IN THE INTERNATIONAL COURT OF JUSTICE

February 1975

Between:

NEW HELIOS

Applicant

and

KARMA

Respondent

MEMORIAL FOR THE RESPONDENT

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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 defenses 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

Karma is not responsible for any environmental harm which has been or may be inflicted upon New Helios.

The doctrines of rebus sic stantibus, extinctive prescription, acquiescence, and the canons of treaty interpretation apply to bar New Helios' claims, and to absolve Karma of liability under the Treaty of 1923.

Karma is entitled to continue its utilization of the drainage basin for purposes of economic development under general principles of international law.

Should Karma be found responsible for environmental harm, neither reparations nor injunctive relief are appropriate. Instead, the Court should recommend the establishment of a joint commission to supervise the drainage basin.

ARGUMENT AND AUTHORITIES

I. NEW HELIOS' CLAIM IS BARRED IN PART BY THE PRINCIPLES OF EXTINCTIVE PRESCRIPTION AND ACQUIESCENCE.

A. The laches of New Helios should extinguish that part of its claim that is based on the alleged pollution of the mill.

1. It is a recognized principle of international law that the extinction of claims may result from lapse of time.

"International law contains a rule for the extinction or barring of claims upon lapse of time."[1] The principle of extinctive prescription is a general principle of law recognized by civilized nations,[2] and is attested by publicists[3] and international tribunals.[4] The principle finds its foundation in the highest equity - the avoidance of possible injustice to the defendant."[5]

2. The principle of extinctive prescription applies to bar New Helios' claim insofar as it relates to the paper mill.

The factors that substantiate a claim of prescription are 1) unreasonable delay, 2) actual or constructive knowledge of the events constituting the alleged wrong and 3) prejudice.[6] While "no rule of international law lays down a time limit"[7] and it is

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1. 2 D,P. O'Connell International Law 1066 (2d ed., 1970)
2. Pinto, 'La prescription en droit international' 87 Hague Recueil [hereinafter cited as H.R.] 438 (1955)
3. eg. Bin Cheng General Principles of Law as Applied by International Courts and Tribunals 386 (1953): "Prescription appears as the rational basis of certain rules of law admitted in all legal systems and...is dictated by the sense of justice and equity common to civilized mankind," and I. Brownlie Principles of Public International Law 492 (2d ed. 1973)
4. eg. Gentini Case (Italy v. Venez.) 10 RIAA 551, 555 (1903), Ambatielos Case (Greece v. U.K.) 23 I.L.R. 306, 314 (1956).
5. Gentini Case supra no.4. See also 2 L. Cavaré Le droit international public positif 372 (2d ed. 1962).
6. H. McClintock Equity 71 (2d ed. 1948), King, 'Prescription of Claims in International Law' 15 B.Y.B.I.L. 82 (1934)
7. I. Brownlie supra n.3 loc. cit.

generally agreed that the amount of time that suffices cannot be arbitrarily fixed,[8] periods from six to forty years have been accepted.[9] It has been suggested that in modern times, two years from the date of actual or presumed awareness should suffice in the case of "cumulative" pollution.[10] In the present case, ten years elapsed between the official opening of the mill complex in 1964 and New Helios' first protest in 1974, which delay constitutes unconscionable laches. The proximity of the two States and the international character of the mill project fix New Helios with constructive, if not actual, knowledge. Finally, Karma has been gravely prejudiced by the laches of New Helios inasmuch as Karma is thereby precluded from adducing evidence as to the extent of pre-existing pollution in the boundary waters.

B. In the alternative, New Helios should be held to have acquiesced in the activities of the mill and therefore to be estopped from objecting thereto.

1. Acquiescence is an accepted principle of international law

Acquiescence "takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection"[11] and is "numbered among the general principles of law accepted by international law as forming part of

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8. Pinto, supra n.2 439

9. O. Hoijer, Les traités internationaux 471 (1928)

10. Jenks, 'Liability for Ultra-hazardous Activities in International Law' 117 H.R. 188-89 (1966-I)

11. MacGibbon, 'The Scope of Acquiescence in International Law' 31 B.Y.B.I.L. 143 (1953) See also 2 L. Cavaré supra n.4 816: "Silence is equivalent to a tacit manifestation of the will, in short, to acquiescence" (transl.)

the law of nations".[12] Jurists of every age have recognized the juridical effects of silence.[13]

2. The prolonged silence of New Hélios operates as a tacit Consent

New Helios' ten year silence should estop it from protesting now. Good faith would require New Helios to have taken "active steps of some kind in order to preserve its right of freedom of action"[14] and its failure to take such steps should preclude it from objecting at this late stage.

II. KARMA IS NOT RESPONSIBLE UNDER THE 1923 TREATY FOR ANY HARM INFLICTED UPON THE ENVIRONMENT OF NEW HELIOS

A. Article II of the 1923 Treaty is rendered inoperative by virtue of the doctrine of the clausula rebus sic stantibus

1. The clausula is enshrined in conventional international law

The clausula was codified in 1928 by the Havana Convention on Treaties[15] and most recently by the Vienna Convention on the Law of Treaties in 1969, which provides in Article 62, as follows:

> 1. A fundamental change of circumstances which has occured 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 of 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.[16]

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12. North Sea Continental Shelf Cases [1969] I.C.J. Rep. 3, 127

13. Bentz, 'Le silence comme manifestation de volonté en D.I.P.' 67 R.G.D.I.P. 45 (1963)

14. Schwarzenberger, 'The Fundamental Principles of International Law' 87 H.R. 256 (1955); See also the Temple of Preah Vihear (Merits) Case [1962] I.C.J. Rep. 3, 23

