Team No. 1923

INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

QUESTIONS RELATING TO 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 APPLICANT

2018

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STATEMENT OF JURISDICTION

The Federal States of Alliguna ("Alliguna") and the Republic of Revels ("Revels") have submitted to the jurisdiction of the International Court of Justice ("the ICJ") by written declaration as provided for in the compromissory clause of the Convention on the Conservation of Biological Diversity ("the CBD"), United Nations Framework Convention on Climate Change ("the UNFCCC") and the Paris Agreement. As both States accepted the same manner of dispute settlement, Alliguna and Revels have accepted the jurisdiction of the ICJ pursuant to Article 36.1 of Statute of the ICJ.

QUESTION PRESENTED

I. WHETHER THE ICJ HAS THE JURISDICTION OVER THE DISPUTE AND THE CONDUCT AT ISSUE WAS ATTRIBUTABLE TO REVELS.

II. WHETHER THE REPUBLIC OF REVELS VIOLATED INTERNATIONAL LAW THROUGH THE SARGASSUM HARVESTING PROJECT

STATEMENT OF FACTS

Alliguna is a developed country with a diversified economy. Revels, heavily relying its economy on fishing and agriculture, is a developing country. They are neighboring coastal States situated on Ugani, located in the North Atlantic Ocean near the Sargasso Sea. Both nation's coasts are approximately 250 nautical miles from the Sargasso Sea.

European eel is a highly migratory species under the Convention on the Conservation of Migratory Species ("the CMS") and the IUCN Red Lists of Threatened Species, which spawns in the Sargasso Sea, an Ecologically or Biologically Significant Area ("EBSA"), and are found in habitats in the territory of Alliguna. The species is important to Alliguna with regards to its culture, religion and history.

Both States are Members of United Nations and are parties to the Statute of the ICJ, the CBD, the UNFCCC, the Paris Agreement, the CMS, United Nations Convention on the Law of the Sea ("UNCLOS"), Vienna Convention on the Law of Treaties ("VCLT"), and signatories to Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea.

In pursuit of meeting its NDC ("Nationally Determined Contribution") commitments under the Paris Agreement, Revels subsidized the Seaweed Energy Alternatives, Inc. ("the SEA Corporation") to implement the renewable energy program, which generated biofuel from Sargassum. The SEA Corporation used the *Columbus*, sailed under the flag of Revels, to harvest Sargassum in the Sargasso Sea from July 2016.

In the end of 2016, Revels issued a press release highlighting the ongoing Sargassum initiative. Alliguna noticed and was concerned about the potential negative impacts on European eels, thus decided to contact the Government of Revels.

Alliguna urged Revels to halt the Sargassum initiative, for harvesting a large amount of Sargassum will adversely impact the ecosystem of Sargasso Sea and devastate the European eel. However, Revels continued to harvest Sargassum.

After failing to resolve the dispute in several months of negotiations and mediations, Alliguna submitted the matter to the ICJ, while Revels denied ICJ's jurisdiction.

SUMMARY OF ARGUMENTS

The ICJ has jurisdiction to determine the present dispute between Alliguna and Revels as there exists a legal dispute and both States consented to submit to the jurisdiction of the ICJ. There are objective legal bases that the CBD, the UNFCCC and the Paris Agreement are applicable to this dispute. Revels' statements of the CMS and the UNCLOS being *lex specialis* and that the dispute should not be heard by the ICJ are invalid. In addition, the conduct of the SEA Corporation is attributable to Revels. Thus, the ICJ has jurisdiction over the present dispute.

Revels violates the CBD, the UNFCCC, the Paris Agreement, the CMS, the UNCLOS and customary international law, including the obligations of conserving biological diversity, protecting the marine environment, the duty of cooperation, taking appropriate measures to prevent transboundary harm and to minimize the risk thereof, and the precautionary principle in the face of uncertainty.

ARGUMENT

I. THE ICJ HAS JURISDICTION OVER THE DISPUTE AND THE CONDUCT AT ISSUE WAS ATTRIBUTABLE TO REVELS

The ICJ has jurisdiction over all matters specially provided for in treaties and conventions in force.[1] Alliguna and Revels consented to the Court's jurisdiction over the dispute under the CBD, the UNFCCC and the Paris Agreement. These treaties and conventions all confer jurisdiction to the Court. Moreover, Revels is estopped from denying this consent, and the cases cited by Revels do not support exclusion of ICJ's jurisdiction of this case. In addition, the SEA Corporation's conduct is attributable to Revels and triggers Revels' responsibility for internationally wrongful acts.

