IN THE INTERNATIONAL COURT OF JUSTICE

THE GOVERNMENT OF NEW HELIOS, Applicant

v.

THE GOVERNMENT OF KARMA, Respondent

Memorial for APPLICANT, The Government of New Helios

Team Number 2
March 14 & 15, 1975

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JURISDICTION

New Helios and Karma jointly submit to the jurisdiction of the International Court of Justice on the basis of Article 36 of its Statute waiving the defenses of sovereign immunity and exhaustion of local remedies.

STATEMENT OF FACTS

New Helios and Karma are neighboring states and co-riparians to the international drainage basin composed of the Peace River and International Lake. (See map in appendix). A 1923 Treaty of Amity, Friendship, and Economic Cooperation provides, inter alia, that "neither State shall pollute boundary waters to the injury of the health or property of the other," and that both States shall "cooperate and consult on matters of mutual interest."

In 1964, a large commercial pulp and paper mill was opened on the Upper Peace River. The wastes from this mill and the human sewage from the rapidly growing settlement of 20,000 surrounding it, are discharged into the Upper Peace River untreated. The World Development Authority, an intergovernmental organization, has recommended that the mill construct facilities for the treatment of its wastes and those of the boom town. The mill company has promised to build modern housing, thereby alleviating the sewage problem, but has done nothing yet.

The untreated wastes from the paper mill have rendered the waters of International Lake unfit for human potation. Since both the capital of New Helios and the world-famous Lower Peace Brewery draw their drinking and brewing water from the Lake, they have been forced to install sophisticated water purification facilities at considerable costs. Unless the paper mill takes some action to treat its wastes, New Helios will be forced to spend another $2,000,000 to purify the Lake's water and the Brewery may have to find a new source of water at additional cost. Most critically, an increase in the incidence of typhoid among New Helios' citizens was reported in 1970. As a result, health authorities were forced to close the beaches along International Lake.

In 1970, without either notifying or consulting New Helios, a state-owned utility in Karma began construction of a very large nuclear power generating plant at the point where the waters of the Lake enter the Lower Peace. In May, 1974, the plant became operative at 10% of capacity, emptying its heat-laden cooling waters back into the Lower Peace River. The citizens of New Helios have found that this interferes with their recreational uses of the River. The Lower Peace Brewery, located downstream from the plant requires clear and cool waters to produce its premium beers and will be forced, should the plant

go fully operational, to spend $900,000 for special cooling lagoons or else find a new source of water. The State of New Helios has protested several times against the location and construction of the plant, but Karma has always reacted with a blunt assertion of a sovereign right to develop in any way it chooses.

Finally in July, 1974, New Helios formally and vigorously protested, asking that the dumping of wastes from the paper mill and sewage from the shantytown as well as the thermal discharge from the nuclear plant be halted immediately as violations of the 1923 Treaty and of customary international law. Karma rejected New Helios' assertions of law and claimed a right to continue on its present course. This dispute now threatens the long, peaceful, and productive relationship between the two states and is submitted to this Court for adjudication.

QUESTIONS PRESENTED

I. Whether Karma has failed to fulfill its obligations to New Helios under the 1923 Treaty of Amity, Friendship, and Economic Cooperation.

II. Whether the actions of Karma are violations of the general principles of international law.

III. What reparations are due New Helios in compensation for injuries and imminent losses.

SUMMARY OF ARGUMENT

The Peace River and International Lake form a common and potentially very productive resource for both parties to this adjudication. Claims to the river based on strict territorial sovereignty could split this natural system in two, yet the physical indivisibility of the system necessarily transmits the effects of any act from one territory to the other.

This community of interests is the basis of the treaty to protect the river and lake from abuse by pollution substantial enough to cause injury to health and property. Karma's release of raw sewage, noxious industrial wastes, and unmoderated heat from its nulcear power plant are clear violations of the Treaty. Each is causing serious injury to the citizens and territory of New Helios. International law requires that treaty obligations be respected and imposes indemnities and other reparation for such violations. Karma must comply with the treaty or be sanctioned. Karma has also violated the duty not to pollute an international waterway which arises from the more general duty not to use or permit the use of one's territory in such a manner that injury is inflicted on the territory, property, or persons of another nation. This is a well-recognized rule of customary international law, which is based in the traditional doctrine of sic utere tuo, and is recognized in the recent private codification of

customary international river law, the Helsinki Rules. Even when the claims of Karma are examined as mere assertions of equitable utilization, they must be found to be an abuse of the rights which flow from a reasonable and equitable share of beneficial uses.

Although the needs of the developing nations must be given consideration by all industrialized nations, the international community cannot condone the creation of a double standard for state responsibility or the interposition of absolute sovereign immunity to the detriment of the principles of equality and neighborliness.

Karma's violations of its treaty obligations and the duties of customary international law require this Court to order reparations and equitable relief for the injuries done New Helios. Damages must be assessed. Sewage which threatens human life must be abated. Untreated industrial wastes which prevent any further beneficial use of the waters of the lake and river must be moderated so that New Helios with its present sophisticated purification facilities again has a safe and economic source of water for drinking and brewing. Water should be suitable for recreation as well. The volume of effluent from the nuclear power plant must not be increased until Karma can prove to this Court that it will not cause injury in New Helios or until cooling towers are installed. Finally, damages in the nature of economic rents must

be ordered if the final régime governing this common resource allows future injury. Alternatively, this Court should impose provisional measures to protect the rights of both parties until further proofs can be submitted and a permanent régime can be tailored to provide a reasonable sharing of this valuable common resource.

