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

LEONIA,
Applicant

VULPINIA,
Respondent

February 1990

On Submission to the
International Court of Justice

MEMORIAL FOR THE APPLICANT

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INDEX OF AUTHORITIES

Cases

<u>The Aaland Island Case</u> (Swed.v.Fin.), League of Nations O.J. Spec. Supp. No.3 (1920)	5
<u>Alabama Claims Arbitration</u> (U.S.v.U.K.), (1872), Moore, i <u>Arbitrations</u> 495	3
<u>Anglo-Norwegian Fisheries Case</u> (U.K.v.Nor.), 1951 I.C.J. 116	6
<u>Barcelona Traction, Power and Light Co.</u> (Belg.v.Spain), 1970 I.C.J. 324	9, 19
<u>Case Concerning the Factory at Chorzow</u> (Ger.v.Pol.), 1928 P.C.I.J. ser.A, No.17	12, 22
<u>Corfu Channel Case</u> (U.K. v. Alb.), [1949] I.C.J. 4	1
<u>The Heirs of Jean Maninet</u> (Fr. v. Ven.), 10 R. Int'l Arb. Awards 24 (1903)	23
<u>The I'm Alone</u> (Can.v.U.S.), 3 R.Int'l Arb.Awards 1609 (1935)	24
<u>Island of Palmas Arbitral Award</u> (1928) (U.S. v. Neth.), 2 R. Int'l Arb. Awards 829	1, 7
<u>Military and Paramilitary Activities In and Against Nicaragua</u> (Nicar.v.U.S.), 1986 I.C.J. 14	4
<u>Missouri v Independent Petrochem Corp.</u> , 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20 (1985)	17
<u>Reparations for Injuries Suffered in the Service of the United Nations</u> (Advisory Opinion), 1949 I.C.J. 185	5
<u>South West Africa Cases</u> (Second Phase) (Eth.v.S.Afr., Lib.v.S.Afr.), 1966 I.C.J. 6	20, 21
<u>Trail Smelter Arbitration</u> (1941) (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905	2
<u>United States Diplomatic and Consular Staff in Tehran</u> (U.S. v. Iran), 1980, I.C.J. 3	2
<u>The Wimbledon Case</u> (Fr.v.Ger., Italy v.Ger., Japan v.Ger., U.K.v.Ger.), 1923 P.C.I.J., ser A, No.1	5

Treaties

<u>Agreement Governing the Activities of States on the Moon and Other Celestial Bodies</u> , 1979, 1126 U.N.T.S. 407.	7
---	---

Antarctic Treaty, <u>opened for signature</u> at Washington Dec. 7, 1959, Aust. T.S. 1961 No. 12, 1960, 97 U.K.T.S. (Cmd. 1535), 402 U.N.T.S. 71	5, 10, 20, 21
Brussels Convention on the Liability of Operators of Nuclear Ships, done at Brussels, May 25, 1962, <u>reprinted in</u> 37 Am. J. Int'l L. 268 (1963).	16
Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, <u>opened for signature</u> done at Basel, Mar.22, 1989, U.N.E.P. Doc. IG.80/L.12 <u>reprinted in</u> 28 Int'l Legal Materials 649 (1989)	3, 4, 5
Convention on the Conservation of Antarctic Marine Living Resources <u>opened for signature</u> at Canberra, Aug.1, 1980, <u>reprinted in</u> 19 Int'l Legal Materials, 341 (1980)	14
Convention on International Liability Caused By Space Objects, done March 29, 1972, 24 U.S.T. 2391 (1972)	16
Convention on the Law of the Sea, <u>opened for signature</u> at Montego Bay, Dec.6-10, 1982, U.N.Doc. A/CONF.62/122	4, 13, 14
Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, done at Dec.29, 1972, 24 U.S.T. 2403 (1975) T.I.A.S. No. 8165	13
Convention on the Protection of the Marine Environment of the Baltic Sea Area done at Helsinki, Mar.22, 1974, St./Leg./Ser./18, at 518 <u>reprinted in</u> 13 Int'l Legal Materials, 546 (1974), Annex III.	13 U.N.Leg.Ser.
Convention for the Protection of the Mediterranean Sea Against Pollution, done at Barcelona, Feb.16, 1976, St/Leg./Ser.B/194, at 59, <u>reprinted in</u> 15 Int'l Legal Materials 285 (1976)	13 U.N.Leg.Ser.
International Convention on Civil Liability For Oil Pollution Damage, done at Brussels, Nov.29, 1969, 1975 U.K.T.S. 106 (Cmd.6183) <u>reprinted in</u> 9 Int'l Legal Materials 45 (1970)	15
Statute of the International Court of Justice 1945	4
Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including The Moon and Other Celestial Bodies, <u>entered into force</u> at 10, 1967, 610 U.N.T.S. 205; 1968 U.K.T.S. 10 (Cmd.3519)	7
Vienna Convention on Civil Liability for Nuclear Damage, done at Vienna, May 21, 1963, <u>reprinted in</u> 2 Int'l Legal Materials 727 (1963)	16
Vienna Convention on the Law of Treaties, <u>opened for signature</u> at Vienna, May 23, 1969, 1980 U.K.T.S. 58 (Cmd.7964), 8 Int'l Legal Materials 679, U.N.Doc. A/Conf. 39/27 (1969)	10, 11

Treatises and Digests

I. Brownlie, <u>Principles of Public International Law</u> (3rd ed. 1979)	16
I. Brownlie, <u>System of the Law of Nations: State Responsibility</u> , (Part 1), (1983)	2, 12
I.W. Bush, <u>Antarctica and International Law</u> (1982)	6
A. Cassese, <u>International Law in a Divided World</u> (1986)	19
B. Cheng, <u>General Principles of Law as Applied by International Courts and Tribunals</u> (1967)	9
R. Churchill & A. Lowe, <u>The Law of the Sea</u> (1983)	2
C. Gray, <u>Judicial Remedies In International Law</u> (1987)	22, 24
K. Hakapaa, <u>Marine Pollution In International Law</u> (1981)	14
A. Kiss, <u>L'Abus de droit en droit international</u> (1953)	9
R. Lillich (ed.), <u>International Law of State Responsibility for Injury to Aliens</u> (1983)	2
S. Lyster, <u>International Wildlife Law</u> (1985)	22
I F. Mann, <u>Studies in International Law</u> (1973)	2
A. McNair, <u>The Law of Treaties</u> (1961)	5
I D.P. O'Connell, <u>International Law</u> (2nd ed. 1970)	5
L. Oppenheim, <u>International Law</u> (8th ed. 1967)	9
Organisation for Economic Cooperation and Development, <u>Legal Aspects of Transfrontier Pollution</u> (1977)	23
J. Schneider, <u>World Public Order of the Environment: Towards an International Ecological Law and Organisation</u> (1979)	15
G. Schwarzenberger, <u>International Law as Applied by International Courts and Tribunals</u> (1957)	12, 23, 24
B. Smith, <u>State Responsibility and the Marine Environment</u> (1988)	2, 15, 21
L.A. Teclaff & A.E. Utton (eds.), <u>International Environmental Law</u> (1974)	19
G. Triggs, <u>International Law and Australian Sovereignty In Antarctica</u> (1986)	7
M. Whiteman, <u>Damages in International Law</u> (1937)	23
R. Wolfrum (ed.), <u>Antarctic Challenge II</u> (1986)	8, 9