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

Article 36.1 of the Statute of the ICJ states that the jurisdiction of the Court covers all matters specially provided for in treaties and conventions in force. In the present case, Alliguna and Revels issued declarations binding them to submit disputes with respect to the interpretation or application of the CBD, the UNFCCC, or the Paris Agreement to the ICJ.[2] Since this dispute primarily relates to the CBD, the UNFCCC, and the Paris Agreement, the ICJ does have jurisdiction thereof.

The ICJ can establish its jurisdiction on various grounds. Compulsory jurisdiction is merely one of them.[3] Although Revels argues that it did not recognize the Court's jurisdiction as

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[1] Statute of the ICJ, Art. 36.1
[2] Record, ¶¶7,10
[3] *Supra* note 1

‘compulsory *ipso facto*’,[4] it cannot deny the Court’s jurisdiction under the CBD, the UNFCCC and the Paris Agreement because these conventions grant jurisdiction to the ICJ to settle disputes arising thereunder.[5]

1. The ICJ has jurisdiction over the present dispute under the CBD

a. The CBD is applicable to this dispute

The conduct of Revels causing harm to the European eel is a harm to biological diversity and the harm to the Sargasso Sea is a harm to the ecosystem, both of which are prohibited by the CBD.[6] To this end, Revels’ conduct falls within the scope of the CBD. Revels therefore is to ensure that activities within its jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,[7] to cooperate with other contracting parties,[8] to undertake in-situ conservation actions[9] and to adopt measures relating to the use of biological resources to minimize adverse impact on biological diversity.[10] Furthermore, Revels’ actions need to be interpreted under CBD Decisions IX/20 and X/29 .[11]Hence, the dispute must be settled under the CBD.

[4] Record, ¶5
[5] *Supra* note1
[6] CBD, Art. 2
[7] CBD, Art. 3
[8] CBD, Art. 5
[9] CBD, Art. 8
[10] CBD, Art. 10 (b)
[11] Record, ¶18

b. The rule of *lex specialis* with the CMS shall not be invoked to preclude the ICJ's jurisdiction under the CBD

Revels claims that the CMS governs this dispute rather than the CBD according to the rule of *lex specialis*.[12] However, to invoke this rule, the treaties must at least regulate the same subject matter,[13] which is not the case in the present dispute.

The present dispute arises under both the CBD and the CMS but the subject matters are not the same. The present case concerns mainly the conservation of the European eel, which is not governed by a single convention. The CBD and the CMS have different focuses, while the dispute falls within the ambit of both conventions. The CBD covers the biological diversity which includes not only the European eel's survival and the preservation of its habitats but also the biodiversity in the Sargasso Sea as a whole.[14] The CMS covers the conservation of migratory species, including the European eel in this case, while it does not include the general protection of the Sargasso Sea. An act of a State may violate its obligations under more than one treaty.[15] Since the present dispute arises under both the CBD and the CMS, the rule of *lex specialis* cannot be invoked to preclude the ICJ's jurisdiction under the CBD.

c. The CBD prevails the UNCLOS as the present dispute is an inter-systemic conflict

First, the present case arises under both the CBD and the UNCLOS, while the CBD is more relevant than the UNCLOS. Since "it is a commonplace of international law and state practice for more than one treaty to bear upon a particular dispute",[16] the Court should "interpret the submissions of parties" so as to "isolate the real issue in the case and to identify the object of

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[12] Record, ANNEX C
[13] Report of the International Law Commission on the Work of Its Fifty-eighth Session, UN GAOR, 61th Sess., Supp. No. 10, 178, UN Doc. A/61/10 (2006)
[14] CBD, Art. 1, 8 and 10
[15] Southern Bluefin Tuna Award (2000), ¶2
[16] *Id.*

the claim".[17] The CBD focuses more on regulating issues specifically related to the conservation of biodiversity,[18] while the UNCLOS governs activities on the sea. The present case concerns the conservation of biological diversity on the high seas, which is more centered on the CBD rather than UNCLOS. Accordingly, the CBD should be applied to resolve the present dispute.

