

**Team 1026A**

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## **JURISDICTIONAL STATEMENT**

The Kingdom of Aduncus and the Republic of Mersenne present the following case to the International Court of Justice. The International Court of Justice (hereinafter “the Court”) has contentious jurisdiction over this case based on the Special Agreement of the parties dated June 16, 2009 and in accordance with Articles 36 and 40 of the Statute of the International Court of Justice. *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. (R. at 3-5.) Article 36 provides jurisdiction over matters referred by parties to the Court and Article 40 specifically authorizes cases to be brought by joint notification of special agreement. Statute of the International Court of Justice, arts. 36, 40, T.S. No. 993 (1945). Furthermore, the Charter of the United Nations, to which both States are parties, deems all member-states to be parties to the Court’s Statute and thus subject to the Court’s jurisdiction.

## **QUESTIONS PRESENTED**

- I. DID THE REPUBLIC OF MERSENNE VIOLATE INTERNATIONAL LAW WHEN IT REFUSED TO PREPARE AN ENVIRONMENTAL IMPACT ASSESSMENT BEFORE DIRECTING ITS STATE-OWNED ELECTRIC COMPANY, MECO, TO USE FORTY AIRGUNS FOR OFFSHORE HYDROCARBON EXPLORATION NEAR ADUNCUS’S MARINE PROTECTED AREA WHERE APPROXIMATELY 12,000 TOURISTS ENJOY WHALE WATCHING EACH YEAR?
  
- II. DID THE REPUBLIC OF MERSENNE VIOLATE INTERNATIONAL LAW WHEN MECO’S CHOSEN METHOD OF HYDROCARBON EXPLORATION EMITTED HIGH INTENSITY SOUND PRIOR TO, DURING, AND AFTER TWELVE BEAKED WHALES WERE STRANDED IMPACTING ADUNCUS’S WHALE WATCHING INDUSTRY?

## STATEMENT OF THE FACTS

### *The Kingdom of Aduncus*

The Kingdom of Aduncus (Aduncus) is a developing country with an economy dependent on tourism.<sup>1</sup> Tourism is the second-largest source of national income in Aduncus.<sup>2</sup> Aduncus, with a population of only 240,000 people, hosted more than 80,000 tourists in 2008.<sup>3</sup>

Aduncus's government is committed to maintaining its ecotourism activity.<sup>4</sup> One such activity is whale watching off Aduncus's coast.<sup>5</sup> This activity draws approximately 12,000 participants annually, generating more than 100 million kroons (approximately \$5 million) each year.<sup>6</sup>

### *The Republic of Mersenne*

The Republic of Mersenne (Mersenne), located directly to the south of Aduncus, is an industrialized nation with a population of approximately 22 million people, and an abundant supply of natural resources.<sup>7</sup> Beginning at the end of 2007, Mersenne began to experience energy problems because the state-owned electric company (MECO) was unable to import sufficient amounts of oil and natural gas.<sup>8</sup>

### *Exclusive Economic Zones and Marine Protected Areas*

Because Aduncus and Mersenne share a territorial boundary, their territorial seas and exclusive economic zones (EEZs) boarder one another.<sup>9</sup> Aduncus has designated the half of its territorial sea that borders Mersenne's EEZ as a marine protected area (MPA).<sup>10</sup>

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<sup>1</sup> R. at ¶ 2.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at ¶ 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at ¶ 1.



### *The Problem of Underwater Noise*

Many marine mammals, including beaked whales, may be adversely affected by underwater sound.<sup>11</sup> Underwater sound can harm marine mammals in several ways, including causing severe trauma, causing tissue bleeding, causing permanent hearing damage, and modifying behavior.<sup>12</sup>

### *Mersenne's Use of Airguns*

In December 2007, Mersenne began using two ships, each towing 20-gun arrays, to search for natural gas under the sea.<sup>13</sup>

### *Report by an Independent Agency*

In July 2008, Bluewatch, an international non-governmental organization, reported that the loud blasts from the airguns were causing beaked whales to avoid the areas around where Mersenne was searching for resources.<sup>14</sup>

### *Initial Communication between Aduncus and Mersenne*

On 28 August 2008, the government of Aduncus sent the government of Mersenne a diplomatic note expressing concern that MECO's activities would have an adverse impact on Aduncus's whale watching industry.<sup>15</sup> In the note, Aduncus indicated that the Espoo Convention, to which both States are a party, requires Mersenne to prepare an Environmental Impact Assessment (EIA).<sup>16</sup>

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<sup>10</sup> *Id.* at ¶¶ 4-5.

<sup>11</sup> *Id.* at ¶¶ 15-16.

<sup>12</sup> *Id.* at ¶ 15; Bill Streever, et al., *Managing Marine Mammal Issues: Corporate Policy, Stakeholder Engagement, Applied Research, and Training* 4-5 (SPE Int'l 2008) (incorporated in record by reference).

<sup>13</sup> *R.* at ¶ 17.

<sup>14</sup> *Id.* at ¶ 18.

<sup>15</sup> *Id.* at ¶ 19.

