IN THE INTERNATIONAL COURT OF JUSTICE

THE GOVERNMENT OF NEW HELIOS, Applicant

v.

THE GOVERNMENT OF KARMA, Respondent

Memorial for RESPONDENT, The Government of Karma

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 the local remedies rule.

STATEMENT OF FACTS

The applicant New Helios, a developed industrialized nation enjoying a high standard of living, is requesting relief from allegedly adverse effects inflicted upon it by the uses made of the Upper and Lower Peace Rivers by its co-riparian State, the relatively poor and primarily agricultural Karma.

Since the early 1960's, Karma has been developing rapidly. Much of this economic growth is attributable to the development of Karma's Wilderness Region, to the north of the Upper Peace River. (See map in Appendix.) It was not until 1955 that commercial logging in the Wilderness Region of Karma first became feasible, when a tunnel-roadway was built to traverse the mountains north of the Upper Peace River. The World Development Agency (WDA), an intergovernmental organization recommended that a large pulp and paper mill be constructed in this region. The privately-owned mill, opened in 1964, created thousands of new jobs for the people of the Wilderness Region, most of whom had previously relied upon hunting and trapping for a living. A

community of some 20,000 persons now surrounds the mill complex.

Since 1950, the population of the capital of Karma has quadrupled, while the number of light manufacturing operations has greatly increased. An energy-intensive fertilizer industry has been developed to assist in enriching the plains area around the capital. Businessmen in the capital have complained that they have been unable to build new factories or expand existing plants because of a lack of adequate electrical power supplies. To meet this growing demand for energy, Karma decided to construct a several-hundred megawatt nuclear power plant. Construction began in 1970 at a site near the mouth of the Lower Peace River and in May, 1974, the plant was placed in operation at 10% of its projected capacity.

In July, 1974, New Helios submitted a formal protest to Karma, calling upon Karma to halt its industrial development at once. Karma responded that its actions were consistent both with the 1923 Treaty of Amity, Friendship, and Economic Cooperation and with international law. Citizens' groups in New Helios have threatened a boycott of all goods produced in Karma.

Recognizing that a potentially dangerous situation has arisen, Karma and New Helios agree to utilize Article IV of the 1923 Treaty and submit the dispute to this Court.

QUESTIONS PRESENTED

I. Whether Karma's actions have caused injury to New Helios.

II. Whether a fundamental change of circumstance has occurred so as to terminate the 1923 Treaty of Amity, Friendship, and Economic Cooperation.

III. Whether Karma's use of the Peace River Basin is equitable and beneficial.

IV. Whether developing countries in general and Karma in particular should receive special consideration in disputes whose resolution involves an adjustment of conflicting uses.

V. Whether New Helios' demands for relief violate Karma's sovereign right to exploit natural resources.

SUMMARY OF ARGUMENT

Under the 1923 Treaty of Amity, Friendship, and Economic Cooperation, the prohibition against "pollution" does not mean that international waters should remain unchanged in quality, but rather that no change "injure the health or property in the other State." The term "injury" is not synonymous with "damage" or "harm"; "injury" is only the harm or damage in excess of that which the sufferer should reasonably be called upon to bear, in light of all the circumstances of the case. The burden of persuasion is on New Helios to show injury of serious consequence by clear and convincing evidence. New Helios has not only failed to meet that standard, but has not even adduced evidence to demonstrate any causal connection between Karma's paper mill

complex and New Helios' typhoid, nor between Karma's power plant and interference with recreational uses of the Lower Peace River. Because Karma's actions are in fact not unjustifiably burdensome to New Helios, Karma has acted consistently with the provisions of the Treaty.

However, the Treaty provisions are not obligatory upon Karma, because the Treaty has lapsed due to a fundamental change of circumstances. Only while the low standard of living of Karma's citizens appeared inescapable was the Treaty a fair exchange of Karma's control of navigational access to International Lake for any freedom to pollute which the comfortably prosperous citizens of industrialized New Helios might believe they had.

Now that Karma has the ability to raise its standard of living, it should enjoy no less a right to develop than did states which earlier had such an unrestricted opportunity. Such important first steps in the development process as a pulp and paper mill and a power plant certainly constitute such reasonable uses of a river as qualify under the international law of equal co-riparian rights. Moreover, New Helios would better serve its obligations to a co-riparian State were it to modify or terminate its existing uses which obstruct the goal of a better overall standard of living for all the peoples dependent on the Peace River Basin. Toward that same goal, Karma should be subsidized

in developing pollution treatment facilities. Such social cost would be commensurate with the social benefit to be derived by all from cleaner waters.

