Responsibility and Liability for Environmental Damage Under International Law

Sompong Sucharitkul
Golden Gate University School of Law, ssucharitkul@ggu.edu

Follow this and additional works at: http://digitalcommons.law.ggu.edu/pubs
Part of the Environmental Law Commons, and the International Law Commons

Recommended Citation
http://digitalcommons.law.ggu.edu/pubs/664

This Response or Comment is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.
RESPONSIBILITY AND LIABILITY
FOR ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL LAW

REPLIES TO THE QUESTIONNAIRE

1. CONCEPTUAL FRAMEWORK

(a) Liability has become a primary rule of customary international law obligating a recalcitrant State to pay compensation or make amends for the resulting damage for which the State is accountable.

Once this primary rule is breached, regardless of the origin of the rule whether it is derived from a Treaty or is based on a norm of customary international law, the liable State is responsible for secondary obligations under international law. Thus, a State which is held liable as Canada was in the Trail Smelter Arbitration, is further responsible to ensure the non-repetition or non-recurrence of the same or like environmental damage to the United States by taking all measures necessary to prevent the recurrence of such damage.

In a manner of speaking the function of liability may be said to be of a dual character, but to be more precise the primary rule of liability, as derived from the maxim: "sic utere tuo ut alienum non laedas", entails a secondary obligation to restore or restitution and to make reparation. These are measures ex nunc and ex tunc under the law of State responsibility which is engaged as soon as a primary rule of international obligation is breached. The final consequences of secondary rules of State responsibility may also encompass the adoption of measures ex ante or preventive measures, now perfectly consistent with the precautionary principles advocated for all conducts of States in environmental law.
(b) The concept of punitive damages is not favored under international law, although preventive measures could be regarded as a form of sanction, but the purpose is to prevent harm and not to punish the polluter. This does not preclude the polluting State from viewing the obligation to take measures *ex ante* or precautionary measures as a penalty for past misconduct, wilful or unintentional.

It is important to distinguish punitive sanctions from preventive measures, and consequently also punitive damages from mandatory precautionary measures. Thus, provisional measures indicated by the International Court of Justice to maintain the status *quo ante* of both parties or to prevent further deterioration of the existing situation are not punitive sanctions imposed by the Court. They are not designed to punish either party, but merely to preserve the rights and obligations of all concerned.

Furthermore, it should likewise be observed that as State practice begins to favor the concept of offenses against humanity as including offenses against the environment, equating environmental crime or international damage to the environment as a serious international crime or a grave crime against the law of nations, there is no reason why punitive damages should not be assessed.

However, the purpose of punishing a criminal is not the same as awarding excessive and exorbitant compensation to the victim of environmental damage as a punishment as may be done in some domestic legal systems. For instance, punitive damages in cases, such as the Bhopal Incident, could be awarded by a jury if the trial took place in the United States, and if the victims were American, and the negligent corporation foreign, which could be as high as US$ 45 million per head, whereas in reality the damages paid by the wrong-doing corporation in that case were nowhere near compensatory, let alone exemplary. In other words, punitive sanctions in international law or punitive damages for that matter would be intended to punish or penalize the offender or wrong-doer, and would take the form of FINES collected by the international community or as a contribution to the common fund to pay compensation to unpaid victims and never to overpay the privileged few who happen to incur environmental damage or suffering. Thus, in Exxon Valdez Case, the fines
collected were not only to punish the negligent misconduct but to contribute to the expenses of cleaning up the oil pollution caused by negligent navigation. Fines and punitive damages are not for the individual victims or sufferers of the injurious consequences of an activity under the control or within the jurisdiction of the State, hence its liability for compensation and answerability for future recurrences of the harmful effects. Fines are not advanced payment for future damage or suffering but should contribute to preventive or pre-emptive measures.

(c) The new links of international environmental law with intergenerational equity, sustainable development, environmental security and human rights are clearly indicative of the current perspectives on the question of responsibility and liability. The links are logical and inevitable. They have always existed although unnoticed until recently. More linkages will emerge as new perspectives on the fundamental question of responsibility and liability which must at all times remain evolutionary, as long as law continues to evolve for the international community as well as within a member nation of the global society.

2. LEGAL DISTINCTIONS

(a) The distinction between State responsibility and liability or international liability or accountability of a State is very useful. It is conducive to a broader scope of measures destined to prevent harm or its recurrence and measures of restitution, restoration or reparation. Thus, liability is a primarily rule, a breach of this rule by a State will engage its responsibility. The consequences of State responsibility may entail the adoption or award of measures *ex nunc*, *ex tunc* and *ex ante*. But there is no breach of the primary rule if the offender, or in the case under examination the offending State, has undertaken to pay, or better still, has proceeded to make reparation or to pay the compensation which satisfies the requirement of international law and/or of the domestic law of the State or States concerned. Thus,
liability could be pre-empted or aborted by the decision of the State to pay compensation.

