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

**Case of Beaked Whales and
Marine Seismic Surveys**

The Kingdom of Aduncus,

Applicant

v.

The Republic of Mersenne,

Respondent.

Fall Term 2009

Memorial for the Applicant

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STATEMENT OF JURISDICTION

The Kingdom of Aduncus and the Republic of Mersenne submit the following dispute to the International Court of Justice (“ICJ”). Pursuant to Article 40, paragraph 1 of the Statute of the ICJ, States may bring cases before the Court “either by the notification of the special agreement or by a written application addressed to the Registrar.” Statute of the International Court of Justice, Art. 40(1), T.S. No. 933 (1945). The parties signed a special agreement to submit their dispute to the Registrar of the Court. *See* Special Agreement Between the Kingdom of Aduncus and the Republic of Mersenne for Submission to the International Court of Justice of Differences Between Them Concerning Beaked Whales and Marine Seismic Surveys, signed at Granada, Spain, on 16 June 2009. (Record [“R.”] 2). The Registrar acknowledged receipt of the joint notification on 30 June 2009. (R. 2).

QUESTIONS PRESENTED

- I. Did Mersenne violate its international obligations by conducting seismic surveys in the Sedna Sea that caused environmental and economic harm to its neighboring State?
- II. Does international law require Mersenne to assess the environmental impact of its seismic surveys considering that these surveys cause transboundary and environmental harm?
- III. Does the doctrine of necessity fail to excuse Mersenne's violations of its international obligations?

STATEMENT OF FACTS

The Kingdom of Aduncus (“Aduncus”) is a small developing country on the coast of the Sedna Sea that both champions and depends on a healthy marine environment. (R. ¶¶ 1-2). Due to the popularity of its whale-watching and resort industries, ecotourism is the second-largest source of income in Aduncus. (R. ¶¶ 2, 19, 21). In order to continue this growth, Aduncus has designated the southern half of its Exclusive Economic Zone (“EEZ”) as a Marine Protected Area (“MPA”). (R. ¶¶ 2, 4). Aduncus has also signed the Convention on Environmental Impact Assessment in a Transboundary Context (“Espoo Convention”), the United Nations Convention on the Law of the Sea (“UNCLOS”), the Convention on Biological Diversity (“CBD”), and the International Convention for the Regulation of Whaling (“ICRW”) to further its preservationist goals. (R. ¶¶ 6-11).

Mersenne is a large developed nation that shares a territorial and marine boundary with Aduncus. (R. ¶ 1). Like Aduncus, Mersenne is a contracting party to the aforementioned international agreements. (R. ¶¶ 6-11). However, unlike Aduncus, Mersenne has declined to establish an MPA. (R. ¶ 5). In 2007, the state-owned power company Mersenne Electric Company (“MECO”) failed to import adequate oil and gas supplies. (R. ¶ 3). This energy shortage, combined with the global financial crisis in 2008, resulted in an economic downturn. (R. ¶ 3).

In December 2007, Mersenne granted MECO permission to conduct seismic surveys 250 nautical miles from Aduncus’s EEZ to locate potential natural gas and oil reserves. (R. ¶ 17). Aduncus expressed concern that the seismic surveys would harm local beaked whales and Aduncus’s ecotourism industry, and asked Mersenne to comply with its Espoo Convention duties by conducting an environmental impact assessment (“EIA”). (R. ¶ 19). Mersenne refused,

asserting that the seismic surveys were necessary for energy independence and national security. (R. ¶ 20). Aduncus reiterated its concerns and asserted that Mersenne's actions violated the Espoo Convention, UNCLOS, and the CBD. (R. ¶ 21). In response, Mersenne denied that the Espoo Convention required an EIA and counterclaimed that it had mitigated any harm by slowly ramping up the airgun arrays' intensity. (R. ¶ 22). MECO continued its seismic surveys throughout the ensuing diplomatic rounds. (R. ¶ 23).

On January 15, 2009, twelve beaked whales stranded themselves on Mersenne's shoreline, twenty kilometers from Aduncus's MPA. (R. ¶¶ 23-24). Every whale ultimately perished. (R. ¶ 24). Aduncus deplored Mersenne's reckless indifference to marine life and its creation of transboundary harm. (R. ¶ 25). It again urged Mersenne to halt the seismic surveys pursuant to its treaty obligations and the precautionary principle, and pointed to the causal connection between MECO's conduction of surveys a week earlier and the subsequent strandings. (R. ¶ 25). Mersenne denied that it had contravened the precautionary principle or that the deaths of the whales had a transboundary impact, and further stated that any violation was excused by the doctrine of necessity. (R. ¶ 26). Mersenne also claimed its new mitigation measure—visual monitoring—would alleviate harm. (R. ¶ 26).

The parties submitted the question of whether the seismic surveys had resulted or were likely to result in significant adverse transboundary impacts to an inquiry commission. (R. ¶ 27). One member found that MECO's activities had such an impact, one found that there was no such impact, and the final member found that although there may have been such an impact, the aforementioned mitigation measures made it unlikely that the impacts would recur. (R. ¶ 28). Additional negotiations between Aduncus and Mersenne failed to resolve the dispute, and the parties agreed to submit the matter to this Court. (R. ¶ 30).

SUMMARY OF ARGUMENT

1. Mersenne breached its binding treaty obligations and customary international law when it improperly conducted harmful seismic surveys in the Sedna Sea. The pollution created by the surveys injured the environmental and economic well-being of Mersenne's neighboring State, Aduncus.
2. Mersenne is required to conduct an EIA under its treaty obligations and customary international law because the noise produced by the seismic surveys causes both transboundary and environmental harm.
3. Mersenne's failure to comply with its international obligations is not excused by the doctrine of necessity. It has failed to allege that its seismic surveys are the "only way" for it to protect its national security, and its actions impair Aduncus's economic and environmental interests.

