

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



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

FEDERAL STATES OF ALLIGUNA

APPLICANT

V.

REPUBLIC OF REVELS

RESPONDENT

MEMORIAL FOR THE APPLICANT

**23RD ANNUAL STETSON INTERNATIONAL ENVIRONMENTAL
MOOT COURT COMPETITION
2018-2019**

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QUESTIONS PRESENTED

1. Does the International Court of Justice (“ICJ”) have jurisdiction to determine the present dispute?
2. Is the Republic of Revels (“Revels”) responsible for the alleged internationally wrongful conduct?
3. Did Revels violate international law by harming Sargasso Sea biodiversity, including the European eel, through a Sargassum harvesting project it supported, subsidized, and failed to regulate in accordance with its obligations under treaty and customary law?

STATEMENT OF JURISDICTION

Under Article 36(2) of the Statute of the International Court of Justice, the ICJ has jurisdiction over the present dispute as a matter “specifically provided for in . . . treaties and conventions in force” because the Federal States of Alliguna (“Alliguna”) and Revels have agreed in writing to submit to the jurisdiction of the ICJ pursuant to Article 27 of the Convention on Biological Diversity (“CBD”) and Article 24 of the Paris Agreement, under which the dispute arises. Because the parties have agreed, as expressed in the Joint Written Statement of the Federal States of Alliguna and the Republic of Revels (“Joint Statement”), that Revels’s preliminary objections be heard and determined within the framework of the merits, the ICJ shall decide both the jurisdictional and merits questions of the dispute based on the facts contained in Annex A of the Joint Statement.¹

¹ Rules of Court, art. 79, ¶ 10; Statute of the International Court of Justice, art. 36, ¶ 6.

INDEX OF AUTHORITIES

JUDICIAL DECISIONS

Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 23 (April 9).....	6, 7, 16
Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).....	16
Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SFRC), Case No. 21, Advisory Opinion of Apr. 2, 2015, [2015] ITLOS Rep. 4.....	7
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Convention on Biological Diversity art. 1, June 5, 1992, 1760 U.N.T.S. 79.	1, 2, 4, 10, 11, 12
Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 333.....	3, 12, 14
Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 13, 2015, in Rep. of the Conference of the Parties on the Twenty-First Session, U.N. Doc. FCCC/CP/2015/10/Add.1 (2016).....	18
United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3..	4, 13, 15, 17
Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.....	2, 14

ESSAYS, ARTICLES, & JOURNALS

Burrus M. Carnahan, Treaty Review Conferences, 81AJIL 226 (1987).....	20
Jutta Brunnée, <i>COPing with Consent: Law-Makin Under Multilateral Environmental Agreements</i> , 15 Leiden J. Int'l. 21 (2002).	20
Lyle Glowka, <i>Complementarities between the Convention on Migratory Species and the Convention on Biological Diversity</i> , 3 J. Int'l Wildlife L. & Pol'y 205 (2000).....	3

U.N. DOCUMENTS & OTHER INTERNATIONAL DOCUMENTS

“*Anguilla Anguilla*,” The IUCN List of Threatened Species (Version 2018.1),
<https://www.iucnredlist.org/search?query=ANGUILLA%20ANGUILLA&searchType=species>
 (last visited Nov. 2, 2018)..... 20

CMS, Res. 11.27, P 3.3, UNEP/CMS/Resolution 11.27 (4-9 Nov. 2014) (renewable ocean
 energy). 19

CMS, Res. 12.21, P 9, UNEP/CMS/Resolution 12.21 (15 Dec. 2017) (climate change and
 migratory species). 19

Ecologically or Biologically Significant Marine Areas: The Sargasso Sea, CHM (June 15, 2015),
<https://chm.cbd.int/pdf/documents/marineEbsa/200098/4>. 11

IUCN, *Guidelines for Applying the Precautionary Principle* (2007),
http://cmsdata.iucn.org/downloads/ln250507_ppguidelines.pdf..... 15

Nicholas Ashford, et. al., World Health Org., *Wingspread Statement on the Precautionary
 Principle* (1998), www.who.int/ifcs/documents/forums/forum5/wingspread.doc. 15

Report of the International Law Commission on the Work of Its Fifty-Third Session, [2001] 2
 Y.B. Int’l L. Comm’n 34, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2)..... 6, 8, 9, 20

Rules of Court, art. 79, ¶ 10.....iv

Sargasso Sea Alliance, *Submission of Scientific Information to Describe Ecologically or
 Biologically Significant Marine Areas*, <https://www.cbd.int/doc/meetings/mar/rwebsa-wcar-01/other/rwebsa-wcar-01-sargasso-sea-alliance-02-en.pdf>. 11, 12

Statute of the International Court of Justice, art. 36, ¶ 6.iv

The Future We Want, G.A. Res. 66/288, P 206, U.N. Doc. A/RES/66/288 (Sept. 11, 2012). 14

U.N. Conference on Environment and Development, *Rio Declaration on Environment and
 Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Aug. 12, 1992). 16

U.N., *First Global Integrated Marine Assessment*, ch. 50 (2016),
http://www.un.org/Depts/los/global_reporting/WOA_RPROC/WOACompilation.pdf.
 11, 12

BOOKS

Daniel Bodansky, et. al., *The Oxford Handbook of International Environmental Law* 598 (2007).
 15, 16

Godefridus J.H. Hoof, *Rethinking the Sources of International Law* (1983)..... 14

Philippe Sands, et. al., *Principles of International Environmental Law* (2012). 20

