

**THE 2005 STETSON INTERNATIONAL ENVIRONMENTAL LAW
MOOT COURT COMPETITION**

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

Fall Term 2005

**THE CASE CONCERNING
AN OFF-SHORE WIND FARM**

THE KINGDOM OF AKKAD,
Applicant

- versus -

THE REPUBLIC OF HERONIA,
Respondent

**ON SUBMISSION TO THE
INTERNATIONAL COURT OF JUSTICE**

Memorial for the Respondent

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STATEMENT OF JURISDICTION

The governments of the Republic of Heronia and the Kingdom of Akkad have referred this dispute, The Differences Between the Kingdom of Akkad and the Republic of Heronia Concerning An Off-Shore Wind Farm, to the International Court of Justice at The Hague, Netherlands. The parties have also submitted notification of the Special Agreement signed at The Hague, Netherlands on 11 May 2005, consistent with Article 40(1) of the Statute of the Court. While Heronia contests the jurisdiction of this Court, the parties recognize the Court's power to determine its jurisdictional authority in accordance with Article 36(6) of the Statute of the Court. In the event that this Court finds that jurisdiction does exist, the parties submit the substantive issues herein to the International Court of Justice, pursuant to Article 40(1) of the Statute of the Court.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under the Convention on Biological Diversity or the United Nations Convention on the Law of the Sea to consider the merits of this case; and
2. Whether Heronia violates international law by constructing and operating the Kennedy Wind Farm.

STATEMENT OF FACTS

Parties

The Republic of Heronia is a developed island nation with a diverse economy and a population of approximately 45 million people. (C. 1). The Kingdom Akkad is a developing country of 16 million people and lies 120 nautical miles to the east of Heronia. (C. 2,3).

Heronia and Akkad designated wetlands of international importance in accordance with the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention). (C. 6-8). The freshwater marshes included the Eadiedra National Wildlife Refuge, located on the eastern coast of Heronia, and Sargon National Park, located on the western coast of Akkad. (C. 7,8). The Akkadian spotted scoter (Scoter) is a species of waterfowl that migrates back and forth between the two wetlands. (C. 9).

The Migratory Bird Convention

In 1980, the two parties entered into a bilateral agreement entitled Convention Between The Kingdom of Akkad and The Republic of Heronia For The Protection of Migrating Birds and Birds in Danger of Extinction, and Their Environment (MBC). (C. 10). The MBC requires protection of scoters and obligates the parties to prevent damage to them resulting from sea pollution or pollution of its habitat. (*Id.*). The MBC was signed in 1980, however there had been a decline in the Scoter population. In 2002, scoters were not in danger of extinction, but were considered threatened. (C. 9). If a dispute arose, the MBC stated it would be subject to negotiation, and if that failed, then the matter would be submitted to mediation. (C. 10). No other dispute settlement method was listed.

Dispute

Heronia is a party to the U.N. Framework Convention on Climate Change (UNFCCC) and to the Kyoto Protocol. (C.14). Akkad is a signatory to the UNFCCC. (C. 15). These treaties require parties to reduce greenhouse gas emissions (GHGs). (C. 14). In 2002, Heronia announced its intention to construct the Kennedy Wind Farm to meet its requirements under the UNFCCC and the Kyoto Protocol. (C. 16). The wind farm would be located within Heronia's exclusive economic zone (EEZ) and would produce electricity for 425,000 households. (*Id.*).

Following this announcement, Akkad expressed concern through diplomatic notes stating that the wind farm would have a negative impact on scoters. (C. 18-19). Heronia responded that the wind farm would shift the nation to clean renewable energy, satisfy obligations under the Kyoto Protocol, and reduce the use of foreign oil. (*Id.*). Formal consultations began regarding the proposed site of the wind farm. (C. 20). Seven months after consultations, Heronia announced that it would build the wind farm to prevent global warming and allow all States to cope with rising sea levels, a phenomenon that had adverse effects on island nations. (C. 23). Heronia regretted the wind farm's impact on birds, but stated that no alternative site existed that produced the winds necessary for a successful wind farm. (*Id.*).

Akkad then accused Heronia of violating its treaty obligations. (C. 24). Heronia reminded Akkad that the MBC controlled the obligations of the parties with respect to the Scoter. (C. 25). It further stated that the wind farm satisfied the MBC, was not going to be placed near protected wetlands, did not harm the marine environment and satisfied Heronia's paramount environmental policy to reduce GHGs. (*Id.*). Akkad responded that the U.N. Convention on the Law of the Sea (UNCLOS) and the Convention on Biological Diversity (CBD), to which both States are parties, would override the dispute resolution procedure of the MBC. (C. 26).

Heronia disagreed stating that the MBC was the only means to resolve the dispute. (C. 27). The parties then entered into mediation, and later Heronia began construction of the wind farm. (C. 28-29). On May 11, 2005, Heronia and Akkad signed an agreement that submits the matter to this Court. (C. 31).

