

The 1990 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

CASE CONCERNING INTERNATIONAL ENVIRONMENTAL
LAW AND ANTARCTICA

IN THE INTERNATIONAL COURT OF JUSTICE

State of Leonia, Applicant

versus

State of Vulpinia Respondent

MEMORIAL FOR THE RESPONDENT

February 1990

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TABLE OF CONTENTS

INDEX OF AUTHORITIES iv

JURISDICTION x

STATEMENT OF FACTS xi

QUESTIONS PRESENTED xviii

SUMMARY OF PLEADINGS xix

PLEADINGS 1

I. LEONIA LACKS STANDING TO BRING A CLAIM FOR ENVIRONMENTAL
INJURY ALLEGEDLY CAUSED BY VULPINIA 1

A. The Antarctic Treaty Creates No Binding
 International Obligations On Vulpinia. 3

 1. The Antarctic Treaty provisions are not binding
 on Vulpinia 3

 2. The Antarctic Treaty does not create an
 "objective regime" that imposes binding obligations
 on third-party States such as Vulpinia 4

B. Neither Customary Law Nor General Principles Of
 International Law Will Support An Erga Omnes Claim For
 The Loss Of The Species. 5

II. VULPINIA IS NEITHER RESPONSIBLE NOR LIABLE TO LEONIA
FOR THE LOSS OF THE SPECIES 7

A. Vulpinia Cannot Incur Responsibility When Its
 Conduct Was Fully Consistent With Its Obligations
 Under International Law. 7

 1. No norm prohibited placing the drums on the
 terra nullius in Antarctica 7

 2. The release of the contents of the barrels
 into the Southern Ocean does not violate
 international law 10

 3. No international norm protects the starfish . 12

 4. Vulpinia fulfilled its obligations
 undertaken in the exchange of notes with Leonia . 12

<u>B. Any International Responsibility That Vulpinia Could Incur Is Precluded By Exonerating Circumstances.</u>	13
1. Leonia's consent to the release of the waste material precludes Vulpinia's responsibility	13
2. The Doctrine of <u>Fortuitous Event</u> precludes any responsibility by Vulpinia	14
<u>C. Leonia's Claim Is Unjustified Under The "Clean Hands" Doctrine.</u>	14
1. Leonia can be charged with the constructive knowledge of the existence of the starfish	15
2. Leonia has breached its duty to inform under various international conventions	16
3. Leonia is estopped from denying its international responsibility for the loss of the species	17
<u>D. Vulpinia Cannot Be Held Strictly Liable For The Loss Of The Species.</u>	17
1. General principles and customary international law do not support applying strict liability against Vulpinia	17
2. Vulpinia should incur no liability for its lawful activities	20
III. ASSUMING LIABILITY, SUBSTANTIAL REPARATIONS OR REMEDIAL MEASURES BY VULPINIA ARE INCONSISTENT WITH EXISTING INTERNATIONAL LAW	21
<u>A. Reparations To Leonia Cannot Include Restitution Or Substantial Monetary Damages.</u>	23
1. Restitution is an inappropriate remedy	23
2. A remedy of monetary damages is rare, and must be based on substantial evidence	23
<u>B. The Principle Of Equity Should Govern Any Damage Remedy Imposed On Vulpinia.</u>	24
1. The "Clean Hands" Doctrine when applied to Leonia's conduct should mitigate or eliminate any claim for damages	24
2. Punitive damages are inconsistent with existing rules of international law	24

3. A declaration by this Court, or an award
of nominal damages are the only appropriate
remedies 25

CONCLUSION 25

INDEX OF AUTHORITIES

INTERNATIONAL TREATIES, CONVENTIONS, AND AGREEMENTS

- Agreed Measures for the Conservation of Antarctic Flora and Fauna, 2-13 June 1964, 17 U.S.T. 996, T.I.A.S. No. 6058, modified in 24 U.S.T. 1802, T.I.A.S. No. 7692 (1973) 9
- Antarctic Treaty, 1 Dec. 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 1, 3, 5, 8, 9, 10, 16
- Convention on the Conservation of Antarctic Marine Resources, 20 May 1980, 33 U.S.T. 3476, T.I.A.S. 10240 16
- Recommendation IX-5 on "Man's Impact on the Antarctic Environment" at the Ninth Consultative Meeting in 1977 . . . 16
- Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 2
- Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, U.N. Doc. A/CONF.39/27 1, 3, 13

DOCUMENTS OF THE UNITED NATIONS

- Draft Articles on State Responsibility, [1980] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (pt. 2) 6
- Draft Articles on the Law of Treaties, [1966] Y.B. Int'l L. Comm'n 51, U.N. Doc. A/CN.4/1966 4
- International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, [1984] 2 Y.B. Int'l L. Comm'n 73, U.N. Doc. A/CN.4/SER.A/1984/Add.1 (pt. 2) 21
- International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law: Fourth Report, [1983] 2 Y.B. Int'l L. Comm'n 201, U.N. Doc. A/CN.4/373 20, 21, 22
- Preliminary Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, [1985] 2 Y.B. Int'l L. Comm'n 97, U.N. Doc. A/CN.4/394 18, 21

<u>Preliminary Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law</u> , [1980] 2 Y.B. Int'l L. Comm'n 24, U.N. Doc. A/CN.4/334/Add. 1-2 (pt. 1)	3
<u>State Responsibility</u> , [1983] 2 Y.B. Int'l L. Comm'n 11, U.N. Doc. A/CN.4/SER.A/1983/Add.1 (pt. 1)	6
<u>State Responsibility</u> , [1979] 2 Y.B. Int'l L. Comm'n 109, U.N. Doc. A/CN.4/SER.A/1979/Add.1 (pt. 2)	13, 14
<u>United Nations Commission on International Trade Law: Report of the International Law Commission 33d Session</u> , 34 U.N. GAOR Supp. (No.10), U.N. Doc. A/34/10 (1979)	7, 18
<u>United Nations Conference on the Human Environment</u> , U.N. Doc. A/CONF.48/14 and Corr. 1 (1972)	8, 18
<u>United Nations Convention on the Law of the Sea</u> , 7 Oct. 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261 (1982)	10, 11
<u>United Nations Environmental Program & Conference of Pleni-potentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal</u> , 22 March 1989, 28 I.L.M. 649 (1989)	11
 JUDICIAL AND ARBITRAL DECISIONS	
<u>Barcelona Traction Light & Power Co. (Belg. v. Spain)</u> , 1970 I.C.J. 3	2, 6, 14, 24
<u>Case of the S.S. Lotus (Fr. v. Turk.)</u> , 1927 P.C.I.J. (ser.A) No. 10	3
<u>Chorzow Factory (Ger. v. Pol.)</u> , 1927 P.C.I.J. (ser.A) No. 13	23
<u>Corfu Channel (U.K. v. Alb.)</u> , 1949 I.C.J. 4 (Merits)	19, 23
<u>Diversion of the River Meuse (Neth v. Belg.)</u> , 1937 P.C.I.J. (ser.A) No. 70, 77	14, 15, 24
<u>Ethiopia and Liberia v. South Africa</u> , 1966 I.C.J. 47	1, 6
<u>Fisheries Case (U.K. v. Nor.)</u> , 1951 I.C.J. 116	4
<u>Island of Palmas (U.S. v. Neth.)</u> , 11 R. Int'l Arb. Awards 829 (1928)	3

<u>Lake Lanoux Arbitration</u> (Fr. v. Spain), 12 I.L.R. 101 (1957)	20
<u>Lillie S. Kling Claim</u> (U.S. v. Mex.), 4 R. Int'l Arb. Awards 575 (1930)	23, 24
<u>Lusitania</u> (U.S. v. Ger.), 7 R. Int'l Arb. Awards 39 (1923)	24
<u>Naulilaa Cases</u> (Portugal v. Ger.), 2 R. Int'l Arb. Awards 1013 (1930) & (Fr. v. Venezuela) 10 R. Int'l Arb. Awards 55 (1903)	22
<u>North Sea Continental Shelf</u> (W.Ger. v. Den.; W.Ger. v. Neth.), 1969 I.C.J. 3	6
<u>Samoan Claims</u> (Ger. v. Gr. Brit. & U.S.), 9 R. Int'l Arb. Awards 15 (1902)	22
<u>S.S. Wimbledon</u> , 1923 P.C.I.J. (ser.A) No. 1	23
<u>Trail Smelter Arbitration</u> (U.S. v. Can.), 9 Ann. Dig. & Repts. Pub. Int'l L. Cases 315 (1941)	19, 23
<u>United States v. Germany</u> , 7 R. Int'l Arb. Awards 29 (1923)	22

