Team No. 1984

IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

THE CASE CONCERNING

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

THE FEDERAL STATES OF ALLIGUNA

APPLICANT

v.

THE REPUBLIC OF REVELS

RESPONDENT

MEMORIAL FOR THE RESPONDENT

THE 2018-2019 STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION

NOVEMBER 2018

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STATEMENT OF JURISDICTION

Pursuant to Article 79, paragraph 1, of the International Court of Justice Rules of Court (1978), the Republic of Revels ("Respondent") timely filed a preliminary objection to the Federal States of Alliguna's ("Applicant") application instituting proceedings, challenging this Court's jurisdiction over the subject matter of the dispute between Respondent and Applicant. *See* Preliminary Objection of the Republic of Revels, dated 5 May 2018; Application Instituting Proceedings, Dated 21 April 2018. Pursuant to the Statute of the International Court of Justice, art. 36(6), T.S. No. 993 (1945), this Court has jurisdiction to settle this matter of jurisdiction.

QUESTIONS PRESENTED

1. WHETHER THE INTERNATIONAL COURT OF JUSTICE HAS JURISDICTION TO DETERMINE THE MATTER AND WHETHER THE CONDUCT AT ISSUE IS ATTRIBUTABLE TO RESPONDENT.
2. WHETHER THE RESPONDENT VIOLATED INTERNATIONAL LAW WITH RESPECT TO THE HARVESTING OF SARGASSUM IN THE SARGASSO SEA.

STATEMENT OF FACTS

A. The Parties and Dispute

The Federal States of Alliguna and the Republic of Revels are neighboring states located near the Sargasso Sea.[1] Alliguna is a developed country with manufacturing and energy making up a large portion of its diversified economy.[2] By contrast, Revels is a developing nation whose economy is still largely based on fishing and agriculture.[3]

Revels sought renewable energy projects aimed at mitigating climate change.[4] To reduce greenhouse gas emissions, Revels provides subsidies to select non-governmental entities or persons to implement renewable energy projects.[5] Seaweed Energy Alternatives, Inc. ("SEA Corporation") is one such entity.[6] SEA Corporation specializes in renewable energy, particularly biofuels.[7] Prior to moving forward with the subject biofuel project, SEA Corporation conducted an Environmental Impact Assessment, which did not reveal any negative impacts on marine biodiversity.[8]

Thus, in July 2016, Sea Corporation began harvesting Sargassum from the Sargasso Sea to use for biofuel production.[9] To harvest Sargassum, SEA Corporation sent its vessel, the *Columbus*, sailing under the flag of Revels, to the high seas.[10] News media from both countries

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[1] R. at 4.
[2] *Id*.
[3] *Id*.
[4] R. at 5.
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] IEMCC Clarifications at 2.
[9] R. at 5.
[10] *Id*.

covered the project widely.[11] Since the renewable energy program proved to be successful, Revels issued a press release and report highlighting the initiative.[12]

On January 13, 2017, Alliguna forwarded a diplomatic note asking Revels to end the harvesting initiative because it could have negative effects on the European eel, whose population was already in serious decline.[13] On March 11, 2017, Revels responded to Alliguna by denying the assertion that it violated international law.[14] From April 2017 to September 2017, Alliguna and Revels continued to exchange diplomatic notes, claiming that multiple international agreements and international law principles were being violated and denying any violations, respectively.[15]

After September 2017, the countries attempted further unsuccessful negotiations and mediation.[16] Because of the impasse, in February 2018, Alliguna asked Revels to submit the matter to the International Court of Justice (ICJ), but Revels refused.[17] Alliguna nonetheless submitted this dispute to the ICJ on April 21, 2018, and Revels submitted its Preliminary Objections on May 5, 2018, accordingly.[18]

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[11] R. at 6.
[12] *Id*.
[13] R. at 6; *see also* R. at 4 ("Unfortunately, the species' recruitment, population, and escapement have exhibited pronounced declines over the past several decades.").
[14] R. at 7.
[15] R. at 8-10.
[16] R. at 10.
[17] *Id*.
[18] *Id*.

SUMMARY OF THE ARGUMENT

I. The ICJ does not have jurisdiction over this dispute because Respondent has not agreed to submit this dispute to the ICJ, and none of the relevant, controlling international agreements require Respondent to do so.

II. If the Court did establish jurisdiction, the actions of a private corporation on the high seas are not attributable to Respondent.

III. Even if this Court has jurisdiction over this dispute, Respondent did not violate international law by implementing its sargassum harvesting project. Rather, by acting aggressively and responsibly to combat climate change, Respondent fully complied with its international law obligations.

ARGUMENT

I. THE ICJ DOES NOT HAVE JURISDICTION OVER THIS DISPUTE.

Jurisdiction is a "question of law to be resolved in the light of the relevant facts," and its establishment is a matter for the Court itself.[19] To determine whether it has jurisdiction over a dispute, the Court must take into account all the facts and arguments advanced by the Parties, "whether the force of the arguments militating in favour of jurisdiction is preponderant, and to 'ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it.'"[20] In the instant case, the ICJ lacks jurisdiction over this dispute because: (1) Revels has not recognized the Court's jurisdiction as compulsory ipso facto; (2) the CBD, UNFCCC, and the Paris Agreement do not relate to this dispute; and (3) the CMS and UNCLOS do not confer jurisdiction upon the Court.

