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

**Case Concerning the Differences Between the Kingdom of Akkad and the Republic
of Heronia Regarding an Offshore Wind Farm**

The Kingdom of Akkad

Applicant

v.

The Republic of Heronia

Respondent

Fall Term 2005

Memorial for Respondent

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QUESTIONS PRESENTED

1. Whether, as a consequence of the dispute resolution procedures contained in the Migrating Bird Convention, the International Court of Justice lacks jurisdiction to hear this dispute?
2. Whether the International Court of Justice lacks jurisdiction to hear this dispute because this dispute does not concern the “interpretation or application” of the United Nations Convention for the Law of Sea or the Convention on Biological Diversity?
3. Whether Heronia was required under international law to refrain from constructing a renewable energy source when the project would disrupt the migratory path of the Akkadian spotted scoter?
4. Whether Heronia properly determined that its obligations under multiple international treaties to mitigate climate change and its choice to fulfill those obligations by implementing a renewable energy source outweighed the potential danger of this policy to the Akkadian spotted scoter?

STATEMENT OF JURISIDCTION

The Kingdom of Akkad and the Republic of Heronia submit the following dispute to the International Court of Justice, pursuant to Article 40 of the Statute of the International Court of Justice, which states that a State party may bring cases before the Court “either by the notification of the special agreement or by a written application addressed to the Registrar.” On May 11, 2005, the parties notified the Court of the special agreement they signed on that date, and on May 18, 2005, the Registrar for the Court acknowledged the receipt of the notification.

STATEMENT OF FACTS

The Republic of Heronia (hereinafter, “Heronia”) is a developed nation whose territory is comprised of one island, with a population of approximately 45 million people living on the territory. Record (hereinafter, “R”) at 1. Heronia has no significant fossil fuel deposits. *Id.* The Kingdom of Akkad (hereinafter, “Akkad”) is a developing nation, whose territory is also comprised of one island. R2. The parties have no disputes concerning the boundaries of their respective exclusive economic zones. R3.

Akkad and Heronia are Contracting Parties to the Convention on Wetlands of International Importance especially as Waterfowl Habitat, also known as the Ramsar Convention on Wetlands (hereinafter, “Ramsar”). R6. Mindful of its international obligations under Ramsar, Heronia designated Eadiedra National Wildlife Refuge as a wetland of international importance in 1979. R8.

In 1980, Akkad and Heronia 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, also known as the Migrating Bird Convention (hereinafter, “MBC”). R10. The MBC established a particular set of obligations for both parties in articles III and V, as well as a dispute resolution procedure for any conflicts that arose related to the terms of said convention. *Id.*

Heronia is a state party to the United Nations Convention on the Law of the Sea (hereinafter, “UNCLOS”), the Convention on Biological Diversity (hereinafter, “CBD”), the United Nations Framework Convention on Climate Change (hereinafter,

“UNFCCC”), and the Kyoto Protocol. R11-14. Under the Kyoto Protocol, Heronia has international obligation to reduce its greenhouse gas emissions to 92% of its 1990 levels. R14. Akkad is a signatory to the UNFCCC, and has participated in several worldwide conferences on the environment and development and sustainable development. R13,15.

In December 2002, Heronia announced its intention to construct a renewable energy source, a project known as the “Kennedy Wind Farm” (hereinafter, “the project”). R16. It is undisputed that the proposed location of the project is entirely within Heronia’s exclusive economic zone. R17.

On December 15, Akkad forwarded a Diplomatic Note to Heronia, claiming that location of the project would have a negative impact on the population of the Akkadian spotted scoter. R18. A study presented by Akkad concluded that if the project moved forward, then in light of the design and location of the project, the status of the Akkadian spotted scoter should be considered endangered. R22.

After several months of consultations with Akkad, in November 2003, Heronia decided to move forward with the project, noting that although it deeply regretted the likely impact to certain bird species, no other alternative site provided the sustained winds necessary for a productive wind farm. R21, 23. Another series of diplomatic exchanges followed. R24-26.

In March 2004, Akkad and Heronia entered into negotiations, as contemplated by the MBC. R28. Subsequently, during August 2004, Akkad and Heronia agreed to enter into mediation pursuant to the MBC. R29. After months of prolonged mediation, in February 2005, Heronia commenced the construction of the project. R30. Akkad and

Heronia submitted the matter to the International Court of Justice through an agreement signed on May 11, 2005. R31.

SUMMARY OF ARGUMENTS

1. The International Court of Justice has no jurisdiction to hear the instant dispute because it arises exclusively under the MBC, which contains its own compulsory dispute resolution procedures.
2. Similarly, the instant dispute does not entail an interpretation or application of either the UNCLOS or CBD, and in consequence, this Court lacks jurisdiction to hear Akkad's claims.
3. Heronia has fulfilled its international obligations to consider the environmental impact of the proposed energy project in exercising its sovereign right to develop alternative sources of energy within its exclusive economic zone.
4. Under general principles of international law, Heronia has an obligation to balance its rights and duties arising under the treaties which it has subscribed, and after having done so, Heronia has determined that those obligations are fulfilled by constructing the project, which is a renewable energy source, even though there is a potential danger to the Akkadian spotted scoter.

