2 State Responsibility and Environmental Regulation

I. Text Materials

Introduction

It has long been a basic principle of international law that a state that causes an injury to a foreign citizen (national) is responsible to the national's state for the harm done, but not to the national. This responsibility follows from the basic idea of international law as the law of nations.

The chapter considers when a state is responsible, what the standard of responsibility is, what defenses states have against allegations of mistreatment, and what steps aliens and foreign businesses can take to minimize potential losses.

The chapter examines the insurance programs that states and IGOs have established to protect companies that invest internationally. The chapter also examines the international legal obligations of states to protect the environment and considers the responsibilities states have to curtail pollution and protect natural resources.

State Responsibility

To establish that a state is responsible for an injury to an alien or foreign business, there must be (1) "conduct consisting of an action or omission attributable to the State under international law," and the conduct must (2) "constitute a breach of an international obligation of the State." In the Positivist view of international law, responsibility adjudged by another state or an international tribunal can only be of consequence where a sovereign agrees that it is not the sole judge of its responsibility toward others.

Doctrine of Imputability – It states that a state is only responsible for actions that are imputable (attributable) to it.

The usual interpretation of this theory is that the state is responsible for acts done by officials within their apparent authority. This includes (1) acts within the scope of officials' authority and (2) acts outside their scope of authority if the state provided the means or facilities to accomplish the act.

Thus, states are responsible both for mistaken actions and even for actions done contrary to express orders or even the internal laws of the state.

Case 2-1: *Sandline International Inc. v. Papua New Guinea*
International Arbitration under the UNCITRAL Rules (October 1998).
Facts: A Papua New Guinea (PNG) revolutionary movement cut off power to a mine on Bougainville Island, part of PNG. The PNG Defense Force could not retake the mine and looked

to a private contractor for help with military helicopters and modern equipment. PNG and Sandline entered into an Agreement signed by PNG's Deputy Prime Minister, for PNG, with the approval of the Prime Minister, Minister of Defense, and following a resolution of the PNG National Executive Council approving U.S. $36 million for the joint operations with 50 percent to be paid up front. PNG paid the first part, but did not pay the $18 million balance within 30 days of Sandline's deployment.
Issue: Is PNG liable for its failure to perform the terms of the contract?
Holding: Yes.
Law: "An agreement between a private party and a state is an international, not a domestic, contract," thus the rules of international law apply. "[A]cts of a state will be regarded as such even if they are *ultra vires* or unlawful under the internal law of the state." Under the doctrine of preclusion or ratification, "a party may not deny the validity of a contract entered into on its behalf by another, if, by its conduct, it later consents to the contract."
Explanation: PNG pled that the contract violated Section 200 of the PNG Constitution and that those who entered the contract "on behalf of PNG lacked the capacity to do so." The Tribunal ignored the first argument as an internal matter for PNG courts. The Tribunal stated that the "agreement was not illegal or unlawful under international law or under any established principle of public policy." "PNG participated in the performance of the contract" and is thus estopped from "denying the validity of its agreement with Sandline."
Order: Sandline is awarded damages for breach of contract.

Nonimputable Acts – Because states are only responsible for actions taken by their officials, they are not responsible for the acts of private persons, acts of officials of other states or international organizations, or acts of insurrectionaries within their own territories. However, this fact overlooks the growing body of law and reality when it comes to state-sponsored or supported terrorism.

Terrorism

Terrorism is the sustained clandestine use of violence—murder, kidnapping, threats, bombings, torture, or some combination of these—for a political purpose. Terrorism does not require sponsorship by a state, but states have often sponsored terrorism. State responsibility for terrorism is often limited to helping other states bring terrorists to trial.

Efforts to deter terrorism have led to the adoption of the Tokyo Convention of 1963 and the Montreal Convention of 1971 on the hijacking and sabotage of civilian aircraft; to the 1973 Convention on crimes against diplomats and the 1979 Hague Convention on hostage taking; and to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. These conventions classify certain kinds of acts as international crimes that are punishable by any state regardless of the nationality of the criminal or the victim or the locality of the offense. They do not, however, impose liability on states that participate in state terrorism.

Most domestic terrorism legislation does not impose liability on states for terrorism. The Anti-terrorism and Effective Death Penalty Act of 1996 grants U.S. federal courts jurisdiction to hear suits against foreign states and their officials and creates a private cause of action for personal injuries and death resulting from state-sponsored terrorist attacks.

Case 2-2: *Flatow v. The Islamic Republic of Iran*
United States District Court for the District of Columbia, 1998.