1. This Court Does Not Have Jurisdiction Because Revels Has Not Recognized The Court's Jurisdiction As Compulsory Ipso Facto.

The Statute of the ICJ permits Party States to recognize the Court's jurisdiction over legal disputes as "compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation."[21] Unless another controlling international agreement dictates otherwise, a Party State that has not recognized such compulsory jurisdiction must first affirmatively agree to submit to the Court's authority before the Court may adjudicate any related legal dispute.[22] Thus, the jurisdiction of the Court depends on the mutual consent of the Parties involved.[23]

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[19] *Fisheries Jurisdiction Case (Spain v. Canada)*, 1998 ICJ 1 (Dec. 4) (citing *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p.76, para. 16) (internal quotations omitted).
[20] *Id.* at 22 (quoting *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p.76, para. 16) (internal quotations omitted).
[21] Statute of the International Court of Justice, art. 36(2), 26 June 1945, T.S. 993.
[22] *See id.*
[23] *See id.*

In *Fisheries Jurisdiction Case (Spain v. Canada)*,[24] the Court ultimately sided with Canada, finding that the officers' actions fell within the ambit of Canada's reservation and were therefore excluded from the Court's jurisdiction.[25] In so holding, the Court reiterated that mutual consent by the Parties involved was a prerequisite to establishing jurisdiction.[26] Here, the Parties have not mutually consented to the Court's jurisdiction.[27] Without Revel's reciprocal acceptance of the Court's jurisdiction, Alliguna's recognition under Article 36, paragraph 2 of the Statute does not satisfy the requirement of mutual consent. Thus, the ICJ should therefore hold it does not have jurisdiction to adjudicate this dispute and allow the parties to reach a settlement via mutually agreeable means.

2. This Court Does Not Have Jurisdiction Under The CBD, The UNFCCC, Or The Paris Agreement Because They Do Not Relate to This Dispute.

To acquire jurisdiction under a treaty, a court must determine whether the parties' claims "reasonably relate" to the "legal standards of the treaty" at issue.[28] In making this determination, the court must focus on how the parties formulate the dispute by examining their final submissions, diplomatic exchanges, and other relevant evidence.[29]

a. The CBD does not relate to this dispute.

The Convention on Biological Diversity (CBD) is a multilateral treaty whose main goals are to conserve biological diversity, to sustainably use its components, and fairly and equitably share "the benefits arising out of the utilization of genetic resources."[30] The CBD does not concern renewable energy projects.[31] Moreover, this dispute concerns the purported negative

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[24] *Fisheries Jurisdiction Case (Spain v. Canada)*, 1998 ICJ 1 (Dec. 4).
[25] *Id.* at 38.
[26] *Id.* at 25 (citing *Phosphates in Morocco*, Judgment, 1938, P.C.I.J., Series A/B, No. 74, p. 23; *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, I.C.J. Reports 1998, p. 291, para. 25).
[27] R. at 4.
[28] *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan)*, 2000 Arbitral Tribunal 1, 38-39 (Aug. 4).
[29] *Id.* at 39.
[30] Convention on Biological Diversity, 6 June 1992, 1760 U.N.T.S. 79, Article 1 [hereinafter CBD].
[31] *See generally id.*

impacts that harvesting sargassum on the high seas has on the European eel.[32] While Alliguna may attempt to link the dispute to the use of marine life and thereby bring the dispute within the ambit of the CBD, Alliguna's argument lacks merit. There is no evidence that the SEA Corporation's recent biofuels initiative harms the European eel[33] and the act of harvesting sargassum also does not violate the CBD.[34] Thus, this dispute does not reasonably relate to the legal standards of the CBD and, therefore, the CBD does not apply.

b. The UNFCCC does not relate to this dispute.

The United Nations Framework Convention on Climate Change (UNFCCC) is an international environmental treaty whose main objective is to combat climate change.[35] Both Alliguna and Revels have only agreed to submit to this Court's jurisdiction for those disputes concerning the interpretation and application of the UNFCCC.[36] The dispute here, however, does not concern the interpretation and application of the UNFCCC as the subject matter of the dispute deals with putative harm done to the European eel.[37] In its provisions, the UNFCCC does not contemplate the protection of this endangered species, nor does it prohibit the harvesting of sargassum.[38] Therefore, Article 14 of the treaty, which governs the settlement of disputes under the Convention, cannot provide the ICJ with jurisdiction.

c. The Paris Agreement does not relate to this dispute.

