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CASE COMMENT: *Scherk v. Alberto-Culver Company* - An arbitration clause in an international business transaction is enforceable notwithstanding section 29(a) of the Securities Exchange Act of 1934

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NOTES

POLLUTION OF INTERNATIONAL DRAINAGE BASINS: THE 1975 PHILIP C. JESSUP MOOT COURT COMPETITION

*It is a generally accepted principle that a state does not have the right to exercise absolute sovereignty over internal or shared waters which comprise part of an international drainage basin. It is equally well accepted, however, that a state has the right to some use of such waterways, but the extent of this right remains unresolved. The 1975 Jessup Problem presents a prototype case for exploring the traditional and emerging law of international drainage basins. These memorials present a practical application of the various theories of water utilization and, in particular, of their relation to an environmental dispute between a developed and a developing state.**

STATEMENT OF FACTS

The Upper Peace River rises in the State of Karma and is wholly within Karma until it flows into the International Lake which is twenty miles long and ten miles wide at its broadest reach. The State of New Helios borders on the entire northern shore of International Lake and the State of Karma on its entire southern shore. The capital of New Helios is at the mouth of the Lower Peace River. International Lake empties into the Lower Peace River which continues to form the boundary between Karma and New Helios. It then wholly enters Karma again until it empties into the Ocean.

Both Karma, a developing and primarily agricultural state, and New Helios, a developed industrialized nation enjoying a high standard of living, are members of the United Nations. The only bilateral agreement between the parties concerning these waters is the 1923 Treaty of Amity, Friendship and Economic Cooperation.¹

* The memorials were submitted to the Jessup Competition by the Brooklyn Law School participants and were awarded the Eastern Regional prize for best memorial. The introductory sections have been modified and combined; the arguments have been reproduced in their entirety.

1. The following are relevant Articles of the 1923 Treaty of Amity, Friendship and Economic Cooperation [hereinafter cited as 1923 Treaty].

Article I

In order to carry out the purposes and objectives of this Agreement, the States

The construction in 1955 of a tunnel-roadway first made commercial logging feasible in Karma's Wilderness Region, located on the Upper Peace River. In 1965 a large, privately owned pulp and paper mill was opened upon the recommendation of the World Development Authority (WDA), an intergovernmental organization. The WDA also recommended the construction of facilities for treatment of wastes from the mill and of sewage from the shantytown of 20,000, where mill workers and their families live. Because of the huge expense involved, the mill company has not built these facilities, and the wastes and sewage are discharged into the Upper Peace River untreated. The waters of International Lake, from which the Capital of New Helios has for many years drawn its drinking water, have been rendered undesirable for human potation and its beaches were closed in 1970 when an increase in typhoid was reported. Both New Helios and the Lower Peace Brewery, one of its more successful industries which has relied on the waters for thirty years, have already installed sophisticated water purification facilities at considerable

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.

costs. If no remedial actions are taken, New Helios will be forced to further purify the waters of the lake at a documented cost of \$2,000,000, and the brewery may be forced to seek a new source of water at an increased cost.

In 1970, without notification to New Helios, Karma began construction of a several-hundred-megawatt nuclear power plant at the mouth of the Lower Peace River. The utility is a state-owned corporation with its equipment and fuel supplied by a third nation under strict international safeguards. In May of 1974 the plant was placed in operation at 10% of its total capacity, emptying its cooling waters back into the Lower Peace River. The plant was constructed to meet the growing energy demands of the capital of Karma, located fifty miles south of International Lake. When the construction of the nuclear plant first commenced, protests were lodged with the government of New Helios by citizens fearing the ruin of recreational uses of the Lower Peace River and by the management of the Lower Peace Brewery, which requires clear, cool waters in the production of beer. If the plant is permitted to become fully operational, the Brewery will be forced to install cooling lagoons at a documented cost of \$900,000 or to find a new source of water.

New Helios' protests against the location and construction of the plant have met with curt statements that Karma has the sovereign right to work for the development of its nation in any way possible. In July of 1974 New Helios submitted a formal protest to Karma requesting that the dumping of wastes and sewage from the paper mill and shantytown and the operation of the nuclear plant be halted immediately. The ensuing diplomatic exchange was unfruitful, and citizens groups in New Helios are threatening a boycott of all goods produced in Karma. Businessmen in Karma have urged their legislature to ban the sale of Lower Peace Beer.

New Helios and Karma agreed to submit the dispute to a chamber of the International Court of Justice, pursuant to Article IV, para. 3, of the 1923 Treaty. The states waive the defenses of sovereign immunity and local remedies and stipulate that the 1923 Treaty is the only bilateral agreement binding on them.

QUESTIONS PRESENTED

I. Whether Karma is responsible under the 1923 Treaty of Amity, Friendship and Economic Cooperation for the harm which has been or may be inflicted upon the environment of New Helios.

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

III. Whether any relief should be available to New Helios.

MEMORIAL FOR NEW HELIOS
SUMMARY OF ARGUMENT

Karma's polluting uses of the international drainage basin composed of the Upper and Lower Peace Rivers and International Lake are causing substantial harm to New Helios and its nationals. Such uses are violative of Karma's obligations under the 1923 Treaty of Amity, Friendship and Economic Cooperation and under well-recognized principles of international law. Karma is not absolved of liability simply by virtue of being a developing state. New Helios is entitled to injunctive relief to prevent future harm and also to monetary damages to compensate for past and future injuries.

ARGUMENT

I. *Karma is violating both the letter and the spirit of the 1923 Treaty of Amity, Friendship and Economic Cooperation through its use of the Upper and Lower Peace Rivers and the International Lake.*

The 1923 Treaty of Amity, Friendship and Economic Cooperation was designed to compel the non-polluting use of the boundary waters between New Helios and Karma.² The continued and expanded dumping of harmful industrial waste, raw sewage and cooling waters is a polluting use of the boundary waters and violates both the specific language and intent of the 1923 Treaty. There has been no disavowal by Karma of the well-recognized principle that parties to a treaty are bound by it.³ As the only pertinent bilateral agreement in force between New Helios and Karma, the 1923 Treaty has a special place in determining the legal obligations between the two nations.

It is a well-respected principle of international law that treaty provisions should be interpreted in light of their ordinary

2. 1923 Treaty, Art. II.

3. See Vienna Convention on the Law of Treaties, May 23, 1969, Art. 26, U.N. Doc. A/CONF.39/27 [hereinafter cited as Vienna Convention]. See also C. HYDE, 2 INTERNATIONAL LAW 1454 (1945).

and natural meaning as well as in the context in which they occur.⁴ The ordinary and natural meaning of the language of Article II is clear: "[N]either State shall pollute boundary waters or other waters running between them so as to injure the health or property in the other State."

Karma's actions have clearly altered the quality of the river and lake waters it shares with New Helios to the extent that the health and economic well-being of the citizens of New Helios have been injured. Typhoid, unpotable water, damaged recreational facilities and a substantial economic burden on one of New Helios' major industries all testify to the injury that results from Karma's current uses of the waterways. This injury will be compounded if Karma's activities are allowed to continue. These actions must be deemed polluting under the explicit treaty language. That such acts are to be considered polluting within the ordinary meaning of the term is further demonstrated by the attitude of the International Law Association [hereinafter referred to as ILA] as to what constitutes a polluting use of an international drainage basin. In 1966, the ILA adopted the following definition in its Rules on the Uses of the Waters of International Rivers: "[T]he term 'water pollution' refers to any detrimental change resulting from human conduct in the natural composition, content, or quality of the waters of an international drainage basin."⁵ Publicists are in agreement.⁶

In the absence of any specific technical definition in the 1923 Treaty of what constitutes a polluting use, the natural and ordinary meaning encompasses the clearly injurious acts initiated by Karma. New Helios acknowledges that in order to be polluting the usage must not institute a mere trifling change. The injuries already caused by Karma have resulted in both a significant dilution of the overall quality of the shared waters as well as a quantitative drop in the volume of potable water available. A vast number of treaties describe a polluting act as one which is injurious or deleterious to the health or well-being of other uses of shared waters.⁷

4. See, e.g., Vienna Convention, Art. 31; Advisory Opinion on the Admission of States to the United Nations, [1950] I.C.J. 4, 8.

