

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 FOR THE RESPONDENT

THE 23RD STETSON MOOT COURT COMPETITION 2018-2019

November 2018

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QUESTIONS PRESENTED

- I. WHETHER THE INTERNATIONAL COURT OF JUSTICE (ICJ) HAS JURISDICTION OVER REVELS WITH REGARD TO ALLIGUNA'S APPLICATION.
- II. WHETHER REVELS IS RESPONSIBLE FOR THE CONDUCT OF SEA CORPORATION.
- III. WHETHER, BY HARVESTING SARGASSUM IN THE SARGASSUM SEA, REVELS HARMED THE EUROPEAN EEL AND VIOLATING INTERNATIONAL LAW.

STATEMENT OF JURISDICTION

Pursuant to Article 79, paragraph 1, of the international Court of Justice Rules of Court (1987), the Republic of Revels (“Respondent”) filed a preliminary objection as to the Court’s jurisdiction over the dispute between Respondent and the Federal States of Alliguna (“Applicant”). *See* Preliminary Objection of the Republic of Revels, 5 May 2018. This Court has jurisdiction over the settlement of the matter of jurisdiction under the Statute of the International Court of Justice, art. 36(6), T.S. No. 993 (1945).

If the Court finds that it has jurisdiction over the subject matter of the dispute, the Court would have jurisdiction pursuant to Statute of the International Court of Justice, art. 40(1), T.S. No. 993 (1945), as Applicant submitted an application instituting proceedings. *See* Application Instituting Proceedings, Dated 21 April 2018.

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STATEMENT OF FACTS

A. Parties, and dispute between two parties.

Alliguna and Revels are sovereign states located on Ugani, with their coast lines approximately 250 miles from the Sargasso Sea.¹

European eels exist in numerous habitats, including lakes in multiple continents and countries, including Alliguna and Revels.² European eels migrate to the Sargasso Sea to spawn and later to inland waters to develop and grow.³ The species' recruitment, population, and escapement have declined pronouncedly over the past several decades.⁴

Seaweed Energy Alternatives, Inc. (SEA Corporation) is a large private company in Revels that produces renewable energies, especially biofuels.⁵ SEA Corporation launched a biofuels initiative in July 2016 and began harvesting Sargassum from Sargasso Sea as a source of biofuel, using its vessel, the *Columbus*, sailing under the flag of Republic of Revels.⁶ The Government of Revels subsidized SEA Corporation's activities under a program to reduce greenhouse gases and expand renewable energy.⁷ The Government of Revels expected the project to help Revels meet its NDC commitments under the Paris Agreement.⁸ SEA Corporation's seaweed

¹ Record, para. 1.

² Record, para. 3.

³ *Id.*

⁴ *Id.*

⁵ Record, para. 13.

⁶ *Id.*

⁷ Record, para. 14.

⁸ *Id.*

harvesting project was among the first commercial initiatives of its kind and widely covered in Revels and abroad, including Alliguna.⁹

The NGO Friends of the Eels learned that SEA Corporation was harvesting Sargassum in the Sargasso Sea and informed the Government of Alliguna because they were concerned about the negative impacts on European Eels.¹⁰ The Government of Alliguna contacted the Government of Revels to discuss the situation.¹¹

On January 13th, 2017 the Government of Alliguna alleged that Revels' conduct violated CBD.¹²

On 11 March 2017, the Government of Revels responded that it was pursuing its NDC commitments under the Paris Agreement.¹³ Revels denied responsibility for SEA Corporation's conduct and denied violating international law or CBD.¹⁴

On 9 April 2017, the Government of Alliguna asserted that Revels violated CMS and, in accordance with the Draft Articles on Responsibility of States for internationally wrongful acts, that SEA Corporation's conduct is attributable to Revels.¹⁵

On 22 May 2017, the Government of Revels denied violating CMS or responsibility for SEA Corporation's conduct.¹⁶ Revels accused Alliguna of ignoring the UNCLOS provision that *all* states have freedom of the high seas.¹⁷

⁹ Record, para. 15.

¹⁰ Record, para. 17.

¹¹ *Id.*

¹² Record, para. 18.

¹³ Record, para. 19.

¹⁴ *Id.*

¹⁵ Record, para. 20.

¹⁶ Record, para. 21.

