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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 RESPONDENT

AGISTANUS

MEMORIAL OF THE

STATE OF AGISTANUS

- RESPONDENT-

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 Agistanus and Behestoon have signed a compromis pursuant to Article 36 (1) of the Statute of the International Court of Justice bringing their dispute before this High Court. No question of jurisdiction of this Court is at issue.

STATEMENT OF FACTS

Agistanus is a small, landlocked nation situated on the Ozoonio River. Behestoon is the lower riparian State, in the north bordered with Agistanus and in the south with the ocean. Both States are members of the United Nations, the Strategic Options Treaty Organisation (SOTO) and the World Bank Group including its constituent institution, the Inter-Regional Development Bank (IRADB). Agistanus and Behestoon are signatories of the Stockholm Declaration, the Rio Declaration and Agenda 21.

Agistanus heavily relies on the Ozoonio river since it provides the primary source of drinking water for Agistanus' growing population and water essential for its industries. Behestoon uses the Ozoonio for much of the water used in its industrial processes and domestic services and simultaneously as depository of most of its treated and untreated waste.

Agistanus' indigenous population have been by tradition seminomadic herders of sheep, goats and other livestock on the arid highlands of Agistanus. Its neighbor Behestoon developed much more quickly than Agistanus. In recent years after its colonial times it had generated an annual surplus net balance of payments for the government. It's only primary import of any substantial cost is petroleum.

In the early 1970's Agistanus looked for possibilities to encourage better and more sustainable land and resource use and to encourage the development of its natural resources to improve and diversify its budding market economy and initiated a survey for the investigation of its natural resources. This investigation was undertaken with the technical and administrative assistance of the WBG and the IRADB.

Agricultural development was viewed as the best potential use for the lands of Agistanus and therefore expert teams looked for water resources to be used for agricultural purposes but they found only a few supplies of water which the expert team of the IRADB believed to be unusuable and insufficient. Its source and origin were not further identified. During the investigation the expert team discovered a very significent body of precious strategic and rare earth minerals which were on

considerable demand on world markets and therefore provided a significent development opportunity for Agistanus.

Agistanus decided to develop its land for agriculture together with the development of a domestic food industry which would serve the growing needs of the nation. The minerals were to be developed and exploited commercially.

To ensure sufficient quantities of water for the proposed agricultural and mining development projects, Agistanus decided to build the Namche Dam. This dam was also intended to be used to generate hydroelectric power for planned industries and surplus electricitiy to sell to Behestoon and other nations.

To afford this developmental project Agistanus applied to the IRADB for a loan equivalent to US $ 10 billion and for government assistance to developing industries related to the dam's construction. The loan was granted in 1980 although Behestoon did not give its consent. The funds were released in 1981 subject to non-negotiable loan agreement terms, among which some provisions required Agistanus

-to use the water from the dam for the proposed projects,
-to maintain a technichally recommended minimum safe level of water in the reservoir necessary for the operation of the dam and water at all times to protect against agricultural emergencies
-to store continuously sufficient water to generate enough excess electricity for sale to meet its loan obligations should other development opportunities not succeed
-to maintain a consistent flow of water during the construction downstream to Behestoon.

Should Agistanus not comply with these terms the loan would be declared in default and the control of the dam facility would revert to the IRADB.

The construction of the dam lasted four years. Meanwhile Agistanus started to convert its rangelands to agricultural use and established mining facilities. During this period Agistanus guaranteed a full continued flow of the Ozoonio to Behestoon by building a by-pass. When the dam construction was completed in 1986, the by-pass was closed and the reservoir gradually filled. A couple of years later, when the water from the reservoir became available, Agistanus started with the operation of the mining facilities and initial stages of agricultural production. Agistanus was successfully making 500,000 acres of its semi-arid desert available for agricultural use. An irrigation system was employed, applying water from the reservoir to the fields. This irrigation system was also created in such a way as it could recapture the irrigation water to re-introduce it to the Ozoonio River.

The development activities brought about a change in Agistanus: its population of 14 million people is now gathered in cities along the Ozoonio. By the summer of 1992 Agistanus met a substantial amount of the electric needs of the entire region,

it produced food enough to create an export market and processed its first shipments of earth minerals. Agistanus' manufacturing growth has helped the nation to establish a stable economic climate, and an economy substantually free of foreign debt.

Behestoon also benefitted from Agistanus' efforts, experiencing an economic boom. It increasingly purchased electricity from Agistanus for favorable rates and was able to make up about 20% of its domestic demand for electricity by 1992. Behestoon also established a number of bustling freight processing depots and terminals at the mouth of the Ozoonio, and constructed an extensive, new port facility on Solonia Bay to serve as a trans-shipment point for the increased barge traffic of the new products of Agistanus.

Behestoon appeared to suffer a relative economic decline, from which a portion could be attributed to a loss of regional markets due to Agistanus' development. There seemed also to be a loss of agricultural productivity, reduced fishing stocks and periods of eutrophication in the river. Although the operation of the dam was in exact conformity with the technical requirements of the IRADB and Agistanus made extensive efforts to reintroduce the water needed for irrigation, Behestoon charted a 33% decrease in the river's flow.

The Prime Minister of Behestoon noted that increased levels of agricultural chemicals were present in the river. She expressed her government's fear to Agistanus that continued increases of agricultural chemicals could lead to health concerns in Behestoon as well as potential agricultural problems and damage to sensitive aquatic species. She was also concerned about the risk to a species of zoo-plankton which decrease in the population could in the future endanger Behestoon's fishing industry. Thus Behestoon suggested that the flow of the river should be returned to previous levels.

The Government of Agistanus rejected this proposal and stated that Agistanus was acting fully within its right to sustainable development of its natural resources and was also not able to change its development plans due to the limitations in its loan agreement with the IRADB. There was nothing of which Behestoon could reasonably complain since there was no shortage of drinking water in Behestoon and also minor increases in the level of agricultural chemicals were anticipated from the start of the project.

On Friday, August 13, 1993, a subterranean temblor occurred at the mine which laid bare a tar-like strata as well as a water-bearing fissure and portions of the mine were quickly flooded. The mixed liquids began to ooze through naturally occuring and man-made fractures in the rock and drained into the Ozoonio. After attempting to contain the spill, which failed due to its size and a lack of appropriate equipment, Agistanus decided that no reports should be published in its national press. Also after an official inquiry by Behestoon the

incident was explained as minor in nature by the President of Agistanus.

Not believing this statement, Behestoon dispatched two aerial reconnaissance flights into the territory of Agistanus and also a team of military scientists was secretly dispatched by boat north of Behestoon's border to take water samples. As a result of the mission these samples confirm the presence of toxic, unidentified substances in the river as well as toxic levels of agricultural chemicals in the irrigation return streams. These results were immediatly released by Behestoon's Government to the press.

After the failing of a high-level diplomatic meeting, which was now voluntarily initiated by Agistanus to find possible joint actions, Behestoon made the proposal that Agistanus should open the valves of the dam to release water into the river in hopes of diluting the plume. But after Agistanus' advisors had determined that there was not sufficient water in the reservoir to dilute the plume, Agistanus refused the opening, also because such a release would likely flood large quantities of as yet unharvested land and would cause Agistanus to violate the terms of the loan agreement with the IRADB.

While the plume traveled downstream and left a trail of dead flora and fauna in its wake, the presence of an additional toxic substance was discovered in Behestoon that is thought to be responsible for health-related problems. However, the scientists on both sides were at a loss as to the source of this substance. The working presumption is that a spontaneous chain reaction may have occurred just after the Ozzonio meandered into Behestoon's territory giving rise to the formation of the substance.

