Team No. 1919

THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

THE CASE CONCERNING THE

USE OF THE SARGASSO SEA

AND THE PROTECTION OF EELS

THE FEDERAL STATES OF ALLIGUNA

APPLICANT

v.

THE REPUBLIC OF REVELS

RESPONDENT

MEMORIAL FOR THE RESPONDENT

THE 2018-2019 STETSON'S INTERNATIONAL

ENVIRONMENTAL MOOT COURT COMPETITION

NOVEMBER 2018

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LIST OF ABBREVIATIONS

ICJ	International Court of Justice
UNCLOS	United Nations Convention on the Law of the Sea
CBD	Convention on Biological Diversity
CMS	Convention on the Conservation of Migratory Species of Wild Animals
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
UNFCCC	United Nations Framework Convention on Climate Change
COP	Conference of the Parties
NDC	Nationally Determined Contributions
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
ITLOS	International Tribunal for the Law of the Sea
EBSA	Ecologically or Biologically Significant Marine Area
ILC	International Law Commission
PCIJ	Permanent Court of International Justice
EIA	Environmental Impact Assessment
UNTS	United Nations Treaties Series
UNEP	United Nations Environment Programme
ILM	International Legal Materials
IUCN	International Union for the Conservation of Nature

STATEMENT OF JURISDICTION

On 21 April 2018, the Federal States of Alliguna (Applicant) filed an application instituting proceedings against the Republic of Revels (Respondent), to which the Respondent filed its Preliminary Objection on 5 May 2018. On 16 July 2018, both States submitted a Joint Written Statement to the Registrar, requesting the Court to decide the jurisdictional 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 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 TO DETERMINE THE MATTER AND WHETHER THE CONDUCT AT ISSUE IS ATTRIBUTABLE TO THE STATE OF REVELS

II.

WHETHER THE REPUBLIC OF REVELS VIOLATED INTERNATIONAL LAW BY NEGATIVELY IMPACTING THE EUROPEAN EEL WITH THE HARVESTING OF SARGASSUM IN THE SARGASSO SEA

STATEMENT OF FACTS

The Republic of Revels and the Federal States of Alliguna are neighboring coastal states located on Ugani, near Sargasso Sea. They are parties to the Statute of the ICJ, UN, VCLT, CBD, CMS, UNCLOS, UNFCCC, Paris Agreement and Hamilton Declaration. Alliguna is developed with a diversified economy, while Revels is a developing country, which relies on fishing and agriculture.

In July 2016, the SEA Corporation, a privately-owned company in Revels, launched an initiative to harvest sargassum from the Sargasso Sea for biofuel production. The project received subsidy from Revels to help reduce greenhouse gas emissions and meet NDC commitments.

Alliguna informed Revels of its concerns with the potential negative impacts of the harvesting of sargassum to the European eels and requested that the project be halted. Throughout 2017, various diplomatic notes were exchanged, though failing to resolve the dispute.

In February 2018, Alliguna requested Revels to agree to the submission of this dispute to the ICJ, which Revels refused. Alliguna then submitted an Application instituting proceedings to the ICJ, to which Revels submitted a Preliminary Objection.

SUMMARY OF ARGUMENTS

I. The ICJ does not have jurisdiction over the dispute. *Firstly,* Revels has not recognized the Court's jurisdiction as compulsory, while UNCLOS and CMS do not concede this Court jurisdiction in the present matter. *Secondly,* CBD should not govern this dispute because CMS is *lex specialis*, and the possible effects on the biodiversity of the Sargasso Sea were not part of the Applicant's claim. *Thirdly,* UNFCCC and Paris agreement should not govern this case since the dispute's subject-matter is not regulated by them. *Finally,* none of the SEA Corporation's conducts are attributable to Revels pursuant to ARSIWA.

II. The Respondent has not violated international law by negatively impacting the European eel in the Sargasso Sea. *Firstly*, the Applicant did not meet the necessary burden of proof to hold Revels accountable for any impacts on European eels. *Secondly*, Revels acted in accordance with the purposes and obligations of UNCLOS, CMS, CBD and Hamilton Declaration. *Thirdly*, hydropower facilities from the Applicant are harmful to the European eels. *Lastly*, Revels complied with the duty to prevent transboundary harm, the precautionary principle and the principle of sustainable development.

