
TEAM: 1900

THE INTERNATIONAL COURT OF JUSTICE



AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

QUESTIONS RELATING TO

USE OF THE SARGASSUM SEA AND THE PROTECTION OF

EELS

(FEDERAL STATES OF ALLIGUNA/REPUBLIC OF REVELS)

THE FEDERAL STATES OF ALLIGUNA

APPLICANT

V

THE REPUBLIC OF REVELS

RESPONDENT

MEMORIAL FOR THE

APPLICANT

THE 2018 STETSON MOOT COURT COMPETITION

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ABBREVIATIONS

ARISWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
ARISWA commentary	Commentaries on I.L.C Draft Articles on State Responsibility
CBD	Convention on Biological Diversity
CIL	Customary International Law
COP	Decisions of the Conference of Parties
EIA	Environmental Impact Assessment
EBSA	Ecologically or Biologically Significant Marine Area
ICJ	International Court of Justice
ILC	International Law Commission
ICJ Statue	Statue of the International Court of Justice
PP	Precautionary Principle
RSHP	Revels's Sargassum Harvesting Project
SHP	Sargassum Harvesting Project

SD	Sustainable Development
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention on Climate Change
VCLT	The Vienna Convention on the Law of Treaties
1995 SFSA	The 1995 Agreement for the Implementation of the Provisions of UNCLOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks

STATEMENT OF JURISDICTION

The Federal States of Alliguna [hereinafter **Alliguna or Applicant**] and the Republic of Revels [hereinafter **Revels or Respondent**] submit this dispute to this Honorable Court, pursuant to Article 36(1) of the Statute of the International Court of Justice [hereinafter **this Court or ICJ**]. On 21 April 2018, Applicant filed an application instituting proceedings against Respondent, to which Respondent filed its Preliminary Objection on 5 May 2018. On 16 July 2018, Applicant and Respondent submitted a Joint Written Statement to the Registrar, requesting the Court to decide the jurisdictional questions and state responsibility questions and the merits of this matter on the basis of the rules and principles of general international law, as well as any applicable treaties, and that the Court to determine the legal consequences, including the rights and obligations of the Parties, arising from any judgment on the questions presented in this matter. The Registrar addressed a notification to the parties on 6 July 2018.

QUESTIONS PRESENTED

I. WHETHER THE INTERNATIONAL COURT OF JUSTICE HAS JURISDICTION OVER THE DISPUTE

II. WHETHER THE CONDUCT OF SEA CORPORATION IS ATTRIBUTABLE TO THE REPUBLIC OF REVELS

III. WHETHER THE REPUBLIC OF REVELS VIOLATES INTERNATIONAL LAW

STATEMENT OF FACTS

Alliguna and Revels are neighboring coastal sovereign states located on Ugani, a small continent located in the North Atlantic Ocean near the Sargasso Sea(R¶1).

The European eel is an endangered species which is found in multiple areas including Revels and Alliguna(R¶3), it migrates to Sargasso Sea to spawn and the larvae migrate across the Atlantic Ocean to coastal waters(R¶3).

SEA Corporation is a large private owned company in Revels(R¶13), in July 2016, the government of Revels provides a large amount of subsidies to enable it to implement its biofuel initiative, which is about harvesting Sargassum from Sargasso Sea(R¶13). At the end of 2016, Revels highlighted the country's new renewable energy program(R¶16). Then, Friends of the Eels informed Alliguna about RSHP(R¶17). Alliguna realized RSHP will negatively impact this precious ecosystem, especially European eel, whose population is already in a serious decline(R¶18). Then Alliguna contacted with Revels about this situation on 13 January 2017(R¶18), 9 April 2017(R¶20) and 7 July 2017(R¶22), but Revels refused to terminate the RSHP and admit the harmful effect.

After over one-year fruitless negotiation, Alliguna requested Revels to submit the dispute to ICJ but Revels refused(R¶24), which leads to the filing of application by Alliguna.

SUMMARY OF ARGUMENTS

I. The ICJ has jurisdiction to determine the matter and that Revels is responsible for the conduct at issue; and

II. The conduct of SEA Corporation is attributable to Revels; and

III. Revels violates international law by negatively impacting the European eel through the Sargassum harvesting project in the Sargasso Sea.

ARGUMENTS

I. THE INTERNATIONAL COURT OF JUSTICE HAS JURISDICTION OVER THE DISPUTE

Under Art. 36(1) of the ICJ Statute, the Court has jurisdiction over all matters specially provided for in treaties and conventions in force.¹ Jurisdiction over this dispute is thus conferred on the ICJ by com-promissory clauses of the CBD,² UNFCCC³ and the Paris Agreement,⁴ under which Alliguna and Revels consented to the ICJ's jurisdiction. The subject matter of Alliguna's application falls under these conventions; as a consequence, the dispute is one which the Court has jurisdiction *ratione materie* to entertain.⁵

A. THE ICJ HAS JURISDICTION OVER THE DISPUTE CONFERRED BY THE CBD, UNFCCC AND THE PARIS AGREEMENT

1. ICJ'S JURISDICTION IN GENERAL

Pursuant to Article 36 of the ICJ statute, the jurisdiction of the Court in contentious proceedings is based on the consent of the States.⁶ The Court is competent to entertain a dispute only if the States concerned have accepted its jurisdiction in one or more of the following ways: (1) by entering into a special agreement to submit the dispute to the Court; (2) by virtue of a jurisdictional clause,

¹ ICJ Statute, art. 36(1).

