

TEAM 1998

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



**THE CASE CONCERNING
QUESTIONS RELATING TO ATTRIBUTION OF INTERNATIONAL
RESPONSIBILITY AND MARINE BIODIVERSITY**

**THE FEDERAL STATES OF ALLIGUNA
*APPLICANT***
v.
**THE REPUBLIC OF REVELS
*RESPONDENT***

MEMORIAL FOR THE RESPONDENT

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

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QUESTIONS PRESENTED

1. Does the ICJ have jurisdiction over this dispute?
2. Is the act of harvesting Sargassum by SEA attributable to Revels, and if so, did this act breach Revels' international obligations?

STATEMENT OF JURISDICTION

Pursuant to Article 79, paragraph 1 of the International Court of Justice Rules of Court (1978), the Republic of Revels (“Respondent”) has filed a timely preliminary objection as to this Honourable Court’s jurisdiction over the subject matter of the dispute between the Respondent and the Federal States of Alliguna (“Applicant”). See Preliminary Objections, Dated 5 May 2018. In accordance with Article 36(6) of the Statute of the International Court of Justice, this Court has jurisdiction to settle the matter of jurisdiction.

If this Court determines that it does have jurisdiction to decide the subject matter of this dispute, this Court would have jurisdiction over this matter pursuant to Article 40(1) of the Statute of the International Court of Justice since the Applicant has submitted an application instituting proceedings. See Application Instituting Proceedings, Dated 21 April 2018.

The Respondent and Applicant have agreed that the questions of jurisdiction and merits in this matter are to be heard, determined and considered simultaneously. In accordance with Article 79, paragraph 10, of the International Court of Justice Rules of Court, the Court gave effect to the agreement. The Registrar of the Court notified the parties on 6 July 2018 that the case had been entered as 2018 General List No. 237.

STATEMENT OF FACTS

The Republic of Revels (“Revels”) is a developing country, with its economy dependent on fishing and agriculture. The Federal States of Alliguna (“Alliguna”) is a neighbouring coastal state with a developed and thriving economy dependent on manufacturing and energy, namely hydroelectric power from their dams.

Background concerning the *Anguilla anguilla* (“the European Eel”) and the Sargasso Sea

The European Eel larvae drift with transatlantic currents across the Atlantic Ocean¹. They grow into glass eels when they reach continental shelf waters, and travel to inland waters and grow². The European Eels faces a 90% population decline since the 1980s³. The European Eel is endangered by environmental conditions such as rising water temperatures⁴, and human activities such as, inter alia, land reclamation⁵, and dam-building⁶, which Alliguna participates in⁷.

Events leading up to the dispute

Revels has actively participated in conversations on sustainable development, and in fulfilling its NDC Commitments, set up a subsidy scheme for projects that help contribute renewable energy.

In July 2016, Seaweed Energy Alternatives Inc (“SEA”), a privately owned company in Revels, began harvesting Sargassum from the Sargasso Sea for biofuel production. This promising project received subsidies from Revel under the scheme. An Environment Impact Assessment was conducted on the impacts on marine biodiversity, including the European Eel, which came out to be inconclusive⁸. The SEA Corporation used its vessel, the Columbus,

¹ Lecomte-Finiger, R. (1992) Growth history and age at recruitment of European glass eels (*Anguilla anguilla*) as revealed by otolith microstructure *Marine Biology* Volume 114, Issue 2, pp 205–210

² Lecomte-Finiger, R. (1992) Growth history and age at recruitment of European glass eels (*Anguilla anguilla*) as revealed by otolith microstructure *Marine Biology* Volume 114, Issue 2, pp 205–210

³ W. Dekker, (2003). Did the lack of spawners cause the decline of the European eel, *Anguilla anguilla*? *Fisheries Management and Ecology* 10(6), 365-376.

⁴ Friedland, K. D., Miller, M. J., and Knights, B. 2007. Oceanic changes in the Sargasso Sea and declines in recruitment of the European eel. – *ICES Journal of Marine Science*, 64: 519–530.

⁵ Conserving the critically endangered European eel, *Science for Environment Policy*, 2 July 2015

⁶ <https://www.theguardian.com/environment/2009/may/01/eel-fishing-europe-environment>

⁷ IEMCC Record at [2]

⁸ A17 of IEMCC Clarifications

to harvest Sargassum in the Sargasso Sea on the high seas. The Columbus sailed under the flag of Revels.

This initiative was covered widely by Revels and Alliguna. At the end of 2016, the Government of Revels issued a press release and a report discussing the progress and success of the country's renewable energy program, highlighting the SEA Corporation's ongoing Sargassum initiative and other projects that had received subsidies through the program.