ARGUMENTS

I. The International Court of Justice does not have jurisdiction to determine the matter and the conduct at issue is not attributable to the State of Revels

A. The International Court of Justice does not have jurisdiction over the case

The Republic of Revels has not recognized the International Court of Justice's (ICJ) jurisdiction as compulsory pursuant to article 36 of its Statute.[1] Therefore, jurisdiction must be examined casuistically[2] as to whether the subject-matter of the dispute falls under a treaty which, in turn, provides the Court jurisdiction.[3]

1. CMS prevails as lex specialis vis-à-vis CBD

The *lex specialis derogat legi generali* is an interpretation technique used to establish which law is to be applicable on a given dispute.[4] On the *PCIJ Mavrommatis Palestine Concessions Case*, the Court held that, in conflicts between legal provisions, preference should be given to the "special and more recent agreement".[5] Consequently, whenever two or more norms regard the same subject-matter, preference should be given to the more specific norm.[6]

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[1] Statute of the International Court of Justice art. 36

[2] Shany, Y., *Jurisdiction and Admissibility,* The Oxford Handbook of International Adjudication, 2013, Chapter 36, at 798 and 800.

[3] *Southern Bluefin Tuna*, New Zealand v Japan, Provisional Measures, ITLOS Case No 3, (1999) 38 ILM 1624, ICGJ 337 (ITLOS 1999), 27th August 1999, ITLOS, at 31.

[4] International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*. Yearbook of the International Law commission, 2006, Vol. II, Part Two, para. 178; para. 251(5).

[5] *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30), at 31.

[6] *Supra note* 4, para 5.

In the present matter, Alliguna specifically requested the Court to hold Revels responsible for "negatively impacting the European eel through the Sargassum harvesting project in the Sargasso Sea".[7] In such, the claims of the Applicant are *solely* related to the project's possible effects on the European eel, and not on the Sargasso Sea ecosystem, for why the applicable law should be one that governs the protection of this particular species.

The Convention on Biological Diversity (CBD) aims for the conservation of biological diversity and the sustainable use of its components. To that extent, it determines that State-parties shall cooperate with each other,[8] develop national strategies[9] and adopt economically and socially sound measures as an incentive to foster its objectives.[10] In relation to jurisdiction, both parties have agreed to submit any dispute concerning the application of this Convention to the ICJ.

The Convention on Migratory Species (CMS), however, directly addresses the protection of migratory species, especially the European eel, which is present in its Appendix II regarding endangered species and is also the focus of a concerted action proposal.[11] Regarding jurisdiction, article XIII of CMS provides that if negotiation fails to resolve a dispute, then State-parties shall resolve the matter through arbitration.[12]

Accordingly, CBD does not specifically address migratory species, nor does it regulate the protection of the European eel, but rather establishes a broad regime for the

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[7] Record, ¶26.

[8] Convention on Biological Diversity, 6 June 1992, 1760 U.N.T.S 79 [CBD], art. 5.

[9] Ibid, art. 8.

[10] Ibid, art. 11.

[11] CMS COP 12, Doc. 26.2.1, *Proposal for a concerted action for the European eel (Anguilla anguilla) already listed on appendix II of the convention.*

[12] Convention on the Conservation of Migratory Species of Wild Animals, Jun 23, 1979, 1651 U.N.T.S. 333 [CMS], art. VIII.

protection of all biological diversity. Thereupon, the specificity of CMS qualifies it as *lex specialis vis-à-vis* CBD's general regulations.[13]

Besides, even though the Sargasso Sea is designated as an Ecologically or Biologically Significant Marine Area (EBSA) under the CBD, the claim made by the Applicant is strictly related to the effect of the project on the European eel, as previously demonstrated.[14]

Hence, in accordance with the abovementioned judgement,[15] the applicable technique is indeed the one that undeniably concedes CMS preference to rule this case, since it is the more specific norm regarding the present subject-matter.

In conclusion, CBD should not govern this dispute because (1) CMS is *lex specialis* in comparison to it, and thus better regulates the subject-matter of this dispute, and (2) possible effects on the biodiversity of the Sargasso Sea were not part of the claim made by the Applicant. Hereinafter, the ICJ does not have jurisdiction to resolve this dispute, since CMS does not concede it the power to do so.[16] Rather, according to article VIII of the latter convention, parties shall resort to arbitration.

2. When parties choose different dispute settlement procedures under UNCLOS, arbitration becomes the only means to resolve the dispute

Article 87 of UNCLOS provides that all states have freedoms on the high seas. Notwithstanding, Alliguna sustained that possibly damaging the European eels on the Sargasso Sea "goes beyond what is permitted on the high seas and violates UNCLOS Articles 117, 118, 192, and 300".[17] However, even though the applicant submitted the dispute

[13] CBD, *supra note* 8, art. 1.

[14] Record, ¶26.

[15] *PCIJ Mavrommatis* Case, *supra note* 5, at 31.

[16] CMS, *supra not*e 12, art. XIII.

[17] Record, ¶22.

concerning this Convention to the ICJ, it failed to consider the applicable dispute settlement procedure.

Pursuant to article 287(5) of UNCLOS, when two State-parties have chosen different procedures for settlement of disputes upon ratifying the Convention, the applicable procedure becomes arbitration.

