IN THE INTERNATIONAL COURT OF JUSTICE

February 1975

Between:

NEW HELIOS

Applicant

and

KARMA

Respondent

MEMORIAL FOR THE APPLICANT

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JURISDICTION

The parties submit the present dispute, by special agreement under Article IV of the 1923 Treaty of Amity, Friendship and Economic Cooperation, to a chamber of the International Court of Justice.

The said Article IV makes provision for the submission of disputes arising under the Treaty "to the Permanent Court of International Justice or to a special chamber of that Court."

Article 35 of the Statute of the International Court of Justice provides that: "1. The Court shall be open to the states parties to the present Statute." Both Karma and New Helios, as members of the United Nations, are "...ipso facto parties to the Statute of the International Court of Justice," by virtue of Article 93 of the Charter of the United Nations.

Article 36 of the Statute of the International Court then provides as follows:

> 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

And, continuing at Article 37,

> Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

Finally, Article 26 of the Statute allows the Court to form chambers "composed of three or more judges", which shall determine cases if the parties so request.

It must therefore follow that the Court as presently composed

has jurisdiction to resolve the present dispute submitted to it. In addition, by virtue of the enabling provisions of the Statute of the International Court of Justice (Articles 36 and 38), the Court may settle the full range of questions presented.

STATEMENT OF FACTS

The parties have agreed to the Statement of Facts which has been filed before the Court; the parties have also waived the defences of sovereign immunity and the local remedies rule (F-5).*

* Page references to the Statement of Facts are cited thus; e.g. (F-1) for page one of the agreed Statement.

QUESTIONS PRESENTED

I

Whether Karma is responsible for the harm which has been or may be inflicted upon the environment of New Helios under the Treaty of 1923.

II

Whether Karma is responsible for the harm which has been or may be inflicted upon the environment of New Helios under general principles of international law.

III

The nature of the remedy, if any, to which New Helios may be entitled.

SUMMARY OF ARGUMENT

New Helios is not barred from pursuing its claim either by laches or acquiescence.

Karma is responsible for the harm which has been or may be inflicted upon the environment of New Helios under the 1923 Treaty of Amity, Friendship and Economic Cooperation. The Treaty is an agreement of legal obligation. It has not been terminated, nor has its operation been suspended, by virtue of the doctrine rebus sic stantibus which even if it does exist as a rule of international law, is inapplicable to the 1923 Treaty.

Karma has breached the provisions of the 1923 Treaty as interpreted according to general principles of international law. It is responsible in international law for the activities of both the mill complex and town and of the nuclear plant, the operations of which, having resulted in the pollution of common waters contrary to the provisions of the 1923 Treaty, constitute breaches of the Treaty rendering Karma liable to New Helios for any resulting injury to health or property in New Helios.

International law recognizes liability for harm inflicted through water pollution by one state on another. This liability may be based upon customary rules of international law or alternatively on general principles of law recognized by civilized nations, and is attested by judicial decisions and the writings of the most highly qualified publicists. Karma may not escape liability by reliance

on any recognized doctrine of international law. The doctrine of absolute territorial sovereignty is not a recognized principle of international law. The equitable utilization doctrine is not a principle of international law de lege lata and even if it were, it does not absolve Karma from liability.

New Helios is entitled to relief from Karma due to the extensive damage done to New Helios by the pollution of the Peace River system attributable to Karma. The relief should be calculated to restore the status quo ante insofar as possible and should consist of the cessation of the illegal pollution and an indemnity for damage caused.

ARGUMENT AND AUTHORITIES

I. NEW HELIOS IS NOT DEBARRED FROM PURSUING ITS CLAIM EITHER BY LACHES OR ACQUIESCENCE.

A. Laches: New Helios has not been dilatory in advancing its claim.

While the mill complex has been operating for ten years, it is nevertheless to be observed that pollution is, by its very nature, generally slow to manifest itself. It is, moreover, relevant, that under Paragraph 1 of Article IV of the 1923 Treaty, disputes between the two States were to be settled "amicably and equitably", and, by Paragraph 2 of the same Article, were to be submitted to arbitration only if not settled "within a reasonable time". New Helios advanced its claim, accordingly, only after it had become apparent that the dispute could not be otherwise settled, which course of action was fully in accord with the legally binding provisions of the Treaty. New Helios has not, therefore, been guilty of laches.

B. Acquiescence: New Helios did not acquiesce in the breach of Treaty by Karma.

New Helios may not be deemed to have acquiesced in the violations by Karma of the 1923 Treaty unless such acquiescence was incapable of reasonable explanation and had not been negatived by protests reserving its rights.[1] It has been shown that the course of action pursued by New Helios in protecting its right under the Treaty may be explained by the obligations imposed in this respect by the Treaty itself, namely, to attempt to settle disputes

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1. Lord A. McNair, The Law of Treaties 518 (2d rev. ed. 1961)

"amicably"; in addition, New Helios persistently protested the violations by Karma of the Treaty, although these protests were ignored by the Respondent.

II. KARMA IS RESPONSIBLE FOR THE HARM WHICH HAS BEEN OR MAY BE INFLICTED UPON THE ENVIRONMENT OF NEW HELIOS UNDER THE 1923 TREATY.

A. The 1923 Treaty is legally binding upon the States under general principles of international law.

All international treaties are sources of law for the parties who conclude them.[2] In effect, they are agreements of a contractual nature between States, creating legal rights and obligations between the parties.[3] Every treaty is binding upon the parties to it and must be performed by them in good faith: pacta sunt servanda.[4]

B. The parties themselves intended that the Treaty be established as an agreement of legal obligation.

The intention of the parties to be legally bound by the Treaty is evidenced by the provision in Article IV for the settlement by judicial process of disputes arising out of it.[5]

C. The Treaty has not been terminated, nor has its operation been suspended, by virtue of the doctrine rebus sic stantibus.

