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

THE CASE CONCERNING
THE WELFARE OF THE AKKADIAN SPOTTED SCOTER

KINGDOM OF AKKAD,
APPLICANT,

V.

REPUBLIC OF HERONIA,
RESPONDENT.

MEMORIAL FOR APPLICANT

2005 Stetson International Environmental
Moot Court Competition

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STATEMENT OF JURISDICTION

The Kingdom of Akkad and the Republic of Heronia submit this dispute to the International Court of Justice. Article 40(1) of the Statute of the International Court of Justice provides that “[c]ases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar.” In accordance with Article 40(1), the parties notified the Court of the special agreement they entered into at Freiburg, Germany, on May 11, 2005. Although the Republic of Heronia is contesting jurisdiction, both parties recognize the Court’s power to determine whether it has jurisdiction over a dispute pursuant to Article 31(6) of the Statute of the International Court of Justice.

QUESTIONS PRESENTED

- I. Whether the International Court of Justice has jurisdiction to consider this dispute when both parties have consented to the jurisdiction of the Court by submitting written declarations through the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea, pursuant to Article 36(1) of the Statute of the International Court of Justice.

- II. Whether the Republic of Heronia will violate international law by completing construction and operation of the Kennedy Wind Farm when it is undisputed that the Wind Farm will cause the status of the Akkadian Spotted Scoter to rise from threatened to endangered.

STATEMENT OF FACTS

The Kingdom of Akkad (“Akkad”) is a developing island nation¹ that is seeking to use Sargon National Park (“Sargon”), a wetland of international importance,² on its Western coast as a foundation for an ecotourism industry.³ The Republic of Heronia (“Heronia”) is a developed nation,⁴ located 120 nautical miles west of Akkad, that has a wetland of international importance on its Eastern coast called the Eadiedra National Wildlife Refuge (“Eadiedra”).⁵ Both parties claim an exclusive economic zone (“EEZ”) that extends approximately 60 nautical miles from the baseline of their territorial seas.⁶

The Akkadian Spotted Scoter (“Scoter”) is a species of waterfowl that migrates between Sargon and Eadiedra.⁷ In 2002, with an estimated population of 3,000, the Scoter was considered a threatened species.⁸ Consequently, both nations entered into a bilateral agreement, the Migratory Bird Convention (“MBC”).⁹ There under, both parties assumed an obligation to protect the Scoter from pollution of the seas and to conserve its habitat, particularly, areas identified under Ramsar.¹⁰

Both parties belong to several other international agreements: the United Nations Convention on the Law of the Sea¹¹ (“UNCLOS”), the Convention on Biological Diversity¹²

¹ Compromis 6.

² Both parties designated wetlands under Ramsar and thus assumed a duty to “consider its international responsibilities for the conservation, management, and wise use of migratory stocks of waterfowl.” Convention on Wetlands of International Importance especially as Waterfowl Habitat, art. 2(6), December 21, 1975, 1976 U.N.T.S. 246.

³ Compromis 6, 11.

⁴ *Id.* at 6.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261.

¹² Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

(“CBD”), the Ramsar Convention on Wetlands¹³ (“Ramsar”), and the Vienna Convention on the Law of Treaties¹⁴ (“Vienna Convention”).¹⁵ Both parties are also Members of the United Nations (“UN”), and thus are Parties to the Statute of the International Court of Justice¹⁶ (“Statute”).¹⁷ High-level representatives from both Heronia and Akkad attended and fully participated in the 1972 United Nations Conference on the Human Environment at Stockholm¹⁸ (“Stockholm”), the 1992 United Nations Conference on the Environment and Development at Rio de Janeiro¹⁹ (“Rio”), and the 2002 World Summit on Sustainable Development at Johannesburg²⁰ (“Johannesburg”).²¹ Lastly, Heronia is a Party to the United Nations Framework Convention on Climate Change²² (“UNFCCC”) and the Kyoto Protocol²³ (“Kyoto”).²⁴ Akkad has signed, but not ratified the UNFCCC and has not signed Kyoto.²⁵

In December 2002, Heronia announced the Kennedy Wind Farm (“Wind Farm”) project, to build 180 wind turbines in Heronia’s EEZ, directly in the flyway of the Scoter.²⁶ On December 15, 2002, Akkad forwarded a diplomatic note to Heronia requesting consultations regarding the project and an environmental impact assessment.²⁷ In February 2003, the parties engaged in formal consultations; Akkad’s primary objections were the deleterious effect on the

¹³ Ramsar, *supra* note 2.

¹⁴ Vienna Convention of the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

¹⁵ Compromis at 6, 9.

¹⁶ Statute of the International Court of Justice, Oct. 24, 1945, 832 U.S.T.S. 993.

¹⁷ Compromis at 6.

¹⁸ Stockholm Declaration of the United Nations on the Human Environment, June 16, 1972, 11 I.L.M. 1416.

¹⁹ Rio Declaration on Environment and Development, June 13, 1992, 31 I.L.M. 874.

