

THE 1995 PHILIP C. JESSUP INTERNATIONAL LAW  
MOOT COURT COMPETITION

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

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STATE OF BEHESTOON,

Applicant,

v.

STATE OF AGISTANUS,

Respondent.

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SPRING TERM 1995

ON SUBMISSION TO THE  
INTERNATIONAL COURT OF JUSTICE

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MEMORIAL FOR THE RESPONDENT

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### STATEMENT OF JURISDICTION

The governments of Agistanus and Behestoon have accepted 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: 1) the interpretation of treaties; 2) any question of international law; and 3) any 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

Agistanus is a small, landlocked nation bordered on three sides by mountain ranges and to the south by the state of Behestoon. Compromis at lines 4-5, 12-13 (Comp.). The Ozoonio River, a vital natural resource, originates high in the northern mountain regions of Agistanus, flows through the Gorgon Plateau, passes into Behestoon and descends into Solonia Bay and the Bandeke Estuary.

Agistanus is relatively prosperous, economically and socially stable, and virtually free from foreign debt. Comp. at lines 12, 18, 22, 24-26. The Amahas, Agistanus' indigenous population, were traditionally semi-nomadic herders on the semi-arid plains. Comp. at lines 13-15. Now, most of the nation's population of 14 million lives in cities that have sprung up along the banks of the Ozoonio River. Comp. at lines 15-18. The river provides most of the country's water for drinking and manufacturing, and facilitates a thriving barge industry which carries products from Agistanus to the rest of the world by way of Solonia Bay. Comp. at lines 19-24.

The Beshini minority, who migrated from their native Behestoon early this century, receive much of the credit for Agistanus' prosperity. Comp. at lines 27-30. Fleeing civil unrest during Behestoon's post colonial period, they were welcomed by the native Amahas, and the two groups have lived together peacefully for almost fifty years. Comp. at lines 30-34. The Beshini occupy most of the important government positions in Agistanus, but they have appointed several Amahan representatives to cabinet and ministry-level positions. Comp. at lines 35-38. Nearly one-quarter of Agistanus' population is now of Beshini descent. Comp. at line 39.

Behestoon developed more quickly than Agistanus and is regarded as a powerful nation possessing sophisticated technical and aerial reconnaissance

capabilities. Comp. at lines 45, 59. Exports have generated a surplus for the government in recent years. Comp. at line 46-47. Behestoon purchases electricity from neighboring states, and meets additional power needs through thermal generators and petroleum imports. Comp. at lines 47-51. The generators are linked to a waste recycling program; however, these facilities fail to meet Behestoon's waste processing needs. Comp. at lines 49-51. Thus, Behestoon dumps most of its raw and treated industrial and domestic sewage into the Ozoonio River. Comp. at lines 56-57, Clarification no. 5 (Clar.).

Agistanus and Behestoon are both members of the United Nations, the Strategic Options Treaty Organization (SOTO), and the World Bank Group and its member institutions. Comp. at lines 40-44. Each has signed the Rio Declaration, the Stockholm Declaration, and Agenda 21, and are parties to the Vienna Convention on the Law of Treaties. Comp. at lines 364-365, Clar. no. 12. Behestoon has ratified the Law of the Sea Convention. Clar. no. 11.

Lacking technological expertise, Agistanus commissioned the Inter-Regional Agricultural Development Bank (IRADB) to conduct an extensive survey of its natural resources in the early 1970's. Comp. at line 63. The study's purpose was to bolster sustainable use of land and resources, and to improve and diversify Agistanus' developing economy. Comp. lines 63-66.

Most funds were earmarked to study agricultural development, since this was believed to be the best use for the land. Comp. at lines 67-69. As part of this survey, the IRADB conducted several pre-appraisal missions and a project appraisal. Comp. at lines 69-71, Clar. no. 3. A team of experts began a drilling project to search for alternative water sources in the northernmost mountains of Agistanus. Comp. at lines 71-74, Clar. no. 4. Although some water supplies were discovered, their source and quantity were not explored due to poor technical advice and inadequate consultations. Comp.

at lines 74-76. The IRADB team of experts concluded they were unusable or insufficient for Agistanus' development needs. Comp. at lines 76-79.

The drilling project unearthed a large body of rare earth and strategic minerals. Comp. at lines 80-81. Since the minerals were highly coveted on world markets, the experts viewed them as a prime development opportunity for Agistanus. Comp. at lines 82-85.

Relying heavily on the IRADB survey, the Ministry of Commerce filed a report with Agistanus's legislature, making the following recommendations: 1) that the land formerly used by the Amahas be developed for agriculture together with a food processing industry; and 2) that the minerals be extracted and sold. Comp. at lines 88-94, 109-111. The report concluded that, to further these goals, a dam should be built across the Ozoonio River. Comp. at line 96. This would ensure that enough water was available to irrigate crops, supply the mining operations and run hydroelectric facilities needed to harness power for resale and for Agistanus's industries. Comp. at lines 97-104.

Agistanus applied to the IRADB for a US\$10 billion loan to finance the dam and related development projects. Comp. at lines 105-109. In 1980, the IRADB granted the application. Comp. at line 111. Behestoon protested, filing a reservation regarding the effect the damming of the river could have on its domestic and industrial water usage. Comp. at lines 111-113.

The loan was a standard, non-negotiable agreement. Comp. at line 115. Disbursement of funds was contingent upon Agistanus' strict adherence to the loan terms as a sign of good faith. Comp. at lines 113-117. These provisions included using reservoir water for irrigation and mining; keeping surplus water in the dam at all times in case of drought and to generate electricity; and maintaining a consistent flow of water to Behestoon. Comp. at lines 119-

131. Noncompliance 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.

Agistanus fulfilled the terms of the loan in good faith while the dam was being built. It ensured that a consistent flow of water reached Behestoon by constructing by-passes. Comp. at line 138. When the dam was completed, Agistanus managed it in strict conformity with the IRADB requirements. Comp. at lines 181-184. It also devised an extensive network of ditches to recapture irrigation water and return it to the Ozoonio. Comp. at lines 153-157. Despite all these efforts, Behestoon charted a thirty-three percent decrease in the river's flow. Comp. at line 185.

Behestoon benefited substantially from these development activities. It purchased twenty percent of its domestic power needs from Agistanus at favorable rates. Comp. at line 165. It also established freight processing depots and built an expansive port facility on Solonia Bay to handle increased barge traffic on the Ozoonio River. Comp. at lines 167-170, Clarification 10.

Despite these benefits, Behestoon's economy declined. Comp. at line 174. Some of the decline resulted from a loss of markets to Agistanus. Comp. at line 176. However, Behestoon blamed its troubles on the loss of productivity of its riparian agricultural lands and fishing industry, which it attributed to the reduced flow of the Ozoonio. Comp. at line 178-180. To solve its problems, Behestoon wanted Agistanus to restore the flow of the river to its previous levels. Comp. at lines 204-205. Doing so, however, would have frustrated the purpose of the entire dam project and placed Agistanus in blatant violation of its loan agreement. Comp. at lines 204, 218.

Minor increases in agricultural residues were anticipated from the beginning of the project. Comp. at line 210. The President of Agistanus

stated that some of Behestoon's own agricultural activities were the source of the residues. Comp. at line 214. He noted that Behestoon had ample quantities of drinking water, and emphasized his nation's right to develop in a sustainable manner. Comp. at lines 208-209.

On August 13, 1993, an earthquake of medium severity created an extensive fissure from which a tar-like substance and corrosive water which flooded the mine were unleashed. Comp. at lines 222-229. These liquids oozed through openings in the rock, joined streams heading south, and eventually entered the Ozoonio River just below the Namche Dam. Comp. at lines 232-235. The mixture created a visible toxic plume only upon entering the river. Comp. at line 236.

Agistanus attempted to contain the spill, but failed because of a lack of expertise, equipment and technology. Comp. at line 238. Agistanus then chose to release limited information concerning the incident at the mine. Comp. at line 240. Behestoon documented an increase in unidentified toxic substances at one of its sampling sites. Comp. at line 243. Aware of the earthquake at the mine, Behestoon demanded to know if there was a link between this increase and the disaster. Comp. at line 246. Since *force majeure* had laid open the fissure containing water and the tar-like substance, the President of Agistanus responded that no activity within his country had caused any damage to Behestoon. Comp. at line 247. He also stated that the mining incident was not the cause of any water quality problems in Behestoon; the plume was well within Agistanus's borders at that time. Comp. at lines 248, 265-266.

Unsatisfied with these answers, Behestoon resorted to self-help. Behestoon's Prime Minister dispatched two aerial reconnaissance flights into Agistanus's air space and ordered a team of military scientists to covertly obtain water samples. Comp. at lines 250-254. Test results confirmed the

presence of an unidentified hydrocarbon-based compound in the river and agricultural chemicals in the irrigation channels. Comp. at line 259. Behestoon immediately disclosed this information to the press. Comp. at line 267.

