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

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**THE CASE CONCERNING  
THE IMPACT OF WIND FARMS ON MIGRATORY BIRDS**

**KINGDOM OF AKKAD,  
APPLICANT,**

**V.**

**REPUBLIC OF HERONIA,  
RESPONDENT.**

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**MEMORIAL FOR THE APPLICANT**

2005 Stetson International Environmental  
Moot Court Competition

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## **STATEMENT OF JURISDICTION**

The Governments of the Kingdom of Akkad and the Republic of Heronia submit the following dispute to the International Court of Justice. While jurisdiction is proper in this case pursuant to Article 27, paragraph 3 of the Convention on Biological Diversity, Article 288, paragraph 1 of the United Nations Convention on the Law of the Sea, and Article 38, paragraph 2 of the Statute of the International Court of Justice, Akkad and Respondent recognize the Court's power to determine its own jurisdictional authority under Article 36, paragraph 6 of the Statute of the Court. The parties submit the substantive issues contained herein to the International Court of Justice, pursuant to Article 40, paragraph 1 of the Statute of the Court.

## **QUESTIONS PRESENTED**

- I. Whether this Court has jurisdiction to hear this dispute between the Kingdom of Akkad and the Republic of Heronia when both Parties have consented to the jurisdiction of the Court pursuant to the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea, and when the Parties have exhausted all settlement options under the bilateral Migrating Bird Convention.
  
- II. Whether the Kennedy Wind Farm project violates international law when said project violates provisions of the Migrating Bird Convention, the Ramsar Convention on Wetlands, the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, and customary international law.

## STATEMENT OF FACTS

The Kingdom of Akkad (“Akkad”) is a developing island nation striving to build an eco-tourism industry, with its national park system as the foundation. (R. at 6, 11). The Republic of Heronia (“Respondent”), a developed country with a diversified economy and no significant deposits of fossil fuels, has commenced construction on the Kennedy Wind Farm (“KWF”). (R. at 6, 9). Akkad has communicated to Respondent its concerns regarding the KWF’s size of 180 turbines and its placement in Respondent’s eastern exclusive economic zone (“EEZ”), directly in the migratory flight path of the Akkadian Spotted Scoter (“Scoter”), a threatened species of waterfowl that migrates the 120 miles between Akkad’s Sargon National Park (“SNP”) and Respondent’s Eadiedra National Wildlife Refuge (“ENWR”). (R. at 6, 10-13). Once plentiful, the Scoter’s population in 2002 had dwindled to approximately 3,000, primarily due to habitat loss. (R. at 6).

On 15 December 2002, Akkad contacted Respondent noting its concern about the likely negative impacts that the KWF would have on the Scoter. (R. at 10). Respondent replied on 21 December 2002, stating that Respondent would welcome the opportunity to consult with Akkad regarding the KWF. (R. at 10). Additionally, Respondent noted that the KWF would be located in its EEZ and would help Respondent satisfy its obligations under the Kyoto Protocol, to which Akkad is not a party. (R. at 9, 10).

In February 2003, Akkad and Respondent held a series of meetings concerning the KWF. (R. at 11). A study produced by Akkad concluded that in light of the design and location of the KWF, the Scoter should be considered endangered because it migrates at low altitudes during the night. (R. at 11). Although Respondent does not dispute this contention, it replied in November 2003 that it regretted the impact the KWF would have on certain bird species but no other site

provided the necessary winds. (R. at 11). On 5 December 2003 Akkad replied that although Respondent may have satisfied its procedural duties, it had failed to satisfy its substantive obligations. (R. at 11). Specifically, Akkad stated that proceeding with the construction of the KWF would violate the Migrating Bird Convention (“MBC”), the Convention on Wetlands of International Importance especially as Waterfowl Habitat (“Ramsar”), the United Nations Convention on the Law of the Sea (“UNCLOS”), and the Convention on Biological Diversity (“CBD”) because it would harm the Scoter and its environment. (R. at 12).

On 10 January 2004, Respondent argued that it was in compliance with international law and that the MBC controlled the obligations of the Parties with respect to the Scoter. (R. at 12). Specifically, Respondent stated that it was in compliance with the MBC and that Ramsar was not implicated because the KWF would not be operating within any wetland of international importance. (R. at 12). Furthermore, Respondent alleged that the Scoter is not part of the marine environment. (R. at 12). Lastly, Respondent argued that it has the right to exploit its own natural resources pursuant to its own environmental policies. (R. at 12).

In March 2004, Akkad and Respondent entered into negotiations, but the negotiations failed to resolve the dispute. (R. at 13). In August 2004, Akkad and Respondent entered into mediation, but again failed to settle the dispute. (R. at 13). As a result, Respondent commenced construction of the KWF in February 2005. (R. at 13).