¹⁷ *Id.*

On 7 July 2017, the Government of Alliguna denied Revels's assertions and asserted that, though the Sargasso Sea is high seas, Revels exceeded what UNCLOS permits on the high seas and is harming the Sargasso Sea and European eels.¹⁸

On 14 September 2017, the Government of Revels responded that Revels subsidized SEA Corporation to meet its NDC commitments and complied with UNCLOS to conserve living resources on the high seas.¹⁹ Revels observed that Alliguna presented no scientific evidence and failed to describe any causal link between SEA Corporation's initiative and any detriment to the species.²⁰

For several months, Alliguna and Revels negotiated the dispute but failed to resolve it.²¹ In February 2018, Alliguna asked Revels to submit the matter to ICJ, but Revels refused.²² On 21 April 2018, Alliguna submitted to the ICJ an Application Instituting Proceedings against Revels.²³ On 5 May 2018, Revels submitted Preliminary Objections denying ICJ jurisdiction and state responsibility for SEA Corporation's conduct.²⁴

B. Applicable international laws.

Alliguna and Revels are Members of the United Nations and are Parties to the Statute of the International Court of Justice (ICJ). Pursuant to Article 36, paragraphs 2 and 3, of the Statute of the ICJ, Alliguna recognized the ICJ's jurisdiction as compul-

¹⁸ Record, para. 22.

¹⁹ Record, para. 23.

²⁰ *Id.*

²¹ Record, para. 24.

²² *Id.*

²³ Record, para. 25.

²⁴ Record, para. 26.

sory *ipso facto* but only on condition of reciprocity on the part of other states. Revels has not recognized the ICJ's jurisdiction as compulsory *ipso facto*.²⁵

Alliguna and Revels are Parties to the Vienna Convention on the Law of Treaties.²⁶

Alliguna and Revels are Contracting Parties to the CBD, and under Article 27, paragraph 3, of the CBD, they agreed to submit to the jurisdiction of the ICJ to resolve disputes concerning the interpretation or application of the CBD.²⁷

Alliguna and Revels are Parties to the CMS, which lists the European eel on Appendix II, and both countries are Range States for the species.²⁸

Alliguna and Revels are States Parties to UNCLOS. Under Article 287, Alliguna chose the ICJ to settle disputes over interpreting or applying UNCLOS, while Revels chose the International Tribunal for the Law of the Sea to settle the same.²⁹

Alliguna and Revels are Parties to the UNFCCC and to the Paris Agreement. Under Article 14 of the UNFCCC and Article 24 of the Paris Agreement, both chose to submit any dispute concerning interpreting or applying the UNFCCC or the Paris Agreement to the ICJ. In 2016, Alliguna and Revels submitted their first Nationally Determined Contributions (NDCs) in accordance with the Paris Agreement.³⁰

Alliguna and Revels are signatories to the Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea.³¹

²⁵ Record, Annex A, para. 5.

²⁶ *Id.* at para. 6.

²⁷ *Id.* at para. 7.

²⁸ *Id.* at para. 8.

²⁹ *Id.* at para. 9.

³⁰ *Id.* at para. 10.

³¹ *Id.* at para. 11.

SUMMARY OF THE ARGUMENT

- I. The ICJ does lacks jurisdiction over this dispute, because CMS and UNCLOS are *lex specialis* for this dispute, but neither refers dispute settlement to the ICJ.
- II. If the Court finds jurisdiction over this dispute, Revels is not responsible for SEA Corporation's conduct, because no evidence establishes that Revels instructs, directs, or controls SEA Corporation's sargassum harvesting, and Revels has not adopted SEA's conduct.
- III. If the Court finds Revels' responsible for SEA Corporation's conduct, absence of the evidence which proves that SEA Corporation's conduct negatively impacted to the Sargasso Sea and European eel verifies that Revels did not violate international treaties and does not invoke precautionary principle and Revels' duty not to cause transboundary harm. Rather, SEA Corporation's conduct is a precautionary measure to minimize climate change.
- IV. Revels requests summary judgment against Alliguna because Alliguna has failed to present sufficient evidence to support its claim.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS MATTER.

A. ICJ jurisdiction.

“The jurisdiction of an international tribunal depends ... on the consent of the States concerned to accept that jurisdiction. Accordingly, no sovereign State can be made a party to proceedings before the Court unless it has in some manner or other consented thereto.”³² A State can consent to ICJ jurisdiction by several methods. First, the Court has jurisdiction over “all cases which the parties refer to it.”³³ Second, the Court has jurisdiction over “all matters specially provided for ... in treaties and conventions in force.”³⁴ Last, “the states parties to the present Statute may at any time declare that they recognize ... the jurisdiction of the Court in all legal disputes concerning ... any question of international law.”³⁵

The Court lacks jurisdiction over Revels with regard to the matter of the Sargasso Sea. First, Revels never referred the matter of the Sargasso Sea to the Court. Second, the matter of the Sargasso Sea arises under the Convention on the Conservation of Migratory Species of Wild Animals (a.k.a. the Bonn Convention; hereafter CMS) and the United Nations Convention on the Law of the Sea (hereafter UNCLOS), but neither treaty provides for ICJ jurisdiction over Revels. Last, Revels never declared that it recognizes ICJ jurisdiction with regard to the matter of the Sargasso Sea. The first and the last are undisputed; only the second is disputed.