²⁰ Johannesburg Declaration on Sustainable Development, Sept. 4, 2002, U.N. Doc. A/Conf.199/20.

²¹ Compromis at 6.

²² United Nations Framework Convention on Climate Change, May 29, 1992, 31 I.L.M. 849.

²³ Kyoto Protocol to the United Nations Framework Convention on Climate Change, December 10, 1997, 37 I.L.M.

32.

²⁴ Compromis at 9.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 10.

Scoter and the impact on their ability to develop an ecotourism industry.²⁸ Akkad produced an undisputed study finding that the status of the Scoter would be elevated from threatened to endangered in light of the design and location of the turbines.²⁹ In November 2003, Heronia announced its final approval for the proposed Wind Farm and acknowledged the devastating impact on the Scoter.³⁰

In 2004, the parties entered into negotiation and then mediation, both of which failed to resolve the matter.³¹ On May 11, 2005, the parties signed an agreement submitting the matter to the International Court of Justice (“ICJ”).

²⁸ *Id.* at 11.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 12.

SUMMARY OF THE ARGUMENT

The ICJ has jurisdiction over cases which are submitted by countries that have consented to its jurisdiction. Heronia and Akkad have consented to ICJ jurisdiction through the compromissory clauses of the CBD and UNCLOS and have satisfied the procedural requirements therein.

The CBD and UNCLOS also require that the dispute concern the application or interpretation of the treaty. The objective of the CBD is to protect biological diversity. The Wind Farm is exactly the kind of project the CBD prohibits. UNCLOS requires States Parties to protect, preserve, and prevent pollution of the marine environment. The Scoter is part of the marine environment; therefore this dispute concerns an application of UNCLOS.

Additionally, Heronia will violate Ramsar and the MBC. Ramsar protects and increases populations of migratory waterfowl. Heronia is violating its duty by engaging in a project that will drive the Scoter to extinction. Heronia entered into the MBC to protect the Scoter and its habitat. However, building the Wind Farm in its flyway is not in compliance with the MBC.

The customary law of Principle 21 prohibits states from damaging the environments of other states. The Scoter does not exclusively belong to Heronia; therefore Heronia does not have the sovereign right to exploit it and by doing so, is in violation of this principle.

Lastly, the Wind Farm will violate the principle of sustainable development, which requires that present needs are met without compromising future generations. Considering the risk of extinction the Scoter faces, it is clear that Heronia is violating sustainable development. For the aforementioned reasons, this Court should find that it has jurisdiction to hear the merits of this dispute and Heronia will violate international law if allowed to complete the Wind Farm project.

I. BOTH PARTIES VOLUNTARILY CHOSE THE ICJ FOR FINAL DISPUTE SETTLEMENT THROUGH WRITTEN DECLARATIONS UNDER THE MOST RECENT TREATIES, THE CBD AND UNCLOS, AND HAVE FULFILLED ALL REQUIREMENTS UNDER BOTH, THUS ICJ JURISDICTION IS PROPER.

There are two steps a state must take to express its consent to the jurisdiction of the ICJ.³² First, Article 35(1) of the Statute states that the Court “shall be open to the states parties to the present statute.”³³ A nation can become a State Party by being a member of the UN. In the current case, both parties are Members of the UN and therefore parties to the Statute.³⁴ Second, a state must accept the Court’s jurisdiction. Under Article 36(1), “The jurisdiction of the ICJ comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations *or in treaties and conventions in force.*”³⁵ Akkad and Heronia have accepted the Court’s jurisdiction by selecting it to be the means of dispute settlement through the compromissory clauses of the CBD and UNCLOS.³⁶

A. Heronia’s Careless Construction of the Wind Farm will Severely Threaten Biological Diversity, Therefore the CBD Provides a Proper Basis for ICJ Jurisdiction Because the Dispute Between Akkad and Heronia Concerns its Application.

The CBD provides a basis for jurisdiction because the detrimental harm caused to the Scoter by the Wind Farm does not fulfill Heronia’s obligations under the CBD to conserve biological diversity. Additionally, the procedural requirements under the dispute settlement clause have been satisfied.

The Settlement of Disputes Clause, Article 27 of the CBD, sets forth the conditions parties must meet in order to use this treaty as a basis for jurisdiction for ICJ jurisdiction.³⁷ First,

³² Stannimir A. Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice* 1 (1995).

³³ Statute, *supra* note 16, at art. 35(1).

³⁴ Compromis 6.

³⁵ Statute, *supra* note 16, at art. 36(1) (emphasis added).

³⁶ Compromis 9.

