

There is no indication as to any historic rights existing over the waters of the Umarghela, nor can the problem of irrigating the rice paddies be seen to influence any further agricultural extension. There are no facts to uphold that the stream flow control has in any way been adversely affected, as the river itself has not been altered and also taking into account that dams rather lead to an enhanced flood control. Since the amount of water extracted has not increased through the building of the Lulabeki dam, measures provided for in Article 3 TRU are not necessary. Impounding water does not imply an extraction of water as referred to in Article 5 TRU.⁴⁶ For all these reasons, the TRU has not been breached.

II. LARMASTAN REQUESTS THAT THE COURT ADJUDGE AND DECLARE THAT LARMASTAN IS NOT LIABLE FOR ANY POLLUTION OF THE UMARGHELA RIVER OR ANY CONSEQUENCES THEREOF.

A. The construction of the Lulabeki dam has not violated the principle of equitable and reasonable utilization.

1. Larmastan's usage of the river Umarghela is within the framework of equitable and reasonable utilization.

The fundamental norm of customary international law with regard to the utilization of watercourses is the right of every riparian to an equitable and reasonable share of the resources of an international watercourse⁴⁷ including benefits such as electric power produced from it.⁴⁸ What constitutes "equitable and reasonable" use is determined on a case by case

⁴⁶ Paras. 3, 14 of the Compromis.

⁴⁷ Art. 5 *IWC*; *Commentaries on the IWC*, 98-100, paras. 10-24; *Helsinki Rules*, Art IV; *Berlin Rules*, Arts. 7, 10 (1), 12; *Gabčíkovo-Nagymaros Case*, paras. 78, 85, 147, 150; *River Oder Case*; Bourne, *The International Law Association's Contribution to International Water Resources Law*, 165; McCaffrey, Sinjela, *The 1997 United Nations Convention on International Watercourses*, 99; Rieu-Clarke, Loures, *Still not in Force*, 10; Salman, *The United Nations Watercourses Convention Ten Years Later*, 6; Salman, *The Helsinki Rules*, 634.

⁴⁸ McCaffrey, *The law of International Watercourses* (2007), 216.

basis in weighing the interests of States.⁴⁹ Among the factors that need to be taken into consideration in the case of the construction of a dam are for one the important aspect of sustainability,⁵⁰ the human right to development,⁵¹ the dependency of the economy and social and economic needs of the population dependent on the waters of the watercourse,⁵² existing and potential uses of the watercourse⁵³ as well as the availability of other resources.⁵⁴ Sustainability addresses the balance between environmental and developmental considerations.⁵⁵ At the same time, sustainability is the concept aiming at the eradication of poverty as a legitimate priority need⁵⁶ as well as the reduction of adverse effects on the atmosphere and in the context of energy production refers to increasing “the contribution of

⁴⁹ *Donauversinkung Case*, 310-311; Art. 6 (1) *IWC*; *Principles of Law and Recommendations on the Use of International Rivers*, Principle 2; *Berlin Rules*, Article 13 (1); *Helsinki Rules*, Art.V (1); Bourne, *The Right to Utilize the Waters of International Rivers*, 187; Dickstein, *International Lake and River Pollution Control*, 492 ff.; Handl, *Balancing of Interests and Liability for the Pollution of International Watercourses*, 156; Lester, *River Pollution in International Law* 840; Lipper, *Equitable Utilization*, 45 ff. McCaffrey, *The law of International Watercourses* (2007), 387.

⁵⁰ *Gabčíkovo-Nagymaros Case*, 77-78 para. 140; *Gabčíkovo-Nagymaros*, *Weeramantry Opinion*, 5; *Berlin Rules*, Art. 12 (2); *New Delhi Declaration*, *ILA, International Law on Sustainable Development*; Sands, *Environmental Protection in the 21st Century*, 344; Boyle, Freestone, *International law and sustainable development* (1999), 11; Schrijver, Weiss, *International law and sustainable development*, Agenda 21 on Protection of the Atmosphere (2004).

⁵¹ *African Charter*; *UNGA – Res. 41/128*, Art. 1; *Report of the Secretary-General*; Principle 6, para. 1; *Seoul Declaration*; *Vienna Declaration*, e.g. Art. 2; Boyle, Freestone, *International law and sustainable development*, 11 (1999).

⁵² Art 6 (1) (b), (c) *IWC*; *Berlin Rules*, Art. 13 (2) (b), (c); *Helsinki Rules*, Article V (2) (5), (6); *Dubrovnik Resolution*; *La Pampa v. Mendoza*; Helal, *Sharing Blue Gold*, 349-353.