Journals and Periodicals

<u>Baxter, Multilateral Treaties as Evidence of Customary International Law</u> , 41 Brit.Y.B.Int'l L. 275 (1965-66)	8
<u>Brownlie, A Survey of International Customary Rules of Environmental Protection in International Environmental Law</u> 1 (L. Teclaff & A. Utton eds. 1974)	19
<u>Charney, International Agreements and the Development of Customary International Law</u> , 61 Wash.L.Rev. 957 (1986)	13
<u>Christenson, Genetic Ark: A Proposal To Preserve Genetic Diversity</u> , 39 Stan.L.Rev.279 (1987)	2, 23
<u>Fitzmaurice, The Case of the I'm Alone</u> , 82 Brit.Y.B.Int'l L 82 (1936)	22
<u>Friedmann, The Uses of General Principles in the Development of International Law</u> , 57 Am.J.Int'l L. 279 (1963)	9
<u>Gaines, International Principles for Transnational Environmental Liability: Can Developments in Municipal Law Help Break the Impasse?</u> , 30 Harv.Int'l L.J. 311 (1989)	17, 24
<u>Gamble, Multilateral Treaties: The Significance of the Name of the Instrument</u> , 10 Cal.W.Int'l L.J. 1 (1980)	10
<u>Goldie, Concepts of Strict and Absolute Liability and the Ranking of Liability in Terms of Relative Exposure to Risk</u> , 16 Neth. Y.B. Int'l L. 181 (1985)	18
<u>Goldie, International Principles of Responsibility For Pollution</u> , 9 Colum.J.Transnat'l L. 283 (1970)	15
<u>Handl, International Liability of States For Marine Pollution</u> , 21 Can.Y.B.Int'l L. (1983)	16
<u>Handl & Lutz, An International Policy Perspective on the Trade of Hazardous Materials and Technologies</u> , 30 Harv.Int'l L.J. 351 (1989)	4
<u>Hannequart, The Responsibilities of the Competent Authority Under International Law in Transfrontier Movements of Hazardous Wastes</u> 23 (OECD 1985)	3
<u>Jenks, Liability For Ultrahazardous Activities in International Law</u> , 1 Recueil des Cours 195 (1966)	16
<u>Joyner, Legal Implications of the Common Heritage of Mankind</u> 35 Int'l & Comp.L.Q., 190 (1980)	6
<u>Kelly, International Regulation of Hazardous Waste Shipments</u> , 21 Texas Int'l L. J. 95 (1985)	18
<u>Kelson, State Responsibility and the Abnormally Dangerous Activity</u> , 13 Harv.Int'l L.J. 197 (1972)	16

Quentin-Baxter, <u>International Liability For Injurious Consequences Arising Out of Acts Not Prohibited By International Law</u> , 1981 Y.B.Int'l L. Comm'n 217	15
Legault, <u>The Freedom of the Seas: A Licence to Pollute?</u> , 21 U.Toronto L.J. 211 (1971)	22
Mann, <u>Reflections on a Commercial Law of Nations</u> , 33 Brit.Y.B. Int'l L. 20 (1957)	11
Myers, <u>The Names and Scope of Treaties</u> , 51 Am.J.Int'l L. 574 (1957)	10
Note, <u>Thaw In International Law; Rights In Antarctica Under The Law Of Common Spaces</u> , 87 Yale L.J. 804 (1978)	6
Sachariew, <u>State Responsibility for Multilateral Treaty Violations: Identifying the Injured State and its Legal Status</u> , 35 Neth.Int'l L.J. 273 (1988)	20
Sohn, <u>The Stockholm Declaration on the Human Environment</u> , 14-15 Harv.Int'l L.J. 423 (1973-4)	1, 13
Weinstein, <u>Exchange of Notes</u> , 29 Brit.Y.B. Int'l L. 205 (1952)	10
Widdows, <u>What is an International Agreement in International Law?</u> , 50 Brit.Y.B. Int'l L. 117 (1979)	10, 11

United Nations Documents

Charter of Economic Rights and Duties of States, G.A.Res.3287 (XXIX), 29 GAOR Supp.31, Vol.1, U.N.Doc. A/9631 (1974)	14
Declaration of Legal Principles Governing The Activities of States in the Exploration and Use of Outer Space, G.A.Res. 1962, 18th Sess. GAOR Supp.15, U.N.Doc. A/5656 (1963)	7
Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A.Res. 2749, 25th Sess. GAOR Supp.28, U.N.Doc. A/8028	7
Declaration of the U.N. Conference on the Human Environment U.N.Doc. A/ Conf.48/14 and Corr. 1 (1972)	1, 13, 14, 21
<u>Question of Antarctica, Study Requested Under General Assembly Resolution 38/77, Report of the Secretary General, Views of States (Vol.1)</u> U.N. Doc.A/39/583 (Part II)	8, 9, 14
<u>Report of the International Law Commission on its 39th Session, [1987]</u> ii Y.B. Int'l L. Comm'n 42, U.N. Doc.A/42/10	17
<u>Sixth Report on State Responsibility</u> , [1977] ii Y.B.Int'l L.Comm'n 3, U.N. Doc.A/CN.4/302 and Add.1-3	12

World Charter For Nature, G.A.Res, 37/7 (XXI), 23
21 GAOR Supp.51, U.N.Doc. A/37/51.

Miscellaneous

American Law Institute, Restatement (Third) of Foreign 19, 22, 24
Relations Law of the United States

Directive on the Supervision and Control Within the European 4
Community on the Transfrontier Shipment of Hazardous Waste,
27 O.J.Eur.Comm. (No. L 326) 321 (1984)

Joint Australian/French Proposal in the form of a Paper 8
Including a Draft Recommendation For Antarctic Treaty
Consultative Meeting XV

Montreal Rules of International Law Applicable to Transfrontier 1
Pollution, Resolution No. 2/1982

OECD Council Decision-Recommendation on Export of Hazardous 4, 12
Waste From The OECD Area, OECD Doc. C(86) 64 (Final)

Report and Recommendation of the Eighth Antarctic Treaty 6
Consultative Meeting 1975

Report and Recommendation of the Fifteenth Antarctic Treaty 20
Consultative Meeting 1989

JURISDICTION

The Government of Leonia and the Government of Vulpinia have submitted the present dispute by special agreement to the International Court of Justice pursuant to Article 36, paragraph 1 of the Statute of the International Court of Justice. Both parties have accepted the jurisdiction of the Court without reservation.

STATEMENT OF FACTS

Dr Detritus is a Vulpinian national with an international reputation. He owns and manages a Vulpinian company which exports hazardous waste created by Vulpinia's thriving industries. This was becoming difficult because states, wary of the inherently hazardous nature of such waste, were increasingly unwilling to provide sites for its disposal. [Problem at 1]

In April 1987 Dr Detritus' attention turned to Antarctica, the world's last unspoilt continent, when he read that the Leonian biologist Professor Handlin had just returned from studying Antarctica's marine environment. After a quick investigation, Dr Detritus decided to transport one hundred drums of hazardous Vulpinian waste to an ice shelf in the section of Antarctica not subject to any claims. His company used its Vulpinian flag ship for this purpose. [Id. at 2]

Leonia, a Consultative Party to the Antarctic Treaty, detected Dr Detritus' activities and was distressed to find that hazardous waste had been dumped in the delicate Antarctic environment. [Id. at 3]. Leonia's Minister of Foreign Affairs, Mr Darkeye, contacted his Vulpinian counterpart, Mr Fox, and informed him that the dumping was a violation of the text and spirit of the Antarctic Treaty.

Minister Fox asserted that his government was unaware of its leading disposal expert's activities and that, in any case, the laws of Vulpinia permitted the export of such waste and its dumping in Antarctica. [Id. at 3]

Vulpinia agreed to remove the one hundred drums of hazardous waste and re-establish the pre-existing situation. This agreement was formally expressed in an Exchange of Notes executed on 2 February 1988 and duly registered with

the United Nations in accordance with Article 102 of the United Nations Charter. [Id. at 3]

Acting on the authority of Vulpinia, Dr Detritus organised an expedition to recover the drums of hazardous waste. Technicians from Detritus' company, officials of Vulpinia and observers representing Leonia were present on Detritus ship. [Id. at 5]

The recovery did not go according to plan. Only ninety-five drums were recovered. Five of the drums had been corroded by the particularly hazardous waste which they contained. The Vulpinians decided not to attempt removing the drums. Vulpinia assented to this action by radio. On 7th January 1989 the Vulpinian hazardous waste contained in the five corroded drums was dumped into the sea. The Leonian observers, as had been agreed in the Exchange of Notes, did not interfere but merely reported to their government on what transpired. [Id. at 6]

The dumping caused irreparable damage. Professor Handlin returned to Antarctica in early 1989. He found that the dumping of the hazardous waste into the sea had destroyed an entire species of starfish which he had identified in an exciting discovery on his previous trip. The unique starfish had adapted extraordinarily to live in its fragile environment. [Id. at 6]

The extinction of the species was widely condemned by the international community and in the United Nations General Assembly. A communique issued by the Chair of the meeting of the Consultative Parties to the Antarctic Treaty called on those responsible to take corrective measures. [Id. at 7]

Leonia insists that Vulpinia pay damages to compensate for its destruction of the species. Leonia intends to use the money to establish a fund to protect the Antarctic environment. Vulpinia refuses to compensate for the damage caused by its dumping of the Vulpinian hazardous waste. (Id. at 8)

When negotiations broke down, the parties agreed to submit the matter to the International Court of Justice.