Facts: Alisa Flatow, a U.S. citizen, was killed in Israel by a suicide bomber. The Shaqaqi faction of the Palestine Islamic Jihad, which is funded by Iran, claimed responsibility for the bombing. Flatow's heirs sued Iran, its head of state, its intelligence service, and its minister of intelligence seeking compensation for her wrongful death. Iran did not appear before the court and the court required the heirs to provide that they had a claim to relief before it would grant a default judgment.
Issues: (1) Does the court have jurisdiction? (2) Is there a cause of action?
Holdings: (1) Yes. (2) Yes.
Law: The U.S. Antiterrorism and Effective Death Penalty Act of 1996 creates subject matter jurisdiction and a federal cause of action for acts of state-sponsored terrorism. The elements of the cause of action are: (1) death due to … extrajudicial killing …, (2) perpetrated by an actor receiving resources or support from a foreign state, (3) the support or resources are provided by an official acting within his/her scope of employment, (4) the state was designated as a sponsor of terrorism by the U.S. government, (5) plaintiff offered defendant state the opportunity to arbitrate if the death occurred within the defendant state's territory, (6) the plaintiff or victim was a U.S. citizen at the time of the death, and (7) similar conduct by U.S. officials would be actionable.
Explanation: (1) This suicide bombing was an extrajudicial killing as it was not authorized by a court and it was done in support of international terrorism (it was intended to intimidate or coerce a civilian population or a government). (2) Iran's general support of the bomber's group was sufficient to establish liability as a foreign state's support of an actor does not have to be directly linked to the extrajudicial killing. (3) Funds supplied to a group by a government's head of state, intelligence service, and minister of intelligence is the "provision of material support and resources." (4) U.S. officials would have been liable in a case such as this.
Order: Defendants are jointly and severally liable for Flatow's death.

Fault and Causation – The case law and most law writers suggest that a country is responsible for injuries regardless of fault. In other words, there is no requirement to show *culpa* (fault) by the country (either through knowledge or negligence). This rule reflects the difficulties of proving a lack of proper care by a state. Instead, courts look to causation. They see if a state or its officials actually cause the injury.

Standard of Care

Once a court or other tribunal decides that a state is connected to an action, it has to determine the criteria it is to be judged by. Two criteria have appeared in the case law: the international standard (or sometimes the international minimum standard) and the national standard.

The National Standard of Care – Third World states (especially in Latin America before World War II and in Asia and Africa after World War II) have often pressed for a national standard of care.

A state should treat an alien exactly as it treats its own nationals—no better, no worse. But the critics point out that this is not protection for aliens if the nationals are ill-treated; and if the rule were carried to its extreme, it would mean that aliens should be given the same privileges (voting, health care, etc.) as nationals.

Efforts by the Soviet Union to obtain support for a 1962 United Nations General Assembly resolution that would have established "the inalienable rights of peoples and nations to the unobstructed execution of nationalization, expropriation, and other measures" was defeated. The role that foreign capital plays in development and the fear of offending states that extend

economic and other kinds of assistance were important factors in defeating the Soviet proposal. On the other hand, the less developed countries generally have been unwilling to reject the national treatment doctrine and sign treaties obliging them to pay just compensation if they expropriate foreign investments.

The International Standard of Care – Favored by major Western countries, the international standard of care says that although a country has no obligation to admit aliens to its territory, once it does, it must treat them in a civilized manner. Failure to do so can be classified as either crimes or torts.

In its 1979 Draft Articles on State Responsibility, the International Law Commission suggested that state acts are international crimes if they seriously breach international peace, deny people the right of self-determination, or fail to safeguard human life and dignity (e.g., slavery, genocide, and apartheid).

The most common international tort is the expropriation or nationalization of aliens' and foreign businesses' property. Denial of justice is also a common tort.

Expropriation – Expropriation or nationalization is the state's taking or deprivation of the property of foreigners. The right of states to expropriate foreign property is universally recognized; in municipal law, the right of a government to "take" property for public purposes is known as eminent domain.

Western countries regard expropriation, much as they regard eminent domain, as proper so long as it is done for a legitimate public purpose and the state pays prompt, adequate, and effective compensation. Some argue that the public-purpose element is required in expropriation cases, others argue that it should be expressed only as a requirement not to discriminate against a particular class of foreigners.

The meaning that the major Western industrial powers give to the phrase "prompt, adequate and effective compensation" was succinctly stated by the plaintiff in its pleadings in the *Anglo-Iranian Oil Co. (United Kingdom v. Iran) Case.* By "adequate" compensation is meant the value of the undertaking at the moment of dispossession, plus interest to the day of judgment. Prompt compensation means immediate payment in cash. Effective compensation means that the recipient of the compensation must be able to make use of it.

