

IN THE INTERNATIONAL COURT OF JUSTICE

AT PEACE PALACE

THE HAGUE, THE NETHERLANDS

TWENTY THIRD ANNUAL STETSON INTERNATIONAL ENVIRONMENTAL

MOOT COURT COMPETITION 2018-2019

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 APPLICANT

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STATEMENT OF JURISDICTION

The Federal States of Alliguna [hereinafter Alliguna] has agreed to the jurisdiction of the International Court of Justice [hereinafter ICJ] pursuant to Article 36 (1) of the Statute of the ICJ. The present dispute arises under Convention on Biological Diversity [hereinafter CBD], United Nations Framework Convention on Climate Change [hereinafter UNFCCC] and Paris Agreement. Alliguna, therefore, has invoked the *compromissory* clauses of CBD, UNFCCC and Paris Agreement.

The Registrar acknowledged the receipt of the application instituting proceedings against the Republic of Revels [hereinafter Revels] on 6 July 2018; and the preliminary objection submitted by Revels dated 5 May 2018.

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

ISSUES RAISED

- I. WHETHER THE ICJ HAS THE COMPETENT JURISDICTION TO DETERMINE THE MATTER UNDER RELEVANT CONVENTIONS & REVELS IS RESPONSIBLE FOR THE ACTIONS OF SEA CORPORATION.

- II. WHETHER REVELS VIOLATED INTERNATIONAL LAW BY NEGATIVELY IMPACTING THE EUROPEAN EELS THROUGH THE SARGASSUM HARVESTING PROJECT IN THE SARGASSO SEA.

STATEMENT OF FACTS

BACKGROUND

The Federal States of Alliguna and the Republic of Revels are neighbouring coastal states located near the Sargasso Sea. Alliguna is a developed country with diversified economy, whereas Revels is a developing country. The European Eels are of particular importance to Alliguna and its citizens. The species is migratory in nature and are critically endangered. The species generally migrate to the Sargasso Sea for spawning purposes.

HARVESTING OF SARGASSUM

In July 2016, Seaweed Energy Alternatives, Inc. [hereinafter SEA Corporation], a private company incorporated in Revels started harvesting Sargassum from the Sargasso Sea through its vessel, the *Columbus*. The vessel sailed under the flag of Revels, to carry out its activity on the high seas. The SEA Corporation received subsidy from the Government of Revels for the same under the Government's renewable energy programme to meet its Nationally Determined Contributions [hereinafter NDC] commitments under the Paris Agreement.

IMPACTS ON SARGASSO SEA AND THE MARINE ENVIRONMENT

In January 2017, Alliguna conveyed its concerns regarding the harvesting of Sargassum and its potential negative impacts on the European Eels and the marine environment of the Sargasso Sea. Revels acknowledged Alliguna's objections, and replied that acts do not violate international, as the actions of the SEA Corporation are not attributable to Revels. Revels also assured Alliguna that the SEA Corporation's project is mitigating climate change and is beneficial for the biodiversity.

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After several months of futile attempts at negotiation and mediation, Alliguna finally submitted the dispute to ICJ, however Revels contested ICJ's jurisdiction in its Preliminary Objections.

SUMMARY OF PLEADINGS

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

Alliguna submits that the SEA Corporation's Sargassum initiative poses adverse impacts on the marine environment of the Sargasso Sea and population of the European Eels. Further, SEA Corporation has been provided subsidy as a part of government's renewable energy program which aims to achieve its NDC commitments. Hence, this court has jurisdiction pursuant to the *compromissory* clauses of CBD, UNFCCC and Paris Agreement read with Art.36(1) of the ICJ Statue. Furthermore, Revels has violated its international obligations as the harvesting of Sargassum by SEA Corporation is attributable to Revels under customary international law.

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

By harvesting Sargassum, Revels has violated its international obligations to protect and preserve the ecosystem of the Sargasso Sea and the habitat of the European Eels under United Nations Convention on the Law of Seas [hereinafter UNCLOS], CBD, Convention on Migratory Species [hereinafter CMS] and Hamilton Declaration. Revels, has further violated the Precautionary Principle and the obligation to not cause Transboundary harm to Alliguna. In any case, Revels cannot invoke its obligations under the UNFCCC and Paris Agreement as a justification for its failure to perform its treaty obligations.

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PLEADINGS

I. ICJ HAS THE COMPETENT JURISDICTION TO DETERMINE THE MATTER UNDER RELEVANT CONVENTIONS & REVELS IS RESPONSIBLE FOR THE ACTIONS OF SEA CORPORATION.

A. ICJ HAS THE JURISDICTION TO ADJUDGE THE MATTER.

Under Article 36(1), the Statute of the International Court of Justice [hereinafter ICJ] grants this Court the jurisdiction over all cases which parties refer to it and all matters specifically provided for it in the UN Charter or treaties and conventions in force. Alliguna and Revels being a party to the statute of the ICJ, and UN Charter,¹ have given *ante hoc* consent to the jurisdiction of ICJ for the interpretation or application of the CBD,² UNFCCC & the Paris Agreement.³ By virtue of Article 36(6) of the Statute of the ICJ and the principle of *Competence – Competence*, ICJ can determine the question of jurisdiction for the disputes referred to it.⁴

¹ Rec. ¶ 5.