5. International Law Association [hereinafter cited as ILA], Helsinki Rules on the Uses of the Waters of International Rivers, Report of the Fifty-second Conference, Helsinki, adopted Aug. 20, 1966 [hereinafter cited as Helsinki Rules].

6. See Lester, *Pollution*, THE LAW OF INTERNATIONAL DRAINAGE BASINS 89, 90 (A. Garretson, R. Hayton & C. Olmstead eds. 1967).

7. See, e.g., Exchange of Notes between the United States and Canada constituting

An examination of the 1923 Treaty in its entirety demonstrates that in negotiating the treaty, both parties paid special heed to the problems of pollution. It is significant that the first subject discussed after the preambular language of Article I is the problem of water pollution.⁸ Such a specific water pollution provision was not adopted by indirection; it is clear that the parties committed themselves to a non-polluting use of shared waterways.

Karma's usage of the waters shows a lack of good faith and is violative of Karma's equitable as well as legal responsibilities under the 1923 Treaty. Karma's actions are particularly reprehensible in light of New Helios' repeated protests and its willingness to discuss treaty disagreements. New Helios' complaints have been met with curt answers and, furthermore, no offer of compensation has been made. Such actions controvert recognized principles requiring a state to act reasonably and equitably with its co-riparians, even in the absence of specific treaty obligations. The Commission on the Non-maritime Utilization of International Waters agrees, for example, that one of the fundamental principles of international law in this area includes the following prohibition:

No state can undertake works or utilization of a watercourse or hydrographic basin which seriously affect the possibility of utilization of the same waters by other states, except on condition of assuring the enjoyment of the advantages to which they are entitled . . . as well as adequate compensation for any loss or damage.⁹

Karma's breach of the 1923 Treaty alone places it in violation of its responsibilities under international law.

an Agreement on the St. Lawrence Waterway, Feb. 27, 1959, Section F, 341 U.N.T.S. 4, 6; Convention between Rumania, Bulgaria, Yugoslavia and the Soviet Union concerning Fishing in the Waters of the Danube, Jan. 29, 1958, Art. 7, 339 U.N.T.S. 58, 63; Agreement between Poland and East Germany concerning Navigation in Frontier Waters and the Maintenance and Use of Frontier Waters, Feb. 6, 1952, Art. 17, 304 U.N.T.S. 130, 168.

8. See 1923 Treaty, Art. II.

9. Institute of International Law, "Salzburg Resolution" (1961) Art. 4, reported in 56 AM. J. INT'L L. 737, 738 (1962). See also ILA, Report of the Forty-eighth Conference, Agreed Recommendation No. 1 (1958).

II. *Karma is contravening generally recognized principles of international law through its use of shared waterways to the detriment of a co-basin state.*

A. *As a co-riparian, Karma's actions violate the principles of sic utere and droit de voisinage.*

Karma has neither exercised vigilance or concern nor made any effort to abate the extraterritorial harm caused by its actions. *Sic utere tuo ut alienum non laedus* ("use your property so as not to injure that of another") is one of the "general principles of law recognized by civilized nations" which must be examined under Article 38 of the Statute of the International Court of Justice.¹⁰ The principle was applied as early as 1900 by a Swiss Federal Tribunal which held that no state may use its territory in such a way as to threaten the lives of persons in an adjoining state's territory.¹¹ In the *Trail Smelter Arbitration*,¹² the only previous international adjudication dealing directly with an environmental pollution claim, the Tribunal found that

under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or person therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.¹³

Similarly, in his concurrence in the *Corfu Channel*¹⁴ opinion, Judge Alvarez pointed out that "every State is bound to exercise proper vigilance in its territory" and that failure to do so will render the state responsible for injury to other states and their nationals.¹⁵

A large volume of treaty law concerning the pollution of international lakes and rivers also testifies to the world community's adherence to the principle of limited territorial sovereignty. "Existing treaty practice demonstrates at a minimum that numerous nation states have limited their freedom to pollute

10. 1 H. LAUTERPACHT, *OPPENHEIM'S INTERNATIONAL LAW* 346-7 (8th ed. 1955).

11. *Cantons of Soleure v. Argovie*, discussed in 15 AM. J. INT'L L. 149 (1921).

12. *Trail Smelter (U.S. v. Canada)*, 3 U.N.R.I.A.A. 1905 (1941) [hereinafter cited as *Trail Smelter*].

13. *Id.* at 1965-66.

14. *Corfu Channel* [1949] I.C.J. 4 [hereinafter cited as *Corfu Channel*], cf. *Case of the S.S. "Lotus"* [1927] P.C.I.J. 18, ser. A, No. 10.

15. *Corfu Channel* at 44.

international streams and lakes and thereby have practiced the principle of limited sovereignty."¹⁶

The recent Helsinki Rules support the doctrine of *sic utere*. "Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial use of the water of an international drainage basin."¹⁷ The concept of a reasonable and equitable share in the beneficial use of water serves as a particularized definition of an acceptable use of property under the doctrine of *sic utere*. In 1972 the world community also expressed its support for the doctrine:

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 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.*

Karma has violated the principle of *sic utere* by using shared waterways without concern for extraterritorial consequences. The disposal of human and industrial waste is but one example of Karma's disregard of this principle. Perhaps the most flagrant violation is construction of the nuclear power plant at a site which is particularly harmful to New Helios.

Karma is liable for damage to New Helios and its nationals under the well-established rules of *voisinage* as well as under the international concept of *sic utere*. The *droit de voisinage* refers to rules and practices which arise solely out of the contiguity of two states. One such rule is that "[n]o state may change the natural flow or state of a frontier river or of any watercourse which flows from one state into another in any manner which causes the other state damage."¹⁸

Karma's practice of allowing the emission of harmful pollutants from its territory into shared river and lake waters changes the state of these waterways to the substantial injury of New

16. Utton, *International Water Quality Law*, INTERNATIONAL ENVIRONMENTAL LAW 157 (L. Teclaff & A. Utton eds. 1974) [hereinafter cited as Utton].

17. Helsinki Rules, Art. IV.

18. Report of the U.N. Conference on the Human Environment, Stockholm Declaration on the Human Environment, U.N. Doc. A/CONF.48/14, Principle 21 (1972) (emphasis added) [hereinafter cited as Stockholm Declaration].

19. N. GREEN, INTERNATIONAL LAW 190 (1973). See also F. BERBER, RIVERS IN INTERNATIONAL LAW 211-23 (1959); Hull & Koers, *A Regime for World Ocean Pollution Control*, INTERNATIONAL RELATIONS AND THE FUTURE OF OCEAN SPACE 101 (R. Wirsing ed. 1974).

Helios and its nationals. This practice defies international principles of *sic utere* and *voisinage*.

B. *Karma is responsible to New Helios under the recognized principle of strict liability.*

Karma must be held strictly liable to New Helios for injury caused by pollution. The concept of strict liability has been accepted in international law, as evidenced by conventions regarding oil pollution at sea, radioactive materials, and liability for damage caused by space objects.²⁰ Indicative of the application of strict liability to the international law of pollution are the voluntary actions of several states which had caused injury to other states. On two occasions when negligence would have been very difficult to prove, the United States voluntarily assumed responsibility for international pollution. Following a 1954 nuclear test in the Marshall Islands in which negligence was never established, the United States tendered \$2,000,000 *ex gratia* to compensate Japan for damages resulting to its fishermen.²¹

The *Trail Smelter* and *Corfu Channel* cases may be viewed as evidence of the emergence of strict liability as a principle of international law. In the *Trail Smelter* arbitration, Canada's liability for the discharge of sulphur dioxide fumes across the border into Washington State was not at issue. Canada admitted liability and the Special Arbitral Tribunal was instructed to determine only the extent of damage and the remedies to be administered.

If *Trail Smelter* is to be viewed, as it should be, as an application of public international law, rather than of common law, the irreducible minimum of the relevant general principles of law contained therein is the strict liability which Canada owed to the United States.²²

The *Corfu Channel* case has been interpreted as establishing "prima facie liability for the harmful effects of conditions created even by trespassers of which the territorial sovereign has knowl-

20. See, e.g., International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, Arts. IV and V, 9 INT'L LEG. MAT'S 45, 48-51 (1970); Convention of International Liability for Damage Caused by Space Objects, Mar. 29, 1972, Art. III, reported in 66 AM. J. INT'L L. 702, 703 (1972).