The Paris Agreement is similarly concerned with climate change and aims to mitigate global average temperatures by regulating greenhouse gas emissions.[39] The Parties here have

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[32] R. at 6.
[33] R. at 7.
[34] *See generally* CBD.
[35] United Nations Framework Convention on Climate Change, 9 May 1992, 1771 U.N.T.S. 107, Article 2 [hereinafter UNFCCC].
[36] R. at 5.
[37] R. at 6.
[38] *See generally* UNFCCC.
[39] Paris COP Decision & Paris Agreement, arts. 4, 5, U.N. Doc. FCCC/CP/2015/L.9/REV.1 (12 Dec. 2015) [hereinafter Paris Agreement].

again only agreed to submit to the ICJ's jurisdiction for disputes concerning the interpretation and application of the Paris Agreement.[40] Because the conflict does not relate to the Paris Agreement or require the treaty's interpretation or application, Article 24 of the Paris Agreement cannot be said to provide the ICJ with jurisdiction to adjudicate this case.

3. Instead, The CMS And UNCLOS Are Lex Specialis And Govern This Dispute, And This Court Does Not Have Jurisdiction Pursuant To Either Of These Agreements.

Both the CMS and UNCLOS apply to the instant dispute, particularly in light of the principle of *lex specialis*. When two different treaties apply to the same dispute, *lex specialis* requires that the more specific agreement be given greater priority over the more general one.[41]

a. Because this issue involves a migratory species, the CMS controls and calls for either arbitration or the new CMS COP12 review mechanism to settle this dispute.

The Convention on the Conservation of Migratory Species of Wild Animals (CMS) is an international treaty aims to conserve wildlife and habitats on a global scale.[42] It recognizes the need for joint cooperation among Party States to protect the migratory species that pass through their jurisdictions.[43] Not only does the CMS lay out policies and guidelines to this end,[44] but the CMS also specifically lists the European eel on Appendix II, explicitly labeling the species as one that requires international cooperation.

Again, however, Alliguna's concerns are premised on alleged harm to the European eel.[45] In essence, the dispute amounts to whether Revels has violated that requirement of international cooperation with regard to the European eel. Thus, the CMS clearly relates to the subject dispute

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[40] R. at 5.
[41] Silvia Borelli, *The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship Between International Human Rights Law and the Laws of Armed Conflict*, 46 IUS Gentium 265, 266 (2015).
[42] Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 U.N.T.S. 333 [CMS].
[43] *Id*. at Preamble.
[44] *See generally id*.
[45] R. at 5.

and is *lex specialis*. Rather than submission to the ICJ, the CMS requires the parties to resolve the dispute via arbitration or the new review mechanism adopted at CMS COP12.

b. Because this issue involves actions taken on the high seas, UNCLOS controls and, pursuant to Revels' written declaration, requires ITLOS to settle this dispute.

The United Nations Convention on the Law of the Sea (UNCLOS) Article 87, guarantees freedom of the high seas for all states.[46] The SEA Corporation exercised this freedom by harvesting sargassum entirely on the high seas. Alliguna, however, alleges that this freedom under UNCLOS is subject to limitations. Consequently, this dispute concerns the interpretation and application of UNCLOS provisions, thereby making UNCLOS *lex specialis* and controlling.

Article 287 of UNCLOS allows Party States to choose the means for the settlement of disputes concerning the interpretation or application of this Convention.[47] In this case, Revels has not agreed to submit to the Court's jurisdiction under UNCLOS and has instead chosen the International Tribunal for the Law of the Sea (ITLOS).[48] Consequently, because this Court can only secure jurisdiction if Revels consents, Revels respectfully requests that the Court find itself to be without jurisdiction.

II. IF THE COURT DOES FIND THAT THEY HAVE JURISDICTION, THE ACTIONS OF A PRIVATELY OWNED VESSEL CAN NOT BE ATTRIBUTED TO REVELS FOR PURPOSES OF STATE RESPONSIBILITY.

1. Under the Articles on Responsibility of States for Internationally Wrongful Acts, for there to be an internationally wrongful act, the action or omission must be attributable to the State, which is not the case here.

Under Article 2 of the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARS), "There is an internationally wrongful act of a

[46] United Nations Convention on the Law of the Sea, 10 Dec. 1982, 1833 U.N.T.S. 107, at art. 87 [hereinafter UNCLOS].
[47] *Id*. at art. 287.
[48] R. at 5.

State when conduct consisting of an action or omission: (1) Is attributable to the State under international law; and (2) Constitutes a breach of an international obligation of the State."[49] With regard to section b of Article 2, Alliguna has not identified an actual breach or injury that has been committed or omitted by SEA Corporation or Revels.[50]

a. The SEA Corporation did not commit a wrongful act.

Article 12 provides that "there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."[51] SEA Corporation was under no obligation to refrain from harvesting sargassum on the high seas. Therefore, they did not breach an international obligation.

In *Corfu Channel*, the internationally wrongful act was clear and compensable due to the loss of life and damage to two naval vessels.[52] Full reparation for causing the injury was therefore required and would have been supported by Article 31 of ARS.[53] Since no obligation has been breached by SEA Corporation, they did not commit an internationally wrongful act.

i. SEA Corporations biofuels initiative has not violated principles of customary international law.

