

SVKM's NMIMS KIRIT P. MEHTA SCHOOL OF LAW, MUMBAI
INTERNATIONAL MOOT COURT COMPETITION 2020

20th March – 22nd March 2020

CASE CONCERNING INTERNATIONAL OIL POLLUTION:

**OFF- SHORE DRILLING IN THE TERRITORIAL WATERS OF ENIGMA COUNTRY CAUSING
SIGNIFICANT ENVIRONMENTAL DAMAGE TO COASTAL AREAS IN BOTH ENIGMA AND ITS
NEIGHBORING MYSTERY COUNTRY**

INTERNATIONAL COURT OF JUSTICE

MYSTERY (APPLICANT)

v.

ENIGMA (RESPONDENT)

2020

INTERNATIONAL COURT OF JUSTICE

SPECIAL AGREEMENT

**BETWEEN MYSTERY (APPLICANT) AND ENIGMA (RESPONDENTS)
TO SUBMIT TO THE INTERNATIONAL COURT OF JUSTICE THE
DIFFERENCES BETWEEN THE STATES**

Jointly notified to the Court on 30 January, 2020

JOINT NOTIFICATION

ADDRESSED TO THE REGISTRAR OF THE COURT:

The Hague, January 30, 2020

On behalf of Applicant, Mystery, and Respondent, Enigma, and in accordance with Article 40(1) of the Statute of the International Court of Justice, we have the honor to transmit to you an original of the Special Agreement for submission to the International Court of Justice of the Differences between the Applicant and the Respondent concerning Oil Pollution, signed in The Hague, The Netherlands, on the thirteenth day of January in the year two thousand twenty.

(Signed)

(Signed)

For Mystery

For Enigma

Minister of Foreign Affairs

Minister of Foreign Affairs

SPECIAL AGREEMENT

SUBMITTED TO THE INTERNATIONAL COURT OF JUSTICE BY THE MYSTERY AND ENIGMA ON THE DIFFERENCES BETWEEN THEM CONCERNING OIL POLLUTION

The Mystery (“Applicant”) and the Enigma (“Respondent”) (hereinafter “the Parties”); Considering that differences have arisen between them concerning Oil Pollution and other matters;

Recognizing that the Parties have been unable to settle these differences by direct negotiations; Desiring further to define the issues to be submitted to the International Court of Justice (“the Court”) for resolution;

In furtherance thereof the Parties have concluded this Special Agreement:

Article 1

The Parties submit the questions contained in the Special Agreement (together with Corrections and Clarifications to follow) (“the Case”) to the Court pursuant to Article 40(1) of the Court’s Statute.

Article 2

It is agreed by the Parties that the Mystery shall appear as Applicant and the Enigma as Respondent, but such agreement is without prejudice to any question of the burden of proof.

Article 3

The Court is requested to adjudicate the claims of the Mystery specified in paragraphs 23 below, applying the rules and principles of international law, including any applicable treaties, in accordance with Article 38, paragraph 1, of the Statute of the Court.

Article 4

- (a) Procedures shall be regulated in accordance with the applicable provisions of the Official Rules of the International Moot Court Competition of SVKMS'NMIMS University, Kirit P. Mehta School of Law.
- (b) The Parties request the Court to order that the written proceedings should consist of Memorials presented by each of the Parties not later than the date set forth in the Official Schedule.

Article 5

- (a) The Parties shall accept any Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.
- (b) Immediately after the transmission of any Judgment, the Parties shall enter into negotiations on the modalities for its execution.
- (c) In witness whereof, the undersigned, being duly authorized, have signed the present Special Agreement and have affixed thereto their respective seals of office.