Xue Hanqin, *Transboundary Damage in International Law* (2003). 16

STATEMENT OF FACTS

The Sargasso Sea (“Sea”) ecosystem is vital to marine biodiversity, including the critically endangered European eel (“Eel”).² The Eel migrates from coastal and inland waters, including those of Revels and Alliguna, to the Sea to spawn.³ Eel offspring migrate inland to grow and develop.⁴ The Eel has historically played a major role in Alliguna’s cultural and religious traditions, but Eel populations have steadily declined.⁵

The Eel and other Sea biodiversity are so important and threatened that Revels and Alliguna are parties to a variety of agreements calling for their protection, including the CBD, CMS, UNCLOS, and Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea (“Hamilton Declaration”).⁶ The Eel is listed on Appendix II of the CMS, and Alliguna and Revels are Range States for the species.⁷ The Sea has been designated as an ecologically or biologically significant marine area under the CBD.⁸ Furthermore, Alliguna and Revels have expressed a commitment to environmental conservation by sending high-level representatives to fully participate in the 1972 Stockholm U.N. Conference on the Human Environment, the 1992 Rio de Janeiro U.N. Conference on Environment and Development, the

² See R. ¶ 3.

³ *Id.*

⁴ *Id.*

⁵ R. ¶ 3–4

⁶ R. ¶¶ 7–9, 11.

⁷ R. ¶ 8.

⁸ R. ¶ 18.

2002 Johannesburg World Summit on Sustainable Development, and the 2012 Rio de Janeiro Rio+20 Conference.⁹

Despite its commitments to conserve Sea biodiversity, Revels subsidized and supported the SEA Corporation’s Sargassum harvesting project (“the project”) in the Sea on the high seas beyond national jurisdiction.¹⁰ The corporation, sailing under the flag of Revels, planned to use the Sargassum in biofuel production.¹¹ Without Revels’s subsidy, the project would not have occurred.¹² Revels funded the project with the expectation the project would help the State meet its NDC commitments under the Paris Agreement, to which both Revels and Alliguna are parties.¹³ There is no evidence Revels examined potential risks to biodiversity or communicated with affected parties before subsidizing the project.¹⁴

Friends of the Eels, a non-governmental organization, notified Alliguna of the project out of concern the project would adversely impact the Eels.¹⁵ After confirming the information it received, Alliguna communicated to Revels the concerns for Sea biodiversity.¹⁶ Although there is no indication Revels has assessed its impact on Sea biodiversity, it insists its conduct is legal

⁹ R. ¶ 12.

¹⁰ R. ¶ 14.

¹¹ R. ¶ 13.

¹² C. ¶ A18.

¹³ R. ¶¶ 10, 14, 19.

¹⁴ R. ¶¶ 1–28.

¹⁵ R. ¶ 17.

¹⁶ *Id.*

under international law.¹⁷ Revels has failed to cooperate with Alliguna in finding a means to minimize the harm of the harvesting project or to accept Alliguna's invitation to discuss the matter in greater detail.¹⁸ Despite agreeing to submit to ICJ jurisdiction for disputes involving interpretation of the CBD and Paris Agreement, Revels refused to submit the matter to the ICJ.¹⁹

¹⁷ R. ¶¶ 1–28.

¹⁸ R. ¶¶ 19, 24.

¹⁹ R. ¶¶ 7, 10, 24.

SUMMARY OF ARGUMENT

I. The ICJ has jurisdiction in this case because Alliguna and Revels agreed to submit to ICJ jurisdiction for disputes concerning the CBD and Paris Agreement. The present dispute arises under those agreements because Alliguna alleges Revels has failed to perform its affirmative obligations under the CBD to conserve biodiversity in the Sargasso Sea, and Revels contends the conduct at issue was in furtherance of its NDC commitments under the Paris Agreement and therefore lawful. The Conservation of Migratory Species of Wild Animals (“CMS”) and the United Nations Convention on the Law of the Sea (“UNCLOS”) do not bar ICJ jurisdiction in this case because, under Article 22 of the CBD, the terms of the CBD do not affect the rights and obligations of Revels under the CMS, and Revels’s obligations under the CBD are consistent with its obligations under UNCLOS with respect to living resources of the high seas.

II. Per customary international law, Revels is responsible for the internationally wrongful conduct at issue because it failed to perform its affirmative obligations under treaty and customary law and acknowledged and adopted as its own conduct the SEA Corporation’s harvesting of Sargassum.

III. Revels violated international law by harvesting Sargassum to the detriment of the Sea environment and the Eel’s habitat, by failing to create regulations which protect the marine environment, and by failing to cooperate with Alliguna to preserve biological diversity. Revels violated the duty to promote the conservation and sustainable use of biological diversity of the Sea as mandated by the CBD. Additionally, Revels violated its obligation to conserve migratory species, particularly the vulnerable Eel, under the CMS, CBD, and UNCLOS. The limiting language of the Conventions does not excuse the harvesting of Sargassum because applicable conventions have as their object and purpose the conservation of biodiversity and the protection

of habitats. Revels violated customary international law, including the precautionary principle and duty to prevent transboundary harm. Revels's failure to comply with its obligations is not justified under international law because the freedom of the high seas granted to States under UNCLOS is limited. The freedom of high seas is subject to several other duties under UNCLOS. Revels cannot hide behind Paris Agreement obligations to create harm to another country because harvesting Sargassum goes against the purpose the Paris Agreement—to promote protection of biodiversity and sustainable development. Additionally, Revels has caused an imminent threat or harm to the Eel by damaging the Eel's habitat.

