In modern international law, permanent sovereignty over natural resources has come to entail duties as well as rights. This study analyses the evolution of permanent sovereignty from a political claim to a principle of international law, and examines its significance for a number of controversial issues such as peoples' rights, nationalization and environmental conservation. Although political discussion has long focused on the rights arising from permanent sovereignty, Dr Schrijver argues that this has been at the expense of the consideration of the corollary obligations it also entails. His book thus identifies new directions sovereignty over natural resources has taken in an increasingly interdependent world and demonstrates its relevance to current debate on foreign-investment regulation, the environment and sustainable development.

Sovereignty over
natural resources

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Sovereignty over natural resources

Balancing rights and duties

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To the memory of

Cornelis Schrijver, B. V. A. Röling and Subrata Roy Chowdhury

The fact that the Rio Grande lacks sufficient water to permit its use by the inhabitants of both countries does not entitle Mexico to impose restrictions on the United States which would hamper the development of the latter's territory or deprive its inhabitants of an advantage with which nature had endowed it and which is situated entirely within its territory. To admit such a principle would be completely contrary to the principle that the United States exercises full sovereignty over its national territory.

> *US Attorney-General Harmon, in 21 Opinions of the Attorney-General of the United States* (1895), p. 283

[T]he emphasis on national sovereignty is partly a transitional problem which has to be experienced but which will pass by. But it is also undoubtedly the expression of the new state's weakness, of its need for protection against external influences. In the Charter of the UN, this protective law is expressed in the principles of 'sovereign equality' and of self-determination.

> B. V. A. Röling, *International Law in an Expanded World* (Djambatan: Amsterdam, 1960), p. 78

It would . . . be a mistake to consider the idea of permanent sovereignty over resources as anachronistic nationalistic rhetoric. It should be viewed as a fresh manifestation of present aspirations for self-rule and greater equality.

> O. Schachter, *Sharing the World's Resources* (Columbia University Press: New York, 1977), p. 126

The sovereignty, territorial integrity and independence of States within the established international system, and the principle of self-determination for peoples, both of great value and importance, must not be permitted to work against each other in the period ahead. Respect for democratic principles at all levels of social existence is crucial: in communities, within States and within the community of States. Our constant duty should be to maintain the integrity of each while finding a balanced design for all.

> UN Secretary-General Boutros-Ghali, *An Agenda for Peace* (United Nations, New York, 1992), p. 10

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Preface

My interest in natural-resource management has deep roots. Born into a farming family in a small village in West Friesland, in the north of the Netherlands, I have always cherished the products of nature, initially because of the economic value they represent. We lived in a coastal region at sea level, safely protected by three dikes which have served as lines of defence against flooding since the late fifteenth century. They were called *De Waker* ('The Watchman'), *De Dromer* ('The Dreamer', to be awakened whenever the water would reach its foot) and *De Slaper* ('The Sleeper'). Only later was I to become aware of the beauty of these dikes and the surrounding landscape and of the vulnerability of the natural environment.

My academic interest in the topic of this book first crystallized when I took courses in international law, the sociology of international relations, peace research and the economics of development at the University of Groningen. I thus became acquainted with Third World efforts to establish a New International Economic Order. These efforts included claims to full permanent sovereignty over natural resources and demands for more equitable commodity prices. The political organs of the United Nations served as the forum of debate as well as a vehicle for letting off political steam. But the issue was thrown into sharp relief as Arab petroleum-exporting countries actively pursued a cartel policy and imposed an oil embargo against the Netherlands and the USA as a reaction to those countries' pro-Israeli stand in the aftermath of the Yom Kippur War in 1973. Ever since this time, various developments such as the deterioration in the terms of trade of many developing countries, the reshaping of the international order, resource conflicts, as well as mounting concern about environmental deterioration and how to achieve a sustainable use of the natural resources, have made a deep impression on me. In the meantime,

North–South relations have changed considerably, with newly industrializing countries in the South not being keen to join Group of 77 forces in demanding higher commodity prices since they have become net importers themselves. Simultaneously, awareness has arisen that preservation of the world's environment and natural wealth is a 'common concern of humankind' and that sovereignty is not an unqualified concept behind which governments can hide in claiming that matters within domestic jurisdiction are 'no outsider's business'. Developments in human rights law, law of the sea, international economic and environmental law, all have given rise to the principle that States are increasingly accountable, both at an international and domestic level, for the way they manage their natural wealth and resources.

Although my work over the years has often followed different paths, I have frequently returned to consider the successes and failures of the UN's contribution to promoting development of developing countries, to preserving the environment, and to developing and consolidating international law.

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I would like to record my deep appreciation to Professor W. D. Verwey of the University of Groningen and to Professor P. J. I. M. de Waart of the 'Vrije Universiteit' in Amsterdam for skilfully guiding me during the long march of writing this book, often blocking my way when I was distracted by attractive side-roads. Participants and staff at the Institute of Social Studies (ISS) in The Hague, colleagues in the Evert Vermeer Foundation, the National Advisory Council for International Development Co-operation, the International Law Association and at the UN Secretariat in New York have formed an inspiring multicultural and interdisciplinary community for me which has profoundly influenced my perspective on the role of international law in international as well as domestic affairs.

This study has also greatly benefited from the wise advice and valuable comments of a number of colleagues and friends, particularly: Paul Peters, a former legal adviser to companies of the Royal Dutch/Shell Group, who graciously shared with me his wide knowledge and experience; Professor James Crawford, general editor of Cambridge University Press's international law series; Professor Arthur Westing, formerly with SIPRI and author of books on environment and security; Professor Barbara Kwiatkowska, Deputy Director of the Netherlands Institute for the Law of the Sea at Utrecht University; Dr Johan Kaufmann, former Netherlands Ambassador to the United Nations; Professor Hans Opschoor, Rector of the ISS; Jan van Ettinger, a former Director of Jan Tinbergen's RIO Project and now with the Geneva-based Independent World Commission on the Oceans; Professor Peter Sand of the University of Munich; Professor Godried van Benthem van den Bergh of the ISS; Marnix Krop, Netherlands Ministry of Foreign Affairs; and my dear international law friends, Karin Arts and Ige Dekker.

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Geneva, of the documentation section of the Netherlands Ministry of Foreign Affairs and of the T. M. C. Asser Institute; to my colleagues in the International Studies Group of the ISS: Dr Jessica Byron, Dr Surya Subedi, Dr Thamh-Dam Truong, Janna van der Meulen and Antoinette Hildering as well as Professors Bas de Gaay Fortman, Jeffrey Harrod and Joop Syatauw; and to Ank van den Berg, who assisted me after office hours in overcoming my computer ineptitudes. I sincerely thank Gary Debus and Josephine Bosman of the ISS publications department for skilfully editing this text; Joy Misa and Koos van Wieringen of the ISS and Christopher Hart and other staff at Cambridge University Press for preparing the text for publication.

My wife, Yuwen Li, is the author of a book which includes a thorough examination of the common heritage of humankind, a principle upon which a halt to State sovereignty over natural resources has been based. Similarly, she was instrumental, in her own ever-stimulating and decisive way, in making me realize that my own personal sovereignty is not permanent and subject to duties as well as rights.

I regret that Cornelis Schrijver (my father), B. V. A. Röling (Professor of International Law and Peace Research, Groningen) and Subrata Roy Chowdhury (Senior Advocate, Calcutta High Court and Supreme Court of India), all of whom in different phases of my life taught me a great deal about the true meaning of equity, are no longer with us. In gratitude for their contribution I dedicate this book to their memory.

While gratefully acknowledging the support of many, any errors and shortcomings are my own responsibility.

Abbreviations

AALCC Asian–African Legal Consultative Committee
ACP African, Caribbean and Pacific States (parties to the Lomé Conventionĝ approx. 70)
AFDI *Annuaire Français de Droit International*
AJICL *African Journal of International and Comparative Law*
AJIL *American Journal of International Law*
ALI American Law Institute
APEC Asia–Pacific Economic Co-operation
Area Sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction in accordance with the 1982 UN Convention on the Law of the Sea
ASEAN Association of South-East Asian Nations
ASIL American Society of International Law
BISD *Basic Instruments and Selected Documents* (of GATT)
BITs Bilateral investment treaties
BYIL *British Yearbook of International Law*
CERDS 1974 Charter of Economic Rights and Duties of States
CHM Common heritage of (hu)mankind
CIME OECD Committee on International Investment and Multinational Enterprises
CIS Commonwealth of Independent States
CITES 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora
CJTL *Columbia Journal of Transnational Law*
DD II/III/IV Development Decades II–IV (of the UN)
ECLAC Economic Commission for Latin America and the Caribbean (of the UN)
ECOSOC Economic and Social Council (of the UN)

EC	European Community
ECE	Economic Commission for Europe (of the UN)
EEC	European Economic Community
ECT	Energy Charter Treaty
EEZ	Exclusive economic zone
EJIL	*European Journal of International Law*
EPL	*Environmental Policy and Law*
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FCCC	UN Framework Convention on Climate Change
FCN	Friendship, Commerce and Navigation Treaties
GA	General Assembly (of the UN)
GAOR	*General Assembly Official Records*
GATT	General Agreement on Tariffs and Trade
GEF	Global Environment Facility
GYIL	*German Yearbook of International Law*
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development (the World Bank)
ICA	International Co-operative Alliance (a consumers organization)
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICJ Reports	*International Court of Justice, Reports of Judgments, Advisory Opinions and Orders*
ICLQ	*International and Comparative Law Quarterly*
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention Establishing the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States
IDA	International Development Association
IEA	International Energy Agency
IEL	*International Environmental Law* (5 vols., Erich Schmidt Verlag: Berlin, 1974)
IFC	International Finance Corporation
IFDA	International Foundation for Development Alternatives
IGC	Intergovernmental Committee
IJIL	*Indian Journal of International Law*
ILA	International Law Association

ILC International Law Commission (of the UN)
ILM *International Legal Materials*
ILO International Labour Organization
ILR *International Law Reports*
IMF International Monetary Fund
Iran–US CTR *Iran–US Claims Tribunal Reports*
ITTA International Tropical Timber Agreement
IUCN International Union for Conservation of Nature and Natural Resources (now World Conservation Union)
JWT or JWTL *Journal of World Trade* (formerly *Journal of World Trade Law*)
LJIL *Leiden Journal of International Law*
LNTS *League of Nations Treaty Series*
Martens NRG *Martens Nouveau Recueil Général de Traités*
MERCOSUR Mercado Común del Sur (trade area between Argentina, Brazil, Paraguay and Uruguay)
MIGA Multilateral Investment Guarantee Agency
MITs Multilateral investment treaties
NAFTA North American Free Trade Agreement
NAM Non-Aligned Movement
NGOs Non-Governmental Organizations
NIEO New International Economic Order
NILR *Netherlands International Law Review*
NJB *Nederlands Juristenblad*
nm nautical mile (1,851.85 m)
NQHR *Netherlands Quarterly of Human Rights*
NYIL *Netherlands Yearbook of International Law*
NYUJILP *New York University Journal of International Law and Politics*
OAU Organization of African Unity
OECD Organization for Economic Co-operation and Development
Off. Rec. *Official Records of UNCLOS III*
OIC Organization of the Islamic Conference
OAPEC Organization of Arab Petroleum Exporting Countries
ODA Official Development Assistance
ODIL *Ocean Development and International Law*
OPEC Organization of Petroleum Exporting Countries
PCA Permanent Court of Arbitration
PCIJ Permanent Court of International Justice

Recueil des Cours	Recueil des Cours de l'Académie de Droit International de la Haye
Res.	Resolution(s)
RIAA	*Reports of International Arbitral Awards*
RIO	Project 'Reshaping the International Order' (A Report to the Club of Rome, Co-ordinator Jan Tinbergen, 1976)
SIPRI	Stockholm International Peace Research Institute
SUNFED	Special United Nations Fund for Economic Development
SWAPO	South-West Africa's [Namibia's] People's Organization
TDB	Trade and Development Board (of UNCTAD)
TNCs	Transnational corporations
TRIMs	Trade-Related Investment Measures
UAR	United Arab Republic (of Egypt and Syria, 1958–61: Egypt up to 1971)
UCN	Ultra Centrifuge Nederland
UK	United Kingdom
UKTS	*United Kingdom Treaty Series*
UN	United Nations
UNCED	UN Conference on Environment and Development
UNCIO	UN Conference on International Organization (the San Francisco Conference, June 1945)
UNCITRAL	UN Commission on International Trade Law
UNCLOS	UN Conference on the Law of the Sea
UNCTAD	UN Conference on Trade and Development
UNCTC	UN Centre on Transnational Corporations
UNDP	UN Development Programme
UNEP	UN Environment Programme
UNESCO	UN Educational, Scientific and Cultural Organization
UNGA	UN General Assembly (also given as General Assembly)
UNIDIR	UN Institute for Disarmament Research
UNIDO	UN Industrial Development Organization
UNITAR	UN Institute for Training and Research
UNTAG	UN Transition Assistance Group (in Namibia)
UNTS	*UN Treaty Series*
UNYB	*UN Yearbook*
WCED	World Commission on Environment and Development
WMO	World Meteorological Organization
WTO	World Trade Organization
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*

Main symbols used in UN documents

A/–	General Assembly. Starting with the thirty-first session of the General Assembly in 1976, symbols were expanded to include Arabic numerals denoting the session (e.g., A/31/–, A/32/–, A/C.1/31/–, etc.).
A/S–	General Assembly Special Session. From the first to the seventh special session 'S' followed by a roman numeral denoting the session, was added to the normal resolution symbols (e.g., GA Res. 3202 (S-VI)). With regard to documents no special mention was made. Starting with the eighth special session in 1978, the symbol 'S' was followed by Arabic numeral(s) denoting the session (e.g., A/S–8/2, A/RES/S–8/1).
E/–	Economic and Social Council
S/–	Security Council
ST/–	Secretariat

Special basic series symbols have been established for certain bodies:

ID/–	UN Industrial Development Organization
TD/–	UN Conference on Trade and Development
UNEP/–	UN Environment Programme
UNITAR/–	UN Institute for Training and Research
UNIDIR/–	UN Institute for Disarmament Research

The documents of the subsidiary organs normally carry a symbol consisting of the basic series symbol of the parent body plus one or more of the following elements:

–/AC.–/–	*Ad hoc* committee or similar body

-/C.-/-	Standing, permanent or sessional committee
-/CN.-/-	Commission
-/CONF.-/-	Conference
-/GC.-/-	Governing Council
-/WG.-/-	Working Group
-/WP./-	Working Party

The documents of some subsidiary organs bear a symbol consisting of the basic series symbol of the parent body followed by the acronym of the subsidiary organ:

ST/CTC/-	UN Centre on Transnational Corporations
TD/B/-	Trade and Development Board

The following elements may be added to the series symbol and denote the nature or distribution of the document

-/INF.-	Information series
-/PV.-	Verbatim records of meetings (*procés-verbaux*)
-/RES./-	Mimeographed texts of adopted resolutions
-/SR.-	Summary records of meetings
-/WP.-	Working Paper
-/L.-	Limited distribution

The following elements, if added, denote modification of a previous text:

-/Add.-	Addendum. Indicates an addition of text to the main document.
-/Corr.-	Corrigendum. Indicates modification of any specific part of an existing document to correct errors, revise wording or reorganize text, whether for substantive or technical reasons.
-/Rev.-	Revision. Indicates a new text which supersedes and replaces that of a previously issued document.

Source: United Nations Document Series Symbols (Dag Hammarskjöld Library, New York, 1986), UN Doc. ST/LIB/SER.B/5/Rev.4 (sales no. E.85.I.2)

Glossary

actio popularis: right of legal action vested in all in vindication of a public interest
casus belli: reason to resort to war
clausula rebus sic stantibus: doctrine that a treaty is no longer necessarily binding after there has been a fundamental change of circumstances
damnum emergens: actual damage
dominium: sovereignty, ownership and control over territory
ex aequo et bono: equitable settlement of a dispute, overruling, if necessary, existing law
in statu nascendi: [law] in a nascent stage
jus cogens: peremptory norms of general international law, binding irrespective of the consent of individual parties to be bound
lex ferenda: rule of law which it is desired to establish
lex generalis: law of a general character
lex lata: rule of law that is in force
lex specialis: law of a specific character
locus standi: capacity to institute legal proceedings before a specific court or tribunal for a particular remedy
lucrum cessans: the loss of potential profits
mare clausum: 'closed sea', a defined area of the sea claimed by a State to be under its jurisdiction
mare liberum: the notion of the freedom of the sea
obligatio erga omnes: obligation towards all members of a legal community
opinio juris: opinion that a certain rule is a rule of law; together with *usus* (actual application of the rule) the constituent elements of customary law
opinio juris communis: commonly held legal opinion
pacta sunt servanda: the principle that agreements are binding and are to be observed in good faith

ratione materiae: the subject matter to which a particular rule applies
ratione personae: the persons to which a particular rule applies
ratione temporis: a period of time to which a particular rule applies
res communis: object which cannot be owned by anyone and which is subject to use by all
res nullius: object owned by no one but subject to appropriation
restitutio in integrum: restoration of previous *status quo*
sic utere tuo ut alienum non laedas: the principle of using your property in such a way as not to cause damage to your neighbour's
sub specie lege ferenda: a category of law which it is desired to establish
tabula rasa: 'clean slate', the doctrine that a newly independent State should have maximum discretion in rejecting arrangements made by the predecessor State
terra nullius: territory which is not under the jurisdiction of a subject of international law
terrae dominium finitur: the dominium of the land ends
ubi finitur armorum vis: where the power of arms ends
ultra vires: beyond the jurisdiction of the authority concerned
usus: see *opinio juris*

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1 Introduction

Objectives of the study

'Permanent sovereignty over natural resources' is one of the more controversial new principles of international law that have evolved since World War Two. During this period the decolonization process has taken place and newly independent States have sought to develop new principles and rules of international law in order to assert and strengthen their position in international relations and to promote their social and economic development. The principle of permanent sovereignty over natural resources was introduced in United Nations debates in order to underscore the claim of colonial peoples and developing countries to the right to enjoy the benefits of resource exploitation and in order to allow 'inequitable' legal arrangements, under which foreign investors had obtained title to exploit resources in the past, to be altered or even to be annulled *ab initio*, because they conflicted with the concept of permanent sovereignty. Industrialized countries opposed this by reference to the principle of *pacta sunt servanda* and respect for acquired rights.

This study has three main objectives. Firstly, to map the evolution of permanent sovereignty over natural resources (hereafter 'permanent sovereignty') from a political claim to a principle of international law. The hypothesis is that resolutions of the political organs of the United Nations have been instrumental in this. Secondly, to show that the principle of permanent sovereignty has not evolved in isolation but as part and parcel of other trends in international law. Hence, the study entails excursions through various branches of international law, such as international investment law, the law of the sea and international environmental law. Finally, to demonstrate that, apart from rights, duties relating to resource management can also be inferred and that under modern international law

they are being given increasing significance. Evidence has been assembled and assessed to support this position.

Ever since the Treaty of Augsburg (1555) and the Peace of Westphalia (1648)[1] sovereignty has served as the backbone of international law, or as Brownlie phrases it as 'the basic constitutional doctrine of the law of nations',[2] but sovereignty has also been described as 'the most glittering and controversial notion in the history, doctrine and practice of public international law'.[3] In the context of discussion on sovereignty over natural resources, various adjectives have been used to emphasize its hard-core status: in addition to 'permanent', also 'absolute', 'inalienable', 'free' and 'full'. However, State sovereignty equated as it is with non-interference, with domestic jurisdiction and discretion in the legal sphere has become increasingly qualified. Legally, our planet may be split up into almost 200 sovereign States (apart from some international areas, such as the high seas, the deep sea-bed and perhaps Antarctica), but in practice the world is now recognized as being interdependent on many different levels. Economic and energy crises, speculation in the international money market, deforestation, acid rain, pollution of international waters, the threat of global warming, damage to the ozone layer and loss of biodiversity, all these and other issues provide compelling evidence of the fact that in real life States are no longer masters of their own destiny. States are intertwined in a network of treaties and other forms of international co-operation, which qualify the range of matters that according to Article 2.7 of the UN Charter are 'essentially within the domestic jurisdiction of the State'. Hence, in an age of globalization, drastic political change, resource depletion and environmental degradation, a first question is 'what is permanent sovereignty?' To what extent have claims to 'permanent', 'full', 'absolute' and 'inalienable' sovereignty over natural resources become tempered or even replaced by demands for 'restricted', 'relative' or 'functional' sovereignty? In addition, from a political perspective, the State is said to be riddled with disease, its role in economic affairs is being reviewed and self-determination of peoples is being revitalized.[4] But does this imply that sovereignty is 'in abeyance'?[5] Moreover, the definition of natural resources is no longer as clear cut as it used to be. Until recently, it tended to be economically oriented, focusing on the use to be made of it by humankind, thus neglecting the intrinsic value of natural resources and the integrity of ecological systems.[6] However, the UN de-

[1] Röling (1960: chapter III); Falk (1969: see particularly pp. 43–8).

[2] Brownlie (1990: 287). [3] Steinberger (1987: 397).

[4] See 'The State of the Nation-State', in *The Economist*, 22 December 1990, p. 76.

[5] Berman (1988: 105).

bate on sovereignty over natural resources has always dealt with 'natural wealth' as well as with natural resources. Occasionally, attempts have been made to broaden the range of matters to which permanent sovereignty applies to include 'wealth' and 'economic activities'. This issue is addressed later in this introductory chapter.

Genesis of permanent sovereignty as a principle of international law

In the post-war era permanent sovereignty over natural resources evolved as a new principle of international economic law. Since the early 1950s this principle was advocated by developing countries in an effort to secure, for those peoples still living under colonial rule, the benefits arising from the exploitation of natural resources within their territories and to provide newly independent States with a legal shield against infringement of their economic sovereignty as a result of property rights or contractual rights claimed by other States or foreign companies. Although the term 'permanent sovereignty' was soon to gain currency in international law, its birth was far from easy. Without doubt, one main reason for this was that the provenance of the principle lay in the UN General Assembly. This allowed its development to be more rapid than it would have been through more conventional methods of law-making, such as evolving State practice or diplomatic conferences. However, the legal merits of the development of international law through resolutions of political organs have always been a source of doctrinal controversy.[7] Another reason for the difficult general acceptance relates to the subject matter itself: permanent sovereignty touches on such controversial topics as expropriation of foreign property and compensation for such acts, standards of treatment of foreign investors

[6] Adam Smith pointed out in his *Wealth of Nations* (1776, 4th edn, 1850: xxxii) that:

> water, leaves, skins, and other spontaneous productions of nature, have no value, except what they owe to the labour required for their appropriation. The value of water to a man on the bank of a river depends on the labour necessary to raise it to his lips; and its value, when carried ten or twenty miles off, is equally dependent on the labour necessary to convey it there. Nature is not niggard or parsimonious. Her rude products, powers, and capacities are all offered gratuitously to man. She neither demands nor receives an equivalent for her favours. An object which may be appropriated or adapted to our use, without any voluntary labour on our part, may be of the very highest utility; but, as it is the free gift of nature, it is quite impossible it can have the smallest value.

[7] Classic works on this issue include Sloan (1948), Higgins (1963), Asamoah (1966), Falk (1966) and Castañeda (1969). For a summary and classification of the most legally relevant categories of UN resolutions see Schrijver (1988c: 39–47).

(the national standard versus the international minimum standard) and State succession. These matters are at the heart of official relations between States and at the centre of international and domestic political disputes, North–South confrontations, and doctrinal duels amongst international lawyers. Indeed, permanent sovereignty has not developed in isolation, but as an instrument used during or as a reaction to international events. These have included sensitive nationalization cases, such as the take-over of the Anglo-Iranian Oil Company (1951); the United Fruit Company in Guatemala (1953); the Suez Canal Company (1956); Dutch property in Indonesia (1958); the Chilean copper industry (1972); and the Libyan oil industry (1971–4).[8] These events also marked unprecedented political processes, such as the struggles of colonial peoples for political self-determination and the efforts of developing States to pursue economic self-determination and to establish a New International Economic Order.[9] Thus, the principle of permanent sovereignty was very much part and parcel of the development of 'United Nations law'.[10]

The international context

Efforts in the immediate post-World War Two period to develop the principle of permanent sovereignty were largely derived from and inspired by the following important concerns and developments:

1 Concerns about the *scarcity and optimum utilization of natural resources.* During World War Two, the Allied Powers became painfully aware of their dependence on overseas raw materials and of the vulnerability of their supply lines. In the immediate post-war period this led to initiatives for natural resource development[11] and full utilization of resources[12] as well as to proposals that every State should take into account the interests of other States and of the world economy as a whole.[13]

[8] Akinsanya (1980: 11).

[9] See VerLoren van Themaat (1981: 1–6 and 261–314), Verwey (1981a) and Abi-Saab (1984).

[10] The term 'United Nations law' was introduced by Kelsen (1951) and has also been used on various occasions by Schachter. See Schachter (1991: 452) and (1994b: 1).

[11] For example, the 1947 International Timber Conference of the Food and Agriculture Organization and the 1949 UN Scientific Conference on the Conservation and Effective Utilization of Natural Resources.

[12] See the preamble of the General Agreement on Tariffs and Trade (1947), in which the contracting parties recognize that their relations in the field of trade and economic endeavour should be conducted with a view to 'developing the full use of the resources of the world and expanding the production and exchange of goods'.

[13] See GA Res. 523 (VI), entitled 'Integrated Economic Development and Commercial Agreements', 12 January 1952.

2 Deteriorating *terms of trade* of developing countries. The trend in the prices of industrial products continued upward while prices of raw materials sharply fluctuated around an overall downward trend. During the early 1950s it became obvious that the 1948 Havana Charter, which resulted from the UN Conference on Trade and Employment at Havana and which sought to provide for regulatory mechanisms for commodity prices, would not come into effect.[14] The Economic Commission for Latin America (ECLA) at an early stage drew attention to the terms of trade which were so problematic for developing countries.
3 *Promotion and protection of foreign investment.* At the Havana Conference, agreement had been reached on a substantive article dealing with the treatment of foreign investment.[15] It recognized, on the one hand, the great value of such investment in promoting economic development and social progress and it requested member States to provide adequate security and to avoid discrimination. On the other hand, it provided for certain rights of host States, including the right to non-interference in their internal affairs and domestic policies and the right to determine whether, to what extent, and on what terms they would admit foreign investment in the future. In the early UN debates, different opinions as to the role of foreign investment in the development process were voiced. Western countries, and also countries such as India and Haiti, openly acknowledged the positive role of foreign investment, while others, for example Bolivia, Uruguay and Colombia, explicitly stressed its adverse effects.
4 *State succession.* As a result of the process of decolonization, newly independent States were established to replace the former colonial powers in the responsibility for the administration and the international relations of the territories. This raised important but complicated questions as to whether these new States have a right to start with a clean slate (*tabula rasa*) and to be released from obligations entered into by the former colonial powers, or that, for example, certain treaties and concessions ought to be continued in view of the interests at stake of third States and third parties in the continuation of these relationships (*pacta sunt servanda*). The issue was raised in the early stages of the permanent sovereignty debate and led the General Assembly in 1962 to request the International Law Commission to take up this issue, making 'appropriate reference to the views of States which have achieved independence since the Second World War'.[16]

[14] On the Havana Charter for an International Trade Organization, see Wilcox (1949).
[15] Article 12, entitled 'International Investment for Economic Development and Reconstruction', of the Havana Charter for the International Trade Organization.
[16] GA Res. 1765 (XVII). This effort finally resulted in the Vienna Conventions on Succession of States in Respect of Treaties (1978) and in Respect of State Property, Archives and Debts (1983), but they were concluded at a time when the

5 *Nationalization.* The early debates in the United Nations on permanent sovereignty took place at a time when memories of the Mexican oil nationalizations of 1938 were still fresh, when the Anglo-Iranian Oil Company dispute (1950–2) was still a 'hot issue', and nationalizations were also taking place or were seriously considered in Latin America. For example, in 1951, Bolivia nationalized its tin mines, Guatemala was about to launch an agrarian-land-reform programme under which it would take over United Fruit Company properties, and other Latin American countries (including Chile and Argentina) were considering similar action. Later in the decade, there were dramatic experiences arising from the nationalization of the Suez Canal Company (in 1956) and of Dutch property in Indonesia (in 1958).
6 *Cold War rivalry* added to the heat of the debate. The ideological competition between the two major social and economic systems had a profound impact on the debate on permanent sovereignty. There were significant opposing views on the rights of colonial peoples, on issues of State succession, on the right to property protection and the respect for acquired rights, on the role of foreign investment in the development process and on the inclusion of the right to self-determination and of socio-economic rights in international human rights law.
7 The demand for *economic independence and strengthening of sovereignty.* The decolonization process entailed a claim to economic self-determination. This came especially to the fore in the context of a draft article on the right of peoples to self-determination to be included in the Human Rights Covenants. In addition, Latin American countries grew increasingly unhappy about their unequal relationship with the USA and sought to demonstrate their independence. In an effort to avoid having to take sides in the evolving Cold War between the Western and Eastern blocs, the newly independent countries of Asia and Africa and liberation movements in non-self-governing territories combined forces in the search for a politically and economically independent position, later termed 'non-alignment'.[17]
8 The formulation of *human rights.* In the UN Commission on Human Rights, the Economic and Social Council (ECOSOC) and the Third Committee (charged with humanitarian and social affairs) of the UN General Assembly, the question was discussed whether the *right* to self-determination included an *economic* corollary: in particular the right of peoples and nations to have free disposal of their natural wealth and resources.

decolonization process had more or less been completed. Moreover, actual State practice often proved not to be in conformity with the principles and rules of these conventions.

[17] For the background of the Non-Aligned Movement, see Syatauw (1961: 2 and 14–17) and (1994: 132–5).

These developments exerted a profound influence on international politics during the formative years of the principle of permanent sovereignty and in general terms induced major changes, both in international law which progressively developed, in the words of Röling, 'from a European-oriented law towards a truly universal law'[18] and in the United Nations as an organization, where emphasis shifted from peace and security issues to decolonization and to the promotion of development in developing countries.[19]

The subjects: a widening and a contracting circle

A basic question concerns who is entitled to and endowed with the legal capacity to dispose freely of natural resources. Of course, the discussion on the subjects of the right to permanent sovereignty cannot be dissociated from the general discussion on the subjects of international law. In general, in international law there has been a gradual extension of the circle of subjects.[20] In 1912 Oppenheim could still write: 'Since the law of nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are subjects of international law.'[21]

However, although States are still the primary subjects of international law today, they are no longer the only subjects. In its 1949 Advisory Opinion in the *Reparation Case*, the International Court of Justice (ICJ) concluded that the United Nations is 'an international person', and 'is a subject of international law and capable of possessing rights and duties'.[22] Other intergovernmental organizations have since been treated similarly. The circle has further widened due to legal developments pertaining to the principle of self-determination of peoples and to human rights, which have endowed peoples and individuals with rights and obligations under international law. Transnational corporations have obtained a limited, functional international personality,[23] as evidenced by: the procedures under the World Bank Convention on the International Settlement of Investment Disputes between States and Nationals of Other States;[24] provisions relating to international settlement of deep sea-bed mining

[18] Röling (1960: 73–86) and (1982: 181–209).

[19] Among a vast body of literature see the pioneering book of Claude (1967: 49–72 and 115–18). [20] See in general terms Mosler (1984) and Menon (1990).

[21] Oppenheim (1912: 19). [22] *ICJ Reports* (1949), p. 174.

[23] See Kokkini-Iatridou and de Waart (1983: 117–24 and 129–31) and (1986: 323–5).

[24] As reviewed in chapter 6, pp. 185–7.

disputes in the 1982 UN Convention on the Law of the Sea;[25] and provisions of the World Bank Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) which allow subrogation of MIGA 'to such rights or claims related to the guaranteed investments as the holder of a gurantee may have had against the host country and other obligors'.[26] However, it should be noted that this legal status is conditional since it depends on prior consent of the corporations' home States to be bound by the treaties in question and, in the case of the law of the sea, on State sponsorship of the enterprise concerned. Finally, reference should be made to the development of the concept of 'mankind', more properly 'humankind', which includes both present and future generations. In international law relating to the oceans, outer space and the global environment, rights and entitlements accrue to humankind as such.[27]

The circle of subjects entitled to dispose of natural resources has changed considerably over the years. Initially, during the 1950s, the right to permanent sovereignty was alternatively vested in 'peoples and nations' and 'underdeveloped countries' due to the fact that permanent sovereignty had taken root in both the promotion of the economic development of 'underdeveloped' countries and the self-determination of peoples.[28] As the decolonization process progressed the emphasis on 'peoples' and the connection with 'self-determination' diminished and gradually shifted to 'developing countries', while during the 1970s 'all States' became the primary subjects of the right to permanent sovereignty. From the relevant resolutions and treaty provisions one can infer that this increasingly 'étatist' orientation was tempered by a rising number of obligations incumbent on States, in particular the obligation to exercise permanent sovereignty in the national interest and for the well-being of 'their peoples'. Recently, the rights of indigenous peoples have become an issue, although these peoples feature as objects rather than as subjects of international law.[29] During the 1970s and 1980s only peoples whose territories were under foreign occupation or under alien or colonial domination were identified as subjects of the right to permanent sovereignty and considered as deserving UN attention. For example, in 1974 the UN Council for Namibia

[25] See in particular section 6 of Part XI of UNCLOS; see also Merrills (1991: chapter 8) and chapter 7, pp. 226–7 of this study.

[26] See Art. 24 with Annex I and Art. 57 with Annex II of the MIGA Convention.

[27] See chapters 7 and 8. Occasionally, the term 'humanity' is used, e.g., in the 1992 Biodiversity Convention.

[28] GA Res. 523 (VI) and 626 (VII), 12 January 1952 and 21 December 1952.

[29] See chapter 10, pp. 311–19.

formulated the right of 'the people of Namibia' to the natural wealth and resources of the territory of Namibia, which was called 'their birthright', and the Council appointed itself more or less as the new trustee of Namibia's natural resources. In the same vein, the UN General Assembly gave emphatic attention to a corresponding right of the Palestinian people. For a time, similar rights of particular States, such as some in Latin America and Arab areas under Israeli occupation, received special attention.[30]

Yet, during the 1970s and 1980s a clear tendency to confine the circle of permanent sovereignty subjects to States re-emerged. Both the UN General Assembly's Charter of Economic Rights and Duties of States (CERDS, 1974) and the Seoul Declaration (1986) of the International Law Association (ILA), a non-governmental international law organization which includes lawyers from both industrialized and developing countries, exemplify this tendency: neither Article 2 of CERDS, nor section 5 of the Seoul Declaration, which deal with permanent sovereignty, contains any reference to 'peoples'.[31]

Meaning of terms

It can be inferred from relevant permanent-sovereignty-related UN debates that the term 'peoples' was originally meant to refer to those peoples which had not yet been able to exercise their right to political self-determination. This is not to say that after these peoples had exercised this right, States were free to do with their natural resources whatever their governments saw fit. Various injunctions have been formulated according to which States have to exercise the right to permanent sovereignty in the interest of their populations and to respect the rights of indigenous peoples to the natural wealth and resources in their regions,[32] where 'peoples' are objects rather than subjects of international law. But the extent to which the people in a resource-rich region of a State (for example, the province of Groningen in the Netherlands, which is rich in natural gas) are entitled to (extra) benefit from resource exploitation in their region is in principle a matter of domestic politics. International law is only relevant when a State manifestly discriminates against a certain people and can thus no longer claim to be 'possessed of a government represen-

[30] See chapter 5, pp. 144–60 for three case studies.

[31] GA Res. 3281 (XXIX); Seoul Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order, in *Report of the 62nd Conference of the ILA held at Seoul* (ILA: London, 1987), p. 2. The latter text is also published in de Waart *et al.* (1988: 409–18) and 33 NILR (1986: 328–33).

[32] See chapter 10, pp. 308–19. See also Cassese (1976: 103).

ting the whole people belonging to the territory without distinction as to race, creed or colour'.[33]

In international law the term 'nation' is often used as a synonym for 'State', 'nation-State' or 'country'. For example, Article 1 of the UN Charter provides that the purposes of the inter-State organization include 'to develop friendly relations among nations' and 'to be a centre for harmonizing the actions of nations'. In the social sciences the term 'nation' refers to a society of people united by a common history, culture and consciousness:

> the vital binding force of the nation is variously derived from a strong sense of its own history, its special religion, or its unique culture, including language. A *nation* may exist as an historical community and a cultural nexus without political autonomy or statehood.[34]

During the 1950s and 1960s reference to 'nations' as subjects of the right to permanent sovereignty was probably meant to reinforce the right of peoples to economic self-determination, both prior to and after the exercise of their right to political self-determination. Whatever its legal meaning may be, after the adoption of the 1962 Declaration on Permanent Sovereignty, the word 'nation' was only once included in a permanent sovereignty resolution, namely in GA Resolution 2692 (XXV), and we do not find it in any treaty. A justified conclusion is hence that the term nation has lost its relevance as a subject of the right to permanent sovereignty.

Although the application of the notion of statehood in particular cases is often controversial, the term 'State' has a fairly well-defined meaning,[35] and it is possible to draw up a largely undisputed list of States at any given time. UN resolutions, in contrast to treaties, frequently refer to what was originally called 'underdeveloped countries' and, after 1960, 'developing countries'.[36] From the debates on permanent sovereignty it has become obvious that these are generic terms meant to include all countries of Africa (before 1994 with the exception of South Africa), Asia (with the exception of Japan) and Latin America, in addition to some European countries such as

[33] GA Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, principle V.7, 24 October 1970. See Röling (1985: 97–9) and de Waart (1994a: 73) and (1994c: 390).

[34] G. J. Mangone, 'Nation', in J. Gould and W. L. Kolb (eds.), *A Dictionary of the Social Sciences* (The Free Press: New York/UNESCO, 1969) p. 451.

[35] See Crawford (1979: 36–48), Döhring (1987: 423–4), Jennings and Watts (1992: 120–3) and de Waart (1994a: 98).

[36] For an identification of various (sub-)categories of developing countries, see Verwey (1983: 359–74).

Albania, Cyprus and Malta. The Vienna Conventions on State Succession introduce an additional sub-category in the permanent sovereignty debate, namely 'newly independent States' and stipulate that agreements between the predecessor State and the newly independent State must not infringe the principle of permanent sovereignty of any people.[37] The term newly independent State is defined as 'a successor State the territory of which, immediately before the date of the succession of States, was a dependent territory for the international relations of which the predecessor State was responsible'.[38]

The objects to which permanent sovereignty applies

An analysis of relevant permanent sovereignty resolutions shows a gradual extension of the range of resources and activities covered by the principle of permanent sovereignty: from (a) 'natural resources' and 'natural wealth and resources' (as from GA Resolution 523, 1952); through (b) 'natural resources, on land within their international boundaries, as well as those in the sea-bed, in the subsoil thereof, within their national jurisdiction and the superjacent waters' (GA Resolution 3016, 1972), (c) 'natural resources, both terrestrial and marine, and all economic activities for the exploitation of these resources' (UNIDO II, 1975) and (d) 'natural resources and all economic activities' (GA Resolution 3201, 1974); to (e) 'all wealth, natural resources and economic activities' (GA Resolution 3281, CERDS, 1974). The last citation can be seen as the culmination of a series of permanent sovereignty claims.[39] Only the resolutions on permanent sovereignty in the occupied Arab territories consistently employ the phrase 'national resources', both in their titles and their substantive paragraphs.[40]

UN organs have not always consistently used specific phrases in a particular period. For example, the 1962 Declaration on Permanent Sovereignty over Natural Resources alternates, rather arbitrarily, between references to permanent sovereignty over 'natural resources' and 'natural wealth and

[37] See for the text of the Vienna Convention on Succession of States in respect of Treaties (1978) and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, *The Work of the International Law Commission* (4th edn, New York: United Nations, 1988), pp. 323 and 343.

[38] Article 2(f) of the 1978 Convention and Art. 2(e) of the 1983 Convention. The commas do not appear in the 1978 Convention.

[39] It is rather confusing that the NIEO resolutions also contain references to 'resources' as such (on three occasions), 'natural and other resources' (once) and 'natural resources' (twice).

[40] See chapter 5, pp. 152–6.

resources';[41] and the 1974 Declaration on the Establishment of a New International Economic Order (NIEO, GA Resolution 3201, 1974) refers to permanent sovereignty over 'natural resources and all economic activities', while the accompanying NIEO Programme of Action (GA Resolution 3202, 1974) refers to permanent sovereignty over 'natural resources' only.

Western countries and authors have consistently and strongly opposed the extension of the scope of permanent sovereignty beyond 'natural wealth and resources', although some of them (including the Federal Republic of Germany) have occasionally invoked the extended doctrine in order to justify permanent sovereignty over their own technology.

It is noteworthy that in the permanent-sovereignty-related UN resolutions adopted during the 1980s and 1990s there has been a tendency to return gradually to the original scope of the principle of permanent sovereignty, namely 'natural resources' or 'natural wealth and resources'. An example is the 1986 Declaration on the Right to Development.[42]

What is the significance of these four terms in regard to the object of the right to permanent sovereignty?

Definition of natural resources

In non-legal literature there are plenty of definitions of natural resources: for example, that 'natural resources are naturally occurring materials that are useful to man or could be useful under conceivable technological, economic or social circumstances',[43] or 'supplies drawn from the earth supplies such as food, building and clothing materials, fertilizers, metals, water and geothermal power'.[44] For a long time, natural resources were the domain of the natural sciences. As the economist Zimmerman stated in 1933:

> for centuries resources were the stepchild of economic thought. If they were recognized at all, they were absorbed into the market process, acknowledged only insofar as they were reduced to working tools of the entrepreneur, land, labor, and

[41] The term 'natural resources' occurs fourteen times and 'natural wealth and resources' eleven times in Declaration 1803 (XVII). The declaration refers only once to 'all its wealth and natural resources' and once to 'resources and wealth'. One can only presume that here we are dealing with slips of the pen, since during these days the extension of the principle of permanent sovereignty beyond natural wealth and resources was not yet an issue.

[42] Yet, in the 'Principles Relating to Remote Sensing of the Earth from Space' (GA Res. 41/65), adopted only one day earlier, the General Assembly refers to 'the principle of full and permanent sovereignty of all States and peoples over *their own wealth and natural resources*' (emphasis added).

[43] 19 *Encyclopedia Americana* (1982), p. 792.

[44] Skinner (1986: 1).

capital or recognized through their effects on cost and price, supply and demand.[45]

In international law, before 1945 natural resources were not exactly an object of systematic study and regulation, with fisheries and international rivers being to a certain extent an exception. However, the emergence of the principle of permanent sovereignty, the law of the sea and commodity trade regulation have given rise to a somewhat more active interest in natural-resources law.[46]

During recent decades natural resources have become the object of a variety of scientific disciplines. This makes a definition both desirable and difficult. Every description of the concept will be determined by the specific angle from which the object is studied; the natural scientist will emphasize the generation of living and non-living resources, the economist the abundance or scarcity of resources and their exploitability and distribution at certain cost levels, the geologist the occurrence of certain minerals in the earth's crust, the environmentalist the intrinsic value of natural resources and the need for their sustainable use, while the lawyer will study their ownership and usufruct rights.

In modern economic and geographic reference books natural resources are commonly divided into the following categories:

1 non-renewable or *stock* resources, such as minerals and land, which have taken millions of years to form and the quantity of which, from a human perspective, is fixed; and
2 renewable or *flow* resources, which naturally regenerate to provide new supply units within at least one human generation.[47]

[45] Zimmerman (1951: 6). This view may be somewhat exaggerated. For example, at various places in his *Principles of Political Economy*, John Stuart Mill (1896) paid attention to the natural advantages of a country such as fertile soil, climate, abundance of mineral deposits ('the coalfields of Great Britain, which do so much to compensate its inhabitants for the disadvantages of climate', p. 64) and natural water power, good natural harbours and navigable rivers as factors which determine the degree of productiveness and prosperity of a country. See also Lewis (1955: 249–52).

[46] Nonetheless, it may be symptomatic that an American textbook on natural resources and energy law can still afford to ignore the role of international law and international institutions: see Jan G. Laitos and Joseph P. Tomain, *Energy and Natural Resources Law in a Nutshell* (St Paul, MN: West Publishing Co., 1992).

[47] A classic reference work on the concept of stock resources versus flow resources is Ciriacy-Wantrup (1968: chapter 3): 'Resources are defined as stock resources if their total quantity does not increase significantly with time' (p. 35); and 'Resources are defined as flow resources if different units become available for use in different intervals. These sucessively available quantities constitute the flow' (p. 37). See also R. J. Johnson (ed.), *The Dictionary of Human Geography* (2nd edn, London: Blackwell, 1986) pp. 408–9; Secretariat for Future Studies (1980: chapter 2).