21. Property Damages Resulting from Nuclear Tests in the Marshall Islands, Jan. 4, 1955, T.I.A.S. No. 3160. See also Bikini Atoll (1954 fallout), H.R. REP. No. 110, 88th Cong. 1st Sess. (1963) and H.R. Rep. No. 1193, 88th Cong. 2nd Sess. (1964).

22. Goldie, *Development of an International Environmental Law—An Appraisal*, LAW, INSTITUTIONS, AND THE GLOBAL ENVIRONMENT 132 (J. Hargrove ed. 1972).

edge or means of knowledge.”²³ The *Lake Lanoux* Tribunal also considered that strict liability would govern in the event of a finding for Spain. The decision in favor of France was due to the Tribunal's conclusion that Spain had not shown any injury; if France's activities were harmful,

[i]t could have been argued that the works would bring about a definitive pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which could injure Spanish interests. Spain could then have claimed that her rights had been impaired. . . .²⁴

In none of these three cases was the issue of fault primary; liability was assumed if damage could be found. Substantial damage has been shown in the instant controversy, as evidenced by the fact that both New Helios and the Lower Peace Brewery have already incurred considerable expenses and will incur documented expenses of at least \$2,900,000 in the future. The cases discussed above require that Karma be held strictly liable for the substantial injury to New Helios without reference to negligence or intent.

C. Karma's actions violate international law because New Helios has established prior and preferential uses.

Karma has the right to reasonable use of shared waters under the 1923 Treaty and, as a co-basin state, under the Helsinki Rules; this right must, however, be balanced against the long-established international doctrine of prior use. New Helios' present and prior established uses of the shared waters are greatly jeopardized by Karma's unreasonable and substantially harmful activities. Several treaties have supported the view that prior uses should be accorded preference.²⁵

The goal of equitable utilization “is to provide maximum benefit to each basin State from the uses of the waters with mini-

23. Brownlie, *A Survey of International Customary Rules of Environmental Protection*, INTERNATIONAL ENVIRONMENTAL LAW 1, 2 (L. Teclaff & A. Utton eds. 1974).

24. *Lake Lanoux Arbitration* (Spain v. France), 12 U.N.R.I.A.A. 281 (1957), 53 AM. J. INT'L L. 156, 160-161 (1959) [hereinafter cited as *Lake Lanoux*].

25. See, e.g., General Convention concerning the Hydraulic System concluded between Rumania and Yugoslavia, Dec. 14, 1931, Art. 19, 135 L.N.T.S. 71, 88 (safeguarded already acquired rights); Agreement concerning the Frontier between Germany and Belgium, Nov. 7, 1929, Art. 70, 121 L.N.T.S. 327, 365 (recognition of servitudes imposed).

num detriment to each.”²⁶ Article V of the Helsinki Rules lists relevant factors to be considered in determining what is reasonable and equitable. While under Article VI, no use is “entitled to any inherent preference over any other use,” a general consideration under Article V is whether a use is essential to human life.²⁷ Surely the most essential use of water and that with priority is that for human potation. The capital of New Helios has drawn drinking water from International Lake since first habitation. Such use fulfills a social and economic need, as required by Article V(e), as do uses for recreation and for production by the Lower Peace Brewery. Under Article V(f) the “population dependent on the waters of the basin in each basin State” is to be considered in determining equitable utilization. The capital of New Helios and not that of Karma is located on International Lake. Treaty law also lends support to New Helios’ contention that use of these waters for drinking purposes in particular should be accorded a preference.²⁸ While it may be argued that use by a commercial brewery is no more valuable than use by Karma’s commercial pulp and paper mill, the fact remains that New Helios’ uses were “existing” as contemplated by Article V(d) long before Karma began its unreasonable use of the waters. The fact that Karma’s mill has been in operation for ten years does not defeat this priority for two reasons: the effects of pollution cannot always be detected rapidly, and New Helios has already been forced to take remedial measures in the past. New Helios has never used shared waters to the substantial detriment of its co-basin state.

D. Because Karma and New Helios share a unified basin, Karma’s failure to notify and negotiate as to planned uses was in derogation of its duties under international law.

The current practice in international law is to look at a water system as a unified whole, employing such terms as “river basin,” “drainage basin,” or “hydrographic basin.” It is of no import that the Upper Peace River is wholly within the territory of Karma. As early as 1929, the Polish government contended that the juris-

26. J. BARROS & D. JOHNSTON, *THE INTERNATIONAL LAW OF POLLUTION* 78 (1974) [hereinafter cited as BARROS].

27. BARROS at 79.

28. See, e.g., Treaty between the United States and Mexico relating to the Utilization of the Waters of the Colorado, Feb. 3, 1944, Art. 5, 59 Stat. 1219, T.S.N. 994, 3 U.N.T.S. 313, 324; Treaty between Great Britain and the United States relating to Boundary Waters and Questions arising along the Boundary between the United States and Canada, Jan. 11, 1909, Art. VII, 36 Stat. 2448, T.S.N. 548.

diction of the International Commission of the Oder did not extend to the navigable portions of tributaries wholly within Poland. The Permanent Court of International Justice disagreed and held in the *Oder River*²⁹ case that the two rivers solely within the geographic boundaries of Poland were a part of the unified River Oder system and, therefore, subject to the Commission's authority. In 1958, the ILA adopted the term "international drainage basin" and defined it as "an area within the territories of two or more States in which all the streams of flowing surface water . . . drain a common watershed terminating in a common outlet or common outlets either to the sea or to a lake"; it further established a principle of international law that "a system of rivers and lakes in a drainage basin should be treated as an integrated whole (and not piece-meal)."³⁰ As a state sharing an international drainage basin and as a riparian owner, New Helios has rights regarding the entire basin system, including the Upper and Lower Peace Rivers and International Lake, and Karma has recognized obligations.

Under the Helsinki Rules, a state

(a) must prevent any new form of water pollution or any increase in the degree of existing water pollution in an international drainage basin which would cause substantial injury in the territory of a co-basin State, and (b) should take all reasonable measures to abate existing water pollution in an international drainage basin to such an extent that no substantial damage is caused in the territory of a co-basin State.³¹

A state violating (a) must "cease the wrongful conduct and compensate the injured co-basin State for the injury that has been caused to it," and a state failing to take measures under (b) "shall be required promptly to enter into negotiations with the injured State with a view toward reaching a settlement equitable under the circumstances."³² The Stockholm Conference recommended "that the attention of Governments be drawn to the need to consult bilaterally or regionally whenever environmental conditions

29. Case of the Oder River, [1929] P.C.I.J., ser. A, No. 23.

30. ILA, Report of the Forty-eighth Conference 99, New York (1958). See also Convention between Rumania, Bulgaria, Yugoslavia and the Soviet Union concerning Fishing in the Waters of the Danube, Jan. 29, 1958, 339 U.N.T.S. 58 (1959); Geneva Convention relating to the development of hydraulic power affecting more than one State, Dec. 9, 1923, 36 L.N.T.S. 77.

31. Helsinki Rules, Art. X.

32. Helsinki Rules, Art. XI (2).

or development plans in one country could have repercussions in one or more neighboring countries.”³³ The recent Recommendations of the European Organization for Economic Co-operation and Development require that “[c]ountries should refrain from carrying out projects or activities which might create a significant risk of transfrontier pollution without first informing the countries which are or may be affected. . . .”³⁴ The duties of notice and of negotiation or arbitration among co-basin states have become generally accepted principles of international law, as evidenced by numerous treaties governing river basins. Articles III and IV of the 1923 Treaty, as well as numerous other treaties governing river basins, evidence acceptance of this principle.³⁵ Treaties have required that advance consultation be obtained before proceeding with new and potentially harmful uses of shared waterways.³⁶ This has been especially important when radioactive substances have been involved.³⁷

The *Lake Lanoux Arbitration*³⁸ is the latest international juridical expression relating to environmental regulations. The Tribunal stated that an

upstream State has, according to the rules of good faith, the obligation to take into consideration the different interests at stake, to strive to give them all satisfactions compatible with the pursuit of its own interests, and to demonstrate that . . . it has a real solicitude to reconcile the interests of the other riparian with its own.³⁹

The Tribunal further noted that a state is obligated under inter-

33. Report of the U.N. Conference on the Human Environment, Recommendations on the Planning and Management of Human Settlements for Environmental Quality, U.N. Doc. A/CONF.48/14, Rec. 3 (1972) [hereinafter cited as Recommendations on Planning and Management].

