
No. 1995

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

BEHESTOON,
Applicant

v.

AGISTANUS,
Respondent.

Spring Term

1995

ON SUBMISSION TO THE
INTERNATIONAL COURT OF JUSTICE

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

The State of Agistanus and the State of Behestoon have recognized as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of this Court.

STATEMENT OF FACTS

The arrival of Agistanus' Namche Dam project in the 1980s has resulted in severe levels of environmental damage to Behestoon. (C. 7, 8, 11). A significant portion of the Ozoonio River has been diverted from Behestoon, and the remaining flow has been poisoned with the residue of Agistanus' agricultural and mining activities. (C. 9, 11). At the same time, Behestoon's riparian agricultural lands have become less productive, species of plankton and fish stocks have been decimated, and water treatment costs have risen. (C. 7, 8). Presently, the Ozoonio River is a foul, contaminated mixture of deadly chemicals which not only pose significant health risks to the people of Behestoon but have also rendered the river useless as a domestic and industrial water supply. (C. 7, 11).

AGISTANUS' DEVELOPMENT ACTIVITIES

The Ozoonio River has traditionally been Behestoon's most important water resource. (C. 2). Originating in Agistanus, the Ozoonio River extends for most of its course across Behestoon. (C. 1). It provides 90% of Behestoon's domestic and industrial water needs. (C. 2). The river is also an important ecological habitat, forming the Bandeke Estuary in the southern part of Behestoon, where unique species of wildlife and many of the region's migratory birds thrive. (C. 1).

In the early 1980s Agistanus embarked upon an ambitious development initiative. (C. 5). Implementing proposals from a study completed nearly a decade earlier, Agistanus constructed a major hydro-electric dam across the Ozoonio River. (C. 3, 4, 5). One of the major purposes of the dam, as outlined in the earlier study and reaffirmed in the loan agreement between

Agistanus and the Inter-Regional Agricultural Development Bank (IRADB), was to provide sufficient quantities of water for the irrigation of the arid Agistanus highlands and for the development of mining operations in the northern Agistanus mountains. (C. 4, 5).

The resulting Namche Dam is one of the five largest dams in the world. (C. 5-6). It generates more than three times the amount of energy needed by Agistanus. (C. 6). Agistanus maintains reservoir levels well in excess of those required for the minimum safe levels of operation for the dam, while at the same time utilizing the dam to convert more than 500,000 acres of semi-arid southern Agistanus desert into agricultural lands. (C. 6, 11). Agistanus has used this excess water from the Namche Dam to process marketable rare earth minerals from its mining operation. (C. 6).

Behestoon, on the other hand, has suffered environmental damage as a result from the operation of the Namche Dam and Agistanus' related mining and agricultural activities. (C. 7, 8, 11). The population of a unique species of zoo plankton, which forms the basis of the aquatic and pelagic food chain in the Solonia Bay and Bandeke Estuary, has declined tremendously and faces extinction. (C. 8). The Ozoonio River experiences periods of extreme eutrophication. (C. 7). Behestoon's agricultural riparian lands have become less productive, the river's fish stocks have declined, and Behestoon's water treatment costs have increased. (C. 7). During this same period, Behestoon has measured both a 33% decline in the flow of the Ozoonio River in its territory and increased levels of pesticides in the river below the irrigation ditches just north of Agistanus' southern border with Behestoon. (C. 7).

Behestoon opposed the construction of the Namche Dam from the start. (C. 4). In 1980, Behestoon objected to the IRADB loan that Agistanus needed to

build the dam. (C. 4). In 1991, after preliminary tests identified increased levels of agricultural chemicals in Behestoon's water, the Prime Minister of Behestoon complained to the President of Agistanus regarding the harmful effects of Agistanus' use of the Ozoonio River. (C. 7, 8). The Behestoon Ministry of Environment suggested that Agistanus return the flow of the Ozoonio River back to previous levels in order to dilute pollutants within the water and possibly save the important species of zoo plankton from extinction. (C. 8). Agistanus refused to do so, claiming that its loan agreement made it impossible to change the operation of the Namche Dam. (C. 8). Agistanus has not altered its operation of the Namche Dam and, as of 1992, was making a comfortable profit on its development projects. (C. 7, 12).

AGISTANUS' POLLUTION OF THE OZOONIO RIVER

Agistanus' agricultural chemicals have been detected in the Ozoonio River in ever increasing amounts since its irrigation program became operational. (C. 7, 9, 10). These chemicals were first discovered in Behestoon's waters in 1992. (C. 7).

On August 13, 1993, a temblor of medium severity exposed subterranean water to a strata of tar-like substance within the mining shafts in northern Agistanus. (C. 8). The underground water spewed forth and mixed with the tarry substance, creating a corrosive, toxic liquid. (C. 8, 9). In less than two days, the contaminated water had flooded the mines and was flowing down the mountain into the Ozoonio River just below the Namche Dam. (C. 8, 9). As the toxic mixture entered the river, it formed a visible plume flowing downstream into Behestoon. (C. 9).

Agistanus' response to the toxic spill was grossly inadequate. (C. 9-

13). Instead of notifying Behestoon of the impending peril or requesting assistance from disaster relief organizations that could contain the spill, Agistanus intentionally misrepresented the severity of the toxic spill. (C. 9). Agistanus' response to Behestoon's inquiry regarding the spill was deceitful and prevented Behestoon from taking precautions of its own to mitigate the harmful effects of the pollution. (C. 9).

In an effort to prevent potential harm to its people, the government of Behestoon sent reconnaissance teams into Agistanus to gather more information about the environmental threat. (C. 9-10). The operations revealed two sources of pollution. (C. 10). Behestoon discovered high levels of agricultural chemicals flowing into the Ozoonio River from the irrigation ditches just across the border. (C. 10). Secondly, Behestoon found large quantities of hydrocarbon-based substances in the Ozoonio River. (C. 10). Aerial photographs further revealed a large, grey plume entering the Ozoonio River and heading toward Behestoon just below the Namche Dam near Agistanus' mining operations. (C. 10). Behestoon released this critically important information to the international media. (C. 10).

Under subsequent pressure from the international community, Agistanus initiated high-level diplomatic meetings with Behestoon. (C. 10). After two days without an agreement, Behestoon blamed Agistanus for the occurrence of the environmental disaster and accused Agistanus of worsening the problem by stalling. (C. 10). Behestoon suggested opening the flow of the dam to release a large quantity of water in hopes of diluting the plume and reducing its toxicity. (C. 10). Agistanus rejected Behestoon's proposal even though the reservoir contained more water than was necessary to insure the dam's safe operation. (C. 10-11).

After the toxic plume entered Behestoon's territory, scientists discovered high levels of extremely toxic substances in the river believed to be polycyclic aromatic hydrocarbons (PAHs). (C. 11). PAHs pose an unacceptable risk to humans and the environment at any detectable level. (C. 11). PAHs are believed to be responsible for high rates of malnutrition, spontaneous abortions, cancer, birth defects and other health related problems. (C. 11). Experts have suggested these substances may have resulted from a spontaneous reaction caused by the mixture of the toxic plume and residual agricultural contaminants. (C. 11).