1. The doctrine has not been established as a rule of international law

The definitions of the doctrine which have been given by publicists "... vary from one another in such a fundamental way,

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2. H. Lauterpacht, Private Law Sources and Analogies of International Law 155 (1927).

3. 1 L. Oppenheim, International Law 877 (8th ed., H. Lauterpacht, ed., 1955).

4. Vienna Convention on the Law of Treaties, art. 26, 63 A.J.I.L. 875 (1969). According to McNair, "no Government would decline to accept the principle pacta sunt servanda". Lord A. McNair, supra n. 1 at 493.

5. Fawcett, "The Legal Character of International Agreements", 1953 B.Y.B.I.L. 381, 387.

despite superficial similarities, that one may safely say that there is no definition upon which a majority of writers agree".[6] As to state practice, the doctrine has never been invoked by a State without being challenged by other States.[7] It is also noteworthy that Lauterpacht has referred to the doctrine as being not a rule of law but rather a "maxim of politics".[8]

2. In any event, the doctrine is inapplicable to the 1923 Treaty

a) The doctrine does not apply to a treaty stipulating an international servitude.

Article II of the Treaty, requiring each party to use its territory so as not to pollute common waters "so as to injure the health or property in the other State", stipulates an international servitude, that is, an "... exceptional restriction made by a treaty on the territorial supremacy of a State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State".[9] The doctrine may not be enforced in respect of treaties stipulating international servitudes.[10]

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6. C. Hill, The Doctrine of "Rebus Sic Stantibus" in International Law 7 (IX University of Missouri Studies, 1934). More recently, this has been affirmed by Shaker, "Fundamental Change of Circumstances or The International Law Commission and the Doctrine Rebus Sic Stantibus", 23 Revue Egyptienne De Droit International 109, 117 (1967), and Poch de Caviedes, "De la clause 'rebus sic stantibus' a la clause de revision dans les conventions internationales" 118 H.R. 105,193 (1966).

7. C. Hill, supra, n. 6, at 90.

8. H. Lauterpacht, supra, n. 2, at 170.

9. 1 L. Oppenheim, International Law 487 (7th ed., H. Lauterpacht, ed., 1948).

10. G. Harazti, Some Fundamental Problems of the Law of Treaties 394 (1973).

b) There has been no fundamental change of circumstances.

It is clear in this respect that even the proponents of the doctrine have asserted the need to confine its scope within narrow limits and to regulate strictly the conditions under which it may be invoked. The Vienna Convention on the Law of Treaties, Article 62,[11] outlines the operation of the doctrine as follows:

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (a) the existence of those circumstances constituted an essential basis for the consent of the parties to be bound by the treaty; and
>
> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

Lauterpacht, on the other hand, would restrict application of the doctrine to those situations in which there has taken place such a change of circumstances as to render fulfillment of the treaty dangerous to the "vital interests" of a State party to the treaty.[12] It is significant that "the fundamental change of circumstances resulting in such consequences is an objective criterion which may be established in a manner independent of the appraisal of the parties".[13]

The industrialisation of Karma subsequent to 1923 does not, upon the stipulated facts, constitute a fundamental change of circumstances within any of the formulations of the doctrine rebus sic stantibus. Indeed, it has been stated that "this occurs

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11. Supra, n. 4.

12. H. Lauterpacht, supra, n. 2, at 167.

13. G. Harazti, supra n. 10, at 384-385.

most plainly in the case of a physical change such as the permanent drying-up of a river ..."[14]

In any case, "... if the event alleged to have dissolved the treat has come about as a result of the action of one of the parties to it, it is unlikely that an international tribunal would sustain the plea of the party that the treaty has come to an end".[15] Karma may not therefore rely upon its own industrialisation as a grounds for excusing breach of a legally binding treaty obligation which it now finds inconvenient to fulfil.

D. Karma has breached the provisions of the 1923 Treaty as interpreted according to general principles of international law.

1. The spirit of the Treaty is to be observed.

International treaties are to be interpreted, and treaty obligations carried out, in good faith "... according to the common and real intention of the parties at the time the treaty was concluded, that is to say, the spirit of the treaty and not its mere literal meaning".[16] It follows that "... a party may not be allowed to make capital out of inexact expressions or mistaken descriptions in a treaty, when the real and common intention can be ascertained and the error established".[17]

2. The Treaty is to be liberally construed in the light of its object and purpose, and so as to enlarge rights which may be claimed under it by the parties.

"Treaties are to be liberally construed, so as to effect the apparent intention of the parties .... When a treaty provision

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14. Lord A. McNair, supra n. 1, at 685.

15. Id., at 688.

16. Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 114 (1953).

17. Bin Cheng, supra n. 16, at 118.

fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred".[18] A treaty is therefore to be interpreted "in the light of its object and purpose".[19]

The "object and purpose" of the 1923 Treaty are made manifest by its title, namely, the development and maintenance of "amity, friendship and economic co-operation" between Karma and New Helios. The prohibition against pollution stipulated by Article 11 is therefore to be construed in this light, and, in any instance of ambiguity, consistently with the protection of either State against pollution of common waters by the other, that is, so as to enlarge rights claimed under the Treaty.

3. The Treaty must be interpreted so that it becomes effective in practice.

> ... if by means of the method of interpretation two possible results have been reached, the one of which guarantees the effectiveness of the treaty, whereas the other invalidates it, i.e., precludes its practical prevalence, the former result has to be accepted as correct.[20]

An interpretation "cannot lead to an absurd result, i.e., it cannot render ineffective the treaty or a provision of it".[21]

To adopt an interpretation of the 1923 Treaty which would have the effect of permitting Karma to continue its pollution of international waters would render ineffective the provisions of Art. II thereof, and must therefore be rejected in principle.

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18. Nielson v. Johnson (1929), 279 U.S. 47 (Stone, J.). This has been affirmed by the United States Supreme Court in Kolovrat v. Oregon (1961), 360 U.S. 187 (Black, J.).