ARGUMENT

I. MERSENNE VIOLATED INTERNATIONAL LAW BY CONDUCTING SEISMIC SURVEYS THAT CAUSED ENVIRONMENTAL AND ECONOMIC HARM IN ADUNCUS.

Mersenne harmed Aduncus's marine ecosystem and economic security when it conducted harmful seismic surveys in the Sedna Sea. Though States possess sovereignty over their natural resources, international law requires them to be responsible sovereigns and to temper this right with the corresponding duty to prevent harm to the marine environment and to the environments of other States.¹ This dualistic principle is reiterated in numerous treaties, customary international law, and this Court's past decisions.²

A. Mersenne Is Responsible for the Harm Caused by MECO's Activities Because It Encouraged and Approved the Seismic Surveys.

States are required to ensure that activities occurring within their jurisdiction do not harm other States.³ UNCLOS requires States to prevent the spread of pollution from activities within its control into the territory of other States.⁴ In addition, international law generally forbids a State to "allow knowingly its territory to be used contrary to the rights of other States."⁵

¹ Convention on Biological Diversity art. 3, June 5, 1992, 1760 U.N.T.S. 79 (1992) [hereinafter CBD]; United Nations Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, princ. 2, U.N. Doc. A/CONF.151/5/Rev.1 (1992) [hereinafter Rio Declaration]; United Nations Convention on the Law of the Sea art. 193, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; United Nations Conference on the Human Environment, June 5-16, 1972, *Stockholm Declaration on the Human Environment*, princ. 21, U.N. Doc. A/CONF.48/14/Rev.1 (1973) [hereinafter Stockholm Declaration]; IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, PART I 33, 192 (2001). *See also* Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905 (1941).

² CBD *supra* note 1, art. 3; United Nations Charter, *as amended* June 26, 1945, 892 U.N.T.S. 119; Rio Declaration, *supra* note 1, princ. 2; Stockholm Declaration, *supra* note 1, princ. 21; Gabcikovo-Nagymoros Project (Hung. v. Slov.), 1997 I.C.J. 7, 89 (Sept. 25); Trail Smelter, 3 R.I.A.A. at 1999; Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).

³ UNCLOS, *supra* note 1, art. 193; Gabcikovo-Nagymoros Project, 1997 I.C.J. at 89.

⁴ UNCLOS, *supra* note 1, art. 194(2).

⁵ Corfu Channel, 1949 I.C.J. at 22.

Mersenne was therefore required to ensure that MECO’s seismic surveys did not cause harm outside its territory.

MECO is a “state-owned power company,”⁶ and Mersenne explicitly and knowingly sanctioned its seismic surveys.⁷ Because these surveys created harmful noise pollution that spread beyond Mersenne’s boundaries and harmed Aduncus’s marine environment, Mersenne may be held responsible for the resulting harm.⁸

B. Mersenne Violated Its Duty to Protect the Marine Environment as Mandated by UNCLOS, the CBD, and Customary International Law.

As a party to UNCLOS, the CBD, the ICRW, and the Vienna Convention on the Law of Treaties,⁹ Mersenne is obligated to carry out the provisions of these treaties in good faith.¹⁰ UNCLOS prescribes a State’s rights and responsibilities in relation to the oceans and the law of the sea.¹¹ Its provisions have achieved the status of customary international law,¹² and obligate Mersenne to prevent harmful pollution of the marine environment.¹³ The CBD requires Mersenne to conserve global biodiversity,¹⁴ and the ICRW extends this duty to cetaceans.¹⁵

⁶ R. ¶ 3.

⁷ R. ¶ 17.

⁸ R. ¶¶ 13-18; CBD, *supra* note 1, art. 3; UNCLOS, *supra* note 1, arts. 194-95; W. JOHN RICHARDSON ET AL., MARINE MAMMALS AND NOISE 138 (1995); ELENA MCCARTHY, INTERNATIONAL REGULATION OF UNDERWATER SOUND: ESTABLISHING RULES AND STANDARDS TO ADDRESS OCEAN NOISE POLLUTION 16 (2004).

⁹ R. 2, ¶ 7.

¹⁰ Vienna Convention on the Law of Treaties arts. 11, 26, May 23, 1969, 1155 U.N.T.S. 331.

¹¹ DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 736 (3rd ed. 2006).

¹² United Nations Conference on Environment and Development, June 3-14, 1992, *Agenda 21*, U.N. Doc. A/CONF.151/26 (1992) [hereinafter *Agenda 21*]; UNCLOS, *supra* note 1, sec. XII; *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, 30 (June 3); HUNTER ET AL., *supra* note 11, at 739.

¹³ UNCLOS, *supra* note 1, arts. 192, 194.

¹⁴ CBD, *supra* note 1, pmb.; HUNTER ET AL., *supra* note 11, at 1023.

These treaty provisions are especially relevant given the current exponential increase in oceanic noise levels,¹⁶ and the corresponding consequences for sensitive marine mammals.¹⁷ Therefore, by emitting noise pollution into the Sedna Sea, Mersenne harmed the beaked whale population and its neighboring State in violation of the aforementioned duties.

1. The Noise Pollution Generated by Mersenne's Seismic Surveys Harmed the Beaked Whale Population in Contravention of International Law.