³⁷ CBD, *supra* note 12, at art. 27.

the dispute must concern the interpretation or application of the CBD.³⁸ Second, the parties must attempt dispute settlement through negotiation and in the event its failure, through mediation.³⁹ Finally, in the event that both fail, the parties must have stipulated via written declarations that the ICJ will be the compulsory means of dispute settlement.⁴⁰

This controversy involves the application and interpretation of the CBD, thereby satisfying the first criterion of Article 27.⁴¹ The court in *Southern Bluefin Tuna*⁴² stated that “[t]here is a dispute over the interpretation or application of a given treaty if the actions complained of can be reasonably measured against the...obligations prescribed by that treaty.”⁴³ The protection of biological diversity is the main obligation under the CBD.⁴⁴ The CBD defines biological diversity as “the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part.”⁴⁵ The Wind Farm is significantly destructive to the Scoter and its marine ecosystem, therefore it directly concerns compliance with the CBD.⁴⁶

The procedural requirements of Article 27 of the CBD have also been met. In 2004, the parties unsuccessfully attempted to resolve the dispute through negotiation followed by a failed attempt at mediation.⁴⁷ Both Heronia and Akkad became Contracting Parties to the CBD in 1996 and in accordance with Article 27(3), declared in separate writings that each accepted submission of a dispute concerning the CBD to the ICJ.⁴⁸

³⁸ *Id.* at 27(1).

³⁹ *Id.* at 27(2).

⁴⁰ *Id.* at 27(3)(b).

⁴¹ *Id.* at 27.

⁴² *Southern Bluefin Tuna (Austl. & N.Z. v. Japan)*, August 4, 2000, 39 I.L.M. 1359.

⁴³ *Id.* at 1381.

⁴⁴ *See generally* CBD, *supra* note 12.

⁴⁵ *Id.* at art. 2.

⁴⁶ *Id.* at arts. 3, 8.

⁴⁷ Compromis 13.

⁴⁸ *Id.* at 9.

The CBD provides the ICJ with a basis for jurisdiction to hear the merits of this controversy. Akkad has met all of the conditions of Article 27 of the CBD because the Scoter is protected as part of biological diversity and is threatened by Heronia's careless actions. Moreover, the parties have completed both negotiation and mediation, and both parties selected the ICJ to be the forum to settle disputes regarding the CBD.

B. Heronia's Devastation of the Scoter Violates its Duty Under UNCLOS to Protect and Preserve the Marine Environment and the Parties Have Fulfilled the Criteria of the Settlement of Disputes Section, Thus UNCLOS is a Basis for ICJ Jurisdiction.

This dispute concerns the application of UNCLOS. Specifically, Akkad asserts that Heronia will cause the Scoter, a part of the marine environment, to become endangered with its careless construction of the Wind Farm directly in the Scoter's flyway. Therefore, this dispute fits squarely into the application of UNCLOS.

The Settlement of Disputes, Part XV of UNCLOS, contains three sections that set forth conditions required to use UNCLOS as a basis for ICJ jurisdiction. The parties have satisfied the conditions and therefore jurisdiction of the ICJ is proper.

1. *With no settlement reached or agreement to exclude alternative procedures, the parties have bypassed the general provisions to utilize UNCLOS for jurisdiction.*

Section 1 plays a gate-keeper roll, disallowing parties under certain circumstances from utilizing the dispute settlement provisions of UNCLOS.

Article 281 provides,

[i]f the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.⁴⁹

⁴⁹ UNCLOS, *supra* note 11, at art. 281.

In accord with Section 281 the parties sought a separate peaceful means of dispute settlement regarding the Scoter.⁵⁰ However, the parties can still utilize the dispute settlement provisions of Part XV because they “failed to resolve the matter” by recourse to such means.⁵¹ Furthermore, the parties have not agreed to exclude any other procedures.

Article 282 provides,

[i]f the States Parties...have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.⁵²

In the ten years since they became State Parties to UNCLOS, they have not created an alternative agreement for binding dispute resolution.

Lastly, Article 283(1) obligates the parties to an “exchange of views regarding...settlement by negotiation or other peaceful means.”⁵³ The parties have fulfilled this obligation by the exchange of diplomatic notes and participation in negotiation and mediation procedures.⁵⁴

2. *This dispute concerns an application of UNCLOS and the parties chose the ICJ for dispute settlement, thereby satisfying section 2 procedures.*

As stated *supra*, this dispute concerns the application of UNCLOS, and there has been no settlement reached by recourse to section 1. Therefore, pursuant to Akkad’s request, Articles 286 and 287 provide ICJ jurisdiction.

Article 286 states “any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at

⁵⁰ Compromis 13.

⁵¹ *Id.*

⁵² UNCLOS, *supra* note 11, at art. 282.

⁵³ *Id.* at art. 283.

⁵⁴ Compromis 10-13.

the request of any party to the dispute to the court or tribunal having jurisdiction under this section.”⁵⁵ Article 287(1) allows State Parties to choose the procedure in which they will settle disputes concerning UNCLOS.⁵⁶ In accordance with this article, both parties chose the ICJ via written declarations in 1995.⁵⁷ Furthermore, Article 287(4) states that “if the parties...have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.”⁵⁸ Heronia and Akkad have not agreed upon other means of resolution, therefore they must submit the dispute to the ICJ.⁵⁹

Article 288 confers jurisdiction over a dispute concerning the application or interpretation of UNCLOS to the chosen court or tribunal, in this case the ICJ. Article 288 expands the jurisdiction of the court to include any dispute concerning an “international agreement related to the purposes of this Convention.”⁶⁰ Thus, if the Court determines that jurisdiction exists only under UNCLOS, Akkad may still argue violations of the CBD, Ramsar, and the MBC because they are related to the purpose of UNCLOS.