ARGUMENT AND AUTHORITIES

I

KARMA IS RESPONSIBLE FOR ALL DAMAGE INFLICTED ON NEW HELIOS AS A RESULT OF TRANSBOUNDARY POLLUTION.

Karma's responsibility to New Helios for the damage resulting from transboundary pollution derives from its obligations under international law, that is, treaty, customary international law, general principles of municipal law and, subsidiarily, the writings of publicists and judicial decisions. Article 38 of the Statute of the International Court of Justice. Careful consideration of these sources will reveal that Karma has violated its obligations under international law.

A. Karma Has Failed to Meet Its Obligations Under the 1923 Treaty of Amity, Friendship, and Economic Cooperation with New Helios.

As the only bilateral treaty between Karma and New Helios, the 1923 Treaty is the principal source of law expressly recognized by both parties to this dispute. The principles on treaty interpretation enunciated in Article 31 of the Vienna Convention on the Law of Treaties, U.N. Doc.A/Conf.39/27, 23 May 1969; 63 **A.J.I.L.** 875 (Oct.1969), is the latest expression of the international community on the law of treaties, although it is not as yet in force as conventional international law.

Article 31 provides that a treaty be interpreted by the ordinary meaning of its terms in context and in light of the purposes of the treaty. Neither contemporary documents nor subsequent agreements relating to the treaty are available, and

the Court must therefore consider customary rules of international law applicable in the relations between co-riparian states as well as the ordinary meaning of the terms in the light of the treaty's purpose.

1. Activities taking place within the territorial jurisdiction of Karma have resulted in pollution, causing injury to the health and property of New Helios and its citizens.

Article II, paragraph 1, of the 1923 Treaty provides that "/b/oth parties agree that . . . neither State shall pollute boundary waters or other waters running between them so as to injure the health or property in the other State." Although the obligation assumed by Karma is a limited one, i.e. not to pollute to the injury of health and property in New Helios, it is to be observed "in keeping with the general aim of amity, friendship, and economic cooperation". As "pollution" is defined in terms of "injury", the Court may wish to make reference to other international agreements concerning transboundary pollution.

The Treaty with Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada, Jan.11, 1909, 36 Stat.2448, T.S. No.548 (Article IV), contains a provision that " boundary waters or waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other". This virtually identical treaty language definition of pollution in terms of injury has been amplified by the work of the U.S.-Canada International Joint Commission. In the Final Report of the International Joint Commission, U.S.-Canada, on the Pollution of Boundary Waters

Reference 34 (1918) (hereinafter 1918 Final Report), the IJC found the term "injury as used in the treaty to have a meaning analogous to the term 'injuria' in jurisprudence, i.e. "harm or damage . . . in excess of /that/ . . . which the sufferer, in view of all the circumstances of the Case, . . . and of the paramount importance of human health and life, should reasonably be called upon to bear".

New Helios has been called upon to bear unreasonable damage to the health and property of its citizens as a result of pollution originating within Karma. Moreover, the complete failure of the paper mill to treat its wastes has rendered the water of the International Lake, drawn upon by the capital of New Helios for domestic uses, unfit for human consumption. This threat to the health of New Helios' citizens has been averted for the moment only by the installation of sophisticated water purification systems at considerable expense, which constitutes an "injury to property" of the State of New Helios in violation of the 1923 Treaty, as interpreted by all of the U.S.-Canada IJC Reports: 1918, at 23; 1951, at 168; 1963, at 68; 1970, at 122-126.

Moreover, untreated sewage from the shantytown around the mill has contributed to an increase in the reported cases of typhoid on International Lake, an injury to health in violation of the 1923 Treaty. The U.S.-Canada IJC has documented the causal connection between discharge of untreated human waste and typhoid, 1951 Report at 167-168. Since the beaches have had to be closed, there is also an injury to public property, recognized by the U.S.-Canada IJC as being within the scope of that treaty.

1965 Report, cited at Barros and Johnston, The International Law of Pollution 104 (1974).

There is the further injury to property represented by the necessity of the Lower Peace Brewery's installation of sophisticated water purification facilities to overcome the combined effects of untreated discharges from both the paper mill and the shantytown. The importance of high water quality to an exporter of internationally celebrated beer cannot be underestimated. In addition, the heat discharged from the reactor threatens the use of reliably cool waters by the neighboring brewery to the extent that cooling lagoons costing $900,000 will have to be installed. Heat, along with sewage and chemical wastes, is recognized as a pollutant by Section 502 of the United States Federal Water Pollution Control Act Amendments of 1972. 33 U.S.C.A. §1362. A rise in ambient water temperature reduces a river's capacity for self purification, raises the toxicity of many domestic and industrial effluents, and adversely affects the spawning and survival of fish. Christ, "Assessment of Economic Damage Caused by Water Pollution", 13 W.H.O. Public Health Papers 87, 97 (1962). In short, excess heat can cause ecological catastrophe in the Lower Peace River.