ARGUMENT

I. The International Court of Justice has jurisdiction over the present dispute because Alliguna and Revels have agreed to submit to the Court’s jurisdiction for agreements under which the dispute directly arises.

A. The present dispute arises directly under the CBD because Revels has failed to perform its affirmative obligations concerning conservation of biodiversity in the Sargasso Sea, which are in addition to, and not inconsistent with, its rights and obligations under the CMS and UNCLOS.

Alliguna primarily alleges Revels violated the CBD by failing to take measures required under the convention for the conservation of the Sea, which includes, but is not limited to, the Eel.²⁰ This misconduct directly implicates the CBD because the principal objective of the convention is the “conservation of biological diversity,”²¹ which includes the endangered Eel. While Alliguna is particularly concerned by Revels’s harm to Eel populations, this concern does not diminish Revels’s harm or threat to other species living in the Sea or the applicability of the CBD, which contemplates the protection of individual threatened species.²² Because Alliguna and Revels have agreed to submit to ICJ jurisdiction under Article 27 of the CBD,²³ the ICJ has jurisdiction in the present dispute.

1. *Article 22 of the CBD, rather than the doctrine of lex specialis, should be applied to resolve conflicts between the CBD and other treaties relating to the same subject-matter.*

Lex specialis should not be applied to limit the ICJ’s jurisdiction in this case because the Vienna Convention on the Law on Treaties (“Vienna Convention”) should control. By ratifying

²⁰ R. Annex B (emphasis added); *see infra* Section III.A.1.

²¹ Convention on Biological Diversity art. 1, June 5, 1992, 1760 U.N.T.S. 79, 146 [hereinafter CBD].

²² *See, e.g., id.* art. 8, at 148–49.

²³ R. ¶ 4.

the Vienna Convention,²⁴ Revels has agreed to be bound by the interpretive doctrines it invokes. *Lex specialis* is not an interpretive doctrine of the Vienna Convention. Instead, the Vienna Convention gives effect to the specific conflict provisions contained in treaties.²⁵ Article 22 of the CBD contains conflict clauses similar to the those described by Article 30, ¶ 2 of the Vienna Convention, but they contain limiting language. Because “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,”²⁶ the conflict clauses and limiting language should be given effect.

2. *The CMS does not limit ICJ jurisdiction under the CBD in this case.*

Article 22, ¶ 1 of the CBD provides, “The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.”²⁷ While the CMS is an “existing international agreement,” the CBD obligates Revels without affecting its rights and obligations under the CMS. Moreover, even if it were determined that the CBD affected the rights and obligations of Revels under the CMS, the CBD would be controlling because Revels’s wrongful conduct poses a serious threat to biological diversity.

Revels’s obligation to take measures to conserve biodiversity in the Sea does not affect its rights and obligations under the CMS. While CMS Instruments operate primarily at the

²⁴ R. ¶ 6.

²⁵ Vienna Convention on the Law of Treaties art. 30, ¶ 2, May 23, 1969, 1155 U.N.T.S. 331, 339.

²⁶ *Id.* art. 31, ¶ 1, at 340.

²⁷ CBD art. 22, ¶ 1, *supra* note 21, at 156.

“global and regional levels in the context of a specific, globally significant component of biological diversity[—]migratory species”—the CBD operates primarily at the national level by placing on nation States broader obligations aimed at conserving biodiversity in general.²⁸ Revels violated the CBD by failing to implement specific national measures to protect the biodiversity of the Sea as a whole.²⁹ These measures are distinct from, but not inconsistent with, the obligations Revels has under the CMS with respect to specific migratory species, such as Revels’s obligation to “endeavor to conclude AGREEMENTS where these should benefit” Appendix II migratory species, such as the Eel.³⁰ Furthermore, the CBD does not “affect the rights” Revels has under the CMS because the CMS does not grant Revels any rights that conflict with the terms of the CBD. Although the CMS requires only that Range States “endeavor to conclude” Agreements for the conservation of Appendix II species, this should not be construed as giving Range States the “right” to harm endangered migratory species because this interpretation would be antithetical to the very purpose of the CMS—to encourage, rather than inhibit, actions aimed at conserving migratory species with unfavorable conservation statuses.

Even if it was determined that the CBD affected Revels’s rights and obligations under the CMS, the ICJ would still have jurisdiction in this case. As discussed in Part III of this memorial,

²⁸ Lyle Glowka, *Complementarities between the Convention on Migratory Species and the Convention on Biological Diversity*, 3 J. Int’l Wildlife L. & Pol’y 205, 216 (2000). Lyle Glowka, as the former Senior Legal Advisor to the CBD Secretariat and the current Executive Coordinator of the Abu Dhabi office of the CMS Secretariat, is among “the most highly qualified publicists.”

²⁹ See *infra* Section III.A.1.

³⁰ Convention on the Conservation of Migratory Species of Wild Animals art. IV, June 23, 1979, 1651 U.N.T.S. 333, 362–63; R. ¶ 8 [hereinafter CMS].

Revels's harvesting of Sargassum and failure to satisfy its obligations under the CBD poses a serious threat to the Eel and other biodiversity of the Sea. Thus, pursuant to the limiting language of Article 22 of the CBD, Article 27 of the CBD, which provides for ICJ jurisdiction in this case, would apply.

