

THE TWENTY-THIRD ANNUAL STETSON INTERNATIONAL ENVIRONMENTAL
MOOT COURT COMPETITION
2018-2019

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



THE INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE,
THE HAGUE, THE NETHERLANDS

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ABBREVIATIONS

ARSIWA- Draft Articles Responsibility of States for Internationally Wrongful Acts

CBD - Convention on Biological Diversity

CIL - Customary International Law

CMS- Convention on the Conservation of Migratory Species of Wild Animals

COP - Conference of the Parties

EEZ - Exclusive Economic Zone

EIA - Environmental Impact Assessment

ICJ - International Court of Justice

IL- International Law

ILC - International Law Commission

ITLOS - International Tribunal for the Law of the Sea

UN - United Nations

UNCLOS - United Nations Convention on the Law of the Sea

UNFCCC - United Nations Framework Convention on Climate Change

UNGA - United Nations General Assembly

VCLT- Vienna Convention on the Law of Treaties

STATEMENT OF JURISDICTION

The Federal States of Alliguna [hereinafter **Alliguna or Applicant**] submits the following dispute to the International Court of Justice [hereinafter **this Court or ICJ**]. Pursuant to Article 36 paragraph 1 of the Statute of the ICJ, jurisdiction of this Court comprises of all cases and matters provided in treaties and conventions in force.

The present dispute arises out of CBD, UNFCCC and Paris Agreement. Alliguna, therefore, invokes the compromissory clauses of CBD (Art.27), of UNFCCC (Article 14) and of the Paris Agreement (Article 24).

The Registrar acknowledged the receipt of the application instituting proceedings against the Republic of Revels (hereinafter **Revels or Respondent**) on 21 April 2018; and the preliminary objection submitted by the Revels dated 5 May 2018.

The parties have agreed that the jurisdiction question and merits of this matter be heard and determined simultaneously. The President of this Court, in light of the agreement reached by the parties, has decided to join Revels' preliminary objections to the merits of this case.

QUESTIONS PRESENTED

I

Whether this Court has the Jurisdiction to Determine the Matter;

II

Whether the Republic of Revels is Responsible for the Conduct of The SEA Corporation and actions of the Columbus Vessel;

III

Whether the Republic of Revels Violated International Law by Negatively Impacting the Ecosystem of the Sargasso Sea and the Life Cycle of the European Eel Through the Sargassum Harvesting Project.

STATEMENT OF FACTS

BACKGROUND

The Federal States of Alliguna and the Republic of Revels are neighboring coastal sovereign States located near the Sargasso Sea, a unique and important ecosystem to the States development. Alliguna is a developed country and Revels is a developing country.

The European eel (*Anguilla anguilla*) is an important migratory species that is listed as Critically Endangered on the IUCN Red List of Threatened Species and on Appendix II of CMS, which both countries are Parties. The species is particularly important to Alliguna's citizens and for its culture, religion, and history.

In 1990 The Friends of the Eels, was formed in Alliguna to raise awareness about the importance of conserving the species and the necessity of its protection.

THE SEA CORPORATION PROJECT

In 2016, Seaweed Energy Alternatives, Inc. (also known as the SEA Corporation), a large private company in Revels, became responsible for the program to implement renewable energy in the country, receiving subsidy from the Government of Revels.

The SEA Corporation uses its vessel, the *Columbus*, for harvesting Sargassum in the Sargasso Sea, beyond Revels national jurisdiction, at the High Seas. This initiative was widely covered by the media in Revels and other countries.

ALLIGUNA'S OBJECTION TO THE PROJECT

The Friends of the Eels alerted Alliguna of SEA Corporation projects impact to the European Eel and Alliguna contacted the Government of Revels urging it to put an end to the project and warning of the irreversible impacts that could occur in this ecosystem, directly affecting the European eel. The SEA Corporation continued the harvesting of Sargassum in the Sargasso Sea.

THE DISPUTE

Alliguna, after several attempts to negotiate the end of the SEA Corporation project and consequently, the transboundary harm caused, brought the case to the ICJ.

As response for the attempts of negotiation, Revels stated that it was not responsible for the harm and found unnecessary the meeting with Alliguna. In regard to Alliguna's application before this Court, Revels presented a Preliminary Objection, questioning the ICJ jurisdiction over the matter.

SUMMARY OF PLEADINGS

FIRST PLEADING

The Court has jurisdiction *ratione materiae* to judge the subject of the present case, since the dispute arises under the provisions of CBD, UNFCCC and Paris Agreement. Hence, the Court jurisdiction comes from the compromissory clauses of these conventions. Nevertheless, Alliguna has a legal interest to have the legal dispute resolved as an injured State.

SECOND PLEADING

Revels is responsible for the *Columbus* and SEA Corporation actions according international law. All States are responsible for Vessels flying its flag, as dictated by Customary International Law. Besides, Revels has the obligation of Due Diligence regarding the private sector of its country and the environmental protection, especially at the high seas.

THIRD PLEADING

By harvesting Sargassum in Sargasso Sea, the SEA Corporation projects affects the endangered migratory species, European Eel. Revels did not act in accordance with the precautionary approach and the sustainable development and the species is of great importance to Alliguna's culture. Revels did not prevent the transboundary harm caused by the project. Therefore, Revels is in violation of international treaties and conventions.