² Rec. ¶ 7.

³ Rec. ¶ 10.

⁴ Tomuschat, *The Principle of Kompetenz-Kompetenz*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 694 (Zimmermann et al. eds., 2012); Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 I.C.J. Rep. 432, at 450 ¶ 37 (Dec. 4) [hereinafter Fisheries Jurisdiction]; Corfu Channel (U.K. and N. Ir. v. Alb.), Preliminary Objection, 1949 I.C.J. Rep. 4 (Apr. 9) [hereinafter Corfu Channel].

a. *ICJ has the jurisdiction under CBD.*

1. The subject matter of the dispute arises under the CBD.

The jurisdictional scope of CBD,⁵ extends to all the activities which relate to component of biodiversity carried out by a State under its jurisdiction or control beyond the limits of national jurisdiction.⁶ Article 27 of CBD provides ICJ the jurisdiction on disputes concerning the interpretation or application of this Convention.⁷

Notably, the act of harvesting large amounts of Sargassum by SEA Corporation⁸ will lead to the disruption of the biodiversity⁹ of the Sargasso Sea which includes the ecosystem of the sea as well as the European Eels.¹⁰ Harvesting Sargassum pose adverse impacts on the life process of the European Eels.¹¹ Hence, considering the matter concerns the biodiversity of Sargasso Sea. Therefore, ICJ has the competent jurisdiction to adjudge the dispute.

⁵ Rec. ¶ 7.

⁶ CBD art. 4.

⁷ CBD art. 27(3)(b).

⁸ Rec. ¶ 15.

⁹ Convention on Biological Diversity art. 2, Dec. 29, 1993, 1760 U.N.T.S. 79 [hereinafter CBD].

¹⁰ D.d'A Laffoley, *The Protection and Management of the Sargasso Sea: The Golden Floating Rainforest of the Atlantic Ocean*, SARGASSO SEA ALLIANCE (2012), <https://www.cbd.int/cop/cop-11/doc/vtable/Sargasso.Report.-cop11-iucn1.pdf>.

¹¹ *Id.*

2. ICJ has jurisdiction pursuant to Article 27(3)(b) of the CBD.

Under Article 27(3)(b) of CBD, if a dispute is not settled through negotiation or mediation, a party can submit the dispute to the International Court of Justice. In the present case, after several months of negotiation and mediation, Alliguna has submitted the dispute to ICJ.¹²

b. *The ICJ has the jurisdiction under the UNFCCC and the Paris Agreement.*

The act of harvesting Sargassum concerns the emission of greenhouse gases and climate change.¹³ Revels has acknowledged the same by claiming that the said act will aid in to achieve its NDC Commitments.¹⁴ Hence, the UNFCCC and the Paris Agreement undeniably constitutes to be relevant instruments governing this dispute. Therefore, by virtue of Article 24 of the UNFCCC and Article 14 of the Paris Agreement, ICJ is the competent forum governing the present dispute.

c. *Revels is estopped from denying the ICJ's jurisdiction under the UNCLOS and CMS.*

As per Article 282 of UNCLOS, if the parties have agreed to a binding dispute settlement procedure through a general agreement then the procedure laid down under UNCLOS will not be applicable.¹⁵ Additionally, under Article XII (2) the provisions of CMS shall not affect the rights

¹² Rec. ¶ 24.

¹³ Rec. ¶ 14.

¹⁴ U.N. Framework Convention on Climate Change, *Adoption of the Paris Agreement* art. 3, U.N. DOC. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) [hereinafter Paris Agreement]; United Nations Framework Convention on Climate Change art. 4(1)(d), May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

¹⁵ Convention on the Law of the Sea art. 282, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS].

and obligation of any party deriving from any existing treaty or convention.¹⁶ Notably, Alliguna and Revels both have agreed to ICJ's jurisdiction under CBD, UNFCCC and Paris Agreement. Thus, the ICJ has competent jurisdiction to adjudge this matter.

Moreover, when there is overlap between the jurisdiction of the ICJ and the International Tribunal for the Law of the Sea [hereinafter ITLOS] States should find a sensible division of labour, by directing cases having the nature relating to the law of the seas to the ITLOS and matters involving more ingredients of general international law to the ICJ.¹⁷

Further, ICJ has validly exercised its jurisdiction in matters specific to the law of seas but the ones which had more ingredients of general international law.¹⁸ The present dispute primarily concerns the protection of the European Eels which consequently involves the interpretation and application of CBD, UNFCCC, Paris Agreement rather than the UNCLOS. Therefore, this dispute shall be determined by ICJ.

¹⁶ Convention on the Conservation of Migratory Species of Wild Animals art. XII (2), Nov. 1, 1983, 1651 U.N.T.S. 333 [hereinafter CMS].

¹⁷ 1 Carl-August Fleischhauer, *The Relationship Between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg*, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 333 (1997); *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening)*, Judgement, 2002 I.C.J. Rep. 303 (Oct. 10).

¹⁸ *North Sea Continental Shelf (Ger./Den.; Ger./Neth.)*, Judgment, 1969 I.C.J. Rep. 3 (Feb. 20); *Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.)*, Judgement, 1993 I.C.J. Rep. 38 (June 14).