3. *Heronia’s contravention of international rules to protect and preserve the marine environment allows the ICJ jurisdiction over the dispute.*

Article 297, limits the applicability of Section 2 by specifically enumerating circumstances when the chosen court will have jurisdiction over the dispute. The current case clearly falls within Article 297(1)(c), which provides jurisdiction “when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment.”⁶¹ The dispute qualifies under this article

⁵⁵ UNCLOS, *supra* note 11, at art. 286.

⁵⁶ *Id.* at art. 287.

⁵⁷ Compromis 9.

⁵⁸ UNCLOS, *supra* note 11, at art. 287(4).

⁵⁹ Compromis 9.

⁶⁰ UNCLOS, *supra* note 11, at art. 288.

⁶¹ *Id.* at art. 297(1)(c).

because Akkad is alleging that Heronia's completion of the Wind Farm will be lethal to the Scoter, an integral part of the marine environment.

Akkad has met all of the conditions set forth in Part XV, the Dispute Settlement section of UNCLOS: (1) The dispute concerns the application of UNCLOS; (2) the parties did not reach a settlement through negotiation or mediation; (3) they did not agree to exclude procedures beyond negotiation and mediation; (4) the parties chose the ICJ to be the forum to settle disputes; (5) the parties have not agreed to any other dispute settlement procedure; (6) the dispute concerns an allegation of a coastal state acting in contravention of rules for the protection of the marine environment. Accordingly, UNCLOS can be used as a basis for jurisdiction to submit this dispute to the ICJ.

C. Although the MBC is More Specific, the CBD and UNCLOS Were Both Subsequently Ratified, Therefore Article 30(3) of the Vienna Convention and *Lex Posterior* Dictate That They Are Dispositive in Terms of Allowable Dispute Settlement Procedures.

In accordance with the principle of *lex posterior*, codified in Article 30(3) of the Vienna Convention, both UNCLOS and the CBD are controlling in terms of dispute settlement procedures because they were signed subsequent to the MBC. Specifically, Article 30(3) of the Vienna Convention provides that “[w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59; the early treaty applies only to the extent that its provisions are compatible with those of the latter treaty.”⁶²

In light of *lex posterior*, UNCLOS and the CBD control the dispute resolution procedures. Article VI of the MBC provides only for negotiation and mediation and is silent on how the parties should proceed in the event these fail.⁶³ Therefore, the MBC is not compatible

⁶² Vienna, *supra* note 14, at art. 30(3).

⁶³ Compromis 8.

with UNCLOS and the CBD because they provide for additional dispute resolution procedures beyond negotiation and mediation. The Court must also consider that if it were to merely implement the dispute resolution procedures of the MBC, it would leave the parties with no forum to settle the dispute since they have already exhausted the options set forth in the MBC. This would be an absurd result; therefore this argument must be disregarded.

Heronia will likely argue that since the MBC is the more specific treaty regarding the Scoter, it should exclusively control the dispute settlement procedure.⁶⁴ Southern Bluefin Tuna dealt with a challenge between Japan, Australia, and New Zealand regarding a treaty that established a total allowable catch (TAC) for the Tuna.⁶⁵ Japan argued that since the treaty was specific to TAC, *lex specialis* dictated that its dispute settlement clause exclusively controlled. Australia and New Zealand's position was that the dispute also concerned UNCLOS and therefore it should control. The court ruled that *lex specialis* was inapplicable; stating that, "[t]here is no reason why a given act of a State may not violate its obligations under more than one treaty."⁶⁶

The ICJ is the proper venue for the dispute between Heronia and Akkad. Both are parties to the Statute and, in the CBD and UNCLOS, they have voluntarily consented to the jurisdictional power of the ICJ. Moreover, this dispute concerns an application and interpretation of the CBD and UNCLOS and the procedural requirements set forth in both have been fully satisfied. Lastly, the application of the Vienna Convention dictates that the proper dispute resolution procedures are not limited to the MBC, but include those found in the subsequently ratified CBD and UNCLOS.

⁶⁴ *Id.* at 13.

⁶⁵ Southern Bluefin Tuna, 39 I.L.M. at 1363.

⁶⁶ *Id.* at 1388.

II. HERONIA WILL VIOLATE INTERNATIONAL LAW BY COMPLETING THE WIND FARM BECAUSE IT WILL HARM THE SCOTER, AND THEREFORE THE MARINE ENVIRONMENT AND BIOLOGICAL DIVERSITY, IN VIOLATION OF MULTIPLE TREATIES AND INTERNATIONAL CUSTOMARY LAW.