SUMMARY OF ARUGUMENTS

I. This Court does not have jurisdiction over the dispute between Akkad and Heronia. This Court's statute requires the consent of the parties in all matters before it. Heronia has not consented to the jurisdiction of the Court. This dispute arises under the MBC which does not confer jurisdiction. UNCLOS and the CBD, which do submit disputes arising under them to this Court, are supplanted by the MBC, which is the *lex specialis* regarding this matter. Furthermore, the true character of the dispute sounds in the MBC rather than in UNCLOS or the CBD. Additionally, neither UNCLOS nor the CBD apply to the subject matter in dispute. Accordingly, this Court should decline jurisdiction over this matter.

II. Heronia's construction of the wind farm does not violate international law. The wind farm satisfies all of Heronia's treaty obligations. Because scoters are not part of the marine environment, harm to them does not violate UNCLOS. Additionally, the wind farm does not cause pollution of the seas, but reduces GHGs, which prevent rising sea levels, thereby reducing sea pollution. Finally, both the CBD and the Ramsar Convention are framework treaties and that do not confer hard obligations on Parties. These treaties are aspirational and take into account small island states and their needs.

The wind farm does not violate customary international law. The precautionary principle has not been recognized as customary international law. However, even if the principle has been recognized, Heronia's actions comply. The wind farm is a precaution states take to prevent harm from global warming and rising sea levels.

III. Heronia is not liable for transboundary harm under customary international law. Transboundary harm must be significant or serious. Here the harm to the Scoter is not significant compared to the harm to island nations if rising sea levels continue.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE MERITS OF THIS DISPUTE UNDER UNCLOS OR THE CBD.

This Court does not have jurisdiction to adjudicate the merits of this case because none of the provisions in the Statute of this Court conferring jurisdiction have been met. This Court has historically been cautious in recognizing its own power to adjudicate.¹ The Court tends not to stray outside the boundaries set by the consent of the parties.² There are three ways in which the Court may assert jurisdiction over a dispute: (1) an agreement may confer compulsory jurisdiction on the Court;³ (2) a state may agree to submit a particular dispute to the Court;⁴ or (3) a state may declare that it recognizes the jurisdiction of the Court.⁵ In the absence of the former two conditions, the Court cannot adjudicate a claim without both parties' express consent.⁶ Indeed, "[n]o state can . . . be compelled to submit its disputes with other states" before the Court without granting its unqualified consent.⁷

Heronia has not declared its recognition of the compulsory jurisdiction of the Court over the merits of the present dispute according to Article 36(2). Moreover, the parties have not made any special agreement to appear as contemplated by Article 36(1). Thus, jurisdiction must

¹ See Ram Prakesh Anand, *International Courts and Contemporary Conflicts* 198-99 (1974).

² See Sir Hersch Lauterpacht, *The Development of International Law by the International Court* 91 (2d ed. 1958); Ian Brownlie, *Principles of Public International Law* 680-81 (6th ed. 2003).

³ Statute of the International Court of Justice, June 26, 1945, art. 36(1), 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter Statute].

⁴ *Id.*

⁵ *Id.* art. 36(2).

⁶ *Anglo-Iranian Oil Co. (U.K. v. Iran)*, 1952 I.C.J. 93, 102-103 (July 22).

⁷ *Eastern Carelia (Fin. v. Russ.)*, 1923 P.C.I.J. (ser. B) No. 5, at 27 (July 23).

necessarily depend upon an agreement to which both Heronia and Akkad are parties. Akkad asserts that the CBD⁸ and UNCLOS⁹ sufficiently confer jurisdiction. However, these agreements do not apply to the present dispute. Notwithstanding the applicability of the CBD or UNCLOS, the Migrating Bird Convention provided the exclusive dispute settlement procedure for this matter, and all of those procedures have been satisfied.

A. The MBC is the *lex specialis*.

The MBC provides the exclusive dispute settlement provision. Heronia acknowledges that the CBD and UNCLOS confer jurisdiction on this Court to adjudicate disputes arising under them. However, Heronia disputes the applicability of those treaties to this dispute. Moreover, since disputes in international law commonly implicate more than one treaty, when parallel obligations conflict, the Court must decide which obligations the parties must heed.¹⁰

The principle *lex specialis derogat lex generali* is a rule of treaty interpretation that seeks to resolve conflicts of law.¹¹ *Lex specialis* provides that when two rules conflict, the more specialized rule controls over the more general.¹² *Lex specialis* has long been used to resolve disparate treaty obligations when two rules relate to the same subject-matter.¹³ According to

⁸ Convention on Biological Diversity, June 5, 1992, art. 27.3, S. Treaty Doc. No. 103-20, 1760 U.N.T.S. 79.

⁹ Third U.N. Convention on the Law of the Sea, October 7, 1982, art. 287(1), U.N. Doc. A/CONF. 62/122, 21 I.L.M 1261 (1982) [hereinafter UNCLOS].

¹⁰ *Southern Bluefin Tuna* (Austl. & N.Z. v. Japan), Jurisdiction and Admissibility, Award 91 (UN Law of the Sea Arb. Trib., Aug. 4, 2000) [hereinafter Award].