The matter of the Sargasso Sea invokes no treaty for which Revels has provided for ICJ jurisdiction, but rather invokes CMS and UNCLOS. Alliguna argues that the matter arises

³² *Handbook of the Court*, p. 34, available at: <https://www.icj-cij.org/files/publications/handbook-of-the-court-en.pdf> [accessed 7 November 2018].

³³ United Nations, *Statute of the International Court of Justice*, art. 36(1), 18 April 1946, available at: <https://www.icj-cij.org/en/statute> [accessed 7 November 2018].

³⁴ *Id.*

³⁵ *Id.* at art. 36(2).

under the Convention on Biological Diversity (hereafter CBD), the Paris Agreement, and the United Nations Framework Convention on Climate Change (hereafter UNFCCC), but these treaties govern more general law, less applicable to this matter, which therefore derogate to the *lex specialis* of CMS and UNCLOS.

B. CMS governs this matter; therefore, the Court lacks jurisdiction.

i. CMS governs this matter.

CMS is *lex specialis* in this matter, so it should resolve the matter. *Lex specialis* is from the Latin legal phrase *lex specialis derogat legi generali*, i.e., law governing specific subject matter overrides law governing general subject matter.³⁶ The doctrine often arises in ICJ cases.³⁷ CMS is “concerned particularly with those species of wild animals that migrate across or outside national jurisdictional boundaries,”³⁸ and CMS Parties shall take “individually or in co-operation appropriate and necessary steps to conserve such species and their habitat.”³⁹ CMS lists the European eel as a migratory species in Appendix II.

This matter arises under CMS because it relates to conserving European eels. CMS is the *lex specialis* in this matter, because Alliguna alleges harm to the European eel, and CMS addresses migratory species including the European eel. CBD and UNFCCC are both more general laws governing, respectively, biological diversity and climate change. So, the dispute arises under CMS rather than CBD or UNFCCC because the law more particularly relates to this dispute.

³⁶ USLegal, “Lex Specialis,” available at: <https://definitions.uslegal.com/l/lex-specialis/> [accessed 7 November 2018].

³⁷ *E.g.*, Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), 2 February 2017; Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), 16 December 2015; Pulp Mills on the River Uruguay (Argentina v. Uruguay), 20 April 2010; Territorial and Maritime Dispute (Nicaragua v. Colombia), 13 December 2007.

³⁸ Convention on the Conservation of Migratory Species of Wild Animals, 1 November 1983, preamble, available at: https://www.cms.int/sites/default/files/instrument/CMS-text.en_.PDF [accessed 7 November 2018].

³⁹ *Id.* at art. II, cl. 1.

ii. Because CMS governs this matter, the Court lacks jurisdiction.

CMS art. XIII, para. 1 and 2, require Parties to negotiate any dispute, and CMS art. XIII, para. 2, states that if Parties cannot resolve the dispute by negotiation, then they shall submit the dispute to the Permanent Court of Arbitration at The Hague (PCA-CPA).

CMS provides for dispute resolution at the PCA-CPA, not the ICJ. Since CMS governs this matter, and since Revels has not submitted to ICJ jurisdiction by any other means, therefore ICJ lacks jurisdiction under CMS.

C. UNCLOS governs this matter, but the Court lacks jurisdiction under UNCLOS.

i. This matter concerns marine biodiversity on the high seas as governed by UNCLOS, so UNCLOS is *lex specialis* in this matter.

“The high seas are open to all States, whether coastal or land-locked.”⁴⁰ UNCLOS is *lex specialis* in this matter. Alliguna alleges that Revels is responsible for SEA Corporation harming the marine biodiversity of the Sargasso Sea. The Sargasso Sea is on the high seas. Therefore, UNCLOS applies particularly to resolving this matter.

ii. Each party chose a different organization to settle the dispute, so ICJ lacks jurisdiction.

When a State signs, ratifies, or accedes to UNCLOS, it may choose a procedure to resolve “any dispute concerning the interpretation or application of this Convention.”⁴¹ If the parties to a dispute have chosen different procedures, then they may submit their dispute “only to arbitration in accordance with Annex VII, unless the parties otherwise agree.”⁴²

⁴⁰ UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, art. 87, para. 5, available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf [accessed 7 November 2018].