Attention is drawn to the legislation in force in some countries, such as the United States, where certain industries are allowed to generate some pollution up to the extent to which they have been permitted to emit. Thus, a pre-paid compensation is tantamount to a license to commit environmental harm without entailing the liability to make any further reparation or to pay any more compensation other than the licensing fees already paid in full.

Further consideration needs to be given to the broader scope of measures as to prevention rather than allowance of pre-paid licenses to injure one’s neighbor, even within the national boundary. Transnational or transboundary injury could not be pre-condoned unilaterally by the system of licensing operative in one or more States, merely to ensure sufficient fund to pay for the compensation. The establishment of such a common fund is not unusual for accidents resulting from incidents of navigation at sea or on the high-seas, which could occur in spite of all the precautionary measures taken, even ex abundante cautelae.

(b) If the primary rule could be stated in terms of an obligation not to harm others, then in the context of international environmental law the very inducement of harm or damage or harmful effect triggers the duty to compensate or to make reparation. At this stage, environmental law does not yet admit "injuria sine damno". There must be clear and convincing evidence of physical damage to the environment or to a person or property on which a right of action can be based. There is no right of action, hence no liability, without actual damage, i.e., personal injury or harmful effects. Thus, assessment is essential, and impact assessment must now be made for every industrial project. Such assessment is made to ensure the taking of effective measures to prevent harm, especially in regard to ultra-hazardous activities or substance. The law tends to presume the engagement of liability whenever injury ensues or harmful consequences occur. Res ipsa loquitur is appropriate to allocate the risk which should be placed squarely on the producer or transporter of ultra-hazardous
materials or substance.

(c) Liability or international liability of States is a shortened version of international liability for injurious consequences arising out of acts not prohibited by international law. It happens that most instances of international environmental damage entail international liability of a State under international as well as national laws. On the international law side, the breach of a primary obligation not to harm others engages the State responsibility of the country whence emanate the harmful effects. The engagement of State responsibility triggers legal consequences prescribed by the series of secondary rules, in terms of rights and obligations as between the injured State and the offending State, and possibly also third parties. In national jurisdictions, local remedies may be available to redress the harmful effects, by way of reparation, compensation, cessation of harmful activities or preventive measures to avoid future harms, or to reduce and abate the harms already caused.

Liability régimes may be in place within a national legal system or systems. They may have been created as the result of a decision reached at a sub-regional or regional level, such as the Malacca Straits Council, or the ASEAN Convention or an international agreement on a global scale, such as compensation fund for oil pollution, or for a special geographical area such as the United Nations Claims Commission in Geneva in respect of compensation for environmental damage in Kuwait. Liability régimes can also create secondary rules, supplementary to or supplanting the more general secondary rules under the law of State responsibility. For instance, injury to aliens may fall under a special régime with regard to economic injury or loss of investment which could trigger a recourse to International Centre for the Settlement of Investment Disputes (ICSID) arbitration or conciliation or additional facilities and might also be covered by arrangements under Multilateral Investment Guarantee Agency (MIGA).

(d) The expansion of the geographical scope of the law is clearly relevant in terms of the nature and extent of the liability régimes. Several special régimes of
international liability have been created by Treaties, and, as such, are necessarily limited in its scope of application to parties to the Treaties. Some Treaties and Conventions are regional and therefore not applicable generally unless by special agreement of the regional or founding members.

(e) Certainly the existing conflicts of interest relating to sovereignty, culture or economic development in terms of issues will to a larger or smaller extent affect the prospect of a negotiated liability régimes as well as the likelihood of their future success or failure.

3. THE EVOLVING ROLE OF STATE RESPONSIBILITY

(a) State responsibility is based on the existence of an internationally wrongful act attributable to the State. Such an act could be an action or omission. A State is responsible because it has committed an internationally wrongful act, whether by positive action or by sheer omission. An internationally wrongful act is committed when the State breaches an international obligation, by failing to perform what is required of it under international law. This is not to say that it is fault-based or non-strict. The questions of fault or culpa or intention or state of mind are to be found in the various primary rules creating international obligation for States. "Due diligence" to my mind is more American parlance than an international term of art. Assuredly, the test of State responsibility depends on the requirement mandated by the particular primary rule of international law, a breach of which will entail the responsibility of the State in breach. It is not infrequent that subjective as well as objective criteria have been used.

(b) Internationally agreed standards, if any - and there should be an increasing collection of such standards, will reduce the ambit of discretionality and subjectivity.
(c) The concepts of extra- or ultra-hazardous operations and risk are influencing the making of primary rules and the formulation of primary obligations incumbent upon States. A breach of any of the newly evolved obligations inevitably entails State responsibility as envisaged in the Draft Articles, Part I, on State Responsibility provisionally adopted on first reading by the International law Commission.

(d) Yes, the concept of an international crime in connection with environmental obligations is a useful instrument for a more effective system of State responsibility. The question that remains controversial is the extent and practicability of punishing the State, or head of State or the minister responsible, or the official or private person committing the international crime against the environment. For instance, should we prosecute the head of State or head of government or the national army responsible for the grave environmental damage maliciously caused in Kuwait?

