

**IN THE
INTERNATIONAL COURT OF JUSTICE**



**AT THE PEACE PALACE
THE HAGUE, THE NETHERLANDS**

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

THE FEDERAL STATES OF ALLIGUNA

(APPLICANT)

v.

THE REPUBLIC OF REVELS

(RESPONDENT)

MEMORIAL FOR THE APPLICANT

2018-2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES	IV
STATEMENT OF JURISDICTION	IX
QUESTIONS PRESENTED	X
STATEMENT OF FACTS.....	XI
SUMMARY OF ARGUMENTS	XIII
ARGUMENTS ADVANCED.....	1
I. The ICJ has jurisdiction over the present dispute.....	1
A. The ICJ has jurisdiction under the CBD.....	1
a. The Dispute Involves Interpretation and Application of Revels’ Duties Under CBD.....	1
b. Revels Cannot Invoke The Rule of <i>Lex Specialis</i> to Limit the ICJ’s Jurisdiction.....	2
c. Pursuant to the Vienna Convention on the Law of Treaties, the CBD controls because it was adopted after UNCLOS.....	3
B. The ICJ has jurisdiction under the UNFCCC and the Paris Agreement.....	5
a. Revels has consistently invoked its obligations under the UNFCCC and the Paris Agreement as justification for Revel’s sargassum harvesting project.....	5
b. Revels is estopped from denying the ICJ’s jurisdiction under the above conventions.....	5
C. The <i>Southern Bluefin Tuna</i> and <i>Fisheries Jurisdiction Cases</i> Cited by Revels Are Inapplicable to the Present Dispute.....	6

MEMORIAL ON BEHALF OF THE APPLICANT

a. The <i>Southern Bluefin Tuna</i> case is inapplicable.....	6
b. The <i>Fisheries Jurisdiction</i> case is inapplicable.....	7
II. Revels is internationally responsible for the biofuels initiative.....	7
A. the conduct of SEA Corporation is attributable to Revels.....	8
a. SEA Corporation is exercising elements of governmental authority.....	8
b. The SEA Corporation is acting under the instructions, directions, and control of the State.....	9
c. Revels has adopted and acknowledged the SEA Corporation’s conduct as its own.....	10
d. Revels has failed to ensure due diligence.....	11
B. Revels violated its obligations under international law.....	12
a. Revels violated its obligations under CBD.....	12
b. Revels violated its obligations under UNCLOS.....	13
c. Revels violated its obligation under CMS.....	14
C. Revels Violated Customary International Law.....	15
a. Revels has caused transboundary harm.....	15
b. Revels violated the Precautionary Principle.....	20
CONCLUSION AND PRAYER	24

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STATEMENT OF JURISDICTION

The Federal States of Alliguna [“Applicant”] has submitted the dispute concerning questions relating to the biofuel initiative and marine biodiversity, under Article 27 of the Convention on Biological Diversity, Article 14 of the United Nations Framework Convention on Climate Change and Article 24 of the Paris Agreement, read with Article 41(1) of the Statute of the International Court of Justice. The Republic of Revels [“Respondent”] has challenged the jurisdiction of the Court.

In accordance with Article 1 of the Joint Written Statement, notified to the Court on 16 July 2018, the International Court of Justice is hereby requested to adjudge the dispute, on questions of jurisdiction as well as merits, in accordance with the rules and principles of international law, including any applicable treaties.

QUESTIONS PRESENTED

I.

WHETHER THE INTERNATIONAL COURT OF JUSTICE HAS JURISDICTION TO DETERMINE THE CASE CONCERNING QUESTIONS RELATING TO THE USE OF THE SARGASSO SEA AND PROTECTION OF EELS?

II.

WHETHER REVELS IS INTERNATIONALLY RESPONSIBLE FOR THE BIOFUELS INITIATIVE?

- A.** WHETHER THE CONDUCT OF THE SEA CORPORATION IS ATTRIBUTABLE TO REVELS?
- B.** WHETHER REVELS HAS BREACHED ITS OBLIGATIONS UNDER INTERNATIONAL LAW?

STATEMENT OF FACTS

The present dispute is between the Federal States of Alliguna [hereinafter “Alliguna”] and the Republic of Revels [hereinafter “Revels”]. Both countries’ coasts are approximately 250 nautical miles from the Sargasso Sea **(R.¶1)**. The Sea has been designated as an ecologically or biologically significant marine area under the Convention on Biological Diversity [hereinafter “CBD”] **(R.¶18)**. It is also the spawning habitat of the European eel (*Anguilla Anguilla*), a facultatively catadromous migratory species. However, the species’ population has declined and it is listed as Critically Endangered on the IUCN Red List of Threatened Species **(R.¶3)**. It is also listed on Appendix II of Convention on the Conservation of Migratory Species of Wild Animals [hereinafter “CMS”] **(R.¶8)**.

The European eel has particular importance for Alliguna, culturally and historically. In 2010, due to the declining number of the species, the Government of Alliguna passed strict domestic legislation to protect and recover the species **(R.¶4)**.

Seaweed Energy Alternatives, Inc. [hereinafter “SEA Corporation”] is a large, privately owned company in Revels. It produces and sells renewable energy. Its latest initiative involved harvesting of Sargassum from the Sargasso Sea for biofuel production. To this end, the vessel, the *Columbus*, sailing under the flag of Revels, was used for harvesting Sargassum on the waters of Sargasso Sea in the high seas, beyond national jurisdiction **(R.¶13)**. This initiative received subsidy from the government of Revels, as part of a governmental program **(R.¶14)**.

