

THE 1995 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

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

STATE OF BEHESTOON,

Applicant,

v.

STATE OF AGISTANUS,

Respondent.

SPRING TERM 1995

ON SUBMISSION TO THE
INTERNATIONAL COURT OF JUSTICE

MEMORIAL FOR THE APPLICANT

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INDEX OF AUTHORITIES

Treaties and Other International Agreements

Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, Aug. 14, 1983, Mex.-U.S., 22 I.L.M. 1025.	10
Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Jan. 29, 1991, 30 I.L.M. 775 (1991).	12
Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, May 5, 1992, 28 I.L.M. 657 (1989).	12
Boundary Treaty, Sept. 29, 1864, Spain-Port., Annex Agreement on Regulation of Boundary Waters, Nov. 20, 1866, 129 Consol. T.S. 453.	8
Convention between Great Britain, Northern Ireland, New Zealand, Denmark, Greece, Siam, Southern Rhodesia, and Newfoundland relating to the Development of Hydraulic Power, Dec. 9, 1923, 26 L.N.T.S. 76 (1925).	3
Convention for the Protection of the Mediterranean Sea Against Pollution, Feb. 12, 1978, 15 I.L.M. 290 (1976).	11
Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Aug. 22, 1990, 26 I.L.M. 38.	9, 10
Convention for the Protection of the Rhine River Against Pollution by Chemical Pollution, Jan. 2, 1976, 124 U.N.T.S. 375 (1976).	7, 11
Convention for the Protection of the Rhine River Against Pollution by Chlorides, Dec. 3, 1976, 16 I.L.M. 265.	11
Convention on Biological Diversity, Dec. 29, 1993, 31 I.L.M. 818 (1992).	11, 12
Convention on Certain Questions Relating to the Law of Watercourses, May 11, 1929, Swe.-Nor., 120 L.N.T.S. 277.	3
Convention on Civil Liability for Oil Pollution Damages, Nov. 29, 1969, 973 U.N.T.S. 3.	18
Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Oct. 7, 1952, 310 U.N.T.S. 181.	18

Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762.	18
Convention on the Liability of Operators of Nuclear Ships, May 25, 1962, 57 Am. J. Int'l L. 268 (1963).	18, 21
Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 55 Am. J. Int'l L. 1082 (1961).	18
Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Materials, Dec. 17, 1971, 11 I.L.M. 277 (1972).	18
Frontier Treaty, Dec. 12, 1928, Aus.-Czech., 108 L.N.T.S. 57.	8
Geneva Convention Relating to the Development of Hydraulic Power Affecting More than One State, Dec. 9, 1923, 36 L.N.T.S. 75.	6
IAEA Convention on the Assistance in the Case of a Nuclear Accident or Radiological Emergency, Sept. 26, 1987, IAEA INFRCIRC 336 (1986).	12, 13
Indus Waters Treaty, Sept. 19, 1960, India-Pak., 419 U.N.T.S. 125.	8
Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, Apr. 24, 1978, 1140 U.N.T.S. 133 (1976).	11
Madrid Declaration on International Regulation Regarding the Use of International Watercourses for Purposes Other Than Navigation, reprinted in 24 Annuaire de l'Institut de Droit International 365 (1911).	3
Montreal Guidelines for the Protection of the Marine Environment from Land Based Sources, Apr. 24, 1978, 1140 U.N.T.S. 133 (1978).	11, 12
Nile Waters Agreement, Nov. 8, 1959, Egypt-Sud., 453 U.N.T.S. 51.	8
Protocol Between the Government of Canada and the Government of the Union of Soviet Socialist Republics, Apr. 2, 1981, 20 I.L.M. 689 (1981).	18
Settlement of Japanese Claims for Personal and Property Damages Resulting from Nuclear Tests in the Marshall Islands in 1954, Jan. 4, 1955, 6 U.S.T. 1, T.I.A.S. No. 3160.	18

Treaty Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, U.S.-Can., 542 U.N.T.S. 244.	8
Treaty Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, U.S.-Mex., 59 Stat. 1219.	7
United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF. 62/122, reprinted in 21 I.L.M. 1261 (1982).	1, 9, 10, 11, 12, 14
Vienna Convention on Civil Liability for Nuclear Damage, Nov. 12, 1977, 1063 U.N.T.S. 265.	18, 21
Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.	16, 17

United Nations Documents

Agenda 21, Jun. 13, 1992, U.N. Doc. A/CONF.151/26 (vols. I, II, III) (1992).	10, 11, 12, 13, 18
Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974).	6, 8, 16
Charter of the United Nations, Oct. 24, 1945; 1 U.N.T.S. xvi, 1976 Y.B.U.N. 1043.	14
Declaration on the Co-operation in the Field of Environment Concerning Natural Resources Shared by Two or More States, G.A. Res. 3129 (XXVIII), U.N. GAOR Supp. (No. 30A), U.N. Doc. A/9030/Add.1.	16
Draft Articles on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, [1989] 2. Y.B. Int'l L. Comm'n 139, U.N. Doc. A/CN.4/SER.A/1989/Add.1.	1, 9, 11, 12, 14, 15, 20, 21, 23
Draft Articles on the Non-Navigational Uses of International Watercourses, [1991] 2 Y.B. Int'l L. Comm'n 66 (pt. 2), U.N. Doc. A/46/10.	4, 5, 6, 8, 12, 14, 15, 21
Draft Articles on State Responsibility, [1980] 2 Y.B. Int'l L. Comm'n 31, U.N. Doc. A/CN.4/SER.A/1980/Add.1.	22
Draft Articles on State Responsibility, [1981] 2 Y.B. Int'l L. Comm'n 142, (pt. 2), U.N. Doc. A/35/10.	14

Draft Articles on Treaties Concluded Between States and International Organizations or Between Two or More International Organizations, [1979] 2 Y.B. Int'l L. Comm'n 138 (pt. 2), U.N. Doc. A/CN.4/SER.A/1979/Add.1.	16, 17
Draft 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, May 19, 1978, U.N. Doc. UNEP/IG.12/2, reprinted in 17 I.L.M. 1097 (1978).	1, 8, 9, 14
Experts Group on Environmental Law of the World Commission on Environment and Development, Legal Principles for Environmental Protection and Sustainable Development, Aug. 4, 1987, U.N. Doc. WCED/86/23/Add.1 (1986).	12, 14
Fifth Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, [1989] 2 Y.B. Int'l L. Comm'n 138, U.N. Doc. A/CN.4/SER.A/1989/Add.1.	21
Fifth Report on the Law of the Non-Navigational Uses of International Watercourses, U.N. GAOR, Int'l L. Comm'n, 40th Sess. at 9, U.N. Doc. A/CN.4/421/Add.2 (1988).	3
Recommendation of the Council on Principles Concerning Transfrontier Pollution, OECD Doc. C(77)28 (Final), reprinted in 14 I.L.M. 242 (1975).	8
Report of the International Law Conference to the General Assembly on the Work of its Forty-Third Session, U.N. GAOR, 46th Sess., Supp. No. 10, at 161, U.N. Doc. A/43/10 (1988).	11
Report of the Secretary General of the Conference on Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources, U.N. Doc. A/CONF.151/PC/100/Add.22, reprinted in 4 Agenda 21 and the UNCED Proceedings 514 (Nicholas A. Robinson ed., 1992).	21
Report of the Stockholm Conference on the Human Environment, U.N. Conference in Stockholm, Sweden, June 5-16, 1972, U.N. Doc. A/CONF. 48/14, reprinted in 11 I.L.M. 1416 (1972).	1, 6, 8, 10, 14, 16
Report of the U.N. Commission for Europe: Legal Aspects of Hydro-Electric Development of Rivers and Lakes of Common Interest, U.N. Doc. E/ECE 136 (1952).	3

Resolution on Historical Responsibility of States for the Preservation of Nature for Present and Future Generations, G.A. Res. 35/48, U.N. GAOR, 35th Sess., Supp. No. 48, at 15, U.N. Doc. A/36/48 (1981)	2, 12
Statute of the International Court of Justice, Oct. 24, 1945, 1976 Y.B.U.N. 1052.	5
Survey of State Practice Relevant to International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, Feb. 3, 1984, U.N. Doc. ST/LEG/15.	19
U.N. Conference on Environment and Development (UNCED) at Rio de Janeiro, June. 13, 1992, U.N. Doc. A/CONF. 151/26 (vol. I), reprinted in 31 I.L.M. 874 (1992).	1, 10, 11, 12, 14, 16, 18
World Charter for Nature, G.A. Res. 37/7 (Annex), U.N. GAOR 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51.	10

Cases and Arbitral Decisions

<i>Chorzow Factory</i> (Ger. v. Pol.), (1928) P.C.I.J. Ser. A, No. 17.	23
<i>Colorado v. New Mexico</i> , 459 U.S. 176 (1982).	5, 6
<i>Corfu Channel</i> (U.K. v. Alb.) (Merits), 1949 I.C.J. 4.	1, 4, 10, 11, 12, 13, 22, 23
<i>Dickson Car Wheel Company</i> , 4 U.N.R.I.A.A. 678 (1931).	22
<i>Diversion of Water from the Meuse</i> , (1937) P.C.I.J. Ser. A/B, No. 70, Ser. C, No. 81.	4, 7, 23
<i>Donauversinkung Case</i> (Wurttemberg and Prussia v. Baden), 4 Ann. Dig. 128 (RGst. 1927) (Germ.).	2, 3, 4, 5, 7
<i>Fisheries Jurisdiction Cases</i> (U.K. v. Ice.) (Fed. Rep. of Ger. v. Ice.), 1974 I.C.J. 3.	7, 8, 17
<i>Handelskwekerij G.J. Bier BV und Stichting "Reinwater" v. Mines Domaniales de Potasse d'Alsace SA</i> (Neth. v. Fr.), 113 NJ 313 (HR 1979) (Neth.).	1, 2, 7
<i>Island of Palmas Case</i> , 2 U.N.R.I.A.A. 829 (1928).	4
<i>Kansas v. Colorado</i> , 206 U.S. 100 (1921).	4

<i>Lake Lanoux Arbitration</i> (Fr. v. Spain), 12 U.N.R.I.A.A. 281, 24 I.L.R. 101 (1957)	4, 6, 8, 9
<i>Military and Paramilitary Activities In and Against Nicaragua</i> (Merits) (Nic. v. U.S.), 1986 I.C.J. 14.	12, 18
<i>Minors Oposa v. Secretary of the Dep't of Environment and Natural Resources</i> , 33 I.L.M. 173 (Philippines Supreme Court 1994).	2
<i>Missouri v. Illinois</i> , 200 U.S. 496 (1906).	3, 4
<i>Nebraska v. Wyoming</i> , 325 U.S. 589 (1945).	5, 6, 7
<i>New Jersey v. New York</i> , 283 U.S. 336 (1931).	7
<i>North Seas Continental Shelf Case</i> (Fed. Rep. of Ger. v. Den.) (Fed. Rep. of Ger. v. Neth.), 1969 I.C.J. 3.	8, 18
<i>Portuguese Colonies Case</i> (Port. v. Ger.), 2 U.N.R.I.A.A. 1011 (1928).	23
<i>Societe Energie Electrique du Littoral Mediterranee v. Compagnia Imprese Elettriche Liguri</i> (Fr. v. It.), 9 Ann. Dig. 120, 121 (Cass. 1939) (Italy).	1, 2, 7, 23
<i>SS Lotus</i> , 1927 P.C.I.J. (ser. A) No. 10, at 18 (1927).	4
<i>Territorial Jurisdiction of the Int'l Comm'n of the River Oder</i> (U.K., Czech., Den., Fr., Ger., Swed. v. Pol.), 1929 P.C.I.J. (ser. A) No. 23, at 27 (Sept. 10).	2, 3, 4
<i>Trail Smelter Arbitration</i> (U.S. v. Can.), 3 U.N.R.I.A.A. 1938 (1941).	1, 2, 5, 10, 16, 19, 23
<i>United States Diplomatic and Consular Staff in Tehran</i> (Judgment), 1980 I.C.J. 3.	11, 13, 22
<i>Zarumilla River Arbitration</i> (Ecuador v. Peru), reprinted in Informe del Ministro de las Relaciones Exteriores a la Nacion 623 (Quito 1946), translated and cited in 53 Am. J. Int'l L. 50 (1959).	3

