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**THE 2019 STETSON
INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION**

**2018 General List No. 237
IN THE INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE,
THE HAGUE, THE NETHERLANDS**



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

FEDERAL STATES OF ALLIGUNA

(APPLICANT)

v.

REPUBLIC OF REVELS

(RESPONDENT)

MEMORIAL FOR THE APPLICANT

FEDERAL STATES OF ALLIGUNA

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STATEMENT OF JURISDICTION

The Federal States of Alliguna ('Alliguna' or 'Applicants') submits the following dispute to the International Court of Justice ('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 Registrar acknowledged the receipt of the application instituting proceedings against the Republic of Revels ('Revels' or 'Respondent') on 28 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 THE ICJ HAS JURISDICTION TO DETERMINE THE MATTER AND WHETHER REVELS IS RESPONSIBLE FOR THE CONDUCT AT ISSUE.
- II. WHETHER REVELS HAS VIOLATED INTERNATIONAL LAW BY NEGATIVELY IMPACTING THE EUROPEAN EELS THROUGH THE SARGASSUM HARVESTING PROJECT IN THE SARGASSO SEA.

STATEMENT OF FACTS

Alliguna and Revels are neighboring coastal states in the North Atlantic Ocean and are both approximately 250 nautical miles from the Sargasso Sea (*Sea*). While Alliguna is a developed country, Revels is a developing country.

The European Eel (*Eel*) is a migratory species that is listed as Critically Endangered on the IUCN Red List of Threatened Species. The *Sea* acts as the spawning habitat of the *Eel*. On 22 April, 2016, Alliguna and Revels submitted their respective Nationally Determined Contributions (*NDC*) under the Paris Agreement (*PA*). In July 2016, SEA Corporation, a large private company based in Revels, began harvesting large amounts of *Sargassum* (*Project*) from the *Sea* for production of biofuels. The *Project* was being subsidized by *Revels* with an aim of contributing towards its *NDC* under the *PA*. Furthermore, the *Project* was carried out by *Columbus*, a vessel flying the flag of Revels.

In the end of 2016, Revels issued a press release where it highlighted the success of the *Project*. On 13 January, 2017, Alliguna sent a diplomatic note to Revels, expressing its concerns regarding potential negative impact of the *Project* as it was removing a component of the fragile ecosystem of the *Sea*.

SEA Corporation continues to carry out the *Project* till the present day.

SUMMARY OF ARGUMENTS

- I. The Convention on Biological Diversity ('*CBD*'), the United Nations Framework on Climate Change ('*UNFCCC*') and the *PA* have a reasonable connection with the present dispute and thereby confer the ICJ with compulsory jurisdiction over the present dispute. The mere invocation of applicable laws by the Respondent does not jeopardize the jurisdiction of the ICJ. Furthermore, the conduct of SEA Corporation is attributable to Revels pursuant to articles 5, 8 and 11 of the Articles on Responsibility of States for Internationally Wrongful Acts ('*ARSIWA*').
- II. Revels violated international law by carrying out the *Project*. The removal of the *Sargassum* disturbs the ecosystem on which the *Eels* rely and consequently contravenes Revels' obligations under the United Nations Convention on the Law of the Sea ('*UNCLOS*'), the *CBD*, the Convention on the Conservation of Migratory Species of Wild Animals ('*CMS*'), the United Nations Framework Convention on Climate Change ('*UNFCCC*'), the *PA* and customary international law.

ARGUMENTS

I. THE ICJ HAS JURISDICTION TO DETERMINE THE MATTER AND THE REPUBLIC OF REVELS IS RESPONSIBLE FOR THE CONDUCT AT ISSUE.

A. THE ICJ HAS JURISDICTION OVER THE PRESENT DISPUTE.

Article 36(1) of the Statute of the ICJ provides that Parties may refer to it all matters specifically provided for in treaties and conventions in force.¹ The *CBD (1)*, the *UNFCCC (2)* and the *PA (3)* have a reasonable connection² with the present dispute and confer jurisdiction upon the ICJ.

1. *The ICJ has jurisdiction pursuant to the CBD and the CMS does not bar its jurisdiction.*

a. The ICJ has jurisdiction pursuant to the CBD.

Revels and Alliguna have accepted the compulsory jurisdiction of the ICJ with respect to disputes concerning the interpretation and application of the *CBD*.³ A dispute regarding the interpretation and application of a treaty arises when the claims of one party are positively opposed to the other⁴ and there exists a reasonable connection between the factual causality and the treaty.⁵ Even an incidental or implied connection of the facts with any treaty provision is sufficient to establish a reasonable connection.⁶

¹ Statute of the International Court of Justice art. 36(1), 18 Apr., 1946, 33 U.S.T.S. 993.

² *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, Judgment, 1984 I.C.J. Rep. 392, ¶81 (Nov. 26) [hereinafter *Nicaragua P.O.*].

³ *Convention on Biological Diversity* art. 27(3), June 5, 1992, 1760 U.N.T.S. 79 [hereinafter *CBD*].

⁴ *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Preliminary Objections, Judgment, 1962 I.C.J. Rep. 319, at 328 (Dec. 21).

⁵ *Nicaragua P.O.*, *supra* note 2.

⁶ *Case Concerning Oil Platforms (Iran v. U.S.)*, Preliminary Objections, Judgment, 1996 I.C.J. Rep. 803, ¶42 (Dec. 12).