After considering an operation to use paramilitary forces to take control of the dam, Behestoon appealed to SOTO to take command of Namche Dam and to open the valves of the dam, which was, however, rejected by Agistanus. In the mean time Agistanus has discovered that the presence of the tar-like strata was apparently known to the IRADB's technical team through the pre-appraisal mission. However, its significance and potential hazard had been de-emphasized for fear that Agistanus might withdraw the loan application.

Agistanus suggested that the IRADB should decide the projected remedy in this case. After Behestoon rejected this proposal, both States have now agreed through the intervention of the United Nations Secretary General to submit their dispute to the International Court of Justice for final resolution.

STATEMENTS OF QUESTIONS PRESENTED

The Government of Agistanus asks the Court to declare and order:

1.) that Agistanus has a right to adopt all measures suitable to sustainable development of its natural resources, including the use of water courses for agriculture within its territory, and has conformed to applicable norms of international law;

2.) that Agistanus' use of water resources and response to the mining incident are not inconsistent with any environmental safeguards which Agistanus might owe to Behestoon under applicable norms of international environmental law;

3.) that Agistanus is not liable, and shall not have to pay, to Behestoon for any damages resulting from the dam or any of Agistanus' development activities.

SUMMARY OF PLEADINGS

Regarding Submission One:

I. All measures Agistanus has adopted to the sustainable development of its natural resources including the utilization of the Ozoonio are in conformity with international law. First, Agistanus has territorial sovereignty over its natural resources and has exercised its right under customary international law to make use of the water of the Ozoonio within its territory. Second, Agistanus' use of the Ozoonio for its development activities is within its customary law right to sustainable development. Agistanus, as a former underdeveloped country, used the watercourse to make economic progress possible to attain economic stability and to ensure the satisfaction of the needs of its growing population.

Agistanus' use of the watercourse does not violate Behestoon's rights under international law:

Agistanus has not violated the equitable and reasonable utilization principle. First, Agistanus heavily depends on the Ozoonio for its economic and social progress. Second, Agistanus' use of the Ozoonio in no way deprives Behestoon of any of its existing uses. On the contrary Agistanus' use of the Ozoonio has in addition brought substantial benefits to Behestoon. Third, Behestoon is estopped from claiming a violation of the equitable and reasonable utilization principle since Behestoon has participated in Agistanus' activities and thus has given Agistanus reasons to believe that Behestoon implicitly agreed to the share of the Ozoonio.

Agistanus was not obliged to obtain Behestoon's consent to the planned use of the Ozoonio. There is no duty to obtain consent for planned measures in international customary law. Agistanus also did not violate any obligation to provide information and consult Behestoon about the planned development projects since first, due to a lack of State practice and *opinio juris* there is no such duty under customary law. Second, even if the Court should hold that such a duty exists, Agistanus has fulfilled it by agreeing to sell low-priced electricity to Behestoon. It is within the discretion of the sovereign State to decide, which kind of cooperation it chooses.

Regarding Submission Two:

II. Agistanus' use of the water is consistent with any environmental safeguards.

Agistanus has not violated the obligation not to cause harm by using the Ozoonio for the re-entry of irrigation water since first, Behestoon has not suffered any substantial harm. Second, Behestoon, as the claiming State has the burden of proof and cannot produce sufficient evidence to establish the causal link between any detrimental effects and Agistanus' activities. Third, Behestoon is prohibited from introducing the water samples found during its illegal investigation within Agistanus' territory as evidence. It is a general principle of law that material obtained from an unlawful search is not permitted as evidence.

Agistanus was not obliged to provide data and information on the conditions of the watercourse to Behestoon. First, such a rule does not exist under customary law. Second, even if the Court should rule that such an obligation exists, the requirement of exchange of data depends on the appraisal of the State concerned whether the activities might cause serious effects, and there was no basis for Agistanus to draw this conclusion in this case.

Agistanus did not violate the obligation not to cause substantial harm in connection with the mining incident. First, Agistanus is justified by force majeure since the detrimental effects in Behestoon are the result of the subterranean temblor as an unforseeable natural event and were not caused by any of Agistanus' activities. Second, the duty not to cause harm is a due diligence obligation and Agistanus has acted with due care. Agistanus was unaware of the risk involved in the mining activities and was under no customary law obligation to conduct environmental impact assessments.

III. Agistanus' response to the mining incident is consistent with environmental safeguards.

Agistanus has fulfilled the obligation to minimize harm by undertaking measures to contain the spill and initiating high-level diplomatic meetings. Agistanus was under no obligation to have best available equipment since such a duty must take into

account economic considerations. If the Court should hold that Agistanus was obliged to open the valves of the dam to minimize harm, the refusal is justified as an act of necessity since it was the only means to safeguard the economic survival of Agistanus.

Agistanus was under no customary law obligation to inform Behestoon immediatley about the incident. First, such a rule cannot be established due to a lack of constant and uniform State practice and *opinio juris*. Second, even if it existed it lies within the discretion of the State concerned to decide whether the incident is likely to cause harm.

Behestoon cannot claim a violation of environmental safeguards due to the concept of reciprocity. It has not accepted the principle of good-neighborliness which is the most basic concept of environmental safeguards as binding upon itself by violating Agistanus' territorial integrity with its aerial reconnaissance flights and the operation with military scientists.

Regarding Submission Three:

IV. Agistanus is not liable and must not pay for any damages in Behestoon under the concept of liability for acts not prohibited under international law since, first, this concept is not recognized as customary international law and, second, even if the Court should hold that this concept is recognized as customary law, it is restricted to ultra-hazardous activities like operating nuclear power stations and thus not applicable to Agistanus' development activities.

Even if the Court should hold that Agistanus has violated international law, Agistanus is also not liable nor required to pay under the concept of State responsibility. First, due to a lack of State practice, State responsibility for breaches of international environmental law is not recognized as customary law. Second, even if it is recognized, Agistanus is not responsible for the damages since State responsibility presupposes fault and Agistanus was not at fault. It has not acted negligently as it could reasonably rely upon the IRADB. Third, Agistanus is not responsible since the damages are a result of the IRADB's omission to inform Agistanus about the potential hazards of the strata which cannot be attributed to Agistanus. Fourth, Agistanus is under no obligation to make monetary compensation since the damages in Behestoon are only ecological detrimental effects which are not compensable.

I. All Measures Agistanus Has Adopted for its Sustainable Development Including the Use of the Ozoonio are in Conformity with International Law

All measures Agistanus has adopted to promote the sustainable development of its natural resources including the utilization of the Ozoonio is in conformity with international law. First, Agistanus has territorial sovereignty over its natural resources and second, it has the right to use the watercourse for its sustainable development. Third, Agistanus has not violated any of Behestoon's rights recognized under international law.

1. Agistanus Has Territorial Sovereignty Over its Natural Resources

Agistanus has territorial sovereignty over its natural resources and has with the utilization of the Ozoonio simply exercised its right freely to use its watercourse within its territory. Territorial sovereignty, guaranteed by Arts. 2(4) and 2(7) of the UN Charter[1], to which Behestoon and Agistanus are parties, is one of the cornerstones of international law.[2] This principle affirms that a State has supreme authority to exercise power over its territory.[3] From this it follows that a State is entitled to make use of the waters of an international watercourse within its territory. The concept of sovereign watercourse usage is supported by international customary law. Customary law, as laid down in Art. 38 (1)(b) Statute of the

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

[2]I/1 Oppenheim's International Law 564 (R. Jennings & A. Watts 9th ed. 1992) [hereinafter 1 Oppenheim]; I. Brownlie, Principles of Public International Law 289 (4th ed. 1990); A. Verdross & B. Simma, Universelles Völkerrecht 655 (3d ed. 1984).

