

NO. 1975

IN THE
INTERNATIONAL COURT OF JUSTICE AT THE PEACE PALACE
THE HAGUE, NETHERLANDS

THE STATE OF NEW HELIOS,
Applicant

v.

THE STATE OF KARMA,
Respondent

APRIL TERM
1975

On Submission to the
International Court of Justice

MEMORIAL FOR THE APPLICANT

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TABLE OF CONTENTS

	Page
Index of Authorities	iii
Jurisdiction	1
Questions Presented	2
Statement of Facts	2
Summary of Argument	5
Argument and Authorities	6
I. KARMA'S POLLUTION OF BOUNDARY AND OTHER WATERS VIOLATES THE 1923 TREATY WITH NEW HELIOS	6
A. Karma has breached the Treaty by allowing the discharge of sewage and industrial waste from the paper mill into the Upper Peace River	6
B. Karma has breached the Treaty by allowing the discharge of heated water from the nuclear power plant into the Lower Peace River	9
C. Karma has breached the Treaty by failing to negotiate specific arrangements for the use of boundary waters	11
D. The doctrine of <u>rebus sic stantibus</u> does not nullify the anti-pollution provisions of the Treaty	12
II. THE DISCHARGE FROM THE PAPER MILL AND NUCLEAR POWER PLANT BREACHES KARMA'S OBLIGATIONS UNDER GENERAL PRINCIPLES OF INTERNATIONAL LAW	13
A. A state may not alter the natural condi- tions of her own territory to the detri- ment of the territorial environment of a neighboring state	14
B. The discharge from Karma's paper mill and nuclear power plant has significantly damaged the territorial environment of New Helios.	15

	Page
C. Under principles of state responsibility Karma is liable for the harmful effects of governmental and private pollution in neigh- boring countries	16
D. Even if the principle of equitable utiliza- tion applies, Karma is liable for the sub- stantial and preventable damage to the territorial environment of New Helios	17
III. KARMA IS OBLIGATED UNDER INTERNATIONAL LAW TO MAKE REPARATIONS FOR THE DAMAGES TO THE TERRI- TORIAL ENVIRONMENT OF NEW HELIOS	20
A. The Court should direct Karma to pay com- pensation to New Helios for damages caused by the illegal discharge of wastes into the Peace River	20
1. The damage in the form of water purifi- cation expenses is compensable.	20
2. The Damage to the health of New Helios' citizens is compensable	21
B. The Court should direct Karma to cease and refrain from its illegal discharge of wastes into the Peace River	22
1. The Court should declare Karma bound to take all reasonable measures to prevent pollution at the paper mill site	23
2. The Court should declare Karma bound to take all reasonable measures to prevent harmful discharge at the nuclear power plant	26
C. The Court should declare that both states have a duty to negotiate an equitable regime for regulating legitimate uses of the waters	27
IV. THE COURT SHOULD INDICATE INTERIM MEASURES TO PROTECT NEW HELIOS PENDING FINAL JUDGMENT	28
Conclusion	30
Certificate	30

INDEX OF AUTHORITIES

	Page
<u>Cases</u>	
Advisory Opinion on Interpretation of the Peace Treaties, [1950] I.C.J. 221	6, 8
Ambatielos Case (1st Phase), [1952] I.C.J. 45	8
Anglo-Iranian Oil Co. Case (Interim Measures of Protec- tion), [1951] I.C.J. 89	29
Chorzów Factory Case (Jurisdiction), [1927] P.C.I.J., ser. A, No. 9	20
Chorzów Factory Case (Merits), [1928] P.C.I.J., ser. A, No. 17	20
Corfu Channel Case (Merits), [1949] I.C.J. 4	7, 17, 21
Denunciation of the Treaty of November 2, 1865, between China and Belgium, [1927] P.C.I.J., ser. A, No. 8	22
First South West Africa Case (Advisory Opinion), [1950] I.C.J. 128	12
Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland) (Merits), [1974] I.C.J. 175	20
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Lac Lanoux Arbitration (Spain v. France), 24 I.L.R. 101 (1957)	10, 15

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North Atlantic Coast Fisheries Case (United States v. United Kingdom), Hague Court Reports (Scott) 143 (Perm. Ct. Arb. 1916)	11
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Polish Postal Service in Danzig Case, [1925] P.C.I.J., ser. B, No. 11	8
Second Membership Case, [1950] I.C.J. 4	10
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ENGINEERING ASPECTS OF THERMAL POLLUTION (F. Parker & P. Krenkel eds. 1969)	26
3 B. GINDLER, WATER AND WATER RIGHTS (R. Clark ed. 1967)	10
2 L. KLEIN, RIVER POLLUTION (1962)	25
A. KNEESE & B. BOWER, MANAGING WATER QUALITY: ECONOMICS, TECHNOLOGY, INSTITUTIONS (1968)	25
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M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW (1937)	20, 21
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 <u>Journals</u>	
Bourne, <u>Procedure in the Development of International Draining Basins: The Duty to Consult and to Negotiate</u> , 10 CAN. Y.B. INT'L L. 233 (1973)	27
Comment, <u>Thermal Discharges: A Legal Problem</u> , 38 TENN. L. REV. 369 (1971)	10
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JURISDICTION

Karma and New Helios have agreed to submit their dispute to the International Court of Justice under paragraph 3 of Article IV of the 1923 Treaty of Amity, Friendship and Economic Cooperation. The Court may hear the case pursuant to Article 36 and Article 37 of the Statute of the International Court of Justice. I.C.J. STAT. art. 36, para. 1; art. 37.

QUESTIONS PRESENTED

- I. WHETHER KARMA HAS VIOLATED THE 1923 TREATY BY ALLOWING THE DISCHARGE OF WASTES FROM THE PAPER MILL AND NUCLEAR POWER PLANT.
- II. WHETHER KARMA HAS VIOLATED GENERAL PRINCIPLES OF INTERNATIONAL LAW BY ALLOWING THE DISCHARGE OF WASTES FROM THE PAPER MILL AND NUCLEAR POWER PLANT.
- III. WHETHER KARMA IS OBLIGATED TO MAKE REPARATIONS FOR THE EFFECTS OF THE DISCHARGE ON THE TERRITORIAL ENVIRONMENT OF NEW HELIOS.
- IV. WHETHER THE COURT SHOULD INDICATE INTERIM MEASURES OF PROTECTION PENDING A FINAL DECISION.