<sup>16</sup> *Id.*

On 15 September 2008, Mersenne answered Aduncus's diplomatic note, claiming that it did not have to prepare an EIA.<sup>17</sup>

*Continued Communication between Aduncus and Mersenne*

On 10 October 2008, Aduncus responded by sending a diplomatic note explaining that both Appendix I and Appendix III of Espoo require an EIA in this situation.<sup>18</sup>

In response, on 2 November 2008, Mersenne argued that the "modest" size of the two, 20-gun arrays prevent them from falling under Appendix III.<sup>19</sup> Mersenne claimed that it was reducing the adverse impact by activating the airguns over a period of twenty to forty minutes.<sup>20</sup>

*Mass Stranding of Beaked Whales*

On 15 January 2009, during the period that Mersenne was using airguns to search for hydrocarbon reserves, twelve beaked whales were found stranded on Mersenne's shoreline, only twenty kilometers from Aduncus.<sup>21</sup> All twelve whales died.<sup>22</sup>

*Post-Stranding Actions by Mersenne*

After the stranding, Mersenne placed an on-board observer on each of its survey vessels, and did not allow the use of airguns when the observer spotted a whale within 500 meters of a vessel.<sup>23</sup>

*Questions to Inquiry Commission*

On 15 February 2009, Aduncus and Mersenne submitted the question of whether MECO's activities had resulted in or were likely to result in adverse transboundary impacts to an inquiry commission.<sup>24</sup> The commission's decision was inconclusive.<sup>25</sup>

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<sup>17</sup> *Id.* at ¶ 20.

<sup>18</sup> *Id.* at ¶ 21.

<sup>19</sup> *Id.* at ¶ 22.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at ¶ 24.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at ¶ 26.

### *Treaties and International Organizations*

Aduncus and Mersenne are members of the United Nations.<sup>26</sup> Additionally, Aduncus and Mersenne are parties to the statute of the International Court of Justice, the Convention on Environmental Impact Assessment (Espoo Convention), the United Nations Convention on the Law of the Sea (UNCLOS), the Convention on Biological Diversity (CBD), the Vienna Convention on the Law of Treaties, and the International Convention for the Regulation of Whaling.<sup>27</sup> Aduncus has ratified the first and second amendments to the Espoo Convention, but Mersenne has not.<sup>28</sup>

Representatives from Aduncus and Mersenne also fully participated in the United Nations Conference on the Human Environment at Stockholm and Conference on Environment and Development at Rio de Janeiro.<sup>29</sup>

### *Submission to the International Court of Justice*

After negotiations failed, Aduncus and Mersenne agreed to submit this matter to the International Court of Justice.<sup>30</sup> Aduncus seeks an order declaring that (I) international law requires Mersenne to prepare an EIA with respect to MECO's hydrocarbon activities, and (II) Mersenne breached international law.

## **SUMMARY OF THE ARGUMENT**

I. Mersenne violated both its treaty and customary obligations to assess the environmental impact of MECO's use of airguns to explore for hydrocarbon resources. Under the Espoo Convention, UNCLOS, CBD, and several tenants of customary law, Mersenne was required to

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<sup>24</sup> *Id.* at ¶ 27.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at ¶ 3.

<sup>27</sup> *Id.* at ¶ 3, 6.

<sup>28</sup> *Id.* at ¶ 8.

<sup>29</sup> *Id.* at ¶ 12.

<sup>30</sup> *Id.* at ¶ 30.

assess the impact of an activity that was likely to have a significant transboundary impact. MECO's use of two 20-gun arrays to explore for hydrocarbon resources was one such activity. The airguns emitted high intensity sound which had the potential to injure and cause a behavioral changes in whales in Aduncus's MPA. In fact, during Mersenne's exploration, twelve beaked whales beached themselves and died. As such, Aduncus's ecotourism and, in particular, their whale-watching industry stood to suffer from MECO's hydrocarbon exploration. Therefore, Mersenne was required to prepare a formal EIA or at least take some measures to assess the potential environmental impact of their actions.

II. Additionally, Mersenne violated its international obligation not to cause significant transboundary harm. This duty is recognized in the Espoo Convention, UNCLOS and CBD. Additionally, this principle has been recognized as a tenant of customary law. As noted, MECO's hydrocarbon exploration was likely to cause transboundary harm and did in fact cause transboundary harm by killing 12 beaked whales, thus affecting Aduncus's whale watching industry. Further, Mersenne's failure to recognize this duty was not excused by the doctrine of necessity because Mersenne has not shown efforts to safeguard an essential interest, nor has Mersenne explored other means to address their energy deficiency. Finally, even if the significance of the harm is not apparent, the precautionary approach requires MECO to halt its activities pending further investigation and consultation.

## ARGUMENT

### **I. MERSENNE VIOLATED BOTH TREATY AND CUSTOMARY INTERNATIONAL LAW WHEN IT NEITHER CONDUCTED A FORMAL EIA NOR ASSESSED THE ENVIRONMENTAL CONSEQUENCES OF MECO'S UNDERWATER USE OF AIRGUNS TO EXPLORE FOR HYDROCARBON RESOURCES.**

The Statute of the International Court of Justice recognizes both treaties and custom as applicable sources of international law.<sup>31</sup> Mersenne's failure to prepare a formal EIA or take any steps to assess the environmental consequences of using airguns to conduct seismic surveys violated (A) its obligations under treaty law; and (B) customary international law.

#### **A. Mersenne failed to meet its obligations to assess the environmental impact under the Espoo Convention, UNCLOS, and CBD when it did not evaluate the environmental impact of MECO's use of airguns for underwater hydrocarbon exploration.**

Mersenne and the Kingdom of Aduncus are ratifying parties of the Espoo Convention, UNCLOS, and CBD.<sup>32</sup> *Pacta sunt servanda* requires a State to observe all of its treaty obligations in good faith.<sup>33</sup> Mersenne failed to observe its obligation to assess environmental impact under (1) the Espoo Convention; (2) UNCLOS; and (3) CBD.