International law has recognized that the special problems of developing states must lead to distinct standards for defining conduct which is "injurious". Without standards which take into account the increasing disparity between wealthy and poor populations, the concept of law as applicable to all mankind will suffer, and low-income states which believe existing standards unfairly discriminate to maintain the wealth of those who already possess it will withdraw from legal paths of dialogue. Were the Court to reject special standards and grant compensatory or injunctive claims against Karma, its actions would dangerously impede Karma's right to seek prosperity similar to that of New Helios, and would compromise the very sovereignty of Karma.

ARGUMENT AND AUTHORITIES

I

KARMA'S ACTIONS ARE CONSISTENT WITH THE PROVISIONS OUTLINED IN THE 1923 TREATY OF AMITY, FRIENDSHIP, AND ECONOMIC COOPERATION.

A. The Prohibition Against Pollution in Article II Is Not Absolute.

The Treaty recognizes that a definition of pollution based on mere change in the character or composition of the water would be too narrow. Rather, the Treaty links scope of permissible pollution to "injury to health or property in the other State". Article II(1), 1923 Treaty of Amity, Friendship, and Cooperation. By itself, "pollution" means nothing precise and is a term to be avoided in international disputes.

> Its use obscures the real issues raised by the utilization of water resources and this hinders fruitful legal analysis; it tends to lead one to think that any act that renders water impure is wrong and ought to be illegal. (Bourne, "International Law and Pollution of International Rivers and Lakes," U. Toronto L. J. 193-194 (1971)).

To interpret Article II, paragraph 1, Karma asks the Court to examine a similar provision in the U.S. - Canada Boundary Waters Treaty, January 11, 1909, 36 Stat. 2448, T. S. No. 548 (1910). The parties agreed in Article IV that the boundary waters "shall not be polluted on either side to the injury of health or property on the other," a provision virtually identical to that in the 1923 Karma - New Helios Treaty.

B. Alleged Harm Resulting from Karma's Acts Is Not 'Injury' Within the Terms of the Treaty.

In the first dispute investigated under the terms of the 1909 Treaty, the International Joint Commission (I.J.C.) was confronted with the problem of determining whether the effect of transboundary pollution was an "injury" to health and property. Concerning injury the I.J.C. asked:

> Does it mean simply harm or damage, actual or potential, to health or property, without regard to any extrinsic considerations, such as justification or excuse on the part of those who cause the damage or ease of avoidance on the part of those who suffer from this harm or damage? (International Joint Commission U.S. and Canada) Final Report on the Pollution Boundary Waters Reference 30 (1918), hereinafter, Final Report, 1918).

In its analysis, the Commission adopted a broad view of injury. "The growth and development of riparian communities would be seriously arrested if pollution were looked upon from [a narrow] standpoint exclusively." Final Report, 1918, at 32. For a more accurate understanding of the word "injury" the Commission decided that

> when used in . . . the treaty [it had] a special signification -- one somewhat akin to the term 'injuria' in jurisprudence. It does not mean mere harm or damage, but harm or damage which is in excess of the amount of harm or damage which the sufferer, in view of all the circumstances of the case, and of all the coexistent rights . . . , and of the paramount importance of human health and life, should reasonably be called upon to bear. (Final Report, 1918, at 34).

Additionally, the principle that the extent of "harm" can only be evaluated by weighing damage against the costs of remedy was accepted by the I.J.C. They recognized that

> [i]f the harm which would be done [a community downstream from one which discharged raw sewage into the river] could be remedied by the assumption of a financial burden which would be reasonable under all the circumstances of the case, there would not be an "injury" within the meaning of . . . the treaty." Final Report, 1918, at 33.