In the instant case, Parties have clearly expressed contradictory positions concerning the interpretation of the *CBD*.⁷ Since this dispute concerns the alleged adverse impact of the *Project*⁸ on the conservational status of the *Eels*, there is a reasonable connection⁹ with the provisions of the *CBD* concerning damage to biodiversity,¹⁰ in-situ conservation¹¹ and sustainable use of components of biodiversity.¹² Hence, there exists a dispute concerning the interpretation and application of the *CBD* and the ICJ has compulsory jurisdiction over it.

b. The *CMS* does not bar the jurisdiction of the ICJ.

i. **The arbitral tribunal contemplated within the *CMS* does not have jurisdiction over present dispute.**

Alliguna and Revels agree that there exists a dispute concerning interpretation and application of the *CMS* between them.¹³ Article 13(2) of the *CMS*¹⁴ stipulates that such disputes may by mutual consent of Parties be submitted to a binding arbitration.¹⁵ The use of term ‘may’ emphasizes upon the element of mutuality as a condition precedent to such a submission.¹⁶ As

⁷ Record, ¶18, 19.

⁸ Record, ¶24.

⁹ *Nicaragua P.O.*, *supra* note 2.

¹⁰ *CBD* art 3.

¹¹ *CBD* art. 8.

¹² *CBD* art. 10.

¹³ Record, ¶20, 21.

¹⁴ Convention on the Conservation of Migratory Species of Wild Animals art. XIII(2), June 23, 1979, 1651 U.N.T.S. 333 [hereinafter *CMS*].

¹⁵ *CMS* art. XIII(1).

¹⁶ Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 19 (July 23).

Alliguna has not consented to submit the dispute to arbitration, the arbitral tribunal does not have jurisdiction.

ii. The doctrine of *lex specialis* does not exclude the jurisdiction of the ICJ.

The doctrine of *lex specialis* provides that when a dispute is regulated by a general and a specific instrument,¹⁷ in case of an inconsistency¹⁸ between such instruments, the latter takes precedence over the former in both substantive and procedural matters.¹⁹ An inconsistency arises in case of an impossibility of harmonization.²⁰

The present dispute emanates from both the *CMS* and the *CBD*. Parties to the *CBD* acknowledge that the *CBD* is a framework agreement which harmonizes existing biodiversity conservation regimes, including the *CMS*.²¹ The *CBD* is not inconsistent with the *CMS*, but rather functions as framework agreement dependent upon the *CMS* for informing the normative content of its obligations.²² Hence, the *CMS* does not take precedence but is instead read harmoniously with the *CBD*.²³

c. The *CMS* compliance review mechanism does not bar the jurisdiction of this court.

¹⁷ Int'l L. Comm'n, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶362, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

¹⁸ *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. B) No. 3, at 31 (Aug. 30).

¹⁹ B. CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW 25 (1987).

²⁰ Panel Report, Turkey - Restrictions on Imports of Textile and Clothing Products, WTO Doc. WT/DS34/R, ¶9.92-9.96 (May 31, 2009).

²¹ Ad Hoc Working Group of Experts on Biological Diversity, Report of the Ad Hoc Working Group on the Work of Its First Session, at 2, UNEP/Bio.Div.1/3-9 (Nov. 9, 1989).

²² L. GLOWKA et al., A GUIDE TO THE CONVENTION ON BIOLOGICAL DIVERSITY 14 (1994).

²³ Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *VCLT*].

Compliance review mechanisms of multilateral environmental agreements facilitate effective observance of environmental obligations through recommendations.²⁴ They are not empowered to adjudicate upon state responsibility²⁵ and operate without prejudice to dispute resolution provisions.²⁶ The review mechanism adopted by the *CMS* Conference of Contracting Parties ('*COP*') is a similar non-adversarial compliance mechanism.²⁷ Accordingly, the invocation of this review mechanism, by either party, at any point in time, cannot prejudice the jurisdiction of the ICJ.

2. *The UNFCCC and the PA confer jurisdiction upon the ICJ.*

a. The present matter has a reasonable connection with the UNFCCC and the PA.

Under the *PA*, *NDC* embody domestic mitigation measures taken by each party to combat climate change.²⁸ However, the implementation of *NDC* should take into account the impact on vulnerable ecosystems.²⁹ Similarly, under the *UNFCCC*, the obligation to take measures to mitigate the effects of climate change is qualified by the responsibility to minimize adverse effects on the quality of the environment.³⁰ Revels has subsidized the *Project* by SEA Corporation and has invoked its *NDC* commitments under the *PA* as a rationale for the same.³¹

²⁴ T. TREVES et. al., NON-COMPLIANCE PROCEDURES AND MECHANISMS AND THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS 542 (2009).

²⁵ U. BEYERLIN et. al., ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL TREATIES 14 (2006).

²⁶ Report of the Conference of the Parties to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, ¶45, UNEP/CHW.6/40 (Feb. 19, 2003).

²⁷ Conference of Contracting Parties of the CMS, Establishment of a Review Mechanism and a National Legislation Programme, at 2, UNEP/CMS/COP12/CRP31 (Oct. 27, 2017).

²⁸ Paris Agreement to the United Nations Framework Convention on Climate Change art. 3, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9/REV.1 [hereinafter *PA*].

²⁹ *PA* art. 7(5).

³⁰ United Nations Framework Convention on Climate Change art. 4(1)(f), May 9, 1992, 1771 U.N.T.S. 10 [hereinafter *UNFCCC*].

³¹ Record, ¶14.

Accordingly, the *Project* should be implemented in an environmentally sound manner, as prescribed by the *UNFCCC* and the *PA*. Hence, the present matter has a reasonable connection³² with the *UNFCCC* and the *PA*.

- b. There exists a dispute regarding the interpretation and application of the *UNFCCC* and the *PA*.