Treatises and Digests

Birnie, Patricia and Boyle, Alan, *International Law and the Environment* (1992). 11, 14, 22

Blackstone, W., *3 Commentaries on the Laws of England* (1827). 1

Brownlie, Ian, *System of the Law of Nations* (1983). 22

Bruhacs, J., *The Law of Non-Navigational Uses of International Watercourses* (1992). 4

Delaume, Georges, *Transnational Contracts: Applicable Law and Settlement of Disputes* (1988). 16

Health Impacts of Polynuclear Aromatic Hydrocarbons (A.W. Pucknat, ed. 1981). 13

Kiss, Alexandre and Shelton, Dinah, *International Environmental Law* (1991). 11, 12, 23

Kurgis, Frederic, *Prior Consultation in International Law* (1983). 8

Lammers, Johan, *Pollution of International Watercourses* (1984). 3, 4, 15

Munro, Michael and Lammers, Johan, *Environmental Protection and Sustainable Development* (1990). 9

Nurick, Lester, *Certain Aspects of the Law and Practice of the International Bank for Reconstruction and Development, in the Effectiveness of International Decisions* (1971). 16

1 *Oppenheim's International Law* (Robert Jennings and Arthur Watts, eds., 9th ed., 1992). 1, 2, 3, 5

Organization for Economic Cooperation and Development, *Legal Aspects of Transfrontier Pollution* (1977). 19, 21

Schneider, Jan, *World Public Order of the Environment* (1979). 15

Shihata, Ibrahim, *The World Bank in a Changing World* (1991). 17

Teclaff, Ludwik and Utton, Albert, *International Environmental Law* (1990). 4

Whiteman, Marjorie, *Digest of International Law* (1965). 23

Essays, Journals and Periodicals

Bourne, Charles, *Procedure in the Development of International Drainage Basins: The Duty to Consult and to Negotiate*, 1972 *Can. Y.B. Int'l L.* 212. 8

Broches, Aron, *International Legal Aspects of the Operations of the World Bank*, 98 *Recueil des Cours* 301, 352 (1959). 16

Brown, E.D., *The Lessons of Torrey Canyon*, 21 *Current Legal Problems* 11 (1968). 15

Charme, Joni, *Transnational Injury and Ultra-Hazardous Activity: An Emerging Norm of International Strict Liability*, 4 *J.L. & Tech.* 75 (1989). 19, 20

Dupuy, Pierre-Marie, *International Liability of States for Damage Caused by Transfrontier Pollution*, in *OECD, Legal Aspects of Transfrontier Pollution* 345 (1977). 19

Goldie, L.F.E., *Liability for Damage and the Progressive Development of International Law*, 14 *Int'l & Comp. L.Q.* 1189 (1965). 19, 20

Handl, Gunther, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 *Am. J. Int'l L.* 525 (1980). . . 19, 20, 22

Hutchinson, Charles, *Development in Arid Lands: Lessons from Lake Chad*, *Environment*, Jul.-Aug. 1992, at 16. 7

Please, Stanley, *The World Bank: Lending for Structural Adjustment, in International Borrowing* (Daniel Bradlow, ed., 1986). 16

Jenks, C. Wilfred, *Liability for Ultra-Hazardous Activities in International Law*, 117 *Recueil des Cours* 99 (1966). 20

Kelson, John, *State Responsibility and the Abnormally Dangerous Activity*, 13 *Harv. Int'l L.J.* 197 (1972). 19, 20, 21

Lammers, Johan, *International and European Community Law Aspects of Pollution of International Watercourses*, in *Environmental Protection and International Law* 117 (Winfried Lang, Hanspeter Neuhold and Karl Zemanek, eds., 1991). 15

Linnerooth, J., *The Danube River Basin: Negotiating Settlements to Transboundary Environmental Issues*, 30 *Nat. Res. J.* 629 (1990). . . . 7

Nanda, Ved, *The Law of the Non-Navigational Uses of International Watercourses: Draft Articles on Protection and Preservation of Ecosystems, Harmful Conditions and Emergency Situations, and Protection of Water Installations*, 3 *Colo. J. Int'l Env't'l L. & Pol'y* 175 (1992). 21

Nanda, Ved, *Liability for Space Activities*, 41 *U. Col. L. Rev.* 509 (1969). 20

Paarlberg, Robert, <i>The Politics of Agricultural Resource Abuse</i> , Environment, Oct. 1994, at 7.	7
Partan, Daniel, <i>The Duty to Inform in International Environmental Law</i> , 6 Bos. Int'l L. J. 43, 75 (1988).	11, 12, 13, 14
Plater, Zygmunt, <i>Damming the Third World: Multilateral Development Banks, Environmental Diseconomies, and International Reform Pressures on the Lending Process</i> , 17 Den. J. Int'l L. & Pol'y 121 (1988).	20, 21
Robinson, Nicholas, <i>International Trends in Environmental Impact Assessments</i> , 19 B.C. Env't'l Aff. L. Rev. 591 (1992).	9, 10
Tay, Alice, <i>Principles of Liability and the "Source of Increased Damages" in the Soviet Law of Tort</i> , 18 Int'l & Comp. L.Q. (1969).	19
Utton, Albert, <i>International Water Quality Law</i> , 13 Nat. Res. J. 282 (1973).	4
Van Alstyne, William, <i>International Law and Interstate River Disputes</i> , 48 Cal. L. Rev. 596 (1960).	3
Van de Laar, Art, <i>Water Development for Power and Irrigation, The Environment and Sustainable Development</i> (Institute of Social Studies Working Paper No. 141, 1993).	20, 21
Van Dyke, Jon M., <i>Sea Shipment of Japanese Plutonium under International Law</i> , 24 Ocean Dev. & Int'l L. 399 (1993).	18, 19
Wirth, David, <i>Legitimacy, Accountability and Partnership: A Model for Advocacy on Third World Environmental Issues</i> , 100 Yale L.J. 2645 (1991).	16

Miscellaneous

21 Op. Att'y Gen. 274 (1895).	4
<i>Canada-United States Settlement of Gut Dam Claims (Sept. 27, 1968): Report of the Agent of the United States before the Lake Ontario Claims Tribunal, reprinted in 8 I.L.M. 118 (1969).</i>	2, 18
Declaration of Buenos Aires (Proceedings of the 10th Conference), 1 Inter-American Bar Association 246-48 (1958).	3
Declaration of the Seventh Pan-American Conference on the Industrial and Agricultural Use of International Rivers, 28 Am. J. Int'l L. 59 (Supp.) (1934).	3
Helsinki Rules on the Uses of the Waters of International Rivers, Aug. 20, 1966, 52 I.L.A. 484 (1967).	4, 5, 6, 11
International Law Association Rules on International Law Applicable to Transfrontier Pollution, Sept. 4, 1982, reprinted in 60 I.L.A. 158 (1983).	12, 14

Memorandum to the Legal Advisor,
Nov. 23, 1942, reprinted in 3 Whiteman Digest, Colorado § 13. 4

Report of the Indus Commission 10-11 (1942). 4

Restatement (Third) of the Foreign Relations Law of the United States (1986).
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STATEMENT OF JURISDICTION

The governments of Behestoon and Agistanus have agreed to the compulsory jurisdiction of the International Court of Justice pursuant to Article 36(2) of the Statute of the Court. Article 36(2) places within the jurisdiction of the Court all legal disputes concerning a) the interpretation of treaties, b) any question of international law, and c) questions regarding the existence of any fact which would establish a breach of international law.

Article 38 further provides that the function of the Court is to decide disputes submitted to it.

By virtue of Articles 36(2) and 38, the Court may settle the questions presented by the parties.

STATEMENT OF FACTS

The Ozoonio River is the fresh water artery of the Gorgon Plateau, originating in northern mountains and flowing south through the nations of Agistanus and Behestoon, respectively. Compromis at lines 1-5 (hereinafter Comp.). Two-thirds of the Ozoonio flows through Behestoon before it descends into the Bandeke Estuary, a brackish water bay that provides a habitat for many unique wildlife species and for migratory birds that rest on Solonia Bay. Comp. at lines 6-11. Historically, both Agistanus and Behestoon have relied upon the Ozoonio for their sustenance and prosperity.

Behestoon depends on the river to supply ninety percent of its industrial and domestic water requirements. Comp. at lines 52-53. Prototype desalination plants, built during the last decade, process salt water from Solonia Bay and supply the remaining ten percent. Comp. at lines 53-55.

To meet its domestic energy requirements, Behestoon imports petroleum and surplus electricity, and it employs a waste recycling and recovery program using thermal generators. Comp. at lines 48-51. Although the recovery programs are extensive, they cannot process all of Behestoon's industrial and domestic waste; consequently, both treated and untreated substances are returned to the river. Clarification 5.

Agistanus is a small, but relatively prosperous nation with an economy unburdened by foreign debt. Comp. at lines 4-5, 12-13, 24-26. The Ozoonio is also its primary source of fresh water. Comp. at lines 12, 19-20. In the last few decades, most of the population has moved from semi-arid plains to cities along the Ozoonio. Comp. at lines 15-19. Industries use the river for manufacturing and transporting goods through Behestoon to Solonia Bay for worldwide distribution. Comp. at lines 20-26.

Behestoon and Agistanus belong to the United Nations (UN), the World Bank Group (WBG) and its member institutions, and the Strategic Options Treaty Organization (SOTO), a regional security organization that provides military assistance to its member states. Comp. at lines 40-44, 58. Each country has signed Agenda 21, the Rio Declaration, the Stockholm Declaration, and are parties to the Vienna Convention on the Law of Treaties. Comp. at lines 364-365, Clarification no. 12 [hereinafter Clar.]. Behestoon has also ratified the United Nations Convention on the Law of the Sea. Clar. no. 11. No treaties exist between Behestoon and Agistanus concerning toxic substances. Comp. at lines 365-366.

The loan agreement. In the early 1970's, the government of Agistanus commissioned the (WBG) and the Inter-Regional Agricultural Development Bank (IRADB) to survey the natural resources of Agistanus as a means to foster sustainable development and to diversify its market economy. Comp. at lines 60-66, Clar. no. 2. A team of experts conducted extensive exploratory drilling in the Agistanus highlands to search for additional sources of water for agricultural use. Comp. at lines 71-74, Clar. no. 3. New water supplies were found but not fully explored, due to poor technical advice and inadequate consultations. Comp. at lines 74-76. In its conclusions, the Bank chose not to identify the sources and origins of the water, believing that the quantities were not adequate to meet the development goals of Agistanus. Comp. at lines 76-79.

The Bank also conducted geological explorations in northern Agistanus, where large amounts of rare and strategic minerals were unearthed. Comp. at lines 80-82. The IRADB's experts viewed this find as a lucrative opportunity for development and included the information in their report. Comp. at lines 82-85.

When the Ministry of Commerce for Agistanus presented the survey's results to the legislature, it declared two goals: to convert the traditional, native Amahan grazing lands into vast agricultural fields, and to develop a mining industry. Comp. at lines 86-94.

To further these goals, the Ministry of Commerce proposed constructing a dam across the Ozoonio River. Comp. at line 96. The dam would retain enough water to irrigate crops, supply the mining operation, and generate hydroelectric power for domestic use and resale. Comp. at lines 97-104. The legislature authorized the Ministry to apply for a US\$10 billion loan from the IRADB to finance the dam and other associated development projects. Comp. at lines 105-109.

Upon hearing the news, Behestoon filed objections and reservations with the IRADB over the project, expressing concern over the possible effects the dam would have on its own industrial and domestic water use. Comp. at lines 111-113. Nevertheless, the Bank granted Agistanus' loan application in 1980. Comp. at lines 111-113.