The precautionary principle provides that, "[w]here there are threats of serious or irreversible damage, lack of . . . scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[54] As the latest Intergovernmental Panel on Climate Change (IPCC) report highlighted, the impacts of climate change are by very

[49] I.L.C., Articles of Responsibility of States for Internationally Wrongful Acts, GA U.N. Doc. A/56/10, Art. 2 (2001).
[50] *Id*.
[51] *Id*. at art. 12.
[52] *See generally Corfu Channel (U.K. and N. Ir. v. Alb.)*, Judgment, 1949 I.C.J. Rep. 4 (Apr. 9).
[53] *See* Article of Responsibility of States for Internationally Wrongful Acts, *supra* note 49, at art. 31, ¶ 1.
[54] Rio Declaration on Environment and Development, UN Doc. A/CONF.151/126, Principle 15 (14 June 1992) [hereinafter Rio Declaration]; see also UNFCCC, art. 3 (using similar language).

definition serious and irreversible.[55] According to Hans-Otto Pörtner, Co-Chair of IPCC Working Group II, "Every extra bit of warming matters, especially since warming of 1.5ºC or higher increases the risk associated with long-lasting or irreversible changes, such as the loss of some ecosystems."[56]

Thus, by taking cost effective measures and investing in a renewable energy source that helps Revels move away from fossil fuels, SEA Corporation actions are *de facto* precautionary. Moreover, the SEA Corporation conducted an Environmental Impact Assessment (EIA) and found no evidence of potential harm.[57] Additionally, notification is an "essential part" of risk assessment,[58] hence the global media coverage[59] and issuance of a press release and report discussing the project.[60]

Principle 7 of the Rio Declaration acknowledges that states have common but differentiated responsibilities.[61] Moreover, the UNFCCC stressed that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions."[62]

Revels is therefore fulfilling their duty to cooperate by investing in a renewable source of energy whose technology has the potential to be exported and used by much of the developing world. By publishing the progress of the project for the global community, Revels is acting in

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[55] Press Release, Intergovernmental Panel on Climate Change (IPCC), Summary for Policymakers of IPCC Special Report on Global Warming of 1.5C Approved by Governments, IPCC Press Release 2018/24/PR (Oct. 8, 2018).
[56] *Id*.
[57] IEMCC Clarifications at 2.
[58] *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 1, 61 (Apr. 20).
[59] R. at 15.
[60] R. at 16.
[61] *See* Rio Declaration, *supra* note 54, at Principle 7.
[62] *See generally* UNFCCC.

accordance with Principle 9 of the Rio Convention, specifically the duty to cooperate by means of sharing innovative technologies.[63]

Furthermore, Revel's direct involvement in SEA Corporations biofuels initiative and release of progress reports to the public[64] are indicative of what the precautionary principle calls for because such actions exemplify precaution and embody the "obligation of watchfulness and anticipation."[65] Therefore, SEA Corporation and Revels have acted in accordance with customary international law by exercising their right to development "so as to equitably meet developmental and environmental needs of present and future generation."[66]

ii. SEA Corporation did not cause transboundary harm.

The ILC *Draft articles on Prevention of Transboundary Harm from Hazardous Activities* defined transboundary harm as "harm 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."[67] Comment 9 clarifies that it also applies to "activities conducted under the jurisdiction or control of a state, for example, on the high seas."[68]

For the Court to find that SEA Corporations biofuels initiative is attributable to Revels, they must establish that "significant or substantial" harm has occurred.[69] In *Trail Smelter*, the harm was directly linked to noxious fumes emitted from factories causing residents in the

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[63] *See* Rio Declaration, *supra* note 54, at Principle 9.
[64] R. at 16.
[65] *Gabčikovo-Nagymaros Project (Hung. v. Slov.)*, Judgment, 1997 I.C.J. Rep. 7, 7 (Sept. 25) (separate opinion of vice president Weeramantry).
[66] *See* Rio Declaration, *supra* note 54, at Principle 3.
[67] Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries 2001, art. 2(c).
[68] *Id*. at art. 2, Commentary 9.
[69] In defining environmental harm and risk, Professor Schacter proposes four conditions which must exist for environmental damage to fall within the definition of transboundary environmental harm. First, the harm must be a result of human activity. Second, the harm must result from a physical consequence of that human activity. Third, there must be transboundary effects. Finally, the harm must be *significant or substantial*. *See* O. SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 366-368 (M. Nijhoff, 1st ed. 1991) (citation omitted).

neighboring nation to experience increased risk of lung or skin diseases.[70] In addition, there must be proof of causation.[71] The Court in *Pulp Mills* held that parties asserting the existence of environmental harm must "establish the existence of such facts," and the "[a]pplicant should . . . submit the relevant evidence to substantiate its claims."[72] Thus, because Argentina did not carry its burden, the ICJ held in Uruguay's favor.[73]

Here, Alliguna has failed to identify any harm to their territory caused by SEA Corporation. Thus, because Revels fulfilled its duty to cooperate by notifying the entire international community of their efforts by releasing progress reports, and Alliguna cannot meet the burden of providing proof of damages, SEA Corporation did not violate its duty not to cause transboundary harm.