34. OECD, Recommendations of the Council on Principles Concerning Transfrontier Pollution, Title E (8), C(74)224 (Nov. 21, 1974).

35. See, e.g., Indus Waters Treaty between India and Pakistan, Sept. 19, 1960, Art. 9, 419 U.N.T.S. 125, 150; Convention between Austria and Yugoslavia concerning water economy questions relating to the Drava, May 25, 1954, Art. 7, 227 U.N.T.S. 128, 132; Geneva Convention relating to the Development of Hydraulic Power affecting more than one State, Dec. 9, 1923, Art. 12, 36 L.N.T.S. 77, 85.

36. See, e.g., Convention between Austria and Yugoslavia concerning water economy questions relating to the Drava, May 25, 1954, Art. 4, 227 U.N.T.S. 128, 132; Convention between Baden-Württemberg, Bavaria, Austria on the Protection of Lake Constance against Pollution, Oct. 26, 1960, 1 Feuille fédérale de la Confédération Suisse 1171 (1961).

37. See, e.g., Treaty establishing EURATOM, Mar. 25, 1957, Art. 37, 298 U.N.T.S. 169, 185.

38. Lake Lanoux, 53 AM. J. INT'L L. 156.

39. *Id.* at 169.

national law to undertake preliminary negotiations and to give notice of intended actions. The selection of a site for a nuclear plant is particularly crucial and should be subject to the highest degree of scrutiny before a project is undertaken. Karma has placed its nuclear plant ten miles from the capital of New Helios and fifty miles from its own capital, thus exposing the citizens of New Helios to the risk of harm from a radioactive accident. This is particularly significant since it is the businessmen in Karma's capital who apparently require the electrical energy. The *Corfu Channel*⁴⁰ case held that a state has a duty to warn other states of disasters, and Karma clearly has not met this duty. A nuclear plant creates the possibility of radioactive accidents. In violation of international law and of the 1923 Treaty, Karma did not exhibit solicitude for the rights of its co-basin state; nor did it give notice or negotiate. Karma demonstrated bad faith and flaunted international obligations through its curt responses to repeated protests by New Helios. The Stockholm Recommendations urged "that the attention of Governments be drawn to the need to consult bilaterally or regionally whenever environmental conditions or development plans in one country could have repercussions in one or more neighboring countries."⁴¹ Karma made no effort to consult or cooperate. Laylin stresses the international duty to arbitrate water disputes and emphasizes that water disputes are unlike those which involve other common resources since monetary damages are rarely adequate.⁴² Karma showed no solicitude for the citizens of New Helios and acted in flagrant violation of its obligation to enter into prior negotiations.

III. *Karma's status as a developing nation does not relieve it of its fundamental responsibility to protect the environment.*

Pollution causes irreparable harm, and its continuance is particularly alarming in view of the fact that many effects of pollution are as yet unknown. "Since the flow of river waters follows the dictates of gravity rather than arbitrary political boundaries, one country's sanitation is another's poison."⁴³ Indeed, it is possible that undiscoverable effects of pollutants intro-

40. See note 14 *supra*.

41. Recommendations on Planning and Management, Rec. 3.

42. Laylin & Bianchi, *The Role of Adjudication in International River Disputes: The Lake Lanoux Case*, 53 Am. J. Int'l L. 30, 31 (1959) [hereinafter cited as Laylin].

43. Utton at 154.

duced into the shared waterways by Karma are being inflicted upon the entire world. The disregard exhibited by Karma in polluting the Upper Peace River, International Lake, the Lower Peace River and, ultimately, the ocean is irresponsible and intolerable. The ocean represents the common heritage of mankind.⁴⁴ The Stockholm Principles further provide that "[s]tates shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."⁴⁵

In convening the 1972 Stockholm Conference on the Human Environment, the United Nations General Assembly cited pollution as a "continuing and accelerating impairment of the quality of the human environment."⁴⁶ The Stockholm Declaration included the following:

[t]he discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted on ecosystems.⁴⁷

It is unilateral actions such as Karma's which will bring us to the brink of ecocatastrophe. The essence of the Stockholm Declaration is that the human environment must be preserved and enhanced and that man's present destructive tendencies must be curtailed. The occasional references to the status of developing nations do not create a special license to pollute but rather express the belief that they must avoid such detrimental side effects of industrialization.

Expressing the strong hope that the developing countries will, through appropriate international cooperation, derive particular benefit from the mobilization of knowledge and experience about the problems of the human environment, enabling them, *inter alia*, to forestall the occurrence of many such problems.⁴⁸

The Stockholm Recommendations on Development and Environment direct that "special care be taken [by the developing coun-

44. See Geneva Convention on the High Seas, done Apr. 28, 1958, Art. 25, 12 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 11.

45. Stockholm Declaration, Principle 7.

46. G.A. Res. 2398 (XXIII) (1968).

47. Stockholm Declaration, Principle 6.

48. G.A. Res. 2398 (XXIII) (1968).

tries] to apply the appropriate international standards on environment in order to avoid the creation of pollution problems in developing countries."⁴⁹ Karma has never acknowledged its responsibility to the human environment, and it has and continues to pollute without regard for the consequences. A "developing nation" label may justify the acquisition of funds to prevent pollution during industrialization and to make the products of poorer nations competitive, but it must not be used as an excuse for ignoring the basic responsibilities of every state to its neighbors and to the world at large.

The import of the Helsinki Rules is also that detrimental effects must be avoided. In determining equitable utilization, the economic position of a state is but one of eleven considerations. Regardless of developing nation status, a nation oversteps its right to equitable utilization when it causes substantial injury to a co-basin state.

The fact that New Helios happens to share the waters polluted by Karma does not place the financial burden of repairing damage caused by that pollution upon New Helios. The Preamble of the Stockholm Declaration cites the need for international cooperation "in order to raise resources to support the developing countries in carrying out their responsibilities" in protecting the environment.⁵⁰ It may be incumbent upon the world community to provide funds to aid developing countries in the avoidance of pollution. However, international law does not require a developed nation to subsidize or repair damage done to it by developing countries within its vicinity. Such a harsh and unwarranted rule would lead to highly inequitable results. Even if the world community wishes to give special privileges to Karma as a developing nation through partial indemnification for damages paid to New Helios, it is still compulsory that Karma first be required to fully compensate New Helios. Any other decision would place a financial burden upon New Helios for no other reason than geographic happenstance.

In light of the overwhelming weight of international conventional, customary, and case law condemning the acts of Karma, New Helios has shown restraint and good faith in restricting its action to repeated pleas for relief from the pollution and in stead-

49. Report of the U.N. Conference on the Human Environment, Recommendations on Development and Environment, U.N. Doc. A/CONF.48/14, Rec. 106 (1972).

50. See note 18 *supra*.

fastly seeking arbitration. Because of the highly egregious nature of the acts committed by Karma, New Helios is entitled to the full measure of relief available under international law.

IV. *Karma's actions entitle New Helios to injunctive and monetary relief.*

A. *New Helios is entitled to injunctive relief.*

An injunction should issue to cease operation of the pulp mill until treatment facilities are constructed to eliminate industrial waste. Karma is responsible for the mill company as an entity which is operating within its borders. The merging of identity of a state and its nationals is illustrated by *Trail Smelter*, and the responsibility of a state for activities within its borders, irrespective of knowledge, is illustrated by *Corfu Channel*. The ILA has found a state responsible, under international law, for public and private acts which it could have prevented with reasonable diligence producing a change in the existing regime of a river to the injury of another state.⁵¹ Karma accepted the advice of the World Development Authority in constructing the plant but chose not to accept a recommendation which would protect the environment, nor did Karma attempt to secure a loan from the World Bank to finance the necessary protections. Under the Helsinki Rules, Karma must take "reasonable measures to abate" existing pollution.⁵² If Karma pleads inability or unwillingness to abate, it should be forced to cease operation of the mill.