Only after being pressed by the Friends of the Eels on this project, on 13 January 2017, Alliguna forwarded a diplomatic note to Revels expressing concern that harvesting large amounts of Sargassum from the Sargasso Sea would adversely affect the European eel. Revels understood Alliguna's concern, assuring Alliguna on 11 March 2017 that such concerns were unwarranted as Revels was unaware of any demonstrable negative impact from the project on the Sargosso Sea or the European eel.

Since then, Alliguna has alleged that harvesting Sargassum from the Sargasso Sea has breached international obligations⁹. It is claimed that this will remove part of the delicate ecosystem that the European eel spawns in¹⁰. As the European eels are a migratory species, Alliguna alleges it will be adversely affected if the species continues to decline.

Despite these allegations, Alliguna has admitted in the diplomatic note dated 9 April 2017¹¹ that it has yet to obtain and present direct evidence that the biofuels project has harmed the European eel.

⁹ IEMCC Record at [20] and [22]

¹⁰ IEMCC Record at [20]

¹¹ IEMCC Record at [20]

In February 2018, Alliguna asked Revels to agree to submit the matter to the ICJ but Revels refused. However, on 21 April 2018, Alliguna nevertheless submitted an Application to the ICJ instituting proceedings against Revels.

Overpopulation of Sargassum

Sargassum, a food source for the European eel and as a part of the oceanic ecosystem, is not only not endangered, but there is a significant threat of it posing a danger to many coastal communities¹² due to its overabundance. When washed up on neighbouring shores, this clogs bay areas and affects fishing. The rotting seaweed also entraps nesting turtles and other wildlife¹³.

Use of Sargassum for biofuels

The harvesting of sargassum as biofuel has shown to be an effective and viable source of alternative energy¹⁴ because it is a sustainable and renewable energy source which is inexpensive to produce and has a fast growth rate¹⁵.

SUMMARY OF THE ARGUMENT

1. The ICJ does not have jurisdiction over this dispute because Revels has not accepted the ICJ's compulsory jurisdiction. None of the international agreements governing this dispute require Revels to submit this dispute to the ICJ. This Court should hold that it does not have jurisdiction to adjudicate this dispute, and allow the parties to settle their dispute via mutually agreeable means.

¹² <http://jupiter.guardian.co.tt/news/2015-11-24/sargassum-still-%E2%80%98grave-problem%E2%80%99>

¹³ Wynne S.P., Observational Evidence of Regional Eutrophication in the Caribbean Sea and Potential Impacts on Coral Reef Ecosystems and their Management in Anguilla, BWI, Anguilla Fisheries and Marine Resources Research Bulletin No.08 (2017)

¹⁴ <https://www.theguardian.com/environment/2013/jul/01/seaweed-biofuel-alternative-energy-kelp-scotland>

¹⁵ Algae Oil: A Sustainable Renewable Fuel of Future (2014) Monford Paul Abisek, Jay Patel, Anand Prem Rajan p.3

2. Even if this Court had jurisdiction over the dispute, Revels should not be responsible because harvesting of Sargassum was conducted by SEA, a private entity, which should not be attributed. Even if this act was attributed to Revels, it facilitates the mitigation of climate change. There is no significant causal link between the harvesting of Sargassum and the decline in the European eel population. Revels has fully complied with its international law obligations.

ARGUMENTS

I. THIS COURT DOES NOT HAVE JURISDICTION TO HEAR THIS DISPUTE **Characterisation of the subject matter of the dispute**

This dispute relates to the potential effect on the European Eel, a migratory species, from the harvesting of some amounts of Sargassum in the High Seas (Sargasso Sea) by a private company, SEA Corporation.

A. This Court does not have jurisdiction over this dispute as Revels has not accepted the compulsory jurisdiction of the ICJ

This Court should uphold the Respondent's complete non-acceptance of this Court's compulsory jurisdiction and the Applicant's acceptance of this Court's jurisdiction only on the condition of reciprocity to find that this Court has no jurisdiction.

The ICJ's compulsory jurisdiction only arises within the limits within which it has been accepted¹⁶ and applies only to the extent to which the parties' declarations of compulsory jurisdiction coincide in conferring it¹⁷.

¹⁶ Fisheries Jurisdiction (Spain v. Canada), Judgment, 1998 I.C.J 45, 48 (Dec 4)

¹⁷ Certain Norwegian Loans (France v. Norway), Judgment, 1957 I.C.J 175, 23 (Jul 6)

In *Fisheries Jurisdiction (Spain v. Canada)*¹⁸ (“*Fisheries Jurisdiction*”), this Court noted that its jurisdiction only exists within the limits within which it has been accepted. In this case, Canada had made a declaration of acceptance of this Court’s compulsory jurisdiction, but with a reservation to exclude the Court’s jurisdiction relating to fishing vessels in the NAFO Regulatory Area. This court upheld the validity of the reservation and found it had no jurisdiction over the dispute¹⁹.

