

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



**QUESTIONS RELATING TO
USE OF THE SARGASSO SEA AND THE PROTECTION OF EELS**

FEDERAL STATES OF ALLIGUNA

APPLICANT

v.

REPUBLIC OF REVELS

RESPONDENT

MEMORIAL OF THE APPLICANT

THE 23RD STETSON MOOT COURT COMPETITION 2018-2019

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STATEMENT OF JURISDICTION

Alliguna and Revels are parties to the ICJ Statute. Alliguna has recognised the jurisdiction of this Honourable Court as compulsory *ipso facto*. Revels has not recognised the jurisdiction of the ICJ as compulsory *ipso facto*.

Alliguna submitted an application instituting proceedings against Revels on 21 April 2018. Pursuant to Article 79 of the ICJ Rules of Court, on 5 May 2018 the Republic of Revels filed a preliminary objection to this Honourable Court's jurisdiction over the subject matter of the dispute between Revels and Alliguna. In accordance with Article 36(6) of the ICJ Statute, this Honourable Court has jurisdiction to determine whether it has jurisdiction to decide this case.

If this Honourable Court determines that it has jurisdiction to decide the subject matter of this dispute, the ICJ would have jurisdiction over this matter pursuant to Article 40(1) of the ICJ Statute, as Alliguna has brought these proceedings by way of application.

QUESTIONS PRESENTED

1. WHETHER THE ICJ HAS JURISDICTION TO DECIDE THIS CASE.
2. WHETHER REVELS IS IN BREACH OF INTERNATIONAL ENVIRONMENTAL LAW.
3. WHETHER THE ACTIONS OF SEA ARE ATTRIBUTABLE TO REVELS.

STATEMENT OF FACTS

The Federal States of Alliguna (“Alliguna”) and the Republic of Revels (“Revels”) are neighbouring coastal countries located approximately 250 nautical miles from the Sargasso Sea. Alliguna is a developed country and Revels is a developing country.

The European eel migrates to the salt waters of the Sargasso Sea to spawn before travelling to inland fresh waters to develop and grow. The European eel is listed as critically endangered on the International Union for the Conservation of Nature (“IUCN”) Red List of Threatened Species. European eels are particularly important in the history, culture and religion of Alliguna. They are protected under Alliguna’s domestic legislation.

Sargassum is seaweed which floats in the Sargasso Sea and is a crucial part of its unique ecosystem, operating as a source of food, refuge and breeding grounds for species that live there.

Seaweed Energy Alternatives (“SEA”) is a privately-owned company registered in Revels. In July 2016, SEA commenced using its ship, the *Columbus*, to harvest sargassum from the Sargasso Sea for biofuel production. The *Columbus* flies the flag of Revels. The project was one of a number of initiatives for which Revels provided a subsidy to reduce its greenhouse gas emissions. SEA conducted an Environmental Impact Assessment (“EIA”) which failed to rule out harm to the European eel.

Between 13 January 2017 and 14 September 2017, Alliguna and Revels exchanged six diplomatic notes. In these notes, Alliguna alleged that Revels was in breach of international treaty and customary law. Revels denied that the actions of SEA were attributable to it, and that, if those actions are attributable, Revels was not breaching international law.

Further attempts at negotiation and mediation failed. In February 2018, Alliguna asked Revels to agree to submit the matter to the International Court of Justice (the “ICJ” or this “Honourable Court”). Revels refused to agree. Alliguna instituted proceedings against Revels on 21 April 2018. Revels filed its Preliminary Objections on 5 May 2018. Revels argued that the ICJ does not have jurisdiction in this case. Sargassum harvesting continues to date.

Alliguna seeks a declaration from the ICJ to the effect that this Honourable Court has jurisdiction to decide this case, that Revels is breaching international environmental law and that the actions of SEA are attributable to Revels.

SUMMARY OF ARGUMENTS

1. This Honourable Court can adjudicate on this dispute under the CBD, UNFCCC, the Paris Agreement, UNCLOS and the CMS. Alliguna has *locus standi* as Revels' breaches are contraventions of *erga omnes partes* and *erga omnes* obligations or Alliguna is specially affected by Revels' breaches.
2. Revels is breaching international environmental law. Alliguna asks this Honourable Court to adjudge and declare that Revels is breaching the CBD, UNCLOS, the CMS and customary international law, and that Revels has no available defences.
3. The actions of SEA are attributable to Revels, as SEA is exercising elements of governmental authority. Alternatively, SEA is acting under the instruction, direction and control of Revels.

ARGUMENT

1. THE ICJ HAS JURISDICTION TO DECIDE THIS CASE.

a. The CBD dispute resolution mechanism applies because it was adopted after UNCLOS and the CMS.