Mersenne's disregard of the potentially harmful consequences its seismic surveys have on marine life¹⁸ violates the customary international obligation that all States have to protect the marine environment.¹⁹ Mersenne's seismic surveys create unacceptable levels of underwater noise that harm migratory beaked whales traveling between Mersenne and Aduncus.²⁰ This has negative implications for Aduncus's ecotourism industry, and for the interconnected oceanic network that depends on the whale as a primary regulator of the food chain.²¹ The obligation to refrain from such harmful conduct is made clear in UNCLOS.²²

¹⁵ International Convention for the Regulation of Whaling pmbl., Dec. 2, 1946, 161 U.N.T.S. 72 [hereinafter ICRW].

¹⁶ RICHARDSON ET AL., *supra* note 8, at 101-02.

¹⁷ MCCARTHY, *supra* note 8, at 14-15, 290-99; RICHARDSON ET AL., *supra* note 8, at 202-03.

¹⁸ R. ¶¶ 20, 22.

¹⁹ See Agenda 21, *supra* note 12; UNCLOS, *supra* note 1, arts. 192, 235; Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 30 (June 3).

²⁰ R. ¶¶ 3, 19. Exposure to sound waves may cause whales to suffer auditory nerve damage, lose their sense of direction and strand themselves, or suffer an extreme form of the bends which causes internal bleeding and ultimately death. Michael Stocker, *Ocean Bioacoustics, Human-Generated Noise and Ocean Policy*, 10 J. INT'L WILDLIFE L. & POL'Y 255, 258 (2007).

²¹ MCCARTHY, *supra* note 8, at 18.

²² See UNCLOS, *supra* note 1, sects. V, XI, XII.

Mersenne is required to cease its seismic surveys because the noise generated constitutes pollution sufficient to trigger UNCLOS's protective mechanisms.²³ Article 194(1) requires parties to take all measures "necessary to prevent, reduce and control pollution of the marine environment"²⁴ This duty may be extended to anthropogenic noise. Article 1(4) explicitly states that "pollution of the marine environment" means the "introduction by man . . . of substances or *energy* into the marine environment . . . which results or is likely to result in such deleterious effects as harm to living resources and marine life" (emphasis added).²⁵ This wording extends to noise pollution because sound waves transfer "energy" from one region of space to another.²⁶ As such, Article 194(1) encompasses underwater noise as a type of pollution.²⁷ Such a reading also comports with UNCLOS's Preamble and overarching goal of marine protection.²⁸

UNCLOS also requires that Mersenne prevent pollution in accordance with international standards,²⁹ and that it protect its marine environment.³⁰ Furthermore, UNCLOS tempers a State's right to exploit its natural resources with the duty to conserve living marine resources and

²³ UNCLOS, *supra* note 1, arts. 192, 194.

²⁴ *Id.* art. 194.

²⁵ *Id.* art. 1.

²⁶ RICHARDSON ET AL., *supra* note 8, at 15; Bill Streever et al., *Managing Marine Mammal Issues: Corporate Policy, Stakeholder Engagement, Applied Research, and Training*, 2 SPE 111479 (2008).

²⁷ Karen N. Scott, *International Regulation of Undersea Noise*, 53 INT'L & COMP. L.Q. 287, 298 (2004).

²⁸ UNCLOS, *supra* note 1, pmb1.

²⁹ *Id.* arts. 192-94, 212.

³⁰ *Id.* arts. 192-94, 235; HUNTER ET AL., *supra* note 11, at 743.

to “consider the best scientific evidence available.”³¹ These preservationist provisions specifically extend to cetaceans.³² Beaked whales use sound to communicate and navigate, and are therefore especially susceptible to the noise generated by the seismic surveys.³³ By thus creating noise that pollutes the marine environment and harms beaked whales, Mersenne is violating its duty to protect marine biodiversity under UNCLOS.

Mersenne errs in claiming that its activities are not subject to regulation because they are exploratory.³⁴ Section XIII extends UNCLOS’s general mandate of marine preservation to exploratory and research activities.³⁵ Article 240 allows States to conduct scientific research in the ocean as long as the research conforms with the duty to preserve the marine environment.³⁶ This duty to protect is expansive.³⁷ As a result, States cannot carry out even scientific research or “exploration” if it harms marine biodiversity.³⁸ Mersenne’s actions violate this principle.

³¹ UNCLOS, *supra* note 1, arts. 56, 61; HUNTER ET AL., *supra* note 11, at 764.

³² *Id.* (“[I]n the case of cetaceans [States] shall in particular work through the appropriate international organizations for their conservation, management, and study”).

³³ R. ¶¶ 15, 16; *see supra* note 20; MCCARTHY, *supra* note 8, at 5, 10, 14, 19; Harm M. Dotinga & Alex G. Oude Elferink, *Acoustic Pollution in the Oceans: The Search for Legal Standards*, 31 OCEAN DEV. & INT’L L. 151, 152 (2000).

³⁴ R. ¶ 20.

³⁵ UNCLOS, *supra* note 1, pmbl., 192, 194, 238, 240, 242; Scott, *supra* note 27, at 300.

³⁶ UNCLOS, *supra* note 1, art. 240.

³⁷ *Id.* arts. 136-49, 208, 209, 238, 240.

³⁸ *See* Agenda 21, *supra* note 12; CBD, *supra* note 1, pmbl.; UNCLOS, *supra* note 1, art. 240.