TREATISES, DIGESTS, AND BOOKS

B. Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953)	12, 24
D. Gray, JUDICIAL REMEDIES IN INTERNATIONAL LAW (1987)	8, 23, 24, 25
F. Auburn, ANTARCTIC LAW AND POLITICS (1982)	4
HANDBOOK OF MEASURES IN FURTHERANCE OF THE PRINCIPLES AND OBJECTIVES OF THE ANTARCTIC TREATY (prepared for the Ninth Consultative Meeting, London, 16 Sept. 1977)	16
J. Brierly, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE (6th ed. C. Waldock ed. 1963)	6, 10, 15
L. Oppenheim, INTERNATIONAL LAW (8th ed., Lauterpacht, 1955)	18
Lord McNair, THE LAW OF TREATIES (1961)	13

M. Whiteman, DAMAGES IN INTERNATIONAL LAW (1937) 21

M. Whiteman, DIGEST OF INTERNATIONAL LAW (1965) 10

ARTICLES

Allen, Freedom of the Sea,
60 Am. J. Int'l L. 814 (1966) 10

Azraai, The Antarctic Treaty System from the Perspective
of a State Not a Party to the System, in ANTARCTIC TREATY
SYSTEM: AN ASSESSMENT (1986) 4

Barnes, Legal Aspects of Environmental Protection in
Antarctica, in THE ANTARCTIC LEGAL REGIME (C. Joyner &
S. Chopra eds. 1988) 9

Bernhardt, Sovereignty in Antarctica,
17 Cal. West Int'l L.J. 297 (1975) 4, 8

Bilder, The Present Legal and Political Situation in
Antarctica, in THE NEW NATIONALISM AND THE USE OF
COMMON SPACES: ISSUES IN MARINE POLLUTION AND THE
EXPLORATION OF ANTARCTICA (J. Charney ed. 1982) 2, 3, 8

Boczek, The Protection of the Antarctic Ecosystem:
A Study in International Environment,
13 Ocean Dev. & Int'l L.J. 347 (1983) 11, 12

Brownlie, A Survey of International Customary Rules of
Environmental Protection,
13 Nat. Resources J. 179 (1973) 5, 11

Charney, International Agreements and the Development of
Customary International Law,
61 Wash. L. Rev. 971 (1986) 5

Chopra, Antarctica as a Commons Regime: A Conceptual
Framework for Cooperation and Coexistence, in
THE ANTARCTIC LEGAL REGIME 181 (C. Joyner & S. Chopra
eds. 1988) 8

Downey, International Pollution: The Struggle
Between States and Scholars Over Customary Environmental
Norms: The Hazy View After Chernobyl and Basel,
12 S. Ill. U.L.J. 247 (1987) 8

Gulland, The Management Regime for Living Resources, in
THE ANTARCTIC LEGAL REGIME (C. Joyner & S. Chopra
eds. 1988) 16

Handl, <u>Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited</u> , 13 Can. Y.B. Int'l L. 156 (1975)	19, 20, 22
Handl, <u>International Liability of States for Marine Pollution</u> , 21 Can. Y.B. Int'l L. 85 (1983)	12, 18, 19
Handl, <u>State Liability for Accidental Transnational Environmental Damages by Private Persons</u> , 74 Am. J. Int'l L. 525 (1980)	15, 18
Handl, <u>Territorial Sovereignty and the Problem of Transnational Pollution</u> , 69 Am. J. Int'l L. 50 (1975)	19, 25
Joyner, <u>Oceanic Pollution and the Southern Ocean: Rethinking the International and Legal Implications for Antarctica</u> , 24 Nat. Resources J. 1 (1984)	10
Joyner, <u>Protectors of the Antarctic Environment: Rethinking the Problems and Prospects</u> , 19 Cornell Int'l L.J. 259 (1986)	9, 11
Joyner, <u>The Antarctic Legal Regime: An Introduction in THE ANTARCTIC LEGAL REGIME 3 (C. Joyner & S Chopra eds. 1988)</u>	5
Joyner, <u>The Southern Ocean and Marine Pollution: Problems and Prospects</u> , 17 Case W. Res. J. Int'l L. 165 (1985)	11
Kiss, <u>The International Protection of the Environment</u> , in SURVEY OF CURRENT DEVELOPMENTS IN INTERNATIONAL ENVIRONMENTAL LAW (1976)	25
MacGibbon, <u>Estoppel in International Law</u> , 7 Int's & Comp. L.Q. 468 (1958)	17
Magraw, <u>Transboundary Harm: The International Law Commission Study of "International Liability"</u> , 80 Am. J. Int'l L. 305 (1986)	18, 22
Malanczuk, <u>Countermeasures and Self-Defence As Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility</u> , in UNITED NATIONS CODIFICATIONS OF STATE RESPONSIBILITY (M. Spinedi & B. Simma eds. 1987)	13
Nanda, <u>The Establishment of International Standards for Transnational Environmental Injury</u> , 60 Iowa L. Rev. 1089 (1975)	19

Rubin, <u>Pollution by Analogy: The Trail Smelter Arbitration</u> , 50 Or. L. Rev. 259 (1970-71)	24
Simma, <u>The Antarctic Treaty as a Treaty Providing for an "Objective Regime"</u> , 19 Cornell Int'l L.J. 189 (1986)	1, 2, 3, 4
Tanzi, <u>Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?</u> , in UNITED NATIONS CODIFICATIONS OF STATE RESPONSIBILITY (M. Spinedi & B. Simma eds. 1987)	1, 7
Triggs, <u>The Antarctic Treaty Regime: A Workable Compromise or a "Purgatory of Ambiguity?"</u> , 17 Case W. Res. J. Int'l L. 195 (1985)	3, 4, 10
Williams, <u>Public International Law Governing Transboundary Pollution</u> , 13 U. Queens. L.J. 112 (1983)	7, 19

JURISDICTION

The sovereign States of Leonia and Vulpinia submit their dispute to this Court pursuant to Article 36(1) of the Statute of the International Court of Justice, which provides that the jurisdiction of the Court comprises all cases which the parties refer to it. Thus, the Court has jurisdiction in the present controversy and may resolve all legal questions submitted by the parties.

STATEMENT OF FACTS

I

In 1987, Professor Handlin, a leading biologist from the State of Leonia, a Consultative Party to the 1959 Antarctic Treaty, journeyed to Antarctica to conduct scientific studies in an unclaimed area.(C.1,6). While in Antarctica, he discovered a populous colony of asteroid echinoderm, or starfish.(C.6). These starfish were small, sophisticated animals, measuring five millimeters in length. They were extraordinarily adapted to live in the waters off an isolated ice shelf.(C.6). Later that year, Professor Handlin returned to Leonia to conduct further studies.(C.6). He concluded that he had discovered a new species of starfish which died rapidly if there were any changes in it's unique environment (balance of temperature, purity, salinity or transparency of the water in which they were located).(C.6). Professor Handlin did not make his discovery known to anyone. (C.6).

