



THE HAGUE, THE NETHERLANDS



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

**THE FEDERAL STATES OF ALLIGUNA**

(APPLICANT)

**V.**

**THE REPUBLIC OF REVELS**

(RESPONDENT)

\*

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**MEMORIAL ON BEHALF OF THE APPLICANT**

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## **QUESTIONS PRESENTED**

- I. WHETHER THE INTERNATIONAL COURT OF JUSTICE HAS JURISDICTION OVER THE DISPUTE BETWEEN THE FEDERAL STATES OF ALLIGUNA AND THE REPUBLIC OF REVELS?
  
- II. WHETHER REVELS HAS VIOLATED ITS INTERNATIONAL OBLIGATIONS BY HARVESTING SARGASSUM?

## **STATEMENT OF JURISDICTION**

The Federal States of Alliguna [“Applicant”] and the Republic of Revels [“Respondent”] humbly submit this dispute to this Honorable Court, pursuant to Article 36(1) of the Statute of the International Court of Justice.

## STATEMENT OF FACTS

The Federal States of Alliguna (Alliguna) and the Republic of Revels (Revels) are two neighbouring coastal sovereign states located in the North Atlantic Ocean, approximately 250 nautical miles from the Sargasso Sea. Alliguna is a developed country, primarily engaged in the production of energy. Revels is a developing country, engaged largely in fishing and agriculture.

Alliguna has several rivers which are home to the European Eel, which has been a historically significant to Alliguna's culture and religion. The European Eel is facultatively catadromous and migrates to the Sargasso Sea to spawn, as it relies heavily on the free floating seaweed, *sargassum* for the spawning process. The European Eel is listed as "critically endangered" on the IUCN Red List of Endangered Species, and Alliguna has implemented domestic legislation protecting the eel, in cognizance of the same.

Revels launched a government program where it would provide private entities with subsidies so that they may research and develop renewable energy alternatives to fossil fuels. One such private entity was the SEA Corporation, a private company registered in Revels, that was engaged in the commercial production of renewable energy and biofuels. The subsidy granted by Revels enabled the SEA Corporation to use their ship, the *Columbus*, to harvest sargassum from the high seas area of the Sargasso sea.

Alliguna states that the act of harvesting sargassum is harmful to the European Eels, as it causes an impact on their ecosystem, which is disputed by Revels. Revels endorsed the acts of the SEA Corporation, stating that their acts do not negatively impact the delicate ecosystem of the Sargasso sea, despite there being no scientific evidence confirming the same. Alliguna also states that Revels has violated its obligations under the CBD, UNCLOS, and customary

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international law, and has approached the international court of justice for adjudication on the dispute.

## **SUMMARY OF ARGUMENTS**

### **THE ICJ HAS JURISDICTION OVER THE DISPUTE**

This court has jurisdiction over the present matter as the dispute concerns the interpretation and the application of the CBD, UNFCCC and the Paris Convention. At the same time, the present matter concerns itself neither with the UNCLOS nor the CMS. Further, the principle of *lex posterior* commands the application of CBD as opposed UNCLOS thereby recognizing the forum to be the ICJ. Furthermore, Alliguna has *locus standi* in the present dispute since it is an injured state as well as an interested party. Lastly, it approaches this court with clean hands.

### **REVELS HAS VIOLATED INTERNATIONAL ENVIRONMENT LAW BY HARVESTING WILD SARGASSUM IN THE SARGASSO SEA**

The act of harvesting wild Sargassum for commercial purposes is attributable to Revels since the SEA Corp. was acting under government authority. Further, it is responsible for funding as well as its eventual failure to stop the harvesting, once it was made aware of its ill effects. Therefore, the acts of harvesting undertaken by Revels, has violated international law since there exists a general duty to protect biological diversity in areas beyond national jurisdiction. Such a duty specifically extends for the protection of the Sargasso Sea. Revels has violated the duty to observe an ecosystem approach, the duty to protect the habitat of an endangered species, the duty to cooperate and the precautionary principle. Lastly, the violation of international law cannot be justified by a countervailing duty to prevent climate change.

## ARGUMENTS ADVANCED

### JURISDICTION

#### **I. ICJ DOES HAS JURISDICTION OVER THE DISPUTE**

##### **A. The ICJ Has Jurisdiction Over This Dispute under Relevant Treaties.**

1. The jurisdiction of the ICJ extends to all matters which concern the interpretation and application of Treaties, where parties have opted for the ICJ to settle the dispute.<sup>1</sup> Pursuant to this, the ICJ has jurisdiction in the present matter under the (1) CBD, (2) the UNFCCC and the Paris Agreement.

##### **1) The ICJ has jurisdiction under the CBD.**

2. The ICJ has jurisdiction since (a) the dispute concerns the interpretation and application of the CBD and (b) the principle of *lex posterior* calls for the application of CBD over UNCLOS.