Similarly, this Court should uphold the validity of the Respondent’s non-acceptance of this Court’s compulsory jurisdiction and the Applicant’s qualified acceptance of this Court’s jurisdiction on the condition of reciprocity. As the Respondent has not agreed to this Court’s compulsory ipso facto jurisdiction²⁰ pursuant to Article 36(2) and (3) of the Statute of the International Court of Justice²¹, there is a divergence in the scope and substance of the commitments entered into by both parties. Since this Court’s jurisdiction applies only to the extent to which the parties’ Declarations coincide in conferring it, this Court’s jurisdiction does not extend to the present dispute.

Accordingly, as this Court only has jurisdiction within the limits which it has been accepted, this Court should find that it has no jurisdiction over this dispute.

¹⁸ *Supra* note 16

¹⁹ *Ibid* at [87]

²⁰ Record, p4

²¹ Statute of the International Court of Justice, 26 June 1945, T.S. 993

B. This Court does not have jurisdiction over this dispute pursuant to the CMS

Pursuant to Article XIII of the Convention of Migratory Species of Wild Animals, any disputes with respect to the interpretation or application of the CMS provisions shall be subject to negotiation²². If this dispute cannot be so resolved, the Parties may submit the dispute to arbitration. Alternatively, the new review mechanism adopted at CMS COP12²³ can be used to resolve disputes under the CMS.

Thus, this Court does not have jurisdiction over this dispute.

1. The present dispute concerns the CMS

The claims made either reasonably relate to, or are capable of being evaluated in relation to, the legal standards²⁴ of the Convention on the Conservation of Migratory Species (“CMS”).

The present dispute relates to the potential effect on the European eel due to the harvesting of some amounts of Sargassum in the High Seas (Sargasso Sea) by a private company, SEA Corporation. The CMS seeks to conserve migratory species²⁵ and the European Eel is listed in Appendix II of the CMS. Thus, any dispute concerning the alleged effects and hence conservation of the European Eel would reasonably relate to, or is capable of being evaluated in relation to the legal standards of the CMS.

²² Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 U.N.T.S 333 art XIII

²³ Conference of the Parties to the Convention on the Conservation of Migratory Species of Wild Animals, Resolution 12.9, *Establishment of a Review Mechanism and a National Legislation Programme*, U.N. DOC. UNEP/CMS/Resolution 12.9 (Oct. 2017)

²⁴ *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan)*, 2000 Arbitral Tribunal 1, 48 (Aug. 4)

²⁵ *Supra* note 22 at art. III

As such, it is submitted that the present dispute concerns the CMS. As explained above, this Court has no jurisdiction over the present dispute.

2. The CMS should govern instead of the CBD pursuant to the principle of *lex specialis*

If this Court decides that both the Convention on Biological Diversity (“CBD”) and CMS apply, it is not true that this court has jurisdiction conferred under Article 27(3)(b) of the CBD²⁶. This is because here, the CMS is the *lex specialis*. Therefore, the CMS dispute resolution provisions in Article XIII²⁷ on arbitration should be given priority over Article 27(3)(b) of the CBD.

This was set out in *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan)* (“*Southern Bluefin*”) where the court held that the *lex specialis* doctrine applies to a treaty’s dispute settlement provisions²⁸. A special rule should be given priority over the general rule²⁹.

In the case of *Gabcikovo-Nagymaros*³⁰, the ICJ addressed the relationship between different treaties. The ICJ held that the relationship between the parties was governed above all by the applicable rules of the 1977 Treaty as a *lex specialis*³¹ as it was the most specific instrument. Similarly, in *Mavrommatis Concessions*³², the Permanent Court of International

²⁶ Convention on Biological Diversity, 6 June 1992, 1760 U.N.T.S. 79, art 27(3)(b)

²⁷ See CMS, *supra* note 22 at art. XIII

²⁸ *supra* note 24 at [3]

²⁹ Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 *Nordic Journal of International Law* 27 (2005)

³⁰ *Gabcikovo-Nagymaros Project case (Hungary v. Slovakia)*, 25 September 1997, ICJ, *ICJ Reports 1997* at [132]

³¹ *Ibid*

³² *Mavrommatis Palestine Concessions case (Greece v The Great Britain)*, 30 August 1924 CIJ, *PCIJ Reports 1924* p30

Justice found that the Protocol that deals “specifically and in explicit terms” with the concessions on the facts was *lex specialis* as opposed to Article II of the Mandate which deals with them “only implicitly”.

On the facts, CMS deals specifically and in explicit terms regarding the conservation of the European Eel. The CBD, in contrast, speaks generally on how best to make use of the Earth’s living organisms sustainably to conserve biodiversity³³ and makes no specific reference to protection of animal species, much less the European Eel which is the subject of the present dispute.

In the CBD COP Decision VI/20 (2002), the CBD recognised the CMS as “the lead partner in conserving and sustainably using migratory species”³⁴. It also recognised that migratory species is a “unique globally important component of biological diversity”³⁵. This is significant as it shows how migratory species are a specific component of the broader framework of biological diversity. Accordingly, the CMS applies regarding issues relating to conservation of migratory species listed in the CMS.