The determination of the existence of a dispute is a matter of substance and not a question of form or procedure.³³ It is also given a wide interpretation³⁴ which includes a mere disagreement as to the application of the convention to the fact in issue.³⁵

In the instant case, the *UNFCCC* and *PA* have not been formally invoked during the Parties' diplomatic exchanges. However, as a matter of substance, Parties have expressed positively opposed views regarding the applicability of these treaties to the facts in issue.³⁶ Hence, there exists a dispute regarding the interpretation and application of the *UNFCCC* and the *PA* which allows the ICJ to exercise its compulsory jurisdiction.

3. *The Compulsory dispute settlement mechanism of the UNCLOS does not bar the jurisdiction of the ICJ with respect to the high seas.*

- a. The *CBD* provides the ICJ jurisdiction over the dispute concerning the high seas.

³² *Nicaragua P.O.*, *supra* note 2, ¶427.

³³ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Geor. v. Russ.*), Preliminary Objections, Judgment, 2011 I.C.J. Rep. 70, ¶30 (Apr. 1).

³⁴ *Factory at Chorzow (Ger. v. Pol.)*, Jurisdiction, Judgment, 1927 P.C.I.J. (ser. A) No. 13, at 32 (Sep. 13).

³⁵ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libya v. U.K.*), 1998 I.C.J. Rep. 9, ¶24 (Feb. 27).

³⁶ Record, ¶11.

Article 22(2) of the *CBD* imposes an obligation upon States to implement the *CBD* in accordance with, and subject to, the customary law of the sea.³⁷ The regime of the high seas is well embedded in customary international law and is within the ambit Article 22(2).³⁸ Accordingly, the *CBD* has a reasonable connection with the part of dispute concerning high seas and thus confers jurisdiction upon the ICJ.

b. The *UNCLOS* does not bar the jurisdiction of the ICJ.

The *UNCLOS*, in addition to codifying customary law in the high seas,³⁹ is a relevant instrument to the present dispute as Alliguna and Revels are Parties to it.⁴⁰ In such disputes, where Parties have chosen different forums under Article 287 of the *UNCLOS*, the Annexure VII arbitral tribunal has jurisdiction.⁴¹ In the present case, Revels and Alliguna have chosen the ITLOS and the ICJ respectively.⁴² Hence, the Annexure VII tribunal has jurisdiction over the dispute concerning the high seas.

However, the mere presence of another tribunal, competent to adjudicate on the dispute via a different applicable law does not deprive the ICJ of its jurisdiction.⁴³ Accordingly, the *UNCLOS* does not bar the jurisdiction of the ICJ pursuant to the *CBD*.

B. REVELS IS RESPONSIBLE FOR THE CONDUCT OF SEA CORPORATION.

³⁷ Rudiger Wolfrum, *The Interplay of the United Nations Convention on the Laws of the Seas and the Convention on Biological Diversity*, 4 MAX PLANK UNYB 445, 464 (2000).

³⁸ Third United Nations Conference on the Law of the Sea, at 85, U.N. Doc. A/Conf.62/16 (Nov. 28, 1984).

³⁹ R. RAYFUSE, *INTERNATIONAL LAW IN THE ERA OF CLIMATE CHANGE: CLIMATE CHANGE AND THE LAW OF THE SEA* 345 (2012).

⁴⁰ Record, ¶9.

⁴¹ United Nations Convention on the Law of the Sea art. 287(5), Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter *UNCLOS*].

⁴² Record, ¶9.

⁴³ Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), 1972 I.C.J. Rep. 46, at 27 (Aug. 18).

The conduct of SEA Corporation is attributable to Revels under customary rules of attribution codified by Article 5 (1) Article 8 (2) and Article 11 (3) of the *ARSIWA*.⁴⁴ In any case, Revels is responsible for the conduct of the SEA Corporation (4).

1. *The conduct of SEA Corporation is attributable to Revels pursuant to Article 5 of the ARSIWA.*

a. Revels entrusted SEA Corporation with the performance of an essentially governmental function.

Article 5 of the *ARSIWA* purports that the conduct of a non-state entity involving an exercise of governmental authority entrusted upon it by the State is attributable to the State.⁴⁵ The determination of a function as essentially governmental involves an objective comparative analysis of state practice⁴⁶ on what is normally regarded as governmental in a contemporary setting.⁴⁷ Such an analysis shows that, notwithstanding increased privatization,⁴⁸ climate change mitigation through renewable energy deployment is an exclusively governmental task to ensure energy security and sustainable growth.⁴⁹

⁴⁴ Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶156 (Nov. 6, 2008) [hereinafter *Jan De Nul*].

⁴⁵ Articles on Responsibility of States for Internationally Wrongful Acts, art. 5, G.A. Res. 56/83, 2002 (Jan. 28, 2002) [hereinafter *ARSIWA*].

⁴⁶ Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶79 (Jan. 25, 2000).

⁴⁷ R. DOLZER & C. SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 119 (2008).

⁴⁸ Conference of Contracting Parties of the UNFCCC, Dialogue on long-term cooperative action to address climate change, ¶107, FCCC/CP/2005/5/Add.1, 1/CP.11 (Mar. 30, 2006).

⁴⁹ *Energy Policy, 2015*, Costa Rica; *Renewable Energy 5 year plan, 2016*, China; *The Law on Energy Law, 2007*, Indonesia; *Syracuse v. Attorney General of Canada* [2016] A-383-14, ¶93 (Federal Court of Appeal 2016).