It has often been stated that the distinction between the two categories is blurred: 'many so-called renewable resources (eroded soils, endangered species, 1,000-year-old tropical forests) are not renewable in any practical sense. On the other hand, many non-renewable resources (coal, oil and certain minerals), if not inexhaustible in an absolute sense, are inexhaustible in a practical sense, because of technology, substitution and the operation of the market.'[48] Data on availability and exploitability of resources depend very much on knowledge, technology, social structures, use and human investment. As Zimmerman put it in a well-known comment: 'Resources *are* not, they *become*; they are not static but expand and contract in response to human wants and human actions.'[49] For example, fossil fuels are non-renewable and are consumed by use, but the size of their exploitable reserves depends very much on their price and on the knowledge, technology and investment to exploit them. Forests, plants, animals, fish and soils are in principle renewable resources, but their renewability and regeneration will often depend on actual use levels and human decisions relating to investment and management. Political factors also may be involved:

> In peacetime available reserves are also known as commercial reserves in capitalistic countries because availability is measured by commercial standards, i.e., in terms of profitableness reckoned in money. But in war, when victory and the lives of many hinge on certain mineral supplies, the cost–price relationship drops more or less out of sight and availability becomes a matter of geological realities and of technical proficiency, scientific know-how, and availability of capital and labor determined not by a free and automatic market but by government decree ... When peace hangs delicately balanced, considerations of national security demand that mineral reserve problems be approached not solely from the standpoint of business profit but also with due regard to their vital significance for national security.[50]

For political reasons governments may decide not to publish accurate records on known reserves of mineral resources. With the aim of strengthening their negotiating position and business prospects, oil and gas companies may do the same. During the 1960s and 1970s, Shell and the Netherlands Oil Company (NAM, a joint venture of Esso and Shell) consistently published minimum figures relating to natural gas reserves in the north of the Netherlands. In contrast, the South African government used to publish maximum figures in order to demonstrate its powerful resource basis and its relaxed attitude towards the threat of economic sanctions.[51]

Despite the intensive work on natural-resources law in recent decades, no

[48] MacNeill *et al.* (1991: 53). [49] Zimmerman (1951: 15). [50] Zimmerman (1951: 445).
[51] Brouwer (1983).

general definition exists of the term 'natural resources' in international law. In GATT practice, the term 'exhaustible natural resources' (Article XX(g) of the GATT), which at first glance relates to stock resources (like minerals) only, is interpreted to cover also renewable flow resources like animals, plants and fisheries.[52] Some treaties provide their own definition of specific natural resources. Thus, in Article 2 of the 1958 Convention on the Continental Shelf, repeated in Article 77 of the 1982 Law of the Sea Convention, it is provided that:

The natural resources . . . consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

For the purposes of the 1968 African Convention on the Conservation of Nature and Natural Resources, the term 'natural resources' means 'renewable resources, that is soil, water, flora and fauna',[53] while the 1992 Biodiversity Convention employs the term 'biological resources' as meaning 'genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity'.[54] Nor does international law literature provide a legally oriented definition of natural resources. So far, the most detailed attempt at systematic definition and classification of natural resources has been made by the Argentinean lawyer Cano in a report to the Food and Agriculture Organization (FAO). He advocates treating the whole complex of natural resources as an integrated whole and as a constitutional element of the human environment and defines natural resources as 'physical natural goods, as opposed to those made by man (which are termed cultural resources).'[55] In 1985, Rosenne approached the question from a similar angle, namely which resources are not 'natural'. With reference to the sea, he mentioned shipwrecks, sunken aircraft, archaeological and historical objects.[56] Artificial islands and oil platforms could be added. Trumpy sought to broaden Rosenne's definition and proposed that: 'A resource is any tangible or intangible which may be used in an economic manner or to create economic value, and which is not a manufactured product or tool.'[57] This is, however, not a satisfactory definition, since it is only economically oriented and disregards the intrinsic value of natural resources and the

[52] See Charnovitz (1991: 45–7) and Petersmann (1993: 71).
[53] Article III.1. Text in Hohmann (1992a: 1,530).
[54] Article 2 of the Convention on Biological Diversity (1992).
[55] Cano (1975: 1 and 30–3). [56] Rosenne (1986b: 64). [57] Trumpy (1986: 184).

integrity of ecological systems, including the sea, the air, the land and flora and fauna.

Natural wealth and wealth in general

The term 'natural wealth' has frequently been used in UN resolutions and other legally relevant instruments, but hardly in legal doctrine. It cannot easily be inferred from those documents what is actually meant by 'natural wealth' and in what respect it differs from physical natural resources.[58] It seems logical to presume that it refers to the natural wealth of our planet, such as land,[59] soil, forests, wetlands, natural harbours, rivers, lakes, beaches, seas and oceans, flora and wildlife, rainfall and other beneficial climatic conditions, including the sun, the wind and natural sources of energy. Problems of definition may arise in certain cases, for example concerning the question whether or not the inter-oceanic Panama Canal, as 'a product of human labour' but based on the natural characteristics of the territory, comes within the scope of Panama's permanent sovereignty over natural wealth. In the opinion of this author and by reference to particular geographical circumstances, the answer should be affirmative.[60] One might contrast the rather peculiar opinion of Katzarov that the working capacity of workers should as well be considered a natural resource of the country concerned.[61] Such a definition is so broad as to deprive the term of any specific meaning.

The concept of natural wealth may come close to what is commonly called 'the environment' as a description of a physical matter, being the air, the sea, the land, flora and fauna and the rest of the natural heritage.[62]

[58] The concept of 'natural wealth and resources' as used in early UN debates does not link up with the 'wealth of nations' as analysed by Adam Smith and numerous classical economists since then. Tinbergen has pointed out that the wealth of any nation consists of two components: '[i] its *natural wealth*, such as land for agricultural purposes, minerals, natural means of communication, geographic position and climate, and [ii] the *capital goods* it owns, i.e. the goods partly produced by human labour which are used for further production or consumption: buildings, roads, harbours, machinery, raw material stocks, stocks of consumer goods': Tinbergen (1965: 4).

[59] See, for example, the definition of 'land' in the 1994 UN Convention to Combat Desertification: 'the terrestial bio-productive system that comprises soil, vegetation, other biodata, and the ecological and hydrological processes that operate within the system' (Art. 1(e)).

[60] See chapter 5, pp. 158–9.

[61] Katzarov (1964: 355). Also cited in Seidl-Hohenveldern (1992: 27).

[62] See also the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques which refers in its Art. II to 'the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space'. On this ENMOD Convention see Falk (1984) and Goldblat (1984).

Alternative terms are sometimes used, such as 'ecosystems' (the 'natural capital of the earth') and 'biological diversity'. Adler-Karlsson has used the phrase 'harrying and carrying capacity' of the earth to acknowledge the basic interrelationships between developments in the fields of population, utilization and distribution of resources, and the state of technology.[63] Opschoor has introduced the term 'environmental utilization space' which aims to emphasize that the capacity of the natural environment to be used as a basis for supply of natural resources and for the absorption of waste is limited.[64] The physical availability of resources, the regenerative capacity of nature, the way economic processes function and the state of technology are among the main factors determining the size and the limits of the environmental space.[65] These concerns are also echoed in the concept of 'sustainable development' adopted by the Brundtland Commission in 1987. This concept seeks to integrate environmental and developmental concerns 'to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs'.[66] Obviously, sustainable development requires that we do not structurally operate beyond the limits of the environmental space and that we do base development on forms and processes that do not undermine the integrity of the environment on which they depend.[67]

It is doubtful whether the coverage of permanent sovereignty can be extended to 'wealth' in general, that is including non-natural wealth, as claimed in CERDS, in some treaties and in the 1986 Seoul Declaration of the ILA. Wealth is a fundamental concept of economics with different connotations at different times.[68] It features in the titles of such classic treatises of economics as Adam Smith's *The Wealth of Nations* (1776) and John Bates Clark's *The Distribution of Wealth* (1899). 'Wealth' is a generic term: 'a collective term for those things the abundant possession of which (by a person or a community) constitutes riches, or wealth in the popular sense'.[69] Apart from natural wealth, the term 'wealth' may thus cover

[63] Adler-Karlsson (1974).

[64] Opschoor (1992b: 28–33). See also Klaassen and Opschoor (1992). Opschoor first introduced this term in *Duurzaamheid en verandering: ecologische inpasbaarheid van economische ontwikkeling*, inaugural lecture, Vrije Universiteit, Amsterdam, 1987.

[65] See the Netherlands Ministry of Foreign Affairs (Development Co-operation), *A World of Dispute. A Survey of the Frontiers of Development Co-operation* (The Hague, 1993), pp. 38–60.

[66] World Commission on Environment and Development (1987: 8).

[67] See MacNeill *et al.* (1991: 20).

[68] See Heilbroner, 'Wealth', in Eatwell *et al.* (eds.), *The New Palgrave. A Dictionary of Economics* (Macmillan: London, 1987) vol. IV, pp. 880–3.

[69] *The Shorter Oxford English Dictionary* (revised and corrected 3rd edn, Oxford: Oxford University Press, 1987) p. 2,519.

artificial (capital goods) and cultural wealth. Yet, the principle of permanent sovereignty is, historically speaking, a resource- and investment-related concept and rather remote from wealth in general. It is neither appropriate nor wise to put 'wealth' in general under the permanent sovereignty umbrella.[70]

Economic activities

The concept of permanent sovereignty over natural resources *and economic activities* was introduced in the resolution launching the International Development Strategy for the Second UN Development Decade (DD II) in 1970.[71] It also features in the 1974 NIEO Declaration and the CERDS, but not in the NIEO Action Programme. The NIEO Declaration uses in one place the phrase 'natural resources and all economic activities'.[72] In contrast, one year later the UNIDO II conference referred to 'natural resources . . . and . . . all economic activities for the exploitation of these resources'. In the latter formulation, the scope of permanent sovereignty has not been significantly extended. Diaz also argues that the principle of permanent sovereignty should cover not only control over the resource, but also control over the production, especially in the case of oil: 'for the one who controls production also controls the market, since production is a key to determining the price of oil, and, therefore, the value of the resource. Sovereignty over a resource is meaningless unless it includes sovereignty over the value of the resource.'[73] This appears to be the case in the 1994 Energy Charter Treaty, one of the few international legal instruments which contains a definition (albeit a circular definition) of the term 'economic activity'. For the purposes of this treaty, it is defined as: 'economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of energy materials and products'.[74] These activities come within the purview of the principle of sovereign rights over energy resources as provided for in Article 18 of this treaty.[75] However, the term 'economic activities' may cover a much wider spectrum and could also include non-extractive industries and financial services (banks and in-

[70] See also Peters (1989: 7–9).
[71] Paragraph 73 of GA Res. 2626 (XXV), 24 October 1970.
[72] Paragraph 4(e) of GA Res. 3201 (S-VI), 1 May 1974. [73] Diaz (1994: 157).
[74] Article 1.5 of the Energy Charter Treaty, Lisbon, 17 December 1994.
[75] In comparison, Art. 56.1 of the 1982 Law of the Sea Convention confers on coastal States 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources . . . and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds'.

surance). Economic activities are undoubtedly part and parcel of the scope of economic jurisdiction of the host State. However, the principle of permanent sovereignty does not have much to add to this since it is in any case a rule that economic activities within the territorial jurisdiction of a State are subject to its sovereignty.

National resources and national wealth

In UN resolutions concerning the sovereignty of the territories occupied by Israel, the terms 'national wealth and resources', 'national resources' and 'all resources and wealth' are used. In this regard, as we shall see in chapter 5, a majority of the UN General Assembly preferred to extend the scope of permanent sovereignty beyond natural resources in order to include: the exploitation of 'human resources'; use and ownership of cultural, religious and other aspects of the national heritage; and the personal wealth of Arab people. In this particular context, permanent sovereignty over national wealth and resources is used as a comprehensive concept, linked up with the right of self-determination of the Palestinian people and 'permanent' sovereignty of Arab States, individually or perhaps collectively, as an element of pan-Arabism ('Arab fatherland'), over territories occupied by Israel.[76]

Definitions used in this study

In line with the recent tendency to limit the object of permanent sovereignty once again to 'natural wealth and resources', this study focuses on jurisdiction over 'natural wealth' and 'natural resources'. 'Natural wealth' refers to those components of nature from which natural resources can be extracted or which can serve as the basis for economic activities. Not all natural-resource benefits are extractable: ecosystems can provide many subtle services, for example, flood amelioration or air purification. Natural resources can be described as supplies drawn from natural wealth which may be either renewable or non-renewable and which can be used to satisfy the needs of human beings and other living species.[77] Both 'natural wealth and resources' and 'natural resources' are the object of the principle of permanent sovereignty and are used interchangeably in this study.

[76] See Malanczuk (1990: 170–8); de Waart (1994a: 140–3); and p. 152 below.

[77] See also Art. 1(e) of IUCN's Draft International Covenant on Environment and Development, revision of Draft 4, in IUCN-CEL/Rev. Draft 4/3 May 1993. It is notable that Working Draft 5 of 1994 no longer provides an article on the use of terms.

Goals and objectives for the exercise of permanent sovereignty

Claims regarding permanent sovereignty were initially motivated by efforts to reinforce the sovereignty of newly independent and other developing States.[78] Subsequently, claims regarding permanent sovereignty of peoples over natural resources were motivated by the desire to secure the benefits of natural-resource exploitation for non-self-governing peoples.[79]

Once most of the formerly colonial peoples had gained independence, emphasis shifted back to States as the main subjects invested with the right to permanent sovereignty, but with the injunction as the 1962 Declaration puts it that permanent sovereignty over natural wealth and resources '*must* be exercised' in the interest of the 'national development and the well-being of the people concerned'.[80] Likewise, subsequent resolutions increasingly emphasized that natural resources of developing countries must be utilized in the interest of development of those countries.[81]

Only a few references have been made to world economic interests, and most of them in an indirect way. The very first permanent sovereignty-related resolution (Resolution 523 (1952)) included as one of the objectives 'to further the expansion of the world economy'; the DD II Resolution (1970) pointed out that 'production policies should be carried out in a global context designed to achieve optimum utilization of world resources, benefiting both developed and developing countries';[82] and, finally, CERDS linked the right to association (and the right to form cartels) of primary commodity producers, a right sometimes claimed to arise from permanent sovereignty,[83] to 'the promotion of sustained growth of the world economy, in particular accelerating the development of developing countries'.[84] Such references are, however, the exception rather than the rule. The rule in permanent-sovereignty-related paragraphs of the NIEO resolutions is that they spell out vague objectives such as 'to safeguard these resources' (NIEO

[78] See the statement by Uruguay and Poland when they tabled proposals which finally resulted in the adoption of the first permanent-sovereignty-related GA Res. 523 and 626 in 1952. [79] For a discussion see chapter 2, pp. 49–51.
[80] Paragraph 1 of GA Res. 1803 (XVII), 14 December 1962 (emphasis added).
[81] See GA Res. 2158 (XXI), 25 November 1966.
[82] Paragraph 73 of GA Res. 2626 (XXV), 24 October 1970; see also para. 11.
[83] See para. 7 of GA Res. 3171 (XXVIII), 17 December 1973.
[84] Article 5 of CERDS reads: 'All States have the right to associate in organizations of primary commodity producers in order to develop their national economies, to achieve stable financing for their development and, in pursuance of their aims, to assist in the promotion of sustained growth of the world economy, in particular accelerating the development of developing countries. Correspondingly, all States have the duty to respect that right by refraining from applying economic and political measures that would limit it.'

Declaration) or none at all (Article 2 of CERDS), providing States with maximum discretion in the management of natural resources.

As regards the right to permanent sovereignty of peoples living under colonial or racial domination or foreign occupation, the primary objective undoubtedly has been 'to regain effective control over their natural resources'.[85] The objective of Decree I for the Protection of the Natural Resources of Namibia was indeed to secure 'for the people of Namibia adequate protection of the natural wealth and resources which is rightfully theirs'.[86]

It can be inferred from the series of environmentally relevant resolutions that States, as subjects of the right to permanent sovereignty, have increasingly been charged with the duty to manage the natural resources within their jurisdiction in an environmentally sound way or, in other words, in a sustainable way.[87]

Treaties which implicitly or explicitly formulate the right of permanent sovereignty hardly ever spell out its objectives. The Human Rights Covenants of 1966 provide that peoples may *for their own ends* dispose of their natural wealth and resources and that they should *enjoy and utilize* these fully and freely.[88] The African Charter on Human and Peoples' Rights of 1981 is slightly less general: 'This right shall be exercised in the exclusive interest of the people.'[89] It is further provided that States shall exercise this right 'with a view to strengthening African unity and solidarity'.[90]

Article 56 of the 1982 UN Convention on the Law of the Sea spells out that the sovereign right to natural resources is conferred upon States 'for the purpose of exploring and exploiting, conserving and managing the natural resources'. Innovative is the injunction enshrined in Article 193:

> States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

Finally, the two State Succession Conventions (1978 and 1983) contain provisions that agreements between the predecessor State and a newly independent State shall not infringe the principle of permanent sovereignty. They thus purport to provide newly independent States with maximum discretion (a *tabula rasa*)[91] as far as control over and management

[85] See GA Res. 3171 (XXVIII), 17 December 1973.
[86] Preamble. For a review of this Decree, see chapter 5, p. 147.
[87] See chapters 4 (pp. 120–42) and 10 (pp. 324–36).
[88] Article 1 and Arts. 25 and 47, respectively. [89] Article 21, para. 1. [90] Ibid., para. 4.
[91] See Vienna Convention on Succession of States in respect of Treaties, 23 August 1978, not yet in force, 17 ILM (1978), p. 1,488. The theory of *tabula rasa* is closely related to the 'Nyerere doctrine' named after the Tanganyikan prime minister who in 1961

of natural resources of their territories is concerned. This enables them to ensure that their peoples will fully benefit from the advantages to be derived from their natural resources.

Legal literature provides a fair account of the objectives to be pursued by the exercise of permanent sovereignty in the various periods of its evolution, as described in Part I of this study. For example, Hossain points out that:

The principle was originally articulated in response to the perception that during the colonial period inequitable and onerous arrangements, mainly in the form of 'concessions', had been imposed upon unwary and vulnerable governments.[92]

In another context, Hossain was more specific:

For developing countries the principle of permanent sovereignty was important because it provided a basis on which they could claim to alter 'inequitable' legal arrangements under which foreign investors enjoyed rights to exploit natural resources found within their territories. Such alteration could be affected through an exercise of (a) the right to nationalize, that is, to acquire the rights enjoyed by the foreign investor or (b) the right to alter certain terms of the arrangements (or to repudiate an agreement entered into with the foreign investor).[93]

Socialist international lawyers have paid ample attention to the principle of permanent sovereignty.[94] For example, Brehme analysed the need to exercise it within the framework of 'the struggle of the young independent states and other developing countries' for their economic independence:

It arises from the contradiction between the potentials which most of these countries have on the basis of their natural conditions for a blossoming and independent economy and the actual exploitation of this natural wealth by foreign capital to its own advantage ... National sovereignty over natural wealth and resources therefore means the objective driving out of foreign monopolies from the key positions of the economy, elimination of the domination of foreign monopoly capital ... abolition of the plundering of the natural wealth for the

advocated that newly independent African States should have the right to a 'period of reflection' and the right to review the terms of bilateral treaties within a period of two years from the date of independence. The government of Tanganyika (later incorporated into Tanzania) announced that this would not be applied to multilateral treaties which instead would be reviewed individually. See *Yearbook of the International Law Commission* (1962), vol. II, pp. 115 and 121. See also Makonnen (1984). See generally Bedjaoui (1970), who served as ILC Rapporteur on the issue during the drafting of the Conventions on Succession of States.

[92] Hossain (1984a: IX). [93] Hossain (1980b: 35).

[94] See generally on socialist conceptions of international law, Tunkin (1974 and 1986).

advantage of foreign monopolies and their home states which ensues on the basis of inequality and pressure.[95]

While Western commentators have acknowledged that States have the right to control their natural wealth and resources, their main preoccupation was and still is how permanent sovereignty could be made compatible with international obligations arising from general international law or contractual undertakings. As Hyde put it in 1956:

A state has the power to control and use its natural wealth and resources. It may thus enter into binding agreements for the development of its natural wealth and resources. In the exercise of its power, it is obligated to act in accordance with recognized principles of international law as well as international agreements and with due regard for existing legal rights or interests, with adequate, prompt and effective compensation as one remedy, if the exercise of powers impairs them.[96]

Schachter points out that the development of the permanent sovereignty entailed a challenge to some traditional international law concepts. In his view permanent sovereignty has become 'the focal normative conception used by states to justify their right to exercise control over production and distribution arrangements without being hampered by the international law of state responsibility as it had been traditionally interpreted by the capital-exporting countries'.[97] He argues:

It would therefore be a mistake to consider the idea of permanent sovereignty over resources as anachronistic nationalistic rhetoric. It should be viewed as a fresh manifestation of present aspirations for self-rule and greater equality.[98]

Among Third World international lawyers, Abi-Saab observes that the principle of permanent sovereignty 'addresses the question of the limits imposed by international law on States regarding alien economic interests within their national jurisdiction' and takes the view that while 'this exclusive power is subject to any limitations imposed by international law . . . sovereignty is the rule and can be exercised at any time . . . limitations are the exception and cannot be permanent, but limited both in scope and time'.[99] In the same vein Chowdhury concludes:

The principle underlines the domestic jurisdiction of the State over natural resources, economic activities and wealth within its national jurisdiction without however exempting it from the application of the relevant principles and rules of international law.[100]

[95] Brehme (1967: 265) (in the English summary).
[96] Hyde (1956: 865). [97] Schachter (1977: 124–5). [98] Ibid., p. 126.
[99] Abi-Saab (1984: 47–8). [100] Chowdhury (1988: 80).

Bedjaoui takes a more radical position:

When they treat the claim for the permanent sovereignty of States and nations over their own natural wealth as mere logomachy, traditional lawyers are singularly failing to understand the real facts about how the Third World countries have been dispossessed of their sovereignty for the benefit of foreign economic coteries.[101]

Bedjaoui considers the 'stronger and stronger assertion of the right of peoples and States to be in control of their natural resources' as a method of defence against the 'violent reaction by the imperialists to counter their demands for a new international economic order'.[102] In this respect he is supported by the French lawyer Rosenberg who analyses permanent sovereignty from the perspective of 'un droit à l'émancipation et une arme de libération pour les peuples du tiers monde'.[103] Zakariya also analyses the principle in the context of the search for an NIEO, but in more specific terms. He points out that 'petroleum, the natural resource par excellence ... kindled the big controversy' concerning the search for a new international economic order. However, NIEO debates and resolutions:

reaffirm the crucial place of natural resources, and the manner in which they ought to be developed and disposed of both for the benefit of the producing countries and in the interests of the world community at large.[104]

This study will stress that the exercise of permanent sovereignty should coincide with sustainable use of natural wealth and resources. Elian refers to the necessity for all States to ensure 'better husbanding of their natural resources'[105] and Weiss observes that:

While States have sovereignty over their territory, this sovereignty is of necessity tempered by the requirements of intergenerational equity. They have rights to use and benefit from the resources of the planet, but not to destroy it for future generations.[106]

In summary, the motives for formulating the principle of permanent sovereignty and the objectives to be pursued by it are obvious. The principle was developed during the 1950s, as part of an effort both to secure the benefits arising from exploiting natural resources for peoples living under colonial rule and to provide newly independent States with a shield against infringements upon their sovereignty by foreign States or companies. A far-reaching series of rights was claimed on the basis of the principle of permanent sovereignty. In recent texts a growing emphasis can be discerned

[101] Bedjaoui (1979: 99). [102] Ibid., p. 153. [103] Rosenberg (1975–6) and (1983).
[104] Zakariya (1980: 209). [105] Elian (1979: 217). [106] Weiss, E. B. (1989: 290).

on the obligation of all States to manage their resources in the interests of economic development and that of their population, and in an environmentally responsible way, while also taking into account the interests of other States and humankind. This will be discussed further in Part III.

Scope and orientation of the study

Part I of this book summarizes and assesses the evolution of the principle of permanent sovereignty through the political organs of the United Nations during the period 1945–95. Approximately sixty-five resolutions are reviewed, as well as for the most important ones the records of the relevant debates conducted in working groups, committees and sessions of the UN General Assembly, ECOSOC, the Commission on Human Rights, UNCTAD and, on one occasion, the Security Council.

The overall aim of Part I is to analyse the major norm-setting legal instruments which initially shaped the principle and which later tailored it to new circumstances, practices and needs. These legal instruments include in particular, but not exclusively, UN General Assembly resolutions.[107]

Part II shows that permanent sovereignty is deeply rooted in international law and has not evolved as a legal principle in isolation but rather as part and parcel of other modern trends in public international law. These related developments in modern international law have had a major impact on the evolution, application and interpretation of the principle of permanent sovereignty. Chapter 6 deals with developments in international investment law, in particular the controversies relating to the national versus the international minimum standard; chapter 7 discusses the international law of the resources of the sea, especially the extension of exclusive economic jurisdiction over marine resources; and chapter 8 reviews trends in international environmental law and assesses their impact on the principles of territorial sovereignty and permanent sovereignty over natural resources.

Part III examines the essential content of permanent sovereignty, particularly the rights *and* duties of States and peoples arising from the principle. Chapter 9 focuses on what kind of corollary *rights* have been claimed on the basis of permanent sovereignty and can be derived from it: the right to dispose freely of natural resources; to choose freely a socio-economic system; to expropriate or nationalize foreign investment; to regain effective control over natural resources and to receive compensation

[107] See the list contained in Appendix I.

for damages to natural resources inflicted by other States or by foreign enterprises; and the right of States to pursue their own environmental and developmental policies. To what extent are these rights recognized in the sources of international law?

The main questions to be answered in chapter 10 are: does the principle of permanent sovereignty raise issues not only of rights but also of obligations incumbent on States and peoples? If so, what are these obligations? An analysis will be made of the emergence of obligations pertaining to national management of natural resources. This will entail a search for State obligations toward peoples and nationals of the managing State itself, toward other States (for example, with respect to transboundary natural resources) as well as toward other subjects of international law (for example, 'humankind' in general). Such obligations may relate to: respect for the rights of (indigenous) peoples and future generations; fair treatment of foreign investors; due care for the environment (including that of other States and of areas beyond the limits of national jurisdiction); equitable use of transboundary resources; and international co-operation for sustainable development, in particular of developing countries.

This analysis consistently takes as a starting point the rights and claims contained in the approximately sixty-five UN resolutions reviewed in Part I. Then, partly building on the discussion of various branches of international law in Part II, the recognition and further development of the principle of permanent sovereignty will be investigated, with reference to the main recognized sources of international law, along the lines of Article 38 of the Statute of the ICJ. Thus the analysis includes:

- *multilateral treaties*: for example, the Law of the Sea Conventions of 1958 and 1982, the World Bank Convention on the Settlement of Investment Disputes between States and Nationals of Other States, human rights treaties, the Vienna Conventions on State Succession, commodity agreements, and selected multilateral treaties in the field of international trade, foreign investment and the environment;[108]
- major trends in State practice, especially as they are manifested in the form of bilateral investment protection treaties between (a) industrialized and developing countries, and (b) developing countries *inter se*;
- international judicial decisions and arbitral awards, especially those dealing with the settlement of disputes arising over nationalization of foreign investments;[109] and

[108] See the list of treaties in Appendix II.
[109] See Appendix III.

- the literature in international law and the work of international law forums (such as the International Law Commission and the International Law Association).

Chapter 11 provides conclusions and final observations. Principal issues to be addressed in this chapter on the basis of the study relate to:

1. The origin, development and current legal status of the principle of permanent sovereignty over natural wealth and resources. Is it correct to assert, as is often done, that during the initial years permanent sovereignty evolved as a corollary of the principle of *self-determination of peoples*, while in later years the link with self-determination and human rights has become looser and (territorial) *sovereignty of States* has come to serve as its main legal foundation? If so, at what point did the emphasis shift, and for which reasons? Has the principle of permanent sovereignty become firmly accepted in international law or does it still belong to the 'grey zone' between mere political claims and international law?[110] What conclusions can be drawn as to the 'law-making' functions of the political organs of the United Nations?
2. The impact of the various challenges to State sovereignty and of the changing perceptions of the role of the State in economic development on the current relevance and interpretation of permanent sovereignty. Will awareness of economic interdependence and the process of environmental globalization eventually result in 'the end of permanent sovereignty over natural resources'? Have relevant traditional doctrines, notably the 'national standard' and the 'international minimum standard', and in particular the principles and rules pertaining to the treatment of foreign investment, lost legal significance? Otherwise, to what extent have they been or can they be reconciled with the principle of permanent sovereignty? What role can be attributed to international law in the peaceful settlement of disputes over the distribution and management of natural resources?
3. The new directions of permanent sovereignty in an interdependent world. What are the consequences of the increasing attention for the rights and interests of (indigenous) peoples and humankind as a whole for the status and content of the principle of 'permanent' sovereignty of *States*? Can a changing approach to the exploitation of natural resources be discerned: from full use toward optimal utilization? Can one, as in certain other branches of international law, deduce from the evolution of the principle of permanent sovereignty a trend from 'co-existence' towards 'co-operation', from

[110] See for an exploration in the grey zones of international law, Verwey (1984: 536–45 and 555–6).

> mere attention for its corollary rights towards gradual recognition of corollary obligations, from emphasis on the rights of States towards the interests of people and mankind as a whole? If the answer is yes, how do these rights and duties relate to each other? What is the impact of the emergence of the international law of sustainable development on the principle of permanent sovereignty? Is its original linkage with the cause of promoting the development of developing countries being replaced by increasing emphasis on proper and environmentally sound management of natural wealth and resources?

In order to be able to examine the issues arising from these questions we review various aspects of international law. A definitive characterization of the principle of permanent sovereignty may prove difficult to attain at this stage, given the controversial nature of the issues involved. This is partly a consequence of the nature of the discipline. International law does not lend itself easily to definitive conclusions as it still has to take shape in many fields and is characterized by the inadequacy of international legislative and judicial bodies. As a consequence of the predominant status of the principle of sovereignty, States still have a right to make their own interpretations in many fields. Furthermore, many international law instruments referred to in this study have been formulated in broad terms rather than precise legal language. The contents of these instruments often resemble codes of conduct if not programmes of action, even though they may have been concluded in the legal form of a treaty. Therefore, it will often not be immediately clear what their implications are. Standard methods of interpretation, such as the use by analogy of the interpretation rules of Article 31 of the Vienna Convention on the Law of Treaties, may not be sufficient. And even if the rules are clear, it is by no means certain that they will provide an unambiguous conclusion on the state of the law. For example, State practice may not be in accordance with treaty law. A treaty may not have been ratified by a significant or representative majority of States. Consequently, various alternative interpretations may have legal merits, and this is often evidenced by separate and dissenting opinions of judges and arbitrators in international courts and tribunals. This means that majority decisions can only be taken as authoritative statements on the state of the law in a particular field at a particular point of time and not as final rulings for all time. Finally, as noted above, permanent sovereignty touches on controversial issues in international law and international relations and one has to enter the grey zone between politics and law in order to understand its evolution and content. Permanent sovereignty has

never been a static principle but one often in a state of flux. Hence, it can only be assessed if law is seen as a process. Basically, this process has been characterized by progress in a positive sense, but the evolution of permanent sovereignty has also been affected by stagnation and even regression. The international law status of the principle has increasingly been recognized and permanent sovereignty is expected to serve a host of causes, including promoting the economic development of developing countries, contributing to the attainment of self-determination of peoples and effectuating State economic sovereignty, promoting respect for peoples' and human rights and optimal utilization of the world's natural resources, enhancing nature conservation and pursuing sustainable development.

All this requires that permanent sovereignty should be perceived and interpreted as a fully fledged principle which gives rise to duties in addition to rights. In view of the particular background of the principle, namely that of a main element of the decolonization process and an instrument for the development of newly independent States, it is only logical that in the past legal development and even academic analysis have tended to focus on rights rather than obligations. Yet, it is a deeply rooted presumption of international law that rights and duties are correlative. As early as 1925 Rapporteur Huber, the then President of the Permanent Court of International Justice, pointed out in the *Spanish Zone of Morocco Claims*: 'Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility.'[111] This comes perhaps by coincidence close to the finding of the International Court of Justice in the Barcelona Traction Case (1970): 'Responsibility is the necessary corollary of a right',[112] a case which is best known for the court's *obiter dictum* about obligations *erga omnes*. To summarize, whoever is endowed with the legal capacity to manage natural resources has to accept a balance between rights and duties in order to do justice to the various objectives that permanent sovereignty over natural wealth and resources is meant to serve.

[111] *Spanish Zone of Morocco Claims*, 2 RIIA (1925), p. 615.

[112] *Barcelona Traction, Light and Power Company Ltd Case* (*Belgium* v. *Spain*), *ICJ Reports* (1970), para. 36.

PART I

The birth and development of the principle: the UN General Assembly as midwife

Introductory remarks to Part I

This Part maps the history of the principle of permanent sovereignty over natural resources from its birth in the United Nations and its evolution from a political claim to an accepted principle of international law. The hypothesis is that resolutions of the political organs of the United Nations, especially the General Assembly, have been instrumental in achieving this acceptance. This is not to say become the 'modern source of international law', as Bedjaoui suggested in reference to their flexibility, rapid formulation and democratic nature as opposed to the inability of custom to respond to contemporary challenges and to the limitations of treaties which are not always a manifestation of free will.[1] However, on the other hand we do not subscribe to Schwarzenberger's view that the entire permanent sovereignty exercise 'is no more than a convenient para-legal ideology of power economics' and that the term 'permanent sovereignty over natural resources' is 'meaningless'.[2]

The intention is to present a reading of primary sources in order to put the UN debate on permanent sovereignty in perspective and to show that the UN performed a number of key functions in the process of acceptance. The UN took stock of demands initially formulated in particular by Latin American States but shortly thereafter supported by socialist countries from Eastern Europe, thus embroiling the permanent sovereignty debate in Cold War rivalry, as well as demands by newly independent States of Asia and Africa, which caused permanent sovereignty to become an issue of North–South confrontation. Furthermore, the UN served as a vehicle for letting off political steam; it identified and articulated problems and needs of developing countries; it provided a forum of debate between capital-exporting and capital-importing countries; and it pointed out policy

[1] Bedjaoui (1979: 140). [2] Schwarzenberger (1970: 49) and (1976: 22).

measures to promote economic development and foreign investment flows, and, more recently, sustainable development and environmental conservation. In the end, it also served as 'quasi-law-maker'[3] or, as Cheng put in another context, 'midwife for the delivery of nascent rules'.[4] Indeed, to continue this metaphor, the cradle of the principle of permanent sovereignty over natural resources stood in the UN General Assembly. Occasionally, there were some growing pains and at times a miscarriage threatened as reflected in some deeply split votes. However, it will be argued in Parts I and II that permanent sovereignty over natural resources eventually matured as a fully fledged legal principle in treaty law and State practice.

Chapter 2 examines the period up to 1963 when the principle was introduced, an effort which bore fruit in the adoption, in 1962, of the landmark Declaration on Permanent Sovereignty over Natural Resources. Chapter 3 reviews the manner in which the exercise of permanent sovereignty subsequently became linked with efforts to promote the economic development of developing countries and to establish an NIEO. After 1975 the emphasis shifted towards the promotion of exploration and exploitation of natural resources in developing countries and the role to be played by international institutions and foreign investment.

Meanwhile, environmental preservation and sustainable use of natural resources had become an important focus of concern for the United Nations though permanent sovereignty remained a very important element in the discussion of sustainable development policies. While some early resolutions on the conservation of nature are identified, chapter 4 focuses on the way in which during the period from the Stockholm Conference (1972) up to and including the Rio Conference (1992) the permanent-sovereignty debate was put in an environmental context by formulating responsibilities for proper and environmentally sound management of natural wealth and resources and by integrating environmental and developmental policies. Chapter 5 deals with a relatively controversial aspect of permanent sovereignty over natural resources, namely that applying to territories occupied or administered by foreign powers by briefly describing the legal situation with respect to the natural resources of pre-independent Namibia, of the territories occupied by Israel and of the Panama Canal and the Canal Zone before 1978.

Throughout the entire permanent-sovereignty debate an inherent tension can be noted between efforts, on the one hand, to formulate as many

[3] See Falk (1966: 782). [4] Cheng (1965: 39).

rights as possible of (colonial) peoples and developing States and to define them as 'hard' as possible and, on the other hand, efforts to qualify permanent sovereignty by formulating duties incumbent upon right-holders in order to create a balance between the interests of all parties involved and thus to serve best the main objective of permanent sovereignty: to promote development.

2 The formative years (1945–1962)

This chapter analyzes the development of the principle of permanent sovereignty over natural resources through the political organs of the United Nations in the period up to 1963. The chapter first discusses the concerns during the immediate post-war years regarding the scarcity, optimum utilization and conservation of natural resources, which led to a number of initiatives in the UN. Part of the discussion relates to the question whether a State has the right to dispose[1] freely of its own natural resources or that, in the management of its natural resources, it should take into account the overall needs of the world economy as well.

Latin American countries, especially Chile, took the initiative of introducing the principle of permanent sovereignty in the UN. They used the United Nations as the main forum to express their uneasiness about their relationship with the United States, which they perceived as very unequal. Consequently, they consistently emphasized principles such as national sovereignty, sovereign equality and non-intervention as well as the primacy of national law and domestic courts.[2] Their initiatives resulted, first, in General Assembly Resolution 626 (VII), often perceived as the genesis of the principle of permanent sovereignty[3] but which became branded as 'the nationalization resolution of the Seventh General Assembly session'. The second result was the inclusion of a provision on sovereignty over natural resources in draft Article 1 on the right of peoples to self-determination in the two Human Rights Covenants, despite vigorous opposition from

[1] In English, the expression 'dispose of' can have two different meanings, i.e., (a) to alienate or abandon; and (b) to have at one's disposal powers of decision-making as to how something is to be used. Throughout this study it is used in the latter sense.

[2] See, for example, chapter IV on Fundamental Rights and Duties of States as included in the Charter of the Organization of American States, 30 April 1948, 119 UNTS, p. 3; see also the Convention on Rights and Duties of States, signed in Montevideo, 26 December 1933, 165 LNTS p. 19.

[3] Brownlie (1990: 539).

Western countries in the UN Commission on Human Rights, ECOSOC and the Third Committee of the General Assembly.

In 1958, the General Assembly established a nine-member Commission to conduct a full survey on the status of permanent sovereignty over natural wealth and resources and to make recommendations for its strengthening, where necessary. The Commission concluded its work on this project in 1961 by submitting a draft Declaration on Permanent Sovereignty over Natural Resources, which is reviewed in this chapter. The detailed proceedings of the Commission, the Second Committee for Economic and Financial Affairs and the Plenary of the Assembly serve as highly relevant *travaux préparatoires* for a proper interpretation of the Declaration. Though carefully prepared, the draft text was the object of lengthy debates and extensive amendment, requiring many votes to be taken in the Second Committee and, subsequently, the Plenary of the General Assembly.

The early years (1945–1951): balancing national and global interests

Immediate post-war concerns

In the aftermath of the world economic crisis of the 1930s and of the devastating World War Two, industrialized States, especially the USA, became aware of their dependence on overseas raw materials and of the vulnerability of their supply lines. This concern was explicitly reflected in the Atlantic Charter of 1941, which pointed out that the Allies:

> will endeavour, with due respect for existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity.[4]

Subsequently, this concern was implicitly expressed in the Articles of Agreement of the IBRD[5] and the IMF[6] and in the preamble of the General Agreement on Tariffs and Trade (GATT). Reference is made in these documents to the need of developing 'the productive resources of all members' (IBRD, IMF) and 'the full use of the resources of the world' (GATT) in order to contribute to a balanced and expanding world economy.

It may also be illustrative for the spirit prevailing at that juncture to refer to a surprising initiative of the International Co-operative Alliance (ICA), a consumers' organization, which in 1947 submitted to ECOSOC a proposal

[4] Text in *Documents on American Foreign Relations* (1941–2), vol. IV, p. 10.

[5] See Art. I-i and iii. [6] Art. I-iii.

concerning control over world oil resources. On this issue the ICA had adopted a resolution in 1946 in which it emphasized the need for placing control and administration of the oil resources of the world under the authority of an organ of the United Nations, and, as a first step in that direction, the oil resources of the Middle East. These were to be administered by and with the consent of the States involved.[7] The ICA proposed the establishment of a UN Petroleum Commission under the authority of ECOSOC. In its report to ECOSOC, it referred to the Atlantic Charter's principle of equal access for all States to the raw materials of the world and stated:

> From the consumers' viewpoint it is absolutely necessary that raw materials should be made available to the whole of humanity on equal terms. No valid reason can be constructed for regarding every raw material as the monopoly of the State within whose boundaries it happens to exist or can be produced. On the contrary, raw materials should be the first thing after armaments to be placed under the control of the United Nations.[8]

The ICA further proposed that the United Nations should draw up a convention on international control over oil resources, especially those in the Middle East, where the greater part of the unexploited oil resources of the world appeared to be located. The convention should stipulate that oil resources be exploited in the public interest, that all have equal access to them and that sufficient reserves be left for the needs of future generations.[9] This convention should also be agreed to by the Middle East countries. The ICA's representative pointed out that these proposals did not purport to infringe on the sovereign rights of these States, since they were not meant to transfer property titles.[10]

The ICA requested the United Nations to consider the question urgently, because: rivalry for the acquisition of new oil fields might endanger world peace; equitable access to world oil resources was a vital condition for the world's economic reconstruction; and there was a tendency on the part of large oil enterprises to fix prices without considering the interests of the consumer. The proposals, how ever, have never triggered any action in the UN.

In the late 1940s concern also arose about the conservation and effective utilization of natural resources. In view of the timber shortage in Europe,

[7] UNYB (1947–8), p. 549.
[8] UN Doc. E/449, 2 July 1947, p. 2; and UN Doc. E/449/Add.1, 31 July 1947.
[9] UNYB (1947–8), p. 550.
[10] Official Records of the Economic and Social Council, 111th meeting, 11 August 1947, p. 195.

the Food and Agriculture Organization (FAO) organized an international timber conference in 1947, and stressed the need for a satisfactory distribution of timber supplies and long-term measures to restore forests as a part of European reconstruction. In addition, in 1949, following a proposal of the USA, submitted as early as 14 September 1946, ECOSOC organized a UN Scientific Conference on the Conservation and Effective Utilization of Natural Resources as a joint project of the United Nations and the relevant specialized agencies. The primary concern of the conference was the exchange of ideas and experience in the field of resource management and human use of resources. Discussions focused on the world resource situation, including the issues of resource depletion, critical shortages, use and conservation, and resource exploitation techniques suitable for less developed countries. The central issue was how to meet growing demand. Although the conference did not adopt specific recommendations, it stated that 'scientific knowledge can discover and create new resources and husband better those already in use, so that a new era of prosperity awaited mankind', on condition that war and the wasteful depletion of resources associated with it would be eliminated.[11]

These proposals reflected the war-time problems of the Allied Powers in getting access to vital resources and properly managing natural resources. However, in the post-war period it soon turned out to be impossible to agree on international co-operation, let alone on a common regime for the management of natural resources; on the contrary, efforts to reinforce national control over natural resources soon came to dominate the political scene.

Using natural resources in the national and global interest

On 26 November 1951, Poland introduced, under the item 'Economic Development of Under-Developed Countries', a draft resolution on integrated economic development and long-term trade agreements.[12] Member States were invited to conclude long-term trade agreements 'for supplying to the under-developed countries machinery and equipment essential for the fulfilment of the plans for the economic development of these countries in exchange for raw materials exported by them'. Poland pointed out that such agreements 'must not contain any economic or political conditions violating the sovereign rights of the economically under-developed countries or conditions which are contrary to the aims of the plans for economic development of these countries'.[13] This document gave rise to a vigorous

[11] UNYB (1948–9), pp. 481–2, at p. 482.

[12] UN Doc. A/C.2/L.81, 26 November 1951; and A/C.2/L.81/Corr. 1.

[13] Ibid., para. 5.

debate which stimulated a flood of amendments and focused on the extent to which under-developed countries should take world economic interests into account in their natural resources policy. The Polish draft stipulated that the under-developed countries have the full right to determine freely the use of their natural resources and referred to economic development plans and national interests of these countries only.[14] The USA submitted amendments proposing to insert, for example, a reference to 'the interests of an expanding world economy'.[15] Poland considered this as an attempt to submerge the problem of economic development of the under-developed countries into that of the needs of the USA, which was 'particularly desirous of securing raw materials for its armaments race'.[16] This would result in a further increase of 'United States pressure on under-developed countries to secure strategic raw materials'.[17] Egypt, India and Indonesia submitted a compromise sub-amendment to the American proposal, according to which the relevant part of the preamble should read: 'that they must utilise such resources to promote further the realization of their plans of economic development, in accordance with their national interests, thereby participating in the expansion of the world economy'.[18] Furthermore, the operative part should recommend that member States conclude trade agreements in order to facilitate:

> the development of natural resources which can be utilized in the first instance for the domestic needs of the under-developed countries and also for the needs of international trade, provided that such trade agreements shall not contain economic or political conditions violating the sovereign rights of the under-developed countries, including the right to determine their own plans for economic development.

In the opinion of the USA, however, this formulation did not reflect sufficient emphasis on the needs of the world economy. During the debate in the Second Committee, India agreed on behalf of the three delegations to replace the words 'thereby participating in' by the words 'and to further'. Earlier, Egypt had already pointed out that under-developed countries 'were under the obligation to use their resources for their own economic development as well as for that of the world in general'.[19] Thereupon, the compromise text was adopted without discussion as General Assembly Resolution 523 (VI).[20]

[14] See preamble, para. 1.
[15] UN Doc. A/C.2/L.120, 20 December 1951, sub. 1.
[16] UN Doc. A/C.2/SR.173, 3 January 1952, p. 171, para. 21.
[17] UN Doc. A/C.2/SR.174, 4 January 1952, p. 179, para. 45.
[18] UN Doc. A/C.2/L.124, 3 January 1952.
[19] UN Doc. A/C.2/SR.174, 4 January 1952, p. 175, para. 3.
[20] UN Doc. A/PV.360, 12 January 1952, p. 338 and UNYB (1951), p. 418.

The relevance of this resolution lies in the fact that it formulated:

1 for the first time the (sovereign) *right* of 'under-developed countries' to determine freely the use of their natural resources;
2 for the first time the *obligation* to utilize such resources in order to be in a better position to further the realization of their plans of economic development in accordance with their own national interests; and
3 for the first (and last!) time the obligation to utilize such resources not only in their own national interests, but also in order to further the expansion of the world economy.[21]

The 1952 'nationalization' resolution: the demand for economic independence

First North–South nationalization clash: the Anglo-Iranian Oil Company

The nationalization by Iran of the Anglo-Iranian Oil Company in 1951 provided the first major economic 'North–South clash' in the post-war period. By the terms of a concession agreement, concluded in 1933 between the British-owned Anglo-Persian Oil Company and the government of Iran, the company had acquired, up to 1993, the exclusive right to extract and process petroleum in a specified area in Iran. On 1 May 1951, Dr Mossadegh, the Prime Minister of the then socialist Iranian government, announced the official decision to nationalize the company and to annul the 1933 oil concession agreement. The National Iranian Oil Company was established to take over the exploitation of the nationalized oil fields. Obviously, this situation jeopardized the free flow of oil to the United Kingdom. When the Iranian government announced its unwillingness to submit the dispute arising from this act of nationalization to arbitration, the British government, on 27 May 1951, filed an application with the International Court of Justice. It requested the court to declare that the Iranian government was under an obligation to submit the dispute to arbitration under the provisions of the arbitration agreement or, alternatively, that the Iranian government was acting contrary to international law, particularly to its obligations under the 1933 Agreement. In a provisional order of 5 July 1951,[22] the court prescribed a number of interim measures which parties should observe in order to prevent an aggravation of the dispute, including permission to continue the operations of the Anglo-Iranian Oil Company pending settlement of the dispute. Iran, however, refused to comply with

[21] For a brief review of the debate see UNYB (1951), pp. 417–19.
[22] *ICJ Reports* (1951), pp. 89–98. See also Dolzer (1992b).

these interim measures. The British government subsequently requested the Security Council in October 1951 to order Iran to obey the provisional court order (cf. Article 94.2 of the UN Charter).[23] But after an extensive debate the Security Council decided, following a French proposal, to adjourn its debate on the issue until the court had ruled regarding its jurisdiction on the matter. On 22 July 1952, the court gave a final judgment, by nine votes to five, concluding that it had no jurisdiction to deal with the case. One of its main arguments was that the concession contract did not fall within the meaning of the term 'international conventions' of Article 38(1) of the court's Statute. The court stated that the agreement itself could not be considered as anything more than a 'concessionary contract between a government and a foreign corporation'. In 1953, a new Iranian government under the leadership of the Shah came to power after a *coup d'état* in which the British and US secret services were reportedly involved. In 1954, the new government signed a new agreement with an international oil consortium consisting of British, Dutch, American and French oil companies.[24]

During the years of the Anglo-Iranian dispute, ECOSOC and the UN General Assembly discussed the right of peoples and nations to take charge of their own natural resources. This occurred in two different contexts, namely the debates on: (a) the promotion and financing of economic development in under-developed countries; and (b) the drafting of human rights treaties. The first context has often been overlooked, both in international law literature and in relevant UN documents.[25]

The 'nationalization' resolution debate: victory for communist propaganda?