STATEMENT OF FACTS

The Upper Peace River, situated wholly within the State of Karma, flows into the International Lake, which borders Karma on the south and the State of New Helios on the north. The Lake empties into the Lower Peace River which runs along the boundary between the two States before reentering Karma and emptying into the ocean. (See map.)

Ten years ago a private company in Karma, on the recommendation of the World Development Authority (WDA) opened a large pulp and paper mill on the shores of the Upper Peace. The mill has contributed to the development of Karma's northern Wilderness Region. The WDA further recommended that the mill company construct pollution control devices to treat the wastes from the mill and the raw sewage from the surrounding Shantytown, but the company contends that the cost is prohibitive. The company has promised to begin providing suitable housing to alleviate the sewage, but to date no action has been taken. Since its construction the mill complex has discharged untreated wastes and sewage.

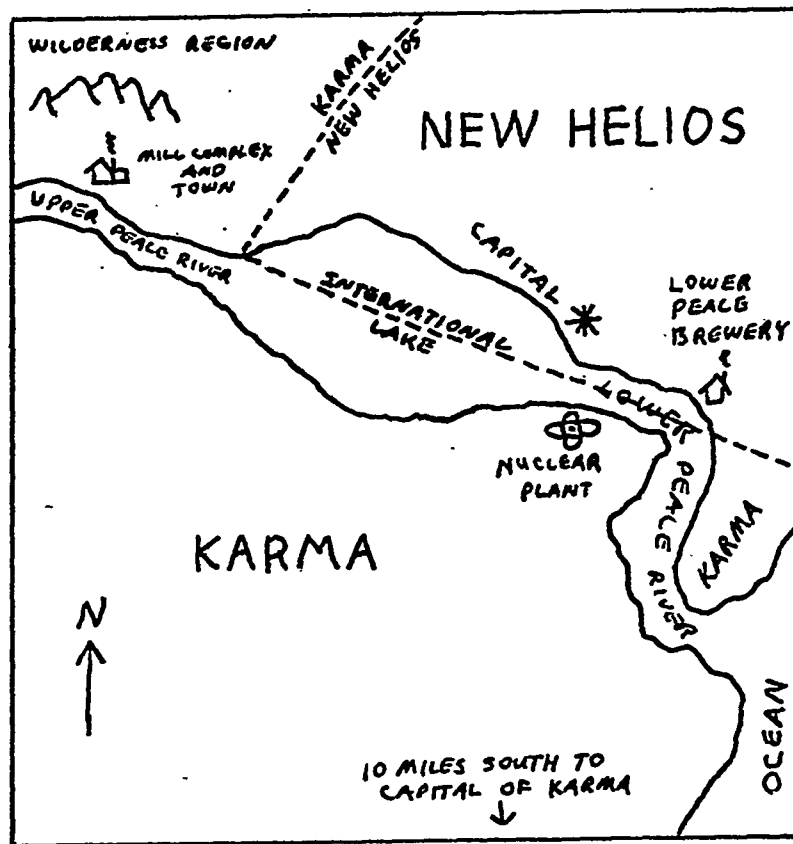
into the Upper Peace, thereby affecting New Helios' use of the waters of International Lake. For many years the Lake has been the source of drinking water for New Helios' capital, but the mill effluents have made the water undrinkable. The Lower Peace Brewery, a major industry in New Helios, uses the water in the production of its celebrated beer and ale. Both the State of New Helios and the Brewery have already purchased sophisticated purification equipment; if the pollution continues unchecked, New Helios will be forced to install further devices at a cost of \$2,000,000, and the brewery may have to seek a new water source. In addition, reports of an increase of typhoid forced the closing of the beaches around New Helios' capital.

In 1970, without any notification to New Helios, Karma began constructing a huge nuclear power plant at the mouth of the Lower Peace. The plant, a state-owned corporation, was constructed to meet energy needs in Karma's capital, located over ten miles to the south. In May of 1974 the plant began operation at ten percent capacity, emptying heated water used for cooling into the river. At that time the citizens of New Helios protested that the heated water would ruin their recreational use of the river. The management of the Brewery also objected since they must have cool water for brewing beer. If the plant becomes fully operational, the Brewery will be forced either to install cooling lagoons at a cost of \$900,000 or to seek a new water source.

New Helios made several protests to the Government of Karma, but these received only a curt reply that Karma had the sovereign right to develop in any manner she chooses. In July of

1974, New Helios lodged a formal protest, stating that the discharge into the Peace River system violates the 1923 Treaty of Amity, Friendship and Economic Cooperation (Appendix). Karma refuses to acknowledge any violation; citizens groups in both countries are threatening boycotts.

Karma and New Helios have agreed to submit the disputes to the International Court of Justice pursuant to paragraph 3 of Article IV of the 1923 Treaty. Defenses of sovereign immunity and exhaustion of local remedies have been waived; the Court has granted the request that a three-judge chamber hear the case.



SUMMARY OF ARGUMENT

The pollution from Karma's paper mill and nuclear power plant breached the 1923 Treaty with New Helios. In Article II of the Treaty Karma and New Helios agreed that neither State would pollute any part of the Peace River so as to injure health or property in the other State. Karma has also breached the Treaty by failing to give notice of the construction of the nuclear power plant. The doctrine of rebus sic stantibus does not release Karma from liability, since what changes have occurred do not affect Karma's basis for consent, and Karma has acquiesced in the validity of the Treaty.