Agistanus voluntarily participated in high-level diplomatic meetings with Behestoon. Comp. at line 271. When no agreements to act jointly were reached, Behestoon's Prime Minister demanded Agistanus open the valves of the dam in hopes of diluting the plume. Comp. at line 279. The President of Agistanus responded that his advisors did not believe there was enough water in the reservoir to dilute the toxins. Comp. at line 282. Such a course of action would also have flooded unharvested agricultural land, disrupted hydroelectric power, and placed Agistanus in violation of its loan agreement. Comp. at lines 285-286. Agistanus believed that the IRADB would not approve of opening the dam since the environmental crisis, along with Agistanus' agricultural activities, might increase regional demands on available economic resources. Comp. at lines 284-286. Clar. 1. Therefore, Agistanus' ability to sell hydroelectric power would be critical, not only to repay its loan, but to generate enough revenue to deal with the environmental consequences of the spill. Comp. at lines 337-339.

As the plume crossed into Behestoon, highly toxic, unidentified polycyclic aromatic hydrocarbons (PAHs) were discovered in the water. Comp. at lines 291, 293-294. Scientists from both countries believe that these new toxins were created by a chain reaction which may have occurred when components of the plume combined with contaminants already present in Behestoon's side of the Ozoonio River. Comp. at lines 305-307.

In response to the environmental crisis, Behestoon considered deploying its own paramilitary forces and advocated that SOTO seize control of the dam.

Comp. at lines 311-316. Agistanus rejected any SOTO intervention, and asked that the decision be left up to the IRADB. However, both Behestoon and Agistanus have recently discovered that the IRADB was aware of the tar-like strata during its preliminary assessment, but downplayed its existence for fear that Agistanus would withdraw its loan application. Comp. at lines 325-328. Remembering the IRADB's decision to proceed with the dam project over Behestoon's opposition, Behestoon rejected the suggestion by Agistanus' President that the IRADB resolve this dilemma. Comp. at lines 341-343.

With the aid of the United Nations Secretary General, Agistanus and Behestoon accept compulsory jurisdiction of the International Court of Justice and submit this dispute before it for final resolution. Comp. at lines 358, 362-363. Agistanus recognizes that the situation remains severe and urgent as the toxic mixture makes its way downstream. Comp. at 357-358, Clar. no. 8.

QUESTIONS PRESENTED

- I. Does Agistanus have the right to adopt all measures suitable to sustainable development of its natural resources?
- II. Did Agistanus comply with those environmental safeguards owed to Behestoon under international law?
- III. Did Agistanus' response to the toxic plume comply with established principles of international law?
- IV. Is Agistanus liable to Behestoon for any damages under traditional principles of state responsibility?
- V. Is Agistanus liable for acts of the IRADB?
- VI. Is Agistanus strictly liable to Behestoon for any damages resulting from its development activities?

## SUMMARY OF PLEADINGS

Agistanus is developing in a sustainable manner. By working to eradicate poverty and thereby reduce the environmental problems often exacerbated by under-development, it is fulfilling its obligations under the Rio Declaration and Agenda 21. But while exercising the right to exploit its resources according to its own policies, Agistanus ensured that Behestoon would receive a consistent flow of the Ozoonio River both before and after the dam was built.

The Ozoonio River, as the only viable water resource in Agistanus, holds the key to economic self-sufficiency for Agistanus. The nation's social and economic dependency on the river, and its efficient use of those waters, outweigh Behestoon's interest in preserving its prior use of the Ozoonio. Acting in accordance with the *doctrine of equitable and reasonable utilization*, Agistanus has satisfied the primary obligation it owes to Behestoon as a co-riparian state sharing a common watercourse.

Before construction of the dam began, Agistanus enacted all the environmental safeguards necessary to protect the interests of Behestoon. That nation was apprised of Agistanus' development plans through its membership in the World Bank Group, the parent organization of the IRADB. In addition to informing Behestoon of future changes, the advance notice allowed Behestoon time to respond to the proposal. Because international law does not require the consent of a potentially affected state, Agistanus acted properly when it proceeded with its plans over Behestoon's objections.

Even though Agistanus is bound to consider the interests of Behestoon, Agistanus could proceed with its development plans without conducting a prior environmental impact assessment (EIA). In 1982, when work on the dam project

began, international law did not require EIAs as a prerequisite to any development project.

Although failing to contain the polluting substances unleashed by the earthquake, Agistanus complied with its duty to prevent substantial injury to Behestoon to the best of its ability. It acted immediately, but ultimately failed because of inadequate technology and equipment. Agistanus' two day delay in notifying Behestoon of the accident was consistent with state practice, which allows a state a reasonable period in which to correct an environmental hazard, especially where national and industrial security interests are implicated.

By using the Ozoonio in an equitable and reasonable manner while avoiding substantial injury to Behestoon's enjoyment of the river, Agistanus has acted in conformity with the *doctrine of restricted sovereignty*, the guiding principle governing relations between riparian states. Fulfillment of both duties renders Agistanus immune from liability under traditional principles of state responsibility, which hold a state liable only when it breaches a duty.

Behestoon's attempt to hold Agistanus liable for certain injuries rests on weak ground. Because Behestoon engaged in activities that polluted its marine environment and freshwater resources, it cannot meet the clear and convincing standard linking its alleged injuries to Agistanus' activities. Irrespective of any causal link, Behestoon may not hold Agistanus liable for the consequences of the earthquake: *force majeure* precludes a finding of wrongful conduct.

Behestoon cannot attribute to Agistanus the IRADB's failure to design a safe mining operation. Agistanus may only be held liable for those third party acts or omissions of which it has knowledge.

Behestoon has not attempted to mitigate any injuries. Violating Behestoon's obligation under the Law of the Sea Convention, Behestoon cannot hold Agistanus liable for any injury arising out of this failure.

Behestoon has no basis on which to hold Agistanus strictly liable for the consequences of its development activities. Strict liability has garnered little support in state practice and has been imposed only in a narrow set of circumstances: a party must either explicitly consent to be held to that standard or must engage in an ultra-hazardous activity. Agistanus satisfies neither requirement.

Strict liability also imposes a greater burden on developing nations like Agistanus which lack the means for monitoring the risky activity and ultimately retards the developmental progress envisioned by the Rio Declaration and Agenda 21. In no event may Agistanus be held strictly liable for consequences of *force majeure*, an exception made under almost every strict liability regime.

## PLEADINGS AND AUTHORITIES

### **I. AGISTANUS HAS THE RIGHT TO ADOPT MEASURES SUITABLE TO SUSTAINABLE DEVELOPMENT OF ITS NATURAL RESOURCES.**

#### **A. Agistanus' Right and Duty to Develop Is Well-Established Under International Law.**

The right to develop is an inalienable human right<sup>1</sup> and a principle of international law based on the self-determination of peoples.<sup>2</sup> The primary responsibility for fostering development lies with each state,<sup>3</sup> whose people have the right to an adequate standard of living, including sufficient food,<sup>4</sup> and the continuous improvement of living conditions.<sup>5</sup> An overarching public policy goal--also promoted by financial institutions, such as the World Bank<sup>6</sup>

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<sup>1</sup> Declaration on the Right to Development, Dec. 4, 1986, art 1(1), G.A. Res. 41/128 (Annex), U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1987) [hereinafter UNDRD]. See also Universal Declaration of Human Rights, Dec. 10, 1948, U.N.G.A. Res. 217A (III) U.N. Doc. A/810, art. 28 [hereinafter UDHR].

<sup>2</sup> See Charter of the United Nations, June 26, 1945, art. 55(a), 1 U.N.T.S. xvi, [1976] Y.B.U.N. 1043, 59 Stat. 1031, T.S. 993 [hereinafter UN Charter]; Rio Declaration on Environment and Development, June 13, 1992, princ. 2, U.N. Doc. A/CONF.151/26 (vol.I) (1992), reprinted in 31 I.L.M. 874 (1992) [hereinafter Rio Declaration]; Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, princ. 21, Report of the U.N. Conference on the Human Environment, Stockholm, 5-16 June 1972, U.N. Doc. A/CONF.48/14/Rev. 1 at 3 (1973), U.N. Doc. A/CONF.48/14 at 2-65, and Corr.1 (1972), reprinted in 11 I.L.M. 1416, 1420 (1972) [hereinafter Stockholm Declaration]; Agenda 21, June 13, 1992, ch. 3.4, U.N. Doc. A/CONF.151/26 (vols. I, II & III) (1992); League of Nations Covenant art. 22; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1(1), 993 U.N.T.S. 3 [hereinafter ICESCR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1(1), 999 U.N.T.S. 171 [hereinafter ICCPR]; Declaration on Social Progress and Development, Dec. 11, 1969, art. 3(a), G.A. Res. 2542, U.N. GAOR, 24th Sess., Supp. No. 30, at 49, U.N. Doc. A/7630 (1970); American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, O.A.S. Off.Rec. O.E.A./Ser. L/V/II.23 doc. 21 rev. 6 (1979), 9 I.L.M. 673 (1970).

<sup>3</sup> UNDRD, *supra* note 1, Preamble and art. 3(1). See also Rio Declaration, *supra* note 2, princ. 9; ICESCR, *supra* note 2, art.2(1).

<sup>4</sup> UDHR, *supra* note 2, art. 25(1); ICESCR, *supra* note 2, art. 11(1).