15. Art.10, Convention on Treaties, Havana, 1928: 22 A.J.I.L., Supp. 139 (1928)

16. In S. Rosenne, The Law of Treaties 324-25 (1970)

2. The clausula is firmly entrenched in customary international law

"[T]he principle included in the rebus sic stantibus clause belongs to the objective rules of international law, enforceable irrespective of the express or tacit intention of the parties at treaty-making and in the given instance bringing about the termination of the treaty, wholly or partly"[17]

The clausula has recently received the stamp of approval of the World Court: "This principle, and the conditions and exceptions to which it is subject, have been embodied in Art. 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law..."[18] The clausula has been frequently invoked "dans la pratique diplomatique:"[19] "The doctrine of rebus sic stantibus ...can be, and has been justifiably applied in the practical legal relations of states."[20] In many respects, the clausula is "as necessary for International Law and international intercourse as the very rule pacta sunt servanda".[21] Far from being mutually exclusive, "nous pouvons trouver dans la règle pacta sunt servanda

17. G. Harazti Some Fundamental Problems in the Law of Treaties 376 (1973).

18. Fisheries Jurisdiction Case [1973] I.C.J. Rep. 3, 18.

19. 1 P. Guggenheim Traité de droit international public 232 (2d ed. 1967)

20. Baker, 'The Obligatory Jurisdiction of the P.C.I.J.' 6 B.Y.B. I.L. 100 (1925). The clausula has been relied on by many countries eg. the U.S. with respect to the Loadline Convention and Clayton-Bulwer Treaty; China, to bolster claims for the revision of unequal treaties; Russia, on denouncing Art. 59 of the Treaty of Berlin and France, on her withdrawal from N.A.T.O.

21. 1 L. Oppenheim International Law 844 (7th ed. Lauterpacht 1948)

et la règle rebus sic stantibus les deux éléments qui doivent assurer l'existence d'un droit efficient et en même temps équitable."[22]

3. The clausula has received the sanction of judicial decisions.

The World Court has considered the clausula on several occasions. In 1932, the Court assumed its existence "while reserving its position on its extent and the precise mode of its application."[23] In 1971[24] and 1973 again, the Court was more categorical:

> "International law admits that a fundamental change in the circumstances which determine the parties to accept the treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty."[25]

The clausula has been accepted by other international tribunals[26] and by courts in federal jurisdictions dealing with inter-state problems.[27]

4. The clausula has been widely accepted by publicists.

"Almost all modern jurists, however reluctantly, admit the existence in international law of the principle...commonly spoken of as the doctrine of rebus sic stantibus:"[28] "la plus grande

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22. van Bogaert, 'Le sens de la clause rebus sic stantibus dans le droit des gens actuel' 1966 R.G.D.I.P. 50 Transl. "in the twin rules: pacta sunt servanda and rebus sic stantibus, we find the two ingredients necessary to ensure the existence of an efficient and equitable law"

23. I. Brownlie supra n.3 599 (Free Zones Case [1932] P.C.I.J. ser. A/B No.46, 156-58)

24. Advisory Opinion on Namibia [1971] I.C.J. Rep. 16, 47

25. Fisheries Jurisdiction Case [1973] I.C.J. Rep. 3, 18

26. eg. Russian Indemnity Case Hague Court Rep. (Scott) 297 (1910)

27. eg. Lucerne v. Argau 8 B.G.E. 57 (Switz.S.C. 1882): "There is no doubt that treaties may be denounced unilaterally by a party under obligation, if their continuance is incompatible

partie des auteurs de droit ont penché en faveur de la clause... avec plus ou moins de réserves et en interprétant celle-ci d'une façon plus ou moins restrictive."[29] It is the overwhelming consensus of the most qualified publicists, both ancient and modern[30] that "treaties may be discharged as a result of the...doctrine."[31]

5. Partial termination may result from the operation of the clausula.

"[W]here treaties consist of different parts, dealing with completely different subjects, it is now recognized by the majority of writers, by the treaties themselves, by international tribunals and by the practice of states, that the problem of the validity or termination of treaty-created norms can arise not only with regard to the treaty as a whole, but also with regard to certain parts or articles of the treaty".[32]

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with its vital interests...or if there has taken place such a change of the circumstances as...constituted, at the time of its creation, an implied condition of its continued existence." See also Hooper v. United States 22 Ct.Cl. 408 (1887) and Stransky v. Zivnostenska Bank [1955] I.L.R. 424, 27.

28. 'Commentary to the I.L.C. Draft Articles' 1966 2 Ybk. I.L.C. 256.

29. Poch de Caviedes, 'De la clause rebus sic stantibus à la clause de révision dans les conventions internationales' (18 H.R. 149 (1966) Transl.: the vast majority of legal writers have accepted the clausula, with more or less reservations and interpreting it with varying degrees of strictness. See also H. Lauterpacht, Private Law Sources and Analogies of International Law 46 (1927).

30. eg. B. Spinoza, Tractatus Politicus III, 14 (1677). T. Huang, The Doctrine of Rebus Sic Stantibus in International Law 17 (1935), Bluntschli Le droit public general in O. Hoijer, supra n.9, 511: "lorsqu'un ordre de faits determiné forme la base et la condition d'existence d'un traité, et que cette base vient d'être renversée, la validité du traité s'ecroule en même temps," Williams, 'The Permanence of Treaties' 22 A.J.I.L. 89 (1928): "There has been a general acquiescence in the doctrine that an essential change of conditions involves the obsolescence that is to say, the supervening invalidity of treaty obligations". G. Schwarzenberger A Manual of International Law 170 (5th ed. 1967) and Rest.(2nd) Foreign Relations Law of the United States Art. 153 (1965).