This harvesting caused concern to Government of Alliguna, which initiated a diplomatic communication with the Government of Revels **(R.¶17)**. This was because harvesting of Sargassum would negatively affect the precarious ecosystem of the Sargasso Sea, and have devastating effects on the already declining population of the European eel. The

Governments engaged in further futile communications, negotiations, and mediation. The dispute remained unresolved **(R.¶24)**.

Alliguna and Revels are Members of the United Nations and Parties to the Statute of the International Court of Justice [hereinafter “ICJ”] **(R.¶5)**. They are also parties to the Vienna Convention on the Law of Treaties [hereinafter “VCLT”] **(R.¶)**, Convention on Biological Diversity [hereinafter “CBD”] **(R.7¶)**, Convention on Conservation of Migratory Species of Wild Animals [hereinafter “CMS”] **(R.¶8)**, United Nations Convention on the Law of Seas [hereinafter “UNCLOS”] **(R.¶9)**, United Nations Framework Convention on Climate Change [hereinafter “UNFCCC”], and the Paris Agreement **(R.¶10)**. The countries are also signatories to the Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea **(R.¶11)**. The countries have also participated in the 1972 United Nations Conference on the Human Environment at Stockholm; the 1992 United Nations Conference on Environment and Development at Rio de Janeiro; the 2002 World Summit on Sustainable Development at Johannesburg; and the 2012 Rio+20 Conference at Rio de Janeiro **(R.¶12)**.

In February 2018, Alliguna asked Revels to agree to submit the matter to the ICJ, but Revels refused **(R.¶24)**. Alliguna submitted an Application instituting proceedings against Revels, dated 21 April 2018, and Revels submitted its Preliminary Objections, dated 5 May 2018 **(R.¶25)**. Hence, the present dispute stands. The SEA Corporation has continued to harvest Sargassum in the Sargasso Sea **(R.¶28)**.

In view of Revels preliminary objection regarding jurisdiction, the ICJ has decided to hear questions as to its jurisdiction simultaneously with the questions on merits.

SUMMARY OF ARGUMENTS

The ICJ has jurisdiction to determine the matter. The treaties applicable to the dispute include CBD, UNFCCC and Paris Agreement. Both parties have submitted disputes arising under these treaties to the ICJ by means of written declarations. Furthermore, CMS is not *lex specialis* in relation to instant issue. The cases cited by Revels do not apply to the present dispute.

In order to make a State internationally responsible for any wrongful act, it is necessary to establish that the act was attributable to the State, and that it was a breach of the obligation of the State. The conduct of the SEA Corporation is attributable to Revels because it is exercising governmental authority insofar as it is helping Revels achieve its Nationally Determined Contributions [hereinafter “NDC”] commitments under the Paris Agreement.

Moreover, it is acting under the instructions, directions, and control of Revels. Revels has also acknowledged and endorsed the activities of the SEA Corporation by means of the subsidy, and press release. Further, by failing to ensure due diligence over the project, Revels has become responsible for the acts of the SEA Corporation.

Revels has breached its obligations under International Law by violating its treaty obligations. It has acted in contravention of the CBD, CMS, and UNCLOS by causing environmental damage to the biodiversity of the Sargasso Sea, and migratory species, like European eels.

Revels has also violated customary international law. It has breached its obligation not to cause transboundary harm, since there is a causal link between its actions and the harm. Moreover, the harm is transboundary, and significant. Further, it has failed to act with due diligence. Revels has violated the Precautionary Principle since there is a serious and irreversible threat of environmental damage, and lack of data regarding the impacts of its climate geoengineering.

ARGUMENTS ADVANCED

I. THE ICJ HAS JURISDICTION OVER THE PRESENT DISPUTE.

Under Article [hereinafter “Art.”] 36(1) of the Statute of the ICJ, the Court has jurisdiction over all matters specially provided for in treaties and conventions in force.¹ Jurisdiction over this dispute is thus conferred on the ICJ by compromissory clauses of the relevant conventions, under which Alliguna and Revels consented to the ICJ’s jurisdiction. Revels is estopped from denying this consent, and cases it cites are inapplicable to the case at present.

A. THE ICJ HAS JURISDICTION UNDER THE CBD.

a. THE DISPUTE INVOLVES INTERPRETATION AND APPLICATION OF REVELS’ DUTIES UNDER CBD.

In accordance with Art.27, paragraph 3, of the CBD,² when Alliguna and Revels ratified the CBD, both countries declared in writing that they would submit to the jurisdiction of the ICJ to resolve disputes concerning the interpretation or application of the CBD.³ The present dispute requires interpretation and application of Revels’ duty to ensure that activities within its jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,⁴ cooperate for the conservation and sustainable use

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

² Convention on Biological Diversity art. 27, 6 June 1992, 1760 U.N.T.S. 79 [hereinafter CBD].

³ Record ¶7.

⁴ Art. 3, CBD.

of biological diversity,⁵ to undertake *in-situ* conservation⁶ and protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.⁷

Furthermore, interpretation and application of Revel's duties under Decisions IX/16 and XI/20 of CBD is required. Hence, the dispute must be settled under the CBD.

b. REVELS CANNOT INVOKE THE RULE OF LEX SPECIALIS TO LIMIT THE ICJ'S JURISDICTION.

Under the VCLT, treaties must be interpreted in light of their object and purpose.⁸ Provisions of treaties should be interpreted in such a way as to render them effective.⁹ Revels' argument that the Court's jurisdiction must be restricted as CMS is the most specific to the present dispute is contrary to these rules, as this would render ineffective any other declaration of consent under other relevant conventions.