<sup>5</sup> ICESCR, *supra* note 4.

<sup>6</sup> World Bank, *The World Bank and the Environment--A Progress Report Fiscal 1991*, at 1-2 (1991).

--is the eradication of poverty through sustainable development,<sup>7</sup> which is defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>8</sup> Although a nation's right to develop is constrained by an obligation not to cause harm to the environment of any other state,<sup>9</sup> not all transboundary harm is proscribed. Only significant damage,<sup>10</sup> which causes a real impairment of use and can be established by objective evidence,<sup>11</sup> is wrongful. Because under-development is the source of most environmental problems in developing countries, those states must direct their efforts to development,<sup>12</sup> and these development objectives within a nation may take priority over environmental measures.<sup>13</sup>

**B. Agistanus Has the Sovereign Right to Determine the Use of the Waters of the Ozoonio River within Its Territory.**

Although a state's sovereign right to exploit its own resources pursuant

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<sup>7</sup> See, e.g., Agenda 21, *supra* note 2, ch. 3.3; Rio Declaration, *supra* note 2, princ. 5.

<sup>8</sup> The World Commission on Environment and Development, *Our Common Future* 43 (1987).

<sup>9</sup> See, e.g., *Trail Smelter Arbitration* (U.S. v. Can.), 3 U.N.R.I.A.A. 1938 (1949).

<sup>10</sup> See Helsinki Rules on the Uses of the Waters of International Rivers, Aug. 20, 1966, art.X 1(a), 52 I.L.A. 484 (1967) [hereinafter Helsinki Rules]; 2 *Restatement (Third) of Foreign Relations Law of the United States* §§ 601(1)(b) and 602(2) (1987) [hereinafter *Restatement*].

<sup>11</sup> See Draft Articles on the Law of the Non-Navigational Uses of International Watercourses, July 19, 1991, art. 3, U.N. GAOR, 46th Sess., Supp. No. 10 at 161, U.N. Doc. A/46/10 (1991) [hereinafter Non-Navigational Uses] and Commentaries Thereto Provisionally Adopted on First Reading by the ILC at its Forty-Third Session (Sept. 1991), ¶¶ 14-15, at pp. 19-20.

<sup>12</sup> See, e.g., Stockholm Declaration, *supra* note 2, art.I(4); Agenda 21, *supra* note 2, ch. 2.2.

<sup>13</sup> See Rio Declaration, *supra* note 2, princ. 3; Agenda 21, *supra* note 2, ch. 3.2; Charter of Economic Rights and Duties of States, Dec. 12, 1974, art. 30, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975), 14 I.L.M. 251 (1975), ch. III [hereinafter Economic Rights Charter]; Convention on Biological Diversity, June 5, 1992, art. 20(4), 31 I.L.M. 818 (1992); U.N. Framework Convention on Climate Change, May 29, 1992, art.4(7), 31 I.L.M. 849 (1992).

to its own policies<sup>14</sup> is subject to an obligation to avoid causing significant harm to any other state,<sup>15</sup> the obligation to prevent transboundary pollution is evolving.<sup>16</sup> At present, customary international law imposes no specific legal obligations regarding irrigation and industrial uses of waters.<sup>17</sup>

**C. Agistanus' Use of the Ozone Complies with the Doctrine of Restricted Sovereignty.**

The doctrine of restricted sovereignty is defined as the right of each riparian state to use water from a common source, but with a duty not to interfere with similar use by other riparian states.<sup>18</sup> The governing principle is equitable and reasonable utilization,<sup>19</sup> tempered by a duty to avoid causing significant harm to other states.<sup>20</sup> It is noteworthy that the International Law Commission recently raised the standard of harm from

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<sup>14</sup> Economic Rights Charter, *supra* note 13, ch. II, art. 2(1). See also Rio Declaration, *supra* note 2, princ. 2; Stockholm Declaration, *supra* note 2, princ. 21 (1972) (on which Rio's princ. 2 was based and to which the words "and developmental" were added (i.e., states have "the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies") at the U.N. Conference on Environment and Development); Resolution on Permanent Sovereignty over Natural Resources, Dec. 17, 1973, ¶ 1, G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1974), 13 I.L.M. 238 (1974).

<sup>15</sup> See Rio Declaration, *supra* note 2, princ. 2; Stockholm Declaration, *supra* note 2, princ. 21; Non-Navigational Uses, *supra* note 11, art. 7.

<sup>16</sup> See *Trail Smelter Arbitration* (U.S. v. Can.), 3 U.N.R.I.A.A. 1938 (1949); *Developments in the Law--International Environmental Law*, 104 Harv. L. Rev. 1484, 1492 (1991) (discussing the failure of international law to address disparate environmental standards and regulatory enforcement among countries).

<sup>17</sup> Melissa Crane, Note, *Diminishing Water Resources and International Law: U.S.-Mexico, A Case Study*, 24 Cornell Int'l L.J. 299, 317 (1991) (discussing reliance of nations on theory of territorial sovereignty).

<sup>18</sup> *Water in the Middle East: Conflict or Cooperation?* 165-66 (Thomas Naff & Ruth Marson eds., 1984).

<sup>19</sup> See Non-Navigational Uses, *supra* note 11, art. 5(1).

<sup>20</sup> See *Experts Group on Environmental Law of the World Commission on Environment and Development, Legal Principles for Environmental Protection and Sustainable Development*, U.N. Doc. WCED/86/23/Add. 1 (1986) [hereinafter WCED Principles]. See also *Helsinki Rules*, *supra* note 10, art. V(2)(k); *Trail Smelter Arbitration*, (U.S. v. Can.) (1941), 3 U.N.R.I.A.A. 1938 (1949).

"appreciable" to "significant."<sup>21</sup>

Restricted sovereignty is a principle of customary international law, as recognized by treaties,<sup>22</sup> international judicial and arbitral awards,<sup>23</sup> and the nearly unanimous opinions of publicists.<sup>24</sup> Shared resource allocation is based on the idea that each state is entitled to a "reasonable share."<sup>25</sup> No universally accepted standard exists, however, for what constitutes a reasonable share.<sup>26</sup>

1. **Agistanus has used the Ozoonio River in an equitable and reasonable manner.**

The doctrine of equitable utilization connotes equality of rights, but

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<sup>21</sup> See Joseph W. Dellapenna, *Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty vs. Community of Property*, 26 Case W. Res. J. Int'l L. 27, 38 n.53 (1994).

<sup>22</sup> See generally F. Berber, *Rivers in International Law* (1959); 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); Herbert Smith, *The Economic Uses of International Rivers* (1931); Stephen Schwebel, *Third Report on The Law of Non-Navigational Uses of International Watercourses*, [1982] 2 Y.B. Int'l L. Comm'n 76-82, 88-90, U.N. Doc. A/CN.4/348; Albert Utton, *International Streams and Lakes Generally in 5 Waters and Water Rights* 7-14 (Robert E. Beck ed., 1991).

<sup>23</sup> 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*]; *Lake Lanoux Arbitration* (Spain v. Fr.), 12 U.N.R.I.A.A. 281 (1957); *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 William L. Griffin, *The Use of Waters of International Drainage Basins Under Customary International Law*, 53 Am. J. Int'l L. 50, 61 (1959).

<sup>24</sup> See generally Berber, *supra* note 22, at 25, 272-74; D. O'Connell, *International Law* 556-58 (2d ed. 1970); Smith, *supra* note 22, at 150-51; Ludwik Teclaff, *Water Law in Historical Perspective* 152 (1985); Dominique Alheritiere, *Settlement of Public International Disputes on Shared Resources: Elements of a Comparative Study of International Instruments*, in *Transboundary Resources Law* 139-49 (Albert Utton & Ludwik Teclaff eds., 1987); Dante Caponera, *Patterns of Cooperation in International Water Law: Principles and Institutions*, in *Transboundary Resources Law* 1, 3-10 (Albert Utton & Ludwik Teclaff eds., 1987); Schwebel, *supra* note 22, at 82-85, 87-88, 91-103; Utton, *supra* note 22, at 20-21.

<sup>25</sup> Draft Articles on the Non-Navigational Uses of International Watercourses, *Draft Report of the ILA*, U.N. GAOR, 43d Sess., arts. 5-7, U.N. Doc. A/CN.4/L.463/Add.4, (1991).

<sup>26</sup> *Id.*

not necessarily equality of shares, in the use of water. This has been recognized as customary international law<sup>27</sup> generally supported by states.<sup>28</sup> It finds resonance in judicial decisions,<sup>29</sup> state practice<sup>30</sup> and international codifications.<sup>31</sup> What constitutes a reasonable and equitable utilization turns on the balancing of "relevant factors" and interests in each individual case.<sup>32</sup> Agistanus can document that it has used the River in an equitable and reasonable manner by explaining how the "relevant factors" apply to its use.

The first factor is the social and economic needs of each watercourse state, taking into account the population dependent on the water source.<sup>33</sup>

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<sup>27</sup> Stephen McCaffrey, *Second Report on the Law of the Non-Navigational Uses of International Watercourses*, [1986] 2 Y.B.Int'l L. Comm'n, pt. 1, 103-5, 110ff.