In response to this heightened threat, Behestoon closed its water treatment plants along the Ozoonio River to prevent any damage to the facilities. (C. 11). Behestoon also appealed to the SOTO Council of Ministers for assistance. (C. 12). Agistanus, however, insisted that the IRADB take control of the dam and decide whether or not to release a greater flow of water. (C. 12). After learning that the IRADB consultant team had known about potential dangers associated with the underground water prior to the spill and that the IRADB had de-emphasized the significance and potential hazard for fear that Agistanus might withdraw its loan application, Behestoon rejected the notion of the IRADB taking control of the dam. (C. 12-13).

SOTO's Council of Ministers then recommended that the United Nations review the dispute. (C. 13). The United Nations Environmental Programme sent experts to Behestoon to recommend appropriate clean-up operations. (C. 13). Behestoon and Agistanus later agreed to the jurisdiction of the International Court of Justice to settle this dispute. (C. 13).

QUESTIONS PRESENTED

- I. WHETHER AGISTANUS VIOLATED INTERNATIONAL LAW BY DIVERTING THE FLOW OF THE OZONIO RIVER AND INFRINGING UPON BEHESTOON'S TERRITORIAL AND EQUITABLE RIGHTS TO THE RIVER.

- II. WHETHER AGISTANUS VIOLATED ENVIRONMENTAL OBLIGATIONS OWED TO BEHESTOON AS A RESULT OF ITS USE OF THE OZONIO RIVER AND ITS INADEQUATE RESPONSE TO THE TOXIC SPILL WHICH HAS CAUSED SIGNIFICANT HARM TO BEHESTOON.

- III. WHETHER AGISTANUS IS LIABLE, AND SHALL PAY, TO BEHESTOON FOR ALL DAMAGES INCURRED AS A RESULT OF AGISTANUS' DIVERSION AND POLLUTION OF THE OZONIO RIVER.

SUMMARY OF THE PLEADINGS

I.

Agistanus' diversion of the Ozoonio River infringes upon Behestoon's territorial rights to the river and additionally deprives Behestoon of its right to reasonable and equitable utilization of the river.

International law prohibits Agistanus from infringing upon Behestoon's absolute and restricted territorial rights to the Ozoonio River. Agistanus violated Behestoon's territorial sovereignty to the Ozoonio River by using the river in a manner that was detrimental to Behestoon. Agistanus' construction and operation of the Namche dam, which resulted in 33% reduction in the flow of the river into Behestoon, clearly amounted to a detrimental use of the river on the part of Agistanus. Under international law, upper riparian States, such as Agistanus, are no longer allowed to exercise absolute sovereignty over the waters of an international watercourse.

Agistanus also violated Behestoon's territorial rights to the Ozoonio River by using the river in a manner that caused harm to Behestoon. Agistanus' construction and operation of the Namche Dam and the resulting reduction in the flow of the river damaged Behestoon's agricultural lands and fishing stocks, precipitated periods of extreme eutrophication in the river and created higher water treatment costs for Behestoon. Clearly, such vast damage amounts to an appreciable and substantial harm to Behestoon.

Agistanus' also violated international law by depriving Behestoon of its right to reasonable and equitable utilization of the river. The principle of equitable utilization is widely regarded as a rule of customary international

law. Agistanus breached its obligation not to deprive Behestoon of its right to reasonable and equitable utilization of the Ozoonio River by using the river in a manner that caused appreciable harm to Behestoon. Again, Agistanus' diversion of the Ozoonio River resulted in damage to Agistanus agriculture, to its fishing industry and to the river itself. Thus, Agistanus' use of the Ozoonio River deprived Behestoon of its right to a reasonable and equitable use of the river.

Agistanus further deprived Behestoon of its reasonable and equitable share to the Ozoonio River by using the river in an unreasonable and inequitable manner. Agistanus usurped from Behestoon an estimated 33% of the pre-existing, normal flow of the river, which Behestoon had clearly put to use prior to Agistanus' construction and operation of the Namche Dam. Moreover, Behestoon's utilization of this new water supply has been grossly excessive and environmentally unsound. Therefore, Agistanus used the Ozoonio River in an inequitable and unreasonable manner and, as a result, deprived Behestoon of its right to reasonable and equitable utilization of the river.

II.

Agistanus' use of the Ozoonio River and its inadequate response to the toxic spill which polluted the river violated several environmental obligations owed to Behestoon.

Agistanus violated both its duty to prevent transfrontier pollution and its duty to cooperate in abating transboundary environmental damage in its use of the Ozoonio River. Agistanus violated its duty to prevent transfrontier pollution by failing to assess the impact of its planned uses of the Ozoonio River, particularly the impact of the Namche Dam and the related mining and agricultural activities. The most obvious proof of Agistanus' violation of the

duty to prevent transboundary pollution, however, is the actual pollution damage suffered by Behestoon as a result of Agistanus' development plans.

Agistanus violated its duty to cooperate in abating transboundary environmental damage by failing to inform Behestoon of its plans to build the Namche Dam and to use the Ozoonio River for developmental purposes. Agistanus further violated this duty by not consulting with Behestoon regarding its actual use of the Ozoonio River for hydro-electric, agricultural, and mining purposes.

Agistanus violated additional environmental obligations owed to Behestoon by inadequately responding to the toxic spill which polluted the Ozoonio River. In fact, under international law, Agistanus is strictly liable for the pervasive environmental damage stemming from the spill, given that such damage resulted from Agistanus' dangerous mining activities. Agistanus should have been wary of the fact that its mining activities created a significant risk of harm.

Even if Agistanus is not strictly liable for the pollution damage caused by the toxic spill, Agistanus violated its duty to cooperate in mitigating the resulting environmental damage. Agistanus breached this duty by failing to inform Behestoon of the initial mining accident, intentionally misrepresenting the severity of the accident to both Behestoon and the public, and refusing to cooperate in diluting the toxicity of the plume. Moreover, Agistanus had no contingency plans or precautionary measures in place so as to contain or mitigate the catastrophic accident.

III.

Agistanus is liable and shall pay to Behestoon for all damages incurred as a result of the environmental catastrophe and pollution of the Ozoonio

River. Agistanus' responsibility flows from the breach of those international obligations owed to Behestoon. Thus, given that Agistanus has breached numerous international obligations, Behestoon only needs to show that it suffered material damage attributable to Agistanus to be entitled to reparations. Clearly, Behestoon has met this burden in that it has suffered immense ecological, agricultural and economic damage as a result of the reduction in flow and pollution of the Ozoonio River. Moreover, this reduction in flow and pollution of the Ozoonio River is directly attributable to Agistanus.

Since Agistanus has incurred international responsibility, it must make reparation for all damages suffered by Behestoon. Therefore, Agistanus should re-establish the undiminished flow of the Ozoonio River, immediately cease its pollution of the river, and compensate Behestoon for all damage incurred as a result of the environmental catastrophe.

PLEADINGS AND AUTHORITIES

I. AGISTANUS' DIVERSION OF THE OZOONIO RIVER VIOLATES INTERNATIONAL LAW BY INFRINGING UPON BEHESTOON'S TERRITORIAL RIGHTS TO THE RIVER AND DEPRIVING BEHESTOON OF ITS RIGHT TO REASONABLE AND EQUITABLE UTILIZATION OF THE RIVER.

A. Agistanus' Diversion Of The Ozoonio River Infringes Upon Behestoon's Territorial Rights To The River.

1. International law prohibits Agistanus from using the waters of the Ozoonio River in a manner that is detrimental to Behestoon.