PLEADINGS

PRELIMINARY OBJECTIONS

I. THE COURT HAS JURISDICTION RATIO MATERIAE TO ADJUDICATE ON THE CLAIM BROUGHT BY ALLIGUNA

The subject matter of Alliguna's application falls on the scope of the CBD, UNFCCC and Paris Agreement, and consequently the dispute is one of which this Court has *ratione materiae* jurisdiction to entertain¹.

Nevertheless, Alliguna's application is admissible before the Court.

A. THE SUBJECT MATTER OF THE PRESENT DISPUTE

This dispute relates to the damage caused by the action of the *Columbus*², a vessel flying the flag of Revels³, and the threats posed to the environment of the Sargasso Sea⁴, common to the parties⁵, by the harvesting of the sargassum and damaging its marine biodiversity, especially the European Eel⁶, a threatened species of extremely importance to Alliguna citizens⁷.

¹ *Oil Platforms (Iran/USA), Preliminary Objections, ICJ Report 1996, ¶16.*

² *R¶18*

³ *R¶13*

⁴ *R¶18*

⁵ *R¶1*

⁶ *R¶18,22*

⁷ *R¶4*

**B. THE SUBJECT MATTER OF THE DISPUTE ARISES FROM VIOLATION OF THE
CBD**

The Convention on Biological Diversity provides an integrated approach⁸ for the conservation of the marine biodiversity⁹. Its scope extends to action under the control or jurisdiction of the State¹⁰. Actions of vessels flying the flag of the State falls in the scope of jurisdiction of that State.

The project utilize the sargassum harvested in the Sargasso Sea for biofuel production. The corporation use the *Columbus* to harvest the Sargassum and the project it's been financed by the government. Thus, the SEA Corporation biofuels project falls under the obligations set on the CBD.

1. Violation of the Objectives of the CBD in its Art. 1

Revels violated art. 1 of the CBD by not following the objectives of the convention to conserve the biodiversity, since the Project contributed for the eliminating of the habitat of the species *Anguilla anguilla* .

Said obligation is also consider as a CIL by this Court and Revels is bound by the CBD provisions since it has signed and ratified¹¹.

⁸ *Convention on Biological Diversity, 1760 UNTS 79 (1993) [Hereinafter CBD], preamble*

⁹ *CBD, Preamble*

¹⁰ *CBD, art.3*

¹¹ *United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 33 [hereinafter VCLT], art. 11*

2.Revels is causing a Transboundary Harm and is in Violation of Art.3 of CBD

Art. 3 of the CBD¹² is based by The Principle 21 of Stockholm Declaration¹³ which requires States to not cause any transboundary harm when exploring the environment, even within its territory. Revels is causing a harm in Alliguna's territory by the harvesting of the SEA Corporation of the Sargassum, which is affecting the migratory species *Anguilla anguilla*.

The said species is important for the applicants culture, religion and history. Thus, Revels is causing a irreversible harm in the applicants territory. Hence, its application is warranted in the instant case.

3.Revels Breached the Cooperation Principle and Art. 5 of CBD

Revels violated art.5 of the CBD when did not notify neither inform Alliguna of the project and its impacts at the environment, this is a basic obligation when dealing with the cooperation principle¹⁴ set out in the said article.

Revels is in violation of this principle, since it did present the Environmental Impact Assessment (EIA) to Alliguna and did not tried to negotiate the minimization of the project impact at the environment¹⁵.

This Court has already expressed that the principle is an obligation of the State initiating a harmful activity to inform the party that the activity might cause significant damage¹⁶. This, the dispute arises from the breach of this article.

¹² *CBD, art.3*

¹³*UNGA, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994, Principle 21*

¹⁴*Gabcikovo-Nagymaros Project (Hungary v. Slovakia, Judgment, I.C.J. Reports 1997, ¶79 [hereinafter Gabcikovo-Nagymaros case]*

¹⁵ *R¶18*

4.Revels is in Breach of Art. 8 of CBD by Changing the European Eel Natural Space

Article 8 is referent to the principle of the *in situ* conservation of biological diversity, which means that a State should maintain and conserve the ecosystem in its natural space.

The conservation must be made through actions such as stablishing areas of special protection, ensuring the sustainable use of the space, encouraging the protection of natural habitats and ecosystems and more.

None of those measures were taken by the Respondent, which is doing the exactly opposite. Hence, Alligunas's claim that Revels has caused harm to the marine biodiversity has reasonable connection with Art.8 of CBD.

5.By Permitting and Funding the SEA Corporation Project Revels is Breaching Art. 10 of the CBD

Art. 10 of the CBD¹⁷ seeks to stablish a cooperation between governmental authorities and its private sector to develop a sustainable use of the biodiversity, which means that Revels cannot claim that is not its responsible for the environmental damage caused by SEA Corporation.

Revels Government was not only aware of the biofuels project but it also funded it¹⁸ and when the State was informed by the applicant of the harm to the European Eel it did not try to

¹⁶ *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 44 and 48 [hereinafter Pulp Mills case]*

¹⁷ *CBD, art.10*

¹⁸ *Rfj14*

prevent any possible harm¹⁹. It is a demonstration of noncooperation between them for a sustainable development, a violation of CBD²⁰. Hence, its application is warranted in the instant case.