¹¹ International Law Commission, Study Group on Fragmentation, *Fragmentation of International Law* 4, http://www.un.org/law/ilc/sessions/55/fragmentation_outline.pdf [hereinafter *Fragmentation of International Law*].

¹² *Id.*

¹³ *But see id.* at 4.

Grotius, “Among agreements which are equal . . . that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general.”¹⁴ This Court, permitted by Article 38(1)(c) of the Statute of the Court to apply general principles of law, is compelled to apply this widely accepted conflict rule. Indeed, *lex specialis* is so widely regarded as a general principle of law that it was cited as an example of such in the drafting of Article 38 of the Statute of the Permanent Court of International Justice.¹⁵

This Court has recognized the prevalence of the particular over the general in the past. In the *Right of Passage Case*, the Court declined inquiry about general principles of law regarding coastal transit because it had concluded that the parties had established their own practice regarding the matter.¹⁶ Similarly, according to this Court, “it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases as between particular parties.”¹⁷ Indeed, the agreement need not expressly derogate from the general one.¹⁸

This Court most recently endorsed the principle of *lex specialis* in two cases concerning human rights in armed conflict.¹⁹ In the *Nuclear Weapons* case, the Court considered whether

¹⁴ Hugo Grotius, *De Jure Belli et Pacis* 214 (Archibald Colin Campbell trans., Hyperion 1979).

¹⁵ Bin Cheng, *General Principles of International Law As Applied by International Courts and Tribunals* 25-26 (2d ed. 1987). See generally Statute, *supra* note 3, art. 38(1)(c).

¹⁶ (Port. v. India) 1960 I.C.J. 6, 44 (Apr. 12).

¹⁷ *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 42 (Feb. 20).

¹⁸ *Id.*

¹⁹ See generally *Fragmentation of International Law*, *supra* note 11, at 6; Michael J. Dennis, *I.C.J. Advisory Opinion On Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 Am. J. Int'l L. 119 (2005).

the prohibition against taking one's life arbitrarily found in the International Covenant on Civil and Political Rights ("ICCPR") applied in armed conflict.²⁰ Although the Court held that this right survives armed conflict, it did not rely upon the ICCPR. Rather, it used "the applicable *lex specialis*."²¹ Similarly, the Court recently considered whether human rights agreements give way to international humanitarian law in times of armed conflict and found the Court must always take *lex specialis* into account.²²

Application of the general regimes provided by UNCLOS and the CBD to the present matter is inappropriate. The MBC particularized the obligations of the parties concerning migrating birds. The MBC specifically addresses the subject matter in the present case, scoters. UNCLOS governs the marine environment and exemplifies the "umbrella" agreement.²³ The CBD addresses the protection of ecosystems generally. The latter two agreements provide rules of general application that are inappropriate when the parties have formulated special rules to address the matter. Since a special rule is more on point and regulates the matter more effectively, this Court should apply the MBC's dispute resolution procedures instead of those provided by UNCLOS and the CBD.

Additionally, as stated in the *North Sea Continental Shelf* case, the particular agreement need not explicitly derogate from the general. Thus, Heronia need not have reserved its rights under the MBC when becoming a party to UNCLOS or the CBD. Heronia's obligations

²⁰ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8) [hereinafter *Nuclear Weapons*].

²¹ *Nuclear Weapons*, 1996 I.C.J. at 226.

²² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 43 I.L.M. 1009, 1051 (July 9, 2004).

²³ Int'l Marine Org. [IMO], *Implications on the Entry into Force of UNCLOS for the International Marine Organization*, IMO doc Leg/Misc/2 (1996).

regarding migrating birds survived its accession to these agreements. Moreover, although the Court in the *Nuclear Weapons* case found that human rights obligations applied during armed conflict, it did so using the more specific rules in accordance with *lex specialis*. The MBC addresses a limited subject, yet within that narrow area of competency it eclipses rules of general application.²⁴

Furthermore, this Court has found that the procedural provisions of *leges speciales* also prevail over those of *leges generales*. In the *Mavrommatis Palestine Concessions* case, Greece and the United Kingdom were parties to the Palestine Mandate and Protocol XII of the Treaty of Lausanne.²⁵ The Palestine Mandate subjected the parties to the jurisdiction of the Permanent Court of International Justice while the Protocol did not.²⁶ Greece submitted a dispute to the P.C.I.J. concerning the United Kingdom's refusal to recognize rights acquired by a Greek subject to construct public works in Palestine.²⁷ The United Kingdom requested the Court to dismiss the suit for lack of jurisdiction.²⁸ Finding that the Protocol "deal[t] specifically" with matters such as those at issue, the Court concluded that the Protocol prevailed over the Mandate and declined jurisdiction.²⁹ Thus, the Court found that the dispute resolution procedures provided by a *lex specialis* prevail over those provided by a *lex generalis*.

²⁴ See Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points* 236 (1957).

²⁵ *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 30 (Aug. 30).

²⁶ Protocol XII of the Peace with Turkey Signed at Lausanne, July 24, 1923, 28 L.N.T.S. 11; Mandate for Palestine, 8 O.J. 1007, art. 26 (1922).

²⁷ *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A) No. 2, at 2.