(e) Liability as a primary rule for environmental damage cannot be fault-based. There must be *injuria* for every *"damnum"*. There can be no cases of *"damnum sine injuria"*. Under liability rule *"ubi damnum ibi injuria"*, wherever that is harm, there is actionable liability. On the other hand, the law of State Responsibility in its definition and general principles does not require any injury or damage, it is *injuria sine damno* or responsibility regardless of injury of absence thereof.

(f) Concurrent obligations are cumulative and will increase the likelihood of State responsibility for non-compliance.

(g) Yes, the system of State responsibility and all national and international systems of civil liability should operate concurrently, in a complementary manner, to assist the victims or injured States and not to promote forum shopping or enhance the opportunities of vexatious litigations or malicious prosecutions. The last two deserve punitive sanctions from the international community.
(h) Positively, States cannot pretend to be innocent by-standers, reaping only the benefits and sharing no burdens when it is within their control and jurisdiction to permit, refuse, allow or tolerate certain activities which could result in harmful effects for other nations.

4. STRICT LIABILITY AND NEW INTER-LINKAGES

(a) Apparently the liability for injurious consequences arising out of acts not prohibited by international law is stricter under international as well as national laws. It has to be strict since it is regardless of wrongfulness and independently of legal prohibition. This is an evolution on its own, and not related to any alleged fault-based liability or its contrast to liability without fault (responsabilité sans faute).

(b) Such generalization appears dangerous and not very helpful to any problem-solving attempt.

(c) There is primary obligation incumbent on the part of every State to see to it that no harm occurs outside its territory as the result of activities inside its territory or within its control. The State is held accountable by international law to answer for the injurious consequences. Once the State fails to comply with this obligation, it becomes responsible and all the legal consequences of State responsibility flow from its international liability.

On the other hand, this does not release actual operators from primary civil liability both for the harms caused to outsiders and for the wrongful acts committed whether or not through negligence, criminal negligence, or without due diligence. There is a dual régime of liabilities, nationally and internationally. The operators are directly and primarily liable under the national laws of the country in which they operate, while that State is primarily liable under international law to the injured State
for the harmful consequences suffered by the victims across the boundary line. Under the national legal system, the operators could find no comfort nor relief from the absence of legal provisions proscribing the operations. Whether or not this liability is strict, absolute, without fault, etc., under the national law of the host State, the State could accept international liability or be condemned to pay compensation internationally, and obtain reimbursement from the operators under its own law, by subrogating the rights of the injured parties.

(d) The apportionment of liability is not feasible between international and national legal systems. Rather the question of priorities must by settled as between the State responsible for allowing harmful consequences to generate from its territory or under its control and the actual operators answerable for the harms caused with or without fault. Allocation of priorities is not essentially or too remotely different from apportionment of burden or duty to compensate. Priorities also relate to the primary and subsidiary character of liability, depending on the legal system under which compensation is sought. Thus, the State has primary liability if proceeded against by another State, while under its own legal system the operators have uncontested primary responsibility or civil liability regardless of any residual responsibility of the territorial State.

(f) Dual liability should be concurrent, or joint and several, rather than subsidiary. It is not always convenient to regard the international adjudication as the primary system. There is indeed the possibility of exhaustion if not the requirement of primary recourse to local machinery for dispute resolution.

(g) The State back-up or primary system of liability, depending on the stand-point of the injured parties, should operate in conjunction with, rather than in isolation from, other concurrent mechanisms such as insurance and international funds.

(i) There is an enigma in the phrase "multinational operators" which may beg the
question. Are we concerned with the problem of the nationality of claims or that of the corporation whose stocks or shares have been internationally floated? Is it a question of *locus standi* of a nation-State or rather a question of selection of the respondent State against which proceedings should be instituted? Whatever the ultimate answers to these questions, the fact remains that the two-track approach should be also complemented by a two way system for each track. International law cannot allow a State or multiple States controlling a multi-national corporation to extend diplomatic protection for their economic interests without attaching to this right of protection the duty of accountability or answerability for the unsavory activities or questionable intents of these multi-national corporations lurking in developing countries, looking for new pastures for profitable exploitation regardless of the primary interests of the host countries. States whose nationals are answerable for the activities and projects of multi-national corporations should be held liable for the harmful consequences flowing from their wilful misconduct. Failure to meet the international standard of care to prevent harm caused by their nationals, natural and juridical, including multi-nationals, should lead to a breach of duty to prevent harm, and consequently, engaging the responsibility of the States of which multi-national corporations are nationals. Of course, here an order of predominance of control should dictate the order of priorities for their right to protect as well as their duty to compensate for the misadventures of multi-nationals.