[3]Lotus Case (Fr. v. Turk.), 1927 P.C.I.J., (ser. A) No 10, 18 (Sept. 7); Starke's International Law 144 (I.A. Shearer 11th ed. 1994); 1 Oppenheim, supra note 2, at 564.

International Court of Justice[4] and interpreted by this Court, is constituted by a constant and uniform state practice and the conviction of the acting State that it is under a legal obligation to act in that way (*opinio juris*).[5] State practice can be established by positive acts as well as by the activities and pronouncements of State organs representing the State in international organizations.[6] As regards international watercourse law, evidence of State practice recognizing a State's sovereignty over the use of the watercourse within its territory can be found in the statements made before the General Assembly[7] and in various attempts to resolve international watercourse disputes[8]. *Opinio juris* can be verified, *inter alia*,

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[4]Statute of the International Court of Justice, June 26, 1945, 15 U.N.C.I.O. 360 [hereinafter StICJ].

[5]North Sea Continental Shelf Case (F.R.G. v. Den./ F.R.G. v. Neth.), 1969 I.C.J. 44 (Feb. 20) [hereinafter Shelf Case]; Case Concerning Rights of Nationals of the United States of America in Morocco (Fr.v.U.S.), 1952 I.C.J. 200 (Aug. 27); Asylum Case (Colom. v. Peru), 1950 I.C.J. 277 (Nov. 20).

[6]M. N. Shaw, International Law 70 (3d ed. 1991).

[7]Statement of India as regards the River Ganges, cf. U.N. GAOR Special Political Comm., 31st Sess., 20th mtg. at 4, U.N. Doc. A/SPC/31/SR.20 (1976); Statements of the representatives of Kenya, Brazil, U.S.S.R. before the General Assembly, reprinted in: Third Report on the Law of the Non-Navigational Uses of International Watercourses reprinted in: [1982] 2 Y.B. Int'l L. Comm'n 70, U.N. Doc. A/CN.4/SER.A/1982/Add.1 (Part 1) [hereinafter ILC Report 1982].

[8]Cf. Austria dispute with F.R.G. on successive waterways reprinted in: J. Lipper, Equitable Utilization, in The Law of International Drainage Basins 21 (A.H. Garretson et al. eds., 1967); Ethiopia in relation to the Blue Nile, reprinted in: J. Bruhàcs, The Law of Non-Navigational Uses of International Watercourses 44 n.35 (1993).

through statements of State representatives.[9] *Opinio juris* is evidenced by diverse statements of official State representatives including Turkey in the Atatürk Dam Dispute with Syria who insisted on its absolute freedom to do with its waters what it wants to[10] as well as the government of India in the dispute with Pakistan over the Indus River who claimed its full freedom to draw off such quantities of water of the Indus as it wanted.[11]

2. Agistanus' Use of the Ozoonio Follows from its Right to Sustainable Development

Agistanus has a right to use the Ozoonio for its development activities following from its right to sustainable development. This principle entitles a State to use its natural resources in order to assure the realization and continued satisfaction of human needs and an increase in the nation's living standards for both the present and future generations.[12] It especially protects the interests of developing countries, extending to them the oportunity to fulfill their aspirations for a better

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[9]Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 90 (June 27); 1 Oppenheim, supra note 2, at 28.

[10]Statement of the Prime Minister of Turkey Demirel, reprinted in: 62 Archiv der Gegenwart 37129 (1992); see also: Statements of US governmental officiers in the Senate hearings on the 1944 US-Mexico Treaty, reprinted in: C.B. Bourne, The Right to Utilize the Waters of International Rivers 3 Can. Y.B. Int'l L.187, 204 (1965).

[11]India Statement reprinted in: R.R. Baxter, The Indus Basin, in A. H. Garretson, supra note 8, at 453.

[12]C.K. Mensah, The Role of the Developing Countries in The Environment after Rio 43 (L. Campiglio et al eds. 1994); The State of the World Environment, U.N. Doc. UNEP/GC.15/7/Add.2/at 16 (1989); N. Singh, Right to Environment and Sustainable Development as a Principle of International Law in 1 Essays in Honour of Judge T. O. Elias 181 (E. G. Bello et al eds. 1992).

life by allowing these countries to develop their resources so as to sustain the essential economic growth.[13] This right is a recognized principle of international customary law. State practice is evidenced by statements made by several State representatives.[14] *Opinio juris* can be established through resolutions or declarations of the General Assembly.[15] The right to sustainable development is expressed in several UN declarations such as Principle 5 of the Rio Declaration[16] and Agenda 21[17], to which Behestoon is a signatory, as well as in other international documents[18]. Agistanus started to exploit its natural resources to encourage economic progress. It has been an underdeveloped country. The majority of its population has been by tradition semi-nomadic herders living on the arid lands of Ag-

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[13]Cf. Report of the World Commission on Environment and Development, U.N. Doc. A/42/427, at 25 (1987) [hereinafter WCED-Report]; Prpl. 5, Rio Declaration on Environment and Development, U.N. Doc. A/CONF. 151/5 (1992) at 2 [hereinafter Rio Declaration]; G.A. Res. 62, U.N. GAOR, 44th Sess., Supp. (No. 49), at 181, U.N. Doc. A/44/49 (1989); C.K.Mensah, supra note 12, at 42, A. Boyle, Economic Growth and Protection of the Environment, in Environmental Regulation and Economic Growth 176 (A. Boyle ed. 1994).

[14]Statement of the U.S.President Clinton, reprinted in: R.A.Hoelting, After Rio: The Sustainable Development Concept 24 Ga. J. Int'l & Comp. L.117, 118 (1994); Statement of the Government of Ethiopia reprinted in: B. A. Godana, Africa's Shared Water Resources 35 (1985).

[15]H. Thirlway, The Law and Procedure of the International Court of Justice, 61 Brit. Y.B. Int'l L. 1, 80 (1990); Brownlie, supra note 2, at 14.

[16]Rio Declaration, supra note 13; see also: G.A. Res. 228, U.N. GAOR, 44th Sess., Supp.No.49, at 152, U.N. Doc. A/44/49 (1989).

[17]Agenda 21, U.N.Doc A/CONF. 151/4 (Part I) at 6 (1992).

[18]WCED-Report, supra note 13, at 24; FAO Activities Related to Environment and Sustainable Development, U.N. Doc.FAO/CL.98/6/at 3 (Nov.1990).

istanus. It is only in the late twentieth century that some development has begun, a development that was only possible through financial support from the IRADB. Agistanus used the Ozoonio to convert its arid rangelands to agricultural land to produce the food it needed to satify the demands of its growing population and to make the economical progress possible.

3. Agistanus' Use of the Watercourse Does not Violate Behestoon's Rights under International Law

Agistanus' use of the Ozoonio has not violated Behestoon's rights. In the following, Agistanus will demonstrate that, first, it has not violated the equitable utilization principle, second, that it was not obliged to obtain consent for the planned use of the watercourse and third, that it has not violated any duty to cooperate.

a) Agistanus' Use of the Watercourse does not Violate the Equitable Utilization Principle

Agistanus' use of the Ozoonio does not violate the equitable utilization principle since its use of the Ozoonio enables both States to satisfy their needs. The equitable utilization principle, recognized by the P.C.I.J.,[19] is customary law as it is practiced by many States in the utilization of international rivers[20] and affirmed in several international instruments[21]. It

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[19]River Oder Case (U.K.et al v. Pol.), 1929 P.C.I.J. (ser.A) No. 23, at 27 (Sept. 10).