Governmental authority is entrusted upon an entity where the State recognizes the entity's vital contribution in its initiatives.⁵⁰ The *NDC* of Revels categorically provided for increased reliance on biofuel.⁵¹ Revels subsidized the SEA Corporation and enabled the commercially unviable *Project* to contribute towards the *NDC*.⁵² Such critical support for enhancing biofuel production amounted to an entrustment of the governmental function of climate change mitigation upon SEA Corporation.

b. Harvesting of Sargassum by SEA Corporation relates to the performance of a governmental function entrusted upon it.

The act of an independent entity is attributable to the State when the entity is in discharge of a governmental function entrusted upon it.⁵³ The determination of whether an activity involves the discharge of a governmental function is solely contingent upon the purpose of the conduct complained of.⁵⁴ Notwithstanding its commercial nature,⁵⁵ the *Project* is inextricably linked to governmental function of promoting renewable energy. Therefore, the *Project* involves the performance of a governmental function entrusted upon SEA Corporation and is attributable to Revels.

2. *The conduct of SEA Corporation is attributable to Revels pursuant to Article 8 of the ARSIWA.*

⁵⁰ Helnan International Hotels A/S, v. The Arab Republic of Egypt, ICSID Case no. ARB 05/19, Decision on Objection to jurisdiction, ¶92 (Oct. 17, 2006).

⁵¹ Clarifications, A9.

⁵² Clarifications, A18.

⁵³ Trendtex Trading Corporation v. Central Bank of Nigeria [1977] EWCA (Civ) 2 WLR 356, ¶122 (Eng.).

⁵⁴ Intertrade Holding GMBH v. the Czech Republic, PCA Case No. 2009-12, Separate Opinion by Henri Alvarez, J, ¶9 (May 28, 2012).

⁵⁵ Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award, ¶52 (Nov. 13, 2000).

Article 8 purports that a State may, either by instruction, direction or by exercising control over a group, in effect assume responsibility for their conduct.⁵⁶ An act of a non-state entity is attributable to the State when effective control is exercised in respect of each operation in which the alleged violations occurred.⁵⁷ This threshold of control is met where, but for the State's intervention, the conduct complained of is impossible to perform.⁵⁸ Such intervention is fact specific⁵⁹ and need not be in the form of a specific authorization or instructions.⁶⁰

In the instant case, the SEA Corporation would not have been able to perform the Sargassum harvesting operations without the targeted subsidy thereby establishing control.⁶¹ Such control was effectively exercised by specifically directing the subsidy towards the *Project* to meet Revels' *NDC*. Moreover, by being the flag state of the *Columbus*, Revels exercised effective jurisdiction and control over the vessel on high seas as it had the option to deny its flag and bar its operations.⁶² Hence, Revels effectively controlled the Sargassum harvesting operations and the conduct is attributable to it.

3. *The conduct of SEA Corporation is attributable to Revels pursuant to Article 11 of ARSIWA.*

⁵⁶ *ARSIWA*, *supra* note 45, art. 8.

⁵⁷ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Preliminary Objections, Judgment, 1996 I.C.J. Rep. 595, ¶400 (July 11).

⁵⁸ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. Rep. 14, ¶115 (June 27) [hereinafter *Nicaragua Merits*].

⁵⁹ Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, Trial Judgment, (Int'l Crim. Trib. for the former Yugoslavia Mar. 3, 2000) (Declaration by Shahbuddin, J.).

⁶⁰ Nikola Jorgic v. State of Germany, (1997) 2 BvR 1290/99 [BVerfG. 1997]; Bayindir Insaat A.Ş. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, ¶129 (Aug. 27, 2009).

⁶¹ *Nicaragua Merits*, *supra* note 58, ¶110.

⁶² *UNCLOS* art. 94(1).

Article 11 provides for the attribution to a State of conduct that was not attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.⁶³ Acknowledgement and adoption of conduct can be inferred from the actions of the State.⁶⁴ A State may by accepting the correctness of an act⁶⁵ and endorsing the same as a regular event⁶⁶ assume responsibility for it.

Revels issued a press release and a report highlighting the success of SEA Corporation's *Project*.⁶⁷ This is a clear acknowledgement of the conduct of SEA Corporation as being vital to its national policy of reducing Greenhouse Gas ('GHG') emissions. Furthermore, Revels has on several occasions highlighted the *Project's* compliance with international law. Hence, Revels has acknowledged and adopted the *Project* as its own and thus assumed responsibility.

4. Even if the conduct of SEA Corporation is not attributable to Revels, it is responsible for such conduct.

States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of their national jurisdiction.⁶⁸ This obligation operates notwithstanding the attribution of conduct in question

⁶³ *ARSIWA*, *supra* note 45, art. 11.

⁶⁴ J. CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 187 (2013).

⁶⁵ *Ampal-American Israel Corp. and Others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Award On Liability And Loss, ¶144 (Feb. 21, 2017).

⁶⁶ *Affaire relative a la concession des phares de l'Empire ottoman (Greece v. Fr.)*, 12 R.I.A.A. 155, at 198 (1955).

⁶⁷ Record, ¶16.

⁶⁸ *Corfu Channel case (U.K. v. Alb.)*, Merits, Judgment, 1949 I.C.J. Rep. 4, at 22 (Apr. 9).

to the State.⁶⁹ The responsibility to ensure is an obligation of due diligence and entails undertaking all appropriate measures to prevent harm.⁷⁰

The *Columbus* is under the exclusive jurisdiction of Revels. Accordingly, Revels has a responsibility to ensure that the conduct of SEA Corporation does not cause environmental damage in the high seas. The failure of Revels to take all appropriate measures to prevent transboundary harm, as established in merits, entails its international responsibility. Accordingly, an absence of attribution does not justify the dismissal of the application for institution of proceedings.

