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"The Case Concerning Development and the Waters of the Ozoonio River"

Morad Eghbal*
The Riess Foundation, Washington, DC

Behestoon v. Agistanus

* Adjunct Professor of Legal and Ethical Studies, University of Baltimore, Baltimore, Maryland; B.A., George Washington University; M.A., George Washington University; J.D., Howard University; LL.M., McGeorge School of Law, University of the Pacific; Certificates in Advanced International Legal Studies from Inns of Court, School of Law, London, United Kingdom, Paris Lodron Universität, Salzburg, Austria, and Eötvös-Lorand University, Budapest, Hungary.

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Originating high in the mountain regions which form the northern-most border of Agistanus, the Ozoonio River is one of the most significant natural resources of the Gorgon Plateau region. From its mountain origins, the Ozoonio flows south, increasing in size as it traverses the Gorgon Plateau through the small nation of Agistanus. From there, it continues across the plateau to Behestoon, where it follows the lower two-thirds of its course, eventually meeting the rolling foothills which descend to Solonia Bay. At the mouth of the Ozoonio River lies the Bandeke Estuary, a prominent brackish water bay which serves as home to many unique species of wildlife and is an important resting place along the flyways for the many species of waterfowl which migrate yearly from the cool mountain regions in Agistanus along the Ozoonio River, to winter around the shores of Solonia Bay.

Agistanus is a relatively prosperous nation. It is landlocked and bordered on the north, east and west by mountain ranges of the Gorgon Plateau region. Agistanus' indigenous population, the Amahas, have been by tradition semi-nomadic herders of sheep, goats and other livestock on the arid plains. The late-twentieth century, however, has brought about a period of slow change in Agistanus, and the large majority of Agistanus' population of nearly 14 million people is now gathered in cities along the Ozoonio River, where a variety of industries have established themselves as an integral part of Agistanus' economy. The river also provides the primary source of drinking water for Agistanus' growing population. The industries rely heavily on the Ozoonio River as a resource for the water needed in manufacturing processes, and also for a thriving barge industry which carries the many products of Agistanus' industry down the Ozoonio River to Solonia Bay, where ships carry them to destinations around the world. Agistanus' manufacturing growth has helped the nation to establish a stable economic and political climate, and an economy substantially free of foreign debt.

Much of this growth is, in turn, attributed to the Beshini minority, who are well-known for their enterprising and industrious trading abilities. The Beshini, a native population of Behestoon, migrated to Agistanus in large numbers during the first half of the Twentieth Century as the withdrawal of colonial influences in Behestoon led to

widespread civil unrest in that nation. Following the Ozoonio River northward, they soon found themselves settling in Agistanus.

Having a long history of cooperation and friendly relations, the native Amaha welcomed the Beshini, and the two groups have lived in harmony for almost 50 years. The Beshini have assumed an important role in governing Agistanus, occupying the majority of governmental ministries. At the same time, however, they have assured the Amaha much involvement in the governing process, appointing several prominent Amahan representatives to lower-level cabinet and ministry positions. Today, nearly one-fourth of Agistanus' population are of Beshini descent.

Agistanus is a member of the United Nations, the Strategic Options Treaty Organization (SOTO), and a member of the World Bank Group (WBG) and its constituent institutions. SOTO is an independent, regional security organization for multilateral mutual military assistance to its member states, with five additional regional members, including the Nation of Behestoon.

Neighboring Behestoon developed much more quickly than Agistanus in its post-colonial period. Its exports, in recent years, had generated an annual net balance of payments surplus for the government. Behestoon's only primary import of any substantial cost is petroleum, which is refined domestically for national use. Behestoon buys occasional surplus electricity from neighboring nations, and has an extensive waste recycling and recovery program which employs thermal generators, and creates further energy for industrial use.

Behestoon also relies upon the Ozoonio River for much of the water used in its industrial processes and domestic service. While several prototype desalination plants were constructed along Solonia Bay in the 1980's, these provide now only about 10% of the water needed for the increased domestic and industrial consumption. The remaining water is drawn from the Ozoonio, which is also the depository of most of Behestoon's treated and untreated industrial and domestic waste. Behestoon is a non-aligned country, a member of the United Nations (UN) and the WBG, and is quite

powerful, with sophisticated technical and aerial reconnaissance capabilities.