²⁸ *Id.* at 4.

²⁹ *Id.* at 24.

Like the Mandate, UNLCOS and the CBD are laws of general application. This Court has previously found that where a *lex specialis* applies to the subject matter of a case and provides dispute resolution procedures, those procedures exclude dispute resolution provisions in applicable *leges generales* even when both regimes apply to the same dispute. If this Court finds that both regimes apply, it is still compelled to find that the dispute resolution provision of the MBC prevails over those of UNCLOS and the CBD.

B. The true character of this dispute arises under the MBC.

This Court has been circumspect about its own power to adjudicate, predicating its decision on both the consent of the parties and on the nature of the controversy.³⁰ The true character of this dispute distinguishes it as one implicating the MBC.

The jurisdiction of an adjudicative body does not turn on the facts which may be before it but on the identification of the dispute.³¹ In the *Southern Bluefin Tuna* case, a dispute arose under the Convention for the Conservation of Southern Bluefin Tuna (“CCSBT”) between Australia and New Zealand on one side and Japan on the other. Japan had embarked on an Experimental Fishing Program (“EFP”) whereby it endeavored to fish for southern bluefin tuna over its limit set by a commission created under the CCSBT. Australia and New Zealand objected and, after consultations failed, submitted the dispute to a tribunal formed under UNCLOS, characterizing the dispute as one arising under that agreement.

Upon Japan’s request, the tribunal declined jurisdiction over the matter. While noting that adjudicative bodies must consider the applicant’s characterization of the dispute, the tribunal

³⁰ Ibrahim F.I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction* 33 (1965). See Statute, *supra* note 3, art. 36.

³¹ *Fisheries Jurisdiction* (Spain v. Can.), 1998 I.C.J. 432, 449 (Dec. 4).

found that the nature of the dispute arose under the CCSBT.³² The decision stated that it was for the tribunal to determine what the “real dispute” was between the parties, defining a real dispute as a matter reasonably, and not remotely, relating to a treaty.³³ Thus, the Court found that although UNCLOS applied to the dispute it did so only remotely, stating that the “most acute elements” of the dispute related to the CCSBT.³⁴ Furthermore, in the *Fisheries Jurisdiction Case*, this Court stated that it is for the Court to decide “on an objective basis the dispute dividing the parties,” looking to the diplomatic exchanges, public statements and other pertinent evidence.³⁵

The MBC, like the CCSBT, embodies the most acute elements of the dispute. The real dispute regards Akkad’s assertion that Heronia has failed to preserve and enhance the environment of scoters under the MBC. It was the MBC that Akkad first cited in its first diplomatic note to Heronia regarding the wind farm.³⁶ It was under Article VI of the MBC that the parties first attempted to resolve the dispute.³⁷ In contrast, Akkad first invoked UNCLOS and the CBD almost a year after its first diplomatic note, citing the MBC. Looking to the diplomatic exchanges, public statements and other pertinent evidence, the MBC clearly governs the present dispute.

³² Award, *supra* note 10, at 86. See also *Oil Platforms* (Iran v. U.S.), 1996 I.C.J. 803, 810 (Dec. 12); *Fisheries Jurisdiction*, 1998 I.C.J. at 449.

³³ Award, *supra* note 10, at 87.

³⁴ *Id.*

³⁵ *Fisheries Jurisdiction*, 1998 I.C.J. at 449.

³⁶ Compromis ¶ 18.

³⁷ *Id.* at ¶ 28-29.

The matter relates only remotely to UNCLOS and the CBD. Additionally, UNCLOS and the CBD fall short of establishing “a comprehensive regime of compulsory jurisdiction.”³⁸ Consequently, the MBC approaches the present dispute more nearly than do UNCLOS or the CBD.

C. *Lex posterior* only applies in the absence of a *lex specialis*.

Akkad asserts that this Court should apply the CBD and UNCLOS because they were concluded later in time than the MBC. This doctrine of treaty conflict, codified in article 30(3) of the Vienna Convention on the Law of Treaties, gives preference to the earlier treaty when two treaties apply to the same subject matter. However, when the earlier treaty is a *lex specialis*, that treaty should apply.³⁹ Although not stated in the treaty, the Vienna Convention approves the use of *lex specialis*.⁴⁰ The rules of construction in Article 30 are only used absent other means of reconciling treaties.⁴¹ The rules in Article 30 are purely residual.⁴² Thus, specific treaties supplant general treaties, even if the general provisions are later in time.⁴³ Accordingly, the MBC, the specific treaty in this matter, supplants UNCLOS and the CBD. Since the MBC is the

³⁸ Award, *supra* note 10, at 102.

³⁹ Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 Geo. Wash. Int'l L. Rev. 573, 614 (2005).

⁴⁰ See Sir Ian M. Sinclair, *The Vienna Convention on the Law of Treaties* 98 (2d ed. 1984); Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 *Envtl. L.* 841, 912-13 (1996).

⁴¹ Sabrina Safrin, *Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements*, 96 *Am. J. Int'l L.* 606, 613 (2002).

⁴² Sinclair, *supra* note 40, at 97.