Heronia will violate international law if it completes the Wind Farm because this action will constitute a direct violation of the CBD, UNCLOS, Ramsar, and the MBC, to all of which Heronia is a State Party. Operation of the Wind Farm will also constitute a violation of international customary law which establishes that states have an obligation not to harm the environment of another state. Lastly, Heronia's construction of the Wind Farm constitutes a breach of the principle of sustainable development.

A. If Heronia Completes the Construction of and Operates the Wind Farm, it Will Blatantly Disregard its Duties Under Multiple Treaties to Prevent and Reduce Pollution of Any Kind and to Protect the Scoter, the Marine Environment and Biological Diversity.

Heronia has represented itself to the world community as being an environmentally conscious and progressive nation. It signed numerous treaties and attended three UN conferences which are all focused on the preservation, conservation, and enhancement of the global environment. Now, in light of emerging alternative energy sources, they are in complete disregard of the sanctity of their treaty obligations and promises. Heronia's actions are jeopardizing an entire species in contravention of treaties, custom and principles and therefore, they are in clear violation of international law.

1. Heronia's completion of the Wind Farm will be detrimental, not conservational, to biological diversity and thus will violate its duties under the CBD.

Articles 3 and 8 of CBD specifically establish an obligation not to harm the environment of other states and to conserve biological diversity within its natural ecosystem.⁶⁷ The Wind Farm will unquestionably endanger the Scoter and have a direct and adverse impact on the

⁶⁷ CBD, *supra* note 12, at arts. 3, 8.

marine environment of Akkad. Therefore, Heronia will be in contravention of Articles 3 and 8 of the CBD if it completes the Wind Farm.

Under Article 3 of the CBD, states have the “responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States.”⁶⁸ The Scoter does not live exclusively on the shores of Heronia; rather, it migrates between the two nations and Heronia does not have the sovereign right to exploit it.⁶⁹ Therefore, Heronia will fail to meet this obligation under Article 3 because it is undisputed that the construction of the Wind Farm will cause the Scoter, currently classified as threatened, to become endangered.⁷⁰

Heronia’s construction of the Wind Farm will also violate Article 8.⁷¹ First, Article 8(f) establishes a duty to “promote the recovery of threatened species.”⁷² Heronia is actually perpetuating the eradication of the species and thereby the balance of the entire ecosystem in complete contradiction of Article 8(f). Furthermore, they will violate Article 8(c), which demands that parties “regulate or manage biological resources important for the conservation of biological diversity...with a view to ensuring their conservation.”⁷³ Both parties have declared the Scoter to “constitute a natural resource of great value.”⁷⁴ Heronia’s decision to build the Wind Farm in the flyway of the Scoter does not constitute conservation, but rather, will be the direct cause of the species extinction.

The CBD clearly lays out duties under Articles 3 and 8 not to damage the environment of other states and to promote the recovery of threatened species. Heronia is wholly disregarding its obligations under the CBD by completing the Wind Farm despite uncontroverted evidence of

⁶⁸ *Id.* at art. 3.

⁶⁹ Compromis 6.

⁷⁰ *Id.* at 11.

⁷¹ CBD, *supra* note 12, at art. 8.

⁷² *Id.* at art. 8(f).

⁷³ *Id.* at art. 8(c).

⁷⁴ Compromis 7.

the harm it will impose. Therefore, the completion of the Wind Farm will be in direct violation of Heronia's duties under the CBD.

2. *The Wind Farm will create pollution that will contravene duties under UNCLOS to protect the marine environment and to prevent, reduce, and control pollution.*

As a party to UNCLOS, Heronia has accepted an obligation to protect and preserve the marine environment as well as the duty to prevent, reduce, and control pollution from any source. The construction of the Wind Farm will directly violate the obligations as set forth in Articles 192 and 194 of UNCLOS.

Article 192 declares that “[s]tates have the obligation to protect and preserve the marine environment.”⁷⁵ Although the drafters did not specifically define marine environment, there has been significant recognition in treaties that the definition is properly understood to include birds as “integral parts of marine ecosystems.”⁷⁶ Therefore, the term marine environment in UNCLOS can only be properly understood to include birds, and thus, the Scoter. Since it is undisputed that construction of the Wind Farm will endanger the Scoter, Heronia will violate its duty to protect and preserve the marine environment.

Heronia will also violate Article 194 of UNCLOS, which establishes that State Parties have the obligation to prevent, reduce, and control *pollution* of the marine environment. Article 1 defines pollution to mean “the introduction by man, directly or indirectly, of substances or energy into the marine environment...which...is likely to result in such deleterious effects as harm to living resources and marine life.”⁷⁷ The World Trade Organization has established that treaty definitions which are evolutionary in nature are not “static,” and they must “be interpreted and applied within the framework of the entire legal system prevailing at the time of the

⁷⁵ UNCLOS, *supra* note 11, at art. 192.