1. Mersenne's failure to prepare a formal EIA prior to MECO's hydrocarbon exploration activities violated its obligations under the Espoo Convention.

Article 2(3) of the Espoo Convention requires a party to prepare an EIA "prior to a decision to authorize or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact."<sup>34</sup> MECO's use of airguns for hydrocarbon exploration necessitated the preparation of an EIA under the Espoo Convention because the

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<sup>31</sup> Statute of the International Court of Justice, art. 38, T.S. No. 993 (1945).

<sup>32</sup> R at ¶¶ 8-10.

<sup>33</sup> Vienna Convention on the Law of Treaties, art. 26, *opened for signature* May 23, 1969, 115 U.N.T.S. 331 [hereinafter VCLT].

<sup>34</sup> Convention on Environmental Impact Assessment in a Transboundary Context, art. 2, ¶ 3, *opened for signature* May 25, 1991, 1989 U.N.T.S. 309 [hereinafter Espoo Convention].

activity fell within Appendix I's listing of "[o]ffshore hydrocarbon production" and was to likely to have a significant adverse transboundary impact.

- i. MECO engaged in "[o]ffshore hydrocarbon production" as listed in Appendix I of the Espoo Convention when it conducted seismic surveys to explore for hydrocarbon resources.

Appendix I of the Espoo Convention lists "offshore hydrocarbon production" as an activity which necessitates the preparation of an EIA.<sup>35</sup> Although Amendment II to the Espoo Convention further defines "[o]ffshore hydrocarbon production," the amendment has no applicability in this case because Mersenne has refused to ratify it.<sup>36</sup> As such, the scope of "[o]ffshore hydrocarbon production" remains broad.

MECO's offshore hydrocarbon exploration falls within the broad definition of "[o]ffshore hydrocarbon production." The meaning of a term in a convention depends on the ordinary meaning of the term read in context and in light of the convention's purpose.<sup>37</sup> The ordinary meaning of "producing" is the process of bringing hydrocarbon resources "to the surface of the earth."<sup>38</sup> Further, a purpose of the Espoo Convention is assessing environmental impact at an early stage.<sup>39</sup> Because exploration is the first step in hydrocarbon production, including hydrocarbon exploration in the definition of "offshore hydrocarbon production" comports with the purpose of the Espoo Convention. Therefore, in light of the purpose of the Espoo Convention, as well as the definition of "producing," the broader definition of "[o]ffshore hydrocarbon production" includes MECO's hydrocarbon exploration.

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<sup>35</sup> *Id.* at appx. I.

<sup>36</sup> See VCLT, *supra* note 33, at art. 40, ¶ 4.

<sup>37</sup> See VCLT, *supra* note 33, at art. 31; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herz. v. Serb. and Mont.), 2007 I.C.J. 191 (Feb. 26).

<sup>38</sup> BLACK'S LAW DICTIONARY 569 (3rd pocket ed. 2004).

<sup>39</sup> Espoo Convention, *supra* note 34, at preamble.

- ii. MECO's hydrocarbon exploration was likely to cause significant adverse transboundary impact because it used two 20-gun arrays to conduct seismic surveys only 250 nautical miles from Aduncus's EEZ and MPA.

The listing of an activity in Appendix I compels a presumption that the activity causes significant transboundary impact.<sup>40</sup> As shown above, MECO's hydrocarbon exploration is "[o]ffshore hydrocarbon production,"<sup>41</sup> and is therefore presumed to cause significant transboundary impact. Additionally, Mersenne cannot defeat this presumption because an analysis of the factors listed in Appendix III, which are used in determining whether an impact is "significant," suggests that MECO's exploration activities were likely to cause significant transboundary harm. The Appendix III factors are the size of the activity, the location of the activity relative to an area of sensitive environmental importance, and the effects of the activity.<sup>42</sup>

First, MECO's use of airguns to conduct seismic surveys was large in size when viewed from the standpoint of underwater noise. Appendix III(a) indicates that the size of an activity is analyzed by comparing the scope of the proposed activity with the scope of similar activities.<sup>43</sup> The activity engaged in by MECO is the use of airguns to conduct seismic surveys.<sup>44</sup> Although Mersenne notes "the surveys [were] conducted by two vessels and [were] relatively modest in size,"<sup>45</sup> it fails to address the intensity of the sound emitted from MECO's airgun arrays. In relative terms, the noise emitted from airguns is one of the loudest underwater sounds.<sup>46</sup> Further,

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<sup>40</sup> Jonas Ebbeson, *Innovative Elements and Expected Effectiveness of the 1991 EIA Convention*, 19 ENVTL IMPACT ASSM'T REV. 47, 51 (1999).

<sup>41</sup> See *supra* Part I(A)(1)(i).

<sup>42</sup> Espoo Convention, *supra* note 34, at appx. III.

<sup>43</sup> *Id.* at appx. III(a).

<sup>44</sup> R. at ¶ 17.

<sup>45</sup> R. at ¶ 22.

<sup>46</sup> Dainel Inkelas, Note, *Security, Sound, and Cetaceans: Legal Challenges to Low Frequency Active Sonar Under U.S. and International Environmental*, 37 GEO. WASH. INT'L L. REV. 207, 210 (2005) (assessing human-made noises that affect marine mammals including scientific surveys); see also W. John Richardson et al., MARINE

underwater sound is capable of traveling thousands of miles, so the scope of the noise pollution is expansive.<sup>47</sup> Therefore, the “size” of the noise pollution was significant.