II. THE REPUBLIC OF REVELS VIOLATED INTERNATIONAL LAW BY NEGATIVELY IMPACTING THE EUROPEAN EEL THROUGH THE SARGASSUM HARVESTING PROJECT IN THE SARGASSO SEA.

Through the *Project*, Revels breached its obligations under the *UNCLOS*, the *CBD* and the *CMS* and under customary international law. Additionally, Revels cannot justify its breach of the abovementioned obligations by invoking its duty to mitigate climate change under international law.

A. EXISTING SCIENTIFIC DATA INDICATES THAT HARVESTING SARGASSUM ON A LARGE SCALE WILL NEGATIVELY IMPACT THE *EELS*.

⁶⁹ Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶61 (May 24).

⁷⁰ Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (No. 21), Case No. 21, Advisory Opinion of April 2, 2015, [2015] ITLOS Rep. 4, ¶120 [hereinafter *ITLOS Advisory*].

The *Sea* is the only known spawning area of the critically endangered *Eels*,⁷¹ which spawn only once in their lifetime.⁷² The *Eel* larvae gain nutrition from dissolved organic matter ('*DOM*')⁷³ and a variety of planktonic organisms found specifically in the *Sea*.⁷⁴ Scientific studies indicate that variations in food availability in the upper layers of the *Sea*, where the larvae primarily live,⁷⁵ have adverse effects on their growth, development, and eventual recruitment.⁷⁶

Sargassum is a floating seaweed,⁷⁷ which supports *Sea*'s diverse ecosystem on which the larvae depend.⁷⁸ It is an important source of *DOM* in the surface layers of the *Sea*⁷⁹ which not only serves as the larvae's primary source of food, but contributes significantly to the production of planktons in the *Sea*.⁸⁰ The balance in the *Sea*'s ecosystem is therefore integral to the lifecycle of the *Eels*, and harvesting large amounts of *Sargassum* will inevitably harm the *Eels*.

B. REVELS HAS VIOLATED ITS TREATY OBLIGATIONS.

⁷¹ John S. Schmidt, *Breeding Places and Migrations of the Eel*, 111 NAT. 51, 52 (1923).

⁷² M. Gollock, *European eel briefing note for Sargasso Sea Alliance*, 3 SARG. SEA ALL. SCI. REP. SER. 11, 12 (2011).

⁷³ T. Otake et. al., *Dissolved and particulate organic matter as possible food sources for eel leptocephali*, 92 MAR. ECO. PROG. SER. 27, 33 (1993).

⁷⁴ Daniel J. Ayala et. al., *Gelatinous plankton is important in the diet of European eel (*Anguilla anguilla*) larvae in the Sargasso Sea*, SCI. REP., Dec. 2018, at 6.

⁷⁵ M.J. Miller, *Ecology of Anguilliform Leptocephali: Remarkable Transparent Fish Larvae of the Ocean Surface Layer*, ABSM, Oct. 2009, at 6.

⁷⁶ S. Bonhommeau et. al., *Fluctuation in European eel (*Anguilla anguilla*) recruitment resulting from environmental changes in the Sargasso Sea*, FISH. OCEANOGR., Mar. 2008, at 9.

⁷⁷ D. LAFFOLEY, SARGASSO SEA ALLIANCE, *THE PROTECTION AND MANAGEMENT OF THE SARGASSO SEA: THE GOLDEN FLOATING RAINFOREST OF THE ATLANTIC OCEAN* 12 (2009).

⁷⁸ K.D. Friedland et. al., *Oceanic changes in the Sargasso Sea and declines in recruitment of the European eel*, 64 ICES JOUR. MAR. SCI. 519, 524 (2007).

⁷⁹ G. Zepp et. al., *Production of chromophoric dissolved organic matter from mangrove leaf litter and floating *Sargassum* colonies*, 119 MAR. CHEM. 172, 179 (2010).

⁸⁰ M.D. DuRand et. al., *Phytoplankton population dynamics at the Bermuda Atlantic Timeseries station in the Sargasso Sea*, 48 DEEP-SEA RES. II 1983, 2000 (2001).

Parties must comply with their treaty obligations in good faith, pursuant to the principle of *pacta sunt servanda*.⁸¹ Alliguna submits that by conducting the *Project*, Revels has breached its obligations under the *UNCLOS* (1), the *CBD* (2) and the *CMS* (3), all of which it is Party to.⁸²

1. *Revels has violated its obligations under the UNCLOS.*

While all States have the freedom of the high seas,⁸³ this freedom is limited by articles 117, 192 and 300. As per these provisions, Parties must ensure that their vessels are not involved in activities which undermine their duty to conserve and manage marine living resources, and abuse this right.⁸⁴ It was held in the *South China Sea* award that article 192 imposes an obligation on Parties to take measures that are necessary to protect and preserve rare ecosystems and habitats of endangered species.⁸⁵

Given the negative impacts of the *Project* on the *Sea's* ecosystem in general and the *Eels* in particular,⁸⁶ Revels was under an obligation to prevent the *Project*, rather than encourage it through subsidies.⁸⁷ However, by doing the latter Revels violated its duty to protect and preserve the *Eels* and their spawning habitat, and abused its right to freedom of high seas.

2. *Revels violated its obligations under the CBD.*

⁸¹ *VCLT* art. 26.

⁸² Record, ¶9.

⁸³ *UNCLOS* art. 87.

⁸⁴ *UNCLOS* art. 117, 192; *ITLOS Advisory*, *supra* note 70, ¶119.

⁸⁵ *South China Sea Arbitration*, (Philippines v. China), PCA Case No 2013-19, Award, ¶945 (July 12, 2016).

⁸⁶ *See supra* Part II.A.