*a) The dispute involves the interpretation and application of the CBD.*

3. The present dispute applies to 1) actions carried out under the control of Revels in areas beyond national jurisdiction [**ABNJ**]<sup>2</sup>. It concerns the interpretation and application of Revels' duty 2) to '*in situ*' conserve the biological diversity<sup>3</sup>, 2) to equitably utilization natural resources<sup>4</sup>, 3)

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<sup>1</sup> Statute of the International Court of Justice, art. 36(1), 18 April 1946, 33 USTS 993 [hereinafter ICJ Statute].

<sup>2</sup> Convention on Biological Diversity, June 5, 1992, art. 4, 31 I.L.M. 818. [hereinafter CBD].

<sup>3</sup> CBD, art. 8.

<sup>4</sup> CBD, art. 1.



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to observe the principle of sustainable development<sup>5</sup>, 4) to protect the habitat of endangered species<sup>6</sup>, 5) to cooperate<sup>7</sup> and 6) to observe the precautionary principle<sup>8</sup>.

4. At the same time, the UNCLOS is inapplicable. On 24<sup>th</sup> December 2017, the General Assembly recognized the need for a legally binding instrument under the UNCLOS on the conservation of marine biological diversity in the ABNJ,<sup>9</sup> indicating the lack of an existing regime.
  
5. Further, states parties to the UNCLOS are obligated to protect the ‘Catadromous’<sup>10</sup> and the ‘Highly Migratory Species’<sup>11</sup> only in the Exclusive Economic Zone of a state. Therefore, the European Eel [**Eel**], being both, catadromous and highly migratory, is not accorded protection in the Sargasso Sea. Further, the UNCLOS envisages protection of the marine environment in the ‘Area’,<sup>12</sup> which is defined as the ‘seabed and ocean floor and subsoil thereof, in the (ABNJ)’.<sup>13</sup> Therefore this protection does not extend to the Sargassum Seaweed [**Sargassum**], which is pelagic in its very nature. Hence, the UNCLOS is inapplicable to the present dispute.

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<sup>5</sup> CBD, art. 6.

<sup>6</sup> CBD, art. 8(f).

<sup>7</sup> CBD, art. 5.

<sup>8</sup> CBD, preamble.

<sup>9</sup> G.A. Res. 72/249 (Dec. 24, 2017).

<sup>10</sup> United Nations Convention on the Law of the Sea, 10 Dec. 1982, 1833 U.N.T.S., art. 67. [hereinafter UNCLOS].

<sup>11</sup> UNCLOS, art.64.

<sup>12</sup> UNCLOS, art.145.

<sup>13</sup> UNCLOS, art.1(1).

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6. Furthermore, CMS does not protect the habitat of a threatened species which is mentioned in its Appendix II.<sup>14</sup> The Eel is listed in Appendix II to the CMS.<sup>15</sup> Therefore CMS does not concern the protection of the Sargasso Sea [**Sea**] as the habitat of the Eel.

### *b) Principle of Lex Posterior calls for the Application of the CBD*

7. When there is a conflict in the application of two treaties, and parties to the later treaty do not include all parties to the earlier one, between states which are party to both the treaties, the earlier treaty applies only to the extent it is compatible with the later treaty.<sup>16</sup> The UNCLOS opened for signature in 1984,<sup>17</sup> while the CBD opened for signature in 1992. Alliguna and Revels signed and adopted both agreements in the first year they were opened for signatures.<sup>18</sup> Further, while the United States of America, among others, is a party to the UNCLOS, it is not a party to the CBD. Therefore, in an event of a dispute, the provisions of the CBD would take precedence over those of the UNCLOS. In the present matter, since there is a conflict of forums under the CBD and the UNCLOS, the forum opted for under the CBD would be applicable. Therefore, ICJ has jurisdiction under the present dispute.

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<sup>14</sup> Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 333, art. IV [hereinafter CMS].

<sup>15</sup> Record, ¶8.

<sup>16</sup> Vienna Convention on the Law of Treaties, art. 30, [1969] 1155 U.N.T.S 331 [hereinafter VCLT].

<sup>17</sup> UNCLOS,

<sup>18</sup> IEMCC Clarifications, Q4.

**2) The ICJ has jurisdiction under the UNFCCC and the Paris Agreement.**

8. To determine jurisdiction under a treaty, the parties claims ought to ‘reasonably relate’ to the obligations under the treaty.<sup>19</sup> Consideration has to be paid to the manner in which issues, diplomatic exchanges, preliminary objections of the parties and other evidence which is relevant.<sup>20</sup>
9. Both parties to the dispute declare that they submit disputes arising from the interpretation of the UNFCCC and the Paris Agreement to the ICJ.<sup>21</sup> Revels has consistently invoked its obligations under the Paris Agreement and the UNFCCC as a justification for its harvesting initiative.<sup>22</sup> Thus, the dispute concerns the determination of Revels’ obligations under the UNFCCC and the Paris agreement.