⁴¹ *Id.* at art. 286,

⁴² *Id.* at art. 287, para. 5.

Under Annex VII, the arbitral tribunal shall consist of five arbitrators⁴³ chosen from a list of arbitrators “drawn up and maintained by the Secretary-General of the United Nations.”⁴⁴

Alliguna and Revels have chosen different procedures. Alliguna chose the ICJ, but Revels chose the International Tribunal for the Law of the Sea (hereafter ITLOS). Therefore, any dispute between Alliguna and Revels arising under UNCLOS must submit to Article VII arbitration, not to ICJ judgment.

D. The Court lacks jurisdiction under CBD, the Paris Agreement, and UNFCCC.

i. CBD is irrelevant to this dispute.

CBD seeks to conserve biological diversity by using the earth’s living organisms sustainably.⁴⁵ CBD requires Parties to settle disputes by negotiation, but if they cannot, by arbitration or submission to the International Court of Justice.⁴⁶ However, for a treaty to apply to a legal dispute, the facts of the dispute must reasonably relate to the legal standards of the treaty.⁴⁷ The Court decides whether a treaty relates to a dispute.⁴⁸ The Court should consider not only the Application and Final Submission but also diplomatic exchanges, public statements, and other pertinent evidence.⁴⁹

CBD is irrelevant to this dispute, because CBD concerns conserving biological diversity through sustainable use of organisms, but Alliguna has not alleged an unsustainable use of the sargassum. Since the matter does not invoke CBD, the Court lacks jurisdiction.

⁴³ *Id.* at Annex VII, art. 3.

⁴⁴ *Id.* at Annex VII, art. 2.

⁴⁵ Convention on Biological Diversity, 6 June 1992, page 2 and art. 1.

⁴⁶ Convention on Biological Diversity, 6 June 1992, article 27.

⁴⁷ Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan), 2000 Arbitral Tribunal 1, 38-39 (Aug. 4).

⁴⁸ Fisheries Jurisdiction Case (Spain v. Canada), I.C.J. Reports 1998, paragraphs 30-31.

⁴⁹ *Id.*

ii. The Court lacks jurisdiction under the Paris Agreement and UNFCCC, because Revels violated neither.

“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”.⁵⁰ For the Paris Agreement or UNFCCC to apply, the Court must find that Revels has state responsibility for the actions of SEA Corporation. Yet, as presented in another section, Revels bears no state responsibility for SEA Corporation’s actions. Yet, even if the Court finds that Revels does bear state responsibility for SEA Corporation’s actions, the Paris Agreement and UNFCCC still do not apply, because SEA Corporation–Revels violated neither treaty. The objective of UNFCCC is “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”⁵¹, and Paris agreement is “strengthen the global response to the threat of climate change”⁵². As both treaties aim stabilization of climate change, Revels did not violate both treaties because what SEA Corporation had done was all to meet the NDC standard.

⁵⁰ UN General Assembly, United Nations Framework Convention on Climate Change, preamble, 9 May 1992, available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf> [accessed 11 November 2018].

⁵¹ UN General Assembly, United Nations Framework Convention on Climate Change, article 2, 9 May 1992, available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf> [accessed 11 November 2018].

⁵² UN General Assembly, Paris Agreement, article 2, 12 December 2015

II. IF THE COURT FINDS JURISDICTION OVER REVELS, THEN SEA CORPORATION'S ALLEGED INTERNATIONALLY WRONGFUL ACTS DO NOT APPLY TO REVELS, BECAUSE REVELS IS NOT RESPONSIBLE FOR SEA CORPORATION'S CONDUCT.

a. SEA Corporation's conduct is not attributable to Revels under the Draft Article on Responsibility of States.

The Draft Articles on Responsibility of States for Internationally Wrongful Acts provide, "Every internationally wrongful act of a State entails the international responsibility of that State." When is 'conduct that breaches an international obligation of the State' attributable to the state? Chapter II provides eleven possibilities,⁵³ of which only Articles 8 or 11 may be disputed. "Conduct directed or controlled by a State," provides:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

And Article 11 attributes conduct to a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own."

Then, has SEA Corporation 'in fact acted on the instructions of, or under the direction or control of, Revels'? If not, has Revels adopted SEA Corporation's conduct as its own? No.

⁵³ "Conduct of organs of a State," "of persons or entities exercising elements of governmental authority," "of organs placed at the disposal of a State by another State," "excess of authority or contravention of instructions," "conduct directed or controlled by a State," "carried out in the absence or default of the official authorities," "of an insurrectional or other movement," or "acknowledged and adopted by a State as its own."

