

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

COUNTER-MEMORIAL FOR THE RESPONDENT

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April 26, 1975

Agents for Respondent

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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 THE DISCHARGE OF WASTES INTO THE UPPER AND LOWER PEACE RIVERS CONSTITUTES A BREACH OF THE 1923 TREATY FOR WHICH KARMA IS RESPONSIBLE.
- II. . . . WHETHER THE DISCHARGE OF WASTES INTO THE UPPER AND LOWER PEACE RIVERS CONSTITUTES A BREACH OF PRINCIPLES OF INTERNATIONAL LAW FOR WHICH KARMA IS RESPONSIBLE.
- III. . . . WHETHER KARMA IS OBLIGATED TO MAKE REPARATIONS TO NEW HELIOS.
- IV. . . . WHETHER THE COURT SHOULD INDICATE INTERIM MEASURES OF PROTECTION.

STATEMENT OF FACTS

The Upper Peace River, situated wholly within the sovereign territory of 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 re-entering 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 been a vital contribution 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 to date this has proved to be financially impossible. The company has promised to begin providing suitable housing to alleviate the sewage as soon as possible, but no action has been taken. Since its construction the mill complex has discharged wastes and sewage into the Upper Peace. For many years

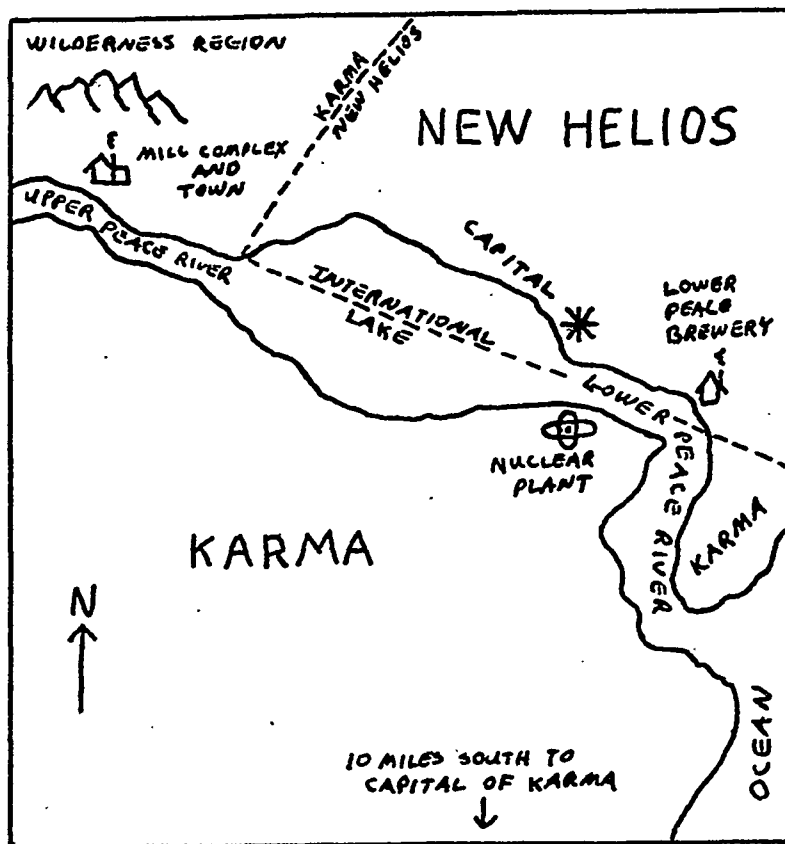
International Lake has been the source of drinking water for New Helios' capital, but the mill effluents have made the water undrinkable without prior purification. The Lower Peace Brewery, a major industry in New Helios, uses the water in the production of beer and ale. Both the State of New Helios and the Brewery have already purchased purification equipment; if the pollution becomes more serious, New Helios will have to install further devices at a cost of \$2,000,000, and the brewery may have to seek a new water source. In addition, in 1970 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 River. The plant, a state-owned corporation, was constructed to meet energy needs in Karma's capital, located about 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 some of the citizens of New Helios and the brewery protested that the heated water would affect their uses of the river. 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 concerning the power plant to the Government of Karma, and Karma replied by asserting her sovereign right to develop in any manner she chooses. Not until July of 1974 did New Helios lodge 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 dispute 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

Karma has not breached the 1923 Treaty with New Helios.

Development of Karma's resources is in accord with the Treaty's stated purpose. The ordinary meaning of the Treaty's language does not forbid discharge of wastes from the mill and power plant. Moreover, the doctrine of rebus sic stantibus nullifies the anti-pollution provision.

Karma has not violated general principles of international

law by allowing the discharge from the mill and power plant.

Under the principle of state sovereignty and the Harmon Doctrine states are not liable for the consequences of their use of international rivers. Even if the Harmon Doctrine is not customary international law, New Helios cannot prove that any other rule of customary international law restricts Karma's use of her territorial waterways. If such use is restricted by customary international law, it must be through an application of the doctrine of equitable utilization. The discharge from the mill and power plant are equitable uses under international law.