[20]Danube Dam Dispute between Hungary and Slovakia cf. G.M. Berrisch, The Danube Dam Dispute under International Law 46 Austr. J.Pub.Int'l L. 231, 258 (1994); Lauca River Dispute (Bolivia v.Chile) reprinted in: I. Detter, The International Legal Order 323 (1994).

[21]Helsinki Rules on the Uses of the Waters of International Rivers, Art. 4, Report of the 52nd Conf. of the Int'l L. Ass'n, Helsinki 486 (1966) [hereinafter Helsinki Rules]; Res. of the Inter-Am. B. Ass'n on its 10th Conf., Nov. 19, 1957 cf. U.N. ESC, 8th Sess., at 17, U.N. Doc E/CN 12/511 (1959); Report of

entitles each riparian State to an equitable and reasonable share in the beneficial uses of an international watercourse in accordance with its needs.[22] Agistanus heavily depends on the Ozoonio for drinking water and the irrigation of its arid lands and for the exploitation of the minerals to satisfy the needs of its growing population. Agistanus' newly established industries heavily rely on the Ozoonio. Since Agistanus is a landlocked nation it has no other source to get the needed quantities of water other than the Ozoonio. Behestoon cannot argue that Agistanus' use of the water deprives Behestoon of former beneficial uses of the Ozoonio and thereby violates the equitable utilization principle. This principle does not assign priority to existing uses since such absolute protection would be incompatible with the idea of the equality of rights and make necessary beneficial future uses impossible.[23] The principle is primarily concerned with the satisfaction of the needs of States. Behestoon is not at all prevented from satisfying its needs. It has no shortage of drinking water and is situated on the ocean and thus has other waterresources to utilize. Any small reduction in the agricultural and fishing productivity is more than off-set by the substantial benefits Agistanus' use of the river has brought to Behestoon. It satisfies 20% of its domestic energy needs with favorable electricity purchased from

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the Int'l L. Comm'n to the General Assembly in [1987] 2 Y.B. Int'l L. Comm'n 31, U.N. Doc. A/CN.4/SER.A/1987/Add.1 (Part 2) [hereinafter ILC-Report 1987-II].

[22]J.L. Brierly, The Law of Nations 231 (6th ed. 1963); J. Lipper, supra note 8, at 44; Bruhàcs, supra note 8, at 157.

[23]G. Hafner, The Optimum Utilization Principle, 45 Austr.J.Pub. Int'l L. 113, 138 (1993); G. Handl, The Principle of "Equitable Use", 14 R. Belg. D. Int'l 40, 50 (1978-79).

Agistanus which it formerly had to buy from other nations for a much higher price. Above all Agistanus' development of the Ozoonio has created new industries in Behestoon. Behestoon has established a number of bustling freight processing depots and has constructed a new port facility as a trans-shipment point thus profiting from the increased barge traffic.

b) Behestoon is Estopped from Claiming a Violation of the Equitable Utilization Principle

Behestoon is estopped from claiming a violation of the equitable utilization principle. Estoppel is a general principle of law[24] recognized by this Court[25] which prohibits a party from asserting a legal position that is in contradiction with previous conduct on which the party concerned has relied in good faith.[26] Such representation can also be given impliedly by a course of events in which the claiming State has due to its conduct given reasons to assume that it agrees to a given situation.[27] Behestoon has participated in Agistanus' development activities by purchasing electricity and building the port facilities, thus giving Agistanus reason to believe that it implicitly agreed to the way Agistanus shared the Ozoonio. Be-

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[24]H. Lauterpacht, The Development of International Law by the International Court 172 (1958).

[25]Case Concerning The Temple of Preah Vihear (Camb. v. Thail.), 1962 I.C.J. 32 (June 15) [hereinafter Temple Case]; Case Concerning the Barcelona Traction Light and Power Company Ltd. (Belg. v. Spain), 1964 I.C.J. 24 (July 24) (preliminary objections); Case Concerning The Arbitral Award Made by the King of Spain (Hond. v. Nicar.), 1960, I.C.J. 209, 213 (Nov. 18).

[26]Report of the Int'l L. Comm'n to the General Assembly, in [1963] 2 Y.B. Int'l L. Comm'n 213, U.N. Doc. A/CN.4/SER.A/1963/Add.1.

[27]Temple Case, supra note 25, at 143-144 (Diss.Op. of Judge Spender); J. Müller, Vertrauensschutz im Völkerrecht 23 (1971).

hestoon cannot argue that it is not estopped because it has once in the past objected to the planned building of the dam. As stated by this Court in the Temple of Preah Vihear Case, decisive is, regardless to any doubt in the beginning, how the claiming party acted in the subsequent course of events.[28] From the time the dam was built, Behestoon has increasingly enjoyed substantial benefits from Agistanus' use of the Ozoonio.

c) Agistanus Did not Violate International Law by not Obtaining Behestoon's Consent to the Planned Use of the Ozoonio

Agistanus was not obliged to obtain Behestoon's consent to the planned use of the Ozoonio since such a rule does not exist under customary law. Such a rule would give the riparian an absolute veto-right putting unacceptable restrictions on the sovereign State.[29] In the Lake Lanoux Case the arbitral tribunal had recourse to the law of international watercourses[30] and held that France, who intended to divert the waters of the lake, was not obliged to get consent from Spain. The court stated that absent a relevant treaty, there is no such duty.[31] No treaty exists between Behestoon and Agistanus.

d) Agistanus Has not Violated any Duty to Cooperate with Behestoon About the Planned Use of the Ozoonio

Agistanus has not violated an obligation to provide information and consult Behestoon about the planned development of the

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[28]Temple Case, supra note 25, at 32.

[29]Lake Lanoux Case (Sp. v. Fr.) 1957, 12 R.I.A.A. 306 (Nov.16).

[30]Second Report on the Law of the Non-Navigational Uses of International Watercourses, in [1986] 2 Y.B. Int'l L. Comm'n 119, U.N. Doc. A/CN.4/SER.A/1986/Add.1 (Part 1) [hereinafter ILC-Report 1986].

[31]Lake Lanoux Case, supra note 29, at 308.

Ozoonio. Such an obligation does not exist under customary law. A duty to inform and consult about planned measures has been rejected in the statements of many State representatives[32]. The non-existence is also shown by the conduct of States who in developing their watercourses have refused to recognize a duty to consult.[33] The non-existence of such a rule is also evidenced by several States' rejection of a duty to supply information upon planned activities in the preliminary discussions on Principle 20 of the Stockholm Declaration.[34] Even if the practice of a few States suggests cooperation - this is certainly not enough to establish a norm of customary law. States have cooperated since they had formally agreed to,[35] which is not sufficient to establish a norm of customary law,[36] or States have cooperated be-

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[32]e.g. Statements of representatives of the F.R.G., France, Turkey and Honduras before the General Assembly, reprinted in: ILC-Report 1982, supra note 7, at 72.

[33]This is seen in the dispute between Argentina and Brazil over the use of the Paraná River where Brazil planned to build a dam and rejected to inform and consult its neighbor, cf. ILC-Report 1986, supra note 30, at 111; cf. Lake Tiberias Dispute between Israel and Syria cf. U.N. SCOR, 17th Sess., Supp., Jan.-Mar. 1962, at 87, U.N. Doc. S/5084 (1962).