⁷⁶ Convention for the Protection of Migratory Birds, U.S.- Gr. Brit., Aug. 16, 1916, 39 Stat. 1702. *See also* Convention on the Conservation of Antarctic Marine Living Resources, April 7, 1982, 33 U.S.T. 3487.

⁷⁷ UNCLOS, *supra* note 11, at art. 1.

interpretation.”⁷⁸ In recent years, wind farms have been recognized as constituting pollution because of the harmful effects they have on the surrounding environment, the noise levels they produce, and the negative impact they have on the aesthetics of their surrounding area.⁷⁹ Lastly, while pollution is defined as the introduction of substances or energy into the environment, Article 194(1) provides that states have a duty to prevent, reduce and control pollution *from any source*.⁸⁰ The inclusion of “from any source” is a clear indication that pollution should be defined broadly; therefore pollution must be interpreted to include modern sources, such as wind farms.

Heronia will also be in violation of Article 194(5), which obligates parties “to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species.”⁸¹ It can not be emphasized enough the devastating effect that the Wind Farm will have on the population, the habitat, and the ecosystem of the Scoter. It is certain that if the Wind Farm is completed and put into operation, not only would the status of the Scoter go from threatened to endangered, it would cease to exist, clearly a result not supported under 194(5).

The Scoter resides in wetlands on the shores of both Heronia and Akkad. Any destructive force introduced into an environment by man, constitutes pollution. Therefore, since Heronia is polluting the marine environment in which the Scoter exists, they are acting in direct opposition to Articles 192 and 194 of UNCLOS.

⁷⁸ Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 130, 131, WT/DS58/AB/R (Oct. 12, 1998).

⁷⁹ Michael Shulz, *Questions Blowing in the Wind: The Development of Offshore Wind as a Renewable Source of Energy in the United States*, 38 NEW. ENG. L. REV. 415, 423 (2004).

⁸⁰ UNCLOS, *supra* note 11, at art. 194(1) (emphasis added).

⁸¹ *Id.* at art. 194(5).

3. *The Wind Farm will eradicate the Scoter's migratory flyway thereby violating a duty under Ramsar to promote conservation of migratory waterfowl.*

Heronia, as a Party to the Ramsar Convention, has an obligation to make wise use of migratory stocks of waterfowl and to increase populations. Its reckless decision to construct the Wind Farm in close proximity to a wetland of international importance and in the direct migratory flyway of the Scoter evidences a clear disregard for its duties under Ramsar.

Under Article 2(6) of Ramsar, “[e]ach Contracting Party shall consider its international responsibilities for the conservation, management and wise use of migratory stocks of waterfowl.”⁸² The Contracting Parties stated that “wise use of wetlands involves maintenance of their ecological character, as a basis not only for nature conservation, but for sustainable development.”⁸³ Article 4(4) states that “[t]he Contracting Parties shall endeavor through management to increase waterfowl populations.”⁸⁴ While the focus of this treaty has primarily been on designated sites, in recent years there has been “a growing realization that...sites remain affected by decisions taken outside their boundaries.”⁸⁵ Additionally, “[e]cologists have long recognized that land adjacent to areas managed for waterfowl play a major role in the entire management scheme.”⁸⁶ Thus, since conservation of a listed site will be affected by decisions regarding land adjacent to it, Contracting Parties must use the adjacent land wisely to not violate Ramsar.

There is no question that building 180 turbines in the direct flyway of the Scoter will cause a substantial number to be killed. Moreover, the Wind Farm’s location will be devastating by permanently preventing the Scoter from migrating to Eadiedra, thereby reducing its food sources

⁸² Ramsar, art. 2, December 21, 1975, 1976 U.N.T.S. 246.

⁸³ First Meeting of the Conference of the Contracting Parties, Cagliari, Italy, *Recommendation 1.5: National Wetland Inventories* (Nov. 24-29), http://www.ramsar.org/keyrec_1.5.htm.

⁸⁴ Ramsar, *supra* note 2, at art. 3(1).

⁸⁵ Beth Kruchek, *Extending Wetlands Protection Under Ramsar Treaty's Wise Use Obligation*, 20 ARIZ. J. INT'L & COMP. LAW 409, 417 (2003).

⁸⁶ Kruchek, *supra* note 85, at 421.

and ability to reproduce, and thus increasing its vulnerability to extinction. The damage that the Scoter will face is exactly what the drafters of Ramsar sought to prevent with Articles 2(6) and 4(4). Furthermore, the fragile ecosystem of Eadiedra, a wetland of international importance, will be permanently disrupted by the absence of the Scoter. Protection of wetlands is one of the twin aims of Ramsar because they are inseparably linked to the welfare of migratory waterfowl.⁸⁷

The turbines will simultaneously devastate the population of the Scoter and disrupt the delicate balance of the wetland's ecosystem. If this Court allows Heronia to administer this cruel blow to the environment, then the binding obligations under Ramsar will be rendered meaningless.