C. THE SUBJECT OF THE PRESENT DISPUTE FALLS WITHIN THE SCOPE OF THE UNFCCC AND PARIS AGREEMENT

The United Nations Framework Convention on Climate Change (UNFCCC) stress the importance of the environmental protection and specifically the marine biodiversity²¹ and its effects to the climate change.

The Paris Agreement is in pursuit of the objective of the UNFCCC, being guided by its principles²².

Revels did not comply with the provisions of the convention and the agreement by harvesting Sargassum. Thus, the dispute falls under the jurisdiction of this Court, since Revels violated said agreement.

1.Revels Violated the Preamble, Art. 3 and 4 of the UNFCCC

The UNFCCC expressly establishes the obligation of States to promote policies for the protection of the environment and use for precautionary measures to anticipate and minimize risks²³.

¹⁹R/19

²⁰ *Gabcikovo-Nagymaros case*, ¶109.

²¹ UNFCCC, Preamble

²² UNFCCC. *Adoption of the Paris Agreement*. Report No. FCCC/CP/2015/L.9REV.1, [hereinafter *Paris Agreement*], Preamble

²³ UNFCCC, art.3 and 4 (f)

Revels, instead of using polices to promote the protection of the environment, its permitting and funding a project that its harming the environment and causing a irreversible harm to Alliguna marine biodiversity.

2.Revels is in Breach of the Paris Agreement Obligations

Revels has violated several obligations under the Paris Agreement²⁴.

These articles state the importance for States Parties, as is Revels, to protect the environment and use the sustainable use as police.

Revels was trying to achieve its commitments under the Paris Agreement when approve and financed the biofuels Project²⁵, but was not complying with the obligations set out under the agreement regarding the applicability of polices that should harm significantly the environment.

By being contradictory for breached the Paris Agreement, the dispute falls under the scope of the jurisdiction.

D. THE APPLICATION OF ALLIGUNA IS ADMISSIBLE

Alliguna stands before this Court since it is a injured State and has a legal interest to have to legal dispute resolved.

1. Alliguna is an Injured State

The SEA Corporation Project has a casual link to the damage caused at the spawning habitat of the European Eel, since it has been harvesting the Sargassum at the Sargasso Sea,

²⁴ *Paris Agreement arts. 4(13); 6(1,2); art. 7(5)*

²⁵ *R¶14*

whose conservation its crucial for Alliguna's citizens and culture and with that Alliguna its been injured by the actions of the *Columbus*.

2.The Obligations under CBD to Conserve the Environment are Erga Omnes

Nevertheless, Alliguna has legal interest in having this Project seized because it poses a threat to the conservation of biodiversity which is an obligation *erga omnes partes*.

The obligation to conserve the biodiversity is a *erga omnes*, which means that this obligation relies upon the whole international community, as stated by the ICJ²⁶. These obligations, to protect and conserve the environment, arises under the CBD²⁷.

Therefore, Alliguna has a legal interest in ensuring that Revels does not violate the interdependent obligations of CBD.

²⁶ *Barcelona Traction, Light and Powe Company, Limited, Judgment, I.C.J. Reports 1970, p. 3, ¶33; Prosecutor v. Blaskic, ICTY Appeals Chamber, 110 ILR 699-700 ¶26*

²⁷ *CBD, Arts.1,3,8,10.*

MERITS

II. REVELS IS RESPONSIBLE FOR THE *COLUMBUS* AND SEA CORPORATION ACTIONS IN ACCORDANCE WITH THE INTERNATIONAL LAW

In accordance with international law, the actions taken by private persons, sponsored by States, could fall on the Responsibility of that State.

In accordance with the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), a State wrongful act may entail the State responsibility²⁸. To consider an act as wrongful, it should breach International Law (IL) and it could be an action or omission attributable to the State²⁹.

The actions of the *Columbus* are attributable to Revels in accordance with rules regarding States Responsibility [A], since the actions were accepted by Revels and in sponsorship.

In accordance with IL, Revels is also responsible for the Vessels flying its flag and has the obligation of due diligence regarding said Vessels in matters of environment [B].

Revels violated its due diligence obligations regarding the environment, therefore the responsibility for the acts of the *Columbus* at the High Seas falls on the State.

²⁸ *International Law Commission, Draft articles on responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), [hereinafter ARSIWA] Article 1*

²⁹ *ARSIWA, art.1, commentary (1)*

A. THE ACTS OF THE COLUMBUS ARE ATTRIBUTABLE TO REVELS IN ACCORDANCE WITH THE INTERNATIONAL RESPONSIBILITY OF STATE

According with Article 1 of the ARSIWA³⁰ states that the internationally wrongful act of a State entails the international responsibility of the said State.

The *Columbus* actions are attributable to Revels, since States can be Responsible for the actions of private persons and for those Vessels who is flying its flag in the High Seas.

The article 8 of ARSIWA states that the conduct of private person or group of persons could be attributed to a State if their acts are authorized by that State³¹.

It must be taken into consideration that Revels provided subsidies for the Sargassum initiative, with that the State knowingly accepted the actions of the Columbus³² and has the responsibility for those actions.