Furthermore, CMS is not *lex specialis* with the respect to the present dispute. CMS concerns the actions of Range States to conserve migratory species whenever possible and appropriate.¹⁰ The present dispute concerns the negative impact that the climate-related

⁵ Art. 5, CBD.

⁶ Art. 8, CBD.

⁷ Art. 10, CBD.

⁸Vienna Convention on the Law of Treaties, art. 31(1), [1969] 1155 U.N.T.S 331 [hereinafter VCLT].

⁹Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.), 2016 I.C.J. 15 (Mar. 17).

¹⁰ Convention on the Conservation of Migratory Species of Wild Animals art. II, Jun. 3, 1979, 1651 U.N.T.S. 333 [hereinafter CMS].

geoengineering project in the Sargasso Sea will have on the precious ecosystem and the sprawling habitat provided for numerous species, many of which are threatened or endangered.¹¹ The CMS does not concern issues which deal with the effect of such projects on biological diversity, whereas CBD Decision XI/20 specifically deals with the impact of climate-related geoengineering on biological diversity and ecosystems.¹² Thus, the dispute settlement provision under CBD shall operate.

c. PURSUANT TO THE VIENNA CONVENTION ON THE LAW OF TREATIES, THE CBD CONTROLS BECAUSE IT WAS ADOPTED AFTER UNCLOS.

According to the VCLT, when multiple similar treaties apply to a dispute between parties to those treaties, “*the earlier treaty applies only to the extent that its provisions are compatible*” with the later treaty.¹³ CBD and UNCLOS both involve applicable subject matter to this dispute, and Alliguna and Revels are parties to both agreements.¹⁴

The CBD seeks to conserve biological diversity, which means the variability among living organisms from all sources including marine and other aquatic ecosystems.¹⁵ Likewise,

¹¹ Record ¶18.

¹² Decision XI/20 Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Eleventh Meeting, U.N. DOC. UNEP/CBD/COP/DEC/XI/20 (5 Dec. 2012) [hereinafter COP Decision XI/20].

¹³ Art. 30(3), VCLT.

¹⁴ Record ¶¶7, 9.

¹⁵ Art. 2, CBD.

UNCLOS provides a wide-ranging legal regime seeking to protect the marine environment,¹⁶ highly migratory species,¹⁷ and living resources on the high seas.¹⁸

The dispute involves Revels' biofuel initiative, by which Revels is harvesting sargassum from the Sargasso Sea.¹⁹ Because this dispute concerns the effect of such harvesting on the sprawling ecosystem of the Sargasso Sea and the potential devastating consequence on the European eels,²⁰ provisions of UNCLOS and CBD both apply.

UNCLOS opened for signature in 1984,²¹ but the CBD did not open for signature until 1992.²² Alliguna and Revels signed and adopted both agreements in the first year they were open for signature.²³ As such, pursuant to Article 30 of the VCLT, UNCLOS only applies to the extent that its provisions are compatible with the CBD's provisions.²⁴ Thus, the CBD's dispute settlement provisions take precedence. Since both the countries have declared in writing that they would submit to the jurisdiction of the ICJ to resolve disputes concerning the interpretation or application of the CBD, the ICJ has jurisdiction over the dispute.²⁵

¹⁶ United Nations Convention on the Law of the Sea art. 192, 10 Dec. 1982, 1833 U.N.T.S. 3, 30 [hereinafter UNCLOS].

¹⁷ Art. 64, UNCLOS.

¹⁸ Art. 117, UNCLOS.

¹⁹ Record ¶18.

²⁰ Record ¶20.

²¹ UNCLOS, *supra* note 16.

²² CBD, *supra* note 2.

²³ Clarifications, A4.

²⁴ *See* VCLT, *supra* note 8.

²⁵ Record ¶7.

B. THE ICJ HAS JURISDICTION UNDER THE UNFCCC AND THE PARIS AGREEMENT.

Both parties declared in writing that they will submit disputes arising from interpretation or application of UNFCCC and Paris Agreement to the ICJ.²⁶ The provisions of Article 14 of UNFCCC on dispute settlement also apply *mutatis mutandis* to Paris Agreement,²⁷ thus the ICJ also has jurisdiction under said Agreement.

a. REVELS HAS CONSISTENTLY INVOKED ITS OBLIGATIONS UNDER THE UNFCCC AND THE PARIS AGREEMENT AS JUSTIFICATION FOR REVEL'S SARGASSUM HARVESTING PROJECT.

According to Revels, the sargassum harvesting project will help to mitigate climate change by expanding use of renewable energy and reducing reliance on fossil fuels in Revels.²⁸ Significantly, Revels contends that the sargassum harvesting project will help the country to achieve its NDC commitments under the Paris Agreement. The dispute thus involves the interpretation and application of Revel's obligations under these conventions.

b. REVELS IS ESTOPPED FROM DENYING THE ICJ'S JURISDICTION UNDER THE ABOVE CONVENTIONS.

Estoppel is a general principle of law,²⁹ recognized by ICJ and other tribunals.³⁰ Having alleged that its actions are justified under UNCOLS and Paris Agreement, Revels is estopped from denying ICJ's jurisdiction under these conventions.

²⁶ Record ¶10.

²⁷ United Nations Framework Convention on Climate Change art. 14, 9 May 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]; Paris COP Decision & Paris Agreement art. 24, U.N. Doc. FCCC/CP/2015/L.9/REV.1 (12 Dec. 2015) [hereinafter Paris Agreement].

²⁸ Record ¶19.

²⁹ ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW, 38 (2010).