Case 2-3: *Acsyngo v. Compagnie De Saint-Gobain (France) S.A.*
Belgium, Commercial Court of Namur, 1986.
Facts: France had nationalized the stock in the French conglomerate Compagnie de Saint-Gobain (CSG) in 1982. CSG in turn owned slightly more than half of the stock of Glaceries de Saint-Roch (GSR), a Belgian company. The shareholders of CSG who had had their shares nationalized formed a syndicate, ACSYNGO, and ACSYNGO then brought suit in Belgium to claim that it (rather than CSG) should be made the owner of the half interest in GSR. ACSYNGO argued that to do otherwise was to wrongfully give extraterritorial effect to a French nationalization decree.
Issues: (1) Was the nationalization decree expropriatory or discriminatory? (2) Is a foreign nationalization decree illegal if it has extraterritorial effects? (3) Does this nationalization decree violate the public policy of Belgium?
Holdings: (1) No. (2) No. (3) No.
Law: (1) A nationalization decree is not expropriatory if it provides for fair and adequate compensation. It is not discriminatory if it differentiates between different economic sectors. (2)

Belgium does not recognize the theory of *Spaltgesellschaft* (that a splinter company would automatically come into existence when one state nationalizes a company with assets in another state). (3) The appropriation of foreign assets of a private person is lawful if it does not violate the public policy of the state where the assets are located.
Explanation: (1) Fair market price was paid. The only discrimination was between economic sectors. (2) A shareholder who receives adequate compensation would be acting in bad faith to invoke the theory of *Spaltgesellschaft*. (3) It would violate Belgian public policy to separate GSR from the CSG group, as this would decrease its value to the harm of its Belgian shareholders.
Order: Case dismissed.

Many former colonies of industrialized nations object to the requirement of adequate compensation when, as the Western nation-states would have it, it is for full market value. They argue that factors (such as colonial domination) should be taken into consideration.

Denial of Justice – A denial of justice is said to exist "when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce a manifest injustice is not a denial of justice."

The states that advocate the application of a national standard emphasize that notions of justice are relative to each society and that whether or not there has been a denial of justice with respect to a particular case requires an understanding of the judicial system of the society where the case arose.

Case 2-4: *Chattin v. United Mexican States*
Mexico-United States General Claims Commission, 1927.
Facts: Chattin had been an employee of a Mexican railroad company. On July 9, 1910, he was charged with embezzlement (based on the accusation of a brakeman who was arrested for fraudulently selling railroad tickets), was tried in January 1911, convicted on February 6, 1911, and sentenced to two years' imprisonment. He was liberated from the jail in May or June 1911, as a result of the Madero revolution, and he returned to the U.S. In this claims commission proceeding, Chattin claimed that his arrest, trial, and sentencing were illegal, and his treatment in jail was inhuman.
Issue: Had Chattin been denied justice?
Holding: Yes.
Law: Mexico's treatment is to be tested by international standards.
Explanation: There was evidence of undue delay in allowing Chattin to respond to the allegations and evidence against him, and in forwarding his appeal to the appellate court. There was evidence that Chattin had not been informed of the charges brought against him or allowed to face his accusers. The manager of the railroad was allowed to submit a series of anonymous written accusations that were only included in the record after the investigations were over and Chattin's lawyer had filed his briefs. There was evidence that the hearing was only a formality that lasted five minutes. This constituted treatment amounting to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action that is recognizable by every unbiased man. There was no evidence to support the other allegations (e.g., bias by the judge and ill treatment in the prison).
Order: Chattin was awarded $5,000 in damages.
Dissent: To require that a trial must have the sacred forms of the common law is to forget "that the same goal is reached by many roads." This claim should have been disallowed.

Objections

States can raise several objections to complaints brought against them, including lack of standing, lack of nationality, lack of a genuine link, and failure to exhaust remedies.

Lack of Standing – A common objection states raise to being sued in international tribunals is lack of standing. If a plaintiff is not qualified to appear before the particular court, the case must be dismissed.

In most international tribunals, such as the ICJ, only a state can file a complaint. If a private person or company were to appear as a plaintiff, the case would be dismissed for want of standing. In these tribunals, the only way for the matter to be heard is for a state to sponsor the suit of its national.

Lack of Nationality – An objection related to lack of standing is lack of nationality. Although a state may bring a complaint in an international tribunal on behalf of one of its own nationals, it may not do so on behalf of any other person.

This rule is easily applied with respect to persons with a single nationality and to stateless persons (the first have a claim if they are sponsored by the state of their nationality; the second cannot be sponsored by any state).