Upper riparian States are prohibited from utilizing a shared water resource in a manner that is detrimental to lower riparian States under the principle known as absolute territorial integrity.¹ This doctrine prohibits upper riparian States from altering the flow of an international watercourse.²

The doctrine of absolute territorial integrity is viewed as a binding rule of international law.³ Article 38 of the Statute of the International Court of Justice designates as binding sources of international law conventions between contesting States, international custom arising from the widespread practice of States that is engaged in as a legal obligation, and general principles of law recognized by civilized nations.⁴ Judicial decisions and the writings of publicists serve as subsidiary evidence of these

¹J.G. Lammers, *Pollution of International Watercourses* 361 (1984).

²F. Berber, *Rivers in International Law* 19-22 (1959).

³See B. Godana, *Africa's Shared Water Resources*, 38-39 (1985) (citing Schenkel, *Das badische Wasserrecht*); L. Oppenheim, *International Law* 475 (H. Lauterpacht ed., 8th ed. 1955).

⁴Statute of the International Court of Justice, art. 38, para. 1, 59 Stat. 1055, T.S. 933.

binding sources of law.⁵ Resolutions of international organizations similarly serve as non-binding sources of international law, although such resolutions may become binding when widely adopted by States or relied upon as rules of international law.⁶

- a. The principle of absolute territorial integrity is accepted as a rule of customary international law.

The doctrine of absolute territorial integrity is specifically binding on Agistanus as a rule of customary international law.⁷ State practice of absolute territorial integrity is reflected in the 1925 Nile Commission hearings, where Egypt claimed an absolute right to the uninterrupted natural flow of the waters of the Nile river into its country.⁸ Egypt recently reasserted this right in a meeting of international river organizations held in 1981.⁹ Pakistan also put forth this theory in its 1947 dispute with India over the Indus River.¹⁰ Further support for this theory is evidenced by its acceptance by publicists, its adoption in resolutions and declarations and its use in national court decisions.¹¹ Thus, the doctrine of absolute

⁵Id.

⁶See generally *Advisory Opinion, Western Sahara* 1975 I.C.J. 4 (Oct. 16); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); see also *Texaco Overseas Protection Co. v. Libya*, 17 Int'l. Leg. Mat. 1 (1978).

⁷See *supra* note 3.

⁸See *Godana*, *supra* note 3, at 39.

⁹Id.

¹⁰Id.

¹¹See Declaration of the Seventh Pan-American Conference on the Industrial and Agricultural Use of International Rivers, art. 2, 28 Am. J. Int'l L. 59 (Supp. 1934); see also Athens Resolution, preamble, Inst. Int'l L., 1979 Y.B. Vol. 58, Part II at 196-203; Madrid Declaration on International Regulation Regarding the Use of International Watercourses for Purposes Other Than Navigation, art. 2, Inst. Int'l L., 24 I.L.L. Y.B. 365-67 (1911); Buenos Aires Resolution, 10 Inter-American Bar Ass'n, Proceedings, 82 (1957); J. Lipper, *Equitable Utilization*, in *The Law of International Drainage Basins* 38-39 (Garretson et. al. eds., 1967) (referring to Max Huber and Hersch

territorial integrity is considered a well-established principle of international law.

- b. Agistanus violated the principle of absolute territorial integrity by diverting the flow of the Ozoonio River.

Agistanus clearly violated the principle of absolute territorial integrity by building the Namche Dam and diverting the normal, pre-existing flow of the Ozoonio River into Behestoon. The operation of the dam resulted in a 33% reduction in the flow of water into Behestoon, and as such, infringed upon Behestoon's territorial rights to an undiminished flow of the river through its State.

2. International law does not allow upper riparian States to exercise absolute sovereignty over the waters of an international watercourse.

The principle that an upper riparian State can do whatever it chooses with an international watercourse flowing through its State without regard to lower riparian States is no longer viable under international law and has been widely rejected.¹² In fact, one author has noted that of the few States that have asserted this doctrine, almost all have explicitly or implicitly admitted it is not a generally recognized principle of international law.¹³ Thus, any claim on the part of Agistanus to absolute sovereignty over the upstream waters of the Ozoonio River should be wholly rejected.

Lauterpacht as accepting the theory of absolute territorial integrity); *Wurttemberg and Prussia v. Baden*, [1927-28] Ann. Dig. Pub. Int'l. L. Cases 128 (1927) (no. 86) (Sup. Ct. F.R.G.).

¹²C.B. Bourne, *The Right to Utilize the Waters of International Rivers*, Can. Y.B. Int'l L. 187, 207 (1965).

¹³See Lammers, *supra* note 1, at 210-11, 274-75, 292, 317 (citing Austria, the United States, and Chile as all abandoning the principle of absolute territorial sovereignty).

3. International law prohibits Agistanus from using the Ozoonio River in a manner that causes appreciable or substantial harm to Behestoon.

Riparian States are prohibited from using an international watercourse in such a way as to cause injury to a co-riparian State under the doctrine of restricted territorial sovereignty.¹⁴ This basic concept, which is a reflection of the maxim *sic utere tuo, ut alienum non laedas*,¹⁵ deems the injurious use of an international river by a riparian State to be unlawful when it causes either appreciable¹⁶ or substantial harm to a co-riparian State.¹⁷

- a. The principle of restricted territorial sovereignty is widely accepted as a rule of customary international law.

Restricted territorial sovereignty has widespread support as a rule of customary international law.¹⁸ In *Lac Lanoux*, France acknowledged the "correlative duty" of a State "not to injure interests of neighbouring

¹⁴*Id.* 562-572.

¹⁵See *id.*

¹⁶See Draft Articles on The Law of Non-Navigational Uses of International Watercourses, art. 7, Int'l L. Comm., Report of the Forty-Third Session, U.N. GAOR, 46th Sess., Supp. No. 10 at 161, U.N. Doc. A/46/10 (1991) [hereinafter Draft Articles on Non-Navigational Uses]; see also S.C. Jain, *Shared Natural Resources and the Concept of of Appreciable or Significant Damage in International Law*, 26 Indian J.Int'l L. 138 (1986). The expression "appreciable harm" is further employed in a number of international instruments such as Article 35 of the Statute of the Uruguay River, adopted by Uruguay and Argentina in 1975, and the 1971 Declaration of Asuncion on the Use of International Rivers, signed by Argentina, Bolivia, Brazil, Paraguay and Uruguay. Report of the International Law Commission to the General Assembly on the Work of its Fortieth Session, U.N. GAOR, 43d Sess., Supp. No. 10 at 36-7, U.N. Doc. A/43/10 (1988) [hereinafter 1988 Report].

¹⁷Helsinki Rules on the Uses of International Rivers, art. V(1)(k), Int'l L. Ass'n, Report of the Fifty-Second Conference 477 (1966) [hereinafter, Helsinki Rules]; Lammers, *supra* note 1, at 571.

¹⁸J.O. Moermond and E. Shirley, *Survey of the International Law of Rivers*, 16 Denv. J. Int'l L. & Pol'y 139, 147 (1987-88).

States."¹⁹ Further, this doctrine was overwhelmingly adopted at the United Nations Conference on the Human Environment held in Stockholm,²⁰ where the attending nations of the world found that "the principle of responsibility of one State for damage caused in another is generally recognized."²¹

Additional support for the the principle of restricted territorial sovereignty can be found in many water treaties, numerous declarations and in the writings of publicists.²² Thus, there seems to be little question that the principle of restricted territorial sovereignty is an accepted principle of international law.

