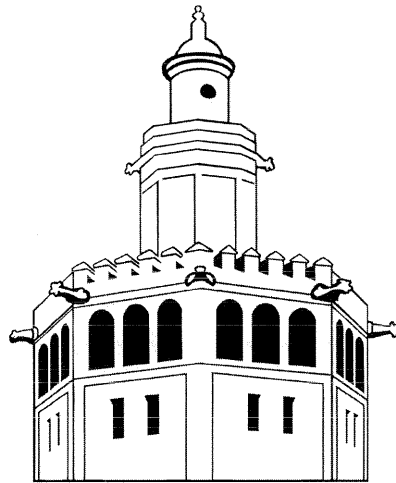


**Beaked Whales and Marine Seismic Surveys
(Kingdom of Aduncus/Republic of Mersenne)**

RECORD

**Fourteenth Annual
International Environmental
Moot Court Competition
2009–2010**



STETSON
UNIVERSITY

College of Law

NOTIFICATION, DATED 30 JUNE 2009, ADDRESSED TO
THE MINISTER OF FOREIGN AFFAIRS OF THE KINGDOM OF ADUNCUS
AND
THE MINISTER OF FOREIGN AFFAIRS OF THE REPUBLIC OF MERSENNE

The Hague, 30 June 2009.

On behalf of the International Court of Justice, and in accordance with Article 26 of the Rules of Court, I have the honor to acknowledge receipt of the joint notification dated 16 June 2009. I have the further honor to inform you that the case of Beaked Whales and Marine Seismic Surveys (Kingdom of Aduncus/Republic of Mersenne) has been entered as 2009 General List No. 114. The written proceedings shall consist of memorials to be submitted to the Court by 20 November 2009. Oral proceedings are scheduled for 11–14 March 2010.

/s/
Registrar
International Court of Justice

JOINT NOTIFICATION, DATED 16 JUNE 2009, ADDRESSED TO
THE REGISTRAR OF THE COURT

The Hague, 16 June 2009.

On behalf of the Kingdom of Aduncus and the Republic of Mersenne, and in accordance with Article 40, paragraph 1, of the Statute of the International Court of Justice, we have the honor to transmit to you an original copy of the English texts of the 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.

For the Kingdom of Aduncus:

/s/
Meg Aptera
Minister of Foreign Affairs

For the Republic of Mersenne:

/s/
E. Chladni
Minister of Foreign Affairs

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

The Kingdom of Aduncus and the Republic of Mersenne,

Recalling that the Kingdom of Aduncus and the Republic of Mersenne are Members of the United Nations and that the Charter of the United Nations calls on Members to settle international disputes by peaceful means,

Observing that the Kingdom of Aduncus and the Republic of Mersenne are Parties to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention),

Cognizant that the Kingdom of Aduncus and the Republic of Mersenne are States Parties to the United Nations Convention on the Law of the Sea,

Conscious that the Kingdom of Aduncus and the Republic of Mersenne are Parties to the Convention on Biological Diversity and the International Convention for the Regulation of Whaling,

Considering that ecotourism, including whale watching, is an important economic activity in the Kingdom of Aduncus,

Bearing in mind the energy needs of the people and industries of the Republic of Mersenne,

Recognizing that differences have arisen concerning the alleged environmental impact and risks associated with hydrocarbon-related activities,

Noting that the Kingdom of Aduncus and the Republic of Mersenne have been unable to settle their differences through negotiation and inquiry,

Desiring that the International Court of Justice, hereinafter referred to as the Court, consider these differences,

Desiring further to define the issues to be submitted to the Court,

Have agreed as follows:

Article I

The Kingdom of Aduncus and the Republic of Mersenne, hereinafter referred to as the Parties, shall submit the questions contained in Annex A of this Special Agreement to the Court pursuant to Article 40, paragraph 1, of the Statute of the International Court of Justice.