Its application becomes more complex, however, with dual nationals. The traditional rule is that either state can complain to a third state; but between the two, neither can complain. A new rule evolved that allows the state of which the individual has the master nationality (i.e., the one with which he/she has the most links) to complain against the other.

Effect of an Injured Person's Waiver on the Right of His National State to Bring Suit on His Behalf: The Calvo Clause requires an investor who seeks to establish a business operation in a foreign country to agree, in advance, that he, she, or it will not ask for its home state to intervene in any dispute with the host state.

According to the ICJ, "A claim belongs to a state and not to an individual; therefore, any attempt of waiver by the individual is ineffective." As a practical matter, however, Calvo Clauses do have some impact.

Lack of a Genuine Link – A person whose suit is being sponsored by a state in an international tribunal must be a real and bona fide national of that state. That is, the person's nationality must be genuine and not based on a token relationship. If it is based on a token or insignificant relationship, the opposing state can raise an objection of a lack of a genuine link to the sponsoring state.

For companies, the ability of a state to sponsor a complaint depends on the particular company's nationality. States have a wide variety of national rules that define the nationality of a company. Regardless of these tests, international tribunals now require that a company have a genuine link with its sponsoring state.

Failure to Exhaust Remedies – Before an individual or business firm can seek the help of its home state in supporting a complaint of mistreatment by a foreign state, the individual or firm

must exhaust all of the local remedies available to it within the foreign state. Failure to exhaust remedies is thus an objection that the foreign state may raise in an international tribunal. As is the case in municipal law, the requirement that complainants must exhaust their local remedies serves to resolve problems at the lowest level and with the least use of a sovereign's time.

There are exceptions to the rule. If an adequate remedy is clearly unavailable, if the requirement to exhaust a person's remedies is waived by treaty, if the injury was done directly to a state (rather than to a private person), or if the defendant state has delayed excessively in granting a remedy, the requirement is excused.

Case 2-5: *The M/V Saiga Case (Merits)*
(*Saint Vincent and the Grenadines v. Guinea*)
International Tribunal for the Law of the Sea, 1999.
Facts: The M/V *Saiga* sold "gas oil" to fishing vessels in Guinea's exclusive economic zone (EEZ). The Guinean Navy arrested it and its master and crew the next day outside the EEZ. The master was charged with importing taxable goods without declaring them and it brought criminal charges. The trial court found him guilty, and the Court of Appeal affirmed. He was fined and the ship's cargo was seized. The *Saiga*'s master and crew were Ukrainian, the owner was in Cyprus, the manager in Scotland, and the ship itself was provisionally registered in Saint Vincent and the Grenadines (SVG). SVG sued Guinea before the ITLOS demanding that Guinea release the ship, the master, and the crew. Guinea agreed to submit to the proceedings, but asked that they be dismissed because there was no genuine link between the ship and SVG, the master had not exhausted all local remedies, and the persons affected were not nationals of SVG.
Issues: (1) Is there a genuine link between the Saiga and SVG? (2) Had the master exhausted his remedies? (3) Must the master and crew of a ship be nationals of the flag state?
Holdings: (1) Yes. (2) Yes. (3) No.
Law: (1) The UNCLOS requirement that there must be a genuine link between the ship and its flag state does not allow other states to challenge the validity of the flag state's registration. (2) A state does not have to exhaust remedies to bring a suit when its own interests are harmed. (3) A flag state has jurisdiction over all persons (whether its own or foreign nationals) aboard its flagged ships.
Explanation: (1) Guinea produced no evidence to show that a genuine link was lacking. (2) The detention of the ship, the master, and the crew was a breach of SVG's rights. It could complain of this independent of any proceeding brought by or against master. (3) UNCLOS looks at a ship as a unit. The master and crew are part of that unit and SVG is entitled to act on their behalf.
Order: SVG is entitled to reparations for the injuries it has suffered.

Other Objections – A defendant state may also argue that a claimant delayed too long in bringing a claim (this is called laches) or that the complainant is tainted with dirty hands.

Relief

Several kinds of relief can be obtained from states for injuring an alien. International tribunals have awarded restitution in kind, satisfaction, and compensatory damages.