**B. The Present Dispute Is Admissible.**

10. The present dispute is admissible since (1) Alliguna has *locus standi* and (2) it has approached the court with clean hands.

**1) Alliguna has *locus standi* in the present matter.**

11. Alliguna has locus standi in the present matter since (a) it is an injured state and (b) the present matter involves the interpretation and application of *erga omnes* obligations.

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<sup>19</sup> *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan)*, 2000 Arbitral Tribunal 1 (Aug. 4).

<sup>20</sup> *Id.* at 39.

<sup>21</sup> Record, ¶ 10.

<sup>22</sup> Record, ¶ 10.

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### *a) Alliguna is an Injured State.*

12. According to the traditional understanding of *locus standi*, states ought to be ‘injured’ in order to invoke responsibility of another state.<sup>23</sup> The term ‘injury’ refers to infringement of rights and legally protected interests.<sup>24</sup>
13. In the *Nuclear Disarmament Case*, even though the court denied admissibility owing to the lack of a dispute, it observed that Martial Islands had a specific interest in bringing the claim since it was specifically affected by the refusal of states towards disarmament.<sup>25</sup>
14. The CBD requires states to ‘cooperate ...in respect of [ABNJ]...on matters of mutual interest’<sup>26</sup>. In the present scenario, even though the act of commercial harvesting of wild Sargassum [**Harvesting**] causes general degradation to the biological diversity of the marine environment<sup>27</sup>, it has real potential to specifically affect the Eel,<sup>28</sup> which is ecologically<sup>29</sup> and culturally<sup>30</sup> significant for Alliguna. Therefore, there existed a specific duty to cooperate, before such an activity was carried out.

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<sup>23</sup> I.L.C., Articles on the Responsibility of States for Internationally Wrongful Acts, art. 42, GA U.N.Doc. A/56/10 (2001) [hereinafter ARSIWA].

<sup>24</sup> James Crawford, *State Responsibility* 55 (2013) [hereinafter Crawford].

<sup>25</sup> Obligations concerning Negotiations relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment, 2016 I.C.J. Rep. 255 (October 5).

<sup>26</sup> Convention on Biological Diversity, June 5, 1992, art. 5, 31 I.L.M. 818. [hereinafter CBD].

<sup>27</sup> David Freestone, *Sargasso Sea*, in *The First Global Integrated Marine Assessment* 893-898 (2017).

<sup>28</sup> *Id.*

<sup>29</sup> Record, ¶ 4.

<sup>30</sup> *Id.*

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b) *There exists an Erga Omnes Obligation.*

15. State responsibility can be invoked even in the absence of a direct injury when there is a breach of an obligation ‘which is owed to the entire international community’, more generally an *erga omnes* obligation.<sup>31</sup> In view of this, states have a responsibility “to ensure that activities within their ...control do not cause damage to environment of other states”<sup>32</sup> Such a duty specifically extends to marine biodiversity<sup>33</sup>. While interpreting the same, the court in the case of *Canadian Fisheries Jurisdiction (Astai) Case*, legitimized the use of force by Canada for protection of marine biodiversity, since such a duty is an *erga omnes* obligation.<sup>34</sup>

16. The applicability of the CBD also extends to the ABNJ.<sup>35</sup> Such an interpretation is supported by<sup>36</sup> decisions of the COPs<sup>37</sup> and subsequent agreements,<sup>38</sup> which specifically extend its

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<sup>31</sup> ARSIWA, art. 48.

<sup>32</sup> Rio Declaration on Environment and Development, Principle 2, U.N..Doc.A/CONF.151/5/Rev.1 (16.June.1992); Case Concerning the Gabčíkovo – Nagymaros Project (Hung v.Slovk.), Judgment, 1997 I.C.J. Rep. 7 (September 25) [hereinafter Gabčíkovo].

<sup>33</sup> Fisheries Jurisdiction (U.K. v. Ice.), Merits, 1974 I.C.J. Rep. 3 (July 25).

<sup>34</sup> Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1996 I.C.J. 432 (December 4).

<sup>35</sup> CBD, art. 4.

<sup>36</sup> Jonathan M. Verschuuren, Ramsar Soft Law Is Not Soft at All (2008) [http://www.ramsar.org/pdf/wurc/wurc-verschuuren\\_bonaire.pdf](http://www.ramsar.org/pdf/wurc/wurc-verschuuren_bonaire.pdf); Natural Res. Def. Council v. Env'tl. Prot. Agency, 464 F.3d 1 (D.C. Cir. 2006)

<sup>37</sup> UNEP/CBD/COP/DEC/VII/5 (13 April 2004); UNEP/CBD/COP/DEC/VIII/21 (15 June 2006); UNEP/CBD/COP/DEC/X/29 (29 October 2010); UNEP/CBD/COP/DEC/XI/24 (5 December 2012).

<sup>38</sup> The Hamilton Declaration On Collaboration for the Conservation of the Sargasso Sea, (March 11, 2014) [hereinafter, Hamilton].

