

INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE
THE HAGUE, THE NETHERLANDS



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

2018 General List No. 237

FEDERAL STATES OF ALLIGUNA
Applicant

v.

REPUBLIC OF REVELS
Respondent

MEMORIAL FOR THE APPLICANT

THE 23RD STETSON MOOT COURT COMPETITION
2018-2019

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QUESTIONS PRESENTED

- I. WHETHER THE INTERNATIONAL COURT OF JUSTICE HAS JURISDICTION TO DETERMINE THE MATTER.**

- II. WHETHER THE CONDUCT OF THE SEA CORPORATION IN HARVESTING SARGASSUM ON THE HIGH SEAS IN THE SARGASSO SEA IS ATTRIBUTABLE TO THE REPUBLIC OF REVELS.**

- III. WHETHER THE REPUBLIC OF REVELS VIOLATED INTERNATIONAL LAW BY ITS INVOLVEMENT IN THE SARGASSUM HARVESTING PROJECT.**

STATEMENT OF JURISDICTION

On 21 April 2018, the Federal States of Alliguna (“Alliguna”) submitted the present case by written application instituting proceedings against the Republic of Revels (“Revels”) pursuant to Article 40, paragraph 1, of the Statute of the Court (“ICJ Statute”)¹, wherein a State may bring a case before the Court by written application.

Alliguna has recognized the jurisdiction of the Court as compulsory *ipso facto* pursuant to Article 36, paragraphs 2 and 3, of the ICJ Statute.² Revels has not recognized the jurisdiction of the Court as compulsory *ipso facto*.³ Nevertheless, in accordance with Article 36, paragraph 1, of the ICJ Statute, the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

The present dispute involves an interpretation and application of the Convention on Biological Diversity (“CBD”)⁴, the United Nations Framework Convention on Climate Change (“UNFCCC”)⁵, and the Paris Agreement⁶. Alliguna, therefore, invokes the compromissory clauses of the CBD (Article 27), the UNFCCC (Article 14), and the Paris Agreement (Article 24) as bases of the Court’s jurisdiction.

¹ Statute of the International Court of Justice, Art. 36(1), 18 April 1946, 33 U.N.T.S. 993.

² Record ¶5.

³ *Id.*

⁴ Convention on Biological Diversity, 5 June 1992, 1760 U.N.T.S. 79.

⁵ United Nations Framework Convention on Climate Change, 9 May 1992, 1771 U.N.T.S. 107.

⁶ Paris Agreement, FCCC/CP/2015/10/Add.1, 13 December 2015.

On 5 May 2018, Revels submitted its Preliminary Objection contesting the Court’s jurisdiction to determine the matter.⁷ However, on 4 June 2018, the Parties have agreed that the questions regarding the Court’s jurisdiction are inextricably linked to the merits of the questions raised in the Application submitted by Alliguna and should, therefore, be heard and determined within the framework of the merits.⁸ Under Article 79, paragraph 10, of the Rules of Court, such agreement between the parties shall be given effect by the Court.

On 6 July 2018, the Registrar, noting the agreement of the parties on the dispute, entered the case of Questions Relating to Use of the Sargasso Sea and the Protection of Eels (*Federal States of Alliguna v. Republic of Revels*) as 2018 General List No. 237.

⁷ Record ¶25.

⁸ Notification from the Registrar of the ICJ, dated 6 July 2018, Record p. 2.

STATEMENT OF FACTS

A) THE PARTIES

Alliguna and Revels are neighboring coastal sovereign states. Both countries' coasts are approximately 250 nautical miles from the Sargasso Sea.⁹

B) THE QUESTIONED CONDUCT

In July 2016, the SEA Corporation, a privately owned company in Revels, began harvesting Sargassum from the Sargasso Sea on the high seas beyond national jurisdiction using its vessel, the *Columbus*, which sailed under the flag of Revels.¹⁰

Revels provided a subsidy to the SEA Corporation for the Sargassum harvesting project¹¹ in an amount such that the project would not have moved forward without the subsidy.¹²

C) THE DISPUTE

Alliguna requested Revels to put an end to the project on the ground that it would negatively impact the European eel, which spawns on the Sargasso Sea, and that the likely harm to the eels is a violation of customary international law and other multilateral environmental agreements,¹³ but Revels refused.¹⁴ After several months of fruitless negotiations, followed by mediation, Alliguna asked Revels to agree to submit the matter to the Court, but Revels refused,¹⁵ hence the Application by Alliguna instituting proceedings against Revels.

⁹ Record ¶1.

¹⁰ Record ¶13.

¹¹ Record ¶14.

¹² Clarification to the Record, A18.

¹³ Record ¶18.

¹⁴ Record ¶19.

¹⁵ Record ¶24.

SUMMARY OF ARGUMENTS

A) THE COURT HAS JURISDICTION OVER THE PRESENT DISPUTE.

By the express declaration of the parties recognizing the jurisdiction of the Court in the settlement of any dispute arising from the interpretation or application of the provisions of the CBD, the UNFCCC, and the Paris Agreement, the Court has jurisdiction over the present case. In any case, the specificity of the CMS¹⁶ to migratory species like the European eel does not divest the Court of jurisdiction seized under the CBD, the UNFCCC, and the Paris Agreement.

