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IN THE

INTERNATIONAL COURT OF JUSTICE

AT THE

PEACE PALACE, THE HAGUE
THE NETHERLANDS

SPRING TERM 1995

BEHESTOON

v.

AGISTANUS

ON SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE

MEMORIAL
OF THE APPLICANT

BEHESTOON

MEMORIAL OF THE

STATE OF BEHESTOON

- APPLICANT-

PRESENTED TO THE

INTERNATIONAL COURT OF JUSTICE

THE CASE CONCERNING DEVELOPMENT AND THE WATERS OF THE OZOONIO RIVER

BEHESTOON v. AGISTANUS

SPRING TERM 1995

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STATEMENT OF JURISDICTION

The Governments of Behestoon and Agistanus have submitted the settlement of their dispute by special agreement to this Court pursuant to Article 36, paragraph 1, of the Statute of the International Court of Justice.
No question of jurisdiction of this Court is at issue.

STATEMENT OF FACTS

Agistanus and Behestoon are neighboring States, both situated on the Gorgon Plateau and riparian States of the Ozoonio River.

Agistanus and Behestoon are members of the United Nations and the World Bank Group. Both are furthermore signatories to the Stockholm Declaration, the Rio Declaration and the Agenda 21.

The relationship between these two bordering nations had always been one of good neighborliness. Agistanus and Behestoon are closely ethnically linked and are also willing to send each other mutual military assistance as members of the regional security organization SOTO.

Agistanus, the upper riparian State, has 14 million inhabitants which live predominantly in the urban areas of the State. Throughout the late twentieth century, Agistanus grew in wealth and prosperity. It developed a variety of industries using the water from the Ozoonio River for their manufacturing processes and as a navigable waterway for their thriving barge industry. Agistanus has established a stable economic and political climate.

Behestoon, the lower riparian State, is a former colony, but nevertheless steadily worked its way towards development and industrialization. As far as water resources are concerned, it heavily relies on the Ozoonio River as its desalination plants can only provide ten percent of its fresh water needs. Behestoon takes care of its environment as it furthers the invention of ecologically modern technologies, e.g. in the field of waste recycling and recovery.

In the 70's, the government of Agistanus decided to exploit its natural resources much more extensively. For this reason, the Ministry of Commerce engaged in the exploration of the natural resources and employed technical experts from the IRADB, a member agency of the World Bank group, for the realization of the survey. However, the pre-appraisal missions were executed deficiently. Due to a lack of adequate technology they delivered only a distorted picture of Agistanus' natural resources. In particular, the mission failed to reveal additional subterranean water supplies.

As a consequence of this survey, the Ministry of Commerce of Agistanus advanced the following development scheme: a semi-arid desert area, which had in earlier times served as grazing land for sheep and goats, should be turned into arable land by laying out extensive irrigation systems. The crop of this land was supposed to furnish a projected export-oriented food-processing industry. Furthermore, Agistanus intended to exploit a significant body of minerals that had accidentally been found and to sell the products on world markets. The realization of this project required the extensive diversion of waters from the Ozoonio River which should be made possible by the construction of a dam across the Ozoonio River. According to Agistanus' plans, this facility, the Namche Dam, should rank among the five biggest of its kind in the world. Due to its enormous size, Agistanus was able to produce an amount of hydroelectric energy which was four times bigger than its own domestic electricity needs.

The legislative body of Agistanus warmly received this proposal and consented to the plans of the ministry of commerce without reservations. Agistanus applied to the IRADB for a loan equivalent to US $ 10 billion in order to realize the projected measures. Behestoon objected to these plans and pointed out their enormous potential hazards. Nevertheless, the IRADB granted the loan, rejecting Behestoon's reservations but obliging Agistanus to provide for a constant flow of the Ozoonio River to Behestoon.

Between 1982 and 1986 the Namche Dam was constructed and the river was diverted through a by-pass. Following the completion of the dam, Agistanus continued to extend its development activities, using ever more water from the river for its various enterprises. In the following years the mining operations and the production of hydroelectric energy expanded according to Agistanus' schedule. By summer 1992 Agistanus was meeting a substantial amount of the electricity needs of the entire region. It also provided Behestoon with electricity which the latter purchased for favorable rates but only amounting to not more than twenty percent of its domestic electricity needs. Additionally, Agistanus' food processing industry grew so quickly that by the same year the country was able to create a budding export market and to process shipments of minerals for sale on the world market. However, due to the dry surroundings, an exorbitantly high share of the water diverted from the Ozoonio River did not return to the stream after irrigation. Due to Agistanus' failure to recapture the water, the flow of the watercourse has been reduced by one third. In addition, Agistanus' uses of vast amounts of agricultural chemicals severely polluted the remaining water.

Apart from its purchase of a small amount of electricity Behestoon could not really participate in the economic advantages Agistanus derived from its intense utilization of the Ozoonio River. It not only suffered a general economic decline but also realized that due to Agistanus' reduction of the quantity and quality of the water the productivity of Behestoon's agriculture decreased. Additionally, Behestoon was confronted with increased costs for the maintaining of water treatment facilities as well as periods of extreme eutrophication of the river and health concerns. Furthermore, the deterioration of the waters of the Ozoonio River led to the almost complete extinction of the zoo-plankton in the Bandeke estuary which is the basis for all life in this area.

Behestoon contacted the government of Agistanus which once more showed no willingness to consider the objections which Behestoon expressed with all sincerity. In particular, Agistanus rejected any proposed measures of pollution abatement. Prospering politically from the nation's good fortune and facing an impending election the President of Agistanus denied any responsibility for the damages and stated that Behestoon should look elsewhere for a solution to its problems.

On August 13, 1993, Agistanus' interference with nature gave rise to even more drastic ecological damages. While mining crews were working underground, there was a subterranean temblor. In the subterranean hole created by Agistanus, tar-like substance and water mixed into a corrosive liquid. Through man-made fractures in the rock, these fluids flowed out of the mine, eventually entering into the Ozoonio River. They formed a visible plume there which among other things contained highly toxic hydrocarbons.

Using inappropriate equipment, Agistanus failed to contain the toxic substances. Thus it decided to squash all reports of the disaster and to describe the situation as a minor incident fully under control. Agistanus did not do anything to inform Behestoon about the accident, either. Even when Behestoon noticed on its own the first traces of the intoxication and made official enquiries with its neighbor, the Agistanian government denied any information on the catastrophe and again declared that the incident was certainly not the cause for any downstream water quality problems.

Concerned that the Government of Agistanus was not entirely truthful, Behestoon employed aerial reconnaissance and dispatched an expert team to collect water samples on the Agistanian part of the Ozoonio River. These missions verified Behestoon's concerns as they produced evidence for both for the presence of highly toxic levels of agricultural chemicals in the irrigation return streams and for large quantities of toxic, unidentified hydrocarbon-based substances in the river.

The publication of this information finally forced Agistanus' government, under public pressure, to enter into consultations with Behestoon.