Accordingly, the CMS deals specifically and in explicit terms with the present dispute and should apply according to *lex specialis*. As explained above, this Court lacks jurisdiction pursuant to the CMS.

3. The CMS’ dispute settlement mechanism should apply

It is submitted that the CMS’ dispute settlement mechanism should apply.

³³ See CBD, *supra* note 26 at art. 1

³⁴ Decision VI/20 Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Sixth Meeting, U.N. DOC. UNEP/CBD/COP/DEC/6/20 (19 April 2002)

³⁵ *Ibid*

As stated in *Southern Bluefin*, where a dispute implicates provisions under a broader “framework” treaty and an implementing treaty, it would deprive of substantial effect the dispute settlement provisions of those implementing agreements which prescribe dispute resolution by means of the parties’ choice if the court were to hold that such disputes must fall under the broader “framework” treaty³⁶.

On the facts, while the CMS was entered into before the CBD, it has transpired that the CMS is a component of the larger framework of biological diversity under the CBD and is viewed as the leading framework for issues relating to migratory species³⁷. It can thus be viewed as an implementing treaty under the CBD framework used to resolve issues specifically relating to migratory species. Accordingly, effect should be given to the dispute settlement provisions of the CMS over that of the CBD lest the CMS’ dispute settlement provisions are deprived of substantial effect.

C. This Court does not have jurisdiction pursuant to UNCLOS

Pursuant to Article 287(5) of the United Nations Convention on the Law of the Sea³⁸ (“UNCLOS”), when parties to a dispute have not accepted the same procedure for the settlement of a dispute under UNCLOS, it may only be submitted to arbitration. Therefore, this court does not have jurisdiction over this dispute pursuant to UNCLOS’ dispute resolution mechanism.

1. The present dispute relates to UNCLOS

Alliguna’s claim that SEA Corporation’s harvesting of Sargassum harms the European eel is reasonably related to, or is capable of being evaluated in relation to UNCLOS³⁹.

³⁶ *Supra* note 24 at [63]

³⁷ *Supra* note 34

³⁸ United Nations Convention on the Law of the Sea, 10 Dec. 1982, 1833 U.N.T.S. 397

³⁹ *Supra* note 24 at [48]

Specifically, it is related to Article 117 of UNCLOS, which requires States to conserve the living resources of the high seas, and Article 192 imposes a general obligation upon states to protect and preserve the marine environment. Alliguna claims the species may decline⁴⁰ and this is reasonably related to the preceding articles.

Furthermore, Alliguna believes that UNCLOS applies to this dispute. In its diplomatic note to Revels on 7 July 2017, Alliguna alleged that Revels violated, *inter alia*, Articles 117, 118, 192 and 300 of UNCLOS⁴¹.

2. The jurisdiction of this Court is excluded as the compulsory jurisdiction of UNCLOS applies

The compulsory jurisdiction of UNCLOS applies as the requirements in Article 281 and Article 287(5) of UNCLOS are fulfilled.

The pre-conditions under Article 281 of UNCLOS necessary for the compulsory jurisdiction of UNCLOS pursuant to Article 287(5) are fulfilled.

Under this compulsory jurisdiction, parties who have not agreed to a dispute settlement procedure can only submit the dispute to arbitration.

On the facts, the parties have not agreed to the same means of dispute settlement. The Applicant has chosen the ICJ for the settlement of UNCLOS disputes whereas the Respondent has chosen the ITLOS. No settlement has been reached as a result. Therefore, this dispute should be submitted to arbitration in accordance with Annex VII of UNCLOS. Accordingly, this court does not have jurisdiction over the present dispute.

⁴⁰ Record, p8

⁴¹ Record, p9

D. This Court does not have jurisdiction under the UNFCCC or the Paris Agreement because neither relates to this dispute

The ICJ has no jurisdiction under Article 14 of the UNFCCC⁴² or Article 24 of the Paris Agreement⁴³ since the present dispute does not reasonably relate⁴⁴ to the legal standards of the UNFCCC or the Paris Agreement.

The dispute involves potential effects on the European Eel arising from the harvesting of Sargassum. In contrast, both the UNFCCC and the Paris Agreement obligations relate to combating climate change and make no mention of protecting the welfare of marine species. Specifically, the UNFCCC seeks to stabilise greenhouse gas concentrations in the atmosphere⁴⁵ while the Paris Agreement seeks to limit global temperature rises in this century.

Although the Respondent provides subsidies to harvest Sargassum to meet its NDC commitments under the Paris Agreement, this is only incidental to the dispute. The dispute does not centre on the Respondents' breach of any obligation under the UNFCCC or the Paris Agreement.