² Record ¶7.

³ Record ¶10.

⁴ Paris Agreement, FCCC/CP/2015/10/Add.1 (13 December 2015)[hereinafter the Paris Agreement].

⁵ Oil Platforms (Iran/USA), Preliminary Objections, ICJ Report 1996, ¶16.

⁶ THE INTERNATIONAL COURT OF JUSTICE: HANDBOOK, p34.

i.e., typically, when they are parties to a treaty containing a provision whereby, in the event of a dispute of a given type or disagreement over the interpretation or application of the treaty, one of them may refer the dispute to the Court; (3) through the reciprocal effect of declarations made by them under the Statute; (4) accepting the jurisdiction of the Court after its seizure (*forum prorogatum*).⁷ Since Revels has conferred the jurisdiction of the Court through CBD, UNFCCC and Paris Agreement,⁸ the fact that Revels has not recognized the ICJ's jurisdiction as compulsory *ipso facto*⁹ does not exclude the ICJ's jurisdiction.

2. THE ICJ HAS JURISDICTION UNDER THE CBD

a. The dispute is subjected to the “jurisdictional scope” of CBD

Pursuant to Art. 4 of CBD,¹⁰ the jurisdictional scope of CBD is decided that whether Revels's conduct satisfies two elements. One is the project disputed concerns components of biological diversity, the other is the activity carried out under Revels's jurisdiction or control.

The Sargassum and eels are living organisms from marine ecosystem and both are part of ecological complex which fall into the interpretation of biodiversity under Art. 2 of CBD.¹¹ Major components in biodiversity are ecosystem diversity, species diversity and genetic diversity.¹² Ecosystem diversity deals with the variations

⁷ <https://www.icj-cij.org/en/basis-of-jurisdiction#1>.

⁸ Record¶ 7, ¶10.

⁹ Record¶ 5.

¹⁰ CBD, art. 4.

¹¹ CBD, art. 2.

¹² Lakshman D. Guruswamy with Mariah Zebrowski Leach, International environmental law: in a

in ecosystems. Sargassum and eels are two variations in ecosystems within the Sargasso Sea and they have impacts on the human existence and the environment. Harvesting Sargassum has a great influence on fulfilling the demand of energy, mitigating the climate change and threatening the survival of creature on the earth as well. Species diversity is the number of different species that are represented in a given community. There are numerous species including European eels in the Sargasso Sea.¹³

The second element is that the activity should be carried out under state's "jurisdiction or control". This project is carried out under the control of Revels, specific reasons and explanations could be found in part II.¹⁴

b. The dispute is concerning the "interpretation and application" of the CBD

Revels violates the obligations required by Art. 1, 3, 5, 8, 10 of CBD. Furthermore, Revels's obligations should be determined by CBD Decisions IX/20¹⁵ and X/29¹⁶ on marine and coastal biodiversity in this dispute.¹⁷ Hence, the dispute relates to the interpretation and application of CBD.

nutshell, p.63 (4th ed., 1939).

¹³ Record¶18.

¹⁴ See *infra* Part.II.B.

¹⁵ UNEP/CBD/COP/DEC/XI/20 (5 December 2012).

¹⁶ UNEP/CBD/COP/DEC/X/29 (29 October 2010).

¹⁷ See *infra* Part.II.B.

3. THE ICJ HAS JURISDICTION UNDER THE UNFCCC AND THE PARIS AGREEMENT

a. The dispute is concerning the “interpretation and application” of the UNFCCC and the Paris Agreement

Revels has consistently invoked its obligations under the UNFCCC and the Paris Agreement as justification for its project, arguing that the project can enable it to fulfill its nationally determined contributions commitments under Art. 3 of the Paris Agreement and thus fulfill its commitments under Art. 4 of UNFCCC.¹⁸ In order to examine whether Revels’s conduct is fulfilling its obligations, Paris Agreement and UNFCCC shall be applied and interpreted.

B. REVELS CANNOT INVOKE THE RULE OF *LEX SPECIALIS* TO LIMIT THE ICJ’S JURISDICTION TO CMS AND UNCLOS

1. CMS and UNCLOS are not the “*lex specialis*” governing the dispute

lex specialis is the principle that when the same subject-matter concerned, a particular law that may displace a more general law in the event of a conflict between the two.¹⁹ The idea that special overrides general has a long pedigree in international jurisprudence. Its rationale is well expressed already by Grotius:

“What rules ought to be observed in such cases [i.e. where parts of a document are in conflict]. Among agreements which are equal..that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general.”²⁰

¹⁸ The Paris Agreement, art. 3; UNFCCC, art. 4; Record¶10, ¶14.

¹⁹ James Crawford, *Principles of Public International Law*, 8th edition, lxxix.

²⁰ Hugo Grotius, *De Jure belli ac pacis. Libri Tres*, Book II Sect. XXIX.

