348-355.

(60) Art. 18 Helsinki Rules on the Uses of Waters of International Rivers, *I.L.A. Report of the 52nd Conference*, p. 484 ff.; art. 10 Barcelona Conference on the Regime of Navigable Waterways; VITANYI, B., *The International Regime of River Navigation*, 1979, p. 371.

stinately refusing to take any measure against this damage. Under customary international law, a material breach of a treaty by one party entitles the others to terminate the treaty unilaterally, as was held in the Namibia case ⁶¹ and is confirmed by a wide state practice ⁶².

The 1936 Treaty contained no procedural conditions for termination nor settlement of disputes provision. Moreover, it should be noted that Gulinodos cannot invoke the stringent procedural requirements of the Vienna Convention on the Law of Treaties. This Convention only applies to treaties which are concluded after the entry into force of the Convention. Parties to a treaty previous to this date may invoke the Vienna rules, but only to the extent that these rules can be considered as a customary law ⁶³.

It is generally accepted that the procedural requirements of the Convention as to termination of treaties have no customary character ⁶⁴.

The denunciation of the 1936 Treaty is therefore fully justified. This treaty being denounced, Gulinodos cannot claim free transit and free use of Ranadian ports.

d. The taxation on import, export and handling of tropical timber is legal.

(i) The taxation is allowed by the GATT.

*** Ranadia can charge Gulinodos for the costs of the services rendered.**

The dikebursts together with the silting up of rivers and ports, entail extra costs for the Ranadian government to keep the rivers navigable and

(61) Namibia, Advisory opinion, *I.C.J. Reports*, 1971, p. 16.; Diversion of the Meuse case, dissenting opinion of Judge Anzellotti, *P.C.I.J.*, 1937, Ser A/B, nt 70, p. 4; Tacna Arica arbitration, *R.I.A.A.*, 1925, p. 923; Air Services Agreement of 27 March 1946 arbitration, Dec. 9, 1978, *R.I.A.A.*, XVIII, p. 312; ELAGAB, O.Y., *The Legality of non-forcible countermeasures in international Law*, 1988, p. 152; Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, *I.C.J. Reports*, 1972, p. 64, §31.

(62) SINHA, B, *Unilateral denunciation of treaty because of prior Violation of Obligations by the Other Party*, 1966, 232 p.; SIMMA, B., "Reflections on art. 60 of the Vienna Convention on the Law of Treaties and its background in General International Law", *Ö.Z.f.Ö.R.*, 1970, p. 35.

(63) Art. 4 Vienna Convention on the Law of Treaties of May 23, 1969, *UN Doc.*, A/CONF. 39/27; VILLIGER, M., *Customary international law and treaties*, 1985, p. 255-259.

(64) VILLIGER, M., *Customary International law and Treaties*, 1985, p. 369; ELAGAB, O.Y., *The Legality of Non-Forcible Countermeasures in International Law*, 1988, p. 163.

the ports accessible. Art. V.3. of the GATT⁶⁵ explicitly entitles a transit state to charge the user for the costs of the services rendered, hereby confirming a well established tradition in river navigation⁶⁶. Since the charges affect "products, being transported on the same route under like conditions"⁶⁷, they are consistent with GATT, especially because they serve a specific purpose⁶⁸.

The sole fact that a large part of the taxed product is imported by Gulinodos does not constitute an unjustified discrimination⁶⁹.

Ranadian waterways and ports are mainly used for the floating down of tropical timber, so Ranadia can recoup its expenses to maintain them serviceable⁷⁰.

*** The GATT entitles Ranadia to protect its national security.**

The uncontrolled deforestation in Gulinodos leads to dramatical dikebursts in Ranadia. People were killed and unless the further production of tropical timber is reduced drastically, Ranadia will become flooded entirely.

The GATT does not prevent the use of economic measures based on security motives, but on the contrary gives them a legal basis⁷¹.

Art. XX, b) gives a contracting party the right to adopt all measures to protect human, animal or plant life. It is accepted that this article also covers natural calamity and that all restrictions, provided for in the heading of the article must yield for the protection of human lives⁷².