<sup>28</sup> *Report of the ILC to the Gen. Assembly* (1987), U.N. Doc. A/42/10, at 70.

<sup>29</sup> See *River Oder Case*, *supra* note 23; *Lake Lanoux Arbitration* (Spain v. Fr.), 12 U.N.R.I.A.A. 281 (1957).

<sup>30</sup> See *Convention Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes*, May 21, 1906, Mex.-U.S., 34 Stat. 2953; *Treaty Relating to the Utilization of the Waters of the Colorado, Tijuana and Rio Grande Rivers*, Feb. 3, 1944, Mex.-U.S., 3 U.N.T.S. 313; *Agreement on the Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River*, Aug. 30, 1973, Mex.-U.S., 12 I.L.M. 1105 (1973); *Treaty Relating to the Co-operative Development of the Water Resources of the Columbia River Basin*, Jan. 17, 1961, Can.-U.S., 542 U.N.T.S. 244; *Indus Waters Treaty*, Sept. 19, 1960, 419 U.N.T.S. 125.

<sup>31</sup> *Report of the ILC to the Gen. Assembly*, UN Doc. A/46/10 (1991), 161; *Helsinki Rules*, *supra* note 10, art.IV; *Institute of International Law, Salzburg Sess., 1961, Resolution on the Utilization of Non-Maritime International Waters*, art. 3 [hereinafter *Salzburg Resolution*]; *Non-Navigational Uses*, *supra* note 11; *Draft Principles of Conduct in the Field of the Environment for Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States*, May 19, 1978, princ. 1, U.N. Doc. UNEP/IG12/2 (1978) [hereinafter *Harmonious Utilization*].

<sup>32</sup> *North Sea Continental Shelf Case* (Fed. Rep. of Ger. v. Den.) (Fed. Rep. Ger. v. Neth.) 1969 I.C.J. 3, 50. See also Patricia W. Birnie & Alan E. Boyle, *International Law and the Environment* 221 n.46 (1992) (citing *Tunisia-Libya Continental Shelf Case*, *Malta-Libya Continental Shelf Case* and *Gulf of Maine Case*); *Icelandic Fisheries Cases*, *ibid.* (1974); *United Nations Convention on the Law of the Sea*, Dec. 10, 1982, arts. 69, 70, 87, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261, 1283 (1982) [hereinafter *UNCLOS*].

<sup>33</sup> See *Helsinki Rules*, *supra* note 10, art. V(2) (e)-(f); *Non-Navigational Uses*, *supra* note 11, art. 6(1) (b).

The Oزونio River is the backbone of Agistanus' economy: it is the main source of drinking water, farmland irrigation and hydroelectric power; it has helped raise the living standard of the population, including the Amahas; and it has galvanized the nation's drive toward self-sufficiency. Although Behestoon has also used the Oزونio, that nation is less dependent on the River because it is technically more sophisticated than Agistanus and has a more diversified economy.

A second "relevant" factor is the availability of alternative resources.<sup>34</sup> Agistanus is landlocked. Based on a feasibility study, the IRADB concluded that Agistanus has no alternative source of water.<sup>35</sup> By contrast, Behestoon has access to the Bandeke Estuary and Solonia Bay.

Third is the conservation and economy of use of water resources.<sup>36</sup> Agistanus built channels and irrigation ditches to promote a more efficient use of the River, as favored by Agenda 21.<sup>37</sup> On the other hand, Behestoon has exploited the River, using it as a dumping area for untreated wastes, violating tenets of sustainable development.<sup>38</sup>

Fourth is the natural character of the river.<sup>39</sup> Although two-thirds of the River's course lies within Behestoon, the Oزونio's headwaters are in the mountains of Agistanus.

The relevant factors enumerated above in such international documents as the Helsinki Rules and International Law Commission Draft Rules on the Non-

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<sup>34</sup> See Helsinki Rules, *supra* note 10, art. V(2)(h); Non-Navigational Uses, *supra* note 11, art. 6(1)(f).

<sup>35</sup> *Compromis* at lines 76-79.

<sup>36</sup> See Helsinki Rules, *supra* note 10, art. V(2)(i); Non-Navigational Uses, *supra* note 11, art. 6(1)(e).

<sup>37</sup> See Agenda 21, *supra* note 2, ch. 2.37.

<sup>38</sup> See generally Agenda 21, ch. 21.

<sup>39</sup> See Helsinki Rules, *supra* note 10, art. V(2)(a) and (b); Non-Navigational Uses, *supra* note 11, art. 6(1)(a).

Navigational Uses of International Watercourses are not meant to be exhaustive.<sup>40</sup> Because international law provides no definitive answer regarding resolution of interstate water disputes, national court decisions can be looked to for evidence of evolving state practice.<sup>41</sup> For example, the United States Supreme Court has resolved river disputes similar to the one at issue by applying the *doctrine of equitable apportionment*.<sup>42</sup> When a downstream user seeks to limit an upstream user's river use, the benefits to the downstream user are balanced against the damage to the upstream user.<sup>43</sup> A relevant factor is that of protecting the less developed economy.<sup>44</sup>

Although prior use of an international watercourse is important, it may be outweighed by developmental concerns.<sup>45</sup> The multiple developmental uses to which Agistanus has put the River have benefited not just Agistanus but its neighbors, including Behestoon, thus resulting in a greater net regional benefit and the furtherance of sustainable development goals.<sup>46</sup> Integrated utilization of the River is not a viable option because the two watercourse states are at different stages of development.<sup>47</sup>

Thus, under customary international law and state practice, the use of the Ozoonio by Agistanus in promoting sustainable agricultural<sup>48</sup> and mountain<sup>49</sup>

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<sup>40</sup> See Helsinki Rules, *supra* note 10, art. V(2); Non-Navigational Uses, *supra* note 11, art. 6(1).

<sup>41</sup> See *Trail Smelter Arbitration* (U.S. v. Can.), 3 U.N.R.I.A.A. 1938, 1964 (1949).

<sup>42</sup> *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982).

<sup>43</sup> *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945), citing *Colorado v. Kansas*, 320 U.S. 383, 394 (1943).

<sup>44</sup> *Nebraska v. Wyoming*, 325 U.S. at 618.

<sup>45</sup> Helsinki Rules, *supra* note 10, art. VIII(1).

<sup>46</sup> See Agenda 21, *supra* note 2, ch. 2.5.

<sup>47</sup> J. Bruhacs, *The Law of Non-Navigational Uses of International Watercourses* 168 (1992).

<sup>48</sup> See, e.g., Agenda 21, *supra* note 2, ch. 14.

<sup>49</sup> See, e.g., Agenda 21, *supra* note 2, ch. 13.

development is justified.

**II. AGISTANUS COMPLIED WITH THOSE ENVIRONMENTAL SAFEGUARDS OWED TO BEHESTOON UNDER INTERNATIONAL LAW.**

**A. Joint Membership in the IRADB Provided a Sufficient Forum Through Which Agistanus Fulfilled Its Obligation to Conduct Good Faith Consultations with Behestoon.**

A riparian state has the duty to notify potentially affected states when its activities pose a risk of significant injury to them.<sup>50</sup> The notification must be: 1) timely; 2) allow a reasonable time for reply; and 3) contain sufficient information for evaluation of the proposal's impact.<sup>51</sup> A state need not suspend the contested activities until the affected state consents to their continuance. Although prior consultation norms are growing, they have not attained the level of a duty.<sup>52</sup> In any event, a duty to consult does not imply an obligation to agree.<sup>53</sup> Other states have no veto over river development.<sup>54</sup>

When an international forum has jurisdiction to consider a proposed action by a member state, members can assert a duty to consult within the forum.<sup>55</sup> Agistanus informed Behestoon of its development plans through the IRADB, of which both countries are members. The two nations had ample opportunity to exchange views regarding the possible impacts of the development project before the IRADB approved the development loan.

**B. Agistanus Owed No Duty to Consult Behestoon About Its Mining Project Since It Posed No Risk of Substantial Harm.**

Mining is not an inherently dangerous activity to a neighboring state;

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<sup>50</sup> See, e.g., Rio Declaration, *supra* note 2, princs. 18 and 19.

<sup>51</sup> See, e.g., Jens Evensen, *2nd Report*, [1984] 2 Y.B. of the Int'l L. Comm'n, pt. 1, 114; Helsinki Rules, *supra* note 10, art. XXIX; Salzburg Resolution, *supra* note 31, art. 5.

<sup>52</sup> Frederic Kirgis, *Prior Consultation in International Law* 374-75 (1983).

<sup>53</sup> See, e.g., Bruhacs, *supra* note 47, at 178.

<sup>54</sup> *Lake Lanoux Arbitration* (Spain v. Fr.), 12 U.N.R.I.A.A. 281, 24 I.L.R. 101, 128-38 (Arb. Trib. 1957).

<sup>55</sup> Kirgis, *supra* note 52, at 370.

nor did the mining project in Agistanus pose a risk of substantial harm to Behestoon. The mining operation is located in Agistanus's northern region; Behestoon shares Agistanus' southern border. The duty to inform includes an exception for national and industrial security.<sup>56</sup> Because the minerals Agistanus extracted were strategic and rare, Agistanus qualified for the exemption.