Furthermore, the Applicant failed to state that the Respondent contravened either agreement although it alleged contraventions of specific articles of other agreements⁴⁶ in its application instituting proceedings. Accordingly, the present dispute does not reasonably relate to the UNFCCC and or the Paris Agreement.

⁴² United Nations Framework Convention on Climate Change, 9 May 1992, 1771 U.N.T.S. 107, Article 1

⁴³ Paris COP Decision & Paris Agreement, U.N. Doc. FCCC/CP/2015/L.9/REV.1 (12 Dec. 2015), Article 24

⁴⁴ *Supra* note 16

⁴⁵ *Supra* note 42

⁴⁶ Record, p11

Therefore, this court lacks jurisdiction over this dispute under the UNFCCC and the Paris Agreement.

II. REVELS' PROVISION OF SUPPORT TO CREATE RENEWABLE ENERGY COMPLIED WITH INTERNATIONAL LAW

A. Actions of SEA should not be attributed to Revels

1. Receiving subsidies under a government scheme is not equivalent to exercising government authority

i. SEA did not exercise any governmental authority

As a general principle, the conduct of private persons or entities is not attributable to the State under international law.⁴⁷

While “every internationally wrongful act of a State entails the international responsibility of that State”⁴⁸, this responsibility only arises when the act is attributable to that State, and the act constitutes a breach of the State’s international obligation⁴⁹. Further, an act must be “empowered by the law of that State to exercise elements of the governmental authority”, in order to be considered as attributable⁵⁰.

The only policy that has supported the harvesting of Sargassum is a grant given towards renewable energy projects, which is too remote to be considered as an exercise of governmental authority.

⁴⁷ *Report of the International Law Commission on the work of its fifty-third session*, UNGAOR, 53rd Sess, Supp No 10, UN Doc A/56/10 (2001) 38.

⁴⁸ Responsibility of States for Internationally Wrongful Acts (“ASR”), Art 1

⁴⁹ GA Res 56/83, UNGAOR, 56th Sess, UN Doc A/RES/56/83 (28 January 2002) Art. 2

⁵⁰ *ibid*, Art. 5

ii. SEA Corporation was not under control of Revels Government

SEA does not fall under Article 8 of the ASR, which provides that the person is “acting on the instructions of, or under the direction of control of the State”. Although SEA received a government subsidy for their work, it would be overly onerous to expect a State to bear responsibility for all the grants and subsidies that it provides, and this would deter States from engaging with the private sector to promote government initiatives. This goes against the idea of cooperation between the state and the private sector promoted by Article 10(e) of the CBD.

Article 137(1) of UNCLOS states that “No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, *nor shall any State or natural or juridical person appropriate any part thereof*” [emphasis added]. This suggests that with regards to UNCLOS, a juridical person such as SEA Corporation is treated as a separate and independent entity from states such as Revels. Therefore, it is submitted that UNCLOS does not intend to attribute the actions of parties to a State unless they are carrying out a function of the government pursuant to the ASR.

B. Even if the act of harvesting Sargassum to produce biofuels can be attributed to Revels, it does not breach any international obligations

1. Harvesting Sargassum positively contributes towards mitigating climate change by fulfilling Revel’s NDC Commitments under the UNFCCC.

Climate change is “one of the most important development challenges facing humanity”⁵¹. Revels has taken active steps by empowering and encouraging private entities to produce renewable fuel, which allows it to meet its Nationally Determined Contributions (NDCs).

⁵¹ *Climate Change Statistics*, UNSC, 47th Sess, UN Doc E/CN.3/2016/15 (8-11 March 2016) 1.

The meeting of the NDCs pursuant to Article 4, paragraph 2 of the UNFCCC is just as, if not more, important than the preservation of a singular species, especially given renewed calls for curbing of climate change. Further, the European eels have been shown to be affected by climate change as the temperature of the water affect larvae growth, and reduced food availability.

By providing subsidies to allay the costs of developing technology for renewable energy sources⁵², Revels helps to meet its NDC commitments as it would lower greenhouse gas emissions. It is emphasized that a short span of 6 months was enough for the Sargassum initiative to see success and progress towards fulfilling the NDCs⁵³. The Sargassum initiative is key to Revels' success in fulfilling its NDC commitments, and for sustainable biofuel production which helps resolve climate change. This also helps to combat the overabundance of Sargassum in the oceans by allowing them to be reused by affected developing countries such as the Caribbean Islands⁵⁴.

The UNFCCC emphasizes the need to take into account the economic constraints of developing countries such as Revels, and reaffirmed the prioritization of economic development and poverty eradication, when response measures are tabled⁵⁵⁵⁶. Therefore, Revel's actions in mining Sargassum for its own economic development is in alignment with, and exceeds, its scope of responsibility for meeting its NDC commitments, given that its agricultural-based economy is still in its initial stages of development⁵⁷.