SEA Corporation “is a large, privately owned company in Revels that produces and sells renewable energy, particularly biofuels,” and “launched its latest biofuels initiative and began harvesting Sargassum from the Sargasso Sea to use for biofuel production” in July 2016.⁵⁴ The evidence argues that SEA Corporation acted independently, not under Revels’s instructions, direction, or control. SEA Corporation is large and privately owned. The biofuels initiative is SEA’s, not Revels’, and SEA “launched” the initiative, not Revels.

The Government of Revels subsidized SEA Corporation’s Sargassum initiative—“as part [of] the Government’s recently launched program to reduce greenhouse gas emissions and expand the use of renewable energy in Revels”—and other “select non-governmental entities or persons to implement renewable energy projects.”⁵⁵ Revels “provided” a subsidy to SEA Corporation and to several other “non-governmental entities or persons.” Governments do not force taxpayer money on non-governmental entities; rather, subsidies must be applied for. Again, SEA Corporation did not follow Revels’ instructions, directions, or control.

Finally, in 2016, “the Government of Revels issued a press release and a report discussing the progress and success of the country’s new renewable energy program. The press release and report highlighted the SEA Corporation’s ongoing Sargassum initiative and a few of the other projects that had received subsidies through the program.”⁵⁶

Issuing a press release mentioning another entity’s operations is not adopting the operation as one’s own. It is responsible government oversight of expenditures of taxpayer money. Revels never claimed that the program was its own.

Thus, no doctrine of state responsibility attributes SEA Corporation’s conduct to Revels.

⁵⁴ Record, para. 13.

⁵⁵ Record, para. 14.

⁵⁶ Record, para. 16.

III. IF THE COURT FINDS REVELS RESPONSIBLE FOR SEA CORPORATION'S CONDUCT, THEN REVELS COMMITTED NO INTERNATIONALLY WRONGFUL ACT.

A. Revels complied with CBD.

“Biological diversity” includes diversity within species, diversity between species, and diversity of ecosystems.⁵⁷ “Ecosystem” means a dynamic complex of plant, animal and micro-organism communities.⁵⁸ The Sargasso Sea (designated an ecologically significant marine area) is an ecosystem, and the sargassum growing there and the European Eels spawning there are both elements of that ecosystem.⁵⁹

Alliguna claims that harvesting sargassum in the Sargasso Sea harms that ecosystem, where European Eels spawn and grow, and therefore also harms the European Eels. In fact, the eels’ population has been declining for several decades, long before SEA Corporation began harvesting sargassum, and Alliguna has shown no causal link between SEA Corporation’s activities and the decline in the eel population. Nor has Alliguna shown any evidence that harvesting sargassum harms marine biodiversity in the Sargasso Sea.

The Sargassum Management Brief⁶⁰ presents an event between Caribbean islands and Western African countries. This points out inundation by unprecedented quantities of pelagic sargassum that had to be cleaned up. The brief illustrates that leaving sargassum unmanaged can ruin ecosystems, and some harvesting promotes healthier ecosystems. Far from harming marine biodiversity, SEA Corporation harvesting sargassum might help the European eel. As

⁵⁷ Convention on Biological Diversity, 5 June 1992, article 2, UNTS, available at : https://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf [accessed 8 October 2018]..

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Catrina Hinds, “Sargassum Management Brief” available at: <https://www.cavehill.uwi.edu/principal/getattachment/17762/Sargassum-Management-Brief.pdf.aspx> (2016).

already stated, Alliguna offered no evidence that SEA Corporation's conduct harmed any element of the Sargasso Sea ecosystem, European eels included.

B. Revels complied with CMS.

For a treaty to apply to a legal dispute, the facts of the dispute must reasonably relate to the legal standards of the treaty.⁶¹ The relevant legal standards of CMS are as follows. CMS art. II, para. 1: "Parties acknowledge the importance of migratory species being conserved." "Parties acknowledge the importance ... of Range States agreeing to take action to this end whenever possible and appropriate." "Parties acknowledge the importance ... of Range States ... taking individually or in co-operation appropriate and necessary steps to conserve such species and their habitat." CMS art. II, para. 3(a), (c): Parties "should promote, co-operate in and support research relating to migratory species" and "shall endeavour to conclude AGREEMENTS covering the conservation and management of migratory species included in Appendix II." CMS art. IV, para. 3: "Parties that are Range States of migratory species listed in Appendix II shall endeavour to conclude AGREEMENTS where these would benefit the species and should give priority to those species in an unfavourable conservation status." The European eel is listed on Appendix II of CMS, and Revels is a Range State for the European eel.⁶²

Alliguna alleges that Revels violated CMS articles II and IV, but the legal terms of those articles do not reasonably relate to the facts of the dispute. Articles II and IV require Revels to acknowledge certain items as important, to promote migratory-species research, and to make agreements favorable to Appendix II species like the European eel. Revels has done so, nor does Alliguna's Application allege otherwise. As a result, CMS simply does not apply to this matter.