Art. XXI, b. iii) authorizes a contracting party to take all actions which it considers necessary for the protection of its essential security interests, especially in situations of emergency. The contracting parties agreed on the principle that "each country is the sole judge of what is necessary in its essential security interest"⁷³, which is confirmed by state practice⁷⁴.

(65) General Agreement on Tariffs and Trade, Oct. 30, 1947 (hereafter GATT), *B.I.S.D.*, Vol. IV, 1969, p. 1-78.

(66) VITANYI, B., *The International Regime of River Navigation*, 1979, p. 313.

(67) GATT, Oct. 30, 1947, *B.I.S.D.*, Vol. IV, 1969, annex 1, Ad. Art. V, par. V.

(68) JACKSON, J.H., *World Trade and the Law of GATT*, 1969, p. 233; Clarification nt 44.

(69) European Export restrictions on Chilean Apples, *B.I.S.D.*, 1979-80, supp. 27, p. 112 and 119.

(70) Clarification nt 57.

(71) CARREAU, D., "Les moyens de pression économique au regard du F.M.I. du GATT et de l'O.E.C.D.", in *S.B.D.I. Les moyens de Pression Economique*, 1985, p. 26.

(72) *UN Doc.*, EPTC/C6/55 at 48 (1974); ROM, M., "Export Controls in GATT", *J.W.T.L.*, 1984, p. 143.

(73) *GATT Doc.* SR 19/12, at 196 (1961).

(74) Dispute between the United States and Czechoslovakia, *GATT Doc.*, C.P. 3 / SR. 22 at 7 (1949).

The importance of art. XXI in emergency situations was demonstrated by the United Nations trade embargo against Rhodesia and by the more recent actions of the European Community against Argentina ⁷⁵.

The Ranadian government was confronted with a case of emergency and had to take immediate action to restrict the further production of tropical timber. Since its vital interests were at stake and human lives were endangered, Ranadia could impose the heavy taxes under Art. XX and XXI of the GATT.

(ii) The taxation is allowed by the customary right of self-preservation.

In accordance with the Charter of the United Nations, a state has a fundamental right to secure its very existence ⁷⁶.

Self-preservation justifies economic sanctions, even in spite of treaty commitments, when the bare existence of a state is threatened and economic sanctions are able to protect this existence ⁷⁷.

Since Ranadia is situated beneath the sea-level, it is strongly dependant upon its dikes. The mass deforestation in Gulinodos imposes a serious danger upon the territorial integrity of Ranadia as the rise of the water threatens the state and its citizens with inundation. Therefore self-preservation forces Ranadia to take measures.

e. Subsidiarily, if the Court were to consider the Ranadia measures as unlawful, they still would constitute legal counter-measures.

In order to preserve its territory from a catastrophe, Ranadia invited the government of Gulinodos to enter into negotiations, but this was firmly refused by the latter. Then Ranadia denounces the 1936 Transit and Trade Treaty and imposes taxes on tropical timber. It is a rule of customary international law that a coercive action, even when in se considered as unlawful, is justified when responding to a prior unlawful act of another state. This principle has been repeatedly confirmed in decisions of this Court and arbitral awards ⁷⁸ and was affirmed by the International

(75) UN S.C.O.R. Res. 232, 76 Stat. 1446 (1962); Council of Ministers of the EEC, regulation 877/82, *O.J.E.C.*, C 102 of April 16, 1982, p. 2.

(76) Art. 51 and art. 1.4. UN Charter, June 26, 1945, *UN Doc.*, 1290 P/19, I, UNICO Doc., 635 (1949); Art. 33 b Draft Articles on State responsibility, *Yearbook I.L.C.*, 1980, Vol. II, p. 33.

(77) VAN HOUTTE, H., "Treaty Protection against Economic Sanctions", in *S.B.D.I. Les Moyens de Pression Economique et le Droit International*, 1985, p. 47; BOWETT, D.W., "Economic Coercion and Reprisals by states", in *Economic Coercion and the New International Economic Order*, LILLICH, R.B. (ed.), 1976, p. 13-14.

(78) Naulilaa arbitration, 1929, *R.I.A.A.*, II, p. 1026-1027; Air Services agreement of march 27, 1946 arbitration, 1978, *R.I.A.A.*, XVII, p. 483; United States Diplomatic and Con-

Law Commission ⁷⁹.