2. Mersenne Failed to Apply the Precautionary Principle Before Commencing Its Seismic Surveys.

Mersenne's failure to apply the precautionary principle is a breach of customary international law.³⁹ The precautionary principle establishes that a State may not use a lack of scientific certainty to continue an activity that will potentially harm the environment, instead of taking measures to prevent environmental degradation.⁴⁰ Several international tribunals have also recognized the precautionary principle as customary international law.⁴¹ This principle extends to the marine environment.⁴² Given the ubiquity of this principle, the potential for harm in this case, and the lack of knowledge surrounding marine mammals and ocean acoustics, Mersenne should have applied the precautionary principle.

Mersenne violated the precautionary principle when it decided to conduct seismic surveys without considering the effect of the resultant noise on beaked whales. A State is not required to be certain that a harmful consequence will occur, it merely needs to take precautionary measures to address potential harm *before* it occurs.⁴³ Absent more information about the effect of noise on beaked whales, Mersenne was therefore required to be cautious when

³⁹ See *Johannesburg Declaration on Sustainable Development and Plan of Implementation*, U.N. Doc. A/CONF.199/20 [hereinafter *Johannesburg Declaration*]; CBD, *supra* note 1, pmb.; Agenda 21, *supra* note 12; Rio Declaration, *supra* note 1, princ. 15; United Nations Framework Convention on Climate Change, June 5-16, 1972, 1771 U.N.T.S. 108; North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 71 (Feb. 20); HUNTER ET AL., *supra* note 11, at 510-16; Daniel Dobos, *The Necessity of Precaution: The Future of Ecological Necessity and the Precautionary Principle*, 13 FORDHAM ENVTL. L.J. 375, 389 (2002).

⁴⁰ See CBD, *supra* note 1, pmb.; Rio Declaration, *supra* note 1, princ. 15; HUNTER ET AL., *supra* note 11, at 512.

⁴¹ See *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25); *Nuclear Tests* (Aus. v. Fr.), 1974 I.C.J. 253 (Dec. 20); *Southern Bluefin Tuna* (Austl. & N.Z. v. Japan), 39 I.L.M. 1359 (Arb. Trib. constituted under Annex VII of the U.N. Conv. on the Law of the Sea 2000); *Mox Plant* (Ir. v. U.K.), 42 I.L.M. 1187 (Perm. Ct. of Arb. 2003).

⁴² See Agenda 21, *supra* note 12.

⁴³ HARALD HOHMANN, PRECAUTIONARY LEGAL DUTIES AND PRINCIPLES OF MODERN INTERNATIONAL ENVIRONMENTAL LAW 121 (1994).

introducing potentially harmful levels of noise into the Sedna Sea.⁴⁴ Here, harm has already occurred,⁴⁵ indicating that Mersenne failed to apply the precautionary principle in contravention to international law.

C. Mersenne Violated Its Duty to Prevent Transboundary Harm as Mandated by UNCLOS, the CBD, the Espoo Convention, and Customary International Law.

Mersenne breached its affirmative duty to avoid transboundary harm when it caused damage to Aduncus's marine ecosystem and economic well-being.⁴⁶ *Sic utere tuo ut alienum non laedus*, or the duty to not cause transboundary harm,⁴⁷ has achieved the status of customary international law.⁴⁸ Mersenne was therefore required to avoid harming Aduncus's environment and economy. It breached this duty when it caused the aforementioned harm to the beaked whale population.

⁴⁴ See Agenda 21, *supra* note 12; Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area, November 24, 1996, 36 I.L.M. 777 [hereinafter ACCOBAMS]; Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, March 17, 1992, 1772 U.N.T.S. 217 [hereinafter ASCOBANS].

⁴⁵ R. ¶ 24.

⁴⁶ CBD, *supra* note 1, arts. 3, 5; Convention on Environmental Impact Assessment in a Transboundary Context art. 2, March 25, 1991, 1989 U.N.T.S. 309 [hereinafter Espoo Convention]; UNCLOS, *supra* note 1, arts. 193-94; Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9). See also PATRICIA BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT (3rd ed. 2009).

⁴⁷ BLACK'S LAW DICTIONARY 1690 (7th ed. 1999); DOUGLAS BRUBAKER, MARINE POLLUTION AND INTERNATIONAL LAW: PRINCIPLES AND PRACTICE 64 (1993).

⁴⁸ CBD, *supra* note 1, art. 3; UNCLOS, *supra* note 1, art. 194(2); Espoo Convention, *supra* note 46, art. 2; Stockholm Declaration, *supra* note 1, princ. 21. See Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25); Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905 (1941); HUNTER ET AL., *supra* note 11, at 550; Kenneth F. McCallion, *International Environmental Justice: Rights and Remedies*, 26 HASTINGS INT'L & COMP. L. REV. 427, 429-31 (2003) (citing over 350 international agreements that incorporated the duty to avoid transboundary harm).

1. Mersenne Harmed Aduncus When It Allowed the Pollution Generated by Its Seismic Surveys to Injure the Marine Environment.

Mersenne signed three treaties that explicitly prohibit it from causing transboundary harm.⁴⁹ UNCLOS requires States to prevent pollution created in their territory from entering neighboring States.⁵⁰ The CBD reiterates this duty.⁵¹ The Espoo Convention requires States to “take all appropriate and effective measures to prevent, reduce, and control significant adverse transboundary environmental impact from proposed activities.”⁵² This Court also recognized that the duty to avoid transboundary harm has achieved customary law status and become “part of the corpus of international law relating to the environment.”⁵³ By allowing its seismic surveys to harm Aduncus, Mersenne has violated this duty.