Agistanus agreed to comply strictly with the terms of the loan, which was a standard, non-negotiable international agreement. Comp. at lines 115-117. Under the loan's provisions, Agistanus was required to use the dam's water for mining and agriculture projects. Comp. at lines 118-121. It also agreed to maintain a large surplus of water in the dam's reservoir at all times in case of drought and to generate electricity for resale. Comp. at lines 122-128. Finally, Agistanus promised to provide a consistent flow of water to Behestoon during all phases of the dam's construction and operation. Comp. at lines 119-131. Non-compliance with these terms would place Agistanus in default of the loan agreement and cause control of the dam to revert to the IRADB. Comp. at line 132.

The development projects. Agistanus began construction during the early 1980s, leveling ground and cutting down forests to make way for the dam site. Comp. at line 136. In addition, Agistanus initiated development of its mining and agricultural industries, so that when the Namche Dam became operational on 1986, these projects were ready as well. Comp. at line 149.

From 1986 to 1991, Agistanus converted 500,000 additional acres of semi-arid desert to agricultural lands. Comp. at lines 151-153. Moreover, Agistanus constructed irrigation channels to collect saline run-off from the fields and dispose of it in the Ozoonio River adjacent to Behestoon's border.

The effects of the development projects. The economy of Agistanus boomed significantly. Comp. at lines 161, 213. Agricultural production prospered, and initial shipments of strategic minerals and ores sold successfully on the world market. Comp. at lines 161-162. The Namche Dam, operating at nearly full capacity, produced almost four times the domestic energy needs of Agistanus, allowing it to sell the surplus to other countries, including Behestoon. Comp. at line.160.

In sharp contrast, Behestoon documented a thirty-three percent drop in the river's flow after the dam became operational. Comp. at line 185. Testing revealed increased levels of pesticides, herbicides, nitrates, estrogen-based compounds and other agricultural toxins in the Ozoonio. Comp. at lines 190-195. In addition, the productivity of Behestoon's riparian agricultural lands declined, as did its fishing stocks. Comp. at lines 178-179. Periods of extreme eutrophication of the river and increased water treatment costs also plagued Behestoon. Comp. at lines 177-180. However, Behestoon did benefit from Agistanus' projects by attempting to take advantage of increased barge traffic, and by purchasing electricity at favorable rates. Comp. at lines 163-170.

Behestoon's Prime Minister expressed concern to Agistanus over the increased pollutants in the river and the economic woes Behestoon appeared to be suffering as a result of Agistanus' use of the Ozoonio. Comp. at lines 189-191. More urgently, the Prime Minister noted that these changes to the river could adversely affect the health of Behestoon's citizens. Comp. at line 196. She also warned that the chemicals could cause agricultural problems and damage many sensitive aquatic species, especially the zoo-plankton, which inhabit the Bandeke Estuary and Solonia Bay. Comp. at lines 196-199. The zoo-plankton form the base of the food chain in the estuary and the bay, and are currently faced with extinction. Comp. at lines 200-202. A further drop in their numbers would pose a threat to the entire fishing industry of Behestoon. Comp. at line 203.

The President of Agistanus ignored Behestoon's concerns. Comp. at lines 212-214. Behestoon's Ministry of the Environment also asked for changes and proposed that Agistanus simply increase the water flow to previous levels to dilute the contaminants in the Ozoonio River. Comp. at lines 204-207. Agistanus refused, denying all responsibility for Behestoon's growing concerns. Comp. at lines 211-212, 219.

The toxic plume. On August 13, 1993, an earthquake of medium severity shook Agistanus's mining operation, exposing a massive water-bearing fissure and a layer of tar-like substance. Comp. at lines 220-224. Highly corrosive, malodorous water erupted from the crevice and flooded the mine within thirty-six hours. Comp. at lines 225-227. The toxic liquids poured through natural and human-formed cracks in the rocks, and joined streams that flowed into the Ozoonio just below the dam. Comp. at lines 233-235. The corrosive water formed a visible toxic plume that proceeded to move downstream toward Behestoon. Comp. at lines 235-237.

Agistanus failed in its initial attempts to contain the toxic spill. Comp. at line 238. Its government then suppressed all news of the disaster in its national press, instead characterizing the event as "minor" and "fully under control." Comp. at lines 238-241.

Two days later, when Behestoon discovered increasing levels of an unidentified toxic substance at one of its sampling sites along the river, it lodged an official inquiry with Agistanus. Comp. at line 242-245. Again, Agistanus rebuffed Behestoon's fears, downplayed the extent of the mining disaster, and refused to accept responsibility for Behestoon's ever-increasing water concerns. Comp. at lines 246-249.

Fearing a cover-up, Behestoon dispatched two aerial reconnaissance flights survey the Ozoonio River the disaster site itself. Comp. at lines 250-253. The aerial photographs exposed the truth: a large, gray plume visibly flowing from streams near the mine and emptying into the river. Comp. at lines 261-262. It increased in size and intensity as it moved downstream, and apparently would enter Behestoon within a week. Comp. at lines 264-266.

A small team of military scientists also crossed the border to collect water samples from both the river and irrigation channels. Comp. at lines 254-257. Test results revealed large amounts of highly toxic hydrocarbon-based substances in the Ozoonio and dangerously high levels of agricultural chemicals in the channels. Comp. at lines 258-260. Behestoon immediately released the photographs and test results to the media. Comp. at lines 266-268.

Only after suffering public embarrassment from the international outcry over the catastrophe did Agistanus agree to meet with Behestoon. Comp. at lines 269-274. Behestoon suggested that Agistanus open the valves of the dam to dilute the toxin and lessen its damaging effects. Comp. at lines 279-281.

The President of Agistanus flatly rejected this proposal. Comp. at line 287. He stated that his advisors did not believe there was enough water to effectively dilute the plume, despite the large excess maintained in the reservoir. Comp. at lines 281-283. The President said that such an action would place Agistanus in violation of its loan agreement, flood unharvested land, and disrupt power production. Comp. at lines 284-286. Meanwhile, the time in which Agistanus could have stopped the plume from reaching Behestoon had passed. Comp. at lines 277-278.

The plume proved to be lethal, killing plants and animals in its now-unstoppable path toward Behestoon. Comp. at lines 288-289. Scientists from Behestoon conducted further tests on the plume in their territory and discovered the presence of large amounts of deadly polycyclic aromatic hydrocarbons (PAHs). Comp. at lines 289-294. Even minute quantities of these compounds are believed to cause malnutrition, cancer, spontaneous abortions, birth defects and other health problems. Comp. at lines 295-298. The World Health Organization (WHO) believes any detectable amount of PAHs poses an unacceptable health risk. Comp. at lines 298-299. Now alarmed over this new threat, Behestoon began closing water treatment facilities along the Ozoonio to prevent damage and contamination of the facilities themselves. Comp. at lines 301-303.

Behestoon's Prime Minister called an emergency meeting of her cabinet. Comp. at lines 309-310. She finally turned for assistance to the SOTO for help. Comp. at line 313. Behestoon suggested that SOTO take over the dam and increase the flow for the amount of time needed to dilute the plume. Comp. at lines 314-316.

Agistanus still refused to open the dam. Comp. at lines 316-317. Instead, Agistanus proposed that the IRADB should make the decision to empty

the reservoir, having already "surmised" that the IRADB would not allow Agistanus to do so. Comp. at lines 319, 333-334, Clar. no. 1. In addition, recent evidence had come to light which revealed that the IRADB had minimized the existence of the tar-like substance out of fear that Agistanus might withdraw the loan application. Comp. at lines 322-323, 327-328. Recalling that the IRADB had simply ignored its initial objections to the development projects, Behestoon rejected the proposal that the bank remedy this situation. Comp. at lines 341-344.

With the assistance of the United Nations Secretary General, Behestoon and Agistanus have agreed to accept the compulsory jurisdiction of the International Court of Justice and to submit their dispute to the Court for final resolution. Comp. at lines 360-364. As of this date, the toxic plume continues to pose a severe and imminent threat as it moves slowly towards Solonia Bay. Comp. at lines 357-359, Clar. no. 8.

QUESTIONS PRESENTED

- I. Does Behestoon have a right to the continued, undiminished flow of the Ozoonio River, to preserve its territorial integrity?
- II. Did Agistanus violate Behestoon's right to an equitable and reasonable utilization of the Ozoonio River?
- III. Did the development activities of Agistanus prior to August 13, 1993 violate environmental safeguards owed to Behestoon under international law?
- IV. Did the response of Agistanus to the toxic plume emergency after August 13, 1993 violate environmental safeguards owed to Behestoon under international law?
- V. Is Agistanus strictly liable to Behestoon for all damages resulting from its operation of the Namche Dam?
- VI. Is Agistanus liable to Behestoon under a fault liability regime for all damages incurred as a result of these violations?

SUMMARY OF PLEADINGS

Both Agistanus and Behestoon recognize that the governing rule of international environmental law permits states to exploit their own resources, provided that the activities within their jurisdiction do not cause harm to the environment of other states. Despite this acknowledgment, Agistanus' ambitious, but ill-conceived, development initiatives have caused Behestoon to suffer serious harm. Thus, Behestoon brings two separate claims before this Court for its injuries suffered before and after the August 13, 1993 earthquake.

Since Agistanus opened the Namche Dam in 1986, Behestoon has suffered a thirty-three percent reduction in the river's flow through its territory. Under the doctrine of territorial integrity, Behestoon is entitled to a restoration of the river's flow to its pre-1986 levels, particularly when the reduction in flow causes substantial harm. Such a restoration would correct the environmental ills suffered by Behestoon, alleviate the threats posed to the species in the Bandeke Estuary and Solonia Bay, as well as place Agistanus in compliance with its international obligation not to cause transboundary harm to Behestoon.

Agistanus prospered greatly from its use of the Ozoonio River, irrigating its agricultural fields and generating hydroelectric power far in excess of its domestic needs. Notwithstanding its right to sustainable development, Agistanus cannot maintain its present course to the detriment of the quantity and quality of Behestoon's water flow, fishing stocks and agricultural productivity. Furthermore, Agistanus' failure to enter into good faith negotiations with Behestoon prior to the construction of the dam only exacerbated its inequitable and unreasonable use of the Ozoonio River.

Agistanus failed to adequately consult with Behestoon and assess the potential environmental hazards with respect to its development projects. This inevitably gave birth to the chain of events that resulted in the August 13, 1993 earthquake and formation of the polycyclic aromatic hydrocarbons.

Agistanus' response to the emergency was highly unacceptable to protect Behestoon from transboundary harm. The outright, repeated suppression of vital information regarding the transboundary threat transcended a mere legal violation to constitute an offense against humanity.

Despite Agistanus' excuse, the loan agreement does not bar Agistanus from restoring the flow of the Ozoonio River to its pre-1986 levels. International law affords Agistanus the right to suspend its obligation to retain an excess amount of water in the reservoir. In reality, Agistanus is under no credible threat of losing control over its dam facility. The fundamental change of environmental circumstances justifies a release of the excess water to protect the environment of Behestoon, the Bandeke Estuary, and Solonia Bay.

Agistanus is strictly liable to Behestoon for all damages caused by its dam operations. As an ultrahazardous activity, dams have foreseeably triggered medium grade earthquakes. In the alternative, Agistanus is strictly liable for causing appreciable harm through the detrimental effects of its development projects upon the river's nutrient content, salinity, and fishing stocks, as well as the agricultural land, in Behestoon's territory.

Additionally, Agistanus is liable for its failure to prevent transboundary harm to Behestoon. Agistanus' liability extends to the conduct of the IRADB because of Agistanus' inadequate supervision over the IRADB's activities within Agistanus.

Therefore, Behestoon is entitled to all damages caused by Agistanus'

development activities. Agistanus' failure to prevent transboundary harm requires it to pay compensation for the reduction in flow, property damage, and economic losses suffered by Behestoon.