On 11 May 2005, Akkad and Respondent submitted their dispute, including the question of jurisdiction, to this Court. (R. at 2, 13). Akkad seeks an order from this Court declaring that this Court has jurisdiction over this dispute and that Respondent’s construction of the KWF in the migratory path of the Scoter violates international law. (R. at 13).

## **SUMMARY OF ARGUMENT**

The ICJ should exercise jurisdiction over the dispute between Akkad and Respondent for two reasons. First, Akkad and Respondent are contracting parties to the CBD and UNCLOS and, under both conventions, each Party has chosen this Court as the forum to resolve disputes, thereby consenting to the Court's jurisdiction. Second, this Court has jurisdiction because the MBC relates to the CBD and UNCLOS and lacks any binding and final dispute resolution procedure. Consequently, under Section XV of UNCLOS and Article 22 of the CBD, this Court can exercise jurisdiction over the MBC to achieve a binding resolution.

The ICJ should find that the KFW project violates international law because it is a violation of the MBC, UNCLOS, Ramsar, the CBD, and customary international law. Both Akkad and Respondent are parties to the above named treaties which impose the duty to protect the Scoter and its environment. Respondent's construction and operation of the KWF directly in the migratory path of the Scoter will cause considerable pollution of the Scoter environment which will lead to the further decline of the Scoter population. In addition, the KWF will create a collision hazard because the Scoter flies at low altitudes during the night and will be unable to perceive the risk the KWF poses. Finally, Respondent has disregarded the basic principles of customary international law by causing transboundary harm to Akkad's economy and environment

## ARGUMENT

### **I. THIS COURT HAS JURISDICTION TO ADJUDICATE THE PRESENT DISPUTE BECAUSE THE KINGDOM OF AKKAD AND RESPONDENT HAVE CONSENTED TO THE JURISDICTION PURSUANT TO BOTH THE CONVENTION ON BIOLOGICAL DIVERSITY AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, AND BECAUSE THE MIGRATING BIRD CONVENTION FAILS TO PROVIDE A BINDING DISPUTE SETTLEMENT PROCEDURE.**

The jurisdiction of the International Court of Justice (“ICJ”) comprises “all matters specially provided for . . . in treaties and conventions in force.” Statute of the International Court of Justice art. 36, para. 1, June 26, 1945, 59 Stat. 1031, 1055, T.S. No. 993 [hereinafter ICJ Statute]. This gives the ICJ jurisdiction “in advance over classes of disputes arising from [the treaty’s] subject-matter.” Ian Brownlie, Principles of Public International Law 722 (4th ed. 1990). However, “the Court’s jurisdiction is always a limited one, existing only in so far as States have accepted it . . . . When considering whether it has jurisdiction or not, the Court’s aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it.” *Factory at Chorzow*, 1927 P.C.I.J. (ser. A) No. 9, at 32 (June 26). In determining whether or not consent exists, the Court first examines the subject-matter of the dispute. See Abdul G. Koroma, Assertion of Jurisdiction by the International Court of Justice, in Asserting Jurisdiction; International and European Legal Perspectives 193 (Patrick Capps et al. eds., 2003). Where the parties disagree which treaties are implicated in the dispute, the Court “determine[s] for itself, having examined all of the relevant instruments, what [is] the subject of the dispute brought before it.” *Fisheries Jurisdiction Case (Spain v. Canada)*, 1998 I.C.J. 438, 448 (Dec. 4). Subsequently, the Court “ascertain[s] whether the violations of the [t]reat[ies] . . . pleaded . . . do or do not fall within the provisions of the [t]reat[ies] and whether, as a consequence, the dispute is one in which the Court has jurisdiction . . . to entertain.” *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* ITLOS Case Nos. 3 & 4 at 86 (May 26, 2000) (citing *Oil*

Platforms (Iran v. U.S.), 1996 I.C.J. 803, 810 (Dec. 12)). However, “more than one treaty [can] bear upon a particular dispute . . . There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder.” Id. at 91. Therefore, while a dispute can be centered in one treaty, it can also implicate violations of another treaty. See id. at 91.

In the current dispute, both Parties have consented to the jurisdiction of the Court under the CBD and UNCLOS by express written declarations. (R. at 9). Specific to UNCLOS violations, the Court also has jurisdiction over a narrower treaty when it has no binding resolution mechanism. See United Nations Convention on the Law of the Sea art. 281, para. 1, Dec. 10, 1982, 21 I.L.M. 1261, 1322 [hereinafter UNCLOS]. Pursuant to UNCLOS Section XV, when “no settlement has been reached . . . and the agreement between the parties does not exclude any further procedure,” the Court can assume jurisdiction. Id.