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applicability to the high seas. Therefore, the CBD codifies *erga omnes* obligation to protect biological diversity in the high seas.

17. The present matter concerns itself with the violation of the duty to protect biological diversity in the High Seas. Therefore, Alliguna, being a state party to the CBD, has a legitimate interest in bringing the present matter before the ICJ.

### **2) Alliguna has approached this court with ‘clean hands’.**

18. According to the ‘clean hands’ doctrine, applicant cannot approach the court being guilty of its own illegality.<sup>39</sup> Revels indicates that by using its rivers to generate hydroelectricity,<sup>40</sup> Alliguna has violated international law.
19. Such an assertion is false, since harnessing hydroelectric power is materially different from harvesting, on many grounds. *Firstly*, states possess complete sovereignty over its own natural resources<sup>41</sup>, as opposed to over the High Seas.<sup>42</sup> *Secondly*, the Sea is the only place where the Eel spawns, while it spends its adult life in numerous freshwater habitats across the world.<sup>43</sup> Therefore, while Alliguna’s freshwater habitat is essential for the Eel, the Sea is critical for its existence. Therefore, Alliguna has not approached this court with clean hands.

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<sup>39</sup> Case Concerning Continental Shelf (Tunis. v. Libyan Arab Jamahiriya), Dissenting Opinion, 1982 I.C.J. Rep. 60, (February 24).

<sup>40</sup> Record, ¶ 19.

<sup>41</sup> CBD, preamble.

<sup>42</sup> UNLCOS, arts 89, 90.

<sup>43</sup> *Anguilla anguilla*: Jacoby, D. & Gollock, M., IUCN Red List of Threatened Species (2014). [hereinafter IUCN Red List].

**MERITS**

**II. REVELS HAS VIOLATED INTERNATIONAL ENVIRONMENT LAW BY HARVESTING WILD SARGASSUM IN THE SARGASSO SEA.**

20. Revels has violated international law by Harvesting since (A) such an act is attributable to it and (B) it constitutes violation of international law. Lastly (C) a violation of such a duty cannot be justified by a countervailing duty to prevent climate change.

**A. The Act of Harvesting Sargassum is Attributable to Revels.**

21. The jurisdictional scope of CBD extends to acts carried out by state parties ‘...under ... [their] jurisdiction or control ... beyond the limits of national jurisdiction’.<sup>44</sup> The act of Harvesting is attributable to the Revels since (1) SEA Corp. was exercising government authority. (2) *In any case*, it acted under the control of Revels.

**1) SEA Corp. was acting under Government Authority.**

22. States can be held responsible for the acts of a person, not being an organ of the State, if such a person was exercising elements of governmental authority at the time when the acts were committed.<sup>45</sup> While government authority has been defined as being 'empowered by the law of that state'<sup>46</sup>, such a criterion ought to be read liberally to mean ‘specific delegation’.<sup>47</sup> Further, in order to determine the same, the purpose of such a delegation ought to be enquired into.<sup>48</sup>

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<sup>44</sup> CBD, art. 4.

<sup>45</sup> ARSIWA, art. 5.

<sup>46</sup> Malcolm N Shaw, *International law* 787 (6 ed. 2008).

<sup>47</sup> Crawford, p. 130.

<sup>48</sup> (1985) 9 Iran – US CTR 72, 89.

23. In the present matter, the SEA Corp. received subsidy under a ‘government ...program’ which aims at reducing greenhouse emissions<sup>49</sup> and promotes ‘select’ non-governmental agencies for the fulfilment of the said objective.<sup>50</sup> This program was launched in pursuance of its NDC commitment under the Paris Agreement.<sup>51</sup> Since enforcement of treaty obligations is state function, its delegation of the same to the SEA Corp. renders it a government authority.

**2) The Act of Harvesting Happened under the Control of Revels.**

24. States can be held responsible for the acts of a person, which is a non-state entity when that person acts under the direction or control of the state.<sup>52</sup> In view of this, Revels is responsible for (a) funding and (b) its subsequent failure in taking any steps to stop the act of harvesting.

*a) Responsibility for funding*

25. In the *Case Concerning Armed Activities in and against Nicaragua*, this court employed the ‘effective control’ test for assessing the responsibility of the United States (the US) in aiding the paramilitary activities in and against Nicaragua.<sup>53</sup> The standard for ‘effective control’ is that of ‘complete dependence’<sup>54</sup>. Therefore, even though the court observed the involvement

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<sup>49</sup> Record, ¶ 14.

<sup>50</sup> Record, ¶ 14.

<sup>51</sup> Record, ¶ 14.

<sup>52</sup> James Crawford, *The International Law Commission's Articles on State Responsibility* 123 (2003), art. 8 comment 8 [hereinafter ARSIWA Commentary].

<sup>53</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.)*, Merits, 1986 I.C.J. Rep. 14, ¶ 62 (June 27) [hereinafter *Nicaragua*].