**C. Customary International Law Did Not Require Agistanus to Conduct an Environmental Impact Assessment (EIA) or to Ensure That the IRADB Do So.**

Although the Rio Declaration states that its signatories must conduct an EIA, the agreement was approved only in 1992, and is limited to proposed activities that are likely to have a significant adverse impact on the environment.<sup>57</sup> Consequently, when work on the dam and mine projects began in 1982, no duty existed.

As a developing nation, Agistanus placed great faith in, and reasonably relied on the IRADB to take the necessary steps to evaluate the proposed development projects. In any event, the World Bank requirement that all proposed investment projects be screened for their potential environmental impact has been in effect only since October 1989,<sup>58</sup> seven years after work on the dam project began.

**III. AGISTANUS' RESPONSE TO THE TOXIC PLUME COMPLIED WITH ESTABLISHED PRINCIPLES OF INTERNATIONAL LAW.**

**A. Agistanus Controlled the Toxic Plume Caused by the Earthquake to the Best of its Ability.**

A state has an "obligation to counteract transfrontier pollution [only]

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<sup>56</sup> See, e.g., Kirgis, *supra* note 52, at 361; ILC Draft Articles on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, art. 11, U.N. GAOR, 44th Sess., Supp. No. 10, at 222, U.N. Doc. A/44/10 (1989) [hereinafter *Injurious Consequences*]. See also Jon Van Dyke, *Sea Shipment of Japanese Plutonium under International Law*, 24 *Ocean Development and International Law*, 399 (1993) (noting that for security reasons, the Japanese refused to divulge the intended route of a plutonium shipment).

<sup>57</sup> Rio Declaration, *supra* note 2, princ. 17.

<sup>58</sup> See Charles Di Leva, *The World Bank and Environmental Law: A Post-Rio Summary of Activities*, C883 ALI-ABA 525, 529 (Feb. 17, 1994).

when it has intentionally or negligently caused the event . . . or abstained from abating it."<sup>59</sup> This duty is flexible and takes into account the varying levels of development among states.<sup>60</sup> Agistanus complied with its obligation to abate the pollution by attempting to contain the toxic spill, even though this effort was hampered by a lack of technological expertise and equipment.<sup>61</sup> An earthquake, not negligence on the part of Agistanus, created the toxic plume. Additionally, scientists believe that the most dangerous chemicals in the plume, the polycyclic aromatic hydrocarbons (PAHs), were created by a chain reaction with contaminants already present in Behestoon's waters.

There is some dispute as to whether opening the valves of the dam would effectively dilute the plume.<sup>62</sup> The precautionary principle of international law requires a state to diligently prevent causing a foreseeable harm.<sup>63</sup> Emptying the reservoir would result in three injuries to Agistanus: 1) devastation of agriculture and food production, in direct opposition to the goals of Agenda 21 and other conventions;<sup>64</sup> 2) disruption of

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<sup>59</sup> *Corfu Channel* (U.K. v. Alb.) (Merits), 1949 I.C.J. 4, 20 (Albania had knowledge of risk and means to avoid it but did not act); *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran) (Judgment), 1980 I.C.J. 3, 32-33 (Iranian government was aware of impending attack, had power to stop it, but failed to do so); Gunther Handl, *Liability as an Obligation Established by a Primary Rule of International Law*, 16 Neth. Y.B. Int'l L. 49, 58; Johan Lammers, *Pollution of International Watercourses* 348 (1984).

<sup>60</sup> Rio Declaration, *supra* note 2, princ. 11; Agenda 21, *supra* note 22, ch. 17.2; Stockholm Declaration, *supra* note 2, princ. 23; Injurious Consequences, *supra* note 56, art. 8.

<sup>61</sup> Compromis at line 238.

<sup>62</sup> *Id.* at lines 281-282.

<sup>63</sup> Birnie & Boyle, *supra* note 32, at 95.

<sup>64</sup> Agenda 21, *supra* note 2, ch. 14.2 (stating that security of food supply is a primary development goal); See also, ICESCR, *supra* note 2, art. 1(2) (stating that a people must not be deprived of its means of subsistence); Declaration on Social Progress and Development, Dec. 11, 1969, G.A. Res. 2542, U.N. GAOR, Supp. No. 30, at 49, U.N. Doc. A/7630 (1970) (affirming that a government has the primary responsibility of ensuring the well-being of its people).

hydroelectric power to Agistanus and neighboring states;<sup>65</sup> and 3) liability for breaching its loan agreement.<sup>66</sup> Furthermore, because the two nations are ethnically linked and have a history of cooperation, this, coupled with Agistanus' containment efforts, precludes a finding of willful intent to harm Behestoon, or a refusal to abate the effects of the plume.

**B. Agistanus Did Not Violate Its Duty to Notify in a Timely Manner.**

**1. Delayed notification was reasonable.**

The duty to notify is dependent upon the time between when the danger appears and the moment it causes harm.<sup>67</sup> States normally are allowed a reasonable period of time to correct an environmental hazard, and "reasonableness" is case-specific.<sup>68</sup> Only two days had elapsed from the moment the plume entered the river and when Agistanus initiated high-level diplomatic meetings to deal with the incident. The nature of the toxins was unknown.<sup>69</sup> Thus, a cautious review<sup>70</sup> of the situation, before making a public disclosure, was prudent and not a breach of a duty to notify.

**2. Agistanus had legitimate security reasons for attempting to contain the toxic plume before notifying Behestoon and the international community.**

Reasons of national and industrial security provide exceptions to the

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<sup>65</sup> See Agenda 21, *supra* note 2, ch. 7.46 (dependency on fossil fuels must be reduced in favor of safer, renewable alternatives).

<sup>66</sup> David Wirth, *Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues*, 100 Yale L. J. 2645, 2663 (1991) (explaining that World Bank loans contain enforceable obligations); See also, Ibrahim Shihata, *The World Bank in a Changing World* 154 (Franziska Tschoten and Antonio Parra, eds., 1991) (stating that general loan conditions empower bank to suspend disbursements and apply penalties for deviations).

<sup>67</sup> *Corfu Channel* (U.K. v. Alb.) (Merits), 1949 I.C.J. Rep. 4, 20 (explaining that Albania's duty to warn was based on the time between the moment the ships were spotted and the first explosion).

<sup>68</sup> Lammers, *supra* note 59, at 349.

<sup>69</sup> Compromis at lines 243, 259.

<sup>70</sup> Injurious Consequences, *supra* note 56, art. 10(a) (declaring that a state shall review an activity for its potential transboundary effects, then give notification).

duty to notify.<sup>71</sup> This Court has acknowledged<sup>72</sup> the right of a state to decide its own domestic and foreign policies.<sup>73</sup> Each nation determines which activities are of strategic importance, and valid security claims exist for a broad spectrum of situations.<sup>74</sup> Mining strategic minerals,<sup>75</sup> protecting national food supplies,<sup>76</sup> and maintaining an important regional source of hydroelectric power<sup>77</sup> are all activities of significant importance to Agistanus' national and industrial security. The plume emergency implicated these interests; thus, Agistanus acted within its rights when it made efforts to contain the plume before providing notification.

**C. Behestoon's Own Self-Help Actions Pre-empted Agistanus from Providing Notification of the Toxic Plume.**

Notification of emergency situations gives states the opportunity to

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<sup>71</sup> Injurious Consequences, *supra* note 56, art. 11; See also, Van Dyke, *supra* note 56; Lammers, *supra* note 59, at 182 (recounting the resistance of Switzerland and France to the Rhine Chemicals Convention because it would disadvantage their chemical industry).

<sup>72</sup> *Case Concerning Military and Paramilitary Actions In and Against Nicaragua* (Nic. v. U.S.) (Judgment), 1986 I.C.J. 14 (affirming that states have a right to conduct their affairs without outside interference because this is a corollary principle to the sovereign equality of states).

<sup>73</sup> United Nations Charter, *supra* note 2, art. 2(1); Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969) (recognizing sovereign equality and independence of all states); Declaration of Principles on International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, G.A. Res. 2625, U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1970), 9 I.L.M. 1292 (1971) (affirming political independence of states); See also, Ian Brownlie, *Principles of Public International Law* 287 (4th ed., 1990).

<sup>74</sup> Daniel Magraw, *Transboundary Harm: The International Law Commission's Study of "International Liability"* 80 Am. J. Int'l L. 305, 328 (1986).

<sup>75</sup> Hans Maull, *Energy, Mining and National Security* 7 (1984) (noting that raw materials and minerals are critical to the power and welfare of nations); Kenneth Kessel, *Strategic Minerals: A U.S. Alternative* 13 (1990) (explaining that strategic minerals are essential to defense and require strict conservation and distribution control).

<sup>76</sup> M. Swaminathan, *Building a National Food Security System* 3, 5 (1981) (greatest resource of a nation is its people, who must be fed).