The right to exercise coercive power is in accordance with the UN Charter, since art. 2,4 does not prohibit the use of economic sanctions ⁸⁰.

Moreover, in the Nicaragua case, the International Court of Justice explicitly held that even a complete embargo was not contrary to the principle of non-intervention ⁸¹.

(i) The conditions under which Ranadia is entitled to exercise economic coercion are fulfilled.

The damage caused to Ranadian rivers and ports through uncontrolled deforestation constitutes the required prior breach of an obligation under international law ⁸². On the other hand, Ranadia made several proposals to obtain an amicable settlement in favour of both countries and thus fulfilled the condition of attempting to obtain reparation through negotiation ⁸³.

Finally, only reprisals which would be manifestly disproportionate to the wrongful act of Gulinodos are prohibited ⁸⁴.

It should also be acknowledged that Ranadian citizens were killed, substantial damage is caused and the existence of the state itself is endangered.

In such circumstances, all conditions to take legal countermeasures are fulfilled. Therefore, the denunciation of the 1936 Treaty combined to trade restriction constitute legal measures of coercion.

sular Staff in Tehran case, *I.C.J. Reports*, 1980, p. 28-29; Military and Paramilitary Activities in Nicaragua case, *I.C.J. Reports*, 1986, p. 120.

(79) Art. 30 Draft Articles on State responsibility, *Yearbook I.L.C.*, vol. II, 1979, p. 55-63.

(80) ZOLLER, E., *Peacetime unilateral Remedies: an analysis of countermeasures*, 1984, p. 79; SEIDLE-HOHENVELDERN, I., "The United Nations and Economic Coercion", in *S.B.D.I. Les moyens de pression économique et le droit international*, 1985, p. 10; BOWETT, D., W., "Economic Coercion and Reprisals by States", in *Economic Coercion and the New International Economic Order*, LILLICH, R. (ed.), 1976, p. 7.

(81) Military and Paramilitary Activities In and Against Nicaragua case, Judgment, *I.C.J. Reports*, 1986, p. 126, §245.

(82) Debates on the principles of Friendly Relations, statement of the Netherlands representative Jonkheer van Panhuys, *G.A.O.R.*, 23d. sess., 6th. Com., 1095 mtg, 13 Dec. 1968, p. 3; United States Diplomatic and Consular Staff in Tehran case, *I.C.J. Reports*, 1980, p. 28, §53; Naulilaa award, 1929, *R.I.A.A.*, vol. II, p. 1027; Art. 6.1. Resolution of the International Law Institute, *Annuaire*, 1934, p. 692; BARBERIS, J.A., "International Regulation of the Use of Water", *E.P.I.L.*, p. 407.

(83) *Yearbook I.L.C.*, 19, vol. II, part. 2, 1979, p. 118, §11; OPPENHEIM, L.F.L., *International Law*, vol. II, 1952, p. 136; GREEN, L.C., *International law*, 1978, p. 218.

(84) Naulilaa arbitration, *R.I.A.A.*, vol. II, p. 1927-1928, p. 527; FITZMAURICE, Fourth Report on the Law of Treaties, Doc. A/CN. 4/120, *Yearbook I.L.C.*, vol. II, 1959, p. 37; *Yearbook I.L.C.*, vol. II, part. 2, 1979, p. 116.

(ii) *In any case, countermeasures are justified by Gulinodos' violation of an obligation erga omnes.*

Since tropical rain forests occupy a central place in the protection of the global climate, thus affecting the fundamental interests of all mankind, there is an emerging consent to regard the preservation of these forests, as an obligation erga omnes⁸⁵.

The International Law Commission explicitly condemns the breach of an obligation which is of essential importance to safeguard the human environment⁸⁶.

When a state violates such an obligation, all states concerned can resort to countermeasures⁸⁷.

This was confirmed in the Barcelona Traction case, where this Court held that all states have an interest in the protection of an obligation towards the entire international community⁸⁸.

Apart from being directly harmed by the deforestation of the rain forest, Ranadia, as member of the international community, has the right to take measures to prevent Gulinodos from endangering the global climate.