Meanwhile, however, the toxic plume had reached Behestooni territory, where it left behind a trail of dead flora and fauna. Scientists from Behestoon's Ministry of Environment gathered a second set of samples. The analysis of these samples proved that another even more toxic substance had come into existence due to a chain reaction between substances from the plume and agricultural chemicals. This new discovery caused severe concern in Behestoon as the presence of only small amounts of this substance is regarded to cause high rates of malnutrition, spontaneous abortions, cancer and birth defects and considered so toxic that the World Health Organization judges any detectable amount to be an unacceptable risk. The substance, a polycyclic aromatic hydrocarbon, is even in very small quantities responsible for very dangerous health problems.

Trying to find a solution to the situation Behestoon agreed to consult with Agistanus in high-level diplomatic meetings. But when two days had passed and no agreement was reached, Behestoon officially stated that Agistanus was responsible for the occurrence of the situation, and openly declared that Agistanus worsened the problem by stalling. As it had become impossible to contain the toxic spill due to Agistanus' delay, Behestoon proposed that the Namche Dam should be opened in order to dilute the intoxication. This was categorically rejected by Agistanus. It also refused to rely on the good offices of the mutual assistance organizations SOTO, which both States are members of. It proposed to leave the solution of the crisis to the IRADB, speculating that the bank would never consent to an opening of the dam for fear that this would have made more difficult the repayment of the loan.

Finally, both States turned to the United Nations for their help in managing the crisis. The United Nations ordered experts from the UNDP and UNEP to work on some strategies of dealing with the catastrophe. However, the severe and urgent perils posed by the toxic broth remain as the plume continues to move downstream. Behestoon and Agistanus agreed to judicial settlement of their controversy and accepted the compulsory jurisdiction of this honorable Court.

STATEMENT OF QUESTIONS PRESENTED

Therefore may it please the Court to adjudge and declare:

1. that Behestoon has a right to the continued and undiminished flow of water from the Ozoonio River to preserve its territorial integrity, that Agistanus' actions violate Behestoon's right to equitable and reasonable utilization of the resource;

2. that Agistanus' use of the 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;

3. that 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.

SUMMARY OF ARGUMENTS

Agistanus' actions violate, first, Behestoon's right to territorial integrity, second, Behestoon's right to an equitable utilization of the waters of the Ozoonio River and, third, Agistanus' obligations under international environmental law. Agistanus is liable and has to pay for the damages that its actions have caused.

I. Agistanus' actions violate Behestoon's territorial integrity. This general principle of international law entitles Behestoon to freely decide how to use its natural resources, especially over the parts of the Ozoonio River which flow through its territory. It prohibits Agistanus from altering or diverting the natural flow of the international watercourse.

II. Agistanus' actions violate the obligations which it owes to Behestoon under the Principle of Equitable Utilization.

First, Agistanus' appropriation of the water of the Ozoonio River violates Behestoon's right to an equitable share of the natural resource. Under customary international law, Agistanus has to share the watercourse in a way that is proportional. This means that there has to be a balance of the respective benefits and inconveniences for both riparian States. As a result of its appropriation of the Ozoonio River, Agistanus has obtained numerous benefits and has greatly disadvantaged Behestoon. The one-sided distribution of benefits is not justified by Agistanus' social and economic needs.

Second, under the principle of equitable utilization Agistanus had the procedural obligation to co-operate with Behestoon on its planned development measures. Agistanus violated this obligation by not providing Behestoon directly with detailed information and not negotiating with Behestoon on the planned projects in good faith. Agistanus' co-operation with the IRADB has no relevance in this context.

III. Agistanus' actions, namely the use of water resources, its mining activities and its response to the mining accident violate international environmental law.

1. Agistanus' use of water for agricultural purposes and its refusal to co-operate with Behestoon on the pollution of the Ozoonio River violate its obligations under international environmental law.

First, under customary environmental law, Agistanus is prohibited from causing transboundary pollution that causes harm to the environment of Behestoon. By introducing polluted irrigation water into the Ozoonio River, Agistanus has given rise to serious environmental injuries in Behestoon, which even under a most restricted concept of the duty not to cause harm amount to an international wrongful act.

Even if one assumed that a violation of the duty required a lack of due diligence, Agistanus has violated its obligations, as it foresaw the transfrontier pollution. Agistanus is estopped to argue that it is not obliged to prevent transboundary harm. Its previous declarations in front of the world community established this expectation on behalf of Behestoon. Relying in good faith on Agistanus' statements and conduct, Behestoon refrained from taking preventive actions against Agistanus at an earlier time.

Second, Agistanus had under customary law the procedural obligation to provide Behestoon regularly with all appropriate data on the water quality and the obligation to consult with the former on actual and potential problems of transboundary pollution.

2. Agistanus furthermore violated its environmental law obligation not to cause harm to Behestoon, as its mining activities led to serious environmental damages in Behestoon. Agistanus has even acted without due diligence, as it has violated its customary law obligation to assess the environmental impacts of its dangerous mining activities. It cannot shift the responsibility for this failure to the IRADB, as the bank's expert teams acted as agents of Behestoon.

3. Agistanus' response to the mining accident also violates its obligations under environmental law.

First, Agistanus failed to perform its duty to reduce the harmful substances polluting the Ozoonio River after the mining accident. Even if the duty to reduce transboundary harm were only an obligation to meet a certain standard of diligence, Agistanus has committed an unlawful act. It has acted indiligently by not taking all practicable measures of reduction: Agistanus did not use the best available technology to contain the intoxication of the Ozoonio River though it was obliged to do so. It cannot argue that, in relation to its economic power, it had no duty to employ appropriate equipment.
Furthermore, Agistanus was under the circumstances of the present case obliged to open the valves of Namche Dam. It cannot claim that the wrongfulness of its failure to open the dam, was justified under the concept of self-preservation.

Second, Agistanus breached its customary law obligation to warn Behestoon about the mining accident. It cannot excuse its failure by claiming that it found it was not necessary to inform Behestoon.

Third, Agistanus cannot claim that Behestoon's reconnaissance actions on Agistanian territory were illegal and hindered Behestoon under the concept of reciprocity from holding Agistanus responsible for its breaches of environmental norms.

IV. Agistanus is liable and has to make monetary compensation for all the damages Behestoon suffered due to the environmental catastrophe and pollution of the Ozoonio River.

First, Agistanus has incurred State responsibility by breaching norms of international customary law. It is liable and has to pay compensation, as it inflicted compensable material damages upon Behestoon. Agistanus has to compensate all the environmental damages, as ecological injuries are compensable regardless of their lack of commercial market value.

Second, Agistanus would have to pay compensation, even if its harmful activities were lawful. Under the general principle of law that the author of ultra-hazardous activities has to pay for their injurious consequences, Agistanus has to compensate the damages Behestoon suffered due to its extremely risky mining activities and poisoning of irrigation water.

I) Agistanus' Actions Violate Behestoon's Right to an Undiminished Flow of Water That Arises from the Principle of Territorial Integrity.