Aduncus does not need to show that Mersenne intended to cause harm; it must only demonstrate that Mersenne violated an international obligation that resulted in harm.⁵⁴ Mersenne violated its duties to prevent transboundary harm and protect the marine environment. The resultant reduction in the beaked whale population harms Aduncus.⁵⁵ Mersenne’s claim that Aduncus’s whale watching activities may be responsible is belied by the fact that the noise generated by whale watching is not comparable to that of airguns,⁵⁶ and the whale watching

⁴⁹ R. ¶¶ 8-10; CBD, *supra* 1, art. 3; Espoo Convention, *supra* note 46, art. 2; UNCLOS, *supra* note 1, art. 193.

⁵⁰ UNCLOS, *supra* note 1, art. 194(2).

⁵¹ CBD, *supra* note 1, art. 3.

⁵² Espoo Convention, *supra* note 46, art. 2.

⁵³ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 241-42 (July 8).

⁵⁴ ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 20 (2007).

⁵⁵ R. ¶ 19.

⁵⁶ RICHARDSON ET AL., *supra* note 8, at 138 (“Peak levels of sound pulses from airgun arrays are much higher than the continuous sound levels from any ship or industrial source.”).

industry is well-regulated by the International Whaling Committee and the ICRW.⁵⁷ Thus, it is apparent that Mersenne's seismic surveys harmed the beaked whales and Aduncus.

2. Harming a Migratory Species Is an Inherent Violation of the Duty to Avoid Transboundary Harm.

Mersenne's counterclaim that the whales died on its territory, therefore negating a transboundary effect, is inaccurate as whales are migratory animals.⁵⁸ Beaked whales travel between both countries.⁵⁹ Thus, the location of the strandings in Mersenne⁶⁰ does not negate their transboundary impact.

The CBD prohibits causing harm to a migratory species,⁶¹ and proscribes any State action that severely harms biological diversity.⁶² Whales are a key species in the marine food chain, regulating levels of large predators such as squid, and smaller prey species like krill.⁶³ As such, a threat to the whale species likely causes overall "habitat degradation."⁶⁴ Aduncus has specifically established an MPA to prevent such degradation,⁶⁵ and the transboundary harm caused by the seismic surveys impedes this goal.

⁵⁷ See generally ICRW, *supra* note 15.

⁵⁸ RICHARDSON ET AL., *supra* note 8, at 260-68.

⁵⁹ R. ¶ 19.

⁶⁰ R. ¶ 24.

⁶¹ CBD, *supra* note 1, art. 1 & annex 1. See also UNCLOS, *supra* note 1, art. 64.

⁶² *Id.* art. 22.

⁶³ COMMITTEE ON POTENTIAL IMPACTS OF AMBIENT NOISE IN THE OCEAN ON MARINE MAMMALS, NATIONAL RESEARCH COUNCIL, OCEAN NOISE AND MARINE MAMMALS 106-08 (2003); MCCARTHY, *supra* note 8, at 18.

⁶⁴ MCCARTHY, *supra* note 8, at 18.

⁶⁵ R. ¶ 4.

Mersenne is required to prevent the transboundary harm caused by its seismic surveys.⁶⁶ The international community already recognizes that noise pollution negatively affects the marine ecosystem.⁶⁷ Noise naturally occurs as a boundary-traversing pollutant,⁶⁸ further suggesting that the seismic surveys caused damage outside of Mersenne. This inherently transboundary nature of both sound and whales suggests that Mersenne's seismic surveys should be regulated as a cause of marine pollution.

D. Mersenne Violated Its Duty to Cooperate in the International Protection of Cetacean Species as Mandated by the ICRW, UNCLOS, and the CBD.

1. Mersenne Failed to Notify Aduncus Before Commencing Its Seismic Surveys.

Mersenne violated the customary international duty to notify a neighboring State before embarking on a potentially harmful activity.⁶⁹ The Rio Declaration applies this duty to transboundary pollution.⁷⁰ Mersenne violated this duty when it began seismic surveys with no attempt to notify Aduncus of the consequences thereof.⁷¹

⁶⁶ Espoo Convention, *supra* note 46, art. 2; UNCLOS, *supra* note 1, arts. 192-94, 197; Stockholm Declaration, *supra* note 1, princ. 21; Corfu Channel (U.K v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9). *See also* Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905 (1941).

⁶⁷ *See generally* ICRW, *supra* note 15; ASCOBANS, *supra* note 44; ACCOBAMS, *supra* note 44.

⁶⁸ MCCARTHY, *supra* note 8, at 9-11; *Seismic Surveys at Sea: The contributions of airguns to ocean noise*, ACOUSTIC ECOLOGY INSTITUTE 1, 4-5 (Nov. 2004).

⁶⁹ Espoo Convention, *supra* note 46, arts. 2(4); CBD, *supra* note 1, art. 14; UNCLOS, *supra* note 1, art. 198.

⁷⁰ Rio Declaration, *supra* note 1, princ. 19.

⁷¹ R. ¶¶ 17, 19.

Under its binding treaty obligations, Mersenne is required to notify a State if it thinks that its actions may negatively impact the marine environment of that State.⁷² Moreover, the CBD extends this duty to activities that may adversely affect the biodiversity of neighboring States.⁷³ If an injury does occur, the CBD requires a State to immediately notify the potentially affected States and to initiate action to minimize the damage caused.⁷⁴ Mersenne failed to notify Aduncus before commencing its surveys.⁷⁵ Aduncus also initiated all negotiations between the parties.⁷⁶ This demonstrates a failure on Mersenne's part to properly carry out its notification duty. Even if Mersenne believed that it was not initially required to notify Aduncus upon initiating seismic surveys within 250 nautical miles of Aduncus's MPA, the mass strandings triggered Mersenne's duty to notify and to mitigate any harm caused.⁷⁷

2. Mersenne's Refusal to Cooperate with Aduncus to Alleviate the Harm It Caused the Beaked Whales is a Violation of Its Duty to Protect Cetacean Species.