Article II

1. The Parties shall request the Court to decide this matter on the basis of the rules and principles of general international law, as well as any applicable treaties.
2. The Parties also shall request the Court to decide this matter based on the Agreed Statement of Facts, attached as Annex A, which is an integral part of this Agreement.
3. The Parties also shall request the Court to determine the legal consequences including the rights and obligations of the Parties, arising from any judgment on the questions presented in this matter.
4. The Parties shall not contest the jurisdiction of the Court in their written pleadings or oral arguments.

Article III

1. The proceedings shall consist of written pleadings and oral arguments.
2. The written pleadings shall consist of memorials to be submitted simultaneously to the Court by the Parties.
3. The written pleadings shall be consistent with the Rules of the 2009–2010 International Environmental Moot Court Competition (International Finals).
4. No changes may be made to any written pleading once it has been submitted to a Regional Round. A written pleading submitted to the International Finals must be an exact copy of the written pleading submitted to the Regional Round.

Article IV

1. The Parties shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.
2. Immediately after the transmission of the Judgment, the Parties shall enter into negotiations on the modalities for its execution.
3. If the Parties are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment.

Article V

This Special Agreement shall enter into force upon signature.

DONE at Granada, Spain, this sixteenth day of June 2009, in two copies, each in the English language, and each being equally authentic.

For the Kingdom of Aduncus:

/s/

Meg Aptera
Minister of Foreign Affairs

For the Republic of Mersenne:

/s/

E. Chladni
Minister of Foreign Affairs

ANNEX A

1. The Kingdom of Aduncus and the Republic of Mersenne are coastal states along the Sedna Sea that share a common territorial boundary. Accordingly, their territorial seas and exclusive economic zones (EEZs) are adjacent to each other. The Kingdom of Aduncus is located directly north of the Republic of Mersenne.
2. The Kingdom of Aduncus is a small, developing country with a population of approximately 240,000 people. Its economy depends heavily on tourism, agriculture, and artisan fishing (small-scale commercial and subsistence fishing). Tourism is the second-largest source of hard currency after remittances from Aduncus nationals living and working abroad. Known for its beaches and corals reefs, the Kingdom of Aduncus hosted more than 80,000 international visitors in 2008. Approximately 12,000 people participate annually in whale watching excursions, which generated more than 100 million Aduncus kroons (approximately the equivalent of 5 million U.S. dollars). The government, a constitutional monarchy, is committed to maintaining and developing the state's ecotourism activities, such as beach resorts, sport fishing charters, and whale watching trips.
3. The Republic of Mersenne is a newly industrialized country with a population of approximately 22 million people. It has an abundant supply of natural resources, and from 2003 to the first half of 2008, its economic growth was robust. At the end of 2007, however, the Republic of Mersenne began to experience an electricity crisis because the state-owned power company, Mersenne Electric Company (MECO), was unable to import sufficient quantities of oil and natural gas. In the last half of 2008, the global financial crisis led to a decline in demand for and prices of the Republic of Mersenne's commodities; accordingly, its economy contracted significantly. In 2009, the unemployment rate reached 23 percent.
4. The Kingdom of Aduncus has designated approximately half of its territorial sea and EEZ as a Marine Protected Area (MPA). Under its domestic legislation, the Kingdom of Aduncus prohibits all fishing in the MPA, except for sport and subsistence fishing. The extraction of mineral resources is prohibited within the MPA.
5. The MPA is located off the southern half of the Kingdom of Aduncus's territory and thus borders the territorial sea and EEZ of the Republic of Mersenne. The Kingdom of Aduncus has requested that the Republic of Mersenne establish a similar MPA within its territorial sea and EEZ. The Republic of Mersenne has declined to do so.
6. The Kingdom of Aduncus and the Republic of Mersenne are Members of the United Nations, and are Parties to the Statute of the International Court of Justice.
7. The Kingdom of Aduncus and the Republic of Mersenne are Parties to the Vienna Convention on the Law of Treaties.