B. GULINODOS IS UNDER THE OBLIGATION TO COOPERATE WITH RANADIA IN A JOINT MANAGEMENT REGIME FOR THEIR SHARED DRAINAGE BASIN.

The territories of Gulinodos and Ranadia are part of a drainage basin,

(85) PETERS, P., SCHRIJVER, H. and DE WAART, P., "Responsibility of State in respect of the Execution of Permanent Sovereignty over Natural resources", *N.I.L.R.*, 1989, p. 311; The Amazon Declaration, *UN Doc. A/44/275*, E 1989/79, Annex, of May 15, 1989, *I.L.H.*, 1989, p. 1303; General Assembly Resolution of January 27, 1989 on Protection of the Global Climate for Present and Future Generations of Mankind of Dec. 6, 1988, *UN Doc. A/43/53*.

(86) Art. 19 §3, Draft Articles on State Responsibility, *Yearbook I.L.C.*, 1976, Vol. II, part 2, p. 73.

(87) ELEGAB, O.Y., *The legality of Non-Forcible Countermeasures in International Law*, 1988, p. 63; Commentary on art. 30 Draft Articles on State Responsibility, *Yearbook I.L.C.*, 1979, Vol. II, part 2, p. 116 and 121; SPINEDI, M., "International Crimes of State: The Legislative History", in *International crimes of state*; WEILER, J.H.H., CASSESE, A., and SPINEDI, M. (ed.), 1989, p. 69.

(88) Barcelona Traction, Light and Power Company case, *I.C.J. Report*, 1970, p. 32; RUIZ, J.J., "Las obligaciones erga omnes en derecho internacional público", en *Estudios de derecho internacional, Homenaje al Profesor Miaja de la Muela*, 1979, p. 228.

which is a hydrological unity encompassing interconnected rivers and groundwaters⁸⁹.

Both share many important rivers which flow from Gulinodos through Ranadia towards the sea, whereas the tropical forests in Gulinodos, as immense water reservoirs play an essential part in the hydrological balance of their common basin. Since drainage basins are a physical unity, utilization of the water resources by one state necessarily affects the water conditions of connected basin states. This fact was dramatically evidenced when deforestation in Gulinodos resulted in dangerous floods and increase of mud and silt in Radian rivers and ports.

Ranadia demands Gulinodos to cooperate in a joint management system for the preservation of the drainage basin upon which they both depend.

1. Gulinodos has the duty to cooperate in a joint aquatic management system under a rule of customary law.

In an international drainage basin, states are under the obligation to cooperate management of their shared water resources under a customary rule adopted by the International Law Commission⁹⁰.

Cooperation between co-basin states is to be considered as a "constant and uniform state practice, accepted as law"⁹¹.

The duty to cooperate between states sharing waterresources has been repeatedly laid down in UN General Assembly Resolutions⁹², declarations of international organisations⁹³, conferences to which both Gulinodos and Ranadia participated⁹⁴, and in codificatory texts of inter-

(89) Art. 2 Helsinki Rules on the Uses of the Waters of International Rivers, *I.L.A. Report of the 52nd Conference*, Helsinki 1966, p. 484; LAMMERS, J., *Pollution of international Watercourses*, 1984, p. 19.

(90) Report of the International Law Commission on the Work of its thirty-ninth session, *UN Doc.*, A/42/10 (1987); McCAFFREY, S., "The Thirty-ninth Session of the International Law Commission", *A.J.I.L.*, 1988, p. 144-151.

(91) Asylum case, Judgment, *I.C.J. Reports*, 1950, p. 266.

(92) G.A. Res. 2625 (XXV), of 24 October 1970, 25 UN G.A.O.R., supp. nt 28, p. 121, *UN Doc.*, A/8028 (1970); G.A. Res. 3129 (XXVIII); G.A. Res. 3281 (XXIX) of 12 December 1974, G.A.O.R., supp. 31, *UN Doc.*, A/9631; G.A. Res. 3201 (VI), UN G.A.O.R., supp. 1, *UN Doc.*, A/9559.