Therefore, because the current dispute between Akkad and Respondent involves more than one treaty, this Court should exercise its jurisdiction under UNCLOS and the CBD and should resolve this dispute under the MBC so that a binding resolution can be achieved.

**A. This Court has jurisdiction to adjudicate this dispute because the Kingdom of Akkad and Respondent have both consented to it under the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea.**

Pursuant to Article 27 of the CBD, contracting parties can consent to the jurisdiction of this Court as a compulsory dispute settlement mechanism when the dispute arises under the convention and negotiation and mediation fail to resolve the dispute. See Convention on Biological Diversity art. 27, para. 3, June 5, 1992, 31 I.L.M. 818, 834 [hereinafter CBD]. When ratifying the CBD, both Parties “declared in separate writings that each accepted submission of a

dispute concerning the interpretation or application of the CBD to the [ICJ] as the means of compulsory settlement.” (R. at 9).

Likewise, UNCLOS provides that parties can consent to the jurisdiction of this Court in order to settle disputes, and where both parties to the dispute consent to the jurisdiction, then the dispute may only be submitted through that procedure. See UNCLOS, supra, art. 287, para. 1, 4, 21 I.L.M. at 1322-23. Pursuant to Article 287, both Parties voluntarily selected the ICJ to be “the means for the settlement of disputes concerning the interpretation or application of UNCLOS.” (R. at 9).

**1. This dispute concerns the Convention on Biological Diversity.**

The purpose of the CBD is to conserve and sustain biological diversity. See CBD, supra, art.1, 31 I.L.M. at 823. To accomplish this goal, parties to the convention have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” Id. art. 3, 31 I.L.M. at 824. Parties are encouraged to “cooperate with other Contracting Parties . . . for the conservation and sustainable use of biological diversity.” Id. art. 5, 31 I.L.M. at 825. Substantively, parties are required to “establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity.” Id. art. 8, 31 I.L.M. at 825. Furthermore, parties are responsible for “[p]romot[ing] the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings.” Id. art. 8, para. d, 31 I.L.M. at 825. Developed countries should also cooperate in providing financial support to assist in the developing country’s conservation, and specifically “shall take into consideration the special conditions resulting from the dependence on . . . biological diversity

within developing country Parties, in particular small island states.” *Id.* art. 20, para. 3, 6, 31 I.L.M. at 831.

This dispute involves the impact of the KWF on the Scoter, which is being constructed in the Scoter’s direct migratory path. Respondent does not contest Akkad’s conclusion that upon completion of the KWF, “the status of the [Scoter] should be considered endangered.” (R. at 11). At a minimum, the CBD is implicated because Respondents actions will decrease the biological diversity of Akkad, thereby creating transboundary harm. Furthermore, the actions will damage Akkad’s environment, and will impair the number of Scoters as well as limit the access between ENWR and SNP. The economic disparity between the Parties is also at the core of the dispute. Akkad’s economy is dependent on its eco-tourism, and part of the CBD is based on the recognition of small island states and their dependence on biological diversity.

As a result, because Respondent’s actions will decrease the biological diversity of Akkad, decrease the Scoter’s conservation and habitat, and hurt Akkad’s reliance on biological diversity as it relates to its eco-tourism, the dispute concerns the CBD, which enables this Court to exercise jurisdiction.

**2. This dispute concerns the United Nations Convention on the Law of the Sea.**

States have the obligation to “protect and preserve the marine environment.” UNCLOS, *supra*, art. 192, 21 I.L.M. at 1308. While UNCLOS does not define the term “marine environment,” scholars have argued that species protection is included in the definition when UNCLOS is viewed as a whole because other parts of the convention focus on protection of species. *See, e.g.,* Lakshmun Guruswamy, The Promise of UNCLOS: Justice in Trade and Environmental Disputes, 25 Ecology L.Q. 189, 214 n.111 (1998) (noting that while UNCLOS does not define “marine environment,” the definition of “marine pollution” includes “harm to

living resources and marine life”). UNCLOS also acknowledges a state’s right to “exploit their natural resources,” but that right must be “in accordance with [the State’s] duty to protect and preserve the marine environment.” UNCLOS, supra, art. 193, 21 I.L.M. at 1308. Furthermore, “States shall take . . . all measures . . . to prevent, reduce and control pollution . . . from any source” and “not [] cause damage by pollution to other States.” Id. art. 194, 21 I.L.M. at 1308. Finally, “the measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species . . . .” Id. art. 194, para. 5, 21 I.L.M. at 1308.