Karma's pollution violates general principles of international law. The principle of sic utere prohibits a State from using her territory for purposes detrimental to the interests of neighboring States. Under the principle of state responsibility Karma is responsible for the harmful effects of pollution by her private citizens (paper mill) as well as that resulting from direct state action (nuclear power plant). Even applying the theory of equitable utilization, the benefit to Karma does not outweigh the injury to the environment of New Helios.

Karma is obligated to make reparations for the damage to New Helios' territorial environment. The Court should direct Karma to pay compensation for the damage already suffered, and to cease and refrain from the illegal pollution of the Peace River. The Court should also recognize the existence of an international obligation to negotiate an equitable regime for the settlement of future water use disputes.

The Court should indicate interim measures of protection pending final judgment. Serious and irreparable consequences are imminent if Karma's pollution continues at present or increased levels.

ARGUMENT AND AUTHORITIES

I. KARMA'S POLLUTION OF BOUNDARY AND OTHER WATERS VIOLATES THE 1923 TREATY WITH NEW HELIOS.

A refusal to fulfill a treaty obligation involves international responsibility. Advisory Opinion on Interpretation of Peace Treaties, [1950] I.C.J. 221, 228. Karma has breached the anti-pollution provision of the 1923 Treaty in three instances. First, the paper mill complex discharged its waste into the Upper Peace River. Second, the nuclear power plant discharges its thermal waste into the Lower Peace River. Third, Karma has failed to enter into specific arrangements for the use of boundary waters.

A. Karma has breached the Treaty by allowing the discharge of sewage and industrial waste from the paper mill into the Upper Peace River.

The anti-pollution provision of the 1923 Treaty, Article II(1), states 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." (See Appendix). The paper mill complex, owned by citizens of the state of Karma, empties its waste into the Upper Peace River. (R. 2). The resulting pollution in boundary waters has injured, first, the health of New Helios' citizens by causing a typhoid outbreak and by creating non-potable water necessitating a purification plant and,

second, the property of New Helios' brewery by forcing it to install an expensive purification plant or seek pure water elsewhere. (R. 3). Three principles of international law make Karma liable.

1. The Treaty obligates Karma reasonably to control pollution of boundary waters by its citizens.

In the absence of a provision creating liability for breaches committed by a state's citizens, a state only has a duty to take all reasonable measures of prevention and punishment to ensure that her citizens do not violate the treaty. A. McNAIR, LAW OF TREATIES 551 (1961) [hereinafter cited as McNAIR]. Karma has not taken all reasonable measures. The World Development Authority has recommended construction of waste treatment facilities at the mill site for both mill wastes and sewage. (R. 2). The mill company has promised to erect modern housing, alleviating only the sewage problem. Karma has not begun construction of treatment facilities, choosing instead to allocate her funds to a nuclear power plant. Nor has Karma taken any measures to punish or enjoin the polluters. Karma, therefore, has breached her treaty obligations.

2. Pollution of boundary waters encompasses pollution of tributaries located wholly within one state's territory.

Article II(1) states that the parties cannot pollute "boundary waters or other waters running between them." (emphasis added). The surplus words rule of interpretation requires that the Court interpret the Treaty so as to give effect to every word. Corfu Channel Case (Merits), [1949] I.C.J. 4, 24. Lower

Peace River and International Lake form part of the boundary between Karma and New Helios; Upper Peace River does not. Unless "other waters running between them" is devoid of effect, the words must mean the actual waters which flow naturally from Upper Peace River between the two countries to the sea.

Furthermore, the Court interprets treaties according to their normal meaning in their context unless this leads to an unreasonable or absurd result. Polish Postal Service in Danzig Case, [1925] P.C.I.J., ser. B, No. 11, at 39. In the latter situation, the Court can look to supplementary means of interpretation. Id.; Vienna Convention on the Law of Treaties, art. 32, U.N. Doc. A/Conf. 39/27 (1969) [hereinafter cited as Vienna Convention]. Excluding a tributary situated wholly within one state from the 1923 Treaty's designation of waters is unreasonable and absurd, since water polluted in such a tributary eventually flows into boundary waters and pollutes them as well. The rule of effectiveness requires that the Court interpret a treaty so as to give practical effect to the intentions of the parties. Ambatielos Case (1st Phase), [1952] I.C.J. 45; Advisory Opinion on Interpretation of Peace Treaties, supra at 233-38 (dissenting opinion of Judge Read). In the 1923 Treaty, the parties intended to prohibit pollution that might cause injury. Therefore, to give effect to this intent the Court must interpret "other waters" so as to include the Upper Peace River.

3. The doctrine of estoppel does not apply.

The doctrine of estoppel by conduct applies only when a state's prior inaction is inconsistent with her current complaint.

North Sea Continental Shelf Case, [1969] I.C.J. 3, 27; id. at 121-22 (separate opinion of Judge Ammoun). At the time Karma's paper mill complex began operation, it was difficult to foresee the seriousness of the future injury. Pollution causes injury only when the concentration level exceeds the natural ability of the river to remove the pollutants. Utton, International Water Quality Law, 13 NATURAL RESOURCES J. 282 (1973). This requires time. See International Joint Commission (Canada and United States), Report on the Pollution of Boundary Waters 165 (1951) [hereinafter cited as International Joint Commission, Report]. Because of the difficulty in forecasting an outbreak of typhoid or the serious water contamination, New Helios lodged no complaint initially. When the gravity of the injury became clear, Karma persuaded New Helios not to act by obtaining a promise from the mill owners to build modern housing to alleviate the sewage problem. (R. 2). New Helios waited for the mill to comply. When it first became clear that Karma did not intend to enforce the promise, New Helios lodged a formal protest--a step entirely consistent with its previous inaction. New Helios, therefore, never accepted Karma's interpretation of the treaty and is not estopped for that reason.

B. Karma has breached the Treaty by allowing the discharge of heated water from the nuclear power plant into the Lower Peace River.

The nuclear power plant's thermal discharge breaches the anti-pollution provision of the Treaty. The state-owned utility, now operating at ten percent of capacity, empties its heated effluent into boundary waters--the Lower Peace River. (R. 3).