B) THE SARGASSUM HARVESTING PROJECT IS ATTRIBUTABLE TO REVELS.

The Sargassum harvesting project conducted by the SEA Corporation is attributable to Revels because, through its acts, it has acknowledged and adopted the conduct of the SEA Corporation as its own. In fact, without Revels' sanction and subsidy, the project would not have moved forward.

C) REVELS HAS VIOLATED INTERNATIONAL LAW.

Harvesting large amounts of Sargassum negatively impacts the European eel by destroying part of their spawning habitat. Revels breached its obligations to prevent transboundary harm, to observe the Precautionary Principle, to promote sustainable development, and to conserve biodiversity for future generations. Revels likewise neglected to protect and preserve the marine environment, as mandated by the UNCLOS¹⁷. Furthermore, Revels violated its obligation to protect the European eel under the CMS.

¹⁶ Convention on the Conservation of Migratory Species of Wild Animals, 3 June 1979, 1651 U.N.T.S. 333.

¹⁷ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3.

ARGUMENTS

I. THE COURT HAS JURISDICTION OVER THE DISPUTE.

In accordance with Article 36, paragraph 1, of the ICJ Statute, the Court's jurisdiction derives from Article 27 of the CBD, as well as from Article 14 of the UNFCCC and Article 24 of the Paris Agreement. Further, the Court retains jurisdiction even if the CMS and the UNCLOS apply as this Court is the most competent forum to deal with all aspects of the present dispute.

A. CHARACTERIZATION OF THE SUBJECT MATTER OF THE DISPUTE

The dispute concerns the harvesting of Sargassum in the Sargasso Sea with the sanction of and subsidy from Revels, in breach of obligations assumed under international law, including, but not limited to, violations of customary international law and several multilateral environmental agreements.

B. THE COURT HAS *COMPÉTENCE DE LA COMPÉTENCE* TO DETERMINE JURISDICTION.

The Court, whose powers derive from its Statute, has the express power to determine its own jurisdiction should any dispute arise on the matter.¹⁸ The Court has consistently exercised this power before determining the merits of the case.¹⁹ Article 36, paragraph 6, of the ICJ Statute, provides that: "*In the event of a dispute as to whether the Court has jurisdiction, the matter shall*

¹⁸ ANDREAS ZIMMERMANN, ET AL., *STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY*, Oxford University Press (2012) ¶109; *Fisheries* (Spain v. Can.) 1998 I.C.J. 432, ¶37-38.

¹⁹ *Legality of Use of Force* (Serb. and Montenegro v. U. K.), Preliminary Objections, 2004 I.C.J. 1307, ¶33; *See also Corfu Channel* (U.K. v. Albania), Preliminary Objection, 1948 I.C.J. 15; *Nottebohm* (Liech. v. Guat.), Preliminary Objection (Second phase), 1955 I.C.J. 4.

be settled by the decision of the Court."²⁰ Article 36, paragraph 6, suffices to invest the Court with the power to adjudicate on its jurisdiction in the present case.²¹

C. THE COURT HAS JURISDICTION OVER DISPUTES CONCERNING THE INTERPRETATION OR APPLICATION OF A TREATY.

Under Article 36(1) of the ICJ Statute, the Court can exercise jurisdiction upon the concurrence of two elements: *first*, there must be a dispute,²² and *second*, some genuine relationship exists between the object of the claim and the provisions invoked.²³

(a) There is a dispute between the parties.

A dispute exists when there are positively opposing claims between parties on a point of law or fact.²⁴ Alliguna maintains that by harvesting Sargassum, Revels is damaging the marine biodiversity that depends on the Sargasso Sea, especially the European eel, in breach of obligations assumed under customary international law and several multilateral environmental agreements.²⁵ Conversely, Revels denies that it violated any international obligation, and alleges that the conduct of the SEA Corporation in harvesting Sargassum is not attributable to Revels

²⁰ ICJ Statute, Art. 36(6).

²¹ *Nottebohm* (Liech. v. Guat.), Preliminary Objection, Judgment, [1953] ICJ Rep 111, 18th November 1953, at 120.

²² *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20) ¶24; *Border and Transborder Armed Actions* (Nicar. v. Hond.), 1988 I.C.J. 69 (Dec. 20) ¶52.

²³ *Judgements of the Administrative Tribunal of the I.L.O. Upon Complaints Made Against the UNESCO*, Advisory Opinion, 1956 I.C. J. 77, 89.

²⁴ *East Timor* (Port. v. Austl.), Jurisdiction, 1995 I.C.J. 90, ¶ 22; *South West Africa* (Eth. v. S. Afr.; Liber. v. S.Afr.), Preliminary Objections, 1962 I.C.J. 319.

²⁵ Record, Annex B.

such that Revels would be responsible for any alleged violation of international law.²⁶ Hence, there is a dispute arising from the disagreement of the parties on several points of law and fact.

(b) There is a genuine relationship between the object of the claim and the provisions invoked.

To determine the existence of such genuine relationship, the Court must ascertain whether it has jurisdiction *rationae materiae*.²⁷ In determining such jurisdiction, the concern is whether the object of the claim is capable of violating a treaty provision.²⁸ Here, there is a genuine relationship between Alliguna's claims and the treaty provisions invoked.