More recent publicists have recognized this same principle as it related to potential spillover costs and effects of development activity. E.g. C. Wilfred Jenks, "The Scope and Nature of Ultra-Hazardous Liability in International Law," Recueil des Cours, Vol. 117, 1966 I, pp. 99-200. Pertinent to the present dispute is the problem of nuclear reactors, but it has been claimed that even though

> the operation of nuclear power stations . . . entails serious risk of pollution resulting from accidents, [t]he total benefit accruing from such activities may sometimes outweigh the risks involved, in which case these acts are in themselves considered lawful. (Christopher Bo Bramsen, "Transnational Pollution and International Law," OECO, Problems in Transfrontier Pollution 274 (1974)

The other aspect of this principle, that the reasonableness of inconvenience should be evaluated in terms of the overall benefits to the parties, has also been accepted by other international tribunals. The waters of the Helmund River were

divided between Persia and Afghanistan so as to maximize the welfare of both communities, without considering whether the inconveniences fell equally across political lines. Award of the McMahon Mission in the Helmand River Dispute (1872) in Int'l L. Assn., "Observations on 'Comments on the First Report of the Committee'", Principles of Law Governing Uses of International Rivers, 20. For a similar application of this case principle, see Report of the Nile Commission (1925), 130 Brit. and For. State Papers 122 (1929).

The Indus River Dispute also used this principle when development projects in India created difficulties in Pakistan for which India could not give compensation. The dispute was resolved through the equitable development of the entire river basin. The developmental effort could not have succeeded if the resources of India had been diverted to the payment of compensation to Pakistan. The 1960 Indus Waters Treaty (between India, Pakistan and the International Bank for Reconstruction and Development, 419 U.N.T.S. 125 (1962).

The concept of measuring "injury" and "harm" with ability to pay and the extent of benefits has been codified in the Helsinki Rules, 1966. Int'l L. Assn., Report of the Fifty-Second Conference at Helsinki, 1966, hereinafter Helsinki Rules, 1966. This will be discussed infra at 9.

Liability and a consequent legal obligation only arises when there is a breach of legally protected right accompanied by damage. As the above discussion discloses, damage is not measured on an absolute scale but it is understood only in relation to the amount of harm suffered compared to the benefit generated by the injurious conduct. Karma contends that the damage suffered is not of a substantial nature and does not call into question Karma's equal obligations to make reparations.

C. New Helios Must Prove Substantial Damage by Clear and Convincing Evidence.

Karma denies that any damage caused by the actions of Karma or its citizens has caused serious injury, and notes that the burden of persuasion by clear and convincing evidence rests upon New Helios. The Trail Smelter Arbital Tribunal stated:

> [N]o 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 property or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence (emphasis added) (3 UN Rep. Int. Arb. Awards 1905, 1965 (1949)).

Without clear and convincing evidence that an injury is linked to an identifiable source of pollution, this Court should not assess penalties against Karma.

That evidence of injury alone is insufficient to establish

liability was confirmed by the decision of the International Court of Justice (I.C.J.) in the Corfu Channel Case [1949] I.C.J. 4. The Court, referring to the fact that minelaying could not be imputed to the Albanian Government merely because a minefield discovered in Albanian waters caused damage and injury to British ships, said

> [T]his fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof. ([1949]I.C.J. 18).

The Harvard Preliminary Draft Convention on State Responsibility for Aliens examined the Trial Smelter Arbitration and the ex gratia payments made by the United States to Japanese fishermen injured after the atomic bomb experiments in the Pacific, 32 Dept. of State Bulletin 90 (1955), and concluded that there was not sufficient grounds to support the proposition that states should be absolutely liable for wrongful acts or omissions "as the result of violations of boundaries or of extra hazardous activity." Convention on the International Responsibility of States for Injuries to Aliens, Preliminary Draft with Explanatory Notes, Harvard Law School, May 1959, p. 43. Karma submits that New Helios has not proved causation by clear and convincing evidence and they cannot rely on evidence of mere harm.

Karma notes the findings of the International Joint

Commission Report, 1951, at 166, where it shows that the diffusion and dillution of wastes by receiving waters, the intermingling of pollutants from numerous sources, the influence of winds, and river obstructions make it difficult or even impossible to measure the effect of transboundary pollution precisely.

II

NOTWITHSTANDING KARMA'S COMPLIANCE WITH ITS PROVISIONS, THE 1923 TREATY HAS LAPSED DUE TO A FUNDAMENTAL CHANGE OF CIRCUMSTANCES.

Although Karma is in full compliance with the 1923 Treaty with New Helios, Karma is no longer obligated to New Helios under the treaty terms. The fundamental changes in technology permitting the construction of a nuclear plant and of a tunnel-roadway through the mountains north of the Upper Peace River have enabled Karma to pursue a development program not contemplated in 1923.