The resulting thermal pollution will injure New Helios' citizens' property interest in the river's recreational use and the property of the brewery by forcing it to install \$900,000 cooling lagoons or seek cool waters elsewhere. (R. 4)... In anticipation of this breach New Helios may seek relief having the effect of an injunction. See McNAIR, supra at 576.

1. Thermal discharges constitute pollution since they change the quality of the water.

The Court must give the Treaty terms their ordinary meaning. Second Membership Case (Advisory Opinion), [1950] I.C.J. 4, 8; Vienna Convention, supra art. 31. The term "pollution" in international law includes thermal pollution. 3 B. GINDLER, WATER AND WATER RIGHTS 21 (R. Clark ed. 1967); Report of the United Nations Conference on the Human Environment 4, U.N. Doc. A/Conf. 48/14/Rev. 1 (1973). Article IX of the Helsinki Rules on the Uses of the Waters of International Rivers defines "water pollution" as "any detrimental change resulting from human conduct in the natural composition, content, or quality of the waters." INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-SECOND CONFERENCE, HELSINKI RULES, art. IX (1967) [hereinafter cited as HELSINKI RULES]. Pollution, therefore, encompasses more than chemical change. It includes changes in temperature. See Lac Lanoux Arbitration (Spain v. France); 24 I.L.R. 101, 121 (1957); Comment, Thermal Discharges: A Legal Problem, 38 TENN. L. REV. 369, 380 (1971). Furthermore, although nuclear reactors are a recent development, thermal pollution from heat exchangers has existed for over a century. See, e.g., Mason v. Hill, 110 Eng. Rep. 692

(1833). The 1923 Treaty, therefore, envisioned "thermal pollution" within the prohibition.

2. International law allows an action in anticipation of a breach of the treaty.

Karma in locating her nuclear power plant has violated the requirement of good faith adherence to treaty obligations for those situations in which certain state acts, though not in form a breach, effectively breach a treaty. Polish Nationals in Danzig Case, [1932] P.C.I.J., ser. A/B, No. 44, at 28; McNAIR, supra at 540. An act technically not a breach of a treaty that in substance frustrates the rights of the other party constitutes a breach of good faith and hence the treaty. North Atlantic Coast Fisheries Case (United States v. United Kingdom), Hague Court Reports (Scott) 143, 170 (Perm. Ct. Arb. 1916); McNAIR, supra at 550. The positioning of the power plant at the mouth of the Lower Peace River rather than closer to Karma's capital where the energy will be needed or below the brewery where no harm will be done demonstrates Karma's lack of good faith and has frustrated New Helios' right, guaranteed by the treaty, of freedom from fear of damaging pollution. This clearly breaches the good faith requirement of the treaty and exposes Karma to liability.

C. Karma has breached the Treaty by failing to negotiate specific arrangements for the use of boundary waters.

The anti-pollution provision of the 1923 Treaty, Article II(2), states that "in furtherance of [the] responsibility [not to pollute] the parties [agree] to enter into specific arrangements as appropriate." Karma has breached this provision by not notifying New Helios of the construction of the nuclear power plant.

The Court looks to other provisions of the same treaty to determine the parties' intent. S.S. Wimbledon Case, [1923] P.C.I.J., ser. A, No. 1, at 23. Article III states that conditions may be placed on navigation only when "either state, upon notification to the other, believes that health and safety require the imposition of such conditions." It is unlikely that the states would require notification before restricting navigation and not require notification before restricting the use of the waters by pollution. "Specific arrangements," therefore, includes notification. Moreover, interpreting "appropriate, specific arrangements" solely as a requirement to negotiate would violate the surplus word rule. First South West Africa Case (Advisory Opinion), [1950] I.C.J. 128, 187. Since Article I contains the requirement to negotiate, it would deprive Article II(2) of any meaning. Karma, therefore, breached Article II(2) when she located and constructed the nuclear power plant without prior notification.

D. The doctrine of rebus sic stantibus does not nullify the anti-pollution provisions of the Treaty.

The doctrine of rebus sic stantibus does not apply to Karma's situation since not all of the elements necessary for its application are met. The conditions that have changed must have been essential to Karma's consent to the Treaty. Fisheries Jurisdiction Case (Jurisdiction), [1973] I.C.J. 3, 17; Vienna Convention, supra, art. 62. What has changed is Karma's economy. Nothing indicates that Karma's state of development was essential to Karma's agreement not to injure or be injured by pollution. The

fact that some of Karma's motives for entering the agreement have become less compelling or have disappeared is not a ground for repudiation of those provisions of the agreement that remain unchanged. Fisheries Jurisdiction Case, supra at 18. Furthermore, the object and purpose of the pollution provision--protection of health and property--have not changed. The change in Karma's economy, therefore, cannot nullify the pollution provision. Id.

Furthermore, the principle of acquiescence applies. A state may not claim a treaty is invalid on grounds of rebus sic stantibus if, after becoming aware of the facts, the state has expressly agreed that the treaty is valid. Temple Case, [1962] I.C.J. 6, 23-32; King of Spain Case, [1960] I.C.J. 191, 213-14; Vienna Convention, art. 45. Karma, in submitting this dispute to the Court, stipulated that the 1923 Treaty was the only binding bilateral agreement between Karma and New Helios. Karma has, therefore, acquiesced in the validity of the treaty and may not argue its invalidity.

II. THE DISCHARGE FROM THE PAPER MILL AND NUCLEAR POWER PLANT BREACHES KARMA'S OBLIGATIONS UNDER GENERAL PRINCIPLES OF INTERNATIONAL LAW.

Besides the obligations arising under the 1923 Treaty, Karma has violated international law by allowing the use of her territory to cause serious harm in New Helios. Karma is responsible for the damage to the environment of New Helios under principles of state responsibility. Even if the Court declares a customary regime of equitable utilization, Karma is still liable for the harmful effects of her pollution.

- A. A state may not alter the natural conditions of her own territory to the detriment of the territorial environment of a neighboring state.