31. J. Starke An Introduction to International Law 373 (6th ed. 1967)

32. Kunz, 'Sanctity of Treaties' 39 A.J.I.L. 194-95 (1945). Cf. A. McNair The Law of Treaties 484 (2d rev. ed. 1961): [C]ircumstances frequently arise which make it necessary to regard

In view of the separate and discrete nature of Article II of the 1923 Treaty, it may be terminated without affecting the validity of the rest of the treaty.

6. Article II of the Treaty should be terminated by virtue of the clausula.

a. The fundamental change in the circumstances of Karma should result in the termination of Article II.

Karma contends that the state of affairs that obtained at the time the treaty was concluded more than half a century ago, has undergone a radical change inasmuch as at that time, Karma was a poor, underdeveloped and sparsely populated nation whose economy was almost wholly agricultural, (F-1) whereas at the present time, Karma is a rapidly developing nation with an increasing population which depends heavily for its economic survival on the mill complex and related industries and which is in urgent need of an adequate supply of electrical energy. (F-4) Karma's recent reasonable and equitable use of the drainage basin is vital if Karma is to alleviate the poverty that for too long has been the lot of its citizens and to provide them with a standard of living in conformity with U.N. recommendations. This radical change in the economic conditions prevailing in Karma is a strong reason for the termination of Art. II. The I.C.J. recognized the legitimacy of arguments based on economic conditions in the Anglo-Norwegian Fisheries Case: "Finally, there is one consideration not to be overlooked...that of certain economic interests peculiar

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one or more of the provisions of a treaty as forming a self-contained unit and requiring separate legal treatment" and C. Jenks The Prospects of International Adjudication 274 (1964).

to a region," and held traditional fishing rights to be buttressed by "the vital needs of the population."[33]

b. The disproportion in the obligations of Karma and New Helios should result in the termination of Article II

It is Karma's contention that the Court should adopt the criterion that "any change of circumstances provides a basis for invocation of the doctrine if the change satisfies the following requirement: the change of circumstances has to be of an extent which decisively affects the burden devolving from the treaty on the parties..."[34] The burden devolving on Karma from the Treaty as interpreted by New Helios is immensely greater than in 1923 as compliance with Art. II now, would have catastrophic effects on Karma's economy. In fact the Treaty has become virtually one-sided and the result of this disproportion should be the termination of Art. II.

c. The principle of good faith in treaty relations requires the termination of Article II

"The performance of treaties is subject to an over-riding obligation of mutual good faith."[35] It would be a substantial iniquity and a flagrant injustice[36] for New Helios to require Karma to adhere to treaty provisions and where there has been a fundamental change in the circumstances of Karma:

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33. [1951] I.C.J. Rep. 116, 133. With respect to the part economic factors can play in the termination of a treaty, see G. Schwarzenberger supra n.30, 169 and generally McNair, 'La terminaison et la dissolution des traités' 22 H.R. 467 (1928).

34. G. Harazti, supra n.17 384, see also Fisheries Jurisdiction Case supra n.25.

35. A. McNair supra n.32 465. See also B. Cheng supra n.3 ch.3.

36. Poch de Caviedes supra n.29 166. See also Tucker v. Alexandroff 183 U.S. 347 (1902)

> "[L]a maxime pacta sunt servanda ne peut s'imposer avec un caractère universel et irréfutable, mais bien plutôt conditionnel et toujours subordonné au principe régulateur de la bonne foi qui, a son tour, fera entrer en scene le principe rebus s.s. quand le changement de circonstances impliquera la violation de la bonne foi elle-même..."[37]

d. Article II may be terminated where performance jeopardizes the very existence of the state or its vital interests.

If treaty obligations are "incompatible with the duties of a Nation towards itself...it is necessarily implied that the treaty does not apply in such a case."[38] As Oppenheim puts it,

> "when the existence or the vital development of a state stands in unavoidable conflict with its treaty obligations, the latter must give way for self-preservation and development in accordance with the growth and vital requirements of a nation, are the primary duties of every state."[39]

As Karma's vital development[40] and economic future are clearly impinged upon and placed in jeopardy by Art. II, Art. II should be terminated.

e. The changes in the circumstances of Karma comply with the criteria proposed by the Vienna Convention on the Law of Treaties.

In the event the Court adopts the formulation of the clausula in the Vienna Convention, it is Karma's contention that the change of circumstances meets its standards inasmuch as a) the

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37. Poch de Caviedes supra n.29, 168 Transl.: The maxim pacta sunt servanda may not be applied universally or irrefutably but under certain conditions and always subject to the ruling principle of good faith which in its turn will call into play the rebus principle when a change of circumstances results in a breach of good faith.

38. E. Vattel Le droit des gens 164 (1758).

39. L. Oppenheim supra n.21 748 (8th ed. 1955). Cf. the words of Bismarck in 1 L. Cavaré supra n.4, 109. Rien ne prévaut contre l'intérêt de l'Etat," and G. Harazti supra n.17, 378.