The ICJ recognized that it is not necessary to show that the persons, who performed the acts in violation of IL, were in a relationship of complete dependence of the State; it must be proved that they acted in accordance with that State's instructions³³.

In the present case, not only the project of the *Columbus* was accepted by the Respondent, but it was also financed the Sea Corporation to perform the project and reinforced the Company to conduct the Biofuels Project and the harvest of Sargassum³⁴.

³⁰ ARSIWA,art. 1

³¹ ARSIWA, Art. 8

³² R¶14

³³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. I.C.J. Reports 1986, p. 129,[hereinafter *Nicaragua Case*] ¶254 and 255

³⁴ R¶14

Articles 1 and 8 of the ARSIWA were configured as CIL by this Court in several cases³⁵ and found that even in cases that States were not directly responsible for the harm on another State, since it financed the actions or did not prevent it to happen.

The same premises should be applicable in this case since Revels provided subsidies for the project, were completely aware of actions taken by the *Columbus* and at every note exchange by the two Countries it defended the continuity of the Project³⁶.

B. REVELS IS RESPONSIBLE FOR ALL VESSELS FLYING ITS FLAG AND HAS THE OBLIGATION OF DUE DILIGENCE OF THE ACTIONS TAKEN BY THOSE VESSELS

1. The Principle of The Flag of State

Although the high seas are not under the jurisdiction of any State, there are still international conventions and customs that limit its use, for example the figure of the Flag of Convenience principle.

This principle has the power to indicate on which State has an eventual responsibility may affect, as made clear by UNCLOS³⁷ stating that the States should exercise control and jurisdiction over the ships flying its flag.

Since the *Columbus* is flying the Flag of Revels³⁸, its actions falls on the scope of responsibility of that State, even though it's property of a private company.

³⁵*Nicaragua case*, ¶254 and 255; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 184

³⁶R¶19, 21, 23

³⁷ UNCLOS art.94

Nevertheless, the Flag Convenience and the Responsibility of the State for actions of Vessels flying under its flag are recognized by this Court as CIL³⁹.

The Court⁴⁰ established that there is a practice of States regarding the Flag of Convenience and only in cases of collision, which does not apply in the present case, the Court should analyse the lack of responsibility of the flag State.

Several decisions applying the rule of the Flag to attract the State Responsibility can be found in International⁴¹ and National⁴² law, only confirming that the said rule is considered as CIL and should be applicable in this case.

This principle is applicable in the present and with its application Revels has the responsibility for the environmental harm caused by the *Columbus*.

2. Revels Has The Obligation of Due Diligence Regarding Vessels Flying Its Flag At The High Seas

Taken into consideration the occurrence of environmental damage, Revels it's also responsible for the Vessel actions since is sponsoring those actions.

³⁸ ¶13

³⁹ Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960: I.C.J. Reports 1960, p. 21; *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), p. 37, 45

⁴⁰ *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), p. 45

⁴¹ MIV "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p.40;

⁴² *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923); *Anklagemyndigheden v. Peter Michael Poulsen (Case C-286/90)*, European Court of Justice, 24 November 1992, ECR 1992, p. I-6019, ¶14-15

According to the Advisory Opinion decided by ITLOS⁴³, States have duty of due diligence for the protection of the environment regarding those Vessels that are flying its flag in the High Seas.

In those cases, the ITLOS brought to the attention the interpretation of the articles of the UNCLOS regarding the obligations of the State. Revels is bound by those obligations, but not complying with it.

Revels not only sponsored the activities, but also protected the actions which were causing the harm on the environment, even when Alliguna alert and brought to the attention the problematic situation.

This Court stated the need to crystallize rules of CIL relative to the continental shelf about the preservation of the legal status of the high seas⁴⁴, stressing its importance for IL.

ITLOS has already stated the obligation of State of monitoring activities in their respective environments and to avoid adverse impacts, to protect the marine and estuarine environment⁴⁵.

This Court already raised the need for mutual efforts among States to ensure the conservation of marine resources⁴⁶, efforts not taken by Revels.

⁴³ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10; Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, ¶129*

⁴⁴ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, [hereinafter North Sea Continental Shelf cae] p. 39*

⁴⁵ *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), decision of 1 September 2005, ITLOS, p. 144*

⁴⁶ *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, [hereinafter Fisheries Jurisdiction case] p. 3, ¶42.*

The actions of the Sea Corporation are causing transboundary harm and irreversible environmental harm. Since Revels is responsible the consequences of the project, as its sponsored by it, it should answer for those actions before this Court.

III. THE REPUBLIC OF REVELS COMMITTED INTERNATIONALLY WRONGFULL ACTS BY HARVESTING SARGASSUM IN SARGASSO SEA AND CAUSING IMPACTS FOR THE MIGRATORY AND THREATENED SPECIES, EUROPEAN EEL

Revels is in violation of several obligations of IL, thus committing an internationally wrongful act, characterizing its responsibility.

By harvesting the Sargassum, Revels is in clear violation of the precautionary principle [A] and its provisions, consider as a CIL.

The biofuels project are putting in danger a species already in extinction and since the species is of extremely importance for Alligunas citizens culture, religion and history, hence, Revels is not complying with its obligation regarding prevention of the transboundary harm [B].