ARGUMENTS

I. THE INTERNATIONAL COURT OF JUSTICE LACKS JURISDICTION *RATIONE MATERIAE* TO HEAR THIS DISPUTE.

This Court has *compétence de la compétence*, or the power to address its own jurisdiction before adjudicating the merits.¹

A. The dispute is one concerning Heronia’s obligations under the MBC, not the UNCLOS nor the CBD.

1. The MBC is *lex specialis* that establishes Heronia’s exclusive obligations regarding the Akkadian spotter scoter.

Lex specialis norms operate in “two different contexts ... [1] as an elaboration or application of general law in a particular situation and [2] ... as an exception to the general law.”² Indeed, one of the functions of *lex specialis* is to “se[t] aside [] the general law in view of the existence of a conflicting specific rule,”³ and “preference was often given to a special standard because it not only best reflects the requirements of the context, but because it best reflected the intent of those who were to be bound by it.”⁴ This view has been endorsed by the Permanent Court of International Justice⁵ and the International Court of Justice.⁶

¹ Statute of the International Court of Justice art. 36(6), 53; *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 259-60 (Dec. 20); *see generally* IBRAHIM F.I. SHIHATA, *THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION* (1964).

² United Nations International Law Commission, *Report of the International Law Commission – Fifty-fifth session*, 274, (May 5-June 6, July 7-Aug. 8, 2003)

³ United Nations International Law Commission, *Report of the International Law Commission – Fifty-sixth session*, 284 (May 3-June 4, July 5-Aug. 6, 2004).

⁴ *Id.*, at 286.

⁵ *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A) No. 2, at 31 (Aug. 30) (... in cases of doubt, the Protocol, being a special and more recent agreement, should prevail).

⁶ *Continental Shelf case (Tunis. v. Libya)*, 1982 I.C.J. 18, 38 (Feb. 24); *Military and Paramilitary (Nicar. v. U.S.)*, 1986 I.C.J. 14, 137.

According to Akkad, the instant dispute concerns the potential impact that the “proposed project would have on the Akkadian spotted scoter.”⁷ Akkad and Heronia executed the MBC as a bilateral treaty aimed at “preserv[ing] and enhance[ing] the environment of migratory birds,” including the Akkadian spotted scoter.⁸ Likewise, Akkad recognized in the diplomatic note forwarded to Heronia on December 15, 2002, that this dispute arises from Heronia’s obligations under the MBC.⁹ In effect, the MBC is *lex specialis* in relation to any conflict regarding the preservation of the Akkadian spotted scoter.

2. The MBC establishes a compulsory dispute resolution procedure.

The principle that “states are not subject to the jurisdiction of an international tribunal absent express consent” is widely recognized in international law.¹⁰ Bilateral treaties that include dispute settlement procedures before the International Court of Justice are rare.¹¹

In the *Southern Bluefin Tuna case*, the arbitral tribunal presided by President Schwebel¹² concluded that a convention (the CSBT Convention) executed between the

⁷ Record at 18 (hereinafter R).

⁸ Migrating Bird Convention, Article III, R10.

⁹ R18.

¹⁰ Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 Am. J. Int’l L. 277, 284 (2001); *see also* CHITTHARANJAN F. AMERASINGHE, JURISDICTION OF INTERNATIONAL TRIBUNALS 69-77 (2003).

¹¹ RENATA SZAFARZ, THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 24 (1993) (referring to the I.C.J. Yearbook 1989-90).

¹² *See generally* Southern Bluefin Tuna case (Austl. and N.Z. v. Japan), Award on Jurisdiction and Admissibility (Arb. Trib. Constituted under Annex VII of the UNCLOS 2000), *available at*

parties to the dispute provided “for binding third-party settlement only with the consent in each case of all parties to the dispute.”¹³ The reasoning of the court was that because

the dispute between the parties concerning the interpretation and application of the [UNCLOS] with which the tribunal was seized, and their dispute concerning the interpretation or implementation of the CSBT Convention, *are the same dispute...* and the effect of the provisions of the CSBT Convention regarding settlement of disputes, notwithstanding the absence of an express reference to dispute settlement obligations under other treaties in general or the [UNCLOS] in particular, *is to exclude compulsory jurisdiction under both Conventions.*¹⁴

In effect, the Court held that if the dispute effectively arises under the *lex specialis*, its dispute resolution procedures determine the court’s jurisdiction. Likewise, the Court cannot exercise compulsory jurisdiction when an agreement

“expressly require[s] disputes to be *resolved by mutually agreed procedures* ... [and] preclude[s] unilateral submission of a dispute to compulsory binding adjudication or arbitration, not only by explicitly requiring disputes to be settled by mutually agreed procedures, but also, ... by requiring the parties to continue to seek to resolve the dispute *by any of the various peaceful means of their own choice.*”¹⁵

A reading of Article VI indicates that the parties did not include any dispute resolution procedure before the International Court of Justice.¹⁶ In fact, the very treaty clearly established that any dispute between the parties “*shall* be subject to negotiation between the Contracting Parties” and “the Contracting Parties *shall* submit the matter to

www.worldbank.org/icsid/bluefintuna/main.htm (hereinafter, Southern Bluefin Tuna case) (last visited September 30, 2005).

