Some Reflections on State Responsibility: A Comparative Study*

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Preliminary Notion

There are two regimes, *summa divisio,* of state responsibility recognized by international law. The former is liability based on fault-traditional regime; the latter is liability without fault-special regime which are used with lawful activities of state or non prohibited by international law but they are prone to danger such as nuclear power plant and outer space objects activities. According to some scholars,[1] those activities are- called ultra hazardous activities. The main objective of this article is to compare the traditional or classical regime and the special regime—the risk theory— into some legal aspects and the present author would like to emphasize some instances and perspective related to Thailand.

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[1] Dr. Jenks, as a herald, distinguishs ultra-hazardous activities as a distinct category for which strict or absolute liability is an exceptional principle, justified as a means of shifting the burden of proof and ensuring a more equitable distribution loss. See Jenks, Liability for Ultra- Hazardous Activities in International Law, 117 R.A.D.I 1966,p.105

Historical Sketch of State of Responsibility

In earlier times, the notion of state responsibility was mainly concern with diplomatic protection in case of aliens suffering physical damage ,life or body, and properties that student know as the topic "The Treatment of Aliens"[2]. Expropriation, especially, was a phenomenon because, before and after the First World War, the developed countries like United States and United Kingdom invested in developing countries such as , Middle East and Latin American countries[3]. Generally speaking, petroleum refinery was a popular business that demanded not only high technology but also academic staff. It was inevitable that these countries were dependent upon the assistance of powerful states. Middle East countries wanted to protected national interest, thus the Host State can expropriate or nationalize alien's properties. However, such an expropriation must be based on the concept of public utility and the injured person, which is normally a transnational corporation, must be compensated equitably. The international disputes often involved the Host State and petroleum investment companies and there are several cases in which international law authorized the expropriation[4]. International law, however, impose "the prompt , adequate and effective compensation" on the Host State and so-called "Hull Formula".[5] Contrary to what has been said, the Hull rule was untenable among developing countries and the principle of compensation has changed considerably over the last twenty years concurrenly. At this point, international law recognizes the notion of "appropriate compensation" which is vividly reflected in UN resolution 1803 (xvii) and Bilateral Investment Treaty (BITs) which were concluded between Developing countries and Industrial countries.[6]

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[2] See Wheatley, *International Law*, (Great Britain: Blackstone Press Ltd,1996), pp.97-101; Slomanson, *Fundamental Perspective on International Law*, (U.S.A: West Publishing Company,1990), pp.349-351; Dixon, *Textbook on International Law* ,(Great Britain: Blackstone Press Limited,1990),pp.205-221;Wallace, *International Law*,(London: Sweet & Maxwell,1997), pp.180-195.

[3] See detailed in Kuusi, *The Host State and the Transnational Corporation*, (Great Britain; Gower Publishing Ltd,1979),pp.3-6

[4] For examples, The Abu Dhabi Case , The Texaco Case and The Aramco Case

[5] See Seymour Rubin and Don Wallace (ed), *Transnational Corporations and National Law*, (U.S.A.: Routedge,1994),p.110.

[6] See detailed in Fatouros (ed), *Transnational Corporational: The International Legal Framework*, (U.S.A.: Routledge,1994), pp.123,365-387.

In addition, the injury to the alien in case of uprising or civil war is a good example of state responsibility, especially, in Latin America countries where the changing of government with violence often occurred. The injured state can claim compensation from a Host state for the jeopardy of alien, however, he shall bring the claim before the court, *lex forum*,. According to the local remedies rules, a universally accepted prerequisite for a state searching for appropriate remedy, if a judgment manifests injustice or does not comply with international standards, responsibility of state arises. Moreover, if an alien was killed or wounded or received any shameful conducts and he or she is **denied of justice**[7] from local officials or the exhausted remedies rules failed, the injured state may use diplomatic protection to claim an offending state is held responsible on the international plane. In summary, there are numerous literature and judicial decisions which uphold firmly the customary law of state responsibility.