(Signed)

(Signed)

For Mystery

For Enigma

Minister of Foreign Affairs

Minister of Foreign Affairs

STATEMENT OF FACTS

1. Both Enigma country and Mystery country have large coastal areas, and are historically seafaring nations with large ports. Both nations are dependent on oil imports to meet their energy and industrial requirements, although Mystery Country is increasingly trying to focus on renewable energy sources, whereas Enigma Country plans to embark on a nuclear energy route by adding at least 4 more nuclear power plants to its one existing plant, which is also located on the shoreline close to the area where the oil accident happened and not too far from the border with Mystery.
2. This oil dependency is one of the reasons why Enigma encouraged domestic and international companies to aggressively undertake off-shore drilling activities in its exclusive economic zone (EEZ) in the hope to discover large amount of oil sources, which would take care of its future energy security.
3. OilCo is such multinational company, with its headquarters in the financial capital of the Riddle country. It won a bid to set up a floating oil rig or mobile drilling unit (MDU), named Neptunus, to undertake ultra-deepwater oil explorations within the EEZ to survey the hydrocarbon reservoirs there. In fact, OilCo had explored the Hydro oil well as deep as 8 kilometers (vertically) and had earmarked it for future hydrocarbon extraction. Hence, the day before the accident, it temporarily sealed the Hydro well by using cement casings, and various other multiple barriers, to ensure that there would be no hydrocarbon flow, until it would revisit the Hydra well at a later stage. The hydrocarbon being referred to is a persistent oil (not gasoline or other light oil), as governed by the IOPC Funds.
4. On the night of 2 March, 2018, an explosion occurred on the oil rig, and the ensuing fire engulfed the entire Neptunus MDU, causing it to collapse and completely sink. Most of the crew survived, but two engineers could never be found. Although the investigations are still ongoing, what transpires is that the Hydro well was not sufficiently sealed and triggered a series of events, leading to the accident and the uncontrolled pouring of oil from the Hydra well, estimated at 2 million oil barrels, over the next 60 days, before a technical solution was

finally found by OilCo to successfully seal the well and stop the oil from pouring out from the Hydro well.

5. At the time of the accident, the MDU was located at 50km from the coast of Enigma, and only 250km from the coast of Mystery. Initial estimates indicate that the oil slick fouled the shoreline of Enigma up to a distance of 600km long, and about 400km of Mystery's shoreline. Most of the affected areas on either side of the Enigma and Mystery coastal border consist of valuable and protected wetland areas, which form a unique and interlinked ecosystem, followed by a significant part of about 50km on each side of the countries' borders consisting of forest area, with trees of over 100 year old, which have all been affected. As a matter of fact, the wetland area in Mystery, bordering the national park, is earmarked as a "Ramsar Site". It may be noted here that Enigma is not part of the Ramsar Convention.
6. One of the response measures adopted by the country of Enigma, in line with international practice in such dramatic oil spill situations, was putting fire to the oil drifting on the sea to stop it from flowing further. Heavy and unusual winds complicated the matter further and some of the fires started at sea due by way of response measures also touched the forest areas, and an unintentional fire in the forests ensued, which also spread to the protected forest of Mystery.
7. Not only did Enigma not notify its neighboring countries of the expanding oil leakage into their territorial waters; it also failed to take immediate domestic actions to stop its forest fires, and did not inform its neighboring countries when the forest fires crossed boundary lines, as all its efforts were focused on controlling the oil pollution from spreading and the local fire departments had assured they were getting the forest fires under control.
8. The natural resources heavily impacted by the oil pollution across both countries encompasses crustaceans, birds, protected sea turtles, phytoplankton which form a critical part of the food chain, marine mammals, fish, oyster habitats, marshes, mangroves, sand beaches and dunes, aquatic vegetation, the ocean floor, etc. The forest fires in itself led to a loss of protected trees, and impacted their natural habitat, including birds, small mammals,

etc. Moreover, on the side of Mystery, the affected forest area forms part of a larger national park.

