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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 RESPONDENT

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Human Impact On The Environment: Waste Disposal

JURISDICTION

The Government of Leonia and the Government of Vulpinia have submitted the following matter 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 the State of Vulpinia's leading expert in hazardous waste disposal. He disposes of waste in suitable sites in Vulpinia and other states in accordance with applicable international agreements and the laws and environmental policies of other states.[Problem at 1]

In April 1987 Dr Detritus read an article about scientific research in the unclaimed area of Antarctica. He decided to conduct an experiment. Aware of the enormous problems facing the industrialised world in finding suitable disposal sites for its waste, Detritus obtained legal advice on the possibility of placing some waste in the unclaimed area of Antarctica. He was told that there were no international legal bars to this.[Id. at 2]

Detritus consulted with other experts familiar with Antarctica. They said that parts of Antarctica may be suitable for long-term disposal of waste. Acting on this advice, he conducted an investigation of an unclaimed ice shelf, Stella Maris. He placed one hundred drums of his typical hazardous waste on this isolated ice shelf for one year, as an experiment.[Id. at 2]

The Vulpinian Government was not aware of Dr Detritus' activities. He acted solely as a private individual.[Id. at 3]

The State of Leonia is a Consultative Party to the Antarctic Treaty. The Leonian Minister of Foreign Affairs, Mr Darkeye, received information about Detritus' experiment in Antarctica and objected to Mr Fox of the Vulpinian Government. He asserted that Leonia has a right to prevent certain activities in Antarctica. Mr Fox explained that Vulpinia had not authorised

Detritus' experiment. He informed Darkeye that international law did not prohibit the actions of Detritus.[Id. at 3]

Although under no obligation to do so, Vulpinia decided, without prejudicing its legal position, to remove the waste from the Antarctic. This arrangement was set out in notes discreetly exchanged between the ministers. It was agreed that Leonia would have observers on the recovery vessel. [Id. at 4]

During the intervening winter, Detritus and his experts carried out extensive out tests and determined that the drums could be removed safely without harming the Antarctic environment.[Id. at 4]

The recovery operation took place on 7th January 1989 under the scrutiny of the Leonian observers. Ninety-five drums were removed without incident. Five drums had been seriously damaged. They contained a highly explosive and corrosive substance and were too dangerous to move because they were likely to explode. Waste disposal experts established through experiments that the safest solution would be to empty the contents into the sea. They determined that the substance in the drums would dissolve in the sea within ten days and without effects on the purity of the sea water.[Id. at 5]

Before any action was taken concerning the damaged drums, the Leonian Government was consulted by radio. The Leonian Government gave its permission to empty the drums by ordering its observers not to interfere. The contents were then emptied into the sea without any protest from the Leonian observers. As was expected, ten days after the discharge, the sea waters had recovered their purity and no traces of the wastes were found in the water.[Id.at 6]

On the February 10 1989, Professor Handlin, a Leonian biologist, found that a species of tiny starfish he had discovered there in December 1988 had been destroyed. Handlin had told nobody about his discovery.[Id. at 6]

The Governments of Vulpinia and Leonia issued a joint communique expressing regret for the loss of the starfish and restating their commitment to the preservation of the Antarctic environment.[Id. at 7]

Leonia insisted that Vulpinia pay it compensation in furtherance of Leonia's activities in Antarctica. Vulpinia explained that it had breached no international laws binding on it and had no duty to pay compensation to Leonia.[Id. at 8]

After months of negotiations, both states have decided to submit the dispute to the International Court of Justice for resolution.[Id. at 8]

Questions Presented

1. Is the State of Vulpinia responsible for any breach of right pertaining to Leonia?

2. If the answer to question one is affirmative, is the State of Vulpinia obliged to take remedial measures or to provide reparations with regard to its conduct in Antarctica?

3. What type of remedial measures or reparation would be appropriate in the circumstances?

The State of Vulpinia has agreed to submit this dispute to the Court in order to establish its complete lack of any wrongdoing in the Stella Maris incident. The compromis is merely a source of jurisdiction and is not an acknowledgement of any rights pertaining to Leonia in this matter.

The export of the drums of waste to the Stella Maris ice shelf in the unclaimed sector of Antartica by Dr Detritus for the purpose of experimentation was a private act. It is not attributable to Vulpinia. No obligation of conventional or customary international law binds Vulpinia to prohibit the export of such waste or to prevent his placing the drums in Antarctica as a scientific experiment.

Vulpinia, as a non-party, is not bound by the Antarctic Treaty to regulate Detritus' activities in the area. The Treaty does not create an objective regime because the Treaty was never intended to do so and is objected to by many states. Its provisions have not developed into customary international law because they are not of fundamentally norm-creating character and have been rejected by many states. If the Court were to consider the Antarctic Treaty to be binding on a third parties such as Vulpinia, Dr Detritus' scientific investigations are encouraged by the Treaty rather than prohibited.

Vulpinia agreed to remove the drums from Antarctica out of a sense of co-operation and goodwill but was not obliged to do so. The arrangement that Vulpinia recover the drums was set out in notes discreetly exchanged between the Foreign Ministers. It was a non-binding arrangement in furtherance of a joint policy to protect the Antarctic. Its specific terms are typical of

such non-binding "Gentlemen's Agreements" relating to scientific cooperation.

The emptying of the five drums into the sea by Vulpinia was in accordance with Vulpinia's obligations. The drums were in a corroded state and too dangerous to move. Moreover Vulpinia acted with great care to protect the marine environment by ascertaining first that the discharge of the waste would do no lasting damage to the environment. In the circumstances Vulpinia acted with due regard to other states' freedom of the high seas and with due regard to protect the marine environment.