¹³ Oxman, *supra* note 10 at 281.

¹⁴ Oxman, *supra* note 10 at 281-82 (emphasis added); *see generally* Southern Bluefin Tuna case, *supra* note 12.

¹⁵ Southern Bluefin tuna, *supra* note 12, at 104, ¶ 63 (emphasis added).

¹⁶ Migrating Bird Convention, Article VI, R10 [hereinafter MBC].

mediation,” creating an affirmative obligation to resolve the dispute through “various peaceful means of their own choice,”¹⁷ rather than submit it to the International Court of Justice.¹⁸

B. The dispute does not relate to the interpretation or the application of the UNCLOS or the CBD.

The parties have stipulated that this Court has jurisdiction if this dispute concerns the interpretation or application of either the UNCLOS or CBD.¹⁹ However, since the dispute relates to the alleged violations by Heronia of its obligations regarding the Akkadian spotted scoter, neither the UNCLOS nor the CBD need be interpreted or applied to this matter.

1. Heronia’s legal obligations under the UNCLOS relate exclusively to the “marine environment,” and the Akkadian spotted scoter is not part of the marine environment.

This dispute does not concern the interpretation or application of rights or duties under the UNCLOS.

Akkad argues that the proposed Kennedy Wind Farm constitutes “pollution of the seas.”²⁰ However, the UNCLOS clearly recognizes that “‘pollution of the marine environment’ means the introduction by man, directly or indirectly, of substances or energy into the marine environment.”²¹ Furthermore, Akkad seems to suggest that the

¹⁷ Southern Bluefin Tuna case, *supra* note 12, at 104, ¶ 63.

¹⁸ *Id.* (emphasis added).

¹⁹ R11-12.

²⁰ R24.

²¹ United Nations Convention on the Law of the Sea art. 1(4), Dec. 10, 1982, 1833 U.N.T.S. 31363, [hereinafter UNCLOS].

Akkadian spotted scoter is a part of the marine environment,²² a contention that Heronia disputes.²³ Consequently, the relevant inquiry relates to whether the Akkadian spotted scoter is a part of the “marine environment.”

The UNCLOS does not define the term “marine environment,”²⁴ but the International Seabed Authority, an autonomous authority created by the states party to the UNCLOS,²⁵ has defined it as only “the physical, chemical, sedimentological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof.”²⁶ Likewise, the International Law Commission has said that “the expression ‘marine environment’ is understood to include, inter alia, the water, flora and fauna of the sea, as well as the sea-bed and ocean floor.”²⁷

Consequently, Heronia contends that the term “marine environment” only refers to “species that live at sea.”²⁸ Since this dispute arises out of a conflict related to the Akkadian spotted scoter, a species that does not live at sea, the dispute does not concern the interpretation or application of the UNCLOS.

²² R24.

²³ R25.

²⁴ United Nations International Law Commission, *Report of the International Law Commission – Forty-sixth session*, 300, U.N. Doc. A/49/10 (1994); *see generally* UNCLOS, *supra* note 21.

²⁵ MALCOLM N. SHAW, *INTERNATIONAL LAW* 566 (5th ed. 2003).

²⁶ Press Release, International Seabed Authority, Seabed Council Discusses Meaning of Marine Environment, Polymetallic Nodules, Precautionary Measures, SB/5/22 (Aug. 23, 1999).

²⁷ United Nations International Law Commission, *supra* note 24, at 300.

²⁸ R25.

2. In cases of disputes, the UNCLOS defers to the dispute resolution procedures contained in *lex specialis* treaties, as in this case.

Assuming *arguendo* this Court finds that the instant dispute concerns the “marine environment” as per the UNCLOS, Heronia further submits that the UNCLOS defers to the MBC as *lex specialis* on the matter. The UNCLOS establishes that “[t]he provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment,”²⁹ and that the UNCLOS does not “impair[] the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice,”³⁰ such as the procedures outlined in the MBC.

3. The CBD does not establish any obligations vis-à-vis Heronia regarding the Akkadian spotted scoter.

The jurisdiction provisions of the CBD establish that the biological diversity provisions of the treaty apply only to “biological diversity, *in areas within the limits of its national jurisdiction.*”³¹ The Akkadian spotted scoter naturally lives in Akkad, and only temporarily migrates to Heronia.³² As a result, the threshold jurisdictional provision of the CBD excludes any potential dispute related to the Akkadian spotted scoter, and in

²⁹ UNCLOS, *supra* note 21, at 237(1).

³⁰ Southern Bluefin Tuna case, *supra* note, 12 104, ¶ 63.

³¹ Convention on Biological Diversity art. 4(a), June 5, 1992, 1760 U.N.T.S. 30619 [hereinafter, “CBD”]. *See also id.* at 3.

³² R9.

fact, the CBD contains no provision which explicitly protects the Akkadian spotted scoter; the MBC, as *lex specialis*, contains the relevant international obligations.³³

II. HERONIA HAS PROPERLY BALANCED ITS SOVEREIGN RIGHT TO EXPLOIT ITS NATURAL RESOURCES AGAINST ITS INTERNATIONAL OBLIGATIONS.

