

**Susan J. Ferrell Intercultural Human Rights
Moot Court Competition**

Problem 2012-2013

THE YAGO RIVER CASE

AKOPIA V. ROWAN

1. Rowan is a landlocked, developing state that enjoys amicable relations with its neighboring nation-states. It has recently attracted the attention of several multinational corporations (“MNCs”) for its fertile soils capable of generating high yields of agricultural production. In an effort to attract foreign investment to Rowan, Rowan’s President Petro Rumulan (“Rumulan”) and its national government officials have entered into several bilateral investment treaties (“BITs”) with various developed states. The BITs serve as a guarantee to possible future investors that their investments will be protected under international law.
2. Many Rowanians, although desirous of the benefits that foreign investment could represent to a developing country such as Rowan, have been at least skeptical, if not openly opposed to the continued presence of the MNCs in their state. They claim their land and natural resources are being unjustifiably expropriated and sold off to investor corporations by the Rowanian government in exchange for the potentially elusive promise of future economic prosperity in the region. The most vocal protest group, the Rowanians Against Misappropriation (“RAM”), has led both non-violent and violent demonstrations against Rowanian governmental authorities and various MNCs’ facilities in Rowan.

3. In 2008, Rowan entered into a BIT with the State of Akopia, which is a highly developed state replete with able and willing investors. It guaranteed fair and equitable treatment, total protection and security, safeguards against unlawful expropriations, as well as other protections of investors from one of the contracting parties, including any of their contractual rights, as specified in the BIT which is attached to this problem (Annex 1). In 2009, Agromist Corporation (“Agromist”), a corporation with its headquarters in Tamara, the capital of Akopia, entered into an investment contract with Rowan. The Agromist-Rowan Contract for the Production of Sugar Cane (“ARC”) was signed by Agromist’s Chief Executive Officer (“CEO”) Ronald King (“King”) and Rowanian President Rumulan.
4. Under the terms of the ARC, Agromist purchased 10,000 hectares of state-owned fertile land in the southeastern part of the country, at a price of U.S. \$100 million, for the exclusive purpose of Agromist’s growing sugar cane. Agromist intended to turn the crop into sugar and export the majority of its finished product. A minimum of 15% of Agromist’s annual production of sugar was guaranteed to be purchased by Rowan for its domestic consumption at a price of 10% below the world market price for sugar. In addition, Agromist was to employ a minimum of 1,000 workers in the cane fields and train twenty Rowanians at its headquarters in Tamara for future management positions with the Rowan branch of Agromist. The government of Akopia guaranteed work visas for the trainees and their families.

5. As set forth in the ARC, Rowan guaranteed Agromist full access to the necessary water resources and the issuing of all required licenses and permits to ensure the efficient operation of the corporation. Rowan was to build a pipeline that would channel water from the Yago, the main river of Rowan, directly to the cane fields. Claiming the need to complete the necessary studies for issuing the environmental impact statement for this project required under its domestic legislation, the Rowan government, however, failed, as of yet, to provide the necessary permits for the construction of the pipeline or the license for the use of water by Agromist. At its own expense, Agromist built a highly sophisticated water pipeline with connecting system lines, an effective irrigation system that funnels water from the river Yago directly into Agromist's production fields and facilities.
6. Since early 2012, Rowan citizens have suffered from the effects of a severe drought, resulting in ongoing water shortages and several deaths. Although Rowan is prone to droughts and this was not the first natural crisis of its kind, Agromist's funneling of a substantial part of the Yago River's water to its cane fields exacerbated the problem. Also, a key ingredient of President Rumulan's election platform has been to spur the development of Rowan by building a dam for the generation of hydroelectric power, a much needed source of energy for the country. Local food producers now urge President Rumulan to construct the dam as soon as possible in order to curtail Agromist's "excessive use" of the Yago water, a use which endangers their very survival.
7. In an effort to calm the Rowanian citizenry, President Rumulan wrote a letter to Agromist CEO King asking the company to reduce its water usage to help

ameliorate the situation until drought conditions improve in Rowan. Citing to the ARC, King refused to heed Rumulan's requests and continued its agricultural operations in Rowan at full capacity. Rumulan responded by threatening to bring an action in the International Court of Justice against Akopia for human rights violations against his most vulnerable citizens. Rumulan claimed that Agromist's excessive use of water turned the drought situation in Rowan into a national emergency with escalating numbers of children and families either extremely sick or already deceased.