[34]e.g. Brazil and the U.S., cf. M. Timmler, Die Umwelt-Konferenz in Stockholm 23 Außenpolitik 618, 625 (1972).

[35]Cf. Nile Waters Agreement (UK - Egypt), May 7, 1929, 93 L.N.T.S.43, 46; Agreement on the Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River (Mex.- U.S.), Aug. 30, 1973, 12 I.L.M. 1105, 1106; R.R. Baxter, International Law in "Her Infinite Variety" 29 Int'l & Comp. L. Q. 549, 556 (1980).

[36]Shelf Case, supra note 5, at 43; Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 41 (Apr. 6) (Diss. Op. of Judge Read); Thirlway, supra note 15, at 44; R.Y. Jennings, What is International Law and how do we tell it when we see it?, 37 Ann. Suisse D.Int'l 59, 68 (1981).

cause of a notion of comity,[37] which this Court has stated does not rise to the level of *opinio juris* [38]. Even if this Court should hold that a duty to cooperate exists, Agistanus has fulfilled its obligation. It has in its plans to build the Namche dam taken Behestoon's interests into account by agreeing to sell low-priced electricity to Behestoon. International law does not recognize a specific form of cooperation. It is within the discretion of the sovereign State concerned to choose a form of cooperation which it thinks is suitable.[39] As the practical and effective purpose of a duty to cooperate is to assure the observance of the interests of the co-riparian in the achievement of an equitable and beneficial use,[40] it is fulfilled if a State observes these interests in its conduct .

II. Agistanus' Use of the Watercourse is Consistent With Environmental Safeguards of International Law

Agistanus' use of the Ozoonio is consistent with applicable environmental safeguards since first, its use of the watercourse for irrigation has not violated an obligation not to cause harm to neighboring States, second, Agistanus was not obliged to provide data and information to Behestoon on the physical con-

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[37]E. Klein, Umweltschutz im völkerrechtlichen Nachbarrecht 300 (1976); Summary Records of the 2006th Meeting 118, 124 [1987] 1 Y.B. Int'l L. Comm'n 90, U.N. Doc. A/CN.4/SER.A/1987 [hereinafter ILC-Report 1987-I]; A. Nollkaemper, The Legal Regime for Transboundary Water Pollution, 220 (1993).

[38]Shelf Case, supra note 5, at 44.

[39]Godana, supra note 14, at 236; ILC-Report 1987-I, supra note 37, at 81, 83.

[40]C. B. Bourne, Procedure in the Development of International Drainage basins: The Duty to Consult and to Negotiate, 10 Can. Y.B.Int'l L. 212, 233 (1972); ILC-Report 1987-I, supra note 37, at 73, 81, 83; ILC-Report 1987-II, supra note 21, at 32.

dition of the Ozoonio and third, it has not violated a duty not to cause harm in connection with the mining incident.

1. Agistanus' Use of the Ozoonio for Agriculture has Not Violated an Obligation Not to Cause Harm to Neighboring States

Agistanus' use of the water for irrigation has not violated the duty not to cause harm since first Behestoon has not suffered any substantial harm and second, any harm that exists cannot be attributed to Agistanus. First, the obligation not to cause harm as a rule of international customary law only prohibits such activities which cause substantial harm to neighboring States. This is supported by the decision in the Trail Smelter Case[41] and affirmed in various documents of international organizations.[42] The harm is substantial if it results in deleterious effects detrimental to human health or safety or to the beneficial use of the waters.[43] The minor decline in Behestoon's economic fortunes does not rise to the level of substantial harm since it neither affects the health or safety of Behestoon's population nor does it in any way restrict the fishing and agricultural activities. All of Behestoon's other complaints rest upon what "could" happen and refer to a hypothetical outcome which is not established and unsupported by evidence. The

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[41]Trail Smelter Case, (U.S. v. Can.) 1941, 3 R.I.A.A. 1965 (March 11); J. Lammers, Pollution of International Watercourses, 363 (1984); Brownlie, supra note 2, at 272.

[42]G.A. Res. 2995, U.N. GAOR, 27th Sess., Supp. No. 30, at 42, U.N. Doc. A/8730 (1972); ILC-Report 1982, supra note 7, at 98; Rules on Water Pollution in an International Drainage Basin, Art.1, Report of the 60th Conf. of the Int'l L. Ass'n, Montreal 535 (1982); J. Sette-Camara, Pollution of International Rivers, 186 R.C.A.D.I. 117, 165 (1984-III).

[43]O. Schachter, International Law in Theory and Practice 366 (1991); Sette-Camara, supra note 42, at 169; ILC-Report 1982, supra note 7, at 144.

duty to cause harm refers only to existing damage.[44] Second, any decrease in the quality of the water cannot be attributed to Agistanus' use of the Ozoonio. The conduct complained of must be proven to be an adequate *conditio sine qua non* for the damage.[45] From the general principle that the claiming State has the burden of proof,[46] Behestoon must produce evidence for the causal link between the activity and the effect. This evidence must be clear and convincing.[47] Since Behestoon undertakes not only agricultural activities itself but in addition pours untreated domestic and industrial waste into the Ozoonio, it cannot be clearly demonstrated that Agistanus' activities are the source of any significant change in the watercourse. Behestoon should in addition not be permitted to introduce the water samples with the chemicals extracted during the "night investigation" as evidence since it was an illegal mission. It is a general principle of law that material obtained from an unlawful search is not permitted to be introduced as evidence. General principles of law, as laid down in Art. 38 (1)(c) StICJ, are rules generally accepted by municipal legal systems which can

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[44]B. Graefrath, Responsibility and Damages Caused 185 R.C.A.D.I. 9, 116 (1984-II); Schachter, supra note 43, at 366.

[45]G. Dahm, 3 Völkerrecht 219 (1961); M. Sibert, 1 Traité de Droit International Public 318 (1951).

[46]Minquiers and Ecrehos Case (Fr. v. U.K.), 1953 I.C.J. 52 (Nov. 17); Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 18 (Apr. 9) (Merits); B. Cheng, General Principles of Law as applied by International Courts and Tribunals 330 (1953).

[47]Trail Smelter Case, supra note 41, at 1965; A. L. Springer, The International Law of Pollution 33 (1983).

by analogy be implemented by this Court.[48] The principle not to permit evidence obtained from a illegal mission is applied in most municipal legal orders.[49] With the unauthorized entering of the military scientists into Agistanus' territory Behestoon has violated the territorial integrity of Agistanus and thus violated international law.

2. Agistanus Was not Obliged to Provide Data and Information on the Physical Condition of the Watercourse to Behestoon

Agistanus has not violated environmental safeguards by not providing data and information on the condition of the water of the Ozoonio to Behestoon since no such rule exists as customary law. Although some States have exchanged data and information with co-basin States this practice is not sufficient to establish a rule of customary law. It is moreover a political but not a legal obligation as it is not accompained by *opinio juris*.[50] The relevant documents only recommend the exchange of data and information.[51] Even if such an obligation existed it is

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[48]Guardianship of Infants Case (Neth. v. Swed.), 1958 I.C.J. 92 (Nov. 28) (sep. op. of Judge Lauterpacht); Corfu Channel Case, supra note 46, at 18; Barcelona Traction Case (Belg. v. Spain), 1970 I.C.J. 33 (Febr. 5); M. Bos, A Methodology of International Law, 68 (1984); Shaw, supra note 6, at 87.