It should be pointed out that under international law diplomatic protection is not a duty of state but merely a discretion of state and it stipulates that the conditions of nationality of claims, to wit, a bond of nationality must be a *genuine link*-that is to say, the relation between the granting state and its own national is *real and effective*[8].The principle of genuine link may also be confirmed in international judicial decision in the *Nottebohm Case(1955)*.

Recently, a tragic event happened in Thailand when Mr.Michael Wansley, an Australian accounting expert, was murdered in cold blood. It should be noted that Thai officials must take action seriously and quickly to seek out the suspects for trial otherwise the Thai government avoids, *inter alia*, accountability.

As earlier mentioned, this article is merely a brief tour of the history of state responsibility that makes readers understand the background of the fault theory or liability based on fault either willfulness or negligence. Then, we have to look for another regime that authorities call absolute liability, *Gefarhdungschaftung* in German.

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[7] See detailed in Slomanson, *supra* note 2, pp.351-357.

[8] In principle, the granting of nationality is still regarded with in the sovereignty of state that reflected in the law of nationality of each countries. Broadly speaking, there are two grounds of nationality which recognized by international law : *jus sanguinis* and *jus soli*.

The Salient Features of Traditional Regime: Fault Theory

Roberto Ago, one of the most outstanding international jurists, as a Special Rapporteur on the topic of state responsibility, and other jurists accept two elements of state responsibility[9]. First, the attributable to the state means state perform any task on behalf of state or it could be imputable to state either directly or indirectly; consequently, the author of such act is the state. It is widely acknowledged in publicist works that a State is a juristic person, an abstract concept, which is not capable of international juristic act such as concluding a treaty, establishing diplomatic and consular relations between legal entities, declaring the war and etc; therefore, the intention of state is declared or performed through his officials or representatives by action or omission. It is correct to conclude that an act which stems from the organs of state is the conduct of the state. For the problem whether of private acts can be imputable to state is an interesting point. There are numerous international decisions relating to foreigners who live in the host state that upheld a state can become responsible for the private act. In principle, a private act is not taken into account of attribution of state. According to Judge Higgins, however, there are three types of responsibility of state for individual acts: if state encouraged them, if the individual effectively acts as agents in the performance of these acts, and if it endorses as its own, the acts of the individuals[10]. Another point of view, contrary to Judge Higgins's view, is that state is responsible for own omission, not for the individual act, if the officials act negligently or imprudently in the protection of the legal interests of foreigners.[11] In my opinion, state responsibility occur when the officers or agencies of State involve themselves in a particular situation that display the wrongful conduct of them, for example, a police suppress the protesters by shooting

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[9] Ago, Second report on state responsibility : Document A / CN 4/233 Y.I.L.C 1970 vol. 2, pp.187-188.

[10] Higgins, The General Course of International Law, *R.D.C.* 1991 V, pp.204-205

[11] Aregchaga, *International Law: Achievements and Prospects ,M. Bedjaoui (ed),* (The Netherlands: Martinus Nijhoff Publishers,1991), p.360.

One must bear in mind that when academic lawyers are talking about the attributable to the state. It means exclusively that the state is a subject under international law, not as a subject under municipal law[12]. Secondly, the breach of international obligation means state has failed to fulfill an international obligation *vis-a-vis* incumbent on it.[13] Concerning responsibility, to speak of breach of international obligation indicate that the action or omission which is performed by agent or representative is wroungful, wilful or negligent, or *mala fide*[14] and entails responsibility of state[15].

The word "international obligation"[16], a generic term, means the international legal obligation which is incumbent upon States to have rights and duties under international law. *A argumentum contrario,* the breach of international obligation or international agreement which does not create legal binding force e.g., *la courtoisie,* an Gentleman Agreement, as a political will, does not entail international responsibility. According to the International Law Commision's draft the attributable to the state and the breach of international obligation are a *conditio sine qua non*, whereas the damage, *dommage*, does not embrace elements of liability. In short, they are *per se* a source of international responsibility. In the eyes of International Law Commission (ILC), a group of eminent experts in international law selected to work on specific topics, the damage is consequence of violating international obligations which are incumbent upon States. In addition, the injured state is entitled to claim compensation depending upon material damage, pecuniary loss, or moral damage, non-pecuniary loss. Undoubtedly, international law recognizes two

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[12] Ago, *supra* note 9, p.190

[13] *Ibid.*,p.191

[14] Zoller, *La Bome Foi En Droit International Public,* (Paris: A.Pedone,1977),p.xxii

[15] Klabbers, *The Concept of Treaty in International Law,* (The Netherlands; Kluwer Law International,1996), p.99;Schachter, *International Law in Theory and Practice,*(The Netherlands: Martinus Nijhoff Publishers,1991), p.203.