5. **STRICT LIABILITY AND THE NEED FOR LEGAL CERTAINTY:**

   LIMITS, INSURANCE AND COLLECTIVE REPARATION

(a) Any open-ended system of liability, strict for fault-based, is to be avoided. Stricter liability should be limited in the upper ceiling of compensation, otherwise no investor would dare to undertake the risk. This is not unnatural as we have seen in the context of the Warsaw Convention of 1929 in international air transport. On the other hand, liability for harm caused by industrial activities across the frontier cannot
be limited except to the extent of the injury suffered. Thus, compensation or redress to be accorded should be tantamount to the injury suffered without limitation, whereas remoteness of consequences should be tested by a more acceptable theory of causation, whether it be causa causans, causa sine quanon, direct causes, combination of independent causes or approximate causes, thereby foreclosing the open-endedness of liability severing from it all remote consequences.

(b) Full compensation should remain the ideal criterion, while limitation is placed at that point. There should be no more than full compensation in the sense of unlimited, excessive, exemplary, punitive or exorbitant damages without regard for the actual injury suffered or the damaging consequences incurred. Beyond full compensation lie preventive or precautionary measures.

(c) It is pertinent to consider full or unlimited liability schemes, commensurate with the injury suffered, taking into account the need for appropriate or apportioned contributions from operators, insurance companies, liable States and the available special funds, each with its own ceiling or limitation which together provide an aggregate whole covering the fullest (unlimited) compensation without imposing penalty on any of the parties accountable for the contribution.

(d) Yes, an unlimited overall liability scheme in the sense discussed would be an answer to any allegation of unfairness.

(e) Yes, but appropriateness depends on the particular circumstances of each type of damage.

(f) That may depend on the amount of the premium set or the insurance policy chosen by the insured.

(g) "Unlimited liability" is a very ambiguous term, and can only be used in the
limited context in which the subject-matter is circumscribed. For instance, a company
which is not a limited company is still limited in its liability by the existence and
availability of the assets that can be marshalled to pay for all the debts in case of
bankruptcy or dissolution. The unlikelihood of uninsurability is something only an
insurance company could answer.

(h) A system of mandatory insurance is preferred in many instances, such as
compulsory insurance for diplomatic motor-vehicles.

(i) Requirement by the State is consistent with the precautionary principle.
Insurance can best fulfil its role in such operations which may entail harmful
consequences.

(j) Reconciliation may well depend on the terms and conditions of the insurance
policy. There may be several levels of intention. For instance, there is a clear
intention to drive a motor-vehicle, but no intention to skid, or to hit a pedestrian in any
given case of a road accident.

(k) An appropriate and ideal solution need to be found which must be just as well
as equitable for all concerned.

(l) There should be a mechanism for collective compensation where the source of
harm cannot be clearly determined. Even if the source is determinable, such as oil
pollution from a sea-going vessel, a collective mechanism like the common fund would
be helpful.

(m) Adequacy of such funds depend on the imagination of contributors and the
seriousness and frequency of the occurrences of disasters, such as earthquakes. In
which could trigger a chain of events. In any event, inadequate funds could be
replenished.
(n) Yes, to an appreciable extent.

(o) Yes, they contribute noticeably to this preventive role.

(p) Each of the new principles mentioned, the precautionary principle, the polluter pays principle, and the principle of common but differentiated responsibility has its impact on liability régimes with varying degrees of legal consequences.

(q) International assistance to avoid environmental damage is desirable, but it is far from being adequate substitute to liability régimes, and it will take time before a meaningful mechanism of international assistance can be put in place. For instance, the Malacca Straits States have devised the traffic separation scheme which constitutes but an initial minimum measure to prevent oil pollution caused by incident of navigation at sea.

6. NEW ISSUES ASSOCIATED WITH LIABILITY AND RESPONSE ACTION

(a) Yes, primary responsibility of response actions should be placed on the operators, several duties are incumbent upon them, such as the duty to give warning, notification and immediate response actions including restoration and cleaning-up measures.

(b) Yes, it would entail additional liability because it constitutes a separate breach of a secondary obligation, following from the breach of the primary rule or obligation.

(c) Compliance with the secondary obligation is normally designed to ensure stoppage, abatement or mitigation of injurious consequences. It neither reduces nor eliminates the liability for the accomplished breach of the primary obligation.
However, if compliance with secondary obligations does prevent the occurrence of harmful effects, then no liability is created because no actual damage was caused. State responsibility is not engaged in this instance as the incidence of harm has been obviated. There is no victim, no injured party, hence no liability.

(d) Ideally, it should be the duty of any able-bodied entity to assist in the response action, as in other cases of national calamity, such as major earthquakes, forest fires, etc.

(e) Yes, contingency plans, etc, constitute the necessary tools for initial minimal discharge of response action obligations. They may or may not be adequate for the situation, depending on the swiftness with which response actions are taken, see, for instance, response actions by Japan to the 1995 Kobe earthquake.

(f) Failure to prepare a contingency plan engages the primary responsibility of the State and also its liability which is not subsidiary, nor indeed secondary. Failure to comply with its contingency plan is an additional liability for breach of secondary obligation by the State.