The precondition for the application of *lex specialis* principle is that the particular law should cover all the subject-matter concerned and the legal issues of the dispute could be examined under that particular law.

As stated above, this dispute arises directly under the CBD, the UNFCCC, and the Paris Agreement. Alliguna's primary concern is the negative impacts on the biological diversity which includes the European eels and the rest of the marine biodiversity in the Sargasso Sea. The UNFCCC and the Paris Agreement are also relevant because Revels alleged that this project can help it to fulfill its obligations under these conventions.

CMS is a convention regulating migratory species which have an unfavourable conservation status. The project not only harms eels but also other endangered species which are not protected by CMS.

In addition, UNCLOS is a convention defining the rights and responsibilities of nations with respect to their use of the world's oceans, establishing some guidelines for businesses, the environment, and the management of fishing resources. In this case, Revels alleged that Alliguna's allegations seem to focus on the high seas and UNCLOS is *lex specialis* about high seas. However, UNCLOS does not confer Revels the freedom to implement RSHP which means the freedom of high seas stipulated in UNCLOS is irrelevant. Even if Revels could have the freedom to harvest Sargassum, it should exercise its freedom within limitations. Plus, Ad Hoc Open-ended Informal Working Group of the United Nations published that apart from UNCLOS and its implementing agreements, a number of international instruments are

relevant to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction, such as CBD.²¹

To summarize, the subject-matter and the characteristic of the disputes are both beyond the application of CMS and UNCLOS and this leads to the conclusion that Revels could not invoke the rule of *lex specialis* to limit ICJ's jurisdiction.

²¹ http://www.un.org/Depts/los/biodiversityworkinggroup/webpage_legal_and_policy.pdf

II. THE CONDUCT OF SEA CORPORATION IS ATTRIBUTABLE TO REVELS

A. The SEA Corporation is “empowered” by Revels and “exercising elements of governmental authority”

Art. 5 of ARISWA requires that the entity is empowered by a state and the entity is exercising elements of governmental authority as well.²²

1. The SEA Corporation is “empowered” by Revels

It is not necessary that the empowering law should define the roles and responsibilities of the entity exhaustively. The dictionary meaning of “empowered ” is “to enable or permit”. In this case, the government of Revels selected the SEA Corporation to implement its renewable energy project,²³ and this could be regarded as a permission to harvest Sargassum which is an integral part of the project in this dispute.

2. The SEA company is “exercising elements of government authority”

The ARSIWA offers a set of criteria to define “governmental authority”: (a) the content of powers; (b) the manner in which they are conferred on the entity; (c) the purposes for which the powers are to be exercised, and (d) the extent to which the entity is publicly accountable for their exercise.²⁴

Insofar as criterion (a) is concerned, RSHP is under the Revels’s permission,

²² ARISWA, art. 5.

²³ Record¶14.

²⁴ ARISWA commentary, art. 5(6).

put another way, Revels reserves the conduct for itself,²⁵ thereby, the conduct of SEA company can be described as having governmental content.²⁶ Criterion (b) as identified in the commentary-the manner of conferral-is likewise relevant. Many governments have begun to use contractual arrangements with private entities in order to avoid scrutiny of their operations.²⁷ In this case, Revels permitted SEA to harvest Sargassum, the “permission” can be regarded as a manner of conferral. Criterion (c) is the purpose for which the power is conferred, the launching of SEA Corporation’s project is not driven by the commercial interests but to help the government of Revels to meet its NDC commitments under the Paris Agreement. Criterion (d) refers to accountability, subsidies provided by Revels enable SEA to implement the SHP, and its financial affairs were supervised by Revels.

B. The conduct of HSP is “directed or controlled” by a State

For the internationally wrongful conduct of the secessionist entity to be attributed to the outside power, it must be shown that organs of the outside power exercise “effective control” of the particular operation or activity in the course of which the conduct has been committed.²⁸ The “effective control” test was devised by the ICJ in *Nicaragua* and affirmed tangentially in *Armed Activities* and more forcefully in *Bosnian Genocide*.²⁹ In this case, Revels controls the beginning of the operation and the government power is involved in planning the operation, choosing targets, giving specific directives and instructions, and providing financial support.³⁰

Additionally, the Court applies the “effective control” test in cases where

²⁵ JAMES CRAWFORD, STATE RESPONSIBILITY, p130 (2013).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Cf *Nicaragua* (n 22) para 115; *Bosnian Genocide* (n 5) para 399.

²⁹ *See supra note 25*, p147.

³⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*, Merits, Judgment [hereinafter ‘*Nicaragua*’], ICJ Rep 1986, 14, para 112 .

there is evidence of “partial dependency” of the secessionist entity on the outside power.³¹ Such partial dependency could be inferred, *inter alia*, from the provision of financial assistance, logistic and military support, supply of intelligence, and the selection and payment of the leadership of the secessionist entity by the outside power.³² And the supporting of subsidies are evidence of “partial dependency” of the SEA Corporation on the government power in this case.