Furthermore, the CBD prevails the UNCLOS as the present dispute is an inter-systemic conflict. Article 22 of the CBD indicates that when the action of a State party would cause serious damage or threat to biological diversity, the CBD prevails over other existing agreements between parties.[19] In addition, with respect to disputes regarding the conservation of the marine environment, the contracting parties shall implement the CBD consistently with the rights and obligations under the UNCLOS.[20] The present dispute concerns the conservation of the European eel, listed as "Critically Endangered" on the IUCN Red List of Threatened Species,[21] and the preservation of the Sargasso Sea.[22] The actions of Revels affected the spawning habitat for the European eel and will likely cause significant damage to the biodiversity because the delicate ecosystem is not strong enough to bear the external destruction. Accordingly, the CBD should govern this dispute as the dispute is related to harm to the biodiversity, while application of the CBD would not neglect Revels' obligations under the UNCLOS.

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[17] Nuclear Tests (Australia v France) (1974), ¶29
[18] CBD, Art. 2 defines the "biological diversity"; Art. 7 and 10 respectively elaborates more on conservation and sustainable development than UNCLOS Art. 192
[19] CBD, Art. 22
[20] CBD, Art. 22.2
[21] Jacoby, D. & Gollock, M., European eel (*Anguilla anguilla*) The IUCN Red List of Threatened Species, 2014, online: https://www.iucnredlist.org/species/60344/45833138 (last visited Nov. 16 2018)
[22] Record, ¶3

2. The ICJ has jurisdiction over the dispute under the UNFCCC and the Paris Agreement

Both States submitted written declarations stating that with respect to any dispute concerning the interpretation or application of the UNFCCC or the Paris Agreement, they would submit the dispute to the ICJ pursuant to Article 24 of the Paris agreement and Article 14 of the UNFCCC.[23]

a. The UNFCCC and the Paris Agreement are applicable to the dispute

The objective of the UNFCCC is to stabilize the "greenhouse gas concentration in the atmosphere."[24] The NDC commitments aim to reduce greenhouse gas emissions under the Paris Agreement[25] to enhance the implementation of the UNFCCC.

Revels claims that the renewable energy projects would help to meet its NDC commitments under the Paris Agreement[26] and will allegedly mitigate climate change and generate potential carbon offsets which might help to meet the emission reduction objective under the UNFCCC. The dispute therefore is definitely related to the main purpose of the UNFCCC and the Paris Agreement and requires the interpretation and application of Revels' obligations thereunder.

b. Revels is estopped from precluding the UNFCCC and the Paris Agreement

Estoppel is a general principle of law[27] recognized by the ICJ.[28] The Court held that estoppel consists of three fundamental elements. First, a State must make a representation to another; secondly, the representation must be unconditional and made with proper authority; finally, the State invoking estoppel must rely on the representation.[29]

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[23] Record, ¶10
[24] UNFCCC, Art. 2
[25] Paris Agreement, Art. 4.2
[26] Record, ¶14
[27] ANTHONY AUST, HAND BOOK OF INTERNATIONAL LAW 8 (2nd ed. 2010)
[28] Separate opinion of Judge Ajibola in Territorial Dispute, at 75-83
[29] North Sea Continental Shelf (1969), ¶30; Alexander Ovchar, *Estoppel in the Jurisprudence of the ICJ A principle promoting stability threatens to undermine it*, 21 BOND L. REV., 4 (2009)

Diplomatic notes can be considered as a representation to another[30] if the notes are unequivocal and consistent with the State's former exercise.[31] Revels clearly stated in its diplomatic notes that the Sargassum harvesting project was initiated in accordance with its NDC commitments in its diplomatic note to Alliguna,[32] which serve as an unequivocal and consistent representation of its former exericises to Alliguna. Alliguna relied on the statement of Revels and instituted proceedings against Revels under the UNFCCC. Thus, based on the principle of estoppel, Revels cannot contend that the UNFCCC is irrelevant in the preliminary objections.

B. THE SEA CORPORATION'S CONDUCT WAS ATTRIBUTABLE TO REVELS AND IMPLIES STATE RESPONSIBILITY OF REVELS

The RSIWA drafted by the ILC reflect customary international law on State responsibility.[33] It is noted that "[e]very internationally wrongful act of a State entails the international responsibility of that State."[34] A State thus should bear State responsibility when the conduct in question is attributable to the State under international law.[35] The SEA Corporation's conducts on the high seas were attributable to Revels, thus Revels is responsible for the Corporation's conduct.