In the early 1970's, with technical and administrative assistance provided by the WBG and its member institution, the Inter-Regional Agricultural Development Bank (IRADB), the Agistanus Ministry of Commerce commissioned a detailed and extensive survey to inventory the nation's natural resources. The stated purpose of the study was (1) to encourage better and more sustainable land and resource use and (2) to encourage the development of natural resources with a goal of improving and diversifying Agistanus' budding market economy.

A large portion of the resources set aside to conduct the study was dedicated to investigating possible agricultural development opportunities, as this was viewed as the best potential use for much of the land in Agistanus. The IRADB, which in the past has maintained projects in Behestoon and in Agistanus, undertook a series of pre-appraisal missions and a project appraisal. As part of the study, a team of experts engaged in an extensive exploratory drilling program in the bedrock of the mountainous regions and highlands of Agistanus in an effort to identify additional supplies of water that could be used for agricultural purposes. Due to inadequate technical advice and a lack of proper consultation at the time of the survey, the exploratory drilling program did not succeed as intended. Though some supplies of water were discovered, their source and origin were not identified and the quantities discovered were generally believed by the team of experts from IRADB to be either unusable or insufficient for the contemplated development projects.

In the course of this geological exploration a very significant body of strategic and rare earth minerals was also discovered in the mountain ranges of Agistanus, across the river from the most likely agricultural development sites. As the minerals discovered were in considerable demand on world markets, the team of experts concluded that this deposit of minerals was of a size large enough to be a potentially significant development opportunity.

Thus, the Ministry of Commerce concluded the report, and offered the following

recommendations:

1) That the agricultural development of the land formerly used by the Amahas as grazing land be undertaken in conjunction with the development of a domestic food processing industry to serve the growing needs of the region; and

2) That the body of strategic and rare earth minerals be developed and exploited commercially so that the end product could be sold on world markets.

In conjunction with these two primary goals, the report also concluded that:

(3) A dam should be built across the Ozoonio River:

a) to ensure sufficient quantities of water to allow successful irrigation of the arid Agistanus highlands;

b) to provide water for the extensive development of the mining and ore operations necessary to extract the strategic and rare earth minerals; and

c) to generate enough hydroelectric power for use by planned industries in Agistanus, with a surplus of electricity large enough to sell to neighboring nations, including Behestoon.

The report was well-received by the legislature of Agistanus, which provided the Ministry of Commerce with the authority to apply for and accept from the IRADB a construction and development loan equivalent to US$10 billion to build the dam across the Ozoonio, and to provide government assistance to developing industries related to the dam's construction. Agistanus placed much confidence in and relied on her many contacts with IRADB staff during the pre-appraisal missions and appraisal stage. The IRADB granted Agistanus' application in 1980, over objections and reservations filed by Behestoon with regard to certain effects the damming of the river might have on their domestic and industrial water usage. The loan funds were released the following year, subject to terms defined by the IRADB and described by

the staff of that organization as non-negotiable, standard international loan agreement terms for such ventures, which Agistanus was expected to adhere to strictly as a good faith assurance of repayment.

Among the terms of the loan were provisions that required:

1) the use of water from the reservoir formed by the dam for the proposed mining and agricultural development projects, as set forth in the survey commissioned by the Ministry of Commerce;

2) a certain amount of water, considered in excess of technically recommended levels for operation of such a dam, be maintained in the reservoir at all times to protect against drought and other agricultural emergencies, as well as to ensure that sufficient quantities of water were held in storage in the reservoir continuously for Agistanus to generate enough excess electricity for sale to meet its loan obligations should other development opportunities not prove successful;

3) that the construction and operation of the dam otherwise be conducted in such a way as to maintain a consistent flow of water downstream to Behestoon.

In the event Agistanus failed to comply with these terms, once accepted, the loan would be declared in default and the complete control of the dam facility would revert to the IRADB.

With the acceptance of the loan, work was initiated on the dam and other development projects. Agistanus levelled ground and felled whole stands of trees in preparation of the dam construction site and to increase the life span of the dam, once construction was concluded. To accommodate the terms of the loan, a large by-pass was built around the dam site, allowing the full flow of the Ozoonio to continue unimpeded during the entire construction process. The Namche Dam was completed in four years, and in 1986 the by-pass was closed and the reservoir gradually filled. When it reached capacity, the new project ranked as one of the five largest facilities

of its kind in the world, and was capable of generating 400% of the domestic power needs of Agistanus.

During the four-year construction period of the dam, vast progress was made in the conversion of the former Amahan rangelands to agricultural use, and in the establishment of mining facilities in the northern mountain ranges of Agistanus. When the water from the reservoir became available for use a couple of years later, the mining facilities were quickly made operational and the initial stages of agricultural production were also begun.