Draft resolution of Uruguay

On 5 November 1952, Uruguay submitted a draft resolution under the item 'Economic Development of Under-developed Countries'.[26] The preamble recognized 'the need for protecting economically weak nations which are tending to utilize and exploit their own natural resources'. The operative part recommended that member States recognize 'the right of each country to nationalize and freely exploit its natural wealth, as an essential factor of

[23] See on the concurrent use of these two UN organs, van Elsen (1986: 57–60).

[24] See Mughraby (1966: 66–8) and Schwarzenberger (1969: 71).

[25] See, for example, 'Historical Summary of Discussions Relating to the Question of Permanent Sovereignty of Peoples and Nations over their Natural Wealth and Resources', UN Doc. A/AC.97/1, 12 May 1959.

[26] UN Doc. A/C.2/L.165, 5 November 1962 and Corr. 1–3.

economic independence'. In the preamble, nationalization of this wealth was said to be in line with Article 1.2 of the UN Charter which refers to the principle of self-determination of peoples. When introducing the draft resolution, Uruguay explained that in its view the free exploitation of a country's natural wealth was directly linked to financing its economic development. It pointed out that:[27]

Foreign financing in the form of aid, loans or private investments was certainly a valuable and indeed an essential factor in the development of under-developed countries but it was not the ideal situation. The ideal for an under-developed country was to attain economic independence, to dispose freely of its own resources, and to obtain foreign exchange by selling its products to buyers of its own choice.

Since Uruguay had always pursued a policy of 'scrupulous observance of its obligations towards foreign investors and foreign capital', it claimed to have 'the necessary moral authority to introduce its draft resolution'. It added that the sovereign right of States to exploit 'what belonged to them' should certainly not be confused with the 'manifestations of an aggressive and destructive ideology'.[28] Despite this introduction, the draft resolution triggered a considerable amount of negative reactions from Western delegations, the media and business organizations such as the International Chamber of Commerce, and provoked heated debates in the General Assembly's Second Committee. Eight meetings of the Committee and a plenary meeting of the UN General Assembly were devoted to it.

Unbalanced draft resolution? The debate in the Second Committee

The Uruguayan initiative was warmly welcomed by some Latin American countries (such as Bolivia and Argentina), while others (for example, Mexico and Haiti) were sceptical.[29] Bolivia, a country which had proclaimed the nationalization of its tin mines in April 1952, following a social revolution, submitted an amendment purporting to include the operative provision that: 'Member States in deference to the right of each country to nationalize and exploit its natural wealth, should not use their governmental and administrative agencies as instruments of coercion or political and economic intervention'.[30] In the debate Bolivia recalled the 'bitter experience' of Mexico and Iran in the course of the nationalization of their

[27] UN Doc. A/C.2/SR.231, 6 December 1952, p. 253, para. 1 (Mr Cusano).
[28] UN Doc. A/C.2/SR.231, 6 December 1952, pp. 253–4, paras. 6 and 8.
[29] UNYB (1952), p. 387. [30] UN Doc. A/C.2/L.166, 6 November 1952.

petroleum resources. Furthermore, it gave an extensive review of its own 'dramatic experience' in connection with the nationalization of its mining industry and the concomitant economic and political implications.

However, in the view of Mexico (which had nationalized its oil industry in 1938) there was no need for an international recognition of 'the right of States to nationalize their natural resources, as any such proposal would seem to cast doubt on the validity of a right the exercise of which was one of the clearest manifestations of national sovereignty'.[31] For similar reasons Australia, Canada, Haiti, Honduras, Iran, New Zealand, the Philippines, Saudi Arabia, South Africa, Sweden and Turkey cast doubts on the usefulness of this project. Chile, on the other hand, argued that the United Nations was the most appropriate organization to discuss this kind of matter:

> It was the only body in which due recognition could be achieved of the fact that the recovery and free disposal by the under-developed countries of their natural wealth and resources was a historical necessity which could no more be disregarded than could man's inevitable growth from childhood to maturity.[32]

The Netherlands took a rather strong stand against the draft resolution, in particular since 'it omitted any mention of the obligation to give adequate compensation in the event of nationalization and spoke of economic independence just at a time when efforts were being made to stress the inter-dependence of economic problems and the need for international co-operation'. In addition, the Netherlands considered it to be contradictory to adopt, on the one hand, a resolution advocating the establishment of an international finance corporation and, on the other, to adopt a resolution 'which could deepen existing misgivings and deter foreign investment'.[33]

After informal consultations, Uruguay and Bolivia submitted a revised draft resolution,[34] taking into account the various suggestions and objections pertaining to the original draft of Uruguay. The explicit reference to the 'right of each country to nationalize and freely exploit its natural wealth' was deleted and replaced by the following operative paragraph:

> *Recommends* States Members to maintain proper respect for the right of each country freely to use and exploit its natural wealth and resources as an indispensable factor in progress and economic development, and therefore to refrain from the use of any direct or indirect pressure such as might jeopardize, on

[31] UN Doc. A/C.2/SR.231, 6 December 1952, p. 254, para. 13.
[32] UN Doc. A/C.2/SR.234, 9 December 1952, pp. 268–9, para. 36.
[33] UN Doc. A/C.2/SR.232, 8 December 1952, p. 259, paras. 4–5.
[34] UN Doc. A/C.2/L.165/Rev.1, 8 December 1952.

the one hand, the execution of programmes of integrated economic development or the economic stability of the under-developed countries, or, on the other hand, mutual understanding and economic co-operation between the nations of the world.

The preamble, incidentally, said that 'the right of *peoples* freely to use and exploit their natural wealth and resources is inherent in their *sovereignty* and is in accordance with the purposes and principles of the Charter of the United Nations'.[35]

The USA submitted amendments according to which the reference to the 'need to maintain mutual understanding and economic co-operation between the nations of the world' should be moved to the preamble; it proposed to replace the aforementioned operative paragraph by three new paragraphs, embodying, among other things, recommendations relating to the need for international economic co-operation, respect for international law and promotion of foreign investment.[36]

Although the word 'nationalization' was no longer mentioned in the revised version (reference is made to the right 'to use and exploit' only), the 'nationalization' issue continued to be at the centre of the debate. Many delegations questioned whether nationalization or 'government exploitation' was an indispensable feature of progress in under-developed countries. Some (for example, Canada) criticized the bias of the draft resolution to 'centralized government planning of economic affairs', and expressed the fear that the draft resolution, even in its revised form, would contribute to creating an atmosphere unfavourable to private investment.[37]

Australia pointed out that the whole discussion had been characterized by certain political overtones and that it was therefore difficult to pass judgment on the draft 'dispassionately'.[38] The Philippines expressed itself in favour of the principle that States should have 'permanent sovereignty over their own natural resources', but referred to the debate in the Commission on Human Rights on the incorporation of the right of self-determination of peoples in the draft covenants on human rights (see below). Therefore, it would be better to wait for the results of this debate.[39] The actual proposal for adjournment was submitted by Denmark, but it was rejected.[40] At the very last moment, the Bolivian and Uruguayan

[35] Emphasis added. [36] UN Doc. A/C.2/L.188, 10 December 1952.

[37] UN Doc. A/C.2/SR.235, 10 December 1952, p. 275, para. 40.

[38] UN Doc. A/C.2/SR.237, 11 December 1952, p. 280, para. 16. [39] Ibid., paras. 9 and 11.

[40] After a procedural debate, the Danish proposal was put to a roll-call vote on 11 December 1952 and rejected by twenty-eight votes to sixteen, with seven abstentions: UN Doc. A/C.2/SR.237, 11 December 1952, p. 281, para. 22.

delegations accepted the text of an Indian amendment, which proposed a new operative part:[41]

Recommends all Member States in the exercise of their right freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development, to have due regard, consistently with their sovereignty, to the need for the maintenance of mutual confidence and economic co-operation among nations;

Recommends further all Member States to refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources.

After rejection of a substantial part of the US amendments, the Second Committee adopted the draft resolution incorporating the Indian amendment.[42] The USA explained why in its view the draft resolution was 'unbalanced':

whilst it specifically recognized the responsibilities of Member States towards governments which felt that their peoples' welfare would be furthered by exploiting their resources through nationalization, it failed to recognize any reciprocal responsibility towards private investors whose property was expropriated as a result of nationalization.[43]

Nineteen other delegations explained their votes in the Second Committee: seven Western delegations and twelve from the developing part of the world. It can be inferred from the Committee's debate that there was widespread, if not unanimous, support for the principle that a State has the sovereign right freely to use and exploit its own natural wealth and resources. Moreover, no delegation questioned the right of a State to nationalize its natural resources, whenever the State concerned deemed this to be in the public interest. However, deep-seated controversies were revealed on:

1. the competence of the United Nations to discuss, and international law to interfere with, these matters: for example, Mexico argued that it was for national constitutions, and 'not for the United Nations' to recommend the manner in which the right to nationalize should be exercised;[44]
2. the procedural appropriateness of adopting a resolution on this issue:

[41] UN Doc. A/C.2/L.189, 10 December 1952.

[42] By thirty-one votes to one (USA), with nineteen abstentions. The abstentions mainly came from other Western countries, plus China, Honduras, Peru, the Philippines and Venezuela. UN Doc. A/C.2/SR.237, 11 December 1952, p. 282, para. 39.

[43] UN Doc. A/C.2/SR.237, 11 December 1952, p. 282, para. 41.

[44] UN Doc. A/C.2/SR.238, 12 December 1952, p. 287, para. 21.

the Philippines repeatedly referred to the more elaborate discussion on this issue in the Commission on Human Rights,[45] while the French delegate put it as follows: 'a good principle does not necessarily produce a good resolution';[46]

3 the actual rights and obligations of States under international law, especially in the context of nationalization of foreign investment; and
4 the appropriateness of the subject of the debate and any resolution resulting from it, notably its impact on the willingness of private investors to invest in under-developed countries, and thus on the efforts of the United Nations to further economic development of under-developed countries.

Will capital, like water, find its own level?

During the debate in the Second Committee various newspaper articles, including one in the *New York Times*, argued that the adoption of the draft resolution in the Second Committee was 'a victory for communist propaganda' and showed that the USA had 'far fewer friends on whom it could rely in a diplomatic pinch'.[47]

Against this strongly politicized background the General Assembly intensively discussed the draft resolution on Saturday 21 and Sunday 22 December 1952. In a further effort to generate confidence from capital-exporting countries, India – in this period often taking the initiative to bridge differences within the United Nations – submitted an amendment to insert into operative paragraph 1 the phrase: 'the need for maintaining the flow of capital in conditions of security'.[48] In its view 'fair and equitable compensation' should be paid in the event of nationalization.[49] While many Western delegations expressed their appreciation (in contrast to Eastern European countries) of this suggestion, they said at the same time that it was not sufficient to remove their strong objections to what they continued to see as a 'nationalization resolution'. Colombia and Costa Rica asked 'what better way could be found of saying that inequitable, confiscatory and

[45] See UN Doc. A/C.2/SR. 232, 237 and 238: 8, 11 and 12 December 1952. Apart from avoiding duplication of work, the Philippines also mentioned that a Covenant would be binding and thus more effective in serving the intentions of Uruguay and Bolivia and that the procedure would be sounder from a legal point of view, since States would be free to ratify the Covenants or not. See UN Doc. A/C.2/SR. 232, 8 December 1952, p. 261, paras. 24–7.

[46] UN Doc. A/PV.411 (VII), 21 December 1952, p. 499, para. 191.

[47] As reported by Kellogg (1955: 12) and Rosenberg (1983: 106). See also statement by Bolivia in the General Assembly on 21 December 1952, UN Doc. A/PV.411 (VII), pp. 493–4.

[48] UN Doc. A/L.143, 21 December 1952.

[49] UN Doc. A/PV.411 (VII), 21 December 1952, p. 488, para. 74.

unfair procedures should be discarded than to lay the stress in the recommendation on the absolute need for the maintenance of mutual confidence and international co-operation?'[50] Later, the USA stated it 'voted against it, not because of what it contains, but because of what it does not contain'. It obviously referred to the American draft amendments rejected in the Second Committee and concluded that: 'This resolution may be interpreted by private investors all over the world as a warning to think twice before placing their capital in under-developed countries.'[51]

Similarly, the United Kingdom, which also voted against the draft resolution, drew particular attention to operative paragraph 2, which 'demonstrates by its omission of any reference to the obligations of the State receiving the investment just how one-sided the whole matter is. The under-developed countries are crying out for capital. Capital investment depends upon confidence. Confidence, we must admit, has been somewhat shaken in some countries.'[52] The UK reiterated that capital is not 'like a tap which can be turned on at will'. This came, perhaps unintentionally, close to an earlier statement by India: 'Capital, like water, will find its own level. It will not flow into countries which do not provide conditions of security and stability.'[53]

The Western objections obviously were accepted by some Latin American countries (such as Cuba, Haiti, Nicaragua, Peru and Venezuela) which decided not to vote in favour. For example, Haiti explained:

> a vote in favour would be tantamount to breaking down an open door and would lead to uneasiness and insecurity from the persons from whom we seek capital. We might receive a disappointingly cool reception from those upon whom we called for help.[54]

Eventually, the General Assembly adopted the draft resolution on the right freely to exploit natural wealth and resources as Resolution 626 (VII).[55] The resolution cannot be said to have been very instrumental in the legal formulation and clarification of the principle of permanent sovereignty, but the General Assembly undoubtedly performed here one of its principal roles: to serve as a platform for political debate and as stock-taker of the views of the various groups of member States. The American delegate wrote three years later that the resolution 'may have had some beneficial effects as a safety valve for letting off steam, and as a timely reminder to the United

[50] Ibid., p. 486, para. 56. [51] Ibid., pp. 496–7, paras. 168 and 176.
[52] Ibid., p. 496, para. 165. [53] Ibid., p. 488, para. 78. [54] Ibid., p. 484, para. 32.
[55] With thirty-six votes to four (New Zealand, South Africa, UK, USA), with twenty abstentions. See UNYB (1952), p. 390 and UN Doc. A/PV.411 (VII), p. 495, para. 150. However, the list of those voting in favour includes only thirty-five countries.

States that many of the other free countries do not share our views'.[56] On the basis of a detailed analysis of the debate and the issues involved, Rosenberg correctly concludes:

> en effet la résolution 626 servit de fondement avoué à des actions et des sentences, qui confirmèrent que le droit des peuples à disposer librement de leurs resources naturelles était à l'ordre du jour des relations internationales.[57]

Linking human rights, self-determination and natural resources (1952–1955)

Chilean proposal to the Commission on Human Rights

After the adoption of the Universal Declaration of Human Rights in 1948, the Commission on Human Rights energetically continued with 'painting' the second panel of the envisaged three-panel 'International Bill of Rights'. One of the main controversies related to the inclusion and formulation of the right of self-determination of peoples. By Resolution 545 (VI) of 5 February 1952, the General Assembly decided to include in the draft covenants a provision on this right, consisting of two paragraphs which would embody the right of peoples to political and economic self-determination. This issue became even more complicated when Chile, on 16 April 1952, proposed to include a third additional paragraph:

> The right of the peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources. In no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other States.[58]

Chile pointed out that its proposal was to be interpreted as 'a practical way of giving moral support to a country's democratic struggle for the control of its own means of subsistence', its main aim being 'to enable the peoples to remain masters of their own natural wealth and resources'.[59]

This proposal gave rise to a debate which touched upon such sensitive issues as the meaning of 'sovereignty', the legal status of self-determination in international law and the concept of peoples' rights as opposed to rights of States, the validity of treaties, contracts, concession agreements, etc. As Hyde wrote in 1956, it clearly reflected 'the historic conflict between

[56] Kellogg (1955: 15).

[57] Rosenberg (1983: 115). In English: 'in fact resolution 626 serves as a basis for the recognition of acts and judgments, which confirmed the right of peoples freely to dispose of their natural resources as the order of the day in international relations.'

[58] UN Doc. E/CN.4/L.24, 16 April 1952.

[59] UN Doc. E/CN.4/SR.260, 6 May 1952, p. 6 (Mr Valenzuela).

capital-importing and capital-exporting countries over the issue of the taking of private property'.[60] Indeed, all Western delegations opposed the incorporation of the principle of permanent sovereignty because of the fear that it would open the door to unilateral deviations from international obligations, notably expropriation without 'prompt, adequate and effective compensation'.[61]

The most substantive and detailed comments on the Chilean proposal came from the UK. In its opinion, the word 'sovereignty' had been used in a most unusual way, because of its alleged connotation with control over 'natural resources' and the adjective 'permanent'. The latter word could not be tolerated because the conclusion of 'every international treaty involved a deliberate derogation of sovereignty'.[62] Such a qualification could imply that in fact every concession would be invalid. A second major objection was that the Chilean proposal dealt with the relations of States under international law rather than with human rights; the Commission on Human Rights was not competent to deal with rights and duties of States. France took a similar position and added that it could not accept:

> ... a conception of sovereignty which would legalize the autarchic practices of certain States which had a virtual monopoly of the raw materials indispensable to the international community. The object was the rational exploitation of natural resources; to do that some sovereignty would have to be surrendered to international organizations, such as the Schuman Plan. The Chilean proposal might ... impede international solutions and the execution of international treaties.[63]

The Soviet Union strongly opposed the 'formalistic criticism' of the Western delegations:

> All that the draft resolution implied was that peoples could not be deprived of their natural resources, the very basis of their existence, which in turn was the basis of their possibility of exercising the right to self-determination. No reputable international lawyer would dream of sanctioning the looting of a people's natural resources by another State nor would he deny the elementary right of peoples to retain their basic right to independence.[64]

Later on the Soviet delegate concluded that: 'The poor arguments adduced by some delegations were merely a shield for their desire to maintain their colonial domination and to perpetuate their economic exploitation of the territories under their control.'[65] Support for the Chilean proposal was

[60] Hyde (1956: 855–6).
[61] See for a discussion of this 'triple' standard, chapter 6, p. 177; chapter 9, pp. 296–7; and chapter 10, pp. 352–9.
[62] UN Doc. E/CN.4/SR.260, 6 May 1952, p. 7 (Mr Samuel Hoare). [63] Ibid., p. 9.
[64] Ibid., p. 8. [65] Ibid., p. 12.

further expressed by Lebanon, Pakistan, Poland, Uruguay and Yugoslavia, while China (Taiwan) and Greece cast some doubts on its usefulness in the light of the paragraph already adopted on economic self-determination. On 8 May 1952, the Commission on Human Rights adopted it by ten votes to six (all votes against by Western nations), with two abstentions (China and Greece).[66]

The Tenth General Assembly debate: protecting penniless governments?

Major opposition from Western countries in the Third Committee

During the general debate in the UN General Assembly's Third Committee (for Social, Humanitarian and Cultural Affairs) it soon became clear that, while virtually every article of the draft covenants would give rise to some dissatisfaction among some delegations, the most serious problem arose over the provisions on the right to self-determination. Since 'the ship of the covenants was encountering heavy weather and the possibility of securing wide support for the texts was in doubt', the UK questioned whether it would help the cause of human rights 'if the ship were to founder with the flag of self-determination still flying'.[67] In this debate the UK again made the most substantive comments, re-emphasizing that it considered self-determination as a political rather than a legal principle. Furthermore, it argued that:

> there was no such thing as 'permanent' sovereignty, as was shown by the historical fact that States had in the past made voluntary cessions of territory . . . If the drafters of the article had intended to affirm simply that sovereignty over national wealth and resources was inherent in the conception of national sovereignty, that was an understandable, and indeed generally accepted, concept . . . but such a concept was quite distinct from that of 'permanent' sovereignty and in any event had no relevance to the question of self-determination.[68]

The USA also strongly maintained its rejection of the right of peoples to permanent sovereignty over natural resources, albeit from a more political perspective, particularly on account of its general association with the 'nationalization' resolution 626 (VII):

> the resolution had been a serious error, and had had important economic repercussions among sources of capital available for international investment.

[66] Commission on Human Rights, Report of the Eight Session (April–June 1952), in UN Doc. E/2256, p. 8. See Table 2.1, p. 77 for further details.

[67] UN Doc. A/C.3/SR.642, 24 October 1955, p. 91, para. 21 (Mr S. Hoare).

[68] Ibid., p. 91, para. 18.

The same idea was now being linked to the concept of self-determination . . . the attempt to combine the two ideas would surely hamper the efforts of those who supported the progressive realization of the right of peoples freely to determine their own political future and of those who wished to promote international co-operation in world economic development.[69]

Developing countries argued, on the other hand, that the inclusion of such an article was appropriate since the right of self-determination was essential for the enjoyment of all other human rights. Afghanistan challenged the UK by saying that it was astonishing that its representative, 'who had made so admirable a criticism of the wording of the article, had found nothing to propose other than its outright deletion'.[70] Other delegates of developing countries (such as Argentina, El Salvador, Mexico, Pakistan and Venezuela) pointed out their willingness to discuss further the formulation of draft Article 1 with a view to making it more acceptable to Western delegations. For example, Argentina suggested adding after the first sentence of paragraph 3:

In accordance with accepted principles of international law, the present article shall not, in any circumstances, be interpreted as justifying measures likely to prove harmful to the public and private property of nationals and foreigners.[71]

Chile felt that the permanent sovereignty paragraph had been misinterpreted and made a passionate plea to maintain it:

All it meant was that a country could not exercise the right of self-determination unless it were master of its own resources. There was no question of expropriation . . . self-determination must be based on economic independence. Self-determination would be an illusion in a country whose natural resources were controlled by another State, and it would be farcical to give a country political freedom while leaving the ownership of its resources in foreign hands.[72]

Establishment of an *ad hoc* working group

During the debate various suggestions were made to break the stalemate: (a) to have the question studied further by a committee of experts; (b) to draft a protocol on self-determination as an annex to the draft covenants; (c) to prepare a third covenant on self-determination; and (d) to request the Secretary-General to invite member and non-member States to submit observations and proposals for consideration by the General Assembly at its eleventh session in 1956.[73] Finally, a joint proposal by Cuba, Ecuador and El

[69] UN Doc. A/C.3/SR.646, 27 October 1955, p. 110, para. 34.
[70] UN Doc. A/C.3/SR.644, 26 October 1955, p. 101, para. 16.
[71] UN Doc. A/C.3/SR.643, 25 October 1955, p. 97, para. 43.
[72] UN Doc. A/C.3/SR.645, 27 October 1955, p. 104, para. 11.

Salvador was adopted to establish a Working Party composed of nine countries to be designated by the chairman of the Third Committee.[74] It is noteworthy that the chairman, Mr Loufti (Egypt), selected its members only from proponents of the inclusion of an article on self-determination and that nearly all of them were developing States.[75] In its report a majority of the Working Party proposed a substantial change to the text on permanent sovereignty:[76]

> The peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

This new text differed from that proposed by the Commission on Human Rights in three respects. Firstly, the explicit reference to 'permanent sovereignty over natural wealth and resources' had been deleted. According to the chairman of the Working Group, Mr Urquia (El Salvador), this had been done in view of the strong opposition it had aroused and because such a reference 'seemed out of place when the article as a whole referred only to peoples; for sovereignty was an attribute of nations organized as States'.[77] Secondly, a clear, new reference to 'obligations arising out of international economic co-operation and international law' was included. Obviously, this was meant to reduce fears with respect to treatment of foreign investors in developing countries. Finally, in the last sentence, the last part of the original sentence had been deleted ('on the grounds of any rights that may be claimed by other States'), since the preceding sentence of the new text clearly stated that action in this field was also subject to international law.

A mysterious overriding principle? Second round of debate in the Third Committee

The new draft paragraph gave rise to renewed and extensive debate in the Third Committee.[78] The text came once again under attack from the UK. First of all, it argued that ability to dispose of natural wealth and resources was dependent on full control and power. If the term 'peoples' in paragraph 2 would have the same meaning as in paragraph 1, namely groups which are

[73] See UNYB (1955), pp. 154–6.

[74] By thirty-five to thirteen votes, with ten abstentions. [75] See Table 2.1, p. 77.

[76] UN Doc. A/C.3/L.489, 17 November 1955, and Corr. 1 and 2. The Working Party held six meetings. Unfortunately, there are no records of its proceedings. For a procedural report see UN Doc. A/3077, pp. 17–24, paras. 52–66.

[77] UN Doc. A/C.3/SR.668, 22 November 1955, p. 221, para. 5.

[78] This took place from 21 to 30 November 1955.

not yet independent and sovereign, the statement in paragraph 2 could not be true. If the provision was intended to refer to sovereign States representing peoples, then that should be stated explicitly. Secondly, the UK delegate objected to the phrase 'for their own ends', since in the English language it implied that the ends in view were 'nefarious or purely selfish and, consequently, that the peoples would be pursuing activities contrary to the interests of the others'. Thirdly, he feared that the qualification 'based upon mutual benefit' made the meaning of the phrase 'without prejudice to any obligations arising out of international economic co-operation' ambiguous since it might provide an 'escape clause, enabling States to evade those obligations'. Fourthly, in the last sentence he objected to the term 'means of subsistence' since that could not be applied to States, and to the sentence as a whole since this 'mysterious overriding principle ... seemed to be open to dangerous interpretation of removing the limitations imposed in the preceding sentences'.[79]

The USA reiterated that sovereignty of States over their own natural wealth and resources was out of place in an article on self-determination. The new wording of the paragraph was not sufficiently clear to banish fears with regard to expropriation without prompt, adequate and effective compensation or to the impairment of property rights. The second sentence was even more ambiguous: the words 'in no case' implied that the principle was intended to be 'absolute'. Furthermore, it was not clear what the difference was between 'natural wealth and resources' and 'means of subsistence', or what resources were included under the latter term.[80] Australia feared that paragraph 2 could be interpreted so 'as to allow a minority within a State to claim the free use of its natural resources, regardless of the economy of the State as a whole or the interests of other groups'.[81]

During the debate developing countries also voiced objections. Some preferred the original text of the Commission on Human Rights: for example, Indonesia stated that the new text seemed to stress 'the obligations of peoples rather than their rights'.[82] Several developing countries challenged the criticism of Western countries. Thus, Saudi Arabia stated that the concepts of 'peoples' and 'self-determination' were no more obscure than 'freedom', 'justice' or 'peace'. In any case, they could not 'by

[79] UN Doc. A/C.3/SR.670, 24 November 1955, pp. 229–30, paras. 10–15.
[80] UN Doc. A/C.3/SR.670, 24 November 1955, pp. 231–2.
[81] UN Doc. A/C.3/SR.669, 23 November 1955, p. 227, para. 20.
[82] UN Doc. A/C.3/SR.671, 25 November 1955, p. 234, para. 18.

questioning the legal force of such expressions ... hold back the trend which was causing all peoples to claim the right to decide their own future'.[83] 'Mutual benefit' implied 'the equality of parties, and fair play', while 'means of subsistence' unambiguously intended:

> to prevent a weak or penniless government from seriously compromising a country's future by granting concessions in the economic sphere – a frequent occurrence in the nineteenth century. The second sentence of paragraph 2 was intended to serve as a warning to all who might consider resorting to such unfair procedures.[84]

Likewise, the El Salvadorian chairman of the Working Party, Mr Urquia, regretted that the UK 'had seen fit to construe the phrase for their own ends in a pejorative sense'.[85] Egypt indicated that 'in a spirit of conciliation a number of limitations and restrictions had been inserted into the text', but that in fact these were unnecessary since 'the right of peoples to dispose of their natural resources had never authorized arbitrary confiscation or expropriation or justified the breach of freely negotiated agreements'.[86]

Some delegations proposed further study and delay of a decision on Article 1.[87] As proponents and opponents of the draft article were irreconcilable, Denmark proposed a delay of any decision-making on Article 1 but this proposal was eventually rejected.[88] The Third Committee then moved to a series of votes on specific phrases of the text. Finally, it adopted paragraph 2 as a whole by twenty-six votes to thirteen (eleven Western nations plus China [Taiwan] and Turkey), with nineteen abstentions (sixteen developing countries plus Denmark, Iceland and Israel).[89] It read:

> The peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

[83] UN Doc. A/C.3/SR.672, 25 November 1955, p. 240, paras. 31 and 37 (Mr Baroody).
[84] Ibid., para. 36 (Saudi Arabia).
[85] UN Doc. A/C.3/SR.674, 28 November 1955, p. 248, para. 8.
[86] UN Doc. A/C.3/SR.675, 29 November 1955, p. 255, para. 18.
[87] Lebanon and Pakistan even proposed the deletion of para. 2, since there was no agreement on a satisfactory text which would not endanger international economic co-operation. See UN Doc. A/C.3/SR.675, 29 November 1955, p. 255. Others felt, however, that decisions should be taken since the article on self-determination had been under study for several years.
[88] By twenty-eight votes against, twenty-five in favour and five abstentions. UN Doc. A/C.3/L.479/Rev.1.
[89] UN Doc. A/C.3/SR.676, 29 November 1955, pp. 259–62, at p. 262, para. 26.

A number of delegations gave an explanation of their vote.[90] Countries, especially Latin American countries which were at the forefront during the adoption of Resolution 626 (VII), now underlined that they considered the text of paragraph 2 unsatisfactory because:

it was ambiguous and did not clearly specify the limitations to which the inalienable right of peoples to their natural resources might be subjected (Mexico);

although it provided guarantees on the security of private property and foreign investment, others might give it a different interpretation, in which case there was a real danger that it might have an adverse effect on international economic co-operation and investment for economic development (Guatemala);

some machinery should have been provided for safeguarding the rights of private property and foreign investments, as was done in the constitution of many countries (El Salvador).

The most pointed explanation came from the USA, which informed the Committee that because of paragraph 2 it had voted against Article 1 as a whole:

The text did not sufficiently make clear the Committee's intention that the paragraph should not be interpreted as impairing the legal rights of individuals or as authorizing expropriation without adequate, prompt and effective compensation.

The USA recognized the right of a State to control its natural wealth in itself, provided that 'the obligation to make prompt payment of just compensation, in an effectively realizable form and representing the full equivalent of the property taken or the legal rights extinguished' was also recognized.[91]

Although enthusiasm for the formulation of the draft article was far from general in 1955, the text was maintained. Consequently, it appears as Article 1 in both Human Rights Covenants adopted in 1966. But in October 1966, following an amendment submitted by African, Asian and Latin American countries, the Third Committee decided to insert an additional article in both Covenants which features as Article 25 in the Economic Rights Covenant and Article 47 in the Civil Rights Covenant:[92]

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

[90] UN Doc. A/C.3/SR.676, 29 November 1955, pp. 262–4 and A/C.3/SR.677, 30 November 1955, pp. 265–8.

[91] For the texts of the explanations of vote, see UN Doc. A/C.3/SR.676, 29 November 1955, pp. 262–4.

[92] See UNYB 1966, p. 406.

From self-determination of peoples to sovereignty of States: the UN Commission on Permanent Sovereignty over Natural Resources (1958–1961)

Establishing the Commission: potential threat to foreign investors?

In 1954, the Commission on Human Rights[93] had recommended that the General Assembly, through ECOSOC, establish a Commission with the task of conducting a full survey of the right of peoples and nations to 'permanent sovereignty over their natural wealth and resources', which they labelled a 'basic constituent of the right to self-determination'. The main purpose of this survey would be to provide full information regarding the actual extent and character of that right and to make recommendations, where necessary, for its strengthening.[94] However, its establishment proved to be far from easy.

In ECOSOC's Social Committee the recommendation became stranded on the opposition of the Western nations which had a majority in ECOSOC.[95] Nonetheless, in 1954 the Third Committee of the UN General Assembly extensively discussed the matter. Sixteen countries from Latin America, Africa and Asia proposed to request the Commission once again to include recommendations concerning permanent sovereignty in its proposals relating to the right to self-determination.[96] Through a joint amendment, Brazil, Peru and the USA reiterated the by now usual stipulation that such recommendations should have due regard to 'obligations under international agreements, the principles of international law and the importance of encouraging international co-operation in the economic development of under-developed countries'.[97] Yet, the Third Committee only adopted the last part of the amendment ('importance . . . under-developed countries').[98] The Committee thus refused to subordinate 'permanent' sovereignty in any

[93] In its Resolutions 637 C(VII) and 738(VIII) the General Assembly had instructed the Commission on Human Rights to continue preparing recommendations on international respect for the rights of peoples and nations to self-determination.

[94] See the Report of the tenth session of the Commission on Human Rights, February–April 1954, UN Doc. E/2573, pp. 35–8, paras. 322–35. This initiative was taken by Chile, China, Egypt, India, Pakistan and the Philippines. The recommendation was adopted by eleven votes to six (five Western nations and Turkey).

[95] ECOSOC Resolution 545 G (XVIII). Cf. UNYB (1954), pp. 209–11 and Rosenberg (1983: 134).

[96] UN Doc. A/C.3/L.435/Rev.2, 26 November 1954.

[97] UN Doc. A/C.3/L.441, 26 November 1954.

[98] The first part was rejected by twenty-one votes to seventeen, with fourteen abstentions.

way to the validity of what developing countries perceived as 'unequal treaties' and principles of international law in the formulation of which they had not participated. In the plenary meeting, however, Brazil, Peru and the USA succeeded in obtaining a reference to international law through the phrase 'to have due regard to the rights and duties of States under international law'.[99] The relevant part of this Resolution 837 (IX) requests the Commission on Human Rights:

> to complete its recommendations concerning the international respect for the right of peoples and nations to self-determination, including recommendations concerning their permanent sovereignty over their natural wealth and resources, having due regard to the rights and duties of States under international law and to the importance of encouraging international co-operation in the economic development of under-developed countries.

Subsequently, during its eleventh session in 1955, the Commission on Human Rights repeated its proposal for the establishment of a commission on permanent sovereignty.[100] ECOSOC, during its twentieth session in 1955, discussed the issue again. Western nations repeated that the principle of self-determination had nothing to do with control over natural resources, which was an attribute of sovereignty. Similarly, they argued that the establishment of such a commission could 'neutralize the beneficial effects of General Assembly Resolution 824 (IX), the purpose of which was to encourage the international flow of private capital'. A number of developing countries replied again that the survey to be conducted by the proposed Commission would not be directed against foreign investment, since it would be instructed to pay due regard to 'the rights and duties of States under international law and to the importance of encouraging international co-operation in the economic development of under-developed countries'. This time, ECOSOC did decide to transmit the proposal of the Commission on Human Rights to the General Assembly.[101]

It was only in 1958 that the General Assembly took up this recommendation. During the debate in the Third Committee some Western countries repeated that they found it illogical to use the term 'sovereignty' in reference to peoples which were not yet sovereign States and repeated their fear that this exercise might ultimately constitute a potential threat to

[99] UN Doc. A/L.187, 13 December 1954. This amendment was adopted by twenty-three votes to fourteen, with nineteen abstentions. The General Assembly adopted the draft resolution as a whole (by forty-one votes to eleven, with three abstentions) as Resolution 837 (IX), 14 December 1954.

[100] By eleven votes to six, with one abstention.

[101] ECOSOC Res. 586 D (XX), adopted by thirteen votes to none, with five abstentions; see also UNYB (1955), pp. 158–60.

foreign investment and international co-operation for the economic development of under-developed areas. Yet, most Third Committee members supported the proposal and it was adopted by fifty-two votes to fifteen, with four abstentions. The new Commission had nine member States chosen by the President of the UN General Assembly on the basis of geographical distribution: Afghanistan, Chile, Guatemala, the Netherlands, the Philippines, Sweden, the Soviet Union, the United Arab Republic (UAR)[102] and the USA. On 12 December 1958, the General Assembly established the Commission on Permanent Sovereignty over Natural Resources by Resolution 1314 (XIII).[103]

The Commission held three sessions (with thirty-three meetings). Its proceedings have been well recorded and serve as highly relevant *travaux préparatoires* for a proper interpretation of what finally became its main outcome: General Assembly Resolution 1803 (XVII), entitled Declaration on Permanent Sovereignty over Natural Resources.

Formulating a declaration in an ideologically divided United Nations

The first session: general debate

At its first session in May 1959, the Commission held a general debate on its terms of reference and the question of permanent sovereignty over natural resources in general. It also discussed the set-up of a study which the Commission requested the UN Secretariat to prepare on the ownership and exploitation of natural resources by foreign nationals, companies or governments.

In an introductory statement at the Commission's first meeting, Schachter (at the time Director of the UN Office of Legal Affairs) pointed out that the Commission would be 'especially concerned with the provisions of constitutions, national laws and international treaties defining or restricting the rights of foreign nationals, companies or governments to own or exploit the natural resources of a country'.[104]

During the general debate Chile recalled that experience had shown that

[102] On 1 February 1958, Egypt and Syria had formed the United Arab Republic, an initiative of President Nasser. A few years later, on 28 September 1961, this union was dissolved. Egypt retained the name UAR until September 1971.

[103] For a report on the background and adoption of GA Res. 1314 (XIII) of 12 December 1958, see UN Doc. A/AC.97/1, 'Historical Summary of Discussions Relating to the Question of Permanent Sovereignty over Natural Wealth and Resources', 12 May 1959 and UNYB (1958), pp. 212–14.

[104] UN Doc. A/AC.97/SR.1, 18 May 1959, p. 4. See also UN Doc. A/AC.97/3, 'Nature of possible Secretariat studies pertaining to a survey of permanent sovereignty over wealth and natural resources', 18 May 1959.

political and economic independence were inseparable: 'Freedom and independence counted for nothing if they had no economic basis. National sovereignty must be exercised over the entire territory and wealth of a nation, if it were more than a mere figure of speech.' Chile referred to the inability of many peoples and the developing countries to make use of their natural wealth because of lack of capital and addressed the issue of regulation of foreign investment and nationalization of foreign property. Its support of the right of peoples to self-determination in respect of their natural wealth and resources did not mean, however, that it condoned either unlawful expropriation or the repeal of legal provisions protecting foreign investors: 'Investors should be encouraged in an atmosphere of co-operation by the promise of fair rewards.'

A State could expropriate and nationalize such resources provided that its acts were 'in accordance with its laws, were non-discriminatory and the owner was paid appropriate advance compensation'. It is to be noted that this was the very first time that the term 'appropriate compensation' was referred to in a UN forum. Ever since, this concept has played a prominent role in discussions on permanent sovereignty and nationalization. According to Chile, there were additional limitations imposed by respect for rights legitimately acquired and arising from contracts or from treaties concluded with other States: States could not disregard the acquired rights of persons or corporations, whether they were nationals or aliens.[105]

Furthermore, Sweden stated that 'the crux of the problem appeared to be the means by which, within the framework of national sovereignty and international law, foreign persons or corporations could be prevented from gaining undue control over a country's vital resources without recourse to measures which would discourage foreign capital from participating in its economic activities'. As to the question of nationalization Sweden observed that:[106]

> While a State certainly had the right, at least under certain circumstances, to expropriate natural resources owned by aliens, the principle of international law that equitable compensation must be paid for expropriated property would no doubt have to be maintained. On that important point the amount of the compensation should not be left to the discretion of the government which ordered the expropriation. Unless there was a definite assurance that, failing an agreement between the parties concerned, the question of compensation would be decided by an impartial body such as an arbitration court, foreign capital could not be expected to flow into countries most in need of it for their economic development.

[105] UN Doc. A/AC.97/SR.2, 19 May 1959, pp. 3–4. [106] Ibid., p. 7.

Likewise, Guatemala and the UAR stressed that many developing countries wished to foster investment but were anxious to have adequate safeguards for managing their natural wealth and resources in the interest of their economic development.

The UAR raised the question of 'unequal treaties'. In its view:

> The Commission should also examine international agreements by which States permitted aliens to exploit certain natural resources. In conducting such an investigation, the Commission should remember that the world did not stand still, and that the idea that such agreements were something immutable and sacrosanct was out of date. Just as States amended their laws or enacted new laws to meet new developments, so in the international field small nations now wished to free themselves of agreements concluded at a period when circumstances had been entirely different from those of today, and which gave foreign enterprises certain rights and concessions which were incompatible with the interests of the national economy.[107]

The Philippines recalled that the General Assembly had established a link between sovereignty and international co-operation in its Resolution 1314 (XIII). The Charter regarded international co-operation as both a right and a duty: 'international co-operation must be accepted voluntarily and not imposed.'[108]

The USA recalled that, under General Assembly Resolution 1318 (XIII), the Secretariat also had to prepare a study on the international flow of private capital and that it would make sense to combine these efforts.

On behalf of the Secretariat, Schachter responded to various suggestions. In his view the Secretariat study should be mainly concerned with the right of foreign nationals to own or exploit the natural resources of a country not their own and with the means by which States could control these foreigners' activities. In response to a suggestion of the Soviet Union, he acknowledged that the terms of agreements on exploitation of natural resources did not always reflect reality, but he did not see how the Secretariat could institute an inquiry into possible violations.[109]

The second session: discussion of the preliminary Secretariat study

At its second session in February–March 1960, the Commission considered the preliminary study prepared by the Secretariat which included the replies to a questionnaire from governments, specialized agencies and

[107] UN Doc. A/AC.97/SR.4, 21 May 1959, pp. 6–7. [108] Ibid., p. 8.
[109] UN Doc. A/AC.97/SR.5, 22 May 1959, pp. 9 and 10.

regional economic commissions.[110] While there was widespread satisfaction with the work of the Secretariat, the discussion turned out to be far from easy. Suggestions were made to include additional subjects. Thus, Afghanistan proposed to pay attention to the question of 'general transit rights', which were also an essential aspect of sovereignty over natural resources, as well as of water resources common to two or more States.[111] The Soviet Union criticized the lack of detailed information on nationalization and on the extent to which foreign companies attempted to impede the exercise of this sovereign right.[112]

The Netherlands requested more information on foreign investment protection. In its view the section on expropriation was somewhat one-sided in the sense that it did not mention, let alone analyze, the fundamental rule of protection of property and the rights and duties of States under international law.[113] At a later point, the Soviet Union objected to this by stating:

> The Commission's function was not to accommodate the foreign and domestic economic policies of the under-developed countries to the interests of foreign investors or to help foreign companies to gain control over still more of those countries' natural resources. Its function was to promote the development of the under-developed countries' economies and to strengthen their sovereignty over their natural resources.[114]

Chile, Guatemala and the Netherlands wanted to see an analysis of relevant General Assembly resolutions and other documents pertaining to 'the importance of encouraging international co-operation in the economic development of under-developed countries', as it was called in Resolution 1314 (XIII). Chile wanted the Commission not just to present a compilation of existing legislation on sovereignty over natural wealth and resources, but to aim at the improvement of relations between foreign capital and countries needing that capital for the development of their natural resources, and repeated that foreign investment might be discouraged by emphasizing sovereignty over natural resources. Measures aimed at strengthening sovereignty should in any case be 'fair and objective'.[115]

Guatemala drew attention to the relevance of the International Law Commission's (ILC) work on State responsibility with respect to property and contracts of aliens.

[110] UN Doc. A/AC.97/5 and Add.1 and Corr.1.
[111] UN Doc. A/AC.97/SR.8, 23 February 1960, p. 5.
[112] Ibid., p. 7.
[113] UN Doc. A/AC.97/SR.9, 25 February 1960, p. 9
[114] UN Doc. A/AC.97/SR.10, 1 March 1960, p. 12.
[115] UN Doc. A/AC.97/SR.9, 25 February 1960, p. 4.

Peru was the first to relate the work of the Commission on Permanent Sovereignty to law-of-the-sea issues. The exercise of sovereignty over the resources of the sea deserved attention. Old concepts of 'straightforward, selfish appropriation', leading in practice to 'complete disappearance of certain marine species', were to be replaced by new notions of 'common interest', particularly 'the right of riparian peoples [sic] to the wealth of the seas which washed their shores'.[116]

Disagreement continued to exist on the issue of additional subjects and even on the sources from which additional information should be gathered. As to the latter, the question was whether the Secretariat should rely primarily on information submitted by governments (by reference to the argument that governments were the best judges of data regarding sovereignty over natural resources in their respective countries) or on that from the United Nations and other sources. It was finally decided to include 'appropriate references' to UN decisions, reports and studies relating to 'rights and duties of States under international law and to co-operation in the economic development of under-developed countries'.[117]

Third session: discussion of the revised Secretariat study

The third session of the Commission took place in May 1961. The Secretariat had submitted its revised study on 'The Status of Permanent Sovereignty over Natural Wealth and Resources'.[118] The revised study was comprehensive, covering 235 pages, and included the following chapters: (I) National measures affecting the ownership or use of natural resources by foreign nationals or enterprises; (II) International agreements affecting the foreign exploitation of natural resources; (III) International adjudication and studies prepared under the auspices of inter-governmental bodies relating to the property and contracts of aliens; (IV) Status of permanent sovereignty over natural wealth and resources in newly independent States and in non-self-governing and trust territories; and (V) Economic data pertaining to the status of sovereignty over natural wealth and resources in various countries.

In response to the deliberations during the Commission's second session, chapters IV and V had been considerably expanded in comparison with the previous draft. More economic data on sovereignty, in particular over natural resources in less developed countries and in non-self-governing

[116] UN Doc. A/AC.97/SR.10, 1 March 1960, p. 8.

[117] See UN Doc. A/AC.97/7, resolution adopted by the Commission at its fifteenth meeting, 4 March 1960.