II

On 3 April 1987, Dr. Detritus, an internationally known expert in hazardous waste disposal from the State of Vulpinia, noticed a newspaper headline which read: "THE LEONIA BIOLOGIST PROF. HANDLIN BACK FROM EXPEDITION IN ANTARCTIC TERRA NULLIUS." (C.1). Dr. Detritus was attracted to the headline because he was interested in developing new sites for hazardous waste disposal. (C.1). Dr. Detritus operates his own disposal business and is recognized as one of the best disposal experts in his

field.(C.1). He has solved many of Vulpinia's extremely difficult hazardous waste disposal problems.(C.1). If appropriate disposal sites were unavailable in Vulpinia, Dr. Detritus would negotiate with foreign governments for the disposal of the waste in accordance with international environmental policies and the policies of the negotiating government.(C.1). Because disposal sites were becoming scarce, Dr. Detritus has had difficulty finding States that will provide disposal sites for foreign hazardous waste.(C.1). The "Antarctic headline" sparked the idea of a hazardous waste disposal site in the area claimed by no one.(C.2). Dr. Detritus immediately called his attorney to inquire about the legality of his idea.(C.2). The attorney confirmed that 15 percent of the Antarctic continent was not subject to an active claim by any State.(C.2). She also reported that, in accordance with the 1959 Antarctic Treaty, all States which might make effective claims to that area have agreed not to make new claims while the Treaty is in force.(C.2). As to the legality of dumping hazardous waste, the attorney said that the Treaty prohibited military activity and the disposal of radioactive waste.(C.2). However the Treaty, which Vulpinia is not a party to, did not prohibit disposal of other wastes.(C.2).

Because the disposal of hazardous waste was not prohibited by the Treaty, Dr. Detritus decided to look into the safety of disposing of hazardous waste in Antarctica.(C.2). Experts familiar with Antarctica opined that certain areas may indeed be suitable for long-term disposal.(C.2). Dr. Detritus decided to

test these theories.(C.2). He identified a site on the unclaimed isolated tongue of the ice shelf, Stella Maris, and proceeded to assemble waste from private industries.(C.2). Dr. Detritus then shipped the waste in 100 drums to Antarctica on a Vulpinian flagged vessel owned by his company.(C.2). Dr. Detritus intended to leave the drums at Stella Maris for one year before returning to examine their condition.(C.2).

III

The expedition proceeded without incident and publicity, but not without notice.(C.2). The Leonian intelligence agency observed the ship's movements by an artificial satellite.(C.2,3). Because the Vulpinian flagged vessel was not engaging in military activities, Leonia's Foreign Office decided not to interfere with the activities.(C.2). After the Vulpinian flagged vessel departed Stella Maris, Leonia's navy went in to examine the drums.(C.3). Leonia determined that the drums did not contain radioactive materials by reading the labels attached.(C.3).

When the Leonian government learned about the drums on the Stella Maris, the Leonian Minister of Foreign Affairs, Mr. Darkeye, phoned Vulpinia's Minister of Foreign Affairs, Mr. Fox.(C.3). Mr. Darkeye told Mr. Fox that Leonia had an obligation to ensure that no one engaged in activity which was incompatible with the text or the spirit of the Antarctic Treaty, or with the recommendations adopted by the Consultative Parties in furtherance of the Treaty.(C.3). Minister Darkeye claimed that Dr. Detritus' activities constituted such a violation.(C.3).

Minister Fox told Minister Darkeye that Vulpinia had not sponsored the expedition and was not aware that the drums had been placed in Antarctica.(C.3). He also stated that Vulpinian law did not prohibit Dr. Detritus from disposing of the waste in Antarctica, but said that he would look into the matter.(C.3).

Minister Fox spoke with Dr. Detritus who confirmed Mr. Darkeye's story.(C.3). Dr. Detritus then offered to remove the drums at Vulpinia's request.(C.3). Minister Fox contacted Mr. Darkeye and said that Vulpinia was willing to remove the drums even though Vulpinia was not aware of any rule prohibiting hazardous waste disposal in Antarctica, or any rule requiring that the drums be removed.(C.3,4). Therefore, Vulpinia preferred to undertake action without prejudice to its legal position.(C.4).

IV

The countries of Vulpinia and Leonia decided to discretely settle the matter through an exchange of notes.(C.4). The notes were executed on 2 February 1988 without parliamentary approval.(C.4). Neither government published the agreement nor informed any other State or foreign official.(C.4). Parts of the text read as follows:

Without any prejudice to their respective legal positions and aiming at the preservation of the unique and delicate Antarctic environment, Leonia and Vulpinia agree that:

1. Vulpinia shall recover the 100 drums of waste and remove them from the Antarctic Treaty area in order to re-establish the situation that previously existed.
2. Vulpinia shall grant Leonia the right to be represented by observers on board the vessel responsible for recovering the drums to monitor the activities.(C.4).

The exchange of notes was registered in conformity with Article 102 of the United Nations Charter.

Dr. Detritus ran experiments to determine the safest and easiest way to remove the drums without damage to the Antarctic environment.(C.4). After determining that the drums could be removed safely, the Vulpinian government authorized Dr. Detritus to remove the drums.(C.4). A team of technicians from Dr. Detritus' company, officials of Vulpinia under the command of Captain Capablanca, and Leonian observers under the command of Lieutenant Rubinetti, set sail on 7 January 1988 aboard the Vulpinian ship, the "Arianna" for Stella Maris.(C.5). When they arrived, they removed 95 of the drums without incident.(C.5). The remaining five drums, however, which contained highly corrosive and explosive substances, had been seriously damaged.(C.5). They could not be removed without the chance of exploding and damaging the Antarctic environment.(C.5). The experts explained the problem to Captain Capablanca and Lt. Rubinetti and advised that the best solution would be to open the drums and pour the contents into the sea.(C.5). This recommendation was based on prior experiments which proved that the sea water would dissolve the substance within ten days and no lasting damage would be done to the environment.(C.5).

The officials related the experts' suggestions to their governments by radio.(C.5). Vulpinia told Captain Capablanca to trust the experts' recommendations.(C.5). Leonia told Lieutenant Rubinetti not to interfere with the activities, but to report what happened.(C.5). The contents of the five drums were poured

into the water.(C.5). Within ten days the water had returned to its pure form.(C.5,6). All tests indicated no traces of chemical waste.(C.5,6). The remaining 95 drums were transported to a Vulpinian hazardous waste disposal site without incident.(C.6).

V

Early in 1989, Professor Handlin returned to Antarctica to conduct further studies on his newly discovered species before announcing his Antarctic secret.(C.6). When he arrived at Stella Maris, Professor Handlin discovered that the species had been killed by the hazardous waste discharge.(C.7). Professor Handlin returned to Leonia to tell his story.(C.7). When the news broke, the scientific community, environmental associations, and the public at large condemned the governments of Leonia and Vulpinia.(C.7). State representatives spoke in opposition to the actions before the United Nation's General Assembly, although no resolution was adopted.(C.7).

Vulpinia and Leonia subsequently conducted ad hoc negotiations to decide the question of remedies.(C.7). Leonia insisted that Vulpinia had violated international obligations, including customary and conventional law as well as the exchange of notes.(C.8). Leonia demanded that Vulpinia pay the damages to Leonia in order to compensate for the loss of the species.(C.7). Leonia said that the funds would be used for activities conducted in furtherance of the environmental protection goals of the Antarctic Treaty.(C.8). The Vulpinian government reminded Leonia that it had taken the utmost care in its steps to correct the

situation, and that it was not Vulpinia's fault that Professor Handlin had kept such a rare discovery a secret.(C.8). No one was alerted to the unknown risks to the starfish.(C.8). As to the discharge, Vulpinia reminded Leonia that its officials were fully aware that the contents of the drums were going to be poured into the water, but did not protest the action.(C.8). Instead, Leonia approved of the action and acquiesced in it.(C.8). Further, dumping hazardous waste is not forbidden under international law binding on Vulpinia or by Vulpinia's domestic law.(C.8).

Because Vulpinia and Leonia could not reach any agreement as to damages, the two countries decided to submit the dispute to the International Court of Justice for resolution.(C.8).

QUESTIONS PRESENTED

- I. 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 upon Vulpinia?

- II. In the case of an affirmative answer to question number one, is Vulpinia under any obligation to Leonia to take remedial measures or to provide reparations for the injury to the Antarctic environment caused in the Stella Maris incident, and, if so, what type of remedial measures or reparations would be appropriate under the instant circumstances?

SUMMARY OF PLEADINGS

I

Leonia lacks the standing necessary to bring a claim against Vulpinia for the loss of the species. Leonia cannot demonstrate the existence of any norm which prohibited Vulpinia from placing the 100 drums on the ice shelf in Antarctica, or from releasing the contents of five drums into the Southern Ocean. The existence of the Antarctic Treaty does not confer on Leonia any special legal status which must be respected by Vulpinia.