Karma is not obligated to make reparations to New Helios.

New Helios cannot prove that she has suffered any material damages for which compensation is required. The Court should not order Karma to cease and refrain from discharging wastes into the Peace River. There is no general duty to negotiate a regime for the disposal of wastes in the Peace River system.

The Court should not indicate interim measures of protection pending final judgment. Any such measures that the Court might indicate would have the effect of a judgment, and would not

preserve the rights of Karma. Moreover, an order requiring abatement or cessation of waste discharge would cause great hardship to Karma and her citizens.

ARGUMENT AND AUTHORITIES

I. KARMA'S ACTS HAVE NOT BREACHED THE 1923 TREATY WITH NEW HELIOS.

Application of three principles of treaty interpretation demonstrates that Karma's resource development does not violate the anti-pollution provision of the 1923 Treaty. First, the Court must interpret the Treaty in light of its stated purpose. United States Nationals in Morocco Case, [1952] I.C.J. 176, 196; Vienna Convention on the Law of Treaties, art. 31, U.N. Doc. A/Conf. 39/27 (1969) [hereinafter cited as Vienna Convention]. Second, the Court must give the Treaty terms their ordinary meaning. Second Membership Case (Advisory Opinion), [1950] I.C.J. 8; Vienna Convention, art. 31. Third, the rebus sic stantibus doctrine nullifies the Treaty's anti-pollution provision. Fisheries Jurisdiction Case (Jurisdiction), [1973] I.C.J. 3, 17; Vienna Convention, art. 62.

- A. The Treaty objectives of amity, friendship, and economic cooperation include the right of the underdeveloped Karma to develop its resources without undue restraint.

The interpretation of the anti-pollution clause must agree with the purposes of the 1923 Treaty as stated in its title-- to foster amity, friendship, and economic cooperation. Economic cooperation encompasses economic development. U.N. CHARTER, art. 55, para. a. Two techniques of treaty interpretation indicate

the Treaty permits pollution resulting from economic development.

First, the Court may interpret a treaty article by examining subsequent agreements between the same parties regarding its application. Jaworzina Case, [1923] P.C.I.J., ser. B, No. 8, at 38; Vienna Convention, art. 31. The United Nations General Assembly, to which both Karma and New Helios belong, has declared that "States have the duty to co-operate . . . in the promotion of economic growth . . . especially that of the developing countries." G.A. Res. 2625, 25 U.N. GAOR, Supp. 28, at 122-24, U.N. Doc. A/8082 (1970). Article I of the 1923 Treaty expresses this obligation (Appendix). Karma uses the Peace River to provide a higher standard of living for its Wilderness inhabitants and to support its developing manufacturing industry. In contrast, New Helios' interpretation of the anti-pollution restriction violates the purpose of economic cooperation by requiring protective measures so financially prohibitive as to restrict Karma's developing industry and threaten the standard of living now enjoyed by the inhabitants of Karma's Wilderness Region.

Second, the Court uses 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 II contains the limiting language of "in keeping with the general aim of . . . economic cooperation." Article III of the 1923 Treaty prohibits only unreasonable conditions placed on navigation. By analogy, Article II prohibits only unreasonable pollution, inconsistent with economic development. The alternative to Karma's present use of the Peace River is the construction of expensive purifica-

tion and cooling lagoon facilities--neither of which she can economically afford to build. The paper mill was constructed upon recommendation of the World Development Authority (R. 2), and the equipment of the nuclear power plant comes from a third nation under strict international safeguards. (R. 3). This demonstrates that, consistent with the 1923 Treaty, Karma is developing economically by the most reasonable means available.

B. The ordinary meaning of the Treaty permits thermal discharges by Karma's nuclear power plant into the Lower Peace River.

Article II(1) of the 1923 Treaty states that "neither state shall pollute . . . so as to injure . . ." (emphasis added). Application of the ordinary meaning rule to Article II(1) reveals that the thermal discharges comply.

1. The thermal discharges do not constitute pollution.

The word "pollute" generally means seriously to contaminate water by mixing it with other matter in such a fashion as to destroy its purity. The addition of heated water to the river does not change the river's chemical content or affect its purity. It only adds energy to the river's water, not matter. Comment, Thermal Discharges: a Legal Problem, 38 TENN. L. REV. 369, 379-80 (1971). In the Lac Lanoux Arbitration (France v. Spain), 24 I.L.R. 101, 123 (1957), the arbitral tribunal made the distinction between a change of chemical composition and a change in temperature by listing them separately. Chemical discharges constitute pollution while thermal discharges only hinder the uses of the water.