3. *UNCLOS does not limit ICJ jurisdiction under the CBD in this case.*

Article 22, ¶ 2 of the CBD states, “Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea.”³¹ The obligations imposed by the CBD are additional to, but entirely consistent with, the rights and obligations imposed by UNCLOS with respect to living resources of the high seas. UNCLOS Articles 116 through 119 provide that States have the right to fish the high seas,³² subject to duties to take necessary measures to conserve the living resources of the high seas,³³ to cooperate with other States in taking such conservation measures,³⁴ and to “take in consideration the effects on species associated or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.”³⁵ Each of these UNCLOS articles is consistent with the more detailed provisions of the CBD; while UNCLOS establishes the general principle that parties should cooperate to conserve living resources of the high seas,

³¹ CBD art. 22, ¶ 2, *supra* note 21, at 157.

³² United Nations Convention on the Law of the Sea art. 116, Dec. 10, 1982, 1833 U.N.T.S. 3, 441 [hereinafter UNCLOS] (emphasis added).

³³ *Id.* art. 117, at 441.

³⁴ *Id.* art. 117–18, 441.

³⁵ *Id.* art. 119, at 441–42.

the CBD and related Decisions flesh this principle out by imposing more specific obligations on States to conserve biodiversity, and in particular, the biodiversity of the Sea.³⁶ Because Revels's obligations under the CBD are additional to but perfectly consistent with UNCLOS provisions concerning the high seas, UNCLOS does not limit ICJ jurisdiction in this case.

B. The present dispute arises under the Paris Agreement because Revels is defending its wrongful conduct by arguing the SEA Corporation's Sargassum harvesting project fulfills Revels's NDC commitments.

The present dispute also arises under the Paris Agreement because one of Revels's principle arguments is that since its subsidy and support of Sargassum harvesting helps to curtail climate change and fulfill its NDC commitments under the Paris Agreement, Revels is not violating international environmental law.³⁷ For example, Revels contends the project does not conflict with its obligations under customary international law, stating "[t]he precautionary principle actually weighs in favor of continuing the renewable energy project to help mitigate climate change."³⁸ Because Alliguna alleges Revels has violated both treaty and customary international law through its Sargassum harvesting and regulatory failures, evaluating the extent to which Revels's obligations under the Paris Agreement limit or are subject to Revels's rights and obligations under the CBD, CMS, UNCLOS, and customary international law is essential for resolving the present dispute. Thus, the ICJ has jurisdiction under the Paris Agreement because the present dispute arises directly under it and Revels has agreed to submit to ICJ jurisdiction in such cases.³⁹

³⁶ See *infra* Section III.A.1.

³⁷ See R. ¶ 14, 19.

³⁸ R. ¶ 19.

³⁹ R. ¶ 10.

II. Revels is responsible for the wrongful conduct at issue because it failed to perform its affirmative obligations under international law and the SEA Corporation's harvesting of Sargassum is attributable to Revels.

A. Revels failed to perform its affirmative obligation to take measures to conserve the biodiversity of the Sargasso Sea.

Revels is responsible for the wrongful harvesting of Sargassum in the Sea by the SEA Corporation because by subsidizing, supporting, and failing to regulate the project, Revels failed to perform its affirmative obligation to take certain conservation measures specified by treaty and customary law.⁴⁰ A State may be responsible for an internationally wrongful act not only by *acting* directly contrary to international law or through the attributed actions of private entities under the jurisdiction of the State but also by *failing to act* in accordance with its obligations under treaty or customary law.⁴¹

Several international law cases demonstrate that under customary international law, a State is responsible for an internationally wrongful act if it fails to act in accordance with its affirmative obligations. For example, in the Corfu Channel case, the ICJ held that Albania was responsible under international law for the losses the United Kingdom incurred when its warships suffered damage from mine explosions in Albanian territorial waters.⁴² Although the ICJ determined there was no evidence Albania had laid the mines itself, Albania was still responsible for the damage caused because it knew about the mines and breached its obligation under customary international law to warn the United Kingdom of the location of the mines.⁴³

⁴⁰ See *infra* Part III for the measures Revels failed to take.

⁴¹ Report of the International Law Commission on the Work of Its Fifty-Third Session, [2001] 2 Y.B. Int'l L. Comm'n 34, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter ILC, *Fifty-Third Session*].

⁴² Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 23 (April 9).

⁴³ *Id.* at 17, 22.

In the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) case, the International Tribunal for the Law of the Sea held that a State is responsible for an internationally wrongful act where it fails to comply with its “due diligence obligation” to safeguard the rights of other parties by monitoring, adopting and enforcing rules and measures regulating, and administering control over private vessels sailing under its flag and engaged in illegal, unreported, and unregulated (“IUU”) fishing activities in the exclusive economic zones of SFRC member States.⁴⁴ In other words, the flag State was responsible for failing to meet its “due diligence obligation” to take all necessary measures to prevent IUU fishing by fishing vessels flying its flag.⁴⁵

In the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area case, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea held that a State is liable for damage caused by private, sponsored entities engaged in deep seabed mining if the States fails, through act or *omission*, “to carry out responsibilities” under the UNCLOS.⁴⁶ Specifically, a sponsoring State is liable for failing to adopt laws and regulations and take administrative measures “reasonably appropriate for securing compliance [with UNCLOS and related contracts and other instruments] by persons under its jurisdiction.”⁴⁷

⁴⁴ Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SFRC), Case No. 21, Advisory Opinion of Apr. 2, 2015, [2015] ITLOS Rep. 4, 41, 44.

⁴⁵ *Id.* at 40.

⁴⁶ Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, [2011] ITLOS Rep. 10, 55–58 [hereinafter Case No. 17].

⁴⁷ *Id.* at 38–39.