9. Enigma declared a national emergency, blocked off access to its beaches, with the exception of official rescue operations and local citizens and NGOs who assisted them with the removal of oil activities from beaches, birds and mammals. Enigma also banned fishing activities to continue until notified otherwise and warned its citizens not to eat fish. Mystery undertook similar actions. The coastal towns in both Enigma and Mystery which otherwise were known for its natural beauty, and were very popular tourist destination for nature and coastal-related activities such as hiking, boating, fishing, visits to the national park, etc. saw all the prior booked trips being cancelled by the tourists, given that most areas were now cordoned off. Many of the smaller business located in these coastal areas of Enigma, and even some of some located in Mystery, which were affected by this turn of events filed claims before the local civil courts of Enigma.

10. Moreover, domestically in Enigma, a criminal proceeding was also launched against OilCo, as well as civil claims by the Environmental Protection Agency under various environmental laws. As a result of these domestic cases against OilCo, it is clear that its insurance amounts, will be far exceeded by the claims filed against it. Moreover, local town representatives and well-established nature conservation agencies from Mystery also filed civil claims for “pure” environmental damage given that their towns would remain affected for at least the next 20-30 years and their inherent natural typical topography and beauty would be lost, along with the unique biodiversity (including species with no commercial values) which would take years to recover, if recovery was at all possible. The Civil Liability Code of Mystery was recently amended such that it now recognizes in its law that “*any person who causes environmental damage will be held liable*”, whereby environmental damage is described in a very broad manner and may arise from a significant damage to the elements or functions of ecosystems, or to the collective benefits drawn by human beings from the environment.

11. It must be added that OilCo had undertaken an Environmental Impact Assessment (EIA) prior to the commencement of its exploration activities, and had obtained all necessary environmental permits. Hence, OilCo’s position is that it should not be held liable as it

complied with all applicable environmental laws. Mystery argues that Engima should've shared the EIA Draft report and consulted it with regard to this off-shore oil drilling project, in light with the Espoo Convention, although admittedly neither Mystery nor Engima are part of the Espoo Convention yet.

12. It never shared the EIA undertaken domestically with Mystery country, despite the proximity of the drilling activities to their common border, nor did it notify Mystery about the oil spill. It is the Marine Ecology Department of Mystery which notified its own Central Government about the oil leak entering its territorial waters on day 2 after the oil spill, and it was only after 4 days the forest fires started that the emergency team started its operations domestically and after briefing the Central Government on the status and difficulty in taming the fire and subsequently on day 6, when it actually noticed the forest fire spreading across the border did it inform Mystery. Engima argues that it did fulfill its duty by informing Mystery once the fires crossed the borders; and that there is no such preventive obligation under international law, especially not when it could not be foreseen with scientific accuracy that the fires will, indeed, cross their borders. Moreover, with regard to the oil pollution, Engima submits that even OilCo informed its Environment Department only after 2 days, and, hence the delay in notification was not due to bad faith and by that time Mystery's Marine Ecology Department was already aware of the situation.

13. Once Engima came to know about the spreading oil leak and the inability of OilCo to stop the leakage, it dispatched rescue missions who put the drifting oil parts on fire, this being the best, quickest and most cost-effective manner to address such large oil spills. Mystery argues that in doing so, Engima worsened the air pollution situation further, thereby further infringing its climate change obligation to reduce its CO₂ emissions. Moreover, the air pollution was particularly affecting Mystery, since the winds were blowing West-wards, towards Mystery, a fact which Engima should've taken into account, according to Mystery. Engima, on the other hand, submits that it did what it had to do to avert the oil pollution from spreading even further, and it seeks reimbursements from OilCo for its response actions, and even Mystery should address its claims against OilCo only.