..... Analogizing to other treaties reinforces the ordinary meaning result. . . Wimbledon, supra at 25-28; cf. Chorzów Factory Case (Jurisdiction), [1927] P.C.I.J., ser. A, No. 9, at 22. If New Helios and Karma intended to include thermal discharges within the prohibition, they would have used language limiting the states to "just and equitable uses." E.g., Treaty between the Dominican Republic and Haiti, 105 L.N.T.S. 216, 225 (1929). Instead, they used language prohibiting material discharges into the river. . . E.g., Treaty between Germany and Lithuania, 89 L.N.T.S. 337, 361 (1928). The Lac Lanoux tribunal recognized this distinction between "material discharges" and "equitable uses" by suggesting that either a change in chemical composition or a change in temperature affecting the water's use would have violated the "equitable use" treaty involved in that dispute. New Helios and Karma, therefore, intended to exclude "thermal discharges" from the prohibition.

2. The thermal discharges do not cause any injury to health or property in New Helios.

Only pollution that leads to injury violates the anti-pollution provision. Since the plant has never operated above ten percent of capacity, New Helios has not yet sustained any injury from the thermal discharge. Under customary international law, however, an act not literally a breach may yet constitute a breach of the good faith requirement of a treaty and hence be a violation. . . Treatment of Polish Nationals in Danzig Case, [1932] P.C.I.J., ser. A/B, No. 44, at 28 (discriminatory legislation breached good faith). A breach of good faith requires the cer-

tainty of a breach in the future. See id. The future impact of operation of the nuclear power plant is only speculative. Furthermore, only those regulations passed to evade the treaty are prohibited. North Atlantic Coast Fisheries Case, Hague Court Report (Scott) 170 (Perm. Ct. Arb. 1916). The thermal discharges are not an attempt to evade the treaty terms since they are consistent with the purposes of the Treaty. The plant, therefore, does not breach the good faith requirement of the 1923 Treaty.

C. The ordinary meaning of the Treaty permits waste discharges of Karma's paper mill into the Upper Peace River.

Article II(1) of the 1923 Treaty states that "neither state shall pollute boundary waters or other waters running between them . . ." (emphasis added). Application of the ordinary meaning rule to Article II(1) reveals that the waste discharges of Karma's paper mill facility do not violate the Treaty's anti-pollution provision.

1. Boundary waters do not directly receive the mill's sewage.

The Court may look to analogies in other treaties to determine the meaning of terms. Wimbledon, supra at 25-28; cf. Chorzów Factory (Jurisdiction), supra at 22-23. The 1909 Treaty between Canada and the United States, similar to the 1923 Treaty between New Helios and Karma, defines boundary waters as:

the waters . . . of the lakes and rivers along which the international boundary . . . passes . . . but not including tributary waters which in their natural channels would flow into such lakes [and] rivers . . . or waters flowing from such lakes [and] rivers . . . or the waters of rivers flowing across the boundary.

Treaty Relating to Boundary Waters and Questions Arising Between

U.S. and Canada, Jan. 11, 1909, 36 Stat. 2448; T.S. No. 548.

In this case, "boundary waters" include only International Lake and a portion of the Lower Peace River. The anti-pollution provision of the 1909 Treaty states: "boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." (emphasis added). In the present situation, the only waters that flow across the boundary--which is equivalent to "between the two countries"--is that part of Lower Peace River that bends just before it enters Karma. Since the brewery is situated there, it is likely that the parties added these words to cover pollution by the brewery. Upper Peace River, on the other hand, neither constitutes boundary waters nor does it flow "between the two countries." The prohibition does not include tributaries entirely within one state such as the Upper Peace River. The mill discharges its wastes into a river not covered by the prohibition.

2. The State of Karma does not participate in the mill's waste disposal.

The prohibition applies only to state action. Prohibited acts committed by a state's citizens do not ipso facto involve their state in a breach. S.S. Lotus Case, [1927] P.C.I.J., ser. A, No. 10, at 89. Private citizens own and operate the mill. In the absence of a liability provision for breaches committed by her citizens, a state has only a duty to take reasonable measures of prevention to ensure that its citizens do not violate the treaty. A. McNAIR, LAW OF TREATIES 551 (1961). Karma has taken such reasonable measures. Since she cannot construct treatment

facilities herself due to the huge expense, Karma obtained a promise from the mill company to alleviate the sewage problem by providing modern housing.

3. New Helios consented to the alleged breach by the mill.

The Court looks to subsequent actions of a state to interpret treaty provisions. North Sea Continental Shelf Cases, [1969] I.C.J. 3, 251; Vienna Convention, art. 31. For ten years New Helios never complained. When typhoid occurred in 1970, she merely closed her beaches. When the water became nonpotable, she constructed purification facilities. The only explanation for these actions is that the waste discharge by the mill must not have violated the 1923 Treaty.