Besides, Revels violated the CMS [C], several CBD decisions [D], UNCLOS [E] and Hamilton Declarations [F] by the actions of the SEA Corporation project.

A. REVELS VIOLATED THE PRECAUTIONARY PRINCIPLE

The Precautionary Principle (Hereinafter PP) has the objective of preservation of the environment in front of unpredictable and unquantifiable but speculated risks⁴⁷, and has been considered as a CIL.

The ICJ⁴⁸ already showed that to establish a CIL, is necessary the existence of State Practice [1] and *opinio iuris* [2].

The Principle has been widely invoked in the international community in regional⁴⁹ and universal matters⁵⁰, manly in decisions and treaties regarding the sustainable development⁵¹, behaving as a general principle of IL⁵² and entails ,because of its application, the reversal of the burden of proof [3].

The extinction of the European Eel (*Anguilla anguilla*) is an irreparable harm for the environment and Revels should stop the project developed by the SEA Corporation until it has

⁴⁷ *CBD Technical Series No. 66, at 58-59*

⁴⁸ *North Sea Continental Shelf case, ¶74; Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, 1. C.J. Reports 1984, p. 246, ¶111 (“Gulf of Maine Case”)*

⁴⁹ *Helsinki Convention on the Protection of the Baltic Sea 1507 UNTS 167 (1992), Art. 3(2); Black Sea Action Plan, Principle 9 (2009)*

⁵⁰ *Montreal Protocol, Preamble (1987); UNFCCC, Art.3.3, 11; Stockholm Convention on Persistent Organic Pollutants 2256 UNTS 119 (2000), Preamble, Art. 8.*

⁵¹ *CBD/COP Decision IX/16 (2008) [hereinafter Decision IX/16] at ¶C (4); CBD/COP Decision X/33 (2010) [hereinafter Decision X/33] at ¶8(w); CBD/COP Decision XI/20 (2008) [hereinafter Decision XI/20] at ¶8; LP.1, 2008; LP.4(8), 2013; CBD Technical Series No. 66, at 58-59.*

⁵² *EC. Communication from the Commission on the Precautionary Principle. Brussels: Commission of the European Communities, 2000. pg.2/ EC. Conclusions of the presidency adopted at the end of the European Council in Nice on 8 December 2000. Annex III, Resolution on the precautionary principle. Bulletin of the European Union, 2000; 12:8–30. [hereinafter EC Communication.*

the necessary scientific data proving that the species will not be prejudice by the execution of the project⁵³

1.The Existence of State Practice Regarding The Precautionary Principle

The repeatedly practice of States is one of the elements to form a custom. It needs to have substantial uniformity⁵⁴, to implicate that the practice has consistency and notoriously widespread⁵⁵.

This Court already established that the State Practice must be extensive to prove that the provision invoked is general recognized as one legal obligation⁵⁶ and to establish its existence is necessary to analyze the practice of States that its interests would be affected by the existence of the custom⁵⁷.

Taking into consideration the existence of the participations by States that known to be against certain environmental protection⁵⁸, including the United States⁵⁹, it's clear that the

⁵³ The Precautionary Principle: Policy and Application. London: United Kingdom Interdepartmental Liaison Group on Risk Assessment, 2002; pg.6.; Rio Declaration on Environment and Development, UN Doc.A/CONF.151/26 (1992) [hereinafter Rio Declaration]

⁵⁴ *Brownlie, Ian. Brownlie's Principles of Public International Law. Oxford :Oxford University Press, 2012.- p.7*

⁵⁵ ILC, Draft Conclusions on the Identification of Customary International Law, 2018 (A/73/10), Yearbook of the International Law Commission, 2018, vol. II, Part Two, Conclusion 6, p. 2

⁵⁶*North Sea Continental Shelf case, ¶74.*

⁵⁷ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, 1. C.J. Reports 1984, p. 246, ¶74 (“Gulf of Maine Case”).*

⁵⁸*Sirinskiene, Agne, “The Status of Precautionary Principle: Moving towards a Rule of Customary Law”, Jurisprudence, Vol. 4, No. 118, 2009, p.356; Council of Australian Governments. National Strategy for Ecologically Sustainable Development. 1992 [interactive]/ Environment Protection Act. 1993. Sec. 10, ¶1b;iv;*

⁵⁹ Wiener, J.B and Rogers, M.D. (2002) Comparing precaution in the United States and Europe. *J.Risk Res*; Ashford, N. (2007) The Legacy of the Precautionary Principle in US Law: The Rise of Cost–Benefit Analysis and Risk Assessment as Undermining Factors in Health, Safety and Environmental Protection. In: de Sadeleer, N. (ed.) *Implementing the precautionary principle. Approaches from the Nordic Countries, EU and USA*. London: Earthscan.

applicability of a precautionary approach would affect their interests, but even so the have States accepted its applicability.

The Treaty establishing the European Community expressly declared that the Parties shall use the PP as a measure to achieve the environment objectives⁶⁰, existing even a guideline for the application of such principle⁶¹. The PP has been potentially used by the international community in a role of decisions concerning the environment⁶².

The same premises of State Practice can be prove by the 196 States has signed the CBD, including Revels, a well known convention for the protection of the environment and the applicability of the PP⁶³.