4. The Scoter is facing certain extinction due to Heronia's complete disregard for its obligation to conserve and protect it under the MBC.

As early as 1980, the parties recognized the irreplaceable value of the Scoter by ratifying the MBC. Under Article V, both parties have the obligation to "take appropriate measures to preserve and enhance the environment of migratory birds."⁸⁸ Specifically, Article V(1) states that the parties must seek means to prevent damage to such birds resulting from pollution of the seas.⁸⁹ Furthermore, Article V(3) establishes a duty to "conserve migratory bird habitat, especially habitat identified as wetlands of international importance under the Ramsar Convention."⁹⁰

Heronia will be in direct violation of Article V if it builds the Wind Farm because it will effectively destroy a crucial part of the Scoter's habitat; the migratory flight path. Moreover, the priority that is afforded to wetlands of international importance under Article V(3) is clearly indicative of an additional duty to protect migratory birds that reside in such wetlands. The

⁸⁷ Ramsar, *supra* note 2, at art. 3(1).

⁸⁸ Compromis 8.

⁸⁹ *Id.*

⁹⁰ *Id.*

Scoter is the quintessential example of an animal that is given the highest degree of protection under the MBC because it is a migratory waterfowl, whose primary habitat is in such a wetland. Lastly, as stated *supra*, the modern and more comprehensive definition of pollution includes such destructive forces as the Wind Farm. Article V(1) seeks to prevent damage to birds, like the Scoter, from pollution.⁹¹

Prevention of this type of devastation to the Scoter population is specifically what the two parties committed themselves to when they negotiated, and later ratified the MBC. Allowing Heronia to side step its obligations under this bilateral treaty, by completing the Wind Farm, would allow for a result that is unjustifiable.

5. *Heronia will not fulfill its duty under Kyoto in a manner that minimizes adverse effects to the environments of developing nations.*

As a signatory to Kyoto, Heronia has an obligation to reduce greenhouse gases.⁹² However, under Article 2 of Kyoto, Parties must strive to meet emission targets “in such a way as to minimize...the adverse effects on...developing country Parties.”⁹³ This duty applies to the *developed* nation of Heronia despite the fact that the *developing* nation of Akkad is not a signatory to Kyoto.⁹⁴ “If a treaty contains a stipulation which is expressly for the benefit of a State which is not a party or a signatory to the treaty, such State is entitled to claim the benefit of that stipulation so long as the stipulation remains in force between the parties to the treaty.”⁹⁵ Furthermore, the UNFCCC, which Akkad is a signatory to,⁹⁶ also acknowledges the hardships

⁹¹ *Id.*

⁹² *Id.* at 10.

⁹³ Kyoto, art. 2(b)(3), December 10, 1997, 37 I.L.M. 32.

⁹⁴ LORD MCNAIR, THE LAW OF TREATIES 309 (1961).

⁹⁵ *Id.*

⁹⁶ Art. 18 of the Vienna Convention imposes the obligation on Akkad not to defeat the object and purpose of the treaty while waiting for ratification. Therefore, they should be entitled to the rights and benefits of the treaty, just as they are obliged to act in accordance with it.

developing countries face and demands that developed countries take into consideration the economies of developing countries when implementing measures to respond to climate change.⁹⁷

The broad objective of Kyoto, namely, to conserve the environment, would be thwarted if developed countries were allowed to pursue lower emissions at the expense of developing countries. Akkad is seeking to improve economic standing by developing an ecotourism industry that is centered on the Scoter.⁹⁸ The UNFCCC specifically prohibits developed nations, such as Heronia, from interfering with the budding economy of developing nations, like Akkad. Therefore, Heronia will not be satisfying its full array of obligations under Kyoto and the UNFCCC.

B. Heronia's Undaunted Completion of the Wind Farm will be in Violation of the International Environmental Customary Law of Principle 21 Formed via Countless Incorporations into Treaties, Judicial Decisions and Scholarly Consensus.

In order to demonstrate a rule has risen to the level of customary law, a state must show that states act consistently with the rule, not because they feel a moral or political obligation, but because they believe it to be a legal obligation - *opinio juris*.⁹⁹ Furthermore, The ICJ held in North Sea Continental Shelf that "it was unnecessary for a practice to occur over an extended time for it to be deemed customary international law."¹⁰⁰

Heronia is in violation of Principle 21,¹⁰¹ *sic utere tuo*, which has evolved from being a soft principle into a consistent state practice and customary law. Principle 21 provides that "States have...the responsibility to ensure that activities within their jurisdiction or control do

⁹⁷UNFCCC, *supra* note 22, at art. 4(10).

⁹⁸ Compromis 11.

⁹⁹ Mystery Bridgers, *Genetically Modified Organisms and the Precautionary Principle*, 22 TEMP. ENVTL. L. & TECH. J. 171, 184-85 (2004); *See also* David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy* 311 (2d ed. 2002).

¹⁰⁰ North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 4 (Feb. 20).