PLEADINGS AND AUTHORITIES

I. AGISTANUS MUST ENSURE THAT THE ACTIVITIES WITHIN ITS JURISDICTION DO NOT CAUSE DAMAGE TO THE ENVIRONMENT OF BEHESTOON.

Principle 21 of the Stockholm Declaration¹ and Principle 2 of the Rio Declaration,² signed by both parties, require sovereign states "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States."

The maxim *sic utere tuo ut alienum non laedas* ("so use your own property as not to injure your neighbor")³ governs all aspects of this dispute. Consistently applied to resolve international disputes over transboundary pollution,⁴ it is regarded as both customary international law⁵ and a general

¹ Report of the Stockholm Conference on the Human Environment, U.N. Conference in Stockholm, Sweden, Jun. 5-16, 1972, U.N. Doc. A/CONF. 48/14, 11 I.L.M. 1416, 1420 (1972), princ. 21 [hereinafter Stockholm Declaration].

² U.N. Conference on Environment and Development (UNCED) at Rio de Janeiro, Jun. 13, 1992, U.N. Doc. A/CONF. 151/26 (vol. I), 31 I.L.M. 874, 876 (1992), princ. 2 [hereinafter Rio Declaration].

³ 1 *Oppenheim's International Law* 585-86 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992) [hereinafter *Oppenheim*]; W. Blackstone, 3 *Commentaries on the Laws of England* 218 (1827).

⁴ *Trail Smelter Arbitration* (U.S. v. Can.), 3 U.N.R.I.A.A. 1938, 1974-78 (1949); *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22; *Societe Energie Electrique du Littoral Mediterranee v. Compagnia Imprese Elettriche Liguri* (Fr. v. It.), 9 Ann. Dig. 120, 121 (Ct. of Cassation 1939) (It.) [hereinafter *Societe Energie Electrique*]; *Handelskwekerij G.J. Bier BV und Stichtung "Reinwater" v. Mines Domaniales de Potasse d'Alsace SA* (Neth. v. Fr.), 113 NJ 313, 315 (HR 1979) (Neth.) [hereinafter *Handelskwekerij*].

⁵ United Nations Convention on the Law of the Sea, Dec. 10, 1982, arts. 192-194, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261, 1308 (1982), [hereinafter UNCLOS]; Draft 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, May 19, 1978, princ. 3, U.N. Doc. UNEP/IG.12/2, 17 I.L.M. 1097 (1978) [hereinafter *Harmonious Utilization*]; Stockholm Declaration, *supra* note 1, at 64-66 (Canadian and U.S. comments); Draft Articles on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, [1989], art. 6, 2 *Y.B. Int'l L. Comm'n* 139, U.N. Doc. A/CN.4/SER.A/1989/Add.1 [hereinafter *Injurious Consequences*].

principle of law.⁶ The rule extends to the protection of agriculture,⁷ fishing stocks⁸ and water quality.⁹

Whether or not they control the party causing the injury, states are responsible for injuries to their neighbors.¹⁰ Here, Agistanus does, in fact, exercise control over the Namche Dam and its own agricultural and mining activities.¹¹ As a result of these projects, Agistanus has harmed not only Behestoon's economy and environment, but also its citizens and future generations.¹²

II. AGISTANUS' DEVELOPMENT ACTIVITIES PRIOR TO THE AUGUST 13, 1993 EARTHQUAKE VIOLATED BEHESTOON'S RIGHTS UNDER INTERNATIONAL LAW.

A. Agistanus Has Violated Behestoon's Right to the Continued, Undiminished Flow of Water from the Ozoonio River.

1. Under the principle of territorial integrity, Behestoon has a right to a flow of the river at pre-1986 levels.

State practice has identified two possible rules to apply when the flow of a shared watercourse is disrupted by one state. First, under the doctrine

⁶ *Oppenheim, supra note 3, at 585-86; Donauversinkung Case (Wurttemberg and Prussia v. Baden), 4 Ann. Dig. 128, 131 (RGSt. 1927) (Ger.).*

⁷ *Trail Smelter Arbitration (U.S. v. Can.), 3 U.N.R.I.A.A. 1938, 1974-78 (1949) (holding Canada responsible for injuries to personal property).*

⁸ *Canada-United States Settlement of Gut Dam Claims (Sept. 27, 1968): Report of the Agent of the United States before the Lake Ontario Claims Tribunal, reprinted in 8 I.L.M. 118 (1969) [hereinafter *Gut Dam Arbitration*].*

⁹ *Societe Energie Electrique, supra note 4, at 121.*

¹⁰ *Trail Smelter Arbitration, (U.S. v. Can.), 3 U.N.R.I.A.A. 1938, 1974-78 (1949) (holding Canada held liable for injuries in United States caused by a private smelter emitting sulphur dioxide); Handelskwekerij, supra note 4, at 315 (holding France liable for injuries in the Netherlands caused by private company).*

¹¹ *Compromis at lines 135-147; Clarification no. 6.*

¹² *Minors Oposa v. Secretary of the Dep't of Environment and Natural Resources, 33 I.L.M. 173 (Philippine Supreme Court 1994) (granting unborn future generations standing to claim environmental rights); Resolution on Historical Responsibility of States for the Preservation of Nature for Present and Future Generations, G.A./Res. 35/48, U.N. GAOR, 35th Sess., Supp. No. 48, at 15, U.N. Doc. A/36/48 (1981).*

of absolute territorial integrity,¹³ a state is barred from disrupting the natural flow of a shared watercourse without the prior consent of a neighboring state. Second, under the doctrine of restricted territorial integrity,¹⁴ a state may modify the natural flow of a shared watercourse only to the extent that such unilateral modifications do not appreciably harm the neighboring state. Under either rule, Behestoon's rights to the full flow of the river are clearly established.

By reducing the Ozoonio's flow, Agistanus restricted Behestoon's ability to dilute existing contaminants carried through Behestoon's territory.¹⁵ Thus, Agistanus caused injury to Behestoon even before the August 13, 1993 earthquake.

2. Restoring the flow of the Ozoonio River to its pre-1986 levels neither harms nor infringes upon Agistanus' sovereign rights.

At a time when most of the world is suffering an economic recession,

¹³ See, e.g., Madrid Declaration on International Regulation Regarding the Use of International Watercourses for Purposes other than Navigation, art. 2, reprinted in 24 *Annuaire De L'institut De Droit International* 365 (1911); Declaration of the Seventh Pan-American Conference on the Industrial and Agricultural Use of International Rivers, art. 2, reprinted in 28 *Am. J. Int'l L.* 59 (Supp.) (1934); Convention between Great Britain, Northern Ireland, New Zealand, Denmark, Greece, Siam, Southern Rhodesia, and Newfoundland relating to the Development of Hydraulic Power, Dec. 9, 1923, art. 12, 26 *L.N.T.S.* 76, 81 (1925); Declaration of Buenos Aires (Proceedings of the 10th Conference), 1 *Inter-American Bar Association* 246-48 (1958); Oppenheim, *supra* note 3, at 474-75 (1992); William Van Alstyne, *International Law and Interstate River Disputes*, 48 *Cal. L. Rev.* 596, 610-13 (1960).

¹⁴ See, e.g., *Territorial Jurisdiction of the Int'l Comm'n of the River Oder* (U.K., Czech., Den., Fr., Ger., Swed. v. Pol.), 1929 *P.C.I.J.* (ser. A) No. 23, at 27 (Sept. 10) [hereinafter *River Oder Case*]; *Zarumilla River Arbitration* (Ecuador v. Peru), reprinted in *Informe del Ministro de las Relaciones Exteriores a la Nacion* 623 (Quito 1946), translated and cited in 53 *Am. J. Int'l L.* 50, 61 (1959); *Donauversinkung Case*, (Wurttemberg and Prussia v. Baden), 4 *Ann. Dig.* 128, 131 (RGSt. 1927) (Ger.); *Missouri v. Illinois*, 200 *U.S.* 496, 522 (1906); Report of the U.N. Commission for Europe: *Legal Aspects of Hydro-Electric Development of Rivers and Lakes of Common Interest*, at 95-152, *U.N. Doc. E/ECE/136* (1952); Convention on Certain Questions Relating to the Law of Watercourses, May 11, 1929, Swed.-Nor., art. 12(1), 120 *L.N.T.S.* 277, 281; Johan Lammers, *Pollution of International Watercourses* 562 (1984).

¹⁵ *Fifth Report on the Law of the Non-Navigational Uses of International Watercourses*, U.N. GAOR, Int'l L. Comm'n, 40th Sess. at 9, *U.N. Doc. A/CN.4/421/Add.2* (1988)

Agistanus, having "all but realized the full benefit" of the Namche Dam, has prospered and now generates close to four hundred percent of its domestic power needs.¹⁶ A controlled increase in the flow would not deter Agistanus from meeting its domestic needs nor deny it significant profits.

Agistanus cannot assert a sovereign right to develop regardless of the effects on Behestoon. This theory of territorial sovereignty¹⁷ has been universally rejected.¹⁸ In short, Agistanus' development rights extend only to actions that do not encroach upon Behestoon's territory.

B. Agistanus has Violated Behestoon's Right to an Equitable and Reasonable Use of the Ozoonio River.

Under the principle of equitable utilization, overwhelmingly endorsed by international¹⁹ and domestic²⁰ tribunals, states that share an international watercourse may utilize the waters for maximum benefits but must minimize the detriments to other riparian states.²¹ Reasonable and equitable use of the

¹⁶ Compromis at lines 142-44, 159.

¹⁷ See Lammers, *supra* note 14, at 557-58; 21 Op. Att'y Gen. 274, 281-82 (1895) (asserting former U.S. Attorney General Harmon's theory); Memorandum to the Legal Advisor, Nov. 23, 1942, reprinted in 3 Whiteman Digest, Colorado, § 13, at 953 (citing the U.S. State Department's memo rejecting the "Harmon Doctrine").

¹⁸ *Island of Palmas Case*, 2 U.N.R.I.A.A. 829, 839 (1928) (limiting a state's sovereign rights to its own territory); *SS Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 18; *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22. See also J. Bruhacs, *The Law of Non-Navigational Uses of International Watercourses* 47 (1992) and Ludwik Teclaff and Albert Utton, *International Environmental Law* 156 (1990).

¹⁹ *River Oder Case*, *supra* note 14, at 27; *Diversion of Water from the Meuse*, (1937) P.C.I.J. Ser. A/B, No. 70, Ser. C, No. 81, at 81; *Lake Lanoux Case Arbitration (Fr. v. Spain)*, 12 U.N.R.I.A.A. 281, translated in 24 I.L.R. 101 (1959).

²⁰ *Donauversinkung Case (Wurttemberg and Prussia v. Baden)*, 4 Ann. Dig. 128, 129 (RGSt. 1927); *Kansas v. Colorado*, 206 U.S. 100; *Missouri v. Illinois*, 200 U.S. 496 (1906); *Report of the Indus Commission* 10-11 (1942).

²¹ Helsinki Rules on the Uses of the Waters of International Rivers, Aug. 20, 1966, art. 2, 52 I.L.A. 484 (1967) [hereinafter Helsinki Rules]; Draft Articles on the Non-Navigational Uses of International Watercourses, July 19, 1991, [1991] 2 Y.B. Int'l L. Comm'n 66 (pt. 2), U.N. Doc. A/46/10. [hereinafter Non-Navigational Uses]; Albert Utton, *International Water Quality Law*, 13 Nat. Res. J. 282, 291 (1973).

watercourse is determined in light of "all the relevant factors in each particular case."²²

The Ozoonio River is an international watercourse shared by Agistanus and Behestoon.²³ In disregard of Behestoon's rights, Agistanus has reduced both the quantity and quality of the water in Behestoon, while deriving unprecedented profit for itself.²⁴

The Helsinki Rules, considered "general rules of international law,"²⁵ list several factors relevant to equitable use, including geography, hydrology, climate, past and current use, needs, alternative resources, costs, waste, compensation and injury.²⁶ Similar factors found in U.S. Supreme Court decisions²⁷ have been relied upon by international tribunals and commentators²⁸ addressing customary law in this area, and may provide guidance for the Court.²⁹

Notwithstanding Agistanus' right to sustainable development, Agistanus cannot unilaterally hoard the benefits of the river without respecting

²² Helsinki Rules, *supra* note 21, art. 5(1); Non-Navigational Uses, *supra* note 21, art. 7(1); *Donauversinkung Case*, (Wurttemberg and Prussia v. Baden), 4 Ann. Dig. 128, 131 (RGSt.1927) (Ger.); *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

²³ Compromis at lines 1-7; Helsinki Rules, *supra* note 12, art. 2; Non-Navigational Uses, *supra* note 21, art. 7(1).