⁵² Record, p.5

⁵³ Record, p.6

⁵⁴ Sargassum continues to plague the Carribean, including Belize; tourism industry affected. The San Pedro Sun. Retrieved from <https://www.sanpedrosun.com/environment/2018/08/25/sargassum-continues-to-plague-the-caribbean-including-belize-tourism-industry-affected/>

⁵⁵ *United Nations Framework Convention on Climate Change*, Art 4(8)

⁵⁶ *Report of the Conference of the Parties on its Seventh Session*, UNFCCC, 7th Sess, UN Doc FCCC/CP/2001/13/Add.1 (21 January 2002) 2.

⁵⁷ Record at p.4

Further, Revels submits that the hydropower dams that Alliguna is relies on has been shown to affect the upstream migration of the eels⁵⁸, as it causes changes to the water flow and temperature. If the production of hydropower is allowed despite its detrimental impacts to the environment, such as habitat destruction of fishes due to diverted water flow, flooding and species loss⁵⁹, the Respondent urges this Court to similarly find for Sargassum harvesting.

2. Revels has complied with its obligations under the CBD

i. Revels did not breach its obligation to cooperate with other Contracting parties.

It is submitted that Revels has consistently fulfilled its duty in cooperating with other States in conservation and sustainability efforts by sending high-level representatives to various United Nations and global conferences, as provided for in Article 5⁶⁰.

ii. Revels has complied with the methods of sustainable development pursuant to Article 10.

Revels fulfilled its obligations and abided by Article 10 by integrating conservation and sustainability into its national decision-making via its increasing concentration of its economic development upon renewable energy products⁶¹. Further, Revels has consistently adopted measures to minimise harm to biological diversity. The harvesting of sargassum has been shown to be easily environmentally sustainable in countries like the Philippines if they

⁵⁸ Piper, A. T., Wright, R. M., Walker, A. M. and Kemp, P. S. (2013) Escapement, route choice, barrier passage and entrainment of seaward migrating European eel, *Anguilla anguilla*, within a highly regulated lowland river. *Ecological Engineering* 57, pp. 88-96

⁵⁹ Dudgeon, D. (2000) Large-Scale Hydrological Changes in Tropical Asia: Prospects for Riverine Biodiversity: The construction of large dams will have an impact on the biodiversity of tropical Asian rivers and their associated wetlands. *BioScience* 50(9), pp. 793-806

⁶⁰ Record, p. 5

⁶¹ Record, p.5

are done before most of the plants become fertile, allowing for easy regeneration⁶². In addition, the harvesting of Sargassum has even been shown to minimise adverse environmental impact as Sargassum is known to proliferate to the point of becoming an invasive species in areas such as Bantry Bay⁶³. This goes to show how the harvesting of sargassum is not only a sustainable practice, but may even help rather than harm the maintenance of a healthy ecosystem.

iii. Revels has complied with its duty to conduct an Environmental Impact Assessment before commencing harvesting Sargassum.

The CBD Decision X/29⁶⁴ obliges Contracting Parties to conduct greater risk assessments⁶⁵ and consider ecosystems in climate change mitigation. The CBD Decision IX/20⁶⁶ provides a detailed framework to identify, select and develop marine protected areas. Revels has complied with such duties by requiring SEA to conduct an Environmental Impact Assessment before commencement on the project⁶⁷ and publishing updates on the SEA project. While the specific updates are not expressly stated, it would be a reasonable expectation for the environmental impacts of such harvesting to be included given that the project would help fulfill Revel's NDC Commitments.

⁶² 382 Mc Monagle, Micheal & Cornish, Melania & Morrison, Liam & Araujo, R & Critchley, Alan. (2017). Sustainable harvesting of wild seaweed resources. *European Journal of Phycology*. 52. 371-390. 10.1080/09670262.2017.1365273.

⁶³ Roseingrave, L (2017). Will mechanical harvesting of seaweed lead to ecological disaster? Irish Examiner Retrieved from www.irishexaminer.com/lifestyle/features/report-will-mechanical-harvesting-of-seaweed-lead-to-ecological-disaster-448276.html

⁶⁴ *Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity At Its Tenth Meeting*. Convention on Biological Diversity, 10th Meeting, UN Doc UNEP/CBD/COP/DEC/X/29

⁶⁵ *Ibid*, [68]

⁶⁶ *Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity At Its Ninth Meeting*. Convention on Biological Diversity, 9th Meeting, UNEP/CBD/COP/DEC/IX/20

⁶⁷ Clarifications Regarding the Record, A17

The objective of conserving biological diversity⁶⁸ is to protect and encourage customary use of biological resources⁶⁹ and co-operation between the government and the private sector⁷⁰.

The act of providing a modicum of financial assistance to SEA⁷¹ aligns with the goal of the CBD to encourage cooperation between the government and private sector. The harvesting of sargassum as an alternative energy source is a mere extension of Revels' long-standing economic activities.