[49]N.H. Shah, Discovery by Intervention, 53 Am.J.Int'l L. 595, 607 (1959); A.V.W. Thomas and A.J. Thomas, Jr.,Non-Intervention: The Law and its Import in the Americas 136 (1956); J.Atkinson, Admissibility of Evidence Obtained through Unreasonable Searches and Seizures, 25 Col. L. Rev. 11 (1925).

[50]Summary Records of the 2051st Meeting, [1988] 1 Y.B. Int'l L. Comm'n 49, 50, U.N. Doc. A/CN.4/SER.A/1988 [hereinafter ILC-Report 1988].

[51]Cf.Draft Articles on Non-Navigational Uses of International Watercourses, Art. 10 in Report of the Int'l L. Comm'n to the General Assembly, 43 U.N. GAOR Supp. (No. 10) at 106, U.N. Doc. A/43/10 (1988); Commentary to Art. 6 of the Helsinki Rules, supra note 21, at 504.

in the appraisal of the State which uses the watercourse to decide whether the activities might cause serious effects and thus require negotiations and an exchange of data and information.[52] Since Agistanus used the Ozoonio for irrigation, a common usage not likely to cause substantial harm, there was no need to negotiate with Behestoon nor provide data and information.

3. Agistanus Has not Violated the Duty not to Cause Harm in Connection with the Mining Incident

Agistanus has not violated the duty not to cause harm in connection with the incident since first, it is justified by force majeure and second, it has acted with due care.

a) Agistanus Is Justified by Force Majeure

Agistanus is justified by force majeur since the detrimental effects in Behestoon are the result of an unforeseeable natural event. Force majeure is defined as an unforseeable event external to the obligator which makes it impossible for him to perform the obligation concerned.[53] The subterranean temblor made it impossible for Agistanus to perform the obligation not to cause harm. The incident was not caused by any of Agistanus' activities. Behestoon, having the burden of proof, cannot show sufficient evidence for a causal link. Even without the mining

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[52]ILC-Report 1988, supra note 50, at 49; C. B. Bourne, supra note 40, at 233; Nollkaemper, supra note 37, at 170.

[53]The Electricity Company of Sofia and Bulgaria Case (Belg. v. Bulg.), 1940 P.C.I.J. (ser. A/B) No. 80, 8 (Feb 26); Naulilaa Case (Port. v. Germ.), 1928, 2 R.I.A.A., 1025 (July 31); "Force majeure" and "fortuitous event" as circumstances precluding wrongfulness, in [1978] 2 Y.B. Int'l L. Comm'n 69, U.N. Doc. A/CN.4/SER.A/1978/Add.1(Part 1); 1 Oppenheim, supra note 2, at 511; Cheng, supra note 46, at 231; E. Jiménez de Aréchaga, International Responsibility in Manual of Public International Law 544 (M. Soerensen ed. 1968).

activities, the water and the tar-like substance might have mixed underground and the liquid would have spilled through natural fractures. Also no evidence exists that the unidentified substances were caused by any of Agistanus' actions since they occurred on Behestoon's territory and scientists on both sides were at a loss as to the source.

b) Agistanus Has Acted with Due Care

Agistanus has not violated international law since it has acted with due care. The duty not to cause harm is a due diligence obligation[54] which is shown by numerous documents.[55] Agistanus had not known about the risk involved in the mining activities. The source State only violates the duty if it knew that an activity involving risk was undertaken on its territory.[56] In the Corfu Channel Case this Court regarded knowledge as an essential prerequisite for a violation of the duty not to cause harm.[57] Agistanus had no knowledge about the risk since the IRADB had not informed it about the existence of the tar-like strata. Behestoon also cannot argue that Agistanus has acted indiligently by not conducting environmental impact assessments

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[54]Cf. Lammers, supra note 41, at 348; R. Pisillo-Mazzeschi, The Due Diligence Rule and the Nature of the International Responsibility of States, 35 Germ. Y.B. Int'l L. 9, 38 (1992).

[55]Cf. Resolution on the Pollution of Rivers and Lakes, Sept. 12, 1979, Art. 2, 58 Annuaire Inst. D.Int'l. 196, 199 (Part 2) (1979); Art. 10 Helsinki Rules, supra note 21, at 496.

[56]Cf. Fifth Report on International Liability for Injurious Consequences Arising out of Acts not prohibited by International Law, in [1989] 2 Y.B. Int'l L. Comm'n 137, U.N. Doc. A/CN.4/SER.A/1989/Add.1(Part 1); A. E. Boyle, State Responsibility and International Liability for injurious Consequences of Acts not Prohibited by International Law: A necessary Distinction ?, 39 Int'l & Comp. L. Q. 1, 8 (1990).

[57]Corfu Channel Case, supra note 46, at 22.

since no such rule exists under customary law. The lack of State practice is demonstrated through reservations by Brazil and India expressly denying any such obligation.[58] Also Great Britain and the Netherlands have declared that they have full discretion to determine which projects were to be made subject to impact assessments.[59] Even if such a duty exists, it would oblige States to conduct assessments only if there were reasonable grounds for believing that planned activities will cause transboundary harm.[60] Agistanus heavily relied on the IRADB and its work during the natural resources survey and had thus no grounds for believing that the activities may cause harm.

III. Agistanus' Response to the Mining Incident Is Consistent with Environmental Safeguards

Agistanus' response to the mining incident is consistent with environmental safeguards as first, it has acted in conformity with any obligation to reduce transboundary harm and second, it has not violated any duty to inform about the incident.

1. Agistanus' Response to the Mining Incident Is Consistent with any Obligation to Minimize Harm

a) Agistanus Has Fulfilled the Requirements of the Obligation to Minimize Harm

Agistanus' response to the mining incident is consistent with any obligation to minimize harm since a State has only to take

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[58]Towards Prpl. 11c of the World Charter for Nature, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1983); for the reservations, cf. H. Hohmann, 1 Basic Documents of International Environmental Law 3, n.17 (1992).

[59]Council Directive 85/337 of 27 June 1985 on the Assessment of Certain Public and Private Projects on the Environment, 1985 O.J. (L 175) 40 et seq.; for the Declarations cf. Nollkaemper, supra note 37, at 185, n.139.

[60]Cf. Prpl. 17 of the Rio Declaration, supra note 13; E. Brown Weiss, Environmental Change and International Law 120 (1992).

feasible measures, in accordance with its capabilities,[61] and not to guarantee the success of its measures. Agistanus did all that was reasonable by undertaking measures to contain the spill and, when that failed because of the size, by voluntarily initiating high-level diplomatic meetings to try to find an agreement as to possible joint actions. It also proposed that the IRADB should decide the projected remedy, but Behestoon rejected this offer. Behestoon cannot argue that Agistanus has violated the duty due to its lack of appropriate containing-equipment. No obligation to have best available equipment exists under customary law as States have constantly made reservations concerning the interpretation of the term "best available technology"[62]. The technology standard depends on a State's economic ability.[63] This restriction is also shown by documents explicitly qualifying the obligation through reference to economic considerations.[64] Agistanus is a newly developed country and cannot be expected to have highly technical and costly equipment.

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[61]P. Kunig, Nachbarrechtliche Staatenverpflichtungen bei Gefährdungen und Schädigungen der Umwelt, 32 BDGVR 9, 25 (1992).

[62]E.g. Reservations made by the South American States concerning the Prpls 11, 12 of the World Charter for Nature, supra note 58; for reservations cf. Hohmann, supra note 58, at 3, n.17.

[63]Cf. H. Hohmann, Präventive Rechtspflichten und -prinzipien des modernen Umweltvölkerrechts 170 (1992).