8. As conditions in Rowan worsened, violent protests erupted on the premises of Agromist facilities in response to the drought and the corporation's abuse of the scarce water resources. The leader of RAM, Omar Gabriel ("Gabriel"), directed the demonstrations and incited the Rowanians to take action against not only Rumulan and his government, but Agromist as well. Gabriel claimed Agromist and its facilities misused Rowan's natural resources in complicity with the corrupt government of President Rumulan.
9. RAM had on prior occasions complained to the government of Rowan, but Rumulan and his peers did nothing to fix the situation. Dissatisfied with the lack of progress, Robert Hassan ("Hassan"), RAM's second-in-command, had begun to form a militia to overthrow President Rumulan and take over RAM. Rowanian intelligence agents discovered Hassan's plans and Rumulan ordered Hassan's arrest, but he eluded capture and disappeared. Rumulan ordered a hasty trial, in absentia, which found Hassan guilty of treason and sentenced him to death. In an effort to squelch the growing dissent and secure reelection, Rumulan decided to

make good on his campaign promises to build the dam. A welcomed secondary effect of the dam was to block off Agromist's unimpeded access to the Yago River, causing a substantial reduction of the flow of water to its cane fields. The plans to build the dam were finished quickly, and construction of the dam began.

10. Prior to the construction of the dam, Agromist was attacked by a group of RAM extremists who bombed several of its sugar mills which resulted in a loss of millions of dollars to the company. Agromist CEO King complained to President Rumulan via a letter dated March 2012. Specifically, King claimed that Rumulan's inability or unwillingness to deal with the hostilities against Agromist constituted a direct violation of the ARC. President Rumulan responded by stating that his government had no control over RAM. Further, Rumulan accused Agromist of unlawfully operating its facility without the proper licenses to access quantities of water not contemplated in the ARC, drawing on an unlicensed design of a pipeline not approved by his government.

11. As a direct result of the bombing of Agromist's sugar mills, its sugar production decreased by 50%. In response, CEO King decided to reduce the number of workers and laid off 600 Agromist employees, 500 of which were Rowanian employees who worked in the cane fields. These employees did not hesitate to speak out against Agromist and complained that while they worked for Agromist they suffered from unequal treatment and racial discrimination. The ex-employees, who also claimed that Agromist paid them below Rowan's minimum wage, picketed with RAM outside of Agromist facilities. They also alleged that

all of Agromist's actions were taken with the knowledge of Rumulan and his government.

12. RAM leader Gabriel, who sought the Presidency in the upcoming elections, authored a video on the Internet showcasing the worsened conditions of Rowan caused by corrupt foreign investment and the misuse of Rowan's natural resources at the hands of Agromist. It presented the degrading work experiences of the Rowanian ex-employees and displayed Agromist as ruthlessly insensitive to the growing national disaster caused by the drought as it continued to funnel massive amounts of water from the Yago River. The video also displayed horrific images of torture and even death, allegedly inflicted by Agromist, on supposed instigators of the labor unrest. The video went viral and was seen all around the world. The negative publicity caused Agromist stock to plummet to an all-time low in April 2012. The unexpected notoriety of Agromist in Rowan worried its Board of Directors in Tamara. They formed an investigation team to fly to Rowan to take control of the daily operations of Agromist before the investment in Rowan deteriorated further. All visa petitions for the Akopian nationals were, however, denied by the Rowanian government and they were not able to travel to Rowan.
13. During this upheaval in Rowan, the President of Akopia, President Louis Arquimides ("Arquimides"), received an unannounced visit from Hassan. Hassan, in exchange for asylum, offered Arquimides information regarding a RAM sleeper cell in Akopia, poised to inflict mass destruction within the country. Arquimides, at the advice of his defense experts, agreed to Hassan's terms.

Hassan presented President Arquimides with a video of Gabriel speaking to the twenty Rowanian trainees in Tamara, originally broadcast over an encrypted webpage. In the footage, Gabriel ordered “his soldiers” to begin “Phase One” and promised they would be rewarded for destroying the “elitist filth” of Akopia. Gabriel also bragged that he tricked the world into believing a video filled with images of human suffering, death, and torture was done at the hands of Agromist. “But, my children, my soldiers, you know that video documented *our* camps—what was done to our enemies—as punishment for their disobedience.”

14. Out of concern for Akopia’s national security, President Arquimides ordered the immediate detention of the twenty Rowanian trainees and their families. Twenty-four hours later, he expanded his order to include all Rowanian citizens and Akopia citizens of Rowanian descent. The executive order mandates that the detainees were to be held in makeshift camps until the threat dissipated. Arquimides sent notice of this emergency order to the Secretary-General of the United Nations. Within days, three camps were erected housing nearly 1,000 individuals. President Rumulan demanded that Akopia extradite Hassan and release its citizens. President Arquimides refused to comply.
15. At this point, Agromist was unable to sell its sugar at world market prices, as RAM’s video, disseminated around the globe, had led to a boycott of its products worldwide. Drought conditions continued as the construction of the dam was underway in Rowan. The drought, the construction of the dam, and the additional expenses by the Rowanian government to deal with its domestic and foreign crises had taken a huge toll on the Rowanian economy. The Rowanian currency