Heronia enjoys the exclusive right to exploit natural resources within its Exclusive Economic Zone (EEZ).³⁴ This right is balanced against the state's obligation to exercise due regard for the rights and duties of other states,³⁵ act in a manner compatible with its environmental policies,³⁶ and protect and preserve the marine environment.³⁷ The right to use wind to produce energy in the EEZ is an enumerated right under UNCLOS.³⁸

A. Heronia has acted with due regard for the rights and duties of other states.

Due regard is an equitable doctrine³⁹ that tracks the general principle of international law that sovereigns must not abuse their rights.⁴⁰ A sovereign abuses its rights when it fails to act reasonably, honestly or in conformity with international law and

³³ See *supra* pp. 4-5.

³⁴ UNCLOS, *supra* note 21, at 56; United Nations Conference on the Human Environment, Principle 21, adopted June 16, 1972, U.N. Doc. A/CONF. 48/14/Rev.1 [hereinafter Stockholm Declaration].

³⁵ UNCLOS, *supra* note 21, at 56(2).

³⁶ CBD, *supra* note 31, at 3; UNCLOS, *supra* note 21, at 193.

³⁷ UNCLOS, *supra* note 21, at 192.

³⁸ *Id.* at 56(1)(a).

³⁹ See *Fisheries Jurisdiction (F.R.G. v. Ice.)*, 1974 I.C.J. 175, at 60-64 (July 25).

⁴⁰ See PATRICIA BIRNIE AND ALAN BOYLE, *INTERNATIONAL LAW & THE ENVIRONMENT* 145 (2d ed. 2002); Vera Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 Am. J. Int'l L. 643, 663; Howard S. Schiffman, *Reservations in Marine Environmental Treaties*, 26 Whittier L. Rev. 1003, 1021.

with due regard for the rights of others.⁴¹ The duty to exercise due regard is limited to what is possible and appropriate,⁴² but includes the responsibility to notify and consult affected States,⁴³ or in the event of an imminent action, a duty to minimize the damage.⁴⁴ It also includes the creation and use of environmental impact assessments⁴⁵ that not only look at “the impact of individual projects, but also their cumulative and global effects.”⁴⁶ The ICJ has stated that consultation and negotiations are signs that a state has exercised due regard and often constitute the most appropriate remedy.⁴⁷

Heronia has acted with due regard to the rights and duties of Akkad. Heronia has welcomed the opportunity to consult with Akkad,⁴⁸ and through negotiation, has considered Akkad’s concerns regarding the Akkadian spotted scoter.⁴⁹ All that due regard requires is that these concerns be considered and mitigated to the extent possible. After consulting Akkad, Heronia attempted to find another site for the Project, one that would be out of the flight path of the spotted scoter, but no such site is available.⁵⁰ Given

⁴¹ BIN CHENG, *GENERAL PRINCIPLES OF LAW* 134, 136 (1987).

⁴² CBD, *supra* note 31, at 14.1.

⁴³ *See* CBD, *supra* note 31, at 14.1(c).

⁴⁴ *See id.* at 14.1(d).

⁴⁵ United Nations Conference on Environment and Development, June 3-14 1992, *Agenda 21*, ¶ 15.5(k) [hereinafter *Agenda 21*].

⁴⁶ Fifth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Nairobi, Kenya, May 15-26, 2000, Decision V/18, ¶ 2(a) [hereinafter *CBD COP5*].

⁴⁷ *See*, Fisheries Jurisdiction, *supra* note 39; Stephen C. McCaffrey and Mpazi Sinjela, *Current Development: The 1997 United Nations Convention on International Watercourses*, 92 *Am. J. Int’l L.* 97, 102 (1998).

⁴⁸ R18.

⁴⁹ R22.

⁵⁰ R23.

the lack of a viable alternative,⁵¹ and that the overriding consideration of conserving the marine environment for the benefit of all will be accomplished by the reduction of emissions that contribute to global warming, Heronia may lawfully continue with construction of the project.

B. Heronia has acted in a manner compatible with its environmental policies.

States have a sovereign right to define their environmental policies.⁵² This includes the “task of planning, managing or controlling” their environmental resources “with a view to enhancing environmental quality.”⁵³ Under this principle Heronia has the authority to prioritize mitigation of climate change as its paramount environmental policy.

The construction of the project is within Heronia’s rights under the relevant conventions. The project promotes Heronia’s environmental policies and obligations by investing in sustainable energy and reducing its reliance on fossil fuels, thereby reducing emissions of greenhouse gases as required under the Kyoto Protocol. This benefits not only Heronia, but all nations, especially other small island nations such as Akkad.

⁵¹ *Id.*

⁵² CBD, *supra* note 31, at 3; Stockholm Declaration, *supra* note 34, at Principle 21.

⁵³ Stockholm Declaration, *supra* note 34, at Principle 21.

C. Heronia has acted in accordance with its duty to protect and preserve the marine environment.

1. Article 192 must be understood in its proper context.

i. Birds are not part of the marine environment.

As discussed in Part I, *supra*, birds are not part of the marine environment.