Agistanus' actions violate Behestoon's right to an undiminished flow of water from the Ozoonio River. The right derives from the Principle of Territorial Integrity. This principle found in Art 2(4) of the Charter of the United Nations[1], to which Behestoon and Agistanus are parties, has been recognized by States as a fundamental principle of international law.[2] It affirms a sovereign State's right to rule over its territory without the interference of other States.[3] This right has its origin in the general Principle of Sovereign Equality of States.[4] Under these concepts a State is entitled to the control and possession of its territory and is protected from any acts which threaten its freedom of decision thereover.[5] It is widely recognized in international law that this principle refers in particular to international watercourses[6] and

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[1] Charter of the United Nations, June 26, 1945, 15 U.N.C.I.O. 336 [hereinafter: UNC].

[2] Declaration on the Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/L.323 (1960).

[3] C.L. Rozakis, Territorial Integrity and Political Independence, in 10 E.P.I.L. 481, 483 (R. Bernhardt ed. 1987).

[4] UNC Art. 2(1); I. Brownlie, Principles of International Law 19 (4th ed. 1990).

[5] Brownlie, supra note 4, at 287.

[6] On the use of terminology : S.C. McCaffrey, The Evolution of Law of International Watercourses, 45 Austr. J. Pub. Int'l Law 87, 89 et seq. (1993).

acknowledges States' rights to freely decide how to use the waters of international rivers.[7] The free exercise of this right can only be guaranteed if the State has the control over the natural, undiminished flow of water. As uses in such a watercourse are interdependent, an upper riparian State is not only forbidden to stop or divert the natural flow of the water but likewise to change the chemical composition thereof to the disadvantage of a lower riparian State.[8] First, Agistanus has diverted water of the Ozoonio River for irrigation, and moreover it has held back water for the reservoirs in its dam. These actions have decreased the natural flow of the Ozoonio River by an entire third of its original volume. Beyond this Agistanus has polluted the portion of the water still remaining for Behestoon causing, inter alia, a high loss in agricultural productivity and preventing Behestoon from making proper use and free decision on its use of the waters of the river.

II) Agistanus' Actions Violate Behestoon's Right to Equitable Utilization of the Waters of the Ozoonio River

Agistanus violates the Principle of Equitable Utilization first, by its one-sided appropriation of the waters and second, by failing to fulfill its duty to co-operate with Behestoon regarding its development measures.

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[7] Declaration of the 7th Pan American Conference on the Industrial and Agricultural Use of International Rivers, 1933, Art.2, reprinted in U.N. Doc. E/ECE/136, Ann. 8 (1952); Statement of the Representative of Bangladesh, reprinted in Third Report of the Int'l L. Comm'n on its 34th Sess. to the General Assembly, U.N.Doc. A/CN.4/348, at 15 (1981).

[8] 1 Oppenheim's International Law 585 (R.Y.Jennings & A.Watts, 9th ed.1992) [hereinafter 1 Oppenheim]; P. Guggenheim, 2 Traité de droit international public 383 (1954); J.H.W. Verzejl, 3 International Law in Historical Perspective 211 (1970).

1) Agistanus' Appropriation of the Water Violates Behestoon's Right to an Equitable Utilization of the Water

Agistanus' one-sided appropriation of the water violates Behestoon's right to an equitable utilization of the waters from the Ozoonio River. The Principle of Equitable Utilization is a rule of customary international law. It states that neighboring countries must use a shared natural resource so that all participating States benefit in a way that is proportional under the respective circumstances.[9] According to Art. 38 (1) lit.b of the Statute of the International Court of Justice[10] customary international law is constituted by a constant and uniform State practice and the conviction of the acting States that they are obliged to act in this way (opinio juris).[11] State practice can, inter alia, be proven by the conclusion of treaties.[12] The Principle of Equitable Utilization is incorporated in numerous agreements dealing with successive rivers.[13] All these treaties have one element in common: they recognize that an international watercourse shall be shared in such a way that each riparian State is permitted a reasonable and

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[9] J.Lipper, Equitable Utilization, in The Law of International Drainage Basins 15, 41-4 (A.H. Garretson et al. eds., 1967).

[10] Statute of the International Court of Justice, Jun. 26, 1945, 15 U.N.C.I.O. 355 [hereinafter StICJ].

[11] North Sea Continental Shelf (F.R.G. v. Den./ F.R.G. v. Neth.) 1969 I.C.J. 3, 44 (Feb. 20)[hereinafter Shelf Case]; Brownlie, supra note 4, at 7.

[12] Shelf Case, supra note 11, at 41/42; Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 22/23 (Apr. 6).

[13] Agreement on the Columbia River Basin, Jan. 17, 1961, U.S.-Can., Preamble, T.I.A.S. No.5638, 1; Indus Water Treaty, Sep. 19, 1960, India-Pak., Preamble, 419 U.N.T.S. 125, at 126; Agreement on Nile Waters, Nov. 8, 1959, United Arab Republic-Sudan, Preamble, 453 U.N.T.S. 51, at 64.

equitable share. These treaties can also provide evidence of the necessary opinio juris of the acting States.[14] Additional proof can be found in Resolutions of the United Nations General Assembly[15] and documents of multinational organizations[16]. The General Assembly and other international organizations have recognized the Principle of Equitable Utilization as a norm of customary law in numerous records.[17] The object and purpose of this principle is that in using a shared resource all riparian States obtain a maximum benefit at a minimum nuisance for other riparian States.[18] When applying the Principle of Equitable Utilization it is therefore necessary to weigh all benefits and inconveniences for each country in order to evaluate if all riparian States have reached an equitable share.[19] Agistanus has obtained numerous benefits from its utilization of the river for the development measures, at a great

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[14] Brownlie, supra note 4, at 7; A.Verdross & B.Simma, Universelles Völkerrecht 347 (3rd ed. 1984).

[15] Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.), 1986 I.C.J. 14,99-100, (June 27) (Merits), [hereinafter Nicaragua Case].

[16] 1 Oppenheim, supra note 8, at 48; M.Soerensen, Principe de droit international, 101 R.C.A.D.I. 91,99 (1960).

[17] Helsinki Rules on the Uses of Waters of International Rivers, Art.1, Int'l L. Ass'n, Report of the Fifty-Second Conference 484 (1966) [hereinafter Helsinki Rules]; G.A.Res. 1514, supra note 2, at 66; Art.2 Charter of Economic Rights and Duties of States, G.A.Res. 3281, U.N.GAOR, 29th Sess., Supp.No. 31, 50, at 52, U.N.Doc. A/9946 [hereinafter Charter Econ. R.].

[18] G. Hafner, The Optimum Utilization Principle and the Non-Navigational Uses of Drainage Basins, 45 Austr. J. Pub. Int'l L. 113, 124 (1993).