2. The Increase of Treaties and Resolutions Applying Proves The Opinio Iuris of The Precautionary Principle

The second element to form a CIL is the *opinio iuris*, which is the belief of the State to be bound by the provision of an international obligation.⁶⁴

The Court⁶⁵ established that the existence of a series of UNGA resolutions⁶⁶ may show the evolution of an *opinio iuris* and whether this obligation exists in a normative character.

⁶⁰ E.C. Consolidated versions of the treaty on European Union and of the treaty establishing the European Community. Official Journal of the European Communities, 2002; art.174

⁶¹ EC. Communication, art.174; Rio Declaration; CBD.

⁶² Decision IX/16; Decision X/33; Decision XI/20; LP.1, 2008; LP.4(8), 2013.

⁶³ Decision IX/16; Decision X/33; Decision XI/20; LP.1, 2008; LP.4(8), 2013.

⁶⁴ North Sea Continental Shelf case, ¶77.

⁶⁵ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 226, ¶70

⁶⁶ UNGA A/RES/72/L.51; UNGA A/RES/S-19/2; UNGA A/CONF.151/26 (Vol. I); UNGA A/C.1/67/L.16.

In the present case, there is a number of decisions⁶⁷, treaties⁶⁸ and conferences⁶⁹ that applies the PP as an obligation, reinforcing the normative character of this obligation.

The Court already stated that with the modern awareness of sustainable development, it is indispensable that States adapt their economic development to the new request of protection of the environment⁷⁰. The prevention approach was invoked as an *erga omnes* obligation⁷¹.

Besides, Revels has broad participation in several conferences⁷², and signed and ratified treaties that applies these approach⁷³, been a country that cannot qualify as a persistent objector of the obligation.

Thus, Revels did not act in conformity with the current CIL.

3.The Burden of Proof Falls on Revels as an Application of The Precautionary Principle

The applicability of the PP entails the reversal of the burden of proof, since the State responsible for the harmful activity must prove, through scientific research that it doesn't offer any threat to the ecosystem⁷⁴.

This practice is accepted, recommended and utilized in many international organizations, especially found in the EU Commission⁷⁵.

⁶⁷ *Decision IX/16; Decision X/33; Decision XI/20 (2008); LP.1, 2008; LP.4(8), 2013; Pulp mills case.*

⁶⁸ *CBD, Preamble; UNFCCC.*

⁶⁹ *UNFCCC, art.3; Paris Convention for the protection of the marine environment of the north-east Atlantic (September 1992)*

⁷⁰ *Gabcikovo-Nagymaros case, ¶140*

⁷¹ *Ibidem, ¶97*

⁷² *R¶7-12*

⁷³ *(R¶7,8,10,11)*

⁷⁴ *EC. Communication.*

⁷⁵ *Ibidem*

Considering the PP as a CIL, Revels must bring before this Court proof that the actions of the *Columbus* do not impact the environment.

B. REVELS HAS THE DUTY TO PREVENT TRANSBOUNDARY HARM

The transboundary harm occurs when the impact caused at one State reaches another⁷⁶ and, because of its consequences, the duty to prevent transboundary harm is a CIL as established by the ICJ⁷⁷.

This obligation is recognized in several treaties⁷⁸, including conventions accepted by Revels⁷⁹, and it is a CIL recognized by this Court in several cases⁸⁰, recalling the obligation of the state to control activities to do not damage other sovereignty territory⁸¹.

A State to prevent a transboundary harm to happen should at least respect the no significant harm rule [1], act with the required due diligence [2].

Republic of Revels is also in obligated in prevention of any damage to another sovereignty State, been easy to conclude that by removing the spawning habitat of the European Eels, a

⁷⁶Chinthaka Mendis, 'Sovereignty vs. trans-boundary environmental harm: The evolving International law obligations and the Sethusamudram Ship Channel Project' (2006) *United Nations/Nippon Foundation Fellow Paper*

⁷⁷ Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949 [hereinafter Corfu Channel case]; Pulp Mills, Trail Smelter Case;

⁷⁸ ILC, *Prevention of Transboundary Harm from Hazardous Activities*, 2001, *Official Records of the General Assembly, fifty-sixth Session, Supplement No. 10 (A/56/10)*[hereinafter ILC, *Prevention of Transboundary Harm from Hazardous Activities*]

⁷⁹ R¶10

⁸⁰ *Pulp Mills case* ¶101; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996 (I), p. 242, ¶29; *Corfu Channel case*, p. 22

⁸¹ UNGA A/RES/48/189, Preamble

endanger species, Revels is doing a potentially harmful activity⁸², causing an irreversible harm in Alliguna's territory.

1. Revels Did Not Respect The No Significant Harm Rule

The no significant harm rule is a well-recognized CIL⁸³ and it has been discussed by this Court every time a transboundary harm occurs⁸⁴.

The ICJ has expressed in its decisions that States have the obligation to do not cause significant harm at another State territory and as part of this obligation it should prevent the harm by minimizing the risk to the minimum⁸⁵.

The ILC understood the significant harm as the delimitation to typify the harm and it specified that the damage does not need to be substantial, but detectable as an aggression⁸⁶ to the environment.