The mill company should be directed to build the housing facilities which it promised, and can apparently afford. Even these measures will only alleviate the problem, however, which underscores the need for injunctive relief. Such relief is especially appropriate in the instant controversy. "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."⁵³

An interim measure of protection should be issued under I.C.J. STAT. art. 41, para. 1, to prevent the full operation of Karma's nuclear power plant. Under the newly-amended Rules

51. 3 WHITEMAN, DIGEST OF INTERNATIONAL LAW 926 (1964).

52. Helsinki Rules, Art. X.

53. Laylin at 31.

of the I.C.J., Article 66, the request for an interim measure has priority.⁵⁴ Under I.C.J. STAT. art. 27, decisions of a three-judge tribunal have the same effect as one delivered by the whole Court. It is a generally accepted principle of international law that the status quo must be maintained once a proceeding has been initiated.⁵⁵ An interim measure is particularly suited to a case where jurisdiction has been voluntarily accepted and where the nature of the harm, namely damage to the environment, is irrevocable. In the *Nuclear Test Cases*,⁵⁶ the test for an interim measure was defined as a twofold one: "irreparable prejudice" which is an "immediate possibility," and a prima facie showing that the claims are cognizable under international law. Both tests are met in the instant case. In the *Fisheries Jurisdiction*⁵⁷ case, an interim measure was granted even though damages might be available as an appropriate remedy. A sense of urgency must be shown for an interim measure to be granted, and this test is also met in the instant case.⁵⁸ The nuclear plant is currently operating at a ten percent capacity and must be ordered to maintain this level pending arbitration. An injunction should issue making the provisional measure a permanent one against Karma's operation of the nuclear plant or, in the alternative, directing Karma to relocate the plant where it will be less harmful to New Helios.

It can be argued that the nuclear plant involves only a case of prospective harm and thus under *Lake Lanoux* no remedy is available until actual harm is shown. In *Lake Lanoux*, however, the denial of an injunction for potential risk was because bad faith was not presumed and France had shown "solicitude." In the instant case, Karma has been curt in its responses and has shown no solicitude. Karma had a duty to obtain prior consent from New Helios; France was found to have no duty to obtain prior consent precisely because France had shown solicitude and "taken into account" the interests of other states. Karma cannot attempt to place itself in the same posture.

B. *New Helios is entitled to monetary damages.*

Karma is responsible in damages for the brewery's investiga-

54. 67 AM. J. INT'L L. 195, 215-16 (1973).

55. S. ROSENNE, LAW AND PRACTICE OF THE INTERNATIONAL COURT 427 (1965).

56. 12 INT'L LEG. MAT'S 749, 752-53 (1973).

57. 11 INT'L LEG. MAT'S 1069 (1972).

58. Interhandel, [1957] I.C.J. 104; Electric Co. of Sofia and Bulgaria, [1939] P.C.I.J. ser. A/B, No. 79, 191, 199.

tion expenses and future expenses for cooling lagoons if no injunction is issued. The brewery's investigation expenses are clearly compensable since the brewery is a national and not a state. Under *Trail Smelter*, investigation expenses were denied to the United States because they were claimed as an element of damages to sovereignty and because the United States law of damages does not include such costs. In the instant controversy, investigation expenses are specifically claimed by New Helios as compensatory damage. Karma is also responsible in damages for amounts spent by New Helios to restore the beaches and render the water potable, as well as the documented costs of \$2,000,000 for further purification if no remedial action is taken.

New Helios is entitled to compensatory damages for personal injury to its citizens who are typhoid victims and to additional compensation for violation of sovereignty as a result of these personal injuries. The *I'm Alone*⁵⁹ case involved personal injuries to Canadian civilians and damages of \$25,000 were awarded over and above the amount intended to compensate the victims.

Karma should be ordered to provide an indemnity against future damages and future investigation expenses as well as create a contingency plan for radioactive accidents. The indemnity for future damages and investigation expenses were remedies granted in *Trail Smelter*, the only other international arbitration of a pollution claim. The contingency plan serves to emphasize the gravity of risk to which Karma has subjected the citizens of New Helios.

CONCLUSION

Since Karma's actions violate the 1923 Treaty and recognized principles of international law, this Court should require Karma to halt its offending activities and to reimburse New Helios for damages suffered.

MEMORIAL FOR RESPONDENT SUMMARY OF ARGUMENT

Karma's use of the Upper and Lower Peace Rivers and International Lake is not substantially harmful to New Helios and is not violative of its obligations under the 1923 Treaty of Amity, Friendship and Economic Cooperation or under generally recog-

59. *I'm Alone Case* (Canada v. United States), 3 U.N.R.I.A.A. 1616 (1935).

nized principles of international law. As a developing nation, Karma is not subject to the same standards of pollution control as is a developed nation. New Helios is not entitled to injunctive relief or monetary damages; as a developed co-basin state, New Helios should bear present expenses of pollution control in order to allow equitable utilization of the entire drainage basin.

ARGUMENT

I. *Karma's uses of the international drainage basin are authorized by fundamental principles of international law.*

A. *Karma's uses are reasonable under the doctrine of equitable utilization.*

The waterways Karma shares with New Helios constitute an international drainage basin and are subject to an emerging body of international law governing such waters. An international drainage basin has been defined as "a geographical area extending to or over the territory of two or more states and is bounded by the watershed extremities of the system of waters, including surface and underground waters, all of which flow into a common terminus."⁶⁰

The International Law Association [hereinafter referred to as ILA] recently adopted the most comprehensive examination and restatement of emerging customary law regarding international river systems and drainage basins.⁶¹ The ILA formulated principles of equitable utilization under which "[e]ach basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial use of the water of an international drainage basin."⁶² A basin state has rights equal and correlative with those of other co-basin states, but that "does not mean that each such State will receive an identical share in the uses of the waters."⁶³ Weighing factors must be considered, and "[w]hat is a reasonable and equitable share within the meaning of Article IV is to be determined in the light of all the relevant factors in each particular case."⁶⁴ For example, one factor of considerable

60. Olmstead, *Introduction*, THE LAW OF INTERNATIONAL DRAINAGE BASINS 4 (A. Garretson, R. Hayton & C. Olmstead eds. 1967).

61. International Law Association [hereinafter cited as ILA], Report of the 52d Conference, Helsinki, adopted Aug. 20, 1966 [hereinafter cited as Helsinki Rules].

62. Helsinki Rules, Art. IV.

63. J. BARROS & D. JOHNSTON, THE INTERNATIONAL LAW OF POLLUTION 78 (1974) [hereinafter cited as BARROS].

64. Helsinki Rules, Art. V.

significance in the instant controversy is ". . . the contribution of water by each basin State."⁶⁵ Because the Upper Peace River and a substantial portion of the Lower Peace River are solely within its boundaries, Karma clearly supplies a disproportionately large share of the water.

Equitable utilization is also a guiding principle for a number of contemporary agreements regulating the use of specific drainage basins.⁶⁶

Karma's uses of the Upper and Lower Peace Rivers and of International Lake are consistent with the doctrine of equitable utilization as delimited by Article V of the Helsinki Rules. Not only are the uses practiced by Karma socially and economically valuable, but they are also essential to human life.⁶⁷ The rapid industrialization of Karma is necessary for the mere economic survival of its people. The World Development Authority determined that the operation of a pulp and paper mill would be the most socially and economically valuable means of aiding the development of Karma. Equally necessary for the well-being of Karma is the production of energy by the newly-constructed nuclear plant. These essential uses of shared waters may be causing temporary inconvenience to New Helios, but Karma urges that minimal pollution is necessary for its equitable utilization of the waters and that modification of such uses would deprive Karma of its rights under international law.