The duty to protect the marine environment is not a strict duty but rather only a duty to take reasonable care. In the circumstances all possible care was exercised and the resulting death of the starfish was unfortunate but unforseeable. The extensive scientific tests carried out by Vulpinian experts prior to the discharge proved, correctly, that the substances would completely dissolve in the sea water without any lasting effect within ten days it could not have been known any detrimental effects would result from the discharge of the waste. Vulpinia's actions were thus not in breach of international environmental law.

In any event, the drums were not emptied until the consent of the Leonian government was obtained. Leonia cannot now ask the Court to declare that the action was wrongful. Leonia's consent to Vulpinia's emptying of the drums makes Vulpinia's action not wrongful with regard to Leonia and precludes Leonia from seeking to rely on Vulpinia's conduct as breaching any obligations owed to Leonia generally or under the exchange of notes.

The injury caused by the discharge of the waste, the death of the starfish, does not breach any judicially enforceable right pertaining to Leonia. As Leonia does not have any special interest in the species of starfish, wild species being res nullius at international law, it cannot enforce any right against Vulpinia for the injury. Leonia has no direct interest in the injury suffered and thus it cannot assert any capacity to enforce any obligations to protect the environment in Antarctica. Such obligations are owed erga omnes and require a direct infringement of a personal right to be enforceable. The right to act on behalf of the international community is not known in international law and Leonia's position as a Consultative Party does not confer on Leonia any such capacity.

In any event injury suffered by Leonia is not serious enough to warrant compensation. Only serious environmental injuries are compensable. The injury is also incalculable and not proveable in monetary terms. As such it is not a proper subject for the award of damages by this Court. Any damages awarded would be punitive and these awards have no place in international claims. Moreover punitive damages would be most inappropriate because of the accidental nature of the damage and the enormous care taken by Vulpinia to prserve the Antarctic environment.

I THE TRANSPORT OF THE DRUMS TO ANTARCTICA BY DR DETRITUS DID NOT INVOLVE ANY BREACH OF INTERNATIONAL LAW BY VULPINIA

A. Vulpinia Was Not Obliged To Prohibit Dr Detritus' Activities

1. Vulpinia is not responsible at international law for the acts of private individuals

Vulpinia is only responsible for the conduct of its organs and representatives.[1] For most acts of private individuals the state has no responsibility. In the absence of any complicity of Vulpinia's officials and without an affirmative duty to act on the part of the state, Dr Detritus is exclusively responsible for his private actions.[2]

Territoriality is the basis for state responsibility for controlling private activities.[3] International law does not recognise any general duty to control private activities beyond state borders. Brownlie states the matter plainly: "[i]n general a state is not under a duty to control the activities of private individuals (being its nationals) beyond the bounds of state territory. Thus a state is not responsible for the delinquencies of vessels flying its flag or otherwise controlled by its nationals."[4] When transporting to and placing the drums in Antarctica, Dr Detritus was not acting on behalf of or under the authorisation of the state of Vulpinia[5].

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[1] See R.Ago, Fourth Report on State Responsiblity 1972 ii Y.B.Int'l L.Comm'n 95; I. Brownlie, System of the Law of Nations: State Responsibility (Part I) 159 (1983)[hereinafter cited as Brownlie, State Responsibility].

[2] Christenson, The Doctrine of Attribution in State Responsibility, in International Law of State Responsibility for Injuries to Aliens 322 (R.Lillich ed. 1983).

[3] Island of Palmas Case (U.S.v.Neth.), 2 R.Int'l Arb.Awards 829 (1928).

[4] Brownlie, State Responsibility supra n.1, at 165.

[5] Problem at 3.

His actions were not later approved or adopted by Vulpinia.[6] Responsibility for a private act may arise if a state has knowledge of it.[7] Vulpinia had no such knowledge. In the Corfu Channel case this Court stated decisively that such knowledge cannot be presumed and proof must leave "no room for reasonable doubt."[8]

2. Vulpinia is not obliged by international law to restrict the export of hazardous waste from its territory

Vulpinia could only be responsible for Dr Detritus' conduct if there existed independently an international obligation binding on Vulpinia which its organs did not fulfil.[9] No conventional obligation bound Vulpinia to prohibit the export of hazardous wastes at the time Dr Detritus conducted his experiment.[10] The Court must look to customary international law to determine the existence of any such obligation. It is "axiomatic that the material of customary international law is to be looked for primarily in the actual practice of states."[11] Abstention is as much state practice as a positive act.[12] Very few countries prohibit the export of hazardous wastes.[13] Consistent refusal to

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[6] Compare United States Diplomatic and Consular Staff in Tehran (U.S.v.Iran), 1980 I.C.J. 3, 36-40.

[7] Brownlie, State Responsibility supra n.1, at 45 states that in cases of failure to control "questions of knowledge may be relevant in establishing the omission or, more properly responsibility for failure to act."

[8] The Corfu Channel Case (U.K.v.Alb.), 1949 I.C.J. 4, 18.

[9] Christenson, supra n.2, at 326.

[10] Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, opened for signature at Basel, Mar.22, 1989.

[11] Military and Paramilitary Activities In and Against Nicaragua (Nicar.v.-U.S.), 1986 I.C.J. 14, quoting from Case Concerning the Continental Shelf (Libya and Malta) 1985 I.C.J. 13,29-30.

[12] A. D'Amato, The Concept of Custom in International Law 88-89 (1971).