Revels is committing egregious breaches of international environmental law under multiple treaties and customary international law. Where multiple treaties are applicable to a dispute, a treaty adopted earlier may be relied upon only to the extent that its provisions are compatible with a later treaty.¹

The Convention on Biological Diversity,² the United Nations Convention on the Law of the Sea³ and the Convention on the Conservation of Migratory Species⁴ apply to this dispute and Alliguna and Revels are parties to them. The CBD aims to conserve biological diversity in the marine environment.⁵ Article 192 of UNCLOS lays down the general obligation to protect and preserve the marine environment, with Article 194(5) highlighting the necessity to preserve fragile ecosystems, as well as the natural habitats of endangered species. The CMS aims to preserve endangered migratory species. The three instruments are mutually supportive in encouraging the protection of the marine environment and endangered species. The CBD elaborates on some of the general principles set out in UNCLOS.⁶ With regard to the CMS, a Memorandum of Cooperation was concluded between the Secretariats of the CMS and the CBD in 1996 and continues to govern

¹ Vienna Convention on the Law of Treaties, art. 30, May 23, 1969, 1155 U.N.T.S. 331.

² Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 [hereinafter CBD].

³ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS].

⁴ Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 333 [hereinafter CMS].

⁵ CBD arts. 1-2.

⁶ S.B.S.T.T.A. to the CBD Note of the Executive Secretary 8/1 U.N. Doc. UNEP/CBD/SBSTTA/8/1 (Feb. 20, 2003) ¶ 18.

cooperation.⁷ As this dispute relates to the extraction of materials from the marine environment and the potential resulting effects on an endangered species, both the CBD, the CMS and UNCLOS apply.

UNCLOS was concluded on 10 December 1982, the CMS on 1 November 1983 and the CBD on 29 December 1993. As such, pursuant to Article 30 of the Vienna Convention on the Law of Treaties, the CBD's dispute settlement provisions take precedence. Under the CBD, both Alliguna and Revels have chosen to submit to the jurisdiction of the ICJ. This Honourable Court has jurisdiction over this dispute.

b. The ICJ has jurisdiction over this dispute under the CBD, UNFCCC and the Paris Agreement.

i. The ICJ has jurisdiction under the CBD.

Alliguna and Revels are parties to the CBD. Alliguna and Revels engaged in months of correspondence, followed by negotiation. The CBD provides that if the parties do not come to an agreement after negotiation, mediation may be sought.⁸ Alliguna and Revels engaged in mediation, to no avail. The CBD provides that parties may agree upon compulsory dispute mechanisms if negotiation and mediation fail.⁹ Both Alliguna and Revels have declared that they shall submit disputes covered by the CBD to the ICJ. Therefore, the ICJ has jurisdiction over the matters pertaining to the CBD in this case.

⁷ S.T.C.44 to the CMS 44th Meeting of the Standing Committee 18/1 U.N. Doc. UNEP/CMS/STC44/18.1 (Oct. 14, 2015) ¶ 2.

⁸ CBD art. 27(1)-(2).

⁹ *Id.*, art. 27(3).

ii. The ICJ has jurisdiction under UNFCCC and the Paris Agreement.

Alliguna and Revels are parties to the United Nations Framework Convention on Climate Change¹⁰ and the Paris Agreement.¹¹ Article 14(2)(a) of UNFCCC permits parties to confer on this Honourable Court compulsory jurisdiction to resolve disputes. Article 14(5) provides that conciliation may take place between the parties prior to commencing proceedings at the ICJ. However, the provisions of Article 14(5) are subject to those of Article 14(2)(a), which overrides Article 14(5). Both Alliguna and Revels have submitted declarations giving the ICJ compulsory jurisdiction in accordance with Article 14(2)(a). The ICJ has jurisdiction to consider this dispute under the UNFCCC.

Article 24 of the Paris Agreement provides that the provisions relating to dispute settlement at Article 14 of UNFCCC shall apply *mutatis mutandis* to the Paris Agreement. Therefore, the ICJ has jurisdiction to consider breaches of the Paris Agreement.

c. The ICJ has jurisdiction to consider matters arising under UNCLOS.

In accordance with Article 287(1)(b) of UNCLOS, Alliguna chose this Honourable Court as the forum for settlement of disputes arising under UNCLOS. Under Article 287(1)(a) of UNCLOS, Revels chose the International Tribunal for the Law of the Sea (“ITLOS”).

Where such disagreements arise, Article 282 of UNCLOS applies. Article 282 provides that where UNCLOS parties are also parties to other agreements that provide for binding settlement

¹⁰ United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

¹¹ Paris Agreement, FCCC/CP/2015/10/Add.1 (Dec. 13, 2015).

of a dispute, the dispute settlement procedures under those other agreements apply “in lieu” of ITLOS.¹² This court has endorsed a broad meaning of Article 282 and this interpretation is confirmed by the preparatory works to UNCLOS.¹³ As a result, Article 282 applies to give jurisdiction in matters relating to UNCLOS in this dispute to the ICJ.

d. The ICJ has jurisdiction to determine whether Revels has breached the CMS.

Underpinning the CMS is the principle that states must endeavour to offer immediate protection to endangered species.¹⁴ Revels is violating this principle by causing likely harm to the European eel.

Revels disputes that the ICJ has jurisdiction over this matter insofar as it relates to the CMS. It has not submitted to the compulsory jurisdiction of this Honourable Court when issues relating to the CMS arise. However, the ICJ remains the appropriate court to decide on the subject matter of this dispute as the harm at issue relates to the marine environment. When any damage to the marine environment, whether on the high seas or otherwise, occurs, UNCLOS will apply.¹⁵ Under UNCLOS, other treaties that consider similar issues must be taken into account.¹⁶ Therefore, as this dispute arises under CMS, it also arises under UNCLOS. It has already been shown that this

¹² Maritime Delimitation in the Indian Ocean (Som. v. Kenya) 2017 I.C.J. 3, ¶ 128 (Feb. 2) [hereinafter Delimitation]; DONALD R. ROTHWELL ET AL., THE OXFORD HANDBOOK OF THE LAW OF THE SEA 401 (2015).