The conduct of the SEA Corporation need not be directly attributed to Revels for Revels to be responsible for an internationally wrongful act. Revels committed an internationally wrongful act by failing to perform its affirmative obligations under treaty and customary law to prevent the SEA Corporation from harming or threatening the biodiversity of the Sea.

B. Revels acknowledged and adopted the wrongful conduct of the SEA Corporation as its own.

Although the SEA Corporation's activities in the Sea need not be attributable to Revels for Revels to be responsible for an international wrongful act, the SEA Corporation's wrongful conduct is so attributable because Revels acknowledged and adopted the corporation's conduct as its own. The Articles on Responsibility of States for Internationally Wrongful Acts codify customary international law principles of state responsibility. According to these articles, a State is responsible for its internationally wrongful acts.⁴⁸ An international wrongful act is an act or omission attributable to a State that violates an international obligation of the State.⁴⁹ Conduct is attributable to a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own."⁵⁰ This is true even if (1) the State did not direct or control the private conduct in question and (2) the private party did not exercise elements of government authority.⁵¹ A State "acknowledges and adopts" the conduct of a private party if it assumes responsibility for that conduct.⁵² Where a State gives approval to the internationally wrongful conduct of a private

⁴⁸ ILC, *Fifty-Third Session*, *supra* note 41, at 32

⁴⁹ *Id.* at 34.

⁵⁰ *Id.* at 26.

⁵¹ *Id.* at 52.

⁵² *Id.* at 53.

entity so as to perpetuate it, the conduct may be attributed to the State.⁵³ Acknowledgement and adoption may be express or inferred from the State's conduct.⁵⁴

Revels did not merely support or endorse the SEA Corporation's harvesting of Sargassum; it assumed responsibility and expressed approval for the SEA Corporation's conduct so as to perpetuate it. For example, Revels subsidized the Sargassum harvesting project to such an extent that had the SEA Corporation not received the subsidy from Revels, the project would not have occurred.⁵⁵ Not only did Revels make the project possible, it has effectively taken responsibility for the project by treating the project as a partial fulfillment of its NDC commitments under the Paris Agreement.⁵⁶ With a press release and report, Revels even highlighted the government's success at actively developing the State's new renewable energy program by subsidizing and supporting projects like the SEA Corporation's harvesting project.⁵⁷ If Revels is permitted to take credit for the "success" of the project, it should be held responsible for any resulting internationally wrongful conduct. In sum, because Revels acknowledged and adopted the SEA Corporation's project as its own, Revels is directly responsible for the harm and threat the project is causing to biodiversity of the Sea, including the Eel.

⁵³ *Id.* at 52–53 (discussing United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 35 ¶ 74 (May 24)).

⁵⁴ *Id.* at 53–54.

⁵⁵ C. ¶ A18.

⁵⁶ R. ¶ 14, 19.

⁵⁷ *See* R. ¶ 16.

III. Revels violated international law as a result of the Sargassum harvesting project.

A. Revels violated its treaty obligations.

1. *Revels violated its duty to promote the conservation and sustainable use of biological diversity of the Sea as mandated by the CBD.*

Revels failed to promote conservation and the sustainable use of the Sea as required by the CBD⁵⁸ by violating its obligations, including ensuring activities within and beyond national jurisdiction “as far as possible and as appropriate” do not cause harm to the environment.⁵⁹

Parties must cooperate to conserve biological diversity beyond national jurisdiction,⁶⁰ regulate to protect threatened species,⁶¹ identify threats to such species,⁶² and when imminent danger exists “initiate action to prevent or minimize such danger or damage.”⁶³

Revels has failed to cooperate with Parties under the CBD by failing to work with Alliguna towards conservation of the Sea, especially since Alliguna requested the end of the harvesting project.⁶⁴ Revels is harming a vital part of the Sea ecosystem because Sargassum seaweed “provides essential habitat for a wide diversity of species, many of which are

⁵⁸ CBD art. 8, *supra* note 21, at 149.

⁵⁹ *Id.* art. 3, at 147.

⁶⁰ *Id.* art. 5, at 147–48.

⁶¹ *Id.* art. 8(k)–(l), at 149.

⁶² *Id.* art. 7(b), at 148.

⁶³ *Id.* art. 14(d), at 151.

⁶⁴ *See generally*, R. ¶¶ 18–28.

endangered or threatened.⁶⁵ The Sea is also “the only breeding location” for the “European and American eels and is on the migration route of numerous other iconic and endangered species.”⁶⁶ According to a report by CBD Parties, “[e]xtraction of Sargassum has the potential to pose a direct threat to the Sargasso Sea ecosystem.”⁶⁷ The Sea is an ecologically or biologically significant marine area (“EBSA”) under the CBD.⁶⁸ EBSA status of the Sea is legally significant because the CBD is a legally binding treaty of which Revels is a party to.⁶⁹ Revels allowed the project to continue through regulatory inaction, thereby failing to protect the Sea ecosystem as required by the CBD.

Revels knowingly violated its obligations under the CBD. As noted in Part II of this Memorial, Revels is responsible for harvesting Sargassum in the Sea. An Environmental Impact Assessment determined that the impacts on the marine biodiversity, including the Eel, were uncertain.⁷⁰ Nonetheless, Revels allowed the project to continue even though the CBD community acknowledges Sargassum’s importance to the Sea’s habitat. Revels violated

⁶⁵ See Sargasso Sea Alliance, *Submission of Scientific Information to Describe Ecologically or Biologically Significant Marine Areas 2*, <https://www.cbd.int/doc/meetings/mar/rwebsa-wcar-01/other/rwebsa-wcar-01-sargasso-sea-alliance-02-en.pdf>.