- d. *The Southern Bluefin Tuna and Fisheries Jurisdiction referred by Revels do not support the jurisdictional claim of Revels.*

1. Southern Bluefin Tuna Case.

Revels' contention that the ruling of Arbitral Tribunal in Southern Bluefin Tuna Case,¹⁹ is applicable to the present matter and thereafter the ICJ has no jurisdiction over the dispute is unfounded under international law owing to various differences between the two disputes. The case involved a dispute which arose only under two conventions i.e. UNCLOS and the Convention on Conservation of Southern Bluefin Tuna [hereinafter CCSBT].²⁰ However, the present matter involves the interpretation and application of CBD, UNFCCC, Paris Agreement, UNCLOS, CMS and customary international law.

Moreover, the Annex VII Tribunal in this case did not find its jurisdiction valid as contended by New Zealand and Australia.²¹ The Tribunal held that even though some or much parts of the dispute arose under the UNCLOS, the most acute elements of dispute²² centred on the CCSBT, and hence, the governing agreement is the CCSBT.²³ Therefore, considering the main elements of present dispute concerns the interpretation or application of CBD, UNFCCC and the Paris Agreement, the claim of Revels that the dispute falls under the UNCLOS is not valid.

¹⁹ Southern Bluefin Tuna Case (N. Z./Japan; Austl./Japan), XXIII R.I.A.A. 4 (Annex VII Arb. Trib. 2000) [hereinafter Bluefin Tuna].

²⁰ Convention for the Conservation of Southern Bluefin Tuna art. 16, May 20, 1994, 1819 U.N.T.S. 360 [hereinafter CCSBT].

²¹ Bluefin Tuna, *supra* note 19, ¶ 72 at 48.

²² *Id.* ¶ 49 at 39.

²³ *Id.* ¶ 72 at 48.

2. Fisheries Jurisdiction Case.

This case involved the interpretation of a Canadian reservation clause,²⁴ made for the acceptance of the jurisdiction of ICJ under Article 36 of the ICJ Statute. The Court held that it has the prerogative to determine the nature of the dispute which it validly found under the Canadian declaration.²⁵ The Court's ruling is inapplicable in the present matter, as the dispute arises under several conventions making ICJ the competent adjudicating forum rather than involving the interpretation of a reservation clause excluding the Court's jurisdiction. The ICJ in this matter held that the dispute came within the terms of reservation contained in the Canadian declaration,²⁶ and thus, consequently it had no jurisdiction to adjudge the matter.²⁷

B. REVELS IS RESPONSIBLE FOR THE ACTIONS OF SEA CORPORATION FOR HARVESTING SARGASSUM ON THE HIGH SEAS.

Under international custom, a state is responsible for the actions of an entity, when the entity is exercising the elements of governmental authority,²⁸ or is under the instructions or directions or control of the state,²⁹ or the state has acknowledged and adopted the conduct in issue as its own.³⁰

²⁴ Fisheries Jurisdiction, *supra* note 4, ¶ 3 at 435.

²⁵ *Id.*, ¶ 31 at 432.

²⁶ *Id.*, ¶ 3 at 435.

²⁷ *Id.*, ¶ 89 at 468.

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

²⁹ ARSIWA art. 8.

³⁰ ARSIWA art. 11.

The actions of SEA Corporation are attributable to Revels as, SEA Corporation constitutes an entity for the purposes of Articles on Responsibility of States for Internationally Wrongful Acts [hereinafter ARSIWA]; [a] it is exercising the elements of governmental authority [b] and is acting under the instruction or direction or control of Revels [c]. In addition, Revels has acknowledged and adopted the actions of the corporation as its own [d]. Also, Revels is responsible for the conduct of SEA Corporation on the high seas [e].

a. *SEA Corporation constitutes an entity for the purposes of ARSIWA.*

Under ARSIWA, which represents CIL,³¹ the term entity has been given a wider interpretation which can include any natural or legal person exercising public authority. This interpretation further extends to private companies performing public functions for the state.³²

SEA Corporation is a privately owned company incorporated in Revels,³³ which is harvesting Sargassum, forming the part of Revel's renewable energy programme aimed to achieve its NDC Commitments.³⁴ Therefore, the act of harvesting Sargassum by SEA Corporation satisfies the criteria of an entity under international law.

³¹ Int'l Law Comm'n, Rep. on the Work of Its Fifty-third Session, U.N. DOC. A/56/10, at 43 (2001) [hereinafter ILC Commentary Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 75 at 35 (June 27) [hereinafter Nicaragua case].

³² ILC Commentary, *supra* note 31, at 43.

³³ Clarifications to the Record, ¶ 15 [hereinafter Clarifications].

³⁴ Rec. ¶ 14.

b. *SEA Corporation is exercising the elements of governmental authority.*

Under Article 5 of ARSIWA, a state is internationally responsible for the actions of a private entity when such entity is empowered by the law of that state to exercise elements of the governmental authority and such actions relates to the exercise of the governmental authority concerned.³⁵ It is a well-established rule of International law, that if an entity has been specifically authorised by the internal law of a state,³⁶ to fulfil one of its specific purpose, it can be said to exercise the elements of government authority.³⁷ The real test to determine such governmental authority is to check the state's participation in its capital.³⁸

Notably, SEA Corporation was among a few selected non-governmental entities to receive subsidy from Revels,³⁹ in order to implement the government's renewable energy programme aimed to meet its NDC commitments.⁴⁰ Moreover, without providing heavy subsidy to SEA Corporation, the project would not have move forward.⁴¹ Therefore, it is implicit that SEA Corporation was clearly empowered by Revels to harvest Sargassum within the realms of exercise of governmental authority.