Therefore Heronia's obligations to protect migratory bird species such as the Akkadian spotted scoter are governed solely by the Migrating Bird Convention, discussed *infra*, and should not be considered in determining whether Heronia has satisfied its duty to protect and preserve the marine environment.

ii. The duty to protect and preserve should be understood as limited to issues of pollution.

Article 192 is a statement of general obligation that must be read in context of the Part that it introduces "protection and preservation of the marine environment." Read in conjunction with the remainder of the part, it is clear that article 192 refers to pollution of the sea and the introduction of alien species, neither of which are applicable here. Furthermore, Article 193, "[s]overeign right of States to exploit their natural resources," grants states the right to exploit natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.⁵⁴

2. The Project does not constitute pollution of the marine environment under UNCLOS or customary international law.

Pollution of the marine environment is defined as "introduction by man, directly or indirectly, of substances or energy into the marine environment, which results or is likely to result in such deleterious effects as harm to living resources and marine life,

⁵⁴ UNCLOS, *supra* note 21, at 193.

hazards to human health and hindrance to marine activities.”⁵⁵ According to the United Nations, marine pollutants consist of halogenated hydrocarbons, petroleum and its derivatives, other organic chemicals, nutrient chemicals, inorganic chemicals, suspended solids, radioactive substances, and thermal waste.⁵⁶ Structures cannot themselves be pollution of the sea as their construction and use is a legitimate use of the sea.⁵⁷

Akkad does not suggest that the project will introduce harmful substances or energy into the marine environment, but rather that the structures themselves are pollutants.⁵⁸ Not only is this interpretation not supported by UNCLOS or international law generally,⁵⁹ but to conclude that they are would require prohibiting an enumerated right under the convention.⁶⁰ As Heronia is not introducing substances or energy into the marine environment and it is exercising its Article 56 rights pursuant to its complementary obligations towards the environment, the construction of the project does not violate Heronia’s obligations under the UNCLOS.

⁵⁵ *Id.* at 1(1)(4).

⁵⁶ The Secretary-General, *Report of the Secretary-General on the Sea: Prevention and control of marine pollution* 23-24 UN Doc. E/5003 (1971).

⁵⁷ UNCLOS, *supra* note 21, at 56(1)(a).

⁵⁸ R24.

⁵⁹ *See, e.g.*, The Secretary-General, *supra* note 56.

⁶⁰ *See* UNCLOS, *supra* note 21, at 56(1)(a).

III. IN CONSTRUCTING THE PROJECT, HERONIA IS IN COMPLIANCE WITH ITS OBLIGATIONS UNDER INTERNATIONAL LAW BECAUSE HERONIA'S OBLIGATIONS UNDER THE UNFCCC AND THE KYOTO PROTOCOL CAN BE HARMONIZED WITH THE OBJECTIVES OF HERONIA'S OTHER TREATY OBLIGATIONS.

The shift from species and location specific agreements to multi-lateral framework treaties based upon sustainable use has created conflicts between individual State parties' substantive obligations at the implementation stage.⁶¹ For the most part, the objectives of international environmental treaties and instruments differ in detail but are comparable in principle.⁶² A possible solution to this problem is harmonizing the content of the legal regulations of treaties that are in conflict using the framework of Article 31 of the Vienna Convention on the Law of Treaties.⁶³ Following the rules of interpretation, the simultaneous implementation of two treaties is harmonized if the execution of the separate obligations is interpreted: 1) in good faith; 2) in accordance with the ordinary meaning to be given to the terms of the treaty; 3) in their context; and 4) in the light of the object and purpose of both treaties.⁶⁴

Where the instructions for implementation in the texts of these treaties are ambiguous, the court should consider the relevant rules of international law applicable in the relations between the parties.⁶⁵ These include Heronia's obligations to reduce

⁶¹ RÜDIGER WOLFRUM AND NELE MATZ, *CONFLICTS IN INTERNATIONAL ENVIRONMENTAL LAW* 72-74 (2003).

⁶² *Id.* at 65.

⁶³ *Id.* at 133-34.

⁶⁴ Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

⁶⁵ *Id.* at 31(3)(c). The record does not contain any evidence or subsequent agreements or practice regarding the interpretation or application of the terms. Therefore subsections (a) and (b) of Art. 31(3) are inapplicable here.

greenhouse gas emissions under the Kyoto Protocol⁶⁶ which will benefit all states, including small island developing nations such as Akkad.⁶⁷

A. Heronia harmonizes its multiple treaty obligations in a good faith acceptance of its responsibility to other island nations and the global community.

Change in the Earth's climate and its adverse effects are a common concern of humankind.⁶⁸ Heronia, like any small island country, is particularly vulnerable to the adverse effects of climate change.⁶⁹ Parties to the World Summit on Sustainable Development concluded that all countries should promote sustainable consumption, but that developed countries should take "the lead [] with all countries benefiting from the process."⁷⁰ Both Heronia and Akkad must uphold the objectives of the UNFCCC.⁷¹ But it is Heronia, the developed country, that has an urgent obligation of immediately implementing plans of sustainable development. A principle objective of sustainable development is managing the natural resource base for economic and social

⁶⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 3.1, Dec. 10, 1997, 37 ILM 22 (1998) [hereinafter Kyoto]; R14.