D. THE PREREQUISITE NEGOTIATION HAS BEEN COMPLIED WITH.

The prerequisite of negotiation has also been complied with. For several months prior to the submission of the Application, Alliguna and Revels exchanged diplomatic notes,²⁹ as well as engaged in negotiations, followed by mediation, but the negotiations and mediation failed to resolve the dispute regarding the harvesting of Sargassum in the Sargasso Sea and its effects on European eels.³⁰

E. THE COURT HAS JURISDICTION BY VIRTUE OF ARTICLE 27 OF THE CBD.

1. The parties have accepted submission of the dispute to the Court as a compulsory means of dispute settlement under the CBD.

²⁶ Record, Annex C.

²⁷ *Oil Platforms* (Iran v U.S.), Preliminary Objection, 1996 I.C.J. 803, ¶16.

²⁸ *Oil Platforms* (Iran v U.S.), Preliminary Objection, 1996 I.C.J. 803, ¶51.

²⁹ Record ¶18-23.

³⁰ Record ¶24.

Under Article 27 of the CBD, States may negotiate in the event of a dispute, and if the parties do not come to an agreement, mediation may be sought.³¹ Finally, the parties may agree that dispute settlement by the ICJ is compulsory if it cannot be resolved after negotiation or mediation.³² Here, the negotiations and mediation failed to resolve the dispute.³³ In accordance with Article 27, paragraph 3, of the CBD, when Alliguna and Revels ratified the CBD, both countries declared in writing that they would submit to the jurisdiction of this Court to resolve disputes concerning the interpretation or application of the CBD.³⁴ Thus, the dispute was duly referred to the Court.

2. The CBD applies to the dispute.

Biological diversity is defined as the variability within and between species, and of ecosystems.³⁵ It has three components, namely, (a) ecosystem diversity, (b) species diversity, and (c) genetic diversity.³⁶

Harvesting large amounts of Sargassum from the Sargasso Sea will negatively impact ecosystem diversity in the Sargasso Sea because it could have devastating effects on the European eel, whose population is already in serious decline. This contravenes the purpose of the CBD to conserve biological diversity, which includes the European eel, as well as the rest of the marine biodiversity in the Sargasso Sea.³⁷

³¹ CBD, Art. 27(1, 2).

³² *Id.*, Art. 27(1, 2, 3).

³³ *Id.*, ¶24.

³⁴ *Id.*, ¶7.

³⁵ CBD, Art. 2.

³⁶ LYLE GLOWKA, ET AL., A GUIDE TO THE CONVENTION ON BIOLOGICAL DIVERSITY, IUCN Gland and Cambridge (1994), p. 16.

³⁷ Record, Annex B.

3. The dispute concerns the interpretation and application of the CBD.

The obligation to conserve biodiversity under the CBD requires protection of interlinked components in the marine environment including species, habitats, and ecosystems.³⁸ As this matter concerns the harvesting of Sargassum in the Sargasso Sea and its impact on marine biodiversity, it involves the “interpretation or application”³⁹ of the CBD. Therefore, the Court has jurisdiction.⁴⁰

In particular, the Court must exercise its jurisdiction to resolve questions concerning Revels’ obligations under the CBD 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;⁴¹ to cooperate with other Contracting Parties, whether directly or through a competent international organization, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity;⁴² adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity.⁴³

4. The CBD applies to the processes and activities of Revels on the high seas.

The harvesting of Sargassum in the Sargasso Sea, which is carried out under the jurisdiction or control of Revels, and which has or is likely to have a significant adverse impact

³⁸ CHRISTOPHER JOYNER, BIODIVERSITY IN THE MARINE ENVIRONMENT: RESOURCE IMPLICATIONS FOR THE LAW OF THE SEA, 28 Vand. J. Transnat’l L. 635, 644-46 (1995).

³⁹ CBD, Art. 27(1).

⁴⁰ *Id.*, Art. 27(3)(b).

⁴¹ CBD, Art. 3.

⁴² *Id.*, Art. 5.

⁴³ *Id.*, Art. 10(b).

on the conservation and sustainable use of biological diversity⁴⁴ is within the jurisdictional scope of the CBD. Under Article 4, paragraph b, of the CBD, it is of no moment that the processes and activities are carried out in the high seas or beyond the limits of the national jurisdiction of Revels.

F. THE COURT HAS JURISDICTION UNDER THE UNFCCC AND THE PARIS AGREEMENT.

The dispute also requires the interpretation and application of the UNFCCC and the Paris Agreement, particularly the rights and obligations of Revels towards its Nationally Determined Contributions (NDCs) commitments, which Revels conveniently invokes as an excuse to justify the Sargassum harvesting project that it subsidizes.⁴⁵

Under Article 14 of the UNFCCC and Article 24 of the Paris Agreement, both countries 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 Court.⁴⁶ With such declarations, it can be inferred that Revels accepts the Court's jurisdiction compulsorily under the UNFCCC and the Paris Agreement to the extent of environmental law related disputes.

G. THE COURT IS THE MOST COMPETENT FORUM TO DEAL WITH A DISPUTE THAT ARISES UNDER SEVERAL CONVENTIONS WITH VARIOUS DISPUTE SETTLEMENT METHODS.

1. Revels' argument that the CMS is *lex specialis* and should thus govern exclusively is misplaced.

⁴⁴ *Id.*, Art. 7(c), 3.