³⁵ ARSIWA art. 5; MALCOLM N. SHAW QC, INTERNATIONAL LAW 862 (2008); IAN BROWNLIE, STATE RESPONSIBILITY 787 (2001).

³⁶ ILC Commentary, *supra* note 31, at 43.

³⁷ *Id.*

³⁸ Hyatt International Corporation v. The Government of the Islamic Republic of Iran, 9 Iran-U.S.C.T.R. 72, at 88 (1985).

³⁹ Rec. ¶ 14.

⁴⁰ Rec. ¶ 14.

⁴¹ Clarifications, ¶ 18.

c. *SEA Corporation is acting under instructions or direction or control of Revels.*

Under Article 8 of ARSIWA, a state is internationally responsible for the conduct of an entity when there exists a factual relationship between the state and the entity establishing that the entity is acting on the instructions of the state or is under the direction or control of the state.⁴² Revels is responsible for the actions of SEA Corporation because the SEA Corporation is acting on the instructions of Revels [a] and SEA Corporation is acting under the direction or control of Revels [b].

1. SEA Corporation is harvesting Sargassum on the instructions of Revels.

An entity is said to be acting on the instructions of the state when it is acting as an auxiliary to supplement the actions of the state in carrying out a particular mission.⁴³ The biofuel project by SEA Corporation was not only specifically selected by Revels but it also received subsidy by the government to implement the renewable energy programme.⁴⁴ Considering, the biofuel project is supplementing Revels to achieve its NDC Commitments establishes that SEA Corporation is harvesting Sargassum on the instruction of Revels.

⁴² ILC Commentary, *supra* note 31, at 47; MALCOLM N. SHAW QC, *supra* note 35, at 790.

⁴³ *Id.*

⁴⁴ Rec. ¶14.

2. SEA Corporation is acting under the direction or control of Revels.

Under Article 8 of ARSIWA, actions of an entity shall be attributable to the state if it has directed or controlled the specific operation and the conduct in question is an integral part of that operation.⁴⁵ In addition, it should be in principle proved that the entity could not have well committed the conduct in question without the support of the state.⁴⁶ As per Article 8, Where there is evidence that the corporation is exercising public powers,⁴⁷ or the state is using its control over the corporation to achieve a specific purpose,⁴⁸ then the conduct at issue is attributable to the state. Notably, Revels launched a renewable energy programme under which it selected SEA Corporation's biofuel project and provided it subsidy.⁴⁹ The concerned biofuel project is an integral part of the programme and it solely relies on the harvesting of Sargassum i.e., the conduct at issue. In the present case, SEA Corporation is harvesting Sargassum to implement the revels energy project, a public function to help revels achieve its NDC Commitments, thus the actions of SEA Corporation are attributable to Revels.

⁴⁵ ILC Commentary, *supra* note 31, at 47.

⁴⁶ ILC Commentary, *supra* note 31, at 43; Nicaragua case, *supra* note 31, ¶ 54 at 115.

⁴⁷ ILC Commentary, *supra* note 31, at 48; Phillips Petroleum Company Iran v. The Islamic Republic of Iran, 21 Iran-U.S.C.T.R., 79 (1989).

⁴⁸ ILC Commentary, *supra* note 31, at 48; American Bell International Inc. v. The Islamic Republic of Iran, 12 Iran-U.S.C.T.R., 170 (1986).

⁴⁹ Rec. ¶ 14.

- d. *In addition, Revels acknowledged and adopted the actions of SEA Corporation as its own.*

Under international custom, the conduct of a private entity is considered as an act of a state if and to the extent the concerned state clearly and unequivocally acknowledges and adopts the conduct in issue as its own.⁵⁰ Notably, the ICJ in *Nicaragua Case* had considered acknowledgement and adoption through a press release as valid form of acknowledgement.⁵¹

Revels specifically and unequivocally acknowledged and adopted the Sargassum initiative by not only providing hefty subsidy but also highlighting it in the press release and in the report of its own renewable energy programme.⁵² Therefore such retroactive adoption of harvesting of Sargassum makes Revels responsible under international law.

- e. *Revels is responsible for the conduct of SEA Corporation on the high seas.*

It is a well-established principle of international law that, the high seas are not subject to any national jurisdiction, and the jurisdiction of a flag state over its vessels is the principal way in which order on the high seas is maintained.⁵³ It is only the flag state which has the jurisdiction to

⁵⁰ ARSIWA art. 11; ILC Commentary, *supra* note 31, at 48; MALCOLM N. SHAW QC, *supra* note 35, at 792; Lighthouses Arbitration, (France/Greece), XII R.I.A.A. 155, at 197 (Perm. Ct. Arb. 1956); U.N. LEGIS. SER., MATERIALS ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS at 94, U.N. DOC. ST/LEG/SER B/25 (2012).

⁵¹ Nicaragua case, *supra* note 31 ¶ 86, at 40.

⁵² Rec. ¶ 16.