<sup>77</sup> See generally, W. Derrick Sewell, *The Politics of Hydroelectric Megaprojects: Damming with Faint Praise in Australia, New Zealand, and British Columbia*, 27 Nat. Res. J. 3 (1987) (explaining that electric power projects form integral parts of governmental economic growth plans).

take protective measures.<sup>78</sup> A general principle of international law requires an affected state to mitigate damages.<sup>79</sup> Under Article 194 of the Law of the Sea Convention, signed by Behestoon, member nations must abate pollution, regardless of the source.<sup>80</sup> This rule is supported by case law<sup>81</sup> and state practice.<sup>82</sup>

Behestoon violated Agistanus' sovereignty<sup>83</sup> through covert operations into its territory. It was aware of the existence of the toxic plume only two days after the earthquake and within a week of its crossing the border.<sup>84</sup> Consequently, Behestoon had the knowledge it needed to protect itself and to attempt to mitigate the effects of the spill. These actions also made it unnecessary for Agistanus to take any further steps to give notice, for Behestoon informed both the international community and Agistanus that it had the information it needed through its press releases.<sup>85</sup>

**IV. AGISTANUS IS NOT LIABLE TO BEHESTOON FOR ANY DAMAGES UNDER TRADITIONAL PRINCIPLES OF STATE RESPONSIBILITY.**

Customary principles of state responsibility hold a state liable only

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<sup>78</sup> Daniel Partan, *The "Duty to Inform" in International Environmental Law*, 6 Bos. U. Int'l L. J. 43, 80 (1988); Magraw, *supra* note 75, at 327.

<sup>79</sup> Jan Schneider, *World Public Order of the Environment* 150 (1979) (explaining that the affected state has duty to mitigate).

<sup>80</sup> UNCLOS, *supra* note 32, arts. 194(1) and (2).

<sup>81</sup> *Claims against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954*, reprinted in 18 I.L.M. 899, 905 (1979).

<sup>82</sup> Schneider, *supra* note 67, at 151-2 (recalling the Royal Air Force bombing of the Torrey Canyon oil tanker).

<sup>83</sup> Compromis at lines 80-85, 242. See also, United Nations Charter, *supra* note 2, art. 2(1) (recognizing the principle of sovereign equality among nations); *Case Concerning Military and Paramilitary Actions In and Against Nicaragua (Nic. v. U.S.) (Merits)*, 1986 I.C.J. 14, 101 (stating that the principle of sovereign equality extends to air space and internal waters).

<sup>84</sup> Compromis at lines 242, 252-54, 265.

<sup>85</sup> *Id.* at lines 266-69.

for internationally wrongful acts.<sup>86</sup> An internationally wrongful act requires: 1) an international obligation; 2) a breach, through affirmative acts or omissions, of that obligation; and 3) a breach that is attributable to the state.<sup>87</sup>

**A. Agistanus Is Not Liable to Behestoon for Any Injury as Long as It Used the Ozoonio River in an Equitable and Reasonable Manner.**

Under the *doctrine of equitable utilization*, a riparian state has the right to use a shared watercourse in an equitable and reasonable manner.<sup>88</sup> A state may exercise this right without incurring liability for injury caused to a co-riparian state.<sup>89</sup> Although injury is not unimportant, it is only one factor in determining the reasonableness of a particular use.<sup>90</sup>

Because Agistanus used the Ozoonio River in an equitable and reasonable manner, Behestoon cannot hold Agistanus liable for any alleged injury. This conclusion is consistent with the purpose behind the *doctrine of equitable utilization*, which accommodates multiple uses by states sharing the same watercourse; each use must be considered from an overall perspective rather

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<sup>86</sup> International Law Commission Draft Articles on State Responsibility, July 25, 1980, arts. 1 and 3, U.N. Doc. A/35/10 (1981) [hereinafter State Responsibility]; *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4.; *United States Diplomatic and Consular Staff in Tehran Case* (U.S. v. Iran), 1980 I.C.J. 3; Brownlie, *supra* note 73, at 434.

<sup>87</sup> State Responsibility, *supra* note 86, art. 3; *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4.

<sup>88</sup> Helsinki Rules, *supra* note 10, art. IV; Non-Navigational Uses, *supra* note 11, art.5.

<sup>89</sup> Helsinki Rules, *supra* note 10, art. X; Stephen McCaffrey, *supra* note 27, pt.1, 133, ¶¶ 179-181; Stephen M. Schwebel, *supra* note 22, pt.1, 103, ¶¶ 156-157 (1982); *Danauversinkung Case* (Wurttemberg v. Baden) 4 Ann. Dig. (RGSt.) (Ger.); Treaty Relating to the Utilization of the Waters of the Colorado River, *supra* note 30; Indus Waters Treaty, *supra* note 30, art.4; Agreement Concerning Frontier Rivers Between Finland and Sweden, Sept. 16, 1971, ch.3, art. 3(2), 825 U.N.T.S. 191, 282; Gunther Handl, *Balancing of Interests and International Liability for the Pollution of International Watercourses*, 13 CYIL 156, 184-85; *The Law of Int'l Drainage Basins* 113 (A. Garretson, et al., eds. 1967).

<sup>90</sup> Helsinki Rules, *supra* note 10, art. V; Non-Navigational Uses, *supra* note 11, art. 6(1)(c).

than in isolation.<sup>91</sup>

1. **Even if Agistanus is found to have used the Ozoonio River in an inequitable or unreasonable manner, it is only responsible to Behestoon for substantial or serious injury.**

Although a state is generally required under international law to prevent its own activities from causing extraterritorial environmental harm,<sup>92</sup> arbitral decisions, state practice and international scholars hold a state legally responsible only for substantial or serious environmental injury.<sup>93</sup> Although some commentators would impose state liability for less substantial injuries,<sup>94</sup> state practice evidences a willingness to tolerate some minimal level of pollution.<sup>95</sup>

- B. **Agistanus Used the Best Practical Means at Its Disposal to Prevent Pollution Created by Its Own Activities from Causing Substantial Harm to Behestoon.**

Customary international law requires a state to exercise due diligence to prevent activities within its jurisdiction or control from causing injury to neighboring states.<sup>96</sup> A state fulfills its obligation to prevent harm to

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<sup>91</sup> Helsinki Rules, *supra* note 10, art.V(3); *Danauversinkung Case* (Wurttemberg v. Baden) 4 Ann. Dig. (RGSt.) (Ger.) 128, 131.

<sup>92</sup> *Trail Smelter Arbitration* (U.S. v. Can.), 3 U.N.R.I.A.A. 1938 (1949); Stockholm Declaration, *supra* note 2, princ. 21; Rio Declaration, *supra* note 2, princ. 2.

<sup>93</sup> *Trail Smelter Arbitration* (U.S. v. Can.), 3 U.N.R.I.A.A. 1938 (1949); *Lake Lanoux Arbitration* (Spain v. Fr.), 12 U.N.R.I.A.A. 281, 308 (1957); Van Dyke, *supra* note 56, at 413 (documenting the *Fukuyu Maru Fallout Exposure* (Japan v. U.S.) in which the U.S. expressed its willingness to compensate Japan or Japanese nationals for substantial loss); 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); G.A. Res. 2995 (XXVII), 1 and 2, 27 U.N. GAOR, Supp. No. 30, at 42 (1973); Helsinki Rules, *supra* note 10, art. V(k); Rules on International Law Applicable to Transfrontier Pollution, September 4, 1982, art. 3, reprinted in 60 I.L.A. 158 (1983); WCED Principles, *supra* note 20, art. 10.

<sup>94</sup> Injurious Consequences, *supra* note 56, art. 2(c) (prohibiting states from causing "appreciable" harm).

<sup>95</sup> Lammers, *supra* note 59, at 349 (citing state tolerance of minimal levels of pollution, including the 1980 ECE Declaration of Policy on Prevention and Control of Water Pollution and the 1977 Mar del Plata United Nations Water Conference).

<sup>96</sup> *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4; *United States Diplomatic and Consular Staff in Tehran Case* (U.S. v. Iran), 1980 I.C.J. 3; *Home Frontier and Foreign Missionary Society* (U.S. v. U.K.), 6 U.N.R.I.A.A. 42 (1920);

neighboring states when it employs the best means at its disposal to prevent or abate transboundary pollution.<sup>97</sup> This standard recognizes that the available means, resources, and effectiveness of territorial control will differ among states.<sup>98</sup>

Both the Rio Declaration and the Stockholm Declaration endorse this principle of international law. Principle 23 of the Stockholm Declaration states that environmental standards used by the more advanced countries may be "inappropriate" and "of unwarranted social cost" for developing countries.<sup>99</sup> Principle 11 of the Rio Declaration reiterates this general idea but adds that such standards applied to developing nations may also cause an unwarranted "economic cost."<sup>100</sup>

Agistanus fulfilled its duty by taking all reasonable measures to prevent and abate pollution resulting from its activities. Agistanus had implemented a sustainable development program which included the preservation

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*Mencham v. United Mexican States (U.S. v. Mex.)*, 4 U.N.R.I.A.A. 440, 443 (1929); C. Eagleton, *The Responsibility of States in International Law* 213 (1928); Restatement, *supra* note 10, §601(1); Lammers, *supra* note 59, at 597; Stephen McCaffrey, *Fourth Report on The Law of The Non-Navigational Uses of International Watercourses*, May 9, 1988, A/CN.4/412/Add.2, ¶ 6, at p.7.