⁴⁵ Record ¶14, 19, 21.

⁴⁶ *Id.*, ¶10.

The impact of the Sargassum harvesting project on the European Eel and the Sargasso Sea ecosystem implicates Revels' obligations not only under the CMS but also under the CBD, UNFCCC, Paris Agreement, and customary international law. Hence, the applicability of the CMS to the dispute cannot divest the Court of jurisdiction based on Revels' written declarations of consent under the CBD, UNFCCC, and the Paris Agreement.

2. The Court has jurisdiction even if Revels selected ITLOS for the settlement of disputes under UNCLOS.

Where a case falls within the jurisdiction of various international tribunals, the Court gives preference to that jurisdiction which encompasses all the aspects of the claim.⁴⁷ For instance, in *Chorzów Factory*,⁴⁸ the Permanent Court of International Justice ("PCIJ") established its own jurisdiction over other specialized tribunals as it held that they were not competent to deal with all aspects of the claim or to give parties the kind of satisfaction they could get from the PCIJ.⁴⁹ Further, the tribunal first seized of the dispute assumes jurisdiction in cases where other overlapping jurisdictions are also possible.⁵⁰ Such jurisdiction is not affected even when there is another court with jurisdiction from a later treaty which is *lex specialis*.⁵¹

This Court can adjudicate the case based on the CBD, UNFCCC, Paris Agreement, CMS, UNCLOS, and customary international law. In contrast, the International Tribunal for the Law of

⁴⁷ IBRAHIM F.I. SHIHATA, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION, Springer-Science+Business Media, B.V., (1965), p. 258-59..

⁴⁸ *Chorzów Factory (Germ. v. Pol.)*, 1927 P.C.I.J.(ser. A),No. 9, (July 26).

⁴⁹ *Id.*, at 27-31.

⁵⁰ SHABTAI ROSENNE, I THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005, 39 (2006).

⁵¹ *Territorial and Maritime Dispute (Nic. v. Col.)*, Preliminary Objections, Judgment, 2007 ICJ 832, 872-873, ¶133 (Dec. 13).

the Sea (“ITLOS”) under UNCLOS is limited only to the settlement of disputes concerning the interpretation or application of UNCLOS.

Therefore, this Court is the most competent forum to deal with all the claims of the present matter. Further, this Court was first seized of the present dispute and can thus assume jurisdiction over it.

II. THE CONDUCT OF THE SEA CORPORATION IS ATTRIBUTABLE TO REVELS, AND ALLIGUNA IS ENTITLED TO INVOKE THE RESPONSIBILITY OF REVELS.

Under Article 11 of the Draft Articles on State Responsibility⁵², private conduct may be considered an act of State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own. It provides for an exception to the general principle that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law, thus laying down the legal framework for attribution of private conduct to a State.⁵³

A. REVELS HAS ACKNOWLEDGED AND ADOPTED THE CONDUCT OF THE SEA CORPORATION AS ITS OWN.

The questioned conduct of the SEA Corporation in harvesting Sargassum is technically the conduct of a privately owned company in Revels. However, considering that the SEA Corporation is incorporated in Revels, and its vessel, the *Columbus*, sails under the flag of

⁵² International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, G.A. Res.56/83, U.N. GAOR, 56th Sess., U.N. Doc.A/RES/56/83.

⁵³ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 52.

Revels, Revels has the jurisdiction and authority to put an end to the Sargassum harvesting project. However, instead of putting an end to the project, Revels subsidized the project⁵⁴ in an amount such that the project would not have moved forward without the subsidy.⁵⁵ Revels also highlighted the project in a press release and report it issued about the progress and success of its new renewable energy program⁵⁶ and claims that the SEA Corporation's initiative will help Revels to achieve its NDC commitments under the Paris Agreement.

Therefore, through its acts, Revels has effectively transformed the legal nature of the conduct of the SEA Corporation into its own acts.

B. REVELS EXERCISES EXCLUSIVE JURISDICTION OVER THE *COLUMBUS*.

The *Columbus*, which sails under the flag of Revels, is subject to the exclusive jurisdiction of Revels on the high seas. This is clear from Article 92, paragraph 1, of UNCLOS. Having exclusive jurisdiction over the *Columbus*, Revels had an obligation to ensure that the activities of the vessel do not cause damage to areas beyond the limits of national jurisdiction.⁵⁷ However, Revels failed to fulfill the said obligation. Hence, the questioned conduct of the SEA Corporation, particularly that of harvesting Sargassum, is attributable to Revels so as to entail the international responsibility of Revels.

⁵⁴ Record ¶14.

⁵⁵ Clarification to the Record, A18.

⁵⁶ Record, ¶16.

⁵⁷ Rio Declaration on Environment and Development, UN Conference on Environment and Development, 3-14 June 1992, A/CONF.151/26 (Vol. I), Principle 2.

C. ALLIGUNA IS ENTITLED TO INVOKE THE RESPONSIBILITY OF REVELS.

Alliguna is entitled to invoke the responsibility of Revels because (1) it is an injured State and (2) the obligations breached are *erga omnes*.⁵⁸

1. Alliguna is an injured State.

Alliguna can invoke the responsibility of Revels under international law because it is an injured State.⁵⁹ The harvesting of Sargassum on the Sargasso Sea adversely affects the European eel, which is particularly important to Alliguna and its citizens. Historically, numerous European eels lived in Alliguna's waters, and the eels feature prominently in Alliguna's culture, religion, and history.⁶⁰ Therefore, the Sargassum harvesting project causes injury to Alliguna, thereby entitling it to file the present claim.