¹³ Delimitation ¶ 127.

¹⁴ CMS art. II(3)(c).

¹⁵ UNCLOS art. 287.

¹⁶ Southern Bluefin Tuna (N.Z.-Japan; Austl.-Japan), 13 R.I.A.A. 1, 52 (Annex VII U.N.C.L.O.S. Arbitral Tribunal) [hereinafter Bluefin Tuna].

Honourable Court has jurisdiction to determine the matter in relation to UNCLOS, therefore the ICJ has jurisdiction to consider breaches of the CMS by Revels.

e. Alliguna has *locus standi*.

- i. Alliguna has standing to commence proceedings against Revels for breaches of *erga omnes partes* and *erga omnes* obligations.

Revels is in breach of its obligations under the CBD, UNCLOS and the CMS. Those obligations are *erga omnes partes*. Alliguna's standing to take proceedings against those breaches arises as it is a party to those treaties.¹⁷ This is a general principle of international law¹⁸ and has recently received confirmation before this Honourable Court in *Obligation to Prosecute or Extradite*.¹⁹

The CBD, UNCLOS and the CMS codify customary rules like the prevention of transboundary harm, the precautionary principle and the duty to exercise due diligence. These principles constitute *erga omnes* obligations. They are owed to the international community rather than to particular states.²⁰ Article 48(1)(b) of the Articles on Responsibility of States for Internationally Wrongful Acts provides that “any state may [commence proceedings] if [an] obligation breached is owed to the international community as a whole”.²¹

¹⁷ Case of the S.S. ‘Wimbledon’ (U.K. et. al. v. Ger.), 1923 P.C.I.J. (ser. A) No. 1, at 163 (Aug. 17).

¹⁸ Rep. Int’l Law Comm’n, 53rd Sess., Apr. 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. 10, at 126-128 (2001) [hereinafter ILC 2001].

¹⁹ Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 422 (July 20); Phoebe Okowa, *Admissibility and the Law on International Responsibility*, in INTERNATIONAL LAW 450, 471 (Malcolm D. Evans ed., 2018).

²⁰ PATRICIA BIRNIE ET AL., INTERNATIONAL LAW & THE ENVIRONMENT 145 (3d ed. 2009) [hereinafter Birnie].

²¹ ILC 2001 at 126-128.

Before commencing proceedings, a state need not show actual injury to its interests where breaches of *erga omnes partes* or *erga omnes* obligations are concerned. Consequently, Alliguna, as a party to the CBD, UNCLOS and the CMS, and as a guardian of customary international law, has standing to commence proceedings against Revels for breaches of international environmental law.

ii. Alliguna has special interest in taking proceedings against Revels' breaches of international environmental law.

In the alternative, Alliguna is specially affected by Revels' breaches of international environmental law. A specially affected state can commence proceedings against a state in breach of an obligation which is owed to the specially affected state as a party to a multilateral treaty or to the international community as a whole.²² A specially affected state must suffer "particular adverse effects" among a group of affected states.²³ With regard to the extent of injury to the specially affected state, this is determined on a case-by-case basis.²⁴

Alliguna is a coastal state which values the European eel as an integral part of its culture, religion and history, which is reflected in the protection that European eels receive in Alliguna's domestic law. Alliguna stands to lose more than other states from the substantial threat posed to the European eel by sargassum harvesting. Alliguna is a specially affected state, which confers jurisdiction upon the ICJ to rule on Alliguna's claims against Revels.

²² ILC 2001 at 118-119.

²³ *Id.*, at 119.

²⁴ *Id.*

2. REVELS IS IN BREACH OF INTERNATIONAL ENVIRONMENTAL LAW.

a. Revels is in violation of its treaty obligations.

i. Revels is in breach of the CBD.

Revels is damaging the biological diversity of the Sargasso Sea. The CBD aims to protect biological diversity.²⁵ “Biological diversity” is defined at Article 2 of the CBD as “the variability of living organisms from all sources” including marine ecosystems. Article 3 provides that Revels is obliged to prevent harm to biological diversity “within [its] jurisdiction or control [...] beyond the limits of national jurisdiction”. Consequently, Revels must prevent harm to the biodiversity of the Sargasso Sea, despite its location beyond Revels’ maritime territory.

Revels is failing to cooperate with Alliguna. Under Article 5, Revels should cooperate with Alliguna with regard to areas beyond its jurisdiction or on matters of mutual interest, where possible and appropriate. Revels should cooperate with Alliguna due to the importance of sargassum to the ecosystem of the Sargasso Sea,²⁶ the delicate state of its European eel population,²⁷ and its status as an ecologically or biologically significant area.²⁸ Revels’ failure to do so is in breach of Article 5.