2. If the SEA Corporation did breach an international obligation under UNCLOS, the wrongful act cannot be attributed to Revels.

Revels recognizes the general obligation of states to ensure activities of a ship flying their flag respects the environment of other states and of areas beyond national control,[74] and the general obligation to protect and preserve the marine environment.[75] It is also aware this principle applies beyond pollution by also covering living resources and marine life,[76]

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[70] *See Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1905 (1941).
[71] *See, e.g.*, *Arg. v. Uru.*, 2010 I.C.J. 1 at 225 (Apr. 20) (emphasizing the importance of "clear evidence").
[72] *Id.* at ¶ 162.
[73] *Id.* at ¶ 276.
[74] *See, e.g.*, Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 226-67, 240-42, ¶ 29 (July 08).
[75] UNCLOS, Part XII; *see also id.* at Preamble, ¶4.; *id.* at art. 192.
[76] *Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan)*, Provisional Orders, Order of 27 August 1999, ITLOS Reports 1999, p. 280, 295, ¶ 70 ("the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment").

specifically in the context of fisheries.[77] However, these principles derive from decisions that focused on the impact of Illegal, Unreported, and Unregulated (IUU) fisheries.[78]

The marine resources were either designated for protection or under a quota.[79] Currently, there are no regulations in place for the harvesting of sargassum. Therefore, Revels has ensured that SEA Corporation does not "undermine the effectiveness of conservation and management measures taken in accordance with international law and adopted at the national, subregional, regional or global levels."[80] According to ITLOS, "the flag State is not liable if it has taken all necessary and appropriate measures to meet its "due diligence" obligations to ensure that vessels flying its flag" do not conduct illegal activity.[81]

Sargassum is a renewable resource unlike the minerals discussed in the *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*.[82] Since marine biomass has been identified as "an attractive renewable source for the production of biofuels"[83] and sargassum is not legally protected, Revels has complied with

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[77] *See, e.g.*, *South China Sea Arbitration (Phil. v. China)*, PCA Case No. 2013-19 (2016) [hereinafter *South China Sea Arbitration*] (finding China failed to control the environmental impact of the fishing activity of its vessels on the coral reef and vulnerable marine ecosystems).
[78] *See generally,* Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, April 2, 2015, ITLOS Reports 2015 [hereinafter Sub-Regional Fisheries Commission]; *South China Sea Arbitration*, *supra* note 77.
[79] *See* Sub-Regional Fisheries Commission, *supra* note 78.
[80] FAO Code of Conduct for Responsible Fisheries, FAO Doc. 95/20/Rev/1, ¶ 6.11 (Oct. 31, 1995).
[81] *See* Sub-Regional Fisheries Commission, *supra* note 78, at ¶ 148.
[82] Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p.10 [hereinafter Respect to Activities in the Area].
[83] *See* Phyllis Picklesimer, *Seaweed As Biofuel? Metabolic engineering makes it a viable option*, RENEWABLE ENERGY WORLD (Dec. 16, 2010), https://www.renewableenergyworld.com/articles/2010/12/seaweed-as-biofuel.html ("Marine biomass is an attractive renewable source for the production of biofuels for three reasons: 1. production yields of marine plant biomass per unit area are much higher than those of terrestrial biomass, 2. marine biomass can be depolymerized relatively easily compared to other biomass crops because it does not contain recalcitrant lignin and cellulose crystalline structures, 3. the rate of carbon dioxide fixation by marine biomass is much higher than by terrestrial biomass, making it an appealing option for sequestration and recycling of carbon dioxide.").

Article 153, paragraph 4 of UNCLOS by ""taking all measures necessary to ensure" compliance by the sponsored contractor."[84]

III. RESPONDENT'S INVESTMENT INTO BIOFUELS IS IN ACCORDANCE WITH ITS NDC SUBMITTED TO THE PARIS AGREEMENT AND ALL RELEVANT INTERNATIONAL AGREEMENTS.

1. Revels Meets Its Obligations Under The Paris Agreement By Expanding Its Use Of Renewable Energy To Meet Its NDC Commitments And Responsibly Combat Climate Change.

The Paris Agreement "aims to strengthen the global response to the threat of climate change" by acknowledging the "differentiated responsibilities and respective capabilities" of the signatories.[85] Each party must prepare, communicate, and maintain successive Nationally Determined Contributions (NDC) that it intends to achieve.[86] Each party's NDC reflects its progression and ambitions to mitigate global climate change.[87] Additionally, the Paris Agreement encourages parties to take action to implement and support policy approaches and positive incentives for activities relating to reducing emissions by aiming:

> (a) [t]o promote the mitigation of greenhouse gas emissions while fostering sustainable development;
> (b) *[t]o incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities authorized by a Party*;
> . . .
> (d) To deliver an overall mitigation in global emissions.[88]

In order to continue its commitments under the Paris Agreement, Revels subsidized the harvesting of Sargassum to reduce greenhouse gas emissions and expand the use of renewable energy in Revels. This initiative followed Article 4 of the Paris Agreement by incentivizing private entities to implement renewable energy projects. It is undisputed that the harvesting of

[84] *See* Respect to Activities in the Area, *supra* note 82, at ¶ 119.
[85] Paris Agreement, at art. 2.
[86] *Id*.
[87] *Id*. at art. 4, ¶3.
[88] *Id*. at art. 7.