19. Vienna Convention on the Law of Treaties, Art. 31, supra n. 4.

20. G. Harazti, supra n. 10, at 166-167.

21. Id., at 168.

E. Karma, in polluting the waters of the International Lake and the Lower Peace River, stands in breach of the 1923 Treaty.

1. Karma is responsible at international law for the activities of both the mill complex and town and of the nuclear plant.

The nuclear plant is a state-owned corporation [F-3]. Its pollution of the Lower Peace River is therefore a breach of treaty by Karma itself. While the mill complex, on the other hand is privately owned [F-2], nevertheless

> ... the responsibility of the State ... consists of a duty to take all reasonable measures of prevention and punishment to ensure that its subjects shall not do the things prohibited by the treaty; a failure in that duty constitutes an international delinquency on the part of the State.[22]

Karma has neither taken nor attempted to take any such measures. It has therefore been delinquent in fulfilling its obligations owed to New Helios under the 1923 Treaty.

2. Karma has breached the provisions of Article 1 of the 1923 Treaty.[23]

Acts done by Karma which have the effect, actual as well as potential, of inflicting harm upon the environment of New Helios must necessarily be "matters of mutual interest" as contemplated by Art. 1. In the construction and operation of both the mill and the nuclear plant, Karma was therefore under a legally binding obligation to co-operate and consult "as appropriate" with New Helios. Its failure to consult at all constitutes a breach of the treaty.

Expressions such as "appropriate" occurring in a treaty "... are not stereotyped as at the date of the Treaty but must be under-

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22. Lord A. McNair, supra, n. 1, 55.

23. See Annex B.

stood in the light of the progress of events and changes in habits of life".[24] In effect, then, the requirement to co-operate and consult as appropriate on matters of mutual interest is made ambulatory.

3. Karma has breached the provisions of Article II, Paragraph 1, of the 1923 Treaty[25]

It is significant that the stipulated prohibition against pollution is said to be "in keeping with the general aim of amity, friendship and economic co-operation". This manifests the parties' clear intention that the provision be given a broad and liberal interpretation consistent and "in keeping with" the stated objectives underlying the Treaty. In this respect it is to be noted that "... the discovery of the intention of the parties is the goal of interpretation".[26]

a) The operations of the mill complex and town are in breach of Article II, Paragraph 1, of the 1923 Treaty

The pollution of the Upper Peace River by the mill complex and town does, upon a proper interpretation of Para. 1, constitute pollution of "boundary waters or other waters running between "the two States notwithstanding that the Upper Peace is in fact wholly situate within the territory of Karma. Bearing in mind the underlying objectives of the Treaty, it follows that the true expressed intention of the parties was to prohibit either from CAUSING the pollution of "boundary waters or other waters running between them", so that the activities of the mill complex and town, having

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24. Lord A. McNair, supra n. 1, at 467.

25. See Annex B.

26. W. Friedmann, O. Lissitzyn, and R. Pugh, International Law, 378 note (1969).

the inevitable and clearly foreseeable result of causing the pollution downstream of the International Lake and Lower Peace River, constitute a breach of Para. 1 of the Treaty.

b) The operations of the nuclear plant are in breach of Article II, Paragraph 1, of the 1923 Treaty.

Although the nuclear plant is currently operating at only 10% of its total capacity [F-3], nevertheless, in response to the first question presented to the court, Karma is responsible for any harm which has been AND MAY BE inflicted upon the environment of New Helios as a result of the plant's operation.

The term "pollution" in Para. 1 contemplates thermal pollution. Water pollution, in its reference to causes, includes thermal pollution arising from the increase in temperature caused by hydro-electric works.[27] No distinction in principle may be drawn between nuclear and hydro-electric works in this respect. The Secretariat of the United Nations Conference on the Human Environment includes, as a familiar "substance" contributing to pollution, heat from fossil-fuel and nuclear power stations.[28]

Even as understood in 1923, the concept of "pollution" comprehended thermal pollution. It was recognized in 1893 that pollution consists in the "doing of something which damages the natural qualities of the water".[29] In fact, the use of water and its return to the waterway at a raised temperature was held to constitute un-

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27. J. Barros and D. Johnston, The International Law of Pollution 6 (1974).

28. Doc. A/Conf. 48/8.

29. John Young & Co. v. Bankier Dist. Co. [1893] A.C. 691,698 (H.L.).

lawful pollution at least as early as 1855 in England[30] and 1904 in the United States.[31]

c) Karma's violations of the 1923 Treaty have resulted in injury to health and property in New Helios.

The pollution created by the mill complex and town, having rendered the waters of the International Lake undesirable for human potation, and having further resulted in an increase in the incidence of typhoid around the Capital of New Helios [F-3], has clearly injured the health of the Applicant's population. In addition, combined with the pollution from the nuclear plant, it has adversely affected the operations of the Lower Peace Brewery, one of the most successful industries of New Helios, and has thereby injured property in the Applicant State. The pollution of common waters by Karma is, therefore, actionable under the Treaty.

4. Karma has breached the provisions of Article II, Paragraph 2, of the 1923 Treaty[32]

Para. 2 creates a valid obligation upon the parties to negotiate in good faith; refusal to do so [F-4,5] amounts to breach of the obligation by Karma.[33]

III. KARMA IS RESPONSIBLE UNDER GENERAL PRINCIPLES OF INTERNATIONAL LAW FOR HARM INFLICTED UPON THE ENVIRONMENT OF NEW HELIOS.

A. State responsibility for damage arising from the pollution of international watercourses is a recognized principle of international law.

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30. Tipping v. Eckersley (1855) 2 K & J 264.

31. Walker Ice Co. v. American Steel & Wire Co. 185 Mass. 463; 70 N.E. 937 (1904).

32. See Annex B.

33. Lord A. McNair, supra n. 1, at 29.

1. State responsibility for pollution damage is an accepted principle of customary international law.

The general rules for the utilization of international river basins "are to be found among the rules of international customary law .... The basic rule may be said to express the duty to use river waters in a manner which is not detrimental to the interests of other riparian states,"[34] and thus, "a serious interference ... with the use and enjoyment of an international river [is] ... unlawful."[35]

a) State practice as evidenced by U.N. declarations and conferences points to liability for harmful pollution.