Revels failed to correctly conduct an EIA in accordance with Article 14(1)(a). Where a project carries significant risk of adverse effects on the environment of the high seas, greater

²⁵ CBD art. 1; PHILLIPE SANDS & JACQUELINE PEEL, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 389 (4th ed. 2018) [hereinafter Sands]; Catherine Redgwell, *International Environmental Law*, in *INTERNATIONAL LAW* 450, 471 (Malcolm D. Evans ed., 2018).

²⁶ David Freestone & Faith Bulger, *The Sargasso Sea Commission: An innovative approach to the conservation of areas beyond national jurisdiction* 30 *OCEAN YEARB.* 80, 82 (2016); Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea, Common Vision ¶ 1 (Mar. 11, 2014).

²⁷ Sylvain Bonhommeau et al., *Fluctuations in European eel (Anguilla Anguilla) recruitment resulting from environmental changes in the Sargasso Sea* 17(1) *FISH. OCEANOGR.* 32 (2008).

²⁸ C.O.P. to the C.B.D. Dec. IX/20, U.N. Doc. UNEP/CBD/COP/DEC/IX/20 ¶ 18 (Oct. 9, 2008); C.O.P. to the C.B.D. Dec. X/29 U.N. Doc. UNEP/CBD/COP/DEC/X/29 ¶ 38 (Oct. 29, 2010).

reliability and certainty of information is required in an EIA. The EIA should also assess possible transboundary impacts.²⁹ Article 14(1)(c) of the CBD provides that consultation with - and warning to - “stakeholders” who may be affected by the actions of a state is necessary to correctly conduct an EIA.³⁰

Revels did not consult with Alliguna prior to the commencement of sargassum harvesting. The volume of sargassum which is being harvested, combined with the delicate state of the population of the European eel,³¹ means that a high degree of certainty that sargassum harvesting will not harm European eels is required. The EIA which was conducted does not provide this degree of certainty as it did not conclude that sargassum harvesting is safe for European eels. Consequently, Revels is in breach of Article 14.

Revels is also in breach of Article 8. Article 8 requires Revels to promote the protection of ecosystems, to regulate biological resources and to legislate to protect threatened species. “Biological resources” is defined at Article 2 as including “genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity”. Revels is harvesting sargassum - which is a biological resource - without regulation despite the unique nature of the Sargasso Sea ecosystem. Revels has not legislated domestically to protect the European eel, which Alliguna has done. Revels is breaching Article 8.

Revels is in breach of Article 10. Article 10 urges adoption, as appropriate and as far as possible, of measures to avoid or minimise impacts on biological diversity. The CBD Conference

²⁹ C.O.P to the C.B.D. Dec. VIII/28, U.N. Doc. UNEP/CBD/COP/DEC/VIII/28 ¶ 27(f) (June 15, 2006); C.O.P to the C.B.D. Meeting Document 11/23, U.N. Doc. UNEP/CBD/COP/11/23 ¶ 27(f) (Aug. 21, 2012).

³⁰ *Id.*, ¶ 20(b); Certain Activities Carried Out by Nicaragua in the Border Area and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), 2015 I.C.J. 665 ¶ 168 (Dec. 16) [hereinafter San Juan].

³¹ Miguel Baltazar-Soares et al., *Recruitment collapse and population structure of the European eel shaped by local ocean current dynamics* 24(1) CURR. BIOL. 104 (2014).

of Parties (“COP”) urges implementation of such measures where biofuels affect “areas of high value for biodiversity and areas of cultural, religious and heritage interest [...] and local communities”.³² European eels are culturally important to Alliguna, but there is no evidence that Revels considered measures to avoid or minimise the impacts of the sargassum harvesting on the species. Revels is in breach of Article 10.

ii. Revels is in breach of UNCLOS.

Revels is acting with scant regard for well-established rules of the law of the sea. These rules protect the high seas for the benefit of mankind. Revels enjoys freedom of the high seas under Article 87 of UNCLOS.³³ This freedom is not absolute: Revels must also protect the marine environment under Article 192. Revels’ freedom of the high seas is overridden by its obligation to protect the marine environment. By harvesting sargassum, Revels is not protecting the high seas.³⁴

Revels is obliged, by Article 118, to cooperate with Alliguna to conserve the living resources of the high seas. There is no evidence that Revels attempted to cooperate with Alliguna prior to commencing sargassum harvesting, or is attempting to cooperate with Alliguna now. Sargassum harvesting poses a significant risk of harm to the European eel. This conduct violates Article 118 of UNCLOS.

Article 206 requires parties to carry out an EIA where they “have reasonable grounds for believing that planned activities under their jurisdiction or control may cause [...] significant and harmful changes to the marine environment” and that “they shall, as far as practicable, assess the

³² C.O.P. to the C.B.D. Dec. X/37, U.N. Doc. UNEP/CBD/COP/DEC/X/37 ¶ 9 (Oct. 29, 2010).

³³ DONALD R ROTHWELL & TIM STEPHENS, THE INTERNATIONAL LAW OF THE SEA 164 (2d ed., 2016); PIERRE-MARIE DUPUY & JORGE E. VINUALES, INTERNATIONAL ENVIRONMENTAL LAW 114 (2d. ed., 2018); R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 204 (2d. ed., 1999).