QUESTIONS PRESENTED

1. Is the State of Vulpinia responsible for any breach of right pertaining to Leonia by virtue of any rule of customary or conventional international law binding on Vulpinia?
2. In the case of an affirmative answer to question one, is Vulpinia under any obligation to Leonia to make reparations or to take remedial measures for the injury to the Antarctic environment?
3. What type of reparation or remedial measures would be appropriate in the circumstances?

SUMMARY OF PLEADINGS

Vulpinia's export, placement and disposal of its hazardous waste in Antarctica is a breach of a number of international obligations.

Vulpinia has a duty, at customary international law, to exercise control of activities within its jurisdiction to protect other states and the international commons from harm. This duty extends to the restriction of the export of hazardous substances from Vulpinia. Vulpinia has breached the duty by its failure to control Dr Detritus' export of its hazardous wastes to Antarctica. Since Vulpinia had the capacity, as a sovereign state, to regulate the export and disposal in Antarctica and did not do so it is responsible at international law for the actions of Dr Detritus.

By permitting its national to dispose of hazardous waste in Antarctica, Vulpinia has breached a stringent obligation at international law to exercise a rigorous duty of care towards that fragile environment. The obligation is imposed by the provisions of the Antarctic Treaty which creates an objective regime establishing the area as the common heritage of mankind. Alternatively the Treaty is binding on Vulpinia, a non-party, because its provisions form part of customary international law. The disposal of the drums of hazardous waste in Antarctica is an abuse of the right to free scientific investigation in the area.

The discharge of the hazardous waste into the sea by Vulpinia was a breach of the Exchange of Notes executed by the Leonian and Vulpinian governments and registered with the Secretariat of the United Nations. The Treaty was a binding international agreement and contained strict obligations of result, to remove the one hundred drums from the Antarctic area and to re-establish the

ecological balance. The discharge also breached Vulpinia's customary obligation to reimport hazardous waste which had been wrongfully exported. Vulpinia has breached these strict obligations, by failing to remove all the drums and by destroying an entire species of starfish.

The discharge of the contents of the drums destroyed a living resource and is a serious breach of the international obligation to protect the marine environment from pollution. Responsibility for all environmental injury is on a strict liability basis and Vulpinia cannot rely on the defences of unforeseeability of damage or reasonable care. Strict liability is also imposed because Vulpinia was undertaking an abnormally dangerous activity. Its actions caused the harm to Antarctica and Vulpinia must be held responsible to Leonia and the rest of the international community.

Vulpinia's actions breached personal rights enforceable by Leonia as a party to the Exchange of Notes and as home state of Professor Handlin, the discoverer of the now extinct species of starfish. Handlin has a right to the use of the resources of the area for his research and to free scientific investigation in Antarctica. Both these rights have been breached by Vulpinia.

The particular damage suffered by Leonia enables it to enforce rights owed erga omnes, to an unspoilt environment and to cooperative scientific investigation. Vulpinia is required to make reparation to Leonia for the loss of amenity suffered by Professor Handlin. As a Consultative Party, Leonia also seeks compensation in the form of punitive damages on behalf of the community of states for the irreparable damage caused to the Antarctic environment by the extinction of a unique species of starfish.

I VULPINIA BREACHED ITS INTERNATIONAL OBLIGATIONS BY FAILING TO CONTROL THE EXPORT AND PLACEMENT IN ANTARCTICA OF HAZARDOUS WASTE

A. Vulpinia Has Breached Its Duty To Protect The Environment Beyond Areas Of National Jurisdiction By Failing To Restrict The Export Of Dangerous Substances From Its Territory

1. Vulpinia has a duty to control harmful activities within its jurisdiction

Vulpinia must exercise its sovereign rights so as not to harm the rights of other states. This principle, known as sic utere tuo ut alienum non laedas, is the foundation of international environmental law.¹ The corollary to a state's sovereign right to exercise jurisdiction over its territory and nationals, is the duty² to exercise control to protect other states³ from harm arising from activities within a state's jurisdiction or control. The Stockholm Declaration explicitly states that the customary duty extends "to areas beyond the limits of national jurisdiction."⁴ It is universally regarded as declaratory of customary international law.⁵

Although Dr Detritus was not acting on the authority of Vulpinia when he exported hazardous waste to Antarctica, Vulpinia is responsible for the consequences of his acts. The Trail Smelter Arbitration held that "a state owes at all times a duty to protect other states against injurious acts by

¹ Article 3(1), Montreal Rules of International Law Applicable to Transfrontier Pollution, Resolution No. 2/1982 on Legal Aspects of the Conservation of the Environment, International Law Association, Report on the 60th Conference (1982).

² Max Huber in the Island of Palmas Arbitral Award (1928) (U.S. v. Neth.), 2 R. Int'l Arb. Awards 829.

³ The Corfu Channel Case (U.K. v. Alb.), [1949] I.C.J. 4, at 22.

⁴ Declaration of the U.N. Conference on the Human Environment U.N.Doc. A/Conf.48/14 and Corr. 1 (1972) [hereinafter cited as Stockholm Declaration].

⁵ Sohn, The Stockholm Declaration on the Human Environment, 14-15 Harv.Int'l L.J 423, 513-515 (1973-74).

individuals from within its jurisdiction."⁶ A state is responsible for the conduct of its organs.⁷ This can include the failure to control or regulate private activity.⁸ A state must exercise due diligence "to prevent conduct which if the state were actor would breach its international obligations."⁹ If effective controlling or preventative action should have been taken but was not then the state is responsible for the consequences of private acts.¹⁰

Vulpinia had the capacity to control the export of the waste through its territorial jurisdiction. It also had the capacity to control Detritus' hazardous waste disposal in Antarctica by using its extraterritorial prescriptive authority over its nationals¹¹, corporations¹² and flag ships.¹³ In areas beyond national jurisdiction, it is only Vulpinia who can control its nationals and flag ships.¹⁴ Thus Vulpinia's lack of domestic laws, and lack

⁶ Decision of the Trail Smelter Arbitral Tribunal (1941) (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905.

⁷ I. Brownlie, System of the Law of Nations: State Responsibility (Part 1) 36 (1983) [hereinafter cited as Brownlie, State Responsibility].

⁸ Responsibility arises "if a State does nothing to control unsafe private activities or to prevent private pollution moving from its territory", Christenson, The Doctrine of Attribution in State Responsibility in International Law of State Responsibility for Injury to Aliens 321, 323 (R. Lillich ed. 1983).

⁹ B. Smith, State Responsibility and the Marine Environment 36 (1983).

¹⁰ United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), [1980], I.C.J., 3, 33-35.

¹¹ "Every nation has a right to bind its own subjects by its own laws in every other place", 1 F. Mann, Studies in International Law 20 (1973).

¹² The state has more authority over legal persons than natural ones. Its laws are responsible for the company's very existence. Christenson argues a state has a "duty to control or regulate corporate activity at the risk of being responsible if it fails to exercise such control." Christenson supra n.8, at 338.

¹³ "The state may by prescription and enforcement totally control the physical condition, movement and operations of flag vessels", Smith supra n.9, at 136.

¹⁴ R. Churchill & A. Lowe, The Law of the Sea 255 (1983).

of diligence exercised to control Dr Detritus and his activities, gives rise to state responsibility for the consequences of his acts.¹⁵

2. Vulpinia has breached its obligation to restrict the export of hazardous wastes from its territory

Vulpinia has breached customary international law which demands that states control movement of hazardous wastes from their territory. This customary rule is based on the sic utere principle and is evidenced by extensive state practice and opinio juris. State practice shows that the export of waste must be controlled.¹⁶ Where it has been uncontrolled, States have been forced to reaccept the waste.¹⁷ The Basel Convention¹⁸ requires strict control of transboundary movements of waste and a prohibition on sending waste to Antarctica.¹⁹ Publicists such as Professors Lutz and Handl regard the Basel Convention as codifying state practice.²⁰ The Court may have regard to the

¹⁵ See e.g., Alabama Claims Arbitration (U.S. v. U.K.) (1872), Moore, i Arbitrations 495.