[118] UN Doc. A/AC.97/5/Rev.1, 27 December 1960, and Corr.1 and Add.1.

territories, were added. The Commission's chairman called the study a 'remarkable achievement', which had provided member States, especially the less developed countries, with 'examples and models of legislative provisions which they would be free to adapt to their own systems and traditions when they sought to establish control over the development of their natural resources'.[119] The USA was among many to applaud it as 'a monumental work'. Yet, a few delegations were less enthusiastic. The Soviet Union, the UAR and Afghanistan felt that the report, even in its revised form, did not reflect 'the real situation in the field of exploitation by foreigners and their companies of natural wealth and resources of non-self-governing territories, trust territories and less developed countries'. They wanted more information on the profits made by foreign companies in the natural-resources sector of less developed countries and non-self-governing territories and on violations of the sovereignty of peoples over their natural wealth and resources. With regard to the last point, the Soviet Union referred to the situation in Belgian Congo, Cuba, the Portuguese colonies and Tanganyika.[120] Afghanistan repeated its request for more information on the issue of water resources and transit rights, especially the right of land-locked countries to free access to the sea.[121] The UAR raised the question of sovereignty over international water courses and pointed out that 'riparian States upstream of another State on the same water course did not possess absolute sovereignty over that water course'. For example, it claimed that 'no State would have the right to alter natural conditions in its territory to the detriment of natural conditions in the territory of a neighbouring State'.[122] The Commission's final report to ECOSOC was approved by three votes to two, with four abstentions.[123] It was also decided to submit the Secretariat study to ECOSOC, together with the observations made by members of the Commission.[124]

Two draft resolutions

The Commission had two tasks. Apart from conducting a full survey on the status of permanent sovereignty, General Assembly Resolution 1314 (XIII) also requested that the Commission make recommendations, where necessary, for its strengthening. For the latter purpose, the Soviet Union on 5 May 1961 tabled an extensive draft resolution on permanent sovereignty

[119] UN Doc. A/AC.97/SR.19, 3 May 1961, p. 3.
[120] UN Doc. A/AC.97/SR.21, 5 May 1961, pp. 7–8.
[121] UN Doc. A/AC.97/SR.20, 4 May 1961, p. 11. [122] Ibid., p. 6.
[123] UN Doc. A/AC.97/SR.33, 25 May 1961, p. 6.
[124] See Resolution II adopted on 23 May 1961, in 'Report of the Commission on Permanent Sovereignty Over Natural Resources', UN Doc. A/AC.97/13.

over natural resources;[125] on 10 May 1961, Chile submitted an alternative draft.[126] The Soviet draft proposed, first of all, that the General Assembly should 'reaffirm the permanent sovereign right of peoples and nations freely to own, utilize and dispose of their natural wealth and resources in the interests of their independent national development'. Secondly, its operative paragraph 1 spelled out in detail the discretionary rights of peoples and nations arising from permanent sovereignty, including the right to admit or to refuse establishment of foreign investment for the exploitation of resources; to control foreign investors in their territory, including the distribution and transfer of profits; and to carry out nationalization and expropriation measures 'without let or hindrance' (sic). Thirdly, it declared the violation of these sovereign rights contrary to the spirit and principles of the UN Charter and fully supported measures of newly independent countries to restore and strengthen their sovereignty over natural resources. The USA and the Netherlands, in particular, heavily criticized the Soviet draft as a one- sided document which disregarded the importance of international economic co-operation for development and the need for respect for rules of international law.[127] Afghanistan and the UAR[128] made a number of detailed comments, most of which were taken into account by the Soviet Union when it submitted a revised version.[129]

Chile claimed that its draft was 'better balanced' and reflected more closely the terms of reference of the Commission than did the Soviet draft.[130] The Chilean draft purported to deal, firstly, with the basic concept of the right of peoples and nations to permanent sovereignty and with its objective that it 'must be exercised for the benefit of the people of the State concerned'. Secondly, should a State freely decide to admit foreign capital, then the capital imported and the earnings on that capital 'must be protected on the same conditions as domestic capital similarly invested'. In case of nationalization, expropriation or requisitioning, the owner 'shall be paid appropriate compensation', in accordance with the law of the host State and with international law. Thirdly, its draft supported the promotion of international co-operation by increased capital investment and exchange of technical and scientific information. Specific proposals for amendments were made by Afghanistan and, less extensively, by the UAR.[131] Most of them

[125] UN Doc. A/AC.97/L.2, 5 May 1961. [126] UN Doc. A/AC.97/L.3, 10 May 1961.
[127] UN Doc. A/AC.97/SR.25, 15 May 1961, p. 3 and SR.26, 16 May 1961, pp. 4–5.
[128] UN Doc. A/AC.97/SR.23, 10 May 1961, p. 5 and SR.24, 15 May 1961, p. 3.
[129] UN Doc. A/AC.97/L.2/Rev.1, 16 May 1961.
[130] UN Doc. A/AC.97/SR.25, 15 May 1961, p. 13.
[131] UN Doc. A/AC.97/SR.27, 16 May 1961, pp. 3–7.

were taken into account by Chile when it presented a revised draft on 18 May 1961.[132]

Amendments to the Chilean draft resolution

Various delegations, notably the Netherlands, the USA, the Philippines and Sweden, urged a stronger reference to respect for international law.[133] A USA amendment to operative paragraph 3, to add at the beginning of the second sentence the phrase 'Agreements freely made in each case should be faithfully observed and . . .',[134] was rejected by five votes to four. Chile said it was not opposed to its contents, but felt that it was out of place in this operative paragraph which dealt with the basic concept and nature of permanent sovereignty.[135]

Considerable debate took place on amendments relating to the nationalization and compensation paragraph of the Chilean draft, reading:

> Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases, the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.[136]

Various delegations observed that 'public purpose' (instead of 'public utility'), as proposed by the USA, would be a better translation of the Spanish phrase '*utilidad pública*' in the Chilean draft, but felt that this should be left to the Secretariat and the translators. Eventually, by four votes to nil, with five abstentions, it was decided to retain the word 'utility' in the English text (in French '*utilité publique*'). The USA had also proposed to delete the words 'or the national interest', but withdrew this amendment after the vote on 'public utility'.

Afghanistan and the UAR submitted a joint amendment to insert the words 'when and where appropriate' after the word 'compensation' and to replace the word 'appropriate' by 'adequate'. However, the first part of this amendment was heavily opposed by Western countries and Chile itself, since it would jeopardize the very obligation to pay. The second part also caused objections, since the word 'adequate' was one of the traditional elements of the trinity 'prompt', 'adequate', and 'effective', while 'appropri-

[132] UN Doc. A/AC.97/L.3/Rev. 2, 18 May 1961.
[133] For example, UN Doc. A/AC.97/SR.28, 17 May 1961, p. 4.
[134] UN Doc. A/AC.97/L.9, sub. 4, 22 May 1961.
[135] UN Doc. A/AC.97/SR.31, 22 May 1961, p. 6.
[136] UN Doc. A/AC.97/L.3/Rev.2, 18 May 1961.

ate' was said to have a more neutral meaning. Launching a compromise proposal, the Philippines noted that a large majority of the Commission appeared to accept a duty to pay compensation, but was divided as to how much and under what conditions. It would therefore be better not to enter into details and not to use any adjective, including 'appropriate'. Neither this compromise proposal nor the second part of the joint amendment were acceptable to Chile. Both were therefore finally withdrawn.

Sweden proposed to refer to international adjudication and arbitration: 'Prior agreement on that question could be decisive in inspiring confidence in foreign investors by establishing that the country in which the investments were made would respect its international obligations.'[137] Its amendment read:[138] 'In case the question of compensation gives rise to an international dispute, it would be appropriate to settle it by international adjudication or arbitration.'

However, Chile felt that domestic jurisdiction should not be excluded in matters of compensation, attaching fundamental importance to respect for national jurisdiction. International adjudication or arbitration could only be envisaged as a result of agreement between the parties concerned.[139] When Chile did not incorporate the Swedish proposal into its revised draft, a joint amendment was submitted by Sweden and Afghanistan in which the words 'provided the parties to the dispute agree to such a procedure'[140] were added at the end of the original Swedish amendment. Thereupon, a sub-amendment[141] was submitted by the UAR reading:

> In any case where the question of compensation gives rise to a controversy, national jurisdiction should be resorted to ... Upon agreement by the parties concerned settlement of the dispute may be made through arbitration or international adjudication.

The Soviet Union proposed to split this sub-amendment into two parts, one dealing with domestic and the other dealing with international dispute settlement, but this proposal was not accepted.[142] Subsequently, the UAR sub-amendment as a whole was adopted by five votes to three, with one abstention, and the joint amendment of Sweden and Afghanistan was dropped.

[137] UN Doc. A/AC.97/SR.30, 22 May 1961, p. 6.
[138] UN Doc. A/AC.97/L.5, 16 May 1961.
[139] UN Docs. A/AC.97/SR.27, 16 May 1961, p. 9 and SR.31, 22 May 1961, p. 6.
[140] UN Doc. A/AC.97/L.5/Rev.1, 18 May 1961.
[141] UN Doc. A/AC.97/L.10, 20 May 1961.
[142] Rejected by four to one with four abstentions.

Amendments to and rejection of the Soviet draft resolution; adoption of amended Chilean resolution

Discussions on the Soviet draft were far less extensive. The Soviet Union, somewhat bitterly, repeated its accusation that 'some representatives were attempting to divert the Commission from its task by steering it, not towards the protection and reinforcement of sovereignty over natural resources, but towards the defence of the interests of foreign corporations exploiting the resources of the under-developed countries'.[143] The UAR submitted a number of amendments to the Soviet text, most of which were accepted by the Soviet Union in its revised draft resolution.[144] Hence, the UAR insisted only on a vote on its proposal to replace all specifications of sovereign rights arising from permanent sovereignty by the phrase 'and to take all measures to strengthen the sovereignty over their natural resources in accordance with principles laid down by the Charter of the United Nations'.[145] The Commission adopted this amendment by three votes to none, with five abstentions.

Operative paragraph 3 read:

Fully supports the measures adopted by the countries which have won independence to restore and strengthen their sovereignty over natural wealth and resources;

At the request of the Soviet Union itself, it was put to a roll-call vote, where it was rejected by three votes (Afghanistan, the UAR and the Soviet Union) to four (the USA, the Netherlands, Sweden and the Philippines), with one abstention (Chile). The rest of the Soviet Union draft (with the exception of its very first provision, dealing with the submission of the Secretariat study to ECOSOC, together with the observations made on it by the members of the Commission) met with the same fate.

Finally, the Chilean resolution,[146] as amended, was adopted by eight votes to one.

Stalemate following Commission's report

Only three of the eighteen members of ECOSOC (Afghanistan, the USA and the Soviet Union) had been a member of the Commission.[147] Japan opened the August 1961 ECOSOC debate with some fundamental remarks on the legal status of self-determination in international law. Self-determination was recognized as a 'principle' and not as a 'right' in the UN Charter and it

[143] UN Doc. A/AC.97/SR.25, 15 May 1961, p. 8.
[144] UN Doc. A/AC.97/L.2/Rev.1, 16 May 1961.
[145] UN Doc. A/AC.97/L.4, Part II, sub. 3, 16 May 1961.
[146] UN Doc. A/AC.97/L.3/Rev.2, 18 May 1961.
[147] Thirty-second session of ECOSOC, August 1961.

was doubtful whether the legal concept of 'permanent sovereignty over natural wealth and resources' did in fact exist in international law. Nevertheless, Japan acknowledged that a sovereign State should be able to dispose of the wealth and natural resources within its own territory.[148] Therefore, it felt that it would be wiser to bring the draft text into line with operative paragraph 5 of General Assembly Resolution 1515 (XV),[149] reading:

> The sovereign right of every State to dispose of its wealth and its natural resources should be respected in conformity with the rights and duties of States under international law.

Afghanistan argued in reply that political and economic self-determination were indivisible and referred in this respect to the emergence of the Calvo doctrine, certain judicial decisions, the Porter-Drago Convention, and Articles 1(2) and 55 of the UN Charter.[150] Afghanistan's own criticism of the Secretariat study on permanent sovereignty particularly related to the lack of information on measures affecting the capital and profits of foreign companies exploiting natural resources as well as on the rights of land-locked countries. Moreover, it re-tabled its amendment to operative paragraph 4, designed to replace 'appropriate' by 'adequate' and to insert, after the word 'compensation', the words 'when and where appropriate'.[151] The Soviet Union repeated that the payment of compensation was 'a purely domestic matter to be decided by each sovereign State in accordance with its national laws'.[152] In addition to the Soviet Union, France, the USA and the UK submitted amendments to the crucial paragraph 4. It is striking that the USA proposed deleting the last two sentences dealing with dispute settlement.[153]

No wonder that ECOSOC soon became caught in a stalemate and, following a proposal by Venezuela, could only decide to submit the report of the Commission, together with the summary records of the Council's discussions, to the sixteenth session of the General Assembly.[154]

ECOSOC's report on 'Permanent Sovereignty of Peoples and Nations over

[148] ECOSOC, Official Records, 117th meeting, UN Doc. E/SR.1178, 1 August 1961, p. 172.

[149] 'Concerted Action for Economic Development of Economically Less Developed Countries', unanimously adopted by the General Assembly on 15 December 1960.

[150] UN Doc. E/SR.1178, pp. 172–3. A detailed explanation of the Calvo doctrine is given in chapter 6, pp. 177–81. The Porter Convention was adopted by the Second Hague Peace Conference in 1907 and named after US Secretary of State Porter. This Convention incorporates the principle that States have no right to intervene militarily in a State which defaults on its public debt owed to aliens or another State. This principle is also known as the Drago doctrine after the Argentine foreign minister who formulated this proposition in response to the British–German–Italian blockade of Venezuela in 1902.

[151] UN Doc. E/L.915.

[152] UN Doc. E/L.914.

[153] UN Doc. E/L.918.

[154] ECOSOC Resolution 847 (XXXII), 3 August 1961, meeting 1,181 (UN Doc. E/SR.1181).

their Natural Resources' featured as the last item of the agenda of the Second Committee. Following a proposal by Afghanistan, the Committee decided to postpone substantive discussion of the subject matter to the next session of the General Assembly, due to lack of time. It was also decided that the United Nations' work on permanent sovereignty over natural wealth and resources be continued and that priority be given to discussion of this matter during the seventeenth session of the General Assembly.[155]

Bridging the gap: the near-consensus on the Declaration on Permanent Sovereignty over Natural Resources (1962)

Discussion in the Second Committee: emotions running high

General debate

During the seventeenth session of the UN General Assembly, the Second Committee devoted seventeen meetings to the discussion of permanent sovereignty over natural resources and as many as twenty-six separate votes were taken on sections of the draft resolution. Initially, the Netherlands and Chile proposed refraining from changing any part of the Commission's draft resolution,[156] since it constituted a careful compromise between developed and developing countries as well as between respect for national sovereignty and other rights and obligations under international law. Several delegations supported this proposal in their opening statements.[157] A French proposal to refer the draft text to the ILC hardly drew any attention. Burma and the Sudan proposed sending the draft back to the Commission, which was to be enlarged to eighteen member States, so as to take into account the increased membership of the United Nations and the need for adequate geographical representation, in particular of the developing countries.[158] Alternatively, they proposed deleting operative paragraphs 3 and 4. None of these proposals were accepted. The only trace they left was a new preambular paragraph calling for 'further consideration by the United Nations of the subject of permanent sovereignty over natural resources in the spirit of international co-operation in the field of economic development, particularly of the developing countries', which was adopted by forty-seven votes to one (France), with forty-four abstentions.

[155] See UNYB (1961), pp. 530–3. Resolution 1720 (XVI) of 19 December 1961 was adopted with eighty-five votes in favour, none against, with five abstentions.
[156] UN Doc. A/C.2/L.654, 31 October 1962.
[157] Including Afghanistan, Bolivia, Brazil, Congo, Costa Rica, Greece, India, Indonesia, Nigeria, Sweden, Uruguay and the UAR.
[158] UN Doc. A/C.2/L.696, 29 November 1962.

Afghanistan opened the debate,[159] presenting its earlier amendments to operative paragraph 4.[160] The UK, not represented on the Commission, took the view that the draft of the Commission did not adequately reflect the two principles on which the Commission's mandate had been based in Resolution 1314 (XIII), namely respect for national sovereignty and due regard for the rights and duties of States under international law. The UK hence submitted a number of amendments.[161] The Soviet Union, repeating its well-known critical assessment of the work of the UN Secretariat and the Commission, introduced a series of amendments,[162] one of which demanded a reference to the importance of UN General Assembly Resolutions 523 (VI) and 626 (VII).

Like Chile,[163] Peru called the draft 'a happy combination of ideals and interests' and Sweden described it as a 'delicate balance of interests'[164] and 'a guide for the future'. According to the Philippines it contained 'nothing which could be interpreted as undermining the sovereignty of any State'.[165]

When the USA asked Chile directly whether the draft proposed any modification of existing international law, Chile responded that 'the text proposed no modification of existing principles of international law and, in fact, called in two places for observance of these principles'.[166] Nevertheless, the USA stated that it did not want its 'sovereignty to be impaired by voting for a resolution which, unless clarified, might put in question the fundamental concept of its nationhood and the rights of its nationals'.[167]

Amending and voting on the draft resolution

On 3 December 1962, the Second Committee embarked on a series of votes on the various amendments to the draft resolution. As regards the preamble, the first amendment to be adopted was that by the Soviet Union recalling Resolutions 523 (VI) and 626 (VII).[168] The second vote related to the important question of State succession in a colonial context: Algeria had submitted an amendment according to which 'the obligations of interna-

[159] UN Doc. A/C.2/SR.834, 12 November 1962, p. 228.
[160] UN Doc. A/C.2/L.655, 31 October 1962.
[161] UN Doc. A/C.2/L.669, 9 November 1962.
[162] UN Doc. A/C.2/L.670, 9 November 1962.
[163] UN Doc. A/C.2/SR.834, 12 November 1962, pp. 230–1.
[164] UN Doc. A/C.2/SR.850, 23 November 1962, p. 328, para. 27.
[165] UN Docs A/C.2/SR.842, 16 November 1962, p. 273, para. 24 and SR.846, 20 November 1962, p. 317, para. 44.
[166] UN Doc. A/C.2/SR.842, 16 November 1962, p. 274, para. 35.
[167] UN Doc. A/C.2/SR.850, 23 November 1962, p. 326, para. 10.
[168] UN Doc. A/C.2/L.670, sub. I, adopted by fifty-seven votes to fifteen with fifteen abstentions.

tional law cannot apply to alleged rights acquired before the accession to full national sovereignty of formerly colonized countries and that, consequently, such alleged acquired rights must be subject to review as between equally sovereign States'.[169] This amendment obtained wide support from developing countries. Some developed countries considered it inappropriate to deal with this complicated question of acquired rights while the ILC was studying it on a 'priority basis'. The UK and the USA tried to accommodate the developing countries with the following preambular paragraph:[170]

Considering that nothing in operative paragraph 4 of this resolution in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule,

Noting that the subject of succession of States and Governments is being examined as a matter of priority by the International Law Commission ...

Algeria accepted this amendment 'in a spirit of compromise', since it left it to 'the discretion of States to decide on the legitimacy of acquired rights and on the granting and amount of compensation'.[171] A Bulgarian proposal to delete the words 'operative paragraph 4 of', aimed at widening the scope of the US/UK amendment, was rejected.[172] Subsequently, the amendment was adopted.

At the initiative of the Soviet Union,[173] another new preambular paragraph was inserted, reading:

Noting that the creation and strengthening of inalienable sovereignty of States over their natural resources and wealth strengthens their economic independence ...

As this amendment reflected one of its crucial demands, the Soviet Union requested a roll-call vote: it was adopted by thirty-seven votes to twelve (eleven Western countries plus Mexico), with forty-five abstentions.[174]

[169] UN Doc. A/C.2/L.691, 23 November 1962.
[170] UN Doc. A/C.2/L.686/Rev.2, sub. I, 28 November 1962.
[171] UN Docs A/C.2/SR.854, 28 November 1962, p. 360, para. 31 and SR.858, 3 December 1962, p. 387, para. 28.
[172] UN Doc. A/C.2/SR.858, p. 388. The words 'operative paragraph 4 of' were adopted by thirty-nine votes to eighteen, with thirty-four abstentions. The first paragraph of the UK/USA amendment was adopted by eighty-five votes to one with six abstentions, and the second one by sixty-three votes to twelve with sixteen abstentions.
[173] UN Doc. A/C.2/L.670, sub I.3, 9 November 1962.
[174] UN Doc. A/C.2/SR.858, 3 December 1962, pp. 388–9.

As to the operative part, the Committee first voted on a Soviet amendment to insert the words 'of their national development and' in paragraph 1, after the words 'must be exercised in the interest'. This received wide approval.[175] It purports to broaden the objective of the exercise of permanent sovereignty by serving both the well-being of the people of the State concerned and national development in general. The next amendment by the Soviet Union, to delete operative paragraph 3 entirely since in its view it had no direct relation with the objective of strengthening permanent sovereignty over natural resources, was rejected.[176]

Subsequently, the Committee took a round of votes on amendments relating to the core paragraph 4 on nationalization and compensation. Firstly, a Soviet amendment to insert the following opening words was put to a vote:

> *Confirms* the inalienable right of peoples and nations to the unobstructed execution of nationalization, expropriation and other essential measures aimed at protecting and strengthening their sovereignty over their natural wealth and resources ...

It was rejected as there was no majority: thirty votes to thirty, with thirty-three abstentions. So was the next Soviet amendment,[177] to replace the second sentence of paragraph 4, which deals with the duty to pay compensation, by the following:

> The question of payment of compensation to the owners shall in such cases be decided in accordance with the national law of the country taking those measures in the exercise of its sovereignty.

Next, the Committee dealt with the dispute-settlement clause. The UK and the USA wished to indicate that national jurisdiction should be 'exhausted' rather than 'resorted to'. At stake here was the issue whether, after the exhaustion of local remedies, an international dispute-settlement procedure could be pursued. In addition, they wished to make clear that upon agreement by 'the parties concerned', settlement of the dispute should be made through arbitration or international adjudication.[178] Lebanon and Syria claimed that this could only occur upon agreement 'between sovereign States'.[179] Whereupon, the UK and the USA proposed the phrase

[175] It was adopted by eighty-seven votes to one, with three abstentions.

[176] The paragraph was maintained by fifty-five votes to fifteen, with twenty-one abstentions.

[177] This amendment received twenty-eight votes in favour, thirty-nine against, with twenty-one abstentions.

[178] UN Doc. A/C.2/L.686, 22 November 1962 and Rev.1, 23 November 1962.

[179] UN Doc. A/C.2/L.697, 30 November 1962.

'by sovereign States and other parties concerned'. The important question here was whether non-State entities, namely foreign companies and nationals, could have a *locus standi* with an international tribunal and whether they enjoyed certain rights under international law, for example those emanating from the *pacta sunt servanda* principle. Eventually, the Lebanon/Syria sub-amendment was rejected,[180] while the UK/USA proposal was accepted.[181]

Emotions in the Western camp ran high once again, when the Committee adopted by forty-three votes to thirty-two, with thirty-two abstentions, the following Soviet amendment to insert a new provision after paragraph 4 by which the General Assembly:

> Unreservedly supports measures taken by peoples and States to re-establish or strengthen their sovereignty over natural wealth and resources, and considers inadmissible acts aimed at obstructing the creation, defence and strengthening of that sovereignty.

Less controversial[182] was the last Soviet amendment, to replace the second part of paragraph 6 by the words 'such as to further their independent national development and be based upon respect for their sovereignty over their natural wealth and resources'.

With respect to operative paragraph 8, the UK and the USA submitted an amendment to insert the following sentence at the beginning: 'Foreign investment and technical assistance agreements freely entered into by or between sovereign States shall be observed in good faith.'[183] As in the case of the dispute settlement clause in paragraph 4, Lebanon and Syria submitted a sub-amendment to delete the words 'by or' which was aimed at denying that agreements between States and foreign investors could have a status under international law. This being rejected, the UK/USA amendment was adopted.[184]

At the end of the debate, upon the request of Mauritania and Bulgaria, a

[180] By thirty-eight votes to thirty, with twenty-four abstentions. A similar sub-amendment submitted by Lebanon and Syria was proposed with respect to para. 8, namely to replace 'by, or between, sovereign States' by merely 'between'. This was rejected by forty-seven votes to thirty-three, with eleven abstentions. See UN Doc. A/C.2/SR.858, 3 December 1962, pp. 389–90.

[181] By fifty-two to twenty-eight, with thirteen abstentions.

[182] Adopted by forty-six votes to twenty-four, with nineteen abstentions.

[183] UN Doc. A/C.2/L.686/Rev.3, 3 December 1962, sub. 3. Orally revised by the USA during 858th meeting on 3 December 1962, UN Doc. A/C.2/SR.858, p. 387, para. 15.

[184] By fifty-three votes to twenty-two, with fifteen abstentions. An amendment submitted by Argentina and Peru (UN Doc. A/C.2/L.700), to replace the words 'the provisions of' in para. 8 by 'the principles set forth in', was adopted by forty-seven votes to two, with thirty-seven abstentions.

separate vote was taken on paragraph 4 as a whole, as amended. This key paragraph was adopted by fifty-two votes to eighteen, with seventeen abstentions. After three and a half hours of voting on separate paragraphs and clauses therein the Chairman could finally put the draft resolution as a whole to a vote: it was adopted by sixty votes to five, with twenty-two abstentions.[185]

Final round in the General Assembly: eliminating a major stumbling block

On 14 December 1962, the Rapporteur of the Second Committee presented the Committee's report[186] to the plenary meeting of the General Assembly. On behalf of thirteen countries, Tunisia submitted a number of widely acceptable amendments to the draft resolution, including one requesting the Secretary-General to continue the study of the various aspects of permanent sovereignty.[187] For the Western countries, the new paragraph 5, inserted at the initiative of the Soviet Union, remained a major stumbling block. As the USA stated:

> It does not make sense, painstakingly to compose a draft resolution which sets forth the rights and obligations of States, which affirms the sovereignty and the modalities of the exercise of that sovereignty, and, at the same time, declares unreserved support for measures to 're-establish' or strengthen their sovereignty over natural wealth and resources.[188]

Several Western countries, including Canada, Greece and the UK, indicated that they could only accept the draft resolution if operative paragraph 5 were removed. Notwithstanding this situation the Soviet Union once more insisted on incorporating, at the beginning of operative paragraph 4, the sentence:

> *Confirms* the inalienable right of peoples and nations to the unobstructed execution of nationalization, expropriation and other essential measures aimed at protecting and strengthening their sovereignty over their natural wealth and resources . . .[189]

It was rejected again, this time by forty-eight votes to thirty-four, with twenty-one abstentions.

Mauritania, finally, once more tried to have the words 'shall be

[185] See UN Doc. A/C.2/SR.858, 3 December 1962, p. 391, para. 58.
[186] UN Doc. A/5344/Add.1 and Add.1/Corr.1. Rapporteur was Ms Sellers from Canada.
[187] UN Doc. A/L.412 and Rev.1 and Rev.2, 12–14 December 1962.
[188] UN Doc. A/PV.1193, 14 December 1962, p. 1,124, para. 66.
[189] UN Doc. A/L.414, 14 December 1962.

exhausted' replaced by 'should be resorted to', but by the narrowest margin failed again.[190]

At the request of the USA, the General Assembly took a separate vote on operative paragraph 5[191] and this time rejected it.[192]

Subsequently, the draft resolution as a whole was adopted as General Assembly Resolution 1803 (XVII) with eighty-seven votes to two (France and South Africa), with twelve abstentions. France explained that it had cast a negative vote because advice had not been sought from UN organs competent to deal with legal matters, such as the Sixth Committee or the International Law Commission.

[190] The amendment was rejected by twenty-five votes in favour, twenty-five against and thirty-three abstentions. See UN Doc. A/PV.1193, p. 76.

[191] See Art. 18, paras. 2 and 3 of the UN Charter and rule 87 of the rules of procedure of the UN General Assembly.

[192] By forty-one votes to thirty-eight, with fifteen abstentions.

Table 2.1 Drafting history of the provisions on permanent sovereignty in the Human Rights Covenants

Forum	Draft text proposal	Voting record
UN Commission on Human Rights, 8 May 1952, on Chilean proposal	'The right of the peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources.'	10 votes to 6 (all Western nations), with 2 abstentions (China and Greece)
	'In no case may a people be deprived of its own means of subsistance on the grounds of any rights that may be claimed by other States.'	9–8–1 (Lebanon)
	Proposal to include this article in both Human Rights Covenants	9–4–5
Third Committee, 1955	Proposal by Cuba, Ecuador and El Salvador to establish an *ad hoc* Working Party composed of nine countries	35–13–10
Ad hoc Working Party of Third Committee of UNGA, consisting of Brazil, Costa Rica, El Salvador, Greece, India, Pakistan, Poland, Syria and Venezuela	'The peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'	7–0–2
Third Committee, 1955	Proposal by Denmark to delay decision-making on Article 1	25–28–5
Third Committee, 1955	Separate votes on specific phrases of the text of the Working Party:	
	1. 'for their own ends'	21–17–20
	2. 'based upon the principle of mutual benefit'	21–14–23
	3. 'In no case may a people be deprived of its own means of subsistence.'	25–8–25
Third Committee, 29 November 1955	Vote on proposal as a whole, text as proposed by *ad hoc* Working Party	26–13–19
Third Committee, 1966, proposal of African, Asian and Latin American countries	'Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources':	
	1. As Article 25 of the Convenant on Economic, Social and Cultural Rights	75–4–20
	2. As Article 47 of the Covenant on Civil and Political Rights	50–2–17
General Assembly, 16 December 1966	GA Resolution 2200 A (XXI), adopting the Human Rights Convenants	Unanimously

Table 2.2 General Assembly resolutions on permanent sovereignty over natural resources (1952–1962)

GA Resolution	Date of adoption	Voting record	Title
523 (VI)	12 January 1952	Adopted unanimously	Integrated Economic Development and Commercial Agreements
626 (VII)	21 December 1952	36 (60%)–4–20	Right to Exploit Freely Natural Wealth and Resources
837 (IX)	14 December 1954	41 (80%)–11–3	Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-Determination
1314 (XIII)	12 December 1958	52 (69%)–15–8	Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-Determination
1720 (XVI)	19 December 1961	85 (95%)–0–5	Permanent Sovereignty over Natural Resources
1803 (XVII)	14 December 1962	87 (86%)–2–12	Permanent Sovereignty over Natural Resources

Box 2.1 Text of the draft resolution submitted by the Commission on Permanent Sovereignty over Natural Resources (A/AC.97/10), 25 May 1961

The General Assembly,

Bearing in mind resolution 1314 (XIII) adopted by the General Assembly on 12 December 1958, which established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination, with recommendations, where necessary, for its strengthening, and decided further that, in the conduct of the full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard should be paid to the rights and duties of States under international law and to the importance of encouraging international co-operation in economic development of under-developed countries,

Bearing in mind resolution 1515 (XV) adopted by the General Assembly on 15 December 1960, which recommended that the sovereign right of every State to dispose of its wealth and its natural resources should be respected,

Considering that any measure in this respect must be based on recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States,

Considering that in order to promote international co-operation for the economic development of under-developed countries, based on respect for the principles of equal rights and the right of peoples and nations to self-determination, it is desirable to establish in advance economic and financial agreements,

Considering that the provision of economic and technical assistance, loans and increased foreign investment must not be subject to conditions which conflict with the interests of the recipient State,

Considering the benefits to be derived from exchanges of technical and scientific information likely to promote the development and use of such resources and wealth, and the important part which the United Nations and other international organizations are called upon to play in that connection,

Attaching particular importance to the question of promoting the economic development of under-developed countries and securing their economic independence,

Declares that,

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources mut be exercised in the interest of the well-being of the people of the State concerned;
2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities;
3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources;
4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases, the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, national jurisdiction should be resorted to. Upon agreement by the parties concerned, settlement of the dispute may be through arbitration or international adjudication;
5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality;
6. International co-operation for the economic development of under-developed countries, whether in the form of public or private capital investments, technical assistance, or exchange of scientific information, shall be so encouraged as to contribute in every possible way to the exercise of sovereignty as described in paragraph 5 above;
7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the United Nations Charter and hinders the development of international co-operation and the maintenance of peace;
8. States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the United Nations Charter and the provisions of this resolution.

3 Promoting economic development by the exercise of permanent sovereignty: the period after 1962

From the 1960s, developing countries actively pursued the implementation of the principle of permanent sovereignty over natural resources because they perceived this to be a main basis for their economic development and for a redistribution of wealth and power in their relations with the industrialized world. Consequently, during the period 1963–70 emphasis on State control and the actual ways of implementing the principle of permanent sovereignty over natural resources increasingly received attention and the link between permanent sovereignty over natural resources and promoting the development of developing host countries was firmly established. General Assembly Resolution 2158 (XXI), in particular, was instrumental in this, both substantively and politically. The guidelines it entails for the relationship and co-operation between foreign investors and developing host countries contain a relevant and substantive inventory of the problems involved and recommend constructive policies. Politically, it was important that the broad coalition which supported the 1962 Declaration persisted.

Yet, after 1970 the discussion on permanent sovereignty over natural resources changed substantially. Some controversial elements were more vigorously introduced in the discussion on the scope and content of permanent sovereignty, in particular creeping jurisdiction of coastal States over adjacent sea areas and marine resources which often led to fishery disputes,[1] and the issue of economic coercion. Furthermore, in the early 1970s an increasing number of developing countries nationalized certain sectors of their economies, including foreign-owned sectors, and sought international legitimization for these actions through the United Nations leading to a resumption of the 'nationalization debate'.

[1] See Buzan (1978) and Sharma (1985: 479–87).

In the wake of the first oil crisis, at the initiative of Algeria, in 1974 a special session of the UN General Assembly exclusively devoted to the problems of development and raw materials resulted in the adoption of a Declaration and an Action Programme on the Establishment of a New International Economic Order (NIEO).[2] Since it had 'proved impossible to achieve an even and balanced growth of the international community under the existing international economic order', according to the NIEO Declaration, the developing countries set out to change the rules of the game in order to put a halt to the widening of the gap between rich and poor nations and to promote a redistribution of wealth and power. Permanent sovereignty was perceived as an essential component of these efforts and nationalization as a 'development instrument', as the Algerian minister Bouteflika put it.[3] The NIEO resolutions were adopted in an atmosphere of confrontation which sharply contrasted with the spirit of co-operation and compromise during the adoption of the resolutions on permanent sovereignty in the 1960s. The major controversies were reflected in the vote on the Charter of Economic Rights and Duties of States (CERDS), adopted during the twenty-ninth session of the UN General Assembly in December 1974 and serving as one of the prime NIEO documents.[4]

From 1975 there was a return to compromise and pragmatism. While the previous three periods (1970–72, 1972–73 and 1974) were characterized by attempts by developing countries to gain full control over their resources, both land and marine, and over the activities of transnational corporations in their economies, an increasing number of developing countries became concerned with the decrease in the flow of foreign investment in the natural-resources sector and the low prices of many minerals (with oil as the exception) and other commodities. This concern led to UN initiatives for international assistance to developing countries for the exploration and exploitation of their natural resources and for promotion of foreign investment.

[2] GA Res. 3201 and 3202 (S-VI), 1 May 1974.

[3] See Official Records UN General Assembly, sixth Special Session, 2,230th meeting, 2 May 1974, A/PV.2230, p. 15, para. 190.

[4] GA Res. 3281 (XXIX), 12 December 1974, adopted by 120 to six (Belgium, Denmark, Federal Republic of Germany, Luxembourg, the UK and the USA) with ten abstentions (including the Netherlands).

Reaffirming and elaborating the 1962 Declaration (1963–1970)

UNCTAD I and permanent sovereignty

In 1964, the first United Nations Conference on Trade and Development (UNCTAD I) took place. The Conference resulted in a final document, entitled 'General and Special Principles Recommended by UNCTAD I to Govern International Trade Relations and Trade Policies Conducive to Development'. Its General Principle Three relates to sovereignty over natural resources:

> Every country has the sovereign right freely to trade with other countries, and freely to dispose of its natural resources in the interest of the economic development and well-being of its own people.

This text proved to be marginally acceptable to Group B representatives,[5] although the USA proposed that this principle be redrafted to read:

> Every State has the sovereign right freely to dispose of its natural resources by trade or other means in the interest of the economic development and well-being of its own people in accordance with General Assembly resolution 1803 (XVII).

Belgium, Germany and France supported the proposal by the USA, but expressed their willingness to accept the original text, provided the words 'in accordance with international law' were added at the end of the paragraph. This was not accepted by a majority and, eventually, the original wording was adopted.[6]

Relations between foreign investors and developing countries in natural resources control

The drafting of General Assembly Resolution 2158 (XXI)

In 1965, the General Assembly resumed its debate on permanent sovereignty over natural resources following the submission of Report E/3840 by the UN Secretariat on various aspects of permanent sovereignty, as requested by the 1962 Declaration. During the twentieth session of the General Assembly, two alternative draft resolutions were submitted. The

[5] See for a summary of the debate *Proceedings of the United Nations Conference on Trade and Development, Vol. I: Final Act and Report* (1964), paras. 33–7. Countries are divided into four groups for UNCTAD purposes as follows: Group A: Africa and Asia; Group B: Western Europe and other industrialized countries with a market economy; Group C: Latin America and the Caribbean; and Group D: Eastern Europe.

[6] By ninety-four votes to four (Australia, Canada, the UK and the USA), with eighteen abstentions (Group B countries plus Cameroon, Nicaragua, Peru and South Africa).

first was by Ceylon and Ecuador which dealt with the promotion of foreign investment in developing countries and proposed to formulate 'standards and procedures for the investment of foreign capital in developing countries'.[7] These could be based on existing legislative and treaty provisions and other appropriate information. The two countries expressed the hope that this would reduce uncertainty and anxiety on the part of both investors and capital-recipient countries and would induce capital-exporting countries to provide tax concessions to private capital exporters and to conclude bilateral investment protection treaties with developing countries.

The Soviet Union proposed two amendments to this draft resolution.[8] The first was to declare that the United Nations should exercise maximum efforts aimed at consolidating sovereignty of developing countries over their natural resources. The second was to insert a new paragraph by which the General Assembly would appeal to all States to refrain from actions preventing the exercise of sovereign rights of a State over its natural resources.

The second draft resolution was submitted by Poland and the United Arab Republic (UAR), subsequently supported by Algeria, Sudan and Tanzania.[9] Its main thrust was that the best way of ensuring permanent sovereignty of developing countries over their natural resources was for these countries to exploit and market these resources 'by themselves'; and, hence, to increase their share in the administration of the enterprises, and in the advantages and profits derived from natural resources exploited by foreign investors. The latter should also be made responsible for the proper training of indigenous personnel in all fields connected with the exploitation. Nearly all Western countries indicated that they considered the 1962 Declaration as a delicate and careful balance between the need to protect permanent sovereignty and the need to protect the interests of foreign investors in accordance with international law. Attempts to deviate from this could be detrimental to the efforts of developing countries to attract more foreign capital. The USA considered the draft to be 'hostile to private investors and to international economic co-operation among private enterprises and developing countries. It favours government enterprise.'[10] It submitted a

[7] Draft resolution by Ceylon and Ecuador, in UN Doc. A/C.2/L.806 and Add.1 and Rev.1, 13 December 1965. While most Latin American countries at that time rejected BITs, Ecuador concluded two BITs, one with Germany (1965) and another with Switzerland (1968). [8] UN Doc. A/C.2/L.859, 16 December 1965.

[9] UN Doc. A/C.2/L.828 and Add.1, 2 and 9 December 1965.

[10] UN Doc. A/C.2/SR.1015, 14 December 1965, p. 348, para. 10.

number of amendments[11] aimed at including references to: (1) the need for co-operation among developing countries and the world investment and trading community; (2) the right of developing countries to enter into 'mutually satisfactory arrangements' with foreign investors for the development of their natural resources; and (3) 'fair access' for developing countries to sources of capital, goods and know-how, necessary for the exploitation and marketing of their natural resources. The UAR re-emphasized in turn that 'absolute' sovereignty over natural resources would be essential: 'the developing countries have to be in a position to decide how and to what extent they would exploit their natural resources by themselves.'[12] Due to lack of time, it was decided to defer consideration.

At the General Assembly's session in 1966, eleven countries submitted a new text.[13] It reaffirmed the right of all countries to exercise permanent sovereignty over natural resources in the interest of their national development; it declared that the United Nations should undertake a concerted effort to ensure the full exercise of that right and the highest utilization of their natural resources by developing countries themselves; and it recognized the right of developing countries to secure and increase their share in the administration of the enterprises and in the advantages and profits derived from the exploitation of their natural resources. Several Western countries, including the UK and the USA, opposed the strong emphasis on national exploitation of the natural resources of developing countries. They repeated that developing countries should have freedom of choice in the way their resources would be exploited and marketed, but they should not aim at 'autarky' and diminish the rights accorded to foreign investors, thereby discouraging foreign aid (USA).[14] In response, Afghanistan, Ceylon, Ghana and Lebanon proposed to insert the following paragraph in the preamble:

> Taking into account the fact that foreign capital, whether public or private, forthcoming at the request of the developing countries, can play an important role . . .[15]

The Byelorussian SSR proposed to add:

> . . . inasmuch as it supplements the efforts undertaken by them in the exploitation and development of their natural resources and provided that there is govern-

[11] UN Doc. A/C.2/L.857, 15 December 1965.
[12] UN Doc. A/C.2/SR.1015, 14 December 1965, p. 349, para. 18.
[13] UN Doc. A/C.2/L.870/Rev.2, 4 November 1966.
[14] UN Doc. A/C.2/SR.1050, 31 October 1966, pp. 176–7, para. 33.
[15] UN Doc. A/C.2/L.871, 28 October 1966.

ment supervision over the activity of foreign capital to ensure that it is used in the interest of national development.[16]

As regards the administration of enterprises wholly or partly operated by foreign investors and the profits made by them, the USA proposed to spell out the right of developing countries to increase 'on an equitable basis' their share in the administration and profits, such share to be determined in the light of their development needs and 'without prejudice to any obligation arising out of international economic co-operation'.[17] The Netherlands preferred the phrase 'mutually acceptable contractual practices',[18] which was opposed by adherents of the Calvo doctrine such as Mexico, Peru, Venezuela and Guatemala, because in their view it could imply obligatory 'international arbitration'.[19] Mexico held that the exploitation of natural resources should always be in accordance with each country's national laws and regulations.[20]

Informal consultations resulted in a revised compromise draft,[21] in which the Mexican amendment was incorporated in paragraph 4, while some US amendments, as well as the Dutch amendment, were incorporated in paragraph 5. Only a few amendments had to be put to the vote, including that submitted by the Byelorussian SSR relating to government supervision over the activity of foreign capital.[22] On 25 November 1966, the General Assembly adopted the text as the important Resolution 2158 (XXI).[23]

Resolution 2158 emphasizes that the natural resources of developing countries constitute a basis for their economic development in general and their industrial progress in particular and advocates that, in order to safeguard the exercise of permanent sovereignty over natural resources, it is essential that developing countries themselves undertake the exploitation and marketing of their natural resources so that they may employ the maximum possible benefits in the interest of their national development.

[16] UN Doc. A/C.2/L.881, 3 November 1966.

[17] UN Doc. A/C.2/L.873/Rev.1, 3 November 1966.

[18] UN Doc. A/C.2/L.885 and A/C.2/SR.1060, p. 218, para. 13, 7 November 1966. These words should be added after the phrase 'of the peoples concerned' in operative paragraph 4.

[19] The Calvo doctrine, which embodies the national standard, emphasizes the primacy of national law and dispute settlement through domestic courts. See chapter 6, pp. 177–81 below.

[20] UN Doc. A/C.2/L.886, 7 November 1966.

[21] UN Doc. A/C.2/L.870/Rev.2 and Corr. 1, 4 November 1966.

[22] This received thirty-five votes in favour, seventeen against, and no less than fifty-three abstentions. Thereupon, the Second Committee adopted the draft resolution by ninety-nine votes to none, with eight abstentions. The abstentions were from Argentina, Australia, Belgium, Japan, Malta, New Zealand, the UK and the USA.

[23] By 104 votes to none, with six abstentions.

Foreign capital can play an important supplementary role, but developing countries should secure an appropriate share in the administration, management and profits of foreign companies ('on an equitable basis'). Foreign companies should undertake training of national personnel at all levels. The resolution thus put the exercise of permanent sovereignty over natural resources firmly in an economic and social-development context.

Follow-up of Resolution 2158 (XXI)

In 1968, the Secretariat submitted a progress report[24] on the implementation of Resolution 2158 (XXI). In a draft resolution, Poland, the Ukrainian SSR, Ghana and Libya[25] proposed that the Secretary-General be requested to prepare a more extensive report, especially on the implementation of paragraphs 5, 6 and 7 of General Assembly Resolution 2158 (XXI). They wanted more concrete information on relations between foreign investors and host countries in practice, regarding finance, administrative management and training of national personnel in foreign enterprises. Western delegations opposed the explicit reference to only a few paragraphs of Resolution 2158, because this could disturb the balance between the various interests. They also disliked an additional preambular paragraph which in their view went beyond the scope of Resolution 2158:

> *Considering* that the *full* exercise of permanent sovereignty over natural resources will play an important role in the achievement of the goals of the Second United Nations Development Decade ...[26]

Yet, the initiators were not prepared to change their draft resolution and on 19 December 1968 the General Assembly adopted the text as Resolution 2386 (XXIII) by ninety-four to none, with nine abstentions.[27]

In 1970, the Assembly received the new report from the UN Secretary-General,[28] as requested by Resolution 2386 (XXIII). The Secretariat observed that the Assembly was not content with merely affirming the principle of State sovereignty over natural resources *in abstracto* as a legal concept, but had consistently dealt with that principle in an economic and social context. Thus it had acquired a 'dynamic connotation', encompassing not only the formal rights of ownership over these resources and freedom to

[24] UN Doc. A/7268, 11 October 1968.

[25] Later on joined by Panama and Sierra Leone. See UN Doc. A/C.2/L.1007, 28 October 1968. [26] Emphasis added. [27] UNYB (1968), p. 432.