[16] International obligations are reflected in various forms such as treaty, customary international Law general principle of law and unilateral act whereas a word of "international agreement" means a treaty only. Sir Fitzmaurice, third Special Rapporteur in topic of the law of Treaty, speaks clearly that *"a treaty is an international agreement Ointended to create legal rights and obligations, or to establish relationships, governed by international law."*

forms of compensation or reparation. The first is restitution in kind, *restitutio in intregrum*[17], and the second is satisfaction[18]. When material damage occurs, international law stipulates that a measure of redress is restitution in kind. The main purpose of this redress *stricto sensu* are to ameliorate the injury and to do everything possible to help the victim retrieve *status qua ante*[19], namely the condition which existed prior to the incidence of the international illicit act. Whereas moral damages[20] arise such as when aggression integrity of territory or against the principle of non-violability in the Vienna Convention on Diplomatic Relation as well as Consular Relation occurs, where the satisfaction is appropriate redress. *De l' illceite de l'acte* or *des regrets exprim'es* and *le salut au drapeau* are usually used to redress in case of moral or political damage. Recently, Korean officials attempted to kidnap Mr. Hong Sun-Gyong, a former consultant for science and technology , in Bangkok that breached not only Thai law but also the principle of non- violability in the light of the Vienna Convention on Diplomatic Relation 1961. Foreign Minister Surin Pitsuwan requried an " *immediate official apology*" from Pyongyang.[21] In term of international law an " immediate official apology " gave Thailand sufficient satisfaction. Even though the abduction caused no material damage which is not a pecuniary loss, the dignity of Thailand was badly tarnished and political damage had already occurred. In the case of political damage, an immediate official apology may be sufficient.

To sum up, state responsibility give attention to international wrongful acts,

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[17] For the meaning of *restitution in integraum* See Arangio-Ruiz, Preliminary report on state responsibility: Document A/CN.4/416 and ADD.1,1988, pp.21-23.

[18] See generally Brownlie, *Principle of Public International Law*, (Great Britain : Clarendon Press,1990),pp.457-466; Dinstein and Tabory (ed) , *War Crimes in International Law*, (The Netherlands : Martinus Nijhoff Publishers,1996), pp.96-97.

[19] I.C.J. ever used *restitutio in integrum* in Temple of Preah Vihear Case (1962). According to I.C.J., the decision stated that *"...Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers , stationed by her at the Temple, or in its vicinity on Cambodian territory..."* is an illustration of *restitio in integrum*. See I.C.J. Report Temple of Preah Vihear (Merits) ,pp.36-37.

[20] An illustration of moral damage is East Daily, a newspapers published in Hong Kong, wrote there were many Thai women working as prostitutes in Hong Kong , a statement that brought dishonour to Thailand as a member of the international community.

[21] See Bangkok Post Saturday March 13,1999, p.14

fait internationalement illicite, particularly the treatment of aliens and penetration of the territory of state that damaged the Host state either material damage or moral damage. Bearing in mind always that in classic view, the notion of fault, *la faute,* is the cornerstone of state responsibility. A consequence of a wrongful act is reparation which wipes out all the results of the infringement of legal international obligation. The main aim of redress is to help victim of damage to gain *status qua ante.*

The Progressive Development of State Responsibility: International Crime

The dichotomy between civil and criminal in state responsibility is the highlight of the I.L.C. 's Draft which was prepared under the auspices of the United Nation. The civil responsibility of state, may be called an international delict, is codified into a written law. The word " codify " presuppose that there are legal rules and they can be arranged into written form. To clarify, the civil responsibility of state is customary international law: *lex lata.* In contrast, an international crime is a result of the progressive development: *lex ferenda.* With respect to an concept of international crime, modern international law is a leaning toward the concept of *erga omnes*[22], an international obligation that binds the States as a whole, including the concept of *jus cogens*, a peremptory norm of international law, and they are the basis of international crime. According to I.L.C. Draft's article 19 an international law is defined as:

> "[A]n internationally wrongful act which act results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole..."[23]

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[22] The concept of *erga omnes* is obviously recognized by I.C.J. in the *Barcelona Traction case.* The breach of *erga omnes* authorizes a *locus standi in judicio* to every states. The Court addressed "...*In view of the importance of the right involved, all States can be held to have a legal interest in their protection; they are obligation erga omnes .*" See I.C.J. Report,1970,p.32

[23] Draft Art. 19(2).There are many leading books that comment on this issue. For example, Kofele-Kale, *International Law of Responsibility for Economic Crimes,* (The Netherlands: Kluwer Law International,1995),pp.51-58.

Although the scope and content of international crime has been debated among scholars, the international community agree in principle that the time is ripe for preparing new conventions. In the Second World War the brutal massacre of the magnitude of innocent Jews under Hitler 's command, a man who can not be forgiveness for his wrong-doing by the human race, shocked the whole world and this tragedy stimulated the community of states as a whole to make the new law. Draft's article 19 is a result of an effort to protect human beings from the infringement of humanitarian law and to establish international peace. The law regarding international crime are playing an important role in the near future because innocent peoples, who are of different race, religion and political regime from those in power, have been systematically killed. Recently, the conflict between Serbs and Albanians in Kosovo, Yugoslavia, highlighted the trend of the criminal responsibility of state and individual responsibility. It should be borne in mind that an individual who can incur responsibility in international level is the high-ranking officers who have a position of military command[24] and his responsibility can be separate from state responsibility. Theoretically, a serious breach of international obligation, *erga omnes*, such as war crimes, crime against peace, genocide, slavery etc, are generally accepted that individual can incur his wrong doing. Because this issue is very complicated and the present author devotes effort to the explanation of state responsibility, the author does not address the details of the subject-matter[25].

The Origin of Absolute Liability: lacuna in Law

Although the traditional regime has played a dominant role today, it is not quite capable enough of envisaging new problems, in particular ultra-hazard-

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[24] D'Amato, *International Law and Political Reality: Collected Papers Volume One*, (The Netherlands: Kluwer International,1995),p.219.

[25] This topic has been given widespread consideration in many publicists's works. The readable and important books are Dinstein and Tabory(ed.), *War Crime and International Law*, (The Netherlands: Martinus Nijhoff Publisher,1996); Bassiouni, *Crimes Against Humanity in International Criminal Law*, (The Netherlands: Martinus Nijhoff Publishers,1992)

ous activities which can generate transboundary harm in the large-scale and cause grievous. The pivotal problem of activities involving risk is *onus probandi*:a burden of proof. Harmful[26] activity usually involves high technology in a multitude of ways so *onus probandi* either *dolus* or *culpa* is very difficult to prove. Furthermore, the cost of *onus probandi* is prohibitive and takes a lot of time while the measures of preventions and remedies affecting states are needed urgently. Lastly, state can obtain the benefits of these activities, for instance, the production of electricity from nuclear reactors, the use of Direct Broadcasting Satellites (D.B.S.) or Remote Sensing from a space object; hence, it must not push *onus probandi* on the injured state. After the debris of the Cosmos 954 fell onto the earth in 1978 and the leak of radioactivity was dispersed in Chernobyl in 1986, the content of liability of state changed dramatically: *from fault to no fault*. These problems are concerned by international community and agree to draft a special regime different from a classical regime, *sui generis*,to cope with a *lacuna*: a burden of proof. One of the most salient features of absolute liability regime is that the legal basis of liability is injury not a fault. As Judge Lachs clearly puts it, "*Absolute liability arises from the mere fact that damage has been done, even if the activity was lawful...*[27] "

Another important role of absolute liability is protecting international environmental[28] law effectively because ultra-hazardous activities can easily to damage the environment or atmosphere including living resources. But without doubt, any sourced state, where harmful activities are situated or operate, shall be liable to compensate sums of money to anyone who suffered

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[26] The giving of definition or explanation for legal term e.g. *harm* or *risk* in international law is not easy. In Schachter' s view there are four conditions to be met. Firstly, the harm must result from human activity. Secondly, the harm must result from a physical consequence. Thirdly, the physical effects cross national boundaries. Lastly, the harm must be significant or substantial. See more details in Schacter, *International Law Theory and Practice*,(The Netherlands: Martinus Nijoff,1991), p.366.