According to paragraph 9 of the Record, when becoming State-parties to UNCLOS, Alliguna chose the ICJ for the settlement of disputes concerning the interpretation of the Convention, while Revels chose the International Tribunal on the Law of the Sea (ITLOS). Therefore, since the parties did not accept the same procedure, the dispute concerning UNCLOS shall be resolved through arbitration, as determined by article 287(5).

3. UNFCCC and Paris Agreement have a distinct subject-matter and do not govern this case

On the *Nuclear Tests* case, the ICJ established that "it is the Court's duty to isolate the real issue in the case and to identify the object of the claim", or, in other words, the subject-matter of the dispute.[18] This is of utmost importance since the subject-matter is key to identifying which court has jurisdiction for the settlement of a dispute.

The main objective of the UNFCCC is "to achieve stabilization of greenhouse gas concentrations in the atmosphere"[19] at an acceptable level to prevent hazardous interference with the climate system, while the Paris Agreement's[20] aim is to "strengthen the global

[18] *Nuclear Tests (Australia v. France)*, Judgment, I. C. J. Reports, 1974, para. 262.

[19] United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107 [UNFCCC], art.2.

[20] Conference of the Parties, Adoption of the Paris Agreement, Dec. 12, 2015 U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015) [Paris Agreement].

response to the threat of climate change".[21] Therefore, both treaties focus on climate change and the necessary actions to counter its effects.

In the present case, the object of the claim made by the Applicant is the effects of the project on the European eels[22], and not the intentions of the project nor the Nationally Determined Contributions (NDC). This commitment from Revels was not included as the subject of the dispute in the Application Instituting Proceedings.[23]

As stated in the record, Alliguna seeks an order from the ICJ declaring that Revels violated international law by negatively impacting *the European eel* through the sargassum harvesting project in the Sargasso Sea. Syntactically, the main part of the predicate is *to impact*, hence a conduct rather than an intention, and its direct object *the European eel*, not the atmosphere.[24]

In such, the subject-matter of this dispute, as defined by the Applicant itself, is not part of the scope of the UNFCCC nor the Paris Agreement. If it were to be so, the Applicant would have to question the fulfillment of the commitments made under them. However, instead, its claims are solely based on the project and its effects on the European eels and, therefore, this dispute should not be governed by the abovementioned treaties, since the present dispute's subject-matter is not regulated by them.

4. Possible alternatives for resolution of the dispute within the applicable treaties

Considering the prevalence of CMS regarding this case, since (a) CMS is *lex speciallis* over CBD and (b) the subject-matter lies under the scope of hypothetical damages

[21] Ibid, art. 2.

[22] Record, ¶26.

[23] Record, Annex B.

[24] Record, ¶26.

to the European eel, *then* this dispute shall be resolved through arbitration pursuant to article VIII of CMS.

Nonetheless, another possible procedure could be the CMS' Review Mechanism from COP 12, which is presented as a time-efficient and cost-effective process "with the aim of ensuring long-term compliance".[25] Through this process, the application of Articles III.4, III.5, III.7, and VI.2 of the Convention could be examined both legally and scientifically, thus rendering a better solution.[26] This mechanism could be a reasonable alternative for both States, since CMS best addresses this dispute's subject-matter and an implementation action plan would be of great importance for "identifying challenges and appropriate steps".[27]

B. The SEA Corporation's conduct is not attributable to Revels

1. Sailing under the flag does not imply attribution

The SEA Corporation's vessel flied under the flag of the Republic of Revels,[28] fulfilling the obligation of sailing under the flag of one State only.[29] Therefore, this State has jurisdiction over the ship — exercising its power to prescribe rules of conduct and enforce sanctions.[30]

Accordingly, the relationship between the Respondent and the vessel implies a commitment from the State to sanction any violation to its legal order by the private entity. Nonetheless, this duty does not imply attribution of the SEA Corporation's actions to the

[25] CMS COP 12, *Establishment of a review mechanism and a national legislation programme*, Doc 20 and 22, at 2.

[26] CMS Resolution 12.9, art. 1, C.1.c and D.1.

[27] CMS COP 12, *supra note* 25, at 5.

[28] Record, ¶13.

[29] Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [UNCLOS], art. 92(1).

[30] MEYERS, The Nationality of Ships, at. 41 apud HOSANEE, Nivedita M., *A Critical Analysis Of Flag State Duties As Laid Down Under Article 94 Of The 1982 United Nations Convention On The Law Of The Sea,* 2009, at. 18.

State of Revels pursuant to the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), as argued below.

2. The corporation's conduct does not entail state responsibility from Revels under ARSIWA

Alliguna claims that the SEA Corporation's conduct shall be considered an act of State from Revels pursuant to articles 5, 8 and 11 of ARSIWA, which establish when a conduct is attributable to a state.[31] These articles[32] and their commentaries[33] were drafted by the International Law Commission (ILC) and have been cited by the Court as legal grounds shortly after their publication, specifically since the joint-decision for the Case Concerning Armed Activities on the Territory of the Congo.