2. Karma is responsible to New Helios for the trans-boundary effects of this pollution even though the wastes of the paper mill and shantytown result from private activity.

Since Karma has waived the procedural prerequisite of exhaustion of local remedies, the state of Karma can be held directly responsible under international law for violations of

the 1923 Treaty, even though the activity creating the violations was essentially private. Article II, paragraph 1 provides that "neither State shall pollute . . ." This refers not only to its obligation to take no action on its own part to pollute, but also to its duty to insure that pollution which originates within its territorial jurisdiction does not cross into New Helios.

Support for this interpretation can be found in both the Treaty's object and purpose and in relevant rules of international law. For Karma to eschew pollution on its own part but permit it by its citizens would render nugatory the object of controlling transboundary pollution on the Peace Rivers and in International Lake. Permitting such private pollution with transboundary effects is neither amicable nor friendly, nor, considering the costs that New Helios must accordingly bear, economically cooperative. This is especially true in light of the fact that New Helios has protested this situation to Karma and the latter has taken no responsive action.

This interpretation finds further support in the rules of international law applied by arbitral tribunals and international adjudications. In the Trail Smelter case, the tribunal observed that "under principles of international law . . . no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein . . . ."
35 A.J.I.L. 684 (1941). Although not pursuant to a term of the

reference, this rule received further recognition and articulation in The Corfu Channel Case, /1949/ I.C.J. 4; 43 A.J.I.L. 558 (1949). In that case, the Court held Albania liable to Great Britain for damage caused by mines laid with the knowledge of Albania. Due to Albania's control over the evidence of its knowledge, Great Britain was allowed "a more liberal recourse to inferences of fact and circumstantial evidence". 43 A.J.I.L. at 567. The Court, noting Albania's attitude before and after the disaster and the feasibility of its observance of the area where the mines were laid, found that Albania had knowledge of the facts.

There is an analogous situation here. Karma has indicated an intention to rapidly develop its Wilderness region. It is doing so in cooperation with the WDA, which has recommended the construction of facilities for the treatment of sewage from the mill and shantytown. The mill company, in apparent recognition of the problem, has promised to build modern housing for the workers. Moreover, New Helios' diplomatic protest of July 1974, has given Karma official notice of the transboundary effect of the pollution. Karma's attitude has favored unimpeded development with no thought to social cost (e.g. living conditions of the pulp mill workers). Under the Corfu Channel standard, there is a clearly permissible inference of knowledge and responsibility on the part of Karma.

3. Karma has failed to cooperate and consult with New Helios on treaty matters of mutual interest.

Article I of the 1923 Treaty provides that Karma and New Helios "agree to cooperate and consult with one another as appropriate on matters of mutual interest" with a view to carrying out "the purposes and objectives of this Agreement". Karma has completely failed to fulfill this obligation, most egregiously in the case of the proposed nuclear power plant. In conjunction with the complaints of citizens' groups, New Helios has protested several times against the location and construction of the power plant. Instead of cooperating on this matter of obvious mutual interest, evidenced by the very fact of New Helios' protest, Karma has answered with an assertion of the sovereign right to develop in any way possible.

The long-accepted international rule that pacta sunt servanda requires the enforcement of Karma's obligation to consult or cooperate. However much a sovereign right Karma has to develop, it must do so in the context of its other international obligations, including prior treaty obligations. The general aim of amity, friendship, and economic cooperation through consultation and cooperation is certainly not achieved by curt assertions of sovereign rights. An analogous situation, the Lac Lanoux arbitration, 62 Revue Générale de Droit International Public 79 (1958), 53 A.J.I.L. 156 (1959), found a binding obligation expressed in Article XVI of the Additional Protocol to the Treaty of Bayonne, 56 Brit. and For. State Papers 212, 226, 229 (1865-6), for France to consult with Spain whenever the general interests of the parties in water utilization were involved. Similarly,

Karma's undertakings to consult and cooperate are binding in international law.

4. There can be no question of the continuing validity and enforceability of the 1923 Treaty.

Despite the considerable lapse of time since the 1923 Treaty came into force, there has been no fundamental change of circumstances such as might justify the termination or suspension of the Treaty on the grounds of clausula rebus sic stantibus. Although noted in Article 62 of the Vienna Convention on the Law of Treaties, supra, the principle of fundamental change of circumstances has never been officially invoked by this Court, its predecessor, or any other international tribunal. Brierly, Law of Nations 244 (4th ed., 1949). In fact, the present case is closely analogous to the Case of the Free Zones of Upper Savoy and the District of Gex, /1932/ P.C.I.J., Ser.A/B, No.46, at 156-8; 2 Hudson, World Court Reports 448, 553 (1935), in which the Permanent Court of International Justice expressly reserved the question of the existence of this rule. There, France failed to prove that the existence of the allegedly changed circumstance was the basis for the parties' consent to be bound by the treaty. Similarly, Karma can present no evidence showing that any circumstances which have changed since 1923 were essential bases for the parties' consent to the treaty.