- suffered a substantial devaluation. CEO King demanded that Rumulan take delivery and pay for the agreed upon 15% of Agromist's production at 10% below the world market price, as set forth in the ARC.
16. Lost in this dispute, at least initially, were the Khuta. The Khuta are Rowan natives who describe their history as beginning when the first ray of light broke through the darkness of the land. They emerged from Nanih Waiya, a large mound of earth thirty feet tall and 160 feet wide. The Khuta explain that the mound was originally under water in the Yago River and that their ancestors lived there as beautiful fish of brilliant colors. Over time, the Yago began to recede and Nanih Waiya became part of the Yago's bank, standing tall above the water. The Khuta followed Nanih Waiya and learned to walk the earth.
 17. In line with their traditions and oral history, the Khuta live solely off of the land, refusing to eat any life found in the Yago. At every new phase of the Moon, the Khuta stand in the shallow waters of the Yago and offer blessings to those who came before. Marriages and births also take place in the same shallow area of the Yago. When a member of the Khuta tribe ceases to walk the land, he is first washed in the Yago, and then buried inside Nanih Waiya. The Khuta explain they are returning the body to where the spirit began. The Khuta have respected these traditions and lived peacefully since the beginning of the light.
 18. Rowan and the Khuta entered into a solemn treaty 112 years ago, declaring large parts of the West Bank of the Yago River in the northwestern corner of Rowan, as Khuta territory (see Map – Annex 2). The Khuta also consider these lands their own since time immemorial. Whenever Rowan desired use of Khuta land, it sent

a delegate to broker an amicable agreement. However, all of this changed when Rowan government employees started the Yago River Dam construction. One early morning, the Khuta awoke to the sound of Nanih Waiya being leveled to the ground. As they attempted to shield the sacred site from the onslaught of Rowan's bulldozers, Rowanian soldiers threw them down and placed guns to their heads. The Khuta could only watch as Nanih Waiya was destroyed by the hands of those they had trusted.

19. Additionally, the dam, when completed, is expected to cause the water in the Yago to rise upstream from the dam and cover a significant portion of the near-by lands of the Khuta tribe displacing them forever from key parts of their homeland. Most recently, however, the Khuta were apprised of International Law Association Resolution No. 5/2012 of August 30, 2012, cited as evidence of their collective human rights under customary international law. They see their rights to their traditional lands as violated by the flooding of their lands resulting from the dam construction; also, their customary international law right not to be relocated without their free, prior, and informed consent was, in their eyes, clearly breached. In addition, they claimed a violation of their rights under the treaty with Rowan.
20. Agromist can no longer fight the impending bankruptcy of the corporation as they are now faced with Rumulan's inability to pay and the loss of 50% of its investment due to the bombing attack. With Gabriel's video foreclosing the possibility of any future investment in Rowan, Agromist's shareholders in Tamara urge Akopian leaders to take legal action against Rowan. Some Akopian citizens

have already lost their lives' savings when Agromist's stocks plummeted. As Agromist is Akopia's most important corporation, bankruptcy would create economic disaster within the Akopian society. In an effort to prevent this, President Arquimides decides to take action on behalf of Agromist against Rowan.

21. President Arquimides writes President Rumulan a letter urging Rowan to compensate Agromist for the destruction of the sugar mills and all other damages sustained by Agromist as a result of the incident. Additionally, he requests that Rumulan take legal action against RAM. In addition, Rowan is asked to stop construction of the dam blocking Agromist's use of water for its sugar production and to provide Agromist with all appropriate licenses and permits as promised under the ARC. In exchange, the company would release Rowan from its commitment to purchase 15% of Agromist's sugar production.
22. Rumulan refuses any such conditions and accuses Agromist of violating the ARC by operating without a license, using excessive amounts of water, and discriminating against Rowanian employees. Rowan claims that Agromist's malicious firing of Rowanian employees added to the already bad conditions of the Rowanian economy. Furthermore, Rumulan argues that Agromist should have decreased its sugar production when asked to do so by his government in response to the drought, and that not doing so has contributed to the escalation of conditions into a national crisis. Furthermore, Rowan demanded the release of all Rowanian citizens arbitrarily detained in Akopia and the extradition of Hassan.