[28] UN Doc. A/8058 of 14 September 1970, entitled 'The Exercise of Permanent Sovereignty over Natural Resources and the Use of Foreign Capital and Technology for their Exploitation'. For the purpose of the report the Secretary-General had addressed a questionnaire to member States asking them to provide him with information on the progress made in the implementation of the provisions of GA Res. 1803 (XVII) and 2158 (XXI). Only nineteen countries replied.

decide on the manner in which they should be exploited and marketed, but also the capability to do so in such a way that the people of the State concerned might effectively benefit from them.[29] The report emphasized the role of foreign capital and technology in the exploitation of natural resources in developing countries and predicted that these countries would try to attract more foreign investors in the 1970s. On this point, the report was criticized by communist countries and some developing countries. Others, including India and the Philippines, welcomed the report. Chile, Poland and the Ukrainian SSR submitted a draft resolution,[30] inviting member States to inform the Secretary-General on 'the progress achieved to safeguard the exercise of permanent sovereignty over natural resources, including the measures taken to control the outflow of capital in a manner compatible with the exercise of their sovereignty and international co-operation'. An extensive discussion took place on the fifth preambular paragraph of the draft, which stated that the financing of development plans of developing countries depended to a considerable degree upon the conditions under which their natural resources were exploited and upon their share in the profits of foreign investments. Eventually, it was decided merely to take this 'into account'.[31] This Resolution 2692 (XXV) emphasizes that the exercise of permanent sovereignty over natural resources by developing countries is indispensable for accelerating industrial development and invites ECOSOC to arrange periodic reports on: (i) the advantages derived from the exercise of permanent sovereignty over natural resources, especially with respect to the increased mobilization of domestic resources; (ii) the outflow of capital; and (iii) the transfer of technology.

Permanent sovereignty as a condition for social progress and development

During the period under review (1963–70) the principle of permanent sovereignty over natural resources was repeatedly recalled in resolutions which dealt with other issues, such as the world social situation.[32] Other interesting examples are two main resolutions which took stock of the UN

[29] Ibid., p. 7. [30] UN Doc. A/C.2/L.1136, 25 November 1970.

[31] See GA Res. 2692 (XXV), adopted on 11 December 1970 by a vote of 100 to six, with three abstentions. See below for further discussion.

[32] GA Res. 2035 (XX), adopted without a vote on 7 December 1965. In operative paragraph 1 the General Assembly requests ECOSOC and the Social Commission, when considering the role which the United Nations should play in the social field, to bear in mind, *inter alia*, the following general principle: '(b) The necessity to direct the main efforts of the United Nations in the social field towards supporting and strengthening independent social and economic development in the developing countries, with full respect for their permanent sovereignty over their natural resources, in accordance with General Assembly Res. 1803 (XVII) of 14 December 1962.'

'development ideology' prevailing during those days, namely the 1969 Declaration on Social Progress and Development which considers permanent sovereignty of each nation over its natural wealth and resources as one of the 'primary conditions of social progress and development'[33] and the International Development Strategy for the Second United Nations Development Decade.[34] However, the principle does not feature in the important Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.[35] Proposals to include it as a component of 'the principle of sovereign equality of States' failed to achieve consensus.[36]

Permanent sovereignty over marine resources (1970–1972)

Among the most controversial amendments to what became General Assembly Resolution 2692 (XXV), as discussed above, was a proposal by Peru[37] to insert two new preambular paragraphs which would recognize the right of developing countries to full utilization of the natural resources in 'their adjacent seas'. In view of the controversies which had arisen over the delimitation of territorial waters and the establishment of a new regime for the exploration and exploitation of marine resources beyond the limits of these waters, in the First Committee and in the (recently established) Seabed Committee, several countries opposed references to this question in the resolution. But a compromise was reached, referring merely to 'the necessity for all countries to exercise fully their rights so as to secure the optimal utilization of their natural resources, *both land and marine*'.[38] The Soviet Union, traditionally a champion of the freedom of the seas because of its international shipping interests, submitted a sub-amendment to add the phrase 'in accordance with international law'. It was adopted in the Second Committee,[39] but upon a proposal by Chile (supported by twenty-seven other member States)[40] the General Assembly removed it.[41] On 11 December

[33] Article 3 of the Declaration on Social Progress and Development, GA Res. 2542 (XXIV), adopted on 11 December 1969 by a vote of 119 in favour, none against, with two abstentions.

[34] See para. 74 of GA Res. 2626 (XXV), 24 October 1970, adopted without vote.

[35] GA Res. 2625 (XXV), adopted without a vote on 24 October 1970.

[36] See UN Doc. A/AC.119/L.6 (proposed by Czechoslovakia) and L.7 (also supported by Yugoslavia). See Abi-Saab (1973: 42) and (1984: 43).

[37] UN Doc. A/C.2/L.1137, co-sponsored by Ecuador and Yugoslavia, 30 November 1970.

[38] Emphasis added.

[39] By thirty-three to twenty-six, with twenty-nine abstentions. See UNYB (1970), p. 454.

[40] UN Doc. A/L.620 and Add. 1, 10–11 December 1970.

[41] By sixty-five votes in favour, twenty-three against, with eighteen abstentions; UNYB (1970), p. 454.

1970, the draft as amended, was adopted as General Assembly Resolution 2692 (XXV).[42]

In May 1972 the issue was followed-up in Santiago de Chile in the context of UNCTAD III. One of the principles governing international trade relations and trade policies conducive to development, as adopted, reads:

> Coastal States have the right to dispose of marine resources within the limits of their national jurisdiction, which must take duly into account the development and welfare needs of their peoples.[43]

In 1972, Iceland submitted a draft resolution, also on behalf of twenty-five developing countries, purporting to 'reaffirm' that permanent sovereignty extends over the resources 'found in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters'.[44] It was quite obvious that this country sought legitimization from the UN General Assembly for its position taken in the fisheries disputes with the UK and Germany, on which they had instituted proceedings before the ICJ. The draft met with considerable opposition from both Western countries and non-Western 'land and shelf-locked' countries. They considered it inappropriate for the Assembly to prejudge the outcome of the Third UN Conference on the Law of the Sea (UNCLOS III), which was about to be convened. Their view, however, was not accepted.[45] In separate votes the key phrase on resources 'found in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters' was maintained[46] as well as the words 'both on land and in their coastal waters' in another paragraph.[47]

In the General Assembly, Afghanistan[48] once more tried to insert a preambular paragraph referring to the competence of UNCLOS III.[49] The attempt failed again.[50] Thereupon, a separate vote was taken to remove the phrase 'and in the superjacent waters' in operative paragraph 1, at the request of the Netherlands which announced it would abstain on the

[42] GA Res. 2692 (XXV), adopted by 100 votes to six, with three abstentions.

[43] Principle XI of Res. 46 (III), adopted by UNCTAD III by seventy-two votes to fifteen, with eighteen abstentions on 18 May 1972.

[44] UN Doc. A/C.2/L.1272/Rev.1, 30 November 1972.

[45] By forty-three votes to thirty-five, with thirty-four abstentions; UNYB (1972), p. 347.

[46] By sixty-two votes to thirteen, with thirty-nine abstentions.

[47] By fifty-four votes to fourteen, with twenty-six abstentions.

[48] Supported by Jordan, Laos, Nepal, Paraguay and Singapore.

[49] UN Doc. A/L.694. The amendment read: '*Bearing in mind* that the question of the limits of the States' national jurisdiction will be dealt with by the forthcoming conference on the law of the sea.'

[50] By forty-five votes in favour, fifty against and twenty-eight abstentions.

resolution as a whole if the phrase was maintained. Nevertheless, the disputed words were maintained.[51] The Soviet Union declared that it interpreted the words 'within their national jurisdiction' in paragraph 1 in the sense of Article 1 of the 1958 Convention on the Continental Shelf and expressed support for the Dutch amendment as it had done for the amendment of Afghanistan. It pointed out that the rights of coastal States to fishery resources only extended to the limits of the territorial sea, which in accordance with international law was twelve nautical miles. Despite this considerable difference of opinion, the General Assembly adopted the draft as Resolution 3016 (XXVII).[52]

It is remarkable that the titles of Resolutions 2692 (XXV) and 3016 (XXVII) refer to 'Permanent sovereignty over natural resources of *developing countries*'.[53] While the reasons for this cannot be traced from the drafting history, it reflects how closely the exercise of permanent sovereignty was linked to the cause of development of developing countries.

Towards the NIEO resolutions: renewed debate on nationalization (1972–1973)

Prohibition of coercion

Apart from claiming permanent sovereignty over natural resources over all natural resources on land and in their coastal waters, Resolution 3016 (XXVII) of 18 December 1972 marked the introduction of the prohibition of coercion – economic, political, or any other kind – into the General Assembly's discussion on permanent sovereignty. Coercion had been extensively discussed in the context of, *inter alia*, the drafting of the 1970 Declaration on Principles of International Law (Principle 3). In Resolution 3016 (XXVII) the Assembly declared that:

> actions, measures or legislative regulations by States aimed at coercing, directly or indirectly, other States engaged in the change of their internal structure or in the exercise of their sovereign rights over their natural resources, both on land and in their coastal waters, are in violation of the Charter and of the Declaration contained in Resolution 2625 (XXV) and contradict the targets, objectives and policy measures of the International Development Strategy for the Second United Nations Development Decade.[54]

[51] By seventy-four votes in favour, twenty-six against, with twenty-five abstentions.

[52] The voting record was 102 to none, with twenty-two abstentions (including developed and developing countries) on 18 December 1972.

[53] Emphasis added.

[54] This paragraph was adopted by ninety-eight votes to three, with twenty-one abstentions; UNYB (1972), p. 347.

Earlier in 1972, UNCTAD had first introduced the concept of prohibition of coercion and linked it to the maintenance of international peace and security in the discussion on permanent sovereignty, an issue which received considerable attention in the course of the debate on a New International Economic Order. Principle II of UNCTAD Resolution 46 (III) of 18 May 1972 reads:

> Every country has the sovereign right freely to dispose of its natural resources in the interest of the economic development and well-being of its own people; any external, political or economic measures or pressure brought to bear on the exercise of this right is a flagrant violation of the principles of self-determination of peoples and non-intervention, as set forth in the Charter of the United Nations and, if pursued, could constitute a threat to international peace and security.[55]

Forerunners of the NIEO debate

During the 1970s the NIEO debate was one of the important international political issues. In the early 1970s, a number of major changes in the world economy took place which had a negative impact on the overall development perspectives of developing countries. These changes included world economic stagnation, high inflation, increasing unemployment in Western nations, and international monetary instability. The oil crisis of 1973 resulted in a number of unforeseen and unprecedented price increases, partly due to the cartel policy of the Organization of Petroleum-Exporting Countries (OPEC). The political events of 1973, including the Yom Kippur war and the Arab oil embargo against the USA and the Netherlands, and the initial success of OPEC led to an increasingly assertive, if not militant, attitude of developing countries in international affairs.[56] Consultations took place on the establishment of producers' associations.[57] Large-scale nationalizations took place in many countries including Chile (1971), Iraq (1972), Peru (1974), Libya (1971 and 1973) and Venezuela (1976). Often a clear-cut confrontation occurred with the transnational companies concerned as well as with their home States. The countries carrying out these nationalizations sought international support and legitimization for their policies in UN organs. Various resolutions were adopted by UNCTAD, ECOSOC and the General Assembly.

[55] See 'Proceedings of the United Nations Conference on Trade and Development', third session, Santiago de Chile, 13 April–21 May 1973, UN Doc. TD/180/Vol. I, p. 59.

[56] See Paust and Blaustein (1974: 410) and (1977) and Shihata (1975).

[57] Rangarajan (1978).

UNCTAD

During its twelfth session held in Geneva in October 1972, the UNCTAD Trade and Development Board (TDB) adopted a quite radical resolution which provoked a new debate on the right of nationalization. Paragraph 2, the most controversial element of the resolution, reads:

> *Reiterates* that, in the application of this principle, such measures of nationalization as States may adopt in order to recover their natural resources are the expression of a sovereign power in virtue of which it is for each State to fix the amount of compensation and the procedure for these measures, and any dispute which may arise in that connection falls within the sole jurisdiction of its courts, without prejudice to what is set forth in General Assembly Resolution 1803 (XVII).

This text: (1) introduces an arbitrary legal foundation for nationalization measures ('in order to recover their natural resources'); (2) stipulates unilateral competence to fix the amount of compensation; and (3) provides for dispute settlement through domestic courts exclusively. It is needless to say that this resolution was unacceptable to Western and other countries. Yet, on 19 October 1972, the Trade and Development Board adopted it as TDB Resolution 88 (XII).[58]

ECOSOC

During its April–May session in 1973, ECOSOC adopted Resolution 1737 (LIV).[59] As in General Assembly Resolution 3016 (XXVII), this ECOSOC resolution reaffirms the right of States to permanent sovereignty 'over all their natural resources, on land within their international boundaries as well as those of the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters' (paragraph 1). New elements were that the resolution emphasizes that exploration and exploitation of such resources are subject to national laws and regulations in each country (paragraph 2) and that suppressing the 'inalienable right' of a State to the exercise of 'full sovereignty over its natural resources, both on land and in coastal waters' would be a flagrant violation of the UN Charter and relevant resolutions of the General Assembly (paragraph 3). The paragraph even claims that 'to persist therein could constitute a threat to international

[58] UN Doc. TD/B/421, 5 November 1972, adopted by thirty-nine votes in favour, two against (Greece and the USA) and twenty-three abstentions (sixteen OECD and seven developing countries). In para. 16 of GA Res. 3041 (XXVII) the General Assembly (by 121 votes for with none against and five abstentions) would later endorse the paragraph of TDB Res. 88 (XII) relating to permanent sovereignty.

[59] This was an initiative of Peru, Chile and Venezuela; see UN Doc. E/AC.6/L.483/Rev.1, 24 April 1973.

peace and security', one of the circumstances under which, according to Article 39 of the UN Charter, the Security Council can take mandatory action. In paragraph 4 ECOSOC recognizes that:

> one of the most effective ways in which the developing countries can protect their natural resources is to promote or strengthen machinery for co-operation among them having as its main purpose to concert pricing policies, to improve conditions of access to markets, to co-ordinate production policies and, thus, to guarantee the full exercise of sovereignty by developing countries over their natural resources.

International institutions are requested to provide developing countries with all possible financial and technical assistance for this purpose. The UK and the USA submitted amendments. The UK attempted to have deleted the phrase 'and in superjacent waters' in paragraph 1, to insert the words 'contrary to international law' in the anti-coercion/pressure clause and to replace 'coastal waters' by 'territorial waters' in paragraph 3. The USA proposed to qualify paragraph 4, dealing with the machinery for trade and marketing co-operation among developing countries, with the phrase 'but not so as to put consumer countries, both developing and developed, in an inferior bargaining position'. Both amendments were rejected and the draft resolution was adopted.[60] This debate was continued during the twenty-eighth session of the General Assembly.

General Assembly

In 1973 Iceland once again introduced a draft resolution,[61] seeking legitimization of the extension of economic jurisdiction of coastal States over the resources of the sea. As in 1972, Western countries, Eastern European countries and land-, shelf- and zone-locked countries protested. The UK submitted similar amendments as it did during the debates in ECOSOC. However, both in the Second Committee and in the General Assembly plenary meeting these amendments were defeated.[62] The Assembly thereupon reaffirmed the inalienable right of States to permanent sovereignty over all their land and marine resources. Iraq, supported by Algeria and Syria, had proposed to insert a radical nationalization paragraph,[63] based on TDB Resolution 88 (XII), in the draft resolution. Much to the dismay of Western countries, this had been accepted by the sponsors

[60] By twenty votes to two (Japan and the UK), with four abstentions (France, Netherlands, Spain and the USA); UNYB (1973), pp. 397 and 404.

[61] UN Doc. A/C.2/L.1328/Rev.1, 4 December 1973. Draft resolution submitted by Argentina, Chile, Ecuador, Egypt, Guyana, Iceland, Kenya, Libya, Peru, Tanzania, Venezuela and Zaire.

[62] UNYB (1973), pp. 398–9.

[63] UN Doc. A/C.2/L.1334, 4 December 1973.

as a new operative paragraph 3. Among other things, it 'strongly' reaffirmed the inalienable right of States to permanent sovereignty and affirmed that each State, in carrying out nationalization measures, was 'entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the *national* legislation of each State carrying out such measures'.[64] Consequently, it features as paragraph 3 in General Assembly Resolution 3171 (XXVIII).[65] The Resolution also contains an anti-coercion paragraph and endorsed co-operative measures by developing countries to protect their natural resources by concerting pricing policies, improving conditions of access to markets and co-ordinating production policies.

Steamrollering it through: the NIEO Declaration and Action Programme (1974)

On the initiative of the Algerian President Boumédienne, a Third World leader and President of the Non-Aligned Movement, a special session was convened which for the first time in UN history was exclusively devoted to the problems of raw materials and development. During this Sixth Special Session of the General Assembly, held at Geneva from 9 April to 2 May 1974, the ninety-five member States working within the framework of the 'Group of 77' submitted a draft resolution entitled 'Draft Declaration on the Establishment of a New International Economic Order'.[66] Its operative paragraph 4 stated the following on permanent sovereignty over natural resources:

The new international economic order should be founded on full respect for the following principles:

...

e Every country has the right to exercise permanent sovereignty over its natural resources and economic activities. With this principle in mind:
 i Every country has the right to exercise effective control over its natural resources and their exploitation with means suitable to its

[64] Emphasis added. The Second Committee approved its inclusion by eighty-one to eleven, with twenty-three abstentions and, subsequently, the Assembly by eighty-six to eleven, with twenty-eight abstentions; UNYB (1973), p. 399.

[65] This resolution was adopted by 108 to one (the UK), with sixteen abstentions on 17 December 1973.

[66] See 'Report of the Ad Hoc Committee of the Sixth Special Session', UN Doc. A/9556, Part II, pp. 3–4, which reproduces the Draft Declaration contained in UN Doc. A/AC.166/L.47, 30 April 1974.

own situation, including the right of nationalization or transfer of ownership to its nationals;

ii The right of all States, territories and peoples under foreign occupation, colonial rule or apartheid, to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources, as well as the exploitation and manipulation of the human resources of those States, territories and peoples;

iii Nationalization is an expression of the sovereign right of every country to safeguard its resources; in this connection, every country has the right to fix the amount of possible compensation and mode of payment, while possible disputes have to be resolved in accordance with the domestic laws of every country.

This principle may be applied according to the national interests and laws of each country. It shall in no way affect the right of all States to conclude, in the free exercise of their sovereign will, agreements consonant with the purposes of the United Nations.

The last part was inserted in an effort to reassure the Western group. In addition, the Group of 77 presented a proposal for a 'Programme of Action', which included a chapter IX on 'Assistance in the exercise of permanent sovereignty over natural resources'.[67] Section (a) thereof asked for:

The adoption of all necessary measures to defeat attempts to counteract the positive effects of the nationalization of foreign property on the economy of developing countries.

These and other proposals were discussed in the Ad Hoc Committee of the Sixth Special Session.[68] At the start of the debate Germany, on behalf of the EEC, proposed that the first sentence of the draft paragraph should be replaced by the following text: 'Every country has the right to exercise national sovereignty over its natural resources and all domestic activities.' Alternatively, the text could read: 'Each State enjoys permanent sovereignty over its natural resources, to be exercised in the interest of economic development and well-being of its people.' The subparagraph would then continue:

States endowed with natural resources have the right on grounds of or for reasons of public utility, security or the national interest to dispose of these resources; included therein is the right on such grounds or for such reasons to nationalize, expropriate or requisition them. The sovereignty and rights in question shall be exercised in accordance with the applicable rules of international law, in particular with regard to the payment to the owners of prompt, adequate and

[67] Ibid., p. 15; Draft Programme of Action contained in UN Doc. A/AC.166/L.48, 30 April 1974. [68] UN Doc. A/AC.166, SR.6–7, 16 and 17 April 1974.

effective compensation. The exercise of this sovereignty and these rights shall take account of the requirements and interdependence of the economies of all States and the necessity to contribute to the balanced expansion of the economy.[69]

Since this text posed more restrictions on the exercise of State sovereignty than the 1962 Declaration, it is not surprising that this amendment was not acceptable to developing countries. Some of them (Peru, Brazil, Iran, Tunisia and Argentina) used conciliatory language in explaining their objections, but others referred to 'attempts of multinational corporations and developed countries to neutralize the effect of nationalization and prevent the countries of the third world from regaining their natural heritage' (Algeria),[70] and 'an attempt to obstruct the work of the Committee' (Libya). France and the USA proposed to avoid substantive debate on this issue in order not to jeopardize the work of the Committee and not to duplicate the work of the Working Group on the Charter of Economic Rights and Duties of States.[71]

On this and other issues, the Committee reached an impasse. At the eleventh hour, however, the Iranian Chairman of the Ad Hoc Committee introduced, in his own name, two compromise draft resolutions.[72] Without a vote, the Committee adopted his proposals on the understanding that the Group of 77 would not press for a vote. On 1 May 1974, the General Assembly adopted the Declaration on the Establishment of a New International Economic Order as General Assembly Resolution 3201 (S-VI) and the Programme of Action on the Establishment of a New International Economic Order as General Assembly Resolution 3202 (S-VI). The provisions of the Declaration as far as relevant to permanent sovereignty over natural resources read:

4 The new international economic order should be founded on full respect for the following principles:

. . .

e Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full sovereignty of the State. No State may be subjected to economic, political or any other type of

[69] General Assembly, Ad Hoc Committee of the Sixth Special Session, sixth meeting, 16 April 1974, UN Doc. A/AC.166/SR.6, p. 10. [70] UN Doc. A/AC.166/SR.6, p. 12.

[71] See pp. 100–2 below.

[72] UN Docs A/AC.166/SR.21, p. 2 and A/AC.166/L.50 and L.51, 30 April 1974.

coercion to prevent the free and full exercise of this inalienable right;

g Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries;

h Right of the developing countries and the peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities;

The relevant section of chapter VIII on 'Assistance in the Exercise of Permanent Sovereignty of States over Natural Resources' of the NIEO Action Programme reads:

All efforts should be made:

a To defeat attempts to prevent the free and effective exercise of the rights of every State to full and permanent sovereignty over its natural resources;

Although both the NIEO Declaration and the Action Programme were adopted by consensus, most Western nations could not agree with important parts of these resolutions, in particular those dealing with permanent sovereignty, nationalization, producers' associations and price indexation. Western countries objected to: (1) the extension of the scope of permanent sovereignty to 'all economic activities'; (2) the phrase 'in order to safeguard these resources' as sufficient ground for exercising full sovereignty, including the right to nationalization and transfer of ownership to nationals; (3) the absence of any reference to compensation for nationalization measures; and (4) the emphasis on restitution and full compensation for the exploitation and depletion of the natural resources of States and peoples under foreign occupation, alien and colonial domination or apartheid. The USA called permanent sovereignty over natural resources 'the most difficult subject' which the Declaration addressed. While it recognized the principle as contained in Resolution 1803 (XVII), it was clear that the formulation was neither complete nor acceptable: 'The governing international law cannot be, and is not prejudiced by the passage of this resolution.'[73] Other industrialized countries, including Germany, Canada, Belgium, France, Australia, Spain, Greece and Denmark, made similar reservations, but they were simply ignored by leading developing countries. For example, Mexico stated:

[73] UN Doc. A/PV.2229, 1 May 1974, p. 8, para. 91.

we are pleased that the inalienable principle of full permanent sovereignty of States over their natural resources emerges from the Assembly strengthened through the empathetic recognition of certain fundamental rights... We believe that nationalization in developing countries which are exporters of raw materials is the only way to implement effectively the principle of permanent sovereignty and to exercise real and effective control over natural resources.[74]

At the closing session Algeria applauded 'the spirit of moderation which guided the Group of 77' and 'the spirit of conciliation which emerged in other groups'. It spoke of an 'unprecedented' and 'genuine consensus', while for the first time in history the General Assembly worked on the basis of documents prepared by the Third World: 'The Third World is no fiction. It is a contemporary reality. It is a force, a responsible force.'[75] The USA repeated in reply:

The document we have produced is a significant political document, but it does not represent unanimity of opinion in this Assembly. To label some of these highly controversial conclusions as 'agreed' is not only idle; it is self-deceiving. In this house, the steamroller is not the vehicle for solving vital, complex problems.[76]

Other developed countries did not put it so bluntly. For example, the Netherlands' representative Kaufmann stated that his delegation 'wholeheartedly joined the consensus'.[77] But, in view of the lack of real agreement on the issues dealt with in the NIEO resolutions, he later observed that this was an example of 'pseudo-consensus'.[78]

Subsequently, these major controversies were reflected in the debate and vote on the Charter of Economic Rights and Duties of States (CERDS).

The Charter of Economic Rights and Duties of States (1974)

Background

During UNCTAD III (1972), President Echeverra of Mexico proposed the drafting of a UN Charter of Economic Rights and Duties of States. The Conference established a Working Group for this purpose.[79] Between February 1973 and June 1974 the Working Group held four sessions. Between the third and fourth session, the Sixth Special Session of the

[74] UN Doc. A/PV.2230, 2 May 1974, pp. 11–12, paras. 142 and 150.
[75] Ibid., p. 14, para. 186. [76] UN Doc. A/PV.2229, 1 May 1974, p. 7, para. 81.
[77] UN Doc. A/PV.2230, 2 May 1974, p. 4, para. 56; Report of the Netherlands Ministry of Foreign Affairs, publication 106 (The Hague, 1974), p. 70.
[78] Kaufmann (1988: 26–7).
[79] UNCTAD Res. 45 (III), adopted on 18 May 1972 by ninety votes to none, with nineteen abstentions. UN Doc. TD/180/Vol. I, p. 36, para. 214.

General Assembly took place and it had a major impact. The NIEO Action Programme stipulated that the Charter should be adopted during the twenty-ninth session of the UN General Assembly. In September 1974, the UNCTAD Board decided to transmit the Working Group report to the General Assembly. On 25 November 1974, its Mexican chairman, Castañeda, reported to the Second Committee of the General Assembly.[80] During the consultations in the Working Group a sub-group had been established to deal with issues of foreign investment, nationalization, permanent sovereignty and regulation of transnational corporations. The outcome was included in Chapter II of the draft Charter.

Castañeda observed that 'great efforts had been exerted to reach agreement and, in the group considering paragraph 2, attempts had been made to overcome disagreement by using more abstract language. However, the attempt had failed.' Several alternatives to Article 2 had indeed been submitted, but none of them could obtain support from all groups of countries. Subsequently, on 21 November 1974, ninety members of the Group of 77 submitted a draft text.[81] A group of fourteen Western countries submitted a series of amendments on Article 2 of this draft, including far-reaching ones.[82] In the course of the debate the Group of 77 issued a revised version,[83] but this text was no more successful in taking away the objections raised by Western countries.

On 5 December 1974, the EEC countries submitted their own draft resolution, asking the General Assembly to take into account the considerable progress already achieved but also to note that some controversial points remained. Therefore, it requested the Working Group to continue its efforts with a view to submitting a complete and generally acceptable draft Charter to the Seventh Special Session of the General Assembly, devoted to development and international economic co-operation and scheduled for September 1975.[84] However, on behalf of the Group of 77, Mexico pointed out that there was a real danger that any delay, instead of reconciling views, would cause even greater divergence and a hardening of positions:

While the third world countries were always prepared to exert every effort to achieve consensus, consensus was not an end in itself; the objective was to secure

[80] UN Doc. A/C.2/SR.1638, 25 November 1974, pp. 382–5.

[81] UN Doc. A/C.2/L.1386, 21 November 1974 and Corr.1–5, 26 November–4 December 1974.

[82] UN Doc. A/C.2/L.1404, 3 December 1974. The group of fourteen consisted of Australia, Belgium, Canada, Denmark, France, Federal Republic of Germany, Greece, Ireland, Italy, Japan, Luxemburg, the Netherlands, the UK and the USA.

[83] UN Doc. A/C.2/L.1386/Corr.6, 5 December 1974.

[84] UN Doc. A/C.2/L.1419, 5 December 1974.

agreement on the substance of the Charter provisions. Consequently, the sponsors of the draft resolution rejected all attempts to use the pretext of consensus to disguise the ambitions of a minority which sought to impose their views on the overwhelming majority of Member States.[85]

Hence, the EEC countries' draft was rejected.[86] Thus, a confrontation between the OECD countries and the Group of 77 became unavoidable. In the Second Committee as many as seventy-three separate votes took place. At the request of the USA, all votes taken were recorded. Eventually, all amendments were rejected and on 6 December 1974 the Second Committee adopted the draft as a whole by 115 votes to six, with ten abstentions, followed on 12 December 1974 by the General Assembly with a similar vote: 120 votes to six, with ten abstentions, thereby adopting the Charter of Economic Rights and Duties of States as General Assembly Resolution 3281 (XXIX).[87] The sixteen States abstaining were all industrialized countries. Australia, Greece, Finland, New Zealand, Sweden and Turkey were the only OECD countries supporting it.[88]

Article 2 of CERDS

Basic provision on permanent sovereignty

The text of the Group of 77 reads as follows:

> Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

Western countries noted a contradiction between the mandatory character ('shall') and the right to 'freely exercise full sovereignty' and also objected to the considerable extension of the scope of permanent sovereignty over natural resources by including 'wealth' in general (previously only 'natural wealth') and 'economic activities'. Hence, the fourteen developed countries proposed the following alternative text: 'Every State has permanent sovereignty over its natural wealth and resources and has the inalienable

[85] UN Doc. A/C.2/SR.1647, 6 December 1974, p. 433, para. 12.

[86] By eighty-one votes to twenty, with fifteen abstentions; UN Doc. A/C.2/SR.1647, 6 December 1974, p. 434, para. 18.

[87] The six countries voting against were: Belgium, Denmark, Federal Republic of Germany, Luxemburg, the UK and the USA.

[88] Thus the finding by Chatterjee (1991: 672), that 'Except for Australia, none of the developed States cast a vote in favour of the Resolution' is obviously incorrect. In addition, all countries of Eastern Europe voted in favour.

right fully and freely to dispose of them.'[89] The Second Committee rejected[90] this alternative and adopted the Group of 77 text.[91]

Regulation and treatment of foreign investment

In his report on the work of the Working Group, Castañeda pointed out:

the Group B countries considered that, if a State accepted foreign investment under certain conditions and concluded an agreement with the investing company, that agreement should be fulfilled in good faith. The countries of the Group of 77 did not deny the general duty of all States to fulfil their obligations, but considered that such agreements were not international agreements, since they were not concluded between States and were therefore governed by the domestic law of the State concerned. They did not have international status, because private companies were not subjects of international law. The developing countries refused to accept the formula ... because they felt that it would be tantamount to conferring an international status on such companies and making the bond between the company and the State a bond of international law. Disagreement on that issue was radical.[92]

The Group of 77 proposed the following text on the rights of States to regulate foreign investment:

2 Each State has the right:
- a To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
- b To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph;

Through a joint amendment[93] Western countries submitted an alternative text for this paragraph:

[89] UN Doc. A/C.2/L.1404, 3 December 1974.
[90] By eighty-seven votes to nineteen, with eleven abstentions; UN Doc. A/C.2/SR.1648, 6 December 1974, p. 438, para. 6.
[91] By 119 votes to nine, with three abstentions: ibid., p. 439, para. 20.
[92] UN Doc. A/C.2/SR.1638, 25 November 1974, p. 383, para. 7.
[93] UN Doc. A/C.2/L.1404, 3 December 1974.

2 Each State has the right:
  a To enact legislation and promulgate rules and regulations, consistent with its development objectives, to govern the entry and activities within its territory of foreign enterprises;
  b To enter freely into undertakings relating to the import of foreign capital which shall be observed in good faith;
  c To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply fully with its laws, rules and regulations and conform with its economic and social policies. Every State shall ensure that transnational corporations enjoy within its national jurisdiction the same rights and fulfil the same obligations as any other foreign person. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the rights set forth in this subparagraph;

Many elements in this text are more or less similar to provisions of Resolutions 1803 (XVII) and 2158 (XXI), especially on the issues of investment agreements and the principle of fulfilment in good faith of international obligations. New elements are the injunction for transnational corporations not to intervene in the internal affairs of a host State and the duty to co-operate. But it was rejected.[94] This is not to say that all developing countries took the same position. For example, Jordan reiterated the view that 'a reasonable balance should be maintained between the overriding consideration of sovereignty and the national independence and welfare of States, particularly developing States, on the one hand and the pragmatic consideration of encouragement of foreign investment on the other'. Therefore, foreign investors 'must be given sufficient guarantees, derived from the spirit of international law and international co-operation'. Likewise Afghanistan, Fiji, Indonesia, Iran, Kuwait, Malaya, Singapore and Thailand referred to the useful role foreign investors can play in the development of their economies, stressing the need for a favourable investment climate, although this should be in conformity with their national objectives and priorities.

The Canadian representative explained his position with regard to 'privileged treatment' of foreign investors and the right to grant diplomatic protection:

It is not the view of my Government that Canadian investors should occupy a privileged position in the economies of the countries in which they invest. But it is

[94] By eighty-seven votes to nineteen, with eleven abstentions: UN Doc. A/C.2/SR.1648, 6 December 1974, p. 438, para. 6.

our view that, when a host State takes measures against foreign investment, it should not discriminate against Canadian foreign investment in relation to foreign investment from other sources, and the measures which it applies to all foreign investment should be in accordance with its international obligations. If either of those requirements were not met, my Government would feel it was entitled to raise the matter with the Government of the host state and to rely on any relevant principles of international law. We could not consider this as constituting a demand for preferential treatment, but we are not at all confident that all the sponsors of the text share this view.[95]

Australia observed that it did not regard the provisions of Article 2.2(a) as 'in any way prejudicing the right of a State to extend consular protection on behalf of its investors'.[96] For these reasons the industrialized countries wished to add a new paragraph, reading:

3 States taking measures in the exercise of the foregoing rights shall fulfil in good faith their international obligations.[97]

They made clear that they considered this an essential condition for their willingness to go along with other parts of the Charter. As the UK stated:

In the absence of any provision making clear that States were under a duty to fulfil their international obligations in good faith, no part of the article was acceptable to this delegation.[98]

However, in the Second Committee the amendment was rejected.[99] What remained was merely a general reference to the principle of 'Fulfilment in good faith of international obligations'[100] in draft Chapter I entitled 'Fundamentals of International Economic Relations'.

Expropriation, nationalization and compensation

Every delegation taking part in this debate recognized that each State had the sovereign right to nationalize or expropriate foreign property. However, the views of industrialized and developing countries differed widely on the question of under which conditions a State could legitimately exercise this right. As Castañeda recalled, there had been 'differences of opinion on the

[95] Official Records of the General Assembly, 2,315th meeting, 12 December 1974, p. 1,374, para. 124. See also UN Doc. A/C.2/SR.1649, 6 December 1974, p. 446, para. 44.

[96] UN Doc. A/C.2/SR.1650, 9 December 1974, p. 450, para. 15.

[97] UN Doc. A/C.2/L.1404, 3 December 1974.

[98] UN Doc. A/C.2/SR.1650, 9 December 1974, p. 454, para. 48.

[99] By seventy-one votes to twenty, with eighteen abstentions; UN Doc. A/C.2/SR.1648, p. 438, para. 2.

[100] Sub-paragraph (j) of Chapter I, adopted by 130 votes to none; UN Doc. A/C.2/SR.1648, 6 December 1974, p. 438, para. 18.

matter for over a century'.[101] The nationalization paragraph in the text of the Group of 77 read:

Each State has the right:

> c. To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.[102]

The Group of 14 industrialized countries proposed replacing this subparagraph by the following text:

> d. To require, expropriate or requisition foreign property for a public purpose, provided that just compensation in the light of all relevant circumstances shall be paid;[103]

This text would reconfirm 'a public purpose' as a condition for nationalization, while the text of the Group of 77 did not stipulate any condition. As far as the duty to pay compensation was concerned, the Western proposal reflected a remarkable deviation from the traditional triple standard ('prompt, adequate and effective compensation') as well as from the Resolution 1803 formula of 'appropriate compensation in accordance with the rules in force in the State taking such measures ... and in accordance with international law'. Even so, there was no room left for further compromise. As Castañeda put it:

> The developing countries maintained that compensation should be fixed in accordance with the law of the expropriating State. The Group B countries maintained that, while the domestic law of each country played a decisive role, if the solution imposed by that law in the setting of compensation did not satisfy certain international standards international law should be applicable. In that context they understood international law to include generally accepted practice as well as bilateral or multilateral agreements concluded by the expropriating country. Among such generally accepted practice, they included the payment of 'prompt, adequate and effective compensation' – the almost ritual formula of jurists in those countries, particularly the common law countries. The countries

[101] UN Doc. A/C.2/SR.1638, 25 November 1974, p. 384, para. 8.
[102] UN Doc. A/C.2/L.1386, 21 November 1974, Art. 2.2(c).
[103] UN Doc. A/C.2/L.1404, 3 December 1974.

of the Group of 77 denied the existence of generally accepted practice on that issue, since the legal precedents and the opinions differed too widely for there to be any real international custom.[104]

In the course of the debate in the Second Committee, the Group of 77 was willing to make one minor change only, namely to replace the words 'provided that all relevant circumstances call for it' by 'taking into account its relevant laws and regulations and all circumstances that the State considers pertinent'.[105] While at first glance this could perhaps have been interpreted as not explicitly denying a duty to pay compensation, diverging interpretations existed among developing countries. On the one hand, it was the view of Mexico that this provision meant that in such cases the State 'should undertake to pay appropriate compensation' which 'is such an important principle for Mexico that we have inscribed it in our Constitution and our laws'.[106] But according to Cuba it allowed for:

> the possibility that after study a State might decide that compensation was inappropriate because of such items as tax debts or excessive profits, or national strategic requirements.[107]

Therefore, the developed countries insisted on an unambiguous acceptance of their view that a valid exercise of the right to nationalize requires payment of compensation. As Australia stated: 'any act of nationalization should be accompanied by the payment of just compensation, without undue delay, to be determined where necessary through recourse to internationally agreed procedures for the settlement of disputes.'[108] And Canada added:

> my delegation is unable to accept a text which seeks to establish the principle that a State may nationalize or expropriate foreign property without compensation – in effect, confiscate such property.[109]

Eventually, the text of the Group of 77, as revised, was adopted by 104 votes to sixteen, with six abstentions.[110]

Settlement of disputes

The discussions on the dispute-settlement clause were also difficult and

[104] UN Doc. A/C.2/SR.1638, 25 November 1974, p. 384, para. 8.
[105] UN Doc. A/AC.2/L.1386/Corr.6, 5 December 1974.
[106] Official Records of the General Assembly, 2,315th meeting, 12 December 1974, p. 1,377, para. 162. [107] UN Doc. A/C.2/SR.1638, 25 November 1974, p. 384, para. 8.
[108] UN Doc. A/C.2/SR.1650, 9 December 1974, p. 450, para. 15.
[109] Official Records of the General Assembly, 2,315th meeting, 12 December 1974, p. 1,374, para. 126. [110] UN Doc. A/C.2/SR.1648, 6 December 1974, p. 439, para. 20.

proved to be a major stumbling block. Article 2.2(c) of the draft Charter of the Group of 77 read:

In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.[111]

All Group B countries opposed this text and, through the fourteen-nations amendment, the following text was put forward:[112]

e To require that its national jurisdiction be exhausted in any case where the treatment of foreign investment or compensation therefore is in controversy, unless otherwise agreed by parties;
f To settle disputes where so agreed by the parties concerned through negotiation, good offices, inquiry, fact-finding, conciliation, mediation, arbitration or judicial settlement, on the basis of the principles of sovereign equality of States and free choice of means.

However, this amendment was rejected and the Group of 77 text was adopted. Latin American countries expressed their traditional position. As Mexico put it:

it should be the internal legal order which established the procedures and means of compensation. What is not to be tolerated, and what the overwhelming majority of countries have therefore completely rejected, is that instead of or in addition to the national legal system, other bodies or extra-national procedures should be called on to rule on what a State should do in such cases. To accept such a system as binding would be to place States on an equal legal and political footing with foreign corporations, and that would mean that those corporations would receive nothing more or less than the treatment which should be reserved solely for States.[113]

However, some other developing countries seemed to disagree. Kuwait stated that it:

was not at ease with the formulation of Article 2 concerning the role of local tribunals in the settlement of disputes over the nature of compensation. In that connection, its interpretation was that Article 2, paragraph 2(c) did not in any manner affect the provisions of agreements concluded bilaterally between the recipients of capital and its suppliers.[114]

Similarly, Singapore announced that it would continue to adhere to the provisions of the Convention Establishing the International Centre for the

[111] UN Doc. A/C.2/L.1386, 21 November 1974.
[112] UN Doc. A/C.2/L.1404, 3 December 1974.
[113] Official Records General Assembly, 2,315th meeting, 12 December 1974, pp. 1,377–8, para. 162.
[114] UN Doc. A/C.2/SR.1642, 2 December 1974, p. 411, para. 40.

Settlement of Investment Disputes (ICSID Convention) and other multilateral and bilateral treaty obligations, while Indonesia emphasized that this paragraph still gave States a flexibility to seek the settlement of disputes arising from nationalization and the awarding of compensation by peaceful means other than through national tribunals.

Sweden represented the view of the developed countries:

> in cases where national means of justice have been exhausted and the result of that process still appears unsatisfactory to a foreign State, there exists a dispute on the international level, a dispute which in the view of the Swedish delegation should be settled by an international court.[115]

At first glance the text of CERDS is not at all flexible in this respect. While General Assembly Resolution 3171 (XXVIII) still stated that 'any disputes which might arise should be settled in accordance with the national legislation', Article 2.2(c) uses terms such as 'in *any* case' and '*shall* be settled'[116] under domestic law *and by domestic tribunals*, unless it is mutually agreed *by all States concerned*[117] that other peaceful means be sought. Moreover, the CERDS dispute-settlement clause provides, in contrast with paragraph 4 of Resolution 1803 ('sovereign States and other parties concerned') and the ICSID Convention, no *locus standi* for non-State entities as proposed by the Group B countries ('the parties concerned'). At second glance the differences may be more apparent than real since neither instrument contemplates international arbitration or adjudication in the absence of an agreement between the parties to the dispute and international means of dispute settlement can thus come within the purview of 'the principle of free choice of means' as it is in Article 2.2(c), subject to agreement by all States concerned. Yet, from the *travaux préparatoires* it appears that, at least at the time of adoption of CERDS, resort to such means was strongly repudiated.

Other relevant articles of CERDS

Several other provisions of CERDS are relevant from the perspective of permanent sovereignty over natural resources. As mentioned above, Chapter I mentions a number of 'fundamentals of international economic relations', including: (i) Making good injustices which have been brought

[115] Official Records of the General Assembly, 12 December 1974, p. 1,367, para. 57. See also UN Doc. A/C.2/SR.1649, 6 December 1974, p. 447, para. 59.

[116] Emphasis added.

[117] It is unclear which States, other than the host State and home State, are referred to here.

about by force and which deprive a nation of the natural means necessary for its normal development; (j) Fulfilment in good faith of international obligations; and (n) International co-operation for development. Article 1 deals with the sovereign right of every State to choose its own economic and political system without outside interference, coercion or threat. Article 3 provides that in the exploitation of natural resources shared by two or more countries, 'each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others'. The question of the legal regime for shared resources proved to be a most difficult one, since in the view of some States[118] it could infringe on the permanent sovereignty of States over their natural resources and the ensuing right of every State to the free use of those resources. The sensitivity and disagreement involved, notably amongst developing countries, was reflected in the voting record on Article 3: 100 votes to eight, with twenty-eight abstentions, the only example of an article or part thereof being adopted with more than seventeen abstentions.

Article 5 sets out the right of all States to associate in organizations of primary commodity producers such as OPEC in order to develop and achieve stable development financing. All States should refrain from applying economic and political pressures that would limit that right. Needless to say, the Western countries were not in favour of this particular article, but their effort to have it deleted failed.[119] Article 6 could be interpreted as counter-balancing Article 5 in so far as it deals with the duty of States to contribute to the development of international trade, particularly by the conclusion of long-term multilateral commodity agreements, where appropriate, taking into account the interests of producers and consumers. Article 16 formulates the rights of oppressed countries, territories and peoples to restitution and full compensation for the depletion of, and damages to, their natural and all other resources. Twelve OECD countries tried to have this article removed, but their amendment was rejected.[120]

Article 30 calls upon all States to be responsible for the preservation of the environment and in Article 31 the UN General Assembly determines that it is the duty of each State to contribute to the balanced expansion of the

[118] Including Afghanistan, Bolivia, Brazil, Ecuador, Ethiopia, Paraguay and Turkey.

[119] UN Doc. A/C.2/L.1406, 3 December 1974. Rejected by ninety-eight votes to fifteen, with eight abstentions; UN Doc. A/C.2/SR.1648, 6 December 1974, p. 438, para. 6.

[120] UN Doc. A/C.2/L.1411, 3 December 1974. Rejected by ninety-eight votes to seventeen, with eight abstentions; ibid., para. 8.

world economy, adding that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts. In Article 32 the General Assembly stipulates: 'No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.' Finally, Article 33 provides that, in their interpretation and application, the provisions of the Charter are interrelated and that each provision should be construed in the context of other provisions. Thus, Article 2 should be interpreted in the light of provisions such as those of Chapter I, sub-paragraph (j) and Article 31.

Follow-up measures

It is remarkable that in subsequent years there was so little reaction within the UN system to the provisions on permanent sovereignty in CERDS. In fact, the last echo of the discussion on controversial elements in Article 2 were heard during the Second General Conference of the United Nations Industrial Development Organization (the UNIDO II Conference), held in Lima in March 1975. The Lima Declaration and Plan of Action on Industrial Development and Co-operation provides:

> That every State has the inalienable right to exercise freely its sovereignty and permanent control over its natural resources, both terrestrial and marine, and over all economic activities for the exploitation of these resources in the manner appropriate to its circumstances, including nationalization in accordance with its laws as an expression of this right, and that no State shall be subjected to any forms of economic, political or other coercion which impedes the full and free exercise of that inalienable right;[121]

UNIDO II's document also states that 'the effective control over natural resources and the harmonization of policies for their exploration, conservation, transformation, and marketing, constitute for developing countries an indispensable condition for economic and social progress' (paragraph 34) and it points out that the principles set out in CERDS should be fully implemented.[122]

The basic conceptual differences between industrialized and developing countries narrowed considerably in subsequent years and a new spirit of constructive co-operation emerged. In 1975, the Seventh Special Session of

[121] This para. 32 was adopted by seventy votes in favour, ten against and eleven abstentions, while the Lima Declaration and Plan of Action as a whole was adopted by eighty-two to none, with seven abstentions.