International law imposes limitations on a state's actions that cause injury in the territory of another state under the legal principle of sic utere tuo ut alienum non laedas: "one must not use his own to injure another." In the words of Judge Lauterpacht, "it is a rule of International Law that no state is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighboring state." 1 L. OPPENHEIM, INTERNATIONAL LAW, 474-75 (8th ed. H. Lauterpacht 1955). "There has been general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to international law." Survey of International Law 34, U.N. Doc. A/CN. 4/1 Rev. 1 (1949). Sic utere is an obligation inherent in the concept of territorial sovereignty, a duty correlative to the right of sovereign jurisdiction. Manner; Water Pollution in International Law, U.N. Doc. WATER POLL./CONF./12, at 21 (1960).

Pollution across national boundaries is exactly the form of injury that sic utere prohibits. The Trail Smelter Arbitration, 3 U.N.R.I.A.A. 1905 (1949), the leading arbitral decision on international pollution, held that "under the 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 on 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." 3 U.N. R.I.A.A. at 1965 (1949). In the Lac Lanoux Arbitration the tribunal applied sic utere directly to international rivers, and indicated that each state's right to use the water in her territory is limited to the extent that right conflicts with the availability for use by other riparians. Lac Lanoux, supra; cf. Van Alstyne, The Justiciability of International River Disputes: A Study in the Case Method, 1964 DUKE L.J. 307, 314.

B. The discharge from Karma's paper mill and nuclear power plant has significantly damaged the territorial environment of New Helios.

International Lake, for many years the source of drinking water for the capital of New Helios, is now unfit for human consumption, a condition requiring sophisticated purification facilities constructed at considerable expense. The waters of the Lower Peace were once pure enough for use in the acclaimed beer and ale produced by New Helios' Lower Peace Brewery. High pollution levels have forced the brewery to purify the water before use. The 1970 increase in typhoid forced the closing of resort beaches around the capital of New Helios, and it can be proved that increased pollution caused the disease outbreak.

Besides the mill's pollution, the partial operation of the nuclear power plant near the Lower Peace River threatens New Helios' property interest in the recreational use of the surrounding waters. If thermal pollution from the power plant increases, the brewery may need to seek an entirely new water source. The plant's expected expansion of capacity will compound these problems.

C. Under principles of state responsibility Karma is liable for the harmful effects of governmental and private pollution in neighboring countries.

A state is responsible for injuries only when, first, the offensive conduct violates an international obligation and, second, the conduct can be attributed to the state as a subject of international law. Phosphates in Morocco Case (Preliminary Objections), [1938] P.C.I.J., ser. A/B, No. 74, at 28; Aréchaga, International Responsibility, in MANUAL OF PUBLIC INTERNATIONAL LAW 534 (Sprensen ed. 1968) [hereinafter cited as Aréchaga].

Since Karma's operation of the paper mill and power plant violates the international legal obligation expressed in the maxim sic utere, the remaining issue concerns whether Karma is responsible as a subject of international law. The actions of the nuclear power plant, a state-owned facility, are directly attributable to the Karma government. The paper mill, however, is a private enterprise, and Karma may argue that the absence of state action precludes liability.

Such a position would be totally without merit under the acknowledged principles of state responsibility. A state may incur responsibility through an omission when state officials should have prevented the conduct causing the damage. . 2 D. O'CONNELL, INTERNATIONAL LAW 1021 (1965). In fact, cases invoking international responsibility on grounds of a state's omission to act are more numerous than those based on overt state action. Ago, (Third) Report on State Responsibility, [1971] 2 Y.B. INT'L L. COMM'N 216, U.N. Doc. A/CN. 4/246 (1971). The 1972 United Nations Conference on the Human Environment in Stockholm accepted

imputed responsibility in Principle 21, which proclaims that states have 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." Report of the United Nations Conference on the Human Environment 5, U.N. Doc. A/Conf. 48/14/Rev. 1 (1973).

Karma has permitted the operation of the paper mill and the concomitant discharge of sewage and wastes into the Upper Peace. Karma took no action whatsoever to abate the pollution, even after protests from New Helios. (R. 4).

In the Corfu Channel Case the Court held that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." Corfu Channel Case (Merits); [1949] I.C.J. 3, 22. A state, because of her exclusive territorial control, cannot be viewed as having constructive knowledge of all illegal acts committed within her territory; however, the Court should allow a complaining state "liberal recourse to inference of fact and circumstantial evidence" in proving facts giving rise to responsibility. Id. at 18. In light of the World Development Authority's recommendation Karma can scarcely plead ignorance of the mill's harmful conduct and, therefore, must be responsible for it.

D. Even if the principle of equitable utilization applies, Karma is liable for the substantial and preventable damage to the territorial environment of New Helios.

The violation of sic utere provides a sufficient basis for holding Karma liable for the damage to the environment of New

Helios. However, there is some support of the international community for settlement of water use disputes by the doctrine of equitable utilization. HELSINKI RULES, supra at 486-94. Article IV of the Rules states that "each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin." Article V provides that "what is a reasonable and equitable share within the meaning of Article IV is to be determined in the light of all the relevant factors in each particular case." A consideration of equitable utilization is not warranted when one State so blatantly ignores the sic utere obligation. Application of equitable utilization, however, in no way excuses Karma's pollution.

Each riparian state has a right under international law "to have its own interests taken into account together with those of other states." J. BRIERLY, THE LAW OF NATIONS 231 (6th ed. 1963). The Permanent Court of International Justice recognized the right to equality of use with respect to navigation. International Commission on the River Oder Case, [1929] P.C.I.J., ser. A, No. 23, at 26-27. Equitable apportionment, however, modifies the equality principle by requiring that the division of water use be in accordance with the "legitimate economic and social needs" of each riparian State. Lipper, Equitable Utilization, in THE LAW OF INTERNATIONAL DRAINAGE BASINS 15, 63 (A. Garretson, et al. ed. 1967).