Case 2-6: *Re Letelier and Moffitt*
Chile-United States International Commission, 1992.
Facts: Despite Chile's assertion of sovereign immunity, a U.S. trial court held that Chile was liable for the car bombing of one of its former foreign ministers. The minister was killed, as was a

passenger, Mrs. Moffitt, who was a U.S. citizen. Another passenger, Mr. Moffitt, was injured. The trial court awarded the plaintiffs approximately U.S. $5 million.
Because the plaintiffs were unsuccessful in executing the award, the U.S. government intervened on their behalf, and Chile eventually agreed (although it did not admit liability) to have an international commission decide the amount of *ex gratia* payment Chile should make to the injured parties in accordance with international law (as its liability has been established).
Issue: What constitutes reparation?
Holding/Law: The appropriate remedy for an *ex gratia* payment is a reparation. Reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability, have existed if the act had not been committed.
Explanation: In calculating reparations for the injuries done, this Commission considered the loss of financial support and services to the heirs of the victims, and the material and moral damages suffered by them.
Order: The heirs of the victims were awarded U.S. $2,611,892.
Separate Opinion: (1) International law does not allow for the award of punitive damages (to punish a party for wrongdoing). Also, any excessive award, which is equivalent to an award of punitive damages, would be wrong. (2) International law requires that damages be proximate to the causal act. Remote damages would not be proper. (3) The remedy of "satisfaction" usually requires a determination of responsibility. Since the Commission was not allowed to determine responsibility, satisfaction cannot be granted. Additionally, satisfaction is only appropriate in disputes between states, and not in cases involving individuals.

Insurance

Insurance is the contractual commitment by an insurer to indemnify an insured against specific contingencies and perils. Both domestically and internationally, insurance is an important business tool that can either supplement or take the place of litigation.

Private Insurers – A variety of insurance products for multinational enterprises are available from private insurers, governments, and intergovernmental agencies. These include international property insurance, international casualty insurance, coverage for overseas employees, and special coverages.

Private insurers who offer international insurance include the Exporters Insurance Company of Bermuda, the Dutch and British Nederlandsche Credietverzekering Maatsschappij, the French Compagnie Française d'Assurance pour le Commerce Exterieur, Foreign Credit Insurance Association, American International Group Global Trade & Political Risk Insurance Co., and CNA Credit. Most of these insurers provide the full range of insurance products. However, specialty coverage, especially political risk insurance, is often expensive or unavailable in designated high-risk countries.

National Investment Guaranty Programs – Most developed countries provide insurance when it is unavailable or too expensive from private insurers. They target their insurance offerings in order to promote domestic exports to certain favored countries.

The United States Overseas Private Investment Corporation (OPIC)

OPIC's mission is to mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed friendly countries and areas, thereby complementing the development assistance objectives of the United States. OPIC runs

two basic programs: a political risk insurance program and a finance program. OPIC functions as a bank as well as an insurer.

The political risk insurance program covers the political risk of expropriation, currency inconvertibility, and various kinds of risks associated with political violence.

Expropriation: Demands for expropriation coverage have declined. Most claims are now for creeping expropriation—that is, expropriation through a series of acts that individually might be seen as administrative actions or general health, safety, or welfare measures undertaken by the host government. This trend is attributable to at least three factors. First, most LDC governments need to attract foreign investment. Second, LDC governments have become much more sophisticated. Third, international transactions no longer consist mainly of agreements with a host government for the extraction of minerals or other resources.

OPIC has defined creeping expropriation as any act, or series of acts, for which the State is responsible, which are illegal under domestic or international law, and which have a substantial enough adverse effect on either the enterprise or the investor's rights under the enterprise.

Currency Inconvertibility: OPIC offers insurance that guarantees that an investor will be able to convert local currency into dollars. OPIC's coverage, however, only insures an existing legal right to convert. In the absence of such a right, OPIC cannot offer this form of coverage.

Political Violence: OPIC offers insurance against losses due to political violence. Political violence losses cover risks associated with wars, revolutions, civil strife, and terrorism. This coverage is different from OPIC's expropriation or inconvertibility coverage because the risk is different. This risk is generally beyond the control of the host government. In addition, when there is a claim, OPIC's ability to salvage its losses is greatly reduced. OPIC protects itself both by charging higher insurance rates for countries that are more susceptible to political violence and by requiring investors to take actions to manage perceived risks.

Multilateral Investment Guaranty Programs (MIGA) – Since its inception in 1988, MIGA has provided political risk insurance guarantees to private sector investors and lenders. Its shareholders include most of the world's nation-states.

Part of MIGA's mission is to share its research and knowledge about risk in a variety of sectors and geographic locations, with particular emphasis on investments in "difficult operating environments" and in places where it can make the greatest difference. MIGA professes to support only those investments that are developmentally sound and meet high social and environmental standards.

Environmental Protection

In 1972, the Stockholm Conference on the Human Environment issued the Stockholm Declaration, adopting a list of principles that define both new human rights and new state responsibilities. Two of these are especially noteworthy.
Principle 1 proclaims:
Man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.
And Principle 21 states:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and 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.