²⁴ Compromis at lines 158-162, 173-180.

²⁵ Helsinki Rules, *supra* note 21, art. 1. *See generally* Non-Navigational Uses, *supra* note 21 (following the Helsinki Rules in their treatment of non-navigational uses of waterways).

²⁶ Helsinki Rules, *supra* note 21, art. 5(2); Non-Navigational Uses, *supra* note 21, art. 7(1).

²⁷ *See, e.g., Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Colorado v. New Mexico*, 459 U.S. 176 (1982).

²⁸ *Oppenheim*, *supra* note 4, at 584; *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1938, 1964 (1949).

²⁹ Statute of the International Court of Justice, Oct. 24, 1945, arts. 38(1)(b), (c), (d), 1976 Y.B.U.N. 1052.

Behestoon's past and current usage.³⁰ Behestoon relies upon the river for its industry, its domestic consumption, its fishing stocks, its agricultural lands, and its energy programs.³¹ These uses cannot be sacrificed for the sake of Agistanus' development objectives.

Today, the Ozoonio supplies ninety percent of Behestoon's fresh water.³² During the 1980s, the construction of prototype desalination plants along Solonia Bay occurred at a time when Behestoon was in an economic position to explore other hydrological resources.³³ As Agistanus continues to exploit the Ozoonio River to Behestoon's detriment, however, Behestoon's ability to finance such alternatives has weakened considerably. A properly negotiated use of the river by the two states would not only stimulate Behestoon's economy but also reopen the opportunity for Behestoon to explore desalination, ultimately to the benefit of both states.

The principle of equitable utilization also contains a procedural obligation for states to negotiate in good faith on the basis of good neighborly relations.³⁴ Because Agistanus never negotiated with Behestoon, it would offend equity to reward Agistanus by considering its present use of the

³⁰ Stockholm Declaration, *supra* note 1, art. 7.

³¹ Compromis at lines 45-52; Helsinki Rules, *supra* note 21, arts. 5(2)(c), (d) (evaluating past and current use as a factor); Non-Navigational Uses, *supra* note 21, arts. 7(1)(b), (c), (d); *Nebraska v. Wyoming*, 589 (1945).

³² Compromis at lines 52-55.

³³ Compromis at lines 54-55; Helsinki Rules, *supra* note 21, arts. 5(2)(g), (h) (considering availability of alternative resources as a factor); Non-Navigational Uses, *supra* note 21, arts. 7(1)(e), (f); *Colorado v. New Mexico*, 459 U.S. 176, 187-88 (1982) (considering availability of conservation measures as a factor).

³⁴ *Lake Lanoux Arbitration* (Fr. v. Spain), 12 U.N.R.I.A.A. 281, 24 I.L.R. 101, 119 (1957); Charter of Economic Rights and Duties of States, art. 3, G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) at 50, U.N.Doc. A/9631 (1974); Geneva Convention Relating to the Development of Hydraulic Power Affecting More than One State, Dec. 9, 1923, art. 4, 36 L.N.T.S. 75; Helsinki Rules, *supra* note 21, art. 29(1).

river as a factor in the determination of equitable uses.³⁵

C. Agistanus Violated Its Duty to Prevent Transboundary Harm to Behestoon As a Result of Its Development Projects.

States have been held responsible under principles of good neighborliness for activities that reduce the flow,³⁶ increase the salinity,³⁷ or raise the toxicity³⁸ of a watercourse they share with a neighboring state. Irreversible environmental degradation of entire regions due to ill-advised agricultural projects and irrigation systems is well-documented.³⁹ In the instant case, Agistanus has committed each of these wrongful acts.⁴⁰

1. Agistanus breached its duty to consult with Behestoon regarding the dam project and other development plans.

The International Court of Justice has followed customary international

³⁵ See *Fisheries Jurisdiction Cases* (U.K. v. Ice.) (Fed. Rep. of Ger. v. Ice.), 1974 I.C.J. 3, 31-32 (barring Iceland from unilaterally extending its fishing jurisdiction without negotiations in good faith with other states).

³⁶ *Diversion of Water from the Meuse*, 1937 P.C.I.J. Ser. A/B, No. 70, Ser. C, No. 81; *Societe Energie Electrique*, supra note 4, at 120; *Donauversinkung Case* (Wurttemberg and Prussia v. Baden), 4 Ann. Dig. 128, 131 (RGSt. 1927) (Ger.); See also *Nebraska v. Wyoming*, 325 U.S. 589, 609 (1945) (holding that deprivation of water in semi-arid area is injurious to other U.S. states).

³⁷ *Handelskwekerij*, supra note 4, at 315; Treaty Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, U.S.-Mex., 59 Stat. 1219; *New Jersey v. New York*, 283 U.S. 336, 338 (1931).

³⁸ Convention for the Protection of the Rhine River Against Pollution by Chemical Pollution, Jan. 2, 1979, 1124 U.N.T.S. 375, (1967) [hereinafter *Convention Against Chemical Pollution*]; *New Jersey v. New York*, 283 U.S. 336, 338 (1931). See also J. Linnerooth, *The Danube River Basin: Negotiating Settlements to Transboundary Environmental Issues*, 30 Nat. Res. J. 629, 630 (1990).

³⁹ Charles Hutchinson, *Development in Arid Lands: Lessons from Lake Chad*, *Environment*, Apr. 1992, at 16 (stating that large irrigation project accelerates decline of semi-arid lands); Robert Paarlberg, *The Politics of Agricultural Resource Abuse*, *Environment*, Oct. 1994, at 7 (stating that dams and agricultural projects in developing nations can injure fragile ecosystems).

⁴⁰ Compromis at lines 176-86, 191-95, 258-64, 291-94.

law⁴¹ and the writings of eminent jurists⁴² by requiring states to consult with their neighbors concerning any significant risks of pollution with respect to the utilization of a shared watercourse.⁴³ Even in the absence of injury, the tribunal in the *Lake Lanoux* arbitration required France to consult and negotiate in good faith before diverting a watercourse shared with Spain.⁴⁴ Although Spain could not veto France's actions, a procedural obligation to consult still existed. In the instant case, Agistanus initiated no consultations whatsoever with Behestoon prior to undertaking the most extensive development project in its modern history,⁴⁵ one directly affecting Behestoon's source of fresh water.

Principle 24 of the Stockholm Declaration recognizes that the prevention of transboundary environmental harms requires states to cooperate "in such a way that due account is taken of the sovereignty and interests of all [s]tates."⁴⁶ State practice and international organizations have interpreted

⁴¹ *Lake Lanoux Arbitration* (Fr. v. Spain), 12 U.N.R.I.A.A. 281, 24 I.L.R. 101 (1957); Charter of Economic Rights and Duties of States, *supra* note 34, art. 3; Harmonious Utilization, *supra* note 6, princ. 7; Recommendation of the Council on Principles Concerning Transfrontier Pollution, Annex ¶ 8(a), OECD Doc. C(77)28 (Final), 14 I.L.M. 242 (1975); Non-Navigational Uses, *supra* note 21, art. 7; Boundary Treaty, Sept. 29, 1864, Spain-Port., Annex Agreement on Regulation of Boundary Waters, Nov. 20, 1866, 129 Consol. T.S. 453, 455; Frontier Treaty, Dec. 12, 1928, Aus.-Czech., art. 28(3), 108 L.N.T.S. 57; Indus Waters Treaty, Sept. 19, 1960, India-Pak., art. 7(2), 419 U.N.T.S. 125; Nile Waters Agreement, Nov. 8, 1959, Egypt-Sud., 453 U.N.T.S. 51; Treaty Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, U.S.-Can. art. 13(1), 542 U.N.T.S. 244.

⁴² Charles Bourne, *Procedure in the Development of International Drainage Basins: The Duty to Consult and to Negotiate*, 1972 Can. Y.B. Int'l L. 212, 233. See also Frederic Kirgis, *Prior Consultation in International Law* 16-18 (1983).

⁴³ *Fisheries Jurisdiction Cases* (U.K. v. Ice.) (Fed. Rep. of Ger. v. Ice.), 1974 I.C.J. 3, 31-32; *North Sea Continental Shelf Case* (Fed. Rep. of Ger. v. Den.) (Fed. Rep. of Ger. v. Neth.), 1969 I.C.J. 3, 47.

⁴⁴ *Lake Lanoux Arbitration* (Fr. v. Spain), 12 U.N.R.I.A.A. 281, 24 I.L.R. 101, 103 (1957).

⁴⁵ Compromis at lines 158-162.

⁴⁶ Stockholm Declaration, *supra* note 1, princ. 24.

Principle 24 to require an "adequate basis of information" to satisfy the duty to consult.⁴⁷

Although Agistanus may contend that its communications with the IRADB gave Behestoon notice of the project, mere notice is insufficient to satisfy the duty to consult.⁴⁸ Agistanus' unilateral actions with respect to a shared watercourse foreclosed any opportunity to mitigate the consequences that eventually took place.

2. **Agistanus breached its duty to assess and review the environmental impact of the dam, agricultural and mining industries prior to construction.**

Environmental impact assessments are required for projects that pose a "reasonably foreseeable" risk of harm.⁴⁹ In spite of the enormous potential risks, Agistanus never prepared an assessment to consider the potential adverse effects of its projects.⁵⁰ During at least two critical phases of the project, international law required such an evaluation.

When construction began on the Namche Dam in 1982,⁵¹ customary international law had already established the requirement of prior assessments before beginning such projects.⁵² By 1986, the year in which Agistanus began

⁴⁷ UNCLOS, *supra* note 5, art. 206; Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, August 22, 1990, art. 16, reprinted in 26 I.L.M. 38 (1987) [hereinafter SREP Convention].

⁴⁸ *Lake Lanoux Arbitration* (Fr. v. Spain), 12 U.N.R.I.A.A. 281, 24 I.L.R. 101 (1957).

⁴⁹ Michael Munro and Johan Lammers, *Environmental Protection and Sustainable Development* 78-80 (1990); *Injurious Consequences*, *supra* note 5, art. 10.

⁵⁰ *Compromis* at lines 328-331.

⁵¹ *Compromis* at lines 135-136.

⁵² *Harmonious Utilization*, *supra* note 5, princs. 4, 5, 6, 7; See also Nicholas Robinson, *International Trends in Environmental Impact Assessments*, 19 B.C. Env'tl. Aff. L. Rev. 591, 610-621 (citing the laws of Australia, Brazil, Canada, China, Colombia, France, Israel, Japan, Korea, Kuwait, Malaysia, the Netherlands, New Zealand, Papua New Guinea, Philippines, Sri Lanka, Thailand, the United States and the United Kingdom, implementing environmental impact assessment laws prior to 1982).

its massive agricultural and irrigation project, state practice⁵³ and multilateral treaties,⁵⁴ particularly the Law of the Sea Convention,⁵⁵ had further established within customary international law the necessity of prior environmental assessments. The resulting impact, including the increased salinity of the river⁵⁶ and potential displacement of the indigenous Amaha population,⁵⁷ among other consequences, was never considered.

3. Agistanus' duty to prevent transboundary harm overrides its rights to sustainable development and equitable utilization.