- b. Agistanus violated the principle of territorial sovereignty by diverting the flow of the Ozoonio River.

Agistanus' diversion of the Ozoonio River clearly amounts to a violation of its duty not to injure a co-riparian State. The construction and operation of the Namche Dam caused appreciable and significant harm to Behestoon. The International Law Commission has defined appreciable harm as a harm that has a "detrimental impact of some consequence" upon the public health, industry, property, agriculture or environment of another State.²³ Without doubt, the

¹⁹Lac Lanoux (*Spain v. Fr.*), 23 Int'l L. Rep. 101, 123 (1957); see also *Trail Smelter (U.S. v. Can.)*, 3 U.N.R.I.A.A. 1905 (1941); *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 9); *Diversion of Water from the Meuse (Neth. v. Belg.)*, 1937 P.C.I.J. (ser. A/B) No. 68 (Dec. 16).

²⁰See Stockholm Declaration of the United Nations Conference on the Human Environment, Principle 21, *Report of the U.N. Conference on the Human Environment*, U.N. Doc. A/Conf.48/14 at 2-65 and Corr. 1 (1972) [hereinafter *Stockholm Declaration*].

²¹See L.B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 *Harv. Int'l L. J.* 423, 492-93 (1973).

²²Bourne, *supra* note 12, at 188-89 (citing the 1961 Salzburg Resolution of the Institute of International Law, the 1933 Declaration of Montevideo, the 1957 Buenos Aires Resolution and the 1958 New York Resolution of the International Law Association); S. Saliba, *The Jordan River Dispute* 49 (1968).

²³See 1988 Report, *supra* note 16, at 85.

33% reduction in flow of water into Behestoon has had a "detrimental impact of some consequence" upon the health, industry, property, agriculture, and environment of Behestoon. Behestoon's agricultural riparian lands have been raped of their productivity and its fishing stocks have been reduced. Behestoon has also experienced periods of extreme eutrophication in the Ozoonio River and higher water treatments costs. Thus, at a minimum, Behestoon has suffered appreciable harm as a result of Agistanus' diversion of the Ozoonio River. Agistanus further caused substantial harm to Behestoon considering that the diversion of the Ozoonio river materially interfered with and prevented Behestoon from reasonably utilizing the Ozoonio River for its own needs.²⁴

B. Agistanus' Diversion Of the Ozoonio River Deprives Behestoon Of Its Right To Reasonable And Equitable Utilization Of The River.

1. The principle of equitable and reasonable utilization is widely regarded as a customary principle of international law.

According to the doctrine of equitable utilization, each riparian State has a right to a reasonable and equitable share in the beneficial uses of the waters of an international watercourse and is under a duty not to deprive co-riparians of this right of equality.²⁵ This doctrine has been hailed as one of the strongest principles of international river law²⁶ and has clear support in both the Helsinki Rules and the Draft Articles on Non-Navigational

²⁴See Helsinki Rules, *supra* note 17, at 500 (defining "substantial injury" as an injury which "materially interferes with or prevents a reasonable use of water").

²⁵See Helsinki Rules, *supra* note 17, art. IV; Draft Articles on Non-Navigational Uses, *supra* note 16, art. 5; Lammers, *supra* note 1, at 364-65; Lipper, *supra* note ?, 11, at 41.

²⁶C.B. Bourne, *Pollution of International Rivers and Lakes*, 21 U. Toronto L. J. 193, 201 (1971); A.M. Hirsch, *Utilization of International Rivers in the Middle East*, 50 Am. J. Int'l L. 81 (1956); Lipper, *supra* note 11, at 41-62.

Uses of International Watercourses, both of which are viewed as comprehensive codifications of international law.²⁷ The doctrine has received further support in State practice,²⁸ in the writings of numerous scholars,²⁹ and in the decisions of international and domestic tribunals.³⁰ It has even been recognized by Syria and Jordan, on the one hand, and Israel, on the other, amid the violence of the Arab-Israeli conflict.³¹ Thus, the doctrine of equitable and reasonable utilization should be considered a customary principle of international law.

2. Agistanus deprives Behestoon of its right to an equitable and reasonable utilization of the Ozoonio River by using the river in a manner that causes harm to Behestoon and is inequitable and unreasonable.

a. Agistanus' diversion of the river caused appreciable and substantial harm to Behestoon.

A riparian State may not cause harm to a co-riparian State under the

²⁷Helsinki Rules, *supra* note 17, ch. 2; Draft Articles on Non-Navigational Uses, *supra* note 16, art. 5. See also A.E. Utton, *International Water Quality Law*, in *International Environmental Law* 164 (1974); S. McCaffrey, *The Law of International Watercourses: Some Recent Developments and Unanswered Questions*, 17 *Denv. J. Int'l L. & Pol'y* 505, 505 (1988-89).

²⁸See Treaty on the River Platte Basin, opened for signature April 23, 1969, art. 1(b), 8 *Int'l. Leg. Mat.* 905, 906; Treaty for Amazon Cooperation, opened for signature July 3, 1978, *Bol.-Braz.-Colom.-Ecuador-Guy.-Peru-Surin.-Venez.*, 17 *Int'l. Leg. Mat.* 1045, 1046. For an additional overview of State practice, see *Third Report of the Law of Non-Navigational Uses of International Watercourses*, 2 *Y.B. Int'l L. Comm.* II 65, 75-87 (1982).

²⁹See Berber, *supra* note 2, at 209; Bourne, *supra* note 12, at 221; Lipper, *supra* note 11, at 41-62.

³⁰*Territorial Jurisdiction of the International Commission of the River Oder (Czech., Den., Fr., Ger., Swed., U.K./Pol.)*, 1929 *P.C.I.J. (ser. A) No.* 23, at 5; see also *Lac Lanoux*, *supra* note 19; *North-Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 *I.C.J.* 3 (Feb. 20); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 46 (1922); *Kansas v. Colorado*, 206 U.S. 46 (1907).

³¹Lipper, *supra* note 11, at 28.

doctrine of equitable utilization.³² This is reflected in the I.L.C. commentary to the Draft Articles on Non Navigational Uses of International Watercourses, which states that the "utilization of an international watercourse is not equitable if it causes other watercourse States appreciable harm."³³ The Special Rapporteur to the Draft Articles has further clarified that appreciable pollution harm is "per se inequitable and unreasonable."³⁴ Thus, a riparian State's use of an international river that results in appreciable or substantial harm to a co-riparian State amounts to an absolute violation of equitable utilization under international law. Again, Agistanus' diversion and utilization of the Ozoonio River clearly resulted in an appreciable and substantial harm to Behestoon. Consequently, Agistanus violated its duty not to deprive Behestoon of its right to reasonable and equitable utilization of the Ozoonio River.

- b. Agistanus diversion of the river is inequitable and unreasonable based on a balancing of all equitable factors.

When no harm results from a riparian's use of a shared water resource, the doctrine of reasonable and equitable utilization requires a weighing of factors in favor of one riparian's use against factors in favor of the other riparian's use.³⁵ Some of these factors are found in the Draft Articles and the Helsinki Rules, both of which point out that these factors are to be taken as a whole.³⁶

³²See 1988 Report, *supra* note 16, at 36-7; see also Lammers, *supra* note 1, at 562-72.