⁵³ UNCLOS art. 92; The Sub-Regional Fisheries Commission, Advisory Opinion, 2015 ITLOS Rep. 21, ¶ 115 (April 2); Douglas Guilfoyle et al., *Article 91: Nationality of Ships*, in UNITED NATIONS CONVENTION ON THE LAW OF

enforce the regulations applicable to vessels,⁵⁴ regardless of where the vessel is operating.⁵⁵ Thus, in accordance with Article 94 of the UNCLOS, it is the flag state which is responsible for the matters in respect of its flag vessels on the high seas.⁵⁶

SEA Corporation is incorporated under the internal laws of Revels,⁵⁷ and *Columbus* is flying under its flag on the high seas,⁵⁸ and hence falls within its jurisdiction. Thus, it is the responsibility of Revels to ensure that *Columbus* complies with the international obligations owed by Revels.

THE SEA: A COMMENTARY 186-96 (Alexander Proelss ed., 2017) [hereinafter UNCLOS Commentary]; BIRNIE, BOYLE & REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT 360 (3d ed. 2009).

⁵⁴ BIRNIE, BOYLE & REDGWELL, *supra* note 53, at 401; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 422 (7th ed. 2008).

⁵⁵ *Id.*

⁵⁶ UNCLOS Commentary, *supra* note 53, at 694.

⁵⁷ Rec. ¶ 13; UNCLOS Commentary, *supra* note 53, at 694.

⁵⁸ Rec. ¶ 13.

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

A. THERE EXISTS A CAUSAL LINK BETWEEN THE HARVESTING OF SARGASSUM BY REVELS AND DECLINE OF EUROPEAN EELS.

The Sargasso sea is the natural spawning habitat,⁵⁹ of the critically endangered European Eels,⁶⁰ owing to the abundant presence of Sargassum in the Sargasso Sea.⁶¹ The Sargassum acts as a nursery and feeding habitat for the leptocephali,⁶² and thus provides the required nutrients for the growth and development of European Eels. Also, Sargassum acts as a hiding area for the leptocephali and provides them protection from the predators.⁶³

⁵⁹ Rec. ¶ 3; M. J. Miller & J. D. McCleave, *Species Assemblages of Leptocephali in the Subtropical Convergence Zone of the Sargasso Sea*, 52 J. MARINE RES. YALE UNIV. 743–772 (1994).

⁶⁰ Rec. ¶ 3.

⁶¹ M. J. Miller & R. Hanel, *The Sargasso Sea Subtropical Gyre: The Spawning and Larval Development Area of Both Freshwater and Marine Eels*, 7 SARGASSO SEA ALLIANCE SCIENCE REPORT SERIES 20, 32 (2011), https://www.cms.int/sites/default/files/document/cms_Eels-ws1_doc-4_the-sargasso-sea-subtropical-gyre_miller-hanel_e.pdf.

⁶² L. Coston-Clements, L.R. Settle, D.E. Hoss & F.A. Cross, *Utilization Of Tile Sargassum Habitat By Marine Invertebrates And Vertebrates - A Review*, U. S. DEPT. OF COMMERCE (1991), https://repository.library.noaa.gov/view/noaa/9151/noaa_9151_DS1.pdf?.

⁶³ *Id.*

Notably, the nutrients required for the growth of leptocephali are engendered by Sargassum, and also contributes to the productivity of the Sargasso Sea.⁶⁴ Such nutrients not only promote the life of other marine species,⁶⁵ but also help the Sargasso Sea to act as a feeding and spawning area for the European Eels.⁶⁶ Considering that the habitat loss has been identified as one of the major reasons for decline in the recruitment and escapement of these Eels,⁶⁷ the commercial harvesting of Sargassum by Revels,⁶⁸ would lead to their further decline.

B. REVELS VIOLATED ITS OBLIGATIONS UNDER CBD.

- a. *Revels failed to comply with its obligation to not cause environmental damage beyond its national jurisdiction.*

According to Article 3 of CBD, States have the responsibility to ensure that the activities within their jurisdiction or control do not cause environmental damage beyond the limits of its national jurisdiction. Even though, the Sargassum present in the Sargasso Sea falls in the high seas, it constitutes to be a common interest of the international community.⁶⁹ Therefore, Revels act of

⁶⁴ M. J. Miller & R. Hanel, *supra* note 61; Emerson, Mecking, S. & J. Abell, *The Biological Pump in the Subtropical North Pacific Ocean: Nutrient Sources, Redfield Ratios and Recent Changes* 15 J. MARINE RES. 535–554 (2001).

⁶⁵ *Id.* at 13.

⁶⁶ *Id.* at 61; David Freestone, *Place Based Dynamic Management of Large-Scale Ocean Places: Papahānaumokuākea and the Sargasso Sea*, 33 STAN. ENVTL. L. J. 191 (2014).

⁶⁷ D. Jacoby & Gollock, *Anguilla Anguilla*, IUCN RED LIST OF THREATENED SPECIES (Nov. 15, 2018, 03:50 PM), <https://www.iucnredlist.org/species/60344/45833138>; G. THILLARD, 30 SPAWNING MIGRATION OF THE EUROPEAN EELS: REPRODUCTION INDEX, A USEFUL TOOL FOR CONSERVATION MANAGEMENT 5 (Springer ed. 2009).

⁶⁸ Rec. ¶ 15.