[122] This paragraph was adopted by seventy-two votes in favour, five against and fourteen abstentions.

the UN General Assembly unanimously adopted Resolution 3362 (S-VII) on Development and International Economic Co-operation, which reinforced and specified the DD II strategy, also in the light of the NIEO resolutions.[123] This time a real consensus emerged on the most important items. It is noteworthy that such terms as 'permanent sovereignty' and 'nationalization' do not occur at all in this resolution. They are also absent in UNCTAD IV's Integrated Programme for Commodities,[124] aimed at a global commodity policy through the conclusion of individual commodity agreements and the establishment of a Common Fund for Commodities. During the second half of the 1970s, little action was taken to effectuate the commitments.[125] The transfer of the focus of action from the United Nations to the twenty-seven-nation Conference on International Economic Co-operation (the Paris-based 'North–South dialogue', 1975–7) led to few concrete results.

Although numerous resolutions adopted after 1974 have referred to the NIEO resolutions and, for some years after 1976, the Sixth (Legal) Committee included an item called 'The Progressive Development of the Principles and Norms of International Law Relating to the Establishment of a New International Economic Order' in its agenda, it became obvious that CERDS had not gained any real legal significance and certainly had not succeeded in establishing 'generally accepted norms to govern international economic relations systematically', let alone 'a just order and stable world', in which 'the rights of all countries and in particular the developing States' are duly protected.[126]

Similarly, negotiations on a comprehensive UN Code of Conduct on Transnational Corporations, initiated in 1977, were impeded by the fading appeal of the NIEO resolutions. It was impossible to complete these negotiations due to continuing disagreement on, among other things, controversial aspects of the principle of permanent sovereignty over natural resources, albeit that agreement has been reached on a general paragraph reading: 'Transnational corporations shall respect the national sovereignty of the countries in which they operate and the right of each State to exercise its permanent sovereignty over natural resources.'[127]

[123] See the preamble and UNYB (1979), pp. 329–47.

[124] UNCTAD Res. 93 (IV), 30 May 1976.

[125] See Khan (1982: 74–6 and 331–2) and Chimni (1987: 190–2).

[126] See preamble to UNCTAD Res. 45-III which initiated the drafting of CERDS.

[127] Paragraph 7 of the proposed text of the Draft Code of Conduct on Transnational Corporations (Chairman's text) as contained in UN Doc. E/1990/94. See also chapter 6, pp. 181–3 below.

Towards pragmatism: international co-operation in natural-resource policy

In the middle of the 1970s an increasing number of developing countries became concerned with investment problems. As a result of the worldwide economic recession and the 'risky' political climate in developing countries, there was an actual decrease of foreign investment in natural-resource projects. Similarly, the high debt burden of developing countries and the frequency of debt rescheduling discouraged both public and commercial financial institutions from providing money for new projects. Furthermore, the prices of many mineral and other commodities remained at low levels. In this changing climate, previously neglected UN initiatives for multilateral development assistance for the exploration of natural resources were welcomed and various institutional arrangements were made for this purpose. Similarly, attention was paid to the question how to promote foreign investment in the natural-resource sector of developing countries in line with their priorities.

Development assistance for exploration of natural resources

In the 1960s efforts to increase international assistance to developing countries in the field of the exploration and exploitation of their natural resources were begun. The International Development Strategy for DD II contains an interesting paragraph on this, namely paragraph 74 which provides:[128]

> Full exercise by developing countries of permanent sovereignty over their natural resources and economic activities will play an important role in the achievement of the goals and objectives of the Decade. Developing countries will take steps to develop the full potential of their natural resources. Concerted efforts will be made, particularly through international assistance, to enable them to prepare an inventory of natural resources for their more rational utilization in all productive activities.

Similarly, General Assembly Resolutions 2692 (XXV) and 3167 (XXVIII) addressed this problem. It was also regularly discussed in ECOSOC and its Committee on Natural Resources. However, it took a number of years before the General Assembly adopted specific resolutions on this issue. In 1977, the General Assembly reaffirmed that 'the effective discovery, exploration, development and conservation of their natural resources by developing countries is indispensable to the mobilization of their resources for

[128] Paragraph 74 of GA Res. 2626 (XXV), 24 October 1970.

development'. It requested the Secretary-General to prepare a report, with the assistance of an expert group, on: (a) the financial requirements over the next ten to fifteen years for the exploration and location of natural resources in developing countries; (b) the availability of multilateral mechanisms for the provision of adequate finance for the exploration of natural resources with special reference to the availability of soft loans with an element of subsidy for developing countries; and (c) the availability of mechanisms for the transfer of technology for this purpose to developing countries.[129] During its next session, the General Assembly recognized the need to ensure an adequate flow of investment into the natural-resource sector in developing countries, in particular from the industrialized countries. It requested several UN organs, including the Secretariat, ECOSOC, UNDP and the World Bank to assist developing countries for this purpose within the field of their competence, for example, by undertaking assessment missions, financing natural-resource projects and promoting transfer of technology in the natural-resource field.[130] For many years ECOSOC biannually adopted resolutions relating to permanent sovereignty over natural resources.

UN Revolving Fund for Natural Resources Exploration

In the early 1960s, the United Nations became involved in projects for natural-resource exploration in developing countries, but these were initially fairly limited due to a lack of financial means. In order to streamline and extend the activities within the UN system to meet the need for increased natural-resource exploration in developing countries, the UN Secretariat and subsequently an Intergovernmental Working Group put forward proposals to establish a special fund for such activities, to be financed by money generated from successful projects.[131] Three years of intensive negotiations followed in ECOSOC. Some countries (including Chile and Peru) felt that it was too radical a departure from standard UN assistance procedures to introduce the 'royalty' concept in the UN development system. They preferred developing countries to repay a 'loan' when a project proved to be successful. Some Western countries had serious doubts as to whether the developing countries would be able to make any repayments to the fund. But in 1973, upon the recommendation of

[129] UN Doc. A/RES/32/176, 19 December 1977, adopted by 130 votes to none, with eight abstentions. [130] UN Doc. A/RES/33/194, 29 January 1979, adopted without a vote.

[131] See the reports on the first, second and third sessions of the Committee on Natural Resources, UN Docs. E/C.7/13 (1971), pp. 23–4; E/C.7/22 (1972), pp. 17–20; and E/C.7/43 (1973), pp. 13–17.

ECOSOC,[132] the General Assembly decided to establish the United Nations Revolving Fund for Natural Resources Exploration.[133] The Fund was to be financed from voluntary contributions, donations in cash and kind, payments by recipient States equal to a percentage of the value of the natural resources produced under Fund-assisted projects.

Over the years the UN Revolving Fund has had to face many difficulties due to, *inter alia*, limited voluntary contributions and depressed commodity prices. Nonetheless, it has been able to play a useful role in generating a number of successful projects, mostly in the field of exploration of solid minerals and geothermal energy. In 1991, the Fund began receiving the first 'replenishment' payments following a successful project involving a large chromium deposit in the Philippines.[134] It should be noted that the ECOSOC Resolution 1762 (LIV) of 1973 provides that 'the Fund shall be guided by the principles of the Charter of the United Nations duly taking into account the principle of permanent sovereignty of States over their natural resources' (paragraph 1(f)).

ECOSOC Committee on Natural Resources

In 1970, the Committee on Natural Resources was established as a standing committee of ECOSOC. It replaced the *ad hoc* Committee on the Survey Programme for the Development of Natural Resources. Originally, the Committee had twenty-seven, subsequently thirty-eight and, from 1972, fifty-four members, elected by ECOSOC on the basis of equitable geographical distribution. According to ECOSOC Resolution 1535 (XLIX) the terms of

[132] ECOSOC Res. 1762 (LIV) of 18 May 1973, adopted by seventeen votes to none, with nine abstentions.

[133] GA Res. 3167 (XXVIII). Adopted with 106 to none, with eighteen abstentions, on 17 December 1973. The Fund is one of the special purpose funds, placed in the charge of the UN Secretary-General and administered by the UNDP. The main purpose of the Fund is to provide financial assistance to participating developing countries for exploration of potential commercially exploitable mineral, water and energy resources under national jurisdiction. For this purpose the Fund seeks and utilizes voluntary contributions and funds generated through the exploitation of these resources discovered or developed with the assistance of the Fund. The Fund may give assistance in all phases of exploration, which may include preparation for requests for assistance from the Fund, exploration of natural resources, and pre-investment studies including feasibility studies. The operational procedures provide that, if commercial exploitation follows successful exploration financed by the Fund, the country concerned has to provide 2 per cent of the annual net benefits to the Fund for fifteen years. Its revolving nature is an essential characteristic of the Fund.

[134] UNYB (1991), p. 469 and UNYB (1992), pp. 654–5. See for a recent account UNYB (1993), p. 782.

reference of the Committee include, 'with due respect for the concept of sovereignty of every nation', assistance to ECOSOC in the planning, implementation and co-ordination of activities within the UN system for the development of natural resources and the making of recommendations to governments and bodies in the UN system such as the UNDP on appropriate priorities concerning their exploration and exploitation.[135]

The Committee dealt extensively with the principle of permanent sovereignty over natural resources: it was expected 'to help in the formulation of policy guidance to enable developing countries to maximize benefits that could be derived from the optimum exploration and exploitation and full use of their natural resources'.[136] It was decided to have a periodic report on the advantages derived from the exercise of this principle, with particular reference to 'the impact of such exercise on the increased mobilisation of resources, especially of domestic resources, for their economic and social development, on the outflow of capital therefrom as well as on transfer of technology'.[137]

Throughout the years the principle has remained an important element of the work of the Committee.[138] During the initial period, in the wake of General Assembly Resolutions 2692, 3016, 3171 as well as the NIEO resolutions of 1974, the debate on many issues was marked by a rather ideological undertone; this applied to issues such as nationalization and compensation, extending exclusive economic jurisdiction over sea areas and marine resources as well as permanent sovereignty over natural resources in territories under occupation, colonial domination and apartheid.

Simultaneously, the Secretariat undertook fact-finding and reporting on current developments in the hard-mineral and oil sectors of developing countries and on noticeable trends in national legislation, joint ventures, service agreements, government ownership and the control of natural-resource ventures in developing countries, transfer of technology, and the role of producers' associations and technical co-operation among developing countries.

On the basis of biannual Secretariat reports,[139] the Committee discussed

[135] Operative paragraph 4. On 27 July 1970, ECOSOC Res. 1535 (XLIX) was adopted by twenty votes to two, with three abstentions. It is notable that the preamble only refers to GA Res. 626 and not to GA Res. 1803 (XVII) or 2158 (XXI).

[136] Committee on Natural Resources, Report on its First Session, 1971, UN Doc. E/C.7/13, p. 4, para. 4.

[137] Ibid.; see para. 5 of GA Res. 2692 (XXV).

[138] See the reports of the Committee on Natural Resources on its twelve regular meetings in the period 1971–91: UN Docs. E/C.7/13 (1971); E/C.7/22 (1972); E/C.7/43 (1973); E/C.7/56 (1975); E/C.7/76 (1977); E/C.7/112 (1979); E/C.7/125 (1981); E/C.7/1983/13; E/C.7/1985/11; E/C.7/1987/11; E/C.7/1989/11; and E/C.7/1991/14.

trends in investment legislation, including investment incentives, taxation, customs and foreign-exchange legislation, as well as trends in legal and economic arrangements between mineral-producing developing countries and transnational corporations. It often reviewed the role played by transnational corporations in the mining sector and the extent to which they undermined efforts of developing countries to exercise effective control over natural resources and economic activities in their territory. The Committee also discussed issues such as: renegotiation of contracts as a more flexible way of adapting long-term contracts to changing conditions than nationalization; and experience with State mining enterprises, including their internal organization, economic and financial autonomy, the applicable tax regime and mechanisms to improve their efficiency.

The strengthening of indigenous capabilities of developing countries in the resource field to make optimum economic use of their natural resources and the promotion of investments in line with basic priorities, such as local industrialization of the exploitation of natural resources, featured as a central topic. The Committee also discussed: co-operation in mineral development between centrally planned economies and developing countries; possibilities for economic and technical co-operation among developing countries; the extension of natural-resource-related information and advisory services provided by the UN Secretariat to developing countries; the linkage between pricing, import barriers and indebtedness of countries; and access by producing countries to technology and to the markets of industrialized countries.

From more recent reports one can infer the Committee's increasing concern with means of attracting foreign investment and new techniques, including remote sensing, for natural-resource exploration and assessment.[140] Moreover, in 1989 and 1991 a debate was initiated on the relationship between permanent sovereignty over natural resources, sustainable development and global environmental concerns as well as on international mechanisms for transfer of new, clean technology mitigating environmental consequences.

In the course of the effort to restructure the economic and social sector of the United Nations,[141] the mandate of the Committee was terminated in 1992. However, a new Committee on Natural Resources was established,[142]

[139] UN Docs. E/5425 (1973); E/C.7/53 (1975); E/C.7/66 (1977); E/C.7/99 (1979); E/C.7/119 (1981); E/C.7/1983/5; E/C.7/1985/8; E/C.7/1987/2; E/C.7/1989/5; E/C.7/1991/6; and E/C.7/1993/2.

[140] See UN Doc. E/RES/1991/88 and 89, 26 July 1991, UNYB (1991), pp. 470–2.

[141] See UN Doc. A/RES/46/235, 13 April 1992; see UNYB (1992), pp. 932–6.

[142] UN Doc. A/RES/46/235, 13 April 1992; ECOSOC Decision 1992/218; and UN Doc. E/RES/1992/62, 31 July 1992.

which is quite different from its predecessor. It has a more restricted mandate pertaining to non-energy minerals and water resources only[143] and is composed of twenty-four government-nominated experts instead of government officials. At its first meeting in 1993, the Committee paid considerable attention to the link between integrated management of water, land and minerals, and sustainable development.[144] It recommended that ECOSOC give the Committee the opportunity to advise the UN Commission on Sustainable Development, which had been established by ECOSOC in February 1993 as an institutional follow-up to the Rio Conference on Environment and Development.[145]

The Committee discussed a Secretariat report which reviewed current developments and trends with respect to the exercise of permanent sovereignty, with particular attention to sustainable development.[146] The report noted 'a progressive reduction in the bargaining power' of mineral-exporting developing countries, as a result of global recession and successful conservation measures. It referred to the difficulties of attracting foreign investment in an increasingly competitive investment climate and the new awareness of both industrialized and developing countries that certain standards regarding environmental protection had to be met. With respect to water management, and the exercise of permanent sovereignty, the report repeated the findings of earlier ones, namely that national sovereignty had to be balanced against international obligations and the integrated development of international watercourse systems.

The Committee reaffirmed the important link between the principle of permanent sovereignty over natural resources and sustainable development, but took the view that the application of the principle in the area of mineral and water resources could not be separated from other issues related to sustainable development and management of water and mineral resources. Hence, the Committee recommended to ECOSOC that 'the issue of permanent sovereignty over mineral and water resources no longer be included in the agenda of its future sessions'. It suggested that the Committee could instead deal with specific aspects of this issue under other items relevant to the development of mineral and water resources.[147] ECOSOC did agree with these recommendations and this implied that 'permanent sovereignty over natural resources' after forty years no longer features as a separate item on the ECOSOC agenda.

[143] Its mandate with respect to energy was taken over by the reconstituted Committee on New and Renewable Sources of Energy and on Energy for Development; see UNYB (1992), pp. 655 and 659. [144] UN Doc. E/C.7/1993/14.

[145] See chapter 4, p. 139. [146] UN Doc. E/C.7/1993/2.

[147] UN Doc. E/C.7/1993/14, pp. 1–2.

Table 3.1 General Assembly resolutions on permanent sovereignty after 1962

GA Resolution	Date of adoption	Voting record	Title
2158 (XXI)	25 November 1966	104 (95%)- 0- 6	Permanent Sovereignty over Natural Resources
2386 (XXIII)	19 December 1968	94 (91%)- 0- 9	Permanent Sovereignty over Natural Resources
2692 (XXV)	11 December 1970	100 (92%)- 6- 3	Permanent Sovereignty over Natural Resources of Developing Countries and Expansion of Domestic Sources of Accumulation for Economic Development
3016 (XXVII)	18 December 1972	120 (85%)- 0- 22	Permanent Sovereignty over Natural Resources of Developing Countries
3171 (XXVII)	17 December 1973	108 (86%)- 1- 16	Permanent Sovereignty over Natural Resources
3201 (S-VI)	1 May 1974	Adopted without vote	Declaration on the Establishment of a New International Economic Order
3202 (S-VI)	1 May 1974	Adopted without vote	Programme of Action on the Establishment of a New International Economic Order
3281 (XXIX)	12 December 1974	120 (88%)- 6- 10	Charter of Economic Rights and Duties of States
32/176	19 December 1977	130 (94%)- 0- 8	Multilateral Development Assistance for the Exploration of Natural Resources
33/194	29 January 1979	Adopted without vote	Multilateral Development Assistance for the Exploration of Natural Resources

4 Permanent sovereignty, environmental protection and sustainable development

Growing international awareness of environmental degradation

Under the auspices of the World Meteorological Organization (WMO), an International Geophysical Year was proclaimed in 1957–8, mainly focusing on meteorological and ozone-layer observations, including atmospheric pollution and climate change.[1] The Year marked the beginning of a broader interest in the state of the world environment. During the 1960s the global extent of resource depletion and environmental degradation came to the fore.[2] A wide variety of environmentally relevant issues came under discussion including: the long-term damaging effects on nature of products containing DDT; excessive economic growth; tanker disasters on the high seas or in territorial waters; contamination of water; harmful chemicals; waste discharge; the testing of nuclear weapons; population growth; wasteful consumption patterns; and unrestricted use of the world's natural resources. Such issues provoked a new debate on traditional international law, including the principles of freedom of action and non-interference in domestic affairs. Previously, if issues of sea and river pollution were addressed at all at the international level, it was not so much because of fear of damage to the human environment and the ecological balance at large, but because of the threat posed to economic interests, for example, to fish stocks and consequently to the fishing industry.

During the 1960s this situation radically changed. It was realized that the 'human environment' as such was at stake. People began to see the world as an entity, as 'spaceship earth'. This affected thinking on State sovereignty.

[1] See UNYB (1957), pp. 487–8.

[2] One of the first books which called for international attention to this issue was Rachel Carson's *Silent Spring* (1962; re-published 1987).

At the same time it became clear that the environmental problems of destitute developing and affluent industrialized countries differed essentially. The latter considered whether a pause in their economic growth, or even deceleration, would be necessary. In contrast, the standard of living in most developing countries was low and their economic growth was far below needs. In most developing countries the problem of industrial pollution and waste discharge hardly existed and natural wealth and resources such as clean air and pure water were abundantly available. Their major environmental problems resulted from a lack of development.[3] Low and unstable commodity prices resulted in haphazard exploitation of their natural resources, both mineral and agricultural.

Early UN resolutions on the conservation of nature

In 1962, the General Assembly adopted Resolution 1831 (XVII) on 'Economic Development and the Conservation of Nature' which considered natural resources of 'fundamental importance to the further economic development of countries and of benefit to their populations', and expressed consciousness of the extent to which economic development of developing countries might jeopardize their natural wealth and resources, including flora and fauna. It endorsed a call by UNESCO to enact effective domestic legislation covering, *inter alia*, the preservation and rational use of natural resources.[4]

In 1968, Sweden revived the debate in the General Assembly by raising concerns over the accelerating impairment of the quality of the human environment. The General Assembly decided, by Resolution 2398 (XXIII), to convene a UN Conference on the Human Environment in 1972 in order to provide for 'a framework for comprehensive consideration within the United Nations of the problems of the human environment'.[5] The developing countries initially felt somewhat suspicious about the developed countries' concern for the human environment, fearing a further deteriora-

[3] Syatauw (1974: 262–3).

[4] UNYB (1962), pp. 268–9. UNESCO, in co-operation with other specialized agencies including FAO and WHO and non-governmental organizations such as the International Union for the Conservation of Nature and Natural Resources (IUCN, now World Conservation Union), hosted an Intergovernmental Conference of Experts on the Biosphere in 1967. It led to the establishment of an interdisciplinary research programme, entitled 'Man and Biosphere' and the launching of a ten-year programme, the International Hydrological Decade, to promote the study of hydrological resources, including the effect on them of pollution. These and other UNESCO initiatives are discussed in Weiss *et al.* (1994: chapter 8).

[5] GA Res. 2398 (XXIII) of 3 December 1968; see UNYB (1968), pp. 473–6.

tion of their terms of trade as a result of developed countries' environmental policies. On the eve of the Conference in Stockholm, the General Assembly adopted a resolution entitled 'Environment and Development'.[6] In the view of the industrialized nations, the resolution focused too heavily on the environmental problems of developing countries while ignoring theirs. Furthermore, they opposed the observation that pollution with a worldwide impact had primarily been caused by industrialized countries and that therefore these countries should bear the main responsibility for financing corrective measures. They feared that the outcome of the UN Conference might be prejudiced.

Protecting the human environment: Stockholm 1972

Preparatory stage

At the end of 1969, the General Assembly established for the Conference a Preparatory Committee, which decided that a draft declaration should be presented to the Conference.[7] The Declaration was intended merely to outline broad goals and objectives and not to formulate legally binding principles. It was also agreed that the relationship between environment and development was one of crucial importance and that it would be useful to refer specifically in the declaration to the protection of the interests of developing countries. This proved, however, to be difficult. For example, in 1971 the draft was challenged on the grounds that it 'unduly dissociated the environmental issues from the general framework of development and development planning, in such a manner as to render it an instrument for purely restrictive, anti-developmental and conservationist policies',[8] and that it did not put 'in the forefront the basic principle that each State has inalienable sovereignty over its environment and over its natural resources'.[9] Nonetheless, the Preparatory Committee finally succeeded in completing the draft Declaration, thanks to the work of a special meeting of experts in Founex in Switzerland in June 1971, convened by Maurice Strong (the Secretary-General of the Conference).[10]

The Stockholm Conference took place from 5 to 16 June 1972 and was attended by 113 States. It was the first intergovernmental global conference on environmental issues. During the Conference the draft Declaration was

[6] This Resolution 2849 (XXVI), an initiative by Brazil, proved to be quite controversial: the voting record was eighty-five votes to two, with thirty-four abstentions.

[7] GA Res. 2581 (XXIV), 15 December 1969.

[8] UN Doc. A/CONF.48/PC.12, Annex II, para. 3.

[9] Ibid., para. 58. See also Sohn (1973: 428).

[10] The report to the Club of Rome, *The Limits to Growth* (1972) by Donella Meadows *et al.*, gave an extra impetus and sense of urgency to the debate.

substantively challenged. China, in particular, submitted a series of amendments, and was eventually successful in its efforts to link environmental issues more closely to development issues. On 16 June 1972 the Conference could be concluded with the adoption by acclamation of a Declaration embodying twenty-six general principles aimed 'to inspire and guide the peoples of the world in the preservation and enhancement of the human environment'. In addition, 109 specific recommendations were adopted which together constituted an Action Plan for International Co-operation on the Environment.[11]

The Declaration reviewed

In Part I, the Conference proclaimed that the improvement and defence of the human environment had become an imperative goal for humankind, to be pursued together with the fundamental goals of peace and worldwide economic and social development. It stated that: (a) local and national governments would bear the greatest burden for large-scale environmental policy and action within their jurisdictions; and (b) international co-operation was needed, both to raise resources to support developing countries and because an increasing number of environmental problems were regional or global in extent. It affirmed that in developing countries most environmental problems were caused by under-development, while in industrialized countries they were generally related to industrialization and technological development. The Declaration, as far as relevant to the present study, can be summarized as follows.

Fundamental human right (Principle 1)

Principle 1 formulates a human right to a healthy and safe environment, albeit in a somewhat indirect way: '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 he bears a solemn responsibility to protect and improve the environment for present and future generations.' Thus Principle 1 formulates responsibilities as well as rights.

Management of natural resources (Principles 2 to 5 and 13 to 14)

Principle 2 declares that careful planning and management are required for the safeguarding of the natural resources of the earth. As in the 1970 Seabed Declaration, it is stated that this is for the benefit of humankind. Principle 3

[11] UN Doc. A/CONF.48/14/Rev.1, 16 June 1972. The text of the Declaration is also in 11 ILM (1972), p. 1,416.

stipulates that 'the capacity of the earth to produce vital renewable resources must be maintained and, wherever practical, restored or improved'. Principles 4 and 5 elaborate this with respect to wildlife and non-renewable resources. As regards the latter, it is provided that they must be employed in such a way 'as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind'. Principles 13 and 14 point out that an integrated and co-ordinated approach and rational planning are necessary in order to achieve a more rational management of resources and to ensure that development is compatible with environmental preservation.

The correlation between development and environment (Principles 8 to 12)

After stating in Principle 8 that economic and social development is essential for an environment favourable to human beings, Principle 9 points out that 'environmental deficiencies generated by the conditions of underdevelopment and natural disasters' can best be remedied by accelerated financial and technical assistance. It is also provided that, for the developing countries, stability of prices and adequate earnings for primary commodities and raw material are essential to environmental management (Principle 10). Principle 11 stipulates that the environmental policies of States should enhance and not adversely affect the development potential of developing countries and the attainment of better living conditions for all. Principle 12 repeats that more resources should be made available to preserve and improve the environment, especially for developing countries.

Rights and obligations of States under international law and the role of international institutions (Principles 21 to 25)

Rightly or wrongly, Principle 21 is undoubtedly the best-known principle of the Stockholm Declaration. It reflects the principle of permanent sovereignty over natural resources as well as State responsibility for transboundary environmental damage.[12] Hence it has been described as 'a classical case of matched pairs traveling together'.[13] Principle 22 calls for the further development of international law regarding liability and compensation for victims of such environmental damage.

Principle 23 underlines that, in defining criteria and norms on environmental matters, the system of values prevailing in each country should be respected, in particular in developing countries. Principle 24 formulates a

[12] See pp. 125–7 and 244–5 below. [13] Palmer (1992: 267).

duty of States to co-operate in protection and improvement of the environment, in such a way 'that due account is taken of the sovereignty and interests of all States'. International organizations should play a co-ordinated, efficient and dynamic role for this purpose (Principle 25).

Principle 21: a delicate balance between rights and obligations

In 1970, the Secretary-General had circulated a questionnaire on principles to be included in the envisaged Declaration. One of them related to 'the principle of national sovereignty over natural resources'.[14] There were only a few replies pertinent to this issue.[15] The Canadian one was the most substantive and specific. It suggested nine principles including:[16]

1 Every State has a sovereign and inalienable right to its environment including its land, air and water, and to dispose of its natural resources;
2 No State may use or permit the use of its territory in such a manner as to cause damage to the environment of other States or to the environment of areas beyond the limits of national jurisdiction.

There was considerable debate in the Preparatory Committee whether the exercise of sovereignty could be subject to any qualification or limitation. Sweden proposed the following injunction:[17]

In bringing about economic and social development and adequate conditions for all, States whether acting individually in the exercise of their sovereignty over their natural resources or in concert through international organizations, *must* use their power to preserve and enhance the human environment.

The Netherlands suggested the following formulation:[18]

Each State, when exercising sovereignty over its natural resources for economic and social development, shall take due account of the effect of its activities on the ecological balance of the biosphere.

However, developing countries preferred putting the sovereign right of each country to exploit its resources more clearly in the forefront. Brazil, Egypt and Yugoslavia submitted the following proposal:[19]

[14] See Note to Question 8 in UN Doc. A/CONF.48/PC/WG.1/CRP.4, 1 April 1975, p. 13.

[15] See also the very informative review of the *travaux préparatoires* of the Stockholm Declaration by Sohn (1973: 487–93).

[16] UN Doc. A/CONF.48/PC/WG.1/CRP.4/Add.2, 28 April 1971, p. 3.

[17] Emphasis added. UN Doc. A/CONF.48/PC/WG.1(II)/CRP.2, 1971, p. 3.

[18] UN Doc. A/CONF.48/PC/WG.1(II)/CRP.5, 1972, p. 3.

[19] UN Doc. A/CONF.48/PC/WG.1(II)/CRP.3/Rev.1, 1972, p. 2.

Each country has the sovereign right to exploit its own resources in accordance with its own environmental policies, standards and criteria, in such a manner as to avoid producing harmful effects beyond its national jurisdiction.

Initially, the Committee proposed to include the following texts in the draft preamble:[20]

Each State has inalienable sovereignty over its natural resources;

Each State has the responsibility to exercise its sovereignty over natural resources in a manner compatible with the need to ensure the preservation and enhancement of the human environment.

While the concept of resource sovereignty was not questioned, opposition was expressed with respect to describing sovereignty as 'inalienable' rather than putting it in an environmental context. But others questioned whether the exercise of sovereignty could be subject to qualifications and restrictions, such as expressed in this text, and proposed deletion of the second sentence.

It was also proposed to include as an additional fundamental principle in the body of the Declaration:[21]

Each State has a sovereign right to its environment and to dispose of its natural resources and a right to take all necessary and appropriate measures to protect its environmental integrity.

However, others challenged using the concept of sovereignty over natural resources to 'the environment' as well, since the contents and limits would not be clearly established. For example, it could be interpreted as implying that each State was free to define the extent of its environment, not necessarily confined to its national territory.[22]

The final version of the Preparatory Committee's preamble came to read:[23]

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.

During the 1972 Conference several countries attempted to change the text. For example, Brazil had never been very happy with the restrictive reference

[20] UN Doc. A/CONF.48/PC.12, Annex I, p. 1.

[21] UN Doc. A/CONF.48/PC.12, Annex 12, p. 12.

[22] See UN Doc. A/CONF.48/PC.12, Annex II, 14 June 1971, pp. 12–15.

[23] UN Doc. A/CONF.48/4, 11 April 1972, p. 4, para. 18.

to the UN Charter and principles of international law and proposed deleting them, while nine African countries proposed an additional reference to the sovereign right to control resources.

Yet, the consensus reached in the Preparatory Committee was so fragile that eventually it was decided not to accept any changes.[24] Thus the text places sovereignty over natural resources in an environmental context, but it does not substantially limit it ('pursuant to their own environmental policies'). However, if one reads the principles of the Declaration in relation to each other (for example, Principles 2, 5 and 21), it could be argued that the Stockholm Declaration as a whole stipulates that sovereignty over natural resources must be exercised in an environmentally responsible way and for the benefit of both the present and future generations. This interpretation also finds support in the text which connects sovereignty over natural resources with the UN Charter and principles of international law. The second phrase of Principle 21 builds on the well-known findings of the *ad hoc* tribunal in the *Trail Smelter case* (1938 and 1941) and of the International Court of Justice in the *Corfu Channel case* (1948) and includes such international law principles as good neighbourliness and due diligence and care.[25] However, while Principle 21 thus calls for the prevention of extraterritorial effects causing environmental damage in other countries or in areas outside national jurisdiction, it does not in fact impose specific obligations that could be invoked by other States with regard to national management of resources.

Follow-up to the Stockholm Declaration with respect to permanent sovereignty

In December 1972, the General Assembly merely took note, albeit 'with satisfaction', of the report of the Stockholm Conference.[26] Abstentions came from the Soviet Union and Eastern European countries. Most of them had boycotted the Stockholm Conference in protest against the exclusion of the German Democratic Republic. As an institutional follow-up to the Conference, the General Assembly established the United Nations Environment Programme (UNEP) with headquarters in Nairobi.[27]

Apart from taking note 'with satisfaction', during its twenty-seventh session the General Assembly underscored more specifically the relevance of Principle 21. Thus, the Assembly 'emphasized that, in exploration,

[24] See UN Doc. A/CONF.48/14/Rev.1, pp. 63–6. [25] See chapter 8, p. 241 and p. 243.

[26] GA Res. 2994 (XXVII), adopted by 112 votes to none, with ten abstentions.

[27] GA Res. 2997 (XXVII), 15 December 1972.

exploitation and development of their natural resources, States must not produce significant harmful effects in zones situated outside their national jurisdiction' and it recognized that 'co-operation towards the implementation of Principles 21 and 22 ... will be effectively achieved if official and public knowledge is provided of the technical data relating to the work to be carried out by States within their national jurisdiction, with a view to avoiding significant harm that may occur in the environment of the adjacent areas'. In this way the concept of prior notification was acknowledged within the ambit of Principle 21. Next, the General Assembly adopted Resolution 2996 (XXVII) in which it bears in mind that Principles 21 and 22 'lay down the basic rules governing this matter' and therefore the Assembly declares 'that no resolution adopted at the twenty-seventh session of the General Assembly can affect Principles 21 and 22'.

In subsequent years, a significant development took place. While previous resolutions were primarily concerned with the extraterritorial impact of environmentally harmful activities, later resolutions have indicated that the environmental impact of an irrational and wasteful exploitation of natural resources may amount to a threat to the exercise of permanent sovereignty over natural resources by other countries, especially by developing countries. Moreover, ever since the Stockholm Conference, UN resolutions have gradually elaborated guidelines for nature management, conservation and utilization of natural resources within States, while recognizing permanent sovereignty over natural resources. The following paragraph of General Assembly Resolution 35/7 is symptomatic of this new trend:

Solemnly invites Member States, in the exercise of their permanent sovereignty over their natural resources, to conduct their activities in recognition of the supreme importance of protecting natural systems, maintaining the balance and quality of nature and conserving natural resources, in the interests of present and future generations.

This phrase was literally repeated in General Assembly Resolutions 36/6 and 37/7. In the latter resolution the General Assembly adopted and solemnly proclaimed the (revised) World Charter for Nature as a UN document. It had been drafted in 1979 by a task force of the International Union for Conservation of Nature and Natural Resources (IUCN) and brought to the attention of the General Assembly in 1980.[28] In the World Charter the conviction is expressed that:

[28] See Burhenne and Irwin (1986: 194); book review by A. H. Westing, in 14 *Environmental Conservation* (1987), No. 2, pp. 187–8. Initially, the usefulness of drafting such a Charter was introduced to the UN agenda by President Mobutu of Zaire.

Man can alter nature and exhaust natural resources by his action or its consequences and, therefore, must fully recognize the urgency of maintaining the stability and quality of nature and of conserving natural resources ...

Competition for scarce resources creates conflicts, whereas the conservation of nature and natural resources contributes to justice and the maintenance of peace.

Consequently, the World Charter for Nature outlines its functions and proclaims five principles of conservation 'by which all human conduct affecting nature is to be guided and judged'. The scope of the Charter is limited to the conservation of living natural resources. In the implementation section each State is required ('shall') to give effect to the provisions of the Charter through its competent organs and in co-operation with other States, while the sovereignty of States over their natural resources is fully taken into account. Apart from the United States, which voted against, substantial opposition to the World Charter was expressed in particular by Latin American countries. In view of pre-existing regional instruments, they saw no need and even no place for the formulation of multilateral rules for the management of shared resources, such as the Amazonian area. It has been reported that 'the Amazonian countries considered the text non-mandatory and would treat it merely as a general indication of intentions which they might take into account if such guidelines were in conformity with national legislation and accepted international obligations'.[29] Like the Stockholm Declaration, the World Charter for Nature is a non-binding instrument.

The UN and the issue of shared resources: the UNEP Guidelines of 1978

Water, fisheries, oil and gas deposits, and atmospheric resources often straddle boundaries and give rise to transboundary issues. The management and equitable sharing of resources common to two or more States may raise difficult problems and create controversies between neighbouring States. For obvious reasons some consultation and co-operation is required (but all too often is not achievable) in order to prevent disputes over concurrent national uses of internationally shared natural resources. In the practice of States as well as through judicial and arbitral decisions, principles and rules of international law have evolved, particularly with respect to international watercourses, such as rivers, lakes and canals,

[29] See UNYB (1982), p. 1,024.

which mark the border between or pass through the territories of two or more States. As a matter of fact, the earliest example of modern international organization was in this particular field, namely the Danube Commission established in 1856.[30] Numerous arrangements have been made, both at a bilateral and a regional level, with respect to 'shared water resources' and their use.[31] In the early days these arrangements focused on the issue of free navigation. In the twentieth century the non-navigational uses of international watercourses have become increasingly important and have given rise to regulations concerning fisheries, extraction of minerals and other uses of waters for agricultural and industrial purposes, and pollution control. The ILA's Helsinki Rules on the Uses of the Waters of International Rivers (1966) have served as a relevant model for the development of international norms in this field during recent decades. Criteria such as prior use, historic rights, proportionality, and relative needs have been invoked and applied in order to achieve 'equitable' results with respect to the use and apportionment of shared water resources and the delimitation of maritime boundaries. Such criteria have been applied by the International Court of Justice, for example in its judgments in the *North Sea Continental Shelf cases* (1969), the *Fisheries Jurisdiction cases* (1974), the *Libya/Tunisia Continental Shelf case* (1982), the *Gulf of Maine case* (1984) and the *Jan Mayen case* (1993).

Shared resources on the UN agenda

The issue of shared resources has been on the UN agenda only since the early 1970s. Debates have focused on the mutual obligations of neighbouring States regarding these resources, and what their relation is to the permanent sovereignty of each State, as well as on obligations arising from such principles as good neighbourliness and due diligence. At the 1972 Stockholm Conference it proved to be impossible to include a substantive paragraph on shared resources in the UN Declaration on the Human Environment, because of serious differences of opinion between, for example, Argentina and Brazil, on the use of the La Plata river basin for a Brazilian hydroelectric project.

The Non-Aligned Movement took up the issue during its summit in Algiers, in 1973.[32] It was agreed that it was important soon to develop an effective system of co-operation for the conservation and exploitation of

[30] See Bowett (1982: 6) and Westing (1989b: 323–9). [31] See Lammers (1984: 124–47).

[32] Economic Declaration adopted by the Fourth Conference of Heads of State or Government of Non-Aligned Countries, Algiers, 5–6 September 1973, in UN Doc. A/6300 and Corr.1, p. 57.

natural resources shared by two or more States. In the same year, on behalf of a large number of non-aligned countries, Yugoslavia tabled in the UN General Assembly a draft resolution on 'Co-operation in the field of the environment concerning natural resources shared by two or more States'. The ensuing controversy is illustrated by the fact that neither the co-sponsors nor the opponents were willing to adopt the phrase 'in the best spirit of co-operation and good-neighbourliness' proposed by Uruguay.[33] General Assembly Resolution 3129 (XXVIII) of 13 December 1973 mandated the Governing Council of UNEP to formulate international standards for the conservation and harmonious exploitation of shared resources, including a system of prior information and consultation.[34]

The General Assembly included a relevant provision in the 1974 Charter of Economic Rights and Duties of States.[35] Article 3 reads:

> In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultation in order to achieve optimum use of such resources without causing damage to the legitimate interests of others.

It was adopted with 100 votes to eight, with twenty-eight abstentions, which illustrates the controversy involved.

Based on General Assembly Resolution 3129, UNEP began to deal intensively with the issue and established in 1975 an intergovernmental working group of experts to draft principles of conduct with respect to shared resources.[36] In 1978, its work resulted in the adoption by UNEP's Governing Council of a set of 'Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States'.[37]

UNEP Guidelines on shared resources

The Draft Principles (or Guidelines) contain fifteen principles intended to encourage States which share resources to co-operate for the purpose of their conservation and harmonious utilization and with a view 'to controlling, preventing, reducing or eliminating adverse environmental

[33] The voting result was seventy-seven votes to five, with forty-three abstentions.

[34] UNYB (1973), pp. 374–5.

[35] GA Res. 3281 (XXIX), adopted on 12 December 1974 by 120 votes to six, with ten abstentions.

[36] See UNYB (1975), p. 440.

[37] UNEP GC Dec. No. 6/14 of 19 May 1978, adopted by consensus, reproduced in UN Doc. A/33/25, pp. 154–5. However, three Latin American countries (Brazil, Colombia and Mexico) declared that they were unable to join in the consensus. The text of the set of Principles is reproduced in 17 ILM (1978), pp. 1,094–9.

effects which may result from the utilization of such resources'. Principle 1 calls for co-operation among States to be intensified as the activities of one State increase external effects and the risk of significantly affecting the environment of other States. Thus, the Guidelines provide for: exchange of information; notification of plans; consultations; immediate information in emergency situations; mutual assistance; responsibility and liability; international dispute settlement; equal access to administrative and judicial proceedings; and equal treatment for persons affected in other States. All principles are addressed to States. Principle 1 includes a reference to co-operation on an equal footing and taking into account the sovereignty, rights and interests of States. Principle 3, paragraph 1 repeats the text of Principle 21 of the Stockholm Declaration. Yet, a clarification is added in paragraph 3:

> Accordingly, it is necessary for each State to avoid to the maximum extent possible[38] and to reduce to the minimum extent possible the adverse environmental effects beyond its jurisdiction of the utilization of a shared resource so as to protect the environment, in particular when such utilization might:
>
> a cause damage to the environment which could have repercussions on the utilization of the resource by another sharing State;
> b threaten the conservation of a shared renewable resource;
> c endanger the health of the population of another State.
>
> Without prejudice to the generality of the above principle, it should be interpreted, taking into account, where appropriate, the practical capabilities of States sharing the natural resource.

It can be inferred from the last part of this text how sensitive the issue of management of shared natural resources remained. This also explains why it proved, unfortunately, to be impossible to include a definition of transboundary resources in the Guidelines.

The political follow-up to the UNEP Guidelines

The UNEP Council invited the General Assembly to adopt the Guidelines. During the discussion in the General Assembly, several States reiterated their objection to any encroachment on sovereignty and a State's sovereign right freely to dispose of its natural resources.[39] On the other hand, France and Germany expressed reservations to the preambular paragraph, in which the 'principle of full permanent sovereignty of every State over its

[38] The intent presumably is to reduce the effects to the maximum extent possible in order to minimize the adverse effects.
[39] See UNYB (1978), p. 537 and UNYB (1979), pp. 692–3.

natural resources' was reaffirmed. According to France, the authority of States over their natural resources could never be 'full'. A formal adoption of the Guidelines by the General Assembly turned out to be impossible. Upon a proposal by Brazil, the Assembly finally merely took note of the fifteen draft principles 'without prejudice to the binding nature of those rules already recognized as such in international law' (paragraph 1). Nevertheless, the General Assembly also took a more positive step by requesting all States 'to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to enhance and not to affect adversely development and the interests of all countries, in particular developing countries'.[40]

The Brundtland Experts Group on Environmental Law

In 1985, the World Commission on Environment and Development (WCED) or 'Brundtland Commission'[41] established an Experts Group on Environmental Law in order to prepare legal principles which ought to be in place before the year 2000 to support environmental action and sustainable development within and between States. Article 1 of the legal principles proposed reiterates the fundamental right of all human beings to an environment adequate for their health and well-being, and Article 2 formulates the accompanying obligation of States 'to conserve and use the environment and natural resources for the benefit of present and future generations'. The principles relate to policies on matters within and between States, and apply to their sovereign territories, border areas and transboundary natural resources, as well as to areas beyond national jurisdiction and resources therein.

For our purposes, Part II of the set of legal principles is the most relevant part. It contains twelve articles and forms the core of the proposed legal principles. They clearly depart from the UNEP Guidelines and represent the

[40] UN Doc. A/RES/34/186, 18 December 1979, operative para. 3.

[41] The World Commission on Environment and Development (WCED), commonly known as the Brundtland Commission, was established by GA Res. 38/161 of 19 December 1983. Its mandate included: (a) proposing long-term environmental strategies for achieving sustainable development to the year 2000 and beyond; and (b) recommending ways of achieving greater co-operation among developing countries and between developing and developed countries which would lead 'to the achievement of common and mutually supportive objectives which take account of the interrelationships between people, resources, environment and development'.

elements of both codification (*lex lata*) and progressive development of emerging principles (*lex ferenda*).[42] The set is called 'Principles, Rights, and Obligations concerning Transboundary Natural Resources and Environmental Interferences'. Apparently, it is left to the reader to determine whether a specific article incorporates a principle, a right or an obligation, and the text does not provide definitions of the terms 'transboundary resources' and 'environmental interferences', albeit that the commentary provides some guidance on these questions.

The emphasis in this set of principles is much more on 'environmental protection' than on 'sustainable development'. Probably as a result of time constraints, the Brundtland Commission was not in a position to approve or consider the set of principles, but included, in Annex 1 of its report, a summary of proposed Legal Principles for Environmental Protection and Sustainable Development adopted by its Legal Expert Group. In its report the Commission proposed 'to consolidate and extend relevant legal principles in a new charter to guide state behaviour in the transition to sustainable development'.[43]

Permanent sovereignty in an environmental and developmental context: Rio 1992

Preparatory stage

In 1987, the Governing Council of UNEP adopted the Brundtland Report as a guideline for its work. Later UNEP also embraced the Brundtland Commission's concept of 'sustainable development' which the Commission had defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. However, the UNEP Governing Council added that this 'does not imply in any way encroachment upon national sovereignty'.[44] It was just another sign that States, in particular developing countries, were not very keen to have their sovereignty confined for the sake of protecting the environment. In the UN General Assembly progress was not achieved so smoothly. After its publication in 1987, the Assembly welcomed the Brundtland Report without committing itself to its contents.[45] It introduced a new item on the agenda for the next session, entitled 'A Long-Term Strategy for Sustainable

[42] See also chapter 8, p. 240.

[43] World Commission on Environment and Development (1987: 332). See Munro and Lammers (1987) for a full elaboration of the principles by the Expert Group.

[44] UNEP Governing Council Decision 15/2, Annex II, 26 May 1989, reproduced in UN Doc. A/44/25, p. 115.

[45] UN Doc. A/RES/42/187, 11 December 1987.

and Environmentally Sound Development'. In subsequent years, the debate centred around the usefulness of convening a UN Conference on Environment and Development (UNCED) in 1992 (a 'second Stockholm Conference'). This idea gave rise to complicated discussions on the relationship between aid and environmental management, restraints on trade, the current imbalance in global patterns of production and consumption, and on the responsibility of industrialized countries for causing most pollution and toxic waste. Developing countries expressed the fear that environmental management would be given a higher priority than poverty alleviation and a solution of their debt problems. Nevertheless, on 22 December 1989, the General Assembly decided to convene this Conference, to be hosted by Brazil in 1992, lamenting the 'continuing deterioration of the state of the environment and the serious degradation of the global life-support systems'. It warned that if such trends continue, the global ecological balance could be disrupted, resulting in 'an ecological catastrophe'. Its Resolution 44/228 strikes a delicate balance between the protection of the environment and the promotion of economic growth in developing countries.[46] It reaffirms that States have the sovereign right to exploit their resources pursuant to their own environmental policies, but stresses, as did Principle 21 of the Stockholm Declaration, their responsibility for ensuring that no damage will be caused to the environment and natural resources of other States nor to that of areas beyond the limits of national jurisdiction.[47] The General Assembly decided that one of the objectives of the Conference would be 'to promote the further development of international environmental law, taking into account the Declaration of the UN Conference on the Human Environment, as well as the special needs and concerns of the developing countries, and to examine, in this context, the feasibility of elaborating general rights and obligations of States, as appropriate, in the field of the environment, taking into account existing legal instruments'.[48] The resolution set an ambitious scheme for the 1992 Conference.