2. The obligations breached by Revels are *erga omnes* obligations.

Environmental law obligations are considered *erga omnes*.⁶¹ The conservation of biological diversity is a common concern of humankind and is prioritized above the sovereign rights of States over their own biological resources.⁶² Thus, any State, whether directly affected or not, has the right to invoke a violation against another State performing an environmental

⁵⁸ Draft Articles on State Responsibility, Art. 42.

⁵⁹ *Id.*; *United States Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran)*, Judgment, 1980 I.C.J. 3 (May 24), ¶90.

⁶⁰ Record ¶4.

⁶¹ *Gabcikovo-Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 I. C. J. 7 (Opinion of Weeramantry, J.).

⁶² LYLE GLOWKA, *supra* Note 36, at 3.

wrong. Therefore, even if the obligations breached by Revels are not owed to Alliguna individually, Alliguna has the right to invoke responsibility of Revels.⁶³

III. REVELS VIOLATED INTERNATIONAL LAW BY ITS INVOLVEMENT IN THE SARGASSUM HARVESTING PROJECT.

A. REVELS VIOLATED ITS OBLIGATION TO PREVENT TRANSBOUNDARY HARM.

The duty to prevent transboundary harm is part of customary international law⁶⁴ and is also enshrined in the CBD⁶⁵, to which Revels is a contracting party.⁶⁶ States must ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction.⁶⁷

1. The elements of transboundary harm are present.

Four elements must concur for transboundary harm to be caused, as discussed below.⁶⁸

(a) Nexus between the activity and the damage

There should be a physical linkage between the activity in question and the damage caused by it. Harvesting Sargassum removes part of the delicate ecosystem of the Sargasso Sea⁶⁹

⁶³ Draft Articles on State Responsibility, Art. 42(b). *Barcelona Traction (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶33.

⁶⁴ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, 226, I.C.J. 8 July 1996, 241-42.

⁶⁵ CBD, Arts. 3, 14.

⁶⁶ Record ¶7, 9.

⁶⁷ Rio Declaration, Principle 2; Stockholm Declaration of the United Nations Conference on the Human Environment, A/CONF.48/14/Rev.1 (1972), Principle 21.

⁶⁸ *Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1905 (1938/1941).

⁶⁹ Record ¶20.

resulting in environmentally harmful consequences on the European eels which rely on such ecosystem,⁷⁰ particularly for their spawning cycle.⁷¹

(b) Human Causality

Transboundary damage should have some reasonably proximate causal relation to human conduct.⁷² The harvesting project is done through the SEA Corporation, a corporation privately owned⁷³ by humans.

(c) Threshold criterion

The threshold criterion presupposes that the damage caused should be at least greater than a mere nuisance or insignificant harm which is normally tolerated.⁷⁴

The European eel is listed as Critically Endangered on the IUCN Red List of Threatened Species.⁷⁵ European eels migrate to the Sargasso Sea to spawn, and the leptocephali (larvae) migrate across the Atlantic Ocean to coastal waters. The eels eventually travel to inland waters and continue to develop and grow. Unfortunately, the species' recruitment, population, and escapement have exhibited pronounced declines over the past several decades.⁷⁶

The Sargassum harvesting project involves the risk of causing significant transboundary harm on the Sargasso Sea ecosystem and the European eel as a pelagic species spawning in the Sargasso Sea. Such risk may exist even though those responsible for carrying out the activity

⁷⁰ *Id.*, ¶20.

⁷¹ *Id.*, ¶3.

⁷² SCHACHTER, OSCAR, INTERNATIONAL LAW IN THEORY AND PRACTICE, (Martinus Nijhoff, 1991), at p. 366.

⁷³ Record ¶13.

⁷⁴ *Trail Smelter Arbitration*, *supra* Note 68, at 8.

⁷⁵ Record ¶3.

⁷⁶ Record ¶3.

underestimated the risk or were unaware of it. Alliguna apprised Revels of the risks involved in the harvesting project⁷⁷ and Revels cannot deny responsibility for such risk on the basis that it did not believe such risk to exist.⁷⁸

(d) Transboundary transfer of harmful effects

European eels exhibit facultative catadromy⁷⁹ such that they migrate from the Sargasso Sea to coastal areas. The harmful effect of the harvesting project to the precious Sargasso Sea ecosystem will affect not only the Sargasso Sea where the European eels spawn but the Atlantic Ocean as well where they pass and the coastal waters and inland waters where they continue to develop and grow.⁸⁰

B. REVELS VIOLATED THE PRECAUTIONARY PRINCIPLE.

The Precautionary Principle is a tool for decision-making in a situation of scientific uncertainty⁸¹ and places a default hold on certain activities that may pose serious risks. The principle establishes a stop-and-think mechanism under which the risk creator bears the burden both to quantify the risk and to disclose relevant risk data to regulators.⁸²

⁷⁷ *Id.*, ¶18.

⁷⁸ *Id.*, ¶19.

⁷⁹ *Id.*, ¶3.

⁸⁰ *Id.*, ¶3.