⁶⁷ Kyoto, *supra* at 66, at 10.

⁶⁸ World Summit on Sustainable Development, Johannesburg, S.Afr., Aug, 26-Sept. 4, 2002, *Plan of Implementation*, at 38 [hereinafter WSSD].

⁶⁹ United Nations Framework Convention on Climate Change, introduction, May 9, 1992, 31 ILM 849 (1992) [hereinafter UNFCCC].

⁷⁰ WSSD, *supra* note 68, at 14; *see also* United Nations Conference on Environment and Development, Rio de Janeiro, Braz., *Rio Declaration on Environment and Development*, Principle 7, U.N. Doc A/CONF.151/26 (Aug. 12, 1992) [hereinafter Rio Declaration]).

⁷¹ Akkad has signed but not ratified the UNFCCC. Under art. 18 of the VCLT, Akkad has a duty not to defeat the objective or purpose of the UNFCCC. *See* R13.

development.⁷² This project is sustainable because it uses Heronia's natural wind patterns to replace non-renewable fuel sources and immediately reduces greenhouse gas emissions.

B. Heronia's implementation of the Kyoto Protocol through construction of the project does not conflict with Heronia's obligations under the CBD.

Each contracting party to the CBD has the obligation "as far as possible and appropriate" to regulate or manage activities that present a threat to biological diversity.⁷³ Biological diversity is not the sum total of biological resources (ecosystems, species, and genetic materials) but it is variability within and among ecosystems, species, and genetic materials.⁷⁴ Likewise, protection under the CBD balances conservation and use.⁷⁵ Although the CBD does not include a binding list of species or ecosystems that must be protected,⁷⁶ the sustainable use of biological resources is defined as an objective and a means of protecting biodiversity.⁷⁷ Sustainable use is implemented through the framework of the ecosystem approach.⁷⁸ Heronia has balanced the issues⁷⁹ for the

⁷² See generally World Summit on Sustainable Development, Sept. 4, 2002, *Johannesburg Declaration on Sustainable Development*. Sustainable development is defined as meeting the needs and aspirations of the current generations without compromising the ability to meet those of future generations.

⁷³ See CBD, *supra* note 31, at 8(1); see also Handbook of the Convention on Biological Diversity 152 (3d ed. 2005), available at <http://www.biodiv.org/handbook/default.asp> (requiring article 8(1) to be read with Art. 10(b)).

⁷⁴ GLOWACK ET. AL, ICUN'S GUIDE TO THE 1992 CONVENTION ON BIOLOGICAL DIVERSITY 16 (1994).

⁷⁵ CBD COP5, *supra* note 46, Decision V/6 Annex B, principle 10. ("The ecosystem approach should seek the appropriate balance between, and integration of, conservation and use of biological diversity.")

⁷⁶ See CBD, *supra* note 31, at 8.

⁷⁷ See CBD, *supra* note 31, at 2, 8, 10.

⁷⁸ Seventh Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Kuala Lumpur, Malay., Feb. 9-20, 2004, Decision VII/11, at 2, 3 [hereinafter CBD COP7]. The scope of

conservation of small island nations globally and determined that it must use its resources to mitigate climate change.

Heronia does not dispute that its efforts to mitigate climate change will adversely affect the Akkadian spotted scoter population,⁸⁰ but it submits that this is not a significant threat to biological diversity at the ecosystem level. The significant threat to Heronia's biodiversity at the ecosystem level is climate change. The Conference of the Parties (hereinafter, "COP") to the CBD recognized there is a direct relationship between the CBD and the regime for protection against climate change found in the UNFCCC and its Kyoto protocol.⁸¹ It is Heronia's duty under the CBD and the Kyoto Protocol to take immediate steps to reduce its greenhouse gas emissions by using the renewable energy resources⁸² it has in its jurisdiction, rather than rely on foreign fossil fuels. Heronia's sustainable use of its wind resources is aimed at protecting the biodiversity of island ecosystems from the effects of climate change.

1. The ecosystem approach allows Heronia focus on the long term benefits to the global ecosystem when implementing the CBD.

The COP has declared that "the priority at this time should be on facilitating the implementation of the ecosystem approach as the primary framework for addressing" the

CBD, Article 8, *in situ* protection obligations, should be interpreted using decisions of the Conference of the parties. See UNEP/CBD/COP/4/13, ¶15.

⁷⁹ R23.

⁸⁰ R22.

⁸¹ Fourth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Bratislava, Slov., May 4-15, 1998, Decision IV/7, at 9, DOC.UNEP/CBD/COP/4/12.

⁸² See, Kyoto, *supra* note 66, at 3.1; R14.

objectives of the CBD “in a balanced way.”⁸³ The ecosystem approach is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use⁸⁴ in an equitable way.⁸⁵ In the CBD, “ecosystem” means “a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.”⁸⁶ The CBD definition does not specify any particular spatial unit or scale for an ecosystem.⁸⁷ Therefore the scale of analysis and action under the ecosystem approach is determined by the problem being addressed, and an ecosystem could be a biome or the entire biosphere.⁸⁸ Heronia has made its management decisions looking toward the ecosystem of small island states globally,⁸⁹ and it is entirely consistent with the ecosystem approach and the CBD to have done so.