Looking at the present dispute, while UNCLOS mandates that states protect the habitat of threatened or endangered species, the KWF actually will harm the habitat. Furthermore, the KWF will severely impact the marine environment by turning a threatened species into an endangered one, thereby implicating UNCLOS. Accordingly, where parties have consented to the Court’s jurisdiction under UNCLOS, jurisdiction is proper.

**3. This Court is the only available forum to adjudicate the dispute under the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea.**

Under the CBD and UNCLOS, parties to the conventions choose what compulsory dispute resolution procedure they prefer. CBD, supra, art. 27, para. 3, 31 I.L.M. at 834; UNCLOS, supra, art. 287, para. 1, 21 I.L.M. at 1322-23. While the CBD requires that negotiation and mediation be exhausted prior to utilizing compulsory dispute procedures, both conventions offer a list of available procedures. CBD, supra, art. 27, para. 1-3, 31 I.L.M. at 834; UNCLOS, supra, art. 287, para. 1, 21 I.L.M. at 1322-23. In each convention, in order for the provisions to be binding, parties must choose the same compulsory settlement method. CBD, supra, art. 27, para. 4, 31 I.L.M. at 834; UNCLOS, supra, art. 287, para. 4, 21 I.L.M. at 1323.

Submission of the dispute between Akkad and Respondent to the ICJ is proper because negotiation and mediation between the Parties has failed and both have chosen the ICJ as the only forum to resolve disputes under the conventions. (R. at 9, 13). Further, there is no evidence that the Parties have agreed to arbitration or any other agreed upon method to resolve disputes. As a result, because Akkad and Respondent have exhausted the dispute procedures outlined in Article 27 of the CBD, and because this is the only forum under UNCLOS to adjudicate this dispute, this Court should exercise jurisdiction over this matter.

**B. This Court has jurisdiction over the Migrating Bird Convention pursuant to Section XV of the United Nations Convention on the Law of the Sea and Article 22 of the Convention on Biological Diversity because the Migrating Bird Convention has a limited dispute resolution procedure and is related to the purposes of the two conventions.**

The basic premise of the MBC is “to cooperate in taking measures for the management, protection, and prevention of the extinction of certain birds.” Migrating Bird Convention Preamble; (R. at 7) [hereinafter MBC]. The convention specifically applies to the Scoter. MBC supra, art. II, para. g; (R. at 7). The MBC mandates that parties “endeavor to take appropriate measures to preserve and enhance the environment of migratory birds protected under this Convention . . . [including] means to prevent damage to such birds resulting from pollution of the seas . . . [and] to take such measures as may be necessary to conserve migratory bird habitat . . .” MBC, supra, art. V; (R. at 8).

**1. The Migrating Bird Convention has a limited non-binding dispute resolution procedure.**

Any dispute under the convention is subject to negotiation between the Parties. MBC supra, art. VI, para. 1; (R. at 8). Should this fail, the Parties are obligated to submit the matter to mediation. MBC supra, art. VI, para. 2; (R. at 9). However, the MBC offers no further instruction on available procedures once the Parties exhaust the use of negotiation and mediation.

There is no compulsory binding dispute mechanism in the convention that would ensure that the dispute is settled. A principle of international law is to ensure that the contracting parties to a convention pursue a resolution by their own methods. See, e.g., UNCLOS, supra, art. 281, 21 I.L.M. at 1322 (reserving option for “peaceful means of [the parties’] own choice”). However, without a binding enforcement provision, the obligations under the treaty cease to exist. If the dispute only triggers the limited non-binding dispute resolution provisions of the MBC, Akkad will essentially have no method to resolve this dispute.

**2. Section XV of the United Nations Convention on the Law of the Sea applies to the Migrating Bird Convention.**

Section XV provides for compulsory settlement “over any dispute concerning the interpretation or application of an international agreement related to the purposes of this convention.” UNCLOS, supra, art. 288, para. 2, 21 I.L.M. at 1323. Therefore, this Court has jurisdiction “where no settlement has been reached . . . and the agreement between the parties does not exclude any further procedure.” UNCLOS supra, art. 281, para. 1, 21 I.L.M. 1322. This language applies to outside agreements, when violations of the agreement also violate UNCLOS. Here, the KWF violates both the MBC and UNCLOS because the MBC includes provisions to prevent damage through pollution of the seas as well as conserve migratory habitats, both of which are principles that fall under UNCLOS.

In Southern Bluefin Tuna, ITLOS looked at this provision to determine if it had jurisdiction. Southern Bluefin Tuna, ITLOS Case No. 3 & 4 at 85. The dispute dealt with the level of Southern Bluefin Tuna Japan, Australia and New Zealand could catch given its declining population. Id. at 11. An agreement had been signed by each of the three parties, but Australia and New Zealand claimed that Japan violated the agreement by unilaterally increasing its set allowance. Id. at 12. ITLOS held that it did not have jurisdiction to decide the case. Id. at 105.