⁶⁹ M. J. Miller & R. Hanel, *supra* note 61, at 13.

harvesting Sargassum would damage the biodiversity of the Sargasso Sea and adversely impact the range states of the migratory species that use Sargasso Sea as their migratory route.⁷⁰

b. *Revels failed to sustainably use the biological resources of the Sargasso Sea.*

Each contracting party of the Convention has to adopt measures to avoid or minimize the adverse impacts on the biological diversity in relation to the use of its biological resources.⁷¹ Sargassum is an essential biological resource of the delicate ecosystem supported by the Sargasso Sea and commercial extraction of Sargassum would adversely affect the biodiversity of the Sargasso Sea.⁷² Hence, Revels action of harvesting of Sargassum does not fall under the category of sustainable use.

c. *Revels violated its obligation of In Situ Conservation.*

Article 8(1) of CBD read along with Article 7(c), require States to manage activities and monitor and control them in order to prevent significant harm to the biological diversity.⁷³ The protection of key marine habitats and prevention of alteration of such habitat has been agreed on by all parties including Revels.⁷⁴ Therefore, Revels by its actions is not only causing significant harm to the international community, but also altering the ecology of the Sargasso Sea.

⁷⁰ Freestone, *supra* note 66, at 151-152.

⁷¹ CBD art. 10(b).

⁷² D.d'A Laffoley, *supra* note 10, at 37.

⁷³ SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, HANDBOOK OF THE CONVENTION ON BIOLOGICAL DIVERSITY INCLUDING ITS CARTAGENA PROTOCOL ON BIOSAFETY (3d ed. 2005).

⁷⁴ Rec. ¶ 12; Clarifications, ¶ 7.

d. *Revels has failed to comply with the COP Decisions.*

It has been recognised at the 10th COP that Ecologically or Biologically Significant Areas (EBSAs) require enhanced conservation and management measures and parties should cooperate with each other to adopt appropriate measures for conservation and sustainable use in relation to EBSAs.⁷⁵ Instead of cooperating with Alliguna in relation to the sustainable use and conservation of EBSAs, Revels' action directly threaten the unique ecosystem of Sargasso Sea.⁷⁶

e. *Revels violated its obligations under UNCLOS.*

1. Revels violated its obligation to give due regard to the interests of Alliguna in the high seas.

In exercising its freedom in the high seas, States are required to give 'due regard',⁷⁷ to the interests of the other states in the high seas.⁷⁸ States are bound to refrain from the acts which might adversely affect the interests of other States in the high seas. Revels has failed to give due regards to Alliguna by launching the Sargassum harvesting project in the Sargasso Sea,⁷⁹ impairing the latter's interest in the high seas and continuing with the project despite Alliguna's objections.⁸⁰

⁷⁵ CBD, 9th Meeting of the Conference of the Parties [hereinafter COP], UNEP/CBD/COP/DEC/IX/20 (Bonn., May 19-30, 2008); CBD, 10th COP, UNEP/CBD/COP/DEC/X/29 (Nagoya, Oct. 18-29, 2010).

⁷⁶ Rec. ¶¶ 19, 21, 23 & 28.

⁷⁷ The South China Sea Arbitration (Phil. v. China), 55 ILM 805 (2016).

⁷⁸ UNCLOS art. 87(2).

⁷⁹ Rec. ¶ 13.

⁸⁰ Rec. ¶ 28.

2. Revels breached its obligation to protect and preserve the marine environment.

Under UNCLOS,⁸¹ State parties are required to undertake all possible measures necessary to prevent, reduce and control pollution of the marine environment from any source,⁸² including those necessary to protect and preserve rare or fragile ecosystems, as well as habitats of depleted, threatened or endangered species and other forms of marine life.⁸³

‘Pollution’ is introduction by man, directly or indirectly, of substances or energy into the marine environment, which results or is likely to result in deleterious effects such as harm to living resources and marine life.⁸⁴

Harvesting Sargassum constitutes to be a form of pollution. There are several possible deleterious effects of Sargassum harvest, such as removal of the delicate ecosystem on which the Eels rely,⁸⁵ thereby harming the species which is already critically endangered.⁸⁶

⁸¹ UNCLOS art. 192; UNCLOS Commentary, *supra* note 53, at 1278.

⁸² UNCLOS art. 194(1).

⁸³ UNCLOS art. 194(5).

⁸⁴ UNCLOS art. 1(4).

⁸⁵ *Id.*

⁸⁶ Rec. ¶ 3; D. Jacoby & Gollock, *supra* note 67.

3. Revels breached its obligation to cooperate with Alliguna for conservation of European Eels in the high seas.

The duty to cooperate,⁸⁷ is a natural corollary of the duty to conserve a shared natural resource and it arises from the duty to have due regard to the interests of other States.⁸⁸ The objective of such cooperation is the ‘conservation’ of living resources of the high seas.⁸⁹ Moreover, such conservation measures should take into account the effects on species dependent upon the harvested species,⁹⁰ in order to ensure that they are maintained or restored to levels at which their reproduction is not seriously threatened.⁹¹

However, Revels instead of cooperating with Alliguna, encouraged harvesting of Sargassum by providing subsidy to its nationals,⁹² seriously threatening the reproduction of European Eels.

⁸⁷ UNCLOS art. 118.