These articles provide that there is state responsibility when (1) a private entity or person is empowered by domestic law, (2) the conduct is directed or controlled by a State, or (3) the conduct is assumed by the state as its own. Nonetheless, the SEA Corporation is not a *de facto organ*, and its project is not controlled by Revels or identified as its own, which, consequently, excludes any state responsibility from Revels, as follows.

a. The SEA Corporation is not empowered by governmental authority

Article 5 of ARSIWA provides that the conduct of an entity which is empowered by the law of a State to exercise elements of governmental authority shall be considered an act of that State under international law.

In order to identify entities which are exercising governmental authority, the ILC stated that the most appropriate solution is to refer to a common feature that these entities

[31] Record, ¶20.

[32] *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports, 2005, para. 160.

[33] Ibid, para. 293.

have: they are empowered to exercise specific functions akin to those normally employed by an organ of the State.[34] Examples of such entities are the airlines which undertake functions of immigration control and private companies managing prisons.[35]

The ILC commentaries to ARSIWA provide criterions in order to determine governmental authority.[36] Notably, Article 5 must be interpreted in light of the extent to which the government is entitled to *supervise* and *demand accountability* from whom it has bestowed governmental authority.

This latter concept is clearly defined in the Hyatt International Corporation v. Government of the Islamic Republic of Iran case.[37] This case concerns the attribution of the actions of the Foundation for the Oppressed to the Iranian government. The foundation was subject to considerable oversight by the Iranian government; its officers were appointed and directed by a delegate chosen by the Ayatollah Khomeini; its financial and business affairs were supervised by the office of the Iranian prime minister and its accounts were subject to government's audit.[38] Therefore, the actions of the Foundation for the Oppressed were attributed to the Government of the Islamic Republic of Iran.

On the other hand, the SEA corporation was not under such oversight by Revels and therefore does not fulfill the criteria set forth by the commentary to ARSIWA[39] and international jurisprudence[40] of what an entity should have to be considered to exercise governmental authority. Besides, the conduct of the SEA Corporation of harvesting

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[34] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 [ARSIWA], art 7.

[35] Ibid, art 5.

[36] Id.

[37] CRAWFORD, J. *State Responsibility: The General Part* (Cambridge Studies in International and Comparative Law), 2013, at 131.

[38] Ibid, apud LEHNARDT (2008), 145; TONKIN (2011), 103.

[39] ARSIWA, *supra note* 34, Draft articles commentary, art 5.

[40] CRAWFORD, *supra note* 37, apud (1985) 9 Iran-US CTR, 72,89.

sargassum to produce an alternative biofuel is not analogous to those normally exercised by an organ of State, as are the examples above. Therefore, the private company cannot be considered as empowered by governmental authority and its actions are not attributable to Revels.

b. The harvesting conduct was not under direct and effective control from the Respondent

Article 8 of ARSIWA provides that a conduct shall be considered an act of a State under international law if those in charge of it are acting on the instructions, or under the direction or control, of that State. In the Bosnian Genocide Case, the ICJ established a threshold as being that "the persons, group or entities act in 'complete dependence' on the State, of which they are ultimately merely the instruments".[41]

Additionally, the ILC sustains that the term "controls" refers to "cases of domination over the commission of wrongful conduct and not simply the exercise of oversight",[42] while the word "directs" "does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind".[43]

In this particular case, the SEA Corporation was merely financially assisted by the Government on its project to harvest sargassum, while remaining with its autonomy as a private entity. Even if the amount received was one without which the project would not have

[41] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro). Merits, Judgment, 26 February 2007, para 392; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America), Merits, ICJ Report 1986, p14, 62-63 (para. 109-110).

[42] Report of the International Law Commission on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001), UN Doc A/56/10.

[43] Id.

moved forward,[44] this does not necessarily imply that the SEA Corporation is under the control or direction from the Government.

Consequently, the SEA Corporation does not meet the threshold for Alliguna to claim that there is control or direction from Revels over the company's actions. The Applicant relies solely on the subsidy to sustain its claims, even though mere subsidies are not sufficient to imply state responsibility under international law. Therefore, since the Respondent did not control the harvesting project, the conduct of the SEA Corporation is not be attributable to Revels.

c. Revels does not acknowledge the conduct of the SEA Corporation as its own

According to Article 11 of ARSIWA, a conduct shall be "(...)considered an act of [a] State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own", regardless of whether it meets the criteria of the beforementioned articles.

Revels did publicize the success of the program in a 2016 press release.[45] Nevertheless, as clarified in the ARSIWA commentary, "a conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of a conduct or expresses its verbal approval of it".[46]

Besides, the act of acknowledgment and adoption, "whether it takes the form of words or conduct, must be clear and unequivocal", which was not the case of the aforementioned

[44] Clarifications, A18.