The Antarctic Treaty, like any international agreement, cannot bind third parties without their consent. Since Vulpinia is not a party to the treaty, none of its provisions can be used to create a binding obligation on Vulpinia. Moreover, none of the Treaty's provisions prohibited Vulpinia's actions. It is also well recognized that neither the Antarctic Treaty by itself, nor in combination with other conventions dealing with that region, create an "objective regime" capable of imposing obligations on third party states without their consent.

Finally, customary law and general principles of international law simply do not support an erga omnes claim for the loss of the species.

II.

Vulpinia should not incur any state responsibility for the loss of the species. At no time did Vulpinia commit an internationally wrongful act or breach an obligation owed to Leonia that would permit the imposition of responsibility by this Court. No binding norm exists which would prohibit any of its conduct. Vulpinia likewise fulfilled all of its obligations under the exchange of notes with Leonia.

If Vulpinia was found to have breached an international obligation, its responsibility would be precluded by the presence of exonerating circumstances. First, Leonia consented to the act which caused the destruction of the species. Second, it was materially impossible for Vulpinia to have prevented the loss of the starfish since it lacked the knowledge of their existence.

Since Leonia can be charged with the constructive knowledge of the existence of the species, at the very latest, when Professor Handlin became certain of his discovery, it subsequently failed in its duty to inform the world community of the existence of the new species. This failure to inform breached Leonia's obligations under various international conventions. Leonia's subsequent conduct expressed its acknowledgement of its own international responsibility for the incident. It is estopped from now charging Vulpinia with the sole responsibility for the loss of the species. Leonia's conduct does not comply with the doctrine of "Clean Hands" as required by international law.

Existing international law does not support the imposition of strict liability on Vulpinia. Nor does the new topic under consideration by the International Law Commission, liability for lawful activity, support the imposition of liability on Vulpinia. Even this concept considers the foreseeability (or lack of it) of the harm to be an important factor.

III

Assuming, *arguendo*, that Vulpinia incurs any state liability for the loss of the species, substantial reparations or remedial measures would be inconsistent with international law.

Restitution is inappropriate in the current situation. Paying monetary damages to Leonia is also not acceptable since Leonia cannot show that it has suffered any special injury as a result of the loss of the species. Because the value of the species cannot be measured, money damages to Leonia is also an inappropriate remedy.

Finally, any damages or remedial measures imposed on Vulpinia should be mitigated or eliminated due to Leonia's determinative role in the unfortunate loss of the starfish.

PLEADINGS

I. LEONIA LACKS STANDING TO BRING A CLAIM FOR ENVIRONMENTAL INJURY ALLEGEDLY CAUSED BY VULPINIA.

In order to bring a claim against another State in international law, a State must possess the requisite legal interest.¹ Leonia cannot show that it has any special interests that must be respected by Vulpinia due to the unfortunate loss of the species. The Antarctic Treaty does not provide Leonia with any particular legal status that must be respected by Vulpinia.

Vulpinia is not a party to the Antarctic Treaty², and therefore cannot be bound by any of its provisions under international law.³ Additionally, the Antarctic Treaty itself does not create an objective regime⁴ that imposes any binding obligations on Vulpinia, nor does it create norms of customary

¹Tanzi, Is Damage A Distinct Condition for the Existence of an Internationally Wrongful Act?, in UNITED NATIONS CODIFICATIONS OF STATE RESPONSIBILITY 13 (M. Spinedi & B. Simma eds. 1987). The applicant state must show an international violation of a substantive interest, or legal right in order to be granted locus standi. See also Ethiopia and Liberia v. South Africa, 1966 I.C.J. 47.

²Antarctic Treaty, 1 Dec. 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 [hereinafter Antarctic Treaty].

³Vienna Convention on the Law of Treaties, 23 May 1969, art. 34, 1155 U.N.T.S. 331, U.N. Doc. A/CONF.39/27 [hereinafter Vienna Convention]. Article 34 states that: "A treaty does not create either obligations or rights for a third State without its consent."

⁴See Simma, The Antarctic Treaty as a Treaty Providing for an "Objective Regime", 19 Cornell Int'l L.J. 189, 190 (1986).

law.⁵ Additionally, general customary international law does not support an erga omnes⁶ claim for the loss of the species.⁷

Vulpinia has, at all times, fulfilled its obligations under international law. No treaty provision, customary norm, or general principle of international law⁸ prohibited Vulpinia from depositing the 100 barrels in the terra nullius of Antarctica, or from releasing the contents of the five barrels into the Southern Ocean, which caused the loss of the species. Vulpinia asserts that Leonia lacks the locus standi to bring the claim, and requests this Court to find Leonia's claim inadmissible.

⁵See Bilder, The Present Legal and Political Situation in Antarctica, in THE NEW NATIONALISM AND THE USE OF COMMON SPACES: ISSUES IN MARINE POLLUTION AND THE EXPLORATION OF ANTARCTICA 198-199 (J. Charney ed. 1982).

⁶See Barcelona Traction Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3. The Court in dictum acknowledges the existence of obligations owed to the international community as a whole (erga omnes), but limits their scope to obligations to prevent acts of aggression, genocide, slavery, etc.

⁷Simma, supra note 4, at 197.

⁸The Statute of the International Court of Justice art. 38(1) provides:
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determinations of rules of law.

A. The Antarctic Treaty Creates No Binding International Obligations On Vulpinia.

1. The Antarctic Treaty provisions are not binding on Vulpinia.

The Antarctic Treaty, like any international agreement, can not bind States that are not its parties.⁹ To bind Vulpinia without its consent would impose an illegal limitation upon Vulpinia's rights as an independent sovereign State.¹⁰ Limitations upon the sovereignty of a State must be proved, not presumed.¹¹ In addition, the recommendations promulgated at the meetings of the Consultative Parties to the Antarctic Treaty are not binding even on the contracting parties to the Treaty without their specific assent.¹² The Vienna Convention in Article 35 specifically requires a third State to accept a treaty obligation in writing in order to be bound by it.¹³ This Vulpinia has not done. Consequently, a third party such as

⁹See supra note 3. This conclusion is shared by numerous writers: Triggs, The Antarctic Treaty Regime: A Workable Compromise or a "Purgatory of Ambiguity?", 17 Case W. Res. J. Int'l L. 195, 200 (1985); Bilder, supra note 5, at 174; Simma, supra note 4, at 198.

¹⁰Island of Palmas (U.S. v. Neth.), 11 R. Int'l Arb. Awards 829 (1928).

¹¹Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser./A) No. 10. See also, Preliminary Report on International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law, [1980] 2 Y.B. Int'l L. Comm'n 247, 257, U.N. Doc. A/CN.4/334/Add.1-2 (pt.1).

¹²Triggs, supra note 9, at 210-211. See Antarctic Treaty, articles III, IX and X which detail some of the responsibilities of the Consultative Parties. Antarctic Treaty supra note 2, art. 3, 9 and 10.

¹³See Vienna Convention supra note 3, art. 35.

Vulpinia will not be bound by either the Treaty or any implementing recommendations made by its parties.

2. The Antarctic Treaty does not create an "objective regime" that imposes binding obligations on third-party States such as Vulpinia.

Even if it were possible for a multilateral treaty to create an "objective regime" under international law,¹⁴ the Antarctic Treaty does not do so.¹⁵ As this Court has previously found, Vulpinia's lack of express consent to the "system" created by the Antarctic Treaty cannot be considered as acquiescence to the Antarctic "regime."¹⁶ "Non-parties remain free to challenge the regime's operation."¹⁷ In fact, non-parties have and do challenge the legitimacy of the Antarctic "regime."¹⁸ Absent an "objective regime" in Antarctica, Leonia lacks the standing necessary to bring a claim against Vulpinia.

¹⁴The U.N. International Law Commission rejected that concept altogether. See Draft Articles on the Law of Treaties, [1966] Y.B. Int'l L. Comm'n 51, U.N. Doc. A/CN.4/1966.