Second, the location of MECO’s hydrocarbon exploration was likely to cause significant adverse transboundary impact because it was within 250 nautical miles of Aduncus’s MPA. Appendix III(b) states that the parties should consider the location of the proposed activity in relation to areas of special environmental importance.<sup>48</sup> As stated above, sound is capable of traveling thousands of miles underwater, and airgun explosions are one of the loudest underwater sounds.<sup>49</sup> Given these facts, MECO’s blasting of two 20-gun arrays undoubtedly reached Aduncus’s EEZ and MPA, which was only 250 nautical miles away. MECO’s activities were therefore in close proximity to an area of sensitive environmental importance.

Third, the noise emitted from MECO’s hydrocarbon exploration was likely to have significant adverse effects on beaked whales and, as such, on Aduncus’s ecotourism industry. Appendix III(c) states that activities that have a complex and potentially adverse effect, especially on valued species, should be considered as having a significant adverse transboundary impact.<sup>50</sup> Beaked whales are a valued species.<sup>51</sup> Moreover, MECO’s hydrocarbon exploration causes complex and potentially adverse effects on beaked whales by creating impulsive sounds which can damage tissue or induce hearing loss.<sup>52</sup> Such effects can lead to the death of beaked whales either directly or by affecting their ability to find prey, avoid predators, navigate, or

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MAMMALS AND NOISE 155-58 (Academic Press 1995) (summarizing and comparing source levels for selected sources of human-made, underwater noise).

<sup>47</sup> Michael Jasnay, Nat’l Res. Def. Council, *Sounding the Depths: Supertankers, Sonar and the Rise of Undersea Noise* vii (1999).

<sup>48</sup> Espoo Convention, *supra* note 34, at appx. III(b).

<sup>49</sup> Michael Jasnay, *supra* note 47, at vii.

<sup>50</sup> Espoo Convention, *supra* note 34, at appx. III(c).

<sup>51</sup> *See, e.g.*, International Convention for the Regulation of Whaling, preamble, Nov. 19, 1956, 161 U.N.T.S. 172.

<sup>52</sup> Streever, et al., *supra* note 12, at 4-5.



communicate with other animals.<sup>53</sup> Additionally, the use of airguns can lead to changes in behavior including altered diving habits, avoiding feeding areas, alterations of migrations routes, and disruption of breeding or nursing.<sup>54</sup> In at least five instances, a causal connection has been established between underwater sound and the stranding of marine mammals, including a stranding of beaked whales in 2002 linked to the use of airguns.<sup>55</sup>

The change in behavior of beaked whales and possible stranding of the animals has particularly detrimental effects on Aduncus. Aduncus's economy relies heavily on whale watching.<sup>56</sup> The continued underwater use of airguns risks killing whales or causing them to avoid Aduncus's EEZ.<sup>57</sup> As such, the whale watching industry will suffer and Aduncus's economy will shrink significantly. Therefore, MECO's hydrocarbon exploration has a significant effect on beaked whales and Aduncus's economy.

Thus, Mersenne was required to conduct an EIA under Article 2(3) of Espoo. MECO's hydrocarbon exploration was part of the broad process of "[o]ffshore hydrocarbon production," making it an activity defined in Appendix I. Further, the use of airguns was likely to have a significant adverse transboundary impact by adversely affecting beaked whales and, as a result, Aduncus's economy. Therefore, Mersenne violated its duty under the Espoo Convention to prepare an EIA before MECO explored for hydrocarbon.

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<sup>53</sup> *Id.* at 5.

<sup>54</sup> *Id.* at 4-5.

<sup>55</sup> Kenneth R. Weiss, *Researchers Probe Whether Sonar Caused Deaths of Whales*, L.A. Times, Sept. 26, 2002, at A10; Kenneth R. Weiss, *Sonar Tests a Likely Link to Whale Deaths Probe*, L.A. Times, Oct. 1, 2002, at A3; Kenneth R. Weiss, *Research Involving Sonic Blasts Halted*, L.A. Times, Oct. 29, 2002, at B7 [hereinafter Weiss Research]; U.S. Dept. of Commerce & Sec'y of the Navy, Joint Interim Report, *Bahamas Marine Mammals Stranding Event of 15-16 March 2000* ii-v (Dec. 2001), available at [http://www.nmfs.noaa.gov/pr/pdfs/health/stranding\\_bahamas2000.pdf](http://www.nmfs.noaa.gov/pr/pdfs/health/stranding_bahamas2000.pdf).

<sup>56</sup> *See R.* at ¶ 2.

<sup>57</sup> This is so because the death of whales has been linked to under water sound, *see Streever et al., supra* note 12, at 4-5, and because an independent non-governmental organization, Bluewatch, reported that the use of airguns was causing whales to avoid the areas where MECO was searching for hydrocarbon resources, R. at ¶ 18.

2. Mersenne failed to meet its obligations under UNCLOS when it did not assess the potential environmental effects of MECO's hydrocarbon exploration.

Article 192 of UNCLOS announces that States have a general duty to protect and preserve the marine environment.<sup>58</sup> Under Article 206, a State must, as far as practicable, assess the potential effects of an activity on the marine environment when they have reasonable grounds for believing the activity may cause substantial pollution of, or significant and harmful changes to the marine environment.<sup>59</sup> Mersenne violated its obligation under UNCLOS because (1) there were reasonable grounds for believing that MECO's use of airguns would cause significant and harmful changes to the population of beaked whales in the Sedna Sea; and (2) Mersenne failed to assess any potential impact.