[30] Fisheries Jurisdiction (1998), ¶¶30, 31, "The Court will itself determine the real dispute that has been submitted to it... It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence."
[31] Ovchar, *supra* note 29, at 8
[32] Record, ¶19
[33] Genocide Project (2007), ¶ 385
[34] RSIWA, Art. 1
[35] *Id*. Art. 2

1. Revels empowered the SEA Corporation to exercise governmental authority

Article 5 of RSIWA provides that when non-State entities are empowered by the law of a State to exercise elements of governmental authority,[36] their conduct is attributable to the State. Subsidiary criteria such as the existence of State participation in its capital also help identify the exercise of governmental authority.[37]

The biofuel program aimed at reducing carbon dioxide emission was sponsored by Revels to meet its NDC commitments under the Paris Agreement.[38] Revels provided subsidies to select non-governmental entities or persons to implement the new renewable energy program.[39] It can therefore be inferred that there exists a certain level of elements of governmental authority empowered by law. In addition, the amount of the subsidy was such that the project would not have moved forward without it. This also demonstrates that there was at least some exercise of governmental authority. Since a contribution to fulfill the NDC commitments would not be achieved by a short-term program, the subsidy was more likely to be long-term. Accordingly, such subsidy would have made a persistent impact on the SEA Corporation.[40] This indicates a greater participation in the company's capital, strongly suggesting that Revels' the conduct was an exercise of governmental authority.

2. Revels directly controlled the SEA Corporation's conduct

The conduct of the SEA Corporation was also controlled by Revels because Revels had a factual relationship with the Corporation.[41] This factual relationship was primarily established by its degree of control to the SEA Corporation. *Tadić* (1999) ruled that the degree of control varies "according to the factual circumstances of each case".[42] However, a general standard

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[36] *Id.*
[37] *Id.*
[38] Record, ¶14
[39] *Id.*
[40] Record, ¶¶13, 16
[41] RSIWA, Art. 8
[42] Tádic (1999), ¶117

was introduced in that case that if there was a specific instruction by the controlling State concerning the commission of a particular act of a group,[43] that group can be considered a *de facto* organ of a State.

In this case, the factual relationship between Revels and the SEA Corporation is established on two bases. Firstly, the program was highly related to Revels' policy objective to meet the NDC commitments. Secondly, the SEA Corporation was highly dependent on Revels' subsidy, which specifically required the Corporation to fulfill a certain political goal. Thus, concluding from said factual relationship, by giving specific instructions to the commission of the Sargassum harvesting project, Revels certainly meant to enforce its administrative control and to reach its policy objectives by controlling the private corporation with public subsidy.

3. Revels acknowledged and adopted the SEA Corporation's conduct as its own

When the unlawful act of a non-State entity has been publicly endorsed or approved *ex post facto* by the State, the entity would be recognized as a *de facto* organ of that State.[44] The same concept regarding acknowledgment was incorporated in RSIWA as 'acknowledged and adopted'.[45] Acknowledgement and adoption of conduct by a State might be expressed, or might be inferred from further actions of the State in question.[46]

Revels has factually and persistently acknowledged the act and revealed itself as a sponsor of the SEA Corporation to fulfill its policy purposes in the diplomatic note and the press.[47] Revels has asserted that the program was meant to realize its obligations under international law. Thus, it did more than merely endorsing that act. Moreover, since statements made in a diplomatic note can serve as evidence for State exercise,[48] it can be further concluded that the conduct was clearly acknowledged and adopted by Revels.

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[43] *Id.* ¶ 137
[44] *Id.*
[45] RSIWA, Art. 11
[46] US Diplomatic and Consular Staff in Tehran (1980), ¶74
[47] Record, ¶¶16, 19
[48] North Sea Continental Shelf (1969), *supra* note 29

II. THE REPUBLIC OF REVELS VIOLATED INTERNATIONAL LAW THROUGH THE SARGASSUM HARVESTING PROJECT

Revels violated international law by implementing the Sargassum harvesting project. First, breaking the balance in the Sargasso Sea and endangering the eels therein violated Revels' obligations of conservation under the CBD and the UNCLOS. Secondly, not informing Alliguna when transboundary harm was likely to happen and not cooperating in any form violated Revels' obligations of cooperation under the CMS, the CBD and the UNCLOS. Thirdly, not suspending the harvesting project in the face of uncertainty of causing serious harm violated the precautionary principle. Lastly, Revels could not justify the harvesting program by claiming compliance with the Paris Agreement, the CBD and the UNFCCC.