(93) Draft Principles of Conduct in the Field of the Environment for Guidance of the States in the Conservation and Harmonious Exploitation of Natural Resources Shared by Two or More States", UN E.P. GC Declaration nt 14 (VI); O.E.C.D. Recommendation nt 91 on Principles concerning Transfrontier Pollution, *O.E.C.D. Doc. C. (74) 224* of Nov. 21, 1974.

(94) Principles 24 and 51 of the Declaration of the UN Conference on the Human Environment, *UN Doc.*, A/CONF. 48/14 p. 2 ff.; art. 84-92 of the Action Plan adopted by the first World Water Conference at Mar del Plata on Mar. 25, 1977, *UN Doc.*, E/CONF. 70/29.

national law ⁹⁵.

According to the case concerning Military and Paramilitary Activities in and against Nicaragua, such repeated declarations, even if none of them is formally binding, are to be considered as an expression of the *opinio iuris* of states ⁹⁶.

A wide and uniform state practice justifies the obligation of cooperation. Nowadays, a great part of the watersystems throughout the world are governed by joint management regimes worked out by bilateral or regional treaties ⁹⁷. While making such treaties, states sharing drainage basins provide with a regulatory framework for a joint management which they believe is rendered obligatory by a rule of cooperation, as is often expressed in the preambles of such treaties ⁹⁸.

Consequently, international statements combined with a recurrent and similar practice of cooperation between co-basin states, evidence the existence of a customary rule ⁹⁹.

Gulinodos never objected to the obligation of cooperation but, on the contrary, repeatedly showed its recognition of this duty. It participated at conferences ¹⁰⁰ and voted in favour of resolutions of the General Assembly ¹⁰¹, which provide with cooperation between drainage basins, and is a member of the U.N.E.P. Governing Council, which organ promotes international environmental cooperation ¹⁰².

(95) I.L.A. Montreal Rules on Water Pollution in an International Drainage Basin, *I.L.A. Report of the 60th Conference*, Montreal 1982, p. 1-3 ; art. 4 Resolution on the Pollution of Rivers and Lakes and International Law, *A.L.D.I.*, vol. 58-1, p. 197 ff.

(96) Military and Paramilitary Activities in and against Nicaragua, Judgment, *I.C.J. Reports*, 1986, p. 100-109 ; *Texaco/Calasiatic v./ Lybian Government arbitration*, *J.D.I.*, 1977, p. 350 ff. ; U.S. Nationals in Morocco case, Judgment, *I.C.J. Reports*, 1952, p. 209 ; VIL-LIGER, M., *Customary international law and Treaties*, 1985, p. 324.

(97) HAXTON, D.R., "Report on the Dakar Meeting of international river Commissions, on May 5-14, 1981", *N.R.J.*, 1983, p. 441-449 ; LAMMERS, J., *Pollution of international water courses*, 1984, p. 124-148 ; DE ITURRIAGA, J., "Regional Conventions on the Protection of the Marine Environment", *R.C.A.D.I.*, 1979, Vol. 162, p. 323-449 ; VISSER, F., "Recent developments in the joint management of international non maritime water resources in Africa", *C.I.L.S.A.*, 1989, p. 59-62.

(98) Agreement on an action plan for the common Zambezi River System, Conference of Harare, 25-27 May 1987, *E.L.P.*, 1988, p. 40 ; Act of Santiago concerning Hydrologic Basins, of 26 June 1971, *UN Doc.*, A CN. 4/274 vol. I, p. 180.

(99) HAGGEMACHER, P., "La Doctrine des deux éléments de droit coutumier dans la pratique des arrêts de la Cour Internationale de Justice", *R.G.D.I.P.*, 1986, p. 1-125.

(100) United Nations Conference on the Human Environment, *UN Doc.*, A/CONF. 48/14 ; First World Water Conference at Mar del Plata on Mar. 25, 1977, *UN Doc.*, E/CONF. 70/29.

(101) Clarification nt 58.

(102) Report of the United Nations Conference on the human environment, *UN Doc.*, A / CONF. 48/14, Section III : Resolution on institutional and final arrangements.

Therefore, Gulinodos is bound to cooperation under a customary rule to which it did not dissent ¹⁰³.