<sup>54</sup> *Id.*



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of the US in creating and financing the paramilitary forces, but it held that it lacked ‘effective control’<sup>55</sup>. However, it found the US responsible for supporting the paramilitary forces, which in itself was considered an internationally wrongful act<sup>56</sup>.

26. In the present matter, the harvesting project was able to be carried out but because of the funding received from the government of Revels.<sup>57</sup> Therefore, the act of funding is attributable to Revels.

### *b) Responsibility for omitting to take any steps*

27. In the *Tehran Hostages Case*<sup>58</sup>, even though the state was not held responsible for taking over the US embassy, it was held liable for not taking the requisite actions to protect the diplomats, once it was made aware of the situation.<sup>59</sup>

28. In the present matter, Revels was informed about the potential threats of Harvesting,<sup>60</sup> however, it made no efforts to put an end to such an activity or to even enquire into its potential threats even though it conceded that it was not ‘aware’ of the same.<sup>61</sup> Therefore, Revels is responsible for its failure to take corrective steps, once it was aware of the potential harm.

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Record, ¶ 14; IEMCC Clarifications, Q18.

<sup>58</sup> United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶ 74 (May 24).

<sup>59</sup> *Id.*

<sup>60</sup> Record, ¶ 18.

<sup>61</sup> Record, ¶ 19.

**B. The Act of Harvesting is an internationally Wrongful Act.**

29. The act of Harvesting is an internationally wrongful act since (1) there exists a duty to protect the Sargasso Sea and (2) Revels violated this duty.

**1) There exists a duty to protect the Sargasso Sea.**

30. The CBD protects the ABNJ<sup>62</sup>, which specifically extend to the protection of high seas.<sup>63</sup> This interpretation is supported by existing custom<sup>64</sup> and international policy.<sup>65</sup> According to Art. 2 of the CBD, a ‘protected area’ is one which is managed to achieve specific conservation objectives.<sup>66</sup> Marine biological diversity has been explicitly included in the identification of ‘protected areas’.<sup>67</sup> The test to identify ‘protected areas’, as explained in Annex I to the CBD, is that of ‘ecological and biological significance’.<sup>68</sup> The Sea is considered an ecologically and

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<sup>62</sup> CBD, art. 4.

<sup>63</sup> UNEP/CBD/COP/DEC/VII/5 (13 April 2004); UNEP/CBD/COP/DEC/VIII/21 (15 June 2006); UNEP/CBD/COP/DEC/X/29 (29 October 2010); UNEP/CBD/COP/DEC/XI/24 (5 December 2012).

<sup>64</sup> Stockholm Declaration, U.N. Doc. A/CONF.48/14/Rev.1 (16 June 1972), Principle 21 [hereinafter Stockholm]; Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment* 109 (3 ed. 2009).

<sup>65</sup> DIRECTIVE 2008/56/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), L 164/19, 17 June 2008, ¶17; 98/392/EC: Council Decision of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof; A/CONF.151/26 (Vol. II)

<sup>66</sup> CBD, art. 2.

<sup>67</sup> CBD, annex 1; UNEP/CBD/COP/DEC/VII/5 (13 April 2004); UNEP/CBD/COP/DEC/VII/28 (13 April 2004).

<sup>68</sup> UNEP/CBD/COP/DEC/IX/20 (9 October 2008).

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biologically significant area.<sup>69</sup> Such a characterization is supported by subsequent agreements<sup>70</sup> indicating its legal enforceability. Therefore, there exists a duty to protect the Sea.

### **2) Revels Has Violated the duty to Protect the Sargasso Sea.**

31. Revels has violated the (a) duty to observe an ecosystem approach, (b) the duty to protect the habitat of an endangered species, (c) the duty to cooperate and (d) the precautionary principle.

#### *a) The Ecosystem Approach.*

32. The CBD envisages an ‘ecosystem approach’ which aims at fulfilling three goals of Convention; (i) conservation (ii) sustainable development and (iii) equitable utilisation of natural resources.<sup>71</sup> Such a duty specifically extends to the ABNJ.<sup>72</sup>

#### *i. Duty to Conserve.*

33. The CBD requires parties to ‘identify ...protected areas where special measures need to be taken to conserve biological diversity’.<sup>73</sup> Further, parties are to develop guidelines for the protection of the same.<sup>74</sup> Furthermore, parties are obligated to rehabilitate and restore such areas.<sup>75</sup>

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<sup>69</sup> UNEP/CBD/COP/DEC/XI/17 (5 December 2012).

<sup>70</sup> Hamilton.

<sup>71</sup> Secretariat of the Convention on Biological Diversity, The Ecosystem Approach, (CBD Guidelines) 50 (2004).

<sup>72</sup> CBD, art. 4.

<sup>73</sup> CBD, art. 8(a).

<sup>74</sup> CBD, art. 8(b).

<sup>75</sup> CBD, art. 8(f).