In reality, the only fundamental circumstance which has changed is Karma's desire to develop itself "in any way possible". This is a change of policy, not of circumstance. The attempt to escape the obligations of the treaty is based on a desire to

avoid the cost of treating its sewage and charging the effect of that nontreatment to New Helios. See, generally, Lissitzyn, "Treaties and Changed Circumstances (Rebus Sic Stantibus)", 61 A.J.I.L. 895 (1967). In its official commentary to Draft Article 59 on changed circumstances, the International Law Commission explained that it would allow rebus only for those policy changes, such as political realignment, which both parties might prefer to terminate. 61 A.J.I.L. 433-4 (1967). There is no such policy change here, however. No realignment is taking place and only one party wishes to terminate.

B. The Release of Untreated Municipal Sewage, Raw Industrial Waste, and Unmoderated Nuclear Reactor Thermal Discharge into the Waters of an International Drainage Basin which Causes Injury within the Territory of a Neighboring State and Deprivation of the Beneficial Use of Those Boundary Waters by That State is a Violation of Customary International Law.

The customs and general principles of international law forbid a state and individuals resident in its territory from taking actions which result in injury to the rights of another state. New Helios will show that this rule is recognized in the statements of sovereign nations, in decisions of international judicial bodies, in the writings of publicists analyzing traditional state practices, and in the provisions of modern "private" codifications of international law, and that this rule should be used in interpreting the 1923 Treaty of Amity, Friendship, and Economic Cooperation. Even if this Court should hold the Treaty inapplicable to the present case, Karma and New Helios are bound by the more general but obligatory requirements of the customary inter-

national law recognized by all civilized states. 1 Hackworth, Digest of International Law 17 (1940).

The doctrine of state responsibility for wrongs caused to other states is long established. Lauterpacht, 1 Oppenheim's International Law 335-8 (8th ed., 1955), hereinafter Lauterpacht. However, the circumstances of the present case subject this rule of law to two new considerations. The first is that there is an increasing disparity in wealth between the developed and the less-developed nations and consequently special responsibilities on governments of less-developed states to encourage rapid industrialization. The second is the recent realization that the earth's natural resources are limited, and unless protected from abuse those resources might no longer support the needs of human civilization. The Court is asked to balance these two factors. They should not be viewed as in opposition to each other; each must be given weight in the evolving legal patterns.

The United Nations Conference on the Human Environment, in which most developing countries participated, dealt with this very problem and declared in Principle 21 that:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. (U.N. Doc.A/CONF.48/14, at 7 (1972)).

Thus the sovereign right of a nation to exploit its own resources in accordance with its needs for development is limited by its duty not to impose injury on its neighbors. New Helios notes

that the Stockholm Conference did not suggest what the law ought to be, but only recognized what the "principles of international law" require. No less is required of Karma.

In the Trail Smelter case, 35 A.J.I.L. 684 (1941), an Arbitral Tribunal created by the United States and Canada was asked to consider whether Canada must pay for damage in the State of Washington allegedly caused by fumes from a privately owned smelter on Canadian territory. Although the terms of reference made clear that if injury were found there would be a duty to compensate, the finding of the Tribunal and the basis for its decision was based in the more general duty found in international law:

> The Tribunal, therefore, finds . . . that under the principles of international law, as well as the law of the United States, no state has a right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence. (Final Decision of March 11, 1941; 35 A.J.I.L. 684, 716.)

Although the Tribunal did not assign damages for injury within their terms of reference, it stated that the governments should fix the indemnity. It held that Canada was "responsible in international law for the conduct of the Trail Smelter . . ." and further required that the smelter "refrain from causing any damage through fumes in the State of Washington". 35 A.J.I.L. at 717. The Tribunal set out an injunctive regime which governed the operation of the smelter in such a way as to prevent transboundary pollution.

Similarly, Karma has allowed the privately owned pulp and paper mill and the sewerless mill town to cause substantial damage. Not only has it permitted the use of its territory to the detriment of New Helios, but its government has itself caused damage through the state-owned utility.

As in Trail Smelter, the harmful agents have been transmitted through a medium that must be viewed as a resource common to both countries. The injury has been inflicted on New Helios' beaches and waters, on its brewing and tourist interests, and on the increased number of persons who have suffered from typhoid. There can be little doubt that the loss of a public drinking water source because of noxious industrial wastes and the rise of an often fatal disease transmitted through untreated sewage are of serious consequence. Nor do the documented costs of additional water purification facilities and cooling lagoons fail to meet the standard of "clear and convincing evidence".

The central principle in the Trail Smelter decision, that territoriality is not a bar to responsibility for injury caused to others, is reaffirmed in three decisions of the International Court of Justice: The Corfu Channel Case, /1949/ I.C.J. 4, 43 A.J.I.L. 558 (1949); and the Nuclear Tests Cases, (Australia v. France) Interim Protection /1973/ I.C.J. 99, and (New Zealand v. France) Interim Protection /1973/ I.C.J. 135.

The Corfu Channel case arose after explosions caused by mines in Albanian territorial waters killed British seamen and severely damaged ships in transit through the North Corfu channel. This Court ordered Albania to compensate for its failure to warn

the approaching warships of imminent danger. The obligation was based

> On certain general and well-recognized principles, namely: elementary considerations of humanity, . . . the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States. (43 A.J.I.L. at 570-571) (Emphasis added).