B. Karma's uses do not cause substantial harm or serious consequence to New Helios.

Water pollution has been defined as "any detrimental change resulting from human conduct in the natural composition, content, or quality of the waters of an international drainage basin."⁶⁸ There is no proof of detrimental change to the waters

65. Helsinki Rules, Art. V(b).

66. Recent bilateral agreements evidencing such an orientation include: Treaty between the United States and Canada Relating to Cooperative Development of the water resources of the Columbia River Basin, Jan. 17, 1961, 15 U.S.T. 1555, T.I.A.S. No. 5638, 542 U.N.T.S. 244; Agreement between Egypt and Sudan for Full Utilization of the Nile Waters, Nov. 8, 1959, 453 U.N.T.S. 51; Indus Waters Treaty between India and Pakistan, Sept. 19, 1960, 419 U.N.T.S. 126 [hereinafter cited as Indus Waters Treaty]. Recent multilateral agreements employing this approach include: Act Regarding Navigation and Economic Cooperation Between the States of the Niger Basin, Oct. 26, 1963, Art. 2, 587 U.N.T.S. 9, 13; Convention between Rumania, Bulgaria, Yugoslavia and the Soviet Union concerning Fishing in the Waters of the Danube, Jan. 29, 1958, 339 U.N.T.S. 58.

67. See BARROS at 79.

68. Helsinki Rules, Art. IX.

which Karma and New Helios share because the content of a small body of water like International Lake is renewed every six months or less. Water changes caused by Karma are required for development, and need not be permanent. It is only necessary later to eliminate the source of pollution, and let nature take its course. "If the pollution was caused by the incoming river and if that pollution source was stopped, one would expect to see a marked change in the pollution level of the lake in a very few months."⁶⁹ Soon after it is economically feasible for Karma and the mill company to install facilities to avoid pollution, shared waters will be naturally cleaned.

A state is not under a duty to take pollution prevention or control measures which would deprive it of equitable utilization. Liability attaches only where the use of water is inconsistent with the principle of equitable utilization. A state must abate water pollution in an international drainage basin only to the extent that "substantial damage is caused in the territory of a co-basin State."⁷⁰ This requirement has also been evidenced by recent international agreements. A treaty between India and Pakistan is instructive: "Each party agrees to prevent as far as is practicable undue pollution . . . [and] will take all reasonable measures, and before any sewage or waste is allowed to flow it will be treated in such a manner not to affect those uses."⁷¹ Karma is not causing substantial injury to New Helios and, therefore, has no duty to abate because the expenditures necessary to correct this injury are not substantial for a developed country but are unreasonable abatement measures for a developing country.

A beneficial use under Article IV of the Helsinki Rules need not incorporate the most efficient methods of effluent control since states are held to a standard commensurate with their financial resources; an economically advanced state would thus be required to employ a more efficient and less wasteful system than a developing one. "[I]n its application, the present rule is not designed to foster waste but to hold States to a duty of efficiency which is commensurate with their financial resources."⁷² The various uses of shared waters in the present controversy may be

69. Knauss, *Ocean Pollution: Status and Prognostication*, LAW OF THE SEA: THE EMERGING REGIME OF THE OCEANS 321 (J. Gamble & G. Pontecorvo eds. 1973) [hereinafter cited as Knauss].

70. Helsinki Rules, Art. X(1)(b).

71. Indus Waters Treaty, Art. IV(10) at 138.

72. BARROS at 78.

rendered compatible, as suggested under Article V of the Helsinki Rules, by the expenditure of sums of money which are de minimis for a country with the degree of industrialization and standard of living that New Helios enjoys. Under equitable utilization, it is the duty of co-basin states, according to financial ability, to construct works to accommodate competing uses.⁷³ If New Helios suffers injury, it is a result of its own failure to meet the responsibilities incumbent upon a developed nation sharing an international drainage basin with a developing nation. New Helios is financially able to construct purification facilities without harm to its economy. If Karma were forced to spend such sums, its development would be severely retarded. If the privately owned pulp and paper mill in Karma's Wilderness Region were required at this point to install facilities or to compensate New Helios, its products would become non-competitive in the world market. It is certainly reasonable to suggest as well that the Lower Peace Brewery, whose product is of questionable social value, install purification facilities and cooling lagoons, if necessary, at its own expense. A manufacturer enjoying worldwide distribution for thirty years can well afford to do so.

The only previous international arbitration concerning pollution involved fumes flowing from a Canadian smelter into the United States.⁷⁴ Canada's fault was not at issue in *Trail Smelter*, and the Tribunal was only requested to determine the extent of damages. The Tribunal stated, however, that under the principles of international law, Canada did not have

the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case [was] of serious consequence and the injury [was] established by clear and convincing evidence.⁷⁵

There is a significant distinction to be made between a developed country such as Canada and a struggling, developing nation such as Karma. The damage caused by the fumes emanating from the smelter was of serious consequence and Canada could well afford to adopt reasonable measures of abatement and to pay compensatory damages. There are no serious consequences in the instant

73. Helsinki Rules, Art. V(j).

74. *Trail Smelter (United States v. Canada)*, 3 U.N.R.I.A.A. 1905 (1941) [hereinafter cited as *Trail Smelter*].

75. *Trail Smelter* at 1965.

controversy, but even if there were, Karma should not be forced to pay damages. Unlike Canada, Karma cannot afford abatement costs. Under certain international agreements, even parties who are able to compensate fully for damages are only held liable to a limited extent.⁷⁶

C. In the absence of a threat of substantial harm or serious consequence, Karma was under no duty to negotiate with New Helios in regard to proposed projects.

The mere chance of environmental harm is not sufficient to grant veto power to one state over another state's projected internal economic development. Indeed, the doctrine of equitable utilization supports the concept that a veto power exists only where the co-basin state can no longer exercise its right of equitable utilization. Under the Helsinki Rules, the duty to negotiate does not arise until a party has failed under Article X(1)(b) to take reasonable measures to abate existing water pollution. Only then will a party "be required promptly to enter into negotiations with the injured State with a view toward reaching a settlement equitable under the circumstances."⁷⁷ In the present controversy, "Karma requested that the matter be brought to arbitration" in the spirit of amity, friendship and economic cooperation and not because Karma felt its actions had created substantial harm and hence a duty to negotiate.

The Tribunals in *Lake Lanoux*⁷⁸ and *Trail Smelter* showed a concern for economic growth and did not allow one state to exercise veto power over the proposed actions of its neighbor. In *Lake Lanoux*, Spain did not show that the French dam would cause actual harm to Spanish territory, but demonstrated only potential harm. The Tribunal stated that the potential risk of adverse effects was not a valid reason for enjoining construction and refused to do so even though the risk of serious danger remained. The benefits of the project were balanced against the possible adverse effects, and the Tribunal found that the importance of

76. Compare Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, Art. II, reported in 66 AM. J. INT'L L. 702, 703 (1972) with International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, Art. V, 9 INT'L LEG. MAT'S 45, 48-51 (1970). The former imposes strict liability for accidents occurring on the earth. In the latter, the amount to which a ship owner can be held strictly liable is limited under a funding arrangement.

77. Helsinki Rules, Art. XI.

78. *Lake Lanoux Arbitration (Spain v. France)*, 12 U.N.R.I.A.A. 281 (1957), 53 AM. J. INT'L L. 156 (1959).

economic development outweighed potential effects. The *Trail Smelter* Tribunal adopted the same protective attitude toward economic development. Rather than cause Canada economic detriment by forcing the smelter to cease operations, the Tribunal created a commission and a system of indemnification in the event of future harm. Canada, as a developed country, could well afford to pay the indemnification sums.

D. *New Helios' uses of the shared waterways are entitled to no inherent preference as prior uses.*

Article VI of the Helsinki Rules states: "A use or category of uses is not entitled to any inherent preference over any other use or category of uses." Nor does a survey of treaty law support the view that prior uses are entitled to absolute protection. Under international law, the degree of protection, if any, varies from case to case. As one commentator observed: "Many, if not most, treaties make no mention of protection of existing uses. Among those that do, uniformity is lacking."⁷⁹ Although navigational uses were once accorded preferences, recent treaty law offers little help as to what uses would be accorded preference since they deal generally with the treatment of a single use.⁸⁰

Any pre-existing use of shared waterways by New Helios is of little import. International law does not allow a preceding use by an industrially advanced state such as New Helios to preclude any subsequent equitable use of the same waters by a developing state such as Karma.