⁸⁷ Record, ¶14.

The *CBD* imposes an obligation to regulate or manage biological resources for their conservation and sustainable use.⁸⁸ In particular, when such resources constitute an integral part of the ecosystem of endangered species, Parties are required to take measures to ensure continued existence of habitats critical for the survival of the species.⁸⁹

The *Sea* is the critically endangered *Eels*' only spawning habitat.⁹⁰ It has also been recognized as an *EBSA* where the requirement for effective management of activities is more important because of the higher potential of harm.⁹¹ By allowing the *Project*, which negatively impacts the *Eels* and *Sea*'s ecosystem, Revels violated its obligations under the *CBD*.

3. *Revels breached its obligations under the CMS.*

Articles II(3)(c) and IV(3) of the *CMS* require the Range States of Appendix II species to endeavour to conclude agreements aimed at restoring them to a favourable conservation status. This requirement to “endeavour” is not merely hortatory and entails an obligation to pursue negotiations in good faith.⁹² The *Eels* are Appendix II species,⁹³ and both Alliguna and Revels are its Range States.⁹⁴ Parties have unanimously approved a Concerted Action Plan for the *Eels*⁹⁵ with the aim of concluding an agreement.⁹⁶ Therefore, Revels is under a duty to refrain

⁸⁸ *CBD* art. 8(c), 10(b).

⁸⁹ *CBD* art. 8(d).

⁹⁰ Record, ¶3.

⁹¹ Report of the Scientific Experts' Workshop on Criteria for Identifying EBSA, at 3, UNEP/CBD/COP/8/INF/39 (11 Dec. 2006).

⁹² Commonwealth of Australia v. State of Tasmania, [1983] HCA 21, 625 (Aus. High Ct. 1983).

⁹³ *CMS* art. IV.

⁹⁴ Record, ¶8.

⁹⁵ Record, ¶20.

⁹⁶ *Id.*

from engaging in a conduct which unjustifiably defeats the purpose of such negotiations to conserve the *Eels*.⁹⁷

Furthermore, CMS Resolution 11.27 and 12.21 also urge Parties to avoid sites which are important to migratory species for deployment of renewable energy systems and ensure habitat availability.⁹⁸ Though not legally binding, such resolutions serve as instruments of interpretation of Convention obligations.⁹⁹ As causing harm to the *Eels*' only spawning habitat by removing large amounts of *Sargassum* is antithetical to Revels' obligation of restoring the *Eel* population to a favourable conservation status, it has violated its obligation to negotiate to pursue the negotiation for the conservation of the *Eels* in good faith.

C. REVELS HAS VIOLATED ITS OBLIGATIONS UNDER CUSTOMARY INTERNATIONAL LAW

1. Revels has violated the Precautionary Principle (PP).

a. Revels violated the PP by allowing the Project.

The *PP* is a customary norm¹⁰⁰ that requires States to undertake measures when there is risk of significant or irreversible harm to the environment, despite the lack of full scientific

⁹⁷ Lac Lanoux Arbitration (France v. Spain), 12 R.I.A.A. 281, ¶317 (Perm. Ct. Arb. 1957).

⁹⁸ Conference of Contracting Parties to the CMS, Renewable Energy and Migratory Species, ¶3, UNEP/CMS/ Resolution 11.27 (Nov. 2014); Conference of Contracting Parties to the CMS, Climate Change and Migratory Species, at 6, UNEP/CMS/ Resolution 12.21/Annex (Oct. 2017).

⁹⁹ Whaling in the Antarctic (Austl. v. Japan), Judgment, 2014 I.C.J. Rep. 226, ¶46 (Mar. 31).

¹⁰⁰ A. TROUWBORST, EVOLUTION AND STATUS OF THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL LAW 11 (2002).

certainty.¹⁰¹ It can be invoked on the basis of scientific data available at the time of the activity and does not necessarily require a direct evidence of risk.¹⁰²

As discussed above,¹⁰³ the existing scientific data shows that Revels' continued exploitation of *Sargassum* poses a threat of harm not only to the *Eels* but also to the *Sea's* ecosystem. Furthermore, the *Eels* are critically endangered and at a high risk of extinction.¹⁰⁴ Therefore, in the presence of risk of serious harm to *Eels*, Revels breached the *PP* by allowing the *Project*.

b. Revels cannot justify its *PP* in furtherance of climate change mitigation.

Though the *PP* requires States to take measures despite the scientific uncertainty, such measures should not exceed limits of what is appropriate and necessary to attain the legitimate objectives.¹⁰⁵ Where there is a choice between several appropriate measures, recourse must be had to the least onerous option and the disadvantages caused must not be disproportionate to the aims pursued.¹⁰⁶ In situations similar to the instant case, States have accorded greater importance to biodiversity when taking up biofuel projects for producing renewable energy.¹⁰⁷ The threat of irreversible harm to the *Eels* clearly surpasses the speculative benefits of climate change mitigation to the *Eel* population. In any case, the *Project* is one of the many renewable

¹⁰¹ Rio Declaration on Environment and Development, Principle 15, U.N.Doc.A/CONF.151/5/Rev.1 (Aug. 12, 1992) [hereinafter *Rio*]; Southern Bluefin Tuna (No.s 3 & 4) (N.Z. v. Japan; Austl. v. Japan), Case No.s 3 & 4, Order of Aug. 27, 1999, ITLOS Rep. 280, ¶77 [hereinafter *Bluefin Tuna*].

¹⁰² Case T- 13/99, Pfizer Animal Health v. Council of the European Union, [1999] E.C.R. II-1961, ¶142.

¹⁰³ See *supra* Part II.A.