40. See, in this connection Principle 11 of the Stockholm Declaration. U.N. Doc. A/Conf. 48/C.R.P. 26, which stressed the special needs of developing nations.

change was not foreseen by the parties since the main factor in Karma's recent development program - the Wilderness Region - was until 1955 inaccessible; (F-2) b) the state of Karma's economy in 1923 constituted "an essential basis of the consent of the parties"[41] as evidenced by the very title of the Treaty which refers to "Economic Cooperation" (Annex B) and c) as was argued above (supra p.8), "the effect of the change is radically to transform the extent of obligations still to be performed under the treaty."[42]

B. A true construction of Article II absolves Karma of liability for harm caused to the environment of New Helios.

1. Article II, read as a whole, does not contemplate the infliction of liability for harm caused by one party to another.

The prohibition on pollution in para. 1 of Art. II must be read in conjunction with para. 2[43] which displaces any presumption that might otherwise arise in favour of liability in case of non-compliance with para. 1. Para. 2 plainly contemplates the establishment of a joint commission to supervise the treaty waters, and to combat any possible pollution problem: "The existing customary international law on pollution of drainage basins will...be displaced by treaties providing for the management and control of international drainage basins by international joint agencies"[44]

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41. In S. Rosenne supra n. 16 loc.cit.

42. In S. Rosenne ibid. loc.cit.

43. See Advisory Opinion on the I.L.O. [1922] P.C.I.J. ser. B. Nos. 2,3. 23

44. Bourne,'International Law and Pollution of International Rivers and Lakes' 6 U.B.C.L.Rev. 136 (1971)

2. The canon of contemporaneous meaning removes the activities of the nuclear power station from the scope of Article II.

a. It is generally accepted that the meaning of the words that prevailed at the time of the conclusion of a treaty is controlling.

It is "a generally accepted principle that by the ordinary meaning of the words, the meaning that prevailed at the time when the treaty was concluded has to be understood."[45] This principle has been accepted at least since the time of Vattel[46] and applies "where there is a doubt as to the sense in which the parties to a treaty used words."[47] "Les mots doivent être pris dans le sens qu'était le leur a l'époque de la rédaction et de la conclusion du traité."[48]

b. The word "pollution" as understood in 1923 does not apply to the activities of the nuclear power station.

The discharge of heated waters by the nuclear power station does not constitute 'pollution' since in 1923, the word 'pollution' as used in the Treaty and as understood contemporaneously did not extend to the raising of the temperature in a watercourse. Contemporary dictionaries[49] as well as legal dictionaries and encyclopaedias[50] and bilateral treaties,[51] coincide in restricting

45. G. Harazti, supra n.17, 89.

46. E. Vattel supra n.38 s.298.

47. A. McNair supra n.32, 467.

48. Border Dispute (U.K.-U.S.) int. Dégan L'interprétation des accords en droit international 59 (1963) Transl.: "Words should be given the meaning they had at the time of the drawing up and the conclusion of the treaty."

49. eg. Century Dictionary & Encyclopaedia (1911) which defines 'pollute' as follows: "to make foul or unclean, render impure, defile, soil, taint".

50. eg. Corpus Juris (1930) verbo pollution: "contamination caused by impurities".

51. eg. France-Switzerland Convention, 1904 U.N.Doc. ST/LEG/SER/B/12 no. 196, 701

water pollution to the dirtying or befouling of rivers.

3. Alternatively the principles in dubio mitius[52] and contra proferentem[53] preclude the application of the word 'pollution' in the Treaty to the activities of the nuclear power station.

'Pollution' is a "slippery word, especially when used in relation to water resources. It denotes nothing precise about the state of any given waters; it is thus capable of meaning different things to different people."[54] In view of the ambiguity of the word 'pollution', "that meaning should be preferred which is less onerous to the obligated party, causing less interference with its personal and territorial supremacy."[55] This principle has been sanctioned by the World Court[56] as has the cognate 'contra proferentem' principle. The word 'pollution' should be so interpreted as to exclude from its scope the raising of the temperature of the waters in issue.

4. A literal interpretation of Article II is contrary to the spirit of the Treaty.

To interpret the provisions of Art. II in such a way as to prohibit Karma from having an equitable share in the use of the shared water resources is contrary to the "common and real intention of the parties at the time the treaty was concluded,[57] is

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52. See the Sambiaggio Case in J. Ralston Venezuelan Arbitrations of 1903, 689 (1904).

53. See the Brazilian Federal Loans Case [1929] P.C.I.J. ser.A Nos. 20, 27, 114: "[T]here is a familiar rule for the construction of instruments that where they are found to be ambiguous, they should be taken contra proferentem."

54. Bourne, supra n.44, 117.

55. A. McNair supra n.32, 412. Cf. D. Anzilotti Cours de droit international 113 (1929).

56. Lausanne Peace Treaty Case [1925] P.C.I.J. ser.B No. 12, 25.

57. B. Cheng supra n.3, 114. See also 3 C. Calvo Le droit international théorique et pratique 395 (4th ed. 1888).

garnered from the very title of the Treaty and the provisions of Art. I. The spirit of the Treaty is one of amity, friendship and co-operation and this aim is incompatible with the position taken by New Helios, whose inevitable result would be to stifle Karma's economy.

III. KARMA IS NOT RESPONSIBLE FOR ANY HARM WHICH HAS BEEN OR MAY BE INFLICTED UPON THE ENVIRONMENT OF NEW HELIOS UNDER GENERAL PRINCIPLES OF INTERNATIONAL LAW.