A. REVELS VIOLATED ITS OBLIGATION TO PROTECT THE MARINE ENVIRONMENT AND TO CONSERVE BIODIVERSITY

Revels is required to protect and preserve the marine environment under the UNCLOS.[49] It should also adopt measures not only "to promote the recovery of threatened species"[50] but also "to regulate or manage biological resources important for the conservation of biological diversity"[51] to reach the objective of conservation of biological diversity and sustainable development under the CBD.[52]

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[49] UNCLOS, Art. 192
[50] CBD, Art.8 (f)
[51] CBD, Art. 8 (c)
[52] CBD, Art.1

1. The UNCLOS and the CBD require parties to conserve the environment to reach sustainable development

When harvesting living resources on the high seas, the CBD requires compatibility between present use and the conservation of biological diversity and the sustainable use of its components.[53] The UNCLOS also obliges States to take into consideration the effects on species dependent upon harvested species with a view to maintaining such dependent species above levels at which their reproduction may become seriously threatened.[54] The CBD and the UNCLOS obligations fall under the concept of sustainable development which has been adopted by the ICJ in the *Gabcikovo-Nagymaros* Project (1997).[55]

2. The Sargasso Sea is important to the survival of the European eel

The Sargasso Sea has been designated as an EBSA under the CBD.[56] Its entire ecosystem depends on floating Sargassum, which gives refuge to migratory species. It is a highly important nursery habitat that provides shelter and food to endangered species,[57] including the European eel which was categorized by the IUCN Red List as "Critically Endangered".[58]

3. Revels failed to conserve biological diversity under the CBD and the UNCLOS

Revels has harvested more than a *de minimis* amount of Sargassum.[59] Such amount cannot be ignored since the Sargassum is the nursery habitat for the endangered eels.[60] The harvest destroyed the bases of the entire ecosystem,[61] seriously harmed the marine biodiversity of the area and gravely threatened the endangered eels' reproduction. Revels failed to take into

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[53] CBD, Art. 8 (i)
[54] UNCLOS, Art. 119 (a)
[55] SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 208 (3rd ed. 2012)
[56] CBD Decision XI/17
[57] Laffoley et al., (2011) *The protection and management of the Sargasso Sea: The golden floating rainforest of the Atlantic Ocean,* online: https://www.cbd.int/cop/cop-11/doc/vtable/Sargasso.Report.-cop11-iucn1.pdf
[58] Record, ¶3
[59] Clarification, ¶16.
[60] Report of the First Range States Workshop on the European Eel, ¶21
[61] Laffoley, *supra* note 57, at 9

consideration the effects of the harvesting of Sargassum on the European eel, did not promote the recovery of the threatened species and failed to strike a balance between present uses and the conservation of biological diversity. Revels thus breached its obligations of pursuing sustainable development under the CBD[62] and the UNCLOS[63].

B. REVELS VIOLATED ITS DUTY OF COOPERATION

The duty of cooperation requires States to cooperate in good faith[64] on the protection of the environment and on pursuing sustainable development.[65] The duty of cooperation requires notification, exchange of information, consultation, and reaching agreements under existing conventions. Revels failed to comply with either of the duty's aforementioned elements.

1. Revels failed to notify, exchange information, or consult with Alliguna when there may be significant harm to the environment

Obligations of prior notification, information exchange, negotiation, or consultation where there is significant transboundary impact are enshrined in binding treaties such as the CBD,[66] soft law instruments such as the Rio declaration,[67] case law such as the *Lac Lanoux* Arbitration (1957),[68] *Gabčíkovo-Nagymaros* Project (1997)[69] and *Pulp Mills* (2010).[70] The obligations to notify, exchange information or consult neighboring States when the activities may cause

[62] CBD, Art.8 (f), "promote the recovery of the species"; Art.8 (i), "provide the conditions needed for compatibility between present uses and the conservation of biological diversity"
[63] UNCLOS Art. 119 (b)
[64] Rio Declaration, principle 21
[65] Stockholm Declaration, principle 24
[66] CBD, Art. 14 (c)
[67] Rio Declaration, principle 18, 19, 27
[68] Lac Lanoux Arbitration (1957), at 306-310
[69] Gabčíkovo-Nagymaros Project (1997), ¶141
[70] Pulp Mills (2010), ¶102

significant transboundary harm are intended to create the conditions for successful cooperation[71] and form part of EIA requirements.[72]

The EIA result in the present case was uncertain,[73] which implies that the risk of significant harm to the eels mentioned above could not be ruled out. Since the European eel migrates to Alliguna and is of Alliguna's essential interest,[74] Revels' failure to notify, exchange information or consult with Alliguna in view of an uncertain EIA result gravely violated the duty of cooperation.