[13] See Cirulli, "Toxic Waste Ships In Search of Ports" in Third World Network Features No.448/89, (Jul.2 1989).

prohibit is evidence of state practice which shows that customary law does not require states to prohibit hazardous waste movements. States have not acted to prohibit hazardous waste movements even when directed to do so by regional arrangements.[14] The opinio juris necessary for the development of a customary rule requiring a prohibition on waste exports must be found in the state practice itself.[15] The frequency of waste exports is only explained on the basis that states do not regard themselves as bound by any such rule. Publicists expert in this area of the law[16] support this conclusion[17]. Bothe explains, for example, that "the rule is rather that no export restrictions exist."[18]

Significantly the most recent multilateral treaty concerning hazardous waste movements[19] is regarded as a progressive development of the law. The Declarations[20] attached to the Basel Convention illustrate this by referring to the Convention as, inter alia, "the beginning"[21] and "a step forward".[22]

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[14] Only four member states of the European Economic community (EEC) have implemented the Directive on the Supervision and Control Within the European Community of the Transfrontier Shipment of Hazardous Waste, 27 O.J. Eur. Comm. (No. L 326) 31 1984).

[15] North Sea Continental Shelf Cases (W.Ger.v.Den.;W.Ger.v.Neth.), 1969 I.C.J. 3,176,231,246-47,(per Judges Tanaka, Lachs and Ad hoc Judge Sorenson dissenting).

[16] The Court may have regard to the writings of the most highly qualified publicists as a subsidiary source of law under the Statute of the International Court of Justice, Article 38(1)(d).

[17] See G. Handl & R. Lutz, Transferring International Technologies and Substances: The International Legal Challenge (1989).

[18] See Bothe, "The Responsibility of Exporting States" in G. Handl & R. Lutz, supra n.17, at 163.

[19] The Basel Convention supra n.4.

[20] Nine States have attached Declarations to the Final Act of the Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes UNEP Doc. I.G.80/3.

[21] Id. Declaration of Equador, 27.

B. Vulpinia Is Under No Duty To Prevent Scientific Experiments In Antarctica

1. There is a right of free access to Antarctica

The legal status of the unclaimed area of Antarctica is unresolved in international law. Many regard it as terra nullius.[23] This means it is owned by nobody but everybody has a right of free access.[24] Activities in areas terra nullius are unrestricted,[25] thus permitting the conduct of scientific experiments such as those carried out by Dr Detritus. Even if the area is res communis, international law allows Vulpinia's citizens to pursue their own goals.[26] Cassese provides an accurate summary of the rights of states under the res communis doctrine: "[Furthermore], res communis omnium means that every State is authorised to use a certain good for its own purposes and in its own interest".[27] Free access, including scientific experimentation is thus permissable in Stella Maris regardless of its legal status.

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[22] Id. Declaration of the Socialist Republic of Vietnam, 33.

[23] Both the U.S. and U.S.S.R. reserve the right to make territorial claims in the future. See Boczek, The Soviet Union and the Antarctic Treaty Regime 78 Am.J.Int'l L. 834, 840 ff.(1984); G. Triggs, International Law and Australian Sovereignty in Antarctica 88 (1986).

[24] Larschan & Brennan, The Common Heritage of Mankind Principle in International Law 21 Colum.J.Transnat'l L. 305, 312-13 (1981).

[25] The Lotus Case (Fr.v.Turk.), 1927 P.C.I.J., ser.A, No.10, enunciated the principle that in the absence of any customary rule of international law, or agreement, restrictions on the liberty of States cannot be presumed.

[26] See e.g., P.Birnie, The Antarctic Regime and Third States in Antarctic Challenge II 239 (R.Wolfrum ed. 1986); J.Kish, The Law of International Spaces 78 (1973); Note, Thaw In International Law? Rights In Antarctica Under The Law Of Common Spaces, 87 Yale L.J. 804 (1978).

[27] A. Cassese, International Law in a Divided World 377 (1986). See also, Cheng, The Legal Regime of Airspace and Outer Space: The Boundary Problem Functionalism versus Spatialism: The Major Premises in 5 Annals of Air and Space Law 337 (1980).

The requisite opinio juris is also lacking: many states object to the operation of the Treaty.[33] Furthermore, before a treaty can form the basis of a general rule of law, it must be of a "fundamentally norm creating character".[34] The bifocal approach adopted by Article IV provides conclusive proof that the Antarctic Treaty is not of this nature.[35] Vulpinia thus has no customary law obligation compelling it to regulate the actions of its citizens in Antarctica in accordance with the Antarctic Treaty.

4. The Antarctic Treaty does not create an objective regime binding on Vulpinia

The creation of an objective regime requires that obligations binding on third parties stem from the nature of the treaty itself and the intention and competence of the parties creating it.[36] Consideration of these factors leads to the conclusion that the Antarctic Treaty does not have objective effects.

The Antarctic Treaty Parties did not intend to create an objective regime. Article X indicates they did not intend that third states would be automatically bound by the regime. The ambiguous nature of Article IV and the provision for withdrawal[37] also deny the possibility of an objective regime.

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[33] See e.g., Haron, Antarctica and the United Nations in Antarctic Challenge II, supra n.32, at 321-32, in which Malaysia's objections are detailed. See also 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) at 3 (for the views of Antigua and Barbuda) and at 92 (for the views of Bangladesh).

[34] North Sea Continental Shelf Cases supra n.15, at 41.

[35] See F. Auburn, Antarctic Law and Politics 117-18 (1982); G. Triggs, supra n.22, at 150.

[36] Waldock, Third Report on the Law of Treaties 1962 Y.B.Int'l L.Comm'n 5 (vol.2).

[37] Antarctic Treaty, supra n.30, Article XII(2)(c).