C. Revels “acknowledged and adopted” the conduct of SEA Corporation as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law “if and to the extent” that the State “acknowledges and adopts” the conduct in question as its own.³³

“Acknowledgement and adoption” of conduct by a State could be inferred from conduct of the State in question.³⁴ In this case, the government provided subsidies to the SEA Corporation to conduct SHP which constitutes the “official approval” of Revels. The “official approval” was discussed in the Case Concerning United States Diplomatic and Consular Staff in Tehran³⁵ as well. Ayatollah Khomeini and other agencies of the Iranian government have expressed their approval in the official capacity of the occupation to convert the continued occupation of the

³¹ *Id.*

³² *Id.*; Bosnian Genocide case, Judgment of 26 Feb 2007, ICJ Rep 2007, paras 241, 388, 394.

³³ ARISWA, art. 11.

³⁴ ARISWA commentary, art. 11.

³⁵ US Diplomatic and Consular Suff in Tehran (US. v. Iran) , ICJ Rep.(1980)3, paras73~74.

government and the continued seizure of hostages into state acts.³⁶ ICJ decided that official approval can be implied as the “act of adoption”. Additionally, the press release and the report issued by the government of Revels acknowledged that the project conducted by the Sea Corporation are the “the country’s new renewable energy program”,³⁷ which explained Revels has adopted the conduct of SEA Corporation as its own.

³⁶ *Id.*

³⁷ Record ¶16.

III. THE REVELS VIOLATES INTERNATIONAL OBLIGATIONS

A. REVELS VIOLATES ITS TREATIES OBLIGATIONS

As per the principle of *pacta sunt servanda*, states must comply with treaty obligations in good faith.³⁸ Revels has the obligation to take measures for protection of Sargasso Sea and the European eels. However, RSHP has violated its obligations under CBD, UNCLOS and CMS.

1. Revels violates its obligation under the CBD

CBD requires conservation of biodiversity and sustainable use of its components,³⁹ emphasizing in situ conservation, or conservation of ecosystems and natural habitats and maintenance and recovery of viable populations of species in their natural surroundings.⁴⁰ In conducting RSHP, Revels acts contrary to these objectives and failed to perform its obligations under CBD.

a. Revels violates the obligation under Art. 1 of CBD

The objectives of CBD relate to “the conservation of biodiversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources”.⁴¹

The Sargassum and eels are living organisms from marine ecosystem and both are part of ecological complex which fall into the interpretation of “biodiversity” under Art.2 of CBD. Rapid environmental changes typically cause

³⁸ VCLT, art. 26.

³⁹ CBD, art. 1.

⁴⁰ CBD, art. 2.

⁴¹ CBD, art. 1.

mass extinctions.⁴² By harvesting Sargassum, Revels is destroying eels spawning habitat which certainly will harm various kinds of species, leading to the decimation of their populations.

b. Revels violates the obligation under article 3 of CBD

Art. 3 of CBD, which is based on Principle 21 of Stockholm Declaration,⁴³ reaffirms a fundamental principle of international law about State responsibility with respect to transboundary environmental harm. The same general principle is stated in UNCLOS.⁴⁴

All European eels spawn in the southwestern part of the Sargasso Sea,⁴⁵ RSHP could set off a complicated series of biological reactions not limited to a defined area. Given the large-scale impact of RSHP, unexpected and larger-scale changes of ecosystems not limited to Revels's jurisdiction must be expected.⁴⁶ Therefore, Revels fails to ensure that activities within its jurisdiction or control do not cause adverse effects to the environment of other States and fall within the ambit of transboundary harm.⁴⁷

⁴² Charles Cockell; Christian Koeberl & Iain Gilmour (18 May 2006).

⁴³ PHILIPPE SANDS ET. AL. PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, 454 (3rd ed.2012); Stockholm Declaration, at prin.21.

⁴⁴ UNCLOS, art.194.

⁴⁵ International Council for the Exploration of the Sea, 2015 Report of the Joint EIFAAC/ICES/GFCM Working Group on Eel (WGEEL), ICES CM 2015/ACOM:18, at 8 (2016).

⁴⁶ 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 (2014).

⁴⁷ Riccardo-Pisillo Mazzeschi, Forms of International Responsibility for Environmental Harm, in INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 29 (1991).

**c. Revels breaches the obligation of cooperation under article 5 of
CBD**

Effective conservation and sustainable use of marine biological diversity in areas solely or partially outside of national jurisdiction will require the further “cooperation” of all states.⁴⁸ In addition, the duty to cooperate to protect the environment, as expressed in Principle 24 of the Stockholm Declaration⁴⁹ also reaffirmed in the UN General Assembly Resolution 2995⁵⁰ and the 1982 World Charter for Nature.⁵¹

Revels failed to appreciate the severity of this situation and ignored Alliguna’s notifying go directly against Revel’s obligations under Art. 5 of the CBD. Meanwhile, when Alliguna asked Revels to agree to submit the matter to the ICJ, Revels refused and continued RSHP which caused not only European eels but also other species in a serious situation.

**d. Revels violates its duty of in-situ conservation under article 8 of
CBD**

The fundamental principle of CBD is the in situ conservation of biological diversity.⁵² This is found in the Preamble⁵³ and Art.8 of the Convention. The

⁴⁸ CBD, art. 5.

⁴⁹ The Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea, at prin. 24.