³⁴ South Atlantic Fishery Management Council, Fishery Management Plan for Pelagic Sargassum Habitat of the South Atlantic Region (2002) at 40, 108.

potential effects of such activities on the marine environment”. The content of Article 206 provides that notification to - and/or engagement with - neighbouring coastal states in relation to the proposed activities is necessary to conduct a proper EIA.³⁵ Revels did not consult Alliguna on its plans to harvest sargassum. The EIA was not correctly conducted under Article 206 of UNCLOS.

iii. Revels is in breach of the CMS.

Revels’ actions pose significant risks to the European eel. Those actions constitute a breach of the CMS. A “range state” is defined at Article I(h) of the CMS as a state “that exercises jurisdiction over any part of the range of [a] migratory species”.³⁶ Alliguna and Revels are both range states for the European eel, which is a highly migratory species.

Revels is breaching Article II(1), which provides that in acting to conserve migratory species, range states should give special attention to migratory species whose conservation status is unfavourable. The European eel is such a species. At CMS COP12, 112 states approved a Concerted Action for the European eel, highlighting the importance of conservation of the species.³⁷ Despite this, there is no evidence that Revels gave special attention to the European eel in planning to harvest sargassum, or that it is giving such attention at present.

Revels is obliged to inform the CMS COP of plans for its ships on the high seas which concern migratory species.³⁸ There is no evidence that Revels informed CMS COP or Alliguna of the sargassum harvesting project and its possible effects on European eels.

³⁵ Preparatory Committee established by G.A. Res. 69/292, Chair’s non-paper on elements of a draft text of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (Feb. 28, 2017). ¶ 185.

³⁶ CMS art. II(1).

³⁷ C.O.P. to the C.M.S. Concerted Action 12.1, U.N. Doc. UNEP/CMS/Concerted Action 12.1 (Oct., 2017).

³⁸ Birnie at 683.

Article II(3)(c) provides that parties “shall endeavour to conclude agreements covering the conservation and management of migratory species”. Article I(j) defines an “agreement” as “an international agreement relating to the conservation of one or more migratory species”. Article IV(3) emphasises that range states must give priority to concluding agreements which would benefit a species with an unfavourable conservation status. There is no evidence that Revels sought to conclude such an agreement with Alliguna.

CMS COP Resolutions 11.27 and 12.21 require that potential impacts on migratory species are considered when planning renewable energy projects and climate change mitigation measures.³⁹ There is no evidence that Revels investigated the impact of sargassum harvesting on the European eel. As a result, Revels is contravening CMS COP Resolutions 11.27 and 12.21.

b. Revels is violating customary international law.

- i. Revels’ harvesting of sargassum is breaching its duty not to cause transboundary harm to the global commons.

By harvesting sargassum, Revels breached and continues to breach its obligation not to cause transboundary harm. Article 2(c) of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities defines transboundary harm as “harm caused in the territory of or in other places under the jurisdiction or control of another state other than the state of origin”. Revels is violating the transboundary harm principle by harvesting sargassum, causing likely damage to the European eel.

³⁹ C.O.P. to the C.M.S. Res. 11.27, U.N. Doc. UNEP/CMS/Resolution 11.27 ¶ 3 (Rev. COP12) (Oct. 2017); C.O.P. to the C.M.S. Res. 12.21, U.N. Doc. UNEP/CMS/Resolution 12.21 ¶ 2.1 (Oct. 2017).

To show a breach of the no harm principle, the harm must stem from - and be a physical consequence of - human activity. This is not in dispute.

The *Columbus*, by harvesting sargassum, is removing resources from the global commons. To be transboundary, harm must cross a national border.⁴⁰ This Honourable Court has confirmed that responsibility on states to prevent transboundary harm extends to activities on the high seas.⁴¹ The high seas are in the global commons and are referred to as the “common heritage of mankind”.⁴² All states are affected by the condition of the high seas, both by activities that impact them and the benefits accorded from their well-being.⁴³ In the *Case Concerning the Land, Island and Maritime Frontier Dispute*, this Honourable Court made considerable reference to co-ownership of waters that lie outside exclusive jurisdiction over which all states have common legal rights.⁴⁴ Revels may not damage the high seas as they are part of the global commons.

Harm must also be significant.⁴⁵ States are obliged “not to bring about changes in the condition of territory which will cause irreparable damage to, or substantially prejudice the existing or contingent legal interest of another state”.⁴⁶ Therefore, harm must be more than “detectable”.⁴⁷ Revels has been extracting more than a *de minimis* amount of sargassum, an integral part of the delicate Sargasso Sea ecosystem. Sargassum is a source of food and refuge for many species.⁴⁸ Extracting significant quantities of sargassum fundamentally impacts upon its natural life cycle.

⁴⁰ XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 4 (2003).

⁴¹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 237 (July 8) [hereinafter Nuclear Weapons].

⁴² SUSAN BUCK, THE GLOBAL COMMONS: AN INTRODUCTION 28 (1998) [hereinafter Buck].

⁴³ *Id.*, at 29.

⁴⁴ Case Concerning the Land, Island and Maritime Frontier Dispute (El Sal./Hond.) 1992 I.C.J. 351 ¶ 28 (Sept. 11).

⁴⁵ LAKSHMAN D. GURUSWAMY & MARIAH ZEBROWSKI LEACH, INTERNATIONAL ENVIRONMENTAL LAW: IN A NUTSHELL 532 (4th ed. 2012).