¹⁰¹ Stockholm, June 16, 1972, 11 I.L.M. 1416.

not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”¹⁰²

This principle was enunciated in *Trail Smelter*, where the tribunal held that “no State has the right to use or permit the use of its territory in such a manner as to cause injury...to the territory of another.”¹⁰³ In *Corfu Channel*, the Court again recognized this principle holding that “if a nation knows that harmful effects may befall other nations due to its actions or its failure to act...then that nation will be responsible to those who suffer damage.”¹⁰⁴ At *Stockholm*, both the United States and Canada stated that they considered it a codification of then existing customary international law.¹⁰⁵ Twenty years later, *Rio* also incorporated this concept.¹⁰⁶ Numerous scholars have found that Principle 21 has crystallized into customary law; its “repeated reference to and incorporation...into other declarations, resolutions, and treaties, including the World Charter for Nature and Article 30 of the U.N. Charter of Economic Rights and Duties of States is evidence that is now considered international customary law.”¹⁰⁷

The *Scoter* is part of the environment of both *Akkad* and *Heronia*. Therefore, although *Heronia* may be afforded the right to exploit its *own* resources, in doing so, it is simultaneously devastating the environment of *Akkad*. *Akkad* is entitled to enjoy the benefits of its own environment, including the *Scoter*. The *Wind Farm* will cause a decrease in the population of the *Scoter*, and worse yet, possible extinction. *Heronia*’s interference with the environment of *Akkad* thereby deprives them of their rights and is contrary to the well established customary law of

¹⁰² *Id.* at 1419.

¹⁰³ *Trail Smelter* (U.S. v. Can.), 3 UN Rep. Int’l Arb. Awards (1941) 684, 716.

¹⁰⁴ *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

¹⁰⁵ David Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or ice Versa?* 29 GA. L. REV. 599, 620 (1995); See also Wade Rowland, *The Plot to Save the World: The Life and Times of the Stockholm Conference on the Human Environment* 35, 99-100 (1973).

¹⁰⁶ *Rio*, June 13, 1992, 31 I.L.M. 874, 877.

¹⁰⁷ Joanna E. Arlow, *The Utility of ATCA and the “Law of Nations” in Environmental Torts Litigation: Jota v. Texaco, Inc. and Large Scale Environmental Destruction*, 7 Wis. Env’tl. L. J. 93, 128 (2000); See also MAURICE SUNKIN, DAVID ONG, & ROBERT WRIGHT, *SOURCEBOOK ON ENVIRONMENTAL LAW* 3 (1998).

Principle 21. For the foregoing reasons, Heronia will violate international customary law if it constructs the Wind Farm in the migratory flight path of the Scoter.

C. Heronia Will Violate the Principle of Sustainable Development Because it Has Developed the Wind Farm with a Complete Indifference for its Devastating Impact on the Threatened Scoter and the Environment for Future Generations.

The Scoter, although a living creature, is a finite resource. It would be unconscionable to allow Heronia to continue down a path that will thwart the preservation of finite resources in violation of sustainable development. Sustainable development is “development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.”¹⁰⁸

Johannesburg reiterated the commitment to achieving sustainable development and protection of the environment.¹⁰⁹ Principle 4 states that “[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation of it.”¹¹⁰ In recent years, sustainable development has become the cornerstone of modern international environmental law.¹¹¹

In developing the Wind Farm, Heronia has failed to consider how it will negatively affect the environment for future generations. This recklessness constitutes a violation of sustainable development and Heronia’s obligations to protect the environment as a participant in Stockholm, Rio, and Johannesburg. Heronia disregarded the fact that the Wind Farm will diminish the already threatened population of the Scoter and thereby the balance of the environment will undoubtedly be jeopardized. The goal of sustainable development is to leave the environment in as pristine a condition as possible for future generations, not to deplete an entire species.

¹⁰⁸ Michael Hickey, *Acceptance of Sustainable Use Within the Cites Community*, 23 VT. L. REV. 861, 866 (2001).

¹⁰⁹ Johannesburg Declaration on Sustainable Development, Sept. 4, 2002, U.N. Doc. A/Conf.199/20.

¹¹⁰ Rio, *supra* note 19, at 877.

¹¹¹ Sumudu Atapattu, *Sustainable Development, Myth or Reality? A Survey of Sustainable Development Under International Law and Sri Lankan Law*, 14 GEO. INT’L ENVT’L. L. REV. 265, 271 (2001).

This Court should take the opportunity today to increase and improve environmental protection and conservation and determine that Heronia will violate international law if they continue with the Wind Farm project.

CONCLUSION AND PRAYER FOR RELIEF

In consideration of the aforementioned, the Kingdom of Akkad requests this Honorable Court to:

1. Declare that the International Court of Justice has jurisdiction to consider this dispute under UNCLOS and CBD, and;
2. The Republic of Heronia will violate international law by completing construction of and operating the Kennedy Wind Farm.

Respectfully Submitted,

Agents for the Kingdom of Akkad