Among the recommendations of the Stockholm Conference was a proposal that the United Nations General Assembly create a United Nations Environment Program (UNEP). Since its beginning, UNEP has been active in monitoring Earth's environment, drafting international and regional treaties, and adopting recommended principles and guidelines.

Twenty years after the Stockholm Convention, the United Nations Conference on the Environment and Development (UNCED) convened in Rio de Janeiro in June 1992. The Rio Declaration reaffirmed the principles set forth in the Stockholm Declaration. It linked protection of the environment and development as related goals.

Many other new principles were agreed to as well, such as:

- the recognition of a "right of development,"
- an assertion that "each individual shall have appropriate access to information concerning the environment that is held by public authorities,"
- the promotion of a "supportive and open international economic system to better address the problems of environmental degradation,"
- adoption of the precautionary approach to protecting the environment,
- a statement that all states have an obligation to prepare an "environmental impact assessment" whenever activities are proposed by a governmental agency that "are likely to have a significant adverse impact on the environment."

UNCED also adopted a statement called Agenda 21 that includes both developmental and environmental goals. The former are to promote sustainable and environmentally friendly growth. The latter are, in essence, to prevent pollution and to conserve and protect Earth's natural resources.

Regulation of Pollution – Efforts to minimize pollution have taken two approaches: a sectoral approach regulating particular sectors of the environment and a product approach regulating particular pollutants.

Sectoral Regulations

The main environmental sectors subject to international regulations are the marine environment and the atmosphere.

Marine Pollution: The 1982 United Nations Convention on the Law of the Sea (UNCLOS) imposes on all states the obligation "to protect and preserve the marine environment."

States are to take measures to minimize to the fullest possible extent (1) the release of toxic, harmful, or noxious substances from land-based sources, (2) pollution from vessels, (3) pollution from the installations and devices used in the exploration or exploitation of the seabed and its subsoil, and (4) pollution from other installations and devices operating in the marine environment. To carry out these duties, states are required to "adopt laws and regulations" and "take other measures" to "prevent, reduce, and control pollution."

Several other international conventions and instruments deal with more particular problems of ocean pollution.

Case 2-7: *Southern Bluefin Tuna Cases: Provisional Measures*
New Zealand v. Japan, Australia v. Japan
International Tribunal for the Law of the Sea, 1999.
Facts: Australia and New Zealand sued Japan complaining that a Japanese experimental fishing program violated UNCLOS, a Convention for the Conservation of Southern Bluefin Tuna, and customary international law. Australia and New Zealand claimed that there was mixed scientific evidence in support of Japan's program and therefore the program should be stopped as a matter of prudence. Japan contended that there was sufficient scientific evidence to support the program.
Issue: Does the precautionary principle apply?
Holding: Maybe.
Law: The precautionary principle or approach requires scientific certainty before a state may undertake "any activity relating to marine fisheries."
Explanation: The Tribunal's judgment does not cite precautionary principle, but requires the parties to act with "prudence and caution." Judge Shearer: The Tribunal's judgment is rightly based on the precautionary principle. Judge Laing: While customary international law does not adopt the precautionary principle, UNCLOS clearly does, as can be gleaned from the language requiring the parties to conserve the marine environment.
Order: None of the parties are to do anything to aggravate the situation and each is to refrain from participating in experimental fishing programs unless it obtains consent of the others.

Climate and Air Pollution: The principal international treaty dealing with the problem of global warming is the United Nations Framework Convention on Climate Change (UNFCCC). The ultimate objective of the UNFCCC is the "stabilization of atmospheric concentrations of greenhouse gases at levels that would prevent dangerous anthropogenic interference with the climate system."

The principles adopted by the convention are meant to address two main political problems: (1) how to distribute the burden of reducing emissions among different countries and (2) how to deal with scientific uncertainty. The principles of equity and common but differentiated responsibilities address the first problem. To deal with the problem of scientific uncertainty, the convention adopts the precautionary principle.

The institutional structure set up by the convention consists of a Conference of the Parties, two subsidiary bodies, and a secretariat. At the Conference of the Parties meeting in Kyoto, Japan, in 1997, the member countries drafted the Kyoto Protocol to the United Nations Framework Convention on Climate Change.

For the Kyoto Protocol to come into force, it had to be ratified or acceded to by (1) 55 percent of all member countries and (2) Annex I parties accounting for 55 percent of that group's carbon dioxide emissions in 1990.

Product Regulations

The principal product areas subject to international environmental regulation are toxic waste and nuclear materials.