2. Revels failed to conclude agreements with range States covering conservation of the European eel

The Hamilton Declaration suggests States "collaborate in pursuing conservation measures for the Sargasso Sea ecosystem through existing regional and international organizations".[75] The existing international conventions applicable to both Revels and Alliguna are the CBD, the CMS and the UNCLOS.

The CBD stresses that States shall cooperate in respect of areas beyond national jurisdiction and on other matters of mutual interest for conservation and sustainable use of biological diversity.[76] The CMS also encourages States to reach an agreement for the species in Annex II (which includes the European eel)[77] of which the conservation status is unfavorable.[78] Though the range States concerned with the European eel have passed a concerted action, no substantial regulation for conservation has been reached. Thus, a higher degree of cooperation between range States is needed.[79] The UNCLOS on the other hand, provides more specifically that

[71] *Id.*, ¶113
[72] CBD, Art.14 (a)(b)
[73] Clarification, ¶17
[74] Record, ¶¶3, 4
[75] Hamilton declaration, ¶3
[76] CBD, Art. 5
[77] Record, ¶8
[78] CMS, Art. 2, 4
[79] Concerted Action on the European eel

States shall cooperate with each other in the conservation and management of living resources on the high seas.

Revels is a party to the Hamilton Declaration,[80] in which parties clearly stated that they decide to cooperate under existing conventions.[81] Since the harvest in the Sargasso Sea took place on the high seas and the ecological balance of the marine environment is an essential interest of all States,[82] Revels shall cooperate with Alliguna through existing international conventions such as the CBD, the CMS, and the UNCLOS.

C. REVELS FAILED TO TAKE APPROPRIATE MEASURES TO PREVENT TRANSBOUNDARY HARM AND TO MINIMIZE THE RISK THEREOF

The duty to prevent transboundary harm has been recognized as customary international law,[83] its content summarized by The Draft Articles on Prevention of Transboundary Harm from Hazardous Activities ("Draft Articles on Transboundary Harm"). It is also enshrined in the CBD.[84] Its content includes the "due diligence" standard of care, and requiring appropriate measures to minimize the risk on transboundary harm. Revels' Sargassum harvesting project caused damage to the biological diversity in the Sargasso Sea, and created the risk of transboundary harm to Alliguna.

1. Harvesting Sargassum caused harm to biodiversity in the Sargasso Sea

The CBD requires States to ensure that activities within its jurisdiction do not cause damage to not only other States but also to areas beyond the limit of national jurisdiction. In this case,

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[80] Record, ¶11
[81] Hamilton Declaration, *supra* note 75
[82] International Law Commission, Report of the work of Its 32th Session, 39 ¶14, A/CN.4/SER.A/1980/Add.l (Part 2) (1980)
[83] Corfu Channel (1949), at 22, Trail Smelter Arbitration Award (1941), at 1965, Dissenting opinion of Judge de Castro in Nuclear tests (Australia v. France) (1974), ¶4
[84] CBD, Art.3, 10 (b)

Revels has harvested Sargassum for more than a *de minimis* amount. This was a direct physical damage to the biodiversity within the Sargasso Sea on the high seas. Thus, the damage falls within the scope of the CBD.

2. Harvesting Sargassum involved a risk of causing significant transboundary harm to Alliguna

The duty of prevention applies when activities involve a "risk of causing significant transboundary harm".[85] "Significant harm" is a harm that is "more than trivial".[86] For the harm to be "transboundary", the ILC Draft Articles on Transboundary Harm included those activities conducted on high seas with effects on the territory of another State.[87] In addition, the harm must be caused by the physical consequence of such activities.[88]

Harvesting Sargassum for more than a *de minimis* amount has created risk of harm to European eels in the Sargasso Sea.[89] The potential harm of endangering the eels was definitely more than trivial, since any harm to a species listed as critically endangered would be of high biological significance.[90] Further, there is scientific evidence showing that the most abundant amount of the larvae of European eels locates in the upper 100 meters of the water column in the Sargasso Sea where the Sargassum floats.[91] Accordingly, threat to the European eel's survival is a physical consequence of harvesting Sargassum since it left the eels no refuge. Moreover, since the eels migrate to the territory of Alliguna[92] and are of prominent cultural, religious, historical, and environmental importance to Alliguna,[93] the activities on the high seas with adverse impacts on the European eel can be considered "transboundary" harm to Alliguna.