2. Gulinodos has the duty to enter into negotiations and consultations over the use of the drainage basin.

As a result of a large-scale deforestation in Gulinodos, water and navigation conditions are seriously deteriorating in Ranadia and lower parts of its territory are inundated. Gulinodos however refuses to change its forestal policies, detrimental to Ranadia. Where conflicts over the use or pollution of shared waterresources arise, good neighbourliness imposes upon co-basin states the duty to negotiate and cooperate to come to a common solution ¹⁰⁴.

Within the law of international watersystems, negotiation is a customary obligation, firmly established by the lake Lanoux Arbitration ¹⁰⁵ and other decisions ¹⁰⁶ and in international declarations ¹⁰⁷. Negotiations must be carried out in good faith with a genuine intention to come to a common solution ¹⁰⁸.

The duty to negotiate is largely confirmed by state practice between states sharing waterresources, such as India and Bangladesh ¹⁰⁹, the United States and Canada ¹¹⁰ and many others.

(103) North Sea Continental Shelf Case, Judgment, *I.C.J. Reports*, 1969, p. 26; Nuclear Test case, *I.C.J. Reports*, 1974, p. 268; Anglo-Norwegian Fisheries case, Judgment, *I.C.J. Reports*, 1951, p. 116; AKEHURST, M., A *Modern Introduction to International Law*, 1986, p. 32; BOWETT, R., "Estoppel before international tribunals and its relation to acquiescence", *B.Y.I.L.*, 1957, p. 176-196.

(104) POP, I., *Voistnage et bon voistnage en droit international*, 1980, p. 301; HANDL, G., "Territorial sovereignty and the problem of transfrontier Pollution", *A.J.I.L.*, 1975, p. 56; BILDER, R., "The Settlement of Disputes in the field of International law of the environment", *R.C.A.D.I.*, 1975, p. 166-181.

(105) Lake Lanoux arbitration, *R.I.A.A.*, 1957, p. 285-317; BARBERIS, J., "Le Régime juridique international des eaux souterraines", *A.F.O.I.*, 1987, p. 158.

(106) Donauversinkung case, German Staatsgerichtshof, 1927, 1927-28, p. 228; Administrative Court of Strasbourg, July 27, 1983, *Z.a.ö.R.V.*, 1984, p. 336-345; District Court of Rotterdam, *N.Y.I.L.*, 1984, p. 471.

(107) Art. XXX Helsinki Rules on the Uses of the Waters of International Rivers, *I.L.A. Reports*, p. 484; G.A. Res. 3129 (XXVIII), *UN Doc.*, (A/9030 (1973)).

(108) Art. 2 §2 UN Charter; North Sea Continental Shelf case, Judgment, *I.C.J. Reports*, 1969, p. 47; Fisheries Jurisdiction case, Judgment, *I.C.J. Reports*, 1974, p. 34; Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, *I.C.J. Reports*, 1984, par. 112.

(109) Dispute between India and Bangladesh before the United Nations, as cited in LAMMERS, J., *Pollution of international water courses*, 1984, p. 314-319; Agreement between India and Bangladesh on the sharing of Ganges' Waters, 17, *I.L.M.*, 1978, 103.

(110) US-Canada Transboundary Resource Issues, in *Natural Resources Journal*, 1986, Vol. 26.

Disputes over the use and maintenance of shared waters in all these cases have found their solution through negotiation, cooperation and establishment of joint commissions ¹¹¹.

Therefore, Gulinodos cannot refuse negotiations in good faith with Ranadia.

3. By refusing cooperation, Gulinodos acts contrary to its obligations not to cause harm and to ensure equitable utilization to Ranadia.

a. Gulinodos is responsible for the damage in Ranadia.

States sharing waterresources have the duty not to cause serious harm to each other and to use the waterresources in such a way that the copararian states can benefit of an equitable utilization ¹¹².

These obligations are well-established rules of international law laid down in decisions of this Court and in arbitration awards ¹¹³, in international declarations ¹¹⁴ and are confirmed by a wide state practice ¹¹⁵.