Sargassum was initiated for the purpose of meeting its NDC commitments under the Paris Agreement.

Like all parties to the Paris Agreement, Revels recognizes the need for an effective and progressive response to the urgent threat of climate change.[89] It is undisputed that the primary purpose of biofuels is to reduce carbon emissions and restrain climate change.[90] Indeed, "[t]he potential for biofuels to contribute to climate mitigation is high . . . ."[91] The IPCC has indicated that "[m]odern biofuel technology can provide electricity, gases, and transportation fuels […] with *environmental and social benefits*[;]"[92] Mitigating climate change is precisely what Revel's intends to achieve which will in turn reduce the nation's carbon emissions in accordance with the Paris Agreement and preserve biodiversity.

2. Harvesting Sargassum is not a violation of the CMS.

a. The limiting language of Articles II and IV of the CMS indicate that Respondent has not violated the treaty, and Applicant has not sought to conclude any international agreement.

The CMS seeks to conserve migratory species whose conservation status would significantly benefit from international cooperation.[93] The CMS provides that parties "shall *endeavor* to conclude Agreements" for migratory species included in Appendix II.[94] When a

[89] *Id*. at art. 2, ¶1; *see also* Grant Wilson, *Murky Waters: Ambiguous International Law for Ocean Fertilization and Other Geoengineering*, 49 TEX. INT'L L. J. 507, 510 (2014) ("Climate change is perhaps the most significant environmental global catastrophic risk (GCR), meaning a risk of an event that has a significant impact on humanity at the global level.").
[90] *See* Daniel A. Farber, *Indirect Land Use Change, Uncertainty, and Biofuels Policy*, 2011 U. ILL. L. REV. 381, 382-83 (2011) ("Substitution of biofuels for gasoline and other petroleum-based fuels helps reduce climate change and dependence on foreign oil.").
[91] *Id*. at 385.
[92] *Land Use, Land-Use Change and Forestry*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, at ch. 4.5.1, http://www.ipcc.ch/ipccreports/sres/land_use/index.php?idp=205 (last visited Nov. 12, 2018).
[93] *See* CMS, at art. IV.
[94] *Id*. at art. II.

species could benefit from an agreement between parties, range state parties are encouraged to implement an agreement.[95]

First, Applicant never sought to implement an agreement with Respondent for the conservation of European eels. Applicant cannot claim that Respondent is in violation of the CMS when they took no action to comply with the treaty's recommended steps.[96] Thus, because no agreement was reached in accordance with the CMS, Respondent did not violate its terms.

Second, CMS's language is limiting. The treaty's language "relies more upon political persuasion than legal coercion. By providing for conferences and secretariats, conventions provide a framework for debate, compromise, and cooperation . . .."[97] Here, Applicant did not adhere to the convention's framework and failed to work with Respondent to protect the European eel. Without an international agreement that seeks to protect an Appendix II species, the articles cited by Applicant are not applicable.

b. CMS's resolutions are non-binding.

Applicant states that Revels violated Resolutions 11.27 and 12.21.[98] However, Resolution 11.6 defines Resolution as:

> Resolutions are generally intended to provide *long-standing guidance* with respect to the Convention. *Resolutions include decisions on how to interpret and implement the provisions of the Convention, establishing permanent committees, establishing long-term processes, and establishing the budget of the Secretariat*.[99]

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[95] *Id*. at art. IV.

[96] Article IV of the CMS provides that range state parties of migratory species listed in Appendix II, such as the European Eel, "shall endeavor to *conclude Agreements* where these should benefit the species . . . ." *See* CMS, *supra* note 42, at art. IV. These Agreements are to "restore the migratory species concerned to a favourable [sic] conservation status or to maintain it in such status." *Id*. at art. V. The concluded Agreements should include, without limitation, things such as: (1) the migratory species covered; (2) the species' range and migration route; (3) the national authority of each party to the Agreement; and (4) procedures for the settlement of disputes between the parties. *Id*.

[97] Ralph Osterwoldt, *Implementation and Enforcement Issues in the Protection of Migratory Species*, 29 NAT. RESOURCES J. 1017, 1048 (1989).

[98] R. at 8.

[99] Resolution 11.6 Adopted by the Conference of the Parties at its 12th Meeting, UNEP/CMS/Resolution 11.6 (Oct. 2017) (emphasis added).

Therefore, resolutions adopted by parties to the CMS only serve to guide parties' interpretation of the convention's provisions.