14. Enigma withdrew from the Paris Agreement on Climate Change, on 11 November, 2019, after the newly elected Government was sworn in, but was otherwise an active participant in the UNFCCC regime and had actually submitted its countries Nationally Determined Contributions (NDCs) it committed to achieve.
15. Mystery country submitted its NDC, listing the enhancement of carbon sinks through land-use and reforestation as one of the four mitigation options being considered. Whereas Enigma's NDC focused on energy efficiency in buildings and the increase of nuclear power as means to achieve its NDCs.
16. On 28 May, 2018, Mystery filed a unilateral application before the International Court of Justice (ICJ) against Enigma for all environmental damages, including for "pure" environmental damage, it caused in its territory due to the Hydro oil spill. Even Enigma recognizes the compulsory jurisdiction of the ICJ in principle, but has raised an *in limine litis* objection, submitting that since both Mystery and Enigma are parties to the International Oil Pollution Compensation Funds relating to the 1992 Civil Liability Convention for Oil Pollution Damage (CLC), the claims for compensation for oil pollution damage must be handled under that dispute settlement regime.
17. From Enigma's point of view, the IOPC Funds' Guidelines underscore the fact that the Conventions do not provide compensation for "pure" environmental damage, that is, compensation for the loss of environmental services. Rather, they cover the costs of reinstatement of the damaged environment to restore those lost services, as far as possible. Indeed, the 1992 Fund Claims Manual explicitly states that "compensation is not paid in respect of claims for environmental damage based on an abstract quantification calculated in accordance with theoretical models." It further states that compensation will not be paid for damages of a punitive nature on the basis of the degree of fault of the wrongdoer.
18. The ICJ already issued an Order addressing this argument, and confirmed its jurisdiction. However, the participants have to submit arguments as to why that is the case. Additionally, Enigma argues that an old Treaty of 1924 pertaining to all Transboundary River and territorial water disputes binds both countries; and in it, it is suggested that the parties

appoint each one arbitrator, whom in turn will select the third Chairman arbitrator, to issue a final binding Award on both parties. Hence, Engima submits the International Court of Justice has no jurisdiction over the present dispute involving the territorial waters of the respective countries but that the Disputes Clause of the Treaty should be followed instead. Mystery on the other hand submits that both Enigma and Mystery are members of the United Nations, and have accepted the compulsory jurisdiction of the International Court of Justice, which is in a better position to address issues of transboundary environmental damage.

19. Mystery advances the argument that it is well-established that environmental damage is compensable under international law, including for “pure” environmental damage which is including for resources that have no commercial value as such. Given the vast damage and serious impact on an entire interconnected shoreline, marine life, wetland area and protected forest which all form part of one integrated “ecosystem”, the restoration approach and damage calculation has to take into account this “ecosystem” approach, and impacts of natural resources cannot mathematically be added resource or species-wise only.
20. Enigma as a general position submits that “pure” environmental damage cannot be compensated as it’s impossible to calculate the environmental damage for lost beauty of a site or loss of species without economic value, or loss of recreational use, in an objective and scientific manner, which is universally acceptable and can be adopted as a method by the ICJ. Such claims become too subjective and arbitrary; and, therefore, all claims have to be limited to actual tangible proof of replacement costs.
21. Additionally, Mystery argues that the impairment of forests as a global common must be compensated as well as the impairment and loss of carbon sequestration by the damaged forests. Mystery submits that this constitutes an infringement of the well-established customary international law principle on the mitigation of climate change, further embedded in the Paris Agreement on Climate Change.
22. Mystery further argues this is a case where even under international law punitive damages can be claimed and imposed given the fact that Enigma caused deliberate environmental

damage, with disregard to basic principles of international law not to cause harm to its neighboring countries, and particularly by failing to give immediate notice of the cross-boundary impacts of not just the spreading oil pollution, but also the rapidly spreading forest fires.