C. THE SOUTHERN BLUEFIN TUNA AND FISHERIES JURISDICTION CASES CITED BY REVELS ARE INAPPLICABLE TO THE PRESENT DISPUTE.

The *Southern Bluefin Tuna*³¹ and the *Fisheries Jurisdiction*³² cases cited by Revels are inapplicable to the present dispute, and hence do not support its content that the ICJ lacks jurisdiction.

a. THE SOUTHERN BLUEFIN TUNA CASE IS INAPPLICABLE.

Revels argues that the reasoning of the Arbitral Tribunal in ruling that it had no jurisdiction is applicable in the present case and supports its contention that the ICJ has no jurisdiction under the CMS and UNCLOS, and thus no jurisdiction over the entire dispute. However, this contention is incorrect, as there are several material differences between the two disputes. First, *Southern Bluefin Tuna* involved a dispute arising under only two conventions, UNCLOS and the Convention for the Conservation of Southern Bluefin Tuna [hereinafter “CCSBT”]. The present dispute arises under CBD, UNFCCC, Paris Agreement, UNCLOS, CMS and customary international law. Determination of the legality and consequences of Revels’ project will have important implications for Revels’ obligations under said conventions and custom, and for development of international law governing climate-related geoengineering. *Second*, the dispute resolution provisions of the CCSBT and

³⁰ Barcelona Traction (Belgium v. Spain), 1970 I.C.J. 50, ¶33,34; Tinoco Arbitration (Great Britain v. Costa Rica), 1 U.N. Rep. Int’l. Arb. Awards 369 (1923);

North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 3.

³¹ Southern Bluefin Tuna (N.Z. v. Japan, Aus. v. Japan), I.T.L.O.S. Case No. 3(1999)[hereinafter Southern Bluefin Tuna].

³² Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. Rep. 432 (Dec. 4) [hereinafter Fisheries Jurisdiction].

the CBD are dissimilar. CCSBT's dispute resolution provision required dispute settlement by *mutually agreeable* procedures,³³ whereas CBD's dispute resolution provision is *compulsory*.³⁴ Due to these material differences, this case is inapplicable to the present dispute.

b. THE FISHERIES JURISDICTION CASE IS INAPPLICABLE.

This case involved interpretation of a reservation made to an acceptance of jurisdiction under Art.36 of the ICJ statute. The ICJ held that it had no jurisdiction due to the reservation to acceptance of jurisdiction made by Canada.³⁵

Revels' alleges that this case supports its view that the ICJ does not have jurisdiction. However, the case is patently inapplicable to the present dispute, which arises under several conventions with various dispute settlement clauses, and does not involve the interpretation of a reservation to jurisdiction.

II. REVELS IS INTERNATIONALLY RESPONSIBLE FOR THE BIOFUELS INITIATIVE.

The International Law Commission's [hereinafter "ILC"] Articles of State Responsibility hold that a State is internationally responsible for any internationally wrongful act committed by it.³⁶ An internationally wrongful act is committed when *first* an action or omission is attributable to a State, and *second*, when it constitutes a breach of an obligation of the State.³⁷

³³ Southern Bluefin Tuna, *supra* note 31, at ¶¶45-46.

³⁴ Art. 27, CBD.

³⁵ Fisheries Jurisdiction, *supra* note 32.

³⁶ International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, art. 1, U.N. Doc. A/56/10 (2001) [hereinafter ARSIWA].

³⁷ *Id.*, art.2.

A. THE CONDUCT OF SEA CORPORATION IS ATTRIBUTABLE TO REVELS.

That conduct of the SEA Corporation is attributable to Revels because *first*, SEA Corporation is exercising elements of governmental authority; *second*, it is acting under the instructions, directions, and control of Revels; *third*, Revels has acknowledged and adopted its conduct as its own; and *fourth*, Revels has failed to ensure due diligence.

a. SEA CORPORATION IS EXERCISING ELEMENTS OF GOVERNMENTAL AUTHORITY.

A State is responsible for the conduct of persons who, while not organs of the State, are exercising elements of governmental authority.³⁸ The private entity may be empowered for a specific purpose to exercise certain elements of governmental authority, while retaining its independent discretion to act.³⁹ The SEA Corporation is helping Revels achieve its NDC under the Paris Agreement.⁴⁰ As per Art.4 this is an obligation on a State,⁴¹ thereby making it a state function. Insofar as the SEA Corporation is performing a State function, it is exercising elements of governmental authority. Moreover, since it is funded as part of the Government's programme to expand the use of renewable energy, it has been specifically empowered by the State.⁴² This is more so because the government subsidy is crucial to the operation of the SEA Corporation's biofuel project.⁴³ Therefore, the SEA Corporation is exercising elements of governmental authority, and its conduct is attributable to Revels.

³⁸ Art. 5, ARSIWA.

³⁹ ILC, Commentary on the Draft Articles on Responsibility of States, 43 Yearbook of the International Law Commission, 2001, vol. II (Part Two) [hereinafter ILC Commentary].

⁴⁰ Art. 3, Paris Agreement.

⁴¹ *Id.*

⁴² Record ¶14.

⁴³ Clarifications, A18.

b. THE SEA CORPORATION IS ACTING UNDER THE INSTRUCTIONS, DIRECTIONS, AND CONTROL OF THE STATE.

A State is responsible for conduct of persons who act on its instructions, or under its direction or control.⁴⁴ Conduct of private actors is attributable when the State supplements its own actions by instigating private actors who act as “*auxiliaries*”, but are not part of the official structure of the State.⁴⁵ In the present case, while the SEA Corporation is not a part of the official State structure, Revels is using it as an auxiliary to meet its own NDC commitments,⁴⁶ and as part of Revels’ renewable energy programme.⁴⁷

Under Art.8 it must be shown that the State had “*effective control*” over the actor.⁴⁸ As Revels is bound by UNCLOS, under Art.94 it exercises effective jurisdiction and control over *Columbus*, as the flag State, and has the obligation to ensure the ship acts in accordance with

⁴⁴ Art. 8, ARSIWA.