⁸⁸ Max Valverde Soto, *General Principles of International Environmental Law*, 3 ILSA J. INT'L & COMPARATIVE L. 193 (1996).

⁸⁹ UNCLOS Commentary, *supra* note 53, at 809.

⁹⁰ *Id.*, at 843.

⁹¹ UNCLOS art. 119(b).

⁹² Rec. ¶ 14.

f. *Revels violated its obligations under CMS.*

1. Revels has failed to protect European Eels and its habitat.

Under CMS it is required that state parties take measures to ensure conservation of migratory species,⁹³ and protect its habitats from disturbances.⁹⁴ European Eels are listed under Appendix II of CMS,⁹⁵ and Revels being a range state has the obligation to conclude agreements for their conservation.⁹⁶ Therefore, Revels by not enacting any domestic policy or legislation for the protection and conservation of European Eels,⁹⁷ has not acted in good faith to comply with the objective of the Convention.

2. Revels violated the decisions of the conference of parties.

At 11th COP, it was decided that there has to be a deployment to renewable energy sources in order to fight climate change,⁹⁸ but that should not cause any significant harm to the listed species of CMS or their habitats.⁹⁹ Although Revels has claimed that the act of harvesting Sargassum is

⁹³ Cyril De Klemm, *Biological Diversity Conservation and the Law Legal Mechanisms for Conserving Species and Ecosystems*, 29 ENV'T'L POL'Y & L. PAPER 1, 29 (1993).

⁹⁴ CMS art. V(5)(e).

⁹⁵ CMS Appendix II.

⁹⁶ Rec. ¶ 8.

⁹⁷ Clarifications, ¶ 10.

⁹⁸ CMS Resol. 11.27, UNEP/CMS/Resolution 11.27 (Quito, Nov. 4-9, 2014).

⁹⁹ *Id.*; CMS Resol. 12.21, UNEP/CMS/Resolution 12.21/Annex. (Manila, Oct. 2017).

for biofuels production i.e., a renewable energy source,¹⁰⁰ it has seriously resulted in the decline of the recruitment of Eels.¹⁰¹

Revels cannot evade its responsibility by claiming that the resolutions are not binding in nature.¹⁰²

Considering, Alliguna and Revels consented to these conventions and agreements on the very first year that they were opened for signature,¹⁰³ and have duly participated in all of the Conferences and Meetings of the Parties since then.¹⁰⁴ Revels never objected to any of the resolutions of the parties.¹⁰⁵ As resolutions set forth an authoritative interpretation of international agreements,¹⁰⁶ Revels cannot now impugn the resolutions of the Conference of the Parties.

3. The limiting language of the convention does not preclude the obligations owed by Revels.

Revels repudiated the concerns of Alliguna in reference to the destruction of the habitat of the European Eels,¹⁰⁷ by placing reliance on the limiting language of Article II & IV of CMS, which

¹⁰⁰ Rec. ¶ 13.

¹⁰¹ Rec. ¶ 20.

¹⁰² Rec. ¶ 21.

¹⁰³ Clarifications, ¶ 4.

¹⁰⁴ Clarifications, ¶ 5.

¹⁰⁵ Clarifications, ¶ 7.

¹⁰⁶ PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 109 (Cambridge Univ. Press, 3d ed., 2012).

¹⁰⁷ Rec. ¶ 21.

includes phrases “whenever possible and appropriate”¹⁰⁸ and “shall endeavour”.¹⁰⁹ However, such language cannot be interpreted in a way allowing the harvesting of Sargassum, owing to the general principle of *pacta sunt servanda* under international law. Revels has clearly acted in bad faith due to its direct impact on the population of European Eels.

g. Revels cannot invoke its obligations under the climate change conventions as a justification for breach of its treaty obligations.

Under Article 4 of UNFCCC, Revels has an obligation to protect and preserve the natural carbon sinks and its reservoirs.¹¹⁰ The same has been reaffirmed in Article 5 of the Paris Agreement.¹¹¹ Sargasso Sea plays a major role in the sequestration of the anthropogenically generated carbon due to the presence of Sargassum,¹¹² thus making it a global carbon sink requiring protection.¹¹³

¹⁰⁸ CMS art. 2.

¹⁰⁹ CMS art. 4.

¹¹⁰ UNFCCC, *supra* note, at art. 4(1)(d).

¹¹¹ Paris Agreement art. 5(1), 4(1)(d).

¹¹² D.d'A Laffoley et al., *Submission of Scientific Information to Describe Ecologically or Biologically Significant Marine Areas (Sargasso Sea)*, THE SARGASSO SEA ALLIANCE, (2011), <https://www.oceanfdn.org/sites/default/files/rwebsa-wcar-01-sargasso-sea-alliance-02-en.pdf>; M.W. Lomas et al., *Microbial Productivity of the Sargasso Sea and How it Compares to Elsewhere, and The Role of the Sargasso Sea in Carbon Sequestration—Better than Carbon Neutral?*, 6 SARGASSO SEA ALLIANCE SCIENCE REPORT SERIES 10 (2011), http://www.sargassoseacommission.org/storage/documents/No6_Microbial_HI.pdf.

¹¹³ Antonio G M La Vina & Alaya de Leon, *Conservation and Enhancing Sinks and Reservoirs of Greenhouse Gases including Forests*, in THE PARIS AGREEMENT ON CLIMATE CHANGE; ANALYSIS AND COMMENTARY 172 (Daniel Klein et al. eds. 2017).