¹⁰⁴ T. ARAI, BIOLOGY AND ECOLOGY OF ANGUILLID EELS 561 (2016).

¹⁰⁵ E. FISHER et. al., IMPLEMENTING THE PRECAUTIONARY PRINCIPLE: PERSPECTIVES AND PROSPECTS 27 (2006).

¹⁰⁶ Alpharma Inc. v. Council of the European Union, [1999] E.C.R. II-3495, ¶324; Corrosion Proof Fittings et. al. v. Environment Protection Agency, [1991] 947 F 2d 1201 (U.S. Court of Appeals of the 5th Circuit 1991).

¹⁰⁷ Council Directive 2009/28/EC, art. 17, 2009 O.J. (L 140) 16, 36 (EC); *Third Action Plan on Climate Change for the Period 2013-2020* at 58,59, Decision No. 439/01.06.2012, 2012, Bulgaria; *Towards a clean energy economy: achieving a biofuel mandate for Queensland*, at 8, State of Queensland, 2015.

energy projects being carried out in Revels and hence cannot be deemed as crucial to meet the obligations.¹⁰⁸ Therefore, Revels cannot justify its violation of the *PP*.

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

Duty to prevent transboundary harm requires States to prevent any activity, under their jurisdiction or control, which may cause harm to another State.¹⁰⁹ This duty has attained the status of customary international law¹¹⁰ particularly in respect of marine environment.¹¹¹ This duty arises in a situation where there is risk of significant transboundary harm¹¹² and requires States requires to observe due diligence.¹¹³ As the *Project* poses a risk of significant transboundary harm **(a)**, Revels breached this obligation by failing to act with the required standard of due diligence. **(b)**

a. The *Project* poses a risk of significant transboundary harm.

i. There exists a risk of significant harm.

An objectively determined risk is sufficient to invoke States' duty to prevent transboundary harm.¹¹⁴ It involves appreciation of possible harm resulting from an activity which a State had

¹⁰⁸ Record ¶14, 16.

¹⁰⁹ *Rio*, *supra* note 101, Principle 2.

¹¹⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶29 (July 8).

¹¹¹ P. BIRNIE, A. BOYLE & C. REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT 387 (3rd ed, 2009) [hereinafter *Birnie et. al.*].

¹¹² *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, at 153 [2001] 2 Y.B. Int'l L. Comm'n 148, U.N. Doc. A/56/10 [hereinafter *DAPTH*].

¹¹³ *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Rep. 14, ¶197 (Apr. 20) [hereinafter *Pulp Mills*].

¹¹⁴ *DAPTH*, *supra* note 112, at 151.

or ought to have had known.¹¹⁵ Alliguna's concerns are based on objective scientific evidence¹¹⁶ and the contemplated harm by the *Project* is undoubtedly significant¹¹⁷ given the key role played by *Sargassum* in the growth and development of the critically endangered *Eels*.¹¹⁸

ii. The contemplated harm is transboundary in nature.

Any harm to a shared resource qualifies as transboundary harm for invoking the duty of prevention.¹¹⁹ As migratory species are considered as a shared resource and all the States within whose jurisdiction they move have an interest in their conservation,¹²⁰ any risk of harm to the migratory species is inherently transboundary in nature.

b. Revels failed to observe the required standard of due diligence.

Revels violated this duty by inadequately assessing the transboundary risk arising from the *Project* (i) and by failing to take an appropriate and proportionate measure, which in this case is to cease the *Project*. (ii)

i. Revels violated its duty to adequately assess the risk arising from the *Project*.

Due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated activity¹²¹ and to take appropriate measures, in timely fashion, to address them.¹²² Though States are required to conduct an *EIA*

¹¹⁵ *Id.*

¹¹⁶ *See supra* Part II.A.

¹¹⁷ *DAPTH*, *supra* note 112, at 152; *Bluefin Tuna*, *supra* note 101, ¶8 (separate opinion Treves, J.).

¹¹⁸ *See supra* Part II.A.

¹¹⁹ *Birnie et. al.*, *supra* note 111, at 194.

¹²⁰ Panel Report, United States - Import Prohibition of Certain Shrimp and shrimp Products, WTO Doc. WT/DS58/RW, ¶7.1 (Oct. 22, 2001).

¹²¹ *DAPTH*, *supra* note 112, at 154.

¹²² *DAPTH*, *supra* note 112, at 158.

before the commencement of an activity,¹²³ their duty to observe due diligence does not end with the completion of such an assessment.¹²⁴

The risk identified by Alliguna is based on objective scientific evidence¹²⁵ which Revels ought to have known.¹²⁶ In any case, Revels was made aware of the risk posed by the *Project* on numerous occasions by Alliguna¹²⁷ and therefore cannot plead ignorance. Instead of taking appropriate measures to address the risk, Revels continuously denied its awareness of likely negative impacts which could be caused by the *Project* and resorted to demanding conclusive evidence of harm instead.¹²⁸ As such evidence is not necessary to invoke this duty, Revels failed to adequately assess the risk.

ii. Revels failed to observe the appropriate standard of due diligence.

The standard of due diligence against which the conduct of a State is examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance.¹²⁹ States are required to either prevent the harm or mitigate the

¹²³ *Pulp Mills*, *supra* note 113, ¶204.

¹²⁴ *DAPTH*, *supra* note 112, at 159.

¹²⁵ *See supra* Part II.A.

¹²⁶ *See supra* Part II.C.2.a.i.

¹²⁷ Record, ¶18, 20.

¹²⁸ Record ¶23.