Article 62 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27 (1969); 63 A.J.I.L. 875 (Oct. 1969), expresses the right of a State to terminate a treaty when there is a fundamental change of circumstances the continued existence of which was essential to the continuing consent of the State to be bound by the treaty. This principle is a codification and reformulation of the principle clausula rebus sic stantibus, whose existence in international law has long been recognized and

documented. See, e.g., Hill, "The Doctrine of Rebus Sic Stantibus in International Law," 9 U. Mo. Studies, No. 3 (1934); Huang, The Doctrine of Rebus Sic Stantibus in International Law (1933). Although the treaty itself has not come officially into force, the Vienna Convention has emerged as the latest expression of the international community on the law of treaties by virtue of the support it has already received. 21 UN Monthly Chronicle, No. 9, p. 30 (Oct. 1974).

Technological advancements have enabled Karma to undertake a development program unimaginable in 1923. In 1955, commercial logging in the Wilderness Region of Karma first became feasible with the construction of a tunnel-roadway traversing the mountains north of the Upper Peace River. The development of controlled nuclear fission has enabled Karma to construct a nuclear power plant on the Lower Peace River. These changes make possible development of regions of Karma hitherto inaccessible and of other areas of Karma on a scale previously unthinkable.

It is not difficult to discern the circumstances under which the treaty was concluded. New Helios desired a right of egress for shipping from the International Lake to the ocean. In return it promised not to pollute the part of the river flowing through Karma "so as to injure the health and property" of Karma. Karma had no need of an international régime for the

Lower Peace River, nor would an agreement not to pollute New Helios boundary waters affect it in any way whatsoever, for it had no access to the region where development might pollute New Helios. Now, however, there is an unforeseen fundamental change of circumstances the continued existence of which was the basis for Karma's consent to the treaty and the effect of which change is radically to transform the scope of Karma's obligations under the Treaty. Karma asserts, and respectfully requests the Court to find, that this change allows it to terminate the 1923 Treaty.

III

KARMA'S ACTIONS ARE CONSISTENT WITH GENERAL PRINCIPLES OF INTERNATIONAL LAW.

A. Under International Law, Co-Riparians Have Equal Rights of Reasonable Use.

Competing customs and practices have marked the development of an international law of rivers. Karma recognizes the principle of "Equal Rights of Reasonable Use" as codified in the Helsinki Rules of 1966. Helsinki Rules, 1966, 486.

The decisive weight of authority clearly endorses the principle of equitable utilization or equitable apportionment. According to the principle, co-riparian states have an equality of right with every other co-riparian to use the river in a reasonable and equitable manner. Lipper, "Equitable Utilization"

in The Law of International Drainage Basins, 41-62 (1967). He sets out the cases and conventions which apply and support this doctrine.

Although other principles of international river have been advanced, none has substantial support in the international community. Laylin & Bianchi, "The Role of Adjudication in International River Disputes: The Lake Lanoux Case," 53 A.J.I.L. 30,31 (1959). Thus Karma claims no rights of strict sovereignty under the "Harmon Doctrine", or as an upper riparian, or as a prior appropriator, advantageous as such claims might be.

Karma accepts the concept of limited restrictions on the right of a state to use waters of an international river without regard to injurious effects on neighboring states.

B. Karma Should Enjoy the Same Rights to Develop That Others Have Had in the Past.

Certainly one meaning to be given to "equal rights of use" is that Karma has no less a right to development than developed nations had a century ago. To deny this would be tantamount to a declaration of rights under prior appropriation.

It would presume that the countries that freely took the resources a generation ago had one right of "use" but that countries developing under more difficult circumstances would have a much more restrictive regimen placed on them.

C. The Use Karma Is Making of the Peace River Basin Is Reasonable and Equitable.

Equal rights to a reasonable use under the Helsinki Rules means that a particular state may enjoy a quantitatively and qualitatively greater use than a co-basin state, if each use is justifiable in light of all the circumstances. Of course, to be entitled to protection, a use must be beneficial. There is no question that Karma's uses of the river are beneficial, "that is to say, economically and socially valuable." Helsinki Rules, 1966, 487 . However, a beneficial use need not be the most productive or efficient use. Id. Rather, equal and correlative rights of use mean that co-basin States must take into consideration the economic and social needs of each State.