First, Mersenne had reasonable grounds to believe that MECO's use of airguns would cause substantial pollution of the marine environment or significant and harmful changes to the beaked whale population. Article 1(4) defines pollution of the marine environment as the introduction of substances or energy in the marine environment which result in harm to marine life.<sup>60</sup> The term "energy" includes noise.<sup>61</sup> The high intensity of sound emitted from the use of airguns<sup>62</sup> coupled with the ocean's ability to transmit sound<sup>63</sup> suggests that MECO's use of two 20-gun arrays would cause substantial pollution of the Sedna Sea.

Moreover, Mersenne had reasonable grounds to believe that MECO's use of airguns had the potential to cause significant harm to the beaked whale population. Prior to MECO's

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<sup>58</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 192 [hereinafter UNCLOS].

<sup>59</sup> *Id.* at art. 206.

<sup>60</sup> *Id.* at art. 1, § 4.

<sup>61</sup> See, e.g., Harm M. Dotinga & Alex G. Oude Elferink, *Acoustic Pollution in the Oceans: The Search for Legal Standards*, 31 OCEAN DEV. & INT'L L. 151, 158-59 (2000); Elena McCarthy, *International Regulation of Transboundary Pollutants: The Emerging Challenge of Ocean Noise*, 6 OCEAN & COASTAL L.J. 257, 275-76 (2001).

<sup>62</sup> Inkelas, *supra* note 46, at 210; Richardson et al., *supra* note 46, at 155-58.

<sup>63</sup> See Jansay, *supra* note 47, at vii.

hydrocarbon exploration, at least five mass strandings of marine mammals had been causally linked to high intensity sound in the ocean, and one was specifically the result of airguns.<sup>64</sup> Additionally, within a few months of MECO beginning to explore for hydrocarbon, an international NGO, Bluewatch, reported that sounds emitted from airguns during hydrocarbon exploration caused beaked whales to avoid areas of exploration.<sup>65</sup> Furthermore, several scholars note that sound emitted from airguns has the potential to kill beaked whales or cause significant changes in behavior.<sup>66</sup> Therefore, Mersenne had a reasonable belief that MECO's activity could cause significant harm to beaked whales.

Second, Mersenne failed to take any steps to assess the impact of using airguns underwater. The requirement to assess environmental impact is conditioned with the phrase "as far as practicable."<sup>67</sup> This allows for States to take measures to assess environmental impact consistent with their capabilities, but does not relieve the State from its duty to assess the impact.<sup>68</sup> Before MECO engaged in hydrocarbon exploration, Mersenne did not do any environmental assessment. At this point, Mersenne violated its duty under Article 206, irrespective of mitigation attempts.

In sum, UNCLOS required Mersenne to evaluate the environmental impact of MECO's hydrocarbon exploration – an obligation Mersenne failed to meet. As a result of past stranding events, independent studies, and scholarly literature, Mersenne should have had a reasonable belief that MECO's use of airguns had the potential to cause significant harm to beaked whales. Nevertheless, Mersenne failed to take any steps to evaluate the impact and therefore violated Article 206 of UNCLOS.

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<sup>64</sup> See, e.g., Weiss Research, *supra* note 55, at B7.

<sup>65</sup> R. at ¶18.

<sup>66</sup> Inkelas, *supra* note 46, at 210; Streever, *supra* note 12, at 4-5.

<sup>67</sup> UNCLOS, *supra* note 57, at art. 206.

<sup>68</sup> Neil Craik, *The Environmental Law of Environmental Impact Assessment* 99 (Cambridge University Press 2008).

3. Mersenne failed to meet its obligations under the CBD when it did not assess the potential environmental effects of MECO's hydrocarbon exploration.

A fundamental goal of the CBD is to conserve biological diversity through the protection of species and their habitats.<sup>69</sup> To promote this goal, Article 14 requires parties, as far as possible and appropriate, to introduce procedures for conducting “environmental impact assessments of its proposed projects that are likely to have significant adverse impacts on biological diversity....”<sup>70</sup> As shown above, MECO's underwater seismic surveys were likely to have a significant adverse impact on beaked whales.<sup>71</sup> Additionally, Mersenne did not have any procedures for assessing the environmental impact of MECO's activities. Therefore, Mersenne violated Article 14 of CBD.

**B. Mersenne violated customary international law by refusing to assess the potential impact of hydrocarbon exploration because the use of airguns could harm beaked whales and adversely impact Aduncus's ecotourism industry.**

A principle becomes customary international law whenever there is a relatively uniform and consistent State practice, and there is a belief among States that such practice is legally compelled.<sup>72</sup> Specifically, Mersenne was required to prepare an assessment because (1) the harm principle, (2) the duty to cooperate, and (3) the duties to consult and inform, all principles of customary international law, require a State to gather the information necessary to assess the potential environmental consequences of proposed activities.<sup>73</sup> Additionally, (4) Mersenne should have assessed the potential impact of its actions because environmental assessments are required as a customary norm of international law.

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<sup>69</sup> Convention on Biological Diversity, preamble, June 5, 1992, 1760 U.N.T.S. 9 (No. 30619) [hereinafter CBD].

<sup>70</sup> *Id.* at art. 14.

<sup>71</sup> See *supra* Part (I)(A)(1)(ii).

<sup>72</sup> See *Continental Shelf*, 1969 ICJ 3, ¶¶ 71, 72 (Feb. 20).

<sup>73</sup> Craik, *supra* note 68, at 120; Alexandre Kiss & Dinah Shelton, *International Environmental Law* 259, 280 (2nd ed. 2000).

1. Mersenne failed to comply with customary international law because the harm principle requires MECO to assess the environmental impact of the use of airguns.