The Tribunal reasoned that although there had been no settlement between the parties under the separate agreement, the separate agreement had implied an exclusion of UNCLOS jurisdiction. Id. at 99. The Tribunal noted that the agreement required the consent of both of the parties to send the dispute to the ICJ or ITLOS. Id. at 98. The Tribunal was further influenced by a provision that stated “failure to reach agreement on reference to the [ICJ] . . . shall not absolve the parties . . . from the responsibility to resolve the [dispute].” Id. at 98. The Tribunal interpreted the language as the parties’ intention to remove the proceedings from the reach of the compulsory procedures set forth in UNCLOS section XV. Id. at 103.

The present dispute is distinguishable for many reasons. First, there is no language in the MBC that requires consent of both parties to send disputes arising under the convention to the ICJ or any other tribunal. On the contrary, in this case the MBC is silent on any mechanism to resolve disputes beyond non-binding negotiation and mediation. Second, there is no language within the MBC that reiterates the need for continued resolution of any disputes. The main concern in Southern Bluefin Tuna was bringing one treaty under the dispute mechanism of UNCLOS would “deprive of substantial effect the dispute settlement provisions of those implementing agreements which prescribe dispute resolution by means of the parties’ choice.” Id. at 104. Here, there is no concern of disrupting or supplanting the dispute procedures in the MBC. All available avenues under the MBC have been exhausted, so no procedures under the convention are being deprived of their substantial effect. As a result, Section XV applies because under Article 288, the MBC is an international agreement related to UNCLOS and, under Article 281, no settlement has been reached and no evidence exists that the Parties intended on excluding any further procedure.

**3. Article 22 of the Convention on Biological Diversity allows this Court to override Respondent's rights under other international agreements.**

Provisions under the CBD “shall not affect the rights and obligations . . . from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.” CBD, *supra*, art. 22, para. 1, 31 I.L.M. at 832. This provision allows this Court to override the rights of Respondent under other international agreements where those rights and obligations would threaten biological diversity. Respondent is a contracting party not only to the CBD, but also to UNCLOS, Ramsar, the United Nations Framework Convention on Climate Change, and the Kyoto Protocol. As a result of this provision in the CBD, existing rights of Respondent may be reevaluated and trumped by obligations under the CBD. *See* Concerning Kasiliki/Sedudu Island (Bots. v. Namib.), 39 I.L.M. 310, 346, para. 88 (Dec. 13, 1999). This would include the right of Respondent to diminish the threatened Scoter's population because of “energy needs.”

As a result, where the dispute concerns the CBD and UNCLOS, where the Parties have consented to jurisdiction under both, and where the MBC is related to the purpose of both, this Court should exercise its proper jurisdiction to ensure that Respondent's violations of international law can be resolved.

**II. THE KENNEDY WIND FARM VIOLATES INTERNATIONAL LAW BECAUSE IT CONTRAVENES CUSTOMARY INTERNATIONAL LAW AND SEVERAL TREATIES REQUIRING THE PROTECTION OF THE SCOTER AND ITS ENVIRONMENT.**

Respondent's duty to protect the Scoter is found in a basic principle of international law which “obligates states not to use, or allow the use of, their territory for acts contrary to the rights of other states.” Gariel Eckstein, Application of International Water Law to Transboundary Groundwater Resources, and the Slovak-Hungarian Dispute Over Gabčíkovo-Nagymaros, 19

Suffolk Transnat'l L. Rev. 67, 75 (1995); see also Trail Smelter Arbitration (U.S. v. Canada), 3 R. Int'l Arb. Awards 1911 (1941) (holding that states do not have the right to permit significant injury to the territory of other states through the use of their own territory). "It is beyond serious argument that states are required by international law to take adequate steps to control and regulate sources of serious global environmental pollution or transboundary harm within their territory or subject to their jurisdiction." Patricia Birnie & Alan Boyle, International Law & The Environment 109 (2d ed. 2002). Furthermore, "[t]his is an obligation of harm prevention, not merely a basis for reparation after the event . . . ." Id.