¹⁶ In 1985, 18 of the 24 members of the Organisation for Economic Co-operation and Development had legislative or executive measures in force in relation to the transfrontier movement of hazardous waste. See Hannequart, The Responsibilities of the Competent Authority Under International Law in Transfrontier Movements of Hazardous Wastes 23, at 38 (OECD 1985). For a survey of U.S. legislative and regulatory framework on hazardous wastes see Kelly, International Regulation of Transfrontier Shipments: A New EEC Environmental Directive, 21 Texas Int'l L.J. 85, 128 (1985-86); For legislation in Italy and the Ivory Coast see 28 Int'l Legal Materials 391-2, 393-5 (1989).

¹⁷ E.g., Italy has recently been forced to repatriate hazardous waste carried on a number of Italian vessels. See The Age Sept 1, 1988, Sept. 20, 1988; The Sydney Morning Herald Sept. 5, 1988. Canada was also forced to repatriate waste The Age Aug. 19, 1989.

¹⁸ Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, opened for signature Mar. 22 1989 at Basel, U.N.E.P. Doc. IG.80/L.12 reprinted in 28 Int'l Legal Materials 649 (1989) [hereinafter cited as The Basel Convention].

¹⁹ Id., Article 4(6).

²⁰ Handl & Lutz, An International Policy Perspective on the Trade of Hazardous Materials and Technologies, 30 Harv. Int'l L.J. 351, 360 (1989). They cite the Basel Convention after stating that "Recent developments regarding state responsibility for private hazardous transfers might amount to mere

opinions of leading publicists. Decisions of international organisations have also declared that waste be strictly regulated.²¹ This Court held in the Nicaragua case²² that even non-binding resolutions of representative international organisations can evidence opinio iuris and be "understood as an acceptance of the validity of the rule or set of rules declared by the resolution."²³ The participation by most industrialised, and waste-producing countries in the binding decisions of the Council of the OECD and the Council of the European Economic Community are thus strong evidence of opinio iuris.

The customary law evidenced by the Basel Convention and the decisions of international organisations require stringent control of certain toxic wastes and the regulation of the export of less-hazardous substances. The waste in the one hundred drums exported by Dr Detritus falls into the first category.²⁴ It is the responsibility of the state of export to monitor closely the location of such waste from the point of export to a satisfactory point of disposal by environmentally sound means.²⁵

codification of settled state practice".

²¹ OECD Council Decision-Recommendation on Export of Hazardous Waste From The OECD Area, OECD Doc. C(86) 64 (Final); Directive on the Supervision and Control Within the European Community on the Transfrontier Shipment of Hazardous Waste, 27 O.J.Eur.Comm. (No. L 326) 321 (1984) [hereinafter cited as Final Directive]; the Basel Convention supra n.18. See also Convention on the Law of the Sea, opened for signature at Montego Bay, Dec.10, 1982, U.N.Doc. A/CONF.62/122, [hereinafter cited as LOSC], Article 19 which states "...States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another..."

²² Military and Paramilitary Activities In and Against Nicaragua (Nicar.v.U.S.), 1986 I.C.J. 14 [hereinafter cited as Nicaragua Case].

²³ Id., at 98.

²⁴ Clarification to Problem states that the waste in the five drums is found in Annex 1, of the Basel Convention: the most toxic of all hazardous wastes.

²⁵ The Basel Convention supra n.18, Articles I, VI and Annex I.

B. Vulpinia Failed To Observe The Special Duty Of States To Protect the Antarctic Environment

The special duty of states to preserve the unique and fragile Antarctic environment is evidenced by conventional and customary international law. The duty forbids states from undertaking hazardous activities in Antarctica. Vulpinia has breached this onerous obligation by permitting the disposal of drums containing toxic waste on Stella Maris.

1. The Antarctic Treaty creates an objective regime binding Vulpinia to exercise a rigorous duty of care towards the Antarctic environment

The objective effects of the Antarctic Treaty 1959²⁶ require Vulpinia, a non-party, to observe the obligations it imposes. This Court²⁷ and the writings of publicists²⁸ recognise that certain types of treaties can have erga omnes effects. Waldock expresses this succinctly: "...treaties intended by the parties to provide a general regime for particular regions, States, territories, etc., constitute a special category of treaties which, in the absence of timely opposition from other States, will be considered to have

²⁶ Antarctic Treaty, opened for signature, at Washington Dec. 7, 1959. Aust T.S. 1961 No. 12, 1960, 97 U.K.T.S. Cmd. 1535, 402 U.N.T.S. 71, [hereinafter cited as Antarctic Treaty], Article XII (2) (c).

²⁷ E.g., The "S.S. Wimbledon" Case (Fr. v. Ger., Italy v. Ger., Japan v. Ger., U.K. v. Ger.) 1923 P.C.I.J., ser A, No. 1, in which Article 380 of the Treaty of Versailles was held to "internationalise" the Kiel Canal; Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion) 1949 I.C.J. 185, where it was held 50 States could create a body with objective legal personality. See also Commission of Jurists decision in The Aaland Island Case (Swed. v. Fin.) League of Nations O.J. Spec. Supp. No. 3 (1920) that the Treaty of Peace 1856, between France, Great Britain and Russia had a special international status and was therefore binding on Finland.

²⁸ E.g., A. McNair, The Law of Treaties 531-2 (1961); 1 D.P.O'Connell, International Law 543 (2nd ed. 1970); Waldock, Third Report on the Law of Treaties, 1964 Y.B. Int'l L. Comm'n 5, 32 (vol 2).

objective effects with regard to them."²⁹

The Antarctic Treaty was intended to create a general regime for the area south of 60° Latitude and as such it has objective effects. Vulpinia's failure to protest to the obligations set out in the treaty means it is bound to comply with the Treaty if it wishes to undertake activities in the Antarctic.³⁰

2. Vulpinia breached the special obligations imposed by the Antarctic Treaty

The Antarctic Treaty evinces the intention to establish the region as the "common heritage of mankind".³¹ It is a fundamental tenet of common heritage of mankind that no state shall threaten the environment of the common space because there is a legal obligation to preserve it for other states and future generations.³² The hazardous nature of waste disposal characterizes it as an activity potentially damaging to the environment and therefore prohibited in Antarctica, a common heritage area.

Recommendations made under Article IX of the Antarctic Treaty demonstrate further the requirement of diligent environmental protection.³³ The export of

²⁹ Waldock, supra n.28, at 32.

³⁰ E.g., in the Anglo-Norwegian Fisheries Case (U.K.v.Nor.), 1951 I.C.J. 116 it was held the United Kingdom's prolonged abstention and the general toleration of the international community (inter alia) allowed Norway to enforce its system of territorial sea delimitation.

³¹ For a detailed exposition of this view see, Note, Thaw In International Law; Rights In Antarctica Under The Law Of Common Spaces, 87 Yale L.J. 804 (1978).

³² Joyner, Legal Implications of the Common Heritage of Mankind, 35 Int'l & Comp.L.Q., 190, 195 (1980).

³³ E.g. Report and Recommendations of the Eighth Antarctic Treaty Consultative Meeting 1975, Recommendation VIII-13 The Antarctic Environment notes "the vulnerability of the Antarctic environment to human interference and

hazardous waste to Antarctica is abhorrent to the objective of preservation demonstrated by the Antarctic Treaty System.

3. Vulpinia has breached special duties towards the Antarctic environment imposed by customary international law

Irrespective of the objective effects of the Antarctic Treaty, the stringent duty to protect the environment deriving from the Antarctic Treaty System³⁴ has developed into an obligation of customary international law binding on Vulpinia. The common heritage of mankind operates in customary international law to render inapplicable the traditional classification of unclaimed areas as terra nullius. This is the effect of the doctrine of intertemporal law which requires that rights be maintained in accordance with developing international law.³⁵ State practice demonstrates that common spaces are to be regarded as the common heritage of mankind in international law. This is the legal status of outer space³⁶, the moon,³⁷ and the deep sea bed.³⁸ The

that the consequences of major alterations would be of global significance", reprinted in I.W. Bush, Antarctica and International Law 327.