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34. The Hamilton Declaration identifies the Sea as an area in which ‘health, productivity and resilience’ ought to be protected.<sup>76</sup> It further creates a ‘Sargasso Sea Commission’ to provide guidelines for the protection of the Sea.<sup>77</sup> The CBD characterizes protected areas on the ability to handle human extractive activities.<sup>78</sup> The Sea has been characterized as ‘high’ on its vulnerability, fragility, slow recovery and sensitivity,<sup>79</sup> thereby indicating its inability to handle human extractive activities. Moreover, other analogous treaties have also extended special status to the Sea.<sup>80</sup>
35. The Harvesting involves extracting the entire weed mass of the Sargassum, converting it into biofuel and fertilizing regions of oceans for a good harvest.<sup>81</sup> Both, commercial players<sup>82</sup> as well as international regimes<sup>83</sup> recognise its detrimental effect on biological diversity<sup>84</sup> in the region. Therefore, by indulging in Harvesting, Revels has acted in contravention of its duty to conserve marine biological diversity.

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<sup>76</sup> Hamilton, Annex 2.

<sup>77</sup> *Id.*

<sup>78</sup> UNEP/CBD/COP/DEC/VII/5 (13 April 2004).

<sup>79</sup> UNEP/CBD/COP/DEC/XI/17 (5 December 2012).

<sup>80</sup> NAFO/COP 37/ Recommendation.

<sup>81</sup> United States Patent Application, US2008/0057177A

<sup>82</sup> Lenstron, J. van Haal, J. and H. Reith. 2011. Economic aspects of open ocean seaweed cultivation. Algn’ Chem 2011, Montpellier, France, Conference 7–10 November 2011.

<sup>83</sup> J. A. Vasquez, *Ecological Effects of Brown Seaweed Harvesting*, 38(1-6) BOTANICA MARINA (1995); 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 (2009); <https://www.cbd.int/doc/meetings/mar/rwebsa-wcar-01/other/rwebsa-wcar-01-sargasso-sea-alliance-02-en.pdf>.

<sup>84</sup> *Id.*

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### ii. Principle of Sustainable Development.

36. The Principle of Sustainable Development requires parties to protect intergenerational equity while pursuing their own developmental goals.<sup>85</sup> This means, that the present developmental agendas of a state cannot compromise the ability of its future generations to develop.<sup>86</sup> This principle has crystalized into a rule of Customary International Law.<sup>87</sup>

37. The Eel is threatened by Harvesting.<sup>88</sup> A reduction in the number of the Eels is irreversible even by human interventions.<sup>89</sup> Therefore, Harvesting is contrary to the principle of the Sustainable Development.

### iii. Duty to Equitably Utilise.

38. Parties are obligated to utilise ‘shared natural resources’ in an equitable manner,<sup>90</sup> thereby not compromising on its use by another state.<sup>91</sup> The biological resources found in the high seas have been characterised as a ‘common concern of humankind’.<sup>92</sup>

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<sup>85</sup> Philippe Sands, Jacqueline Peel & Ruth MacKenzie, *Principles of International Environmental Law* (2012).

<sup>86</sup> *Id.*

<sup>87</sup> Gabčíkovo, dissenting opinion of Judge Weeramantry.

<sup>88</sup> William B. Chambers, *Session Four: European Eel Experience*, 21 *Ocean and Coastal Law Journal* 87 (2016).

<sup>89</sup> IUCN Red List.

<sup>90</sup> *Territorial Jurisdiction of the International Commission of the River Oder* (F.R.G, Den. Fr., Gr. Brit., Swed., Czech Rep., Pot), 1929 c (ser. A) No. 23 at 16 (Sept. 10)

<sup>91</sup> *Lake Lanoux* (Fr. v. Spain), *Arbitral Tribunal*, 1957, 24 *I.L.R.* 101 (Nov. 16)

<sup>92</sup> CBD, Preamble.

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39. The Sea contributes significantly towards ‘earth system processes’.<sup>93</sup> Its ecosystem is based upon the Sargassum, which is the only pelagic seaweed in the world.<sup>94</sup> Therefore, Harvesting Sargassum, puts at risk, the ecological balance of the entire world. Thus, by indulging in Harvesting, Revels has violated the obligation to utilise shared natural resources in an equitable manner.

### *b) Duty to Protect the Habitat of An Endangered Species.*

40. The CBD requires parties to protect the habitat of a threatened species<sup>95</sup> and improve its conservation status.<sup>96</sup> A ‘Habitat’ is defined as a place where a species naturally occurs.<sup>97</sup>

41. The Eel is critically endangered<sup>98</sup> and is listed under Annex II of the CMS<sup>99</sup>. It is facultatively catadromous<sup>100</sup> and is semelparous<sup>101</sup>. It spawns only once in its lifetime and exclusively in the midst of the Sargassum.<sup>102</sup> Harvesting reduces the density of the seaweed thereby affecting its

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<sup>93</sup> 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

<sup>94</sup> *Id.*

<sup>95</sup> CBD, art. 8(f).