[45] Record, ¶16.

[46] UN International Law Commission. (2001). *Draft articles on responsibility of states for internationally wrongful acts, with commentaries*, at 53.

press release.[47] To that extent, the Government of Revels has not recognized in any manner the SEA Corporation's project as its own, and must not be liable for its conduct.

II. The Republic of Revels did not violate international law by negatively impacting the European eel with the harvesting of Sargassum in the Sargasso Sea

A. Alliguna did not meet the necessary burden of proof to hold Revels accountable for any alleged impacts on the European Eels

Throughout the exchange of diplomatic notes, as well as through the application instituting proceedings, Alliguna claimed that Revels is responsible for multiple violations of treaties and customary international law, which, ultimately, negatively impacted the European eels.[48] Notwithstanding, the Applicant has not presented this Court any evidence to substantiate its claims and, thereupon, did not meet the burden of proof that the ICJ requires for such accountability.

In the Pulp Mills case,[49] Argentina filed an application instituting proceedings alleging that Uruguay had negatively impacted the quality of the River Uruguay by allowing the construction of two pulp mills along its course. The Court decided that the burden of proving those allegations relied on the Applicant, which made those claims at first, and not on the Respondent which was merely accused of such violations.[50] Additionally, the Court

[47] Id.

[48] Record, ¶18, ¶20, ¶22.

[49] *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 [Pulp Mills].

[50] Ibid, para.162.

dismissed the argument that the precautionary principle would be capable of inverting the burden of proof in the dispute.[51]

In the present dispute, even though the Applicant was consistent in claiming that Revels negatively impacted the European Eels, it failed nonetheless to present any single piece of evidence, whether scientific or factual, upon bringing the matter for the ICJ to resolve. In fact, Alliguna sent a diplomatic note to Revels stating that "Alliguna has yet to obtain direct evidence that the biofuels project has harmed the European Eel", and that it could only *infer* such harm to the species.[52] Nonetheless, the Applicant has not produced any evidence thus far to substantiate its allegations.

Consequently, it becomes unequivocal that the Applicant's claims are merely speculative and are far lower than the threshold of proof required, as defined in the abovementioned Pulp Mills case, as well as numerous other judgements.[53] Thereupon, this Court should dismiss the imputations made by the Applicant, since not only are they not backed by any proof, but also since the SEA Corporation's project and the subsidy initiative from Revels foster the objectives and purposes of the disputed treaties and conventions, as follows.

1. Revels acted in accordance with CMS

Through diplomatic note, Alliguna claimed that Revels, by allowing the harvesting of sargassum, violated CMS's articles II and IV, and Resolutions 11.27 and 12.21.

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[51] Ibid, para.164.

[52] Record, ¶20.

[53] *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgement, I.C.J. Reports 2009, at 86, para. 68; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, at 437, para. 10.

Article II provides that State-parties shall (a) promote and co-operate in research relating to migratory species, and (b) endeavor to conclude agreements covering the conservation and management of migratory species listed in Appendix II, while Article IV establishes the means by which these agreements shall be collectively pursued.

While recognizing *mea culpa* for not acting to conclude such agreement, Alliguna has not attempted so either, which precludes the Applicant from alleging violation solely from Revels. Considering that the drafting of an agreement requires the involvement of both State-parties, Alliguna could only allege that Revels violated such obligation if its Government had refused to engage in negotiations – which has not happened. Simply, neither State has proposed to start the drafting of an agreement pursuant to articles II and IV of CMS.

Additionally, Alliguna claimed that Revels violated Resolutions 12.21[54] and 11.27,[55] which propose the undertaking of measures to reduce climate change to protect migratory species. The first resolution strengthens that, even under uncertainty surrounding the impacts of climate change on migratory species, State-parties shall not "delay related decision-making and action",[56] while the latter recognizes that renewable energy sources can significantly contribute to achieving "an adequate and stable energy supply".[57] In addition, both resolutions require environmental impact assessments (EIA) to minimize the adverse impacts of renewable energy technologies.

The Respondent's initiative is in conformity with the collective intention of State-parties to CMS, as expressed through those resolutions. Through this initiative, Revels intends to minimize the effects of climate change which is beneficial to migratory species

[54] CMS Resolution 12.21, Climate change and migratory species.

[55] CMS Resolution 11.27, Renewable energy and migratory species. [Renewable].

[56] CMS Resolution 12.21, *supra note* 54, at 4.

[57] Renewable, *supra note* 55, at 1.

potentially affected by such alterations, including the European Eel.[58] Additionally, the SEA Corporation undertook an extensive EIA before proceeding with the project, therefore complying with those resolutions.[59]

Furthermore, and most importantly, Alliguna failed to present any evidence of a causal link between the reduction of the population of European eels and the actions taken by the SEA Corporation. Besides, this species has been in decline for the past several decades, according to paragraph 3 of the record, which deconstructs the argument of the Applicant that this decline is due to the biofuels initiative.[60] Consequently, since the Applicant did not satisfy its burden to prove the claims it made, as explained on the preceding topic, this Court shall not hold the Respondent liable for any decline in the number of European Eels.