Toxic Waste: Toxic and other wastes are regulated by the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

The convention forbids the export of "hazardous wastes and other wastes" to nonstates parties and to states parties unwilling or incapable of safely accepting them, and it forbids states parties to import wastes unless they can safely manage them. It also requires states parties to take appropriate actions to minimize their own production of hazardous wastes.

Nuclear Materials: The International Atomic Energy Agency (IAEA) is the primary IGO responsible for supervising the use of fissionable materials. IAEA is responsible for setting up safety standards for the protection of health and for minimizing injury to life and property. One of the IAEA's main functions is to oversee compliance with the 1968 Treaty on the Non-Proliferation of Nuclear Weapons.

Protection of Natural Resources – In October 1982, the United Nations General Assembly adopted the World Charter for Nature. The charter declares that "nature shall be respected and its essential processes shall not be impaired."

The charter states that "living resources shall not be utilized in excess of their natural capacity for regeneration" and that all "ecosystems and organisms, as well as the land, marine, and atmospheric resources that are utilized by man, shall be managed to achieve and maintain optimum sustainable productivity without endangering those other ecosystems or species with which they coexist."

Principle 11 of the World Charter for Nature also declares that states need to establish procedures to control "activities which might have an impact on nature." In particular, it calls upon states to (1) avoid activities that are likely to cause irreversible damage to nature, (2) conduct "exhaustive" examinations to demonstrate that the expected benefits outweigh the potential damage to nature before proceeding with activities that are likely to pose a significant risk, and (3) prepare environmental impact studies that include plans for minimizing potentially adverse effects before undertaking activities that may disturb nature.

Over the years, a variety of conventions have been adopted that seek to protect both terrestrial living resources and marine living resources and, in effect, to carry out the objectives of the World Charter for Nature.

Liability for Environmental Damage – There are a few conventions that impose liability on persons who cause damage to the environment. These conventions, in general, define the nature of the liability, the persons who are liable, and the extent of their liability.

II. Chapter Questions

Imputable Acts and Nonimputable Acts

1. Students' answers may vary. Possible arguments may include that Chiquitaland is not liable for the damages to Cue Co.'s plantation or for the death of the manager. A theory known as the doctrine of imputability says that a state is only responsible for actions that are imputable (attributable) to it. This includes (1) acts within the scope of officials' authority and (2) acts outside their scope of authority if the state provided the means or facilities to accomplish the act.

States are not responsible for the acts of private persons, acts of officials of other states or international organizations, or acts of insurrectionaries within their own territories.

2. Students' answers may vary. Some may argue that this is a case of state-sponsored or supported terrorism. Quirkydom is fully liable for the acts of the terrorists. Terrorism is the sustained clandestine use of violence—murder, kidnapping, threats, bombings, torture, or some combination of these—for a political purpose. Terrorism does not require sponsorship by a state, but states have often sponsored terrorism.

3. Students' answers may vary. Courts, sometimes, look to causation. They look into whether the state or its officials actually caused the injury. The injury in this case was caused by the government of Country X. Therefore, it is fully liable for Mr. A's death.

Expropriations

4. Students' answers may vary. This is a case of expropriation post the major political change in Ruraltania. Expropriation or nationalization is the state's taking or deprivation of the property of foreigners. The right of states to expropriate foreign property is universally recognized. Expropriation is regarded as proper so long as it is done for a legitimate public purpose and the state pays prompt, adequate, and effective compensation. By "adequate" compensation is meant the value of the undertaking at the moment of dispossession, plus interest to the day of judgment.

Students may argue that the concession may not be reinstated. Also, Ruraltania is not liable to compensate to cover the full cost of all assets and installations or lost profits for the next 20 years. However, Ruraltania is liable to compensate to cover the property damages to Little Co. and the injuries suffered by the manager.

5. Students' answers may vary. Possible arguments include that Country M may assert claims on behalf of Big Co. since the concession contained a "stabilization" clause providing that the concession could not be altered except by the consent of Country K and shareholders from Country M. Some may argue that Country M may not assert claims on behalf of Little Co.

Creeping Expropriation

6. Students' answers may vary. Some may argue that Needyland is correct because of the agreement made by MNF that "MNF, Inc. will not seek the diplomatic assistance of Country C in resolving any dispute it may have with Needyland." Therefore, MNF has no right to seek the diplomatic assistance of Country C, due to which Country C has no right to seek compensation from Needyland on behalf of MNF.