<sup>96</sup> Aichi Biological Diversity Target, Target No. 12, <https://www.cbd.int/sp/targets/>.

<sup>97</sup> CBD, art. 1(g).

<sup>98</sup> IUCN Red List.

<sup>99</sup> Appendices I and II of the Convention on the Conservation of Migratory Species of Wild Animals, appendix II, Feb. 23, 2012.

<sup>100</sup> IUCN Red List.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

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spawning capacity.<sup>103</sup> Therefore, Harvesting is in gross violation of the duty to protect the habitat of a threatened species.

### *c) Duty to Cooperate.*

42. Parties are under an obligation to cooperate on matters pertaining to the ABNJ for the purposes of conservation.<sup>104</sup> Such a duty has been specifically recognised as part of customary law for the protection of marine biological diversity.<sup>105</sup>

43. It has been observed that the CBD lends little clarity on the meaning of the ‘duty to cooperate’ in a transboundary context.<sup>106</sup> In order to construe the same, reliance has been placed on existing customary rules.<sup>107</sup> Under Customary International Law, such a duty gets triggered when there exists a (i) risk of significant harm (ii) in a transboundary context. In such circumstances parties are (iii) obligated to notify, consult and negotiate, in good faith.<sup>108</sup>

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<sup>103</sup> Chambers, *supra* note 88.

<sup>104</sup> CBD, art.5.

<sup>105</sup> The Mox Plant Case (Ireland v. U.K.), Case No. 10, Order of Dec 3, 2001, ITLOS Rep. 1. ¶82.

<sup>106</sup> Brels, S., Coates, D., and Loures, F. (2008). Transboundary water resources management: the role of international watercourse agreements in implementation of the CBD. CBD Technical Series no. 40, 48 pages. Secretariat of the Convention on Biological Diversity, Montreal, Canada.

<sup>107</sup> UNEP/CBD/EG-L&R/1/INF/2.

<sup>108</sup> SAND ET AL.,

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### i. Risk of significant harm.

44. In order to trigger such a duty, there ought to be a ‘risk’ of a ‘significant’ harm.<sup>109</sup> Risk’ is defined as ‘high probability of causing significant transboundary harm’<sup>110</sup>. The term “significant” means more than detectable.<sup>111</sup>
45. Since Eels are critically endangered, the further reduction in its number could lead to its extinction.<sup>112</sup> The risk of such an occurrence is high, since Harvesting has a deleterious impact on the lifecycle of the Eel. Therefore, there is ‘high’ probability of causing ‘significant’ harm.

### ii. Transboundary Context.

46. The CBD regulates activities carried out in the ABNJ under the control of the state.<sup>113</sup> When such activities materially impact another state, the harm is said to happen in a ‘transboundary context’.<sup>114</sup>

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<sup>109</sup> Corfu Channel Case (U.K. v. Alb.), Merits, 1949 I.C.J. Rep. 4, ¶ 22 (April 9).

<sup>110</sup> Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, U.N. Doc. A/56/10; GOAR, 53d Sess., Supp. No. 10 (2001).

<sup>111</sup> *Id.*

<sup>112</sup> IUCN Red List.

<sup>113</sup> CBD, art. 4.

<sup>114</sup> Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, U.N. Doc. A/56/10; GOAR, 53d Sess., Supp. No. 10 (2001)



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47. In view of the ‘ecosystem approach’,<sup>115</sup> an ‘ecosystem’ is defined as ‘a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit’. The Eel, being migratory in nature, contributes not only to the aquatic ecosystems but also to the adjacent terrestrial ones by being an essential part of the ‘food webs, nutrient cycling, abiotic properties of the ecosystem and relationships with other organisms’<sup>116</sup>. Since the Eel appears in several of Alliguna’s rivers,<sup>117</sup> it is an important component of Alliguna’s ecosystem. Therefore, the risk of harm exists in a transboundary sense.

iii. The duty to notify, consult and negotiate.

48. The ‘duty to cooperate’, involves a duty to notify, consult and negotiate in good faith.<sup>118</sup> As per the duty to notify, states ought to supply all relevant information to the affected party<sup>119</sup>, usually collected by way of an environmental impact assessment.<sup>120</sup> Further, while cooperating, parties

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<sup>115</sup> UNEP/CBD/COP/DEC/II/8 (14 November 1995); UNEP/CBD/DEC/VI/12 (April 2002); UNEP/CBD/COP/DEC/VII/11 (13 April 2004); UNEP/CBD/COP/DEC/IX/7 (9 October 2008); UNEP/CBD/COP/DEC/XII/19 (17 October 2014).

<sup>116</sup> Sérgio Catarina de Amorim Costa Dias, Ecology and trophic dynamics of the European eel, *Anguilla anguilla* (L.) (2010), <https://repositorio-aberto.up.pt/bitstream/10216/50166/2/PhD%20Sergia%20CD.pdf> (last visited Nov 18, 2018).