The Declaration reviewed

One of the notable outcomes of UNCED, also called the 'Earth Summit', is the Rio Declaration on Environment and Development.[49] During the preparatory phase this document came to be known as the 'Earth Charter', but developing countries feared that this would give the impression of a purely environment-oriented document. Therefore, they expressed strong preference for the title 'Environment and Development' so as to give greater

[46] UN Doc. A/RES/44/228, 22 December 1989. [47] Paragraphs 7 and 8.
[48] Paragraph 15(d). [49] Text in 31 ILM (1992), p. 874.

prominence to the development issues involved.[50] The twenty-seven-principle Declaration embodies several points of interest to the present study.

Sovereignty over natural resources (Principle 2)

Principle 2 repeats literally Principle 21 of the Stockholm Declaration, with one notable addition. The first part of Principle 2 proclaims the sovereign right of States to exploit their own natural resources 'pursuant to their own environmental *and developmental* policies'.[51] This phrase expresses the conviction of developing countries that their environmental policies cannot override their developmental policies, especially not as regards the exploitation of natural resources. This seems, however, to be qualified by Principles 3 and 4 which provide, respectively, that: 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'; and 'in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. It seems to be symbolic that Principle 21 in the Stockholm Declaration now features as Principle 2 in the Rio Declaration, emphasizing, as it were, the predominant place of the principle of permanent sovereignty.

The right to a healthy environment and the right to development (Principles 1 and 3)

Principle 1 provides: 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.' Principle 3 reiterates the right to development, which had been the subject of a rather controversial Declaration of the General Assembly of 1986, and gives recognition to the concept of intergenerational equity, which had been introduced in the realm of international law through the law of the sea and outer-space law.

Correlation between development and environmental preservation (Principles 4 to 7)

In various places, in Principles 4 to 7, the Declaration indicates that environmental preservation and the promotion of development are inter-

[50] Ultimately, the final document was called a Declaration rather than a Charter. From a legal point of view this makes no difference since it was obviously never the intention to adopt this document as a binding one. The term 'charter' has been used for similar documents on a few other occasions, including the 1974 Charter of Economic Rights and Duties of States and the 1982 World Charter for Nature.

[51] Emphasis added.

related and that an integrated approach is called for. Principle 4, incidentally, plainly states that 'environmental protection shall constitute an integral part of the development process'. Principle 6 deals with differential treatment of developing countries, particularly the least developed and 'those most environmentally vulnerable'.

International policy measures (Principles 8, 9 and 12)

Principle 8 calls for the reduction and elimination of 'unsustainable patterns of production and consumption'. Principle 9 deals with the need to improve research and development and to transfer environmentally sound technology. Principle 12 is important in so far as it links sustainable development policies to structural international economic policies. States should co-operate to promote 'a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation'. Most likely with recent GATT discussions in mind,[52] it is added that trade-policy measures for environmental purposes should not constitute 'a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'. In addition, there is an implicit endorsement of the 1991 GATT Tuna Panel report where Principle 12 points out that: 'Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.'

Interests of indigenous peoples (Principle 22)

Principle 22 stresses the need to recognize and support the identity, culture and interests of indigenous peoples and other local communities, because they can play a vital role in environmental management and development in view of their knowledge and traditional practices and for other reasons.

Other relevant international law principles (Principles 13 to 15, 18 to 19, 24 and 26 to 27)

Principle 13 calls for the further development of national and international law regarding liability and compensation for environmental damage. Principle 14 takes up the subject matter of the 1989 Basle Convention on Hazardous Wastes and calls for co-operation for the prevention of environmental degradation or harm to human health as a result of the transfer to other States of environmentally hazardous activities or substances. Prin-

[52] See 'GATT: Dispute Settlement Panel Report on United States Restrictions on Import of Tuna (Mexico v. the US)', 30 ILM (1991), pp. 1,564–623 and BISD 39S/155; GATT Secretariat, 'Trade and the Environment', GATT Doc. 1529, Geneva, 13 February 1992.

ciple 15 addresses the need for 'the precautionary approach' in a non-specific way. This is also reflected in Principle 19 which calls for 'prior and timely notification and relevant information to potentially affected States' as well as early consultation in good faith. States are under an obligation to notify other States immediately of disasters and emergencies which are likely to cause sudden harmful effects on the environment of other States, and to provide international assistance. With the 1990–1 Gulf War still fresh in mind,[53] Principle 24 recalls the obligation of States to respect international law providing protection for the environment in times of armed conflict and to co-operate in its further development, as necessary.[54] Principle 26 reflects the international law obligation of States to resolve peacefully all environmental disputes in accordance with the Charter of the United Nations, while the last one, Principle 27, proclaims the duty of 'States and people' to co-operate in good faith and in 'a spirit of partnership', both in the fulfilment of the principles of the Rio Declaration and 'in the further development of international law in the field of sustainable development'.

Other results

The 1992 Rio Conference also marked the opening for signature of two new global environmental treaties: the UN Framework Convention on Climate Change; and the Convention on Biological Diversity. Furthermore, it adopted 'A Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests'.[55] The serpentine title of the last document reveals its highly controversial nature. All three documents repeat more or less the text of Principle 2 of the Rio Declaration. The Biodiversity Convention is particularly relevant from the perspective of sovereignty over natural wealth and resources, as Article 1 includes, amongst the objectives of the Convention, 'the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources'. As

[53] Paragraph 16 of S/RES/687 of 5 April 1992 holds Iraq liable, among other things, for 'environmental damage and the depletion of natural resources, as a result of Iraq's unlawful invasion and occupation of Kuwait'.

[54] During the Rio Conference there was considerable debate whether a 'green protocol' to the Geneva Red Cross Conventions should be drafted or whether better compliance with existing rules would do more good than the drafting of new rules. The latter was the opinion of the International Committee of the Red Cross. See UN Doc. A/47/328, 31 July 1992, pp. 14–15.

[55] UN Doc. A/Conf. 151/26 (Vol. I). The main texts are also reproduced in 31 ILM (1992), pp. 814–73. See also the report on UNCED in UNYB (1992), pp. 670–81.

its main international law principle, the Convention includes in Article 3 sovereignty over natural resources in a formulation identical to Principle 21 of the 1972 Stockholm Declaration. Thus the words 'and developmental' in the clause relating to 'the sovereign right to exploit their own resources pursuant to their own environmental policies' are missing, whereas they do appear in the preamble to the Climate Change Convention and the Statement of Principles on Forests as well as in the 1994 UN Convention to Combat Desertification. This is possibly a result of the fact that these words were inserted at a late stage of the negotiations; be this as it may, it is remarkable that the main texts resulting from the 1992 Rio Conference are not identical on such a sensitive question.

In addition, the Conference adopted 'Agenda 21', containing an international programme of action with concrete measures for its implementation in the period following the Conference and leading into the twenty-first century. Agenda 21 comprises, for example, a section on conservation and management of resources for development, while Chapter 39 calls for the further development of 'international law on sustainable development', giving special attention to the delicate balance between environmental and developmental concerns', and for further study in the area of avoidance and settlement of disputes.

The forty-seventh session of the General Assembly endorsed the Rio Declaration, Agenda 21 and the Statement of Principles on Forests.[56] As suggested in Chapter 38 of Agenda 21, ECOSOC, after an official request made by the General Assembly, established a UN Commission on Sustainable Development.[57] The mandate of the new Commission includes: monitoring progress made in the implementation of Agenda 21; considering national reports on implementation; reviewing the adequacy of funding and transfer of environmentally sound technologies to developing countries; and making recommendations on the need for new co-operative arrangements related to sustainable development.[58]

Comparing the Stockholm and the Rio Declarations

The Stockholm Declaration contains more specific and substantive provisions pertaining to natural-resource management and nature conservation

[56] GA Res. 47/190, 22 December 1992, adopted without a vote.
[57] ECOSOC Res. 1993/207, 12 February 1993.
[58] See also UN Doc. A/48/442, 14 October 1993, containing the report of the Secretary-General on 'Implementation of GA Resolution 47/199 on the Institutional Arrangements to Follow up the United Nations Conference on Environment and Development'.

than the Rio Declaration. The Rio Declaration appears to be less 'environment-centred' than its predecessors, the 1972 Stockholm Declaration and the 1982 World Charter of Nature, and it has been criticized for representing 'a triumph of unrestrained anthropocentricity'.[59] For example, Stockholm Principle 2 stipulates careful planning and management of the natural resources of the earth including air, water, land, flora and fauna and especially representative samples of natural ecosystems, while Stockholm Principles 3 to 5 provide that: the capacity of the earth to produce vital renewable natural resources must be maintained and improved; the heritage of wildlife and its habitat should be safeguarded and wisely managed; and non-renewable natural resources should be safeguarded against the danger of future exhaustion. These provisions refer to the interests of humankind, including both present and future generations. Principle 7 of the Rio Declaration merely provides that 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem', and points to 'the common but differentiated responsibilities' of industrialized and developing countries, respectively. The rationale for the latter lies in 'the different contributions to global environmental degradation' and not in different levels of development as such. Rio Principle 7 thus reflects 'the polluter pays' concept more than the duty to co-operate for development embodied in the Stockholm Declaration.

Furthermore, Stockholm also seems less exclusively State-oriented in that it formulates the 'solemn responsibility' of humans 'to protect and improve the environment for present and future generations' (Principle 1) and 'to safeguard and wisely manage the heritage of wildlife and its habitat' (Principle 4). In contrast, the Rio Declaration links environmental preservation more closely to poverty eradication (see its Principle 5) and calls for special priority for the needs of developing countries, particularly the least developed and those which are most vulnerable environmentally (Principle 6).[60]

[59] Pallemaerts (1993: 12).

[60] However, this principle becomes somewhat weakened by the last sentence: 'International actions in the field of environment and development should also address the interests and needs of all countries.'

Table 4.1 General Assembly resolutions on sovereignty over natural resources and the environment

GA Resolution	Date of adoption	Voting record	Title
1831 (XVII)	18 December 1962	Unanimously adopted	Economic Development and the Conservation of Nature
2398 (XXIII)	3 December 1968	Unanimously adopted	The Problems of the Human Environment
2581 (XXIV)	15 December 1969	Unanimously adopted	United Nations Conference on the Human Environment
2849 (XXVI)	20 December 1971	85 (70%)-2-34	Environment and Development
2994 (XXVII)	15 December 1972	112 (92%)-0-10	United Nations Conference on the Human Environment
2995 (XXVII)	15 December 1972	115 (92%)-0-10	Co-operation between States in the Field of Environment
2996 (XXVII)	15 December 1972	112 (92%)-0-10	International Responsibility of States in Regard to the Environment
2997 (XXVII)	15 December 1972	116 (92%)-0-10	Institutional and Financial Arrangements for International Environmental Co-operation
3129 (XXVIII)	13 December 1973	77 (62%)-5-43	Co-operation in the Field of the Environment Concerning Natural Resources Shared by Two or More States
3281 (XXIX)	12 December 1974	120 (88%)-6-10	Charter of Economic Rights and Duties of States
3281 (XXIX), Art. 3		100 (74%)-8-28	
3281 (XXIX), Art. 30		126 (98%)-0-3	
34/89	14 December 1979	Adopted without vote	Development and Strengthening of Good Neighbourliness Between States
34/186	18 December 1979	Adopted without vote	Co-operation in the Field of the Environment Concerning Natural Resources Shared by Two or More States
35/7	30 October 1980	Adopted without vote	Question of the Draft World Charter for Nature
37/7	28 October 1982	111 (85%)-1-18	World Charter for Nature
37/217	20 December 1982	Adopted without vote	International Co-operation in the Field of Environment
42/186	11 December 1987	Adopted without vote	The Environmental Perspective to the Year 2000 and Beyond
42/187	11 December 1987	Adopted without vote	Report of the World Commission on Environment and Development
44/228	22 December 1989	Adopted without vote	United Nations Conference on Environment and Development
44/229	22 December 1989	Adopted without vote	International Co-operation in the Field of the Environment
47/191	22 December 1992	Adopted without vote	Institutional Arrangements to follow up the United Nations Conference on Environment and Development

5 Permanent sovereignty over natural resources in territories under occupation or foreign administration

In chapter 3 it was noted that during the 1960s the discussion on the principle of permanent sovereignty over natural resources was increasingly confined to developing countries. From the early 1970s, the General Assembly and other UN organs also frequently stressed the principle that permanent sovereignty included the right of peoples to regain effective control over their natural resources. For example, in Resolution 3171 (XXVIII) the General Assembly '*supports resolutely* the efforts of the developing countries and of the peoples of the territories under colonial and racial domination and foreign occupation in their struggle to regain effective control over their natural resources'. The NIEO Declaration stipulates that the right to permanent sovereignty includes, in case of violation, the right to 'restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples'.[1] Problems have arisen over the question of permanent sovereignty in territories being administered and/or occupied by third States. In this chapter three cases are reviewed. Firstly, South West Africa/Namibia: its status and the exploitation of its vast mineral and fish resources by South Africa, other States and foreign enterprises. Secondly, the exploitation of resources of the Sinai and other territories occupied by Israel. Thirdly, the operation and administration of the Panama Canal and Zone.

[1] Paragraph 4(f) of GA Res. 3201 (S-VI). See also Art. 16 of CERDS and para. 33 of the Lima Declaration of UNIDO II.

The status of Namibia and its natural resources before independence in 1990

The status of South West Africa/Namibia

Namibia, up to the late 1960s called South West Africa, was a German colony from the Berlin Conference (1884–5) up to the First World War, when newly independent South Africa conquered the territory. It soon became clear that South Africa had plans to annex it, but in 1918 President Woodrow Wilson opposed this. South West Africa came under the 'mandate system' of the League of Nations and in 1920 the Mandate over this territory was conferred upon the British Crown, to be exercised by the Union of South Africa. This granted South Africa 'full power of administration and legislation over the Territory' and the right to apply its own laws.[2] But South Africa was also obliged to promote the material and moral well-being and the social progress of the people (Article 2 of the Mandate). This Mandate may have prevented South Africa from unilaterally annexing the Territory, but the South African statesman Smuts had a point when he called it 'annexation in all but name'.

During the League of Nations period some problems arose between the League and South Africa because of the application of racially discriminatory laws in South West Africa, originally termed 'segregation' and later '*apartheid*'. However, South Africa could easily disregard these protests made by the weak and deeply divided League of Nations.

In 1946, during the first UN General Assembly session, South Africa proposed the integration of South West Africa into the Union of South Africa. But the General Assembly rejected this plan and stated, in its Resolution 65 (I) of 14 December 1946, that South West Africa should now fall under the trusteeship system of the United Nations. South Africa, in turn, was not willing to recognize that the responsibilities of the League regarding mandated territories had passed to the United Nations. An advisory opinion of the International Court of Justice (ICJ) in 1950 was not very clear on this issue. The court stated, on the one hand, that South Africa had no right to alter unilaterally the international status of the territory and that the United Nations as the *de facto* successor to the League of Nations could fulfil the supervisory functions which earlier had been carried out by the League, but, on the other hand, it did not provide a clear answer to the question whether South

[2] League of Nations, 'Mandate for German South West Africa', League of Nations Doc. 21/31/14D, 17 December 1920.

Africa was under a legal obligation to place the Territory under the new trusteeship system.[3]

In November 1960, Ethiopia and Liberia, the only two African countries which had been members of the League, instituted proceedings against South Africa at the ICJ on the ground that South Africa had violated the obligations arising from the Mandate, primarily by applying apartheid policies in the territory. In 1966, the court, deeply divided on this issue, ruled by a narrow majority that Ethiopia and Liberia 'cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims and that, accordingly, the court must decline to give effect to them'.[4]

In the meantime, through decisions of the political organs of the United Nations, the rules of international law pertaining to self-determination and permanent sovereignty over natural resources developed rapidly.

The United Nations and Namibia

Against this background, the General Assembly decided to take matters in its own hands. In General Assembly Resolution 2145 (XXI) of 27 October 1966, the Assembly declared that South Africa:

> has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate.

For these reasons the General Assembly terminated the Mandate and placed the Territory under the direct responsibility of the United Nations. The Assembly also stated in this Resolution that the people of South West Africa had an inalienable right to self-determination, freedom and independence in accordance with the Charter of the United Nations and the 1960 Decolonization Declaration.[5] In 1967, the General Assembly established a UN Council for South West Africa to administer the Territory until independence (which was envisaged for 1968) and entrusted the Council, *inter alia*, with the power 'to promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on

[3] International Status of South West Africa, Advisory Opinion, *ICJ Reports* (1950), pp. 143–4.

[4] *South West Africa cases (Ethiopia and Liberia* v. *South Africa)*, *ICJ Reports* (1966), p. 6 (final judgment). See also *ICJ Reports* (1962), p. 319 (judgment on preliminary objections).

[5] GA Res. 2145 (XXI), 27 October 1966, was adopted by 114 votes to two (Portugal and South Africa), with three abstentions (France, Malawi and the UK).

the basis of universal adult suffrage'.[6] It also renamed the country as Namibia.[7] In Resolutions 264 and 269 (1969) and 276 and 283 (1970), the Security Council recognized the termination of the Mandate by the General Assembly. The resolutions called upon South Africa to withdraw from Namibia immediately. In its Resolution 276, the Council declared that all actions by South Africa on behalf of or regarding Namibia since the termination of the Mandate were 'illegal and invalid'. This resolution also called upon all States to refrain from any dealings with South Africa insofar as they concerned Namibia. Through its Resolution 284 (1970), the Security Council requested an advisory opinion from the ICJ on the question:

What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?

In 1971, this time within less than a year after the request, the court gave its opinion:

1 that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;
2 that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration.[8]

The Security Council, in Resolution 301 (1971), agreed with the Court's findings by thirteen votes to nil, with two abstentions (France and the UK). It declared that South Africa's illegal occupation constituted 'an internationally wrongful act', and that South Africa was responsible for any violations of its international obligations or the rights of the Namibian people. In relation to foreign companies working in Namibia, the Council declared:

that franchises, rights, titles, or contracts relating to Namibia granted to individuals or companies by South Africa after the adoption of General Assembly Resolution 2145 (XXI) are not subject to protection or espousal by their States against claims of a future lawful Government of Namibia.

[6] GA Res. 2248 (S-V), 19 May 1967. For the work of the UN Council on Namibia, see Arts (1989).
[7] GA Res. 2372 (XXII), 12 June 1968. [8] *ICJ Reports* (1971), p. 58.

Decree No. 1 for the Protection of the Natural Resources of Namibia

Intensive foreign mining operations carried out in Namibia worried the UN Council for Namibia a great deal. Exploitation of natural resources was taking place without the permission of the Council. Royalties or taxes were not paid to the Council for the benefit of the Namibian people but to the South African Government. Another cause for concern was the overfishing of stocks off the Namibian coast, which would take years to recover. In this way, Namibia's resources were being rapidly depleted.

This situation clearly conflicted with the principle in Article 1 of the 1966 Human Rights Covenants that peoples should be able freely to dispose of their natural resources and that these should be exploited in their interests. On the basis of its mandate in Resolution 2248 (S-V) of 1967, the UN Council for Namibia on 27 September 1974 enacted Decree No. 1 for the Protection of the Natural Resources of Namibia. In the preamble, the Council pointed out that the political aim of the Decree was 'securing for the people of Namibia adequate protection of the natural wealth and resources of the Territory which is rightfully theirs'.

The main points of the operative part of the Decree can be summarized as follows:

1 *Prohibition of exploitation and export.* Paragraph 1 of the Decree forbade the prospecting, mining, processing, selling, exporting, etc., of natural resources within the territorial limits of Namibia without permission of the UN Council. Paragraph 2 declared concessions, licences, etc., granted by others, for example, the South African Government, to be null and void no matter when granted. Paragraph 3 forbade the export of natural resources without permission of the UN Council.

2 *Seizure and forfeitures of illegally obtained resources and the means of transport thereof.* If minerals or other natural resources were exported contrary to the above provisions, these resources could be seized and declared forfeited by the UN Council (paragraph 4). Paragraph 5 stated that every vehicle, ship or container which transported illegally obtained Namibian resources could be seized and forfeited for the benefit of the Namibian people.

3 *Future claims for damages.* Paragraph 6 stated that the future government of an independent Namibia could hold each person or firm contravening the provisions of the Decree liable for damages caused to the Namibian people. This related to an action for damages and not to criminal proceedings.

The legal value of Decree No. 1

The form (not just another resolution, but a Decree), the formulation (not general but specific, not worded as a recommendation but mandatory) and the content (not only objectives but prohibitory provisions) created the initial impression that this concerned a binding decision which was meant to be 'directly applicable'. The Decree was clearly meant to have extraterritorial effect, in other words to be valid and to be applied outside Namibia. Such an extraterritorial effect would in principle be possible, except that from a legal point of view the paragraphs on seizure and forfeiture of the means of transportation of Namibian raw materials outside Namibia seemed untenable. Formally, the Decree was a decision of a subsidiary organ of the General Assembly. The question arose whether the Decree, as a decision of a subsidiary organ, could be binding, while decisions of the main organ, the General Assembly, were in principle non-binding.

The UN Council for Namibia had been vested with the power to administer the territory and to serve as the caretaker government until independence. Moreover, in various resolutions[9] the General Assembly had reaffirmed the Decree and reiterated its core contents. For example, in its Resolution 33/182 A, on the work of the UN Council for Namibia, the General Assembly declared that the natural resources of Namibia were 'the birthright of the Namibian people and that the exploitation of those resources by foreign economic interests . . . is illegal and contributes to the maintenance of the illegal occupation regime'. In this connection, it is also relevant to recall an observation the ICJ made in its advisory opinion on Namibia:

> it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting in specific cases within the framework of its competence resolutions which make determinations or have operative design.[10]

In earlier work the present author concluded that the legal validity of the Decree varied from one legal order to another as well as from country to country.[11] In general, the legal status of the Decree is bound to be less than that of a binding decision of, say, the Security Council, but greater than that of an 'ordinary' General Assembly resolution or a law of a foreign State. It concerned fundamental provisions which resulted from the unique international status of Namibia and which aimed at protecting the development potential of a people that had hitherto been unable to exercise its

[9] Including GA Res. 33/40, 33/182 A and C. [10] *ICJ Reports* (1971), p. 50.
[11] Schrijver (1985: 29–35).

fundamental right to political and economic self-determination. For example, taking into consideration the relative 'receptiveness' of the legal system of the Netherlands for decisions of international institutions (Article 93 of its Constitution) and the statements of the Netherlands Government recognizing the authority of the UN Council for Namibia to enact such decrees, the legal force of the Decree in the Netherlands was greater than in countries with a less receptive legal system or another Namibia policy. Thus, on 21 October 1975, Herman Burgers, the delegate of the Netherlands stated in the Fourth Committee of the UN General Assembly:

> My Government, however, has no doubt of a legal nature concerning the competence of the General Assembly to create the Council and to invest it with executive powers . . . In the Netherlands' view, the Council was legally entitled to decree that the exploitation, etc., of natural resources in Namibia would henceforward require the consent and permission of the UN Council for Namibia.[12]

The UN Council for Namibia *versus* Urenco, UCN and the Netherlands

The Netherlands and Namibian uranium

During the 1970s, the involvement of the Netherlands Government and of companies based in the Netherlands in the processing of Namibian uranium was under discussion. It seemed very likely that uranium, originating from Namibia, was being enriched at the Urenco plant in Almelo (the Netherlands). Before enrichment, the uranium had been processed into uranium hexafluoride in France and the UK. The Dutch Government regarded the purchase and utilization of Namibian uranium as 'undesirable' but it pointed out that Urenco itself did not become the owner of the uranium which it only enriched for its clients. The Decree, however, also prohibited the 'processing' and 'refining' of natural resources of Namibia without the permission of the UN Council. The Netherlands Government stated that it was impossible to determine which part of the material originated from Namibia, since it had been mixed in British and French processing plants with uranium from other countries. Consequently, its origin could no longer be determined and it could no longer be regarded as the same product as before. Additionally, the Government referred to an obligation incumbent upon the parties to the Treaty of Almelo (the Netherlands, Germany and the UK) to accept all enrichment

[12] Publication no. 116 of the Netherlands Ministry of Foreign Affairs (1976), pp. 548–9.

orders. The Government argued that it was unable to undertake any action itself, but stated that 'it was up to the Council to seek the implementation of the Decree in the courts of the Netherlands'.[13]

The writ of summons

On 14 July 1987, the UN Council for Namibia summoned Urenco Nederland, Ultra Centifruge Nederland (UCN) and the State of the Netherlands to appear in the District Court in The Hague.[14] The Council stated that the defendants:

> are acting unlawfully *vis-à-vis* the people of Namibia, *viz.* infringing and contributing towards the infringement of the right to self-determination of the people of Namibia, the rights of that people with respect to the ownership and exploitation of the natural resources of Namibia [and] are acting contrary to the diligence they are bound to observe *vis-à-vis* the people of Namibia and its natural resources.

The Council based its writ not only on the infringement of the Decree, but also on the 1920 Mandate, the UN Charter, the General Assembly resolutions concerning permanent sovereignty over natural resources and the termination of the Mandate, the 1971 advisory opinion of the ICJ and the Security Council resolutions ordering South Africa to terminate its exercise of power over Namibia and all other States and companies under their direct or indirect control to refrain from any dealing with respect to commercial or industrial enterprise or concessions in Namibia.[15]

In the writ of summons, the UN Council asked for a court order prohibiting any further carrying out of enrichment orders by Urenco and UCN which were placed wholly or partly on the basis of Namibian uranium. In order to ensure compliance with this prohibition, Urenco and UCN would have to submit a negative certificate of origin ('a written statement from the party by or on whose behalf the order is placed') as obtained from their principals. Moreover, the UN Council required the State of the Netherlands to supervise the observance of these court orders and to do everything in its power to prevent the enrichment of Namibian uranium. It is striking that the Council did not file a claim for compensation for damages, seizure or forfeiture in conformity with the Decree, but only aimed at a declaratory judgment and at a prohibition on the carrying out in future of any order to enrich uranium originating from Namibia.

[13] Report of the Mission of Consultation of the UN Council for Namibia to the Netherlands, 25 June 1981, UN Doc. A/AC.131/L.225, 14 December 1981, para. 27.

[14] Schrijver (1988a: 42).

[15] See pp. 145–6 above on the United Nations and Namibia.

The State of the Netherlands was held jointly liable and was consequently summoned as well by the Council, because the Treaty of Almelo had provided for a Joint Committee, consisting of the three States Parties, with wide policy-making powers, which enabled the governments to exercise a decisive influence on the policy of the industrial companies.[16]

The response of the Dutch Government

Following the writ of 14 July 1987, the Dutch Government on 23 July 1987 sent a letter to the UN Secretary-General, expressing dissatisfaction that it had not been offered an opportunity to explain its point of view during a formal meeting of the UN Council for Namibia and its dismay at the accusation of having committed a wrongful act towards the people of Namibia:

> By levelling such an unwarranted accusation against the Netherlands, the Council seemed to question the sincerity of the Netherlands Government on this vital issue, despite the latter's long-standing commitment to the well-being and legitimate aspirations of the Namibian people.[17]

On 6 November 1987, the Netherlands, commenting on reports of the UN Council for Namibia, stated that the Council ought to concentrate on 'evidence and actual forms of plunder and depletion of the natural resources of Namibia'. It pointed to the overfishing by 'some States' and called upon the Council 'to undertake any decisive action to put an end to this form of exploitation'. Concerning the Urenco suit, it declared that the Government's position was based upon 'convincing legal arguments'. Nonetheless, the Dutch Government felt compelled to state:

> We wish to stress that our votes on draft resolutions in the Assembly, be it in the past or the present, may in no way be construed as supportive of the Council's claim in the case pending before the court in the Netherlands.

Namibian independence in 1990

After instituting the proceedings, the claimant did not actively pursue the court case. Because of the many factual and legal complications, there was no guarantee of success. In view of the prospects for a settlement of the Namibian question, the UN Council considered it better to await events. Indeed, after years of negotiation, stalemate and breakthroughs, the independence process finally gathered momentum in 1989 and on 21

[16] The text of this treaty has been published in *Tractatenblad* of the Kingdom of the Netherlands, vol. 1970, no. 41. [17] UN Doc. A/42/414, 23 July 1987.

March 1990 Namibia acquired its independence.[18] In 1990 the court case in the Netherlands was withdrawn.

Permanent sovereignty over 'national' resources in Israeli-occupied territories

On 15 December 1972, the General Assembly affirmed for the first time in respect of territories occupied by Israel after the Six-Day War 'the principle of the sovereignty of the *population* of the occupied territories over their national wealth and resources'.[19] It called upon all States, international organizations and specialized agencies not to recognize or co-operate with any measures undertaken by the occupying power, Israel, to exploit the resources of the occupied territories. This resolution was adopted in response to a report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of Occupied Territories.[20] In subsequent years, this finding was elaborated in a series of resolutions specifically dealing with this issue.[21]

In 1973, Pakistan, supported by seventeen other developing countries,[22] submitted a draft resolution on 'Permanent Sovereignty over *National* Resources in the Occupied Arab Territories',[23] in which it drew particular attention to the economic consequences resulting from Israeli exploitation of the natural resources of the occupied Arab territories. It referred particularly to exploitation of oil in the Sinai area by Israel, which accounted for two-thirds of Israeli needs. Israel regretted attempts to involve the Second Committee of the General Assembly in this highly politicized subject, while China, the German Democratic Republic, Egypt, Kuwait and the Soviet Union spoke in support of the draft resolution. The resolution, adopted on 17 December 1973,[24] recalled, *inter alia*, the 1962 Declaration on permanent sovereignty and affirmed the right of 'the Arab States and peoples whose territories are under foreign occupation to permanent sovereignty over all their natural resources'. It reaffirmed that the Israeli measures 'to exploit the human and natural resources of the occupied Arab territories are illegal' and called upon Israel to bring such measures forthwith to a halt. It also affirmed the right of Arab States and peoples whose territories were under Israeli occupation to 'the restitution

[18] Schrijver (1994a: 1–13). [19] Paragraph 4 of GA Res. 3005 (XXVII); emphasis added.
[20] UN Doc. A/8828, 9 October 1972. [21] See Table 5.1, p. 161.
[22] Three from Asia, twelve from Africa, and Cuba and Yugoslavia.
[23] UN Doc. A/C.2/L.1333, 3 December 1973, emphasis added.
[24] GA Res. 3175 (XXVIII), adopted by ninety votes to five, with twenty-seven abstentions.

of and full compensation for the exploitation and looting of, and damages to, the natural resources . . . of the occupied territories'.[25] Finally, it declared that these principles applied to 'all States, territories and peoples under foreign occupation, colonial rule or *apartheid*'.[26]

In 1974 the General Assembly adopted Resolution 3336 (XXIX) which was similar to that of 1973.[27] New elements were that the right to permanent sovereignty was extended to 'all resources and wealth' and that it called for a report of the Secretary-General on adverse effects for Arab States and peoples resulting from 'repeated Israeli aggression and continued occupation of their territories'. Pakistan claimed that the concept of 'national wealth' comprised all forms of wealth, including items of cultural or national heritage, personal wealth of Arab people, etc. While in essence the debate took place along similar lines as that of 1973, more countries participated and the tone on both sides was more militant.[28] This also applied to the language of the resolution itself, which employed terms like 'resolutely supports . . . their struggle to regain effective control over their natural resources' (preamble), 'full and effective permanent sovereignty' (paragraph 1).

On 11 October 1977, the Secretary-General submitted his report, entitled 'Permanent Sovereignty over National Resources in the Occupied Arab Territories'.[29] The report analyzes in detail the economic effects of the 1967 conflict and its aftermath on Egypt, Jordan and Syria and the occupied territories, including the West Bank and the Gaza Strip. In the absence of a response by Lebanon and in view of the difficult situation existing there, it had not been possible to include Lebanon in the analysis. Egypt claimed that the report did not cover all losses suffered by Egypt as a result of continued occupation of Egyptian territories, including losses incurred in the Sinai resulting from 'excessive reduction in exploitable oil reserves due to exceptionally high rates of exploitation of the oil wells during the

[25] It is interesting to note that all exploitation of natural resources is deemed illegal here, while a subsequent Egyptian note (see note 30 below) referred to the 'excessive' reduction of reserves and 'exceptionally high' rates of exploitation.

[26] This paragraph was adopted in a separate vote by ninety-four to four (Israel, Nicaragua, Portugal and the USA).

[27] On 17 December 1974, the General Assembly adopted the resolution with ninety-nine votes to two (Israel and the USA), with as many as thirty-two abstentions.

[28] See UN Docs A/C.2/SR.1630, 15 November 1974, pp. 335–7 and SR.1635, pp. 359–65; draft resolution UN Doc. A/C.2/L.1372/Rev.1, 18 November 1974. Plenary meeting record in UN Doc. A/PV.2323, 17 December 1974, pp. 1,534–5.

[29] UN Doc. A/32/204. In previous years, the General Assembly had requested the Secretary-General to make the necessary arrangements to submit a comprehensive report; see GA Res. 3516 (XXX) and GA Res. 31/186.

occupation' and the loss of and damage to items of national, religious and cultural heritage, such as ancient mosques and monuments, particularly in the devastated Suez Canal Zone.[30]

On 19 December 1977 the General Assembly adopted a new resolution[31] in which it:

1 emphasized the right of the Arab States and peoples to full and effective permanent sovereignty and control over their natural and all other resources, wealth and economic activities;
2 reaffirmed that all measures undertaken by Israel to exploit the human, natural and all other resources, wealth and economic activities in the occupied Arab territories were illegal and called upon Israel immediately to desist forthwith from all such measures;
3 reaffirmed the right to restitution and full compensation;
4 called upon all States to support and assist the Arab States and peoples in the exercise of these rights; and
5 called upon all States, international institutions, investment corporations and all other institutions not to recognize, or co-operate with or assist in any measures undertaken by Israel to exploit the resources in the occupied territories or to effect any changes in the demographic composition or geographic character or institutional structure of those territories.

The contents of subsequent resolutions in the years 1979–83[32] were basically the same, except that after Resolution 36/173 (1981) they contained explicit references to the 'Palestinian territories' both in the titles and the operative parts. The voting records on all these resolutions remained virtually the same,[33] with Israel and the USA persistently casting a negative vote and nearly all other Western countries abstaining. Portugal, while voting in favour, consistently reserved its position with respect to the right of States and peoples under occupation to restitution and compensation for the exploitation and depletion of their resources. Japan reserved its position with respect to the principle of permanent sovereignty as such but declared its sympathy for the cause of the Arab States and peoples. From 1980, Kuwait instead of Pakistan took the initiative and in 1982 and 1983 Senegal took the lead.

Over the years the reports of the Secretary-General have provided substantial information and specific data on wealth and resources – natural, human, cultural and other – in the occupied territories.[34] In 1983,

[30] UN Doc. A/32/398, note verbale of 29 November 1977 from Egypt.
[31] GA Res. 32/161, adopted by 109 votes to three (Australia, Israel and the USA), with twenty-six abstentions. See UNYB (1977), pp. 318–20 and 327–8.
[32] GA Res. 34/136, 35/110, 36/173, 37/135 and 38/144. [33] See Table 5.1, p. 161.
[34] See UN Doc. A/36/648, 10 November 1981.

the Secretary-General submitted a report on the implications, under international law, of all these UN resolutions relating to permanent sovereignty over natural resources in the occupied territories and on Israel's obligations concerning its conduct in those territories.[35] In an annex Professor Sloan, a former Director of the UN Office of Legal Affairs, concludes that the primary right of peoples and nations to permanent sovereignty entails a right freely to use, control and dispose of them. Full exercise of that right could take place only with the restoration of control (namely sovereignty) over the occupied territories to the States and peoples concerned. As long as that does not materialize, the occupying power is under an obligation not to interfere with the exercise of permanent sovereignty by the local population. Under the law of belligerent occupation, natural resources could not be used by the occupying power beyond the limits imposed by the Regulations respecting the Laws and Customs of War on Land, annexed to The Hague Convention IV of 1907, and by the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949. These stipulate that land cannot be taken for settlement and that other resources cannot be used beyond usufruct and only in connection with the occupation.[36] From this it follows that reparation can be claimed for loss or damage to natural resources suffered as a result of violations of these rules of belligerent occupation.[37]

After 1983 no further separate resolutions have been adopted by the General Assembly on this issue. This is due to the Camp David agreements[38] which resulted, on the one hand, in a return of the Sinai to Egypt, and on the other hand, in a temporary split in the group of Arab States. Only incidental references can be found to the 'inalienable national rights' of the Palestinian people, which may be held to include a right to permanent sovereignty over the natural resources and wealth of its occupied territories as well as a right to claim from Israel restitution of land and compensation for loss of, and damages to, their natural wealth and resources. Similarly, since 1983 ECOSOC and its Committee on Natural Resources have hardly addressed this issue in a substantive way. Discussions have focused on a political settlement of the conflicting territorial claims to Palestine.[39]

On 4 May 1994, Israel and the Palestine Liberation Organization concluded a very detailed agreement on the withdrawal of Israeli forces and

[35] UN Docs. A/38/265 and E/1983/85, 21 June 1983.

[36] See also the 1899 Hague Convention II, Annex, Art. 55, and the 1907 Hague Convention IV, Annex, Art. 55. For a discussion see chapter 9, pp. 266–9.

[37] Ibid., pp. 20–1.

[38] 'A Framework of Peace in the Middle East', 17 September 1978. Text in 17 ILM (1978), p. 1,463. Subsequent Treaty of Peace between Israel and Egypt of 26 March 1979, in 18 ILM (1979) p. 362.

[39] See de Waart (1994a).

administration from the Gaza Strip and the Jericho area. The agreement also includes a lengthy protocol on economic relations between Israel and the PLO, dealing with such issues as import policy, monetary and financial issues, taxation, labour, and agricultural and industrial co-operation.[40] There are no references to natural-resource management or to compensation for depletion of these resources in the past.

Sovereignty over the Panama Canal and Zone

The 1903 Canal Convention

On 18 November 1903, the USA concluded a treaty with Panama, after this country had declared its independence from Colombia a few days earlier. The USA had supported the secessionists and the US Navy prevented Colombia from acting against them. In return for its support, the USA acquired in the Hay-Bunau-Varilla Treaty of 1903:

> in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the Canal to be constructed.

Furthermore, Panama conferred on the USA:

> all the rights, powers and authority . . . which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.[41]

In 1914 the construction of the Panama canal was completed by the USA, which had replaced the French Compagnie Universelle du Canal Interocéanique de Panama.[42] The USA thus obtained all necessary rights to exercise jurisdiction over the Panama Canal and Zone for the purpose of operating the canal, but Panama retained general sovereignty over the zone.[43] However, following the early 1960s Panama undertook efforts to revise or terminate the 1903 treaty. Eventually, in 1977 new Panama Canal treaties were concluded, which reaffirmed Panama as 'the territorial sovereign' but now provided it with full jurisdiction in the zone where the canal is located.

[40] Text of the agreements in 33 ILM (1994), pp. 622–720. Protocol on Economic Relations on p. 696.

[41] Text in Martens, *Nouveau Recueil Général de Traités*, 2nd series, vol. 30, p. 631.

[42] In 1878 this company had obtained a concession for the construction and a right of use for ninety-nine years from Colombia, but it went bankrupt before it actually started the operation.

[43] Hartwig (1990: 285).

The USA retained the rights necessary for operating, protecting and defending the canal, supervised by a joint Panama Canal Consultative Committee.[44] But before the conclusion of these new treaties could be accomplished, tension rose between Panama and the USA during the late 1960s and early 1970s.

Security Council debating 'unequal treaty' in Panama City

In 1972–3 Panama served as a member on the UN Security Council and in March 1973 it held the presidency. On its invitation the Council decided to hold meetings in Panama City from 15 to 21 March 1973.[45] The official agenda item was 'Consideration of measures for the maintenance and strengthening of international peace and security in Latin America in conformity with the provisions and principles of the Charter'. The Council addressed a wide variety of issues under this item, including the question of Panama's sovereignty over the Panama Canal, and economic dependence and economic domination of Latin America.[46] The major part of the meetings was devoted to the question of the Panama Canal and Zone. In his opening speech, the President of Panama underscored his country's legitimate aspirations to regain complete jurisdiction over its whole territory and to exercise sovereign rights over all its natural resources:

> a certain group of nations . . . is shocked because peoples claim the right to exploit their own natural resources, the wealth of their own seas, of their ports, of their soil, of their subsoil, of their labour and of their geographical position in order to benefit their nationals and not to do them harm, and struggle so that their non-renewable resources will not be used to subsidize the economies of the rich nations and because they wish the wealth of their own soil to bear the nationality of the country that possesses it. That is an inherent right of all nations, as the right of Panama to exploit its geographical position for the benefit of its own people is inherent.[47]

Peru held that the situation of the Canal could legally be defined as 'a colonial enclave' and advocated that:

> an agreement should be arrived at that will unequivocally establish the full sovereignty and unhampered jurisdiction of Panama over its entire territory, and enable Panama to have full responsibilities for the functioning of the inter-

[44] Text and introductory note to the treaties in 16 ILM (1977: 1,022).
[45] UN Doc. S/RES/325 (1973), unanimously adopted. Article 28.3 of the UN Charter provides for the possibility that the Security Council is convened outside UN headquarters. [46] UNYB (1973), pp. 164–74.
[47] UN Doc. S/PV.1695, 15 March 1973, p. 2, para. 11.

oceanic Canal, allowing it freely to dispose of its natural resources and to enjoy just participation in the economic benefits derived from it.[48]

Other Latin American countries expressed support for Panama in similar terms. Cuba, not a Council member but addressing it as a guest, went a step further by referring to 'a threat to international peace and security in the hemisphere that lay in neo-colonial relations imposed on Panama by the United States under a treaty that infringed and violated the most elementary norms of international law' and by calling for 'the nationalization of this natural resource for the benefit of its people' as 'an inalienable and imprescriptible right'.[49]

China also expressed support for Panama in its 'patriotic struggle against an unequal treaty' and in its 'struggle to recover full sovereignty over its entire territory'. The Soviet Union called for a realistic and reasonable approach that respected 'the effective sovereignty and complete jurisdiction of Panama over all of its territory and also guarantee freedom of international shipping'.[50] France and the UK took similar positions. The USA stated that it also supported Panama's 'just aspirations'. Therefore, it had already recognized that:

1 the 1903 Canal treaty should be replaced by a new, modern treaty;
2 any new treaty should be of a fixed duration;
3 Panama should get back 'a substantial territory now part of the Canal Zone, with arrangements for use of other areas ... [which] should be the minimum required for United States operations and defence of the Canal'; and
4 Panama should exercise its jurisdiction in the Canal area pursuant to a mutually agreed timetable.

At the same time it believed that it would be 'necessary that the United States continue to be responsible for the operation and defence of the Canal for an additional, specified period of time'.[51] Finally, the USA explicitly stated:

We do not question the principle of 'permanent sovereignty'. However, at the same time we wish to point out that we do not believe that [this] complex issue is properly before the Security Council. In accepting the principle of permanent sovereignty we strongly reaffirm our support for the principles of General Assembly Resolution 1803 (XVII) including *inter alia* the observance in good faith of foreign investment agreements, the payment of appropriate compensation for

[48] UN Doc. S/PV.1696 and Corr.1, 15 March 1973, p. 3, para. 19.
[49] UN Doc. S/PV.1696 and Corr.1, p. 23, paras. 205–12.
[50] UN Doc. S/PV.1700, 19 March 1973, p. 16, para. 141.
[51] UN Doc. S/PV.1701, 20 March 1973, pp. 16–17, paras. 140–1.

nationalized property, as required by international law, and the recognition of arbitration and international adjudication.[52]

Kenya also explicitly linked the discussion to the various General Assembly resolutions on permanent sovereignty and repeated a position taken earlier:

Sovereignty over natural resources is inherent in the quality of statehood and is part and parcel of territorial sovereignty – that is, the power of a State to exercise supreme authority over all persons and things within its territory. Sovereignty over natural resources, which is essential to economic independence, is functionally linked to political independence, and consolidation of the former inevitably strengthens the latter. Since it excludes allegiance or subordination to any authority, sovereignty over natural resources implies complete freedom of action for a State in determining the use of those resources.[53]

American veto on draft Security Council resolution

On 16 March 1973, Panama and Peru submitted a draft resolution requiring the Council to take note that the governments of Panama and the USA had agreed to reach 'a fair and just agreement', specifically mentioning a number of elements including the abrogation of the 1903 Canal Treaty and the conclusion of a new one, and calling on the parties to execute promptly such a new treaty. On 20 March 1973, a revised version was submitted, co-sponsored by other non-aligned countries.[54] This text included a new preambular paragraph asking the Council to observe that 'the free and fruitful exercise of sovereignty by peoples and nations over their natural resources should be fostered through mutual respect among States, based on their sovereign equality (General Assembly Resolutions 1514 (XV), 1803 (XVII) and 3016 (XXVII))'. The operative part was less specific with respect to elements of an agreement, but took note of the willingness of the parties 'to conclude a new, just and fair treaty concerning the present Panama Canal which would fulfil Panama's legitimate aspirations and guarantee full respect for Panama's effective sovereignty over all of its territory'. On 21 March 1973, its adoption by the Security Council was vetoed by the USA.[55] The USA afterwards declared that there was much in the draft resolution to which it could agree, but since these matters were in the process of bilateral negotiation it did not consider it appropriate or helpful for the Council to adopt a resolution on matters of substance 'in the form of sweeping generalities when we know that the real difficulties lie in the application of

[52] Ibid., p. 16, para. 130. [53] UN Doc. S/PV.1700, 19 March 1973, p. 4, para. 27.

[54] UN Doc. S/10931/Rev.1, 20 March 1973.