[19] G. Handl, The Principle of "Equitable Use" As Applied To Internationally Shared Resources, 14 Rev. Belge de D. Int'l 40, 53 (1978/79); Hafner, supra note 18, at 124.

cost to Behestoon. It is not only able to generate 400% of its domestic need for electricity allowing it to meet a substantial amount of the electric needs of the entire region. The extensive irrigation system furthermore empowers it to produce so much food that it has managed to create a budding export market. Moreover its mining activities progressed so enormously that Agistanus has extracted and processed shipments of rare earth minerals all around the world. Behestoon on the other side suffers great economic losses which can by no means be compensated for by the reception of favorable rates for 20% of its domestic electricity needs. It has not only increased costs for maintaining its water treatment facilities, but also a high loss of productivity in agriculture. In addition, it is confronted with the threat of destruction of its entire fishing industry and with serious health concerns. Such an apportionment that enormously benefits one riparian State and disadvantages the other riparian cannot be regarded as proportional. Agistanus can furthermore not argue that this one-sided sharing was justified by its own social and economic needs. First, Agistanus does not have the economic needs which would justify such extensive development measures. It has been a prosperous nation and has a variety of industries, a stable political climate and an economy free from foreign debts. Second, even if development was necessary for Agistanus it would not be entitled to a special share in the waters of the river as it is a rule of customary law[20] that no category of use or

[20] Helsinki Rules, Art. VI, supra note 17, at 491; Handl, supra note 19, at 51 et seq.

need has preference over another one. The sole exception to this rule is made for uses which are the basis for life such as the use for drinking water.[21] Behestoon heavily depends on the river for this basic need as its desalination plants can only provide 10% of its drinking water needs. The country furthermore greatly relies on the water from the Ozoonio River for its established economy, its agriculture and fishing industry. To the contrary Agistanus possesses other fresh water resources, discovered by the IRADB in the mountainous regions which it does not even use. Agistanus is thus not entitled to a special share in the waters and has violated Behestoon's right to an Equitable Utilization of the waters.

2) Agistanus Has Violated the Principle of Equitable Utilization by not Co-operating with Behestoon

Agistanus has violated its obligation to co-operate with Behestoon on the planned development measures regarding in particular the building of the dam and the irrigation works. This duty originates in the Principle of Equitable Utilization.[22] In order to reconcile differing interests, each basin State must work together with its co-riparian States if it, by new uses, alters the former conditions of the resource. The duty to co-operate requires States concerned to provide each other with detailed information on planned projects and to negotiate thereon in good faith.[23] This is a rule of customary

[21] Handl, supra note 19, at 52, A. Reinicke, Die angemessene Nutzung gemeinsamer Naturgüter 158 et seq. (1991).

[22] R. B. Bilder, The Settlement of Disputes in the Field of the International Law of Environment 144 R.C.A.D.I. 139, 169 (1975); Handl, supra note 19, at 52.

[23] Lac Lanoux (Spain v. Fr.) 12 R.I.A.A. 281, 308 (1957); Re-

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[21] Handl, supra note 19, at 52, A. Reinicke, Die angemessene Nutzung gemeinsamer Naturgüter 158 et seq. (1991).

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[23] Lac Lanoux (Spain v. Fr.) 12 R.I.A.A. 281, 308 (1957); Re-

international law which has been established by numerous bilateral and multilateral agreements.[24] States have furthermore expressed their conviction in several resolutions of the General Assembly that they feel obliged to co-operate when sharing a natural resource.[25] Under this rule States are required, first, to provide other participating States directly with information [26] and second, obliged to consult with each other with the intention to reach an agreement on the differing interests.[27] Agistanus cannot argue that in its work with the IRADB it has fulfilled its duty to co-operate. It has at no time supplied Behestoon with any kind of information concerning its development measures nor entered into any consultations with its neighbor. In fact Agistanus, with the assistance of the IRADB, started the project over Behestoon's reservations and went ahead in spite of this to construct the dam and to carry out its development plans.

III) Agistanus' Use of Water Resources, Its Mining Activities and Its Response to the Mining Accident Violate International Environmental Law

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port of the Int'l L. Comm. to the General Assembly on its Work of its 43th Sess., Art. 17, in 2 Y.B. Int'l L. Comm. 68, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2) [hereinafter ILC 1991].

[24] E.g.: Act of Santiago, June 26, 1971, Arg.-Chile, Art.5, reprinted in U.N.Doc. A/CN.4/274, 180-81 (1974); Boundary Waters Treaty, May 5, 1909, U.S.-Can., Art. II,IV, reprinted in 4 Am.J. Int'l L. (Supp.) 239 (1910).

[25] G.A.Res. 2995, U.N.GAOR, 27th Sess., Supp.No. 30, at 42, U.N. Doc. A/8901 (1972); Art.3 Charter Econ. R., supra note 17, at 52; G.A.Res. 3219, U.N.GAOR, 28th Sess., Supp.No. 30, at 48, U.N.Doc.A/9402.

[26] J. Bruhács, The Law of Non-Navigational Uses of International Watercourses 172-74 (1993).

[27] P.Birnie & A. Boyle, International Law and the Environment 238 (1992)

Under international environmental law States have the obligation first, to refrain from causing harm to the environment of neighboring States and second, to co-operate with the former especially by providing information and consulting on environmental pollution. These material and procedural obligations exist both in the general management of shared natural resources and in emergency situations.

1) Agistanus' Use of the Water Resource and Its Refusal to Communicate With Behestoon Before the Mining Accident Violate International Environmental Law

Agistanus' use of water for agricultural purposes and its refusal to co-operate with Behestoon to adress the pollution of the river violate its obligations under international environmental law.

a) Agistanus' Use of Water Resources for Agricultural Purposes Violates the Duty Not to Cause Harm

First, Agistanus' re-introduction of chemical-laced irrigation water violates its obligation to prevent pollution which causes harm to the environment of its neighboring States. It is a customary rule of international environmental law that States shall in particular refrain from pollution of shared resources. This obligation originates in the concept sic utere tuo ut alienum non laedas[28]. Already in 1938 the Trail Smelter Arbitration[29] introduced this general principle into international environmental jurisprudence and since then it has been continually re-iterated.[30] States have in practice

[28] 1 Oppenheim, supra note 8, at 346; Nuclear Tests (Austl. v. Fr.) 1974 I.C.J. 253, at 388 (Dec. 20)(diss. op. of Judge de Castro)[hereinafter Nuclear Tests].

[29] Trail Smelter (U.S. v. Can.) 1941, 3 R.I.A.A. 1965 (Mar.11).

agreed that they should refrain from causing environmental injury to other States in numerous treaties dealing especially with the pollution of international watercourses.[31] There is also ample evidence of a respective opinio juris provided by resolutions and instruments of multinational organizations.[32]

(1) Agistanus' Use of Water Has Caused Serious Harm

Agistanus' introduction of agricultural chemicals in the river has caused serious harm to Behestoon. Harm can be regarded as the existence of a loss or detriment of any kind to a State.[33] Even if it is unclear to which degree transfrontier damage has to be tolerated by the suffering State it is uncontroversial that States, irrespective of their economic development, must refrain from causing serious harm.[34] Serious harm includes the emission of substances that could because of their quantity or quality become a danger to the health of human beings, the living resources, the ecosystem or the use of the

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[30] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, at 22 (Apr.9), Lac Lanoux, supra note 23, at 303, Gut Dam Arb., Settlement of Claims (U.S. v. Can.)(Sep. 27, 1968) exerpted in Report of the Agent of the United States 120, 8 I.L.M. (1969).