As enshrined in the *Trail Smelter* arbitration, the harm principle demands that “[n]o state has the right to use or permit the use of its territory in such a manner as to cause injury in or to the territory of another or the properties of persons therein...”<sup>74</sup> The harm principle has been codified as Principle 21 to the Stockholm Declaration,<sup>75</sup> and again as Principle 2 of the Rio Declaration.<sup>76</sup> High ranking representatives from both Mersenne and Aduncus fully participated in both of the conferences that lead to these declarations.<sup>77</sup>

Mersenne argues that under Principle 2 of the Rio Declaration they have “the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies.”<sup>78</sup> The Kingdom of Aduncus is in full agreement with this assessment. However, Aduncus points to the second half of Principle 2, which explains that Mersenne has “the [additional] responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”<sup>79</sup> An identical provision is included within Principle 21 of the Stockholm declaration.<sup>80</sup> This responsibility inherently requires Mersenne to assess the environmental impact of the use of airguns. Mersenne was notified by a diplomatic note in August 2008 that Aduncus had concerns about harm to whales within Aduncus’s EEZ.<sup>81</sup> At this point, Mersenne’s international responsibilities under the harm principle required Mersenne to ensure that the

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<sup>74</sup> *Trail Smelter* (U.S. v. Can.), 3 R. Int’l Arb. Awards 1905 (1941).

<sup>75</sup> United Nations Conference on the Human Environment, June 5-16 1972, *Declaration of the United Nations Conference on the Human Environment*, prin. 21, 11 I.L.M. 1416 [hereinafter Stockholm Declaration].

<sup>76</sup> United Nations Conference on Environment and Development, June 3-14, 1992, *Declaration on Environment and Development*, prin. 2, 31 I.L.M. 874 [hereinafter Rio Declaration].

<sup>77</sup> R. at ¶ 12.

<sup>78</sup> Rio Declaration, *supra* note 76, at prin. 2.

<sup>79</sup> *Id.*

<sup>80</sup> Stockholm Declaration, *supra* note 75, at prin. 21.

<sup>81</sup> R. at ¶ 19.

airgun activities were not damaging Aduncus's environment by assessing the environmental impact of their use. Moreover, Aduncus reiterated its position in the correspondences of October 2008 and January 2009.<sup>82</sup> Nevertheless, at no point was any type of environmental assessment conducted by Mersenne. Thus, Mersenne breached its international obligations under the harm principle.

2. Mersenne failed to comply with customary international law because the duty to cooperate to protect the environment required Mersenne to prepare an assessment of potential environmental harm.

The duty to cooperate to protect the environment, as expressed in Principle 24 of the Stockholm Declaration, requires that “[i]nternational matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries...”<sup>83</sup> The United Nations reaffirmed this principle in UN General Assembly Resolution 2995,<sup>84</sup> and the 1982 World Charter for Nature.<sup>85</sup> Further, UN General Assembly Resolution 2995 explains that the duty of cooperation applies during “*exploration*” for natural resources, and that the duty can only be achieved when “knowledge is provided of the technical data relating to the work to be carried out by states... with a view to avoiding significant harm that may occur in the environment of the adjacent area.”<sup>86</sup> In accordance with this principle, Mersenne defines MECO's activities as hydrocarbon “*exploration*.”<sup>87</sup> Additionally, these activities significantly harm the environment.<sup>88</sup> Thus, the duty to cooperate to protect the environment, a norm of customary international law, required Mersenne to assess the potential environmental impact of

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<sup>82</sup> R. at ¶¶ 21, 25.

<sup>83</sup> Stockholm Declaration, *supra* note 75, at prin. 24.

<sup>84</sup> G.A. Res. 2995, U.N. GAOR, 27th Sess., U.N. Doc. A/2995 (Dec. 15, 1972) [hereinafter Resolution 2995].

<sup>85</sup> World Charter for Nature, U.N. Doc. A/RES/37/7 (Oct. 28, 1982) [hereinafter World Charter].

<sup>86</sup> Resolution 2995, *supra* note 82, at ¶¶ 1-2 (emphasis added).

<sup>87</sup> R. at ¶ 20.

<sup>88</sup> See *supra* Part (I)(A)(1)(i).

airgun use. Because Mersenne conducted no such assessment, Mersenne breached customary international law.

3. Mersenne failed to comply with customary international law because the duties to consult and inform required Mersenne to confer with Aduncus before undertaking activities that would adversely affect Aduncus's EEZ and MPA.

The duty to consult, as embodied in the Rio Declaration, requires States to provide “prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and [to] consult with those States at an early stage....”<sup>89</sup> Additionally, the duty to inform stresses the necessity to notify other States in advance of activities that can reasonably be expected to significantly affect the environment in those States.<sup>90</sup> As argued above, Aduncus's activities not only *may* cause significant transboundary harm, they *do* cause significant transboundary harm.<sup>91</sup> Thus, under the duties to consult and inform, Mersenne was required to provide Aduncus with “relevant information” about the potential affect of the airguns, and Mersenne breached these duties of customary international law.

4. Mersenne failed to comply with various other tenants of customary international law by refusing to prepare an assessment of the potential environmental consequences of its actions.

Other instruments reaffirm Mersenne's responsibility to prepare an assessment of the environmental impact of the use of airguns under customary international law. For example, Principle 11(c) of the World Charter for Nature states that “[a]ctivities which may disturb nature

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<sup>89</sup> Rio Declaration, *supra* note 76, at art. 19. The norm is also included in General Assembly Resolution 3129 and Article 3 of the Charter of Economic Rights and Duties of States. G.A. Res. 3129, U.N. GAOR, 28th Sess., U.N. Doc. A/3129 (Dec. 13, 1973)

<sup>90</sup> Kiss, *supra* note 73, at 289.