¹⁵F. Auburn, ANTARCTIC LAW AND POLITICS 117 (1982).

¹⁶See Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116. Lack of protest by non-interested States does not imply acquiescence.

¹⁷Simma, supra note 4, at 207. Other writers concur with the conclusion that, at best, the existence of a regime in Antarctica would be considered de lege ferenda. See also Bernhardt, Sovereignty in Antarctica, 15 Cal. West Int'l L.J. 297 (1975) "The treaty, although a laudable and extremely practicable approach to international political problems associated with Antarctica, does little more, legally speaking, than preserve an opaque status quo ante..."; Triggs, supra note 9, at 195.

¹⁸Azraai, The Antarctic Treaty System from the Perspective of a State Not a Party to the System, in ANTARCTIC TREATY SYSTEM: AN ASSESSMENT 305-315 (1986).

Even assuming the existence of an "objective regime" in Antarctica, nothing contained in the various conventions comprising the alleged "regime"¹⁹ would prohibit any of the actions undertaken by Vulpinia. The Antarctic Treaty, the centerpiece of this "regime," only prohibits the disposal of radioactive waste material.²⁰ Even if the Treaty could impose a binding obligation on Vulpinia, Vulpinia's conduct does not violate any of its provisions.

B. Neither Customary Law Nor General Principles Of International Law Will Support An Erga Omnes Claim For The Loss Of The Species.

Customary law provides only a limited means of dealing with environmental protection measures.²¹ No customary norm exists which prohibited Vulpinia from exercising its sovereign rights when it placed the 100 drums on the terra nullius of Antarctica

¹⁹Joyner, The Antarctic Legal Regime: An Introduction, in THE ANTARCTIC LEGAL REGIME 3 (C. Joyner & S. Chopra eds. 1988). The six components thought to comprise the Antarctic system are:

1. The Antarctic Treaty.
2. The 1972 Convention on the Conservation of Antarctic Seals.
3. The 1980 Convention on the Conservation of Antarctic Living Marine Resources.
4. The Agreed Measures for the Conservation of Antarctic Flora and Fauna.
5. The Evolving Antarctic Minerals Regime.
6. The Scientific Committee on Antarctic Research (SCAR).

²⁰Antarctic Treaty, supra note 2, art. V.

²¹Brownlie, A Survey of International Customary Rules of Environmental Protection, 13 Nat. Resources J. 179 (1973). See also Charney, International Agreements and the Development of Customary International Law, 61 Wash. L. Rev. 971, 996 (1986). The author states that it is unwise to presume that new customary law arises out of international agreements without significant State practice. (emphasis added).

or when it released the contents of five drums into the Southern Ocean. Sufficient state practice²² indicating that Vulpinia's conduct violates international principles does not exist. In order to rise to the level of a customary norm, state practice should be "both extensive and virtually uniform and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."²³ The opinio juris necessary to establish valid erga omnes obligations through international customary law does not exist.

Erga omnes effect is applicable only against the perpetrator of international crimes.²⁴ The concept of international crimes so far has been accorded the status of de lege ferenda.²⁵ Even if the concept were valid, none of Vulpinia's actions constitute such a crime.²⁶

²²J. Brierly, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 59-61 (6th ed. C. Waldock ed. 1963). See also North Sea Continental Shelf (W.Ger. v. Den.; W.Ger. v. Neth.), 1969 I.C.J. 3.

²³North Sea Continental Shelf (W.Ger. v. Den.; W.Ger. v. Neth.), 1969 I.C.J. 3, 44.

²⁴See Barcelona Traction Light & Power Co., (Belg. v. Spain), 1970 I.C.J. 3, 44. Prior to Barcelona Traction, the Court denied standing to Ethiopia and Liberia to protect a public interest. See Ethiopia and Liberia v. South Africa, 1966 I.C.J. 47.

²⁵State Responsibility, [1983] 2 Y.B. Int'l L. Comm'n 11-13, U.N. Doc. A/CN.4/SER.A/1983/Add.1 (pt. 1).

²⁶See Draft Articles on State Responsibility, [1980] 2 Y.B. Int'l L. Comm'n, art 19, para. 3, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (pt. 2). Article 19, para. 3 lists conduct that would fall into the category of an "international crime." Types of

II. VULPINIA IS NEITHER RESPONSIBLE NOR LIABLE TO LEONIA FOR THE LOSS OF THE SPECIES.

According to a fundamental principle of international law, an internationally wrongful act²⁷ or the violation of a legal right of a State is necessary to generate a State's responsibility.²⁸ Vulpinia's conduct was fully consistent with its obligations under international law. Any State responsibility arguably attributable to Vulpinia is precluded by exonerating circumstances. In addition, Leonia's conduct indicates its acceptance of international responsibility for the incident.

Current international law will not support the imposition of absolute or strict liability against Vulpinia. Finally, although the possibility exists for the imposition of liability for lawful activity, this trend should not apply to the current dispute.

A. Vulpinia Cannot Incur Responsibility When Its Conduct Was Fully Consistent With Its Obligations Under International Law.

1. No norm prohibited placing the drums on the terra nullius in Antarctica.

"[T]here is clearly no obligation under international law either to refrain from acts of discovery or occupation in terra

conduct include: aggression, slavery, genocide, apartheid, and massive pollution of the atmosphere or sea.

²⁷United Nations Commission on International Trade Law: Report of the International Law Commission 33d Session, 34 U.N. GAOR Supp. (No.10) at 335, para. 154, U.N. Doc. A/34/10 (1979) [hereinafter U.N. Commission].

²⁸See Tanzi, supra note 1, at 13. See also Williams, Public International Law Governing Transboundary Pollution, 13 U. Queens. L.J. 112, 115 (1983).

nullius..."²⁹ A fortiori, the mere use of the Stella Maris ice shelf for the temporary storage of the barrels by Dr. Detritus does not constitute any violation of international law. Indeed, due to the interim nature of the Antarctic Treaty itself³⁰ the entire continent should be considered terra nullius³¹, not just the unclaimed sector where the barrels were placed.

Principle 21 of the Stockholm Declaration³² is not a statement of existing customary law.³³ "[I]t should be construed as a statement of aspiration rather than of existing law."³⁴ As such, it imposes no binding obligation on Vulpinia.

The Antarctic Treaty, under Article V, prohibits the

²⁹Bernhardt, supra note 17, at 314. Terra nullius refers to land which has no owner or which has been abandoned by its owner. Chopra, Antarctica as a Commons Regime: A Conceptual Framework for Cooperation and Coexistence, reprinted in THE ANTARCTIC LEGAL REGIME 181, n.19 (C. Joyner & S. Chopra eds. 1988)

³⁰See Antarctic Treaty supra note 2, article IV which freezes any territorial claims during the period in which the Treaty is in force.

³¹See Bilder, supra note 5, at 182. See also Chopra, supra note 29, at 164.

³²United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14 and Corr. 1 (1972) [hereinafter Stockholm Declaration]. Principle 21 provides: "States have, in accordance with the Charter of the United Nations and the principles of international law . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."

³³Downey, International Pollution: The Struggle Between States and Scholars Over Customary Environmental Norms: The Hazy View After Chernobyl and Basel, 12 S. Ill. U.L.J. 247, 257-258 (1987).

³⁴D. Gray, JUDICIAL REMEDIES IN INTERNATIONAL LAW 231, n.65 (1987).

disposal only of radioactive waste material. Even if this provision were binding on Vulpinia, it does not apply to Vulpinia's conduct, since the waste deposited on the terra nullius was not radioactive.

The Antarctic Treaty parties have also promulgated "codes of conduct" related to waste disposal in Antarctica.³⁵ These "codes," however, are entirely voluntary even for the parties to the Treaty, and obviously are not binding on Vulpinia.³⁶

An example of the non-binding nature of the Antarctic "regime" can be seen in the non-reaction by this "regime" to the environmental damage knowingly caused by France, a party to the Treaty, when it was building an airstrip at Point Geologie in Antarctica in 1983.³⁷ During the course of the French project, several rare penguins were killed, their eggs crushed, and a number of birds were removed from the area.³⁸ The Consultative Parties made no official public response or protest to France's actions.³⁹ This lack of response by the parties to clear

³⁵Barnes, Legal Aspects of Environmental Protection in Antarctica, in THE ANTARCTIC LEGAL REGIME 250-52 (C. Joyner & S. Chopra eds. 1988).