8. The Kingdom of Aduncus and the Republic of Mersenne are Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, known as the Espoo Convention. The Kingdom of Aduncus has ratified the first and second amendments to the Espoo Convention, while the Republic of Mersenne has not.
9. The Kingdom of Aduncus and the Republic of Mersenne are States Parties to the United Nations Convention on the Law of the Sea (UNCLOS).
10. The Kingdom of Aduncus and Republic of Mersenne are Contracting Parties to the Convention on Biological Diversity (CBD).
11. The Kingdom of Aduncus and Republic of Mersenne are also Parties to the International Convention for the Regulation of Whaling.
12. High-level representatives from the Kingdom of Aduncus and the Republic of Mersenne attended and fully participated in the 1972 United Nations Conference on the Human Environment at Stockholm, the 1992 United Nations Conference on Environment and Development at Rio de Janeiro, and the 2002 World Summit on Sustainable Development at Johannesburg.
13. The dispute between the Kingdom of Aduncus and the Republic of Mersenne concerns underwater sound. A recent paper prepared for the April 2008 Society of Petroleum Engineers International Conference on Health, Safety, and Environment in Oil and Gas Exploration and Production held in Nice, France, explains the concept of underwater sound:

Rapidly changing pressure—that is, mechanical energy that cycles as a wave—in air and water is perceived as sound, which can be characterized by its frequency, usually measured in hertz (Hz), and its amplitude, or “loudness,” usually reported in decibels (dB). One often-confusing aspect of sound measurements reported in decibel units is related to the “reference pressure.” In air, dB are generally reported in reference to 20 μPa (i.e., microPascals), while in water dB are generally reported in reference to 1 μPa . Ideally, the reference pressure should be incorporated as part of the units; for example, underwater sounds should normally be reported in units of dB re 1 μPa . Because in-air and underwater sounds are usually reported in different units, they cannot be compared directly. It is also important to understand that a 3 dB increase in amplitude (regardless of the reference pressure) constitutes a doubling of sound intensity. For example, a 113 dB re 1 μPa sound has twice the intensity of a 110 dB re 1 μPa sound.

Bill Streever et al., *Managing Marine Mammal Issues: Corporate Policy, Stakeholder Engagement, Applied Research, and Training*, 2 SPE 111479 (2008). [The complete paper is available at the Stetson International Environmental Moot Court website.]

14. Underwater sound is produced by many activities. One such activity is the use of an array of airguns to conduct a seismic survey. The survey results can offer information about geologic structures, including the presence of oil and/or natural gas, up to 40 kilometers below the ocean floor. Figure 1, from Streever et al., *supra*, at 3, ¶ 13, provides an illustration of a seismic vessel.

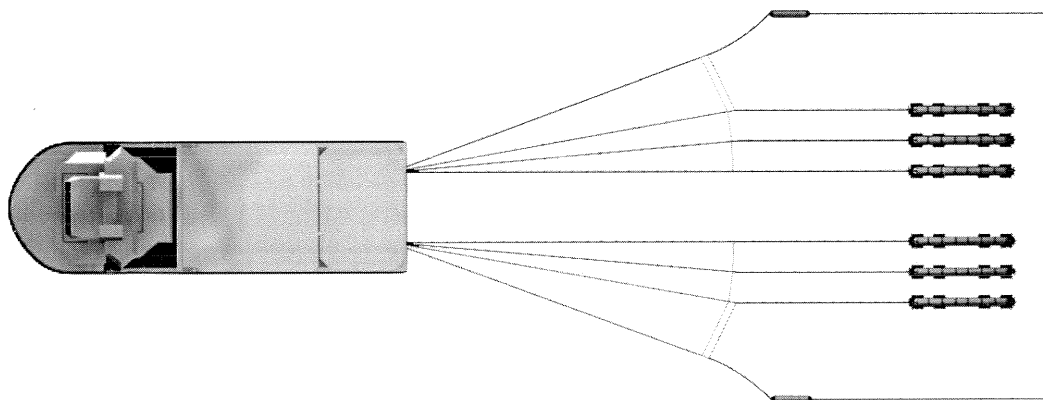


Figure 1—Seismic vessel with airgun array.