Furthermore the Treaty is open to be re-negotiated in 1991[38] and was never intended to be more than a temporary arrangement to avoid disputes over sovereignty while engaging in activities in Antarctica.[39]

The Consultative Parties lack demonstrable special competence in relation to the subject-matter of the Antarctic Treaty. Territorial competence is rendered impossible by Article IV. Involvement in the area is not a sufficient basis for competency because, contrary to the principles of the New International Economic Order,[40] it prejudices and excludes states unable to bear the prohibitive costs of Antarctic exploration.[41] The Antarctic Treaty does not satisfy the pre-conditions of an objective regime and therefore Vulpinia is not required to act in accordance with its terms.

5. Even if the Court finds that the Antarctic Treaty is binding on Vulpinia, it does not operate to prohibit Dr Detritus' experiments on Stella Maris

Freedom of scientific investigation is the primary purpose of the Antarctic Treaty.[42] Experimentation is the most effective means of finding a solution to the global problem of waste disposl. Consultative Parties recognise the

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[38] Supra n.30, Article XII (2)(a).

[39] Auburn, supra n.35, at 84.

[40] Declaration on the Establishment of a New International Economic Order, G.A.Res.3201, 6th Spec.Sess. GAOR Supp.1, at 3, U.N.Doc.A/9559 (19740;Programme of Action on the Establishment of a New International Economic Order, U.N.Doc.A/RES/3202 (S-VI); 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).

[41] See Simma, The Antarctic Treaty as a Treaty Providing For An Objective Regime, 19-20 Cornell Int'l L.J. 189 (1986) for an extrapolation of this view.

[42] Antarctic Treaty, supra n.30, Article II.

need for improvements in waste disposal technology[43] due to the mounting problem in Antarctica. Dr Detritus' experiments may resolve these dilemmas. Dr Detritus' experiments were a valid exercise of the right to conduct scientific investigations provided by the Antarctic Treaty. Article V(I) prohibits only the disposal of radio-active waste and it does not have the effect of out-lawing a controlled experiment in waste disposal.

II THE EMPTYING OF THE CONTENTS OF THE FIVE DRUMS INTO THE SEA WAS NOT A BREACH OF ANY INTERNATIONAL OBLIGATION BINDING ON VULPINIA

Although Vulpinia was under no duty to abort Dr Detritus' experiment and reimport the waste from Antarctica, it undertook to do so as a gesture of goodwill. The emptying of the contents of the five dangerously corroded drums into the sea was in accordance with all Vulpinia's obligations in the circumstances.

A. Vulpinia exercised due regard for the rights of other states on the High Seas

The Stella Maris ice shelf is not subject to any territorial claim and so the adjacent waters are a part of the high seas.[44] Freedom of the high seas[45] must be exercised with "due regard to the interests of other states."[46] The right

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[43] Report and Recommendations of the Antarctic Treaty Consultative Meeting XV, Paris Oct.1989, Recommendation XV-3 Human Impact On The Environment: Waste Disposal, para.25.

[44] See Convention on the Law of the Sea opened for signature at Montego Bay, Dec.10. 1982, U.N.Doc. A/Conf.63/122 and Corr.1 to 11, reprinted in 21 Int'l Legal Materials 1261 (1962) [hereinafter cited as LOSC] Article 87(2).

[45] The Antarctic Treaty supra n.30, Article V expressly preserves this freedom.

[46] LOSC supra n.44, Article 87(2). The Convention on the High Seas, done Apr.29, 1958, 450 U.N.T.S. 11 also imposes the obligation to act with "reasonable regard for the rights of others."

"to dispose of waste materials in the high seas is a traditional freedom of the seas" tempered only by the "reasonable regard standard."[47]

Vulpinia emptied the five drums of waste from the isolated Stella Maris ice shelf into the vast Southern Ocean. It did so only after conducting extensive tests to ensure the environmental viability of the action and consulting with Leonia. Since the waste was known to have no lasting effects and there was no forseeable injury to any other state, Vulpinia acted with reasonable regard to the interests of other states.

B. Vulpinia Complied With Its Obligation To Protect The Marine Environment

1. The customary obligation to protect the marine environment requires that reasonable care be taken

Vulpinia is not a party to any convention in force which regulates the discharge of waste into the sea. The Court must thus look to customary international law binding on Vulpinia. The customary duty to protect the marine environment requires that due care be taken but is not absolute. It is well recognised that the needs of development conflict with a duty to protect the environment. A great number of states, particularly the developing states, have asserted that "in the interests of development, the environment can be sacrificed".[48] Principle 21 of the Stockholm Declaration,[49] considered to be the touchstone of the customary duty to protect the environ-

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[47] Council on Environmental Quality, Ocean dumping, A National Policy: A Report To The President (1970), reprinted in Pollution Crisis: Official Documents 107 (Rabin and Schwartz eds. 1972).

[48] J.Kindt, Marine Pollution and the Law of the Sea 35 (1988).

[49] Declaration of the UN Conference on the Human Environment, UN Doc. A/Conf. 48/14, and Corr.1 (1972)[hereinafter cited as The Stockholm Declaration].

ment;[50] expresses the duty in limited terms. It recognises states' rights to development and exploitation of natural resources. The Preparatory Committee for the Declaration maintained that "negligence remained a prerequisite before the controlling state's responsibility under international law might be invoked."[51] The World Charter for Nature of 1982[52] also recognises that there is a duty to take reasonable care to protect the environment; it does not impose a standard of strict liability.[53]

Even if certain parts of the LOSC are regarded as declaratory of customary law,[54] it requires implementation of only reasonable measures to protect the marine environment. Article 194, for example, requires states to "take measures" to "minimise" pollution to the fullest possible extent. The Court may have regard to the Travaux Préparatoires[55] which reveal clearly that due care is the standard required by the LOSC. A proposal of strict liabilty for any damage caused was submitted to and expressly rejected by the Conference.[56] Professor Handl summarises the customary rule aptly:

> Liability [for marine pollution] will depend on proof that the state's lack of due care or due diligence brought about the transnationally injurious event...The state's failure to prevent

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[50] See L. Sohn, The Stockholm Declaration on the Human Environment, 14 Harv. Int'l L.J. 423 (1973).