⁴⁵ ILC Commentary, *supra* note 39, at 47; Kristen E. Boon, *Are Control Tests Fit For the Future: The Slippage Problem in Attribution Doctrines*, 15 Melbourne J. of Int’l L. 1, 9 (2014) [hereinafter Boon].

⁴⁶ Record ¶14.

⁴⁷ Record ¶16.

⁴⁸ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Yugoslavia*), 1996 I.C.J. [2007] ICJ Rep 43, [hereinafter *Bosnian Genocide*]; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Judgment) [1986] ICJ Rep 14 [hereinafter *Nicaragua*]; JAMES CRAWFORD, *STATE RESPONSIBILITY*, 73 (2013).

international law.⁴⁹ Moreover, the biofuels initiative would not have been possible without the subsidy, thereby establishing governmental control over it.⁵⁰

Therefore, the activities of the SEA Corporation are attributable to Revels as it operates under the instructions, direction, and control of Revels.

c. REVELS HAS ADOPTED AND ACKNOWLEDGED THE SEA CORPORATION'S CONDUCT AS ITS OWN.

Acts of private persons become attributable to the State when that State acknowledges and adopts them as its own.⁵¹ As per the decision of the ICJ in the *United States Diplomatic and Consular Staff in Tehran* case, when the government showed “approval” and “endorsement” the conduct of the private actor became attributable to the State.⁵² By using the biofuels initiative to meet its own NDC commitments, Revels has adopted and acknowledged the SEA Corporation's activities as its own. Moreover, the SEA Corporation is being provided financial assistance in the form of subsidy from the State, and its leadership is

⁴⁹ UNCLOS, *supra* note 16, art. 94; Nivedita M. Hosanee, *A Critical Analysis of Flag State Duties as laid down under Article 94 of the 1982 United Nations Convention on the Law of the Sea*, Division for Ocean Affairs and the Law of the Sea: Office of Legal Affairs, The United Nations (2009) available at http://www.un.org/Depts/los/nippon/unncff_programme_home/fellows_pages/fellows_papers/hosanee_0910_mauritius.pdf.

⁵⁰ Clarifications, A18.

⁵¹ Art. 11, ARSIWA.

⁵² ILC Commentary, *supra* note 39 at 53; *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3.; *Kenneth P. Yeager v. The Islamic Republic of Iran, Iran–U.S. C.T.R.*, vol. 17, (1987).

being supervised and supported by the State, as is implicit from the press release.⁵³ The press release and report clearly demonstrate that the State of Revels endorses and approves the conduct of the SEA Corporation. Thus, its conduct is attributable to Revels.

d. REVELS HAS FAILED TO ENSURE DUE DILIGENCE.

States have a due diligence obligation to ensure that private actors within their territory, jurisdiction or control, such as those flying their flag,⁵⁴ do not cause transboundary harm to other States. The positive failure on the part of the State to prevent wrongful conduct by private actors is attributable to it.⁵⁵

Revels is fully aware of its obligations to prevent transboundary harm, preserve biodiversity, and conserve migratory species, yet it has shown no due diligence in preventing harm caused by the SEA Corporation.⁵⁶ The Environmental Impact Assessment conducted has not conclusively stated that the biofuels initiative will cause no harm to the Sargasso Sea

⁵³ *Bosnian Genocide*, *supra* note 48; *Boon*, *supra* note 45.

⁵⁴ *Advisory Opinion on the Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, 2 April 2015, ITLOS Reports 2015, 4.

⁵⁵ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 I.C.J.; *Trail Smelter Arbitral Decision (U.S. v. Canada)*, 3 R.I.A.A. 1905 (1938/1941) [hereinafter *Trail Smelter*]; *Seabed Disputes Chamber in its Advisory Opinion on the Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, *Advisory Opinion*, 1 February 2011, ITLOS Reports 2011, 10.

⁵⁶ *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, 1949 I.C.J. 4; *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3.

or European eels. Having failed to ensure due diligence, the activities of SEA Corporation are attributable to Revels.

B. REVELS VIOLATED ITS OBLIGATIONS UNDER INTERNATIONAL LAW.

Revels is internationally responsible for its biofuels initiative because, *first*, Revels has violated its obligations under CBD; *second*, under UNCLOS; *third*, under CMS, and *fourth*, under customary international law.

a. REVELS VIOLATED ITS OBLIGATIONS UNDER CBD.

The objectives of the CBD are the conservation of biological diversity along with sustainable use of its components.⁵⁷ States are required to cooperate in the areas of mutual interest beyond national jurisdiction in order to achieve its objectives.⁵⁸ The harvesting of sargassum in the Sargasso Sea,⁵⁹ disregarding the long-term effects on migratory species, is in contravention of the objectives and provisions of the CBD.

Art.3 of the CBD requires that States do not cause damage to the environment beyond the limits of their national jurisdiction.⁶⁰ By harvesting sargassum Revels is continuing to destroy the habitat of the European eel. This is in contravention of Art. 3.⁶¹ Moreover, the ecosystem is essential, as it is the habitat of several species, and deserves special importance.⁶²

⁵⁷ Art. 1, CBD.

⁵⁸ Art. 5, CBD.

⁵⁹ Record ¶28.

⁶⁰ Art. 3, CBD.

⁶¹ *Id.*

⁶² Decision X/29 Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Tenth Meeting, U.N. DOC. UNEP/CBD/COP/DEC/X/29 (Oct. 29, 2010).