³⁶Id.

³⁷See Joyner, Protectors of the Antarctic Environment: Rethinking the Problems and Prospects, 19 Cornell Int'l L.J. 259 (1986).

³⁸Id. at 268-270. See also Article X of the Antarctic Treaty, as well as Article VI of the Agreed Measures for the Conservation of Antarctic Flora and Fauna, 2-13 June 1964, 17 U.S.T. 996, 998, T.I.A.S. No. 6058, modified in 24 U.S.T. 1802, T.I.A.S. No. 7692 (1973).

³⁹Joyner, supra note 37, at 268-270.

violations of the Treaty's provisions renders the current use of the Treaty to support Leonia's assertion of either an "objective regime" or an erga omnes claim questionable at best.

2. The release of the contents of the barrels into the Southern Ocean does not violate international law.

Another fundamental principle of international law is that the high seas are available for use by all people.⁴⁰ Article VI of the Antarctic Treaty also acknowledges that its provisions cannot derogate from the existing international principle of freedom of the high seas.⁴¹ Since Antarctica lacks the requisite sovereignty of a coastal State, it cannot possess a territorial sea, an exclusive economic zone, or a continental shelf. Consequently, all the surrounding water possesses merely the "status of the high seas."⁴² Therefore, Vulpinia was under no obligation to Leonia to behave as anything other than a

⁴⁰M. Whiteman, DIGEST OF INTERNATIONAL LAW 501-42 (1965); Allen, Freedom of the Sea, 60 Am. J. Int'l L. 814 (1966); J. Brierly, supra note 22, at 305.

⁴¹Article VI provides:

The provisions of the present treaty shall apply to the area south of 60 degrees south latitude including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area. See also Triggs, supra note 9, at 196.

⁴²Joyner, Oceanic Pollution and the Southern Ocean: Rethinking the International Legal Implications for Antarctica, 24 Nat. Resources J. 1, 34-5 (1984); See also U.N. Convention on the Law of the Sea, 7 Oct. 1982, U.N. Doc. A/CONF.62/122 reprinted in 21 I.L.M. 1261 (1982) [hereinafter LOS] art. 86 which defines the high seas as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State..." (emphasis added).

sovereign State exercising its freedom over the high seas.

Vulpinia is only a signatory to the Law of the Sea Convention,⁴³ as well as to the WASTE Convention,⁴⁴ both of which require ratification. Consequently, neither Convention's provisions are binding upon it, nor has the LOS Convention created any stringent rules of environmental protection that could be enforced as binding customary law.⁴⁵ A customary norm that is conceivably established by the LOS Convention is a more general norm of state cooperation in the prevention of environmental damage.⁴⁶ Vulpinia's cooperation from the moment it learned of the disposal experiment cannot be questioned.

Existing customary international law is tolerant of a degree of "ordinary user" levels of pollution.⁴⁷ The Southern Ocean moreover, is renowned for its stormy, dynamic nature which "dissipates pollutants easily and effectively,"⁴⁸ thereby

⁴³Id. The Law of the Sea has never entered into force since it has never reached the number (60) needed for its ratification.

⁴⁴U.N. Environmental Program & Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989, reprinted in 28 I.L.M. 649 (1989).

⁴⁵Boczek, The Protection of the Antarctic Ecosystem: A Study in International Environment, 13 Ocean Dev. & Int'l L.J. 347, 392-94 (1983).

⁴⁶Id.

⁴⁷Brownlie, supra note 21, at 180.

⁴⁸Joyner, supra note 37, at 263. See also Joyner, The Southern Ocean and Marine Pollution: Problems and Prospects, 17 Case W. Res. J. Int'l L. 165, 177 (1985): "Marine pollution of the Southern Ocean is to some degree inevitable"

preventing serious environmental damage. Indeed, as our case illustrates, within ten days after the release of the drum contents, "there were no traces of the chemical waste and . . . the waters had recovered all of their purity and quality." (C.6). No customary norm prohibited the release of the drum contents into the Southern Ocean. In fact, state practice supports the lawfulness of Vulpinia's conduct.⁴⁹

3. No international norm protects the starfish.

Only certain species enjoy the protection of international law.⁵⁰ While preservation of the ecosystem of Antarctica is certainly a laudable objective, the preservation of any ecosystem exactly as it exists is not a realistic goal. In addition, there is not enough information available about either the Antarctic ecosystem⁵¹ or the starfish to know what impact, if any, their absence will have on the Antarctic environment.

4. Vulpinia fulfilled its obligations undertaken in the exchange of notes with Leonia.

When the exchange of notes was executed, neither State was aware of the existence of the starfish. Hence, the phrase calling for the reestablishment of "the situation that previously existed" referred solely to Vulpinia's obligation to remove the drums, which it did. Any international agreement requires a

⁴⁹Handl, International Liability of States for Marine Pollution, 21 Can. Y.B. Int'l L. 85, 91, n.32 (1983).

⁵⁰For example, see the 1972 Convention on the Conservation of Antarctic Seals.

⁵¹Boczek, supra note 45, at 376, 379.

meeting of the minds.⁵² Since the existence of the starfish was unknown to both Leonia and Vulpinia, the exchange of notes should not be construed to impose an obligation on Vulpinia regarding something of which it was totally unaware. Last, it is a maxim of treaty interpretation that the interpretation "should be preferred which is less onerous to the obligated party..."⁵³

B. Any International Responsibility That Vulpinia Could Incur Is Precluded By Exonerating Circumstances.

A State cannot incur international responsibility when the "wrongfulness" of its conduct is precluded by showing the existence of exonerating circumstances.⁵⁴

1. Leonia's consent to the release of the waste material precludes Vulpinia's responsibility.

It is a well established rule in international law that "[t]he consent validly given by a State to the Commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act"⁵⁵ The expression of consent

⁵²Vienna Convention, supra note 3, art. I(a). See also B. Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 112-115 (1953).

⁵³Lord McNair, THE LAW OF TREATIES 462 (1961).

⁵⁴Malanczuk, Countermeasures and Self-Defense As Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility, in UNITED NATIONS CODIFICATIONS OF STATE RESPONSIBILITY 201 (M. Spinedi & B. Simma eds. 1987).

⁵⁵State Responsibility, [1979] 2 Y.B. Int'l L. Comm'n 109, U.N. Doc. A/CN.4/SER.A/1979/Add.1 (pt. 2).

must be clear, but may be by conduct as well as words.⁵⁶ The officials from Leonia on board the "Arianna" consented to the release of the barrels' contents into the sea. The government of Leonia could have objected to this method of discharge, but it did not. This consent precludes any responsibility by Vulpinia.

2. The Doctrine of Fortuitous Event precludes any responsibility by Vulpinia.

Another well founded rule in international law is that:

[T]he wrongfulness of an act of a State . . . is precluded if the act was due . . . to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.⁵⁷

Without the knowledge of the existence of the starfish, it was materially impossible for the State of Vulpinia to prevent the loss. This lack of knowledge by Vulpinia precludes any responsibility for wrongful activity.

C. Leonia's Claim Is Unjustified Under The "Clean Hands" Doctrine.

This Court, and its predecessor, have applied the "Clean Hands" doctrine which recognizes that equity is a general principle of international law.⁵⁸ The standard of conduct for those who invoke the powers of this Court is "he who seeks equity

⁵⁶Id. at 112, para. 13.

⁵⁷Id. at 122, art. 31.

⁵⁸Diversion of the River Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser.A/B) No. 70, 77; Barcelona Traction, 1970 I.C.J. 3.

must do equity."⁵⁹ Leonia has failed to act in accord with this standard.