Mersenne's actions directly contravene the ICRW's goal of international cooperation with regards to cetacean species, resulting in harm to Aduncus. The ICRW works in conjunction with UNCLOS and the CBD to extend protection to marine mammals beyond the reach of a State's EEZ.⁷⁸ As the oceans are a global common resource, true biodiversity preservation is not

⁷² UNCLOS, *supra* note 1, art. 198; Espoo Convention, *supra* note 46, art. 3. *See also* Draft Articles on Responsibility of States for Internationally Wrongfully Acts, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter DARSIIWA].

⁷³ CBD, *supra* note 1, art. 14(1)(c).

⁷⁴ *Id.* art. 14(1)(d).

⁷⁵ R. ¶ 19.

⁷⁶ R. ¶¶ 19, 21, 25.

⁷⁷ CBD, *supra* note 1, art. 22.

⁷⁸ UNCLOS, *supra* note 1, arts. 65, 120. *See generally* ICRW, *supra* note 15.

possible without State cooperation.⁷⁹ Moreover, the duty to cooperate is the basis of international law.⁸⁰

The international community indicated its desire to engage in cooperative preservation with the passage of numerous treaties and agreements.⁸¹ Mersenne's ratification of these agreements⁸² indicates its commitment to the same ideal. Therefore, Mersenne should not be allowed to harm a common resource without excuse or consequence if the underlying treaties designed to protect the environment are to retain efficacy.⁸³

II. MERSENNE'S REFUSAL TO PREPARE AN EIA VIOLATES ADUNCUS'S PROCEDURAL AND SUBSTANTIVE RIGHTS UNDER INTERNATIONAL LAW.

Mersenne has a legal obligation to conduct an EIA before carrying out any further seismic surveys in its northern EEZ. This obligation flows from Mersenne's treaty obligations and customary international law.⁸⁴ The noise produced by the seismic surveys is likely to cause transboundary and environmental harm, in contravention of Aduncus's substantive rights under

⁷⁹ BIRNIE ET AL., *supra* note 46, at 703; HUNTER ET AL., *supra* note 11, at 746.

⁸⁰ BIRNIE ET AL., *supra* note 46, at 601; HUNTER ET AL., *supra* note 11, at 368-69; KISS & SHELTON, *supra* note 54, at 28.

⁸¹ CBD, *supra* note 1, art. 5; Rio Declaration, *supra* note 1, princs. 7, 13; Stockholm Declaration, *supra* note 1, princ. 24; BIRNIE ET AL., *supra* note 46, at 751-52; HUNTER ET AL., *supra* note 11, at 746, 1023, 1077.

⁸² R. ¶¶ 7, 10, 12.

⁸³ BIRNIE ET AL., *supra* note 46, at 601.

⁸⁴ See CBD, *supra* note 1, art. 14, ¶ 1(a); Espoo Convention, *supra* note 46, art. 3, 5-6; UNCLOS, *supra* note 1, art. 206.

those same treaties. Furthermore, as a contracting party to the Espoo Convention,⁸⁵ Aduncus has certain procedural rights⁸⁶ that Mersenne has violated by refusing to conduct an EIA.

A. Mersenne’s Binding Treaty Obligations and Customary International Law Require It to Conduct an EIA for Actions That Cause Transboundary Harm.

1. Mersenne’s Seismic Surveys Cause an Adverse Transboundary Effect That Triggers the Need for an EIA Under the Espoo Convention.

As a contracting party to the Espoo Convention,⁸⁷ Mersenne is required to conduct an EIA for proposed activities that are “likely to cause a significant adverse transboundary impact . . .”⁸⁸ Appendix III provides three general criteria for parties to consider when determining whether an activity is likely to have such an impact.⁸⁹ They are: (1) whether the size of the proposed activity is large for the type of activity; (2) whether the proposed activity is located close to an area of special environmental sensitivity; and, (3) whether the proposed activity has potentially adverse effects on valued species or organisms.⁹⁰ Because the size, location, and effects of Mersenne’s seismic surveys all indicate that they will have a significant adverse transboundary effect, Mersenne is required to conduct an EIA.

First, even in instances where seismic surveys are conducted by two vessels,⁹¹ the noise produced is detectable in the water thousands of kilometers from the source.⁹² Therefore, the

⁸⁵ R. ¶ 8.

⁸⁶ See Espoo Convention, *supra* note 46, arts. 3, 5-6.

⁸⁷ R. ¶ 8.

⁸⁸ Espoo Convention, *supra* note 46, art. 2(5).

⁸⁹ *Id.* app. III(1).

⁹⁰ *Id.*

⁹¹ R. ¶ 22.

⁹² *Seismic Surveys at Sea*, *supra* note 68, at 5.

size of Mersenne’s seismic surveys is large for the type of activity. Second, Mersenne is conducting its seismic surveys close enough to Aduncus’s EEZ that the noise produced can be heard by marine mammals, and specifically beaked whales, within Aduncus’s MPA.⁹³ Therefore, Mersenne’s seismic surveys are close to an area of special environmental sensitivity. Third, Mersenne’s seismic surveys adversely affect beaked whales,⁹⁴ a species that Aduncus highly values.⁹⁵ Because these three criteria indicate that Mersenne’s seismic surveys are likely to have a significant adverse transboundary impact, Mersenne must conduct an EIA.