This decision was based in part upon a finding that Albanian authorities' knowledge of the minefield could be fairly imputed from the facts in spite of spirited denials. The Court reasoned:

> By reason of its exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion. (43 A.J.I.L. at 567).

The implication of this rule for the difficult problems of proof in the present case is obvious and justified by the magnitude and severity of the injury involved.

Most recently, in the Nuclear Test Cases, supra, this Court was confronted with evidence that the testing of nuclear weapons by France in its Pacific territory would result in radioactive fallout causing injury in the territories of the applicants. The Court granted provisional measures forbidding testing which could cause such fallout and consequent injury. Although the Court dissolved its original protective orders and dismissed the case following French declarations that testing had permanently terminated, it must be recognized that the protective orders show

that one nation cannot take action detrimental outside its own territory. See Nuclear Tests (Australia v. France) Judgment of December 20, 1974 /1974/ I.C.J. 253; and (New Zealand v. France) Judgment of December 20, 1974 /1974/ I.C.J. 457. The orders indicate this Court's willingness to take injunctive action to prevent likely future injury by transfrontier propagation of harmful agents.

Although there are not yet any international decisions relating specifically to the pollution of an international river, this Court should note the remarks of the Arbitral Tribunal created by France and Spain to settle the Lake Lanoux case, 62 Revue Générale de Droit International Public 79-119 (1958); 53 A.J.I.L. 156 (1959). The tribunal found that it was unable under the treaty involved to declare that France had violated international obligations by diverting a volume of water from the Carol River and later returning a similar volume via a tunnel before entry into Spain. However, the Tribunal set out grounds which, had they been argued, would have justified a finding of injury:

> It could have been argued that the works would bring about a definitve pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which would injure Spanish interests. (53 A.J.I.L. at 160).

Thus the very injuries complained of by New Helios have been found to violate the international obligation that an upper reparian state refrain from inflicting harm on a lower riparian. See Lauterpacht, at 474-475.

This same principle has been recognized by the highest Italian appellate court in Société Énergie Électrique du Littoral Méditerranéen v. Compagnia Imprese Elettriche Liguri, Judgment of February 13, 1939, [1938-1940] Ann.Dig. 120-122 (No.47)(Corte di Cassazione); 3 Whiteman, Digest of International Law 1050.

This rule also finds support in the traditional doctrine of sic utere tuo ut non alienum laedas (so use your own property as not to injure your neighbor). Blackstone recognized this as the essence of the common law of nuisance, noting as an example the poisoning of a water course. 3 Blackstone, Commentaries on the Laws of England 218 (Chitty ed., 1827). Its importance in international law is stated in Lauterpacht, at 346-347:

> The maxim, sic utere tuo ut non alienum non laedas, is applicable to relations of States no less than to those of individuals; . . . it is one of those general principles of law recognized by civilized States which the Permanent Court is bound to apply . . . (footnotes omitted).

Quincy Wright classed the principle with the obligations of a government to abstain from and prevent aggression and subversive intervention launched from its territory. Wright, "Subversive Intervention", 54 A.J.I.L. 521, 528 (1960). He includes in this classification river pollution and diversion, as well as industrial air pollution, atmospheric nuclear tests, and obstructions to navigation as possible violations of sic utere tuo. Certainly the transmission of typhoid contagion and toxic pulp waste are violations.

The Helsinki Rules, International Law Association, Report of the Fifty-Second Conference 484 et seq. (1966), which set forth the "general rules of international law applic-

able to the use of the waters of an international drainage basin", Article I, state that when pollution originating in the territory of one state causes substantial injury in another, the doctrine of sic utere tuo demands that new or increased pollution be abated by reasonable measures, Article X. Pollution is "any detrimental change resulting from human donduct in the natural composition, content, or quality of the waters of an international drainage basin", Article IX. The waters of International Lake and the Peace River have obviously been polluted under this definition. Although pollution must normally be consistent with the "equitable utilization" rules in Chapter 2 of the Rules and must be balanced with the relevant factors in Article V, the obligation to abate existing pollution by "reasonable measures" becomes an absolute duty when human life is threatened. Comment (e) to Article X. Typhoid undoubtedly threatens human life. Indeed, Illustration 2 to Article XI specifies that typhoid caused by untreated upstream urban sewage requires abatement and reasonable measures to prevent substantial injury.

Comment (c) to Article X states "an injury is considered 'substantial' if it materially interferes with or prevents a reasonable use of the water". New Helios strongly urges that use as municipal drinking water is reasonable, and that the discharge of industrial effluent and untreated sewage by Karma is preventing such use in violation of Article X(b).

Finally, Article XXIX of the Helsinki Rules imposes an obligation on a state to give "notice of any proposed construction or installation which would alter the regime of the basin in a way

which might give rise to a dispute" concerning another state's legal rights and interests when those interests may be "substantially affected" so as to provide reasonable time for "an assessment of the probable effect". Failure to give such notice deprives the project of the preferential status of an existing use normally given to reasonable and equitable uses under Articles V(d) and VIII. Karma gave no notice of either planning or construction of the large nuclear plant, and the plant should, accordingly, be denied that priority.