(g) Response actions may entail some expenses. The cost of such actions should be borne by those responsible to undertake them. However, the State should feel free if not obligated to reimburse private organizations which have volunteered their services in the response actions.

(h) It is part of the chain of consequences. The cost of response actions could be claimed as part of the compensation for damage, although it could be itemized as a separate item forming part of the integral amount of the total compensation to be awarded.
DEFINING ACTIVITIES WHICH MAY ENGAGE STRICT LIABILITY

(a) In every special liability régime, it is necessary at the outset to define, specify and identify activities or the type of activities deemed to be environmentally dangerous.

(b) Certainly, the nature of the risk involved and the financial implications of such identification should be taken into consideration.

(c) The current trends in State practice appears to indicate a more sophisticated differentiation of the varying degrees of dangerous activities, classifying them into at least three categories, ultra hazardous, hazardous and dangerous, depending on the likelihood of the harm generated and the seriousness or gravity of such harm.

(d) No, activities in a geographical area, even the most sensitive, cannot be presumed in advance as dangerous, only activities likely to cause harm or potentially harm-generating activities could be categorized as dangerous, hazardous or ultra hazardous, according to the nature of the resulting harm.

(e) The order of priority could be arranged in accordance with the criteria of seriousness or gravity of the danger involved or the risk incurred.

(f) A liability régime may take into account the multiple criteria for such priority to determine a priori the degree of strictness of the liability commensurate with the risk entailed by the régime.

IDENTIFYING DAMAGE IN THE CONTEXT OF LIABILITY REGIMES

(a) Damage to the environment as such could be assessed for the purpose of
calculating compensation over and above and independently of the amount of compensation already paid or to be paid in respect of death, personal injury and loss of property, resulting from the damage to the environment.

(b) Yes, a special régime in the context of liability for environmental damage should be comprehensive enough to cover incidental injuries to persons as well as property, irrespective of the existing rules of international or domestic law. However, compensation already paid in regard to loss of property and personal injuries should be taken into account in assessing the total amount of compensation, without incurring double jeopardy for the offending State or double payment of compensation for the same victims or injured parties.

(c) The problem is where to draw the line between other types of damage arising directly from such environmental damage. How far is consequential damage to be taken into consideration under the umbrella of this comprehensive régime? These questions may be answered in the same sense as the theory of causation adopted.

(d) Some types of damage, such as mental anguish or suffering appear to deserve a separate study and not forming part of the "all types" of damage, including physical injury sustained by persons, as the result of environmental damage.

(e) A special régime should provide for the normal types of damage associated with, or flowing directly from, the environmental damage concerned. Another limitation is necessarily placed on the extent or degree of damage which should be appreciable and not negligible. Here the rule "de minimis non curat lex" should apply.

9. ISSUES RELATED TO THE DEGREE OF DAMAGE

(a) There should be a floor above which all damage should be covered by the
liability régime. Without "de minimis" rule, there will be endless litigations, vexatious suits, malicious prosecutions and other abuses of legal proceedings.

(b) The distinctions listed appear to provide an appropriate approach to the establishment of the minimum or appreciable damage which is beyond toleration, entailing serious impact, or major or more permanent impact.

(c) Foreseeability relates to reasonable foresight which could be more subjective than an objective standard. Besides, we are concentrating on "injury" or "injurious consequence" without fault or irrespective of intention. However, absence of any foreseeability could imply remoteness of consequence or lack of connection, thereby severing the chain of causation.

(d) Foreseeability of damage, such as from earthquakes, is a relative vision prior to actual occurrence and should in no circumstance preclude the insurance coverage. On the other hand, non-foreseeability may provide an excuse for non-coverage or incomplete coverage of a particular insurance policy.

(e) Yes, it would appear to facilitate the distinction and further clarify reasonable foresight.

(f) That depends on the definition of "minor" damage. Minimal or infinitesimal damage should be covered by "de minimus" rule. On the other hand, accumulation for a lengthy duration of repeated "minor" damage on a continuing basis may exceed the level of tolerability of injury suffered.

(g) The purpose of the exercise to place all impacts above the degree of "minor" to be defined with greater precision, at the level of actionable injury.

(h) That appears to be the logical consequence of the definition or distinction to be
drawn between above the line of "minor" damage and below the line which is tolerable and as such sustainable.

(i) Assessment will entail no additional burden and should be made in any case. What it would lead to is a different proposition.

(j) As earlier indicated, the fact that an impact is foreseen should neither create nor eliminate liability for the resulting damage. Foreseen consequence is direct consequence, covered by any theory of causation. Failure to prevent foreseen consequence engages the liability of those responsible for the operation.

(k) On the contrary, the liability régime should cover foreseen, unforeseen, accidental as well as incidental damage arising out of the activity in question. Foreseeability entails additional burden of precautionary measures to be taken to prevent or abate the harmful consequences. Once occurred, harmful effects would give rise to liability in any event.

(l) No, we should therefore make sure, that none of the propositions made is designed to deviate or derogate from the duty to prevent and abate harmful effects whatever the mechanism created.