Article 8 of CBD obligates Revels to take *in-situ* conservation measures to conserve biological diversity.⁶³ Accordingly, Revels is obligated to protect ecosystems, natural habitats, and maintain viable populations of species in natural surroundings.⁶⁴ Moreover, it is also obligated to promote the recovery of threatened species.⁶⁵ The European Eel is a threatened species because it is listed as Critically Endangered on the IUCN Red List of Threatened Species.⁶⁶ Far from conserving biodiversity, Revels by harvesting Sargassum is actually destroying the eels' natural habitat, which will reduce the population of threatened species, and damage the precious ecosystem. Therefore, Revels has breached its obligations under Articles 8, and 3 of the CBD.

b. REVELS VIOLATED ITS OBLIGATIONS UNDER UNCLOS.

Revels violated its obligations under UNCLOS, specifically those under Articles 117, 118, 192, and 300. Under these provisions, Revels has a duty to cooperate to conserve and manage living resources on the high seas.⁶⁷ It is also specifically obligated to protect the marine environment.⁶⁸ Further, under Article 300, Revels is required to fulfill its obligations in good faith and exercise the rights and freedom in a manner which would not constitute an abuse of right. Revels has not taken any measures to conserve the eels and other migratory

⁶³ Art. 8, CBD.

⁶⁴ Art. 8(d), CBD.

⁶⁵ Art. 8(f), CBD.

⁶⁶ Record ¶3; IUCN, *Anguilla Anguilla*, <https://www.iucnredlist.org/species/60344/45833138> (last accessed Oct. 18, 2018).

⁶⁷ Articles 117, 118, UNLCOS.

⁶⁸ Art. 192, UNCLOS.

species. Rather, its harvesting project is destroying the habitat of eels, a living resource of the high seas.⁶⁹ Revels has, therefore, exceeded its freedom of the high seas, and abused its right under UNCLOS.

c. REVELS VIOLATED ITS OBLIGATION UNDER CMS.

European eels are migratory species with an unfavourable conservation status, and are listed on Appendix II of the CMS.⁷⁰ They have been protected by, and have been the focus of much attention under the CMS, which has even approved a Concerted Action for the species. Under the CMS States are required to take measures to prevent migratory species from becoming endangered.⁷¹ Moreover, they have a duty to ensure that any climate change mitigation measures they take do not cause habitat loss of migratory species.⁷² Revels' biofuel initiative, while aimed at mitigating climate change, depends solely on harvesting Sargassum, the habitat of eels. Destroying their habitat puts them in danger of being endangered, which is a violation of Art. II. Therefore, Revels has breached its obligations under CMS, and Resolutions 11.27⁷³ and 12.21.⁷⁴

⁶⁹ Record ¶16.

⁷⁰ Appendices I, II, CMS.

⁷¹ Record ¶20; Art. II, CMS.

⁷² CMS Resolution 12.21, Adopted by the Conference of the Parties at its 12th Meeting Climate Change and Migratory Species, UNEP/CMS/Resolution 12.21 (Manila, October 2017) [hereinafter CMS Resolution 12.21].

⁷³ CMS Resolution 11.27, Adopted by the Conference of the Parties at its 11th Meeting Renewable Energy and Migratory Species, UNEP/CMS/Resolution 11.27 (Quito, 4-9 November 2014). [hereinafter CMS Resolution 11.27]

⁷⁴ CMS Resolution 12.21 *supra* note 72.

C. REVELS VIOLATED CUSTOMARY INTERNATIONAL LAW.

In addition to its obligations under various treaties, Revels has also violated principles of customary law. *First*, it has breached its obligation not to cause transboundary harm; and *second*, it has violated the precautionary principle.

a. REVELS HAS CAUSED TRANSBOUNDARY HARM.

States are prohibited from exercising sovereignty over their territory in a manner that causes transboundary harm to any other state.⁷⁵ This has also been recognized in various soft law declarations, such as The Rio Declaration, 1992, and Stockholm Declaration, 1972.⁷⁶ Revels has satisfied the elements of transboundary harm, as follows: *first*, the causal link between Revels' actions and the harm is established; *second*, the harm caused is transboundary; *third*, the harm caused is significant; *fourth*, Revels has failed to act with due diligence.

⁷⁵ Trail Smelter, *supra* note 55; Stockholm Declaration, 11 I.L.M., 1416, Principle 21 [hereinafter Stockholm]; United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874, Principle 2 [hereinafter Rio]; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶29 (July 8); XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW, 3 (2003).

⁷⁶ Principle 2, Stockholm; Principle 2, Rio Declaration.

i. The causal link between Revel's actions and the harm is established.

To determine causation, according to the principle of *causa proxima*, a causal nexus can only be demonstrated if the harm is not too remote from the cause.⁷⁷ The two tests employed to determine proximate causality are,⁷⁸ *first*, that the loss should be the normal and natural consequence of the delinquent conduct,⁷⁹ and *second*, that the harm could have been reasonably foreseen by the source state.⁸⁰ Both the tests are satisfied in this case.

a. The loss is the normal and natural consequence of the delinquent conduct

For the harm to be a normal and natural consequence of the harvesting project, it needs to be geographically proximate to it.⁸¹ In the present case, the harm was geographically proximate as both countries are Range states for the species, under CMS⁸² and their coasts

⁷⁷ RENÉ LEFEBER, TRANSBOUNDARY ENVIRONMENTAL INTERFERENCE AND THE ORIGIN OF STATE LIABILITY, 85 (1996); SANDS & PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, 99 (2012).