Article V of the Helsinki Rules lists eleven specific factors, Helsinki Rules, 1966, 488, to be included among those relevant to an overall determination of what constitutes "a reasonable and equitable share in the beneficial use of the water of an international drainage basin." The comment to Article V stipulates that "no factor has a fixed weight nor will all factors be relevant in all cases. . . . [T]o be relevant, a factor must aid in the determination or satisfaction of the social and economic needs of the co-basin states."

The first relevant factor is "the past utilization of the waters of the basin, including in particular existing utilization"

Although New Helios may have made more extensive use of the basin in the past, recent developments indicate that this was only due to the financial and technological inability of Karma to develop and use the waters. Karma's existing investment in a pulp mill and nuclear reactor cannot be ignored.

Also to be considered are "the economic and social needs of each basin State." The World Development Authority (WDA) has endorsed the need for the pulp and paper mill. The nuclear power plant will serve the basic energy needs of the increasingly important manufacturing operations, as well as of the fertilizer industry which will enrich the farmland of Karma. Balanced against Karma's basic needs is the Lower Peace Brewery which consumes grain to produce nothing more beneficial to mankind than beer.

The importance of weighing economic considerations is recognized in the Comment to the Helsinki Rules:

> State A, an economically advanced and prosperous State which utilized the inundation method of irrigation, might be required to develop a more efficient and less wasteful system forthwith, while State B, an underdeveloped State using the same method might be permitted additional time to make the required improvements. (Helsinki Rules, at 487).

As to "the availability of other resources," pulp must be milled and paper produced where timber can be found; alternative petroleum or coal power sources are costly, particularly

for developing countries.

Karma believes that the Court should find that the use it is making of the Peace River is reasonable and equitable and economically beneficial to Karma and ultimately to the whole region in light of all circumstances of the case.

D. Certain Existing Uses by New Helios Should Be Modified or Terminated to Accommodate Competing Uses.

Article VIII(1) of the Helsinki Rules states:

> An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to a conclusion that it be modified or terminated so as to accommodate a competing incompatible use. (Helsinki Rules, p. 493).

The existing uses which New Helios claims have been injured can be modified to reduce the extent of damage. Specifically, the highly specialized requirements of the brewery, recreational facilities, and pure water supply in New Helios are existing beneficial uses which could be modified to accommodate uses beneficial to Karma. New Helios cannot expect pure water in International Lake; that demand is outweighed by Karma's need to develop its Wilderness Region. Any expectation that a river used by industry would remain clean at no extra cost would ignore the lessons of development throughout the world. Similarly, the demands of the Lower Peace Brewery for pure water must give way to the need for energy in Karma, since an alternative water

source (or cooling facilities) may be available to the Brewery. Certainly New Helios is inconvenienced by a loss of the clear waters which once existed, but its loss is justified in the interests of a better overall standard of living for the total population of the river basin.

In accordance with Article VIII of the Helsinki Rules, Karma respectfully requests this Court to rule that the existing uses made by New Helios be modified to accommodate the reasonable requirements of Karma.

E. An Important Factor for the Court to Consider Is Karma's Status As a Developing Nation.

The industrialization of states has often been the catalyst for concern and attention over legal problems surrounding co-basin states. Brierly, The Law of Nations 230 (1963). The Helsinki codification of general principles and customary law does not adequately account for this important factor and is not therefore universally accepted as the final statement on international river law. See U.N. Doc. A/CN.4/245, at 145, where the U.N. General Assembly refused to adopt a resolution which asked states to take into account or resort to the Helsinki Rules pending further development of international river law.

It is also significant that the Asian-African Legal Consultative Committee has established a group for the development and codification of the principles governing the law of international

rivers. U.N. Doc. E/C.7/2/Add.6 at 5. It is clear that the content of international river law "will vary in time as well as from one group of states to another." A Study on Water Pollution Control Problems in Europe, U.N. Doc. E/ECE/311 (1958) at 19-20; 3 Whiteman, Digest of International Law 1050 (1964).

Karma believes that further development of international river law as it relates to the present parties should align the doctrines codified in the Helsinki Rules according to the special needs of developing countries.

IV

GIVEN THE SUBSTANTIAL DIFFERENCES IN THE LEVELS OF DEVELOPMENT IT WOULD NOT BE REASONABLE OR EQUITABLE TO IMPOSE THE BURDENS OF REMEDIAL ACTION ON KARMA ALONE.