II. *Karma's status as a developing nation entitles it to preferential treatment.*

The needs of developing states have long been recognized in the practice of nation states and international organizations. In the preamble to its Charter, the United Nations pledges itself to "the economic and social advancement of all peoples." Under Article 55 of the Charter, it is stated that "the United Nations shall promote . . . higher standards of living, full employment, and conditions of economic and social progress and development." Understandably, a greater promotional effort will be nec-

79. Lipper, *Equitable Utilization*, THE LAW OF INTERNATIONAL DRAINAGE BASINS 51 (A. Garretson, R. Hayton & C. Olmstead eds. 1967) [hereinafter cited as Lipper].

80. Lipper at 87.

essary in developing than in developed countries. These are the very goals which Karma now seeks for its people.

Such goals were recently approved by the world community. The 1972 Stockholm Conference on the Human Environment was convened by the United Nations out of "[c]oncern about the consequent effects on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developing as well as developed countries."⁸¹ The preamble of the Stockholm Declaration on the Human Environment stressed the equitable solution of pollution problems and the application of special considerations in regard to developing countries. The achievement of environmental goals

will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts Local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions. International cooperation is also needed in order to raise resources to support the developing countries in carrying out their responsibilities in this field.⁸²

The Stockholm Declaration states that

it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.⁸³

The Stockholm Conference evidenced a clear and unambiguous concern for the problems of developing states in global efforts to minimize environmental harm. The Stockholm Recommendations enumerated a number of specific concerns.⁸⁴ Perhaps the most relevant to the situation between Karma and New Helios is the concern that the preoccupation of developed countries with their own environmental problems "should not affect the flow of assistance to undeveloped countries and should include

81. G.A. Res. 2398 (XXIII) (1968).

82. Report of the U.N. Conference on the Human Environment, Stockholm Declaration on the Human Environment, U.N. Doc. A/CONF.48/14 (1972) [hereinafter cited as Stockholm Declaration].

83. Stockholm Declaration, Principle 23.

84. Report of the U.N. Conference on the Human Environment, Stockholm Recommendations on Development and Environment, U.N. Doc. A/CONF.48/14 (1972) [hereinafter cited as Recommendations on Development and Environment].

money for environmental aid.”⁸⁵ Nations were admonished to recognize “that the burdens of the environmental policies of the industrialized countries should not be transferred, either directly or indirectly, to the developing countries.”⁸⁶ If there are negative effects on exports, particularly from developing countries, appropriate measures of compensation should be devised.

Assistance in meeting the consequences of stricter environmental standards ought to be given in the form of financial or technical assistance for research with a view to removing the obstacles that the products of developing countries have encountered.⁸⁷

Regional organizations were asked to pay particular heed to the “special problems of the least developed countries.”⁸⁸ The Conference’s continued concern with these problems was evidenced by its recommendation that “[a] study must be made to determine how environmental protection may be made available to undeveloped countries without resulting in an ‘unacceptable burden’ to them.”⁸⁹ The Stockholm Conference and Recommendations bear directly upon the present controversy. The special difficulties Karma faces in its economic development mitigate any responsibilities it might otherwise have to New Helios. New Helios has failed to recognize that its environmental burdens cannot be transferred to a developing state such as Karma.

The Helsinki Rules are in accord. One factor to be considered in determining the equitable share of a drainage basin is “the economic and social needs of each basin State.”⁹⁰ Karma, as a developing country, has pressing economic and social needs and the necessity of Karma’s industrialization far outweighs the minor consequences to New Helios. The alternative means of satisfying Karma’s needs, such as the installation of costly pollution control devices, are prohibitive in light of Karma’s economic situation.⁹¹

As a developed, industrialized nation enjoying a high standard of living, New Helios in all probability has and continues to pollute. “Available data show that the level of economic activity is a close correlate of national pollution emission rates. Generally

85. Recommendations on Development and Environment, Rec. 109.

86. Recommendations on Development and Environment, Rec. 103.

87. *Id.*

88. Recommendations on Development and Environment, Rec. 102.

89. Recommendations on Development and Environment, Rec. 108.

90. Helsinki Rules, Art. V(e).

91. Helsinki Rules, Art. V(g).

speaking, developed states are polluter states, while developing states are non-polluter states."⁹² As a developed state, New Helios is, by definition, a polluter state. New Helios could not have achieved its present status in the world community without having taken advantage of years of rampant industrialization with free access to the air and water environment. "[P]ollution potential increases as the standard of living increases. Thus, the developed world with a higher standard of living contributes proportionately more to worldwide pollution."⁹³ New Helios, a polluter, cannot ask this court to enjoin the relatively minimal pollution produced by Karma, not in an effort to achieve a high standard of living but merely to maintain subsistence level for its people.

Where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.⁹⁴

As a developed state New Helios has polluted and, therefore, has no right to complain of Karma's actions. In the *River Meuse*,⁹⁵ the Court refused to enjoin Belgium's construction of a canal because of the Netherlands' prior operation of a canal in the same waters. Applying principles of equity, the Court stated that even though "the Belgian action with regard to the functioning of the Neerharen Lock is contrary to the Treaty of 1863, it should nevertheless refuse in this case to order Belgium to discontinue that action."⁹⁶ Assuming *arguendo* that Karma's actions were in violation of the 1923 Treaty, there would still be no basis for holding Karma liable because New Helios has continuously polluted.

The fears of developing nations in regard to the imposition of stringent international environmental standards by developed nations were acknowledged by a panel of experts which met in preparation for the Stockholm Conference.⁹⁷ Some of those fears

92. Hull & Koers, *A Regime for World Ocean Pollution Control*, INTERNATIONAL RELATIONS AND THE FUTURE OF OCEAN SPACE 98 (R. Wirsing ed. 1974).

93. Knauss at 319.

94. The Diversion of Water from the River Meuse (Netherlands v. Belgium), [1937] P.C.I.J., ser. A/B, No. 70, 77 [hereinafter cited as *River Meuse*].

95. *Id.*

96. *River Meuse* at 78.

97. REPORT OF A PANEL OF EXPERTS CONVENED BY THE SECRETARY-GENERAL OF THE U.N.

which a country in Karma's economic position may reasonably hold include:

fear that the developed nations will create rigorous standards for products traded internationally and generate a "neo-protectionism" excluding nonconforming goods from poor lands; . . . fear that developed lands will unilaterally dictate environmental standards to the developing lands without considering how to relate those standards to the conditions of the developing lands; . . . fear that the developed states will saddle the developing with their own definition of what are proper global environmental concerns.⁹⁸

If Karma were forced to pay for the insubstantial injury caused to New Helios by pollution from the pulp and paper mill and the nuclear plant, such a judicial decision would only confirm the worst fears of developing nations and have grave implications in the world community. The powerful, industrialized nations must admit their heavy responsibility for world pollution and show a good faith willingness to bear their financial burden of eliminating pollution. A just decision in favor of Karma will aid international stability.

Karma would not dispute the acceptance of *sic utere* and *droit de voisinage* as rules of international customary law. The world grows smaller with the advance of technology and national isolation is a luxury no longer feasible or desirable. Each nation has special responsibilities to neighboring countries, to all other countries individually, and to the world at large. Only in an atmosphere of cooperation will the countries of the world achieve lasting peace and uniformly high standards of living.

III. *Karma has performed all of its obligations under the 1923 Treaty of Amity, Friendship and Economic Cooperation as required by international law.*

The validity of the 1923 Treaty of Amity, Friendship and Economic Cooperation, as well as its binding force, is not disputed. Karma disputes the strained application of this half-century-old treaty to its contemporary quest for industrial development. The 1923 Treaty speaks of the obligation not to pollute

CONFERENCE ON THE HUMAN ENVIRONMENT, June 4-12, 1971, Founex, Switzerland, Annex 1, U.N. Doc. A/CONF.48/10.