A. Karma is not responsible for environmental injury under customary international law.

1. Karma's use of water resources is consistent with principles accepted by the United Nations.

The Stockholm Declaration accepts the legitimate development concerns of emergent nations. "The environmental policies of all states should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all...."[58] The United Nations conference recognized the special position of such nations as they attempt to reconcile economic development with perfection of the environment. "...standards which are valid for the most advanced countries...may be inappropriate and of unwarranted social cost for the developing countries."[59] Karma's use of water resources to further its economic development is consistent with this approach. Any interference with such

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58. Declaration of the United Nations Conference on the Human Environment - Stockholm (1972) U.N. DOC. A/CONF. 48/CRP. 26, Article 11

59. Id., Article 13 "It would be a complete and adequate answer if the countries wishing pollution abatement would finance such abatement rather than pass the cost on to those countries who can less afford it." Rubin, "Pollution by Analogy: The Trail Smelter Arbitration", 50 Ore. L. Rev. 259 (1971), 274.

uses without regard for the economic consequences would violate this widely accepted statement of principle.[60]

2. The actions of Karma are not in breach of any rule of customary international law found in river treaties.

a) The relevant treaties do not reflect any principles of customary international law.

No uniform approach to state responsibility for environmental damage has been adopted in river treaties.[61] "The way these treaties deal with pollution suggests that special criteria for each drainage basin are more desirable than general principles capable of application to all basins."[62] No customary rules of international law can be derived from these regional arrangements.

b) If the treaties determine generally accepted principles, New Helios has an onus of proving substantial environmental injury.

The treaties refer to obligations to prevent only "substantial"

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60. The Stockholm Conference was to establish "principles of conduct for states in dealing with environmental problems of international significance." The representatives of the 114 countries present adopted the Declaration on the Human Environment. International Law Association, Report of the 55th Conference, New York 1972 499 (1973).

61. "...the problems of pollution control in internationally shared waters are essentially regional and subject to different treaty arrangements." J. Barros and D. Johnston, The International Law of Pollution 70 (1974). For example, see: Article 11(2) of the Indus Waters Treaty: "Nothing in this Treaty shall be construed...as in any way establishing any general principle of law or any precedent." Indus Waters Treaty Between India and Pakistan, Sept. 19, 1960 U.N. DOC. ST/LEG/SER.B/12, 300, 312. See also Article 56(2) of the Frontier Treaty Between the Netherlands and the Federal Republic of Germany, April 8, 1960 U.N. DOC. ST/LEG/SER.B/12, 757.

62. Bourne, supra note 44, 132.

harm, and "excessive" pollution.[63] If they indicate rules of customary international law, New Helios must satisfy the Court that it has suffered "substantial" injury through "excessive" pollution.

c) The treaties indicate that only reasonable measures are to be taken in abating pollution.

Only reasonable pollution control measures are required by treaties.[64] It is submitted that the prohibitive cost of pollution control devices for the paper mill, and the economic hardship involved in any halt of power plant operations, represent unreasonable control measures which Karma should not be obliged to institute.

3. Karma has not violated any principles formulated in unofficial statements related to the use of international drainage basins.

The Helsinki Rules formulated by the International Law Association exempt a state from liability for pollution consistent with its reasonable share of the beneficial uses of a river system.[65] "...as pollution may be a by-product of an otherwise

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63. See Article 4(10) of the Indus Waters Treaty, supra note 61, 305; Article 58(2)(e) of the Frontier Treaty, supra note 61, 758. The distinction between substantial and minor damage could be understood as the difference in the relative value of the modification in relation to the utility of the development. P. Sevette, "Legal Aspects of Hydro Electric Development on Rivers and Lakes of Common Interest", U.N. Doc. E/ECE/136 (1952) E/ECE/EP 98 Rev. 1, 212.

64. See Article 4(10), Indus Waters Treaty, supra note 61, 305; Article 58(3), Frontier Treaty, supra note 61, 758; Article 1(2), Convention sur la protection du lac de Constance contre la pollution, October 27, 1960 U.N. DOC. ST/LEG/SER.B/12 438, 439.

65. International Law Association, Report of the 52nd Conference Helsinki 1966 496 (1967), Article X.

beneficial use of the waters of an international drainage basin, ...international law...does not prohibit pollution per se."[66] Moreover, any duty to take control measures need only be reasonable.[67] It is submitted that Karma's use of water resources is a reasonable and necessary consequence of the pressing requirements for economic development, thereby excusing even substantial environmental harm.[68]

B. Karma is not responsible for environmental injury under principles of law recognized by civilized nations.

1. The concept "sic utere tuo ut alienum non laedas" is inadequate to assess environmental responsibility.

Without specific criteria to determine the existence and extent of state responsibility for pollution, this maxim[69] cannot be invoked to establish Karma's responsibility for injury to the environment of New Helios.[70]

2. The abuse of rights doctrine has no application.

a) It is not a general principle of international law.

While this doctrine may be significant in civil law systems, it cannot be considered a principle de lege lata.[71]

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66. Id., 500.

67. "This duty,...does not apply to a state whose use of the waters is consistent with the equitable utilization of the drainage basin." Id., 499.

68. "If...an existing use causing pollution is found to be reasonable, then it is not illegal even if it causes serious injury and may be continued." Bourne, supra note 44, 127.

69. "Use your property so as not to injure that of another."

70. J. Barros and D. Johnston, supra note 61, 75.

71. Schwarzenberger, "Uses and Abuses of the 'Abuse of Rights' in International Law", 42 The Grotius Society 147 (1957) 150; I. Brownlie, supra note 3, 432; A. Garretson, R. Hayton, C. Olmstead (ed.). The Law of International Drainage Basins 97 (1967).

b) Application of the doctrine requires intent to injure.