3. Revels has not breached its obligations under the CMS

i. Harvesting Sargassum does not breach the obligation to conduct agreements to protect the European Eels

Range States for species listed under Appendix II “shall endeavour to conclude [agreements] where these would benefit the species and should give priority to those species in an unfavourable conservation status”⁷² pursuant to Article IV of the CMS. The primary purpose of the CMS is provided in Article II, which is to promote research into, provide protection for, and conclude agreements regarding the conservation of migratory species⁷³. The European eel is one of the species listed under Appendix II, for which the CMS provides that parties should conclude agreements which benefit such migratory species⁷⁴. In light of the purposes of the CMS, Range States are obliged to conduct agreements to protect and conserve the European eels.

⁶⁸ Convention on Biological Diversity, Article 1

⁶⁹ Convention on Biological Diversity, Article 10(c)

⁷⁰ Convention on Biological Diversity, Article 10(e)

⁷¹ Record, p. 5

⁷² Convention on the Conservation of Migratory Species of Wild Animals (“CMS”), Art IV (3)

⁷³ *ibid*, Art II (3)

⁷⁴ *Ibid*, Art IV

Revels has not spared any efforts in promoting scientific research regarding endangered species, as can be seen from Revel's long-standing commitment to sustainable development⁷⁵. The act of harvesting Sargassum is also not incompatible with the obligation to conduct agreements because it is neither an act that requires international cooperation, nor is it relevant in promoting the conservation of the European Eel. Agreements conducted pursuant to Article IV considered mainly cooperative actions such as knowledge and information sharing⁷⁶.

It is highlighted that since there has been no active agreement which designates how the spawning areas of the European Eels are to be protected⁷⁷ since the Second Meeting of Range States of the European eel, there is no positive duty upon Revels to refrain from harvesting Sargassum,.

Further, Revels has complied with the CMS Resolution 11.27⁷⁸, which states the concerns that States should take into consideration when implementing renewable energy programs. Harvesting of Sargassum for the production of biofuels do not fall under the renewable energy technologies that were considered in the resolution, namely wind energy, solar energy, ocean energy, geo energy and hydropower⁷⁹. Revels has also taken precaution to conduct environmental impact assessments on the impact of harvesting of Sargassum, which has produced no conclusive evidence on the potential harmful impacts⁸⁰.

Revels has fulfilled its climate change mitigation obligation with increasing production of renewable energy fuels pursuant to Resolution 12.21. The obligation to monitor and report

⁷⁵ Record, p. 12

⁷⁶ Second Meeting of Range States for the European Eel - Outcomes of the Meeting, UNEP, 2nd Meeting, UN Doc UNEP/CMS/Eels2/Outcome (25 March 2018).

⁷⁷ Second Meeting of Range States for the European Eel - Outcomes of the Meeting, UNEP, 2nd Meeting, UN Doc UNEP/CMS/Eels2/Outcome (25 March 2018).

⁷⁸ *Renewable Energy and Migratory Species*, UNEP Res 11.27, UNEP, 11th Meeting, UN Doc UNEP/CMS/Resolution 11.27 (4-9 November 2014).

⁷⁹ *Ibid* at Para 3

⁸⁰ Clarifications, A17

on the progress and impact of renewable energy schemes has also been fulfilled, where Revels has published an update 6 months after the commencement of these projects.

Since Revels has complied with all explicit agreements and treaties related to the CMS, Revels has fulfilled its obligation.

4. Revels did not violate its duty not to cause transboundary harm.

i. Revels acted in accordance with the precautionary principle.

The precautionary principle states that where “there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”⁸¹. Measures should be undertaken to minimize the adverse effects of climate change⁸². However, policies have to be balanced against the needs of developing countries⁸³, especially prioritizing economic development⁸⁴.

By launching a programme to expand the use of renewable energy in Revels⁸⁵, Revels embodies the precautionary principle by proactively reducing reliance on fossil fuels, which are the primary contributors to greenhouse gases which, in turn, are the primary contributors to climate change⁸⁶. Climate change causes increasingly erratic precipitation patterns around the world, resulting in environmental degradation⁸⁷. Climate change and its impact of precipitation patterns cause environmental degradation and causes transboundary harm on a

⁸¹ *The Rio Declaration on Environment and Development 1992*, UNGA, Annex I, UN Doc A/CONF.151/26 (Vol. I) (12 August 1992) Principle 15

⁸² United Nations Framework Convention on Climate Change, 9 May 1992, 1771 U.N.T.S. 107 [UNFCCC] Article 3 Principle 3

⁸³ Report of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1, (1973) [Stockholm Conference], Principle 11

⁸⁴ *ibid*, Principle 10

⁸⁵ Record at p.5

⁸⁶ United States Environmental Protection Agency. Global Greenhouse Gas Emissions Data. Retrieved from <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data>

⁸⁷ Ragab, Ragab, and Christel Prudhomme. "Soil and Water: Climate Change and Water Resources Management in Arid and Semi-Arid Regions: Prospective Challenges for the 21st Century". *Biosystems Engineering* 81.1 (2002): p 3-34.

global scale⁸⁸, which is much more extensive than the local population of European eels. Therefore, contrary to Alliguna's submission that the precautionary principle was violated⁸⁹, Revels's actions, in fact, furthers the precautionary principle and prevents transboundary harm by proactively switching away from fossil fuels to renewable energy.

ii. Revels did not breach its duty to prevent transboundary harm as there is no conclusive evidence that harvesting Sargassum has caused harm to the European eels.