Mersenne is also required to conduct an EIA for its seismic surveys because they constitute an activity listed in Appendix I.⁹⁶ Specifically, the seismic surveys constitute “offshore hydrocarbon production”⁹⁷ because they are a necessary first step in locating possible sites where Mersenne can extract oil and natural gas.⁹⁸ Mersenne errs in contending that, under the proposed Amendment to Appendix I, “offshore hydrocarbon production” only refers to extraction activities.⁹⁹ Although Aduncus has ratified the first and second amendments to the Espoo Convention,¹⁰⁰ these amendments have not yet entered into force.¹⁰¹ Therefore, neither

⁹³ *Id.*

⁹⁴ Streever et al., *supra* note 26, at 4.

⁹⁵ R. ¶ 21.

⁹⁶ Espoo Convention, *supra* note 46, art. 2, § 2.

⁹⁷ *See Id.* app. I, ¶ 15.

⁹⁸ R. ¶ 17.

⁹⁹ R. ¶ 20.

¹⁰⁰ R. ¶ 8.

¹⁰¹ R. ¶ 21.

party is bound by either amendment¹⁰² and Mersenne must assess the environmental impact of its seismic surveys.

2. Customary International Law Requires Mersenne to Conduct an EIA Because Its Seismic Surveys Cause an Adverse Transboundary Effect.

The duty to conduct an EIA when a proposed activity is likely to cause transboundary harm has attained customary international law status.¹⁰³ The 1978 UNEP Draft Principles on Shared Natural Resources proposes that “States should make environmental assessments before engaging in any activity with respect to a shared natural resource which may create a risk of significantly affecting the environment of another State or States sharing that resource.”¹⁰⁴ This concept was subsequently developed in a number of non-binding instruments¹⁰⁵ and treaty arrangements.¹⁰⁶ These treaties are evidence of an emerging rule of customary law that is separate from their binding character *qua* treaty.¹⁰⁷ Members of this Court have also recognized

¹⁰² See UN Treaty Handbook, ch. 4, ¶ 4.4.1(f), <http://untreaty.un.org/English/TreatyHandbook/chapter4.htm> (last visited Nov. 17, 2009).

¹⁰³ BIRNIE ET AL., *supra* note 46, at 169; HUNTER ET AL., *supra* note 11, at 532.

¹⁰⁴ Draft Principles of Conduct for the Guidance of States in the Conservation and Harmonious Exploitation of Natural Resources Shared by Two or More States, United Nations Environment Programme Governing Council, XII Plenary Meeting, princ 4, UNEP/GC/101 and Corr.1 (1978).

¹⁰⁵ See, e.g., Draft Articles On Preventing Transboundary Harm From Hazardous Activities, art. 7, U.N. Doc. A/56/10 (2001).

¹⁰⁶ See CBD, *supra* note 1; UNCLOS, *supra* note 1; Espoo Convention, *supra* note 46; Protocol to Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, S. Treaty Doc. No. 102-22, 30 I.L.M. 1461; Council Directive 85/337, 1985 O.J. (L 175) (EC).

¹⁰⁷ That this process is a distinct possibility was recognized by this Court in the North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 42-43 (Feb. 20). See also Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 92-97 (June 27) (Merits).

the importance of transboundary EIAs,¹⁰⁸ further demonstrating that EIAs directed at transboundary harm are now customary international law.

An increasing number of States are assessing transboundary impacts as part of their EIA regime.¹⁰⁹ For example, case law in much of North America and Europe applies national EIA requirements to transboundary impacts.¹¹⁰ EIA legislation in some States explicitly covers extraterritorial effects.¹¹¹ Therefore, because States widely and consistently conduct EIAs in order to assess possible transboundary impacts and do so out of a sense of legal obligation, transboundary EIAs have attained the status of customary international law.

Mersenne has failed to follow this custom by refusing to prepare an EIA that considers the transboundary impacts of its seismic surveys. Therefore, Aduncus asks this Court to declare that Mersenne cease conducting its surveys in the Sedna Sea until it prepares an EIA.

B. Mersenne’s Binding Treaty Obligations Under UNCLOS and the CBD Require It to Conduct an EIA Because Its Seismic Surveys Harm the Environment.

As a contracting party to UNCLOS,¹¹² Mersenne is required to assess the potential effects of planned activities under its jurisdiction or control that may cause “substantial pollution of or significant or harmful changes to the marine environment.”¹¹³ Anthropogenic noise constitutes

¹⁰⁸ Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288, 344 (Weeramantry, J., dissenting).

¹⁰⁹ HUNTER ET AL., *supra* note 11, at 532.

¹¹⁰ *See, e.g.*, Wilderness Society v. Morton, 463 F.2d 1261 (1972) (U.S.); Sierra Club v. Adams, 578 F.2d 389 (1978) (U.S.); Canadian Wildlife Fed’n v. Minister of Env’t and Saskatchewan Water Co. (1989) 3 FC 309 (TD) (Can.).

¹¹¹ *E.g.* Canadian Environmental Assessment Act, 1992 S.C. § 47 (Can.); Decree on Environmental Impact Procedure, 713/2006 (Fin.).

¹¹² R. ¶ 9.

¹¹³ UNCLOS, *supra* note 1, art. 206.

“pollution” within the meaning of UNCLOS.¹¹⁴ Furthermore, UNCLOS only requires that a planned activity “may” cause harm.¹¹⁵ Under this low threshold, the scientific evidence that anthropogenic noise may be harmful to whales¹¹⁶ is enough to trigger the need for an EIA under UNCLOS. Therefore, UNCLOS requires Mersenne to conduct an EIA with respect to its seismic surveys.