Article V of the Helsinki Rules addresses the question of remedies in river disputes by suggesting that "the practicability of compensation to one or more than one co-basin States as a means of adjusting conflicts among uses," be considered as a factor in apportioning shares of water resources.

When New Helios was developing, it did not need to install anti-pollution devices. For Karma to bear the cost of adding pollution treatment devices would require that it charge higher prices for its goods. Even with an abundance of low cost labor, less developed countries would find their commodities priced above competitive levels, if pollution controls were required.

Goldman, "Pollution: International Complications," 2 Environmental Affairs 1, 8 (1972).

To the extent that New Helios claims that it is actually or potentially harmed by Karma's use of the waters, it already bears a cost. For New Helios to contribute to the cost of stopping pollution at its source in Karma would do no more than substitute a different form of that cost. Indeed, by stopping the pollution at the source, the long-term cost to New Helios might well be lowered. If Karma were to install pollution treatment devices at its own cost, New Helios would clearly derive an unjustifiable benefit in the form of clean, clear water from an industrializing river basin.

Article V also mentions "the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State." While it could be argued that Karma's nuclear power plant rather than the Brewery should install cooling lagoons, it would be inequitable for Karma to bear the burden of building such lagoons, for the simple reason that the Lower Peace Brewery uses only a portion of the waters affected by the nulcear power plant discharge; beyond the Lower Peace Brewery, the river wholly re-enters the sovereign jurisdiction of Karma where any residual heat is clearly no problem. Nor is it reasonable for New Helios to insist that a standard of water

quality be measured by a wilderness upstream water basin. New Helios, like all nations along developed water basins, should make reasonable and substantial adjustments to accommodate the uses normally made by co-basin states of an industrial river. Any lesser measure would imply that Karma is not entitled to an equal right to develop and grow industrially.

In determining an equitable remedy this Court should consider whether one pattern of use is more beneficial for regional development than another. Specifically, the character of the industries in Karma which would be affected by an adverse determination of this Court merits consideration.

Breweries and beaches have few derivative industries. There would be little secondary economic dislocation if these activities were altered. However, the existence of paper mills and power plants facilitates industrial development in an enormous range of commodities. If the operations of the paper mill or the power plant were impeded to any serious extent, the operations of all industries that depend on these would be imperiled.

Taken alone, these two industries represent a far larger proportion of national wealth to Karma than the brewery and beaches do to New Helios. The drop in per capita welfare resulting from an interference with these installations would be substantial. The government of Karma would be abrogating its

responsibilities for development if it were to reduce or suspend these operations for anything less than a finding of major and irreversible injury.

The issue of reasonableness is relevant to the determination of relief as well as to the determination of equitable use. International tribunals and arbitration groups have attempted to select remedies that minimized the overall costs to the contending parties. Thus in Trail Smelter, 35 A.J.I.L. 684, 733 (1941), the Court refused to halt the pollution, but minimized the harm to both the United States and Canada by timing the discharge. The patterns of water utilization worked out in the Nile and Indus arbitrations were both intended to allow maximum use of the waters by both parties, and thus to minimize the overall costs of the settlement to the river communities, supra at 4.

The Court, as it considers claims for relief, should consider how the cost of any remedy could be minimized. Would it be easier for New Helios to purify its water and forego trips to the beach or is it more reasonable for Karma to close or relocate its developing industrial centers?

The question of ability to bear costs must also be considered. The resources under the command of the government of New Helios are far greater than those of Karma. The developing industries in Karma involve a far greater commitment of total

resources than are present in the industries allegedly harmed in New Helios. The opportunity costs to Karma of major alterations would far exceed those of New Helios.

V

DEVELOPING COUNTRIES CANNOT BE HELD TO A STRICT RULE OF STATE RESPONSIBILITY FOR INJURY BY ONE STATE TO ANOTHER.

A. Customary Rules and the General Practice of State Responsibility Do Not Adequately Reflect the Needs and Objectives of Developing States.

Judge Philip Jessup wrote that the history of the international law of Responsibility of States is an "aspect of the history of 'imperialism' and 'dollar diplomacy'." Jessup, Law of Nations, 96. In the nineteenth century, this concept adequately reflected the economic and political relations between states, particularly the relation between colonies and major European countries. Modern international law should reflect the sovereign equality between states, but it must also recognize the economic inequality of states. The developing states quest for economic development and economic equality cannot but "affect the structure of international society and the substance of the rules which govern relations among states." Fatouros, "International Law and the Third World," 50 U. Va. L. R. 783,787 (1964).