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[85] CBD, Art.3
[86] BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT, at 186 (3rd ed. 2009)
[87] Draft Articles on Transboundary Harm, Art.2 (9)
[88] *Id.*, Art 1 (16)
[89] *See* section I.A.3.
[90] The IUCN Red List of Threatened Species, IUCN, online: https://www.iucn.org/theme/species/our-work/iucn-red-list-threatened-species
[91] CBD Decision XI/17, *supra* note 57, at 23
[92] Record, ¶3
[93] Record, ¶4

In sum, Revels' harvesting program created a risk of causing significant transboundary harm to Alliguna.

3. Revels failed to take the appropriate measures required by due diligence

The term "ensure" in Article 3 of the CBD or "appropriate measures" in the Draft Articles on Transboundary Harm both imply the due diligence standard required of a State in its jurisdiction. This was established in the *Pulp Mills* (2010)[94] and also elaborated in ITLOS' Advisory Opinion on *Responsibilities and Obligations in the Area*.[95] The former defines due diligence as consisting of "a certain level of vigilance" in their administrative control applicable to private operators.[96] The latter describes "due diligence" as a "variable concept" which may change with new scientific or technology emerged.[97] However, it has to be "more severe for the riskier activities."[98]

In this case, the only measure which was not even close to being appropriate was the EIA conducted by the SEA Corporation. The CBD mandates the substantial obligations of EIA.[99] States have to take into account the adverse impacts on biological diversity when making policy. However, it was evident that Revels lacked a certain level of vigilance to enforce its administrative control. Firstly, the EIA conducted by the SEA Corporation was not directly supervised by Revels. Moreover, upon knowing the uncertain results of the EIA, Revels neither took this uncertainty into account when making policy, nor did it take any other regulatory or preventive measures. Thus, Revels gravely violated the substantial obligations of the EIA under the CBD, while also failing the due diligence standard required in preventing the risk of causing significant transboundary harm.

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[94] Pulp Mills (2010), *supra* note 70, ¶101
[95] Responsibilities and obligation of States with respect to activities in the Area, Case No. 17, Advisory Opinion, Feb. 1, 2011, ITLOS Rep.10, ¶120
[96] Pulp Mills (2010), *supra* note 70, ¶197
[97] Advisory Opinion, ITLOS, *supra* note 95, ¶117
[98] *Id*.
[99] CBD, Art. 14 (b)

D. REVELS VIOLATED THE PRECAUTIONARY PRINCIPLE IN THE FACE OF UNCERTAINTY

It is important to apply the precautionary principle in all aspects to protect the environment since it has become customary international law.[100] Revels violated the precautionary principle in the regard that its actions entailed an uncertainty of the collapse of the whole ecosystem in the Sargasso Sea.

1. Revels failed to take precautionary measures when there was sufficient scientific uncertainty

The basic definition of the precautionary principle is enshrined in the Rio Declaration, which provides that when facing threats of serious or irreversible damage, scientific uncertainty shall not be used as a reason for postponing cost-effective measures to prevent environmental harm.[101] The CMS and the CBD also include the concept and stress that scientific uncertainty cannot be used as an excuse for delayed measures.[102] In general, the greater the chances of causing serious or irreversible damage, the less scientific uncertainty is needed to take cost-effective precautionary measures.

It is clear that harvesting Sargassum has caused damage to the European eel and created a risk of significant harm to the marine life relying on the Sargassum. However, there was an uncertainty that it may lead to a catastrophe to the environment or even the collapse of the whole ecosystem, which was serious and irreversible because once the species went extinct, it will be irreversible regarding the recovery of the species and the chain effects to the ecosystem

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[100] Advisory Opinion, ITLOS, *supra* note 95, ¶135; HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, 502 (3rd ed. 2007); Gabčíkovo-Nagymaros Project (1997), *supra* note 69, ¶140
[101] Rio Declaration, principle 21
[102] CBD, preamble; CMS Resolution 12.21, ¶2

would be serious. Such level of uncertainty and the potential result were sufficient for Revels to warrant taking precautionary measures.[103]

2. Revels bears the burden of proof regarding its compliance with the precautionary principle

Increasing State practice shows a shift in the burden of proof when deciding on the application of the precautionary principle.[104] When there is a dispute regarding the consequences of Revels' conduct, Revels should cease the conduct unless it can prove that the program would cause no serious harm. However, Revels did not provide any evidence that the Sargassum harvesting project would not cause harm to the marine ecosystem. Since Revels subsequently failed to take any precautionary measures, it thus certainly violated the precautionary principle.