[31] U.N. Convention on the Law of the Sea, Oct. 7, 1982, U.N. Doc. A/CONF.62/122, Art. 194(2), reprinted in 21 I.L.M.(1982), 1261, 1308 [hereinafter UNCLOS]; Indus Water Treaty, Art.4(10), supra note 13, at 138; African Convention on the Conservation of Nature and Natural Resources, Sep. 15, 1969, Art.5(1), reprinted in 1001 U.N.T.S. 4, at 7.

[32] Art 21 (2), ILC 1991, supra note 23, at 68; see also J.E. Osmanczyk, Encyclopedia of United Nations 1030 (2nd ed. 1990).

[33] Black's Law Dictionary 494 (Harm)(6th ed. 1990).

[34] R.Wolfrum, Purposes and Principles of Environmental Law, in 33 Germ. Y. B. of Int'l Law (1990), 308, 312; Report of the Int'l L. Comm. to the General Assembly on its Work of its 40th Sess., in 2 Y.B. Int'l L. Comm. 35 et seq., U.N.Doc. A/CN.4/SER.A/1988/Add.1 (Part 2)[hereinafter ILC 1988].

environment.[35] The re-introduction of polluted irrigation water by Agistanus has led to extreme eutrophication of the water and even to a threat of extinction of the zoo-plankton, which forms the foundation of the entire aquatic and pelagic food chain in the Ozoonio River. Beyond this the increase of chemicals is anticipated to bring about damage to many sensitive aquatic species in Solonia Bay and Bandeke Estuary and, what is even more serious, to lead to health concerns in Behestoon. A direct result of these fundamental ecological damages has been an increase in costs to Behestoon for maintaining its water treatment facilities and for the loss in agriculture productivity. By introducing chemicals Agistanus altered the physical and biological composition of the water. It thereby caused serious ecological and economic harm to Behestoon.

(2) Agistanus Has Acted Without Due Diligence

Even if Agistanus should argue that the obligation not to cause harm would require a lack of due diligence it has violated its duty. The nature of a due diligence obligation is that a State can be deemed to have violated its duty to prevent the causing of harm if the public organs of that State knew or should have known that a certain conduct on their part would give rise to inadmissible transfrontier pollution.[36] As Agistanus itself claims that increases of chemicals had been anticipated from the start of the project, it did foresee that its re-introduction of polluted irrigation water would cause inadmissible transfrontier pollution.

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[35] Wolfrum, supra note 34, at 313.

[36] Lammers, Pollution of International Watercourses 376 (1984).

(3) Agistanus Is Estopped to Claim That It Is Not Obliged to Refrain From Causing Harm

Agistanus is furthermore estopped from claiming that it is not obliged to prevent pollution which causes harm. Estoppel is a general principle of international law recognized by this Court[37] which permits a party to hold the other party to their statement.[38] The party invoking the rule must have relied in good faith on the party's statement to its detriment or to the advantage of the other party.[39] Behestoon relied in good faith on the fact that Agistanus accepted the obligation not to cause environmental harm as a norm of customary international law when it signed the Stockholm and Rio Declaration. Principle 21 of the Stockholm Declaration states that in accordance with the United Nations Charter and the general principles of international law States have to ensure that their activities within their jurisdiction do not cause harm to the environment of other States.[40] This principle was later continually affirmed as customary international law.[41] As Principle 2 of the Rio Declaration[42] merely reiterates the former norm it

[37] Case Concerning The Temple Preah Vihear (Cambodia v. Thail.) 1962 I.C.J. 6,39 (June 15)(dis. opin. of Judge Alfaro) [hereinafter Temple Case]; H.Lauterpacht, The Development of International Law by the International Court 172 (1958).

[38] Temple case, supra note 37, at 73 (separate opinion of Judge Fitzmaurice).

[39] The Land, the Island and Maritime Frontier Dispute (El Salv. v. Hond.) 1990 I.C.J. 93, 118 (Sept. 13); Temple Case, supra note 37, at 63 (separate opinion of Judge Fitzmaurice).

[40] Princ. 21 Declaration of the U.N. Conference on the Human Environment, at 2, U.N.Doc.A/Conf.48/14 (1972).

[41] G.A. Res. 2995, supra note 25, at 42; G.A. Res. 3129, supra note 25, at 48.

[42] Princ. 2, Rio Declaration on Environment and Development,

wholly is an expression of an existing legal obligation. States signing a norm declared to be customary law hence accept its binding force upon themselves.[43] Relying on Agistanus' statement Behestoon felt certain that Agistanus would not act so as to cause harm to its territory. Accordingly, Behestoon did not take any action against this utilization to prevent its ensuing suffering. Having disadvantaged Behestoon, Agistanus is thus estopped from denying the binding force of its acceptance of the principle not to cause harm.

b) Agistanus Has Violated Its Obligation to Co-operate With Behestoon Concerning an Exchange of Data Information and Consultation on the Pollution

Agistanus has violated its duty to co-operate with Behestoon regarding in particular that it has neither provided the former with any relevant information concerning the quality of the water nor taken into account the reservation filed by Behestoon. As evidenced above it is a rule of customary law that watercourse States shall co-operate concerning the management of the shared resource. It is well acknowledged in customary law that this obligation includes apart from the duty to give prior information on planned measures also the obligation to provide co-riparian States regularly with all appropriate data on the water quality and to consult with the former on actual or potential problems of transboundary pollution.[44] Agistanus

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U.N.Doc. A/CONF.151/5(1992).

[43] Cf. Nuclear Tests, supra note 28, at 267; O.Y. Assamoah, The Legal Significance of the Declarations of the General Assembly of the United Nations 19 et seq.(1966).

[44] UNCLOS, Art. 123, supra note 31, at 1291; G.A.Res.3129, supra note 25, at 49; Indus Water Treaty, Art.6(2), supra note 13, at 103; ILC 1988, supra note 34, Art. 10; Inst. D. Int'l,

has at no time provided Behestoon with any relevant information concerning its pollution of the river but has all the more not even reacted on the complaints filed by Behestoon. Agistanus furthermore cannot argue that it was not obliged to provide Behestoon with detailed information as it did not believe that its actions would cause harm to its neighboring State. It is generally accepted in international law that detailed information has in all circumstances to be presented to the potentially affected State which can be the sole judge of its interests.[45]

2. Agistanus' Mining Activities Violate Its Environmental Law Obligation Not to Cause Harm to Neighboring States

Agistanus furthermore violated the customary law duty not to cause harm to the environment of other States,[46] as its mining operations inflicted very serious damage upon Behestoon.

a) Agistanus' Mining Activities Seriously Harmed Behestoon's Environment

Agistanus has caused harm to Behestoon as its mining activities have led to the destruction of Behestoon's riparian environment. Due to Agistanus' excavations, tar-like substances and subterranean waters had the chance to mix inside the mine into a toxic corrosive liquid. As Agistanus' activities had created fractures in the rock, the liquid could spread from the mine and pollute the Ozoonio River, where it formed a highly-toxic plume. This plume destroyed the riparian flora

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1979 Session d'Athénes (Plenary Meetings), Art. 7, 58 Annuaire de l'Inst. D. Int'l (part 2, ch. 2) 201, (1979).