[27] Lachs, *Outer Space, The Moon and Other Celestial Bodies,* in M. Bedjaoui (ed.), *International Law: Achievement and Prospects,* (The Nertherlands: Martinus Nijhoff,1991),p.965. See also Quentin-Baxter, Third report on International Liability for Injurious Consequence Arising Out of Acts Not Prohibited by International Law UN Doc.A/CN.4/SER.A/1982/Add.1(Part1)

[28] See Birnie and Boyle, *International Law and the Environment*, (Great Britain: Clarendon Press, 1992),pp142-149

from physical harm in accordance with the principle of "polluter pay".

The Epitome of Ultra-Hazardous Activities

In order to understand "risk theory", the emphasis would be put on the cardinal features of harmful activities[29], in particular the use of nuclear energy power and exploitation of outer space objects e.g. spacecraft and satellites. This topic is concerned with the examples of ultra-hazardous activities such as nuclear power plants and outer space activities.

1) Nuclear Power Plant: Generating Electricity

There are several benefits in using nuclear reactor with a focal point being the use of nuclear energy for generating electricity. During the last 30 years the growth of nuclear energy has increased rapidly as a alternative source of energy even though some countries have been stopped using nuclear reactor. Nuclear energy has many advantages when it compared other source of energy e.g. natural gas, oil, wind and coal. It is clean and does not produce unpleasant side-effects such as fume, smoke, smells , noise and the like. We take it for granted that solar cell, energy from the sun, is a solution to the scarcity of energy and everybody thinks that solar cells are an efficient source of energy. As a matter of fact, the shortcomings of solar cell are very expensive and it generates too little energy whereas the cost of nuclear energy per household is cheaper than solar cell and it can produce an enormous amount of energy. Nuclear energy's Achilles heel, however, is that it is liable to damage severely both human being and environment. According to D'Amato, a leading international publicist, there are three feasible types of nuclear safety problems[30]. First, a nuclear power plant is lower domestic standard. Secondly, a plant is itself inherently defective. Lastly, a plant may be manufactured negligently. Moreover,a nuclear reactor consist of a very sophisticated and delicate system

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[29] For readers who are interested in the basic characteristic of activities involving risk see Barboza, Fourth report on international law liability for injurious consequences arising out of prohibited by international law in Y.I.L.C. Document A/CN.4/413,1988,p.256.

[30] See detail in D'Amato, *supra* note 26, pp.290-291.

in which the procedural proof of fault is very difficult for laymen to find. For this reason, the international community encourages the absolute liability for using a international standard to controls harmful activities and ensures that the plaintiff can obtain measures of redress and assistance certainty.

2) Outer Space Activities: Launching of Satellites[31]

At the present time, scientists are increasingly exploiting outer space. Moreover, there are so many celestial bodies and space debris that the likehood of a collision between space objects in outer space has been increased gradually.[32] It should be noted that a collision is not a new event one example it occurred in 1978 when some components of the Cosmos 954, which contained a amount of radioactivity, fell into northern Canada[33]. Fortunately, some particles fall into the sea; hence, no one was killed or injured. Additionally, damage caused by a space object to an aircraft in flight happened repeatedly in 1983 US space shuttle , Challenger,which exploded in the air from launching after about seven minutes; consequently, the astronauts were killed outsight. The aforesaid examples are good enough to demonstrate that outer space activities are precarious since it seems likely to fall down onto the surface at any time and at any place. To protect both human being and the ecology from danger of such activities, international law stipulates that a launching state shall be absolutely liable to injured state.[34]

As mentioned previously, there are two common characteristics of all ultra-hazardous activities. The first is such activities based on assumption of risk not fault theory because risk theory can protect an interest of affected state better than fault theory. Due to a point of onus of proof is not necessary for

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[31] See generally in Cheng, *Studies in International Space Law,* (Great Britain: Clarendon Press,1997), pp.603-620.