7. Students' answers may vary. Some may argue that this is a case of creeping expropriation—that is, expropriation through a series of acts that individually might be seen as administrative actions or general health, safety, or welfare measures undertaken by the host government. According to OPIC, it is any act, or series of acts, for which the State is responsible, which are illegal under domestic or international law, and which have a substantial enough adverse effect on either the enterprise or the investor's rights under the enterprise. Thus, some may argue that the Country C insurance program must pay MNF for its losses. However, if the country C insurance program is exactly similar to OPIC, it will have no liability to pay MNF unless MNF is willing to forego its entire investment.

Objections

8. Students' answers may vary. The arbitration tribunal may rule in favor of Country U since it was acting as per its statute and may place the liability on the Crocodonian firm as it intentionally mislabeled the cargo as cowhides.

Law of the Sea: Precautionary Principle

9. Students' answers may vary. Some may argue that *Rustbucket* will be successful and deserves to receive compensation for damages by Country W. Some students may argue otherwise. Article 3(3) of UNFCCC calls for member states to adopt "precautionary measures" to combat climate change, stating that "where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures."

III. Key Terms

- Agenda 21—A schedule of developmental and environmental goals for the period leading up to the year 2000 and beyond. These include the promotion of sustainable and environmentally friendly growth, the elimination and prevention of pollution, and the protection and conservation of the earth's natural resources.
- Calvo Clause—A clause in an agreement between a host state and a foreign investor that says that the investor will not seek the diplomatic assistance of his, her, or its home state in resolving disputes with the host state.
- Causation—(From Latin *causa:* "reason.") The act or agency that produces an effect, result, or consequence.
- Compensatory damages—Money is to be paid for the cost of the injury suffered.
- Creeping expropriation—A series of administrative acts that in combination result in depriving persons of their property.
- *Culpa*—(From Latin: "fault or error.") Responsibility for wrongdoing.
- Denial of justice—A gross deficiency in the administration of justice.
- Dirty hands—The plaintiff took inappropriate steps in attempting to recoup a loss prior to bringing a claim.
- Expropriation—(From Latin *expropriare:* "to take away one's own.") Taking of private property by a government.
- Failure to exhaust remedies—Objection that may be made to an international tribunal's relief from the defendant state.
- Imputable—(From Latin *imputare:* "to charge.") To attribute something done by one person, such as an act or crime, to another.
- Insurance—The contractual commitment by an insurer to indemnify an insured against specific contingencies and perils.
- International Atomic Energy Agency (IAEA)—IGO responsible for supervising the use of fissionable material, developing safety standards, and promoting the peaceful use of atomic energy.
- International standard of care—Doctrine that a state is responsible for injuring an alien when the state's conduct violates international norms.
- Kyoto Protocol—Supplemental agreement to the UN Framework Convention on Climate Control drafted in 1997. It requires developed member countries of the convention to reduce greenhouse gas emissions by 5.2 percent below 1990 levels.
- Laches—(From Latin *laxus:* "loose" or "lax.") Negligent delay in asserting a right or a claim.

- Lack of a genuine link—Objection that may be made to an international tribunal's exercise of jurisdiction when there is no real and bona fide relationship between the state bringing the suit and the person on whose behalf the suit is brought.
- Lack of nationality—Objection that may be made to an international tribunal's exercise of jurisdiction when the state bringing suit is doing so on behalf of a person who is not a national of that state.
- Lack of standing—Objection that may be made to an international tribunal's exercise of jurisdiction when a plaintiff is not qualified to appear before the court.
- National standard of care—Doctrine that a state must treat aliens the same way that it treats its own nationals.
- Precautionary approach—Maxim that states should not delay in taking action to correct a threat of serious or irreversible damage to the environment merely because there is a lack of scientific certainty that injury will result.
- Restitution in kind—The item taken is to be returned.
- Rio Declaration—Issued by the United Nations Conference on the Environment and Development at Rio de Janeiro in June 1992. It links protection of the environment to the need for sustainable development.
- Satisfaction—The honor of the injured state is to be restored.
- State responsibility—Liability of a state for the injuries that it causes to aliens and foreign businesses.
- Stockholm Declaration—Issued by the United Nations Conference on the Human Environment in Stockholm in 1972. It asserts, among other things, that a healthy environment is a human right and that states have a responsibility not to damage the environment of other states.
- Terrorism—(From Latin *terror:* "to frighten.") The sustained clandestine use of violence for a political purpose.
- United Nations Framework Convention on Climate Change (UNFCCC)—Multilateral convention adopted in 1992 and in force since 1994. It seeks to stabilize and diminish greenhouses gases in the atmosphere.
- World Charter for Nature—UN General Assembly Resolution 37/7, adopted October 28, 1982. It states that all states have a duty to respect the essential processes of nature and not to impair them.