(m) Leaving out the term "due diligence" which is imprecise and devoid of internationally accepted meaning, State responsibility is clearly engaged when the State fails to fulfil any of its international obligations. It is for us now to formulate such a primary rule which generates an international obligation incumbent upon States to undertake environmental impact assessment in every field of activities.
10. LIABILITY AND RESPONSIBILITY FOR ILLEGAL ACTIVITIES

(a) Definitely and positively yes.

(b) State responsibility is engaged whenever there is a breach of an international obligation arising out of a treaty regardless of damage; but when this results in any adverse impact another international obligation is breached regardless of the treaty obligation either because of its own doing (action) or because of its failure to maintain effective control over its private enterprises (omission).

(c) The State is responsible for failure to devise rules and standards to prevent environmental damage in the first place. Whether or not the operators is also or secondarily also liable may depend on its knowledge or foreseeability. The strictness of liability imposed on such an operator will depend on the local, federal or national legislation. The State concerned may have been lenient in its rules, standards and governmental controls, but may nonetheless hold the actual author of the environmental damage absolutely liable under its own law of tort for absolute or strict liability for hazardous or ultra hazardous activity in spite of conformance with its internal regulation.

(d) That depends on what constitute "wrongful" enforcement measures. Do they include incompetent or inefficient enforcement measures or corruptible measures?

(e) There should be no need to prove significant impact or injury as the classification of substances as highly dangerous is sufficient evidence of the seriousness or significance of the impact or injury. However, the assessment of compensation, after establishing liability and State responsibility, is still required in the determination of the amount of compensation to be paid by the wrongdoer and other preventive measures to be undertaken by the operator.
At the current stage of technological development, and in the absence of a more plausible criterion, yes, the presumption of causality is useful.

No, we must search for a better formulation of a rule than the shifting of the burden of proof.

11. THE DEBATE ABOUT EXEMPTIONS FROM LIABILITY

There should be no exemption from liability, except when the State discharges its duty to pay appropriate compensation or when the injured State consents to or acquiesces in the damage or injury suffered.

The instances mentioned should provide no ground for exemption from the liability to pay compensation or to undertake further preventive measures to prevent recurrence of the damage or harmful consequences.

They are no exemptions. The most that can be said is only by way of mitigation or alleviation of liability which is shared by acts or omissions of a third party.

To some extent it is admissible, not in complete exoneration of its direct liability, but in abatement or mitigation of the gravity of the consequences of the action taken by the operator.

Yes, the State is responsible once the act is attributable to the State, but without releasing the actual operator of its primary responsibility. Both should share the liability to the extent of their respective contribution to the resulting harms. The public authority concerned becomes accountable under the administrative law of the territorial State.
(f) The fault of the victims in some legal system may be regarded as exempting or exonerating the tortfeasor from liability, as in "contributory negligence" at one time in force in a common law country. If however the activity was not undertaken at the instigation of the injured party, there is no exemption.

(g) Yes, in that case compensation may be withheld or reduced pro rata the contribution to its cause by the injured party.

(h) Yes, for the victim only if at all.

(i) No, that is a crime under international law, entailing punishment as well as liability to pay compensation.

(j) The later obligation subsist in any event. However, the response action may serve to reduce the gravity of the injury suffered, hence the amount of compensation to be paid.

(k) No, but humanitarian activities have other rewards.

(l) Exemptions should only be admitted very sparingly, otherwise they would erode special liability régimes.

(m) Yes, there must be clear and convincing evidence of a direct causal link.

(n) No, it should not constitute an exemption.

(o) There should be sufficient incentives for States to become parties to a given liability régime. Any pretext or resort to the use of flags of environmental convenience should be discouraged.
(p) That incentive would be a sound start on the road to the establishment of a workable mechanism.

(q) Yes, there should be no objection to the extra-territorial application of the stricter laws of an advanced country such as the United States to all U.S. enterprises regardless of the geographical areas of their operation. This does not mean that U.S. laws should apply to non-U.S. operators outside U.S. territory, jurisdiction or control.

(r) The differences between strict and absolute liability are very relative. Even the most absolute of liability is relative.

(s) No, partly because absence of willfulness is a negative subjective evidence not readily susceptible of concrete or objective proof.

12. A BROADER FRAMEWORK FOR THE REPARATION OF DAMAGE

(a) Certainly is should be so broadened as to include not only measures *ex nunc* (immediate cessation of damaging activity) but at least also measures *ex tunc* (inclusive of restoration, clean up and payment for economic loss, such as *damnum emergens* and *lucrum cessans*).

(b) It is a fair beginning. We should start with rehabilitation although it may take time and expenses, barring disproportionate spending.

(c) It would provide a fair substitute performance of that secondary obligation flowing from the breach of the primary rule resulting in environmental damage.

(d) Equitable assessment of compensation is an alternative approach, no better, nor worse, but it may or may not be appropriate for each particular incident.
(e) Contingency plans should provide necessary criteria, but no plans can cover all contingencies.