[45] Lac Lanoux, supra note 23, at 314.

[46] See above p. 8/9.

and fauna in Behestoon, bringing the fluvial ecosystem to the edge of extinction. Moreover, the polycyclic aromatic hydrocarbon contained in the plume threatens Behestoon's population with grave health problems including cancer and birth defects. As Agistanus has thus jeopardized a whole eco-system and severely endangered human health, it has caused serious harm[47] to Behestoon. Even under a duty prohibiting only acts causing serious harm, Agistanus has acted unlawfully.

b) Agistanus Lacked Due Diligence, as it Violated Its Duty to Conduct Environmental Impact Assessments

Even if the Court should hold that a State only violates its obligation not to cause harm when it acts without due diligence, Agistanus violated international law, as it has failed to appraise the environmental impacts of its mining operations. States have, under customary law, a diligence obligation to conduct environmental impact assessments before starting development activities that might have adverse ecological effects.[48] States and international organizations in practice consistently demand such prior assessment.[49] In several international documents, States have declared that such explorations of transboundary risks are the basis for any reasonable environmental policy and shall therefore be obligatory.[50] Agistanus did not conduct an environmental impact

[47] Cf. M.N.Shaw, International Law 538 (1991); Wolfrum, supra note 34, at 311.

[48] Birnie & Boyle, supra note 27, at 105; A.Nollkaemper, The Legal Regime For Transboundary Water Pollution 180 (1993).

[49] Cf. EEC Council Directive 85/337, Art.7 (1), 1985 O.J.(L 175) 40; ASEAN Agreement on the Conservation of Natural Resources, 1985, Art.14/15, in Envtl.Pol. & L. 64 (1985); World Bank, Directive on Environmental Assessment, 1989.

assessment. It started its mining activities without paying any attention to their ecological consequences, even though the profound alterations of the mountain region brought with them a high risk of accidents. Such casualties were bound to affect Behestoon, as Agistanus had built the mine next to streams which flow into the Ozoonio River.

Agistanus cannot excuse its failure by claiming that the IRADB was in charge of the exploration of the resources and that it could rely on the agency assessing the ecological impacts. It is a principle of international law that a State cannot shift the responsibility for the fulfilment of its own obligations by employing organs of other States or international organizations as agents for the performance of these duties.[51] The IRADB provided its technological assistance at the request and in the sole interest of Agistanus' government. Agistanus used the expert teams as agents and remained fully responsible.

3. Agistanus' Response to the Mining Accident Violates Its Obligations Under International Environmental Law

Agistanus' response to the mining accident violates its duty to reduce transboundary environmental harm and its duty to warn neighboring States about environmental emergencies.

a) Agistanus' Response to the Mining Accident Violates Its Obligation to Reduce Transboundary Environmental Harm

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[50] Rio Decl., Princ. 17, supra note 42, at 5; World Charter for Nature, Art.11 (c), G.A. Res.37/7, U.N. GAOR Supp. No.51, at 17, UN Doc. A/37/51 (1982) [hereinafter: World Charter].

[51] Brownlie, supra note 4, 455; Affaire Chevreau (Fr. v. U.K.), 2 R.I.A.A. 1115, 1141 (1931). Cf. International Law Commission Draft Articles on State Responsibility, Art.9, [1974] 2 Yb. Int'l Law Comm. 277, UN Doc. A/CN.4/SER.A/1974 (part 1).

The customary law obligation not to cause harm to the environment of other States[52] includes not only the duty to prevent the causation of new harmful pollution, but also the duty to reduce the harm caused by already existing pollution.[53]

(1) Agistanus Failed to Reduce the Intoxication of the Ozoonio River to Any Extent

In order to ensure the efficient protection of the environment, States are strictly obliged to reduce harmful substances,[54] in particular those that appeared due to environmental emergencies in international watercourses.[55] Agistanus did not at all reduce the dangerous toxins in the Ozoonio River. They arrived in Behestoon completely undimished.

(2) Agistanus Acted Without Due Diligence

It has occasionally been argued that the duty to reduce transboundary harm is only an obligation to meet a certain standard of diligence.[56] Even if the Court followed this opinion,

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[52] See above, p. 8/9.

[53] G.Handl, National Uses of Transboundary Air Resources, 26 Natural Resources Journal 405, 435 (1986); E. Brown Weiss, Environmental Disasters in International Law, 7 Anuario Juridico Interamericano 141, 152 (1986).

[54] F.Orrego Vicuna, State Responsibility, Liability & Remedial Measures Under International Law, in Environmental Change and International Law 124, 134 (E. Brown Weiss ed.1992); L.F.E. Goldie, Responsibility for Pollution, 9 Colum. J. Transnat'l L. 283, 306 (1970).

[55] See the ECE Code of Conduct on Accidental Pollution, 1990, prov.XVI(1),U.N. Doc.ECE/ENVWA/WP3/R1, at 14; J.G.Lammers, International and European Community Law Aspects of Pollution of International Watercourses, in Environmental Protection and International Law 115, 120 (W. Lang et al. eds. 1991).

[56] R. Pisillo Mazzeschi, Due diligence e responsibilita internazionale degli Stati 382 (1989).

Agistanus would have violated its obligation. States only meet the standard of due diligence applicable to the reduction of transboundary harm if they take all measures which are practicable and feasible to reduce the harmful effects of environmental emergencies.[57]

(a) Agistanus Failed to Act with Due Diligence Because it Did Not Employ the Best Available Technology

In order to fulfill their obligation to take all practicable measures of reduction, States must, under customary law, use appropriate, i.e. the best available technology to reduce environmental harm.[58] It is the wide-spread practice of States to require the employment of the most modern equipment.[59] A respective opinio juris is evidenced by numerous declarations of international organizations prescribing the use of the most advanced technology.[60] Agistanus used inappropriate equipment when trying to contain the toxic spill. It cannot argue that in relation to its economic power it had no duty to employ appropriate technical equipment. First, Agistanus is a prosperous nation, which has the economic power to avail itself of appropriate equipment to deal with the hazards stemming from

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[57] Birnie & Boyle, supra note 27, 109; see also the International Law Commission Draft Articles on the Law of Non-navigational Use of International Watercourses, Art.27 (3), U.N. Doc. A/45/10, 137 at 146 (1991).

[58] G.Handl, Environmental Security and Global Change, 1 Y.B. of Int.'l Env.Law 3,24 (1990); Birnie & Boyle, supra note 27, 46.

[59] UNCLOS, Art.194, supra note 31, at 1308; U.N. Convention on the Protection of Transboundary Watercourses, Mar. 17, 1992, Art.3, reprinted in 31 I.L.M. 1312, 1317 (1992).

[60] World Charter, Art.11 c, supra note 50, at 18; ECE Declaration on Prevention And Control of Water Pollution, Apr.23, 1980, Princ.6, U.N. Doc. E/1980/28, at 94.

its development actions. Second, the obligation to use best available technology for the reduction of pollution does not depend on the economic power of the source State.[61] A State, which asserts that it cannot afford to possess best technology at least has to ask other States for their technological assistance.[62] Agistanus did not ask for such help.