Gulinodos fails to observe these obligations towards Ranadia. As experts agree ¹¹⁶, deforestation in Gulinodos is the cause of the floods and pollution in Ranadian waters. Since Gulinodos issued large-scale concessions for timber exploitations and since it lacked to control the disastrous cutting down of the forest by its citizens, Gulinodos is responsible for depriving Ranadia of a harmless and equitable use of its rivers ¹¹⁷ and has the obligation to prevent further damage ¹¹⁸.

(111) BILDER, R., "The settlement of disputes in the field of the international law of the environment", *R.C.A.D.I.*, 1975, p. 172 ; VITANYI, B., *The international Regime of River Navigation*, 1979, p. 205-208.

(112) MENG-QING NAN, *Land-based Marine Pollution*, 1987, p. 64-71.

(113) Corfu Channel case, Judgment, *I.C.J. Reports*, 1969, p. 26 ; River Oder case, *P.C.I.J.*, 1929, Ser. A, nt 16 ; Lake Lanoux arbitration, *R.I.A.A.*, 1957, p. 285-317.

(114) Helsinki Rules on the Uses of the Waters in International Rivers, *I.L.A. Report on the 52nd Conference*, Helsinki 1966, p. 483 ff.; Principle 21 UN Conference on the Human Environment, *UN Doc.*, A/CONF. 48/14.

(115) See Report on the Law of Non-Navigational Uses of International Waterresources, *Yearbook I.L.C.*, 1982, Vol. II, p. 75-87.

(116) Clarification nt 103 ; *Tropical Forests : a call for action, Report of the World Resources Institute*, 1985.

(117) U.S. Diplomatic and Consular Staff in Tehran case, Judgment, *I.C.J. Reports*, 1980, p. 33, §66-67 ; art. 8 (1) and (2) Draft Articles on State Responsibility, *Yearbook I.L.C.*, 1981, Vol. II, p. 81 ; NGUYEN QUOC, D., DAILLER, P. and PELLET, A., *Droit international public*, 1987, p. 685.

(118) Art. 4 Draft Articles on State Responsibility, *Yearbook I.L.C.*, 1981, Vol. II, p. 81 ; ZEMANEK, K. and SALMON, J., *Responsabilité internationale*, 1987, p. 65.

b. Prevention of further damage entails cooperation.

The only way for Gulinodos to guarantee a harmless and reasonable use of waters to Ranadia, is through an active cooperation with Ranadia in a joint system of management and preservation of the drainage basin. As a developing country, Gulinodos lacks the technical and financial capacity and means to manage adequately its part of the water system on its own.

Furthermore, the actual economic and social crisis makes any hope of better environmental management in the future an illusion. In this case, equitable utilization requires cooperation¹¹⁹.

Therefore, by refusing cooperation, Gulinodos not only breaches its duty to cooperation, it also violates the legal right of Ranadia to an equitable utilization without harm.

4. *The preservation of the tropical forests requires cooperation.*

The timber forests, which largely occupy the territory of Gulinodos, are of vital importance for mankind as a whole. The destruction of these forests is known to affect the global climate, considered as a common heritage of mankind¹²⁰.

Even though the forests are situated within its national jurisdiction, Gulinodos cannot claim a discretionary sovereignty over these forests, but has to accept cooperation for their preservation¹²¹.

Cooperation and international management for the preservation of the rain forests are prescribed by Resolutions and other declarations¹²² and have been instaurated by many multilateral and regional Conventions¹²³.

(119) WESTON, B., FALK, R. and D'AMATO, A., *International Law and World Order*, 1980, p. 978.

(120) *Tropical forests : a call for Action, Report of the World Resources Institute*, 1985, 3 pars ; European Communities Council Resolution on the Greenhouse Effect and the Community, *O.J.E.C.*, Nt C. 183 (July 20, 1989), p. 4-5 ; KISS, A., "La notion de patrimoine commun de l'humanité", *R.C.A.D.I.*, 1982, p. 192.

(121) JOYNER, C., "Legal Implications of the Concept of the Common Heritage of Mankind", *I.C.L.Q.*, 1986, p. 192 ; SHRAGA, D., "The common Heritage of Mankind : The Concept and its Applications", *A.E.I.*, 1986, p. 45-63.