[51] Handl, State Liability For Accidental Transnational Environmental Damage by Private Persons, 74 Am.J.Int'l L. 525, 536 (1980).

[52] World Charter For Nature G.A.Res.37/7 (XXI), 21 U.N.GAOR, Supp.(No.51) at 17, U.N.Doc.A/37/51.

[53] E.g., id., Principle 11 requires that "Activities which might have an impact on nature shall be controlled, and the best available technologies that minimise significant risks to nature or other adverse effects shall be used."

[54] LOSC, supra n.44.

[55] VCLT Art.32.

[56] See B. Smith, State Responsibility and the Marine Environment 118 (1983).

> the injury will be evaluated against a standard of conduct which, in the light of the circumstances, the state could reasonably have been expected to adopt.[57]

2. Emptying the drums of waste into the sea was necessary in the circumstances and was done with reasonable care for the environment

The five corroded drums were dangerous to life and property. They were likely to explode if moved. Emptying their contents into the sea was necessary in the circumstances. The relevance of life threatening situations mitigating conduct which might otherwise be wrongful is recognised in international law.[58] The danger averted by so doing was proportional to the risk taken. The London Dumping Convention itself explicitly permits the dumping of even the most dangerous substances when life or property is threatened.[59]

Vulpinia acted with great care to minimise any possible risk involved by undertaking extensive tests undertaken by the Vulpinian experts prior to the emptying of the drums. Experts determined that the waste would dissolve completely within ten days and have no lasting effect. The reasonableness of discharging waste into the sea is judged by "the possibility of harm according to existing information."[60] The information available at the time of the discharge revealed that no permanent damage could be caused to the environment. The care exercised by Vulpinia was in fact far greater than that practised by Consultative Parties to the Antarctic Treaty. Their practice of

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[57] Handl, Liability for Marine Pollution, 21 Can.Y.B.Int'l L. 95 (1983).

[58] Jagota, State Responsibility: Circumstances Precluding Wrongfulness, 16 Neth.Y.B.Int'l L. 249 (1985).

[59] Convention on the Prevention of Marine Pollution By Dumping of Wastes and Other Matter, 1972 Misc.54 (Cmd.5169), U.N.Leg.Ser. St./Leg./Ser.B/16, at 464, reprinted in 11 Int'l Leg.Materials 1291 (19720, [hereinafter cited as London Dumping Convention], Article V.

[60] M. McDougal and W. Burke, World Public Order of the Oceans 863 (1985).

unrestricted dumping into the sea is well documented[61]. The death of a species of tiny starfish dependent on exact environmental conditions for its existence was completely unforseeable. International law and principles of equity deny that a state be held responsible for completely unforseeable injury when it has exercised reasonable care.[62]

C. Vulpinia Was Under No Binding Obligations Arising From The Notes Exchanged Between The Ministers On 2 February 1988

1. The Exchange of Notes was not a binding international agreement

The intention to create legal relations must be manifested clearly in either the provisions of the agreement or the circumstances in which it was concluded.[63] There is no presumption in international law of an intention to create legal relations.[64] No intention to create legal relations is manifest in this case. The complete lack of publicity of the exchange of notes is indicative of the parties' intention to make a non-binding arrangement.[65] The text of the exchange of notes refers to the general aims of the states to preserve the "unique and delicate Antarctic environment". The instrument has

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[61] "It was Greenpeace that publicised McMurdo's continued dumping of untreated sewerage into the sea...The waters right off the station are repotedly more polluted with substances such as heavy metals and PCBs than any similar stretch of water in the U.S. Greenpeace has also documented reckless dumping and burning at Soviet, Uruguayan, Argentinian, Chilean, and Chinese bases." M. Lemonick, supra n.32.

[62] Professor Handl writes: "[U]nforseeable transnational damage to the environment cannot be claimed to engage the acting state's liability as a matter of law simply upon its occurrence." Supra n.57, at 107.

[63] Fawcett, The Legal Character of International Agreements, 30 Brit.Y.B.Int'l L. 381, 385-400; Hamzeh, Agreements in Simplified Form-Modern Perspectives, 43 Brit.Y.B.Int'l L. 1979, 186 (1968-69); Schachter, The Twilight Existence of Non-Binding International Agreements, 71 Am.J.Int'l L. 296, 297 (1977).

[64] Fawcett, id. 385.

[65] Cf. Nuclear Tests Cases, (Aust.v.Fr., N.Z.v.Fr.), 1974 I.C.J. 253, where a public unilateral declaration by France was held to be binding in international law.

been executed "without prejudice" to either States' legal positions.

The arrangement has the features of a non-binding "Gentleman's Agreement" concerning an area of scientific and technical cooperation between two states. Such agreements are often precise but not intended to create legal relations.[66] The instrument represents merely a statement of policy and an arrangement of cooperation made pursuant to that policy, and is not an appropriate subject for international juridical enforcement.[67]

The absence of a dispute resolution mechanism in the exchange of notes demonstrates that it is a non-binding arrangement. There is a strong presumption against the establishment of legal obligations if the provisions of the instrument concerned do not provide for the settlement of disputes.[68] The fact that the exchange of notes was registered under Article 102 of the United Nations Charter does not make the arrangement binding.[69] States regularly register non-binding agreements.[70] The United Nations Secretariat accepts agreements for registration without conferring any status on them which they would not have otherwise.[71]

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[66] Schachter, supra n.39,¢300, lists the following : UN 1946 Agreement on Election to the Security Council, 1966 Luxembourg Compromise to Voting in the Council at European Communities. eg: 1908 Agreement between Japan and the United States Relating to Immigration, 299.