<sup>91</sup> See *supra* Part (I)(A)(1)(i).

shall be preceded by assessment of their consequences.”<sup>92</sup> The requirement in the World Charter that an assessment is invoked when an activity “may disturb nature” has been found to be lower threshold than requirements for assessments in other charters and provisions.<sup>93</sup> Moreover, Principle 4 of the United Nations Environment Programme’s *Environmental Law Guidelines on Shared Natural Resources* declares that States should “make environmental assessment 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.”<sup>94</sup> When considering these sources in addition to the Rio Declaration, the Stockholm Declaration, UN General Assembly Resolution 2995, and the 1982 World Charter for Nature, it is evident that assessments of transboundary environmental harm are uniformly and consistently accepted as a principle of customary international law. Thus, Mersenne was required to assess the potential impact of MECO’s use of airguns.

Mersenne was therefore required under the harm principle, the duty to cooperate, the duties to inform and consult, and other principles of customary international law requiring the preparation of environmental assessments to provide Aduncus with an assessment of the potential harm that airguns may cause. Because Mersenne provided no such assessment, Mersenne breached its obligations under customary international law.

Thus, Mersenne’s failure to prepare any assessment of the potential environmental consequences of hydrocarbon exploration using airguns violated its obligations under treaty law and customary international law.

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<sup>92</sup> World Charter, *supra* note 85.

<sup>93</sup> Craik, *supra* note 68, at 92.

<sup>94</sup> United Nations Environment Programme, *Environmental Law Guidelines on Shared Natural Resources*, prin. 4, available at <http://www.unep.org/Law/PDF/UNEPEnvironmental-Law-Guidelines-and-Principles.pdf> (emphasis added).



**II. MERSENNE VIOLATED INTERNATIONAL LAW BY CAUSING SIGNIFICANT TRANSBOUNDARY HARM AND DEROGATING FROM THE PRECAUTIONARY PRINCIPLE WHEN MECO USED FORTY AIRGUNS TO SEARCH FOR UNDERWATER HYDROCARBON RESOURCES NEAR ADUNCUS’S EEZ AND MPA.**

Mersenne violated international law by allowing MECO to use airguns to explore for hydrocarbon reserves for three reasons. First, both treaty law and customary international law recognize the general principle that States should ensure that activities within their territory do not cause significant harm to the environment of other States and MECO’s activities violated this principle. Second, Mersenne cannot claim a state of necessity. Third, MECO’s activities violated the precautionary principle.

**A. MECO’s use of airguns to conduct underwater seismic surveys violated international law by causing significant transboundary harm.**

Article 2(1) of the Espoo Convention states that “[t]he Parties shall...take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impacts from proposed activities.”<sup>95</sup> The same general principle is stated in UNCLOS and CBD.<sup>96</sup> Additionally, as first observed in the *Trail Smelter* Arbitration,<sup>97</sup> customary law recognizes the general principle that States should ensure that activities within their territory do not cause significant transboundary harm. For example, Principle 21 of the Stockholm Declaration recognizes that “[s]tates have...the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states....”<sup>98</sup> This Court has previously recognized that Principle 21, or some formulation thereof, is “now part

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<sup>95</sup> Espoo Convention, *supra* note 34, at art. 2, ¶ 1.

<sup>96</sup> CBD, *supra* note 69, at art. 3; UNCLOS. *supra* note 58, at art. 194, ¶ 2. Neither of these Conventions contains the word “significant.” However, it is widely recognized that the general principle incorporates the words “significant” or “substantial.” John H. Knox, *The Myth and Reality of Environmental Impact Assessment*, 96 A.J.I.L. 291, 293 (2002).

<sup>97</sup> *Trail Smelter* (U.S. v. Can.), 3 R. Int’l Arb. Awards 1905 (1941).

<sup>98</sup> Stockholm Declaration, *supra* note 75, at prin. 21.

of the corpus of international law relating to the Environment.”<sup>99</sup> Thus, through both treaty and customary law, Mersenne has an obligation to Aduncus to ensure that MECO’s activities do not cause significant transboundary harm.

The Espoo Convention defines “impact” as “any effect caused by a proposed activity on the environment...”<sup>100</sup> This includes effects on fauna that alter socio-economic conditions.<sup>101</sup> The Convention further defines “transboundary impact” as “any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party.”<sup>102</sup>

MECO’s exploration activities caused a “transboundary impact” because they effected beaked whales, which are part of the fauna located in the EEZ of Aduncus, and the effect on beaked whales in turn impacts the “socio-economic conditions” in Aduncus in the form of the eco-tourism industry.<sup>103</sup> Additionally, the harm that Mersenne caused and continues to cause is “significant,”<sup>104</sup> and was even recognized by a non-governmental organization.<sup>105</sup> Therefore, MECO’s exploration activities have a significant transboundary impact to Aduncus, and Mersenne breached its obligations under treaty and customary law.

**B. Mersenne cannot claim a state of necessity for violating its duty to avoid transboundary harm because Mersenne took no measures to assess alternative courses of action.**

This Court has recognized that a state of necessity may be invoked only in

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<sup>99</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 8, 40 (July 8).

<sup>100</sup> Espoo Convention, *supra* note 34, at art. 1(vii).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at art. 1(viii).

<sup>103</sup> *See supra* Part (I)(A)(1)(i).