⁶⁶ *Id.*; See also U.N., *First Global Integrated Marine Assessment*, ch. 50, 1–2 (2016), http://www.un.org/Depts/los/global_reporting/WOA_RPROC/WOACompilation.pdf [hereinafter U.N. Marine Assessment].

⁶⁷ *Id.* at 17–18; see also U.N. Marine Assessment, *supra* note 66, at 1–2.

⁶⁸ *Ecologically or Biologically Significant Marine Areas: The Sargasso Sea*, CHM (June 15, 2015), <https://chm.cbd.int/pdf/documents/marineEbsa/200098/4>.

⁶⁹ R. ¶ 7; CBD art. 7, *supra* note 21, at 148.

⁷⁰ C. ¶ A17.

international law because it did not ensure the project would not cause harm to marine diversity.⁷¹

Revels violated CBD obligations even though the extent of harm is yet unknown. The CBD does not simply create a duty once harm occurs to biological diversity but obligates parties to take preventive measures to ensure conservation and sustainable use of biological diversity of the Sea.⁷²

2. *Revels violated its obligation to conserve migratory species, particularly the vulnerable European Eel, under the CMS, CBD, and UNCLOS*

Under the CMS, Parties must restore⁷³ and conserve⁷⁴ endangered migratory species to satisfactory conservation standards. The Eel is protected by the CMS.⁷⁵ Revels violated the CMS by haphazardly diminishing a vital part of the Eel’s environment in a manner incompatible with a legitimate endeavor to conclude and abide by Article IV Agreements.

Parties must “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.”⁷⁶ Historically, large populations of the Eel thrived in

⁷¹ Sargasso Sea Alliance, *supra* note 65, at 3, 17–18; *See also* U.N. Marine Assessment, *supra* note 66.

⁷² *See* Sargasso Sea Alliance, *supra* note 65, at 3, 17–18; *See also* U.N. Marine Assessment, *supra* note 66.

⁷³ CMS, art. V, ¶ 1, *supra* note 30, at 363.

⁷⁴ *Id.* art. III, ¶ 4, at 361.

⁷⁵ *Id.* art. II, at 360 ([Parties] shall endeavour to conclude Agreements covering the conservation and management of migratory species included in Appendix II,” which includes the European Eel); *see also* U.N. Env’t, Convention on Migratory Species, Certified Action on the European Eel (*Anguilla anguilla*), Oct. 2017, https://www.cms.int/sites/default/files/document/cms_cop12_ca.12.1_european-eel_e.pdf.

⁷⁶ CBD, art. 8(j), *supra* note 21, at 149.

Alliguna's waters, and the Eel holds a prominent place in Alliguna's culture, religion, and history.⁷⁷ Harming the Eel directly affects these communities in contravention of the CBD.

Revels is violating its obligations under UNCLOS by harvesting Sargassum. Parties must conserve living resources of the high seas, cooperate with other States, take responsibility for nationals who exploit national resources, protect and preserve the marine environment, and act in good faith.⁷⁸ "States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned."⁷⁹ Revels failed to conserve vital living resources in the Sea and is not cooperating with other Parties.

The Eel migrates to the Sea to spawn, and the migrates across the Ocean.⁸⁰ They eventually travel to inland waters and continue to develop and grow.⁸¹ By subsidizing a major Sargassum harvesting project in the Sea, Revels is negatively altering the ecological habitat of the protected Eel.

B. The limiting language of the CMS does not justify Revels harvesting Sargassum.

Revels tries to circumvent Alliguna's claims by citing the limiting language in CMS Articles II and IV.⁸² However, the language of a convention must be read in the context of its

⁷⁷ R. ¶ 4.

⁷⁸ UNCLOS, art. 117–18, 192, & 300, *supra* note 32, at 441, 477, & 516.

⁷⁹ *Id.* art. 118, at 441.

⁸⁰ R. ¶ 3.

⁸¹ *Id.*

⁸² R. ¶ 21.

object and purpose.⁸³ The purpose and object of the CMS are to promote conservation of biodiversity⁸⁴ and the protection of habitats.⁸⁵ The principle of *pacta sunt servanda* dictates that every convention be executed in good faith.⁸⁶ This duty applies to any pactum or agreement between parties.⁸⁷ Both countries are Parties to the agreement and both articles use obligatory language, including “shall,” thereby binding parties to the obligations under the CMS.⁸⁸

C. Revels violated customary international law.

Revels violated customary international law, which Revels has made efforts in the past to uphold. For example, high-level representatives from Revels attended the Rio+20 meetings.⁸⁹ The Rio+20 outcome document “The Future We Want” provides States have a “[c]ommitment to sustainable development and to ensuring the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations.”⁹⁰ Additionally, harvesting Sargassum flouts the efforts being made to develop an international

⁸³ Vienna Convention, art. 31, ¶ 1, *supra* note 25, at 340.

⁸⁴ CMS art. II, ¶ 1, *supra* note 30, at 360.

⁸⁵ *Id.*

⁸⁶ Vienna Convention, art. 26, ¶ 1, *supra* note 25, at 340.

⁸⁷ Godefridus J.H. Hoof, *Rethinking the Sources of International Law*, 75 (1983).