Furthermore, estoppel applies to New Helios' actions. In customary international law, estoppel by conduct prevents a state from benefiting from her own inconsistency to the detriment of a state who has relied upon the representation. Continental Shelf, supra at 27; id. at 121-22 (dissenting opinion of Judge Ammoun). Karma has relied on the inaction of New Helios to continue her development by allocating her scarce capital resources to the power plant rather than to purification plants for the mill.

D. The doctrine of rebus sic stantibus nullifies the anti-pollution restriction of the Treaty.

The rebus sic stantibus doctrine has five elements. Vienna Convention, art. 62. First, the changed circumstances must be fundamental. Second, they cannot result from a breach of treaty obligations. Third, the change must be unforeseeable. Fourth, the change must affect the essential basis of consent.

Fifth, the change must have radically altered the treaty obligations. Karma's situation meets these criteria.

First, few changes are more fundamental than those occurring when a poor, underdeveloped nation with its inhabitants living as hunters becomes a developing nation with industrial workers. Second, these changes did not result from any breach of the Treaty since the mill's waste discharges and the plant's thermal discharges accompanied the change but did not cause it. Third, these developments were unforeseeable in 1923 since development of the Wilderness Region became feasible only after 1955 and nuclear energy became feasible only after 1943. Fourth, the previous conditions were essential to Karma's consent. In 1923, Karma's economy was underdeveloped. Had progress toward a higher standard of living at that time depended on the need to discharge wastes in the Peace River, Karma would never have entered into the anti-pollution agreement. The fact of her underdevelopment was, therefore, essential to Karma's consent. Fifth, the changes radically alter the obligations of the parties. Whereas before the anti-pollution restriction had no effect on Karma, it now imposes a huge financial burden on Karma at a time when she cannot afford it. Thus the Court should nullify the 1923 Treaty pursuant to Articles 62 and 65 of the Vienna Convention, leaving only the negotiation provisions which Karma has admitted are still valid.

II. THE DISCHARGE FROM THE PAPER MILL AND NUCLEAR POWER PLANT DOES NOT BREACH KARMA'S OBLIGATIONS UNDER GENERAL PRINCIPLES OF INTERNATIONAL LAW.

A. Under the principle of state sovereignty, international law does not recognize liability where a state's use of its natural resources affects a neighboring state.

The principle of state sovereignty is inconsistent with a theory that nations are absolutely liable for any damage resulting from their actions. Goldie, International Principles of Responsibility for Pollution, 9 COLUM. J. TRANSNAT'L L. 283, 306 (1970).

"An act of state injurious to another state is nevertheless not an international delinquency if committed neither willfully and maliciously nor with culpable negligence." 1 L. OPPENHEIM, INTERNATIONAL LAW 343 (8th ed. H. Lauterpacht 1955).

Under international law the Upper Peace River is part of Karma's territory and is, therefore, under her sole and exclusive control. H. BRIGGS, THE LAW OF NATIONS 274 (1952); 1 L. OPPENHEIM, INTERNATIONAL LAW 464-65 (8th ed. H. Lauterpacht 1955).

Under the Harmon doctrine, co-riparians owe no obligation to each other with respect to the uses of connected inland waterways. 21 OP. ATT'Y GEN. 274 (1895). The doctrine has continuing vitality since Indian writers asserted it during the recent Indo-Pakistan dispute over waters of the Indus River. Bains, The Diversion of International Rivers, 1 INDIAN J. INT'L L. 38 (1960). Under this doctrine, Karma is not liable for the effects of waste and sewage discharge into the Upper Peace River.

Even if the Harmon doctrine is itself not customary international law, co-riparians are not bound by any other customary norm which restricts their uses of territorial waters. One of the most basic principles of international law is that states are bound only by their own consent: "Restrictions upon the independence of States cannot therefore be presumed." S.S. Lotus Case, supra at 18. "No general principle of international law prevents

a riparian State from . . . polluting its waters." BRIGGS, supra at 274.

Moreover, the Court has always used a strict standard for determining whether a rule has achieved status as a customary norm: general acceptance as evidenced by uniform state practice over a considerable period of time, accompanied by opinio juris sive necessitatis. North Sea Continental Shelf Cases, supra at 41-45; Fisheries Case, [1951] I.C.J. 116, 131; Asylum Case, [1950] I.C.J. 266, 277-78. New Helios, as claimant, has, therefore, a heavy burden of proof to establish that a customary rule not to pollute exists. The mere fact that a majority trend exists does not mean that a rule has become customary law. Fisheries Jurisdiction Case (United Kingdom v. Iceland) (Merits), [1974] I.C.J. 89-90 (separate Opinion of Judge De Castro). And state inaction does not create a presumption of support for a norm. Lotus Case, supra at 28. Even if the Court were to declare the maxim of sic utere tuo ut alienum non laedas to be customary law, it would only have the character of a very broad general principle. Manner, Water Pollution in International Law, U.N. Doc. WATER POLL./CONF./12 at 21 (1960). It "provides no conclusive answer to what are the rights and obligations of a state," id., and therefore it cannot create liability in a specific case. In the absence of a showing by New Helios that a specific rule of customary law exists that prohibits Karma's discharge of wastes, the Court cannot hold Karma liable.