Over the next five years, ever larger acreage was successfully committed to agricultural use, creating a 500,000 acre (circa 202,347 hectars) agricultural region in the midst of what had formerly been semi-arid desert. An extensive irrigation system was employed, drawing water from the reservoir, applying it to the fields, and collecting the saline run-off by way of an intricate system of man-made channels and irrigation ditches for re-entry into the Ozoonio at a point just north of the border with Behestoon.

The food processing industry in Agistanus also grew quickly. By the summer of 1992, Agistanus had all but realized the full benefit of the installation, was meeting a substantial amount of the electric needs of the entire region, was producing enough food to create a budding export market, and had extracted and processed its first shipments of strategic and rare earth minerals for sale on the world market.

Receiving favorable rates from its neighbor, Behestoon increasingly purchased the electricity it needed from Agistanus, generated by the Namche Dam, making up about 20% of its domestic demand for electricity by 1992. Attempting to benefit also from Agistanus' economic progress and the increased barge traffic on the Ozoonio River, Behestoon established a number of bustling freight processing depots and forwarding terminals near the mouth of the Ozoonio, and constructed an extensive, new port facility on Solonia Bay as a trans-shipment point with berthing and containerization for ocean-going vessels. During this period, Agistanus made all

scheduled loan payments on time and, in the final accounting, was making a comfortable national profit on its investment.

But despite this economic boom, neighboring Behestoon appeared to suffer a corresponding and relative decline in its economic fortunes, much of which the governmental Ministries of Behestoon attributed to the economic development in Agistanus. While a portion of the decline could readily be attributed to a loss of regional markets to Agistanus, there seemed also to be evidence of a loss in productivity among the riparian agricultural lands of Behestoon, reduced river fishing stocks, periods of extreme eutrophication in the river, and increased costs in maintaining water treatment facilities. Despite the fact that the operation of the Namche Dam was in exact conformity with the technical requirements of the IRADB, including the maintenance of reservoir levels well in excess of those required for the minimum safe levels of operation for the dam, and the extensive efforts made to recapture water used for irrigation to re-introduce it to the Ozoonio, Behestoon charted a 33% decrease in the river's flow through Behestoon territory as of the date the by-pass was closed and the dam became operational. The cumulative nature of these effects suggested that there was more to Behestoon's economic decline than a simple loss of markets.

The Prime Minister of Behestoon complained to the relevant officials in Agistanus, and expressed concern as to the state of affairs which appeared to be developing in Behestoon as a result of Agistanus' use of the river. Preliminary testing of the river, she noted, suggested that increased levels of pesticides, herbicides, nitrates, estrogen-based enzyme compounds, and other agricultural chemicals, of the very varieties Agistanus had used in its agricultural practices, were present in the river. She expressed her government's fear that continued increases of such chemicals could lead to health concerns in Behestoon, as well as potential agricultural problems and damage to the many sensitive aquatic species which inhabited the brine marshes of Solonia Bay and the Bandeke Estuary. In particular, Behestoon was

concerned about the risk to a species of zoo-plankton which, in the past five years, had shown a substantial drop in population and was now threatened with extinction. As zoo-plankton formed the foundation of the aquatic and pelagic food-chain in Solonia Bay and the Bandeke Estuary, serious concerns arose on Behestoon's part that further declines could endanger the future of their entire fishing industry. The Ministry of Environment in Behestoon had suggested that were the flow of the river to be returned to previous levels, the increased flow would likely alleviate most of the problems by providing sufficient quantities of water to dilute the harmful levels of contaminants in the Ozoonio River.

The complaints, however, fell upon deaf ears. As there was no shortage of drinking water in Behestoon, and as minor increases in the levels of agricultural chemicals were anticipated from the start of the project, the government of Agistanus explained that there was, quite simply, nothing about Agistanus' activity of which Behestoon could reasonably complain. The President of Agistanus, prospering politically from the nation's good fortunes and facing an impending election, further denied any responsibility for the problems, citing Behestoon's own agricultural activity as the source, and reminded Behestoon that Agistanus was acting fully within its international rights to develop its resource in a sustainable manner. Furthermore, he stated, Agistanus was powerless to change the operation of the Namche Dam or its other development plans due to the limitations contained in its loan agreements, and therefore, Behestoon should look elsewhere for a solution to its problems.