⁸¹ Freestone, *The Road from Rio: International Environmental Law After the Earth Summit*, 6 JEL at 211(1994).

⁸² Noah M. Sachs, *Rescuing The Strong Precautionary Principle From Its Critics*, U.Ill.L.Rev 1285 (2011).

1. The CBD codifies the Precautionary Principle.

The CBD's Preamble provides that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.⁸³ This definition is an embodiment of the Precautionary Principle.⁸⁴

2. The elements of the Precautionary Principle are present.

The application of the precautionary principle as custom requires the threat of environmental harm, of a serious or irreversible nature, and scientific uncertainty.⁸⁵ All these elements are present.

(a) The threat of environmental harm is present.

The Precautionary Principle cautions against activities that may cause harm or damage. Harvesting Sargassum removes part of this delicate ecosystem on which the eels rely. Although Alliguna has yet to obtain direct evidence that the project has harmed the European eel, it is easy to infer that destroying part of its spawning habitat certainly will harm the species.⁸⁶

(b) The threat of environmental damage is serious and irreversible.

Revels fails to appreciate the severity of the situation and the devastating effects it could have, and likely already has had, on European eels and probably other species as well.⁸⁷

⁸³ CBD, Preamble (9).

⁸⁴ PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, CAMBRIDGE (2nd ed. 2003), at 270.

⁸⁵ IUCN Council, Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management, 67th Meeting (2007).

⁸⁶ Record ¶20.

⁸⁷ *Id.*, ¶20.

Harvesting large amounts of Sargassum from the Sargasso Sea will negatively impact this precious ecosystem and could have devastating effects on the European eel, whose population is already in serious decline.⁸⁸

(c) Finally, there is scientific uncertainty as to the project's risks.

There is uncertainty as to the risks posed by Sargassum harvesting project. Revels alleges lack of awareness of any demonstrable negative impact from its biofuels project on the Sargasso Sea or the European eel.⁸⁹ However, the lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat of significant reduction or loss of biological diversity. Revels is obligated to take measures to prevent such negative impact from occurring,⁹⁰ and it miserably failed in that regard.

C. REVELS FAILED IN ITS DUTY TO CONSERVE BIOLOGICAL DIVERSITY UNDER THE CBD.

Revels ignored and continues to ignore the threat of significant reduction or loss of biological diversity in the Sargasso Sea, thus violating its obligations under the CBD.

The Sargasso Sea has been designated as an ecologically or biologically significant marine area (“EBSA”) under the CBD.⁹¹ Hence, the importance of protecting the Sargasso Sea and avoiding the exploitation of its resources cannot be overemphasized.

⁸⁸ *Id.*, ¶18.

⁸⁹ *Id.*, ¶19.

⁹⁰ Rio Declaration, Principle 15; CBD, Preamble.

⁹¹ *Id.*, ¶18.

1. Revels failed to adopt measures to avoid or minimize impacts on biological diversity.

Revels failed in its obligation under Article 10, paragraph b, of the CBD to adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity.

Sargassum is a vital biological component of the ecosystem on which the critically endangered species of European eels rely on for their survival. Therefore, harvesting large amounts of Sargassum harms the European eels and will have an adverse impact on biological diversity.

However, despite being informed of said risks on biological diversity, Revels failed to adopt measures relating to the harvesting and use of Sargassum to avoid or minimize adverse impacts on biological diversity.

2. Revels failed in its duty to cooperate with other Contracting Parties for the conservation of biological diversity.

Article 5 of the CBD provides that each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.

The Sargasso Sea is an area that is beyond national jurisdiction and is of common interest to the parties. However, Revels failed to cooperate with Alliguna for the conservation of biological diversity in the Sargasso Sea. Revels continues to sanction and subsidize the Sargassum harvesting project notwithstanding the risks to biological diversity.

3. Revels contravened CBD Decisions IX/20 and X/29 on marine and coastal biodiversity.

CBD Decision IX/20 urges Parties to apply the scientific criteria, guidance, and initial steps contained in its annexes, to identify ecologically or biologically significant or vulnerable marine areas in need of protection, with a view to implementing conservation and management measures, among others.⁹² This was followed by CBD Decision X/29 which urges Parties to achieve long-term conservation, management and sustainable use of marine resources and coastal habitats, and to effectively manage marine protected areas, in accordance with international law, including the UNCLOS, in order to safeguard marine and coastal biodiversity, among others.⁹³ Revels simply ignored said CBD decisions when it sanctioned and subsidized the Sargassum harvesting project of the SEA Corporation in breach of its obligations as a party to the CBD.

D. REVELS VIOLATED ITS OBLIGATIONS UNDER THE UNCLOS.

1. Revels violated its obligation to protect and preserve the marine environment under the UNCLOS.

The UNCLOS codifies the obligation of States to protect and preserve the marine environment.⁹⁴ The UNCLOS requires States to follow two main environmental objectives: *first*, to conserve living resources of the seas and oceans, and *second*, to protect and preserve the marine environment.⁹⁵

⁹² CBD Decision IX/20, *Marine and coastal biodiversity*, UNEP/CBD/COP/DEC/IX/20, 9 October 2008.

⁹³ CBD Decision X/29, *Marine and coastal biodiversity*, UNEP/CBD/COP/DEC/X/29, 29 October 2010.