No international decision can serve as authority for the proposition that states are strictly liable for the effects of

their waste disposal in international waterways. The decision in the Trail Smelter Arbitration, 3 U.N.R.I.A.A. 1905 (1941), is restricted by its compromis. The judgment did not establish the principle of liability, because liability was accepted in advance by Canada. THE INTERNATIONAL LAW OF POLLUTION 71 (J. Barros & D. Johnston eds. 1974) [hereinafter cited as BARROS & JOHNSTON]. The decision's dicta that recognizes a rule of responsibility for the effects of environmental pollution was taken by analogy from domestic law and cannot be considered an international legal norm. F. BERBER, RIVERS IN INTERNATIONAL LAW 177 (1959). Moreover, the tribunal did not attempt to examine whether the notion of liability was appropriate in the international context. Rubin, Pollution by Analogy: The Trail Smelter Arbitration, 50 OREG. L. REV. 259, 269 (1971). "Thus, its worth as precedent appears questionable," id. at 271, and the Court cannot use it to hold Karma liable.

B. The principle of equitable utilization permits the discharge from Karma's paper mill and nuclear power plant.

1. Equitable utilization approaches the status of international law.

If a state's sovereignty over her rivers is limited at all, it can only be limited by the principle of equitable utilization, a doctrine most authoritatively stated in the Helsinki Rules on the Use of the Waters of International Rivers. INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-SECOND CONFERENCE, HELSINKI 484 (1966) [hereinafter cited as HELSINKI RULES].

The Helsinki Rules represent a comprehensive attempt at formulation of principles for the settlement of conflicting water

uses, but, at present, they are only rudimentary. Bourne, Pollution of International Rivers and Lakes, 21 U. TORONTO L.J. 193, 195 (1971). If any of the concepts in the Rules approach the status of a general principle of international law, it can only be equitable utilization. Id. at 201. The ILA included equitable utilization among its "Agreed Principles of International Law" as early as 1958. INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FORTY-EIGHTH CONFERENCE, NEW YORK 99 (1958). In addition, the Trail Smelter arbitration supports the doctrine to the extent that it required serious consequences before the imposition of liability. Utton, International Water Quality Law, 13 NATURAL RESOURCES J. 282, 291 (1973).

The principle of equitable utilization is stated in Article IV of the Helsinki Rules--"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." HELSINKI RULES, supra at 486-88.

2. The utility of the mill and power plant to Karma far outweighs the injury to New Helios occasioned by their operation.

Equitable utilization contemplates a decision on water usage based on a balancing of the interests of the riparian states. Karma's usage of the Peace River for the mill and power plant is equitable. Karma is a developing state, still concerned with feeding her population, whereas New Helios is an industrial-

ized country, able to bear the burden of pollution control.

The Court must consider all relevant factors, including "the economic and social needs of each basin state . . . the population dependent on the waters of the basin . . . [and] the comparative costs of alternative means of satisfying the economic and social needs. . . ." HELSINKI RULES, supra at 488.

In a developing state such as Karma capital investment for pollution control involves a "direct trade-off with increased employment opportunities or increased exports or other economic growth objectives, which are necessary simply to sustain life." H. MALMGREN, INTERNATIONAL ECONOMIC PEACEKEEPING IN PHASE II 165 (1972). International borrowing would only increase debt-servicing payments and thereby restrict investment, already inadequate due to low domestic savings. G. OHLIN, FOREIGN AID POLICY RECONSIDERED 88 (1966).

Conflict over the use of international rivers can be a major impediment to economic growth "with the result that progress in development is often held up for years, to the detriment, not only of the countries concerned, but of the world in general." 21 U.N. ECOSOC 5, U.N. Doc. E/3066 (1958). The Founex Report recognized the importance of continued development:

The less industrialized countries cannot forego growth or transformation in the name of conservation of natural resources or for the sake of preserving an unaltered natural habitat. Actions taken to protect the environment by diverting resources from development might in the long run prove to be self-defeating, since they might reduce development thereby limiting the magnitude of resources ultimately available for improving the human environment.

United Nations Conference on the Human Environment, Development

and Environment, 5 U.N. Doc. A/Conf. 48/10 (1971). Moreover, the continued economic development of less-developed countries creates new markets for the increased production in the industrialized states and thereby helps avert the problem of large-scale future unemployment. W. VERWEY; ECONOMIC DEVELOPMENT, PEACE AND INTERNATIONAL LAW 253 (1972).