Although Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration recognize the sovereign right of states to exploit their own resources "pursuant to their own environmental and developmental policies," they also impose the responsibility not to damage the environment of other states.⁵⁸ These principles find consistent support in judicial decisions citing customary law.⁵⁹

The Rio Convention's Agenda 21, signed by both parties, lists specific pollution concerns that limit uncontrolled development. "Priority" concerns include the introduction of fertilizers,⁶⁰ saline run-off⁶¹ and pesticides⁶²

⁵³ Robinson, *supra* note 52, at 610-621 (citing the laws of Greece, India, Indonesia, Italy, Norway, Pakistan, South Africa, Spain and Turkey implementing environmental impact assessment laws between 1982 and 1986).

⁵⁴ Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, Aug. 14, 1983, Mex.-U.S., art. 7, 22 I.L.M. 1025 (1983); SREP Convention, *supra* note 47, art. 16; World Charter for Nature, G.A. Res. 37/7 (Annex), U.N. GAOR 37th Sess., arts. 11, 16, Supp. No. 51, at 17, U.N. Doc. A/37/51 (1983).

⁵⁵ UNCLOS, *supra* note 5, art. 206.

⁵⁶ *Compromis* at lines 176-180.

⁵⁷ *Id.* at lines 13-15.

⁵⁸ Stockholm Declaration, *supra* note 1; Rio Declaration, *supra* note 2.

⁵⁹ *Trail Smelter Arbitration* (U.S. v. Can.), 3 U.N.R.I.A.A. 1938, 1974-78 (1949); *Corfu Channel* (U.K. v. Albania) (Merits), 1949 I.C.J. 4, 22.

⁶⁰ Agenda 21, Jun. 13, 1992, ch. 17.28(f), U.N. Doc. A/CONF.151/26 (vols. I, II, III) (1992) [hereinafter Agenda 21].

into the environment, matters which Agistanus has ignored.⁶³

Furthermore, because a state's right to equitable utilization is checked by the overarching duty to avoid harm to other states,⁶⁴ the serious detrimental effects of Agistanus' actions upon the quality and quantity of the water entering Behestoon outweigh Agistanus' right to an equitable share.⁶⁵

III. AGISTANUS' ACTIONS SUBSEQUENT TO THE AUGUST 13, 1993 EARTHQUAKE VIOLATED INTERNATIONAL LAW.

A. Agistanus Violated Its Duty to Notify Behestoon of the Toxic Plume.

Customary international law requires a state to provide immediate notification of imminent transboundary harm.⁶⁶ This duty is underscored by numerous treaties and conventions,⁶⁷ state practice,⁶⁸ case law,⁶⁹ codifications

⁶¹ *Id.* at ch. 17.28(h).

⁶² *Id.* at ch. 17.28(i).

⁶³ *Compromis* at line 208.

⁶⁴ *Report of the Int'l L. Comm'n to the General Assembly on the Work of Its Forty-third Session*, U.N. GAOR, 46th Sess., Supp. No. 10 at 84, U.N. Doc. A/43/10 (1988); *Non-Navigational Uses*, *supra* note 21, art. 6.; *Helsinki Rules*, *supra* note 21, art. 2; Patricia Birnie & Alan Boyle, *International Law and the Environment* 227-28 (1992) [hereinafter Birnie & Boyle].

⁶⁵ *Helsinki Rules*, *supra* note 21, art. 5(2)(k); *Injurious Consequences*, *supra* note 21, art. 6.

⁶⁶ *Corfu Channel* (U.K. v. Alb.) (Merits), 1949 I.C.J. 4, 20; *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran) (Judgment), I.C.J. (1980) Rep. 3, 32-3 (Iranian government had knowledge and means to prevent attack on U.S.); Alexandre Kiss & Dinah Shelton, *International Environmental Law* 132 (1991) [hereinafter Kiss & Shelton]; Daniel Partan, *The Duty to Inform in International Environmental Law*, 6 *Bos. Int'l L. J.* 43, 75 (1988).

⁶⁷ *Rio Declaration*, *supra* note 2, princ. 18; *UNCLOS*, *supra* note 5, art. 198; *Agenda 21*, *supra* note 60, ch. 15.1; *Convention Against Chemical Pollution*, *supra* note 38, art. 11; *Convention for the Protection of the Rhine River Against Pollution by Chlorides*, December 3, 1976, art. 11, 16 I.L.M. 265 (1977); *Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution*, April 24, 1978, art. IX (b), 1140 U.N.T.S. 133 (1978); *Convention for the Protection of the Mediterranean Sea Against Pollution*, February 12, 1978, art. 9(2), 15 I.L.M. 290 (1976); *Montreal Guidelines for the Protection of the Marine Environment Against Pollution from Land-Based Sources*, May 24, 1985, art. 15, UNEP/GC.13/9/Add.3, UNEP/GC/DEC/13/1811, UNEP ELPG No. 7 [hereinafter *Montreal Guidelines*]; *SREP Convention*, *supra* note 47, art. 15(2); *Convention on Biological Diversity*,

and the works of publicists.⁷⁰ Furthermore, by signing the Rio Declaration,⁷¹ Agistanus accepted the duty to notify of any natural disasters or emergencies within its jurisdiction.⁷² This obligation was recently underscored by the amendments made to the IAEA Convention on Nuclear Accidents⁷³ following the Soviet Union's failure to notify of the Chernobyl disaster.⁷⁴ Five nuclear

December 29, 1993, art. 14(1)(d), 31 I.L.M. 818 (1992); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, May 5, 1992, art. 13(1), 28 I.L.M. 657 (1989); Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, January 29, 1991, art. 13(1), 30 I.L.M. 775 (1991).

⁶⁸ *Restatement (Third) of the Foreign Relations Law of the United States* § 601.1(a) (1986); Partan, *supra* note 66, at 77 (citing the European Community's adoption of a notice requirement). Montreal Guidelines, *supra* note 67, art. 15; Resolution on Historical Responsibility for the Preservation of Nature for Present and Future Generations, Oct. 30, 1980, art. 7, G.A.Res. 35/48, U.N. GAOR, 35th Sess., Supp. No. 48, at 15, U.N. Doc. A/35/48 (1981); Kiss & Shelton, *supra* note 66, at 134-35 (citing the Soviet Union's failure to warn of the Chernobyl reactor accident and criticizing Switzerland's failure to warn of the Sandoz accident).

⁶⁹ *Corfu Channel (U.K. v. Alb.) (Merits)*, 1949 I.C.J. 4, 20; *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) (Judgment)*, 1980 I.C.J. 3, 31.

⁷⁰ Experts Group on Environmental Law of the World Commission on Environment and Development, Legal Principles for Environmental Protection and Sustainable Development, Aug. 4, 1987, art. 19.1, U.N. Doc. WCED/86/23/Add. 1 (1986) [hereinafter WCED Principles]; Non-Navigational Uses, *supra* note 21, art. 25(2); Harmonious Utilization, *supra* note 5, princ. 9(1); International Law Association Rules on International Law Applicable to Transfrontier Pollution, Sept. 4, 1982, art. 7, 60 I.L.A. 158 (1983) [hereinafter I.L.A. Rules]; Kiss & Shelton, *supra* note 66, at 132.

⁷¹ Compromis at line 364-365.

⁷² Rio Declaration, *supra* note 2, princ. 18; Agenda 21, *supra* note 60, chs. 15.1, and 17.1 (supporting treaties which include a duty to notify); UNCLOS, *supra* note 5, art. 198; Convention on Biodiversity, *supra* note 67, art. 14(1)(d).

⁷³ IAEA Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, Sept. 26, 1987, art. 2, IAEA INFCIRC 336, 25 I.L.M. 1377 (1986) (requiring prompt warning of all non-military nuclear disasters).

⁷⁴ Kiss & Shelton, *supra* note 66, at 134; Partan, *supra* note 66, at 77.

weapon states⁷⁵ unilaterally recognized the duty to report all nuclear incidents, including defense-related incidents.⁷⁶

A state must warn of known dangers, regardless of their cause,⁷⁷ to give potentially affected states the opportunity to take protective measures.⁷⁸ Despite such knowledge, Agistanus quashed all news of the disaster, downplayed the nature of the emergency, and destroyed Behestoon's opportunity to take protective measures and mitigate environmental damages.⁷⁹

The duty to warn extends not only to Behestoon, but to the entire international community because of the known danger posed by the toxic plume to the global commons.⁸⁰ Agenda 21 classifies polycyclic aromatic hydrocarbons (PAHs) as some of the most damaging environmental contaminants.⁸¹ PAHs are highly toxic, and cause cancer, mutations, and birth defects.⁸² They accumulate in the food chain, contaminate food supplies and endanger marine and animal life.⁸³ By failing to warn, Agistanus foreclosed any opportunity to contain the spill, and prevent the chain reaction which created the PAHs that now threaten the global commons.

⁷⁵ Partan, *supra* note 66, at 77 (citing statements made by the U.S., Soviet Union, China, the U.K., and France at the IAEA Convention, Sept. 26, 1986).

⁷⁶ IAEA Convention, *supra* note 73, art. 3.

⁷⁷ *Corfu Channel* (U.K. v. Alb.) (Merits), 1949 I.C.J. 4, 20.

⁷⁸ *Corfu Channel* (U.K. v. Alb.) (Merits) 1949 I.C.J. 4, 20; *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran) (Judgment), 1980 I.C.J. 3, 32-33; Daniel Magraw, *Transboundary Harm: The International Law Commission's Study of "International Liability,"* 80 Am. J. Int'l L. 305, 327 (1986).

⁷⁹ Compromis at lines 240-241.

⁸⁰ Compromis at lines 291-299, 357-359; Clarification 7.

⁸¹ Agenda 21, *supra* note 60, ch. 17.18.

⁸² *Health Impacts of Polynuclear Aromatic Hydrocarbons* 170 (A. Pucknat, ed., 1981).

⁸³ *Id.* at 102.

B. Agistanus cannot absolve itself of the duty to notify by claiming national security interests.

Although the duty to notify of transboundary risk recognizes a limited exception for the protection of national security and industrial secrets,⁸⁴ the state claiming the exemption must nevertheless "inform the affected [s]tate that it is withholding some information."⁸⁵ Security concerns "cannot justify a failure to give an affected [s]tate a clear indication" of the harm it may suffer.⁸⁶ The international community reaffirmed these principles in the wake of the Chernobyl incident and the Sandoz chemical spill,⁸⁷ requiring prompt notification even where national security and industrial concerns were involved. Denying the existence of the toxic plume was not vital to national security. In any event, Agistanus still breached this duty by failing to report that it was withholding information.

C. Agistanus Violated its Duty to Mitigate the Effects of the Plume.

A polluting state must assist and cooperate with the injured state to mitigate the effects of an environmental emergency.⁸⁸ Agistanus not only failed to aid Behestoon, but concealed the existence of the plume. Out of necessity,⁸⁹ Behestoon then resorted to self-help⁹⁰ to determine the source and

⁸⁴ Injurious Consequences, *supra* note 5, art. 11.

⁸⁵ *Id.*, art. 11(a).

⁸⁶ Partan, *supra* note 66, at 81 (citing Quentin-Baxter, *Third Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law*, "Schematic Outline" in [1982] 2 Y. B. Int'l L. Comm'n 51,62. U.N. Doc. A/CN.4/Sec. A/1982/Add.1 (Part 1) (1982)).

⁸⁷ Birnie & Boyle, *supra* note 64, at 241; Partan, *supra* note 66, at 75-76.

⁸⁸ UNCLOS, *supra* note 5, art. 199; Stockholm Declaration, *supra* note 1, princ. 24; Rio Declaration, *supra* note 2, princ. 14; WCED Principles, *supra* note 70, arts. 14, 19(2); Charter of the United Nations, Oct. 24, 1945, art. 74, 1 U.N.T.S. xvi, 1976 Y.B.U.N. 1043; Injurious Consequences, *supra* note 5, art. 7; Non-Navigational Uses, *supra* note 21, arts. 25(3), (4); Harmonious Utilization, *supra* note 5, princ. 7, 9(3); I.L.A. Rules, *supra* note 70, art. 3.