States have the responsibility not to cause transboundary harm and damage the environment of other sovereign states⁹⁰. The principle of preventing transboundary harm is a customary international law principle. For a state to be deemed as "likely to be affected" by transboundary harm, the State must demonstrate that there is a significant risk of transboundary harm occurring within its jurisdiction⁹¹.

It has to be highlighted that Revels has already performed its due diligence by fulfilling its obligation to perform an Environmental Impact Assessment as required in *Costa Rica v Nicaragua*⁹², which extended the *Pulp Mills* principle to all proposed activities that may cause significant transboundary harm. The Environmental Impact Assessment has already proven that there is no significant risk of transboundary harm, be it to the Sargasso Sea or the European eel, as impacts are only "uncertain". Hence, there is no duty to notify or consult potential parties affected such as Alliguna.

⁸⁸ Trenberth, Kevin E. (2011) Changes in precipitation with climate change. *Climate Research* 47: 123–138

⁸⁹ Record at p. 6

⁹⁰ Stockholm Conference, *supra* note 93, Principle 21

⁹¹ *Report of the International Law Commission on the work of its fifty-third session*, UNGAOR, 53rd Sess, Supp No 10, UN Doc A/56/10 (2001) Chapter V.

⁹² *Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica)*, 2015, I.C.J at [104]

Costa Rica v Nicaragua⁹³ also indicates that evidence is required for this Court to find that transboundary harm has been proven. This Court found that Costa Rica did not have evidence to show that there has been transboundary harm by Nicaragua’s dredging program on the Colorado River⁹⁴. Alliguna has already explicitly admitted that there is no evidence to indicate that the harvesting of Sargassum by the SEA has caused any impact on the eels whatsoever. Further, it has to be highlighted that there were other more significant factors that led to the decrease in the flow of the Colorado River, which made it more difficult to prove a causal link⁹⁵. Presently, “tentative links” between the decline in glass eels in the Sargasso sea are due to changes in location of their spawning areas, changes in wind driven currents that transport eel larvae to adult habitats in Europe and North America, and potential changes to feeding success for eel larvae⁹⁶.

Ultimately, the precautionary principle should not be stretched to an extreme as to hinder Revel’s economic progress and the development of environmentally-friendly solutions. In the Gabčíkovo-Nagymaros Project, the Court acknowledged the necessity to “reconcile economic development with protection of the environment” with sustainable development. It is highlighted that SEA is a huge multinational corporation and would contribute largely to Revels’ investments and employment⁹⁷. Given that Revels has been pursuing environmentally sustainable practices, it is submitted that, on balance, economic benefits to Revels as well as the overall environmental benefits should outweigh Alliguna’s claim of harm caused.

⁹³ *Ibid*

⁹⁴ *Ibid* at [119]

⁹⁵ *Ibid* at [119]

⁹⁶ Laffoley, D.d’A. et al, (2011). The protection and management of the Sargasso Sea: The golden floating rainforest of the Atlantic Ocean. Summary Science and Supporting Evidence Case. Sargasso Sea Alliance, 44 pp

⁹⁷ *ibid*.

On the whole, it is submitted that no conclusive harm can be said to be suffered by Alliguna or the ecosystem of the Sargasso sea.

C. Environmental conservation is a long drawn battle, where long term benefits should not be sacrificed for short term gains.

The purpose of environmental conservation is for the protection of the entire Earth, not a particular species or region. Therefore, environmental treaties concluded should be interpreted in good faith and not have their meanings stretched which leads to “manifestly absurd or unreasonable” results⁹⁸. In upholding the urgent desire to protect the environment, this Court should balance between the uncertain and unknown risk of European eel decline with the larger long term benefits that biofuels ensures in mitigating climate change, “one of the greatest challenges of our time”⁹⁹.

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.
2. Revels did not violate international law by subsidizing SEA with their harvesting of Sargassum in the Sargasso Sea.

RESPECTFULLY SUBMITTED,

AGENTS OF RESPONDENT

⁹⁸ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Articles 31 and 32

⁹⁹ Climate Change Statistics. United Nations Department of Economic and Social Affairs. Retrieved from <https://unstats.un.org/unsd/envstats/climatechange.cshtml>.