The Court has not been blind to arguments of economic necessity--in the Fisheries Case (United Kingdom v. Norway), [1951] I.C.J. 116, the Court attached significance to the fact that the Norwegians depended on the fish for their livelihood. And in the recent Fisheries Jurisdiction Case the Court noted widespread acceptance of the concept of "preferential rights," particularly where the exploitation of a natural resource is of fundamental importance to the economic development of the state requesting the privileged conduct. Fisheries Jurisdiction Case (United Kingdom v. Iceland), [1974] I.C.J. 3, 23.

. . . A balancing of interests at the present time favors placing the burden on New Helios. As development proceeds, Karma may be able to assume some responsibilities in the protection of the environment, but the present disparity in economic power between Karma and New Helios argues for her release from any liability.

III. KARMA IS NOT OBLIGATED UNDER INTERNATIONAL LAW TO MAKE REPARATIONS TO NEW HELIOS FOR THE EFFECTS OF THE DISCHARGE INTO THE PEACE RIVER.

. . . No act can be attributed to Karma which violates her conventional or customary obligations under international law. Besides this, however, New Helios has suffered no injuries as a result of Karma's conduct for which reparations may be awarded.

A. No compensable damages have been suffered by New Helios under international law.

In the absence of proof that actual loss has occurred, a claim for compensation must be dismissed. Mavrommatis Jerusalem Concessions Case, [1925] P.C.I.J., ser. A, No. 5, at 51. The burden of proof rests squarely upon the claimant: 2 S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 580 (1965); B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 326-35 (1953). Furthermore, the Court can only award compensation on the basis of a

concrete submission as to the existence and the amount of each head of damage. Such an award must be based on precise grounds and detailed evidence concerning those acts which have been committed, taking into account all relevant facts of each incident and their consequences in the circumstances of the case. It is only after receiving evidence on these matters that the Court can satisfy itself that each concrete claim is well founded in fact and in law.

Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), supra at 204. Unless New Helios meets these requirements, the Court must dismiss any claim for compensation.

1. Purification expenses incurred by New Helios and Lower Peace Brewery are not compensable.

Riparian rights are not rights of possession under international law; rather they are rights of use. Bourne, The Right to Utilize the Waters of International Rivers, 3 CAN. Y.B. INT'L L. 188 (1965); 1 WATER AND WATER RIGHTS 66-67, 349 (R. Clark ed. 1967). Pollution of international waterways, therefore, does not constitute damage or injury to a property right in the waters in the sense of damage or injury to other types of real property. Nor has discharge of wastes inside Karma prevented the use by New

Helios of the waters running between the two countries. The only effect of the discharge of wastes into the Upper Peace River has been the requiring of further purification of the water. This purification does not result from damage inflicted by Karma, but rather from a normal condition for the use of natural waterways as a source of drinking water.

Even if the Court decides that pollution injures a property right to use the waters, New Helios is estopped from claiming such damage under principles and practices of international adjudication. . 1 M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 187 (1937). [hereinafter cited as WHITEMAN]. New Helios is estopped in three respects. First, the claim became extinguished by New Helios' failure to promptly notify Karma of its claim for damages or to protest until 1974. Id. at 222. Second, by installing the purification equipment without protest, New Helios acquiesced in Karma's conduct. Third, delay in presentation of this claim has barred New Helios from presenting it as a valid claim under international law. Id. at 236.

Any other claim based on injury or damage to water rights as a result of discharge of wastes must fail because it is not "reasonably capable of estimation." Yntema, The Treaties with Germany and Compensation for War Damage, 24 COLUM. L. REV. 153 (1924). The only international adjudication that has considered the effects of environmental pollution held that the tribunal could consider only damage for which the claimant could prove a pecuniary loss. Trail Smelter Arbitration, supra at 1932-33. Here any claim of injury to water rights would lack specific

measurement.

2. The outbreak of typhoid fever in New Helios is not a compensable damage.

Under international law, any loss for which the claimant asks compensation must have been proximately caused by respondent's illegal act. There must be no break in the chain of causation and the loss must be "clearly, unmistakably and definitely traced, link by link," to the respondent's conduct. United States-Germany Mixed Claims Commission Administrative Decision No. II, 7 U.N.R.I.A.A. 23, 29-30 (1923). Any claim for damage that the claimant cannot prove to be connected with the illegal act must necessarily fail. Responsibility of Germany for Acts Committed after July 31, 1914, and before Portugal Entered the War, 2 U.N.R.I.I.A. 1040 (1930). The Court may use circumstantial evidence but the proof must leave "no room for reasonable doubt." (emphasis added). Corfu Channel Case (Merits), [1949] I.C.J. 4, 18. Specifically, in cases of personal injury, liability depends on the absence of any demonstration "that any other independent cause existed of which [the injury] might have been a result." Maninat Case (1905), Report of the French-Venezuelan Mixed Claims Commission of 1902 (Prepared by J. Ralston 1906).