One European study suggests that "when the injury liable to be caused is serious and lasting, development works may only be undertaken under a prior agreement". Sevette, Legal Aspects of Hydro-Electric Development of Rivers and Lakes of Common Interest, U.N. Doc.E/ECE/136, at 211 (1952); 3 Whiteman, Digest of International Law 931. New Helios has already pointed out the serious consequences of the thermal discharge into its territorial river waters. Relief ought to be granted for this breach of the duty of co-riparians to consult. Relations between neighboring states require the greatest restraint and good faith. Karma has not only a treaty obligation but a customary legal duty to consult and cooperate with New Helios on the placement and operation of the nuclear power plant. See Andrassy, "Les Relations Internationales de Voisinage", 79 Recueil des Cours II 72, 169-171 (1951).

In sum, the duty of a state to refrain from acts within its territory which cause injury in that of another does not absolutely prohibit the transmission of any effects to neighboring

territory. But when there is certain injury, this Court is bound by the principles of customary international law to find Karma responsible. This responsibility for the injurious consequences of a state's action flows directly from the right of sovereign action asserted by Karma.

C. Karma's Claims upon the Beneficial Uses of these International Waters Are Not Acceptable as an Arguably Reasonable and Equitable Share of those Uses, even Considering its Special Needs as a Developing State.

Chapter 2 of the Helsinki Rules enunciates the principle that each basin state within its own territory has a right "to a reasonable and equitable share in the beneficial uses" of an international drainage basin as established by a balancing of several co-equal "relevant factors". Implicit in this statement are two important yet conflicting considerations - first, that each state is sovereign in its territory and territorial waters; and second, that an international drainage basin is a shared resource that physically interrelates the two territories in such a way that any action in one territory necessarily affects the other. The negative and protective aspect of this conflict is expressed by the doctrine of sic utere tuo; the affirmative and productive aspect is expressed by the doctrine of equitable utilization. Both require an ultimate recognition of a community of interests and a balancing of the rights of all members of the community. See Smith, The Economic Uses of International Rivers 150-153 (1931); and the International Commission of the River Oder Case /1929/ P.C.I.J., Ser.A, No.23, at 27. This approach

is the direct opposite of that which Karma has adopted to this point, a resurrection of the long dead "Harmon Doctrine" - absolute sovereignty without regard for effects in other states.

Although Article V of the Helsinki Rules suggests "relevant factors", the Rules carefully refrain from setting priorities or assigning weights to those factors. In deciding this case, New Helios believes that the Court's approach to these competing factors was best defined in 1927 by the Supreme Court of Germany:

> One must consider not only the absolute injury caused to the neighboring State, but also the relation of the advantage gained by one to the injury caused to the other. (Württemberg v. Baden, /1927-1928/ Ann.Dig. 128, 131(No.86)).

An identical approach was taken by this Court in the North Sea Continental Shelf Case, /1969/ I.C.J. 3, 47. A beneficial use need not be the most productive possible use but it must not, on balance, be injurious.

1. None of the Present or Proposed Uses by Karma Meet the Standard of Equitable Utilization as set forth in Articles IV through XIII of the Helsinki Rules.

First, the discharge of raw human sewage from an urban settlement of 20,000 people directly threatens the lives of the citizens of New Helios. The use of water for domestic purposes where no alternative source is available is per se reasonable. New Helios has already invested large sums in water purification facilities to protect its citizens; yet typhoid incidents have risen. No citation is necessary to establish that human life is the one value of compelling importance in this balancing process. Nor is the danger limited to the present:

> No nation can afford to neglect water pollution prevention; without it, the nation will eventually be confronted with a far more onerous burden to secure wholesome and adequate supplies of water . . . If the less developed countries embark now on suitable pollution prevention policies they may avoid the costly errors made in the past by the more developed countries. (McNaughton, "The Financial and Economic Aspects of Water-Pollution Prevention", 13 W.H.O. Public Health Papers 101, 114-115 (1962)).

Second, although there is undoubtedly great economic benefit accruing to the people of Karma's wilderness region from the use of the Peace River as an open and free sewer, this economic "externality" imposes serious harm on those in New Helios who are also economically dependent upon the common waters. Industrial wastes have rendered the waters unpotable and have overburdened both municipal and inudstrial water purification systems. In addition, the water is no longer suitable for recreational uses. This Court has long recognized "economic interests peculiar to a region" . . . "clearly evidenced by a long usage". Fisheries Case, Judgment of December 18, 1951, /1951/ I.C.J. 116, 133. The Court must now strike a balance between such interests.

A W.H.O. study suggests how best to draw the balance:

> Removal of pollutants from an industrial effluent before it is discharged into a body of water is often simpler and more reliable than an attempt to remove them from water intended for domestic use taken from some other point in the same body of water. (World Health Organization, International Standards for Drinking Water 13 (3rd. ed., 1971)).

Third, Karma's nuclear power plant has, without notice, begun to use the Lower Peace as a receptacle for its thermal wastes. The danger of such heat has already been noted. The social and economic needs of Karma's population must be balanced against

other considerations. The failure to consult New Helios about the placement of the plant in accordance with both the 1923 Treaty and Article XXIX of the Helsinki Rules ought to deprive the plant of the status of an existing use. There has been no showing that an alternative placement would not have equally satisfied Karma's needs without harming New Helios. Finally, cooling towers powered by the electric plant itself could insure that Karma's needs were met without causing substantial injury to the territory of New Helios.