[64]Cf. Ministerial Declaration on the Second International Conference on the Protection of the North Sea, Nov. 25, 1987, n. to Art. 8 (a) (i), 27 I.L.M. 835, 838 (1988); Convention on Long Range Transboundary Air Pollution, Nov. 13, 1979, Art. 6, 18 I.L.M. 1442, 1444.

b) The Refusal to Open the Valves of the Dam is Justified as an Act of Necessity

If the Court should hold that Agistanus also had to open the valves of the dam to minimize harm, the refusal is justified by necessity. State of necessity is recognized as a general principle with the following requirements: the act has to be the only means of safeguarding an essential interest of the State and must not seriously impair an essential interest of other States.[65] The economic survival of a State is recognized as an essential interest.[66] The refusal was the only means to safeguard the economic survival of Agistanus. The release of the water would have caused Agistanus to violate the terms of the loan agreement and thus endangered the whole development program. Its still fragile economy would also suffer irreparable injuries as large quantities of unharvested land would have been flooded and hydroelectric power generation would have been disrupted. The refusal also did not seriously impair Behestoon's essential interests. It was only a speculation that opening the valves would have had any beneficial effect since, taking into account the extent of the plume, there was not sufficient water to depoison it.

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[65]Affaire De L'Indemnité Russe (Russia v. Ottoman Empire), 1912, 11 R.I.A.A., 443 (Nov. 11); Oscar Chinn Case (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63, 113 (Dec. 12) (sep. op. of Judge Anzilotti); Nguyen Quoc Dinh & P. Daillier & A. Pellet, Droit International Public 734 (4th ed. 1992).

[66]Société Commerciale De Belgique Case (Belg. v. Greek), 1939 P.C.I.J. (ser. A/B) No. 78, 164 (June 15); Case Concerning the Payment of Various Serbian Loans Issued in France (Fr. v. Kingdom of Serbs, Croats and Slovenes), 1929 P.C.I.J. (ser. A) No. 20/21, 40 (July 12); Addendum to the Eighth Report on State Responsibility, in [1980] 2 Y.B. Int'l L. Comm'n 14, U.N. Doc. A/CN.4/SER.A/1980/Add.1(Part 1).

2. Agistanus' Response to the Mining Incident Did not Violate any Duty to Inform Behestoon About the Incident

Agistanus did not violate a duty to inform as no rule of customary law exists that would oblige States immediately to notify others of incidents happening on their own territory[67]. First, there is no constant and uniform State practice as shown by the Soviet Union's position during the affair of the satellite Cosmos 954, the Chernobyl-disaster and most recently by Russia in the pipeline-accident in Siberia. Also Switzerland failed to give early information about the Sandoz accident.[68] Further the Irish government claimed Great Britain's omission to inform after a nuclear-incident only to be "de facon cavalier" but not an unlawful act.[69] Second, there is also a lack of established *opinio juris* as even in cases where information was given, the States did not feel legally bound to do so.[70]

Even if the obligation exists Agistanus has not violated it, since it is shown by various conventions that it lies within the State's discretion to decide whether the incident is likely to cause significant transboundary harm.[71] In Agistanus' assessment shortly after the temblor the incident was minor in nature and thus there was no need to inform Behestoon.

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[67]K. Ipsen, Völkerrecht 862 (3rd ed. 1990).

[68]Cf. A. Rest, The Sandoz Conflagration and the Rhine Pollution: Liability Issues 30 Germ. Y.B. Int'l L. 160, 165 (1987).

[69]Accident nucléaire de Wylfa, Aug. 26, 1986, 91 Rev. Gén. D. Int'l Publ. 136 (Part 1) (1987).

[70]ILC-Report 1987-I, supra note 37, at 118, 124; Schachter, supra note 43, at 365.

[71]Cf. Convention on the Protection and Use of Transboundary Watercourses and International Lakes, March 17, 1992, Art. 14, 31 I.L.M. 1312, 1321; Nollkaemper, supra note 37, at 173.

3. Behestoon Cannot Claim a Violation of any Environmental Safeguards due to the Principle of Reciprocity

Behestoon cannot claim a violation of environmental safeguards due to reciprocity. Reciprocity is a general principle of international law and determines that a State basing a claim on a norm of international law must accept that rule as also binding upon itself.[72] Behestoon has not accepted the most basic concept of environmental safeguards - the principle of good-neighborliness[73] - as binding upon itself since it has violated Agistanus' territorial integrity with its aerial reconnaissance flights and the operation with military scientists. The non-intervention principle, which prohibits the violation of the territorial integrity of other States[74], is also an integral part of the concept of good-neighborliness. According to this principle, every intrusion into foreign airspace by plane is illegal.[75] Behestoon cannot argue that its mission is justified as a reprisal, since that would have required prior notification[76] which was not made by Behestoon.

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[72]Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 134 (April 12) (Diss. Op. of Judge Fernandes); G. Schwarzenberger, The Frontiers of International Law 15 (1962).

[73]R. Wolfrum, Purposes and Principles of International Environmental Law, 33 Germ. Y.B. Int'l. L. 308, 317 (1990).

[74]F. Ermacora, Article 2 (7), in Charta der Vereinten Nationen 107 (B. Simma et al. eds. 1991).

[75]I/2 Oppenheim's International Law 653 (R. Jennings & A. Watts 9th ed. 1992); Brownlie, supra note 2, at 119; L. Henkin et al., International Law 1070 (3rd ed. 1993); G. Dahm & J. Delbrück & R. Wolfrum, I/1 Völkerrecht 439 (2nd ed. 1989).

[76]Starke, supra note 3, at 472; I. Seidl-Hohenveldern, Völkerrecht 405 (8th ed. 1994).

IV. Agistanus Is not Liable and Has no Obligation to Pay for any Damages

1. Agistanus Does not Have to Pay for Damages under the Concept of Liability for Acts not Prohibited under International Law

Agistanus is not liable for any damages resulting from its activities since it has not violated international law. Due to a lack of constant and uniform State practice no rule of customary law exists that would oblige States to pay compensation for injurious consequences of their lawful activities.[77] In international law, liability can arise only from a wrongful act. The only cases where States have accepted liability absent an unlawful act were in connection with a treaty obligation.[78] On the contrary the non-existence of such liability as customary law is shown by comments of States delegations concerning Principle 21 of the Stockholm Declaration[79] stating that no responsibility should be based on risk alone without the breach of a norm of international law.[80] Although some cases existed where States paid reparations without committing unlawful acts, these were only *ex gratia*-payments and a duty to pay was expressly de-

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[77]Nuclear Tests Case (Austl. v. Fr.), 1973 I.C.J. 132 (June 22) (diss. op. of Judge Ignacio-Pinto); 1 Oppenheim, supra note 2, 509; I. Brownlie, 1 State Responsibility 50 (1983); E. Jiménez De Aréchaga, International Law in the Past Third of a Century, 159 R.C.A.D.I. 1, 273 (1978-I).

[78]Cf. Affair of Cosmos 954 (Canada v. U.S.S.R.), Jan. 23, 1979, 18 I.L.M. 899 et seq. (1979).

[79]Declaration on the United Nations Conference on the Human Environment, U.N. Doc. A/CONF. 48/14 (1972) at 7.

[80]Cf. Report of the Intergovernmental Working Group on the Declaration on the Human Environment, U.N. Doc. A/CONF. 48/PC 12, Annex II, at 15 (1971).

nied.[81] Even if such liability is recognized as customary law it would be limited to ultra-hazardous activities, which can be defined as abnormally dangerous and unusual[82] such as nuclear power stations. Agistanus' activities are not ultra-hazardous since agriculture and mining are usual development activities and not expected as abnormally dangerous.