A relationship between discharge of sewage into supplies of drinking water and the incidence of typhoid fever may exist. New Helios, however, cannot meet its substantial burden of proof in any claim to compensation for the typhoid outbreak. Typhoid can be transmitted by agents other than polluted water--milk products, shellfish, and almost any other foods. C. WINSLOW,

MAN AND EPIDEMICS 44 (1952); I. TAYLOR & J. KNOWLEDEN, PRINCIPLES OF EPIDEMIOLOGY (1957). Moreover, there is a "large class of cases not traceable to the general water supply or milk." A. McLAUGHLIN, SEWAGE POLLUTION OF INTERSTATE AND INTERNATIONAL WATERS WITH SPECIAL REFERENCE TO THE SPREAD OF TYPHOID FEVERS 14-15 (Treas. Dep.'t Hygienic Laboratory Bull. No. 77, 1911). In these cases typhoid is directly transmitted by chronic carriers of the disease. Id. It is quite likely that the 1970 typhoid outbreak in New Helios was due to one of these other causes.

Furthermore, in developed states typhoid has often been virtually eliminated, in spite of existing pollution, through proper purification techniques for drinking water and through immunization. International Joint Commission (United States and Canada), Report on the Pollution of Boundary Waters 58 (1951). Studies have shown that in countries having low rates of endemic enteric disease there is no serious health risk to bathing in polluted waters. WORLD HEALTH ORGANIZATION, WATER POLLUTION CONTROL IN DEVELOPING COUNTRIES 10 (Technical Rep. Ser. No. 404, 1968). It is quite likely that New Helios' own failure to purify its citizens' drinking water properly caused the 1970 outbreak and this may have been accompanied by a low level of immunization. New Helios might have closed the beaches in order to place responsibility on Karma and shift attention away from New Helios' own negligence. In light of these considerations, New Helios has not met the burden of proof in establishing a causal link between Karma's conduct and the typhoid.

3. Future expenditures for water cooling and purification are not compensable.

Simple logic demonstrates that the Court cannot award compensation for injuries not yet suffered. 2 WHITEMAN, supra at 833. Nor can international tribunals take into account "contingent and indeterminate damage" in ordering reparations. Chorzów Factory Case (Merits), [1928] P.C.I.J., ser. A, No. 17, at 57. If any damage results from full operation of Karma's nuclear power plant, the Court cannot remedy it at this time but only in a subsequent case. States may not request advisory opinions on questions of liability for future illegal acts and future injuries. Certain German Interests in Polish Upper Silesia, [1925] P.C.I.J., ser. A, No. 6, at 21; Southwest Africa Case, Second Phase, [1966] I.C.J. 4, 33-34. Any pronouncement by the Court on the question of liability for the effects of effluent from the nuclear power plant would have the character of an advisory opinion.

B. No future restrictions on Karma's conduct are warranted under international law.

New Helios will probably request the Court to order Karma not to pursue her present course of conduct in the future. This relief is not available to New Helios. The remedy of injunction is not used in international adjudication, which must only result in reparations for the existing effects of illegal acts. Chorzów Factory Case (Merits), supra at 47. The only decision in which the tribunal employed such a remedy must be interpreted as being narrowly restricted by the express terms of its compromis. Trail Smelter Arbitration, supra at 1908; BARROS & JOHNSTON, supra at 71.

1. The 1923 Treaty contemplates no prohibition of Karma's conduct in present circumstances.

.... Article II(1) of the 1923 Treaty of Amity, Friendship, and Economic Cooperation provides that pollution that injures health or property in the other state is prohibited (Appendix). Only harmful pollution is forbidden, however. The treaty does contemplate total prohibition of all polluting activities. The states are to enter into specific arrangements if a state's pollution injures the other state. (Art. II(2), Appendix). These arrangements are to be directed at controlling the polluting state's discharge of wastes, so that the responsibility in Article II(1) may be furthered. Thus the Treaty expresses the intention of the parties that they must establish a balance of interests between the polluting state's use of the waters to dispose of wastes and an acceptable range of the other state's beneficial uses.

New Helios cannot prove Karma's use of the waters has injured property or health in New Helios. Nor can New Helios prove with required certainty that she will suffer serious injury in the future. In any event, should the situation contemplated by Article II(1) arise in the future, the parties are under an obligation to enter into specific arrangements. The parties did not intend total prohibition of either state's use.

2. The existing customary regime does not prohibit the discharge of wastes into the Peace River.

.... Any Court order having the effect of a permanent injunction against Karma's discharge of wastes into the Peace River is not consistent with customary international law. First, if that

law embodies the sovereign right of a state to use its territorial waters without regard to other riparians, then Karma is not liable. Second, if customary law embodies the doctrine of equitable utilization, then Karma's conduct in permitting discharge of wastes is not subject to injunction but, at the most, to restriction to a point where the effluent does not conflict unreasonably with New Helios' use of the waters. Since Karma's use of the waters does not illegally restrict New Helios' utilization, the Court cannot prohibit Karma's conduct.