⁴³ *Id.* at 98.

lex specialis and embraces the true character of this dispute, this Court should apply the procedures of that instrument instead of those of UNCLOS and the CBD.

II. HERONIA'S CONSTRUCTION AND OPERATION OF THE KENNEDY WIND FARM DOES NOT VIOLATE INTERNATIONAL LAW.

A. Heronia's operation of the wind farm does not violate its treaty obligations.

1. Heronia does not violate UNCLOS.

a. Heronia may build a wind farm within its EEZ.

Heronia has the right to build a wind farm in its EEZ. UNCLOS has defined the EEZ as an area extending beyond the territorial seas of a state and may stretch to 200 nautical miles from the coast of a state.⁴⁴ Coastal states have the sovereign right to explore, exploit, conserve and manage natural resources, living or non-living.⁴⁵ Coastal states may also produce energy from the water, currents and winds within the EEZ.⁴⁶ UNCLOS permits states to build artificial structures within their EEZ to find and use natural resources.⁴⁷ Many states have constructed artificial installations like wind farms within their territorial waters and EEZs.⁴⁸ Examples include the United States, the European Union, Australia, New Zealand, India, and China.⁴⁹

⁴⁴ UNCLOS, *supra* note 9, at art. 56.

⁴⁵ *Id.* at art. 58. See *Fisheries Jurisdiction* (F.R.G. v. Ice.), 1974 I.C.J. 175 (July 25); *Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18); *S.S. Lotus* (Fr. v. Tur.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

⁴⁶ *Id.*

⁴⁷ UNCLOS, *supra* note 9, at art. 60.

⁴⁸ Avi Brisman, *The Aesthetics of Wind Energy Systems*, 13 N.Y.U. Envtl. L. J. 1, 60-67 (2005).

⁴⁹ Roger Raufer et al., *Yet Another Market Transition?: Moving Towards Market-Oriented Governmental Support of Wind Power in China*, 24 U. Pa. J. Int'l Econ. L. 577, 593 (2003).

Heronia has the sovereign right to construct a wind farm within its EEZ to exploit natural resources including wind energy. Additionally, the wind farm will fulfill Heronia's environmental policy to reduce GHGs, prevent global warming and combat rising sea levels.⁵⁰ By constructing the wind farm, Heronia complies with its duties under UNCLOS.

b. Scoters are not part of the marine environment.

The wind farm does not violate UNCLOS because the Scoter is not part of the marine environment. UNCLOS imposes a general duty on Parties to prevent harm to the marine environment.⁵¹ Birds that are part of the marine environment spend a majority of their lives on the sea and obtain all of their food from the sea.⁵² The Scoter does not spend its life on the sea.⁵³ Most of the scoter's life is spent within freshwater marshes such as the Eadiedra National Wildlife Refuge and Sargon National Park.⁵⁴ Because the scoter does not reside on the seas, it is not part of the marine environment. Therefore, the alleged harm to the scoter is not harm to the marine environment.

2. Heronia does not violate the MBC.

Heronia's wind farm is not sea pollution, therefore Heronia does not violate the MBC. Though the definition of pollution is vague,⁵⁵ states recognize that sea pollution occurs through

⁵⁰ *Compromis* ¶ 17, 23.

⁵¹ UNCLOS *supra* note 9, at art. 192.

⁵² Douglas Brubaker, *Marine Pollution and International Law Principles and Practice* 25 (1993).

⁵³ *Compromis* ¶ 9.

⁵⁴ *Id.*

⁵⁵ Brubaker, *supra* note 52, at 11; UNCLOS *supra*, note 9, Part XII.

land-based materials, vessel sources, ocean dumping and atmospheric emissions causing a rise in sea levels.⁵⁶ These harmful materials include oil, pesticide pollutants, mixed oxide fuel, GHGs and other chlorinated plastics.⁵⁷ State practice and treaty regimes evidence that sea pollution consists of harmful substances emitted into the marine environment causing harm.⁵⁸

Harm to the Scoter does not stem from sea pollution. Activities that cause harm are not necessarily pollution.⁵⁹ For example, in *Goodsman v. Saskatchewan*, the court held that although power lines placed in the flyway of migratory birds traveling between the United States and Canada caused harm, the harm was not significant and was not regarded as pollution.⁶⁰

The present dispute is analogous to *Goodsman v. Saskatchewan* in that the wind farm will not emit harmful substances into the sea. Indeed, the wind farm will prevent sea pollution by replacing fossil fuel energy with clean renewable wind energy, and will reduce the amount of GHGs, thereby preventing global warming and rising sea levels. Heronia's wind farm prevents sea pollution and does not violate the MBC.

⁵⁶ Rebecca Elizabeth Jacobs, *Treading Deep Waters: Substantive Law Issues In Tuvalu's Threat to Sue the United States In the International Court of Justice*, 14 Pac. Rim L. & Pol'y J. 103, 104-5 (Jan. 2005).

⁵⁷ Daud Hassan, *International Conventions Relating to Land-based sources of Marine Pollution Control: Applications and Shortcomings*, 16 Geo. Int'l Envtl. L. Rev. 657, 658-59 (2004).