Karma's actions were based on legitimate self-interest, without intent to injure a co-riparian. Absent such intent, no question of abuse of rights can arise in international law.[72]

3. The riparian rights doctrine sanctions Karms's use of the drainage basin.

The doctrine of riparian rights entitles an upper riparian to make any reasonable use of river waters which does not substantially interfere with the beneficial uses of a lower riparian.[73] It is submitted that Karma's utilization of water resources in support of economic development is reasonable. Moreover, New Helios must prove substantial damage to its beneficial use under the doctrine in order to establish Karma's liability.

C. Karma cannot be found responsible for environmental injury on the basis of principles reflected in judicial decisions.

1. Karma's use of the drainage basin is not in conflict with the decisions of international tribunals.

Since liability had already been admitted, and as the Tribunal relied almost exclusively on American municipal precedent, the Trail Smelter Arbitration is of dubious international authority.[74] Even if the decision is regarded as authoritative, liability was confined to cases of "substantial injury", established by "clear and convincing evidence."[75] New Helios must satisfy the Court that these conditions have been met. The Lake Lanoux Arbitration,

72. Gutteridge, "Abuse of Rights", 5 Camb. L.J. 22 (1932) 42; F. Berber, Rivers in International Law 209 (1959).

73. Davis, "Themes of Water Pollution Litigation," 3 Environment L. Rev. 237 (1972) 241.

74. Rubin, supra note 59, 268.

75. Trail Smelter Arbitration, (United States v. Canada), 3 U.N.R.I.A.A. 1905 (1941), 1965.

in stipulating that states must make mutual concessions to accommodate inconsistent uses,[76] lends its authority to a principle of reasonable apportionment of beneficial uses under which Karma's needs as a developing nation should be recognized.

2. The decisions of municipal courts do not impugn Karma's actions.

Municipal judicial decisions based on relationships between the states of a federal system are of uncertain value.[77] However, the United States Supreme Court has determined that a state seeking to impose liability for pollution on another must establish a case sufficient to outweigh all considerations in favour of the polluting state.[78] New Helios cannot establish such a case in view of Karma's reasonable use of water resources for purposes of economic development.

D. Strict liability for pollution damage is not an accepted principle of international law.

Karma cannot be held strictly liable for environmental injury. The doctrine of absolute liability in international law is limited to treaties pertaining to areas of very hazardous activities.[79] The general assessment of responsibility for injury is still based on considerations of fault.[80]

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76. Lake Lanoux Arbitration (France v. Spain) 24 I.L.R. 88 (1957) 120.

77. Eagleton, "Use of the Waters of International Rivers", 33 Can. Bar Rev. 1018 (1955) 1022.

78. Missouri v. Illinois 200 U.S. 496, 521 (1906); See also Wyoming v. Colorado 259 U.S. 419 (1922), New York v. New Jersey 256 U.S. 296 (1920), Kansas v. Colorado 206 U.S. 46 (1907).

79. J. Barros and D. Johnston, supra note 61, 74.

80. H. Lauterpacht, Private Law Sources and Analogies of International Law 140 (1927).

E. Karma's exercise of territorial sovereignty is consistent with general principles of international law.

1. There can be no responsibility for pollution in the absence of universally applicable principles.

There is no general agreement as to what constitute principles of international law governing liability for pollution.[81] In the absence of such opinio juris, no legal consequences attach to Karma's activities.

2. Karma's exercise of territorial sovereignty cannot be impugned absent any legal obligation to the contrary.

International law does not extend to acts committed within the territory of a sovereign state in the absence of any contrary binding legal obligation.[82]

F. The equitable utilization principle enables Karma to continue its use of the drainage basin.

1. Equitable utilization is an accepted principle of international law.

International and municipal decisions have accepted equitable utilization as a means of resolving conflicting uses of international drainage basins.[83] The 1966 Helsinki Rules adopted by the

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81. Austin, "Canadian-U.S. Practice and Theory Respecting the International Law of International Rivers", 37 Can. Bar Rev. 393 (1959); "Only regional practices may be discovered, and they must remain clearly and narrowly restricted to those cases where they can be proved beyond doubt." F. Berber Rivers in International Law 149 (1959).

82. "Territorial sovereignty plays the part of a presumption. It must bend before all international obligations,...but only before such obligations." Lake Lanoux Arbitration, supra note 76, 120.

83. "This community of interests becomes the basis of a common legal right,...the perfect equality of all riparian states in the user of the whole or the course of the river. ..." River Oder Case [1929] P.C.I.J. ser. A, No. 23, 27. See also the Lake Lanoux Arbitration, supra note 82, 57; Wyoming v. Colorado 259 U.S. 419 (1922); Nebraska v. Wyoming 325 U.S. 589 (1945); Kansas v. Colorado 206 U.S. 46 (1907).

International Law Association were a detailed statement of the principle.[84] Publicists have advanced it as indicative of current trends in the development of international drainage basin law.[85]

2. The principle should be applied to enable Karma to continue its use of the drainage basin.

Karma should be allowed to continue its utilizations as part of its reasonable and equitable share in the beneficial uses of the river system. In essence, equitable utilization "balances the needs and benefits of one state against the harm done to the other."[86] There can be no question of preferred uses.[87] Prior appropriations are not entitled to protection above the competing needs of co-riparian states.[88]

Karma's utilizations are essential for its continued development. Exploitation of resources in the Wilderness Region is the basis of Karma's economic growth, and the operations of the paper mill are a significant part of that development [F-1-2]. The prohibitive cost of pollution control devices [F-2], if forced upon the mill, would make further operations uneconomic, resulting in a

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84. Report of the 52nd Conference, supra note 65, 1023.