2. Revels Did Not Act In Due Diligence

It is imperative for operators of hazardous activities to complied with the due diligence, been the necessary measure to conciliate the territorial integrity and territorial sovereignty⁸⁷.

⁸² *Pulp Mills case*, ¶139.

⁸³ Jervan, Marte (2014), *The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-Harm Rule*, PluriCourts Research Paper [hereinafter Jervan]

⁸⁴ *Pulp Mills case*, ¶95.; *Trail Smelter Arbitration (US/Canada)*, 3 U.N. Rep Int'l Arb Awards 1905 (1941); *Lake Lanoux Arbitration (Spain/France) (1957)*, Reports of International Arbitral Awards (RIAA), Vol. XII, [hereinafter *Lake Lanoux case*] p. 307

⁸⁵ *Pulp Mills case* ¶95.

⁸⁶ ILC Rep. (2001) Document A/56/10, p. 152 ¶4; Jervan.

⁸⁷ Jervan- pg. 62

The Due Diligence is recognized as actions a States should made to prevent the transboundary harm to happen⁸⁸.

Revels should have taken unilateral measures⁸⁹ concerning the SEA Corporation project in the Sargasso Sea and should have implemented polices to ensure the that no harm could be done or to resort to the minimum the risk of a transboundary harm⁹⁰.

As part of the Due Diligence obligation⁹¹, Revels should have notified and informed Alliguna of the project, as well as it should had presented the EIA⁹², considering the potentially harmful activity.

Revels did not act in conformity with the due diligence and Alliguna does not acknowledged any enforcement, administrative or legislative, from Revels, as a way of comply with its obligations⁹³.

⁸⁸ *Rio Declaration, Principle 2; Stockholm Declaration, Principle 21; UNCLOS, Art. 194(2); CBD, Art.3; ILC, Prevention of Transboundary Harm from Hazardous Activities; Pulp Mills, ¶101; United States Diplomatic and Consular Staff in Tehran, Judgment, I. C. J. Reports 1980, p. 3, ¶63*

⁸⁹ *ILC Rep. (2001) Document A/56/10*

⁹⁰ *ILC, Prevention of Transboundary Harm from Hazardous Activities, with commentaries 2001 art.3*

⁹¹ *Lake Lanoux case at 119, 126-30, 140-1, the North Sea Continental Shelf Cases, ¶85; Gabčíkovo-Nagymaros case, ¶141-143.*

⁹² *Gabčíkovo-Nagymaros case, ¶112 and ¶140; Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court S Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, I. C. J. Reports 1995, p. 288, ¶5 in the Order of 22 September 1995, which is referring to paragraphs 73-96 and 108 of the Application of 9 May 1973.*

⁹³ *ILC Rep. (2001) Document A/56/10*

C. REVELS VIOLATED THE CMS

Alliguna and Revels are Parties to the Convention on the Conservation of Migratory Species of Wild Animals (CMS)⁹⁴, been Range States, meaning that their territorial jurisdictions range the species *Anguilla anguilla*.

The CMS lists the European Eel in Appendix II as an endangered species and as a State-Party, Revels should seek for conservation of the species as their responsibility under the Convention⁹⁵.

The international community has recently shown concern about the species, suggesting that States should focused in the conservation of the species habitat as a fundamental measure to reduce risks to the migratory species⁹⁶, but Revels is doing the contrary by harvesting *Sargassum* which is its spawning habitat of the species in breach of its obligations under IL.

1. Violation of The Articles II and IV

Revels violated CMS articles II and IV by harvesting the *Sargassum* in the Sargasso Sea, consequently Revels breaching its obligations under IL.

Article II states that to conserve the threatened species and their habitat the States should be responsible to promote research, protection and to accomplishment the treaty objectives and the purpose to protect the species.

Article IV states that the species listed in Appendix II must be the priority on the action plan deserving a special attention of the Range states. Theses States must have a high responsibility to change the status of the engendered migratory species.

⁹⁴ (R/8)

⁹⁵ VCLT, art.32

⁹⁶ UNEP/CMS/COP12/Doc.26.2.1 (2017)

Revels did not give the necessarily attention for the Sargassum been harvest, consequently causing a harm to the habitat of one the cycles of the life of the *Anguilla anguilla*.

2. Violation of resolutions 11.27 and 12.21 of The CMS

Resolutions⁹⁷ of the CMS encourages States parties to monitor and protect the migratory species and and to act in due diligence towards the impacts on the species and its ecosystem through the time of the new projects regarding the deployment of renewable energy⁹⁸.

Revels did not take any investigative measure neither is monitoring the harm that has been caused by the project on the European Eel neither is protecting the species lifecycle.

D. REVELS VIOLATED SEVERAL OF CBD DECISIONS

Parties from the CBD has the obligation to protect the biodiversity and its sustainable use acknowledging intrinsic value of biological diversity⁹⁹. Thus, the present dispute arises from Revels violations of its articles¹⁰⁰ and decisions.

Various Decisions of CBD¹⁰¹ reaffirms Revels obligations to prevent the transboundary harm and the necessity of the applicability of the precautionary approach and the principles invoked in Rio Declaration.

The decision establishes spawning areas, by being an important stage of the species, as ecologically or biologically significant marine areas in need of protection¹⁰².