Akkad and Respondent are parties to four international treaties that require each contracting party to protect the Scoter and its environment. First, the MBC requires each contracting party to "preserve and enhance" the environment of the Scoter. MBC, supra, art. V; (R. at 8). Second, the duty to "preserve and enhance" the environment of migratory birds is reinforced by Ramsar, which requires contracting parties to designate protected wetlands of international importance. The Convention on Wetlands of International Importance especially as Waterfowl Habitat, art. 2, para. 1, Feb. 2, 1971, 11 I.L.M. 963, 970 [hereinafter Ramsar]. Third, parties must "protect and preserve the marine environment" and "prevent, reduce and control pollution of the marine environment from any source." UNCLOS, supra, art. 192, 194, para. 1, 21 I.L.M. at 1308. Fourth, the CBD imposes a duty on contracting parties to avoid transboundary harm and to promote the protection of ecosystems. See CBD, supra, art. 3, 8, para. d, 31 I.L.M. at 818, 824-25. A project like the KWF, which will damage the environment of Akkad and threaten the existence of the Scoter, is a violation of the MBC, Ramsar, UNCLOS, the CBD, and customary international law.

**A. The Kennedy Wind Farm violates Article V of the Migrating Bird Convention as well as Articles 192 and 194 of the United Nations Convention on the Law of the Sea because it will degrade the environment of the Scoter.**

Respondent and Akkad have stated that “birds constitute a natural resource of great value” and that they desire “to cooperate in taking measures for the management, protection, and prevention of the extinction of certain birds.” MBC, supra, Preamble; (R. at 7). Moreover, the Parties have agreed to “endeavor to take appropriate measures to preserve and enhance the environment of migratory birds protected under . . . [the MBC].” MBC, supra, art. V; (R. at 8).

In addition to the MBC, Akkad and Respondent became States Parties to UNCLOS in 1995. (R. at 9). As States Parties, Akkad and Respondent are bound by “the obligation to protect and preserve the marine environment.” UNCLOS, supra, art. 192, 21 I.L.M at 1308. By authorizing the construction of the KWF, Respondent has violated the MBC and UNCLOS by ignoring its obligations to protect the Scoter’s environment.

**1. The Kennedy Wind Farm will essentially pollute the seas and marine environment.**

Each state must “seek means to prevent damage to . . . [Scoters] resulting from pollution of the seas.” MBC, art. V, para. 1; (R. at 8). Furthermore, Akkad and Respondent must take “all measures consistent with . . . [UNCLOS] that are necessary to prevent, reduce and control pollution of the marine environment from any source . . . .” UNCLOS, supra, art. 194, para. 1, 21 I.L.M. at 1308. “‘Pollution of the marine environment’ means the introduction by man, directly or indirectly, of substances or energy into the marine environment . . . which results or is likely to result in . . . harm to living resources and marine life . . . .” UNCLOS, supra, art. 1, para. 1, 21 I.L.M. at 1271. In the present case, Respondent’s construction and operation of the KWF will harm the Scoter and its environment through excessive noise and visual pollution.

**a. The Kennedy Wind Farm will create excessive noise pollution.**

Noise pollution is created by wind turbines in two ways. E. Binopoulos & P. Haviaropoulos, Environmental Impacts of Wind Farms: Myth and Reality, <http://www.cres.gr/kape/publications/papers/dimosieyseis/CRESTRANSWINDENVIRONMEN T.doc> (last visited Oct. 1, 2005). First, mechanical noise is created by the moving mechanical parts (gear box, electrical generator, bearings, etc.) of the turbine. Id. Second, aerodynamic noise is created by the air passing over the blades. Id. While mechanical noise is usually only audible at about 100 meters, aerodynamic noise can be heard as far as 1.5 kilometers away. Marton, Askam & Ireleth Wind Farm Action Group Webpage, <http://www.windfarm.fsnet.co.uk/who.htm> (last visited Oct. 1, 2005). “These noises may disturb birds, ousting populations that use the area on a constant basis, as well as discouraging birds from flying through the area.” See Morgan Winn Tingley, Effects of Offshore Wind Farms on Birds, “Cuisinarts of the Sky” or Just Tilting at Windmills? 15-16 (2003) (unpublished B.A. thesis, Harvard University) (on file with author), available at <http://www.safewind.info/pdf/TingleyThesis2003.pdf>. Bird sensitivity to noise is corroborated by studies showing that migrating waterfowl, especially scoters, will not approach within 100 meters of a wind farm. Klaus-Michael Exo, Ommo Huppopp & Stefan Garthe, Birds and offshore wind farms: a hot topic in marine ecology, Wader Study Group Bull. 100: 50, 51 (2003) available at <http://www.abcbirds.org/policy/OffShoreCompositeStudy.pdf> [hereinafter Exo].

**b. The Kennedy Wind Farm will create visual pollution.**

In addition to noise pollution, visual pollution can have a substantial impact on certain species of migratory birds by disturbing natural habitats. See id. The disturbance associated with wind farms comes from either their physical presence or the large, rotational movements of

the blades. Tingley, supra, 16. Furthermore, the increased presence of maintenance boats and other construction equipment at the wind farm can cause an additional disturbance to bird habitats. See Victoria Sutton & Nicole Tomich, Harnessing Wind Is Not (By Nature) Environmentally Friendly, 22 Pace Envtl. L. Rev. 91, 97 (2005). “[S]coters are particularly sensitive to disturbance, as exemplified by the fact that they will avoid ships by as much as a few kilometers.” Exo, supra, 52.