⁸⁸ R. ¶ 8; *See, e.g.*, CMS art. II, ¶ 3, *supra* note 30, at 360 (“Parties *shall* endeavour to conclude AGREEMENTS covering the conservation and management of migratory species included in Appendix II.”) (emphasis added); *id.* art. IV, at 362 (“Parties that are Range States of migratory species listed in Appendix II *shall* endeavour to conclude AGREEMENTS where these would benefit the species and should give priority to those species in an unfavourable conservation status.”) (emphasis added).

⁸⁹ R. ¶ 12.

⁹⁰ The Future We Want, Annex, ¶ I.2, G.A. Res. 66/288, P 206, U.N. Doc. A/RES/66/288, 1 (Sept. 11, 2012).

legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.⁹¹ Revels also signed the Hamilton Declaration showing the Revels understands the importance of preserving the Sea and its habitat.⁹²

Revels's activities violate the precautionary principle and the duty to prevent transboundary Harm.

1. ***Revels violated the precautionary principle.***

The precautionary principle mandates States anticipate, avoid, and mitigate threats to the environment.⁹³ The precautionary principle is an established customary international law principle⁹⁴ requiring countries to avoid transboundary pollution, prevent pollution at the source, minimize environmental damage, and reduce risk of harm.⁹⁵ Measures must be taken even if causal connections are not fully established by the scientific community.⁹⁶ There must be a potentially risky activity and the proponent of the activity bears the burden of proving that the act

⁹¹ See UNCLOS pmbl., art. 64, *supra* note 32, at 1271, 1282.

⁹² R. ¶ 11.

⁹³ IUCN, *Guidelines for Applying the Precautionary Principle* 1 (2007), http://cmsdata.iucn.org/downloads/ln250507_ppguidelines.pdf.

⁹⁴ Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 15 ITLOS Rep. 10, P 41, ¶ 135.

⁹⁵ Daniel Bodansky, et. al., *The Oxford Handbook of International Environmental Law* 598 (2007).

⁹⁶ Nicholas Ashford, et. al., World Health Org., *Wingspread Statement on the Precautionary Principle* 1 (1998), www.who.int/ifcs/documents/forums/forum5/wingspread.doc.

does not pose a risk to the environment or human health.⁹⁷ Here, each element is met because harvesting Sargassum directly harmed the environment.⁹⁸

2. *Revels breached its duty to prevent transboundary harm.*

Under the duty to prevent transboundary harm,⁹⁹ States must keep activities within their jurisdiction or control from causing damage to the environment in other States or outside the boundaries of national jurisdiction.¹⁰⁰ The duty is a recognized principle of customary international law.¹⁰¹ This duty is breached if there is a physical connection between the activity concerned and the damage caused, human causation, harm that meets a level of gravity that demands legal action, and transboundary movement of injurious effects.¹⁰² In the *Corfu Channel* case, the ICJ articulated the general principle that every State is obliged not to knowingly allow its territory to be used to commit acts against the rights of any other State.¹⁰³

Here, the elements of the duty to prevent transboundary harm are met. Harvesting Sargassum physically depleted vital portions of the Eel's habitat and was a direct cause of the harm. The harm rises to a level of gravity that it demands legal action and the injurious effects cross boundaries because the Eel is a migratory species.

⁹⁷ Bodansky, *supra* note 95, at 598.

⁹⁸ *Id.*

⁹⁹ U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1, Principle 2 (Aug. 12, 1992).

¹⁰⁰ *Id.*

¹⁰¹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 19, ¶ 29 (July 8).

¹⁰² Xue Hanqin, *Transboundary Damage in International Law* 4 (2003).

¹⁰³ *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 23 (April 9).

D. Revels’s failure to comply with its obligations is not justified under international law.

Revels argues its conduct is allowed under the freedom of the high seas under UNCLOS¹⁰⁴ and that harvesting Sargassum is justified by mitigating climate change pursuant to its obligations under the Paris Agreement.¹⁰⁵ Revels also argues Alliguna has shown no causal link between harvesting Sargassum and harm to the Eel.¹⁰⁶ However, each of these arguments fails, as outlined below.

1. *The freedom of the high seas granted to States under UNCLOS is limited and does not apply to situations that violate other sections of UNCLOS.*

The freedom of the high seas granted to States under UNCLOS is limited. Damaging the marine resources and biodiversity of the Sea goes beyond what is permitted on the high seas and violates UNCLOS.¹⁰⁷ The freedom of the high seas is counter-balanced with the duty to conserve “living resources of the high seas,”¹⁰⁸ protect and preserve the marine environment,¹⁰⁹ cooperate with other States to conserve and manage living resources in the high seas,¹¹⁰ and

¹⁰⁴ R. ¶ 21.

¹⁰⁵ R. ¶¶ 19, 23.

¹⁰⁶ R. ¶ 23.

¹⁰⁷ See, e.g., UNCLOS, art. 117–18, 192, & 300, *supra* note 32, at 441, 477, & 516.

¹⁰⁸ *Id.* art. 117, at 441.

¹⁰⁹ *Id.* art. 192, at 477.

¹¹⁰ *Id.* art. 118, at 441.

“fulfil in good faith the obligations assumed under this Convention.”¹¹¹ Revels’s argument goes against the spirit of UNCLOS to protect living resources and marine environments.¹¹²

2. *Revels cannot hide behind its climate change mitigation obligations because the Sargassum harvesting project violates the Paris Agreement and CMS Resolutions.*

Revels argues the precautionary principle weighs in favor of continuing the renewable energy project to help mitigate climate change.¹¹³ However, Revels cannot hide behind Paris Agreement obligations if it harms another country, the Sea ecosystem, and the Eel. The Paris Agreement prohibits harming the environment in the process of developing renewable energy because increased environmental harm cuts against the very spirit of the agreement.¹¹⁴ For example, the Preamble notes “the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity.”¹¹⁵ Additionally, Article 2 states the “Agreement, in enhancing the implementation of the [UNFCCC], including its objective, aims to strengthen the global response to the threat of climate change, *in the context of sustainable development*.”¹¹⁶ While Revels is encouraged to take measures to mitigate climate change, the Paris Agreement does not justify the Sargassum harvesting project, an instance of unsustainable development that violates the integrity of the Sea ecosystem and its biodiversity.