(122) G.A. Res. on the protection of the Global Climate for present and future generations of mankind of Dec. 6, 1988, *UN Doc.*, A/4353 of Jan. 27, 1989 ; Seoul Declaration on the Progressive Development of Principles of Public International Law Relating to a new International Economic Order, *I.L.A. Reports*, 1987, p. 2-12 ; UNEP, Governing Council Decision on global climate change, May 25, 1989, 28 *I.L.M.*, 1330 (1989).

(123) PETERS, P., SCHRIJVER, N. and DE WAARF, P., "Responsibility of States in Respect of the Exercise of Permanent Sovereignty over Natural Resources", *N.I.L.L.R.*, 1989, p.

The 1983 Tropical Timber Agreement, a commodity agreement signed and ratified by Gulinodos, stresses upon the need for international cooperation in the preservation of forests ¹²⁴.

A joint management commission for the drainage basin between Gulinodos and Ranadia will provide with ecologically sustainable measures of utilization of the forests, since these forests are an essential part of the hydrological system.

Therefore, by refusing cooperation while lacking any capacity to meet with forestal protection on its own, Gulinodos acts contrary, not only to the rights of Ranadia, but to the rights of all mankind.

285-313 ; Convention for the Protection of the World Cultural and Natural Heritage, 1972, *I.L.M.*, 1972, p. 1358-1366.

(124) Tropical Timber Agreement of 25 November 1983, *UN Doc.*, TD/TIMBER/11 ; Waserman, U., "UNCTAD : The Tropical Timber Agreement", *J.W.T.L.*, 1984, p. 89-91.

APERCU GENERAL : Concours international de plaidoirie TELDERS (La Haye 1990), l'affaire Joint Ecological Management : Gulinodos c. Ranadie.

Cette affaire est basée sur le fameux cas *Trail Smelter* (1936) de pollution industrielle transfrontalière entre deux états voisins. Le texte ci-dessus reflète les conclusions de la défenderesse, la République de Ranadie.

Le Gulinodos a une immense forêt tropicale. En 1936, il signe un traité de transit pour son bois avec la Ranadie, située en aval et ayant de nombreux ports. La Ranadie est pour une grande partie sous le niveau de la mer et est protégée par des digues. En 1960, le gouvernement ranadien impose des hautes cheminées à ses industries pour diminuer la pollution atmosphérique. Le Gulinodos voit, depuis, ses résultats de pêches en baisse et en impute la responsabilité à la Ranadie. En 1985, la Ranadie constate pour sa part des flots de boue dans ses fleuves qui envasent ses ports. Ce charriement est dû à l'exploitation effrénée par le Gulinodos de sa forêt où les sols s'érodent.

Face à cette situation de rupture écologique, plusieurs questions se posent au niveau juridique :

1. La Ranadie doit-elle être tenue responsable de la baisse de production piscicole et doit-elle modifier sa politique écologique ?
2. La Ranadie a dénoncé le traité de 1936 puis imposé des taxes sur le bois gulinodien en transit. A-t-elle, par ces actes, violé une règle de droit international prescrivant un droit de libre passage ?
3. Le Gulinodos est-il tenu, selon le droit international, de coopérer avec la Ranadie dans une gestion commune de leur bassin hydrographique ?

Arguments de la République de Ranadie :

1. Non-responsabilité pour le premier fait reproché, le lien causal avec sa politique n'étant scientifiquement pas prouvé. Par conséquent, aucun changement ne s'impose.
2. Ses taxes ne violent aucun droit coutumier de passage, aucun traité, celui de 1936 ayant été légalement dénoncé, ni même le G.A.T.T.
De plus, étant donnée la déforestation incontrôlée au Gulinodos et la menace qui s'en suit pour les rivières et terrains ranadiens, la taxe imposée est une mesure de représailles justifiée par les infractions du droit international commises par le Gulinodos.
4. Obligation pour le Gulinodos de coopérer pour l'établissement d'un régime de gestion commune de leur bassin hydrographique.

Vu le souci renforcé au niveau international vers l'écologie planétaire par des événements comme Tchernobyl et l'assassinat de Chicos Mendes, une approche juridique de ce défi était indispensable. Ces plaidoiries ambitionnent de répondre à ce besoin.