After weighing the factors cited above, this Court should declare that Karma's claims do not constitute a reasonable and equitable share of the basin's beneficial uses. Accordingly, the Court must assess damages or impose the equitable relief sought by New Helios.

2. Karma As an Equal and Sovereign State Must Be Responsible for Injurious Conduct to the Same Degree as Other States.

Although Article V(e) of the Helsinki Rules recognizes "the economic and social needs of each basin state" and although the special needs of developing states should be recognized by the international community, international law does not recognize a "double standard" for the rights and responsibilities of such states. It is true that the developed states have recognized a special responsibility to include developing states in any agreement extending trade and economic concessions. However, this responsibility to assist developing nations cannot be twisted into a duty to suffer substantial harm at the hands of Karma.

Developing countries have asserted the privilege of determining environmental standards in light of their own national economic development priorities, insisting that pollution standards applicable in developed states are inappropriate for developing states. U.N. Conference on the Human Environment, Principle 23, U.N. Doc.A/CONF.48/14 (1972), at 7. New Helios can accept this assertion but insists this is not an unqualified right or pvilege and points to Principles 21 and 22 and Recommendation 103(a) and (e) of that Conference. Recommendation 103(e) at 56 states that:

> all countries agree that uniform environmental standards should not be expected to be applied universally by all countries . . . except in those cases where environmental disruption may constitute a concern to other countries.

According to Principle 21, states do have the sovereign right to exploit natural resources pursuant to their own environmental policies but subject to the obligations of state responsibility not to inflict harm on others. Principle 22 anticipates the need for a legal framework in which problems concerning "compensation for victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction" can be solved. An international double standard for liability-creating conduct is not contemplated by the Declaration. Recommendation 103(a) states: "/A/s a general rule, no country should solve or disregard its environmental problems at the expense of other countries". Id., at 55. Clearly, if Karma has not chosen simply to disregard an important human and environmental problem, then it has certainly sought a

solution at the expense of New Helios.

3. Karma Has Abused its Right to Use the River in a Reasonable Manner.

The common thread in both the doctrine of state responsibility and the doctrine of equitable utilization is that equity ought to be done among those who are equals. But whatever may be the rights which have accrued to Karma by an equitable utilization of the Peace River basin, Karma has nevertheless abused them. There is a community of interests in the river and its waters which requires absolute good faith.

> The principle of good faith which governs international relations controls also the exercise of rights by States. The theory of abuse of rights (abus de droit) recognized in principle both by the Permanent Court of International Justice and the International Court of Justice is merely an application of this principle to the exercise of rights. (Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, 121-123 (1953); citations omitted.)

Karma is responsible for existing and future injuries to New Helios under both the theory of state responsibility and the theory of abuse of the rights of equitable utilization.

II.

KARMA'S RESPONSIBILITY TO NEW HELIOS FOR DAMAGE DUE TO TRANSBOUNDARY POLLUTION GIVES RISE TO AN OBLIGATION BY KARMA TO MAKE REPARATIONS.

Karma's violations of obligations under the 1923 Treaty and customary rules of international law obligate it to make reparation to New Helios for the wrongs done. 1 Lauterpacht 352. In the Case of the Factory at Chorzów /1928/ P.C.I.J. Ser.A, No.17, at 29, hereinafter Chorzów, the Court found the obligation to make reparations "a general principle of international law,

and even a general conception of law . . . ." The most common form of reparation is an indemnity, or payment of money damages. Chorzów at 28. If the Court is unable to determine the amount of damages it may order further proceedings on the subject, Corfu Channel, supra, at 574; and it may indicate provisional measures under Article 41 of its statute "to preserve the respective rights of either party" pending the final decision. Additionally the Court has full power to order "equitable" remedies, as in Trail Smelter. See Hudson, J., Dissent in The Diversion of Waters of the Meuse, /1937/ P.C.I.J. Ser.A/B, No.70, at 4, 76.

New Helios seeks indemnification for the injuries inflicted on its citizens due to typhoid caused by Karma's untreated sewage, United Mexican States (Mallén) v. United States, General Claims Comm'n., Opinion of Commissioners 254 (1927); and for the economic loss caused to owners of beachfront property and to the Lower Peace Brewery, the value of whose property was reduced. Trail Smelter, Decision of 1938, 33 A.J.I.L. 200 (1939).