³³See 1988 Report, *supra* note 16, at 84.

³⁴*Id.* at 14.

³⁵See Lammers, *supra* note 1, at 364.

³⁶Draft Articles on Non-Navigational Uses, *supra* note 16, art. 6; Helsinki Rules, *supra* note 17, art. V.

- i. Behestoon's use of the river has been reasonable and equitable.

Behestoon's use of the Ozoonio River has been reasonable and equitable. Behestoon is heavily dependent on the Ozoonio River. It is the only river flowing through its State. Thus, Behestoon's social and economic need for an uninterrupted flow of the river through its State cannot be denied. Behestoon utilizes the river for 90% of its domestic and industrial water needs and has established a prior, existing use of the river. As indicated in Article VIII(1) of the Helsinki Rules and elsewhere, the concept of prior appropriation carries considerable weight and is a primary factor in determining equitable utilization.³⁷ Further, Behestoon's utilization of the Ozoonio River, two-thirds of which flows through Behestoon, has had no detrimental impact on other watercourse states such as Agistanus. Behestoon has even attempted to expand its water resources by building several desalination plants. It has also established an extensive waste recycling and recovery program which employs thermal generators as an energy source. Thus, given its heavy dependence on the Ozoonio River, along with its efforts to develop other sources of energy and water, Behestoon's utilization of the river has been reasonable and equitable.

- ii. Agistanus' use of the river has been unreasonable and inequitable.

Agistanus' utilization of the Ozoonio River, on the other hand, is in excess of its reasonable and equitable share of the river. Since the construction of the Namche Dam, Agistanus has usurped an estimated 33% of the pre-existing, normal river flow from Behestoon with devastating consequences.

³⁷See Helsinki Rules, *supra* note 17, art. V; Bourne, *supra* note 12, at 235.

The reduced flow has raped Behestoon's riparian lands of their productivity, reduced fish stocks in the Ozoonio River and increased Behestoon's water treatment costs. Moreover, the US\$10 billion dam project, which has been spearheaded by the Beshini-controlled government of Agistanus, has resulted in vast damage to the Gorgon Plateau region. The Amahan rangelands have simply been supplanted by a grossly excessive 500,000 acre agricultural industry. The minority-controlled government also felled whole strands of trees in building the dam and began mining activities in the northern mountains without even considering potential damage to the environment, particularly, damage to the migratory waterfowl who call the mountains home. Agistanus further ignored the utilization of alternative energy sources, such as thermal generators, before creating its grossly exorbitant dam that provides 400% of its energy needs. Agistanus has also deprived Behestoon of much needed water by maintaining surplus reservoirs at the Namche Dam that are well in excess of governing requirements. Perhaps most importantly, however, Agistanus has no real need for this excessive profit-making development project given that Agistanus is economically and politically stable, substantially free of foreign debt, and has other sources of water available in its northern mountains.

Thus, in balancing all of the equitable factors, it is clear that Agistanus used the Ozoonio River in an inequitable if not abusive manner and, as a result, deprived Behestoon of its equitable and reasonable utilization of the Ozoonio River.

II. AGISTANUS' USE OF THE OZONIO RIVER AND ITS INADEQUATE RESPONSE TO THE TOXIC SPILL VIOLATED ENVIRONMENTAL OBLIGATIONS OWED TO BEHESTOON UNDER INTERNATIONAL LAW.

A. Agistanus' Use Of The River Violated Environmental Obligations Owed To Behestoon Under International Law.

International environmental law has evolved more quickly than other facets of international law. As the global community has become aware of the seriousness of pollution and other environmental harms, States have begun to recognize a "common law of the environment."³⁸ Treaties, customary rules, general principles of law, and resolutions of international institutions combine to create this form of international law. Thus, international law does impose upon States a set of rules for safeguarding the environment.

The basic premise of international environmental law is that States are not allowed to conduct activities within their territories without regard for potential harm to other States. This principle is expressed by the maxim *sic utere* and is reflected in the decisions of international tribunals.³⁹ This "no harm" rule is the basis of international environmental law, requiring States to prevent transboundary pollution and to cooperate in mitigating transboundary environmental risks.

The duties to prevent environmental damage and to cooperate in abating such damage have not yet developed under international law so as to require the prevention or abatement of all transfrontier pollution. Rather, these duties appear to be imposed upon states only for activities that cause

³⁸A. Kiss, *International Environmental Law* 95 (1991).

³⁹See e.g., *Trail Smelter*, supra note 19; *Corfu Channel* supra note 19; *Lac Lanoux*, supra note 19; *Nuclear Tests (Austl. v. Fr.)*, 1973 I.C.J. 99 (Protective Order of June 22).

"significant harm" to the environment or to neighboring states.⁴⁰

Recognizing the urgency of preserving the environment, numerous international declarations now formulate these duties in terms of activities that cause "damage to the environment"⁴¹ or "appreciable harm."⁴²

Because the pollution damage resulting to Behestoon from Agistanus' construction and operation of the Namche Dam and its subsequent mining and agricultural activities is significant, Agistanus has breached its obligations to prevent and cooperate under any formulation of these duties.

1. Agistanus violated its duty to prevent transfrontier pollution.

- a. The duty to prevent transfrontier pollution is an established rule of international law.

Support for the obligation to prevent transfrontier pollution damage is found in the classic statement of the international arbitral award of the *Trail Smelter* case, providing that "no state has the right to use ... its territory in such a manner as to cause injury ... in or to the territory of another."⁴³ This decision is heralded as "the *locus classicus* of

⁴⁰See e.g., *Trail Smelter*, *supra* note 19; Helsinki Rules, *supra* note 17, art. X(1)(a); Montreal Rules of International Law Applicable to Transfrontier Pollution, art. 3(1), Int'l L. Ass'n, *Report of the Sixtieth Conference*, (1982) [hereinafter, Montreal Rules on Transfrontier Pollution].

⁴¹See e.g., Stockholm Declaration, *supra* note 20, Principle 21; United Nations Convention on the Law of the Sea, art. 194(2), *opened for signature* Dec. 10, 1982, U.N. Doc. A/Conf.62/121 [hereinafter UNCLOS]; World Charter for Nature, princ. 21, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1982); Charter of Economic Rights and Duties of States, art. 30, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975) [hereinafter, Charter of Economic Rights].

⁴²See e.g., Draft Articles on Non-Navigational Uses, *supra* note 16, art. 21(2); Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, United Nations Environment Programme, U.N. Doc. UNEP/IG12/2 (1978) [hereinafter UNEP Shared Resources Principles] (defining the expression "significantly affect" as any appreciable effects).

⁴³*Trail Smelter*, *supra* note 19 at 1965.

international legal principles on transnational pollution."⁴⁴

Evidence of the continued international support for this principle is reflected in the world community's adoption of Principle 21 of the Stockholm Declaration, which is generally recognized as having become a rule of customary international law.⁴⁵ Principle 21 imposes upon States the responsibility "to ensure that activities within their jurisdiction ... do not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction." The substance of Principle 21 has been included in resolutions adopted by international conferences⁴⁶ and reaffirmed in international declarations.⁴⁷

The obligation not to cause transboundary harm is clear and has support in State practice as *opinio juris*.⁴⁸ Without doubt, Agistanus owes to Behestoon an international obligation to prevent transboundary pollution damage.⁴⁹

⁴⁴G. Handl, *Territorial Sovereignty and the Problem of International Pollution*, 69 Am. J. Int'l L. 50, 60 (1975).