⁸⁹ Draft Articles on State Responsibility, [1981] 2 Y.B. Int'l L. Comm'n 142 (pt. 2), art. 33, U.N. Doc. A/35/10 [hereinafter Articles on State Responsibility].

nature of the toxins.⁹¹ Prompt notification would have given Behestoon and the international community the time needed to contain the spill, and reduce the likelihood of serious damage to the environment.

International law requires states to abate the pollution of a watercourse⁹² through the "best practicable, available means."⁹³ This is true even in the case of accidental transboundary pollution.⁹⁴ Although Agistanus could have opened the valves of the Namche Dam to increase water flow in the Ozoonio and dilute the toxins, it adamantly refused to do so. This decision was particularly reprehensible since the time to build containment structures had passed because Agistanus failed to notify Behestoon of the spill.⁹⁵

IV. THE TERMS OF THE LOAN AGREEMENT DO NOT PREVENT AGISTANUS FROM INCREASING THE FLOW OF THE OZOONIO RIVER.

Agistanus cannot rely upon its obligations under the loan agreement as an excuse to reject Behestoon's requests to increase the flow of the Ozoonio River. International law affords Agistanus the right to suspend its obligation to retain excess water in the reservoir.

A. International Law Governs the Loan Agreement.

International law governs the standard international loan agreement

⁹⁰ See, e.g., E. Brown, *The Lessons of the Torrey Canyon*, 21 *Current Legal Problems* 113 (1968); Jan Schneider, *World Public Order of the Environment* 150-51 (1979).

⁹¹ *Compromis* at lines 250-257.

⁹² Johan Lammers, *International and European Community Law Aspects of Pollution of International Watercourses in Environmental Protection and International Law* 117 (Winfried Lang, Hanspeter Neuhold, and Karl Zemanek, eds., 1991); *Non-Navigational Uses*, *supra* note 21, art. 24.

⁹³ *Injurious Consequences*, *supra* note 5, art. 8; *Montreal Guidelines*, *supra* note 67, arts. 1(1), 6(1)(b); *Rio Declaration*, *supra* note 2, princ. 14; *Harmonious Utilization*, *supra* note 5, princ. 3.

⁹⁴ Lammers, *supra* note 14, at 120.

⁹⁵ *Compromis* at lines 277-278.

between Agistanus and the IRADB.⁹⁶ Furthermore, under the General Conditions of the loan agreement,⁹⁷ Agistanus implicitly consented to the application of international law.⁹⁸

B. The Default Provision of the Loan Agreement is Void and Violates the Principle of *Jus Cogens*.

The right of a state to control its own resources, though limited by the duty not to cause harm to other states,⁹⁹ is an established *jus cogens* norm of international law¹⁰⁰ and non-derogable.¹⁰¹ A provision of an agreement that contradicts a *jus cogens* norm is null and void.¹⁰² In the event that Agistanus failed to comply with the terms of the loan agreement, the default provision allows the IRADB to take complete control of the dam facility.¹⁰³ This

⁹⁶ Georges Delaume, *Transnational Contracts: Applicable Law and Settlement of Disputes* 13 (1988); Aron Brouches, *International Legal Aspects of the Operations of the World Bank*, 98 *Recueil Des Cours* 301, 352 (1959); David Wirth, *Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues*, 100 *Yale L. J.* 2645, 2663 (1991); Lester Nurick, *Certain Aspects of the Law and Practice of the International Bank for Reconstruction and Development, in the Effectiveness of International Decisions* 100, 127 (1971).

⁹⁷ Stanley Please, *The World Bank: Lending for Structural Adjustment, in International Borrowing* 37, 77 (Daniel Bradlow ed., 1986) (citing *International Bank for Reconstruction and Development, General Conditions Applicable to Loan and Guarantee Agreements*, § 10.01).

⁹⁸ Delaume, *supra* note 96, 13 (citing the enforcement provision of the *General Conditions Applicable to Loan Agreements*).

⁹⁹ Stockholm Convention, *supra* note 1, princ. 21; Rio Declaration, *supra* note 2, princ. 2; *Trail Smelter Arbitration*, 3 *U.N.R.I.A.A.* 1905, 1974-78 (1949).

¹⁰⁰ Stockholm Convention, *supra* note 1, princ. 21; Declaration on the Co-operation in the Field of Environment Concerning Natural Resources Shared by Two or More States, G.A. Res. 3129 (XXVIII), U.N. GAOR Supp. (No. 30A), U.N. Doc. A/9030/Add.1; Charter of Economic Rights and Duties of States, *supra* note 34, at 50.

¹⁰¹ Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 *U.N.T.S.* 331 [hereinafter *Vienna Convention*]; Draft Articles on Treaties Concluded Between States and International Organizations or Between Two or More International Organizations, art. 53, [1979] 2 *Y.B. Int'l L. Comm'n* 138 (pt.2), U.N. Doc. A/CN.4/SER.A/1979/Add.1 [hereinafter *Articles on Treaties Between States and International Organizations*].

¹⁰² *Id.*

¹⁰³ *Compromis* at lines 132-134.

provision usurps the sovereign right of Agistanus to control its resources and is therefore void.¹⁰⁴

C. Agistanus can Temporarily Suspend the Loan Agreement under the Principle of *Rebus Sic Stantibus*.

A party may temporarily suspend an agreement due to a fundamental change in those circumstances which: 1) constitute an essential basis of the parties' consent to be bound; and 2) radically transforms the obligations under the agreement.¹⁰⁵ The continued validity of the loan agreement presupposed a consistent flow to Behestoon.¹⁰⁶ The thirty-three percent reduction in flow, the extreme eutrophication and the release of the toxic plume disrupted that consistency.¹⁰⁷

Since the early 1970's, standard international loan agreements required "due regard to be paid to environmental and ecological factors."¹⁰⁸ In light of its duty to retain a specified amount of water in the reservoir,¹⁰⁹ the onslaught of environmental hazards radically transformed Agistanus' ability to protect the environment.

V. AGISTANUS IS STRICTLY LIABLE FOR ALL DAMAGES CAUSED BY ITS DAM OPERATIONS.

A. Agistanus is Strictly Liable for Damages Caused by Its Ultrahazardous Dam Operations.

¹⁰⁴ Vienna Convention, *supra* note 101, art. 53; Articles on Treaties Between States and International Organizations, *supra* note 101, art. 53.

¹⁰⁵ Vienna Convention, *supra* note 101, art. 62(1); Articles on Treaties Between States and International Organizations, *supra* note 101, art. 62(1); *Fisheries Jurisdiction Cases* (U. K. v. Ice.) (Fed. Rep. of Ger. v. Ice.) (Jurisdiction), 1974 I.C.J. 3, 18.

¹⁰⁶ *Compromis* at lines 129-131; add general provisions of standard World Bank loan agreements. Vienna Convention, *supra* note 102, art. 62(1)(a); *Fisheries Jurisdiction Cases* (U.K. v. Ice.) (Jurisdiction), 1973 I.C.J. 3, 18.

¹⁰⁷ *Compromis* at lines 179, 184-185, 235-237.

¹⁰⁸ Ibrahim Shihata, *The World Bank in a Changing World* 149 (1991).

¹⁰⁹ *Compromis* at lines 122-128.

1. **Strict liability for ultrahazardous activities is the applicable rule of international law.**

The imposition of strict liability for ultrahazardous activities is now generally accepted as custom. The practice of states through multilateral treaty regimes¹¹⁰ and international relations¹¹¹ affirms this rule as a "settled practice."¹¹²

As a signatory to Agenda 21 and the Rio Declaration,¹¹³ Agistanus itself recognizes that the polluter should bear the costs of pollution.¹¹⁴ The practice of *ex gratia* payments exhibits the polluting state's adherence to the "polluter-pays" principle and its belief that compensation is required¹¹⁵ even without a finding of liability.¹¹⁶

¹¹⁰ Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762; Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Oct. 7, 1952, 310 U.N.T.S. 181; Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, reprinted in 55 Am. J. Int'l L. 1082 (1961); Convention on the Liability of Operators of Nuclear Ships, May 25, 1962, reprinted in 57 Am. J. Int'l L. 268 (1963) [hereinafter Nuclear Ships Convention]; Vienna Convention on Civil Liability for Nuclear Damage, Nov. 12, 1977, art. IV(4), 1063 U.N.T.S. 265; Convention on Civil Liability for Oil Pollution Damages, Nov. 29, 1969, 973 U.N.T.S. 3; Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Materials, Dec. 17, 1971, 11 I.L.M. 277 (1972).

¹¹¹ *Gut Dam Arbitration*, supra note 8; Jon Van Dyke, *Sea Shipment of Japanese Plutonium under International Law*, 24 *Ocean Development and International Law* 399, 413-15 (1993) (documenting the *Fukuryu Maru* Fallout Exposure (Japan v. U.S.), the *Palomares Nuclear Bomb Accident* (Spain v. U.S.), and the *U.S. Attack on an Iranian Airliner* (Iran v. U.S.)).

¹¹² *North Sea Continental Shelf* (Fed. Rep. of Ger. v. Den.) (Fed. Rep. of Ger. v. Neth.), 1969 I.C.J. 3, 44; *Military and Paramilitary Activities In and Against Nicaragua* (Nic. v. U.S) (Merits), 1986 I.C.J. 14, 108-109.

¹¹³ Compromis at lines 364-365.

¹¹⁴ Rio Declaration, supra note 2, princ. 16; Agenda 21, supra note 60, ch. 29.19(b).

¹¹⁵ *North Sea Continental Shelf* (Fed. Rep. of Ger. v. Den.) (Fed. Rep. of Ger. v. Neth.), 1969 I.C.J. 3, 44; *Military and Paramilitary Activities In and Against Nicaragua* (Nic. v. U.S.), 1986 I.C.J. 14, 108-09.

¹¹⁶ Settlement of Japanese Claims for Personal and Property Damages Resulting from Nuclear Tests in the Marshall Islands in 1954, Jan. 4, 1955, 6 U.S.T. 1, T.I.A.S. No. 3160; Protocol between the Government of Canada and the Government of the Union of Soviet Socialist Republics, done Apr. 2, 1981, 20 I.L.M. 689 (1981).

The application of strict liability to ultrahazardous activities is also a general principle of international law¹¹⁷. This is reflected in the municipal laws of states of varied economic and political conditions.¹¹⁸ Industrial activities, in particular, have been considered ultrahazardous.¹¹⁹

International tribunals,¹²⁰ including this Court, have applied strict liability to ultrahazardous activities. The tribunal in the *Trail Smelter Arbitration* required Canada to compensate the United States for any future damages resulting from continued operation of the smelter, notwithstanding Canada's compliance with the required regulations.¹²¹

International commentators not only support the imposition of strict liability for ultrahazardous activities,¹²² they also highlight the inadequacies of a negligence-based liability regime when applied to abnormally

¹¹⁷ *Survey of State Practice Relevant to International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law* 233, U.N. Doc. ST/LEG/15, 1984 [hereinafter *Survey of State Practice*]; John Kelson, *State Responsibility and the Abnormally Dangerous Activity*, 13 *Harv. Int'l L. J.* 197 (1972); L. Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 *Int'l & Comp. L. Q.* 1189, 1241 (1965); Joni Charne, *Transnational Injury and Ultra-Hazardous Activity: An Emerging Norm of International Strict Liability*, 4 *J. L. & Tech.* 75, 89 (1989).

¹¹⁸ Kelson, *supra* note 117, at 202-11 (citing India, Japan, Germany, Kenya, Nigeria, Sudan, Egypt, U.S., U.S.S.R., and France); *Survey of State Practice*, *supra* note 119, at 228 (citing Poland, Iraq, Jordan, Algeria, Austria, and Mexico); Charne, *supra* note 117, at 88-9.