¹²⁹ *DAPTH*, *supra* note 112, at 154.

risk thereof.¹³⁰ Prevention becomes essential when the harm is of irreversible character,¹³¹ like further deterioration of the conservation status of an endangered species.¹³²

The *Project* poses risk to the critically endangered *Eels* that have already suffered a 99% decline in their recruitment in last three decades.¹³³ Due to the *Sea's* environmental complexities,¹³⁴ it is difficult to understand the *Project's* impact on the *Eels* and take any measure to mitigate any risk arising therefrom. Therefore, in the instant case, due diligence required Revels to cease the *Project* and eliminate any risk of significant harm to the *Eels*. Revels' failure in this respect amounted to a breach of this obligation.

D. REVELS VIOLATED ITS DUTY TO COOPERATE FOR CONSERVATION OF THE *EELS*.

1. Revels breached its duty to cooperate for conservation of biodiversity in ABNJ.

Duty to cooperate in respect of the utilisation of shared resources has been recognized in the *UNCLOS*¹³⁵, the *CMS*¹³⁶ and the *CBD*¹³⁷ and is also an established customary norm.¹³⁸ It requires

¹³⁰ *DAPTH*, *supra* note 112, at 158.

¹³¹ Gabčíkovo–Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7, ¶140 (Sept. 25) [hereinafter *Gabčíkovo–Nagymaros*].

¹³² *Bluefin Tuna*, *supra* note 101, ¶8 (separate opinion by Treves J.).

¹³³ M. Gollock et. al., *Anguila Anguilla*, IUCN Red Book of Threatened Species, at 431 (2014).

¹³⁴ Sargasso Sea Commission, *Submarine Cables in the Sargasso Sea: Legal and Environmental Issues in Areas Beyond National Jurisdiction*, Workshop Report, at 34 (Jan. 16, 2015).

¹³⁵ *UNCLOS* art. 118.

¹³⁶ *CMS* art. II(3)(a).

¹³⁷ *CBD* art. 5.

¹³⁸ *Birnie et. al.*, *supra* note 111, at 194.

States to act in good faith¹³⁹ and not do anything which will defeat the legitimate expectations of other States who are party to the negotiation.¹⁴⁰

The *Project* defeats the purpose of the ongoing negotiations for development of a regime for the conservation and sustainable utilisation of biodiversity in *ABNJ*.¹⁴¹ Therefore, Revels has failed to fulfil its duty to cooperate for conserving biodiversity in *ABNJ*.

2. *Revels failed to cooperate in negotiating with Alliguna.*

Duty to cooperate requires States to negotiate in good faith¹⁴² and not adamantly reject any proposal which runs contrary to their own interest.¹⁴³ In particular, when consultations regarding risk of significant harm from an activity are ongoing, it requires States to cease such an activity.¹⁴⁴ Revels outrightly dismissed Alliguna's concerns regarding the *Project*¹⁴⁵ and instead allowed it to continue despite the ongoing negotiations with Alliguna.¹⁴⁶ Therefore, Revels breached its duty to cooperate with Alliguna.

E. REVELS CANNOT INVOKE ITS OBLIGATIONS UNDER CLIMATE CHANGE CONVENTIONS AS JUSTIFICATION FOR BREACH OF ITS OBLIGATIONS UNDER INTERNATIONAL LAW.

1. *Revels failed to comply with its obligations under the UNFCCC and the PA.*

¹³⁹ Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 4, ¶46 (Dec. 20).

¹⁴⁰ The Indo-Pakistan Western Boundary (Rann of Kutch) (India v. Pak.), Award, 17 R.I.A.A. 553, at 121 (Perm. Ct. Arb. 1965).

¹⁴¹ G.A. Res. 69/292, at 2 (July 6, 2015).

¹⁴² Fisheries Jurisdiction (Ger. v. Ice.), Merits, Judgment, 1974 I.C.J. Rep. 175, ¶70 (July 24).

¹⁴³ North Sea Continental Shelf (Ger. v. Den. & Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶85 (Feb. 20).

¹⁴⁴ *Pulp Mills*, *supra* note 113, ¶147.

¹⁴⁵ Record, ¶19.

¹⁴⁶ *Pulp Mills*, *supra* note 113, ¶147.

The *UNFCCC* imposes an obligation upon Parties to give due consideration to all types of ecosystems, including marine ecosystems, in their endeavours to mitigate climate change.¹⁴⁷ Even the *PA* requires Parties to take preservation of ecosystems into consideration while deciding their *NDC*.¹⁴⁸ As Revels disregarded the *Project's* impact on the *Sea's* ecosystem and the *Eels*, it failed to comply with its obligations under the aforementioned treaties.

2. *Justifying UNCLOS, CBD and CMS violations by appealing to obligations the UNFCCC and the PA is contrary to the principle of pacta sunt servanda.*

Article 26 of the *VCLT* enjoins States to comply with their treaty obligations whilst ensuring that their obligations under other treaties are not derogated.¹⁴⁹ Therefore, an appeal to its obligations under the *UNFCCC* and the *PA* to undermine those under the *UNCLOS*, the *CBD* and the *CMS* would be contrary to Revels' obligation to fulfil treaty obligations in utmost good faith.

¹⁴⁷ *UNFCCC* art. 4(1)(d).

¹⁴⁸ *PA* art.7.

¹⁴⁹ *Gabčíkovo–Nagymaros*, *supra* note 131, ¶142.

CONCLUSION

Alliguna respectfully requests the Court to adjudge and declare that

1. The ICJ has jurisdiction in the present matter and that Revels is responsible for the conduct of the SEA Corporation.
2. Revels has violated international law by negatively impacting the *Eels*.

Respectfully Submitted,
Agents for the Applicant.