15. Some marine mammals may be adversely affected by underwater sound. Whether a particular individual animal is affected will depend on many variables, including the frequency of the sound, the decibel level, whether the sound is impulsive (e.g., from an airgun or explosive) or continuous (e.g., from a vessel's propellers), the distance between the sound and the animal, and the hearing sensitivity and frequency range of the animal.
16. One type of marine mammal that may be adversely affected by underwater sounds created by airguns is beaked whales. Although beaked whales “comprise nearly 25% of all cetacean species, . . . these whales are one of the least understood families of cetaceans.” Smithsonian National Museum of Natural History, Marine Mammal Program, Beaked Whale Identification Guide, *available at* http://vertebrates.si.edu/mammals/beaked_whales/pages/mission.htm.
17. In December 2007, the Republic of Mersenne granted permission to MECO to begin exploration for hydrocarbon reserves with Mersenne's northern EEZ. Beginning in mid-December 2007, MECO used 20-gun arrays to search for natural gas and oil reserves approximately 250 nautical miles from Aduncus's EEZ.

18. In July 2008, Bluewatch, an international non-governmental organization, reported that its data suggested that the sounds associated with the airguns were causing beaked whales to avoid the areas where hydrocarbon exploration activities were being conducted. The Republic of Mersenne and MECO dispute these assertions.
19. On 28 August 2008, the following diplomatic note was forwarded to the government of the Republic of Mersenne:

The Embassy of the Kingdom of Aduncus presents its compliments to the Government of the Republic of Mersenne and has the honor to request that the Republic of Mersenne enter into consultations with the Kingdom of Aduncus concerning the effect of noise pollution from the Mersenne Electric Company's (MECO's) hydrocarbon exploration activities. The Government of the Kingdom of Aduncus notes that the noise associated with airguns is having a significant adverse impact on a number of marine mammals, including especially beaked whales that travel between the exclusive economic zones of our two nations. The Government of the Kingdom of Aduncus is particularly concerned about the economic impact that these activities may have on its eco-tourism industry.

It is observed that the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) requires the Republic of Mersenne to conduct an environmental impact assessment (EIA) for activities listed in Appendix I, including "[o]ffshore hydrocarbon production." MECO's activities fall within this category, and thus an EIA should have been prepared prior to the authorization of the airgun activities. These hydrocarbon production activities should cease pending the preparation of an EIA that considers the impacts of noise pollution on marine mammals. The Government of the Kingdom of Aduncus did not receive proper notice in accordance with Article 3 of the Espoo Convention.

Because of the transboundary impact of the noise pollution, the Government of the Kingdom of Aduncus invokes Article 3, paragraph 7, of the Espoo Convention as a prelude to appropriate consultation. The Government of the Kingdom of Aduncus welcomes the opportunity to discuss these matters at the highest levels.

Please accept the assurance of my highest consideration.

/s/
Mysti Ceti
Ambassador

20. On 15 September 2008, the following diplomatic note was forwarded to the Government of the Kingdom of Aduncus:

The Embassy of the Republic of Mersenne presents its compliments to the Government of the Kingdom of Aduncus and has the honor to acknowledge receipt of the diplomatic note dated 28 August 2008.

As an initial matter, the Government of the Republic of Mersenne appreciates the concerns of the Government of the Kingdom of Aduncus over the perceived impacts of marine seismic surveys. The Government of the Republic of Mersenne notes, however, that the marine seismic surveys undertaken entirely within the Republic of Mersenne's exclusive economic zone are not activities listed in Appendix I of the Espoo Convention. Marine seismic surveys are exploration activities; they are not "hydrocarbon production." The amendment to Appendix I, which the Kingdom of Aduncus has ratified, further clarifies what is meant by hydrocarbon production: "Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 metric tons/day in the case of petroleum and 500,000 cubic metres/day in the case of gas." To date, the surveys have not led to the extraction of petroleum or natural gas.