[67] Such agreements often govern scientific and technical cooperation agreements. See, e.g., Exchange of Letters between Netherlands and Indonesia 799 U.N.T.S. 41.; See, Myers, The Names and Scope of Treaties 51 Am.J.Int'l L. 574, 605 (1957); Schachter, supra n.41,¢279.

[68] Widdows, What Is A International Agreement In International Law?, 50 Brit.Y.B.Int'l L. 117, 122 (1979).

[69] Schachter, supra n.39, at 229.

[70] The Australian Federal Department of Foreign Affairs and Trade has sent agreements, explicitly not intended by the Australian authorities to be binding,for registration under Article 102. eg:Nickel Study Group Terms of Reference. ("Arrangements of less than Treaty Status: Australian Practice" Statement of Department of Foreign Affairs and Trade (26 May 1989). 1.

[71] I. Brownlie, Principles of Public International Law 609 (3rd ed. 1979).

2. Leonia consented to the discharge of the waste

Valid consent to an act may be given by a state in many ways. Special Rapporteur on State Responsibility Robert Ago has said that "[n]o special condition as to form is required for its expression; like all manifestations of the will of a State, such consent can be expressed or tacit, explicit or implicit."[72] It must be expressed prior to or at the time of the conduct in question.[73] The effect of a state's consent to a specific act is to preclude the wrongfulness of the act consented to with regard to the consenting state.[74]

The Vulpinian officials refrained from any action until Leonia was contacted by radio. Leonia gave its consent implicitly by ordering its observers not to interfere.[75] The Vulpinian officials then proceeded in good faith to discharge the contents of the drums without any objection by the observers. This action would have become injurious "only if performed in the face of formal protest or objection" by Leonia.[76]

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[72] Ago, Eighth Report on State Responsibility 1979 ii Y.B.Int'l L.Comm'n 3, at 35 Commentary on Draft Article 29, UN Doc. A/CN.4/SER.A/1979/Add 1 (Part 1).

[73] Id., at 37.

[74] State Responsibility Draft Article 29, ibid.,38; Ago, ibid., at 35 states "nowhere in the writings of international law is there any dissent" from this view.

[75] Problem at 5.

[76] The Aunis Case, Note dated 19 July 1863 from Visconti Venosta to the Italian Minister in Paris; cited with approval by Ago, supra n.72 at 34.

3. Leonia's failure to protest estops it from relying on any breach of obligation

The doctrine of estoppel is a general principle of law[77] which operates in international law[78] to bar Leonia from bringing a claim of breach of any obligation by Vulpinia in emptying the drums. Leonia is precluded, having acquiesced in the discharge of the drums' contents by Vulpinia, from subsequently invoking that conduct as a breach of Vulpinia's international obligations.

The Leonian observers were acting as representatives of the state on the recovery vessel. Their conduct at the time of the tipping amounts to acquiescence, by reason of their "failure to protest"[79] and passivity before allegedly adverse acts.[80] Vulpinia discharged the contents of the five drums only after seeking and obtaining the acquiescence of Leonia. By virtue of that acquiescence Leonia is now precluded from any claim that failure to remove the one hundred drums and their contents is a breach of any international obligation by Vulpinia.

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[77] Article 38(1)(c) of the Statute of the International Court of Justice allows this Court to consider as a source of international law "the general principles of law recongised by civilized nations".

[78] See McNair, Law of Treaties 485-89 (1961); G.Schwarzenberger, International Law 535 (1957 3rd ed.); Bowett, Estoppel Before International Tribunals, 33 Brit.Y.B.Int'l L.197 (1957); MacGibbon, Estoppel in International Law,7 Int'l & Comp.L.Q.468 (1958). See also Case Concerning the Temple of Preah Vihear (Camb.v.Thai.), 1962 I.C.J. 6, 62 (per Judge Fitzmaurice) [hereinafter referred to as Temple Case].

[79] The Temple Case id. at 46.

[80] Anglo-Norwegian Fisheries Case (U.K.v.Nor.), 1951 I.C.J. 116, p.132.

III VULPINIA IS NOT OBLIGED TO MAKE REPARATION OR TO TAKE REMEDIAL MEASURES

A. Vulpinia's Actions Have Not Breached Any Rights Enforceable By Leonia

1. The compromis is not an admission of rights pertaining to Leonia

The compromis is only the means by which this Court is seised of this dispute[81]. It is the source of jurisdiction to establish, inter alia, whether there is "any right pertaining to Leonia" which is susceptible to judicial enforcement. Vulpinia's willingness to settle the matter before the Court is not an admission that Leonia possesses any enforceable legal rights regarding any aspect of the matter.[82]

2. Leonia has not sustained any injury to its personal and exclusive legal rights

Leonia has a right of free access to Antarctica and a right to freedom of scientific investigation.[83] These rights are not exclusive to Leonia; all states enjoy them.[84] The proposition that certain rights pertaining to all States - rights "erga omnes" - may be enforced by any State, has been soundly rejected by this Court.[85] A State can only enforce erga omnes rights if it has an injury to its personal rights. This has been consistently recognised by the Court. In the Nuclear Tests Case it was stated that a party must possess

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[81] K.Oellers-Frahm, Encyclopaedia of Public International Law 45 (R.Bernhardt ed. 1981).

[82] Nuclear Tests Cases(Interim Protection) (Aust.v.Fr.,N.Z.v.Fr.), 1973 I.C.J. 99, 108.

[83] See supra at 12-13.

[84] B. Smith, State Responsibility and the Marine Environment 89 (1988). Common rights in Antarctica are analogous to freedom of the high seas and human rights protection to which all States are entitled.