The benefit Karma receives from the unrestricted pollution does not counterbalance the serious damage done to New Helios' environment. New Helios faces the loss of a natural source of

drinking water, the recreational use of its beaches, and the continued economical operation of one of its major industries. Karma may assert that its fragile development policy cannot be burdened with pollution control. Any benefit Karma receives, however, is only temporary, since early and effective pollution control measures are immediately necessary if global prosperity is to be sustained. W. VERWEY, *ECONOMIC DEVELOPMENT, PEACE AND INTERNATIONAL LAW* 314 (1972). The developing countries should attempt to avoid the worst environmental problems that accompany industrial development. See United Nations Conference on the Human Environment, Development and Environment, Stockholm, U.N. Doc. A/CONF. 48/10 (1971).

Professor Goldie has developed another basis for holding Karma liable under an application of equitable principles. Since any industrial development involves the possibility of injury to those who come into contact with the operation, an enterprise should be responsible for the risk it creates:

To exonerate such an enterprise would have the effect of enabling it to conduct its operations at the expense of others and throw a valid operating cost onto the shoulder of its neighbors, or onto those of the ultimate consumers of its products or services. Professor Cowan has aptly called the emerging judicial policy which gives recovery under these conditions "the policy of [viewing a] deliberately created risk as [an] expropriation.

Goldie, Liability for Damage and the Progressive Development of International Law, 14 INT'L & COMP. L.Q. 1189, 1212-13 (1965).

Karma's practice of shifting its environmental costs and risks to another riparian destroys New Helios' interest in an unpolluted river system and thereby expropriates that interest without any

form of compensation.

III. KARMA IS OBLIGATED UNDER INTERNATIONAL LAW TO MAKE REPARATIONS FOR THE DAMAGES TO THE TERRITORIAL ENVIRONMENT OF NEW HELIOS.

"It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form." Chorzów Factory Case (Jurisdiction), [1927] P.C.I.J., ser. A, No. 9, at 21. Karma's illegal conduct has produced a complex array of effects that demand various types of relief. The principle requirement is that reparations must eliminate all consequences of the illegal act and restore the status quo. Chorzów Factory Case (Merits), [1928] P.C.I.J., ser. A, No. 17, at 47.

A. The Court should direct Karma to pay compensation to New Helios for damages caused by the illegal discharge of wastes into the Peace River.

Reparations may include monetary compensation for injuries. Chorzów Factory Case (Merits), *supra* at 27-28. New Helios has suffered material damages to property and to health as a direct result of Karma's illegal conduct. In conformance with its practice, the Court should establish that compensation is due and, in a subsequent phase of these proceedings, receive evidence and determine the amount of damage. Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1974] I.C.J. 175, 204.

1. The damage in the form of water purification expenses is compensable.

Under international law injuries to or destruction of property are compensable. See 2 M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1413 [hereinafter cited as WHITEMAN]. Particularly

when pollution to the environment has caused damages, tribunals have awarded compensation. Trail Smelter, supra at 1905. New Helios' expenses for water purification are the measure of the compensation required for the injury to New Helios' property interest in the use of her waters.

Neither New Helios' lack of protest or notice to Karma nor her action in undertaking to install the purification equipment estops her from presenting this claim. Estoppel operates only in cases involving many years of failure to notify. 1 WHITEMAN, supra at 244-47. The Court has held as many as fourteen years does not create an estoppel for failure to give notice. Serbian Loans Case, [1929] P.C.I.J., ser. A, Nos. 20-21, at 37-39. Nor can installation of the equipment estop New Helios. Under the exigencies of the situation, New Helios and the brewery had no recourse but to protect citizens and beer customers from the dangers of polluted waters.

2. Damage to the health of New Helios' citizens is compensable.

Damages to personal health caused by breaches of international law are compensable. 1 WHITEMAN, supra at 517. The causal link between Karma's conduct in allowing sewage pollution of the Upper Peace River and the 1970 typhoid outbreak in New Helios (R. 3) is clear from the evidence. The Court may use circumstantial evidence to establish the causal connection since "the proof may be drawn from inferences of fact, provided they leave no room for reasonable doubt." Corfu Channel Case (Merits), [1949] I.C.J. 4, 18. The causal relation of a sewage-polluted

water supply to the incidence and spread of typhoid fever is well known. A. McLAUGHLIN, SEWAGE POLLUTION OF INTERSTATE AND INTERNATIONAL WATERS WITH SPECIAL REFERENCE TO THE SPREAD OF TYPHOID FEVER (Treasury Department Hygienic Laboratory Bull. No. 77, 1911); International Joint Commission, Report, supra at 57. Moreover, the 1970 outbreak was the first time that an increase in typhoid was reported in New Helios. (R. 3). Karma should compensate New Helios in an amount measured by the loss to life and to earning capacity and the pain and suffering of the citizens affected by the typhoid fever. Such compensation for direct and indirect injuries is well within the limits established by international law. C. EAGLETON, RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 201-03 (1928).

B. The Court should direct Karma to cease and refrain from its illegal discharge of wastes into the Peace River.

Although New Helios requests monetary compensation for material injuries suffered as a result of Karma's conduct, mere demand for compensation or restitution cannot remedy certain consequences of illegal acts. Denunciation of the Treaty of November 2, 1865, between China and Belgium, [1927] P.C.I.J., ser. A, No. 8, at 7. In particular, liabilities for interference with water rights enjoyed by a neighboring state may not be susceptible to pecuniary relief. Aréchaga, supra at 566. In these situations, the International Court of Justice may declare the ongoing obligations of the litigants under international law. Northern Cameroons Case, [1963] I.C.J. 37; Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory), [1927] P.C.I.J., ser. A, No. 13,

at 20. The judgment of an international tribunal may assume the character of an injunction where pollution of the environment by one state will cause future injuries to a neighboring state.

Trail Smelter, supra at 1966.

1. The Court should declare Karma bound to take all reasonable measures to prevent pollution at the paper mill site.
 - a. Continued pollution will necessitate further expense to purify the waters.

In addition to the considerable expenses already incurred to purify the waters, continued pollution will force New Helios to bear a documented expense of \$2,000,000 for further purification. (R. 3). Moreover, the brewery may have to develop a new source of water for the production of its beer.