23. As neither state was willing to negotiate, Akopia, on behalf of Agromist and all Akopian citizen shareholders, instituted proceedings against Rowan in the International Court of Justice. Akopia claims that Rowan violated the BIT and the ARC, resulting in significant physical and economic injuries to Akopia for which it seeks just compensation. Also, acting on behalf of the Khuta and their collective human rights, Akopia claims that Rowan violated the Khuta's right to their traditional lands and the principle of free, prior, and informed consent.
24. Rowan contends that the ICJ has no jurisdiction, and that at best the claims put forward by Akopia on behalf of the Khuta people are not admissible. In addition, Rowan denies all of Akopia's claims regarding the violations of the BIT and customary international law. If the ICJ found that it had jurisdiction, it also had to conclude that Akopia had violated the rights of the Rowanian citizens and its own citizens of Rowanian descent not to be arbitrarily detained.
25. Both states are active members of the United Nations and have ratified the International Covenant on Civil and Political Rights and the Vienna Convention on the Law of Treaties. Additionally, in 2010 both states endorsed the 2007 United Nations Declaration on the Law of Indigenous Peoples.
26. In 2000, both Akopia and Rowan had submitted individual declarations recognizing the jurisdiction of the International Court of Justice in accordance with Article 36(2) of its Statute. Rowan, however, had reserved that it would not accept the jurisdiction of the International Court of Justice in relation to matters regarding its domestic economy.

27. Akopia, the Applicant, asks the Court to adjudge and declare that:

- a. The International Court of Justice has jurisdiction to adjudicate this dispute;
- b. The case is admissible;
- c. Rowan has violated the BIT in place between the two states by planning and starting to construct a dam that will substantially impede the water flow from the Yago River to the agricultural facilities of Agromist, an Akopian corporation, in violation of the ARC between Agromist and Rowan;
- d. Rowan further violated the BIT by failing to stop, investigate or prosecute local protestors that destroyed Agromist facilities and caused millions of dollars in damages;
- e. Rowan has violated international law by depriving the Khuta of their traditional lands without their consent and compensation;
- f. Akopia did not violate international law by detaining Rowanian citizens in Akopia as well as its own citizens of Rowanian descent that were deemed to be a clear threat to national security;
- g. Akopia was under no duty to extradite Robert Hassan; and
- h. Rowan has to compensate Akopia under international law for all losses resulting from the incidents causing injury to Agromist.

28. Rowan, the Respondent, asks the Court to adjudge and declare that:

- a. The International Court of Justice has no jurisdiction to adjudicate this dispute;
- b. The case is inadmissible;
- c. Rowan did not violate the BIT by starting to construct the dam as this project was clearly within its sovereign rights of development and, as a matter of necessity, was done in response to the severe drought causing a shortage of water endangering the survival of the nation;
- d. Akopia's national Agromist's claim of violation of the BIT was negated by its failure to secure the appropriate water licenses and permits, by building an unlicensed pipeline, and by using excessive amounts of water in their irrigation of sugar cane fields;
- e. Rowan did not violate international law by failing to prosecute protest groups such as RAM, because Rowan respects and adheres to international human rights guaranteeing free speech and assembly;
- f. Akopia has violated international law by blanketly detaining and placing Rowanian nationals in internment camps;
- g. Akopia has failed to extradite a wanted Rowanian criminal fugitive, Robert Hassan, in violation of its obligations under international law; and
- h. Rowan is not liable for damages to Akopia as Agromist's actions and refusal to mitigate conditions caused the incidents that led to its injury.

ANNEX 1

TREATY BETWEEN THE GOVERNMENT OF AKOPIA AND THE GOVERNMENT OF ROWAN CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT [Excerpts]

The Government of Akopia and the Government of Rowan (hereinafter the "Parties");

Desiring to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;

Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;

Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration;

Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

Article 1: Definitions

...

"investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

“investment agreement” means a written agreement between a national authority of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

- (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;
- (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or
- (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.

...

Article 5: Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
 - (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the

principle of due process embodied in the principal legal systems of the world;
and

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law. ...

Article 6: Expropriation and Compensation

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment].

...

Article 10: Umbrella Clause

Each Contracting Party shall comply with any other obligation that it has entered into in relation to the investments of nationals or companies of the other Contracting Party in its territory.

...

Article 12: Investment and Environment

1. The Parties recognize that their respective environmental laws and policies, and multilateral environmental agreements to which they are both party, play an important role in protecting the environment.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws in a manner that weakens or reduces the protections afforded in those laws, or fail to effectively enforce those laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

...

Article 16: Non-Derogation

This Treaty shall not derogate from any of the following that entitle an investor of a Party or a covered investment to treatment more favorable than that accorded by this Treaty:

1. laws or regulations, administrative practices or procedures, or administrative or adjudicatory decisions of a Party;
2. international legal obligations of a Party; or
3. obligations assumed by a Party, including those contained in an investment authorization or an investment agreement.

...

Article 20: Essential Security

This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.

...

Article 37: State-State Dispute Settlement

1. Subject to paragraph 5, any dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted on the request of either Party to the International Court of Justice for a binding decision in accordance with applicable rules of international law. ...

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at Tamara, Akopia this 28th day of January, 2008.

ANNEX 2