The new international order suggests that international law should more closely conform to the economic and political

make-up of the international community.

The Charter on Economic Rights and Duties of States, Report of the Second Committee, U.N. Doc. A/9946, 9 December, 1974, focuses on the disparity between developed and developing states and declares that a new economic and social order is necessary to bridge the development gap. The law of state responsibility as traditionally applied does not reflect the wider base of state interests which developing states have recognized as important to insure prompt and effective economic development.

B. This Court Should Recognize a Distinct Standard for Developing Countries and Decline to Impose Responsibility for Injury-Creating Conduct.

Long-standing trade agreements have provided special concessions for developing states. Part IV, General Agreement on Tariffs and Trade, GATT, Basic Instruments and Selected Documents, Vol. III, Nov., 1958. Common Market countries have endorsed non-reciprocal generalized tariff preferences to developing states. U.N. Doc. TD/B/AC.12.2/34; N.Y. Times, Mar. 31, §1, 1971, at 1, col. 6. The international community has recognized that certain standards acceptable for developed countries are inappropriate for underdeveloped states. Such recognition is appropriate considering the General Assembly's May 1, 1974 resolution, Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. Doc. A/9959 (1974), wherein the U.N. proclaimed its

determination to work for a new economic order which would eliminate the widening gap between developed and developing countries and insure steadily accelerating economic development. Id.

Karma believes that this Court should grant a provisional and non-reciprocal concession to Karma exempting Karma from any liability which might be incurred through the use of the Peace River Basin.

There is no inherent injustice in applying different tests of legality to action taken by parties in significantly different situations. Like the international law of war which recognizes exceptions for liability creating conduct in certain circumstances, the struggle to close the gap between developing and developed countries requires recognition of equally important exemptions. Fatouros, at 812. As Brierly notes

> [U]niformity is good only when it is convenient. It is bad when it results from an artificial assimilation of dissimilar cases, each of which should be treated differently. Brierly, Règles générales du droit de la paix, 58 Hague Recueil 1, 17-18 (1936).

Special standards may strengthen the international order rather than subvert it, since the alternative is alienation of a large block of nations and further fragmentation and instability in the international arena.

VI

KARMA'S SOVEREIGN RIGHT TO EXPLOIT ITS NATURAL RESOURCES IS UNJUSTIFIABLY COMPROMISED BY NEW HELIOS' DEMANDS FOR COMPENSATION AND FOR INJUNCTIVE RELIEF.

In 1952 the U.N. General Assembly in G. A. Res. 626(VII), U.N. Doc. A/2361 (1952), Right to Exploit Freely Natural Resources, found that

> the economic development of the underdeveloped countries is one of the fundamental requisites for the strengthening of universal peace, [and recommended that] all member States refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any state over its natural resources. (Emphasis added).

Ten years later in U.N. G. A. Res. 1803(XVII) Permanent Sovereignty Over Natural Resources, U.N. Doc. A/5217 (1962), the General Assembly in "attaching particular importance to the question of promoting the economic development of developing countries and securing their economic independence," affirmed the right to permanent sovereignty over natural resources and found that any interference with this right would be "contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace."

In 1972, the world community met at Stockholm at the

U.N. Conference on the Human Environment and sought to reaffirm the rights declared in previous resolutions in light of the more recent concern over the condition of the global environment. In Principle 11 the Conference declared that "the environmental policies of all states should enhance and not adversely affect the present or the future development potential of developing countries." U.N. Doc. A/CONF. 48/14, at 4 (1972).

For over two decades the United Nations has affirmed that the unqualified right to develop natural resources is linked with the urgent task of economic development, and by various declarations and resolutions has decried direct and indirect attempts to interfere with this objective. New Helios cannot ignore this expression of the international community and demand that Karma delay and even set aside her plans to improve the welfare of her citizens. Principle 8 of the U.N. Conference suggests that the economic and social development of Karma is "essential" and "necessary" for the improvement of the quality of life". Principle 9 goes on to recognize the potential adverse effects that large-scale and rapid development may have on the global environment, but it recommends that