⁵⁰ G.A. Res. 2995, U.N. GAOR, 27th Sess., U.N. Doc. A/2995 (Dec. 15, 1972).

⁵¹ World Charter for Nature, U.N. Doc. A/RES/37/7 (Oct. 28, 1982).

⁵² CBD, art. 8; BENEDICTE SAGE-FULLER, *THE PRECAUTIONARY PRINCIPLE IN MARINE ENVIRONMENTAL LAW*, 169 (2013).

⁵³ CBD, Preamble, Tenth recital.

obligations in Article 8(c) and 8(d) to manage biological resources important for the conservation of biological diversity and to protect ecosystems and habitats important to the in-situ maintenance of viable populations of species.

Instead of protecting the marine ecosystem, RSHP intentionally alters the ecosystems of the Sargasso sea. The possibility of more deaths may lead to their population being below the Minimum Viable Population, greatly increasing the risk of short-term extinction, and resulting in imbalance and danger to the ecosystem. RSHP in complete disregards of the Sargasso sea's ecosystem.

e. Revels breaches the obligation under Art. 10 of CBD

Parties are required to comply with obligation of sustainable use of components of biological diversity required by Art. 10 of CBD to adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity.⁵⁴ Revels violated this obligation when it destroying eels spawning habitat certainly will harm many kinds of species, especially eels, which could cause negatively impact on this precious ecosystem and destroy the biological diversity over the Sargasso Sea.

f. Revels fails to comply with the requirements of an EIA under Art. 14 of CBD

Art. 14 requires parties, as far as possible and appropriate, to introduce procedures for conducting “environmental impact assessments of its proposed

⁵⁴ CBD, art. 10(b).

projects that are likely to have significant adverse impacts on biological diversity....”⁵⁵ As shown above, every country must comply with the requirements of an EIA.⁵⁶

In this case, Revels fails to adopt appropriate procedures to assess any possible effects of SHP⁵⁷, as it did not follow the requirements of the ANNEX II Mandate of The Sargasso Sea Commission under Hamilton Declaration.⁵⁸

2. Revels violates its obligation under the UNCLOS

Revels doesn’t have the freedom to initiate SHP pursuant to Art. 87. Even though it could have the freedom, the freedom of the high seas ensured under Art. 87 has limitations subject to Art. 117, 118, 192, and 300 of UNCLOS and other rules of international law to the extent that Revels’s conduct should not result in damaging the marine resources and biodiversity of the Sargasso Sea.

a. Revels does not have freedom to implement SHP

Art. 87 of UNCLOS explicitly recognizes the freedoms of navigation, overflight, scientific research, and fishing, the freedoms to lay submarine cables and pipelines and the freedoms to construct artificial islands and other installations permitted under international law.⁵⁹ It is an exhaustive article so that it doesn’t include any other freedoms. Furthermore, none of the six freedoms authorizes Revels to have

⁵⁵ *Id.*

⁵⁶ CBD, art. 14.

⁵⁷ CBD, art. 14(1)(a).

⁵⁸ *See supra note 49*, ANNEX II j.

⁵⁹ UNCLOS, art. 87.

the freedom to harvest Sargassum in the Sargasso Sea.

b. Even though it could have the freedom, Revels fails to comply with the obligation under Art. 87(2) of UNCLOS

Art. 87(2) provides that all states must act with “due regard” for other states’ interests in exercising the freedoms of the high sea. “Due regard” requires all states, in exercising their high seas freedoms, to be aware of and consider the interests of other states in using the high seas. If Revels fails to refrain from any acts that might adversely affect the interests of the high seas by nationals of other states, it is in violation of Art.87(2).⁶⁰

i. Alliguna has “interests” about the Sargasso Sea

“Interest” means the object of any human desire⁶¹ including any aggregation of rights, privileges, powers, and immunities etc.⁶² Alliguna has interests about the marine biodiversity of the Sargasso Sea including eels featuring prominently in Alliguna.

ii. Revels fails to refrain from SHP that might “adversely affect” the interests of Alliguna

When something affects others’ interests adversely, it’s harmful or negative.

⁶⁰ George K. Walker, Definitions for the Law of the Sea:Terms Not Defined by the 1982 Convention, P185.

⁶¹ VCLT, Art. 31(1).

⁶² Bryan A. Garner Editor In Chief, Black’s Law Dictionary, p.2374(8th ed., 2004).

In this case, Revels has been harvesting more than a *de minimis* amount of Sargassum which could be regarded as a cumulative act damaging the marine biodiversity of the Sargasso Sea.⁶³ Since the destruction of any ecosystem or environment is a gradual process, affected by cumulative acts—a death by a thousand cuts,⁶⁴ RSHP could have negative impact on the delicate and vulnerable ecosystem. In other words, its project has devastating effects on interests of Alliguna. Therefore, Revels violates Art. 87(2).

c. Revels fails to comply with the cooperation of states in the conservation and management of living resource under Art. 117 and 118 of the UNCLOS

According to Art. 117, “cooperation” is together with the good-neighbourliness and sustainable to create a legal obligation.⁶⁵ Pursuant to Art. 118, species regulations are adopted not only for the purpose of “conservation” but are also taken as part of the chain of “management” measures adopted by each State⁶⁶ in pursuance of their respective national economic or social policies⁶⁷ The general duty indicates that states have to take into account the interests of others and to contribute-without specifying the concrete form or means of this contribution-to the solution of common problems.⁶⁸ If a state does not take measures for the solution of

⁶³ CLARIFICATIONS, A16.