E. REVELS COULD NOT JUSTIFY THE HARVEST AS AN APPROPRIATE ADAPTATION ACTION UNDER THE PARIS AGREEMENT, THE CBD AND THE UNFCCC

Compliance with the Paris Agreement does not exempt Revels from its obligations under the CBD, the CMS, the UNCLOS and the UNFCCC because the applicable obligations under these conventions are compatible and govern different subject matters.[105] Revels cannot claim that the Sargassum harvesting project was an appropriate adaptation action under the Paris Agreement[106] to justify its violation of obligations under other conventions. Furthermore, the precautionary principle contended by Revels to mitigate climate change was not cost-effective.

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[103] Southern Bluefin Tuna Order (1999), ¶¶77, 79
[104] Laffoley et al., *supra* note 57, at 223
[105] VCLT, Art. 30
[106] Paris Agreement, Art. 7.5

1. **Revels failed to consider the adverse impacts of the Sargassum harvesting project on the ecosystem.**

The Paris Agreement highlights the importance of the integrity of all ecosystems, including oceans, and the protection of biodiversity.[107] When adopting adaptation actions to meet NDC commitments, State parties should "assess the impacts and vulnerability of climate change",[108] "take into consideration of vulnerable ecosystems",[109] and "build the resilience of ecological systems".[110] CBD Decision X/29 also requires State parties to consider the ecological effects of ocean acidification in conjunction with the impacts of global climate change[111] and to integrate such considerations[112] into relevant adaption actions.[113] The UNFCCC furthermore stresses that such policies must be "comprehensive"[114], and "necessary" especially on fragile ecosystems.[115] States must ensure "sufficient time for the ecosystem to adapt naturally."[116] Brief, the adaptive action must consider its impacts on the ecosystem.

Revels failed to consider the adverse impacts on the ecosystem when trying to meet its NDC commitments. Omitting said requirements when adopting an adaptation action violated the Paris Agreement, CBD Decision X/29 and Revels' obligations under the UNFCCC.

2. **The precautionary principle under the UNFCCC does not favor the Sargassum harvesting project**

The precautionary principle under the UNFCCC requires States to take cost-effective measures at the lowest possible cost.[117] In the present case, the Sargassum, a seaweed in the

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[107] Paris Agreement, preamble ¶13
[108] Paris Agreement, Art 7.9 (c)
[109] Paris Agreement, Art.7.5
[110] *Id.*
[111] CBD Decision X/29, ¶65
[112] CBD Decision X/29, ¶¶13(d), 67
[113] CBD Decision X/29, ¶7
[114] UNFCCC, Art. 3.3
[115] UNFCCC, Art. 4.8 (g)
[116] UNFCCC, Art. 2
[117] UNFCCC, Art. 3.3

sea, can perform photosynthesis and combat ocean acidification.[118] Compared to the commonly-used biofuels which use cultivated algae, wild Sargassum is otherwise limited in quantity and is part of the vulnerable ecosystem.[119] Removing it from the natural habitat would eliminate its beneficial impacts on carbon sequestration,[120] the ecosystem, and ocean acidification. This would worsen the ocean acidification and seriously harm marine biodiversity in the Sargasso Sea. Accordingly, the disadvantages are clearly larger than the benefits of carbon emission reduction achieved by the program. As such, it can be concluded that the project was not aimed at the lowest possible cost. Revels therefore cannot invoke the precautionary principle to justify the project.

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[118] Krause-Jensen et al., *Long photoperiods sustain high pH in Arctic kelp forests,* 2 SCIENCE ADVANCES 12, (2016)

[119] *See* CBD Decision IX/20, Annex 1, EBSA criteria includes vulnerability

[120] CBD Decision X/29, ¶8 (b); Substantial role of macroalgae in marine carbon sequestration, 2016, online: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6030603/ (last visited Nov. 16, 2018)

CONCLUSION AND PRAYER FOR RELIEF

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

1. The ICJ has the jurisdiction to settle the dispute and that the Republic of Revels is attributable for the conducts of the SEA Corporation in the Sargasso Sea.
2. The Republic of Revels violated international law by negatively impacting the European eel and the whole ecosystem in the Sargasso Sea through the Sargassum harvesting project.

Respectfully submitted,

AGENTS FOR APPLICANT