⁵⁸ See, e.g., *Nuclear Tests* (Austl. v. Fr.; N.Z. v. Fr.), 1974 I.C.J. 253 (Dec. 11); *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (April 9); *MOX Plant* (Ire. v. U.K.), 2001 ITLOS No. 10 (Dec. 3); *Trail Smelter* (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1941); Case 4320/74 *Handelskwekerij G.J. Bier BV & Stichting Reinwater v. Mines d'Alsace*, SA 1979 E.C.C. 206 RB (Dist. Ct. Rotterdam); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 3; Convention on the Physical Protection of Nuclear Materials, opened for signature March 3, 1980, T.I.A.S. No. 11,080, 1456 U.N.T.S. 101; UNCLOS, *supra* note 9.

⁵⁹ Patricia Birnie & Alan Boyle, *International Law and the Environment* 125 (2d ed. 2002).

⁶⁰ *Goodsman v. Saskatchewan Power Co.*, (1997) 145 D.L.R.4th 213.

3. Heronia's project complies with the CBD and the Ramsar Convention.

The CBD and the Ramsar Convention are framework treaties, thus imposing few hard obligations on Parties.⁶¹ Both conventions provide that their obligations should be performed to the extent possible.⁶² Construction of the wind farm complies with the CBD and the Ramsar Convention to the extent possible.

a. Heronia complies the CBD.

Construction of the wind farm complies with Heronia's duty to promote the protection of ecosystems.⁶³ The goals of the CBD are to attend to the needs of its Contracting Parties while striving to conserve biodiversity.⁶⁴ The phrase "as far as possible and as appropriate," used in the CBD, takes into account the capabilities of small island states like Heronia.⁶⁵ Furthermore, the CBD confers on Parties the right to exploit their own resources pursuant to their own environmental policies.⁶⁶ Finally, the ultimate goal of the CBD is to protect and enhance human welfare.⁶⁷

⁶¹ Royal C. Gardner, *Perspectives on Wetlands and Biodiversity: International Law, Iraqi Marshlands and Incentives for Restoration*, 2003 Colo. J. Int'l. Env'tl. L. & Pol'y. 1, 2.

⁶² Convention on Biological Diversity, *supra* note 8, at art. 8; Convention on Wetlands of International Importance Especially as Waterfowl Habitat, *opened for signature* Feb. 2, 1971, art. 2, 4 T.I.A.S. No. 11084, 996 U.N.T.S. 245 [hereinafter Ramsar Convention].

⁶³ Convention on Biological Diversity, *supra* note 8, at art. 8(d).

⁶⁴ Michael Bowman & Catherine Redgewell, *International Law and the Conservation of Biological Diversity* 253 (1996).

⁶⁵ Convention on Biological Diversity, *supra* note 8, Preamble.

⁶⁶ *Id.* at art. 3

⁶⁷ Bowman & Redgewell, *supra* note 64, at 254; *Animal & Environmental Legal Defense Fund v. Union of India*, J.T. 1997 (3) SC 298.

Considering that small island nations are most vulnerable to rising sea levels, Heronia's wind farm complies with the CBD to the extent possible without compromising its goal of reducing fossil fuel consumption.⁶⁸

b. Heronia complies with the Ramsar Convention.

The wind farm will not be placed near the Eadiedra National Wildlife Refuge. Therefore, Heronia will not violate the Ramsar Convention. The Ramsar Convention obligates Contracting Parties to designate suitable wetlands and their boundaries; however, it allows Parties to delete or restrict the boundaries of wetlands already included on the Ramsar List due to urgent national interests.⁶⁹ States have recognized that urgent national interests include human welfare.⁷⁰ In the *Commission of the European Communities v. Federal Republic of Germany*, the court held that Germany's dyke project did not violate the Ramsar Convention because the dyke was constructed outside the designated boundaries of the national park and protected human welfare and the benefits of the project did not exceed the costs even though it caused harm to numerous protected bird species.⁷¹

The wind farm is analogous to Germany's dyke project in that it protects human health from global warming and rising sea levels. Although the Ramsar Convention requires Parties to

⁶⁸ Jacobs, *supra* note 56, at 115; Jennifer Sieg, *Small Islands Step Up To Combat Global Warming* (Inter Press Service Apr. 21, 2001).

⁶⁹ Ramsar Convention, *supra* note 62; Simon Lyster, *International Wildlife Law* (1985).

⁷⁰ Case C-57/89, *Comm'n v. Germany*, 1991 E.C.R. I-0883, ¶ 8. See *WWF-UK Ltd. v. Scotland*, 1 C.M.L.R. 1021, [1999] Env. L.R. 632.

⁷¹ *Comm'n v. Germany*, 1991 E.C.R. at ¶¶ 23-27.

promote the conservation of listed sites, it does not legally bind them to prohibit potentially harmful activities or ensure that the sites are actually protected.⁷²

Furthermore, it is arguable whether Parties are required to promote the conservation of all listed sites or only those situated within that Party's territory.⁷³ The wind farm will be constructed within Heronia's EEZ, which is far from the boundaries of the Eadiedra National Wildlife Refuge and Sargon National Park.⁷⁴ Finally, the wind farm will reduce GHGs thereby preventing harm far more costly than the harm to migratory birds.