⁴⁵See Resolution on International Responsibility of States in Regard to the Environment, G.A. Res. 2996, U.N. GAOR, 27th Sess., Supp. No. 30 at 42, U.N. Doc. A/8901 (1972); Kiss, *supra* note 38 at 130.

⁴⁶See e.g., Rio Declaration on the Environment and Development, princ. 2, U.N. Doc. A/Conf.151/26 (vol. I) (1992) [hereinafter, Rio Declaration]; Agenda 21, para. 18.35, U.N. Doc. A/Conf.151/26 (vos. I,II,III) (1992); UNCLOS, *supra* note 41, art. 194(2).

⁴⁷See e.g., Charter of Economic Rights, *supra* note 41, art. 30; World Charter for Nature, *supra* note 41, para. 21(d). See also Restatement (Third) of the Foreign Relations Law of the United States, § 601(1) (1987).

⁴⁸See e.g., Frontier Treaty, opened for signature Apr. 8, 1960, Neth.-F.R.G., art. 58(2)(c), 508 U.N.T.S. 14; Agreement for Cooperation on Environmental Programs and Transboundary Problems, opened for signature Aug. 14, 1983, U.S.-Mex., art. 2.1, T.I.A.S. 10827.

⁴⁹Lammers, *supra* note 1 at 342.

- b. Agistanus breached its duty to prevent transboundary pollution damage by failing to assess the impact of its planned uses of the Ozoonio River.

Although customary international law has not concretely defined how States should satisfy the obligation to prevent, an emerging norm of international law requires that States engage in environmental impact assessment (EIA) before taking any action that could affect another country's environment or the Earth's commons. The *Lac Lanoux* tribunal decision,⁵⁰ multilateral treaty provisions,⁵¹ and international declarations⁵² confirm the existence of this international obligation.

In addition, State practice in conducting EIAs is widespread. Since the United States enacted its National Environmental Policy Act⁵³ in 1969, over forty States have adopted similar legislation requiring that EIAs be completed and considered before major federal action is initiated.⁵⁴ The World Bank has included EIAs as a management tool since the early 1970s, mandating such

⁵⁰See *Lac Lanoux*, *supra* note 19.

⁵¹See e.g., UNCLOS, *supra* note 41, arts. 204-206; Convention on Environmental Impact Assessment in a Transboundary Context, opened for signature Feb. 25, 1991, 30 Int'l. Leg. Mat. 800 (1991).

⁵²See e.g., World Charter for Nature, *supra* note 41, princ. 11(c); Montreal Rules on Transfrontier Pollution, *supra* note 40, arts. 4-6; Rio Declaration, *supra* note 46, princ. 17; Agenda 21, *supra* note 46, para. 18.39; Legal Principles for Environmental Protection and Sustainable Development, art. 16, Experts Group on Environmental Law of the World Commission on Environment and Development, U.N. Doc. WCED/86/23Add.1 (1986) [hereinafter, Experts Group].

⁵³42 U.S.C. §4332(2)(c) (1969).

⁵⁴Australia, Canada, and New Zealand adopted EIA legislation during the mid-1970s. Since then, EIA legislation has been adopted in many more jurisdictions, including Argentina, Belgium, Brazil, China, Columbia, Costa Rica, Denmark, France, Germany, Greece, Hong Kong, India, Indonesia, Israel, Italy, Japan, Korea, Kuwait, Luxembourg, Malaysia, The Netherlands, Norway, Pakistan, Papua New Guinea, Peru, the Philippines, Portugal, Sri Lanka, South Africa, Spain, Taiwan, Thailand, Turkey, United Kindom, the Soviet Union, and Uruguay.

assessment for each project funded since 1989.⁵⁵

Thus, Agistanus was obligated to conduct its own EIA for each of its development projects. Prior assessment would have revealed the combined effects of increased levels of agricultural chemicals and a decreased water flow on the environment, including the marine environment of the Bandeke Estuary and Solonia Bay. These areas receive special protection under international law as they harbor unique species of wildlife and an endangered species of zoo plankton,⁵⁶ constitute part of the marine environment,⁵⁷ and contain a vital component of the aquatic ecosystem.⁵⁸ Also, an EIA would have alerted Agistanus of the presence of potentially hazardous tar-like strata and fluids in the bedrock of the mountains near the planned mining site.

- c. Behestoon's pollution damage is sufficient to establish Agistanus' breach of the duty to prevent transfrontier pollution.

A State breaches the obligation to prevent transfrontier pollution when transfrontier pollution occurs.⁵⁹ The pollution damage incurred by Behestoon evidences Agistanus' breach of this obligation. Fish and vital plankton have been decimated, the river has been engulfed with algae, and Behestoon's

⁵⁵R.J.A. Goodland, *World Bank's Environmental Assessment Policy*, 14 *Hastings Int'l & Comp. L. Rev.* 811 (1990).

⁵⁶See *World Charter for Nature*, *supra* note 41, princ. 3; *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, *opened for signature* Mar. 3, 1973, art. II(1), 993 U.N.T.S. 243.

⁵⁷See *UNCLOS*, *supra* note 41, art. 194; *Guidelines for the Protection of the Marine Environment Against Pollution from Land-Based Sources*, princ. 7, U.N. Doc. UNEP/GC.13/9/Add.3 (1985).

⁵⁸See generally *Convention on Biological Diversity*, *opened for signature* June 5, 1992, 311 Int'l Leg. Mat. 818 (1992); *World Charter for Nature*, *supra* note 41, princ. 4; *Agenda 21*, *supra* note 13, para 18.35.

⁵⁹*Draft Articles on State Responsibility*, arts. 1, 3, Int'l L. Comm., *Report of the Thirty-Second Session*, U.N. Doc. A/35/10 (1981).

agricultural lands have been robbed of their productivity. Furthermore, Behestoon has suffered increased costs in its water treatment plants and a partial loss of its fishing industry. The contamination of the River poses a health risk to all of Behestoon's inhabitants. In short, Behestoon can no longer use the waters of the Ozoonio River.

2. Agistanus violated its duty to cooperate in abating transboundary environmental damage.

- a. The duty to cooperate is an established rule of customary international law.

The general obligation to cooperate in the field of preventing or abating transfrontier pollution was recognized even before the development of modern international environmental law⁶⁰ and has been affirmed in the declarations of international organizations⁶¹ and in conventional provisions.⁶² Although the precise content of a State's obligation to cooperate depends on the particular facts and circumstances of each situation,⁶³ the duties to inform and consult are normally included within this requirement. All of the international bodies that have attempted to codify international environmental obligations have insisted on the importance of information and consultation as the major methods by which to implement the

⁶⁰See *Lac Lanoux*, *supra* note 19 at 129-30.

⁶¹See e.g., Stockholm Declaration, *supra* note 20, princ. 24; World Charter for Nature, *supra* note 41, princ. 21; Charter of Economic Rights, *supra* note 41, art. 30; Rio Declaration, *supra* note 46, princ. 17.