For example, Resolution 11.27 "[u]rges" parties to implement "voluntary" guidelines.[100] Even if this resolution was binding, Applicant itself is in clear violation of its terms. Resolution 11.27 "urges" parties that use hydro-power to "undertake measures to reduce or mitigate known serious impacts on the movements of migratory aquatic species."[101] Yet, Applicant continues to operate hydropower facilities that impact the European eel and it has taken no measures to reduce the impacts.[102]

Similarly, Resolution 12.21 utilizes the same non-binding language.[103] Respondent acknowledges that certain measures can and should be taken to facilitate species adaptation in response to climate change. Resolution 12.21's primary purpose is to "coordinate action to help migratory species adapt to climate change."[104] The Environmental Law Institute states that "[t]he consequences of climate change for wildlife species and habitats appear in a variety of forms."[105] A recent study "gives supportive evidence, that the effects of global warming will have enormous impacts on the European eel."[106] Therefore, Revels posits that its renewable energy initiative comports with Resolution 12.21 by mitigating the negative effects of climate change.

3. The Sargassum harvesting project has not harmed biodiversity in contravention of the Convention on Biological Diversity.

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[100] Resolution 11.27 Adopted by the Conference of the Parties at its 12th Meeting, UNEP/CMS/Resolution 11.27 (Oct. 2017).
[101] *Id*. at 4.
[102] *See id*. (stating that an example of a mitigation technique would be the "installation of measures such as fish passageways.").
[103] Resolution 12.21 Adopted by the Conference of the Parties at its 12th Meeting, UNEP/CMS/Resolution 12.21 (Oct. 2017).
[104] *Id*.
[105] *The Impact of Climate Change on Species and Their Habitats*, L. OF ENVT'L PROT. § 21:6.
[106] Vincent van Ginneken, *Is Global Warming the Cause for the Dwindling European Eel Population?*, ResearchGate (May 2017), https://www.researchgate.net/publication/321365333_Is_Global_Warming_The_Cause_For_The_Dwindling_European_Eel_Population.

The CBD is widely recognized as a framework agreement in that it (1) gives parties considerable freedom to determine how to implement its provisions; and (2) explicitly allows the COP to negotiate legally binding protocols.[107] However, Applicant argues that by harvesting Sargassum, Revels is exploiting biological diversity in an ecologically or biologically significant marine area (EBSA).[108] This argument is without merit. Revels does not dispute the importance of biological diversity in the Sargasso Sea; however, Applicant provides no evidence that the use of biotechnology is "likely" to result in adverse environmental impacts.[109] In fact, Revels argues that it is adhering to the CBD by taking into account human health and the lasting effects of climate change on biodiversity.[110]

Without providing evidence that biological diversity is at risk, Applicant cannot claim that Revels has failed to establish and manage an area where special measures need to be taken to conserve biological diversity.[111] A party to the CBD cannot be in contravention of the treaty's text unless adverse impacts on biological diversity are present, and subsequently, a party fails to take remedial measures. Here, that is not the case.

Additionally, Applicant mistakes the binding nature of CBD decisions.[112] "COP decisions indicate agreements among the 196 CBD Parties on the boundaries of a given problem, desirable steps towards solutions, and principles to *guide* collaboration. COP decisions have a status of

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[107] Deborah Scott, *Framing and Responding to Scientific Uncertainties: Biofuels and Synthetic Biology at the Convention on Biological Diversity*, 56 JURIMETRICS J. 245, 248 (2016).
[108] Indeed, Revels argues that despite the Sargasso Sea's designation as an EBSA, this has no impact on whether it has violated any terms set forth in the CBD. *See* Malcolm Clark et al., *Identifying Ecologically or Biologically Significant Areas (EBSA): A Systematic Method and its Appication to Seamounts in the South Pacific Ocean*, 91 OCEAN AND COASTAL MANAGEMENT 65 (April 2014), https://www.sciencedirect.com/science/article/pii/S0964569114000271 ("Although EBSAs do not necessarily imply that a management response is required, they were initially intended to provide the basis for a network of protected areas.").
[109] CBD, *supra* note 30, at art. 10(g).
[110] *Id*.
[111] *See id*. at art. 8(b) (listing what each Contracting Party "shall" do "as far as possible and as appropriate").
[112] *Id*.

soft-law—formal, but not legally binding."[113] Despite CBD decisions' soft-law classification, Revels maintains that if Applicant believes there is harm to biological diversity, it should follow Decision IX/20 and provide the scientific criteria in accordance with annex I.[114]

4. SEA Corporation's biofuel initiative conforms with the Hamilton Declaration.

Revels recognizes the importance of preserving the Sargasso Sea's ecosystem. Indeed, SEA Corporation, in accordance with paragraph 10 of the Hamilton Declaration, conducted an environmental impact assessment.[115] Because the declaration is a non-binding political statement, it established the Sargasso Sea Commission, a stewardship body intended to encourage and facilitate future efforts to protect the sea's ecosystem from human impacts such as shipping, overfishing, and marine pollution.[116] Yet, the commission has not developed a proposal indicating the harvesting of Sargassum has adverse effects on threatened or endangered species.[117]