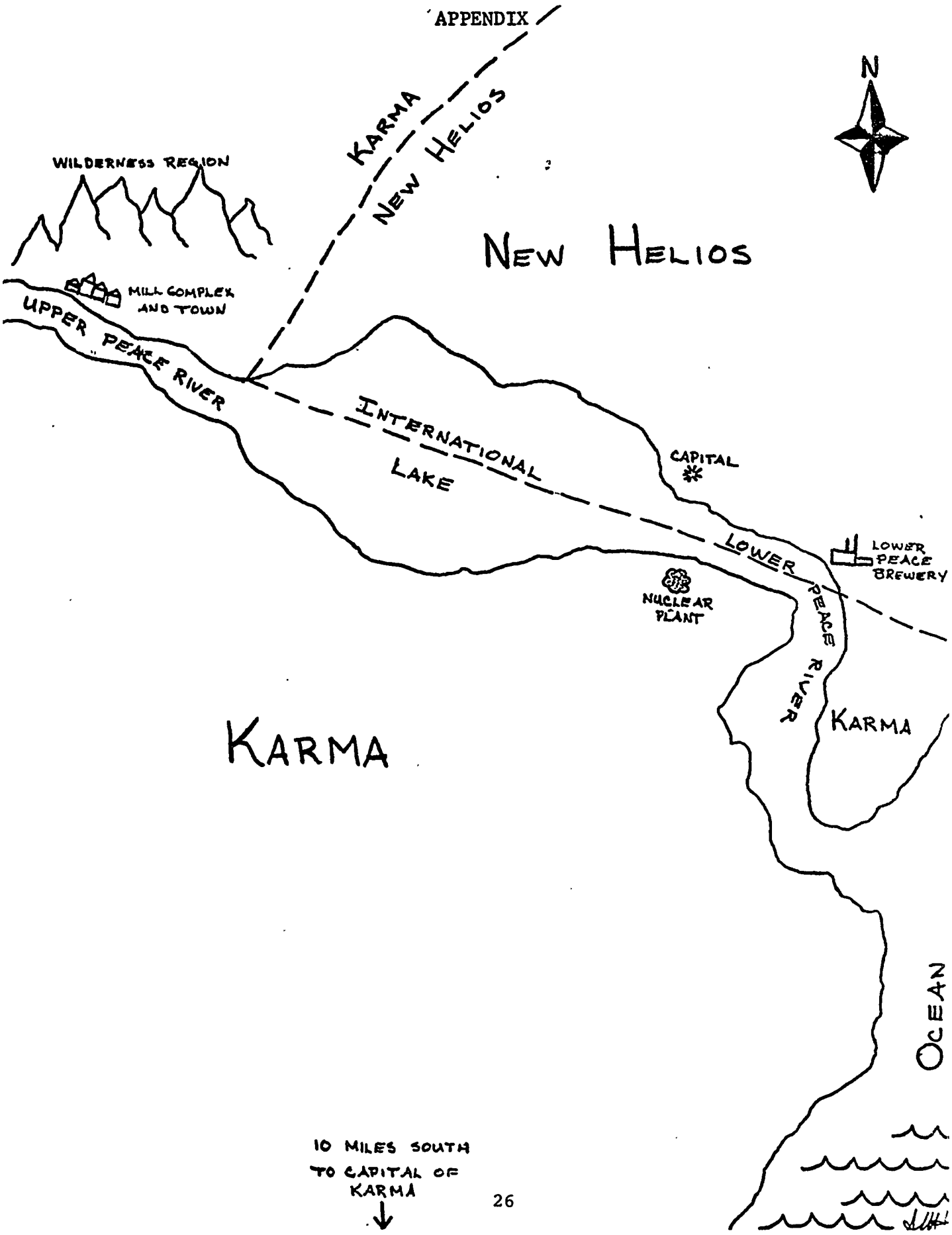
New Helios also requests the Court to establish a comprehensive permanent regime including: primary treatment of human sewage to make the water safe for bathing, lessening of the chemical wastes of the pulp mill to the point that the existing purification facilities of the capital and the brewery can make up any necessary difference in water quality, Trail Smelter, 35 A.J.I.L. 684 (1941); and an order that the present thermal output of the nuclear plant must not be exceeded until cooling towers are built or Karma can prove that ecological harm will not be inflicted. Nuclear Tests Cases, supra.

Until and unless Karma establishes the permanent regime so ordered, it should also indemnify New Helios for future damage, Trail Smelter, 35 A.J.I.L. 684 (1941), including the documented costs of new water-treatment facilities for the capital ($2,000,000) and brewery ($900,000), or the costs of finding a new source of water for the latter. The Court may designate these costs as economic rents or royalties for using a natural resource. If Karma is unable to pay, the Court may order payment in kind, e.g. nuclear power, for the use of the river. Sevette, supra.

If the Court feels it has insufficient facts to establish a comprehensive permanent regime, it may invoke provisional measures under Article 41 of the Statute. See Case Concerning the Polish Agrarian Reform and the German Minorities, Interim Measures of Protection, /1933/ P.C.I.J., Ser.A/B, No.58, at 175. To protect rights against continued pollution, the Court may order the creation of an ad hoc board of supervision, as was done in the Anglo-Iranian Oil Case, Order of July 5, 1951, /1951/ I.C.J. Reports, at 89.

PRAYER FOR RELIEF

New Helos respectfully requests the Court to find that Karma has violated its obligations under the 1923 Treaty and general principles of customary international law, and to order Karma to indemnify New Helios and abate its pollution, or alternatively, to impose the recommended provisional measures.


N
KARMA
NEW HELIOS
WILDERNESS REGION
NEW HELIOS
MILL COMPLEX AND TOWN
UPPER PEACE RIVER
INTERNATIONAL
LAKE
CAPITAL
LOWER PEACE BREWERY
LOWER PEACE RIVER
NUCLEAR PLANT
KARMA
KARMA
OCEAN
10 MILES SOUTH TO CAPITAL OF KARMA