B. The wind farm does not violate customary international law.

Customary international law is the consistent practice of states motivated by a sense of legal obligation.⁷⁵ This Court may look to customary international law to resolve disputes.⁷⁶

1. The precautionary principle is not customary international law.

The precautionary principle is not customary international law; therefore, Heronia's wind farm does not violate custom. The precautionary principle suggests that States should prevent environmental damage before it occurs.⁷⁷ However general concepts of the precautionary

⁷² Lyster, *supra* note 69, at 191.

⁷³ *Id.* at 192.

⁷⁴ *Compromis* ¶ 19.

⁷⁵ Alexandre Kiss & Dinah Shelton, *International Environmental Law* 149 (3d. ed. 2004); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Calif. L. Rev. 182, 189 (2002).

⁷⁶ Statute, *supra* note 3; Birnie & Boyle, *supra* note 59, at 26.

⁷⁷ See Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, June 3-14, 1992, U.N. Doc. A/CONF.151/5/Rev. 1, 31 I.L.M. 874 (1992) [hereinafter Rio Declaration]; David Wirth, *Symposium: The Role of Science in the Uruguay Round and NAFTA Trade Disciplines*, 27 Cornell Int'l L.J. 817 (1994); John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 Case W. Res.

principle have only been found in various non-binding statements and declarations which do not evidence custom.⁷⁸

A principle must be relatively extensive and uniform, and state practice must be consistent with the existence of the obligation in order for the principle to become part of customary international law.⁷⁹ The precautionary principle does not meet these requirements because the references within the non-binding agreements are not uniform.⁸⁰ Furthermore, the principle is not accepted custom because its implications remain unclear; demonstrating weakness of its commands.⁸¹ Heronia is not bound by the weak requirements of the precautionary principle because it is not custom.

2. If the precautionary principle is customary international law, Heronia's actions comply.

If this Court determines that the precautionary principle is customary international law, Heronia's actions comply with the principle. The precautionary principle requires states to prevent harm from their actions. However, prevention of the harm must be reasonable and cost effective. It would be unreasonable to expect Heronia to discontinue the wind farm project to

1, 61 (1998); Harold Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law* 121 (1994).

⁷⁸ See, e.g., Rio Declaration, *supra* note 77, Preamble; Convention on Biological Diversity, *supra* note 8, Preamble; G.A. Res. 37/7, U.N. Doc. A/37/51 (Oct. 28, 1982); David Freestone, *The Precautionary Principle and International Law: The Challenge of Implementation* (1996).

⁷⁹ Naomi Roht-Arriaza, *Precautionary Legal Duties and Principles of Modern International Environmental Law*, 21 Colum. J. Env't'l L. 183, 187 (1996); *North Sea Continental Shelf*, 1969 I.C.J. at 25-26.

⁸⁰ *Id.*

⁸¹ *Nicholls v. Director of National Parks & Wildlife*, (1994) 84 L.G.E.R.A. 419; *M.C. Mehta v. Union of India*, A.I.R. 1997 SC 734; John M. Macdonald, *Appreciating the Precautionary Principle as an Ethical Evolution in Ocean Management*, 26 Ocean Dev. & Int'l L. 255, 255-56 (1995).

prevent harm to bird species when building wind farms is the precaution most states take to protect island nations and coastal cities from the harm of rising sea levels caused by global warming.⁸² Another precaution States take to reduce GHGs is to enter into binding treaty regimes that require these States to reduce fossil fuel consumption.⁸³

Heronia is taking precautions by building wind farms that will convert wind energy into electricity⁸⁴ and supply 425,000 people with clean renewable energy.⁸⁵ A reduction in the fossil fuel consumption will result in a reduction of GHGs thereby preventing climate change and rising sea levels.⁸⁶ This will protect small island nations and coastal cities from future harm.

III. THE WIND FARM DOES NOT CAUSE SIGNIFICANT TRANSBOUNDARY HARM.

The wind farm does not cause significant transboundary harm because harm to the Scoter is not serious compared to the harm that will occur if global warming continues. The International Law Commission (ILC), established by the U.N. General Assembly, promotes the

⁸² Raufer et al., *supra* note 49.

⁸³ See Kyoto Protocol to the U.N. Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998), Preamble [hereinafter Kyoto Protocol]; U.N. Framework Convention on Climate Change, May 9, 1992, art. 3, 31 I.L.M. 849 [hereinafter UNFCCC]; Vienna Convention for the protection of the Ozone Layer, *opened for signature* Mar. 22, 1985, Preamble, 1513 U.N.T.S. 293; Montreal Protocol on Substances that Deplete the Ozone Layer, *opened for signature* Jan. 1, 1989, 26 I.L.M. 977 (1990).