The deleterious effects of pollution and the formidable threat it poses to the global environment are matters of increasing concern to international organizations. At the recent U.N. Conference on the Human Environment held in Stockholm and attended by most of the nations of the world,[36] there was "general acceptance in Principal 21 of the Stockholm Declaration, of the principle of State responsibility for damage beyond territorial limits ...,"[37] although no restrictions were formulated in respect of solely internal pollution, as follows:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own

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34. M. Sorenson, Manual of Public International Law 329,30 (1968).

35. Bourne, "The Right to Utilize the Waters of International Rivers" 1965 C.Y.I.L. 221. See also Hambro, "The Human Environment: Stockholm and After" 1974 Ybk. of World Affairs 211.

36. U.N. Doc. A/Conf./48 C.R.P. 26, 1972.

37. J. Barros and D. Johnston, supra n. 27, 71-72.

> environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[38]

The above principle reiterates a conclusion reached by the U.N.'s Economic Commission for Europe that:

> in accordance with established principles of customary international law no state should pass on its waters to its neighbouring states in such a polluted condition that this water would seriously damage the interest of its neighbouring states.[39]

b) State practice as evidenced by bilateral and multilateral treaties establishes the illegality of harmful pollution international law.

An extensive examination of water treaties indicates that such treaties often include articles forbidding pollution.[40] Typical of these is the Boundary Waters Treaty between Great Britain (Canada) and the United States, 1909, which provides in Art. IV that "boundary waters and waters flowing across the boundaries shall not be polluted on either side to the injury of health and property on the other."[41] A study of European water treaties, discloses "a fairly uniform pattern" which consistently provides that "that no state may effect any work on that part of the river within

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38. U.N. Doc. A/Conf./48 C.R.P. 26, 1972, Principle 21.

39. E.C.E., Conference on Water Pollution Problems in Europe, 1961 in The Future of the International Legal Order Vol. IV: The Structure of the International Environment 148 (C. Black and R. Falk ed. 1972). [Hereinafter cited as Black and Falk].

40. eg. Border Treaty between Belgium and W. Germany, 1956, Art. 7. U.N. Doc. ST/LEG/Ser.B/12 no. 151, 533,34; Frontier Treaty between Norway and the U.S.S.R., 1949, Art. 14 ibid. no. 238, 282. Indus Waters Treaty between India and Pakistan Art. 4 para. 10 ibid. no. 97, 305 and Convention on the Protection of Lake Constance Against Pollution, 1960 ibid. no. 127, 438. See further Colliard, "Evolution et aspects actuels du régime juridique des fleuves internationaux" 125 H.R. 390 et seq. (1968).

41. U.N. Doc. ST/LEG/Ser.B/12 no. 79, 261.

its territory which may result in a serious injury to a co-riparian state, without the consent of that state."[42] This trend, indicative of state practice, is not belied by treaties from other geographical areas.

c) Formulations of principles by international associations posit state responsibility for pollution as a rule of customary international law.

The learned associations, institutes and other bodies that have formulated principles relating to the utilization of international river basins coincide in proposing state responsibility for harm that results from pollution, at least where the harm is substantial.[43] As long ago as in 1911, the Madrid session of the International Law Institute resolved, inter alia, that "[a]ll injurious pollution of the water and discharge of noxious matter (from factories, etc.) is forbidden."[44] A similar attitude to pollution is reflected in the Conferences of the International Law Association at Dubrovnik in 1956 and New York two years later. This concern of the Association culminated in the authoritative formulation in 1966 of principles known as the Helsinki Rules.[45] The Helsinki Rules, which may in many respects be considered a codification of existing customary rules on the subject provide in Art. X that:

> a State (a) must prevent any new form of water pollution or any increase in the degree of existing water pollution ... which would cause substantial injury in the territory of a

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42. S. Saliba, The Jordan River Dispute 49 (1968).

43. See Bourne, supra n. 35, 267,68 et passim.

44. Quoted from G. Kaeckeenbeeck, International Rivers 181 (1918).

45. I.L.A., Report of the 52nd Conference, Helsinki, 1966 496 (1967).

co-basin State, and (b) should take all reasonable measures to abate existing water pollution ...[46]

2. State responsibility for harmful pollution may be based, in the alternative, upon general principles of law recognized by civilized nations.

a) Responsibility may be based on the 'sic utere tuo ut alienum non laedas principle'.

It seems safe ... to state as a general principle of international law that, while each state has sovereign control within its own boundaries, insofar as international rivers are concerned, a state may not exercise that control without taking into account the effects upon other riparian states ... sic utere tuo ut alienum non laedas.[47]

The principle was accepted as a basis for state responsibility by the International Law Association in the Helsinki Rules[48] and is supported by many eminent publicists.[49]

b) Responsibility may also be based on the doctrine of abuse of rights.

The abuse of rights doctrine has been applied in practice for close to a century[50] and is "one of the basic elements of the international law of torts."[51] The doctrine which has been "recognized in principle both by the Permanent Court of International Justice and the International Court of Justice"[52] may form the

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46. I.L.A., supra n.45, 496.

47. Eagleton, "The Use of the Waters of International Rivers" 33 Can. Bar Rev. 1021 (1955).

48. I.L.A., supra n.45, Comment on Art. X at 497.

49. eg. 1 L. Oppenheim, supra n.3, 346 and B. Cheng, supra n.16, 121.