* * *

Furthermore, we are obliged to point out that the Republic of Mersenne has recently been unable to import sufficient quantities of oil and natural gas. The Republic of Mersenne is committed to energy independence. Any interference with this objective must be viewed as prejudicial to our national security.

* * *

We look forward to a continued dialogue, keeping in mind our energy and national security requirements. Please accept the assurance of my highest consideration.

/s/

Daniel Colloden
Ambassador

21. On 10 October 2008, the Government of the Kingdom of Aduncus provided the Government of the Republic of Mersenne with a diplomatic note that stated in part:

While we acknowledge your nation's energy needs, we note that the use of the Republic of Mersenne's natural resources must be done in accordance with its international obligations, including the Espoo Convention, the United Nations Convention on the Law of the Sea (UNCLOS), and the Convention on Biological Diversity (CBD).

We continue to assert that MECO's actions fall under Appendix I of the Espoo Convention. The proposed amendment to Appendix I is irrelevant. It has not entered into force and, in any event, the Republic of Mersenne has not ratified it.

Even if Appendix I is inapplicable, however, MECO's activities also trigger the need for an EIA under the general criteria in Appendix III of the Espoo Convention. The noise pollution, which travels across international boundaries, reaches an area of special environmental concern, Aduncus's MPA. These activities pose a grave threat to valued transboundary species, such as the beaked whale. We also observe that UNCLOS Article 206 and CBD Article 14 reinforce the legal obligation to perform an EIA in these circumstances.

22. On 2 November 2008, the Government of the Republic of Mersenne responded with a diplomatic note that stated in part:

It is unlikely that MECO's seismic surveys are causing any significant adverse transboundary impacts to beaked whales. Indeed, it is more likely that the whale watching vessels, through noise production and chase tactics, have a greater impact on marine mammals.

* * *

We decline to prepare an EIA under the Espoo Convention for several reasons. First, the survey activities do not constitute hydrocarbon production (extraction activities). Second, the surveys are conducted by two vessels and are relatively modest in size; thus, they do not fall under Appendix III's criteria. Finally, even if the survey activities did require an EIA, MECO has undertaken mitigation measures beginning on 1 April 2008. When commencing the survey activity, the intensity of the airguns is slowly "ramped up." The survey begins with the firing of a single airgun (the smallest airgun in terms of energy output and volume). Additional airguns are gradually activated over a period of 20 to 40 minutes until the desired operating level of the airgun array is reached. These steps reduce any alleged impacts below the "significant" level.

23. While MECO continued to conduct marine seismic surveys, the Kingdom of Aduncus and the Republic of Mersenne continued discussing the matter at the diplomatic level. The Kingdom of Aduncus continued to request the cessation of marine seismic surveys until an EIA examining the impact to marine mammals (and the beaked whale in particular) was prepared.
24. On 15 January 2009, a mass stranding of beaked whales occurred in the territory of the Republic of Mersenne. Twelve adult beaked whales were stranded on Mersenne's shoreline, approximately twenty kilometers south of the border of the Kingdom of Aduncus.

Although environmental authorities from the Mersenne Ministry of the Environment attempted to rescue the beaked whales and transport them to deeper waters, all twelve beaked whales died. Autopsy results were inconclusive.