⁴⁶ Certain Phosphate Lands in Nauru (Nauru v. Australia) 1992 I.C.J. 240 ¶ 244 (Jun. 1992).

⁴⁷ ILC 2001 at 152.

⁴⁸ Sargassum is a genus of large brown seaweed, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (Oct. 29, 2018, 10:03 AM), <https://oceanexplorer.noaa.gov/facts/sargassum.html>.

By extracting living sargassum, the natural rate of production is affected and it is unable to reproduce quickly enough to maintain natural levels.⁴⁹

The extraction of sargassum is causing likely significant harm to the European eel, a species already facing extinction. European eel populations rely on the Sargasso Sea exclusively to spawn and rear their young.⁵⁰ Revels' actions are causing substantial damage to the habitat of this species. The European eel has a longer than average larval period.⁵¹ This makes the larval eels especially vulnerable to any changes to their habitat. The last 45 years has seen a decline of up to 95% of the European eel stock.⁵² The EIA undertaken by Revels has failed to show that sargassum harvesting is safe for European eels. Revels cannot sufficiently show that it is preventing harm to the European eel.

ii. Revels' harvesting of sargassum is in violation of the precautionary principle.

The precautionary principle is a rule of customary international law.⁵³ It has been endorsed by the international community generally and by this Honourable Court specifically.⁵⁴ Revels is required to anticipate, avoid and mitigate threats to the environment. If an action is likely to cause harm, Revels will be liable for any significant harm stemming from its action.⁵⁵ The main effect of

⁴⁹ Department of Environment of Natural Resources, Marine Plants Sargassum Seaweed, GOVERNMENT OF BERMUDA (Oct. 18, 2018, 7:00 PM), <https://environment.bm/sargassum-seaweed/>.

⁵⁰ Hanna Nilsson & Jesper Stage, *The economics of European eel management*, 4(1) J. OCEAN AND COASTAL ECON., Article No.6 ¶ 2 (2017) [hereinafter Nilsson].

⁵¹ Kevin J Friedland et al., *Oceanic changes in the Sargasso Sea and declines in recruitment of the European eel*, 64(3) ICES J. OF MAR. SCI. 519 (2007).

⁵² D. Jacoby & M. Gollock, *Anguilla anguilla - The IUCN Red List of Threatened Species*, IUCN RED LIST (Oct. 14, 2018, 8:00 PM), <https://www.iucnredlist.org/species/60344/45833138#geographic-range> [hereinafter Jacoby].

⁵³ Owen McIntyre & Thomas Mosedale, *The Precautionary Principle as a norm of Customary International Law* (9)2 J.E.L. 221 (1997).

⁵⁴ Nuclear Weapons; San Juan; Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.) 1997 I.C.J. 7 (Sept. 25) [hereinafter Gabčíkovo]; Pulp Mills on the River Uruguay (Arg. v. Uru.) 2010 I.C.J. 14 (Apr. 20) [hereinafter Pulp Mills]; Case T-13/99 Pfizer Animal Health S.A. v. Council of the European Union [2002] ECR II-03305).

⁵⁵ Guidelines for Applying the Precautionary Principle, INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE (Oct. 15, 2018 6:15 PM) http://cmsdata.iucn.org/downloads/ln250507_ppguidelines.pdf.

the precautionary principle is that where activity is sufficiently risky to the marine environment and the global commons, Revels is required to exercise extra precaution and submit proposed activities for international scrutiny.⁵⁶

The lack of full scientific knowledge is not a reasonable excuse to postpone measures to prevent environmental damage if there is a threat of serious or irreversible damage. Scientific uncertainty may be instrumental in lowering the burden of proof to show harm.⁵⁷ This Honourable Court has shown itself willing to examine harm under the balance of probabilities previously.⁵⁸ This follows an international trend of a less stringent standard for irreversible threats.⁵⁹ Revels is failing to exercise caution by not liaising with the international community and undertaking proper procedural measures before implementing the project. Revels' actions carry sufficient risk for the precautionary principle to apply. The EIA that was conducted did not confirm that sargassum harvesting is safe for European eels. Given that the eels rely on the Sargasso Sea to spawn, it is likely that there are and will be further consequences for this endangered species. In such circumstances, the environment should receive the benefit of the doubt.⁶⁰

Revels has not undertaken a comprehensive EIA using the best scientific evidence. Revels did not put forward any risk management options or alternatives and no other parties were notified. Revels ignored the uncertain result of the EIA. The precautionary principle is increasingly important given the worsening state of the environment.⁶¹

⁵⁶ Birnie at 159.

⁵⁷ Marte Jervan, *The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-Harm Rule* PluriCourts Research Paper No. 14-17, 72 (2014) [hereinafter Jervan].

⁵⁸ Pulp Mills, separate opinion of Judge Greenwood ¶ 26.

⁵⁹ Bluefin Tuna ¶ 80.

⁶⁰ Jervan 72.