<sup>104</sup> *Id.*

<sup>105</sup> R at ¶ 18.

exceptional circumstances. In the *Gabcikovo-Nagymaros Project* case, the Court stated that a state of necessity is only justified if “the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril.”<sup>106</sup> For the state of necessity to be invoked, the peril must pose grave danger to “the survival of the State itself, or its political or economic survival,” among other disastrous consequences.<sup>107</sup>

Mersenne cannot claim a state of necessity because it has not shown that using airguns for hydrocarbon exploration was the “only means of safeguarding an essential interest.” Mersenne has not suggested that it considered any other methods of hydrocarbon exploration or any alternate ways to address its shortage of electricity. Aduncus supports Mersenne’s attempts to solve its problems, but simply demands that Mersenne does so in a way that does not cause significant harm to beaked whales and comports with international law.

Additionally, Mersenne has not adequately exhibited that its shortage of electricity represents a “grave and imminent” peril to an “essential interest,” such as “its political or economic survival.” Though unemployment has reached 23 percent in Mersenne, Mersenne does not suggest that its economy will “imminently” collapse. As with other countries in these trying economic times, Mersenne is going through an economic downturn and will likely rebound in the near future, especially given its abundance of natural resources.

In sum, Mersenne cannot invoke the doctrine of necessity under international law because it has not shown that there is a grave and imminent peril to an essential interest or that MECO’s current activities are the only means of safeguarding that interest.

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<sup>106</sup> *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 2, 68-69 (Sept. 25).

<sup>107</sup> *Report of the International Law Commission to the General Assembly on the Work of its Thirty-third Session*, Int’l Law Commission Y.B., Vol. 2, part II, 35 (1980), U.N. Doc. A/CN.4/SER.A/1980/Add.1 [hereinafter International Law Commission].

**C. Even if the significance of the harm is not apparent, the precautionary approach requires MECO to halt its activities pending further investigation and consultation.**

This precautionary principle is a tenant of customary international law.<sup>108</sup> The principle, as memorialized in Principle 15 of the Rio Declaration, requires a party taking an action which may potentially have adverse environmental consequences to show that its activity would not cause significant harm.<sup>109</sup> Thus, the burden to show that the activity does not harm the environment is on the party taking action. Moreover, when there are threats of serious or irreversible damage, “lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>110</sup> Importantly, where as little as *some* evidence exists that the activity causes serious harm, even if it is inconclusive, the party must halt the action and assess its effects.<sup>111</sup>

Pursuant to the precautionary approach, Mersenne must stop MECO’s exploration pending a further study of its impact. As discussed above, Mersenne’s actions do have adverse environmental consequences.<sup>112</sup> Although the evidence of the specific effect of noise on whales in Aduncus’s EEZ is inconclusive,<sup>113</sup> Mersenne failed to show that MECO’s use of airguns will not cause significant harm to the whales. Therefore, the precautionary principle dictates that Mersenne halt its activities pending further investigation.

Further, Mersenne’s attempt at mitigation has not properly alleviated the concerns under the precautionary principle. Mersenne attempted to mitigate the risk to beaked whales by having MECO place an on-board observer on its vessels to discontinue airgun blasts when a whale was

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<sup>108</sup> Patricia Birnie, et al., *International Law and the Environment* 159-60 (Oxford University Press 2009).

<sup>109</sup> Rio Declaration, *supra* note 76, prin. 15.

<sup>110</sup> *Id.*

<sup>111</sup> Birnie, et al., *supra* note 108, at 157.

<sup>112</sup> *See supra* Part (I)(A)(1)(ii).

<sup>113</sup> R. at ¶ 26.

spotted within 500 meters of the ship. Additionally, MECO ramped up the intensity of the blasts over a forty minute time period. However, Mersenne has failed to show that either of these measure will be effective in preventing harm to beaked whales. The observers are ineffective because they can only spot whales on the surface of the sea, and beaked whales commonly swim underwater.<sup>114</sup> Moreover, the ramping procedure is ineffective because whales located close to the blasts cannot swim fast enough to avoid the sound.<sup>115</sup> Given the uncertainty of the effectiveness of Mersenne's attempt to mitigate the noise pollution, the precautionary approach requires that the activities are halted pending further investigation.

In conclusion, Mersenne is in violation of international law and must stop its hydrocarbon exploration. Under both treaty and customary law, Mersenne violated its duty to avoid causing transboundary harm in allowing MECO to use airguns for exploration of hydrocarbon. Additionally, MECO's use of airguns cannot be justified under the doctrine of necessity. Further, under the precautionary principle, Mersenne must discontinue MECO's exploration pending a further investigation of its consequences.

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<sup>114</sup> Smithsonian National Museum of National History, Marine Mammal Program, Beaked Whale Identification Guide, *available at* [http://vertebrates.si.edu/mammals/beaked\\_whales/pages/mission.htm](http://vertebrates.si.edu/mammals/beaked_whales/pages/mission.htm).

<sup>115</sup> *Id.* Assuming that the ramp up procedure takes forty minutes, and noting that sound travels at least one thousand miles in water, *see* Jasnay, *supra* note 47, at vii, a whale located very near to the airguns would need to swim 1,500 miles-per-hour to avoid the sound (1000 miles/40 minutes = 25 miles-per-minute = 1,500 miles per hour).

## CONCLUSION

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

1. Declare that Mersenne is required to conduct an EIA with respect to MECO's activities, and;
2. Declare that Mersenne violated international law by directing MECO to use airgun arrays to explore for hydrocarbon reserves 250 nautical miles from Aduncus's EEZ and MPA.

Respectfully Submitted

Team 1026  
Agents for the Kingdom of Aduncus