³⁴ See supra 5-6.

³⁵ See, Island of Palmas Case (Neth.v.U.S.), 2 R.Int'l Arb. Awards 829, 845 (Perm.Ct.Arb. 1928). For a survey of the subsequent application of this principle see G. Triggs, International Law and Australian Sovereignty In Antarctica 55-61 (1986).

³⁶ Declaration of Legal Principles Governing The Activities of States in the Exploration and Use of Outer Space, G.A.Res. 1962, 18th Sess. GAOR Supp.15, U.N.Doc. A/5656 (1963); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including The Moon and Other Celestial Bodies, 1967, 610 U.N.T.S. 205, 1968 U.K.T.S. 10 (Cmd.3519).

³⁷ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979, 1126 U.N.T.S. 407.

³⁸ Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A.Res. 2749, 25th Sess. GAOR Supp.28, at 240, U.N.Doc. A/8028; LOSC supra n.21, Article 136.

Antarctic Treaty confers an analogous status on Antarctica.³⁹

The forty-one parties to the Antarctic Treaty represent more than 70% of the world's population⁴⁰ and a wide range of political, economic and ideological approaches. This is compelling evidence of state practice.⁴¹ Furthermore, the fact that the Antarctic continent remains today unspoilt by human activities demonstrates that it is the practice of states to respect the Antarctic environment.

Opinio juris to this effect is evident from the fact that no state has made a territorial claim to Antarctica since the Antarctic Treaty came into operation. Australia and France, both claimant states, now advocate Antarctica become a world park.⁴² Statements made to the United Nations also evidence opinio juris.⁴³ The special duty to preserve the fragile polar environment is recognised by numerous statements by many states.⁴⁴ Soviet publicist Boczek summarizes the position of the majority of states: "Under general customary law, there is an obligation of third parties not to do damage to the

³⁹ See, supra, 6.

⁴⁰ Sollie, "Panel Discussion" in Antarctic Challenge II, 333, 336 (R, Wolfrum ed. 1986).

⁴¹ Baxter, Multilateral Treaties as Evidence of Customary International Law, 41 Brit.Y.B.Int'l L. 275, 284 (1965-66).

⁴² See Joint Australian/French Proposal in the Form of a Paper Including a Draft Recommendation For ATCM XV, Comprehensive Measures for the Protection of the Antarctic Environment and its Dependent and Associated Ecosystems, 1989.

⁴³ Question of Antarctica, Study Requested Under General Assembly Resolution 38/77, Report of the Secretary General, Views of States (vol.1) U.N.Doc. A/39/583 (Part II)[hereinafter cited as The Secretary General's Report, Views of States] See e.g. the views of Antigua and Barbuda at 3, and Bangladesh at 92.

⁴⁴ See The Secretary General's Report, Views of States supra n.43.

Antarctic environment."⁴⁵

The placement of hazardous waste in Antarctica has deleterious implications for the environment which were realised in this instance. Vulpinia has therefore breached the customary obligation to use the full extent of its legal authority to protect the Antarctic environment.

4. Permitting its nationals to dispose of hazardous waste in Antarctica is an abuse of Vulpinia's rights to use Antarctica.

By permitting its hazardous industrial waste to be disposed in Antarctica, Vulpinia abused its rights to use the area. The principle of abuse of rights operates to prevent the use of a right "in such a manner that its anti-social effects outweigh the legitimate interests of the owner of the right."⁴⁶ The abuse of rights doctrine imposes limits on conduct when interference with the correlative rights of other states results or the exercise is for a reason other than that for which the right was conferred.⁴⁷ It is a general principle of international law⁴⁸ previously affirmed in this Court and closely related to the obligation of states to act in good faith.⁴⁹

All states are free to carry out scientific research in Antarctica or permit

⁴⁵ Wolfrum supra n.28, at 273.

⁴⁶ Friedmann, The Uses of General Principles in the Development of International Law, 57 Am.J.Int'l L. 279, 288 (1963).

⁴⁷ A.C. Kiss, L'Abus de droit en droit international (1953).

⁴⁸ L. Oppenheim, International Law, 346 (1967); B. Cheng, General Principles of Law as Applied by International Courts and Tribunals 121-136 (1967).

⁴⁹ In his separate opinion in Barcelona Traction, Power and Light Co. (Belg. v. Spain), 1970 I.C.J. 324 [hereinafter cited as Barcelona Traction Case] Judge Ammoun described the abuse of rights as an "international tort...enshrined in a general principle of law which emerges from the legal systems of all nations."

their nationals to do so.⁵⁰ Vulpinia has abused this right by allowing Vulpinian hazardous waste to be disposed in Antarctica for the alleged purpose of "experimentation". Hazardous waste is a serious and obvious threat to the fragile environment and contrary to the spirit of environmental protection prevalent in the area. The disposal resulted in damaging Leonia's right to research in the area. Furthermore an "experiment" to test Antarctica's usefulness as a Vulpinian waste dump is contrary to the purpose for which freedom of scientific research in the area is permitted.

II VULPINIA'S DUMPING OF THE HAZARDOUS WASTE WAS A BREACH OF INTERNATIONAL LAW.

A. Vulpinia's Disposal Of The Hazardous Waste Was A Breach Of The Treaty Between Leonia And Vulpinia.

1. The exchange of notes is a binding agreement.

The Exchange of Notes is a treaty under international law. The particular name of the instrument does not preclude it from having this status.⁵¹ The Treaty is thus subject to the Vienna Convention of the Law of Treaties 1969.⁵²

The intention to be bound expressed by Vulpinia and Leonia in the Exchange of Notes, is decisive that it is a legally binding treaty.⁵³ There is a presumption of an intention to create legal relations by States who are parties

⁵⁰ Antarctic Treaty, supra n. 26, Article IX.

⁵¹ Gamble, Multilateral Treaties: The Significance of the Name of the Instrument, 10 Cal.W.Int'l L.J. 1, 7 (1980); Myers, The Names and Scope of Treaties, 51 Am.J.Int'l L. 574, 591 (1957); Weinstein, Exchange of Notes, 29 Brit.Y.B. Int'l L. 205, 226 (1952).

⁵² Vienna Convention on the Law of Treaties, opened for signature at Vienna, May 23, 1969, 1980 U.K.T.S. 58 (Cmd.7964), 8 Int'l Legal Materials 679, (1969), U.N.Doc. A/Conf. 39/27 (1969) [hereinafter cited as VCLT], Article 2(1)(a).

⁵³ Widdows, What is an International Agreement in International Law?, 50 Brit.Y.B. Int'l L. 117, 134, 149 (1979).

to an agreement set out in an Exchange of Notes.⁵⁴ The intention of Vulpinia and Leonia to be create legal relations is manifest when the form of the agreement is considered.⁵⁵ The agreement contains serious undertakings, couched in terms of obligation (using mandatory language such as "shall") to recover the waste from the Antarctic Treaty area and to grant Leonia observers' rights during the operation. These provisions impose specific and particular obligations which are susceptible of judicial interpretation and application.⁵⁶

The subsequent actions of both States pursuant to the agreement is indicative of the obligatory nature of the terms of the Exchange of Notes. Each state acted as if the agreement bound them: Vulpinia by sending a recovery vessel to Stella Maris to remove the waste; Leonia by sending its observers on the vessel. The registration of the Exchange of Notes pursuant to Article 102 of the United Nations Charter supports the contention that the agreement was intended to be governed by international law. Registration under Article 102 gives Leonia the right to invoke the Exchange of Notes before any organ of the United Nations.⁵⁷

2. Vulpinia has breached its obligations under the Treaty.

Vulpinia did not meet its strict obligation to recover the one hundred drums of waste from the Antarctic Treaty area. The obligation established in

⁵⁴ Mann, Reflections on a Commercial Law of Nations, 33 Brit.Y.B. Int'l L. 20, 30-32 (1957).

⁵⁵ VCLT, supra n.52, Art. 13(b).