(f) Demarcation of baseline condition will be useful for restoration criteria.

(g) Where restoration or *restitutio in integrum* is not feasible, impairment of use, aesthetic or wilderness values would provide a reasonable standard of compensation for a start.

(h) International guidelines are often based on the practice of States which originates internally.

(i) Diplomatic means do not necessarily constitute an alternative to adequate compensation.

(j) For irreparable damage, nothing would provide satisfactory relief for the victim. However, a combination of measures of relief or redress might help ease the pain and suffering of the injured parties. No stone should be left unturned.

(k) It often happened in actual practice. Yet there should be substitute performance which at least is designed to establish or restore pre-existing or equivalent conditions.

(l) No, we should not allow that situation to arise.

(m) Punitive compensation by way of pecuniary damages may serve dual purpose.
13. EXPANDING THE ACCESS TO EFFECTIVE REMEDIES

(a) The traditional rules of international law regarding direct or special interest may have to evolve in a more flexible way to allow an extension of a "jus standi" for a State or a close relative of an injured individual to obtain relief. If environmental damage is against the whole world or the international community, there should be grounds for a State or an individual to establish sufficient special interest to seek relief by demanding cessation of such damaging activity.

(b) It should be feasible to identify a sufficiently precise legal interest in environmental matters. However, the environment per se has a global implication with possibility of successive chain reactions beyond immediate calculation.

(c) Whatever rules already adopted in State practice at national or international level would be pertinent to broadening the standing of claimants. What is more important is the purpose of ending injurious consequences of an activity at source.

(d) In the absence of a direct legal interest, the public at large, or community, or society, or society or the State should be the claimant as in most criminal prosecution with the view to arresting or abating the harmful consequences of a criminal activity.

(e) The concept of "trustees" is abandoned in most civil-law systems, although the term "trusteeship" has been revived in the context of the United Nations. Whatever our final resolution, it should be observed that the environment is a common heritage of mankind. It is for everyone, every State to protect and preserve. Any one, any State could act on behalf of the international community when it is a matter of general global concern.

(f) Yes, the United Nations or its principal organs, such as the Security Council and the General Assembly, each in its own sphere, could act on behalf of the global
community.

(g) It could serve as a consolidation of class actions and the compensation obtained could be spread to all injured parties while restoration measures and response actions would benefit the collectivity of nations and peoples as a whole.

(h) Yes, their role deserves closer attention.

(i) Yes, although we already witnessed the establishment of an "environmental chamber" within the International Court of Justice, and the L.O.S. Tribunal for the marine environment.

(j) This is a different proposition. The Barcelona Traction is an outmoded remnant of stricter rule regarding nationality of claims in the treatment of aliens, long overtaken by modern developments in particular regard to international environmental law. Barcelona Traction decision is neither precedent, nor relevant for international claims for environmental damage. The Kuwait environmental claims before the Geneva claims commission provide ample proof of a clear departure from the limited application of the *jus standi* for "multinational corporation" to be represented by the State of incorporation or the State of which the corporation is national.

(k) The deciding authority, whether a Chamber or a Tribunal, should have the power to join all claims in a class or joint action to save time and expenses of duplication.

14. SECURING ACCESS TO REMEDIES BY THE INDIVIDUAL

(a) No, but there is ample room for improvement.
(b) It is already established and it should be encouraged to exercise jurisdiction wherever practical.

(c) This is done in several instances, such as in the Mekong Committee, at any rate for the planning and development of the Lower Mekong Basin for at least four decades.

(d) Yes, it is an absolute must, if we are ever to succeed in our conservation efforts for the common good of the environment.

(e) First, there should be a clear set of rules for the apportionment of liability among States, author States as well as victim or injured States. A mechanism may exist in various forms of international dispute settlement.

(f) It will do for a start, although further improvement in the process should be welcome.

(g) Yes, but it should not give rise to abuses which would defeat the object and purpose of the mechanism. We should learn from the experience of the Inter-American Court a century ago.

(h) No, it is neither adequate nor always useful. Some Courts assume jurisdiction without any sound legal basis. See, for instance, the Filartiga Case, which was not a criminal case. To say that torture is a universal crime, hence the exercise of criminal jurisdiction based on universality principle, is no excuse for the Court to arrogate to itself jurisdiction to adjudicate a tort claim without any connection with the "locus delicti commissi".

(i) Yes, but domestic Courts have a tendency to act as "judex in sua causa", and to chide judicial responsibility on a convenient ground of "forum non conveniens" as
in the Bhopal Incident.

(j) No, even the Courts in the same legal systems are not, as a rule, consistent, either within the same system acting as "judex in sua causa" or with other systems but still acting as "judex in sua causa". See, for instance, the decision of the United States Court and of the Korean Court in the aerial incident case involving KAL 007.