1. Leonia can be charged with the constructive knowledge of the existence of the starfish.

When Professor Handlin went to the Antarctic on a scientific expedition in 1987, he did so as a representative of the State of Leonia. The crucial factor in determining if conduct is attributable to the State is the "nature of the activity."⁶⁰ Under Article IX of the Antarctic Treaty, "the dispatch of a scientific expedition" is how a State would show its interest in Antarctica. Professor Handlin's conduct is clearly attributable to the State of Leonia. Consequently, Leonia can be charged with the constructive knowledge of the existence of the starfish, at the latest, when Professor Handlin was certain of their discovery. Moreover, Leonia made no effort to obtain any information from Professor Handlin at the crucial time when the decision about the disposal of the five drums had to be made.

⁵⁹Diversion of the River Meuse, 1937 P.C.I.J. (ser.A/B) No. 70, 77.

⁶⁰Handl, State Liability for Accidental Transnational Environmental Damages by Private Persons, 74 Am. J. Int'l L. 525 (1980) [hereinafter Private Persons]. See also J. Brierly, supra note 22, at 446.

2. Leonia has breached its duty to inform under various international conventions.

Under Article III(1)(c) of the Antarctic Treaty,⁶¹ there existed a duty to disclose the information regarding the discovery of the new species.

The failure to inform the world community of the existence of the starfish breached a duty imposed on Leonia as a Consultative Party to "[c]ontinue to monitor the Antarctic environment and to exercise . . . [its] responsibility for informing the world community of any significant changes in the Antarctic Treaty Area"⁶²

By failing to inform, Leonia has also breached its duties under the Convention on the Conservation of Antarctic Marine Living Resources⁶³ (CAMLR) to protect the Antarctic marine environment. In light of its numerous international obligations, Leonia's failure to announce the discovery of the species,⁶⁴

⁶¹Antarctic Treaty, supra note 2, art. III(1)(c) provides: "[t]he contracting parties agree that . . . (c) scientific observations and results from Antarctica shall be exchanged and made freely available."

⁶²Recommendation IX-5 on "Man's Impact on the Antarctic Environment" at the Ninth Consultative Meeting in 1977, collected in AGREEMENTS ON FISHERIES, OCEANOGRAPHIC RESOURCES, AND WILDLIFE INVOLVING THE UNITED STATES, 95th Cong., 1st Sess., 12-136, 1185-91. See also HANDBOOK OF MEASURES IN FURTHERANCE OF THE PRINCIPLES AND OBJECTIVES OF THE ANTARCTIC TREATY (prepared for the Ninth Consultative Meeting, London, 16 Sept. 1977).

⁶³Convention on the Conservation of Antarctic Marine Resources, 20 May 1980, 33 U.S.T. 3476, T.I.A.S. 10240, Preamble and art. XV.

⁶⁴See Gulland, The Management Regime for Living Resources, in THE ANTARCTIC LEGAL REGIME 237 (C. Joyner & S. Chopra eds. 1988). The author urges the scientific commission "to recognize

which led to their destruction, makes Leonia's claim against Vulpinia unjustified.

3. Leonia is estopped from denying its international responsibility for the loss of the species.

Leonia was charged with the responsibility for the destruction of the species by the international community. The incident was condemned before the United Nations General Assembly. The Consultative Parties to the Antarctic Treaty expressed their regret for the incident. Not only did the international community as a whole place responsibility on Leonia, Leonia's own conduct indicates its acceptance of responsibility for the loss of the species. Leonia acknowledged its responsibility when it issued the joint communique expressing its regret for the loss of the species. Leonia also stated it was considering reparation for the damage. International law recognizes the principle "[t]hat a State ought to be consistent in its attitude to a given factual or legal situation."⁶⁵ Leonia should be estopped from subsequently denying its responsibility.

D. Vulpinia Cannot Be Held Strictly Liable For The Loss Of The Species.

1. General principles and customary international law do not support applying strict liability against Vulpinia.

Holding Vulpinia strictly liable for the loss of the species, without regard to Vulpinia's lack of fault or Leonia's

that scientific evidence, even if strong, may fall short of proof, but should still be acted on."

⁶⁵MacGibbon, Estoppel in International Law, 7 Int'l & Comp. L.Q. 468 (1958).

conduct, is inconsistent with existing international law.⁶⁶

Leonia, not Vulpinia, was in the best position to prevent the act which led to the loss of the species,⁶⁷ since only Leonia possessed the knowledge of its existence. Vulpinia should not be held liable for what it could not have prevented.⁶⁸

Even Principle 21 of the Stockholm Declaration⁶⁹ does not impose automatic strict liability.⁷⁰ "Liability will depend on proof that a State's lack of due care or due diligence brought about the . . . event."⁷¹ Vulpinia, from the moment it became aware of the disposal effort, exercised the utmost care, diligence, and cooperation in trying to remove the barrels safely from Antarctica.

In the Trail Smelter decision, a tribunal established by the United States and Canada held Canada responsible for the fume

⁶⁶L. Oppenheim, INTERNATIONAL LAW 342 (8th ed., Lauterpacht, 1955). "An act of State injurious to another State is nevertheless not an international delinquency if committed neither willfully and maliciously nor with culpable negligence." See also Preliminary Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, [1985] 2 Y.B. Int'l L. Comm'n 97, 98, U.N. Doc A/CN.4/394 [hereinafter Preliminary Report]; Handl, supra note 49, at 94.

⁶⁷Private Persons, supra note 60, at 531.

⁶⁸Magraw, Transboundary Harm: The International Law Commission Study of "International Liability", 80 Am. J. Int'l L. 305 (1986).

⁶⁹Stockholm Declaration, supra note 32.

⁷⁰Handl, supra note 60, at 535-540; See also U.N. Commission supra note 27, at 245.

⁷¹Handl, supra note 49, at 94.

damage caused by the operation of the smelter.⁷² Under the prior agreement between the two countries, however, Canada had expressly assumed responsibility for the damage caused, so the issue of strict liability was never addressed.⁷³ Trail Smelter, therefore, cannot be used to impose strict liability on Vulpinia.

In the Corfu Channel case this Court found Albania responsible for the injury to British ships caused by mines in Albania territorial waters.⁷⁴ It was Albania's knowledge of the existence of the mines, as well as the opportunity to notify the British navy of their presence, that determined its liability under international law.⁷⁵ Vulpinia had no knowledge of the existence of the starfish. Only Leonia had constructive

⁷²Trail Smelter Arbitration (U.S. v. Can.), 9 Ann. Dig. & Repts. Pub. Int'l L. Cases 315 (1941). The Tribunal held that: "[n]o State has the right to use or permit the use of its territory . . . [so] as to cause injury by fumes in or to the territory of another . . . when the case is of serious consequence or the injury is established by clear and convincing evidence."

⁷³Nanda, The Establishment of International Standards for Transnational Environmental Injury, 60 Iowa L. Rev. 1089, 1097 (1975); See also Handl, Territorial Sovereignty and the Problem of Transnational Pollution, 69 Am. J. Int'l L. 50, 60-1 (1975) [hereinafter Territorial Sovereignty]; Handl, Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited, 13 Can. Y.B. Int'l L. 156 (1975) [hereinafter Balance of Interests]; Williams, supra note 28, at 123.

⁷⁴Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Merits). The basic rule laid down by this case was "every State's obligation not to allow knowingly its territory to be used contrary to the rights of others." (emphasis added).

⁷⁵See Handl, supra note 49, at 96.

knowledge of their existence, as well as the opportunity to prevent the ensuing harm. Hence, under Corfu Channel, State liability could attach to Leonia's conduct, but not to Vulpinia's.

In the Lake Lanoux Arbitration,⁷⁶ Spain objected to France's decision to erect a hydroelectric power station within French territory which it feared would impair its rights of utilization of the waters of Lake Lanoux.⁷⁷ The tribunal determined that France had taken all necessary precautions,⁷⁸ and would only incur liability if it committed an internationally wrongful act.⁷⁹

Any attempt to impose strict liability upon Vulpinia for any of its actions is inconsistent with existing international law.

2. Vulpinia should incur no liability for its lawful activities.

A new theory imposing international liability for the lawful acts of a State is currently undergoing analysis by the International Law Commission.⁸⁰ The main focus of the new topic is to minimize damage to the environment while still preserving

⁷⁶Lake Lanoux Arbitration (Fr. v. Spain), 12 I.L.R. 101 (1957).