<sup>97</sup> Rio Declaration, *supra* note 2, princ. 11; Stockholm Declaration, *supra* note 2, princ. 23; Agenda 21, *supra* note 2, chs. 17.2 and 18.12; UNCLOS, *supra* note 32, art. 194(1); Paris Convention for the Prevention of Marine Pollution from Land-Based Sources, June 4, 1974, art.4(3), reprinted in I.L.M. 352 (1974); Geneva Convention on Long-Range Transboundary Air Pollution, November 13, 1979, art.6, 1302 U.N.T.S. 217; Convention for the Protection of the Ozone Layer, March 22, 1985, art. 2(2), UNEP Doc. IG.53/5, reprinted in 26 I.L.M. 1529 (1987); London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, art. 1, 26 U.S.T 2403; Harmonious Utilization, *supra* note 31, princ. 3(3); Montreal Guidelines for the Protection of the Marine Environment Against Pollution From Land-Based Sources, May 24, 1985, art. 4(a), UNEP/GC.13/9/Add.3, UNEP/GC/DEC 13/1811, UNEP ELPG No.7; Restatement, *supra* note 10, §601(1); Pierre-Marie Dupuy, *Overview of the Existing Customary Legal Regime Regarding International Pollution*, in Daniel Magraw, *International Law and Pollution* 67 (1991).

<sup>98</sup> Birnie and Boyle, *supra* note 32, at 93; Organization for Economic Co-Operation and Development, *Legal Aspect of Transfrontier Pollution* 375 (1977).

<sup>99</sup> Stockholm Declaration, *supra* note 2, princ. 23.

<sup>100</sup> Rio Declaration, *supra* note 2, princ. 11.

of a consistent flow of water to Behestoon through the operation of a by-pass and the creation of an intricate system of channels and irrigation ditches. After the mining incident, Agistanus immediately attempted to contain the resulting spill. Although the containment effort ultimately failed because of inadequate equipment and technology, Agistanus participated in high-level diplomatic meetings with Behestoon two days later.

**C. Behestoon Has Failed to Prove a Causal Link Between Agistanus' Development Activities and Any Damage It May Have Suffered.**

International law, as articulated by the *Trail Smelter Arbitration*, requires the injured state to demonstrate by clear and convincing evidence a causal link between the alleged wrongful conduct and the injury suffered.<sup>101</sup> A causal link will exist only when the conduct constitutes the *conditio sine qua non*<sup>102</sup> of the injury and when that injury is a normal or natural consequence of the alleged wrongful conduct.<sup>103</sup>

**1. Behestoon cannot prove clearly and convincingly that the pollution damage caused before and after the earthquake resulted from Agistanus' activities.**

Behestoon's dumping of untreated domestic and industrial waste into the Ozoonio already threatened the health of its people and the vitality of its agricultural and fishing industries. Agenda 21, an environmental action program to which Behestoon is a signatory,<sup>104</sup> labels untreated sewage as one of

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<sup>101</sup> *Trail Smelter Arbitration*, (U.S. v. Can.), 3 U.N.R.I.A.A. 1938 (1949) (basing this rule on *Missouri v. Illinois*, 200 U.S. 496, 521 (1906) and *New York v. New Jersey*, 256 U.S. 296, 309 (1921)).

<sup>102</sup> Lammers, *supra* note 59, at 601 (1984) (citing the Canadian claim against the U.S.S.R. for the damage caused by Soviet Cosmos 954 as an application of the *conditio sine qua non* test)

<sup>103</sup> *Trail Smelter Arbitration* (U.S. v. Can.), 3 U.N.R.I.A.A. 1938 (1949); *Claim Against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954*, 18 I.L.M. 906 (1979); *The Naulilaa Case*, 2 U.N.R.I.A.A. 1031, reprinted in 4 I.L.R. 274, 275; *Administrative Decision No. 11 of 1 November 1923 of the Mixed Claims Commission United States-Germany*, constituted by Agreement of 10 August 1922, extended by Agreement of Dec. 31, 1928, 7 U.N.R.I.A.A. 29; Alexandre Kiss and Dinah Shelton, *International Environmental Law* 352 (1991).

<sup>104</sup> Compromis at line 364.

the greatest threats to the marine environment<sup>105</sup> and freshwater resources,<sup>106</sup> and links improper waste disposal to 5.2 million deaths each year.<sup>107</sup> Furthermore, Behestoon's development of a bustling freight and shipping industry, an activity also deemed a major pollutant of the marine environment by Agenda 21,<sup>108</sup> creates a hostile environment for the growth of zoo-plankton and the maintenance of a healthy fishing industry.

Regarding the toxic plume caused by the earthquake, Behestoon cannot prove clearly that the emergence of the polycyclic aromatic hydrocarbons (PAHs) was the result of Agistanus' activities. These hydrocarbons were discovered only when Behestoon's scientists tested the toxins in Behestoon's waters. The same scientists failed to detect the PAHs in earlier samples taken from river waters in Agistanus. Scientists from both nations link the PAHs to a chain reaction between the plume and the residual agricultural contaminants that occurred after the plume crossed the Behestoon border.<sup>109</sup>

**D. Agistanus Is Not Liable for Any Injury Caused by The Earthquake That Behestoon Could Have Reasonably Prevented or Mitigated.**

An injured state may not hold another state liable for damage that it could have mitigated through its own preventive measures<sup>110</sup>. The Law of the Sea Convention,<sup>111</sup> to which Behestoon is a party,<sup>112</sup> imposes an affirmative duty

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<sup>105</sup> Agenda 21, *supra* note 2, ch. 17.18.

<sup>106</sup> *Id.* at ch. 18.35.

<sup>107</sup> *Id.* at ch. 21.38.

<sup>108</sup> *Id.* at ch. 17.20.

<sup>109</sup> *Compromis* at lines 303-308.

<sup>110</sup> *Claim Against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954*, 18 I.L.M. 905-06 (1979); *Restatement, supra* note 10, §601, comment d; *Injurious Consequences, supra* note 56, art. 7.

<sup>111</sup> UNCLOS, *supra* note 32.

<sup>112</sup> *Clar. no.* 11.

on its members to prevent, reduce, and control any pollution of the marine environment originating from "any source."<sup>113</sup>

Although Behestoon knew that the plume would cross its border within one week, it took no steps to halt the plume's progress into its territory. When Agistanus could not effectively respond to the crisis because of its lack of technological expertise and equipment,<sup>114</sup> Behestoon could have used its technology and financial resources to contain or clean up the toxins. Failing to take such action, Behestoon clearly breached its duty to mitigate.

**E. Under Traditional Principles of State Responsibility, Agistanus Is Not Responsible for Consequences of Force Majeure.**

An otherwise wrongful act will not invoke state responsibility if the act is the result of an unforeseeable natural phenomenon.<sup>115</sup> An underground tremor caused the mining incident. This natural phenomenon was unforeseeable from Agistanus' standpoint because it relied on the IRADB's technical expertise to design a safe mining project. Because the IRADB had previously done projects in both Agistanus and Behestoon,<sup>116</sup> it was reasonable for Agistanus to assume that the IRADB would be sensitive to any problems that would threaten the territorial integrity of either nation.

**V. AGISTANUS IS NOT LIABLE FOR ACTS OF THE IRADB.**

A state incurs liability for the wrongful act of an independent third party when the act is attributable to the state.<sup>117</sup> As articulated by the International Court of Justice in the *Corfu Channel Case*, acts or omissions of a third party are not attributable to a state merely because the acts or

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<sup>113</sup> UNCLOS, *supra* note 32, art. 194(1).

<sup>114</sup> *Compromis* at lines 238-239.

<sup>115</sup> *State Responsibility*, *supra* note 86, art. 31; Lammers, *supra* note 59, at 592-93.

<sup>116</sup> *Compromis* at lines 69-70.

<sup>117</sup> *State Responsibility*, *supra* note 86, art. 3; Allen Springer, *The International Law of Pollution* 128 (1983).

omissions have occurred within a state's territory.<sup>118</sup> A state may never incur liability for third party acts of which it has no knowledge.<sup>119</sup>

As experts providing technical assistance to Agistanus, the IRADB functioned as an independent private entity, not an organ of the state.<sup>120</sup> Because the IRADB purposely "de-emphasized" the existence of the tar-like strata,<sup>121</sup> Agistanus cannot be held liable for failing to account for this unknown hazard in the design of the mining project.

**VI. AGISTANUS IS NOT STRICTLY LIABLE TO BEHESTOON FOR ANY DAMAGES RESULTING FROM ITS DEVELOPMENT ACTIVITIES.**

**A. Customary International Law Does Not Support The Imposition of Strict Liability for Transboundary Environmental Damage.**

Customary international law does not recognize strict liability for serious transboundary harm. The works of the Preparatory Committee that drafted Principle 21 of the Stockholm Declaration affirmed that state responsibility requires a showing of negligence.<sup>122</sup> Principle 22 of the Stockholm Declaration<sup>123</sup> and Principle 13 of the Rio Declaration<sup>124</sup> commit

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<sup>118</sup> *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4; See also State Responsibility, *supra* note 86, art. 13 (stating that the acts of an organ of an international organization are not attributable to a state merely because they have occurred within that state's territory).