The COP cautions in the principles of the ecosystem approach that objectives for ecosystem management should be long term but that humans have a tendency to favor “short-term gains and immediate benefits over future ones.”⁹⁰ Heronia’s mitigation of climate change fits this principle because it is a management objective that focuses on a long term holistic benefit.

⁸³ CBD COP7, *supra* note 77, Decision VII/11, at 2.

⁸⁴ “Sustainable use” means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations. CBD, *supra* note 31, at 2. This definition is consistent with the concept of sustainable development in the Rio Declaration on Environment and Development and Agenda 21. CBD COP5, *supra* note 46, Decision V/25, annex, paragraph 1.

⁸⁵ *Id.*, Decision V/6, Annex A, paragraph 1.

⁸⁶ CBD, *supra* note 31, at 2.

⁸⁷ CBD COP5, *supra* note 46, Decision V/6, Annex A, paragraph 3.

⁸⁸ *Id.*

⁸⁹ R23.

⁹⁰ CBD COP5, *supra* note 46, Decision V/6 Annex B, principle 8.

2. The project’s possible adverse affects on the Akkadian spotted scoter are permissible under the ecosystem approach to the implementation of the CBD.

The ecosystem approach operates so that the “management of living components is considered alongside economic and social considerations at the ecosystem level of organization,” and decisions do “not simply [] focus on managing species and habitats.”⁹¹ The COP has noted that conservation measures should emphasize the protection of ecosystem functioning in addition to protecting specific stocks.⁹² The COP urges parties to urgently address all threats to marine and coastal biodiversity, but in doing so they must take into account climate change.⁹³ Heronia’s island ecosystem and its total biodiversity are vulnerable to the effects of climate change,⁹⁴ and there is also only one location suitable for the project.⁹⁵ Therefore, the project is justified under the ecosystem approach regardless of the effect on the Akkadian spotted scoter.

C. Heronia’s implementation of the UNFCCC and the Kyoto Protocol are not contrary to the implementation of the Ramsar Convention.

Absolute protection of wetlands and their stock is not a requirement of the Ramsar Convention. The Convention only requires that parties “endeavor” to increase

⁹¹*Id.*, Annex A, paragraph 3(a).

⁹² CBD COP2, Decision II/10, annex I, paragraph (iv).

⁹³ CBD COP7, *supra* note 78, Decision VII/5, paragraph 26. *See also Id.*, ¶ 8 states the COP agrees that the program on marine and coastal biodiversity should address issued related to biodiversity and climate change.

⁹⁴ UNFCCC, *supra* note 69, at introduction.

⁹⁵ R23.

waterfowl populations,⁹⁶ and that they “consider” the conservation and management of migratory stocks of waterfowl.⁹⁷

1. The Ramsar Convention foresees conflicts in priorities in its implementation, and establishes environmental impact assessments as the solution to such conflicts.

The COP to the Ramsar Convention recognizes that there will be some conflicts of interest and difficulty in identifying priorities on most Ramsar sites.⁹⁸ The Ramsar COP has decided that conflicts in priorities should be resolved in the planning process.⁹⁹ The primary mechanism in the Ramsar Convention for protecting wetlands while implementing other treaties – in particular the UNFCCC and the Kyoto Protocol - is environmental impact assessment and risk assessment.¹⁰⁰ The UNFCCC also mandates that impact assessments are the appropriate mechanism for minimizing the adverse effects on environmental quality when considering climate change mitigation.¹⁰¹ Heronia did consider the effect of the project on waterfowl populations, but decided to proceed with the project in light of its other treaty obligations.¹⁰²

⁹⁶ Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, art. 4.4, Feb. 2, 1971, 996 UNTS 245 [hereinafter Ramsar Convention].

⁹⁷ *Id.* at 2.6.

⁹⁸ Eighth Meeting of the Conference of the Contracting Parties, Valencia, Spain, Nov. 18-26, 2002, Res. VIII.14 at 28 [hereinafter Ramsar COP8].

⁹⁹ *Id.* The Ramsar Convention is not a regulatory regime and has no punitive sanctions for violations of or defaulting upon treaty commitments. RAMSAR CONVENTION SECRETARIAT. THE RAMSAR CONVENTION MANUAL, A GUIDE TO THE CONVENTION ON WETLANDS 11 (3d ed. 2004).

¹⁰⁰ *Id.*, Res. VIII.3 at 7.

¹⁰¹ UNFCCC, *supra* note 69, at 4.1(f).

¹⁰² R23.

2. Mitigating climate change preserves the wetlands, and thus, the construction of the project fulfills Heronia’s obligations under the Ramsar Convention.