(k) Reciprocity is required in some jurisdictions as a condition precedent for allowing recovery. Reciprocity is a necessary evil in international judicial relations and provide a lame excuse for a domestic Court to allow or disallow recovery, based on the existence or absence of proof of actual reciprocity. By itself, reciprocity is questionable as a solution which presupposes the pre-existing precedent set up by the other jurisdiction.

(l) No, they are dictated by considerations that are not free from national prejudices and often tainted with political and non legal considerations.

(m) Yes, on the whole, Courts are impartial, but in several countries of dubious requirement of "due process", impartiality may be an exception rather than the prevailing rule.

(n) As long as local remedies are available, they should be resorted to. Their exhaustion is not required in every case, exceptions have enlarged, and States have dispensed with the requirement of exhaustion of local remedies rule, as in the Washington Convention of 1965.

(o) The requirement subsists in the case of injury to aliens as reflected to Article 22 of the Draft Articles on State Responsibility, precisely to show that the State still has another opportunity to be in compliance with an international obligation if by providing local remedies, its obligation is prevented from being breached.
(p) Of course, it is practical to separate State responsibility from civil liability. For one thing, the two concepts operate in different dimensions and at different levels. On the same international level, liability of a State is a primary rule relating to harmful effect, whereas responsibility is comparable to the law of obligations, torts, contracts and crimes combined.

(q) In environmental matters, State immunity in its limited application subsists in regard to activities of the State performed in the exercise of a governmental authority. When the activities are not in the exercise of governmental authority, immunity is absent if the dispute is one falling within the categories of disputes which by the rules of private international law, the Court in question is a competent court with proper jurisdiction to decide the case in accordance with the applicable law.

(r) That appears to be a general rule. Here national treatment is generally admitted in the bilateral treaties, such as F.C.N. Treaties, between States on an equal footing, barring unequal Treaties.

(s) Dispute prevention in the sense of settlement à l’amiable through other alternative means of conflict resolution should be encouraged.

15. PRIVATE INTERNATIONAL LAW ISSUES AND SOLUTIONS

(a) There are no preferred criteria for personal jurisdiction in cases involving multiple jurisdiction or conflict of laws and concurrence of jurisdiction.

(b) Whenever there is a dispute of multinational character, there are questions of choice of law and choice of forum. In some cases, States have agreed beforehand to have the matter decided by an international Tribunal or to have the international
Court determine which national Court should exercise jurisdiction. Compare the Treaty of Lausanne in the Lotus Case.

(c) Yes, many international régimes provide for dispute resolution at the option of the parties.

(d) Yes, such régimes often provide rules for the choice of law.

(e) Enforcement is better ensured if the decision is by a national Court. But when it is an indication of provisional measures or final judgement on the merits by an international Tribunal, execution or enforcement measures are often lacking, save in exceptional cases like the Iran/United States Claims Tribunal.

(f) In principle, yes; but in practice legal aid is still in its infancy before the International Court of Justice. Financial resources are few and far short of what is needed to afford the costs of transnational litigation.

(g) Yes, there are reasons to hope that eventually and inevitably uniform principles regarding jurisdiction and the applied environmental law be developed to enhance further international judicial cooperation.

(h) Yes, there is a rudimentary response in the narrow scope of the 1968 Brussels Convention and the 1988 Lugano Convention, but much more need to be achieved on the global basis, beyond regional European confines.

(i) Yes, and U.N.E.P. as well as other competent specialized agencies of the United Nations should have a role to play. Ultimately the Security Council is the guardian of peaceful and healthful use of the environment. Exchange of information is inherent in the duty of States to cooperate, while on-site inspection should be permitted wherever feasible.
16. ADVANCING INTERNATIONAL REGIMES

(a) Yes, but how comprehensive and how many such régimes? The next question is one of priority for the negotiation and conclusion of Treaties creating such special régimes.

(b) It might assist the development of uniform application of rules of substance and procedure by national Courts.

(c) They should play an active role. Nothing to prevent their submission of a Pro bono or Amicus brief in any international or transnational litigation. Private associations and foundations should have a limited standing, not as parties to the dispute but at any rate as observers or interested friends of the Court.

(d) Enormously yes; national legislatures often seek guidance from existing international instruments and can be inspired by the successes of relevant régimes created by Treaties.

(e) At this stage of legal development, we should aim at the creation of as many specific régimes as feasible and ultimately they could be combined or merged into a single composite régime encompassing all aspects of environmental matters. A comprehensive international régime is an ideal to be targeted with the realization that it will only be achieved in the remote future.

(f) Yes, effective liability principles require different treatments with varying degrees and levels of stringency, limits, exceptions and other characteristics relating to the specific nature of the activities.
(g) Yes, and that appears to be the current trends in the practice of States. See, for instance, the joint efforts and collective endeavors of the ASEAN States in regard to the management of environmental affairs.

(h) Yes, it is plausible and likely for States and entities to apply principles and solution albeit *mutatis mutandis* to different types of special régimes, once the issues and questions relating to them have been clearly identified.

Sompong SUCHARITKUL

*January 31, 1996*

SS : tt