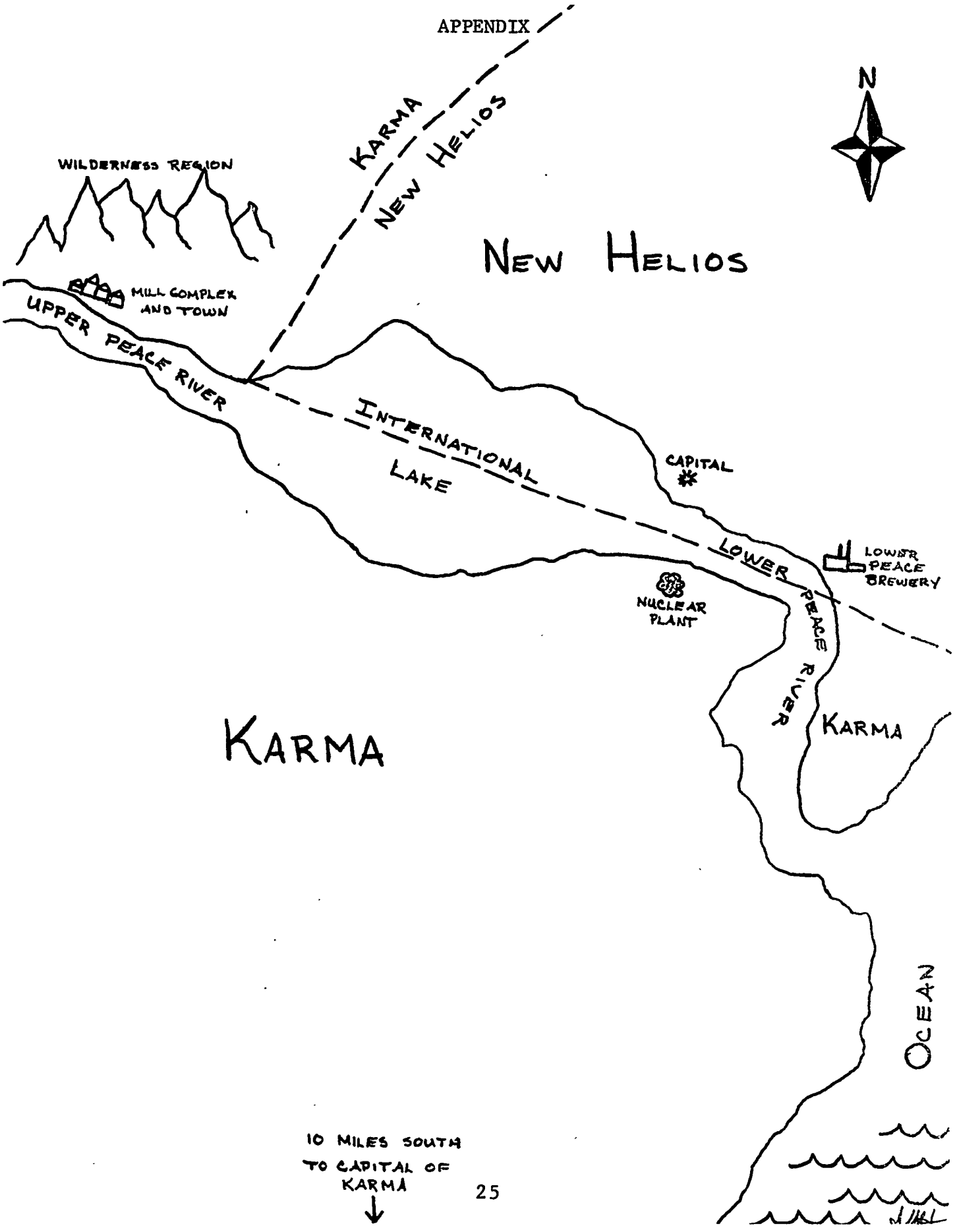
> Environmental deficiencies generated by the conditions of underdevelopment pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance. . . . (Id. at 5).

There is no recommendation that remedies which would impose burdensome costs on underdeveloped countries be adopted. The demand of New Helios in its Note of July 1974 that Karma cease its development activity immediately is contrary to the principles of international cooperation as outlined in these declarations and resolutions.

CONCLUSION

The Government of Karma respectfully requests this Court to rule that Karma's activities in the Peace River basin represent an equitable and reasonable apportionment of the uses of the river and that Karma is therefore not liable under either general principles of international law or under the 1923 Treaty.

Should the Court find, however, that Karma bears some responsibility for damages to New Helios, the Court should consider Karma's status as a developing country in evaluating demands for relief, and should limit liability.


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