23. The claims of compensation submitted by Mystery include (the actual amounts can be determined by the participants):

- a) Affected water column, with its numerous fish species, marine mammals, sea turtles and seabirds which all form part of an important food web, which now has been destroyed:
 - i. The loss of total number of newly hatched fish was approximately 1 trillion, which would have produced at least five thousand tons of adult fish – for which Mystery claims.
 - ii. More than 600 dolphins were found stranded and died on the coast of Mystery. This is 80% increase in death of the prevalent dolphin species typical for this coastal area. Scientific reports further calculated that the oil pollution cause the increase of failed reproduction of the dolphins by 60% and that adverse health effects increase by 40%. It is further estimated that without any active restoration efforts, it will take approximately 40 years for those dolphin species to fully recover.
 - iii. Mystery further submits that about 5000 sea turtles were killed by the oil spill, the loss of which it also seeks compensation.
 - iv. Mystery argues that more than 100 species of birds occur in the affected coastal area, which provide recreational and aesthetic value to the area, apart from playing a crucial role in the coastal ecosystem. Based on extensive field studies, the Environment Department of Mystery estimates that about 50,000 birds of at least 50 species died as a direct result of the oil spill, for which they seek compensation.

- b) Mystery's wetland area, adjacent to the national park with its forested area, has been severely affected by the oil spill. Wetlands are unique ecosystems, vital for all the natural resources of the area. Moreover, this wetland area is identified as a Ramsar site, which needs extra protection. Therefore, the compensation it seeks for the damage caused to this Ramsar site, which will take at least 50 years to naturally recover, if no active restoration steps are undertaken, has to be commensurate with the stature of this wetland. Therefore, Mystery seeks a compensation.
- c) Mystery also claims compensation for reinstatement of the affected environment, more specifically: its beach areas where it had to replace all the sand which was covered in oil. Enigma on the other hand submits that this is not at all a recommended approach, as sand tends to replenish naturally, and, hence, such compensation claim must be rejected as it is unreasonable and not supported by scientific criteria.
- d) The forest fire which spread from Enigma's neighboring forest to the forest area, which is a National Park of Mystery, caused not only severe damage and the loss of over 500 trees, for which many fire departments and special operation forces had to be called in at significant additional expense, which Mystery also seeks compensation for, but it also required the felling of an additional 200 trees which were partially affected but had all fallen and negatively affected the growth of all plants and trees within the National Park.
- e) Mystery further submits various reports undertaken by its Forest Department, confirming it had to replace large sections of soil within the affected forest area, to help the natural recovery process of the badly damaged forest. However, the soil which it had to introduce in the forest had to be of the same biologically rich type as the original forest, which came at a very significant cost, for which it seeks full compensation.
- f) Additionally, Mystery claims a significant compensation amount for "lost recreational use", that is for all the days which its citizens could not access and enjoy the beach for recreational purposes, which Mystery calculated based on the well-established "travel cost method". It may be added here that Enigma strongly contests the reliance on this travel cost method, which many other countries and scientific specialists reject.

- g) Mystery also seeks compensation on behalf of its local towns whose renowned topography will now remain changed for at least the next 50 years, particularly because this also infringes the principle of intergenerational equity, a well-established principle recognized in the Rio Declaration, amongst other very important international environmental law sources.
 - h) Lastly, Mystery submits that the amount of compensation should be assessed so as to fit the wrongful conduct of Enigma.
24. The parties are free to submit their respective methods on how the environmental damage was assessed, the reasonableness of which the ICJ will take into consideration.

Addendum A:

The parties are signatories/referring to the following:

1. ICJ Statute
2. International Oil Pollution Compensation Funds (IOPC Funds)
3. IOPC Funds, Guidelines for Presenting Claims for Environmental Damage, 2018 Edition, including the detailed Tabular Annex
4. IOPC Funds, Claims Manual
5. United Nations Compensation Commission (F4 claims): United Nations Compensation Commission
6. Paris Agreement, UNFCCC
7. Ramsar Convention
8. Rio Declaration on Environment and Development, 1992
9. Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)

“THE MOOT PROPOSITION HAS BEEN DRAFTED BY M.V. KINI & CO., MUMBAI”