⁶⁴ *R v Panarctic Oils Ltd*, 12 CELR 29, [1983] NWTR 47, sentencing reasons at 12 CELR 80 (Terr Ct) at 85–86.

⁶⁵ A.G.Oude Elferink, (2011), *Governance principle for areas beyond jurisdiction*.

⁶⁶ UNCLOS, art.118.

⁶⁷ *Elihu Lauterpacht, C. J. Greenwood, A. G. Oppenheimer, International Law Reports, Volume 123* 238.

⁶⁸ FRANZ XAVER PERREZ, *COOPERATIVE SOVEREIGNTY: FROM INDEPENDENCE TO INTERDEPENDENCE IN THE STRUCTURE OF INTERNATIONAL ENVIRONMENTAL LAW* 261 (Kluwer Law International, 2000).

common problems, it constitutes the violation of Art. 117 and 118.

A diversity of habitats, threats, management strategies, data collection efforts, and other factors all suggest that multilateral efforts to conserve the European eel and Sargasso Sea ecosystem are needed⁶⁹ for the benefit of present and future generations of Revels.⁷⁰ However Revels fails to take any actual policy,⁷¹ even cooperate with other states to conserve the species. In conclusion, Revels fails to comply with Art. 117 and 118 of UNCLOS.

d. Revels breaches its obligation to protect and preserve the marine environment under Art. 192 of UNCLOS

Art. 192 covers *inter alia* matters such as global and regional cooperation; technical assistance; monitoring and assessment; international rules and national legislation⁷² to protect and preserve rare or fragile ecosystems, as well as habitats of depleted, threatened or endangered species and other forms of marine life.⁷³ The term “marine environment” includes the ocean as a whole,⁷⁴ without distinguishing marine spaces under and beyond national jurisdiction. If States fails to ensure that effective conservation measures are taken,⁷⁵ it constitutes the violation of Art. 192.

First, coastal communities are custodians of eels between coastal waters and

⁶⁹ UNEP/CMS/COP12/Inf.34 5 October 2017, III.

⁷⁰ See *supra* note 49, art.2.

⁷¹ CLARIFICATION, A10.

⁷² Basic Texts 2005, International Tribunal for the Law of the Sea, Martinus Nijhoff. at Part XII.

⁷³ UNCLOS, art. 194(5).

⁷⁴ TANAKA, at 276.

⁷⁵ Southern Bluefin Tuna Case (N.Z. v. Japan; Austl. v. Japan), 1999 ITLOS Nos. 3 & 4.

the High Seas,⁷⁶ which means that states shall protect biodiversity in the marine environment.⁷⁷ However, Revels conducts SHP resulting in the destruction of the Sargasso Sea.

Second, in the Southern Bluefin Tuna Cases, the Tribunal expressed the view that although scientific uncertainty could not conclusively assess the scientific evidence presented by the parties, measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock.⁷⁸ Since the EIA impacts of RSHP on the marine biodiversity were uncertain, putting an end to this harmful project should be taken as a matter of urgency to preserve the rights of both Alliguna and Revels and to avoid further deterioration of the European eels.⁷⁹

3. Revels violates its obligation under the CMS

Art. 2 requires Revels to acknowledge the importance of cooperation,⁸⁰ while Art. 4 requires Revels to endeavor to conclude AGREEMENTS covering the conservation and management of eels.⁸¹ Revel's right to exploit living resources is subject to the duty to conserve and protect migratory species.⁸² However, Revels rejected to meet with Alliguna to discuss the situation and to allow Alliguna to explain further the urgency of putting an end to this harmful conduct.⁸³ Revels fails to comply

⁷⁶ BBNJ_Policy brief_Adjacency.

⁷⁷ 1995 SFSA, Art.5.

⁷⁸ See *supra* note 75.

⁷⁹ CLARIFICATIONS, A17.

⁸⁰ CMS, art. 2.

⁸¹ CMS, art. 4.

⁸² CMS, art. 2(1).

⁸³ See Record ANNEX, A18.

with the obligation to conserve migratory species under Art. 2 and 4 of CMS.

CMS Resolutions 11.27 requires Revels to undertake appropriate survey and monitoring both before and after deployment of RSHP to identify impacts on eels and their habitats in the short- and long-term, as well as to evaluate mitigation measures and apply appropriate cumulative impact studies to describe and understand impacts at larger scale, such as at population level or along entire migration routes.⁸⁴ However, Revels fails to fulfill its obligations. All omissions justifies Revels fails to comply with the obligation to undertake appropriate survey and monitoring etc. under CMS Resolutions 11.27 and 12.21.

B. REVELS VIOLATED CUSTOMARY INTERNATIONAL LAW

1. Revels violates the PP

a. The PP is a customary international law

To constitute a customary international law, a norm must satisfy two elements: (i) there is a general practice; (ii) it is accepted as international law (*opinio juris et necessitatis*).⁸⁵

i. There is a general practice about the PP

The best indicators of state practice are the instruments of international law and state domestic law.⁸⁶ Currently, the precautionary principle is used in more than

⁸⁴ See CMS Resolutions 11.27.