[85] B.Smith, id. at 95 interprets the decision of the court in the South West Africa Cases (second phase) (Eth. v. S.Afr., Lib. v. S.Afr.), 1966 I.C.J. 6, as an unequivocal denial of the right of all States to enforce erga omnes rights.

"a right of its own as distinct from a general community interest".[86] In the Barcelona Traction Case it was also stated that states can only "claim a subjective right on the basis of a personal and direct interest".[87] Leonia cannot assert a general right on behalf of all others because it has not been specially affected by Vulpinia's actions.[88]

3. Leonia cannot enforce rights owed erga omnes

The personal legal interests of states in extraterritorial areas such as Antarctica consist of their flag ships, nationals, and property.[89] Every state has an enforceable right to protect these.[90] Leonia has suffered no injury to such an interest. States may also possess personal legal rights which arise from non-material interests.[91] Such rights, however, "must be clearly vested in those who claim them by some text or instrument or rule of law".[92] No such rights are vested in Leonia. Leonia has no contractual rights against Vulpinia. Any that may once have existed have either been waived or are barred by estoppel.[93] No other form of legal right exists in Antarctica, through the operation of the Antarctic Treaty.[94] Vulpinia cannot therefore have been responsible for a breach of any personal right of Leonia.

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[86] Nuclear Tests Cases (Aust.v.Fr.,N.Z.v.Fr.), 1974 I.C.J. 253, 424.

[87] Case Concerning the Barcelona Traction, Power and Light Co. (Belg.v.Spain), 1970 I.C.J. 3, 327.

[88] A. Cassese, supra n.27, at 28-29.

[89] B. Smith, supra n.84, at 87.

[90] Id.

[91] I. Brownlie, supra n.71, at 472.

[92] South West Africa Cases, supra n.85, at 32-33.

[93] See supra at 15.

[94] Article IV(1) of the Antarctic Treaty, supra n.32, freezes all territorial claims.

Leonia has no personal or exclusive right in the species of starfish, either directly or through its national, Professor Handlin. A wild species of living creature is not susceptible to any such claims of right. It is res nullius at international law.[95]

4. Leonia cannot enforce any rights under the Antarctic Treaty against Vulpinia

Vulpinia is not a party to the Antarctic Treaty, which does not create rights or obligations binding upon third States.[96] The treaty does not create an objective regime and its provisions have not emerged into customary international law.[97] As between Leonia and Vulpinia it is therefore neither a source of an enforceable obligation nor of right. Leonia, although a Consultative Party, is not a trustee of the Antarctic area and is not entitled to assert rights pursuant to the Treaty against any State, on behalf of the international community. By their practice, the Consultative Parties have not asserted a right to act as trustees.[98] No such right exists.

The purported right of States to take action "in vindication of a public interest, is not known to international law."[99] The International Law

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[95] J.Kindt, Marine Pollution and the Law of the Sea 176 (1986) writes that wild species have long been recognised as res nullius at international law. See also In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978 MDL No.376 slip op.23 (N.D.Ill., Jan.11, 1988) at 29, which held that no-one possessed legal rights concerning wild marine species.

[96] VCLT supra n.28, Article 34.

[97] See supra at n.28.

[98] See Barnes, supra n.32, at 432, which details the failure of the Consultative Parties in 1984 to take any action against gross environmental damage to Antarctica caused by the French in laying foundations for an airstrip.

[99] South West Africa Cases supra n.85, at 46, the Court held regarding general rights that "in the international field the existence of obligations that cannot be enforced has always been the rule rather than the exception".

Commission recognises as lex ferenda the possibility that States may take action in the public interest to vindicate an international crime such as slavery, genocide, apartheid or massive pollution.[100] Vulpinia has committed no such heinous activity. Thus, in the absence of a personal legal right Leonia cannot enforce erga omnes rights against Vulpinia.[101] Indeed, such a "right to enforce communal rights" goes against basic principles of international law.[102]

B. Vulpinia Is Not Required To Make Reparation

1. The damage is not significant enough to give rise to a duty to compensate

Leonia's right to protection of the Antarctic environment can be no greater than the right to protection of its own environment. Liability to compensate for accidental damage to the environment of another state only arises when the damage is serious. International law has developed this principle because mankind's interaction with the environment inevitably involves some losses; therefore only serious and direct losses are compensable. The publicist Julio Barboza has said that "injury which does not amount to anything significant, tangible or appreciable" is not compensable because "the enjoyment of modern technology implies some wear and tear, the discharge of certain wastes, etc...which we must all endure because we are both victims and

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[100] Report of the International Law Commission to the General Assembly, 35 U.N. GAOR Supp.(No.10) 64, U.N.Doc.A/35/10 1980, Draft Article 19, para.3.

[101] See also A. Cassese, supra n.27, at 29-30.

[102] Roberts, International Cooperation for Antarctic Development: The Test for the Antarctic Treaty in El Dessarrollo de la Antarctica 355 (F. Orega-Vicuna ed. 1977).

assailants".[103] This is evidenced in the awards of tribunals. In the Trail Smelter Award it was held that the case must be of "serious consequence and the injury established by clear and convincing evidence."[104] In The Lac Lanoux Award it was deemed necessary that the injury "change the state of affairs for the working of the requirements of social life" before the injury is compensable.[105] Major multilateral treaties imposing liability are further evidence that only serious harm is compensable.[106]

In areas beyond national jurisdiction, the harm to shared resources is only compensable if it "threatens life or damages property."[107] The death of a species of starfish in Antarctica does neither to Leonia. It is not injury serious enough to warrant compensation.