⁶¹ *Southern Bluefin Tuna* (New Zealand-Japan, Australia-Japan), 2000 Arbitral Tribunal 1, 38-39 (Aug. 4).

⁶² Record, para. 8.

CMS Article VII lets the Conference of the Parties make non-binding instruments in the form of resolutions on proposal submitted by Parties.⁶³

Revels did not violate CMS Resolution 11.27 or 12.21, but even if the Court finds that it did, nevertheless Resolutions are strictly recommendatory and non-binding.

C. Revels complied with UNCLOS.

“The high seas are open to all States.”⁶⁴ The freedom of the high seas includes fishing.⁶⁵ Nationals of States may fish on the high seas subject to State treaty obligations and the provisions of UNCLOS.⁶⁶ All states must take “such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.”⁶⁷ To determine ‘allowable catch and other conservation measures,’ States shall take measures “to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield.”⁶⁸ States shall also consider “the effects on species associated with or dependent upon harvested species” to maintain or restore “populations of such species above levels at which their reproduction may become seriously threatened.”⁶⁹

The Sargasso Sea is high seas, 250 miles from the coasts of Alliguna and Revels,⁷⁰ and Harvesting sargassum is fishing. However, Article 119(1)(a) governing “allowable catch” is irrelevant to the dispute, because Alliguna has not alleged that SEA Corporation’s biofuels

⁶³ “Resolution 2.6 (Geneva, 1988) ... recommends the use of non-binding instruments such as resolutions of the Conference of the Parties on proposals submitted by Parties ... as a potential first step towards the conclusion of AGREEMENTS in accordance with Articles IV and V of the Convention.” UNEP/CMS/Resolution 9.2, Priorities for CMS Agreements, p. 1, December 2008, available at: https://www.cms.int/sites/default/files/document/Inf7_Res9_2_E_0.pdf [accessed 7 November 2018].

⁶⁴ The United Nations Convention on the Law of the Sea (UNCLOS), art. 87.

⁶⁵ *Id.* at art. 87(1)(e).

⁶⁶ *Id.* at art. 116.

⁶⁷ *Id.* at art. 117.

⁶⁸ *Id.* at art. 119(1)(a).

⁶⁹ *Id.* at art. 119(1)(b).

⁷⁰ Record at para. 1.

project threatens sargassum levels. Article 119(1)(b) governing “species associated with or dependent upon harvested species” is relevant, but Revels has complied. Revels considered the effects upon the European eel and found none. This is evident from the fact that, despite its objections to SEA Corporation’s activities, Alliguna itself cannot provide any scientific data or causal link between harvesting sargassum and declining European eel populations. Since harvesting seaweed does not harm the European eel populations, SEA Corporation and Revels need not take measures to restore the European eel populations.

Article 120 applies Article 65 to high seas fishing: “Nothing in this Part restricts the right of a coastal State ... to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part.”

This article is inapplicable to SEA Corporation’s biofuels initiative, because it does not exploit marine animals. Nor, as will be shown, has Alliguna established any harm to the European eel.

D. Revels complied with UNFCCC.

i. Alliguna alleged no harm relevant to UNFCCC.

The United Nations Framework Convention on Climate Change aims to stabilize atmospheric greenhouse gas concentrations at a non-dangerous level.⁷¹ It pronounces three principles to achieve this, the first being: “The Parties should protect the climate system for the benefit of present and future generations of humankind.”⁷² “‘Climate system’ means the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions.”⁷³

⁷¹ UN General Assembly, United Nations Framework Convention on Climate Change, art. 2, 9 May 1992, available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf> [accessed 11 November 2018].

⁷² UNFCCC, art. 3, para. 1.

⁷³ UNFCCC, art. 1, para. 3.

UNFCCC addresses climate change, greenhouse gas levels, and climate systems. Alliguna alleged no harm related to climate change, greenhouse gas levels, or climate systems arising from SEA Corporation's conduct.

ii. SEA Corporation's biofuels project promoted UNFCCC.