⁸⁵ James Crawford, *Principles of Public International Law*, 8th edition, p23.

⁸⁶ Agne Sirinskiene, *The status of precautionary principle: moving towards a rule of customary law*.

90 international declarations and agreements.⁸⁷ The abundance of treaties and declarations incorporating the precautionary principle provides an estimate of state practice and acceptance.⁸⁸ Another primary indicator of state practice is domestic law. The precautionary principle is widely used in the domestic environmental law of Germany, Belgium, and the Nordic countries.⁸⁹

ii. PP is accepted as international law

PP lies at the heart of this case, this disputes concerning the interpretation or application of the CBD, UNFCCC, and the Rio declaration,⁹⁰ which is incorporating PP.

b. Revels violated the PP

Application of precautionary principle as custom requires threat of environmental damage, of a serious or irreversible nature, and scientific uncertainty. Each element is present.

i. RSHP poses a “threat of environmental damage”

“Threat” means an expression of intention to inflict evil, injury, or damage. In this case, RSHP poses a threat to the ecological balance and marine biodiversity of the Sargasso sea.⁹¹

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Implementing the Precautionary Principle: Approaches from the Nordic Countries. de Sadeleer, N. (ed.). Earthscan, 2007.

⁹⁰ *See supra* Part I. A.

⁹¹ *See supra* Part III.A.

ii. The harm brought about by RSHP is of a “serious and irreversible” character

The meaning of “serious and irreversible” is substituted with “significant” damage as the threshold to trigger the precautionary principle.⁹² In some formulations of the principle, the significant standard is used.⁹³ European eel is a migratory species, destroying part of its spawning habitat certainly will harm the species, and Alliguna and other states will be adversely affected. Moreover, once the species is in danger, the impacts on biodiversity of the Sargasso sea is irreversible.

iii. There exists “scientific uncertainty”

“Scientific uncertainty” means that the probability of occurrence cannot be calculated when applying the precautionary principle.⁹⁴ In this case, the SEA Corporation conducted an EIA and determined that the impacts on the marine biodiversity, including the European eel, were uncertain.⁹⁵ Additionally, the likely harm of the SHP to the Sargasso sea cannot be calculated.

2. Revels violates “NO-HARM” rule

a. The “NO-HARM” rule has attained customary status

The no-harm rule is a general practice and it is accepted as law.⁹⁶ The rule is that states are primarily obligated to ensure that activities within their jurisdiction do

⁹² Thomas J. Schoenbaum, *International environment law: cases, materials, problems*, at 655.

⁹³ See e.g. , *Convention on Biological Diversity*, pmbl, para. 9 , U.N. Doc . DPI / 130 / 7 (1992) , S . Treaty Doc . 20 , 103d Cong . 1st Sess . (1993) , reprinted in 31 I.L. M . 818 (1992).

⁹⁴ *Id.*.

⁹⁵ Clarification, A17.

⁹⁶ See *supra* note 85.

not cause damage to environment of other States.⁹⁷ First, The no-harm rule have been adopted in numerous environmental treaties and declarations; and second, the no-harm rule has regarded as part of customary international law by ICJ.⁹⁸

b. Revels causes transboundary harm and violates the “NO-HARM” rule

A violation of this rule has four elements: the harm must result from human activity; there must be a physical relationship between the activity concerned and the harm; there must be a physical effect crossing national boundaries; and the activity must involve “a risk of causing significant harm”.⁹⁹ All four elements are satisfied.

i. The harm is a result of human activity

The harm was a result of the SHP, it is not disputed that the harm was a result of human activity.

ii. There exists a physical relationship between the activity concerned and harm caused

A physical relationship requires that the activity directly or indirectly involving natural resources¹⁰⁰ results in bodily, materially or environmentally harmful consequences.¹⁰¹ In this case, because of RHSP, the habitat of European eels is devastated, leading to the decline of the population. Thus, the activity negatively impacts this precious ecosystem and could have devastating effects.

⁹⁷ Rio, Principle 2; Stockholm Declaration, Principle 21; UNCLOS, Art. 194(2); CBD, Art. 3.

⁹⁸ Pulp Mills (Argentina/Uruguay), ICJ Reports 2010, ¶193.

⁹⁹ Report of ILC, Articles on Prevention of Transboundary Harm from Hazardous Activities, U.N.GAOR, U.N. Doc. A/56/10 (2001).

¹⁰⁰ Xue Hanqin, *Transboundary Damage in International Law*, at 4 (2003).