⁵⁶ Widdows, supra n.53, at 139.

⁵⁷ VCLT, supra n.52, Article 80(1) imposes a duty to register treaties after their entry into force.

the Treaty was one of result.⁵⁸ International obligations of result require that the result prescribed in the obligation will be achieved or there will have been a final breach of that obligation.⁵⁹ All one hundred drums had to be removed and the pre-existing situation reestablished. The discharge of the contents of five of the drums into the Antarctic sea constitutes a breach of the agreement. The destruction of the starfish breached the obligation to "re-establish the situation that previously existed." Vulpinia has thus breached the obligations of result established in the Treaty.

B. Dumping The Hazardous Waste Was A Breach Of The Obligation To Reimport Wrongfully Exported Waste

The commission of an internationally wrongful act requires that the transgressor make reparation.⁶⁰ This Court's predecessor stated that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."⁶¹ As reparation for the breach of the customary duty to control exports of hazardous wastes⁶² Vulpinia was obliged to reimport all of the waste wrongfully exported to Antarctica by Dr Detritus.⁶³ The dumping of the contents of the five drums is a breach of the obligation to make full reparation for which Vulpinia is responsible at

⁵⁸ Ago, Sixth Report on State Responsibility, ii Y.B.Int'l L.Comm'n 3, 229, Article 21.

⁵⁹ Brownlie, State Responsibility, supra n.7, at 255.

⁶⁰ G. Schwarzenberger, International Law as Applied by International Courts and Tribunals, 653 (1957).

⁶¹ Chorzow Factory Case (Indemnity) (Merits) (Ger. v. Pol.), P.C.I.J. Rep, Ser. A , No.17, 47 (1928).

⁶² See supra nn. 16-18 and accompanying text.

⁶³ OECD Doc. C(86)64(Final) supra n.21, Article 1; Final Directive supra n.21, Article 8.

international law.⁶⁴

C. Vulpinia Is Strictly Liable For The Damage To The Antarctic Marine Environment.

1. Vulpinia's discharge of the waste was a breach of its obligation at international law to protect and preserve the marine environment.

The obligation to protect the ecology of the sea from pollution is a rule of customary international law reflected in the principles of the Stockholm Declaration,⁶⁵ and in a large number of international and regional agreements⁶⁶ including the LOSC,⁶⁷ and the Charter of Economic Rights and Duties of States.⁶⁸ Ample evidence of state practice and opinio juris operates to impose the obligation as a customary rule on Vulpinia notwithstanding its non-ratification of such agreements.⁶⁹

Pollution in international law is defined strictly by its result. The LOSC

⁶⁴ See infra at 23.

⁶⁵ The Stockholm Declaration supra n.4. Principles 6 and 21 are especially relevant.

⁶⁶ LOSC supra n.21, Part XII, Articles 192,194,197,198,200,204, 205; Stockholm Declaration supra n.4, Preamble, para 2; Convention on the Presentation of Marine Pollution of Dumping of Waste and Other Matter, done 29 Dec. 1972 at London [1975] 2 U.S.T. 2403, T.I.A.S. No. 8165 [hereinafter cited as London Dumping Convention], Convention on the Protection of the Marine Environment of the Baltic Sea Area U.N.Leg.Ser. St./Leg./Ser./18, at 518 reprinted in 13 Int'l Legal Materials, 546 (1974), Annex III, para.17; Convention for the Protection of the Mediterranean Sea Against Pollution, U.N.Leg.Ser. St/Leg./Ser.B/194, at 59, reprinted in 15 Int'l Legal Materials 285 (1976).

⁶⁷ LOSC, supra n.21, Article 1 (1)(4).

⁶⁸ Article 30 reprinted in Brownlie State Responsibility, supra n.7, at 235.

⁶⁹ See, Charney, International Agreements and the Development of Customary International Law, 61 Wash.L.Rev. 957, 977 (1986); Sohn, The Stockholm Declaration on the Human Environment, 14-15 Harv.Int'l L.J. 423, 513 (1973-4).

defines pollution of the marine environment as: "the introduction by man ... of substances...into the marine environment which results or is likely to result in such deleterious effects as harm to living resources and marine life...impairment of quality for use of sea water and reduction of amenities."⁷⁰ The discharge of the hazardous waste into the sea destroyed a living resource and is an act of pollution in international law,⁷¹ for which Vulpinia is strictly liable.

An important part of the duty to prevent marine pollution is the customary duty to safeguard the natural resources of the sea and to preserve marine ecosystems.⁷² This obligation is particularly stringent in Antarctica. "Antarctic ecosystems are extremely vulnerable to disturbances...[and]...less able to withstand any change induced by human activities than other ecosystems".⁷³ The dumping of the toxic waste into the Antarctic seas is a breach by Vulpinia of its special duty to protect the Antarctic marine environment.⁷⁴

The Convention on Conservation of Marine Living Resources⁷⁵ evidences the international community's recognition of the potentially damaging effects of the loss of one species on the Antarctic marine environment. The ecosystemic

⁷⁰ LOSC, supra n.21, Article 1 (1) (4).

⁷¹ LOSC, supra n.21, Article 194; Stockholm Declaration supra n.4, Principle 7; Charter of Economic Rights and Duties of States, G.A.Res.3287 (XXIX), 29 GAOR Supp.31, Vol.1, at 50, U.N.Doc. A/9631 (1974), Article 30.

⁷² LOSC, supra n.21, Articles 94(7),118,119,194(5),211(6); Stockholm Declaration supra n.4, Principles 2,6 and 7. See also K. Hakapaa, Marine Pollution In International Law 136 (1981).

⁷³ The Secretary's General Report, Views of States , supra , n 43, at 48.

⁷⁴ See supra at 7-9.

⁷⁵ Convention on the Conservation of Antarctic Marine Living Resources, opened for signature at Canberra, Aug 1, 1980, reprinted in 19 Int'l Legal Materials 841 (1980) [hereinafter cited as CCAMLR]

approach adopted provides that living and non-living factors are to be considered together as a unit.⁷⁶ Maintenance of the status quo is the primary objective.⁷⁷ The special duty to protect the Antarctic environment binds Vulpinia to avoid activities likely to have such consequences.⁷⁸ Vulpinia has not therefore complied with this duty.

2. Vulpinia is strictly liable for the resulting damage to the environment.

The doctrine of strict liability provides that injury is wrongful regardless of fault.⁷⁹ The imposition of strict liability on states for environmental injury has status as a customary rule.⁸⁰ This is accepted by eminent publicists.⁸¹ Instances of international practice provide evidence of the acceptance of strict liability by states.⁸² The strict liability regime has been incorporated into several significant multilateral conventions dealing with issues of environmental harm.⁸³ Since Vulpinia's liability is strictly based on causation of injury by the discharge of the hazardous waste, notions

⁷⁶ Id., Articles II(3)(b) and (c).

⁷⁷ Id.

⁷⁸ See supra 7.

⁷⁹ Quentin-Baxter, International liability For Injurious Consequences Arising Out of Acts Not Prohibited By International Law, 1981 Y.B.Int'l L. Comm'n 217, 218

⁸⁰ B. Smith, supra n.9, at 116 (1988).

⁸¹ Quentin-Baxter, supra n.79, at 267-80 writes "when a loss or injury has occurred that nobody foresaw, there is a commitment in the nature of strict liability to make good the loss." See also J.Schneider, World Public Order of the Environment: Towards an International Ecological Law and Organisation 267-280 (1979); Goldie, International Principles of Responsibility For Pollution, 9 Colum.J.Transnat'l L.283, 306-7 (1970).

⁸² B. Smith, supra n.9, at 116, provides a survey of state practice.

⁸³ See e.g., LOSC supra n.21, Article 194; International Convention on Civil Liability For Oil Pollution Damage, 1969, 1975 U.K.T.S. 106 (Cmd.6183) reprinted in 9 Int'l Legal Materials 45 (1969)

of fault and questions of the standard of care exercised in the disposal are not relevant.