85. These include: F. Berber, supra note 72, 25; Bourne, supra note 44, 23; J. Lipper, "Equitable Utilization", supra note 71, 15 (1967); Eagleton, supra note 77, 1023; 1 D. O'Connell, International Law 616 (2nd ed., 1970); A. Garretson (ed.), supra note 71, 15-88 passim.

86. Eagleton, supra note 77, 1023.

87. "It has been said that domestic use has succeeded navigation as a preferential use. However, substantial authority supporting the proposition has not been found....the granting of such a preference would be inconsistent with a principle of equitable utilization...." Report of the 52nd Conference, supra note 65, 491 Article VI.

88. Id., 493 Article VIII; see also Bourne, "Procedure in the Development of International Drainage Basins", 22 U. Toronto L.J. 172 (1973) 189.

halt to production. This would threaten further development in the region and jeopardize Karma's economic stability. Power from the nuclear plant is essential if Karma's growing manufacturing and industrial potential is to be realized [F-3]. Power shortages have already curtailed industrial expansion [F-4]. Without an increasing supply of power Karma's industrial development will be seriously jeopardized.

New Helios, as an advanced and wealthy nation [F-1], can easily absorb the cost of purification facilities, especially since the alternative involves interference with a co-riparian's development. The needs of a brewery cannot outweigh those of a power plant which must supply energy for industrialization and food production [F-4]. The brewery can distribute any additional expenses incurred among consumers of its products. Lost recreational amenities are insignificant when contrasted with the economic well-being of thousands of mill workers.

Pollution is just one factor to be considered in determining "the proper utilization of a water resource."[89] It is a consequence of development utilizations, and as such is part of Karma's right to a "reasonable and equitable share in the beneficial uses of the drainage basin."[90] The injuries suffered by New Helios cannot compare with the economic and social costs involved in halting Karma's utilizations.[91]

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89. Bourne, supra note 44, 118.

90. Bourne, supra note 88, 173.

91. "It is of little value now to warn nations saddled with concrete, visible and pressing economic problems that they must...revise their goals, because they are contributing to a vaguely defined ecological crisis." Dickstein, "International Law and the Environment: Evolving Concepts", Yearbook of World Affairs 245 (1972) 248.

G. Karma was not required to consult New Helios under general principles of international law.

1. The duty to give notice in international law is not mandatory.

The requirement to give notice of utilizations to co-riparians is confined to cases involving a threat of serious injury.[92] Karma was not required to notify New Helios with respect to the power plant since the utility operates under strict international safeguards [F-3]. Moreover, it is impossible to determine at the present time whether future power operations will inflict serious injury on New Helios.

2. Karma was not required to obtain the consent of New Helios for its utilizations.

"...the idea that a riparian state has a veto over development in the territories of co-riparian states is...no longer accepted."[93] The difficulty of determining the extent of possible future injury flowing from a proposed utilization does not entitle the co-riparian to withhold its consent and thereby paralyse development in the basin. Accordingly, Karma was entitled to proceed with its uses without consent.

IV. NEITHER DAMAGES NOR INJUNCTIVE RELIEF SHOULD BE AVAILABLE TO NEW HELIOS.

A. If Karma is found responsible for harm caused to the environment of New Helios, no injunction should be granted.

1. The Court does not have the jurisdiction to grant an injunction.

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92. Bourne, supra note 88, 175.

93. Bourne, "The Right to Utilize the Waters of International Rivers", 3 Canadian Yearbook of International Law 187 (1972) 244; "...co-riparians do not have what in effect would amount to a right of veto;...." de Arechaga, "International Legal Rules Governing Use of Waters from International Watercourses", 2 Inter American L. Rev. 329 (1960) 337.

While interlocutory injunctive relief is authorized by Article 41(1) of the Stature of the Court, final injunctive relief is nowhere authorized.[94] No international judicial authority supports the grant of a permanent injunction.

2. Should the Court find that it is authorized to grant an injunction, such relief would be inequitable in the circumstances.

The harm suffered by the applicant, "is actually far less serious than the harm that would be suffered by the respondent in obeying an injunction..."[95] Cessation of the paper mill operations would result in harm to Karma far in excess of any injury suffered by New Helios. "...it is doubtful whether injunctive relief could provide sufficient flexibility and compromise. It would clearly be inappropriate to prohibit any use resulting in trans-boundary injury...."[96] A quia timet injunction with respect to the nuclear power station is inappropriate as "the mere prospect of probability of injury does not entitle the plaintiff to this relief" unless the damage would be irreparable.[97] It is submitted that any injury resulting from the power plant when fully operational would not be irreparable.

3. Monetary damages constitute sufficient compensation.

Should Karma be found responsible for environmental injury, indemnification for additional water purification facilities, and the installation of cooling lagoons, would be adequate compensation,[98]

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94. 3 M. Whiteman, Digest of International Law, 335 (1964).

95. J. Dobbyn, Injunctions in a Nutshell, 81 (1974).

96. Lester, "River Pollution in International Law", 47 Am. J. Int'l. L. 828 (1963), 848.

97. A. Wisdom, The Law of Pollution, 70 (1966).

98. Chorzów Factory (Jurisdiction) Case [1927] P.C.I.J., ser. A, No. 9, 27.

thereby obviating the need for an injunction.