⁹⁴ UNCLOS, Art. 192.

⁹⁵ *Id.*, Preamble.

Article 117 of the UNCLOS provides for the duty of all States to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

Upon learning about SEA Corporation's project from the Friends of the Eels and after making inquiries to confirm the information,⁹⁶ Alliguna sent a diplomatic note to Revels expressing its serious concerns regarding the harvesting of Sargassum in the Sargasso Sea by the *Columbus* and urged Revels to put an end to the project. However, Revels simply dismissed Alliguna's concerns as unwarranted.

Despite the fact that the SEA Corporation is a company that is based in Revels⁹⁷ and that the vessel used in collecting Sargassum sails under its flag,⁹⁸ Revels failed to take, or cooperate in taking, such measures with respect to the SEA Corporation and *Columbus* for the protection of the European Eel and the other living resources of the Sargasso Sea.

Revels is required by UNCLOS to take measures to protect and preserve the Sargasso Sea as the world's only holopelagic seaweed ecosystem⁹⁹ and spawning habitat of European eels. It failed.

2. Revels abused its exercise of freedom of the high seas under the UNCLOS.

Article 300 of UNCLOS provides that States Parties shall fulfill in good faith the obligations assumed under the Convention and shall exercise the rights, jurisdiction, and freedoms recognized in the Convention in a manner which would not constitute an abuse of right.

⁹⁶ Record ¶17.

⁹⁷ Record ¶13.

⁹⁸ *Id.*

⁹⁹ Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea, 11 March 2014.

Although Article 87 of the UNCLOS may provide for freedom of the high seas, there are limits, and damaging the marine resources and biodiversity of the Sargasso Sea, which Revels is subsidizing monetarily, goes beyond what is permitted on the high seas.

While the high seas are open to all States,¹⁰⁰ there is no absolute right over the living resources of the high seas since it also comes with the obligation to protect and preserve the marine environment.¹⁰¹ Freedom of the high seas should be exercised under the conditions laid down by the UNCLOS and by other rules of international law.¹⁰² Revels' exercise of freedom of the high seas constitutes an abuse of rights. Allowing its nationals to harvest Sargassum, and worse, subsidizing the project, is in complete disregard of the risks to the European Eel and the delicate ecosystem in the Sargasso Sea.

3. Revels failed as a flag state to ensure that the *Columbus* is not engaged in activities that harm the European eel.

Revels, in fulfillment of its responsibility to exercise effective jurisdiction and control in administrative matters as a flag state,¹⁰³ must adopt the necessary administrative measures to ensure that *Columbus* is not involved in activities which will undermine Revels' responsibilities under UNCLOS in respect of the conservation and management of marine living resources¹⁰⁴ in the areas of the high seas in cooperation with its nationals¹⁰⁵ and with other States.¹⁰⁶

¹⁰⁰ UNCLOS, Art. 87(1).

¹⁰¹ UNCLOS, Art. 192.

¹⁰² *Id.*, Art. 87(1).

¹⁰³ *Id.*, Art. 94(1).

¹⁰⁴ *ITLOS Advisory Opinion, Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, 2 April 2015, ¶119.

¹⁰⁵ UNCLOS, Art. 117.

¹⁰⁶ *Id.*, Art. 118.

Revels failed to fulfill this responsibility. Even worse, it subsidized the activity that undermines its responsibilities under the UNCLOS. Alliguna informed Revels that harvesting large amounts of Sargassum from the Sargasso Sea will negatively impact the ecosystem and could have a devastating effect on the European eel.¹⁰⁷ However, instead of fulfilling its obligation under Article 194, paragraph 6, of the UNCLOS, to investigate the matter and to take necessary actions to remedy the situation, Revels simply dismissed Alliguna's concerns.¹⁰⁸

E. REVELS VIOLATED ITS OBLIGATION TO PROTECT THE EUROPEAN EEL UNDER THE CMS.

As a party to the CMS, Revels has agreed to take action for the conservation of migratory species, to pay special attention to migratory species with unfavorable conservation status, and to take appropriate and necessary steps to conserve such species and their habitat.¹⁰⁹

The CMS protects the European eel. In 2014, the species was listed on CMS Appendix II as a migratory species which have an unfavorable conservation status which would significantly benefit from the international cooperation that could be achieved by an international agreement.¹¹⁰

When it allowed and subsidized the harvesting of Sargassum by the SEA Corporation, Revels failed in its duty as a party to the CMS and as a Range State for the European eels,¹¹¹ which has an unfavorable conservation status. Instead of taking steps to conserve such species and their habitat, Revels further endangered the species by allowing the destruction of their

¹⁰⁷ Record ¶18.

¹⁰⁸ *Id.*, ¶19.

¹⁰⁹ CMS, Art. II(1).

¹¹⁰ *Id.*, Art. IV(1).