⁵³ Art. 6 (1) (e) *IWC*; *Berlin Rules*, Art. 13 (2) (e).

⁵⁴ Art. 6 (1) (g) *IWC*; *Berlin Rules*, Art. 13 (2) (g); *Helsinki Rules*, Art. 5 (2) (8).

⁵⁵ *Pulp Mills Provisional Measures*, 133, para. 80; *Gabčíkovo-Nagymaros*, *Weeramantry Opinion*, 85; *Shrimp/ Turtle Case*, paras. 126-30.

⁵⁶ *UNFCCC*, Preamble.

environmentally safe and sound and cost-effective energy systems.”⁵⁷ Hydro power is one example of a sustainable energy system given by the United Nations Conference on Environment and Development (UNCED),⁵⁸ since dams are important “means of meeting perceived needs for water and energy services” and “long-term, strategic Investments”⁵⁹. In addition, dams have positive effects with regard to flood control, soil productivity, transportation, drinking water and irrigation.⁶⁰ Finally, developing States may seek assistance from the World Bank, which only funds and promotes environmentally friendly and sustainable projects,⁶¹ as determined by a prior environmental assessment, *i.e.* which *i.a.* includes the consideration of the abovementioned factors in an integrated manner.⁶²

The historically disadvantaged State of Larmastan constructed the Lulabeki dam and a hydro-electric power station in order to satisfy its increased energy demand by using the waters of the Umarghela. Larmastan, eager to improve the living conditions of its citizens, sought help from the World Bank and in light of the factors to be taken into consideration when utilizing the river in an equitable and reasonable manner, decided to extract energy from the Umarghela. Aware of the long-term impacts of projects regarding energy production, the Lulabeki dam fulfills the international community’s desire to promote sustainable use of resources. Moreover, all potential alternatives were tested and have shown to be inefficient and incompatible with the overall policies of development and poverty reduction. Today, the dam provides 60% of the country’s electricity. Thus, the construction of Lulabeki dam was

⁵⁷ *Agenda 21*, Para 9.11.

⁵⁸ Sands, *Principles of International Environmental Law* (2003), 386.

⁵⁹ *World Commission on Dams Report*, 11.

⁶⁰ Tahmiscioğlu, *Positive and Negative Impacts of Dams on the Environment*, 764.

⁶¹ Goldman, *Constructing an Environmental State*, 500, 514; Hunter, *The World Bank*, 61, 64-67.

⁶² *World Bank OP 4.01.*, para 2.

the most effective way to make reasonable, equitable and sustainable use of the river's energy potential. Hence, Larmastan has acted in full compliance with the principle of equitable and reasonable use.

2. The construction of the Lulabeki dam did not violate Article 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses (IWC).

Article 7 IWC stipulates the obligation not to cause significant harm. For harm to be “significant”, it needs to lead to a “real detrimental effect,”⁶³ and the term itself is to be defined on a case-by-case basis while the diminution of the quantity of water does not constitute harm.⁶⁴ Moreover, Article 7 does not require a State to guarantee that no significant harm will occur to other States sharing the watercourse.⁶⁵ Instead, it imposes an obligation of due diligence to avoid harm in a reasonable way.⁶⁶ As evidenced by the wording of Article 5 IWC, the no-harm principle is subordinated to the principle of equitable and reasonable use⁶⁷ merely constituting one factor in the determination of equitable utilization, and thus, affected States may even have to tolerate significant harm, especially if their demands are in excess to

⁶³ *Commentaries on the IWC*, 152, para 4.

⁶⁴ McCaffrey, *The Law of International Watercourses* (2007), 409-410.

⁶⁵ Fuentes, *The Criteria for the Equitable Utilization of International Rivers*, 350.

⁶⁶ McCaffrey, *The Law of International Watercourses* (2007), 347.

⁶⁷ *Gabčíkovo-Nagymaros Case*, 80, para 150; *Commentaries on the IWC*, 103, para 2; Bourne, *The Right to Utilize the Waters of International Rivers*, 220; Dickstein, *International Lake and River Pollution Control*, 492 ff.; Handl, *Balancing of Interests and Liability for the Pollution of International Watercourses* 156; Lipper, *Equitable Utilization* 840; McCaffrey, Sinjela, *The 1997 United Nations Convention on International Watercourses*, 101; Salman, *The Helsinki Rules*, 644-634; Salman, *The United Nations Watercourses Convention Ten Years Later*, 6, 11; McCaffrey, *The law of International Watercourses* (2007), 436.