⁷⁷Id.

⁷⁸Id. at 123.

⁷⁹Balancing of Interests, supra note 73, at 170.

⁸⁰International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law: Fourth Report, [1983] 2 Y.B. Int'l L. Comm'n 201, U.N. Doc. A/CN.4/373 (author Quentin Baxter) [hereinafter Fourth Report].

State sovereignty.⁸¹ Vulpinia's cooperation from the instant it learned of the experiment of Dr. Detritus is evidence of its commitment to the preservation of the Antarctic environment. But without the knowledge of the existence of the starfish it was unable to prevent the incident. Even under the new topic proposed by the Commission, the factor of the "knowledge of any circumstance which might later give rise to transboundary loss or injury,"⁸² as well as the foreseeability of the harm,⁸³ are still essential elements to be considered. As a result, even under a theory of State liability that can at best be termed de lege ferenda, Vulpinia cannot be found liable for its actions.

III. ASSUMING LIABILITY, SUBSTANTIAL REPARATIONS OR REMEDIAL MEASURES BY VULPINIA ARE INCONSISTENT WITH EXISTING INTERNATIONAL LAW.

First, the payment of monetary damages directly to the State of Leonia as the "injured State" when Vulpinia (or any other State) is equally harmed by the loss of the species does not comport with existing international law.⁸⁴ Second, there is

⁸¹Preliminary Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, [1985] 2 Y.B. Int'l L. Comm'n 97, 98, U.N. Doc. A/CN.4/394 (author Julio Barboza) [hereinafter Preliminary Report].

⁸²International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, [1984] 2 Y.B. Int'l L. Comm'n 73, 75, para. 228, U.N. Doc. A/CN.4/SER.A/1984/Add.1 (Pt. 2).

⁸³See Fourth Report, supra note 80, at 203, para. 6. See also Preliminary Report, supra note 81, at 100, para 16.

⁸⁴See M. Whiteman, DAMAGES IN INTERNATIONAL LAW 80-82 (1937).

competent authority which states that damages are inappropriate when causation cannot be directly traced to the respondent State.⁸⁵ Third, damages are found to be appropriately applied only against a respondent State that should have been able to foresee⁸⁶ the normal⁸⁷ consequences of its actions. Due to Leonia's conduct, Vulpinia did not directly cause the loss, nor could it reasonable foresee it. Consequently, any conceivable liability incurred by Vulpinia should be shared jointly⁸⁸ with Leonia.

Assuming, arguendo, that Vulpinia is liable for an injurious consequence as the result of its lawful activities, Vulpinia has complied with its four-fold duty "[t]o prevent, inform, negotiate, and repair"⁸⁹ upon which such liability is based. Leonia, however, in view of its international obligations, has

⁸⁵United States v. Germany, 7 R. Int'l. Arb. Awards 29 (1923); See also Balancing of Interests, supra note 76, at 162.

⁸⁶See Samoan Claims (Ger. v. Gr. Brit. & U.S.), 9 R. Int'l Arb. Awards 15 (1902): The effect of these rules is that the damages for which a wrongdoer is liable are the damages which are both, in fact, caused by his action, and cannot be attributed to any other causes, and which a reasonable man in the position of the wrongdoer at the time would have foreseen as likely to ensue from his action." (emphasis added).

⁸⁷See Naulilaa Cases (Portugal v. Ger.), 2 R. Int'l Arb. Awards 1013, 1032 (1930) & (Fr. v. Venezuela), 10 R. Int'l Arb. Awards 55 (1903).

⁸⁸See Fourth Report, supra note 80, at 214, para.45. The affected State must bear the whole burden of harm if the applicable principles or factors modify or cancel out the presumption that the source State should repair transboundary harm.

⁸⁹Magraw, supra note 68, at 311.

not complied with these duties. Therefore, assessment of any damages against Vulpinia should take into account Leonia's pivotal role in the incident.⁹⁰

A. Reparations To Leonia Cannot Include Restitution Or Substantial Monetary Damages.

1. Restitution is an inappropriate remedy.

A basic remedy in international law was enunciated in Chorzow Factory.⁹¹ Restitutio in integrum would require the re-establishing of the situation as it existed before the harm occurred. Unfortunately, no reversal of this situation with the species is possible, hence restitution is inappropriate.

2. A remedy of monetary damages is rare and must be based on substantial evidence.

Between this Court and the Permanent Court of International Justice, only two awards of monetary damages have ever been made.⁹² One reason for this is that the evidence proving damages must be clear and convincing.⁹³ In addition, the damages themselves should be actual, substantial, and preferably capable

⁹⁰Lillie S. Kling Claim (U.S. v. Mex.), 4 R. Int'l Arb. Awards 575, 585 (1930).

⁹¹ (Ger. v. Pol.), 1927 P.C.I.J. (ser.A) No. 13.
"[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which could in all probability have existed if that act had not been committed."

⁹²D. Gray, JUDICIAL REMEDIES IN INTERNATIONAL LAW 77, 83-84 (Brownlie ed. 1987); S.S. Wimbledon, 1923 P.C.I.J. (ser.A) No. 1 (no payment of damages was ever made); Corfu Channel (U.K. v. Alb.) 1949 I.C.J. 4.

⁹³Trail Smelter Arbitration (U.S. v. Can.), 9 Ann. Dig. & Repts. Pub. Int'l L. Cases 315 (1941).

of measurement in monetary terms.⁹⁴ Vulpinia deeply regrets the loss of the starfish. It asserts, however, that the loss of the species cannot be measured in monetary terms. Consequently, divining an appropriate monetary amount and then awarding that sum to a State that cannot claim any special injury, and moreover, was at least as responsible for the species' demise, is not an acceptable solution.

B. The Principle Of Equity Should Govern Any Damage Remedy Imposed On Vulpinia.

1. The "Clean Hands" Doctrine when applied to Leonia's conduct should mitigate or eliminate any claim for damages.

Applying equitable principles of international law⁹⁵ to this dispute should reduce or nullify any damages this Court might award.⁹⁶

2. Punitive damages are inconsistent with existing rules of international law.

The concept of punitive damages does not exist in international law.⁹⁷ The International Court of Justice has never ordered this remedy,⁹⁸ and arbitral decisions applying the

⁹⁴See Rubin, Pollution by Analogy: The Trail Smelter Arbitration, 50 Or. L. Rev. 259, 273-74 (1970-71). "[T]he Tribunal's silence with regard to intangible damages is positively thunderous." Id. at 265. (emphasis added).

⁹⁵See supra note 58.

⁹⁶See supra note 90.

⁹⁷B. Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 235 (1953); See also Lusitania (U.S. v. Ger.), 7 R. Int'l Arb. Awards 39 (1923).

⁹⁸See D. Gray, supra note 92, at 28.

concept are extremely rare.⁹⁹ Any award of punitive damages in the context of liability for lawful activity is especially inappropriate.

3. A declaration by this Court or an award of nominal damages are the only appropriate remedies.

Either a declaration by this Court that Leonia and Vulpinia are internationally liable due to injurious consequences caused by their lawful activities, or an award of nominal damages¹⁰⁰ is an equitable solution, as well as one consistent with existing principles of international law.¹⁰¹

CONCLUSION

For the foregoing reasons, the Respondent State of Vulpinia respectfully requests that this Honorable Court find, adjudge and declare as follows:

1. That Leonia does not possess the requisite legal standing to bring this claim for environmental injury against Vulpinia; and
2. That Vulpinia has not violated any international norms, and does not incur any State responsibility or liability for the loss of the species.

⁹⁹Id. at 27-28. See also Territorial Sovereignty, supra note 73, at 64, n. 89.

¹⁰⁰See D. Gray, supra note 92, at 28-29 for a discussion of the similarity of declaratory judgments and nominal damages.

¹⁰¹See Kiss, The International Protection of the Environment, in SURVEY OF CURRENT DEVELOPMENTS IN INTERNATIONAL ENVIRONMENTAL LAW 1077 (1976). The goals of the resolution of environmental disputes "aim not at the compensation, but at the prevention of harmful effects."