The third principle in UNFCCC is, "The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects."⁷⁴

Contrary to causing harm, SEA Corporation's biofuels initiative promotes the first and third principles of UNFCCC. SEA Corporation "sells renewable energy, particularly biofuels," harvests sargassum "to use for biofuel production."⁷⁵ The biofuels project will "reduce greenhouse gas emissions and expand the use of renewable energy in Revels."⁷⁶ So, it helps "protect the climate system" and constitutes "precautionary measures to ... prevent or minimize the causes of climate change and mitigate its adverse effects."

iii. UNFCCC requires consideration for Revels.

UNFCCC limits Parties' responsibilities "to enable economic development to proceed in a sustainable manner."⁷⁷ The second principle in UNFCCC is, "developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration."⁷⁸

Even if Alliguna alleged climate-change harm, the limiting phrase in the Objective and the second principle require consideration for Revels. "Revels is a developing country, and its economy is based largely on fishing and agriculture."⁷⁹ SEA Corporation "is a large,

⁷⁴ UNFCCC, art. 3, para. 3.

⁷⁵ Record, para. 13.

⁷⁶ Record, para. 14.

⁷⁷ UNFCCC, art. 2.

⁷⁸ UNFCCC, art. 3, para. 2.

⁷⁹ Record, para. 2.

privately owned company in Revels that produces and sells renewable energy, particularly biofuels.”⁸⁰ Even if SEA Corporation’s biofuels project caused—not prevented—climate change, the biofuels project is essential to the sustainable progress of Revels’ economy.

E. The Hamilton Declaration, Rio Declaration, Stockholm Declaration, Rio+20 outcome document “The Future We Want,” and the United Nations General Assembly annual resolutions on oceans and law of the sea are non-binding.

The documents above are not binding. For example, the Sargasso Sea Commission states, “The Hamilton Declaration is a non-binding political statement.”⁸¹ The UN Charter, articles 10 and 14, refer to General Assembly resolutions as “recommendations,” and the ICJ has repeatedly affirmed that they are non-binding.⁸²

Alliguna alleged no specific violations of these documents. Revels did not violate any of these documents. But, even if the Court finds that it did, none of these documents are binding.

F. Revels complied with international customary law.

i. Harvesting sargassum does not invoke the precautionary principle.

The precautionary principle applies when there exist considerable scientific uncertainties about causality, magnitude, probability, and nature of harm.⁸³ A mere fantasy or crude speculation cannot invoke the precautionary principle.⁸⁴ Where there are threats of

⁸⁰ Record, para. 13.

⁸¹ The Sargasso Sea Commission, available at: <http://www.sargassoseacommission.org/about-the-commission/hamilton-declaration> [accessed 7 November 2018].

⁸² Sergei A. Voitovich, *International Economic Organizations in the International Legal Process*, p. 95. Martinus Nijhoff Publishers, 1995. ISBN 0-7923-2766-7.

⁸³ UNESCO, *The Precautionary Principle* 13 (2005).

⁸⁴ *Id.*

serious or irreversible damage, lack of full scientific certainty is no reason to postpone cost-effective measures to prevent environmental damage.⁸⁵

Alliguna demands that SEA Corporation stop harvesting sargassum, alleging damage to the Sargasso Sea and the European eel. Such allegations, however, are “mere fantasy.” Alliguna offers no evidence to establish these claims. On the contrary, harvesting sargassum can help ecosystems. Sargassum reproduces asexually and eventually becomes too heavy if there is no attempt to manage sargassum.⁸⁶ Lacking evidence of harm, “crude speculation” cannot invoke the precautionary principle with regard to SEA Corporation harvesting sargassum.

ii. Harvesting sargassum caused no transboundary harm.

States must take reasonable measures to prevent transboundary harm.⁸⁷

Transboundary harm has several elements: physical harm, of a significant or substantial amount, resulting from human activity, and having transboundary effects.⁸⁸ The physical harm must be a real detrimental effect measurable by factual and objective standards.⁸⁹ The amount of harm must reach ‘a threshold of severity calling for legal action.’⁹⁰

Presumably, Alliguna claims that the population of the European eel in the Sargasso Sea is declining, that the decline is significant, that SEA Corporation harvesting sargassum in

⁸⁵ World Commission on the Ethics of Scientific Knowledge and Technology (COMEST)

⁸⁶ *The Prohibition of Transboundary Environmental Harm 4-5* (Jervan, Marte Ingvildsdatter 2014).

⁸⁷ *Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, 2001, General Commentry (1), available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf [accessed 7 November 2018].

⁸⁸ O. Schachter, *International Law in Theory and Practice* (Dordrecht, Martinus Nijhoff, 1991), pp. 366-368.