2. Revels complied with CBD

CBD emphasizes the importance of protecting biological diversity.[61] Notwithstanding, it provides that States have the sovereign right to exploit its natural resources, as long as they pay due regard to the duty not cause transboundary harm.[62] In the present matter, Revels did not violate the Convention since the biofuels project acted in accordance with Articles 8 and 10, whilst promoting the conservation of European eels.

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[58] CASTONGUAY, Martin et al. *Is there a role of ocean environment in American and European eel decline?,* 1994.

[59] Clarifications to the Record, A17.

[60] Record, ¶20.

[61] CBD, *supra note* 8, art. 5.

[62] Ibid, art. 3.

The global average surface temperature has increased by 0.6°C over the last 100 years[63], which has several adverse impacts to marine costal biodiversity[64], besides directly affecting the cycle of spawning eggs by the European Eel[65]. Accordingly, Article 8 of CBD establishes that State-parties shall take action to conserve natural habitats, as well as to maintain and recover species[66], in other words, to promote *in-situ* conservation. Through the Respondent's commitment to mitigate climate change by subsiding renewable energy projects, such as the SEA Corporation's initiative, Revels is acting in accordance with this duty - by preventing an increase in surface temperature of the ocean.

Moreover, article 10 of CBD provides that the use of components of biological diversity shall not lead to a long-term decline, maintaining its potential to present and future generations.[67] Such provision has been met by Revels, since, as previously demonstrated, there is no evidence of the existence of any harm caused by the SEA Corporation, but rather of the biofuels' benefits.

Furthermore, the Sargasso Sea is designated under the CBD as an EBSA, whose guidelines Revels has been acting in accordance with, as set forth on CBD decisions IX/20 and X/29, which support the undertaking of EIAs before activities that may cause significant and harmful changes to the marine environment.[68] The SEA Corporation has, accordingly, conducted an EIA in light of the importance of the EBSA designation.[69]

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[63] Intergovernmental Panel on Climate Change, 2007.

[64] CBD COP IX.20, paragraph 7.

[65] BONHOMMEAU, Sylvain et al. *Impact of climate on eel populations of the Nothern Hemisphere*, apud Knights 2003, Friedland et al. 2007.

[66] CBD, *supra note* 8, art. 11.

[67] Ibid, art. 10.

[68] CBD COP X.29, 2010.

[69] Clarifications, A17.

3. Revels complied with UNCLOS

Through a diplomatic note, Alliguna claimed that article 87 of UNCLOS, while providing State-parties freedom on the high seas, establishes some limits.[70] In addition, Alliguna also claimed that Revels violated articles 117, 118, 192 and 300 of UNCLOS.[71]

Article 87 of UNCLOS provides that State-parties may exercise some freedoms in the high seas, including fishing, laying submarine cables, as well as constructing artificial islands.[72] Additionally, and most importantly, article 56 of UNCLOS provides that State-parties have the sovereign right to explore and exploit natural resources within its exclusive economic zone.[73]

By harvesting sargassum from the Sargasso Sea, the SEA Corporation is exploring abundant natural resource, which is far less deleterious to the ecosystem than fishing, construction of artificial islands or laying submarine cables, all actions which are permitted under article 87 of UNCLOS. In such, by resorting to proportionally reasoning, it becomes clear that if the Convention expressly allows for something *more* harmful, then there is no objection from the Convention to something *less* harmful than those activities.

Therefore, UNCLOS arguably does not see the harvesting of sargassum in the high seas as adverse to the environment, since (1) it is permitted to coastal States within its jurisdiction, and (2) all States can carry out activities which affect the ecosystem far more, such as fishing and constructing artificial islands.

Articles 117, 118, 192 and 300 determine that State-parties shall cooperate for the conservation of the high seas and preservation of the marine environment, as well as fulfill

[70] Record, ¶22.

[71] Id.

[72] UNCLOS, *supra note* 29, art. 87.

[73] Ibid, art. 56.

their obligations in good faith. Revels has complied with these obligations, as demonstrated on sections II.C and II.A.1 of this memorial.