⁶²See e.g., Convention on Long-Range Transboundary Air Pollution, *opened for signature* Nov. 13, 1979, arts. 8-9, 1302 U.N.T.S. 217 [hereinafter Long-Range Convention]; African Convention on the Conservation of Nature and Natural Resources, *opened for signature* Sept. 15, 1968, art. 16, 1001 U.N.T.S. 3.

⁶³J.G. Lammers, *Balancing the Equities in International Environmental Law*, *L'Avenir Du Droit International De L'Environnement -- The Future of the International Law of the Environment* 153 (1985).

duty to cooperate.⁶⁴

- b. Agistanus did not inform Behestoon of its plans to use the Ozoonio River.

The duty to inform requires prior notification to potentially affected States of planned activities that may entail significant transboundary environmental effects, including the pertinent details of such plans. This requirement has been formulated in numerous treaties, both bilateral and multilateral,⁶⁵ and proclaimed in U.N. Resolutions referring to the protection of the environment.⁶⁶

Agistanus' violation of the duty to inform is clear and is not excused on the grounds that the duty only extends to planned activities likely to cause significant adverse effects in Behestoon; adequate and proper project appraisal, including an EIA, would have revealed such effects. In any event, Agistanus failed to notify Behestoon of the IRADB's project appraisal and recommendations. Agistanus also failed to thoroughly inform Behestoon of its plans after deciding to implement its ambitious development initiatives.

- c. Agistanus did not consult with Behestoon regarding its use of the Ozoonio River.

The obligation to consult naturally complements the duty to inform, also arising when an activity is likely to cause transboundary environmental

⁶⁴See e.g., Rules on Water Pollution in International Drainage Basins, arts. 5-6, Int'l L. Ass'n., *Report of the Sixtieth Conference* (1982) [hereinafter *ILA Rules on Water Pollution*]; Draft Articles on Non-Navigational Uses, *supra* note 16, arts. 9-17.

⁶⁵See e.g., Agreement on Great Lakes Water Quality, opened for signature Nov. 22, 1978, U.S.-Can., art. 9, 30 U.S.T. 1383; Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment From Pollution, opened for signature Apr. 24, 1978, art. 11, 1140 U.N.T.S. 133; Long-Range Convention, *supra* note 62, arts. 8-9.

⁶⁶See e.g., Resolution on Co-operation in the Field of the Environment Concerning Natural Resources Shared by Two or More States, G.A. Res. 3129, U.N. GAOR 28th Sess., Supp. No. 30A, U.N. Doc. A/9030/Add.1 (1973); Charter of Economic Rights, *supra* note 41, art 3.

damage. Principle 19 of the Rio Declaration⁶⁷ is one of many international declarations framing the duty to consult.⁶⁸ In addition, treaty practice evidences the existence of this obligation.⁶⁹ The model of consultation in preventing transboundary harm is the International Joint Commission formed between Canada and the United States.⁷⁰

Agistanus breached the duty to consult by accepting the IRADB loan agreement without addressing Behestoon's objections and reservations. By applying for and accepting the loan agreement, Agistanus unilaterally committed to the extensive development of the Ozoonio River, two-thirds of which is located in Behestoon. Failing to consult with Behestoon under these circumstances is a violation of international law.

Because the duty to consult also requires consultation when actual transfrontier pollution problems arise,⁷¹ Agistanus should have consulted with Behestoon when Behestoon complained of the increased agricultural chemicals discovered in its portion of the Ozoonio River. The breach of this duty is clear; Agistanus' President summarily dismissed Behestoon's complaints with no consultation and referred Behestoon elsewhere for a solution to its newly discovered environmental damage.⁷²

⁶⁷See Rio Declaration, *supra* note 46.

⁶⁸See also Montreal Rules on Transfrontier Pollution, *supra* note 40, art. 6; UNEP Shared Resources Principles, *supra* note 42, princ. 6.

⁶⁹See e.g. Long-Range Convention, *supra* note 62, art. 5; Indus Waters Treaty, opened for signature Sept. 19, 1960, India-Pak., art. 6, 419 U.N.T.S. 125.

⁷⁰P. Dupuy, *Overview of the Existing Customary Legal Regime Regarding International Pollution in International Law and Pollution* 61, 73 (D.B. Magraw ed., 1991).

⁷¹See ILA Rules on Water Pollution, *supra* note 64, art 6.

⁷²See Draft Articles on State Responsibility, *supra* note 59, art 5.

B. Agistanus' Response To The Toxic Spill Violated Environmental Obligations Owed To Behestoon Under International Law.

1. Agistanus is strictly liable for any damage resulting from the toxic mining accident.

International law has begun to recognize strict liability for transboundary environmental injury resulting from lawful activities involving a risk of significant harm.⁷³ This strict form of liability is imposed even if the activities were not initially known to cause such risk.⁷⁴ This principle is supported by international treaties⁷⁵ and general principles of law.⁷⁶ Agistanus' mining activities in the mountains situated above the tarry strata have created a significant risk of harm, thus rendering Agistanus strictly liable for all damages caused by the mining accident. Agistanus' liability is not diminished by the fact that the IRADB concealed the potential hazard of the tar-like strata; liability accrues to Agistanus for any activity within its territory of which it knew or had means of knowing.⁷⁷

2. Even if Agistanus is not strictly liable for the damages caused by the toxic spill, Agistanus violated its duty to cooperate in mitigating the resulting transboundary environmental damage.

In emergency situations, the duty to cooperate in abating transfrontier harm is heightened to require immediate notification to any potentially

⁷³See Draft Articles on International Liability for the Injurious Consequences of Acts Not Prohibited by Law, Int'l L. Comm., Report of the Forty-First Session, U.N. GAOR, 44th Sess., Supp. No. 10, at 222, U.N. Doc. A/44/10 (1989) [hereinafter, Injurious Consequences].

⁷⁴Experts Group, *supra* note 52, art 11(2).

⁷⁵See e.g., Convention on International Liability for Damage Caused by Space Objects, opened for signature Mar. 29, 1972, 961 U.N.T.S. 187; Treaty concerning the LaPlata River and its Maritime Limits, opened for signature Nov. 19, 1973, Arg.-Uru., art. 51, Int'l Leg. Mat. 251 (1975).

⁷⁶See French C.Civ., art. 1384(1); German BGB, art. 826, Mexican C.C.D.F., art. 1913.

⁷⁷Injurious Consequences, *supra* note 73, art. 3.

affected State.⁷⁸ This principle enjoys the status of a classic rule of international conduct. Its foundation appears in general international law,⁷⁹ and its substance is affirmed in numerous international declarations and treaties.⁸⁰ The Vienna Convention on Early Notification in the Case of a Nuclear Accident⁸¹ is viewed as marking the "crystallization" of this duty.⁸²

Agistanus first breached this responsive duty to cooperate by failing to inform Behestoon of the mining accident immediately upon its occurrence. Agistanus' conduct in quashing all news reports of both the accident and its resulting toxic plume establishes an even more blatant violation of this duty. Agistanus again ignored this duty during Behestoon's official government investigation of the accident. The President of Agistanus lied about the severity of the accident and denied any possible relation between the toxic substances detected in Behestoon's water and the mining accident.⁸³

In addition to requiring immediate notification of the emergency, the duty to cooperate also commands that States develop contingency plans for responding to pollution emergencies.⁸⁴ Agistanus had no contingency plans in place. As a result, Agistanus lacked the equipment and technology necessary

⁷⁸Draft Articles on Non-Navigational Uses, *supra* note 16, art. 25.