98. Robinson, *Problems of Definition and Scope, LAW, INSTITUTIONS AND THE GLOBAL ENVIRONMENT* 49 (J. Hargrove ed. 1972) summarizing the Founex Report.

shared waterways, but this provision must be regarded in its proper context. Due to the broad nature of the treaty in question, as well as the legal, technological, economic and political events which have transpired in the last fifty years, this treaty must be regarded in its entirety and in a new light. It is a cardinal rule of the international law governing the interpretation of treaties that the

[w]hole of the treaty must be taken into consideration if the meaning of any one of its provisions is doubtful and not only the wording of the treaty but also its purpose, the motives which led to its conclusion and the conditions prevailing at that time.⁹⁹

In the instant controversy, the 1923 Treaty's prohibition of pollution does not proscribe Karma's activities for three reasons. Firstly, what actually constitutes pollution under the 1923 Treaty is not clear. The Treaty itself does not specify standards, and existing treaties regulating pollution fail to clarify that ambiguity.¹⁰⁰ It is also clear that existing standards of international law tolerate a limited amount of contamination.¹⁰¹

Secondly, most of the older conventions prohibiting water pollution were designed to safeguard fishing.¹⁰² It is likely that the provision regarding pollution in the 1923 Treaty was adopted to protect fish stocks and not as a general prohibition against waste. There is no evidence of any current harm to fish stocks of the waterways shared with New Helios.

Thirdly, paragraph 2 of Article II of the 1923 Treaty strongly suggests that even the drafters of the agreement recognized that paragraph 1 was too general to be considered a proscription. It is advised therein that the parties enact specific arrangements to control the application of paragraph 1. That no such action has been undertaken is indicative of lack of agreement on the scope of this provision. Moreover, New Helios' failure to officially protest the use of the shared waterways for waste disposal for nearly twenty years provides implicit consent to this use by Karma.

99. 1 H. LAUTERPACHT, *OPPENHEIM'S INTERNATIONAL LAW* 953 (8th ed. 1955). See also A. McNAIR, *LAW OF TREATIES* 424 (1961).

100. See, e.g., Manner, *Water Pollution in International Law*, 2 UNITED NATIONS CONFERENCE ON WATER POLLUTION PROBLEMS IN EUROPE, DOCUMENTS SUBMITTED TO THE CONFERENCE, 450-53 (1961), cited in WHITEMAN, 3 *DIGEST OF INTERNATIONAL LAW* 1044 (1964) [hereinafter cited as Manner]; Lester, *Pollution, THE LAW OF INTERNATIONAL DRAINAGE BASINS* 103 (A. Garretson, R. Hayton & C. Olmstead eds. 1967).

101. See Brownlie, *A Survey of International Customary Rules of Environmental Protection*, *INTERNATIONAL ENVIRONMENTAL LAW* 2 (L. Teclaff & A. Utton eds. 1974).

102. See Manner at 450.

Assuming *arguendo* that the 1923 Treaty did proscribe Karma's use of shared waterways for waste disposal and for cooling its nuclear power plant, the doctrine of *rebus sic stantibus* should apply and relieve Karma of such extended obligations under the Treaty. Circumstances have radically changed since 1923. The Treaty, like many treaties of that era, was primarily concerned with preserving navigational uses.¹⁰³ This concern is evidenced in Article III of the 1923 Treaty, which deals with freedom of navigation.

Substantially changed circumstances are also evidenced by the fact that Karma did not know of the economic value of its Wilderness Region until 1955. The technologies of contemporary paper mills and of nuclear energy plants were in all probability unknown to either party at the time they entered into the 1923 Treaty. Since an essential basis of that agreement has been radically modified by intervening events not prompted by Karma, a fundamental change of circumstances is present and should relieve Karma of any liability.¹⁰⁴

In its title and in a number of provisions, the Treaty calls for economic cooperation. As a developing state, Karma's economic advances have required much sacrifice and hard work. The record of New Helios, the industrially advanced party to this Treaty, in furthering that economic growth has been disappointing. New Helios chooses to ignore that economic cooperation is a part of the 1923 Treaty. This is especially true in this controversy, in which New Helios seeks to have Karma bear the additional burden of safeguarding the economic well-being of New Helios' industries. The cost of economic growth should not be so compounded, particularly when the 1923 Treaty calls for economic cooperation. In order to protect economic growth, the world community has been willing to impose different standards of care on developing and developed nations.¹⁰⁵ The 1923 Treaty, which calls for economic cooperation, must encompass such considerations.

103. See BARROS at 16; Manner at 450; cf. Convention and Statute on the Regime of Navigable Waterways of International Concern, Apr. 20, 1921, 7 L.N.T.S. 35.

104. See Vienna Convention on the Law of Treaties, May 23, 1969, Art. 62, Doc. A/CONF.39/27. See also RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 153 (1965).

105. See, e.g., The Stockholm Declaration, which rates in pertinent part: it will be essential in all cases to consider . . . the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries. Stockholm Declaration, Principle 23.

IV. *New Helios is not entitled to monetary or injunctive relief.*

Recent statements of international customary law show a clear recognition of the responsibility which developed countries have toward developing countries in view of the heavy economic burdens of development. The General Agreement on Tariffs and Trade allows developing nation members to deviate temporarily from the rules applicable to other trading parties.¹⁰⁶ Under the Stockholm Declaration,

[s]tates shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.¹⁰⁷

This principle, in conjunction with the previously cited provisions of Stockholm principles and declarations, implicitly requires states to develop a law of liability and compensation which takes into account the needs of developing states. The cost of pollution control is prohibitive for a country of Karma's economic status. Bearing in mind the absence of clearly defined principles of liability and the insistence of the Stockholm Declaration that developing countries be given special consideration, this Court should be reluctant to impose a monetary judgment upon Karma.

Even if Karma were to be held liable in damages by this Tribunal, no amounts should be awarded for violation of sovereignty. In the *Corfu Channel* case, minesweeping was held to be a violation but "this declaration by the Court constitutes in itself appropriate satisfaction."¹⁰⁸ In addition, Karma should not be required to compensate New Helios for its costs because the general rule is that each country bears its own.¹⁰⁹ It would, in fact, be equitable for New Helios to pay Karma's costs in this consensual arbitration.

New Helios is not entitled to injunctive relief. The Stockholm Conference looked to compensation only, and not injunctions. *Trail Smelter* serves only to clarify when liability attaches, but limits injunctive relief. In that arbitration, the duty of a developed country to indemnify and regulate polluting uses was

106. General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. XVIII, 61 Stat. (5), (6), T.I.A.S. 1700; 55 U.N.T.S. 187, 252.

107. Stockholm Declaration, Principle 22.

108. *Corfu Channel*, [1949] I.C.J. 4.

109. I.C.J. STAT., art. 64; I.C.J. RULES, art. 76.

stated, but economic growth was safeguarded and the smelter allowed to continue its operations. An injunction is even less appropriate when a developed state seeks relief from a developing nation. Furthermore, in the *Lake Lanoux* arbitration it was determined that an injunction was not available for potential harm. New Helios is not entitled to an injunction against the pulp mill or the full operation of the nuclear power plant. New Helios is not harmed by having to spend minimal amounts to correct any adverse effects of Karma's program of industrialization.

A solution to the instant controversy would be the creation of a special commission to regulate use of shared waters under the doctrine of equitable utilization. Many publicists, emphasizing the variable characteristics of each drainage basin, have found separate commissions to be a necessity.¹¹⁰ While New Helios should bear the present expense of water pollution control, Karma would cooperate in an overall effort to govern the drainage basin. Cooperation would be beneficial to both Karma and New Helios in various ways, including the exchange of scientific information and the use of monitoring systems.¹¹¹ The nuclear plant is in a location which could potentially be shared with New Helios, and there are many other beneficial uses relating to cooling waters which could be adopted to mutual advantage if the necessary funding were available.¹¹² In the absence of an established basin commission, this Court should not demand more of Karma than international law exacts.

CONCLUSION

Because Karma's uses of the Upper and Lower Peace Rivers and International Lake are not substantially injurious to New Helios, Karma's actions are not violative of international law or of the 1923 Treaty of Amity, Friendship and Economic Cooperation. New Helios has no valid claim of relief.

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110. See, e.g., Laylin & Bianchi, *The Role of Adjudication in International River Disputes: the Lake Lanoux Case*, 53 AM. J. INT'L L. 30 (1959).

111. See O.E.C.D., Recommendation of the Council on Principles Concerning Trans-frontier Pollution, C(74)224 (21st Nov. 1974), Title E.

112. See Maloney, *More Heat than Light: Thermal Pollution versus Heat Energy Utilization*, 25 U. FLA. L. REV. 693, 713-14 (1973).