3. Vulpinia is strictly liable for the injury caused by its abnormally dangerous activity

Vulpinia's clean-up operation of the hazardous waste was an abnormally dangerous activity⁸⁴ and Vulpinia must be held strictly liable for the damage caused. Strict liability for abnormally dangerous activities is an accepted principle of international law.⁸⁵ It was first applied in treaties concerning space⁸⁶ and atomic⁸⁷ activity and has since been extended to cover all fields of activity "where a recognisably significant transnational risk is created but cannot be eliminated by reasonable care."⁸⁸

The principle of strict liability for abnormally dangerous activities is recognised in all the major legal systems of the world and has been applied to a wide range of situations.⁸⁹ The principles in municipal systems may

⁸⁴ An abnormally dangerous activity is one which involves "a risk of serious harm on an international scale which cannot be eliminated by the exercise of the utmost care." See Jenks, Liability For Ultrahazardous Activities in International Law, 1 Recueil des Cours 195 (1966).

⁸⁵ In I. Brownlie, Principles of Public International Law 285 (3rd ed. 1979) it is stated, "the normal principles of international responsibility...may sustain liability for the consequences of extra-hazardous operations".

⁸⁶ Convention on International Liability Caused By Space Objects, done Mar. 29, 1972, 24 U.S.T. 2391 (1972).

⁸⁷ Vienna Convention on Civil Liability for Nuclear Damage, done May 21, 1963, reprinted in 2 Int'l Legal Materials 727 (1963); Brussels Convention on the Liability of Operators of Nuclear Ships, done May 25 1962, reprinted in 37 Am. J. Int'l L. 268 (1963).

⁸⁸ Handl, International Liability of States For Marine Pollution, 21 Can.Y.B.Int'l L. 85, 98 (1983).

⁸⁹ Kelson, State Responsibility and the Abnormally Dangerous Activity, 13 Harv.Int'l L.J.197, 201 (1972).

serve as some guidance in this international claim.⁹⁰ In the United States, for example, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) imposes strict liability on generators, transporters and disposers of hazardous waste.⁹¹ CERCLA extracts compensation from "the parties who benefited from 'cheap' waste disposal in the past."⁹² The strict regime was a response to a "fundamental shift in social attitudes about industrial wastes."⁹³ A similar change in attitudes is apparent in the world community.⁹⁴

The imposition of strict liability is justified here. Recovery of explosive and corrosive hazardous waste from Antarctica inevitably involved dangers to the fragile environment. The exercise of reasonable care would not eliminate the risks and is therefore not relevant. Strict liability in this case is equitable and necessary for future accident prevention. The Vulpinian waste was there to be removed because Vulpinia did not control its exports of hazardous waste. Vulpinia has benefited from unregulated waste disposal to the

⁹⁰ At least one publicist has argued, "[B]ecause municipal systems have grappled with the issues such as waste disposal and chemical disposures, they have developed principles that can be applied to the new wave of transnational environmental problems." Gaines, International Principles for Transnational Environmental Liability, 30 Harv.Int'l L.J.311, 315 (1989).

⁹¹ 42 U.S.C para. 9607 (a)(1),(3),(4)(1980). For application of the strict principle see Missouri v Independent Petrochem Corp., 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,161, 20,161(E.D. Mo. Jan. 8, 1985).

⁹² Gaines, supra n.90, at 332.

⁹³ Id. at 333.

⁹⁴ "[T]he threat of transboundary injury in the contemporary world might be equivalent to the threat of aggression in the nineteenth century" in Report of the International Law Commission on its 39th Session, [1987] 2 Y.B. Int'l L. Comm'n 42 ; Politicians are talking "openly and consciously about global security, far more in terms of the ecological threat and economics than interms of nuclear weapons." Markham, Greening of European Politicians Spreads as Peril to Ecology Grows, N.Y.Times, April 12, 1989, at A1., cols 4-5.

cost of the rest of the world.⁹⁵ Strict liability imposes on Vulpinia the full social costs of its hazardous waste disposal industry and serves as an incentive to regulate tightly or prohibit the activity altogether.⁹⁶

III VULPINIA BREACHED RIGHTS PERTAINING TO LEONIA FOR WHICH IT MUST MAKE REPARATION

A. Vulpinia Breached Rights Enforceable By Leonia

1. Non-performance of the Treaty was a breach of Leonia's exclusive legal rights

The Treaty between Leonia and Vulpinia of 2nd February, 1988, establishes particular legal rights and obligations binding on each party. Correlative to Vulpinia's obligation to perform the Treaty, Leonia had a right to its performance. Vulpinia failed to retrieve the one hundred drums, and did not reestablish the pre-existing situation. This breached Leonia's right to performance.

2. Vulpinia has breached Leonia's right to an unspoilt Antarctic environment.

The right to preservation of the Antarctic environment is a right owed erga omnes which stems from Antarctica's status as a common heritage area.⁹⁷ This status is derived from the objective effects of the Antarctic Treaty and

⁹⁵ "[W]aste originates in the country that receives many social and economic benefits associated with the production process is responsible for the waste generated." Kelly, International Regulation of Hazardous Waste Shipments 21 Texas Int'l L. J. 95 (1985).

⁹⁶ Goldie, Concepts of Strict and Absolute Liability and the Ranking of Liability in Terms of Relative Exposure to Risk, 16 Neth. Y.B. Int'l L. 181 (1985)

⁹⁷ See supra, at 8.

customary international law.⁹⁸ Erga omnes rights give rise to obligations owed by each member of the international community towards all other states.⁹⁹ Every state has an obligation to protect Antarctica and every state has a right to its protection. Erga omnes rights are of such importance that "all states can be held to have a legal interest in their protection".¹⁰⁰ Erga omnes rights are enforceable if a state is acting to protect the "collective interests" of the international community¹⁰¹ and when a state has suffered an injury to a special interest of its own.

Leonia can enforce erga omnes rights in the "collective interests" of the international community.¹⁰² Many eminent publicists have argued that erga omnes rights to protection of the environment should be enforceable by any member of the community.¹⁰³ Protection of human rights is another area where every state can enforce the obligations owed erga omnes.¹⁰⁴ Dr Sachariew has argued that breaches of obligations owed to the whole international community are enforceable by a single state. He cites the Antarctic Treaty as an example of an objective regime which exists for the benefit of all states and asserts that "a collective response to a breach of an obligation owed does not necessarily mean a reaction by all parties, but a reaction reflecting the

⁹⁸ See supra at 5.

⁹⁹ A. Cassese, International Law in a Divided World 28 (1986). Other examples of erga omnes are the right to freedom of the high seas, and respect for human rights.

¹⁰⁰ Barcelona Traction Case, supra n.50.

¹⁰¹ Id., at 327 (Sep. Opin. Judge Ammoun).

¹⁰² Id.

¹⁰³ E.g. Brownlie, A Survey of International Customary Rules of Environmental Protection, in International Environmental Law 1,5 (L. Teclaff & A. Utton eds. 1974); Teclaff id. 117; Smith, supra, n.4, at 94-95.

¹⁰⁴ American Law Institute, Restatement (Third) of Foreign Relations Law of the United States, sec. 901 (1986) [hereinafter cited as Restatement].

common will."¹⁰⁵

The international community has expressed serious concern over Vulpinia's actions in Antarctica. The Chair of the Consultative Parties Meeting has called for remedial measures to be taken.¹⁰⁶ Leonia is acting in response to this concern. It aims to obtain redress for the entire international community. It has pledged any reparation recovered for the goals of environmental protection in Antarctica.¹⁰⁷ As a Consultative Party, Leonia has a duty to protect¹⁰⁸ and is entrusted with the protection of the Antarctic environment.¹⁰⁹ It is therefore appropriate that Leonia should act in this matter.

3. Leonia has suffered damage to its special legal interests.

Leonia has suffered an injury to its special legal interests. Special legal interests extend beyond proprietary and territorial rights. They include intangible non-material interests.¹¹⁰ By depriving Professor Handlin of his research source, Vulpinia has infringed Leonia's special legal interests. The Antarctic Treaty establishes a common right to freedom of scientific

¹⁰⁵ Sachariew, State Responsibility for Multilateral Treaty Violations: Identifying the Injured State and its Legal Status, 35 Neth. Int'l L. Rev. 273, 285 (1988).

¹⁰⁶ Problem at 7.

¹⁰⁷ Problem at 8.

¹⁰⁸ Antarctic Treaty, supra n.26, Article X.