¹¹¹ Record ¶8.

habitat. The floating Sargassum seaweeds are the world's only holopelagic algae and are the cornerstones of the Sargasso Sea.¹¹²

F. REVELS VIOLATED ITS OBLIGATION TO PROMOTE SUSTAINABLE DEVELOPMENT.

The term “sustainable development” is generally considered to have been coined by the 1987 Brundtland Report, which defined it as development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.¹¹³ The term is now established as an international legal concept.¹¹⁴

1. Revels failed to observe the principle of intergenerational responsibility.

This principle of intergenerational responsibility stresses that in making choices about meeting the needs of present generations, the needs of future generations should not be sacrificed. This principle is laid down as Principle 3 of the Rio Declaration: “*The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.*”

The Rio+20 outcome document, *The Future We Want*, reiterates the principle providing that States commit to protect, and restore, the health, productivity and resilience of oceans and marine ecosystems, to maintain their biodiversity, enabling their conservation and sustainable

¹¹² CBD Decision XI/17, *Marine and coastal biodiversity*, UNEP/CBD/COP/DEC/XI/17, 5 December 2012.

¹¹³ PHILIPPE SANDS, *supra* Note 84, at 252.

¹¹⁴ International Law Association's New Delhi Declaration of Principles of International Law Relating to Sustainable Development (2002).

use for present and future generations.¹¹⁵ The core idea is that, as members of the present generation, we hold the earth in trust for future generations.¹¹⁶

The CMS also echoes the concept providing that each generation of man holds the resources of the earth for future generations and must ensure that this legacy is conserved and, where utilized, is used wisely.¹¹⁷ Likewise, the conservation of the Sargasso Sea ecosystem for the benefit of present and future generations is also the guiding principle of the Hamilton Declaration.¹¹⁸

The Hamilton Declaration recognizes the Sargasso Sea as an important open ocean ecosystem that deserves recognition by the international community for its high ecological and biological significance, its cultural importance and its outstanding universal value.¹¹⁹

The Sargasso Sea is the only breeding location for European eels, which is listed as critically endangered, and is on the migration route of numerous other iconic and endangered species.¹²⁰

By harming the Sargasso Sea and the European eels, Revels failed in its responsibility to hold the earth in trust for future generations.

¹¹⁵ Rio+20, *The Future We Want*, Resolution adopted by the General Assembly on 27 July 2012, A/RES/66/288, ¶158.

¹¹⁶ E. Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AJIL 198 1990, at 199.

¹¹⁷ CMS, Preamble ¶2.

¹¹⁸ Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea, 11 March 2014, ¶2.

¹¹⁹ *Id.*, ¶1.

¹²⁰ CBD Decision XI/17, *supra* Note 112.

2. Revels failed to promote sustainable development.

Article 8 of the CBD codifies the obligation of State to regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensure their conservation and sustainable use.

Four elements comprise the legal elements of sustainable development as reflected in international agreements:

(a) The principle of intergenerational equity

The *first element* focuses on the need to preserve natural resources for the benefit of future generations.

(b) The principle of sustainable use

The *second element* provides that natural resources are to be exploited in a manner which is sustainable, prudent, rational, wise or deemed appropriate. Harvesting large amounts of Sargassum from the Sargasso Sea will negatively impact this precious ecosystem and could have devastating effects on the European eel, whose population is already in serious decline.¹²¹

(c) The principle of equitable use or intragenerational equity

The *third element* refers to the equitable use of natural resources which implies that the use by one State must take into account the needs of other States. The Sargassum harvesting project does not take into account the needs of other States, including that of Alliguna. The European Eel, which spawns in the Sargasso Sea is of great importance to Alliguna.¹²²

¹²¹ Record ¶18.

¹²² *Id.*, ¶18.

(d) The principle of integration

Finally, the *fourth element* requires that environmental considerations are integrated into economic and other development plans, programmes and projects, and that the same are taken into account in applying environmental objectives. Revels failed to integrate the need to protect and conserve the marine environment in the Sargasso Sea into its biofuel project and to take it into account in achieving its NDC commitments under the Paris Agreement.

G. REVELS' OBLIGATION TO MEET ITS NDC COMMITMENTS UNDER THE PARIS AGREEMENT DOES NOT JUSTIFY THE VIOLATION OF ITS OBLIGATIONS UNDER OTHER TREATIES.

Revels is required by UNCLOS, CBD, and CMS to protect the European eels and their habitat. Revels' failure to comply with this obligation cannot be excused by its obligation to meet its Nationally Determined Contributions ("NDC") under the Paris Agreement.

The CDB Decision XI/20, paragraph 4, emphasizes that climate change should primarily be addressed by reducing anthropogenic emissions by sources and by increasing removals by sinks of greenhouse gases under the UNFCCC.¹²³ Mitigating the effects of climate change under the UNFCCC and the Paris Agreement cannot be achieved at the expense of biological diversity and the marine environment, which must be protected and preserved for the present and future generations.

¹²³ CBD Decision XI/20, *Climate-related geoengineering*, UNEP/CBD/COP/DEC/XI/20, 5 December 2012.

PRAYER FOR RELIEF

For the reasons given in this Memorial, Alliguna requests the Court to adjudge and declare that:

- 1) The Court has jurisdiction over the dispute;
- 2) The SEA Corporation's Sargassum harvesting project is attributable to Revels so as to entail the international responsibility of Revels; and
- 3) Revels has violated its obligations under customary international law and several multilateral environmental agreements.

Further, the Court is requested to adjudge and declare that Revels shall:

- a) cease with immediate effect the implementation of the Sargassum harvesting initiative; and
- b) revoke any authorization, permit or license that allows the harvesting of large amounts of Sargassum in the Sargasso Sea.

Respectfully submitted,

AGENTS OF APPLICANT