¹¹¹ *Id.* art. 300, at 516.

¹¹² *See id.*, art. 117–18, 192, & 300, at 441, 477, & 516.

¹¹³ R. ¶ 19.

¹¹⁴ *See* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 13, 2015, in Rep. of the Conference of the Parties on the Twenty-First Session, U.N. Doc. FCCC/CP/2015/10/Add.1, pmb1. (2016) [hereinafter Paris Agreement].

¹¹⁵ *Id.*

¹¹⁶ *Id.* art. 2 (emphasis added).

Revels’s argument also contravenes its obligations under CMS Resolutions 11.27 and 12.21.¹¹⁷ Resolution 11.27 recognizes the importance of renewable energy sources but expresses concern with the effects exploiting renewable energy can have on migratory species, such as the Eel:¹¹⁸

*Recognizing also that increased use of technologies to exploit renewable energy may potentially affect many migratory species listed by CMS and other legal frameworks, and concerned about the cumulative effects of such technology on the movement of migratory species, their ability to utilize critical staging areas, the loss and fragmentation of their habitats, and mortality from collisions with infrastructural developments;*¹¹⁹

Renewable energy projects must be “undertaken in such a way that negative impacts on migratory species are avoided.”¹²⁰ CMS Resolution 12.21 further elaborates on Parties’ duty to have an action plan to avoid damage to migratory species in the process of climate change mitigation.¹²¹

Revels attempts to argue these resolutions are not binding, but Revels cannot avoid its obligations by arguing that the agreements are not compulsory.¹²² Alliguna and Revels consented to these conventions and agreements on the first year that they opened for signature,¹²³

¹¹⁷ See CMS, Res. 11.27, P 3.3, UNEP/CMS/Resolution 11.27 (4-9 Nov. 2014) (renewable ocean energy) [hereinafter CMS Res. 11.27]; CMS, Res. 12.21, P 9, UNEP/CMS/Resolution 12.21 (15 Dec. 2017) (climate change and migratory species) [hereinafter CMS Res. 12.21].

¹¹⁸ CMS Res. 11.27 *supra* note 117.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ CMS Res. 12.21 *supra* note 117.

¹²² R. ¶ 21.

¹²³ C. ¶ A4.

and fully participated in all of the Conferences and Meetings of the Parties since then.¹²⁴ Revels never objected to any of the resolutions of the parties. Though Decisions of the Conference of Parties are not generally binding,¹²⁵ they set forth an authoritative interpretation of international agreements.¹²⁶ Revels cannot now dispute the resolutions of the Conference of the Parties.¹²⁷

3. *Harvesting Sargassum caused harm.*

Revels argues there is no demonstrable negative impact from the biofuels project on the Sea or the Eel,¹²⁸ but harm does not need to be serious or substantial in order to be actionable.¹²⁹ Destroying part of the Eel's spawning habitat certainly will harm the species. It is sufficient that the harm be susceptible of being measured by factual and objective standards.¹³⁰ Due to the highly protected status of the Eel,¹³¹ the fact it is listed as a "critically endangered species,"¹³² and the steep declines in Eel populations,¹³³ the damage is objectively shown by the destruction of the

¹²⁴ *Id.* at ¶ A5.

¹²⁵ Jutta Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 *Leiden J. Int'l. L.* 21 (2002).

¹²⁶ Philippe Sands, et. al., *Principles of International Environmental Law* 109 (2012); Burrus M. Carnahan, *Treaty Review Conferences*, 81 *AJIL* 226, 229 (1987).

¹²⁷ *Id.*

¹²⁸ R. ¶ 19.

¹²⁹ *See* ILC, Fifty-Third Session, *supra* note 41, at 152, ¶ 4.

¹³⁰ *Id.*

¹³¹ The European eel is listed on Appendix II of CMS, and both countries are Range States for the species. R. ¶ 8.

¹³² R. ¶ 3.

¹³³ *Id.*

habitat upon which the species so importantly relies. Revels directly harmed the Eel by harming its environment. The extinction of the Eel is not necessary to prove harm.

Revels further argues the Eel has been in decline for years, Alliguna has failed to describe any causal link between the SEA Corporation's initiative and any detriment to the species,¹³⁴ and that Alliguna is harming Eel itself by its hydropower facilities.¹³⁵ However, Revels cannot avoid liability by merely shifting blame to Alliguna or the preexisting decline in populations especially when it is a party to multiple treaties which create an affirmative duty to protect the Eel.

¹³⁴ R. ¶ 23.

¹³⁵ R. ¶ 19.

CONCLUSION AND PRAYER FOR RELIEF

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

1. The ICJ has jurisdiction to determine the present dispute.
2. The Republic of Revels is responsible for the internationally wrongful conduct at issue.
3. The Republic of Revels violated international law through the Sargassum harvesting project it supported, subsidized, and failed to regulate, to the detriment of European eel populations and other Sargasso Sea biodiversity.

RESPECTFULLY SUBMITTED,

AGENTS OF THE APPLICANT