- h. *Revels has failed to conserve the Sargasso Sea ecosystem under the Hamilton Declaration.*

The Hamilton Declaration aims to conserve the Sargasso Sea ecosystem for the benefit of the present and future generations.¹¹⁴ It also requires that State parties should collaborate with each other in pursuing conservation measures for the Sargasso Sea ecosystem through existing regional and international organisations.¹¹⁵ Revels' act of harvesting Sargassum is a clear violation of Hamilton Declaration,¹¹⁶ as it failed to take conservation measures while threatening an irreversible impact on the population of European Eels.¹¹⁷

C. REVELS VIOLATED CUSTOMARY INTERNATIONAL LAW.

- a. *Revels violated the precautionary principle.*

The Precautionary Principle is a well-recognised part of customary international law requiring states to anticipate, avoid, and mitigate threats to the environment.¹¹⁸ Further, it also forms the part

¹¹⁴ *Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea*, SARGASSO SEA COMMISSION, (2014),

http://www.sargassoseacommission.org/storage/documents/Hamilton_Declaration_on_Collaboration_for_the_Conservation_of_the_Sargasso_Sea.with_signatures.pdf [hereinafter Hamilton Declaration].

¹¹⁵ *Id.*

¹¹⁶ Hamilton Declaration pmb1.

¹¹⁷ 30 G. THILLART, SPAWNING MIGRATION OF THE EUROPEAN EELS: REPRODUCTION INDEX, A USEFUL TOOL FOR CONSERVATION MANAGEMENT 5 (Springer eds. 2009).

¹¹⁸ Rio Conference on Environment and Development prin. 15, U.N. DOC. A/CONF.151/5/Rev.1 (Aug. 12, 1992) [hereinafter Rio Declaration].

of CBD,¹¹⁹ and UNCLOS,¹²⁰ to which Revels is a State-party.¹²¹ Precautionary measures are required when an activity threatens human health or the environment, even if some cause and effect relationships are not established scientifically.¹²² This principle is applicable when there is a threat of environmental damage, the damage is of serious or irreversible character and there exists scientific uncertainty.

1. There is a threat of environmental damage which is serious and irreversible.

The Sargasso Sea is a unique and important ecosystem that plays an integral role in the life cycle of numerous species, many of which are threatened and endangered.¹²³ The act of harvesting Sargassum by Revels constitutes to be the removal of the part of this unique ecosystem on which the species rely while threatening the stability of the ocean's ecosystem.¹²⁴

¹¹⁹ CBD pmb1.

¹²⁰ UNCLOS annex I.

¹²¹ *Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management*, IUCN COUNCIL 1 (May 14, 2007), https://cmsdata.iucn.org/downloads/ln250507_ppguidelines.pdf.

¹²² Nicholas Ashford et al., *Wingspread Statement on the Precautionary Principle*, WHO 1 (1998), www.who.int/ifcs/documents/forums/forum5/wingspread.doc.

¹²³ Rec. ¶ 18.

¹²⁴ Rec. ¶ 20.

Taking into account that European Eels are already listed as critically endangered,¹²⁵ they are at a high risk of extinction and Revels continuous harvesting of Sargassum will wipe out the entire population of European Eels.

2. There is a lack of evidence regarding the biofuel project harming the European Eels.

Revels should cease the continuing biofuel project initiated by the SEA Corporation even when there exists no scientific certainty. Considering Revels, although capable of preventing adverse effects on the European Eels, did not take measures to prevent environmental damage. Revels therefore violated the Precautionary Principle by further encouraging the SEA Corporation and providing it subsidy for extraction of sargassum.

- b. *Revels breached its duty not to cause transboundary harm.*

Under international environmental law, the duty not to cause transboundary harm,¹²⁶ is a well-recognized principle.¹²⁷ It requires that the activities within the States' jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.¹²⁸

¹²⁵ Rec. ¶ 3; D. Jacoby & Gollock, *supra* note 67.

¹²⁶ Rio Declaration prin. 2.

¹²⁷ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 2919 (July 8).

¹²⁸ Rio Declaration prin. 2.

The rule has four elements.¹²⁹ First, there must be a physical relationship between the activity concerned and the damage caused. Second, there must be human causation. Third, the damage must meet a certain level of severity that calls for legal action. Lastly, there must be a transboundary movement of harmful effects.

Notably, European Eels are highly migratory in nature and Alliguna is one of the Range States for the species. The decline in the population of the species will affect the ecosystem of the ocean and inland waters of all the Range States. Revels violated this duty by harvesting Sargassum which will negatively impact the life-cycle of the European Eels, which is already critically endangered, thus affecting Alliguna and the areas beyond its national jurisdiction i.e. the high seas.

¹²⁹ XUE HANQIN, *TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW* 368 (2003).

PRAYER

CONCLUSION & PRAYER

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

- I. The ICJ has the jurisdiction to determine the matter and that the Republic of Revels is responsible for the conduct at issue; and
- II. The Republic of Revels violated international law by negatively impacting the European Eels through the Sargassum harvesting project in the Sargasso Sea.

RESPECTFULLY SUBMITTED,

AGENTS FOR THE APPLICANT