B. Hydropower facilities from Alliguna are harmful to the European Eels

The life of the European eel can be divided into three stages: the first marine phase; the continental phase; and the second marine phase.[74] The growth and maturation of this species take place in continental waters, where they spend up to 50 years.[75]

By resorting to hydroelectric power, Alliguna is ignoring the negative consequences this source of energy can cause to the environment, especially to the European eels. Hydroelectric facilities can restrict the downstream migration of freshwater eels.[76] As migrant eels travel downstream and encounter hydroelectric facilities, they may experience migration delays within the impoundments created by dams, if not direct turbine mortality or turbine-induced injuries.[77] Turbine mortality of downstream migrant eels is estimated to be higher than 25%, while studies show that turbine-induced injuries are even greater.[78]

The decline of European eels in the Sargasso Sea is much more likely to have been caused by the production of hydroelectric power in Alliguna. Considering that Alliguna failed

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[74] KLECKNER, R. C., and J. D. McCleave. *The northern limit of spawning by Atlantic eels (Anguilla spp.) in the Sargasso Sea in relation to thermal fronts and surface water masses*. 1988, J. Mar. Res. 46: 647–667, 1988.

[75] VAN GINNEKEN V.J.T. and Maes G.E. *The European eel (Anguilla anguilla, Linnaeus), its lifecycle, evolution and reproduction: A literature review*. 2005, Rev. Fish Biol. Fisheries 15: 367-398, 2005.

[76] HARO, A., et al. *Population Decline of the American Eel: Implications for Research and Management*, 2000. Fisheries 25(9):7–16.

[77] RICHKUS, W.A., and D.A. Dixon. *Review of research and technologies on passage and protection of downstream migrating catadromous eels at hydroelectric facilities*. At 357–365 in D. A. Dixon, editor. Biology, management, and protection of catadromous eels. American Fisheries Society, Syposium 33, Bethesda, Maryland, 2003.

[78] BEHRMANN-GODEL, J., and R. Eckmann. 2003. *A preliminary telemetry study of the migration of silver European eel (Anguilla anguilla L.) in the River Mosel*, Germany. Ecology of Freshwater Fish 12:196–202, 2003.

to provide any evidence of causal link between the biofuels project and the species' decline, then, it would have to acknowledge that its hydropower facilities are far more deleterious to the European eel.

C. Revels acted in accordance with the duty to prevent transboundary harm

The duty to prevent transboundary harm obliges a State to use all means available in order to avoid activities from causing significant damage to the environment of another State.[79] This obligation was even considered by this Court to be "part of the corpus of international law".[80]

In the present dispute, the productions of biofuels by the SEA Corporation will, in turn, diminish the effects of global warming by reducing the emission of carbon dioxide and consequently benefit the Sargasso Sea. Studies show that the rise in temperatures of the ocean leads to a decrease in food availability, which, inevitably, leads to lower chances of survival for young eel larvae.[81] Therefore, this project is also indirectly preventing damage to the population of European eels by diminishing the effects of climate change on their habitat, all in plain fulfillment of the obligation to prevent transboundary harm.

Furthermore, this Court also stated, in the Pulp Mills judgement, that it is a requirement under international law for States to undertake an EIA before engaging in activities where *there is a risk* of transboundary adverse impact[82]. In addition, article 2 of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, defines

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[79] Pulp Mills, *supra note 49*, para.101.

[80] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), at 242, para. 29.

[81] BONHOMMEAU, Sylvain. *Fluctuations in European eel (Anguilla anguilla) recruitment resulting from environmental changes in the Sargasso Sea*, 2007.

[82] Pulp Mills, *supra note* 49, para.153, 204.

"risk" as those taking the form of "a high probability of causing significant transboundary harm".[83]

The SEA Corporation duly undertook an EIA according to Clarification A17, which determined that the impacts on marine biodiversity, including the European eel, were uncertain.[84] In such, the results of this EIA did not place the harvesting of sargassum within the scope of the duty to prevent harm, but rather on a neutral zone, of which no effects were apparent. Consequently, the SEA Corporation did not have any grounds to prevent the project from proceeding, since the EIA did not conclude that the project posed any grave *risks* to marine biodiversity – which is the minimum threshold for the duty to prevent transboundary harm to operate.

Additionally, the ICJ noted that a part of the obligation to prevent transboundary harm is that parties are obliged to cooperate and to negotiate in a meaningful way, despite not needing to reach an agreement.[85] According to the Draft Articles on Prevention of Transboundary Harm, to cooperate is to notify, consult and negotiate,[86] all of which the Respondent complied with. Revels did consult and negotiate in a meaningful way through diplomatic notes by showing the reasons underlying the SEA Corporation's project and why it did not agree with the Applicant's suggestions.[87] Even though it was unfortunate that the parties could not reach an agreement, Revels, nevertheless, fulfilled its obligation to cooperate in preventing transboundary harm.

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[83] Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries Yearbook of the International Law Commission, 2001, vol. II, Part Two.

[84] Clarifications, A17.

[85] Pulp Mills, *supra note* 49, para. 281.

[86] Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries Yearbook of the International Law Commission, 2001, vol. II, Part Two.

[87] Record, ¶19, ¶21, ¶23.