Meanwhile, another successful growing season passed in Agistanus, and the development and production of the mining operations proceeded on schedule. However, on Friday, August 13, 1993, while crews were working underground a sub-terranean temblor of medium severity occurred which laid bare a strata of tar-like substance and an extensive, water-bearing fissure. Water spewed forth from that fissure with such force that large portions of the mine were flooded quickly. Within 36 hours, huge quantities of malodorous, highly mineralized and corrosive water filled

the mine in quantities estimated to exceed 4.5 million gallons (circa 18 million litres), although, due to the fact that most of the flooding occurred underground, precise figures could not be obtained. The crews working the sole of the mine were forced to withdraw due to the high levels of toxic fumes which were being exhaled through the entrance of the mine from the depths below. The corrosive liquids which formed from the mixture of the tar-like substances and the water began to ooze quickly through naturally occurring and man-made fractures in the rock, eventually penetrating the surface of the mountain to join streams which flowed south, draining into the Ozoonio River just below the Namche Dam. Upon entering the river, the corrosive mixture formed a visible toxic plume which moved slowly downstream toward Behestoon.

The government of Agistanus attempted to contain the toxic spill. Failing to succeed due to a lack of appropriate equipment and technology and due to the size of the spill, however, it decided to quash all reports of the disaster in its national press, officially describing the situation as a minor incident and fully under control. Two days later, however, the Ministry of Environment in Behestoon noted the sudden occurrence of low-level, and fast increasing, unidentified toxic substances at one of its sampling sites along the Ozoonio, just south of the border with Agistanus. An official government inquiry by Behestoon as to the nature of the toxic substances, and their possible relation to the disaster, was coldly met by the President of Agistanus. He explained again that no activity within the territory of Agistanus was the cause of any damage in Behestoon, and that the incident was minor in nature and certainly not the cause of any downstream water quality problems.

Concerned that the government of Agistanus was not being entirely truthful, the Prime Minister of Behestoon dispatched two aerial reconnaissance flights into the territory of Agistanus to conduct extensive photo reconnaissance of the Ozoonio River north of the Behestoon border, and of the site of the disaster itself. In addition, a small team of military scientists was dispatched by boat under cover of night to

extract water samples from the river north of the border in the territory of Agistanus, as well as within several of the man-made agricultural tributaries leading to the Ozoonio River. Both missions were conducted successfully and without detection.

The results of the tests confirmed the presence of large quantities of highly toxic, unidentified hydrocarbon-based substances in the river, as well as highly toxic levels of agricultural chemicals in the irrigation return streams leading to the river. The accompanying aerial photographs charted what was clearly a large, grey plume emanating from several streams which originated near the mine operations, entering the Ozoonio River just below the Namche Dam and increasing in intensity just north of Agistanus' southern border with Behestoon. The plume grew in size as the river carried it southward toward Behestoon, and would, it appeared, cross the border into Behestoon within the week. Disturbed at these findings, the Behestoon Ministry of Foreign Affairs immediately released the test results and photographs accumulated from its recent reconnaissance missions to the press, precipitating an embarrassment to the government of Agistanus.

Finding itself under sudden pressure to alleviate international concerns over the incident at the mine, Agistanus voluntarily initiated high-level diplomatic meetings with the Behestoon Ministries of Natural and Water Resources, Foreign Affairs, and Environmental Protection aimed at developing a "rapid-response approach" to containing the river contamination. When two days had passed and no agreement could be reached as to possible joint actions, the Prime Minister of Behestoon openly blamed Agistanus for the occurrence of the situation, and accused Agistanus of worsening the problem by stalling. As the appropriate time to build containment structures or otherwise block the flow of the plume had now passed, the Prime Minister of Behestoon suggested that Agistanus open the valves of the dam to release a greater quantity of water into the river in hopes of diluting the plume and reducing its toxicity. In response, the President of Agistanus explained that his advisors had determined that there was not sufficient water in the reservoir to dilute the plume,

despite the excess capacity that was maintained under the terms of the loan agreement. Citing the facts that such a release would likely flood large quantities of as yet unharvested land, disrupt hydroelectric power generation and cause Agistanus to violate the terms of its loan agreement with the IRADB, Behestoon's proposal was rejected out of hand.