The untreated sewage from the shanty town is deleterious to the coloration, odor and taste of the water. In addition, effluent from pulp and paper mills contains suspended solids and dissolved organic and inorganic compounds--fibres and fibre debris, china clay, titanium dioxide, and aluminum sulfate, among others. Economic Commission for Europe, 2 Economic Aspects of Treatment and Disposal of Certain Industrial Effluents 26, 86, U.N. Doc. WATER POLL./Econ./6 (1967). These affect the water's taste, color and odor, and eventually cause an oxygen deficiency, which eliminates the natural decomposition process of organic wastes by which all waterways purify themselves. Id. at 26. The combination of industrial wastes and sewage tends to inhibit the natural process of self-purification in the waters, compounds the pollution problem, and makes necessary ever-increasing purification measures.

b. Continued pollution will endanger the health of New Helios.

"The most serious result of water pollution is the threat to health that it causes, which alone makes it essential that human and industrial wastes be effectively treated." WORLD HEALTH ORGANIZATION, WATER POLLUTION CONTROL IN DEVELOPING COUNTRIES 8 (Technical Rep. Ser. No. 404, 1968). [hereinafter cited as WHO, WATER POLLUTION]. The presence of untreated sewage and other organic wastes in water increases the bacteriological concentration associated with the cause and spread of such diseases as typhoid, cholera, and bacillary dysentery. *Id.* at 9; International Joint Commission, Report, supra at 57-58. In addition, "at some time almost any virus could be transmitted through water," causing infectious hepatitis, viral gastroenteritis, and diarrhea, among other things. Mosely, Transmission of Viral Diseases by Drinking Water, in TRANSMISSION OF VIRUSES BY THE WATER ROUTE 5 (G. Berg ed. 1965). The danger of disease is especially prevalent when polluted waters are used for human consumption. WORLD HEALTH ORGANIZATION, INTERNATIONAL STANDARDS FOR DRINKING WATER 14-15 (1963). Not only is the health of the citizens of New Helios in danger, but a substantially greater peril to health exists in developing countries, such as Karma, as a result of polluted water. WHO, WATER POLLUTION, supra at 9.

c. Continued pollution will adversely affect property values and the recreational use and ecology of the waters.

The undesirable effects of polluted water will diminish the value of beaches and waterfront property for several aesthetic

and health reasons. Great economic losses will result from continued pollution of the waters running into International Lake and Lower Peace River. See International Joint Commission, Report, supra at 17. . . In addition, continued pollution will interfere with the various recreational uses of the waters by the citizens of New Helios.

Continued pollution will also have far-reaching harmful effects upon the ecological balance in the waters of International Lake and Peace River. The polluting effluents kill many aquatic plant and animal species, and, by lowering the levels of oxygen in the waters; endanger others. . A. KNEESE & B. BOWER, MANAGING WATER QUALITY: ECONOMICS, TECHNOLOGY, INSTITUTIONS 17-29 (1968); see L. KLEIN, RIVER POLLUTION 22-109 (1962). One serious consequence of pollution by organic substances is entrophication--the rampant growth of algae and aquatic plants, which can ultimately lead to death of all lifeforms. Lakes are particularly susceptible to entrophication. . Jackson, The Dimensions of International Pollution, 50 ORE. L. REV. 236 (1971) [hereinafter cited as Jackson].

d. . Reasonable measures of waste treatment at the mill site could prevent continued pollution.

..... Karma's economic position possibly militates against the most obvious solution--complete cessation of waste discharge into the Upper Peace River. . In light of the substantial likelihood of serious future harm, however, the Court should order Karma to take immediate steps to reduce the amount of untreated discharge from the mill site. . Long term measures should encompass remedial leg-

islation, government subsidy of the private interests involved, and preparation of a plan for submission to international lending agencies--all aimed at eventual construction of suitable waste treatment facilities. The Court may determine specific requirements at a subsequent phase of these proceedings.

2. The Court should declare Karma bound to take all reasonable measures to prevent harmful discharge at the nuclear power plant.

a. Effluent from the plant will necessitate great expense by the brewery.

If the Court permits full capacity operation of the nuclear power plant, Lower Peace Brewery must either install cooling lagoons at an expense of \$900,000 or find a new supply of water. (R. 4). As a private enterprise within the state of New Helios, the brewery has a right to the use of the territorial waters of New Helios, and the Court should prohibit any illegal interference with that use.

b. Effluent from the plant will adversely affect property values and the recreational use and ecology of the waters.

..... Thermal pollution can not only conflict with specific uses of the waters, but it is detrimental to the entire ecology of a river basin. Hawkes, Ecological Changes of Applied Significance Induced by the Discharge of Heated Waters, in ENGINEERING ASPECTS OF THERMAL POLLUTION 16-18 (F. Parker & P. Krenkel eds. 1969). The most harmful effect is the reduction of the water's oxygen content, which slows down waste assimilation rates and compounds all pollution problems. Id. at 51. In addition, thermal pollution kills fish and accelerates eutrophication which can lead to

destruction of all aquatic life. Jackson, supra at 236. Thermal pollution, thereby, directly and indirectly tends to diminish waterfront property values and interfere with recreational uses of the waters:

- c. Effluent from the plant could reasonably be prevented from harming New Helios and its environment.

Since Karma has a substantial investment in the nuclear power plant and, therefore, is unlikely to move it, and since thermal pollution has serious environmental effects, the most efficient way to solve the problem is to cool the effluent before it enters the Lower Peace River. Karma could use several methods, including cooling towers and cooling lagoons. Alternatively Karma could channel the effluent away from its present outlets for discharge downriver from the brewery or for irrigation of the plains around the capital of Karma. (R. 4). The Court should order Karma not to put the power plant into full operation until Karma makes available facilities for rendering the discharge harmless to the interests of New Helios.

C. The Court should declare that both states have a duty to negotiate an equitable regime for regulating legitimate uses of the waters.