⁸⁹ Report of the International Law Commission on the work of its fifty-third session.

⁹⁰ Xue Hanqin, *Transboundary Damage in International Law* (Cambridge University Press, 2003), p. 4.

the Sargasso Sea caused the harm, and that the harm is transboundary, because the European eel is migratory.

Yet, Alliguna has failed to provide any evidence to establish elements two or three. There is no evidence that the population decline is significant or substantial, of a degree to call for legal action. More importantly, Alliguna has provided no evidence causally linking the decline in the European eel population with SEA Corporation's activity. The population of the European eel has been declining for years,⁹¹ whereas SEA Corporation has harvested sargassum for little more than a year.⁹² As a result, Alliguna has not established a claim of transboundary harm against SEA Corporation, even if the Court finds Revels responsible for SEA Corporation's activities.

⁹¹ Record, para. 23.

⁹² Since July 2016. Record, para. 13.

IV. MOTION FOR SUMMARY JUDGMENT.

A. Even if the Court accepts the facts that Alliguna alleges, no reasonable fact finder could find that Revels caused harm.

ICJ proceedings permit incidental proceedings, including preliminary objections, on any “ground for putting an end to the proceedings.”⁹³ If a party does not defend its case, “the other party may call upon the Court to decide in favour of its claim.”⁹⁴ Then, the Court must satisfy itself that “the claim is well founded in fact and law.”⁹⁵ The Court follows this article.⁹⁶ The Court consistently upholds *onus probandi incumbit actori*, i.e., any party that asserts a fact must establish its existence.⁹⁷ Summary judgment is appropriate if the claimant provides insufficient evidence to establish its claims, such that there is no issue of material fact, or no reasonable finder of fact could find for the applicant.⁹⁸

Here, Alliguna has not established harm. Alliguna claims that SEA Corporation, harvesting sargassum for the biofuels project, harms the European Eel, and that some doctrine of state responsibility makes Revels responsible for that harm. Yet, Alliguna has

⁹³ United Nations, *The International Court of Justice: Handbook*, 31 December 2013, pp. 59, 60, available at <https://www.icj-cij.org/files/publications/handbook-of-the-court-en.pdf>, 4 November 2018 (hereafter “Handbook”).

⁹⁴ United Nations, *Statute of the International Court of Justice*, 18 April 1946, Article 53. 1., available at http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf, 4 November 2018 (hereafter “ICJ Statute”).

⁹⁵ *Id.* at Article 53. 2.

⁹⁶ *E.g.*, *The Fisheries Jurisdiction Case (U.K. v. Ice.)* 1974 ICJ 3, *citing e.g.*, *Maritime delimitation in the Black Sea (Romania v. Ukraine)*, Judgment of 3 February 2009, para. 68; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008, para. 45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 128, para. 204; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 437, para. 101.

⁹⁷ *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, 2010 I.C.J. (Apr. 20), para. 162.

⁹⁸ *Wex Legal Dictionary and Encyclopedia*, “Motion For Judgment As A Matter Of Law” https://www.law.cornell.edu/wex/motion_for_judgment_as_a_matter_of_law, “Summary Judgment” https://www.law.cornell.edu/wex/summary_judgment, 4 November 2018.

shown no harm. It writes of “likely harm”⁹⁹ and admits that “Alliguna has yet to obtain direct evidence that the biofuels project has harmed the European eel.”¹⁰⁰ Revels summarized the situation in a diplomatic note to Alliguna: “Alliguna has not presented any evidence to Revels to demonstrate how the biofuels initiative has negatively impacted the Sargasso Sea ecosystem or European eels. ... Alliguna has failed to describe any causal link between the SEA Corporation’s initiative and any detriment to the species.” Alliguna neither responded to the note nor denied the correctness of the summary, as one would expect if it had evidence of its claim.

Thus, Alliguna has presented insufficient evidence to reasonably support its claim, and Revels requests summary judgment against Alliguna. Filing a claim without evidence of harm is not just precipitous, but an act of bad faith toward Revels and flagrantly disrespectful to this Court.

⁹⁹ Record, para. 18.

¹⁰⁰ Record, para. 20.

CONCLUSION AND PRAYER FOR RELIEF

Respondent, the Republic of Revels, respectfully requests the Court to hold that:

1. The Court has no jurisdiction over Revels in this matter;
2. Revels is not responsible for the conduct of SEA Corporation;
3. Revels committed no internationally wrongful acts; and
4. The facts that Alliguna alleges cannot establish that Revels committed any harm.

RESPECTFULLY SUBMITTED,

AGENT OF RESPONDENT