25. On 20 January 2009, the Government of the Kingdom of Aduncus provided the Government of the Republic of Mersenne a démarche that stated in part:

The Kingdom of Aduncus deplores the reckless indifference displayed toward the impacts associated with MECO's activities. MECO had conducted surveys with 20-gun arrays in this area the previous week. Obviously, there is a connection between the intense noise pollution and the mass strandings. The Republic of Mersenne has failed to abide by its treaty obligations. It has still not prepared the EIA required by the Espoo Convention. The energy introduced into the marine environment by the airguns constitutes pollution under UNCLOS Article 1(4). The actions violate CBD Article 3's requirement to avoid transboundary harm. Furthermore, the Republic of Mersenne's actions and inactions are a clear breach of the precautionary principle. Because much is unknown about beaked whales, the precautionary principle dictates that MECO halt its actions pending further study.

26. On 2 February 2009, the Government of the Republic of Mersenne responded with a diplomatic note that stated in part:

As regrettable as the mass strandings were, we note that there is no specific evidence that establishes that MECO's marine seismic surveys caused the strandings. Chronology does not establish causation, and correlation does not imply causation. Moreover, the whales beached themselves on the territory of the Republic of Mersenne; thus, there is no transboundary impact.

To attempt to alleviate such concerns, however, the Republic of Mersenne has taken the additional step of requiring that all survey vessels have an on-board observer and the airguns may not be used when a whale is spotted within 500 meters of the vessel.

The Republic of Mersenne takes its international legal obligations very seriously. We have not breached any obligation imposed by UNCLOS or CBD. Indeed, those treaties recognize the Republic of Mersenne's right to explore and exploit its natural resources. We also strongly dispute that we have acted inconsistently with any customary international law obligations. Consider, for example, the precautionary approach as enshrined in Principle 15 of the Rio Declaration:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where 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.

The Kingdom of Aduncus reads into this general principle duties that simply do not exist.

To the extent that there may be a violation of an obligation (which we most certainly do not concede), any such action is excused under the doctrine of necessity. As the ICJ recognized in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, “the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation.” To be sure, necessity may be properly invoked only “on an exceptional basis.” The worst economic conditions since the 1930s present such an exceptional case.

27. On 15 February 2009, in accordance with Article 3, paragraph 7, of the Espoo Convention, the Kingdom of Aduncus and the Republic of Mersenne submitted to an inquiry commission the question of whether MECO’s activities in the Sedna Sea had resulted or were likely to result in significant adverse transboundary impacts.
28. On 15 April 2009, the inquiry commission presented its final opinion. One member found that MECO’s activities were likely to have caused and were likely to continue to cause significant adverse transboundary impacts because of the effect on beaked whales. One member found that MECO’s past activities were not likely to have caused any significant adverse transboundary impacts, and similar activities proposed for the future similarly would not likely cause any significant adverse transboundary impacts. The third member found that although MECO’s activities may have caused significant adverse transboundary impacts in the past, the mitigation measures now in force make it unlikely that such impacts would occur in the future.
29. In a public statement, the Prime Minister of the Kingdom of Aduncus expressed disappointment at the inquiry commission’s final opinion, stating that “it is inconceivable to me that an inquiry member could find that mitigation measures that did not prevent mass strandings were somehow dispositive.” She further reported that the Kingdom of Aduncus would continue to review all its legal options, specifically referencing Article 2, paragraph 10, of the Espoo Convention, which states that “provisions of this Convention shall not prejudice any obligations of the Parties under international law with regard to activities having or likely to have a transboundary impact.”
30. Additional negotiations between the Kingdom of Aduncus and the Republic of Mersenne failed to resolve the dispute, but the parties agreed to submit this matter to the International Court of Justice under a Special Agreement pursuant to Article 36, paragraph 1, of the Statute of the International Court of Justice.

31. The Kingdom of Aduncus opposes the claims in paragraph 32 and seeks an order declaring that international law requires the Republic of Mersenne to prepare an EIA with respect to MECO's hydrocarbon-related actions, and that such actions violate international law.
32. The Republic of Mersenne opposes the claims in previous paragraph 31 and seeks an order declaring that MECO's actions within the Republic of Mersenne's EEZ do not require the preparation of an EIA, and that such actions do not violate international law.