2. Agistanus Is not Required to Pay for any Damages on the Basis of State Responsibility

Even if Agistanus' activities have violated international law, Agistanus is not liable on the basis of State responsiblity because, first, the responsibility of States for breaches of environmental law is not recognized as a principle of customary law and second, the prerequisites of responsibility are not satisfied in this case.

a) The Concept of State Responsibility Is not Recognized in Customary Environmental Law

Responsibility of States for breaches of environmental law is not recognized as customary law.[83] The absence of State practice is demonstrated by the Soviet Union's attitude after the Chernobyl disaster denying any responsibility in principle and es-

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[81] E.g. Agreement concerning the "Daigo Fukuryu Maru" Incident between Japan and the USA, Jan. 4, 1955, 237 U.N.T.S. 198; cf. A. Randelzhofer, Probleme der völkerrechtlichen Gefährungshaftung 24 BDGVR 35, 66 (1984); S. Erichsen, Der Ökologische Schaden im internationalen Umwelthaftungsrecht 78 (1993).

[82] P. Birnie & A. E. Boyle, International Law and the Environment 144 (1992); C.W. Jenks, Liability for Ultra-Hazardous Activities in International Law 117 R.C.A.D.I. 99, 107 (1966-I).

[83] Cf. O. Schachter, The Greening of International Law in Mélanges René-Jean Dupuy 272 (1991); B. Conforti, Diritto Internazionale 206 (3rd ed. 1987); M. Bothe & M. Prieur & G. Ress, Les Problèmes juridiques posés par les pollutions transfrontières 225 (1984); A. Rest, International Protection of the Environment and Liability 115 (1978).

pecially by the fact that no claims for reparations were raised by other States.[84] Also after the Sandoz accident no such claims were raised against Switzerland.[85] Furthermore, even in treaties aimed at the prevention of transboundary pollution, the question of responsibility is expressly excluded.[86] In addition judicial decisions often mentioned as precedents are inconclusive[87] as for example in the Gut Dam Arbitration[88] where the tribunal based Canada's liability on treaty obligations.[89]

b) Agistanus Is not Responsible for any Damages Resulting from its Development Activities

Even if the Court should hold that this concept exists, Agistanus is not liable since responsibility presupposes fault and Agistanus was not at fault. In the Corfu Channel Case this Court pointed out that the fact of pollution alone "neither in-

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[84]Cf. A. E. Boyle, Nuclear Energy and International Law: An Environmental Perspective 60 Brit. Y.B. Int'l L. 257, 296 (1989).

[85]Cf. Rest, supra note 68, at 173.

[86]Cf. Convention on the Protection of the Rhine against Chemical Pollution, 1977 July 25, 1977 O.J. (L 240) 51 et seq.; Convention on the Protection of the Marine Environment of the Baltic Sea Area, entered into force May 3 1980, Art. 17, 13 I.L.M. 546, 552 (1974); cf. A. Kiss, Present Limits to the Enforcement of State Responsibility for Environmental Harm, in International Responsibility for Environmental Harm 8 (F. Francioni & T. Scovazzi eds., 1991).

[87]Cf. Birnie & Boyle, supra note 82, at 145; G. Handl, Balancing of Interests and International Liability for the Pollution of International Watercourses 13 Can. Y.B. Int'l L. 156, 167 et seq. (1975); M. E. O'Connell, Enforcing the New Law of the Environment, 35 Germ. Y.B. Int'l L. 293, 304 (1992).

[88]Gut Dam Arbitration, Settlement of Claims (U.S.- Can.), exerpted in Report of the Agent of the U.S., Sept. 27, 1968, 8 I.L.M. 118 et seq. (1969).

[89]Cf. G. Handl, State Liability for Accidential Transnational Environmental Damage by Private Persons, 74 Am. J. Int'l L. 525, 538 (1980); J. Balleneger, La Pollution en Droit International 207 (1975).

volves *prima facie* responsibility nor shifts the burden of proof"[90]. The adherence to *culpa*, implied in this statement, is also reflected in works of most qualified scholars[91]. Fault includes either intension or negligence.[92] Agistanus was not negligently as it could reasonably rely on the IRADB. This institution is much experienced in such projects as it has in the past maintained projects in Behestoon and Agistanus.

c) The Damages Cannot be Attributed to Agistanus

Agistanus is not responsible since the damages cannot be attributed to it. They resulted from the IRADB's omission to inform Agistanus about the existence of the tar-like strata as a result of the geological exploration. An international organization is responsible for damages resulting from its actions[93] also when it has provided technical assistance to a State[94]. Behestoon cannot argue that the IRADB had acted as an agent and thus Agistanus remained responsible. The responsibility is especially excluded if the organization commited willful or reckless acts or omissions.[95] By not informing Agistanus about the

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[90]Corfu Channel Case, supra note 46, at 18.

[91]H. Grotius, De iure belli ac pacis, 433 (1939); 1 Oppenheim, supra note 2, 509; H. Lauterpacht, Private Law Sources and Analogies of International Law, 137 (1927); C. Eagleton, The Responsibility of States in International Law 209 (1928).

[92]Dahm, supra note 45, at 229.

[93]E. Lauterpacht, The Legal Effects of Illegal Acts of International Organizations in Essays in Honour of Lord McNair 88 (1965); D. W. Bowett, The Law of International Institutions 323 (3rd ed. 1975).

[94]W. Meng, Internationale Organisationen im völkerrechtlichen Deliktsrecht 45 ZaöRV 324, 338 (1985).

[95]Cf. e.g., Art. 1, para. 6 of Revised Standard Agreement Concerning Technical Assistance (UNO, ILO, FAO, UNESCO, ICAO, WHO,

significance and potential hazard of the strata for fear that it might withdraw the loan application, the IRADB has commited a willfull omission which is clearly inconsistent with the functions entrusted to it.

d) Agistanus Is not Obliged to Pay for the Ecological Detrimental Effects in Behestoon

Agistanus is not obliged to make monetary compensation for the ecological detrimental effects in Behestoon. Ecological damages are not compensable. This is clearly indicated by the argumentation in the Trail-Smelter-Case: even though it was undisputed that considerable ecological damage was caused by Canadian based smelting operations, the assessment of damages was based solely on the detriments affecting the economic use of property.[96] Domestic decisions argue alike, awarding compensation only for economic damage.[97] The effects to the river's flora and fauna and the drop of zoo-plankton are ecological damages that have not been shown to substantially affect any economic use.

The Government of Agistanus therefore asks the Court to declare and order:

1.) that Agistanus has a right to adopt all measures suitable to sustainable development of its natural resources, including the use of water courses for agriculture within its territory, and has conformed to applicable norms of international law;

2.) that Agistanus' use of water resources and response to the mining incident are not inconsistent with any environmental safeguards which Agistanus might owe to Behestoon under applicable principles of international environmental law;

3.) that Agistanus is not liable, and shall not have to pay, to Behestoon for any damages resulting from the dam or any of Agistanus' development activities.

ITO, WMO - Afg.), May 10, 1956, 243 U.N.T.S. 114; I. v. Münch, Das Völkerrechtliche Delikt 263 (1963).

[96]Cf. J. Wolf, Gibt es im Völkerrecht einen einheitlichen Schadensbegriff ?, 49 ZaöRV 403, 431-32 (1989).

[97]Cf. Kiss, supra note 86, at 6.