2. Loss of a species is not an assessable loss

Because there is no acceptable value system for many things, international law demands that "the actual monetary loss shown to have been sustained"[108] be stictly proved before compensation can be awarded. This is to avoid "economic and political complications because two countries may place

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[103] Barboza, 3rd Report, Injurious Consequences ii Y.B.Int'l L.Comm. 54 (1987) UN Doc. A/CN.4/405 (Part 1)

[104] Decision of the Trail Smelter Arbitral tribunal (1941) (U.S. v. Can.) # R. Int'l Arb. Awrds 1905, at 1965.

[105] Decision of the Lac Lanoux Arbitral Award, XII U.N. Reps of Int'l Arb. Awards 281, at 304.

[106] du Pontavice, "Compensation for Transfrontier Pollution Damage", in OECD Legal Aspects of Transfrontier Pollution 369 (1977).

[107] U.S. Council On Environmental Quality, supra n.47, at 144.

[108] Whiteman, Damages in International Law (1937-43), 627.

substantially different values on damage to a particular resource."[109] The Trail Smelter Award required "tangible injury translatable into provable monetary damages".[110] Municipal Courts have similarly refused to compensate for injury which cannot be proved directly. Recently in the Amoco Cadiz case the court refused to order that damages be paid for death of a non-commercial species.[111] Multilateral conventions concerned with ultra-hazardous and polluting activity allow only for damage to property and for clean-up measures.[112] The environment has returned to its prior purity and Handlin's research had only speculative value which is not recognised as compensable at international law.[113] The mere loss of use or enjoyment of something without monetary value is not compensable.[114] Compensation is limited to particular injury sustained by Leonia and its nationals.[115] Leonia can prove no such loss for which damages can be awarded.[116]

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[109] Gaines, "International Principles for Transnational Environmental Liablity: Can Developments in Municipal Law Help to Break the Impasse?",30 Harv Int'l L.J. 311 at 340 (1989).

[110] Decision of the Trail Smelter Arbitral Tribunal supra n.104 ,at 9.

[111] In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978 MDL No.376. slip op. 23 (NDIll. Jan.11, 1988) 29.

[112] E.g. Convention on Civil Liability for Oil Pollution Damage, done at Brussels, Nov.29, 1969, reprinted in 9 Int'l Leg. Mats 45 (1970); Offshore Pollution liability Agreement done at London, Sept. 4, 1974, reprinted in 13 Int'l Leg. Mats 1409 (1974).

[113] "[P]ossible but contingent and indeterminate damage...cannot be taken into account.", The Chorzow Factory Case (Merits) 1928 P.C.I.J. Ser. A, no.13, at 57.

[114] "The Mixed Arbitration Tribunal only compensates for loss of use if the loss is pecuniary not merely one of pleasure or amenity." Weilmans Award, Recueil des T.A.M. II, 229; cited in du Pontavicce, supra n.106, at 450.

[115] Smith, supra, n.84, at 99.

[116] M. Whiteman, supra, n.108,

3. Punitive damages cannot be awarded against Vulpinia

In the absence of any serious, certain or forseeable injury caused to Leonia any damages awarded would be punitive. Punitive damages have no place in international law[117] because as "between sovereign nations the question to serve penalties...is political rather than legal in nature"[118] and is thus beyond the judicial function. Punitive damages are only awarded for wilful and gross negligence, and harm of the most severe consequence in municipal systems.[119] There has been an explicit refusal by international tribunals to award punitive damages.[120] In this case, Vulpinia took great care and the damage was accidental and unforseeable.

4. Satisfaction is not required

Vulpinia's issue of the Communique is sufficient ackowledgement of regret. Satisfaction, the acknowledgement of wrongdoing by a state and token of regret for injury thereby caused,[121] has only been required in cases of attacks on state territory, agents, official residences, ships and flags.[122] There is "considerable doubt on its status as a legal remedy for other breaches of international law."[123] Vulpinia submits that the joint communique issued by Vulpinia and Leonia constitutes sufficient formal acknowledgement of

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[117] G. Schwarzenberger, International Law as Applied by International Courts and Tribunals (3rd ed. 1957), 674.

[118] The Lutisitania (1923), Decisions, Mixed Claims Commission, United States and Germany 31 (1925).

[119] A. Springer, The International Law of Pollution 139 (1983)

[120] C. Gray, Judicial Remedies in International Law 26 (1987)

[121] I. Brownlie, supra n.71.

[122] P. Bissonnette, La Satisfaction comme mode de reparation en droit international (1952).

[123] Gray, supra n.120, at 42.

wrongdoing. Pecuniary satisfaction has never been awarded explicitly by an international tribunal[124] and is thus not an appropriate measure in this dispute.

A declaration that its rights had been infringed would be appropriate and fulsome redress for Leonia.[125] In the event an obligation has been breached, then "the establishment of this fact...constitutes in itself a serious penalty".[126] This Court has in the past issued declarations to the effect that there has been a breach of international law, either as a substiute for the award of damages or where damages would not be available.[127]

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[124] Id. 43.

[125] Schwarzenberger, supra n.11?, at 668; Gray, supra n.120.

[126] The Carthage Award (1913) (France v. Italy), 11 R.I.A.A. 449,463

[127] In Corfu Channel supra n.8, at 301, the Court declared that Albania's sovereignty had been violated by the United Kingdom and said "that this declaration by the Court constitutes in itself appropriate satisfaction."

CONCLUSION AND PRAYER FOR RELIEF

The Government of Vulpinia respectfully requests that this Court:

1. declare that the State of Vulpinia has acted in accordance with its international obligations regarding Antarctica.

2. declare that the State of Vulpinia has not breached any enforceable rights pertaining to Leonia.

3. further declare that Vulpinia is under no obligation to undertake any remedial measures or make reparation to Leonia.

Respectfully submitted,

AGENTS FOR VULPINIA