⁶¹ Liesl Marisa Harewood, *The importance of the precautionary principle in international environmental law*, 2(2) COVENTRY L.J. 13 (2005); Walter Gullett, *Environmental protection and the precautionary principle: a response*

European eels are of great importance to the ecosystem: they are top-order predators when they return to freshwater streams and help regulate the stocks of other animals.⁶² Eels in turn are a source of food for other predators. The importance of protecting the European eel was first recognised internationally in law in 2007.⁶³ But eel stocks continue to decline.⁶⁴ The extinction of this species is inexcusable and avoidable.

iii. Revels' failure to conduct a proper EIA is in breach of its duty to act with due diligence.

Revels continues to fail to exercise due diligence under customary international law. Revels can be held accountable for its actions. In failing to correctly conduct an EIA, in failing to treat its communications with Alliguna with sincerity for the sake of the European eel, and in failing to halt sargassum harvesting, Revels has breached its duty to act with due diligence under customary international law.

The principle of due diligence is not an obligation of result, but of attempt.⁶⁵ Revels is required to consider appropriate and proportionate measures to the degree of risk of transboundary harm.⁶⁶ It is a minimum standard of conduct. Due diligence is a long accepted primary state obligation under many international treaties providing for a minimum international standard.⁶⁷

to scientific uncertainty in environmental management, 14(1) ENVIRONMENTAL AND PLANNING LAW J. 52 (1997).

⁶² EELIAD Report Summary, European eels in the Atlantic: assessment of their decline, CORDIS (Oct. 22, 2018 2:20 PM), https://cordis.europa.eu/result/rcn/56811_en.html.

⁶³ Council Regulation 1100/07, 2007 O.J. (L 248) 17 (EC).

⁶⁴ Jacoby.

⁶⁵ Birnie at 147.

⁶⁶ ILC 2001 at 158.

⁶⁷ UNCLOS art 94, Convention on Long-Range Transboundary Air Pollution, art 2, Nov. 13, 1979, 1302 U.N.T.S. 117, and Vienna Convention for the Protection of the Ozone Layer, art 2, Mar. 22, 1985, 1513 U.N.T.S. 293.

EIAs are obligatory if there is a risk of transboundary harm.⁶⁸ EIAs must be conducted in accordance with international standards. This Honourable Court recognised this obligation recently.⁶⁹ Article 1 of the Convention on Environmental Impact Assessment in a Transboundary Context defines an EIA as a national procedure for evaluating the likely impact of a proposed activity on the environment.⁷⁰ EIAs are fundamental in international environmental law and are an important tool to promote sustainable development. While SEA has conducted an EIA, this, in and of itself, is insufficient.

The substantive content of the due diligence obligation can be examined through its procedural elements. Revels was aware that it was tampering with the marine environment when it began extracting sargassum in the Sargasso Sea and ought to have conducted a proper EIA. Revels was obliged to notify and consult with any interested party in good faith.⁷¹ Revels failed to do so. Alliguna raised the very serious issue of harm to the endangered European eel. Upon this notification, Revels was obliged to investigate these issues and failed to do so. On the strength of the above, Revels is in breach of its obligation to act with due diligence.

iv. Revels is in breach of the principle of sustainable development.

The survival of the Sargasso Sea depends on sustainable human interaction.⁷² The Sargasso Sea is already subject to unsustainable fishing with negative impacts.⁷³ The principle of sustainable development is found in 112 multilateral treaties, approximately 30 of which aim at universal

⁶⁸ Sands at 657.

⁶⁹ San Juan.

⁷⁰ Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 309.

⁷¹ San Juan ¶ 104.

⁷² Elizabeth J. Cottier-Cook et al, Safeguarding the future of global seaweed aquaculture industry, INSTITUTE FOR WATER, ENVIRONMENT AND HEALTH (Nov. 12, 2018, 10:02 AM), <http://inweh.unu.edu/wp-content/uploads/2016/09/unu-seaweed-aquaculture-policy.pdf>.

⁷³ Dan Laffoley et al., *The protection and management of the Sargasso Sea: The golden floating rainforest of the Atlantic Ocean. Summary Science and Supporting Evidence Case*, Sargasso Sea Alliance 34 (2011).

participation.⁷⁴ Sustainable development is defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.⁷⁵ Sustainability is a core principle of UNFCCC⁷⁶ and the Paris Agreement.⁷⁷

Development ought to protect and restore the environment, not deplete or further endanger a species.⁷⁸ Oceans do not contain an infinite supply of renewable resources nor an infinite capacity to absorb environmental harm.⁷⁹ There is no evidence that Revels is conducting these activities in a sustainable manner. Revels’ actions are not protecting or restoring the ecosystem to which European eels migrate.⁸⁰

Future generations are vulnerable to the consequences of the actions of current generations.⁸¹ Revels has a duty to refrain from acting in a manner which would prevent enjoyment of rights in the future. Seaweed farming is a relatively new area in the field of biofuels, and its effects are largely unknown.⁸² The rapid expansion of seaweed harvesting means that sustainability is vital.⁸³ Revels must develop in a way that will not infringe the rights of future generations and only pursue projects that are sustainable.

⁷⁴ Virgine Barral, *Sustainable development in international law: nature and operation of an evolutive legal norm*, 23(2) E.J.I.L. 377, 384 (2012).

⁷⁵ U.N. Secretary-General, Note by the Secretary-General, U.N. Doc. A/42/427 (Aug. 4, 1987).