<sup>117</sup> Record, ¶ 3.

<sup>118</sup> SANDS ET AL., *supra* note 85.

<sup>119</sup> Case concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14 ¶ 197

<sup>120</sup> *Id.*; CBD, Art. 14

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ought not act in a formalistic sense,<sup>121</sup> but negotiate and consult in a bona fide manner with the intention of arriving at a mutually beneficial position.<sup>122</sup>

49. Not only did Revels fail notify its plans of Harvesting but has shown no intention to come to a mutually suitable solution. It denies, both, the possibility of harm and its involvement in the project, despite the fact that it concedes that it is ‘unaware’ of such a possibility.<sup>123</sup> Therefore Revels has violated the ‘duty to cooperate’.

### *d) The Precautionary Principle.*

50. The parties to the CBD are required to adopt a precautionary approach.<sup>124</sup> According to the precautionary principle, “where there exists a risk of a serious or irreversible damage, lack of scientific evidence should not be used as a defense for not taking precautionary steps”.<sup>125</sup> In order to determine the possibility of risk, the states are to act upon the best knowledge available.<sup>126</sup> This principle recognized in Customary International Law,<sup>127</sup> is also supported by sufficient instances of state practice.<sup>128</sup>

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<sup>121</sup> Lake Lanoux Arbitration; Corfu Channel Case.

<sup>122</sup> Gabčíkovo.

<sup>123</sup> Record, ¶ 19.

<sup>124</sup> CBD, preamble.

<sup>125</sup> Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (16 June 1992).

<sup>126</sup> IUCN, Guidelines for applying the precautionary principle to biodiversity convention and natural resource management, (May. 16, 2007)

<sup>127</sup> Case concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14.

<sup>128</sup> Jeremy H.M. Newsum v. Welsh Assembly Government, 2004 Env L.R. 39 ; Regina v. Secretary of State for Trade and Industry, Ex Parte Greenpeace Ltd., [1998] Env L.R. 415.

51. Since, data collection on the Eel is tough and time consuming,<sup>129</sup> the lack of its evidence cannot negate the risk of its harm to the biological diversity. But as per the best knowledge, harvesting is harmful for the Eel.<sup>130</sup>
52. Therefore, even though there exists an absence of precedence for Harvesting or any proof of harm, Revels has acted in contravention to the best knowledge available. Therefore, Revels has acted contrary to the precautionary principle.

**C. A Violation of Such a Duty Cannot Be Justified by a Countervailing Duty to Prevent Climate Change.**

53. The protection of biological diversity and prevention of climate change are equally important concerns under environmental protection.<sup>131</sup> Biofuel production can be harmful to the biological diversity of an area.<sup>132</sup> The provisions of the CBD do not affect rights and obligations under any other convention to the extent that exercise of such rights and obligations cause threat to biological diversity of the region.<sup>133</sup> Pursuant to this, even though the CBD recognises

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<sup>129</sup> Chambers, *supra* note 88.

<sup>130</sup> *Id.*

<sup>131</sup> Michael Bowman, *Conserving Biological Diversity in an Era of Climate Change: Local Implementation of International Wildlife Treaties*, 53 *German Yearbook of International Law* 289 (2010).

<sup>132</sup> Allison Campbell & Nathalie Doswald, *The impacts of biofuel production on biodiversity: A review of the current literature* (2009), <https://www.cbd.int/agriculture/2011-121/UNEP-WCMC3-sep11-en.pdf> (last visited Nov 13, 2018).

<sup>133</sup> CBD, art. 22.

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the importance of biofuels for the purposes of climate change, it prohibits its use in circumstances where biological diversity can be compromised.<sup>134</sup>

54. Since the Sea is an ecologically sensitive area and is rich in biological diversity<sup>135</sup>, its ecological protection trumps the right to Harvest, even for the purpose of preventing climate change. Therefore, violation of the duty to protect the Sargasso Sea cannot be justified by a countervailing duty to prevent climate change.

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<sup>134</sup> UNEP/CBD/COP/DEC/IX/2 (9 October 2008); UNEP/CBD/COP/DEC/XI/27 (5 December 2012); UNEP/CBD/COP/DEC/XII/7 (17 October 2014).

<sup>135</sup> UNEP/CBD/COP/DEC/XI/17 (5 December 2012).

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**CONCLUSION AND PRAYER FOR RELIEF**

In light of the above facts, issues discussed, and the arguments raised, the Applicant, the Federal States of Alliguna, respectfully requests the Court to adjudge and declare that:

1. The International Court of Justice has jurisdiction over this dispute; and
2. The Republic of Revels was in violation of its international obligations when the SEA Corporation engaged in the act of harvesting *sargassum* in the Sargasso Sea.

MOST RESPECTFULLY AND HUMBLY SUBMITTED,

AGENTS OF THE APPLICANT.