⁹⁷ *UNEP/CMS/Resolution 11.27 (2014) ¶2.2; UNEP/CMS/Resolution 12.21 (2017)*

⁹⁸ *UNEP/CMS/Resolution 11.27 (2014)*

⁹⁹ *CBD- preamble*

¹⁰⁰ *See infra I, B*

¹⁰¹ *COP CBD IX/20- preamble*

¹⁰² *COP CBD IX/20 ANNEX I*

In its decisions, the Conference of the Parties expresses their concern about the impacts of unsustainable fishing such as destructive fishing practices and unreported and unregulated fishing, and overfishing on the biodiversity of the migratory species¹⁰³.

Revels has contradictory practice by unsustainably harvesting the spawning habitat of a threatened species *Anguilla anguilla*, since the State affirms its been complying with the treaties provisions. The Respondent did not only avail of these measures but it's also financing the extinction of the species.

Sargasso Sea was classified as Ecologically or Biologically Significant Area¹⁰⁴, expressing the relevance of preservation of this sea¹⁰⁵. Besides that, the Sargasso Sea Commission already concerns with the harvest of Sargassum as one threat to this special ecosystem.

E. REVELS HAS VIOLATED UNCLOS ARTICLES 117,118,192 AND 300

Revels is State-Party to the UNCLOS¹⁰⁶, even if this Court do not have the jurisdiction to judge under the provisions of UNCLOS, such articles can be considered as CIL.

Articles 117¹⁰⁷ and 118¹⁰⁸ uses the cooperation principle as a base and stress the necessity of national measures for the exploitation of the high seas and negotiation with Parties whose exploit the same living resources.

¹⁰³ *COP CBD IX/20*, ¶56

¹⁰⁴ *Decision X/29*, ¶26

¹⁰⁵ *Ecologically or Biologically Significant Area (ESBAs), The Sargasso Sea, 2015; The protection and management of the Sargasso Sea: The golden floating rainforest of the Atlantic Ocean. Summary Science and Supporting Evidence Case. Sargasso Sea Alliance, 2011.*

¹⁰⁶ *R¶9*

¹⁰⁷ *UNCLOS*, art.117

¹⁰⁸ *Ibidem* 118

Thus, Revels violated these articles by not cooperating, negotiating and conserving the biodiversity of the European Eel, a species of extreme importance for Alliguna's citizens and culture, in the high seas¹⁰⁹.

Such obligations are well-recognized in IL¹¹⁰ and by the ICJ¹¹¹, especially a global common as is the high seas.

These articles can be linked to the article 192¹¹² that obligate to preserve and protect the marine environment, especially the high seas. Such protection is recognized as CIL¹¹³ and this Court should consider Revels breach under such provision.

Thus, Revels did not act under the principle of good-faith, abusing of its freedom¹¹⁴ on the high seas by doing a harmful activity which exploit natural resources and affects a threatened migratory species.

E. VIOLATION OF HAMILTON DECLARATION

The Hamilton Declaration was an important conference which States interested in the Sargasso Sea jointed to encourage to conserve the high seas.

Revels signed the declaration and agreed to be in accordance with the objective and purpose decided on the conference¹¹⁵, including, the obligation to preserve and protect the marine environment¹¹⁶.

¹⁰⁹*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 18 December 2013, ITLOS Reports 2013 [hereinafter Fisheries Commission]*

¹¹⁰ *Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, art. 8, 31 I.L.M. 1312; Convention for the Protection of the Ozone Layer, Mar. 22, 1985, art. 4, 26 I.L.M 1517; Island of Palmas (U.S. v. Neth.), 11 R.I.A.A. 829*

¹¹¹ *Corfu Chanel case; Fisheries Jurisdiction case ¶34-35*

¹¹² UNCLOS

¹¹³*Fisheries Commission; Advisory Opinion of the Seabed Disputes Chamber of International Tribunal for the Law of the Sea on "Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area" , 105 AJIL 755 (2011) ¶97*

¹¹⁴ UNCLOS, art. 300

The declaration was broadly accepted by the States. Revels did not give the necessarily importance through cooperation and collaboration with the other Signatories.

Nevertheless, the statements conduct the use of the precautionary approach as several other conventions as shown before. Revels infringed notably articles 8.2¹¹⁷ and 8.3¹¹⁸ by affecting vulnerable species, European Eel, and its spawning habitat, the Sargassum.

¹¹⁵ *VCLT, art.32*

¹¹⁶ *Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea, adopted 11 March 2014, pp.2*

¹¹⁷ *Paris Agreement art.*

¹¹⁸ *Ibidem art.8.3*

CONCLUSION

For the forgoing reasons, Alliguna respectfully requests that this Court:

1. Declare that the present Court has jurisdiction;

2. Declare that Revels is responsible for the *Columbus* and SEA Corporation actions;

3. Declare that Revels violated international law by harvesting Sargassum in the Sargasso Sea and affecting the endangered migratory species, European Eel; and

4. Order Revels to put an end in this project.

/s/ _____

Cat A. Dromous
Co-Agent of the Federal States of
Alliguna and Minister of Foreign Affairs
Of the Federal States of Alliguna

/s/ _____

Sam S. Sugar
Co-Agent of the Federal States of
Alliguna