<sup>119</sup> *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4; *United States Diplomatic and Consular Staff in Tehran Case* (U.S. v. Iran), 1980 I.C.J. 3; Stephen McCaffrey, *International Liability and International Watercourses: The Work of the International Law Commission Relating to International Pollution*, in Magraw, *supra* note 97; Gunther Handl, *Liability as an Obligation Established by a Primary Rule of International Law*, 16 Neth. Y.B. Int'l L. 49, 59 (1985).

<sup>120</sup> *Report of the International Law Commission on the Work of Its Twenty-Sixth Session*, May 6, 1974, U.N. GAOR, 29th Sess., Supp. No.10, U.N. Doc. A/9610/Rev.1, ¶¶ 2-12, 125-27.

<sup>121</sup> Compromis at lines 326-329.

<sup>122</sup> See Gunther Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 Am.J.Int'l L. 527, 536 (1980) (citing the debates of the Stockholm Declaration Preparatory Committee).

<sup>123</sup> Stockholm Declaration, *supra* note 2, princ. 22.

<sup>124</sup> Rio Declaration, *supra* note 2, princ. 13.

states to "develop further international law regarding liability and compensation," thus indicating the absence of any agreed-upon acceptance of strict liability principles.

States that have accepted strict liability obligations in incidents involving serious transboundary harm have done so only pursuant to explicit treaty provisions.<sup>125</sup> In many of these treaties, states have accepted only subsidiary liability, compensating those injured only when a third party operator or owner becomes financially insolvent.<sup>126</sup> These treaties frequently add liability limits so that the third parties need not pay damages above a certain dollar amount.<sup>127</sup> States also evidence a practice of tendering *ex gratia* payments for incidents in which no liability has been admitted.<sup>128</sup> Such practices demonstrate the absence of any sense of legal obligation to assume

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<sup>125</sup> See, e.g., Convention on International Liability for Damage Caused by Space Objects, March 29, 1972, 961 U.N.T.S. 187; Treaty Concerning the La Plata River, Nov. 19, 1973, Arg.-Uru., art. 51, reprinted in 13 I.L.M. 251.

<sup>126</sup> Rome 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, 956 U.N.T.S. 251; Additional Protocol to the Convention on Third Party Liability in the Field of Nuclear Energy, Jan. 28, 1964, 956 U.N.T.S. 325; Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 U.N.T.S. 265; International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3; London Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploration of Seabed Mineral Resources, July 13, 1976, UNEP, Selected Multilateral Treaties in the Field of the Environment, Reference Series 3 (Nairobi, 1983), p.474.

<sup>127</sup> See, e.g., Vienna Convention on Civil Liability for Nuclear Damage, *supra* note 126, art. V; Convention on Liability of Operators of Nuclear Ships, Brussels, May 25, 1962, art. 3, IAEA Leg. Ser. No. 4 at 34, reprinted in 57 A.J.I.L. 268 (1963); International Convention on Civil Liability for Oil Pollution Damage, *supra* note 126, art. V.

<sup>128</sup> 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; *Claim Against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954*, 18 I.L.M. 905-06 (1979); Gunther Handl, *supra* note 122, at 57 (documenting *ex gratia* payments made by Liberia for pollution by its oil tanker which split off the coast of Japan (Japan v. Liberia)); Marian Leich, *Denial of Liability: Ex Gratia Compensation on a Humanitarian Basis*, 83 Am. J. Int'l L. 319-23 (1989).

strict liability and thus the absence of the *opinio juris* necessary for the establishment of a customary principle of international law.<sup>129</sup>

International tribunals have not supported strict liability as customary international law.<sup>130</sup> The International Court of Justice in the *United States Diplomatic and Consular Staff in Tehran Case* applied a due diligence standard; the Court focused on the Iranian government's knowledge of the impending attacks on the U.S. embassy and its ability to protect those premises.<sup>131</sup>

Strict liability is also unsound from a policy standpoint. Liability imposed irrespective of fault would severely hamper the ability of third world nations like Agistanus to develop,<sup>132</sup> frustrating the development goals of the Rio Declaration, Agenda 21 and the Stockholm Declaration.<sup>133</sup> Furthermore, a developing country like Agistanus often lacks adequate means for monitoring and assessing harm as well as the technology and financial resources to minimize the harm.<sup>134</sup>

**B. Even If Customary International Law Does Support The Imposition of Strict Liability, Such a Standard Does Not Apply in This Instance.**

**1. Agistanus cannot be held strictly liable to Behestoon because its activities were not ultra-hazardous.**

Assuming *arguendo* that strict liability is now recognized as customary

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<sup>129</sup> Harold Maier, *Ex Gratia Payments and the Iranian Airline Tragedy in Agora: The Downing of Iran Air Flight 655*, 83 Am. J. Int'l L. 328-29 (1989); Brownlie, *supra* note 73, at 7.

<sup>130</sup> See Handl, *supra* note 122, at 537 (arguing that the *Trail Smelter Arbitration*, *Lake Lanoux Arbitration*, *Corfu Channel Case*, and *Gut Dam Arbitration* all fail to support a strict liability standard); Handl, *supra* note 89, at 158-62.

<sup>131</sup> *United States Diplomatic and Consular Staff in Tehran Case* (U.S. v. Iran), 1980 I.C.J. 32-33.

<sup>132</sup> See Stephen McCaffrey, *The Law of International Watercourses: Some Recent Developments and Unanswered Questions*, 17 Den. J. Int'l L. & Pol'y 505, 509 (1989).

<sup>133</sup> Rio Declaration, *supra* note 2, princs. 3, 5, and 6; Agenda 21, *supra* note 2, chs. 3 and 14; Stockholm Declaration, *supra* note 2, princs. 9 and 11.

<sup>134</sup> See *Second Report on International Liability For Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/346/ Add.1-2 (1982).

international law, this standard has been applied only to ultra-hazardous activities such as those involving the production of nuclear power, handling or storage of inherently dangerous substances, or space exploration.<sup>135</sup> These activities are thought of as ultra-hazardous because they normally and inevitably entail a high risk of causing substantial harm coupled with a low probability of occurrence.<sup>136</sup> A highly dangerous activity may not qualify as ultra-hazardous under international law if its location does not pose a significant risk of transboundary harm.<sup>137</sup>

Agistanus' development activities are not ultra-hazardous; they do not pose the same level of risk inherent in activities involving nuclear power or space objects. In particular, Agistanus' mining project cannot qualify as ultra-hazardous because the risk of substantial harm to Behestoon was minimal; the mine was located in the northern regions of Agistanus, far removed from Behestoon's border.

**2. Agistanus cannot be held strictly liable to Behestoon for any damage caused by force majeure.**

Even in those multilateral treaties that do impose strict liability, a

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<sup>135</sup> See Van Dyke, *supra* note 56, at 413-415 (documenting the *Fukuryu Maru* Fallout Exposure (Japan v. U.S.), the Nuclear Test Cases (Australia and New Zealand v. France), the Crash of the Soviet Cosmos 954 (Canada v. U.S.S.R.), and the Palomares Nuclear Bomb Accident (Spain v. U.S.)); Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, Council of Europe, art. 2(1), 32 I.L.M. 1228 (1993); Jan Schneider, *World Public Order of the Environment: Toward an International Ecological Law and Organization* 168-71 (1979).

<sup>136</sup> Handl, *supra* note 122, at 555; Kirgis, *supra* note 52, at 360.

<sup>137</sup> See Special Rapporteur Julio Barboza, *Sixth Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law*, [1990] 2 Y.B. of the Int'l L. Comm'n, pt. 1 at p.89, A/CN.4/SER.A./1990/Add.1.

state is not held strictly liable for the consequences of force majeure.<sup>138</sup> Agistanus, therefore, may not be held strictly liable to Behestoon for any harm caused by the earthquake.

CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated above, Agistanus respectfully asks this Honorable Court to adjudge and declare that:

- (1) Consistent with the doctrine of restricted sovereignty, Agistanus has the right to adopt all measures suitable to sustainable development of its natural resources;
- (2) Consistent with the environmental safeguards required under international law, Agistanus' use of the Ozoonio River and response to the mining incident sufficiently protected Behestoon's interests; and
- (3) Because Agistanus has breached no international obligation owed to Behestoon, Agistanus is not liable for any damages resulting from its development activities.

Respectfully submitted,  
Agents for Agistanus

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<sup>138</sup> Injurious Consequences, *supra* note 56, art. 26; Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, *supra* note 135, art. 8(a) and (b); Vienna Convention on Civil Liability for Nuclear Damage, *supra* note 126, art. IV(3)(b); Convention on Third Party Liability in the Field of Nuclear Energy, *supra* note 126, art. 9; Wellington Convention on the Regulation of Antarctic Mineral Resource Activities, June 2, 1988, art. 8(4)(a), reprinted in 27 I.L.M. 868 (1988); 1989 Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigations Vessels, art. 5(4)(a), United Nations publication, Sales No. E.90.II.E.39.