3. Even if existing conventional and customary international law permits an order enjoining Karma's discharge of wastes, no present or future damage to New Helios warrants it.

In order to obtain an order having the effect of an injunction, New Helios must conclusively demonstrate that Karma's acts have resulted in present harm and will definitely cause harm in the future. Such a burden was met in the Trail Smelter Arbitration through admission of liability in the compromis and exhaustive research of future effects. Trail Smelter Arbitration, supra at 1905.

With respect to the discharge of wastes at the mill site, New Helios cannot prove that serious harm is inevitable. New Helios has not proved that the discharge of wastes caused the 1970 typhoid increase. In light of the fact that there have been no reports of similar outbreaks in the last five years, imminent danger to health in New Helios is unlikely. In addition, fears of great destruction to the ecology of the waterways are presently unwarranted. "The polluting effect of a particular organic

material depends . . . on many variable environmental factors."

3 B. GINDLER, WATER AND WATER RIGHTS 11 (R. Clark ed. 1967). New Helios cannot prove that in this case discharge of wastes into the waters will necessarily have the feared consequences. . . Increased expenses for purification equipment do not warrant injunction either. Purification is a normal expense that accompanies use of rivers as a source of drinking water. In any event, Karma's discharge of wastes does not prevent the use of the waters by New Helios, and under a regime of equitable apportionment New Helios can best bear the cost of ensuring a pure supply of drinking water to its citizens.

New Helios cannot prove that effluent from the power plant will cause future harm that warrants injunction. In some situations discharge of heated waters may actually have a beneficial environmental impact. Jackson, The Dimensions of International Pollution, 50 OREG. L. REV. 236 (1971)

C. Except under the 1923 Treaty, Karma has no duty under international law to negotiate a regime for regulating the use of boundary waters.

... New Helios may assert that a duty exists under customary international law for Karma and New Helios to negotiate a regime for the use of the waters running between them. This obligation does not exist. The 1923 Treaty does provide in Article II(2) for such negotiations when appropriate. . . In present circumstances they are not appropriate. . . In any event, New Helios has not heretofore undertaken to comply with this treaty provision. . . Outside of the Treaty, the only general duty to negotiate is found in Article 33 of the United Nations Charter which applies only in disputes

likely to endanger the maintenance of international peace and security. 49 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, tome II, at 92 (1961).

IV. THE COURT SHOULD NOT INDICATE INTERIM MEASURES OF PROTECTION DIRECTED AT KARMA, PENDING FINAL JUDGMENT.

The Court should not indicate interim measures of protection, I.C.J. STAT. art. 41; I.C.J. RULES, art. 61, for several reasons. Firstly, New Helios has suffered no material damages as a result of Karma's conduct and cannot prove that such damages are imminent. Secondly, even if the Court finds that New Helios will be injured, to warrant interim measures the harm must be irreparable and incapable of redress by award of damages. Nuclear Tests Case (Australia v. France) (Interim Measures of Protection), [1973] I.C.J. 99, 104; Denunciation of the Treaty of 1865 Case, [1927] P.C.I.J., ser. A, No. 8, at 7. Here, damages would not be irreparable. Thirdly, interim measures should only preserve the rights of the parties, not effect a judgment in favor of one party. Charzów Factory Case (Indemnities), [1927] P.C.I.J., ser. A, No. 12, at 10. The interim measures that New Helios requests are "so close to the actual subject matter of the case that they are practically indistinguishable therefrom." Nuclear Tests Case, supra at 113 (dissenting opinion of Judge Forster). Karma knows of no "temporary" waste treatment facilities. Effectively, New Helios requests a judgment. Id.

The Court should also consider the serious hardship that an order directing the cessation or abatement of waste disposal at the mill site would have on the state and citizens of Karma.

The private groups which operate the mill complex and Karma's government are financially unable to treat the wastes effectively, and construction of suitable facilities is physically impossible in the near future. Complete cessation would have serious economic effects on the mill owners and disastrous health effects on the inhabitants of the shantytown. Such interim measures would definitely not "preserve the rights" of Karma. Id. at 103. Moreover, the Court should not prohibit full operation of the nuclear power plant. The energy produced by the plant is desperately needed for the development of Karma's interior and the needs of Karma's capital, which has quadrupled in population since 1950. (R. 4).

CONCLUSION

Wherefore, for the reasons set forth above, Respondent respectfully prays that the International Court of Justice render its decision in favor of Karma, finding that:

- (1) Karma has not breached the 1923 Treaty by allowing the discharge of wastes into the Peace River.
- (2) The discharge of wastes is not a breach of general principles of international law for which Karma is responsible.
- (3) Karma is not obligated to make reparations to New Helios.

- (4) The Court should not indicate interim measures of protection pending final judgment.

Respectfully submitted,

George L. Flint, Jr.

Daniel J. Foucheaux, Jr.

Michael G. Mullen

CERTIFICATE

We certify that this Counter-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.