¹¹⁹ Kelson, *supra* note 117, at 197, 202, nt. 23 (citing Japan France, Nigeria, Sudan, Egypt, U.S., U.S.S.R.); Alice Tay, *Principles of Liability and the "Source of Increased Danger" in the Soviet Law of Tort*, 18 *Int'l & Comp. L. Q.* 424, 433 (1969) (stating that "[t]he chief paradigm for Soviet legislators and jurists has clearly been industrial technology.").

¹²⁰ *Trail Smelter Arbitration (U.S. v. Can.)*, 3 U.N.R.I.A.A. 1938, 1905 (1949).

¹²¹ *Trail Smelter Arbitration (U.S. v. Can.)*, 3 U.N.R.I.A.A. 1905, 1980 (1949); Goldie, *supra* note 117, at 1227.

¹²² Goldie, *supra* note 117 at 1223; Gunther Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 *Am. J. Int'l L.* 525, 564 (1980); Pierre-Marie Dupuy, *International Liability of States for Damage Caused by Transfrontier Pollution in OECD Legal Aspects of Transfrontier Pollution* 345, 366 (1977); Van Dyke, *supra* note 111, at 416-17.

dangerous activities.¹²³

2. The Namche Dam is an ultrahazardous activity.

Under international law, an ultrahazardous activity is determined by the degree of risk and likelihood of damage.¹²⁴ The activity may pose a high probability of some harm,¹²⁵ or a low probability of widespread or significant harm.¹²⁶ Operation of the Namche Dam falls within both categories.

3. The earthquake does not absolve Agistanus of liability.

Strict liability does not apply when the harm was caused by a "natural phenomenon of an exceptional, inevitable and irresistible character."¹²⁷ This exception, however, is limited to unforeseeable events of nature,¹²⁸ and dams themselves have foreseeably triggered medium grade earthquakes because of their enormous weight.¹²⁹

4. There is a sufficient causal connection between Agistanus' operation of the Namche Dam and the Harm Suffered by Behestoon.

Strict liability requires a causal connection between the ultrahazardous activity and the harm suffered by the victim-state.¹³⁰ Despite any intervening

¹²³ Kelson, *supra* note 117, at 200; Goldie, *supra* note 117, at 1197; Charme, *supra* note 117, at 77.

¹²⁴ Handl, *supra* note 122, at 555.

¹²⁵ *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1905 (1941).

¹²⁶ Handl, *supra* note 122, at 554-55; C. Wilred Jenks, *Liability for Ultra-Hazardous Activities in International Law*, 117 *Recueil Des Cours* 99, 107 (1966 I); Kelson, *supra* note 117, at 279-80.

¹²⁷ *Injurious Consequences*, *supra* note 5, art. 26(1)(a).

¹²⁸ Goldie, *supra* note 117, at 1205; Handl, *supra* note 122, at 544.

¹²⁹ Aart Van de Laar, *Water Development for Power and Irrigation, The Environment and Sustainable Development* 16-18 (Institute of Social Studies Working Paper No. 141, 1993) (identifying the Koyna, Kremasta, Hsinfengkiang, Oroville, Kariba, Hoover, Marathon, and Benmore as dams that induced earthquakes measuring 5.0 or greater and the Richter scale); Zygmunt Plater, *Damming the Third World: Multilateral Development Banks, Environmental Diseconomies, and International Reform Pressures on the Lending Process*, 17 *Den. J. Int'l L. & Pol'y* 121, 130 (1988).

¹³⁰ Kelson, *supra* note 117, at 238-39; Ved Nanda, *Liability For Space Activities*, 41 *U. Col. L. Rev.* 509, 513-14 (1969).

factors, international law attributes liability to the ultrahazardous activity,¹³¹ especially in cases of non-severable damages.¹³² Even if Behestoon's waste disposal practices contributed to its injury, that does not erase Agistanus' liability for its dam operations.

B. Agistanus is Strictly Liable for the Appreciable Harm Caused by Its Dam Operations.

A state may be strictly liable for non-ultrahazardous activities within its jurisdiction that cause appreciable harm to other states.¹³³ This is particularly true when a non-navigational use of a river¹³⁴ detrimentally impacts the affected state's industry, property, agriculture or environment.¹³⁵

Dams detrimentally affect a river's flow,¹³⁶ nutrient content,¹³⁷ salinization¹³⁸ and fishing stocks.¹³⁹ Under international law, Agistanus is

¹³¹ Organization for Economic Cooperation and Development, *Legal Aspects of Transfrontier Pollution* 291 (1977).

¹³² Kelson, *supra* note 117, at 241. See, e.g., The Vienna Convention on Civil Liability for Nuclear Damage, *supra* note 110, art. IV (4); Nuclear Ships Convention, *supra* note 110, art. IV.

¹³³ Injurious Consequences, *supra* note 5, art. 9; *Fifth Report on International Liability For Injurious Consequences Arising Out of Acts Not Prohibited by International Law*, [1989] 2 Y.B. Int'l L. Comm'n 138, U.N. Doc. A/CN.4/SER.A/1989/Add.1 (citing the *Trail Smelter Arbitration* for the application of strict liability for appreciable injury).

¹³⁴ Non-Navigational Uses, *supra* note 21, art. 21; Ved Nanda, *The Law of the Non-Navigational Uses of International Watercourses: Draft Articles on Protection and Preservation of Ecosystems, Harmful Conditions and Emergency Situations, and Protection of Water Installations*, 3 Colo. J. Int'l Env'tl. L. & Pol'y 175 (1992).

¹³⁵ Nanda, *supra* note 134.

¹³⁶ Van de Laar, *supra* note 129, at 21-22.

¹³⁷ Agenda 21, *supra* note 60, ch. 10.4.

¹³⁸ *Report of the Secretary General of the Conference on Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources*, U.N. Doc. A/CONF.151/PC/100Add.22, reprinted in 4 *Agenda 21 and the UNCED Proceedings* 514 (Nicholas Robinson ed., 1992); Plater, *supra* note 129, at 130 (citing the Kiambere Dam and Bura irrigation projects).

¹³⁹ Plater, *supra* note 129, at 129 (citing the Three Gorges Dam).

strictly liable for, *inter alia*, the thirty-three percent reduction in flow, extreme eutrophication, decrease in fishing stocks, loss of agricultural productivity and increased water treatment costs in Behestoon.¹⁴⁰

VI. AGISTANUS IS LIABLE TO BEHESTOON FOR ALL DAMAGES CAUSED BY ITS DEVELOPMENT ACTIVITIES AND RESPONSE TO THE TOXIC PLUME.

Under traditional principles of state responsibility, a state is liable for wrongful acts attributable to it and in violation of international law.¹⁴¹

A. Agistanus is Liable for the Actions of the IRADB.

A state is liable for the transboundary harm caused by the conduct of third parties within its jurisdiction.¹⁴² This duty of oversight cannot be delegated to private parties.¹⁴³ Proper oversight would have revealed the IRADB's failure to conduct an environmental impact assessment.¹⁴⁴ Agistanus cannot claim ignorance of the IRADB's omission without proof that proper oversight was impossible.¹⁴⁵

B. International Law does not Require a Direct Causal Link.

International law does not require a direct causal link between the wrongful act and the damages as long as the damages stem from an unbroken

¹⁴⁰ Compromis at lines 177-186.

¹⁴¹ Articles on State Responsibility, [1980] 2 Y. B. Int'l L. Comm'n 30 (pt. 2), art. 3, U.N. Doc. A/CH.4/SER.A/1980/Add.1; *Dickson Car Wheel Company*, 4 R.I.A.A. 678 (1931).

¹⁴² *Corfu Channel* (U.K. v. Alb.) (Merits), 1949 I.C.J. 4; U.S. *Diplomatic and Consular Staff in Tehran* (U.S. v. Iran) (Judgment), 1980 I.C.J. 3; *The Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1905 (1941).

¹⁴³ Birnie & Boyle, *supra* note 64, at 140; Handl, *supra* note 122; Ian Brownlie, *System of the Law of Nations* 159 (1983); U.S. *Diplomatic and Consular Staff in Tehran*, 1980 I.C.J. 3.

¹⁴⁴ *Corfu Channel* (U.K. v. Alb.) (Merits), 1949 I.C.J. 4, 44 (concurring opinion of Judge Alvarez).

¹⁴⁵ *Id.*

chain of causation originating from the wrongful act.¹⁴⁶ The formation of the toxic plume in Agistanus' part of the river¹⁴⁷ stems from an unbroken chain of events that began with Agistanus' failure to assess the potential environmental impact of its development projects.

C. Behestoon is Entitled to Compensation for all Damages Resulting from Agistanus' Development Activities.

Under either liability regime,¹⁴⁸ international law requires the polluting state to pay compensation for its failure to prevent transboundary harm to other states.¹⁴⁹ Reparation must erase all consequences of the wrongful act¹⁵⁰ and restore the environment to the *status quo ante*.¹⁵¹ Supported by the practice of states and international tribunals, Behestoon is entitled to compensation for all damages including the reduction in river flow,¹⁵² property damage,¹⁵³ and economic losses.¹⁵⁴

¹⁴⁶ *Portuguese Colonies Case* (Por. v. Ger.), 2 U.N.R.I.A.A. 1011 (1928); *Second Report on State Responsibility*, [1989] 2 Y.B. Int'l L. Comm'n 12 (pt.1), U.N. Doc. A/CN.4/425.

¹⁴⁷ *Compromis* at lines 235-237.

¹⁴⁸ *Injurious Consequences*, *supra* note 5, art. 9; *Chorzow Factory* (Ger. v. Pol.) 1928 P.C.I.J. Ser. A, No. 17, at 29; *Corfu Channel* (U.K. v. Alb.) (Merits), 1949 I.C.J. 4.

¹⁴⁹ *Trail Smelter Arbitration* (U.S. v. Can.), 3 U.N.R.I.A.A. 1938; *Gut Dam Arbitration*, *supra* note 8.

¹⁵⁰ *Chorzow Factory* (Ger. v. Pol.) 1928 P.C.I.J. Ser. A, No. 17, at 29.

¹⁵¹ Kiss & Shelton, *supra* note 66, at 359.

¹⁵² *Diversion of Water from the Meuse*, (1937) P.C.I.J. Ser. A/B, No. 70, Ser. C, No. 81; *Societe Energie Electrique*, *supra* note 4.

¹⁵³ *Gut Dam Arbitration*, *supra* note 8, at 138.

¹⁵⁴ Marjorie Whiteman, *Digest of International Law* 587 (1965) (citing the willingness of the U.S. to compensate Japan for economic losses resulting from the danger zone established by the U.S. for nuclear testing).

CONCLUSION AND PRAYER FOR RELIEF

- I. **Whereas** the lower riparian state has the right to the continued, undiminished flow of a river to preserve its territorial integrity;
- II. **Whereas** Agistanus failed to use the Ozoonio River in an equitable and reasonable manner;
- III. **Whereas** Agistanus failed to consult, negotiate or conduct an environmental impact assessment with respect to its development projects;
- IV. **Whereas** Agistanus failed to provide immediate notification or to mitigate damages with respect to the toxic plume emergency;
- V. **Whereas** Agistanus failed to prevent transboundary harm to Behestoon both before and after the toxic plume emergency; and
- VI. **Whereas** Agistanus is liable to Behestoon for all damages caused by its dam operations under a strict liability and/or fault liability regime;

Behestoon submits to the Court that it is entitled to a declaration and judgment that:

- (1) Behestoon has a right to the continued, undiminished flow of water from the Ozoonio River to preserve its territorial integrity;
- (2) Agistanus' actions violate Behestoon's right to equitable and reasonable utilization of the resource;
- (3) Agistanus' use of water resources and response to the mining accident is inconsistent with any environmental safeguards which Agistanus might owe to Behestoon under applicable principles of international law; and
- (4) Agistanus is liable and shall pay to Behestoon for all damages incurred as a result of the environmental catastrophe and pollution of the international watercourse.

Respectfully submitted,
Agents for Behestoon