50. A-C. Kiss, L'abus de droit en droit international 10 (1953).

51. H. Lauterpacht, The Function of Law in the International Community 298 (1933).

52. B. Cheng, supra n.16, 121 (Free Zones Case [1932] P.C.I.J. ser. A/B no.46, 167, Anglo-Norwegian Fisheries Case [1951]

basis of an international delinquency.[53]

3. The principle of state liability for harm caused by pollution is in accordance with judicial decisions.

Although there are few international precedents in the field of transnational pollution, it may safely be said that those international and federal judicial tribunals that have dealt with the problem favour liability for harmful pollution:

> Claims by an injured State for abatement or compensation in respect of damage caused by fresh water pollution originating within the jurisdiction of another State must be dealt with on the basis of general international law, including the principle affirmed in the Corfu Channel Case that every State has the obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of other States.'[54]

The Lake Lanoux and Trail Smelter Arbitrations may also be looked to for principles applicable in such cases. The Lake Lanoux Tribunal referred to pollution whereby the waters "would have a chemical composition or a temperature or some other characteristic which could injure Spanish interests"[55] as a "possible ground of liability".[56] In the Trail Smelter Case, the "locus classicus on liability for extraterritorial damage to property arising from pollution",[57] the Tribunal concluded that "no State has the right to use or permit the use of its territory in such a manner as to

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I.C.J. Rep. 116,142 and Advisory Opinion on the Competence of the General Assembly [1950] I.C.J. Rep. 4,15 (D.O. Judge Alvarez)).

53. 1 L. Oppenheim, supra no.3, 345 and A-C. Kiss, supra n.53, 190.

54. Jenks, "Liability for Ultra-hazardous Activities in International Law" 117 H.R. 124 (1966).

55. Lake Lanoux Arbitration (France v. Spain) 24 I.L.R. 101,23 (1957).

56. Jenks, supra n.54, 122.

57. Dickstein, "International Law and the Environment: Evolving Concepts" 1972 Ybk. of World Affairs 251.

cause injury ... to the territory of another or the properties or persons therein ..."[58] Several American and European municipal tribunals[59] support the above conclusion.

4. The principle of responsibility for harmful pollution is accepted by most publicists.

The vast majority of modern publicists agree "that all serious interference by one riparian with the use and enjoyment of an international river by another is ipso facto unlawful".[60] While good neighbourliness requires that minor inconveniences be overlooked,[61] the same principle applies "une obligation reciproque de ne pas leser l'Etat voisin."[62] Where this obligation is not met, state responsibility is engaged.[63]

B. Karma cannot escape responsibility for harm caused to the environment of New Helios by reference to any recognized doctrine of international law.

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58. Trail Smelter Arbitration (Can. v. U.S.) 35 A.J.I.L. 684,716 (1941).

59. eg. Missouri v. Illinois, 200 U.S. 496 (1906), New York v. New Jersey 256 U.S. 296 (1921) and New Jersey v. New York City 283 U.S. 473 (1931); Wurttemburg and Prussia v. Baden (Staatsgerichthof, Germany) [1927-28] Ann. Dig. 128 (No. 86): "No state has the right to cause substantial injury to the interest of another State by the use it makes of the waters of a natural waterway."

60. Bourne, supra n.35, 221. See also Colliard, supra n.39, 384: "Comme le droit interne, le droit international comporte la defense contre la pollution"; A. Patry, Le regime des cours d'eau internationaux 11, (1960); Bourne, supra n.35, 203. Cardona, "El Regimen Juridico de los Rios Internacionales" 56 Rev. de Derecho Int. 24,26 (1949) and 2 L. Cavare Le droit international public positif 783 (2d ed. 1962).

61. P. Fauchille, Traite de droit internationale public 449 (8th ed. 1925).

62. Sauser-Hall, "L'utilisation industrielle des fleuves internationaux" 83 H.R. 554,55 (1953) transl: "a mutual obligation not to harm a neighbouring State."

63. Koutikov, in Les cours d'eau internationaux, Conference de Lagonissi, 36 (1967).

1. The doctrine of absolute territorial sovereignty is not a recognized principle of international law.

The doctrine of absolute territorial sovereignty, commonly called the Harmon Doctrine, to the effect that "there is no duty or obligation in international law on any state to restrain its use of the waters within its territory to accommodate the needs of another state,"[64] has been rejected by "an overwhelming number of the publicists who have considered the subject of international water rights",[65] and "has never been followed either by the United States or any other country".[66]

2. The equitable utilization doctrine is of no avail to Karma

a) The equitable utilization doctrine is not an established principle of international law.

The doctrine of equitable utilization as formulated by publicists[67] and by the International Law Association in the Helsinki Rules[68] is not a principle of international law de lege lata.[69] While some writers on the subject consider that the doctrine has a place in international law, it would be premature to consider it as anything but a principle de lege ferenda.

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64. Austin, "Canadian-United States Practice and Theory Respecting the International Law of International Rivers" 37 Can. Bar Rev. 408 (1959).

65. S. Saliba, supra n.42, 66. See also Koutikov, supra n. 63, 15 n.8, H.A. Smith, The Economic Uses of International Rivers, 149 et seq. (1931) and Colliard, supra n.39, 359.

66. Clayton, Hearings before Comm. on Foreign Relations on Treaty with Mexico Relating to Utilization of Waters of Certain Rivers, 79th Cong. 1st Sess. Pt. 1 (1945) 97-98.

67. eg. F. Berber, Rivers in International Law 25 (1959), Austin, supra n.64, 442-43, and J.Barros and D.Johnston, supra n.27,75.

68. I.L.A., supra n.45, 477 et seq.

69. See C. Jenks, The Prospects of International Adjudication 528 (1964) and F. Berber, supra n.67, 40-42.

b) In the event that the doctrine of equitable utilization is accepted as a principle of international law, it does not absolve Karma from liability.