⁷⁸ *Id.*, at 87; ALEXANDRE CHARLES KISS et al., A GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW, 117 (2007); Germany v. Great Britain and U.S.A., IX RIAA 1902, at 15.

⁷⁹ PHOEBE N. OKAWA, STATE RESPONSIBILITY FOR TRANSBOUNDARY AIR POLLUTION IN INTERNATIONAL LAW, 181 (2000); War Risks Insurance Premium Claims, VII UNRIAA 22, at 55-63; Greco-German Mixed Arbitral Tribunal in the Antippa case, 7 T.A.M at 23-28 [hereinafter Okawa].

⁸⁰ Portugese Colonies (Angola case), Award I II RIAA at 1032-33 (1928).

⁸¹ Okawa, *supra* note 78, at 181; Lefeber, *supra* note 76, at 88.

⁸² Record ¶8.

are approximately 250 nautical miles from the⁸³ Sargasso Sea, where the European eels migrate to spawn.

b. The harm could have been reasonably foreseen by Revels

The test of reasonable foreseeability states that the source state is responsible for all reasonably foreseeable consequences of the delinquent act.⁸⁴ Any country taking a major step, the outcome of which is unclear, should factor in both its potential benefits and harms.⁸⁵ Sargasso Sea has, for long, known to have been threatened by human activities, such as over-fishing, and trawling.⁸⁶ Thus, it is easy to infer that destroying part of the eels' spawning habitat by harvesting sargassum will certainly harm the species. Moreover, there have been instances where States have put limitations on commercial harvesting on sargassum, in order to protect the marine life that thrives in the sargassum mats.⁸⁷

⁸³ Record ¶1.

⁸⁴ Okawa, *supra* note 78, at 181.

⁸⁵ Lefeber, *supra* note 76, at 88.

⁸⁶ D. Freestone et al., *Chapter 50: Sargasso Sea— The First Global Integrated Marine Assessment*, World Ocean Assessment I available at http://www.un.org/Depts/los/global_reporting/WOA_RPROC/Chapter_50.pdf.; Melissa Gaskill, *Significant Sargassum: The golden floating rainforest*, Alert Diver Online available at <http://www.alertdiver.com/sargassum> (last visited on Nov 11, 2018); Tammy M. Trott *et al*, *Efforts to Enhance Protection of the Sargasso Sea*, Proceedings of the 63rd Gulf and Caribbean Fisheries Institute, 284 (2011).

⁸⁷ Sargassum, South Atlantic Fishery Management Council available at <http://safmc.net/fishery-management-plans-amendments/sargassum-2/> (last visited on October 11, 2018).

In any event, the diplomatic note sent by Alliguna specifically cautioned Revels about the effects of their harvesting project on the ecosystem of the Sargasso Sea, and European eels.⁸⁸ Despite this, Revels has continued the harvesting project. Therefore, the harm was reasonably foreseeable.

ii. The harm caused is transboundary

Harm caused is “transboundary”, when it “*caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border*”.⁸⁹ This includes activities on the high seas, which affect the territory of another State.⁹⁰ In the present case, while the harvesting is occurring on the high seas, it has a transboundary effect on Alliguna. This is because the harvesting of sargassum, destroys the habitat of the European eels, which is of cultural, religious, and historical significance to Alliguna.⁹¹ Therefore, transboundary harm is caused.

Moreover, “*resources that straddle political borders or migrate from one territory to another are shared resources*”.⁹² Since both the Sargasso Sea,⁹³ and the European Eels, as a

⁸⁸ Record ¶13.

⁸⁹ Draft Articles On Prevention Articles of Transboundary Harm from Hazardous Activities With Commentaries, [2001] 2 Y.B. Int’l L. Comm’n 97 [hereinafter Articles on Transboundary Harm].

⁹⁰ ILC Commentary on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/56/10) (2001), at 152.

⁹¹ Record ¶4.

⁹² U.N. GAOR, 33rd Sess., Supp. No. 25, U.N. Doc. A/33/25, at 154 (May 19, 1978).

⁹³ Record ¶17.

migratory species, are shared resources, any harm to the marine biodiversity in and around Sargasso Sea and adverse effect to the eels would affect Alliguna as it is also a range state for the eels.⁹⁴ Thus, the harm caused is transboundary.

iii. The harm caused is significant

For transboundary damage to be caused the harm should not be merely *de minimus* harm or just noticeable harm.⁹⁵ It should have a detrimental effect on matters such as environment in other states.⁹⁶ In this case, the harvesting project will destroy the spawning habitat of a critically endangered species which also hold importance in the culture, religion, and history of a state.⁹⁷ It could have other irreparable effects on the ecosystem. Therefore, the harm is significant. Furthermore, the amount of Sargassum harvested by the SEA Corporation is more than a *de minimis* amount.⁹⁸ Thus, the harm caused to Alliguna is not merely *de minimus* but significant.

iv. Revels has failed to act with due diligence

Even if the aforementioned elements of transboundary harm aren't proved, Revels had an obligation to act with due diligence to prevent or minimize the harm to Alliguna, or other

⁹⁴ Record ¶8.

⁹⁵ Trail Smelter, *supra* note 55; Lac Lanoux (Fr. v. Spain), 12 R.I.A.A. 281 (1957); Sands, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, 87 (2003).

⁹⁶ Cunningham, *Do Brothers Divide Shares Forever? Obstacles to the Effective Use of International Law in Euphrates River Basin Water Issues*, 21 U.P.A. J. INT'L ECON.L. 131, 153 (2000).

⁹⁷ Record ¶4.