⁸⁴ Brisman, *supra* note 48, at 47-50; Jacobs, *supra* note 56, at 103-105; Ari Bessendorf, *Games in the Hothouse: Theoretical Dimensions in Climate Change*, 28 Suffolk Transnat'l L.Rev. 325, 326-29 (2005); Howard A. Learner, *Emerging Issues in Energy and The Environment Symposium: Cleaning, Greening, and Modernizing the Electric Power Sector in the Twenty-First Century*, 14 Tul. Envtl. L. J. 277, 281-82 (2001).

⁸⁵ *Compromis* ¶ 16.

⁸⁶ See Jacobs, *supra* note 56, at 104.

development of customary international law and its codification.⁸⁷ This Court has recognized and cited the work of the ILC in numerous cases.⁸⁸ The ILC has established that transboundary harm must be significant in order to find a state liable.⁸⁹ Significance has been explained by courts as serious or substantial harm.⁹⁰ For example, in the *Lake Lanoux Arbitration*, the arbitral panel did not hold France liable for transboundary harm for diverting a lake shared between Spain and France because the resulting harm was not serious to Spain compared to France's need to supply electricity to its people.⁹¹

⁸⁷ Statute of the International Law Commission, G.A. Res. 174(II), U.N. GAOR, 2d Sess. 123rd mtg., U.N. Doc. A/519, at 105 (Nov. 21, 1947); *See, e.g.*, Oscar Schachter, *International Law in Theory and Practice* 85 (1991); Jorge Castaneda, *Legal Effects of United Nations Resolutions* 3 (1969).

⁸⁸ *See, e.g.*, *Lagrand* (F.R.G. v. U.S.), 2001 I.C.J. 466, 521-522 (June 21); *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v. Bahr.), 2001 I.C.J. 40, 7-77, 137, 203, 208 (Mar. 16); *Arrest Warrant* (Congo v. Belg.), 2000 I.C.J. 182, 189 (Dec. 8); *Aerial Incident of 10 August 1999* (Pak. v. India), 2000 I.C.J. 12, 54, 58, 87 (Jun. 21); *Fisheries Jurisdiction*, 1998 I.C.J. at 636-637, 669; *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria* (Cameroon v. Nig.), 1988 I.C.J. 275, 293-294 (Jun. 11); *Maritime Delimitations in the Area Between Greenland and Jan Mayen* (Den. v. Nor.), 1993 I.C.J. 38 (June 14); *Fisheries Jurisdiction*, 1974 I.C.J. at 69-70.

⁸⁹ Draft Articles on International Liability For Injurious Consequences Arising Out of Acts Not Prohibited by International Law, International Law Commission, 56th Sess. A/CN.4/L.662 (2004) art. 2(c) [hereinafter I.C. Articles]; *See Commentaries to I.C. Articles*, International Law Commission, 56th Sess. A/CN.4/L.662 (2004) at 164; Draft Articles On the Prevention of Transboundary Harm From Hazardous Activities, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) art. 2(c).

⁹⁰ *See, e.g.*, *Trail Smelter Arbitration* (U.S. v. Can.), 3 R. Int'l Arb. Awards 1911, 1965 (1941); *Lake Lanoux Arbitration* (Spain v. Fr.), 12 R. Int'l Arb. Awards 281 (Nov. 16, 1957); *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 116 (Dec. 8); *Barcelona Traction, Light and Power Company* (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5); *Chorzow Factory* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A), No. 9 (Sept. 13); *Gut Dam Arbitration* (U.S. v. Can.), 8 I.L.M. 118 (1969).

⁹¹ *Lake Lanoux Arbitration*, 12 R. Int'l Arb. Awards at 328.

Heronia, as a small developed island nation, must build the wind farm to reduce GHGs, control global warming and prevent rising sea levels.⁹² Although small island nations do not contribute to a release of GHGs, they are the most threatened by its adverse effects.⁹³ Small island states such as Tuvalu, have suffered grave consequences due to global warming.⁹⁴ Tuvalu was made up of a number of islets; however global warming and rising seas have drowned many of them. It is projected that Tuvalu will become the modern day Atlantis by 2054.⁹⁵ The Alliance of Small Island States has 43 members and observers that have made reducing GHGs a priority because these states are most affected.⁹⁶ Heronia is constructing a wind farm to accomplish the same environmental policy. Although there are adverse effects to scoters, these effects are not significant compared to the harm that may result if GHGs are not reduced and global warming continues. Therefore, Heronia's wind farm does not cause significant transboundary harm.

⁹² Kyoto Protocol, *supra* note 83; UNFCCC, *supra* note 83; U.N. Charter; Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, U.N. Doc. A/Conf.48/14/Rev. (1973), 11 I.L.M. 1416 (1972); Denis Culley et al., *A Review Of Developments in Ocean and Coastal Law*, 7 *Ocean & Coastal L. J.* 201, 207-208 (2001).

⁹³ Jacobs, *supra* note 56, at 105.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

CONCLUSION

In consideration of the foregoing facts, the Republic of Heronia respectfully requests this Honorable Court:

1. Declare that this Court does not have jurisdiction to consider the merits of this dispute under UNCLOS or the CBD.
2. Declare that Heronia's construction of the wind farm does not violate international law.

Respectfully submitted,

Agents for Republic of Heronia