¹⁰¹ Report of ILC, Articles on Prevention of Transboundary Harm from Hazardous Activities, U.N.GAOR, U.N. Doc. A/56/10 (2001).

iii. There is a physical effect crossing national boundaries

This element requires a boundary-crossing factor.¹⁰² In this case, Alliguna and Revels are neighboring coastal states where eels can be found.¹⁰³ The interests of conservation of biodiversity including eels subjected to both states is recognized in international law.¹⁰⁴ Thus, the decline of eels can be a transboundary harm to both states.

iv. RSHP involves a “risk of causing significant harm”

“Risk of causing significant harm” refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact.¹⁰⁵ The risk need not be of high probability, so long as the harm caused is significant.¹⁰⁶ “Significant” means greater than mere nuisance or significant harm normally tolerated. It is something more than ‘detectable’, but need not be ‘serious’ or ‘substantial.’¹⁰⁷ In this case, RSHP involves a risk of causing significant harm. Eels are already “nearly threatened” species and are important to Alliguna’s culture.¹⁰⁸ Further more, RSHP will negatively impact this precious ecosystem of the Sargasso sea, which is designated as an EBSA under the CBD.¹⁰⁹ Potential transboundary affects on environment are valid claims under international law.¹¹⁰

¹⁰² See *supra* note 100, p9.

¹⁰³ Record ¶1.

¹⁰⁴ United States–Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, ¶133.WT/DS58/AB/R (Oct. 12, 1998)

¹⁰⁵ Report of the ILC.

¹⁰⁶ *Id.*

¹⁰⁷ Oscar Schachter, *International Law in Theory and Practice*, at 336 (1991).

¹⁰⁸ Record, ¶3, ¶4.

¹⁰⁹ Record, ¶18.

¹¹⁰ *Nuclear Tests (New Zealand v. France)*, Order (22 June 1973), ICJ Reports 1973, p.135.

C. REVELS HAS VIOLATES GENERAL PRINCIPLES OF INTERNATIONAL LAW

1. Revels violates the principle of Sustainable Development

SD is the cornerstone principle of climate change mitigation.¹¹¹ It has a normative character¹¹² and constitutes a general principle of law.¹¹³ The definition is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”,¹¹⁴ while RSHP violates this norm as it causes harm to the marine diversity, especially European eels in the Sargasso sea.

Furthermore, RSHP does not qualify as a valid measure for climate change mitigation under the UNFCCC.¹¹⁵ It interferes with natural adaptation of ecosystems¹¹⁶ and disrupts the environment-development balance.¹¹⁷ Such project is not a substitute course for reducing greenhouse gas emission.

¹¹¹ Report of the World Commission on Environment and Development (the Brundtland Report), *Our Common Future* 43 (1987).

¹¹² *Gabcikovo (Hungary/Slovakia)*, ICJ Reports 1997, ¶140.

¹¹³ *Iron Rhine Arbitration* (‘Ijzeren Rijn’) (Belgium/Netherlands), Award, RIAA XXVII 2005 pp. 35-125; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Reports 1982, ¶222.

¹¹⁴ United Nations General Assembly, 1987, p. 43.

¹¹⁵ Birnie et al, *International Law and the Environment* 145 (2010) [hereinafter BIRNIE], at 162 and 164.

¹¹⁶ UNFCCC, art. 2.

¹¹⁷ UNFCCC, art. 3(4).

D. REVELS CANNOT INVOKE ITS OBLIGATIONS UNDER CLIMATE CHANGE CONVENTIONS AS JUSTIFICATION FOR BREACHING ITS OBLIGATIONS UNDER INTERNATIONAL LAW

1. Breaching of one treaty in order to comply with another is contrary to *pacta sunt servanda*

Revels's obligations under climate change conventions cannot justify the conduct of RSHP which is in breach of Revels's obligations under UNCLOS, CBD, UNCLOS, and CMS.

The rule of *pacta sunt servanda* is clear: every treaty in force is binding upon the parties to it and must be performed by them in good faith. The ICJ has held that this rule consists of two elements of equal importance.¹¹⁸ First, every treaty in force is binding upon the parties to it. Second, good faith under *pacta sunt servanda* obliges parties to a treaty to apply treaties in a reasonable way and in such a manner that their purpose can be realized.¹¹⁹ Good faith compliance with treaty obligations thus requires compliance in a manner that does not breach any other treaty obligation. Thus Revels shall fulfill its obligations under UNFCCC and Paris Agreement through means that do not violate its obligations under UNCLOS and CBD.

¹¹⁸ Gabčíkovo–Nagymaros Project (Hung. v. Slov.), 1977 I.C.J.7(1997).

¹¹⁹ *Id.*

2. Alleged compliance with its obligations under UNFCCC does not justify Revels's violation of its duty not to cause transboundary harm and PP

Art. 38 of the ICJ Statute provides that both custom and treaty are sources of law.¹²⁰ There exists no hierarchy between the two sources.¹²¹ Revels cannot invoke its obligations under UNFCCC and Paris Agreement to justify its violation of obligations under customary international law, i.e., its duty not to cause transboundary harm and its duty to observe the precautionary principle.

¹²⁰ ICJ Statute, art. 38.

¹²¹ Antonio Cassese, *International Law*, at 199 (2004).

CONCLUSION AND PRAYER FOR RELIEF

Applicant, the Federal States of Alliguna, respectfully requests the Court to adjudge and declare that:

1. The International Court of Justice has jurisdiction over the dispute;
and
2. The Republic of Revels violated international law by conducting the SH project; and
3. Revels shall terminate its project as soon as possible.

Respectfully submitted,
AGENTS FOR THE APPLICANT