[32] See detail in Hurwitz, *State Liability for Outer Space Activities,* (The Netherlands: Martinus Nijhoff,1992),p.33

[33] *Ibid.,pp.*113-116

[34] Article 2 in *The Convention on International Liability for Damage Caused by Space Objects,* 29 March 1972 [hearinafter Liability Convention] state *"A launching state shall be absolutely liable to pay compensation for damage caused its space object on the surface of the earth or to aircraft in flight."*

compensation, injured state is ensured that the channel of claiming a sum of money is certain. Next, the damage is not restricted to one country but is extended to neighbouring countries also. The one task of international law in this field is making the international concern about the activities involving risk include guarantee security among nations.

Nature of a special regime

According to international law, the legal status of a special regime -absolute liability- is the treaty. Due to absolute liability's lack of elements -that is to say, *consuetudo*[35] and *opinio juris sive necessitatis*[36], it can not constitute the customary international law. As we have seen that there are several conventions which recognize an absolute liability theory, such as the 1960 Paris Convention, article 2 in The 1972 Liability Convention, article 4(1) of Vienna Convention on Civil Liability for Nuclear Damage 1963 and article 2 of Convention on The Liability of Operator Nuclear Ship 1962. In addition, one must be careful not jump to a conclusion that a decision on *Trail Smelter Case (1949)* acknowledged the principle of absolute liability for a merely affirmed that any state can not use or allow territory to injury another states, *sic utere tuo alieanum non laedas.* For this reason, a decision on *Trail Smelter Case (1949)* was not quite enough to constitute *consuetudo,* a state practice, and *opnio juris sive necessitatis,* of absolute liability. It follows that international law merely acknowledge the legal principle of risk as a convention, not customary law.

Comparison: Fault Theory and Absolute Liability

There are several salient points of comparison between fault theory and absolute liability, to wit,

1) The remarkable difference between traditional regime and new regime is that fault has played a crucial role for the former and not for the

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[35] State practice is an act or omission which act on behalf of the organs of state. (material element)

[36] Legal consciousness or recognition are legal rules because it is deemed to do something which can not be avoided. (psychological element)

latter. Under civil law ,law of delict, as well as international law, no one is held responsible for the other without fault or blameworthiness. In earlier times of the formation of state responsibility the concept of fault both *dolus* and *culpa* has been influenced, especially,by Grotius who adopted the principle of fault from Roman law into international law by *analogy*[37]. Thus, it is necessary to proofs the fault of defendant and if the plaintiff fail to do that the claim for compensation is not valid. In an area of harmful activities the idea of fault does play not an important role for liability and reparation[38]. The sole ground of liability is injury not fault. Injured state only proofs the damages as a result of these activities which are situated in sourced state.

2) The classical regime has more exoneration than the new regime. For example, self- defense, *force majeure*, necessity, distress ,and the consent of injured state, *volenti non fit injuria*, which is not contrary to *ius cogens*, are all significance exemptions from fault that the ILC' members named "circumstance precluding wrongfulness ". In contrast, new regime accepts only two exonerations, namely, *force majeure* and wrongfulness of injured state.

3) The legal status of traditional regime is customary international law or general principle of law, while for the special regime, the legal basis is reflected in conventions. An illustration of them are The 1972 Liability Convention and The 1963 Nuclear Liability.

4) The fault theory is the main principle of liability meaning it can apply to all areas where states, as a moral entity, are answerable for their own acts, *prima facie* identical with the individual. In contrast, absolute liability is only used in harmful activity because it protects and redresses more effectively than fault liability.[39]

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37 See detail in Lauterpacht,*Private Law Sources and Analogies of International Law,* (U.S.A.:Longman,Green and Co.Ltd,1927) pp.135-136.