D. Revels is committed to fulfilling the nationally determined contributions (NDC) as required by the Paris Agreement

On 22 April 2016, Revels submitted its first NDC under the Paris Agreement,[88] which demonstrated increased reliance on biofuels.[89] In July 2016, the SEA Corporation, subsidized by Revels, launched the renewable energy program,[90] while expecting that the production of renewable energy would help Revels meet its NDC Commitments.[91]

Article 4 of Paris Agreement provides that State-parties shall undertake rapid reductions of greenhouse emissions to reach long-term temperature goals through NDCs.[92] Notwithstanding, the measures to be taken are of discretion of the State-parties as it is not possible to predict every scientific innovation toward mitigation of anthropogenic degradation of the environment.

Judge Cançado Trindade, in his separate opinion in the Pulp Mills case, declared that the Court should take into consideration the intergenerational equity principle. The principle "requires conservation and, as appropriate, enhancement of the quality and of the diversity of this heritage. The conservation of cultural diversity is as important as the conservation of environmental diversity to ensure options for future generations".[93]

Thereupon, Revels, by subsidizing initiatives such as the one from the SEA Corporation, solely intends to pursue sustainable development through preserving the environment and mankind, besides meetings with its noble NDC Commitments.

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[88] Record, ¶10.

[89] Clarifications, A9.

[90] Record, ¶13.

[91] Record, ¶14.

[92] Paris Agreement, *supra note* 20, art. 4.

[93] Pulp Mills, *supra note* 49, separate opinion of Judge Cançado Trindade.

E. Revels complied with the Hamilton Declaration and the precautionary principle

Climate change impacts directly on Europeans eels, diminishing their chances of survival.[94] It is undeniable that this phenomenon is a serious international threat, which, if not prevented, will only be aggravated. Its causes are highly related to the concentration of toxic gases in the atmosphere – which are resultant of the excessive burning of fossil fuels over the last centuries.[95]

Sensitive to these anthropogenic issues, the Hamilton Declaration binds states to "adopt measures to maintain the health, productivity and resilience of the Sargasso Sea and to protect its components",[96] thus encompassing the precautionary principle within.

Additionally, the precautionary principle determines States to anticipate, avoid and mitigate threats to the environment.[97] Consequently, when an activity presents risks to human health or the environment, precautionary measures shall be undertaken.[98]

Moved by this Declaration and the precautionary principle, the SEA Corporation's initiative of using sargassum as an alternative source of energy will ease dependence from fossil fuels and reduce greenhouse gas emissions to the atmosphere.[99]

Therefore, as the production of biofuels is means to avoid further environmental damage to the Sargasso Sea and the European eel, Revels is acting in accordance with the

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[94] CASTONGUAY, *supra note* 58.

[95] United States Environmental Protection Agency. *Global Greenhouse Gas Emissions Data*.

[96] Hamilton Declaration On Collaboration For The Conservation Of The Sargasso Sea, March 11, 2014.

[97] IUCN, Guidelines for Applying the Precautionary Principle, International Union For The Conservation Of Nature, 2007.

[98] ASHFORD, Nicholas, et. al., *Wingspread Statement on the Precautionary Principle*, World Health Organization, 1998.

[99] US Energy Information Administration. *Biomass and the Environment*.

precautionary principle and the Hamilton Declaration. The provision of subsidies to the SEA Corporation can prevent serious and possibly irreversible damage to the European eel.

F. Revels acted in accordance with the principle of sustainable development

The sustainable development principle is mainly conceived in the 1972 Stockholm Conference[100] and the 1992 Rio Declaration,[101] in which it is established that the right to development must be conducted acknowledging the environmental needs of present and future generations. In the Gabcikovo-Nagymaros case,[102] the Court stated that sustainable development translates the need to conciliate economic growth with environmental protection.

Considering that the consumption of energy is essential to the economic development of any State, Governments shall promote the use of energy sources that are less harmful to the environment. Thereupon, Revels, through providing subsidies to stimulate biofuels production, is acting in full accordance with the sustainable development principle – conciliating economic growth with environmental preservation.

[100] Report on United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1, Principle 1. (1973) [Stockholm Declaration].

[101] The Rio Declaration on Environment and Development, Rio de Janeiro, 3-14 June, 1992, Principle 3. [Rio Declaration].

[102] *Gabcikovo-Nagymaros Project Case* (Hungary v. Slovakia), Judgement, 1997 I.C.J. 1, 7 (Sept. 25).

CONCLUSION AND PRAYER

Respondent, the Republic of Revels, respectfully requests this Court to adjudge and declare that:

1. The International Court of Justice does not have jurisdiction to determine the matter and that the conduct at issue is not attributable to the Republic of Revels
2. Even if the Court has jurisdiction, the Republic of Revels has not violated international law with respect to the harvesting of Sargassum in the Sargasso Sea

RESPECTFULLY SUBMITTED,

AGENTS OF RESPONDENT