⁷⁶ UNFCCC art. 3(4).

⁷⁷ Paris Agreement art. 2.

⁷⁸ John C. Dernbach *et. al.*, *Sustainable development and its discontents*, 4(2) TEL 247 (2015); Nilsson.

⁷⁹ Buck at 100.

⁸⁰ David Righton *et al.*, *Empirical Observations of The Spawning Migration of European Eels: The Long and Dangerous Road to The Sargasso Sea*, 2(10) SCI. ADV. 1, 1 (2016).

⁸¹ Bridget Lewis, *Rights of Future Generations within the Post-Paris Climate Regime*, 7 T.E.L. 1, 3 (2018).

⁸² Linus Hasselström *et. al.*, *The impact of seaweed cultivation on ecosystem services - a case study from the west coast of Sweden*, 113 MAR. POLLUT. BULL. 53, 57 (2018).

⁸³ Eric Feunteun, *Management and restoration of European eel population (Anguilla anguilla): An impossible bargain*, 18(5) ECOL. ENG. 575, 586 (2002).

c. There is no defence to Revels' non-compliance with its treaty obligations.

i. Revels cannot rely on the defence of necessity.

An act is excused by necessity when a state's interests have been threatened by a "grave and imminent peril".⁸⁴ The mere apprehension of a possible "peril" is insufficient to successfully prove necessity.⁸⁵ The sargassum harvesting project is not protecting Revels from a grave and imminent peril. Neither is the project the only means of safeguarding Revels' survival. Revels cannot claim that it was acting out of necessity.

ii. Revels cannot rely on its status as a developing country.

Revels cannot justify non-compliance with its obligations by reference to its status as a developing country. Article 2(2) of the Paris Agreement acknowledges that there are differentiated responsibilities and respective capabilities between states due to different national circumstances.⁸⁶ Revels was capable of carrying out an EIA and funding several initiatives.

The CBD enshrines the principle of common but differentiated responsibility. The CBD makes special provisions for the needs of developing countries, including financial and technical support.⁸⁷ Revels did not seek to take advantage of these supports to ensure they were acting in a cautionary or responsible manner. Revels, even as a developing country, must adhere to its obligations in environmental law.⁸⁸

⁸⁴ Gabčíkovo ¶ 52.

⁸⁵ *Id.*, ¶ 54.

⁸⁶ Paris Agreement art. 2(2).

⁸⁷ CBD arts 12, 16 and 20.

⁸⁸ Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, ITLOS Rep. 10, ¶ 158.

3. REVELS IS RESPONSIBLE FOR THE ACTIONS OF SEA.

a. Revels is responsible for the conduct of a ship that is flying its flag on the high seas.

Revels is directly responsible for the actions of the *Columbus*, as it flies Revels' flag. The ship is identifiably acting for Revels. A flag state is responsible for ensuring that its ships act in accordance with Article 94 of UNCLOS. Revels cannot evade responsibility for the actions of the *Columbus* by arguing that those actions took place beyond Revels' geographical jurisdiction or that Revels' has no responsibility for the ship of a privately-owned corporation. There is a "genuine link" between the ship and the flag state as the harvesting of sargassum was done with Revels' full support.⁸⁹ Revels is ultimately responsible for the actions of the *Columbus*.

b. Revels has effective control over SEA.

Revels exercises effective control over SEA by directing a project which is damaging the unique ecosystem of the Sargasso Sea. Conduct is attributable where a state "directed and controlled [a] specific operation and the conduct complained of was an integral part of that operation".⁹⁰ Revels exercises such control by subsidising SEA and directing it to harvest sargassum. When a state decidedly uses its control of a private corporation to achieve a particular result, this signifies effective control over an entity. Revels is using the activities of SEA for a particular result: to reduce its greenhouse gas emissions in accordance with the Paris Agreement.

⁸⁹ UNCLOS art 91.

⁹⁰ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14 (June 27); ILC 2001 at 47.

As a result, the actions of SEA are carried out under the effective control of - and are attributable to - Revels.

c. SEA is exercising elements of governmental authority.

In the alternative, Revels is permitting SEA to exercise elements of governmental authority when harvesting sargassum, in a derogation of Revels' international obligations. A private company must be "empowered by the law of the state" to exercise governmental authority.⁹¹ SEA is empowered by the subsidy provided by Revels to harvest sargassum.

What is "governmental" depends on the history and traditions of the relevant state.⁹² As Revels' economy is largely based on fishing and agriculture, a subsidy from the Government of Revels was required for SEA to commence sargassum harvesting. As a result, SEA is carrying out elements of governmental authority which are attributable to Revels.

The conduct that is attributable to Revels amounts to a reckless breach of international environmental treaties and flagrant disregard for customary law.

⁹¹ JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART, 127-128 (2013).

⁹² ILC 2001 at 43.

CONCLUSION AND PRAYER FOR RELIEF

The Applicant, the Federal States of Alliguna, respectfully requests this Honourable Court to hold that:

1. This Honourable Court has jurisdiction to adjudicate this dispute;
2. The Republic of Revels is breaching environmental law; and
3. The actions of SEA are attributable to the Republic of Revels.

RESPECTFULLY SUBMITTED

AGENTS FOR THE APPLICANT