¹⁰⁹ Recommendations of the Fifteenth Antarctic Treaty Consultative Meeting, Paris, Oct.1989, Recommendation XV-1, Comprehensive Measures For The Protection Of The Antarctic Environment And Dependent And Associated Ecosystems, states "[B]earing in mind...the special responsibility of the Antarctic Treaty Consultative Parties to ensure that all activities in Antarctica are consistent with the purposes and principles of the Antarctic Treaty."

¹¹⁰ In the South West Africa Cases (Second Phase) (Eth.v.S.Afr.,Lib.v.S.Afr.), 1966 I.C.J. 6, 32-3, this Court held a "legal right need not necessarily relate to anything material or 'tangible', and can be infringed even though no prejudice of a material kind has been suffered."

investigation.¹¹¹ Professor Handlin, a national of Leonia, was actively exercising his right to freedom of scientific investigation in Antarctica. This is a right "clearly vested" in him by the Antarctic Treaty.¹¹² Vulpinia's illegal act of pollution - beginning with the export and ending with the discharge of Vulpinian hazardous waste - seriously infringed that freedom by depriving Handlin of his research source. When the legal rights of nationals are infringed they are considered to be those of the State.¹¹³ Thus Leonia's special legal interest has been infringed.

4. There are strong policy reasons for holding that Leonia's interest is sufficient to enforce the obligations breached by Vulpinia

States have clearly recognised obligations to protect and preserve the environment in areas beyond the bounds of national jurisdiction.¹¹⁴ Leonia has as great an interest as is possible in an extraterritorial area not open to appropriation or exclusive interests. If Leonia cannot enforce the right to freedom of research and an unspoilt environment in Antarctica, no state can. If the Court does not allow Leonia to enforce its right correlative to the obligation of states "to protect areas beyond their jurisdiction," the obligation will be rendered utterly ineffectual. The effects of such a decision extend beyond Antarctica. Agreements to protect other parts of the world where no state has exclusive interests such as the ozone layer would also

¹¹¹ Antarctic Treaty, supra n.26, Article II.

¹¹² Id. at 32, 33.

¹¹³ B. Smith, supra n.9, at 89.

¹¹⁴ Stockholm Declaration, supra n.4.

be made meaningless: the effect would be a "licence to pollute"¹¹⁵ the common environment.

B. Vulpinia Must Make Reparation To Leonia

Vulpinia is obliged to provide redress for its violations of international law.¹¹⁶ Restoration to the status quo ante is not possible in the present circumstances. The waste dumped into the sea off Stella Maris cannot be retrieved. The species of starfish cannot be brought back to life.

1. Vulpinia must compensate Leonia for the damage it caused to the Antarctic environment

Payment of compensation by Vulpinia to Leonia would constitute the most appropriate form of redress.¹¹⁷ The lack of a material or pecuniary loss suffered by Leonia is no bar to recovery of compensation as "a government is always entitled to damages in respect of a breach of international law or a treaty which has affected its interests."¹¹⁸ The consequences of Vulpinia's breach are particularly serious. Marine pollution causing the death of an entire species is a grave environmental injury. The extinction of the starfish is an irreversible loss. Genetic diversity is now recognised as extremely valuable by numerous treaties¹¹⁹ and by declarations of the United Nations.¹²⁰

¹¹⁵ Legault, The Freedom of the Seas: A Licence to Pollute?, 21 U.Toronto L.J. 211-221 (1971).

¹¹⁶ Restatement, supra, n. 104, sec. 901.

¹¹⁷ See C. Gray, Judicial Remedies In International Law 79 (1987). In the Case Concerning the Factory at Chorzow (Ger., v. Pol.), 1928 P.C.I.J. ser.A, No.17 at 47-48 the Court held that where restitution of the parties to the status quo ante is impossible, "payment of a sum corresponding to the value which restitution in kind would bear" must be made.

¹¹⁸ Fitzmaurice, The Case of the I'm Alone, 82 Brit.Y.B.Int'l L 82, 109 (1936).

¹¹⁹ See S. Lyster, International Wildlife Law (1985) for a survey of treaties protecting endangered species. He concluded at 299, "[N]ow the emphasis is more on the role species play in the ecosystems in which they occur and on the need to prevent any species, however, unglamorous or of little

The advancement of scientific research and discoveries in the field of biotechnology is largely reliant upon such diversity.¹²¹

2. Vulpinia must make reparation for the loss of amenity suffered by Professor Handlin

Leonia can claim damages for injury to its nationals.¹²² It is recognised that not all such injuries involve material loss. States can recover damages for their nationals' pain and suffering and other loss of amenity.¹²³ Schwarzenberger explains the rationale clearly: "[t]o treat non-material damage differently from material damage would be incompatible with the basic principle that the tortfeasor must make reparation for the whole of the damage which he has inflicted."¹²⁴ In the Lutsitania Claims the Commission emphasised that non-material damage must be awarded because of "the fundamental principle" that there is a remedy "for the invasion of every right."¹²⁵ In the Heirs of Jean Maninat the Umpire awarded a large sum for grief despite no material loss and said, "[i]t is for this tribunal to speak the voice of regret and to tender atonement for a sad result."¹²⁶ Professor Handlin has suffered unspeakable grief and the loss of his source of research. Leonia must be compensated for this.

apparent importance, from becoming extinct through agencies within man's control."

¹²⁰ World Charter For Nature, G.A.Res, 37/7 (XXI), 21 GAOR Supp.51, at 239, U.N.Doc. A/37/51.

¹²¹ Christenson, Genetic Ark: A Proposal To Preserve Genetic Diversity, 39 Stan.L.Rev.279,230 (1987).

¹²² M. Whiteman, Damages in International Law 81 (1937).

¹²³ E. du Pontavice, Legal Aspects of Transfrontier Pollution, 452 (OECD 1977).

¹²⁴ G.Schwarzenberger, supra n. 60, at 667.

¹²⁵ Id. at 668.

¹²⁶ The Heirs of Jean Maninat (Fr v. Ven.), 10 R. Int'l Arb. Awards 24 (1903).

3. Punitive damages are appropriate in this case to discourage states from doing further damage to the Antarctic environment

Punitive damages are awarded to states for non-pecuniary loss.¹²⁷ They serve as penalties to States for their breaches of international law.¹²⁸

In Moke's case the tribunal expressly awarded punitive damages and said that it wished to "condemn" what had been done.¹²⁹ An award of punitive damages would serve two important purposes in the present case. First it would allow recovery for an injury beyond the bounds of national jurisdiction in an area where no state's direct pecuniary interests have been affected.¹³⁰ Such injuries might otherwise would be inflicted on the Common Heritage areas with impunity. It is important to ensure that states do not avoid liability simply by the "fortuity that the damages they cause occur beyond the limits of national jurisdiction."¹³¹ Punitive damages would deter states and their nationals who might perceive the Antarctic area as a potential dumping ground free of the liabilities imposed within state territory.¹³²

Leonia seeks an award of punitive damages not only to protect its own interests in Antarctica, but in the interest of the entire international community of states.¹³³ Any sum recovered is solemnly pledged to help protect the fragile Antarctic environment from further pollution damage.

¹²⁷ See Restatement, supra n.116, sec.901; The I'm Alone (Can.v.U.S.), 3 R.Int'l Arb. Awards 1609, 1618 (1935), where the U.S. was ordered to pay \$25,000 as a "material amend" distinct from their pecuniary damage. See also G. Schwarzenberger, supra n. 60.

¹²⁸ Restatement, supra n.104, sec.901.

¹²⁹ Cited in C. Gray, supra n.117, at 27.

¹³⁰ G. Schwarzenberger, supra n. 60, at 667.

¹³¹ Gaines, Supra n. 90, at 328 (1989).

¹³² Id. at 326-27.

¹³³ Problem at 7.

CONCLUSION AND PRAYER FOR RELIEF.

The Government of Leonia respectfully requests that the Court :

1. Declare that Vulpinia has violated its international legal obligations owing to Leonia and to the international community by polluting the Antarctic environment; and

2. Order that the Government of Vulpinia pays compensation to Leonia for its violations of international law.

Respectfully Submitted

AGENTS FOR LEONIA.