Akkad narrowly and improperly alleges that a project which decreases waterfowl population is contrary to the Ramsar Convention.¹⁰³ The COP anticipates that climate change mitigation under the Kyoto Protocol may adversely affect wetlands,¹⁰⁴ yet it does not call for these activities to be stopped.¹⁰⁵ In fact, the Ramsar COP said that adaptation of wetlands “is a necessity, given that climate change and related impacts are already occurring.”¹⁰⁶

The Ramsar COP acknowledges that climate change may substantially affect the ecological character of wetlands and their sustainable use¹⁰⁷ and welcomes efforts by countries to address climate change.¹⁰⁸ Consequently, the Ramsar COP has suggested that mitigation options for the preservation of wetlands should reduce the land-based emissions of greenhouse gases through substitution of biological products for fossil fuels.¹⁰⁹ The project will contribute to the mitigation of climate change and therefore the conservation of wetlands.¹¹⁰

¹⁰³ R24.

¹⁰⁴ Ramsar COP8, *supra* note 98, DOC. 11 at 276.

¹⁰⁵ *Id.* at 294.

¹⁰⁶ *Id.* at 294.

¹⁰⁷ Ramsar COP8, *supra* note 98, Res. VIII.3, at 1; *see also* Ramsar COP8 DOC. 11 at 66 et seq.

¹⁰⁸ Ramsar COP8, *supra* note 98, Res. VIII.3, at 9.

¹⁰⁹ Ramsar COP8, *supra* note 98, DOC. 11 at 274.

¹¹⁰ R16, 25.

D. Heronia has satisfied its obligations arising under the MBC because the project does not violate any enumerated provision in the MBC and it contributes to environmental protection.

1. Heronia has satisfied its explicit obligations under Article V of the MBC.

Heronia has not permitted the activities explicitly prohibited in Article V, and therefore has satisfied these obligations under the MBC. Heronia is not contributing to the pollution of the seas,¹¹¹ it has not imported live animals or plants that may be hazardous to the Akkadian spotted scoter, and the construction of the project does not affect any of the scoter's habitat area that is identified as a wetland of international importance under the Ramsar Convention.

2. Heronia has in good faith interpreted its obligation to preserve and enhance the environment to include the mitigation of climate change.

Heronia has in good faith interpreted Article V to be an enumeration of the measures it must take to preserve and enhance the environment of migratory birds. Treaties must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹¹² State Parties have the discretion to interpret ambiguous provisions as they wish, so long as their interpretation does not counter enumerated principles of the treaty.¹¹³ As the record contains no evidence of concurrent agreements regarding the interpretation of the terms “preserve and enhance,” the context is limited to the text of the

¹¹¹ See Part II(c)(2).

¹¹² VCLT, *supra* note 64, at 31(1).

¹¹³ Brad L. Bacon, *Enforcement Mechanisms in International Wildlife Agreements and the United States*, 12 Geo. Int'l Evntl. L. Rev. 331, 336 (1999).

convention.¹¹⁴ Since that text is ambiguous, the court should consider this obligation to include Heronia's obligations to reduce greenhouse gas emissions under the Kyoto Protocol.¹¹⁵ Heronia recognizes the possible danger the project poses to the Akkadian spotted scoter and has consulted with Akkad and researched alternative locations for the wind farm. Unfortunately, no viable alternative for the location of the project exists.¹¹⁶ Heronia has worked with Akkad, looked for alternatives, and, in good faith, determined that despite the danger to the Akkadian spotted scoter, construction of the project is in the best interest of all nations because a reduction in greenhouse gas emissions will mitigate the effects of climate change.

E. Heronia's construction of the project is within Heronia's rights and duties under UNCLOS.

UNCLOS does not specifically address the issue of climate change. But many of the same substances that constitute pollution under the UNCLOS contribute to climate change.¹¹⁷ The addition of energy, in the form of heat is considered a pollution of the sea¹¹⁸ and the emission of greenhouse gases contribute to the rise in global mean sea temperatures.¹¹⁹ Therefore measures taken by Heronia to comply with the Kyoto Protocol, including the development of alternative energy sources such as the Project,

¹¹⁴ See VCLT, *supra* note 64, at 31(2).

¹¹⁵ See Kyoto, *supra* note 66, at 3.1; R14.

¹¹⁶ R23.

¹¹⁷ The Secretary-General, *supra* note 56, at 23-24; UNFCCC, *supra* note 69; UNEP, Climate Change Information Kit, Information Sheet 3 Greenhouse Gases and Aerosols, UNEP/IUC/2002/7 (2002).

¹¹⁸ See UNCLOS, *supra* note 21, at 1(1)(4); The Secretary-General, *supra* note 56, at 23-24.

¹¹⁹ See Ramsar COP8, *supra* note 98, DOC. 11 at Table 2.

satisfy Heronia's obligations under UNCLOS to reduce pollution of the marine environment.

CONCLUSION

For the foregoing reasons, Heronia respectfully requests the Court to declare:

- I. That this Court lacks *ratione materiae* jurisdiction to hear this dispute.

In the event that the Court determines that it has jurisdiction,

- II. That Heronia has fulfilled its international obligations to consider the environmental impact of the proposed energy project when it exercised its sovereign right to construct the project within its exclusive economic zone.
- III. That Heronia has fulfilled its international obligations after balancing its rights and duties arising under the treaties to which it has subscribed, and that Heronia has lawfully determined that those obligations are fulfilled by constructing the project.