(b) Agistanus Lacked the Due Diligence Because It Did Not Open the Valves of Namche Dam

The additional practicable measures which a State has to take in order to meet the standard of due diligence can only be determined according to the circumstances of each particular case.[63] In the present case, Agistanus could have easily opened the valves of Namche Dam. This measure would have diluted the dangerous level of pollutants in the watercourse and helped to reduce the environmental harm. Agistanus refused to open the dam. It cannot claim that the wrongfulness of this conduct is precluded under the concept of self-preservation. This principle justifies conduct that prima facie is illegal, but is necessary to safeguard the essential interests of the State.[64] As a liberal application of this concept would subject the observance of legal norms to the caprices of States and challenge the system of international law as a whole,[65] States can only

[61] Nollkaemper, supra note 48, at 46.

[62] T.Bruha, Internationale Regelungen zum Schutz vor technisch-industriellen Umweltunfällen, 44 ZaöRV 1, 62 (1984).

[63] Shaw, supra note 47, at 536; Birnie & Boyle, supra note 27, at 109; Nollkaemper, supra note 48, at 129.

[64] Oscar Chinn Case (U.K.v.Belg.), 1934 P.C.I.J. (ser.A/B) No. 63, at 113 (Dec. 12) (individual opinion of Judge Anzilotti).

[65] R.Quadri, Diritto internazionale pubblico 226 (5th ed.,

invoke this justification, if very restrictive prerequisites are fulfilled. First, the very existence of the State that violates international law must be in peril.[66] The only dangers, which Agistanus would have incurred by temporarily opening the dam, were minor economic losses. Second, the unlawful act of the State must not seriously impair essential interests of the victim State. Particularly, the act must not cause lasting injuries to the environment of this State.[67] As a consequence of Agistanus' failure to open the valves of the dam, Behestoon suffered the almost complete elimination of its riparian flora and fauna.

b) Agistanus' Response to the Mining Accident Violates Its Obligation to Notify Other States of Environmental Emergencies

Agistanus has breached its obligation to warn Behestoon about the mining accident. Under customary law, States are obliged to immediately inform other potentially affected States, when an environmental hazard has taken place on their territory.[68] States consistently expressed their opinio juris that it is obligatory to warn about such environmental emergencies.[69] They have embodied this duty in various treaties, especially in agreements concerning international watercourses,[70] and have in

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1968); 2 G.Dahm, Völkerrecht 439 (1961).

[66] B.Cheng, General Principles of Law 71 (1953).

[67] Report of the International Law Commission, [1980] 2 Y.B. Int'l Law Comm. 39, U.N. Doc. A/CN.4/SER.A/1980 (part 2).

[68] A.Kiss, The Rio Declaration on Environment and Development, in Environment after Rio 55, 59 (L.Campiglio et al.eds. 1994); Shaw, supra note 47, at 540.

[69] Rio Decl., Princ.18, supra note 42, at 5; U.N. Environmental Programme, Declaration on Shared Resources, May 19, 1978, Princ.9(1), reprinted in 17 I.L.M. 1091, 1099.

general adopted a custom-creating practice of immediately notifying other States.[71] This Court has confirmed that the duty to warn is a rule of international customary law.[72] Agistanus has not informed Behestoon about the highly toxic substances which its mining activities created and which were bound to affect Behestoon. Even when being asked by Behestoon two days after the accident, Agistanus continued its policy of total disinformation and denied the existence of any harmful substances in the Ozoonio River. Agistanus cannot excuse its failure by claiming that it found it was unnecessary to inform Behestoon about the accident. At least when the threat to other States is objectively beyond doubt, States no longer have any discretion to decide whether they deem it necessary to inform the victim State.[73] When the highly-toxic hydrocarbons had already formed a visible plume and moved ever closer to the border, it was obvious that Behestoon was inevitably going to be affected. Even then, Agistanus did not notify Behestoon.

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[70] Convention on Early Notification of a Nuclear Accident, Sept.26, 1986, Art.2, reprinted in 25 I.L.M. 1370 (1986); Convention on the Protection of the Rhine Against Chemical Pollution, Dec.3, 1976, Art.11, 1124 U.N.T.S. 375, at 380 (1979); Agreement on Great Lakes Water Quality, Apr.15, 1978,U.S.-Can., Art. IX (2), reprinted in 11 I.L.M. 694, at 699 (1972).

[71] Notes of the USSR to the U.S. and Norway on Accidents of Nuclear Submarines of Oct.3,1986 and Apr.8,1989, 56 Archiv der Gegenwart [AdG] 30329 (1986) and 59 AdG 33226 (1989). Cf. the survey of practice of American and European States, in: H. Smets, The Right to Information, in International Responsibility for Environmental Harm 468 (Francioni et al.eds.,1991).

[72] Corfu Channel, supra note 30, at 22.

[73] Cf.Statement of the Italian Government of Sept. 24, 1986, reprinted in 25 I.L.M. 1402/03 (1986); A.Rest, Fehlende Verantwortlichkeit bei transnationalen Umweltunfällen, in Festschrift für I.Seidl-Hohenveldern 473, 490 (K.H.Böckstiegel et al. eds. 1988); Nollkaemper,supra note 48, at 172.

c) Behestoon Is Not Hindered by the Principle of Reciprocity From Holding Agistanus Responsible

Agistanus cannot claim that Behestoon's reconaissance measures violated international law and thus, under the concept of reciprocity, impeded Behestoon from bringing Agistanus' violations of environmental norms to the Court. First, States can only invoke the principle of reciprocity if they react to unlawful acts of other States by using the thoroughly defined sanctioning mechanisms of international law like retorsion or reprisal. These well-established rules would become meaningless, if States could freely dispose of their obligations by simply pointing to the deeds of other States and making the argument of tu quoque.[74] Second, Behestoon's reconaissance activities were not illegal. They interfered with Agistanus' territorial integrity, but they were lawful reprisals, i.e. proportionate countermeasures forcing other States to return to legality.[75] Behestoon exercised the reconnaissance activities in order to collect enough data to force Agistanus to cease its illegal policy of disinformation. In fact, Agistanus subsequently started to co-operate on the catastrophe.

IV. Agistanus Is Liable and Has to Make Monetary Compensation for All the Damages Incurred due to the Environmental Catastrophe and Pollution of the International Watercourse

Agistanus has to make monetary compensation for the damages which occurred due to its development activities. Its liability derives either from the principle of State responsibility or from the principle of liability for lawful acts.

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[74] B.Simma, Reciprocity, 7 E.P.I.L. 403 (R.Bernhardt ed.1985).

[75] P.M.Dupuy, Droit international public 369 (2nd ed. 1993).