The conflicting interests which appear in this dispute will surface again. New Helios therefore requests that the Court recognize the existence of a customary obligation "to consult and to negotiate in good faith with co-basin states that object to a proposed work or utilization of waters on the ground that it might cause serious injury." Bourne, Procedure in the Development of International Drainage Basins: The Duty to Consult and to Nego-

tiate, 10 CAN. Y.B. INT'L L. 233 (1973). The Institute of International Law has recognized this obligation, 49 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, Tome II, at 383 (1961), and it is embodied in Articles 31-34 of the Helsinki Rules, which represent obligatory customary law. Kulz, Further Water Disputes Between India and Pakistan, 18 INT'L & COMP. L.Q. 734 (1969). Recognition of this duty would also be consistent with the Court's judgment in the Fisheries Jurisdiction Case involving a similar conflict of interests; the Court held that all parties had a duty to undertake good faith negotiations to settle their differences. Fisheries Jurisdiction Case (United Kingdom v. Iceland) (Merits), [1974] I.C.J. 3, 34-35. In the present situation, the parties should exercise the duty with the goal of establishing an equitable regime for regulating the use of the waters involved.

IV. THE COURT SHOULD INDICATE INTERIM MEASURES TO PROTECT NEW HELIOS PENDING FINAL JUDGMENT.

The average duration of contentious cases before this Court is 550 days, and the Trail Smelter arbitration lasted nearly four years. See Gross, The Time Element in the Contentious Proceedings in the International Court of Justice, 63 AM. J. INT'L L. 74, 79, 83 (1959). Since subsequent phases of these proceedings may be required to settle the question of compensation for injuries, New Helios requests that the Court indicate interim measures of protection to safeguard the interests of New Helios and her citizens, pending final decision in this case. I.C.J. STAT. art. 41; I.C.J. RULES, art. 61.

The Court has indicated interim measures of protection on

several occasions, e.g., Fisheries Jurisdiction Case (Interim Measures of Protection), [1972] I.C.J. 12; Anglo-Iranian Oil Co. Case (Interim Measures of Protection), [1951] I.C.J. 89. Most recently, in the Nuclear Tests Case (Australia v. France) (Interim Measures of Protection), [1973] I.C.J. 99, the Court indicated interim measures in a situation where the health and safety of Australia's citizens were endangered because of the serious environmental consequences of France's actions. Id. at 104. The Court ordered that "the French Government should avoid nuclear tests causing the deposit of radio-active fallout on Australian territory." Id. at 106.

The illegal pollution will have serious and irreparable effects upon the health of New Helios' citizens, property values, recreational uses of the waters, and the ecology of the territorial waters of New Helios. In the immediate future, if pollution is not abated, New Helios will incur a \$2,000,000 expense for water purification, and the Lower Peace Brewery will incur a \$900,000 expense for cooling lagoons. In addition, the Court should consider the beginnings of economic aggression by Karma and the justifiable response by the citizens of New Helios in the form of consumer boycotts. (R. 5). This situation frustrates the purposes of the 1923 Treaty and contravenes the United Nations Charter and customary international law. U.N. CHARTER, art. 1, paras. 2, 3, art. 2, para. 2, art. 55; G.A. Res. 2625, 25 U.N. GAOR, Supp. 28, at 122-24, U.N. Doc. A/8082 (1970).

.... For these reasons the Court should indicate the following interim measures of protection: First, the Court should order

Karma not to increase the level of operation of the nuclear power plant; second, the Court should order Karma to take immediate steps to reduce the level of industrial and human waste discharge at the paper mill site; third, the Court should order Karma to ensure that no action of any kind is taken which might aggravate or extend the dispute or prejudice the rights of New Helios.

CONCLUSION

Wherefore, for the reasons set forth above, Applicant respectfully prays that the International Court of Justice render its decision in favor of New Helios, finding that: (1) Karma has breached the 1923 Treaty by allowing the discharge of wastes into the Peace River system. (2) The discharge of wastes violates general principles of international law. (3) Karma must pay compensation to New Helios, cease and refrain its illegal activities, and undertake good faith negotiations with New Helios. (4) Interim measures are warranted, pending final judgment.

Respectfully submitted,

George L. Flint, Jr.

Daniel J. Foucheaux, Jr.

Michael G. Mullen

CERTIFICATE

We certify that this Memorial complies with the 1975 Rules of this competition.

George L. Flint, Jr.

Daniel J. Foucheaux, Jr.

Michael G. Mullen

A P P E N D I X

1923 TREATY OF AMITY, FRIENDSHIP, AND ECONOMIC COOPERATION

Article I

In order to carry out the purposes and objectives of this Agreement, the States of Karma and New Helios agree to cooperate and consult with one another as appropriate on matters of mutual interest.

Article II

Paragraph 1. Both States agree that in keeping with the general aim of amity, friendship and economic cooperation, neither State shall pollute boundary waters or other waters running between them so as to injure the health or property in the other State.

Paragraph 2. In furtherance of this responsibility the parties undertake to enter into specific arrangements as appropriate.

Article III

The Lower Peace River shall be open to the ships of both States, and navigation shall not be impeded or unreasonable conditions placed thereon, unless a situation arises in which either State, upon notification to the other, believes that health and safety require the imposition of such conditions.

Article IV

Paragraph 1. Disputes between the two States shall be settled amicably and equitably with full regard to the purposes and principles set forth in this Agreement.

Paragraph 2. Upon the request of either State, both States agree that questions arising under this Agreement which have not been settled within a reasonable time may be brought to arbitration, each State choosing one arbitrator and the remaining arbitrator to be agreed between them or, if agreement is not reached within a period of six months from the date of the selection of the two other arbitrators, such third arbitrator shall be selected by the President of the Permanent Court of International Justice.

Paragraph 3. At the time a request for arbitration is made, or at any time before the arbitration commences, either State may request that the dispute be submitted to the Permanent Court of International Justice or to a special chamber of that Court. The agreement of the other State shall first be obtained before submission is made to the Court.