The disturbance from the KWF will be especially great since there will be 180 turbines, each with rotating blades. Furthermore, if each turbine is checked a couple of times a year, there will be maintenance boats and other construction equipment at the KWF nearly every day. Therefore, the Scoter will avoid the area due to the visual pollution created by the KWF.

**2. The Kennedy Wind Farm will harm the environment of the Scoter because it will cause “indirect habitat loss.”**

“Each Contracting Party shall endeavor to . . . conserve migratory bird habitat, especially habitat areas identified . . . under the Ramsar Convention.” MBC, supra, art. V, para. 3; (R. at 8). Furthermore, “[t]he measures taken in accordance with . . . [Part XII of UNCLOS] shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.” UNCLOS, supra, art. 194, para. 4, 21 I.L.M. at 1308. Respondent fails to fulfill its obligation to conserve threatened species habitats, such as ENWR and SNP, because the noise and visual pollution created by the KWF will cause “indirect habitat” loss.

Indirect habitat loss occurs when “resources that are important to a species, but are not uniformly distributed over the entire oceanic region, are located within the area disturbed by a wind farm.” Tingley, supra, 16. “The species would have access to the resource originally, but would avoid the area once a wind farm is built, resulting in a loss.” Id. While wind farms do not

physically exclude birds from their habitats, they make the habitats less attractive. Id. “Bird species that are considered to be especially sensitive to the presence of wind farms and which may suffer habitat loss as a result of their installation include, divers, scoters, geese, and waders . . .” Exo, supra, 2.

An example of indirect habitat loss from wind farms can be found at Tuno Knob in Denmark. Andrea Kingsley & Becky Whittam, Wind Turbines and Birds, A Guidance Document for Environmental Assessment, 13 (2003), [http://www.canwea.ca/downloads/en/PDFS/BirdStudiesDraft\\_May\\_04.pdf](http://www.canwea.ca/downloads/en/PDFS/BirdStudiesDraft_May_04.pdf). The Tuno Knob wind farm contains a number of small, modern turbines and is built on a site where large amounts of common eiders and black scoters feed. Id. A study found that these ducks exhibited avoidance behavior and would not fly or land within 100 meters of the turbines. Id. Although the impacts from the 10 turbines at Tuno Knob were minimal, areas of important scoter feeding grounds were still lost. Id. Consequently, “larger wind farms could lead to larger losses of [scoter] habitat.” Id. Like the scoters at Tuno Knob, the Scoter could lose a valuable habitat; especially given the KWF’s size.

### **3. The Kennedy Wind Farm will act as a “barrier to flight.”**

Another major disturbance that can result from a poorly placed wind farm is that it can act as a “barrier to flight” for migratory bird species. Tingley, supra, 16. “Barriers occur when species choose to fly around a wind farm rather than fly through it.” Id. at 18. “Hypothetically, if a wind farm were placed between two areas of importance to a species (e.g. roosting and feeding habitat) and if either the wind farm were significantly large or the birds were funneled into the area with the wind farm, the barrier effect could be quite significant.” Id. at 19. A wind farm that intersects a major migration route can cause extra stress to birds flying through, or it

can force birds to expend extra energy to fly a longer distance around an obstructing wind farm. Id. at 18. Additionally, “[o]ver-water migrations of . . . [birds] encountering adverse weather conditions have resulted in reports of extremely large mortality rates.” Id. (citing Peter Berthold, Bird Migration: A General Suvery (2d ed. 2001)). Consequently, “[t]he placement of an ill-planned offshore wind farm could . . . lead to unforeseen direct or indirect avian mortality.” Tingley, supra, 18.

The hypothetical mentioned above is directly on point with the present case. ENWR and SNP are both areas of extreme importance to the Scoter. (R. at 6). The KWF will place 180 turbines directly between ENWR and SNP in the migratory path of the last 3,000 Scoters. (R at 6-7, 9). Therefore, the barrier effect will be significant because the Scoters will have to alter their course to avoid the wind farm, especially since they travel at low altitudes during the night when visibility is not optimal. (R. at 11). In times of adverse weather, this could lead to high mortality rates because the Scoters will not be able to cope with the added stressor of an extended migration.