Furthermore, the abundance of Sargassum evidence why the Sargasso Sea Commission has not determined that the harvesting of Sargassum has adverse effects on the ecosystem. One detrimental effect from the profusion of Sargassum is the havoc it wreaks on local fauna, choking coral reefs and destroying habitats for birds, sea turtles, and fish.[118] This increase is

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[113] Deborah Scott, *supra* note 107, at 248.
[114] Decisions IX/20 Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Ninth Meeting, U.N. Doc. UNEP/CBD/COP/DEC/IX/20 (Oct. 9, 2008); *see also* 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, ¶¶ 13(a), 30, 34, 36, 38, 40, 43, 47 (Oct. 29, 2010) (reaffirming the importance of providing scientific criteria in order to provide and/or develop appropriate protection measures).
[115] Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea (11 March 2014), at ¶10 [hereinafter Hamilton Declaration].
[116] *International Environmental and Resources Law*, 2014 ABA Env't Energy & Resources L.: Year in Rev. 341, 346 (2015).
[117] *See* Hamilton Declaration, *supra* note 115, at ¶8 (providing a mechanism for the commission to provide proposals, using the best available science, so that signatories may submit to, or support at, regional or international organizations).
[118] Jeremy Berke, *A Dramatic Seaweed Invasion has Hit Coastlines Across Florida and the Caribbean, Killing Wildlife—Here's What it Looks Like on the Ground*, BUSINESS INSIDER (Sept. 4, 2018), https://www.businessinsider.com/sargassum-seaweed-invasion-killing-wildlife-2018-9.

Sargassum in the Atlantic Ocean Revel's repurposing efforts to help reduce climate change and other ecological and economic problems.[119]

5. Applicant's operation of hydropower facilities impacts the European eel.

The "clean hands" doctrine renders Applicant's argument that harvesting Sargassum harms the European eel insufficient because Applicant itself operates many hydropower facilities that negatively affect the species.[120] In an international law context, the "'clean hands' doctrine has been defined as 'an important principle of international law that ha[s] to be taken into account whenever there [i]s evidence that an applicant state ha[s] not acted in good faith and that it ha[s] come to the court with unclean hands.'"[121]

In *Diversion of Water from the River Meuse*, the Permanent Court of International Justice stated: "[i]t would seem to be an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party."[122] There, "Judge Hudson denied the relief sought by the Netherlands on the basis that it was itself guilty of the same breaches which were alleged against Belgium."[123]

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[119] Berke, *supra* note 118 ("Some experts say the influx of Sargassum could be fueled by a combination of increased nitrogen pollution from agricultural runoff and rising ocean temperatures.") (citation omitted).
[120] R. at 7.
[121] Patrick Dumberry & Gabrielle Dumas-Aubin, *The Doctrine of "Clean Hands" and the Inadmissibility of Claims by Investors Breaching International Human Rights Law*, RESEARCHGATE, at 1, https://www.researchgate.net/publication/327318458_The_Doctrine_of_'Clean_Hands'_and_the_Inadmissibility_of_Claims_by_Investors_Breaching_International_Human_Rights_Law_in_Ursula_Kriebaum_ed_Transnational_Dispute_Management_Special_Issue_Aligning_Huma (citing Report of the International Law Commission, 57th Session, UN Doc A/60/10, ¶ 236).
[122] *Diversion of Water from Meuse (Neth. v. Belg.)*, Judgment, 1937 P.C.I.J. (ser. A/B) No. 70, at 4 (June 28) [hereinafter *Meuse*]; *see also Tehran Hostages (U.S. v. Iran)*, 1980 I.C.J. Rep. 3, at 3 (dissenting opinion by Morozov, J.) (stating that due to the military invasion of Iran and other actions, the "United States of America, according to *commonly recognized principles of international law*, has now deprived itself of any right to refer to the treaty of 1955 in its relations with the Islamic Republic of Iran").
[123] Justice Margaret White, *Equity – A General Principle of Law Recognized By Civilised Nations?*, 4 QUEENSLAND U. TECH. & JUST. J. 103, 113 (2004-2005).

Like the plaintiff in *Meuse*, Applicant has a reciprocal obligation to protect the European eel and not harm migratory species or biological diversity. Nothing in the record indicates that Applicant has sought to mitigate the facilities' damage to the European eels. This is a stark contrast to Revels who conducted an EIA to gather valuable data about any harm that might come to marine biodiversity.[124] Therefore, because Applicant is engaged in the same conduct that it alleges against Revels—its hands are unclean—and the Court should dismiss its claim.

CONCLUSION AND PRAYER FOR RELIEF

Respondent, the Republic of Revels, respectfully requests the Court to adjudge and declare that:

1. This Court does not have jurisdiction over this dispute; rather, principles of international law require that the parties settle their disputes via another international tribunal, arbitration, or mutually agreeable terms.

2. Revels did not violate international law when it carefully implemented its subsidy program aimed at expanding the use of renewable energy in Revels.

RESPECTFULLY SUBMITTED,

AGENTS OF RESPONDENT

[124] IEMCC Clarifications at 2.