Karma's use of the international drainage basin is not consistent with the principles of equitable utilization, and its wasteful and ecologically reprehensible use of shared water resources should not take precedence over New Helios' existing beneficial uses.[70] That a reasonable and beneficial existing use should be entitled to special protection is self-evident,[71] and New Helios' use of the Peace River system is eminently reasonable and beneficial, consisting, as it does, primarily of uses traditionally given a high priority: domestic uses.[72] Karma's mill complex, however, in disregarding the recommendations of the W.D.A. that it install treatment facilities [F-2] and continuing to discharge industrial wastes untreated into the Peace River system, cannot be held to be making a reasonable or equitable use of shared water resources. In fact, the danger to human life posed by Karma's polluting the system should suffice, as was held by the I.L.A., to render such pollution "inconsistent with the principle of equitable utilization" and to bring about "an absolute duty to abate the pollution".[73] Moreover, while a legal tribunal may decide that there should be an equitable apportionment, "it is beyond the competence of legal learning to decide what should be fair

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70. The International Drainage Basin 23 (1963 ed. Chapman).

71. I.L.A., supra n.45, 493 and P.Lester in The Law of International Drainage Basins,49 (Garretson,Hayton and Olmstead ed. 1967).

72. See Eagleton, supra n.47, 1025, J. Barros and D. Johnston supra n.27 17 and Andrassy, "Les relations internationales de voisinage" 79 H.R. 112 (1951): "Les usages moderes pour les besoins domestiques...jouissent toujours de la priorite."

73. I.L.A., supra, n.45, 501.

shares to two independent states in the same waters."[74]

c) The requirement for substantial damage, if it exists, has been met.

In the event the Court were to insist on substantial damage to New Helios as a prerequisite for liability on the part of Karma, and there is authority for the contrary view,[75] such damage has indeed been caused. The International Law Association defines 'substantial damage' as any injury "which materially interferes with or prevents a reasonable use of the water."[76] In polluting International Lake, Karma is clearly interfering with New Helios' reasonable use of the water for drinking purposes and for industrial and recreational purposes.

C. The state of Karma is responsible for all injuries inflicted on the environment of New Helios.

Karma is sovereignly responsible for the injurious activities of the state-owned nuclear power station, the privately-owned paper mill and the 'shanty-town':

> Whenever there is a legal obligation to act, a voluntary inaction - by which is meant not necessarily an intended inaction but simply an inaction which is not due to impossibility of acting otherwise - would constitute a breach of that obligation, in other words, an unlawful act.[77]

Thus, "a state is internationally responsible if its acts or those of its citizens ... cause damage ... in another state."[78]

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74. Smith, "Waters of the Jordan" Int. Affairs 415 (1949).

75. Rubin, "Pollution by Analogy: The Trail Smelter Arbitration" 50 Ore. L.R. 247 (1971), for example.

76. I.L.A. supra n.45, 500.

77. B. Cheng, supra n.16, 1974. See also H. Lauterpacht, supra n.2, 138; D.Livingston, "Science, Technology and International Law" in Black and Falk supra n.39, 104 and Andrassy, supra n.72: "il y a obligation generale de ne pas faire ou de ne pas laisser faire que soient provoques des dommages au prejudice de l'Etat voisin".

D. Karma is in breach of a duty to give notice.

It is a rule of customary international law that states must "abstain from any unilateral action that may affect the interests of other riparian states without giving these states every opportunity of studying and expressing their opinion upon the questions involved."[79] The existence of such a customary rule is evidenced by its not infrequent adoption by international associations in declarations of principles[80] and by its acceptance by the most highly qualified publicists of the various nations.[81] Indeed,

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78. H.&J. Taubenfeld,"Modification of the Human Environment" in Black and Falk supra n.45, 130. See also Gottlieb and Dalfen, "National Jurisdiction in International Responsibility", 67 A.J.I.L. 242 (1973): "reflected in the unanimously endorsed principles [of the Stockholm Declaration] is the idea of state responsibility for damage arising from pollution caused by state activities or by organizations or individuals under their jurisdiction", Levy, "La responsabilite pour omission et la responsabilite pour risque en D.I.P." 65 R.G.D.I.P. 748 (1961), Goldie, "International Principles of Responsibility for Pollution" 9 Colum. G.Transnational Law, 307.(1970) and Comment to Article X of the Helsinki Rules, I.L.A. supra n.45,500, where the duty to take action about pollution is said to exist "regardless of whether the pollution results from public activity of the State itself ... or from conduct of private parties within its territory."

79. H.A. Smith, supra n.65, 152.

80. eg. the 1933 Declaration of Montevideo, 28 A.J.I.L. Supp. 59-60 (1934),the 1957 Buenos Aires Resolution, 10 Inter-Am. Bar Ass. Proc. 82 (1957) the Draft Convention on the Industrial and Agricultural Use of International Rivers and Lakes, O.A.S.Off. Rec. OEA/Ser.1/012 (English) CIJ-79; 4,7,13-14,20-21 and the 1961 Salzburg Resolution, 49 Annuaire de l'Institute de Droit International, 38 (1961), which expressly prohibits works or utilizations before notice (Art.5).

81. Bourne, "Procedure in the Development of International Drainage Basins" 22 U. Tor. L.J. 73 et passim (1972), Jenks, supra n.54, 174: "any State proposing to sponsor or permit an experiment, test or development scheme which may prejudice the natural environment of another State should notify, in advance the nature and anticipated and possible consequences...,Laylin and Bianchi,"The Role of Adjudication in International River Disputes"53 A.J.I.L. 48(1959):"The right to receive appropriate and correct information on the existing regime and probable

it has been suggested that the obligation to give notice finds its origin in the Charter of the United Nations.[82] Karma's actions in constructing the nuclear power station without notifying New Helios of its intentions or affording New Helios the opportunity to make representations as to its optimum location, places Karma in breach of this customary norm and contributes another cogent argument against Karma's position. Karma's breach was compounded by its subsequent behaviour in refusing to negotiate with New Helios.[83] [F-4].

IV. NEW HELIOS IS ENTITLED TO RELIEF.

A. Harm has been and will further be done to New Helios by Karma

The raw sewage and industrial wastes emanating from the shanty-town and mill complex respectively have so polluted boundary waters[84] as to injure both health and property in New Helios contrary to the provisions of the 1923 Treaty and to general principles of international law. The level of pollution in International Lake has become so high as to constitute a health hazard - as witnessed

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changes to be effected in a common river is co-terminous with the fundamental duty to respect a riparian's legitimate interests" and Servette, U.N.Doc. D/ECE/136 (1952) E/ECE/EP 98 Rev. 1, 209-13.