Similarly, as a contracting party to the CBD,¹¹⁷ Mersenne is required to conduct an EIA with respect to proposed projects that are “likely to have significant adverse effects on biological diversity”¹¹⁸ Although the CBD requires that harm be “likely” rather than merely possible,¹¹⁹ Mersenne is still required to conduct an EIA. Mersenne’s seismic surveys produce underwater noise at significant volumes¹²⁰ and this noise causes physical damage to whales.¹²¹ Because the seismic surveys are likely to thus harm biological diversity, the CBD also requires Mersenne to conduct an EIA.¹²²

¹¹⁴ See *supra* notes 23-28 and accompanying text.

¹¹⁵ UNCLOS, *supra* note 1, art. 206.

¹¹⁶ Streever et al., *supra* note 26, at 4-5.

¹¹⁷ R. ¶ 10.

¹¹⁸ CBD, *supra* note 1, art. 14, ¶ 1(a).

¹¹⁹ Compare UNCLOS, *supra* note 1, art. 206, and CBD, *supra* note 1, art. 14.

¹²⁰ RICHARDSON ET AL., *supra* note 8, at 142.

¹²¹ Streever et al., *supra* note 26, at 4.

¹²² CBD, *supra* note 1, art. 14, ¶ 1(a).

C. Mersenne’s Mitigation Measures Do Not Relieve It of Its Duty to Conduct an EIA.

Mersenne’s mitigation measures do not relieve it of its duty to conduct an EIA because those measures have not reduced the impacts of its seismic surveys below the “significant”¹²³ level. Less than a year after Mersenne undertook its first mitigation measure—ramping up the intensity of the airguns¹²⁴—twelve whales were stranded and ultimately died on Mersenne’s shoreline.¹²⁵ In the week prior to this incident, Mersenne had conducted seismic surveys in the area where the strandings occurred.¹²⁶ Given the proximity in time and space between the surveys and the strandings, and the fact that anthropogenic noise harms whales,¹²⁷ it is likely that the surveys caused the incident. Therefore, because the harm is still significant, Mersenne must conduct an EIA.

Mersenne’s second mitigation measure—visual monitoring¹²⁸—is also not likely to reduce the impact of its seismic surveys below the “significant” level. Although visual monitoring may reduce the harm to whales when they are at or just below the surface, received levels of airgun pulses are lower just below the surface than at deeper depths.¹²⁹ Therefore, Mersenne’s mitigation measure does not reduce the impact to whales located at deeper depths, which are more likely to be harmed. As such, Mersenne must conduct an EIA.

¹²³ See CBD, *supra* note 1, art. 14, ¶ 1(a); Espoo Convention, *supra* note 46, art. 2; UNCLOS, *supra* note 1, art. 206.

¹²⁴ R. ¶ 22.

¹²⁵ R. ¶ 24.

¹²⁶ R. ¶ 25.

¹²⁷ Streever et al., *supra* note 26, at 4-5.

¹²⁸ R. ¶ 26.

¹²⁹ RICHARDSON ET AL., *supra* note 8, at 142.

Finally, the split inquiry commission's finding that Mersenne's seismic surveys are not likely to cause significant adverse transboundary impact¹³⁰ is not binding on either party. Decisions by the inquiry commission under the Espoo Convention are only advisory in nature,¹³¹ and are therefore not dispositive of whether Mersenne's seismic surveys are likely to cause significant adverse transboundary impact.

III. THE DOCTRINE OF NECESSITY DOES NOT EXCUSE MERSENNE'S FAILURE TO COMPLY WITH ITS INTERNATIONAL OBLIGATIONS.

Under international law, Mersenne was required to protect the marine environment, prevent transboundary harm, and conduct an EIA.¹³² Mersenne's failure to comply with these obligations is not excused by necessity. Article 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts ("Article 25") provides that a State may only invoke a necessity argument when its action: "(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States toward which the obligation exists, or of the international community as a whole."¹³³ Mersenne cannot invoke the excuse of necessity because it fails to meet these requirements.

Mersenne has not shown that its seismic surveys are the only way for it to safeguard its national security against an energy shortage. The first prong of necessity requires a State to

¹³⁰ R. ¶ 28.

¹³¹ Timo Koivurova, *The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)*, in *MAKING TREATIES WORK: HUMAN RIGHTS, ENVIRONMENT AND ARMS CONTROL* 224 (Geir Ulfstein et al. eds., 2007).

¹³² CBD, *supra* note 1, art. 3; Espoo Convention, *supra* note 46, art. 2; UNCLOS, *supra* note 1, art. 192.

¹³³ DARSIIWA, *supra* note 72, art. 25, § 1.

prove that its chosen course of action is the “only way” to safeguard an essential interest.¹³⁴

Mersenne has not met this requirement as there is no evidence that it considered any alternative sources of energy. Furthermore, Mersenne’s seismic surveys seriously damage Aduncus’s economic and environmental interests by harming beaked whales. This harm also impairs the international community’s interest in protecting global biodiversity.¹³⁵ Thus, Mersenne is unable to meet the second requirement for necessity. Because it fails to meet either requirement, Mersenne may not invoke necessity to excuse its violations of international law.

¹³⁴ *Id.* art. 25, cmt. ¶ 15.

¹³⁵ BIRNIE ET AL., *supra* note 46, at 702, 744.

CONCLUSION

For the foregoing reasons, Aduncus respectfully requests that this Court:

1. Declare that Mersenne's seismic surveys violate international law, and;
2. Declare that Mersenne is required to conduct an EIA, and;
3. Declare that necessity does not excuse Mersenne's violations of international law.

Respectfully Submitted

X
Agents for the Kingdom of Aduncus