1. Agistanus Is Liable and Obligated to Pay Monetary Compensation Under the Principle of State Responsibility

A State has to pay monetary compensation when it incurs State responsibility by committing internationally wrongful acts[76] and these illegal acts caused compensable damages.[77]

a) Agistanus Incurred State Responsibility

It is a well-established principle of international law that States are responsible for their unlawful acts.[78] In particular, it is a rule of customary law that breaches of environmental obligations shall entail State liability for unlawful acts.[79] States have reaffirmed their respective legal opinion in a number of declarations in international bodies and by incorporating corresponding provisions in a great number of treaties.[80] They have adopted a practice of making and admitting claims for compensation based on State responsibility in the area of environmental law.[81] As shown above Agistanus breached several of its international obligations.

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[76] International Law Commission Draft Articles on State Responsibility, Art.1, [1973] 2 Y.B. Int'l L.Comm'n 173, U.N. Doc. A/CN.4/SER.A/1973.

[77] Chorzow Factory (Germ. v. Pol.), 1928 P.C.I.J. (ser.A) No.17, at 29; Verdross/Simma, supra note 14, at 874.

[78] U.S. Diplomatic and Consular Staff in Tehran (U.S. v.Iran), 1980 I.C.J. 3 (May 24), at 41/42; Reparation for Injuries Suffered in the Service of the U.N. (Advisory Opinion) 1949 I.C.J. 174 (April 11), at 184; S.S. Wimbledon (U.K. v. Germ.), 1923 P.C.I.J. (ser.A) No.1, at 33 (Aug. 17).

[79] Orrego Vicuna, supra note 54, at 127; Wolfrum, supra note 34, at 316.

[80] G.A. Res. 34/186, U.N. GAOR, 34th Sess.,Supp.No.46,at 128,U.N.Doc. A/34/46 (1979); G.A.Res. 3281, art.30, supra note 17, at 55; UNCLOS, Art. 139,235, supra note 31, at 1293/1315; Agreement Concerning the La Plata River, Nov.19,1973, Uruguay-Arg., Art.51, reprinted in U.N.Doc. A/CN.4/384, at 276.

b) Agistanus' Illegal Acts Caused Compensable Damages

Agistanus' responsibility entails the duty to pay monetary compensation, as its unlawful actions led to compensable material damages on behalf of Behestoon. Damages are compensable if they are pecuniarily assessable.[82] The injuries which Agistanus caused to Behestoon's commercially used resources, i.e. the reduction of fishing-stocks, the decrease of its agricultural production and the increased costs for water-treatment, can easily be included within this category. All the other environmental damages Behestoon suffered are pecuniarily assessable, too. Natural resources have a legally protected economic relevance, even if they are not used for commercial purposes.[83] Any deterioration deprives the people of Behestoon of its right to a life in dignity and of the benefits which it gets from a sound environment, e.g. health and recreation.[84] According to the costs for the restoration of the destroyed nature, the ecological damages are pecuniarily assessable.[85]

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[81] Trail Smelter, supra note 29, at 1905; Lac Lanoux, supra note 23, at 295-96; Canadian Claim Against the U.S.S.R. for Damages Caused by Soviet Satellite Cosmos 954, 18 I.L.M. 899 (1979).

[82] Rainbow Warrior (N.Z. v. Fr.),82 I.L.R. 500, 569 (1990); G. Arangio-Ruiz, Second Report on State Responsibility, Draft Art.8 (2), [1989] 2 Y.B.Int'l L.Comm. 56, U.N. Doc.A/CN.4/SER.A/1989 (part 1).

[83] Convention on the Regulation of Antarctic Mineral Resource Activities, June 2,1988, Art.I (15), reprinted in 21 I.L.M. 869 (1988); Protocol to Amend the 1969 International Convention on Civil Liability for Oil Pollution Damages, May 25, 1984, Art.1 (6), IMO Doc. LEG/Conf. 6/66.

[84] A.Kiss, supra note 68, at 15; M.C. Maffei, The Compensation for Ecological Damage, in International Responsibility for Environmental Harm (Francioni et al. eds. 1991).

[85] Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 628 F.2d

2. Agistanus Is Liable and Obligated To Pay Monetary Compensation Under the Principle of Liability for Lawful Acts

Even if the Court should hold that Agistanus has not violated international law, Agistanus has to pay compensation to Behestoon under the principle of liability for lawful acts, which is widely accepted in international law for all harmful activities.[86] At least, it is a general principle of law in the sense of Art.38 (1) lit.c StICJ that States have to pay damages for the injurious consequences of their lawful but ultra-hazardous activties.[87] General principles of law are basic legal concepts common to all or almost all domestic legal systems.[88] National legal systems unanimously provide that a person whose exceptionally risky activities caused harm to somebody else must pay compensation to that innocent victim, even if his hazardous actions were lawful.[89] Activities are ultra-hazardous in that sense if they bear the danger of very severe injuries.[90] Agistanus' careless re-introduction of large

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652 (1st Cir. 1980), at 676; F.B.Cross, Natural Damage Valuation, 42 Vand. L. Rev. 269, 300 (1989).

[86] Cf. Fifth Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, Draft Art.9, [1989] 2 Y.B. Int'l L. Comm'n 131, 137; U.N. Doc. A/CN.4/423 (part 1).

[87] M.J.L.Hardy, Nuclear Liability, 36 Brit. Y.B. Int'l L 223, 237 (1960); J.M.Kelson, State Responsibility and the Abnormally Dangerous Activity, 13 Harv. Int'l L. J. 197, 198 (1972).

[88] M.Akehurst, A Modern Introduction to International Law, 35 (6th ed., 1987).

[89] Rylands v.Fletcher, Law Reports, 3 House of Lords 330(1868); American Law Institute, Restatement of the Law of Torts (second), sec. 519; France, Code Civile, Art.1384 (1).

[90] C.W.Jenks, Liability for Ultra-Hazardous Activities in International Law, 117 R.C.A.D.I. 99, 107 (1966).

amounts of diverse agricultural chemicals into the Ozoonio River is likely to cause enormous harm.[91] It killed the zooplankton in the Bandeke Estuary and, as the plankton is the basis of the food-chain, threatened the whole eco-system with extinction. Operating an ore mine without an assessment of the ecological implications and without sufficient knowledge of the geological conditions of the mountain equally bears the danger of severe injuries.[92] Even cautious digging might at any time cause subterranean accidents and set free unknown harmful substances which due to the mine's location on joint streams of the Ozoonio River were bound to gravely pollute the international watercourse. The great risks of Agistanus' activities have materialized. Agistanus must bear the consequences and compensate Behestoon.

Therefore may it please the Court to adjudge and declare:

1. that Behestoon has a right to the continued and undimished flow of water from the Ozoonio River to preserve its territorial integrity, that Agistanus' actions violate Behestoon's right to equitable and reasonable utilization of the resource;

2. that Agistanus' use of the 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;

3. that 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.

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[91] Cf. World Commission on Environment and Development, Our Common Future 126 (1987).

[92] Conference on the Human Environment, Environmental Aspects of Natural Resources Management, U.N. Doc. A/Conf.48/7 (1972); F.G. v.Schlabrendorff, Ökologische und soziale Aspekte des Rohstoffabbaus, in Rohstofferschließungsvorhaben in Entwicklungsländern 76, 78 et seq. (Kirchner et al eds. 1977).