B. Monetary compensation is not appropriate in the circumstances.

"...one can deny the existence of a rule that compensation must always be paid when existing beneficial uses are seriously injured."[99] A state may cause injury to the beneficial uses of co-basin states if its own activities involve a reasonable and equitable share in the beneficial uses of the river basin.[100] Since Karma's use of the drainage basin for the purposes of economic development must be viewed as reasonable and equitable, compensation for attendant injury to New Helios is not necessary.

C. The appropriate relief would be the recommendation of a permanent joint commission.

"In this complex situation, a regulatory rather than an adjudicative process would seem appropriate."[101] The complexity of the factors which the Court should consider in "prescribing the level of cleanliness that is tolerable in light of the dominant water needs of the community"[102] is such that a regional commission to regulate the use of the river system is appropriate.[103]

The typical judgment of the Court is "a declaration of law rather than an order as to particular relief or a specific relief.[104] It is submitted that the Court may follow this practice and strongly recommend that the parties establish a permanent joint commission to regulate boundary waters.

99. Bourne, supra note 88, 195.
100. Id., 258.
101. Lester, supra note 96, 848.
102. Bourne, supra note 44, 118.
103. "...law or judicial action alone is not able to provide a permanent solution to the continuing and changing problems of a river system." Eagleton, supra note 77, 1026.
104. David Davies Memorial Institute of International Studies, International Disputes, The Legal Aspects 137 (1972).

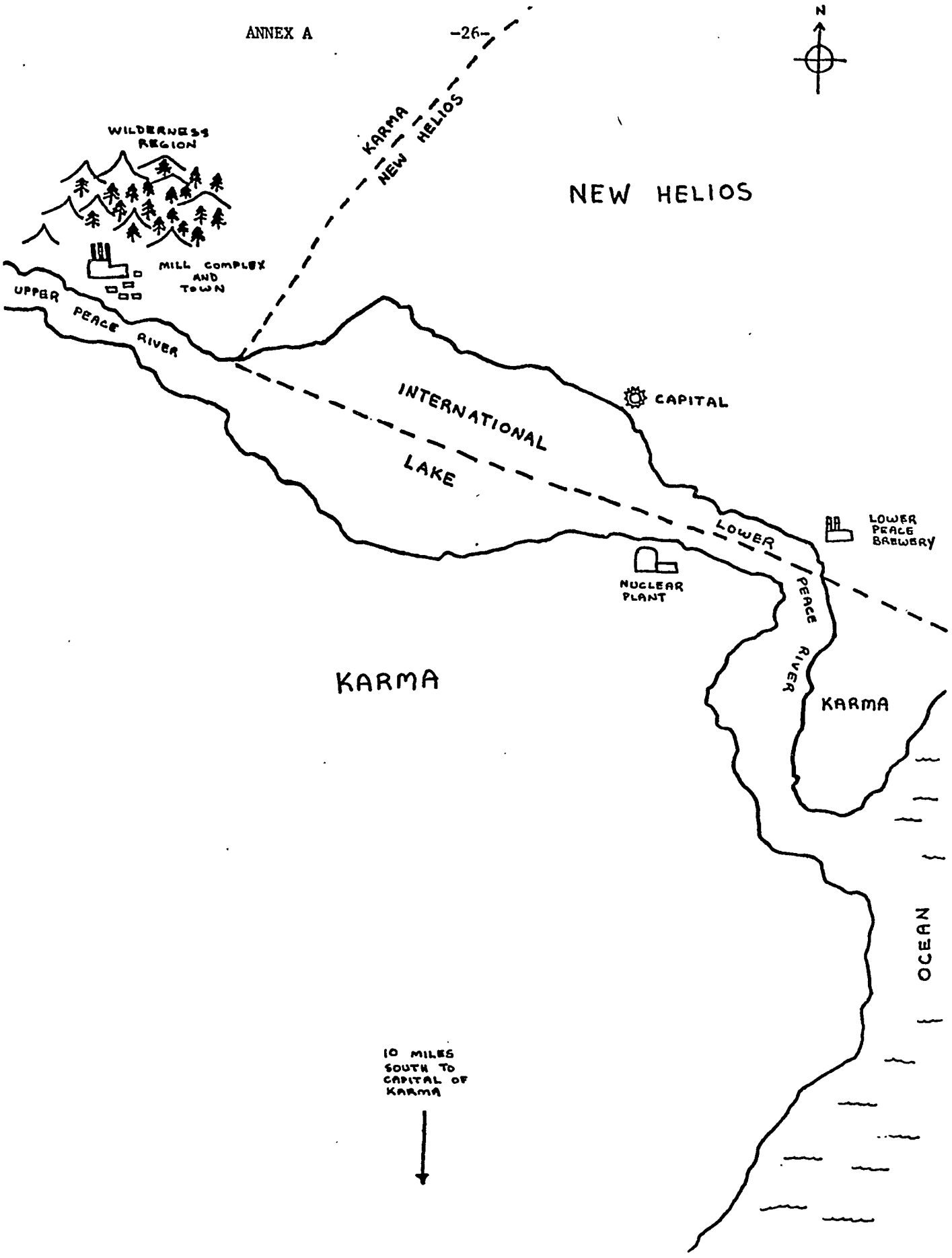
CONCLUSION

It is respectfully requested that this Honourable Court:

1. Dismiss all claims for declarations or damages sought by New Helios.
2. Grant Karma a declaration that it may continue to utilize the waters of the drainage basin for purposes of economic development.
3. Recommend the establishment of an international commission to supervise the use of boundary waters.

All of which is respectfully submitted.

Counsel for Karma.


N
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.