38 According to Mr. Barboza, a Special Rapporteur, the sole basis for liability in activities involving risk is injury. See Barboza, *supra* note 31, pp.257-258.

39 This view harmonizes with Lauterpacht's view. According to Sir Lauterpacht, the principle of absolute liability is an exception of responsibility based on fault. See Lauterpacht, *supra* note 39, p.143.

In conclusion, the classical regime is unlike new regime. For the former, fault is necessary whereas for the latter an assumption of risk is very important role.

Thailand's Position towards The Liability Regime

Thailand has had experiences in international meetings regarding the topic *state responsibility* by sending the representative of state, Dr. Sompong Sucharitgul, to the International Law Commission, and he reported the intellectual activities of I.L.C to Ministry of Foreign Affairs.[40]

At present, Thailand is involved in harmful activities such as satellite and nuclear activities. In earlier times, Thai people might think that outer space activity is unbelievable but now Thailand takes part in sharing both benefits of the use of satellite and hazards. Moreover, Thailand has a satellite, which King Bhumipol named Thaipatt, use for both commercial and non commercial purposes , so Thailand could be liable to be sued as a defendant if fragments fall down onto the earth.

The other instance is nuclear installment. Thailand may be establish a nuclear research center in the future, albeit a unenviable task. Since nuclear activity has two facets —risk and benefit— ,so the government should pay more attention to measures of nuclear safety such as licensing, a regime of liability and insurance.

As mentioned above, the legal standing point of Thailand is providing for a balance between risk and advantage. Of course, activities involving risk need a special regime that is capable of helping and promoting the peaceful used of harmful activities. In general, in order to reach the aim of exploitation, the providing a comprehensive legal framework is necessary. It follows that the legislator should revise national laws including making

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[40] Sucharitrul, *Some Observations on the Report of the International Law Commission on the Works of Its Thirty-Second Session,* Saranrom Journal Febuary 1979, pp. 10-12 and Saranrom Journal Febuary 1981, pp. 15-17.

the laws meet international standards. The Thai government should take into account the advantages and shortcoming of the conventions e.g. The Outer Space Treaty, The 1972 Liability Convention, The Nuclear Liability etc., in order to make a decision to accession. Furthermore, the government can support and promote activities by making bilateral programs for educating and training in this field and by giving financial aid for research and development (r&d) also. Succinctly speaking, but accurately, all stages of operating those activities require national regulation and co-operation in pursuance of international standard.

Concluding Remarks

Although the theory of risk has played a more significant role in international liability and it envisages the problems *onus probandi*, the concept of fault, *dolus* and *culpa,* is a hallmark of state responsibility. In principle, international law makes state responsible for any international wrongful act that is attributable to state, but in the field of harmful activity the subject of state responsibility is not included. Due to the nature of activity being on apprehensible risk with a possible impact on the environment severe, the need of special regime is inevitable. In short, the special regime resulted in the balance of benefit and risk. Nowadays, our World is full of dangerous activities, the greenhouse effect is a tangible result, and many areas are affected by dumping nuclear waste into the sea or discharging toxic chemicals into the air and water. According to I.L.C members these problems are independent of each other but are concerned closely about gap in law of traditional regime and channel into keep the interest of other states which may be damaged by operating activities involving risk. The content, however, of liability is so complicate that I.L.C can not arrange in the same convention. The consensus of I.L.C. 's meeting is that drafting the special regime –an assumption of risk—is the best solution. The special regime is based on the principle "the polluter pays". In statement of Nagendra

Singh, former Judge and President of the Court, the adoption of a rule of absolute responsibility is the new trend locates the source of liability in *causality* alone.[41] In the end, as far as international law concerned, state liability, *lato sensu,* is still the core of international order and it regulate the community of states as a whole by protecting the Rule of Law, whether of convention, customary law or general principle of law, including the interest of injured state and mankind. If states, big or small, capitalist or communist, violate the international obligations, the result is not different, to wit, responsibility.

[41] Singh, *Introduction to International Law of the Sea and International Space Law in* M.Bedjaoui(ed.)*International Law: Achievements and Prospects*,(TheNetherlands: Martinus Nijhoff,1991),p.829