82. Andrassy, "L'utilisation des eaux des bassins fluviaux internationaux", 16 Rev. Egyptienne de Droit Int. 39 (1960).

83. The Helsinki Rules, I.L.A., supra n.45, 501 (Art.XI) make negotiations mandatory in connection with the abatement of existing water pollution. Precedent of the highest authority exists for the view that customary international law may require states to enter into negotiations with a view to arriving at an agreement in the North Sea Continental Shelf Cases [1969] I.C.J. Rep. 3, 46-7, 53-4. See also Bourne, "Procedure in the Development of International Drainage Basins: The Duty to Consult and to Negotiate" 1972 C.Y.I.L. 212.

84. See MacNeill, Environmental Management 158 (1971): "A single ... paper mill ... can produce an organic waste load equivalent to the sewage discharge from a large city."

by a recent rise in the incidence of typhoid - [F-3] and to render its waters unfit for human potation or industrial use, thereby forcing the capital of New Helios and the world famous Lower Peace Brewery to install sophisticated new purification facilities at considerable cost. This state of affairs has restricted the recreational uses of the lake and necessitated the closing of the beaches of the Capital, thereby reducing the amenities of the city and adversely affecting New Helios' tourist industry. If the mill and town continue polluting the lake and poisoning the environment of New Helios, further sums will have to be expended on water purification. As for the nuclear power plant, its thermal pollution accelerates the eutrophication of the lake and should it become fully operational will require the installation of cooling lagoons by the Brewery.

B. Karma is under a duty to make reparation to New Helios.

The breach of any international obligation, whether of a conventional[85] or a customary nature[86] or a "general principle of law recognized by civilized nations involves international responsibility"[87] and entails the duty to "make reparations in an adequate form".[88] In the case of a conventional obligation, "there is no necessity for this to be stated in the convention itself."[89]

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85. Chorzow Factory (Indemnity) Case [1928] P.C.I.J. Ser.A. No. 17, 29.

86. Corfu Channel Case [1949] I.C.J. Rep. 4,23.

87. Schwarzenberger, "Uses and Abuses of the 'Abuse of Rights' in International Law" 42, 1957 Trans. Grotius. See also Advisory Opinion on Interpretation of Peace Treaties [1950] I.C.J. Rep. 221,228.

88. Chorzow Factory (Jurisdiction) Case [1927] P.C.I.J. Ser. A. No. 8, 21.

89. Chorzow Factory (Jurisdiction) Case supra n.88.

Reparation should "wipe out all the consequences of the illegal act and re-establish the situation which would ... have existed if that act had not been committed."[90]

1. New Helios is entitled to the restoration of the status quo ante.

a) The International Court may grant such relief.

> An international court or tribunal has authority to require the specific performance of its decisions. The 'nature or extent of the reparation to be made for the breach of an international obligation, '...clearly includes the specific performance of the obligation. Specific performance would indeed appear to be the normal method of giving effect to a declaratory judgment.[91]

The "very minimum of reparation is dissociation by the offending State from its illegal act,"[92] and the Court should order Karma to disist from its illegal actions. That international courts and tribunals may "grant the equivalent of a prohibitory or mandatory injunction"[93] is clear in the Free Zones Case[94] and shown also by the Trail Smelter Arbitration.[95]

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90. Chorzow Factory (Indemnity) Case [1928] P.C.I.J. Ser. A. No. 17, 47. See also M. Sorenson, supra n.34, 565 and I. Vasarhelye, Restitution in International Law 10 (1964).

91. C. Jenks, supra n.69, 419. See also 2 L. Cavare, supra n. 60, 482: "La competence pour statuer sur la reparation ... implique la competence pour statuer sur les formes et modalites de la reparation" and Sauser-Hall, supra n.62, 524: "La plupart des auteurs [reservent] le droit d'un Etat lese par l'utilisation abusive d'un cours d'eau par un Etat riverain, au retablissement du statu quo ante ou a des dommages-interets."

92. Schwarzenberger, supra n.87, 42. See also the Helsinki Rules, I.L.A., supra n.45, 501 (Art. XI): "the state shall be required to cease the wrongful conduct and compensate the injured co-basin State for the injury that has been caused to it."

93. C. Jenks, supra n.69, 120. See also Griffin, "The Use of Waters of International Drainage Basins under Customary International Law", 53 A.J.I.L. 80 (1959) and M. Sorenson, supra n.34, 565.

94. [1932] P.C.I.J. ser. A/B.No.46, 172, where France was ordered to remove a customs cordon that was in breach of a treaty.

95. (Canada v. United States) 35 A.J.I.L. 684 (1941).

b) Such relief is warranted in the circumstances.

By polluting boundary waters, Karma has placed herself in flagrant breach of binding conventional and customary international law and only an immediate reduction in the discharge of sewage and industrial wastes coupled with an undertaking to construct pollution control facilities can wipe out the consequences of this breach and prevent further injury to New Helios:

> The common remedy of response in monetary compensation following a breach of an international obligation is rarely adequate in the case of a substantial change in the regime of a river system on which nations depend for their livelihood. A man dying of thirst cannot be revived with monetary compensation for his water, even when tendered in advance.[96]

Since the nuclear power station is, by its discharge of heated waters, injuring property in New Helios,[97] and will, when fully operational, do so even more, and since Karma in blithe disregard of its duty to notify and consult built it on its present location instead of a few miles downstream where it would have had no effect on New Helios, Karma should be ordered to suspend its operations until such time as a cooling system can be installed.

2. New Helios is entitled to monetary damages with interest.

"It is a principle of international law that the reparation of a wrong may consist of an indemnity corresponding to the damage which the nationals of the injured State have suffered ..."[98] In addition to restitution, New Helios claims an indemnity for ex-

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96. Laylin and Bianchi, supra n. 81, 31 and see M. Sorenson, supra n.34, 566.