Meanwhile, the plume traveled slowly downstream into Behestoon, leaving a trail of dead flora and fauna in its wake. Scientists from Behestoon's Ministry of Environment were dispatched to gather additional samples of the water in the plume, as it had crossed the border into their nation. The analysis of this second set of samples revealed the presence of additional toxins -- in particular, an unidentified substance occurring in large quantities, and which appeared to fall into the category of polycyclic aromatic hydrocarbons. This new revelation caused great concern among Behestoon's governmental authorities, as the presence of even small amounts of these substances are thought to be responsible for high rates of malnutrition, spontaneous abortions, cancer, birth defects, and other health-related problems linked to contaminants and considered so toxic that the World Health Organization (WHO) considers any detectable amount at all to be an unacceptable risk.

As the plume continues its destructive journey downstream, Behestoon has been forced to begin closing its water treatment plants along the Ozoonio for fear that the substances contained in the toxic plume might cause irreparable damage or contamination to the facilities themselves. The scientists on both sides are still at a loss as to the source of the dangerous toxins. The working presumption, albeit inconclusive, is that a spontaneous chain reaction may have occurred when the toxic plume moved downstream and met residual agricultural contaminants, just after the Ozoonio River meandered into Behestoon's territory. This appears to have precipitated the reaction giving rise to the formation of the highly toxic substances.

Concerned at the apparent inability to prevent an impending and dangerous environmental threat, the Prime Minister of Behestoon convened an emergency

cabinet meeting. Though a direct covert operation to take control of the dam and release the excess flow necessary to dilute the plume was considered, calmer heads prevailed and the Prime Minister appealed to the SOTO Council of Ministers for assistance, with the suggestion that SOTO, instead of Behestoon's paramilitary forces, take control of the Namche Dam and its facilities and open the flow for a period of time sufficient to dilute the toxic plume.

Restating its previous position, Agistanus again rejected any notion that SOTO take command of the dam and its facilities, and suggested, instead, that the decision to open the valves of the dam be left to the IRADB. In its recent contacts with the IRADB, however, Agistanus has discovered accidentally, in perusing a number of communications it received back from the bank, following inquiries on what actions to take in this crisis, that the presence of the tar-like strata and fluids circulating through them was apparently known to the IRADB's technical team. Its existence was discovered in the course of exploratory drilling during the national resource survey and pre-appraisal missions, but neither its size nor dimensions were adequately explored. On advice of IRADB's team of consultants, technicians, and experts, its significance and potential hazard had been de-emphasized and hardly mentioned in the study for fear that Agistanus might withdraw the loan application. In the end, the IRADB had no environmental impact review requirements in place from which to examine such potential effects in advance and project remediation measures in the event of an accident. Through unknown means, documentation of this information has been leaked to Behestoon.

Agistanus has surmised that the IRADB would refuse to waive the review requirement, as the situation indicates that grounds reasonably exist to suggest that Agistanus' own needs for its crops, and water costs or other economic problems, stemming from the environmental crisis, might increase demand on regional economic resources. Therefore, Agistanus' capability to sell electricity in the highest possible quantities would be essential to the success of the repayment program, thus providing

Agistanus a way both to maintain the loan requirements and to address the environmental crisis.

Behestoon, remembering its original opposition to the construction of the dam and that it had not succeeded to dissuade the IRADB from granting Agistanus' loan application, rejects the proposal that the IRADB decide the projected remedy in this case.

SOTO's Council of Ministers, concerned about the potential pitfalls inherent in the situation and reluctant to tolerate tacitly the use of military force between its members, however limited it might be, suggested that the matter be more appropriately taken up by the United Nations. The Council of Ministers referred the Prime Minister to the Office of the UN Secretary General, with a pledge to offer any assistance that good office might require.

After consultation with the UN Security Council and the United Nations Environment Programme (UNEP), the United Nations Secretary General dispatched a team of international environmental experts from the combined offices of UNEP and the United Nations Development Programme (UNDP) to the site, with instructions to develop an immediate response plan to work out appropriate containment responses for the toxic clean-up, and to take steps to implement that plan if possible in order to avert an escalation of the situation. Nevertheless, the perils posed by the toxic broth remain severe and urgent, as the foul mixture continues its course downstream toward Solonia Bay.

Through the intervention of the United Nations Secretary General, Agistanus and Behestoon have now agreed to cease and desist from any hostilities, one against the other, to accept compulsory jurisdiction of the International Court of Justice and to submit their dispute on this compromis to the International Court of Justice for final resolution. Both, Behestoon and Agistanus are signatories of Agenda 21, the Rio Declaration, and the Stockholm Declaration. No relevant treaties relating to toxic substances have been signed between these parties.

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

1.) that Behestoon has a right to the continued, 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 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.

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 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.