⁷⁹See e.g., *Corfu Channel*, *supra* note 19, at 22.

⁸⁰See e.g., UNEP Shared Resources Principles, *supra* note 42, princ. 9 (1); Montreal Rules on Transfrontier Pollution, *supra* note 40, art. 7; Rio Declaration, *supra* note 46, princ. 18; UNCLOS, *supra* note 41, art. 198.

⁸¹Convention on Early Notification in the Case of a Nuclear Accident or Radiological Emergency, *opened for signature* Oct. 27, 1986, IAEA Doc. INFCIRC/335.

⁸²Kiss, *supra* note 38 at 134.

⁸³See Draft Articles on State Responsibility, *supra* note 59, art. 5.

⁸⁴See e.g., O.E.C.D. Council Recommendation on Principles Concerning Transfrontier Pollution, princ. 10, 1974 O.E.C.D. C 224, O.E.C.D. 142; UNEP Shared Resources Principles, *supra* note 42, princ. 9(3).

for any type of a clean-up effort. Thus, Agistanus was unable to contain the toxic spill. Had it properly assessed the impact of its mining operations, Agistanus would have been aware of the potential for accidents and would have been prepared to respond to the toxic disaster.

The absence of precautionary measures for responding to pollution emergencies also evidences Agistanus' breach of the duty to minimize the harmful effects of an emergency.⁸⁵ Agistanus' violation of this obligation is further established by its refusal to cooperate in diluting the toxicity of the plume.

III. AGISTANUS IS LIABLE, AND SHALL PAY, TO BEHESTOON FOR ALL DAMAGES INCURRED AS A RESULT OF THE ENVIRONMENTAL CATASTROPHE AND POLLUTION OF THE OZOONIO RIVER.

A. Under International Law, State Responsibility Flows From The Breach Of An International Obligation.

The principles of international law dictate that State responsibility flows from the breach of an international obligation.⁸⁶ Under this standard known as "objective responsibility,"⁸⁷ a complaining State seeking to invoke State responsibility for transboundary pollution and harm need only show that it suffered material damage, that the damage was caused by conduct attributable to the defendant State, and that the defendant State breached an

⁸⁵The duty to notify in emergency situations is often coupled with the duty to prevent or minimize the harmful effects of accidents. See *id.*; Draft Articles on Non-Navigational Uses, *supra* note 16, princ. 25(3); Experts Group, *supra* note 52, art. 19(1).

⁸⁶See Draft Articles on State Responsibility, *supra* note 59, art. 1.

⁸⁷I. Brownlie, *System of the Law of Nations: State Responsibility (Part I)* 38 (1983).

international obligation.⁸⁸ Thus, in seeking reparation from Agistanus, Behestoon need only show that it suffered material damage caused by Agistanus and that Agistanus breached an international obligation.⁸⁹

1. Behestoon suffered substantial damage.

Behestoon has clearly suffered catastrophic damage. As noted above, Behestoon can no longer use the river for any of its domestic and industrial needs. The Ozoonio River poses a serious threat to the people of Behestoon. Further, Behestoon has already experienced severe ecological, agricultural, and eutrophication problems and now finds its entire fishing industry at risk.

2. Agistanus' unlawful diversion and pollution of the Ozoonio River caused Behestoon's damage.

- a. The diversion and pollution of the Ozoonio river caused Behestoon's damage.

The reduced flow and pollution of the Ozoonio River caused Behestoon's environmental damage. The reduced flow of the river caused the decline in the productivity of Behestoon's riparian lands and, in conjunction with the increased levels of agricultural chemicals, caused the decimation of the zoo plankton species, a drastic decline in fish stocks, lengthy periods of extreme eutrophication, and increased water treatment costs. Furthermore, the reduced flow of the river, increased agricultural chemicals, and inadequate response to the toxic spill combined to destroy flora and fauna and then caused the virulent PAHs that threaten the livelihood of all Behestoon citizens.

⁸⁸Editors of the Harvard Law Review, *Trends in International Environmental Law* 17 (1992).

⁸⁹See Restatement, *supra* note 47, §§ 601(2), 602(1).

- b. The diversion and pollution of the Ozoonio River are attributable to Agistanus.

Both the reduced flow and the pollution of the Ozoonio River are attributable to Agistanus. Acts of organs of States, acting on behalf of that State, are attributable to the State.⁹⁰ Agistanus' construction and operation of the Namche Dam has directly resulted in the 33% reduction in the flow of the Ozoonio River. The chemicals polluting Behestoon's portion of the Ozoonio River are of the very type Agistanus used in its agricultural development and discharged into the river in highly toxic levels through irrigation ditches just north of its southern border with Behestoon. Also, Agistanus' failure to adequately respond to the toxic spill from the mining accident precipitated the environmental disaster resulting from the presence of PAHs in Behestoon's waters.

3. Agistanus has breached several international obligations.

Agistanus has clearly breached numerous international obligations as a result of its diversion and pollution of the Ozoonio River. It infringed the territorial sovereignty of Behestoon and deprived Behestoon of its right to equitable and reasonable utilization of the Ozoonio River. Additionally, Agistanus breached its international duties to prevent transboundary pollution and to cooperate in abating transboundary pollution damage.

B. Agistanus Owes Reparation To Behestoon.

A State that has incurred international responsibility for a breach of an international obligation must make reparation for the damages incurred as a result of that breach.⁹¹ Reparation must, as far as possible, "wipe out all

⁹⁰See Draft Articles on State Responsibility, *supra* note 59, art. 5.

⁹¹P. Birnie and A. Boyle, *International Law and the Environment* 150 (1992).

the consequences of the illegal act and re-establish the situation which would ... have existed if that act had not been committed."⁹² Agistanus should cease its unlawful conduct⁹³ by re-establishing the undiminished flow of the Ozoonio River and by halting its pollution of the river and should compensate Behestoon for damage incurred as a result of the environmental catastrophe. The duty to compensate for the harm caused by the accident is not eliminated by the possible preclusion of wrongfulness under force majeure.⁹⁴ Further, as the toxic plume has not yet completed its destructive course through Behestoon and the full extent of damage is thus unknown, this Court should simply declare that reparation is due to Behestoon and then determine the appropriate amount of compensation at a later phase in the proceedings.⁹⁵

⁹²*Factory at Chorzow (F.R.G. v. Pol.)*, 1928 P.C.I.J (ser A) No. 17, at 47 (Judgment of Sept. 13).

⁹³See *Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 54 (June 21).

⁹⁴See *Draft Articles on State Responsibility*, *supra* note 59, art. 35.

⁹⁵See *Fisheries Jurisdiction (F.R.G. v. Ice.)*, 1974 I.C.J. 175, 204 (Judgment of July 25).

CONCLUSION

For the foregoing reasons the Applicant, Behestoon, respectfully requests that this honourable Court:

- I. DECLARE that Agistanus' actions regarding the diversion of the Ozoonio River are in violation of international law.
- II. DECLARE that Agistanus' actions regarding the use of the Ozoonio River and its inadequate response to the toxic spill are in violation of international law.
- III. DECLARE AND ORDER that Agistanus is liable and shall pay to Behestoon for all damages incurred as a result of Agistanus' diversion and pollution of the Ozoonio River.