97. eg. The Lower Peace Brewery [F-4]. The recreational uses of the Lake are also affected by the discharge of heated waters.

98. Chorzow Factory (Indemnity) Case [1928] P.C.I.J. Ser. A.No. 17, 27.

penses incurred due to Karma's illegal actions,[99] with interest at the rate of 9% from the date of the present judgment.[100]

Should the Court find that New Helios had not fully established the extent of the damage caused by Karma or the amount of the indemnity claimed by the New Helios,[101] it "may award an unliquidated sum",[102] to be determined in a future judgment after the receipt of a report by experts appointed by the Court.[103]

CONCLUSION

It is respectfully requested that this honourable Court:

1. Grant New Helios a declaration that Karma's pollution of the Peace River System is illegal and Order Karma to desist forthwith from such illegal actions.

2. Grant New Helios an indemnity corresponding to the sums spent and the losses incurred by its nationals.

All of which is respectfully submitted,

Counsel for New Helios

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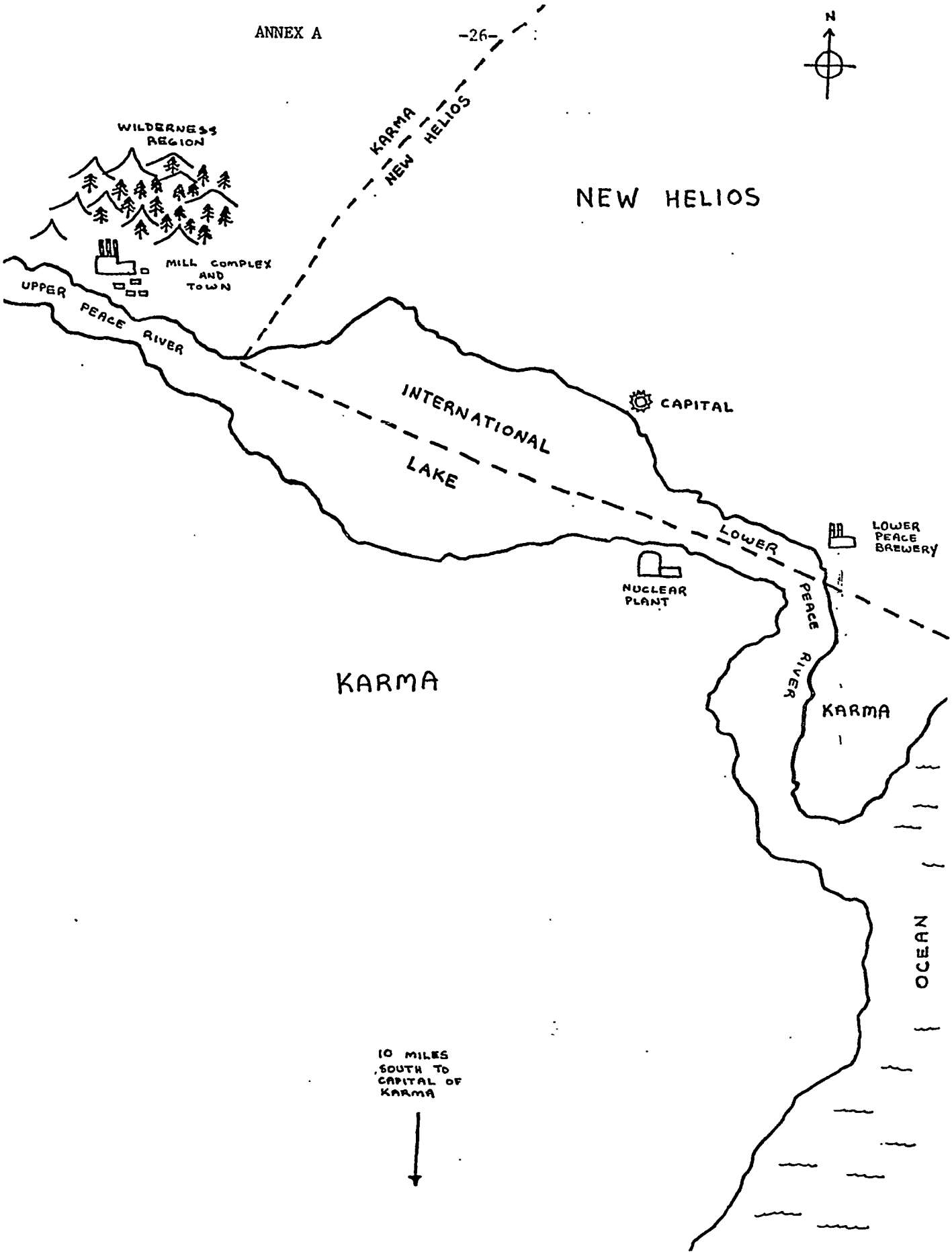
99. D. Anzilotti, Cours de droit international 527 (1929): "Quand la restitution ... ne constitue pas une compensation suffisante, [elle] est remplacee ou completee par des dommages-interets".

100. See H. Lauterpacht, supra n.2, 145 and the Wimbledon Case [1923] P.C.I.J. ser. A No. 1, 33.

101. But see Corfu Channel Case [1949] I.C.J. Rep.4,8 as to the evidentiary presumption in favour of a state bringing a claim.

102. C. Jenks, supra n.69, 684.

103. This was done in the Chorzow Factory (Indemnity) Case [1928] P.C.I.J. ser. A. No. 17, 64.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KARMA
NEW HELIOS
NEW HELIOS
WILDERNESS REGION
MILL COMPLEX AND TOWN
UPPER PEACE RIVER
INTERNATIONAL LAKE
CAPITAL
LOWER PEACE BREWERY
NUCLEAR PLANT
LOWER PEACE RIVER
KARMA
KARMA
OCEAN
10 MILES SOUTH TO CAPITAL OF KARMA

ANNEX B

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.