**B. The Kennedy Wind Farm will decrease the population of the Scoter in violation of Article 4 of the Ramsar Convention.**

Akkad and Respondent became parties to Ramsar in 1976 and 1978, respectively. (R. at 6). Accordingly, Akkad and Respondent must “consider . . . [their] international responsibilities for the conservation, management and wise use of migratory stocks of waterfowl . . . .” Ramsar, supra, art. 2, para. 6, 11 I.L.M. at 971. Moreover, Akkad and Respondent agreed they would “endeavor through management to increase waterfowl populations on . . . [ENWR and SNP].” Id., art. 4, para. 4, 11 I.L.M at 972. Therefore, a project like the KWF that will decrease waterfowl populations is contrary to the heart of Ramsar.

The KWF fails to increase waterfowl populations on ENWR and SNP by creating a collision hazard for the Scoter. “Collisions can occur in several ways: first, when a bird collides with the non-moving part of the turbine (e.g. hub, tower, or motor box), or second, when it makes contact with the spinning rotor blades.” Tingley, supra, 10-11. A third type of collision comes when the bird is “caught in the strong pressure wave, or “wake,” following the passing of a rotor blade.” Id. at 11. “Wake collisions can cause the bird to become disoriented, lose control and collide with the turbine, or be thrown down into the ocean . . . .” Id. The greatest collision risk occurs at night, especially on moonless nights or in unfavorable weather conditions such as fog, rain, or strong wind. Exo, supra, 51.

Wind farm studies show that the “average number of bird collisions per turbine . . . [is] 2.3 birds per turbine per year.” Elizabeth Ridlington & Emily Rusch, The Environmental Case for Wind Power in New Jersey, NJPIRG L. & Pol’y Center 28 (2005) available at <http://www.powernaturally.org/publications/njpirgwindrpt.pdf>. “The impact of such losses can be particularly severe in large, long-lived species with low natural mortality rates and low productivity.” Exo, supra, 51. “Most seabirds and waterfowl . . . are long-lived species.” Id. For these species, even a marginal increase in mortality will have a devastating effect on population levels. Id.

The KWF will increase the mortality rate of the Scoter which will have a devastating effect on the remaining 3,000 Scoters. If 2.3 scoters per turbine are killed by each of the 180 turbines comprising the KWF, then 414 Scoters could be killed each year. At that rate, the Scoter could be extinct seven years after the KWF’s completion. However, the number of Scoters killed will likely be even higher since the Scoter migrates at night and at low altitudes thereby greatly

increasing the collision risk. Accordingly, Respondent fails to comply with Ramsar because it will decrease, rather than increase, the population of Scoter's on protected wetlands.

**C. The Kennedy Wind Farm will cause harm to the environment of Akkad in violation of Articles 3 and 8 of the Convention on Biological Diversity and customary international law.**

Akkad and Respondent, as contracting parties to the CBD, have agreed that “it is vital to anticipate, prevent and attack the causes of significant reduction or loss of biological diversity at [its] source.” CBD, supra, Preamble, 31 I.L.M. at 822. Furthermore, they have assumed the responsibility of global cooperation toward the conservation of biological diversity. See id. Respondent has not only failed to abide by these general obligations, but has also violated Articles 3 and 8 of the CBD by commencing construction of the KWF.

While the CBD gives states the “sovereign right to exploit their own resources pursuant to their own environmental policies,” this right is not unrestrained. Id., art. 3, 31 I.L.M. at 824. In addition to rights, the CBD and customary international law confer the responsibility of ensuring contracting states’ actions “do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.” Id.; see also Birnie & Boyle, supra, 104-105; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) (stating duty to avoid transboundary harm now part of international law corpus). Furthermore, states must “promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings.” CBD, supra, art. 8, para. d, 31 I.L.M. at 825. Respondent’s construction and operation of the KWF will cause damage to the environment of Akkad and will result in the degradation of Scoter ecosystems.

As discussed, the KWF will degrade the environment of the Scoter through indirect habitat loss and by creating a barrier to migration. This will result in a large number of Scoter deaths

from starvation because suitable habitats will no longer be available. Furthermore, many Scoters could be killed by collisions with the wind turbines. Consequently, the loss of the Scoter could have an adverse impact on Akkad's eco-tourism industry, which is using the nation's park system as its foundation. (R. at 11). Thus, not only will Respondent damage the environment of the Scoter through the construction and operation of the KWF, but it will also damage Akkad's economy. Both results constitute transboundary harm and are violations of UNCLOS, the MBC, Ramsar, the CBD, and customary international law.

**CONCLUSION AND PRAYER FOR RELIEF**

For the foregoing reasons, Akkad respectfully requests this honorable Court to:

1. **declare that** this Court has jurisdiction to adjudicate this dispute, and to
2. **declare that** the construction and operation of the KWF is a violation of international law.

Respectfully Submitted,

Team 07\_\_\_\_\_

Agents for the Kingdom of Akkad