⁹⁸ Clarification A16.

shared resources.⁹⁹ The main aim of the obligation is to notify and consult to make sure that the state of origin takes into account the interest of the notified state and ensure that the activity can be carried out in a manner least harmful to the environment.¹⁰⁰ Accordingly, Revels is obligated to accommodate the interests of Alliguna and introduce controls which are capable of minimizing the risk of transboundary harm.¹⁰¹ Revels has not done so, and has instead allowed and endorsed the harvesting of sargassum which will have an adverse effect on these species.¹⁰² In addition, by not accommodating the concerns raised by Alliguna in its diplomatic note,¹⁰³ Revels has failed to discharge its duty to act with due diligence.

b. REVELS VIOLATED THE PRECAUTIONARY PRINCIPLE

The Precautionary Principle is an established principle under international law. The Precautionary Principle is enshrined in the Rio Declaration,¹⁰⁴ which Revels participated in,¹⁰⁵ and CBD¹⁰⁶ and CMS,¹⁰⁷ to which Revels is a state-party.¹⁰⁸ The elements to establish

⁹⁹ Principle 2, Rio; Trail Smelter, *supra* note 55; Articles on Transboundary Harm, *supra* note 88.

¹⁰⁰ John Knox, *Myth and Reality of Transboundary Impact Assessment*, 96(2) THE AMERICAN JOURNAL OF INTERNATIONAL LAW 291, 319 (2002).

¹⁰¹ *Id.*, at 303; Articles on Transboundary Harm, *supra* note 88.

¹⁰² Record ¶16.

¹⁰³ Record ¶13.

¹⁰⁴ Principle 5, Rio Declaration.

¹⁰⁵ Record ¶12.

¹⁰⁶ Preamble, CBD.

¹⁰⁷ Art.II, CMS.

¹⁰⁸ Record ¶¶7, 9.

Precautionary Principle are *first*, a threat of environmental damage; *second*, the threat is serious and irreversible; *third*, there is a lack of data regarding the impact of climate-related geoengineering on biodiversity.¹⁰⁹

i. There is a threat of environmental damage.

As has been discussed previously,¹¹⁰ Revels' exploitation of sargassum poses a threat of environmental damage not only to the European eels but also to biological diversity.

ii. The threat is serious and irreversible.

The Sargasso Sea, being the "*world's only holopelagic seaweed ecosystem*", is a spawning habitat for multitudes of species, including threatened migratory species such as European Eel.¹¹¹ The Sargasso Sea itself has been threatened by climate change, and human activities.¹¹² The population of European eels has been in significant decline for many years,¹¹³ a fact known to Revels.¹¹⁴ They have also been enlisted as Critically Endangered

¹⁰⁹ IUCN Council, Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management, *available at* http://cmsdata.iucn.org/downloads/ln250507_ppguidelines.pdf (last visited on Nov.15, 2018).

¹¹⁰ *See supra* Part II(B)(a).

¹¹¹ Tammy M. Trott et al., Efforts to Enhance Protection of the Sargasso Sea, Proceedings of the 63rd Gulf and Caribbean Fisheries Institute, 284 (2011).

¹¹² D. Freestone, *supra* note 104, at 4; CBD Decision X/29, *supra* note 62.

¹¹³ Trott, *supra* note 111; Hamilton Declaration on Collaboration for Conservation of the Sargasso Sea, Mar. 14, 2014.

¹¹⁴ Record ¶23.

under the ICUN Red List of Threatened Species.¹¹⁵ Revels' destruction of the Eel's spawning habitat could have, and likely already has had, devastating effects on the Eels, along with the other species which thrive in the ecosystem.¹¹⁶ Thus, the threat of damage is indeed serious and irreversible.

iii. The scientific impacts are uncertain

According to the Precautionary Principle if there is a threat of environmental damage, the lack of scientific certainty cannot be used as an excuse to postpone measures or avoid minimizing the threat.¹¹⁷ Revels alleges that there has not been any direct evidence to prove that their project negatively impacts eels.¹¹⁸ However, the biofuels initiative by Revels is an act of climate geoengineering, and it is known that no act of geoengineering, as yet, meets basic criteria of safety and effectiveness.¹¹⁹ Moreover, the impacts of such climate geoengineering, on biodiversity, are also uncertain.¹²⁰ In light of this, especially, there is a need for States indulging in such activities to take a precautionary approach.¹²¹ Since the impact of

¹¹⁵ IUCN RED LIST OF THREATENED SPECIES, *available at* <http://www.iucnredlist.org> (last visited Oct. 15, 2018).

¹¹⁶ Record ¶20.

¹¹⁷ CBD, Preamble; BIRNIE & BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT*, at 153 (3rd ed. Oxford U. Press, 2009); KISS AND SHELTON, *GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW*, at 95 (Brill-Nijhoff, 3rd edn., 2007).

¹¹⁸ Record ¶23.

¹¹⁹ CBD Decision XI/20, *supra* note 12, at ¶6.

¹²⁰ CBD Decision XI/20 *supra* note 12, at ¶7.

¹²¹ CBD Decision XI/20 *supra* note 12, at ¶8.

MEMORIAL ON BEHALF OF THE APPLICANT

the biofuels initiative is unknown, it is imperative that Revels take a precautionary approach, and desist from harvesting sargassum.

CONCLUSION AND PRAYER

For the foregoing reasons, the Federal States of Alliguna respectfully requests this Court to adjudge and declare that:

I. The ICJ has jurisdiction to determine the matter;

II. The activities of the SEA Corporation are attributable to the State of Revels and;

The Republic of Revels has violated international law by conducting the harvesting project in the Sargasso Sea and any continuation of this project would violate international law.

RESPECTFULLY SUBMITTED

AGENTS FOR THE FEDERAL STATES OF ALLIGUNA