[55] It received as many as thirteen affirmative votes, one against and one abstention.

those generalities'. It also observed: 'the Panama Canal is not a work of nature or, as some have tried to put it, a natural resource'.[56] Kenya replied to this that the Panama Canal is 'as much a natural resource of Panama as the copper mines and installations in Chile are the natural resources of Chile [or] as the oil wells and installations in Iran, Saudi Arabia and Indonesia are the natural resources of those countries'.[57]

First and last Security Council reference to permanent sovereignty

Panama, Peru and Yugoslavia had submitted another draft resolution which dealt in more general terms with sovereignty over natural resources, economic independence and freedom from coercion. On 21 March 1973 the Security Council adopted this as Resolution 330 (1973) by twelve votes to nil, with three abstentions (France, the UK and the USA). In its preamble, the resolution recalls General Assembly Resolutions 1803 (XVII) and 3016 (XXVII) and the section of Resolution 2625 (XXV) on freedom from coercion. The Council noted with deep concern the existence and use of coercive measures which affected the free exercise of permanent sovereignty of Latin American countries. In its operative part, the Council 'urges States to adopt measures to impede the activities of those enterprises which deliberately attempt to coerce Latin American countries' and requests States 'to refrain from using or encouraging the use of any type of coercive measures in the region'. The three Western powers declared that they had abstained since they regarded this a matter for the General Assembly and ECOSOC and outside the competence of the Security Council. The USA added that it did not accept the premise that coercive measures were being used in Latin America in a manner likely to endanger peace and security.

This Resolution 330 (1973) is the only Security Council resolution which contains an explicit reference to the concept of permanent sovereignty.

[56] UN Doc. S/PV.1704 and Corr.1, 21 March 1973, p. 8, paras. 75–6.

[57] UN Doc. S/PV.1704 and Corr.1, 21 March 1973, p. 10. However, it can be noted that the Kenyan reply does confuse mines with copper ore and wells with crude oil; while copper ore and crude oil *in situ* clearly are natural resources, mines, wells and installations are not.

Table 5.1 General Assembly resolutions on permanent sovereignty over national resources in occupied Palestinian and other Arab territories

GA Resolution	Date of adoption	Voting record	Title
3005 (XXVII)	15 December 1972	63 (52%)- 10- 49	Report of the Special Committee to investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories
3175 (XXVIII)	17 December 1973	90 (74%)- 5- 26	Permanent Sovereignty over National Resources in the Occupied Arab Territories
3336 (XXIX)	17 December 1974	99 (74%)- 2- 32	
3516 (XXX)	15 December 1975	100 (78%)- 2- 26	
31/186	21 December 1976	107 (77%)- 2- 30	
32/161	19 December 1977	109 (79%)- 3- 26	
34/136	14 December 1979	118 (84%)- 2- 21	
35/110	5 December 1980	122 (83%)- 2- 23	
36/173	17 December 1981	115 (82%)- 2- 24	Permanent Sovereignty over National Resources in the Occupied Palestinian and Other Arab Territories
37/135	17 December 1982	124 (85%)- 2- 20	
38/144	19 December 1983	120 (86%)- 2- 18	

Box 5.1 UN Council for Namibia, 27 September 1974, Decree No. 1 for the Protection of the Natural Resources of Namibia

Conscious of its responsibility to protect the natural resources of the people of Namibia and of ensuring that these natural resources are not exploited to the detriment of Namibia, its people or environmental assets, the United Nations Council for Namibia enacts the following decree:

The United Nations Council for Namibia,

Recognizing that, in the terms of General Assembly resolution 2145 (XXI) of 27 October 1966 the Territory of Namibia (formerly South West Africa) is the direct responsibility of the United Nations,

Accepting that this responsibility includes the obligation to support right of the people of Namibia to achieve self-government and independence in accordance with General Assembly resolution 1514 (XV) of 14 December 1960,

Reaffirming that the Government of the Republic of South Africa is in illegal possession of the territory of Namibia,

Furthering the decision of the General Assembly in resolution 1803 (XVII) of 14 December 1962 which declared the right of peoples and nations to permanent sovereignty over their natural wealth and resources,

Noting that the Government of South Africa has usurped and interfered with these rights,

Desirous of securing for the people of Namibia adequate protection of the natural wealth and resources of the Territory which is rightfully theirs,

Recalling the advisory opinion of the International Court of Justice of 21 June 1971,

Acting in terms of the powers conferred on it by General Assembly resolution 2248 (S-V) of 19 May 1967 and all other relevant resolutions and decisions regarding Namibia,

Decrees that

1 No person or entity, whether a body corporate or unincorporated, may search for, prospect for, explore for, take, extract, mine, process, refine, use, sell, export, or distribute any natural resource, whether animal or mineral, situated or found to be situated within the territorial limits of Namibia without the consent and permission of the United Nations Council for Namibia or any person authorized to act on its behalf for the purpose of giving such permission or such consent;
2 Any permission, concession or licence for all or any of the purposes specified in paragraph 1 above whensoever granted by any person or entity, including any body purporting to act under the authority of the Government of the Republic of South Africa or the 'Administration of South West Africa' or their predecessors, is null, void and of no force or effect;
3 No animal resource, mineral, or other natural resource produced in or emanating from the Territory of Namibia may be taken from the said Territory by any means whatsoever to any place whatsoever outside the territorial limits of Namibia by any person or body, whether corporate or unincorporated, without the consent and permission of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council;
4 Any animal, mineral or other natural resource produced in or emanating from the Territory of Namibia which shall be taken from the said Territory without the consent and written authority of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council may be seized and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;
5 Any vehicle, ship or container found to be carrying animal, mineral or other natural resources produced in or emanating from the Territory of Namibia shall also be subject to seizure and forfeiture by or on behalf of the United Nations Council for Namibia or any person authorized to act on behalf of the said Council and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;
6 Any person, entity or corporation which contravenes the present decree in respect of Namibia may be held liable in damages by the future Government of an independent Namibia;
7 For the purposes of the preceding paragraphs 1, 2, 3, 4 and 5 and in order to give effect to this decree, the United Nations Council for Namibia hereby authorizes the United Nations Commissioner for Namibia, in accordance with resolution 2248 (S-V), to take necessary steps after consultations with the President.

Summary and appraisal of Part I

The UN debate on the management of natural resources began with discussions on the extent to which, if at all, States should take into account the interests of other States, and of the world economy as a whole, in their natural-resources policies. In 1952, a balance was achieved in General Assembly Resolution 523 (VI). Although shortly thereafter the debate took a quite different course, it is striking to see that in the 1990s these early concerns have come once again to the fore.[1]

Between 1952 and 1962, the period between the submission of Chile's proposal to include the principle of permanent sovereignty in the Human Rights Covenants and the adoption of the 1962 UN Declaration, an extensive debate took place on the nature and legal status of the principles of self-determination and sovereignty over natural wealth and resources. Changing political relationships in the world exerted a major impact on this debate. Membership in the United Nations increased from sixty in 1952 to 110 in 1962 as a result of the decolonization process which led to the causes of under-development and the necessary conditions for development also becoming an issue in the debate. The evolution of the principle of permanent sovereignty was marked by an increasing re-emphasis on the sovereignty of States, in particular of developing countries. In this respect, it is symbolic that in the year of the adoption of General Assembly Resolution 1803 (1962) terms such as 'under-developed' or 'less-developed' countries were replaced by 'developing' countries. Yet, at the same time 'international economic co-operation for economic development of developing countries' had become an established concept in world affairs.

The principle of permanent sovereignty over natural wealth and resources became the subject of much politicized debate due to competing

[1] See chapter 10, p. 321.

ideologies in the same period. This debate was characterized by the presentation of over-simplified rival options: on the one hand, to increase the flow of foreign capital by reinforcing respect for acquired rights and for international law in general; on the other hand, to allow the taking of foreign investment 'without let or hindrance' whenever national development and the strengthening of sovereignty was required. The debate was brought into high relief by actual nationalizations, including those of the Suez Canal Company in 1956, of Dutch property in Indonesia in 1958 and of French investments in Algeria in 1961.

Consequently, the discussions in the United Nations on permanent sovereignty over natural resources in the period 1952–62 had a dual character as they focused on these two conflicting perspectives which were controversial and widely publicized. Some Western business organizations reacted by approaching some developing countries with the request not to vote in favour of a 'hostile' resolution.[2] In fact, discussions focused sometimes on these underlying diametrically opposed perspectives rather than on the actual content of texts. For example, the text of Resolution 626 (VII) was – certainly after the first Indian amendment – relatively non-controversial.[3]

The final result of the process in the period under review in chapter 2 was the 1962 Declaration on Permanent Sovereignty over Natural Resources, which is widely considered as embodying a balance between the interests of capital-exporting and capital-importing countries and between permanent sovereignty and the international legal duties of States. All Soviet proposals for unrestricted nationalization were eventually rejected and the observance of agreements and respect for international law was accorded a prominent position. Unfortunately, as a result of the necessary compromise, there is considerable ambiguity in key paragraphs of the Declaration, such as the term 'appropriate' compensation and the 'However, upon agreement' phrase in the dispute-settlement clause. Therefore, it would be incorrect to view this 1962 Declaration as the economic equivalent of the 1960 Decolonization Declaration.[4] The latter is less controversial and more outspoken in outlawing colonial relationships and in establishing the right of all colonial territories to political self-determination.

[2] Kellogg (1955: 12). See also statements by Costa Rica and Colombia during the debate which eventually resulted in GA Res. 626 (VII).

[3] The American delegate Kellogg (1955: 15) said: 'In fact, there is nothing affirmative to which the United States can specifically object in the final text.'

[4] GA Res. 1514 (XV), Declaration on the Granting of Independence to All Colonial Territories and Peoples, adopted on 14 December 1960, by eighty-nine votes to none, with nine abstentions.

Nonetheless, the *travaux préparatoires* of the Permanent Sovereignty Commission (1958–61) and the Second Committee and plenary meetings of the 1962 session of the General Assembly reveal virtually unanimous support for the principle that every State has the right to take control of its natural wealth and resources. A constructive debate on the modalities of this principle took place, taking into account both the obligations arising from international law and the development needs of developing countries. From this perspective, the 1952–62 debate on permanent sovereignty can be qualified as a constructive North–South dialogue, which resulted in a landmark UN Declaration. The preparation and adoption of the Declaration on Permanent Sovereignty over Natural Resources also marks a shift in emphasis from the self-determination of peoples to the sovereignty of States. This was illustrated by the fact that the forum of debate was transferred from the Commission on Human Rights and the UN General Assembly Third Committee to ECOSOC and the UN General Assembly Second Committee.

After 1963 the UN debate evolved in various directions. With the near-completion of the decolonization process during the 1960s, general permanent-sovereignty resolutions increasingly referred to developing countries only or to all States as subjects of the right to permanent sovereignty, with the exception of specific resolutions on the right of certain peoples, notably those 'under foreign occupation, colonial domination or apartheid'. The debate initially focused on elaborating the 1962 Declaration with a view to linking the exercise of permanent sovereignty more closely with the cause of promoting development. General Assembly Resolution 2158 (XXI) of 1966 in particular was instrumental in this, entailing as it did a comprehensive programme on how to implement permanent sovereignty through an active role of the State both in natural resource management and in constructive co-operation with foreign investors. During the period 1963–70 the principle of permanent sovereignty over natural resources found a well-established place in human rights law and development-related resolutions.

Controversy raised its head again during the early 1970s. Developing countries, assembled in the Group of 77, attempted to broaden and deepen their right to permanent sovereignty. They sought to broaden it by claiming permanent sovereignty over marine resources in substantially extended sea areas and over resource-related economic activities, and eventually over all economic activities and 'wealth' in general rather than natural wealth and resources only. Western States strongly opposed these extensions. In addition, the Group of 77 sought to deepen permanent sovereignty by

expanding the series of rights to be derived from permanent sovereignty, including the right to share in the administration and profits of foreign companies, the right to determine freely the amount of 'possible' compensation to be paid after nationalization, and the right to settle disputes solely upon the basis of national law and by national remedies.

In 1974, this controversy culminated in the seventy-four voting rounds on the Charter of Economic Rights and Duties of States (CERDS), especially in the deeply split vote by which Article 2 was adopted. In retrospect, one may wonder why the mutual distrust of each other's intentions was so strong. The result was that nearly every opportunity for a meaningful compromise was lost, such as the possibility of inserting a reference to 'just compensation' in CERDS as proposed by fourteen OECD countries. Most likely the initial successes of OPEC, the establishment of other commodity-producers' associations, various large-scale nationalizations in the early 1970s, and the weakened position of the Western world, as a result of world economic recession and the Vietnam War, strengthened the Group of 77 in their resolve to insist upon formulations which they knew were utterly unacceptable to the Western group. In its turn the latter also hardened its position.

Be that as it may, some of the rough edges were removed from subsequent references to the principle of permanent sovereignty and there was a gradual return to a strategy of compromise and co-operation. In 1975, the unanimously adopted General Assembly Resolution 3362 (S-VII) on Development and International Economic Co-operation does not even use such terms as 'permanent sovereignty' and 'nationalization'. Agreement could be reached on an Integrated Programme for Commodities in 1976 (UNCTAD IV), the establishment of a Common Fund for Commodities in 1980, and a new Law of the Sea Convention in 1982, albeit that the signatories did not include all Western States. In the permanent sovereignty discussion, emphasis gradually shifted from setting the parameters for foreign participation in the exploitation of natural resources (including participation in management and profits, and the training of national personnel) towards the question of what international co-operation could contribute to exploration, exploitation, processing and marketing of the natural resources of developing countries. By 1996, although until recently discussions in ECOSOC on these issues have usually taken place under the agenda item of permanent sovereignty over natural resources, the content of the debate and of the resolutions adopted has been far removed from that of the original permanent-sovereignty resolutions.

Along another trajectory, the General Assembly has also adopted a series of environmentally relevant resolutions since the 1960s. The need to

preserve the environment and to safeguard natural resources is now commonly accepted but is usually balanced against the aim of poverty eradication in developing countries. It is clear that permanent sovereignty has become pervaded with environmental concerns. Various instruments entail guidelines for natural-resources management at a national level. However, all instruments discussed fall short of explicitly restricting the principle of permanent sovereignty. They exemplify the conviction – to interpret them in a positive vein – that the primary responsibility for proper and environmentally sound management of nature and natural resources and for integrating environmental and developmental policies rests with States.

Simultaneously, UN organs have discussed certain long-standing cases or situations in which peoples and States entitled to self-determination and permanent sovereignty were unable to exercise freely their decision-making powers with respect to their natural resources and wealth. All three cases described – Namibia, Israeli-occupied territories and the Panama Canal and Zone – were forcefully pursued during the early 1970s when the developing countries took an assertive stand on many world affairs, including permanent sovereignty over natural resources. Although some elements of the resolutions in question contained fairly new and controversial elements, their main thrust was to reaffirm that:

1. apart from States, permanent sovereignty is also vested in peoples that could not yet exercise their right to self-determination; and
2. the right freely to use, control and dispose of natural resources or, if this is not the case, the right to regain effective control over *their* natural resources are core rights to be derived from the principle of permanent sovereignty.

The development of permanent sovereignty has tended to focus on the formulation of rights in the earlier periods, but a balance with duties has been increasingly created by stipulating that permanent sovereignty over natural resources be exercised for national development and the well-being of the people; by inserting phrases such as 'in accordance with international law' in nationalization- and marine-resources-related paragraphs; or by adding references to other principles of international law such as the observance in good faith of international obligations, the duty to co-operate or the responsibility of States for transboundary damage. UN resolutions are thus providing support for the thesis that rights and duties are two sides of the same coin.

PART II

Natural-resource law in practice: from creeping national jurisdiction towards international co-operation

Introductory remarks to Part II

The principle of permanent sovereignty over natural resources developed through the political organs of the United Nations, but it was given flesh and blood in the practice of international relations. Third World States invoked it in their offensives against the application of traditional international law principles such as *pacta sunt servanda*, freedom of the high seas and State responsibility. In addition, it was part and parcel of the same movement that gave rise to new principles and concepts such as: a fundamental change of circumstances (*clausula rebus sic stantibus*); participatory equality of developing countries in international economic consultation and decision-making; preferential treatment of developing countries in international trade and financial relations; entitlement of developing countries to development assistance; common heritage of mankind in the law of the sea and outer space; and common concern and 'common but differentiated responsibilities' in international environmental law.

Permanent sovereignty over natural resources initially played a pivotal role in efforts of developing countries to achieve 'sovereign equality' and often had – and still has – a protective function as a legal shield against infringement of their sovereignty by other States and foreign enterprises. This particular background and the qualification of permanent sovereignty over natural resources as 'permanent' and 'inalienable' stood for some time in the way of reshaping the principle to accommodate the realities of economic and environmental globalization. However, more recently, increased attention is being given to the interpretation and application of permanent sovereignty over natural resources as a source of duties as well as rights with respect to: treatment of foreign investors; proper management of (living and non-living) natural wealth and resources; and sustainable development. The increasing significance of the duty to co-operate has a profound impact on the modern interpretation and actual application of

the principle of permanent sovereignty over natural resources and is reflected in treaty law, in State practice, in decisions of international courts and tribunals, and in doctrine. This evolution 'from rights to duties' and from a focus on exclusive national interests towards international co-operation is discussed in this Part with reference to developments in international law relevant to natural resource jurisdiction in three main areas of international relations: foreign-investment regulation (chapter 6); control over marine resources (chapter 7); and environmental conservation (chapter 8). The aim of this Part is: (i) to show that permanent sovereignty over natural resources did not take shape in a legal vacuum but in the practice of international relations; and (ii) to provide the background information to be used in Part III in the systematic identification of the hard-core content of permanent sovereignty over natural resources in modern international law.

6 International investment law: from nationalism to pragmatism

In the period since the establishment of the United Nations the regulation of foreign investment has become a major bone of contention between industrialized and developing countries. While the former have emphasized the duty of all States to respect international law, including the fair treatment of foreign investors and the payment of prompt, adequate and effective compensation in the case of expropriation and nationalization, the latter claim free disposal of their natural resources and the right to take over foreign property when they see fit. These issues were, as we noted in Part I, at the centre of the debate on permanent sovereignty over natural resources. This chapter reviews the main developments in international investment law starting with a discussion of the contents and evolution of the two main opposing doctrines (the international and the national standards), focuses on multilateral efforts to draft codes of conduct relating to foreign investment, and then reviews multilateral instruments for promotion, protection and insurance of foreign investment. One of the most striking phenomena in the field of international investment law is the increasing popularity of bilateral investment treaties which is also dealt with. Finally, the chapter discusses some trends in the international settlement of investment disputes.

'National standard' *versus* 'international minimum standard'

Historical background

Rules of law on foreign investment can be traced back to the early days of colonization and European domination. During the eighteenth and nineteenth centuries an extensive and increasing migration of persons and

capital from Europe and North America to eastern and southern parts of the world took place. This was part of the industrialization process in the 'North' and part of the colonization process of the 'South', where important natural resources were found and exploited. The colonial administrative structures created a convenient framework for the exploitation of natural resources by foreigners. Later, foreign investment was stimulated by the authorities of capital-importing sovereign States, by several means, including the conclusion of bilateral treaties and the granting of concessions to foreign investors. Through *bilateral treaties*, the government often conceded that foreign nationals and their property would not be subjected to the national jurisdiction of the host State where they resided or invested but would remain under the jurisdiction of their home State. In this way non-reciprocal ex-territorial rights and privileges were granted which degraded these host States, to a certain extent, to 'quasi-colonies' of Western powers, companies or even individuals. Examples include a series of treaties between China and other countries, including Great Britain (1842), the United States (1844), France (1844), Russia (1858), German States (1861), Austria-Hungary (1869) and Japan (1871).[1] These treaties provided the framework for travel rights for foreign merchants, limitations on customs duties and tariffs, and concessions to foreign enterprises in the fields of natural-resource exploitation, railways and shipping. These treaties also contained clauses for the protection of Christian missionaries and of local Christians. In addition, some treaties provided for a cession or lease of territory to foreign powers, among others, to Great Britain (Hong Kong) and Russia (Manchuria).

Through an *international concession* a State would transfer rights inherent in its sovereignty to a private person, a private or State-owned company or consortium. In the past, concessions often served as instruments for the exploitation of overseas territories by Western powers, companies or even individuals. The rights granted were wide-ranging and gave broadly defined jurisdiction, as in feudal days. For example, the Dutch East Indies and West Indies Companies and the British East India Company obtained extensive trading and jurisdictional privileges through concessions from local rulers. A peculiar and interesting example is the recognition by the British Crown of sovereign powers held by the Brooke dynasty as rajahs from 1841 to 1946 in Sarawak, enabling them to govern a vast territory for private gain. Later on, concessions were often granted by local authorities in an attempt to attract a foreign company to invest and establish an enterprise.

[1] See Morvay (1984: 515).

Generally such concessions pertained to either the public-utilities sector such as postal services, the construction and operation of railways, canals, etc., or the natural-resources sector, including the exploration and exploitation of mineral or timber resources. A well-known example of the first type is the concession for the construction and operation of the Suez Canal, granted in November 1854. An example of the second type is the 1933 concession to the British-owned Anglo-Persian Oil Company, which was unilaterally abrogated by Iran in 1951 and subsequently became the object of proceedings before the International Court of Justice.[2] Another illustrative example is the 1939 concession granted by the Sheikh of Abu Dhabi to the Petroleum Development Company (Trucial Coast) Ltd. This concession to drill for and extract mineral oil in Abu Dhabi later also gave rise to a dispute which was submitted for arbitration in 1949. In his award of 1951, the arbitrator said:

> This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.[3]

Treaties, concessions and arbitral awards such as those mentioned above became a major source of grievance for Third World States and inspired their efforts to change traditional international law relating to international investment.

International diplomatic protection to enforce 'fair treatment'

International investment law began to be developed during the first half of the twentieth century, in particular in response to the needs of the pioneer industrial investor. It was heavily biased in favour of the capital-exporting countries and, as Jessup put it as early as 1949, 'an aspect of the history of imperialism, or dollar diplomacy'.[4] It was intended to provide foreign investors with maximum freedom of movement, transfer of capital, and trade. At the same time, it purported to support them by means of the doctrine of diplomatic protection by the home State, should a dispute arise with the authorities of the host State.

The capital-exporting States of Europe and North America stipulated that

[2] *ICJ* Reports (1951), p. 89. See also Appendix III, p. 410.

[3] Arbitrator was Lord Asquith of Bishopstone, in 18 ILR (1951), p. 149.

[4] Jessup (1949: 96).

all governments were obliged to observe a so-called international minimum standard of civilization (also called the international standard of justice; hereafter IMS), no matter how they treated their own nationals.[5] While the IMS focuses on the treatment of aliens, it applies to various fields of law, including regulation of foreign investment, protection of property rights, judicial (civil and criminal) proceedings, human rights and protection against disorders. Its content is not entirely clear. Several attempts to clarify it have been made, among others by the League of Nations Codification Conference in 1930 and by the International Law Commission in the context of its work on State responsibility. However, the results have not (yet) attracted widespread support. Therefore, one may still seek recourse to the 1926 judgment in the *Neer claim* (*USA v. Mexico*),[6] which formulated the standard in the following terms and thereby seemed to disallow investors' claims except in cases of extreme misbehaviour of the host State authorities:

> the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.

The main implications arising from the IMS for investment regulation are:[7]

1. *Respect for domestic law of the host State.* In principle, a foreign investor has to accept and respect the laws and customs of the country where he is residing and investing.
2. *No treatment below a minimum international standard.* The home State of the foreign investor has a right to expect that its nationals who are investing and residing abroad are not treated below the minimum international standard.
3. *Expropriation standard.* While it is recognized that each State has the sovereign right to interfere with foreign property, it is only entitled to do so if certain conditions arising from international law are met. These conditions, probably the essence of the international minimum standard, have been claimed time and again by Western countries, in particular the USA, in their reactions to 'nationalizations' and in multilateral negotiations. For example, in 1975 the US Government formulated this position in the following terms:

   > Under international law, the United States has a right to expect:
   > - that any taking of American private property will be *non-discriminatory*;

[5] On the international minimum standard, see Schwarzenberger (1955) and (1969). See also Seidl-Hohenveldern (1992), in particular chapter XIII on 'Property rights of aliens'.
[6] US-Mexican General Claims Commission, 4 RIAA (1926), p. 60.
[7] For a more extensive review, see Verwey and Schrijver (1984: 9–22).

- that it will be for a *public purpose*; and
- that its citizens will receive *prompt, adequate, and effective compensation* from the expropriating country.[8]

4 *Pacta sunt servanda*. It is a well-established principle that no interference should take place contrary to a specific contractual undertaking with an investor. Acquired rights must be respected.[9] This rule is often laid down in bilateral investment treaties.

5 *Due process of law*. It is often claimed that measures affecting the property rights and business interests of foreign nationals 'must be based upon [domestic] law and taken in accordance with procedures prescribed in the constitution or [relevant] laws, subject to the possibility of appeal and not applied in an arbitrary manner'.[10]

6 *Local remedies rule*. A foreign investor is required to submit his disputes with the host State's authorities to the host country's tribunals and exhaust the available local remedies. However, it is often claimed that where these remedies do not exist or have proved to be below required standards, there should be a right of direct appeal to international adjudication.

The national standard as riposte

Review of the Calvo doctrine

Traditionally, Latin American countries have put much emphasis in their foreign policy on such principles as national sovereignty, territorial integrity and non-intervention as well as on the primacy of national law and domestic courts.[11] In their relations with Europe and the US this policy served as a political and legal shield for encroachments upon their political and economic independence and their freedom to regulate their own affairs.[12] On the issue of foreign investment regulation, they tried to subject foreign investors exclusively to the national law and the jurisdiction of the courts of the host State.

In response to abuses in the nineteenth century by Western powers of the right of diplomatic protection of their citizens abroad, Latin American countries put forward the claim that investment regulation in general and the taking of foreign property in particular are matters of domestic

[8] US Department of State, Statement on Foreign Investment and Nationalization, 30 December 1975, as published in 15 ILM (1976), p. 186. This 'triple standard' with respect to compensation is also referred to as the 'Hull rule', named after the US Secretary of State who demanded 'prompt, adequate and effective' compensation when Mexico expropriated US oil interests in 1938. [9] See Ko (1977: 127).

[10] Suy (1972: 125, translated from the Dutch).

[11] See Barberis (1995: 1,180–2) and Peters and Schrijver (1992: 355).

[12] See Chapter IV on Fundamental Rights and Duties of States as included in the Charter of the Organization of American States, 30 April 1948, 119 UNTS (1952), p. 3; see also the Convention on Rights and Duties of States, signed in Montevideo, 26 December 1933, 165 LNTS, p. 19.

jurisdiction. The Argentinian lawyer Carlos Calvo (1822–1906) was the first to systematize the elements of this claim at a legal level.[13] Consequently, it came to be known as the 'Calvo doctrine'.

The Calvo doctrine, also referred to as the '*national* standard' (as opposed to the '*international* minimum standard'), basically stipulates that the principle of territorial sovereignty of a State entails:[14]

1. equality before the law between nationals and foreigners;
2. the subjection of foreigners and their property to the laws and judicial jurisdiction of the State in which they invest or operate;
3. the abstention from interference by other governments, notably those of the home States, in disputes over the treatment of foreigners and their property rights (i.e., abstention from 'gunboat diplomacy' and restriction of diplomatic protection); and
4. absence of an obligation for a State to pay compensation for damages suffered by foreigners due to civil wars or disturbances, unless its own law has created such an obligation.

The Calvo doctrine does not imply that all elements of the international standard, including those relating to expropriation (the conditions of 'public purpose', 'non-discrimination' and 'adequate compensation') are unacceptable. In fact, these elements have frequently been incorporated in Latin American national constitutions and laws. However, it does claim that they stem from national law, not from international law, and that, in principle, disputes arising over their application should be settled under the domestic law of the host State and by its tribunals.

Over the years, various versions of the Calvo doctrine have been formulated in national constitutions and laws, regional conventions and other instruments, and investment contracts concluded by Latin American countries. Occasionally, it has found its way into laws enacted by newly independent States in Asia and Africa.

Review of the Calvo clause

Latin American countries frequently required the insertion of a so-called 'Calvo clause' into investment contracts concluded with foreigners, by which the foreign investor committed himself to refrain from seeking diplomatic protection from his home State in a dispute with the host State and to seek redress through local remedies. This way he would find himself in the same position as national investors. A well-known example is the Calvo clause in the contract between Mexico and the North-American Dredging Company of Texas, which stipulated:

[13] Calvo (1896). [14] See Verwey and Schrijver (1984: 22–7).

The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means than those ... established in favour of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract.[15]

While the Calvo clause has been characterized by Latin American scholars as 'an outstanding Latin American contribution to the development of international law',[16] in most other parts of the world this is seriously doubted. In particular, the claim that an investor could renounce the right of diplomatic protection is negated, since this is a right of the State, which cannot be renounced by its nationals. Consequently, in international jurisprudence and specialist literature, the Calvo clause is often considered to be of limited validity. The most authoritative award in this respect was rendered by the American-Mexican General Claims Commission presided over by Cornelis van Vollenhoven, in the *North American Dredging Company of Texas case* (1926).[17] As to the question whether an alien is legally competent to accept a commitment not to seek diplomatic protection from his home government in the case of a dispute with the host State's government, the Commission stated:

The Commission holds that he may, but at the same time holds that he cannot deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen cannot by contract in this respect, tie the hands of his Government.[18]

Unless the States concerned or the parties to the dispute have set aside the local remedies rule or there is *déni de justice* in the course of exhausting the local remedies or a special agreement to resort to arbitration at an early

[15] Text as quoted in Shea (1955: 200). [16] García-Amador (1992: 522).

[17] 4 RIAA (1926), p. 26. For an extensive review see Shea (1955: 194–230).

[18] 4 RIAA (1926), p. 29. However, notwithstanding this observation the Commission decided that in this particular case the international claim by the claimant was inadmissible: 'where a claimant has expressly agreed in writing, attested to by his signature, that in all matters pertaining to the execution, fulfilment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities and then wilfully ignores them by applying in such matters to his Government, he will be held bound by his contract and the Commission will not take jurisdiction of such a claim.'

stage, a foreign investor is bound by international law to refrain from invoking diplomatic protection. Likewise, his home State is not entitled to interfere as long as the local remedies have not been exhausted. The Calvo clause only comes into the picture if a foreign investor invokes diplomatic protection from his home State as a means of circumventing local courts or in the case of a denial of justice.[19]

Calvo's inception in the United Nations

As described in Part I, in the period since the formation of the United Nations, Latin American countries have been campaigning to obtain international support for their national standard policy and to denounce the international standard. These efforts have included an initiative by Uruguay in the early 1950s which for the first time led to formulating the sovereign right of each State 'to freely exploit natural wealth and resources'[20] and the Chilean proposal in 1952 to include a paragraph dealing with permanent sovereignty in the draft text of Article 1 on self-determination of the envisaged Covenants on Human Rights.[21] This was followed by the adoption by the General Assembly of the 1962 Declaration on Permanent Sovereignty over Natural Resources,[22] which is, however, generally interpreted as reflecting more elements of the international minimum standard than of the national standard.[23]

In 1974, the political climate had changed and the campaign by the Latin American countries to 'crack' the IMS was more successful.[24] As discussed in chapter 3, Article 2 of the Charter of Economic Rights and Duties of States (CERDS) was the centre of great controversy.[25] In later years, during reviews of CERDS, these provisions remained a major source of controversy and failed to gain additional support.[26]

Changing attitudes

Nearly all developing countries, including a number of Latin American countries and socialist countries such as the People's Republic of China and

[19] See Brownlie (1990: 546–7). [20] GA Res. 626 (VII), 21 December 1952.

[21] UN Doc. E/C.4/L.24, 16 April 1952. This text was substantially modified during the negotiations and occurs in Article 1 of both Human Rights Covenants as they were finally adopted in 1966. [22] GA Res. 1803 (XVII), 14 December 1962.

[23] See chapter 2, pp. 66–8. [24] See also Rogers (1978: 6–7).

[25] This was reflected in the separate vote on Art. 2.2 (104 votes to sixteen, with six abstentions) and the final vote on CERDS as a whole (120 to six, with ten abstentions). See 28 UNYB (1974), pp. 401–3. For a general discussion of CERDS see Meagher (1979: chapter 3) and VerLoren van Themaat (1981: chapter 4).

[26] Bulajić (1986) and Chatterjee (1991).

Vietnam, have enacted national legislation in recent years, or are in the process of doing so, with a view to promoting the flow of foreign investment and capital into their economies.[27] This policy is also reflected in changes in the Andean Foreign Investment Code. On 11 May 1987, the restrictive Decision 24 was substituted by a new, more liberal Common Foreign Investment and Technology Licensing Code (Decision 220).[28] Each country may apply such regulations as it deems appropriate in its particular national circumstances, including recourse to international dispute-settlement procedures.

In March 1991, the Commission of the Cartagena Agreement considered that 'the new policies toward foreign investment in effect in the Subregion make it necessary to review and update the communitarian norms approved in Decision 220 of the Commission so as to stimulate and promote the flow of foreign capital and technology to the Andean economies'. As a result, Decision 291 of March 1991 does not require common norms on foreign investment and technology.[29] Article 2 reflects the principle of resort to national standards: 'Foreign investors shall have the same rights and obligations as pertain to national investors, except as otherwise provided in the legislation of each Member Country.' Thus, the treatment of foreign investors is basically left to the discretion of individual States. The Commission also agreed in the preamble 'to remove the obstacles to foreign investment'. Consequently, the Code provides for a nearly unrestricted entry for foreign investment and explicitly allows remittance of earnings and the repatriation of capital, as opposed to the extensive restrictions contained in Decision 24.

The changing attitude of a number of Latin American countries towards foreign investment is also reflected in their increasing participation in multilateral investment instruments such as ICSID and MIGA as well as in the increasing number of bilateral investment treaties they have concluded in recent years.

Multilateral codes of conduct on foreign investment

UN Draft Code of Conduct on Transnational Corporations

Since 1977 the UN Commission on Transnational Corporations has been involved in negotiations on a general Code of Conduct on Transnational

[27] See the regular reports and publications of various institutions, including ICSID, the IFC, the UNCTC and UNCTAD. [28] Text in 27 ILM (1988), p. 974.

[29] Common Code for the Treatment of Foreign Capital and on Trademarks, Patents, Licences and Royalties. Text with Introductory Note in 30 ILM (1991), p. 1,283.

Corporations (TNCs). The main aim of this effort is 'to maximize the contributions of TNCs to economic development and growth and to minimize the negative effects of the activities of these corporations'.[30] While all UN member States subscribe to this aim, it has been far from easy to draft and agree on such a code.[31] This is, *inter alia*, the result of suspicions in Western countries regarding standards of treatment of foreign investors in developing countries, of the fear that new rules will be created on the basis of which the host country can claim the cancellation of acquired rights of TNCs, and of suspicions among developing countries regarding the impact of TNCs on their domestic policies and international relations. The decisions to establish a UN Commission on TNCs and to start negotiations on a Code of Conduct were taken in the aftermath of the overthrow of the Allende government in Chile in 1973, of corruption scandals in the West (for example, the Lockheed affair in the Netherlands) and of a wave of nationalizations of foreign companies in developing countries. Furthermore, regulation and control of the activities of TNCs became part and parcel of efforts in the 1970s to establish an NIEO.[32] Thus, it also became linked with the sorry fate of these efforts.

Even if a comprehensive Code of Conduct on TNCs may never be adopted, the discussions and the amount of information generated by the negotiations on it have had a positive impact on identifying the issues and the problems involved, and opened perspectives in which concrete negotiations in other fora could take place. As Weiss correctly observed: 'Effective UN action need not always end in formal resolutions.'[33] Meanwhile, the outstanding issues in the Code negotiations have lost relevance. The question of the definition of a TNC has become less problematic as more developing countries have transnationals of their own and Eastern European countries will no longer attempt to keep State-owned companies outside the scope of the Code. Other outstanding issues are not as 'hot' as they used to be. Experience in other relevant fora shows that they could be solved fairly easily if there is sufficient political will. They include:

1 a reference to international law and international obligations;
2 non-interference in internal affairs;
3 respect for national sovereignty;

[30] Preamble, Draft UN Code of Conduct on Transnational Corporations ('Chairman's text'), as contained in UN Doc. E/1990/94, 12 June 1990.
[31] For a review of the negotiations, see Fatouros (1980) and Dell (1990).
[32] See the Declaration and Action Programme on the Establishment of a New International Economic Order, GA Res. 3201 and 3202, 1 May 1974.
[33] Weiss (1989: 93).

4 nationalization and compensation;
5 dispute settlement; and (6) national treatment.[34]

However, the UN Commission on TNCs has not been able to capitalize on the political momentum of the early 1990s. Upon recommendation by ECOSOC, the General Assembly decided in 1994 to integrate this Commission into the institutional structure of UNCTAD.

World Bank Guidelines on the Treatment of Direct Foreign Investment

After a French initiative in April 1991, the Development Committee, a joint ministerial committee of the Boards of Governors of the International Monetary Fund and the World Bank Group, requested the World Bank to prepare a 'legal framework' embodying the essential legal principles necessary to promote foreign direct investment. A working group of the World Bank institutions energetically worked on this request[35] and formulated 'Guidelines on the Treatment of Foreign Direct Investment' embodying positive approaches. The Development Committee decided to 'call the attention' of member countries to these guidelines as 'useful parameters in the admission and treatment of private foreign investment in their territories, without prejudice to the binding rules of international law at this stage of its development'.[36] These guidelines set out a general framework for the treatment of foreign investment by host States; they supplement the efforts of member countries to attract increased flows of private foreign investment; and they support binding instruments in the field of foreign investment such as national legislation, bilateral investment treaties and multilateral treaties.[37] The Guidelines were formulated

[34] In September 1989 a symposium took place on issues in the negotiations on a draft code of conduct on TNCs in the Peace Palace at The Hague, convened by the UN Centre on Transnational Corporations and the International Law Association's Committee on Legal Aspects of a New International Economic Order. In the Report of this symposium as well as in the 1990 report of the ILA Committee, substantive solutions for bridging the gaps have been formulated; see 29 *CTC Reporter* (Spring 1990) published by the United Nations, New York.

[35] The working group, chaired by the World Bank's General Counsel, Ibrahim F. I. Shihata, first published extensive background studies and a progress report in April 1992. The World Bank Group (1992), vol. I.

[36] The World Bank Group (1992), vol. II; also published in 7 ICSID Review – Foreign Investment Law Journal (1992), no. 2 and in 31 ILM (1992), pp. 1,366–84.

[37] Apart from section (I) on the scope of application, they cover four main areas, viz.: (II) admission of foreign investment; (III) standards of treatment and transfer of capital and net revenues; (IV) expropriation and unilateral alterations or termination of contracts as well as their compensation; and (V) the settlement of disputes between governments and foreign investors. See for the background, drafting history and the prospective impact of the Guidelines, Shihata (1993a: 29–152) and (1993b).

on the basis of an extensive study of existing legal instruments at the national, bilateral and multilateral levels, as well as of international arbitral awards and relevant literature.

It is striking that the Guidelines provide a framework for *bona fide* foreign investments only and do not deal with sensitive issues such as disclosure of information, restrictive business practices, the avoidance of corrupt practices and non-interference in domestic affairs. Thus, they do not formulate rules of good behaviour on the part of foreign investors nor do they address the policies of their home States with respect to these and other issues. They only formulate rules of behaviour for host States and mainly from the perspective of the interests of foreign investors with a view to promoting foreign investment.[38] The report of the working group to the Development Committee argued that it was trying to avoid a duplication of the work done by the UN Centre on Transnational Corporations and a repetition of principles accepted in that context. But, as reviewed above, the fate of this draft Code is highly uncertain. To have Guidelines only for fair treatment of foreign investors by host States, without an accompanying set of rules guiding the behaviour of foreign investors and their home States, seems to be rather one-sided.[39] Yet, it is symptomatic of the present 'business-like' international economic climate that the drafting of such a legal framework for the treatment of foreign investment took only one year, whereas a general draft code of conduct on transnational corporations has not emerged after fifteen years.

Multilateral instruments for promotion and protection of foreign investment

Three World Bank agencies

International Finance Corporation

In 1955, it was decided to establish the International Finance Corporation (IFC), separate from but affiliated to the World Bank.[40] Its purpose is to supplement the Bank by encouraging, in co-operation with foreign investors, the establishment and expansion of private enterprise of a productive

[38] See also Sornarajah (1994: 223).

[39] It contrasts with the 1972 International Chamber of Commerce Guidelines which set out, on each subject, the duties and obligations of the three parties concerned, i.e., investor, host State and home State.

[40] In 1955, its Articles of Agreement were submitted for approval to the Board of Governors of the International Bank for Reconstruction and Development (IBRD) and subsequently approved. On 20 July 1956, the treaty entered into force.

character in member States and especially in developing countries,[41] particularly by stimulating the international flow of private capital and providing risk capital for productive purposes. For these purposes the IFC can provide loans to an enterprise and, from 1961, it has been able to buy shares in a private enterprise. It is unique in the sense that it is the only intergovernmental organization operating for the sole purpose of assisting the international spread of private enterprise. To this end, it operates as an international investment bank, but with responsibilities for assisting economic development as well as making sound investments. Originally, the IFC concentrated on investments in manufacturing, particularly basic industries such as iron, steel, textiles, construction materials, pulp and paper. Later it also started to invest substantial amounts of money in agricultural businesses as well as in financial institutions. Recently, the IFC has been significantly expanding its work due to the increasing interest in the role of the private sector in the development process.

International Centre for the Settlement of Investment Disputes

After earlier efforts in the context of the OECD and other organizations to draft a multilateral convention on the protection of foreign property had been unsuccessful,[42] the Convention on the Establishment of an International Centre for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) was adopted in the context of the World Bank in 1965.[43] ICSID itself does not act as conciliator or arbitrator. The Convention provides for procedures and ICSID keeps a list of qualified persons from which the parties to a dispute are able to choose conciliators or arbitrators.[44] ICSID only administers the proceedings and provides the necessary procedural facilities. Procedures under the auspices of ICSID must conform to three main criteria:

1 both parties must have consented to have recourse to ICSID (*admissibility*);

[41] See Art. 1 of the IFC's Articles of Agreement. Although the IFC operates as a separate agency with its own staff and is a specialized agency of the United Nations in its own right, it has close links with the IBRD. The IFC is also headquartered in Washington; only IBRD member countries are eligible for membership of IFC; it has the same Governors and Executive Directors and a weighted voting system similar to that of the IBRD; and the President of the World Bank is ex officio President of the IFC as well. By April 1996, membership included 168 States.

[42] See Schwarzenberger (1969: 109–60).

[43] After ratification by twenty States, the ICSID Convention entered into force on 14 October 1966.

[44] Each contracting State can appoint four persons from this list to a so-called Panel of Conciliators and Panel of Arbitrators.

2 one party has to be a contracting State and the other a national of another contracting State (*ratione personae*); and
3 it should involve a legal dispute arising out of an investment (*ratione materiae*).[45]

Although relatively few proceedings have been conducted under the auspices of ICSID, hundreds of investment contracts, bilateral investment treaties and national laws contain provisions for the submission of disputes to ICSID. References to ICSID also appear in the Investment Chapter of the 1992 North American Free Trade Agreement (NAFTA)[46] and the 1994 Energy Charter Treaty.[47] Such treaty clauses are meant to generate trust and are interpreted to meet the requirement of a party's consent to the jurisdiction of ICSID in advance. The ICSID Convention has been ratified by a majority of States.[48]

It is interesting to analyze why ICSID is gaining in popularity. For *host States* the following advantages may be identified:

1 if a host State agrees to arbitration of a dispute with a foreign investor of a State which is also a party to the ICSID Convention, there will be less chance that the investor's home State will exercise its right to grant diplomatic protection and thus interfere (Articles 26 and 27);
2 any contracting State may in principle exclude certain disputes from the jurisdiction of ICSID. However, only five States (Jamaica, Papua New Guinea, Saudi Arabia, Turkey and China) have made such a notification under Article 25, paragraph 4;[49]

[45] See Art. 25 of the ICSID Convention.
[46] An interesting detail is that two of the three NAFTA partners, namely Canada and Mexico, are in fact not (yet) ICSID contracting States. However, for disputes between parties falling outside the scope of the Convention, ICSID established the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings. This allows for the settlement of disputes where one of the parties is either a State that is not a contracting State or a national of a State that is not a contracting State. See ICSID Additional Facility Rules, approved in 1978.
[47] See Art. 26. Text in 37 *Official Journal of the European Communities*, No. C 344, pp. 20–1 and in 34 ILM (1995), p. 360. The European Energy Charter Treaty was adopted in Lisbon on 17 December 1994.
[48] As of 15 September 1996, the ICSID Convention had 126 contracting States while a further thirteen States had signed, but not yet ratified the Convention.
[49] The notifications from Jamaica (1974) and Saudi Arabia (1980) exclude disputes relating to the natural-resources sector. Papua New Guinea 'will only consider submitting those disputes to the Centre which are fundamental to the investment itself' (1978), while Turkey (1989) will only consider submitting with respect to investments that have been approved. Moreover, Turkey specified that 'the disputes, related to the property and real rights upon the real estates are totally under the jurisdiction of the Turkish courts and therefore shall not be submitted to jurisdiction

3 a contracting State may, but need not, 'require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention' (Article 26); and
4 the ICSID Convention requires an arbitral tribunal to decide a dispute in accordance with the rules of law agreed to by the parties (freedom of choice). This can very well include the law of the host State. In the absence of agreement, the tribunal must apply the law of the State party to the dispute (including its conflict rules) and such rules of international law as may be applicable (Article 42.1). The parties may authorize the tribunal to decide *ex aequo et bono.*

For a long time, Latin American countries felt that participation in ICSID would not be in line with the Calvo doctrine and the principle of permanent sovereignty over natural resources, as ICSID provides for *international* procedures for settling investment disputes while the Calvo doctrine primarily stipulates *local* remedies. However, in recent years it has increasingly become recognized that ICSID does not contradict the Calvo doctrine and the number of Latin American countries that have signed and ratified the ICSID Convention has substantially increased. By September 1996, twelve Latin American countries had ratified the Convention.[50]

The Convention enables a home State, whose investor might otherwise wish to seek its protection, to induce the investor to rely on ICSID. In this way a home State can avoid the embarrassment of a dispute with another State at an intergovernmental level. In fact, Article 29 of the Convention explicitly forbids the investor's home State to give diplomatic protection in respect of a dispute submitted to ICSID, unless the host State has failed to comply with the award.

Multilateral Investment Guarantee Agency

The establishment of an international investment insurance facility has been on the international agenda since the early 1960s. Early efforts in the context of OECD and the World Bank and later of UNCTAD and the EC failed.

of the Center'. Finally, China (1993) notified ICSID that it would only consider submitting to the ICSID disputes over 'compensation resulting from expropriation and nationalization' (nevertheless China has given consideration in some bilateral investment treaties to the possibility of ICSID arbitration for other types of investment disputes). See the section on 'Notifications concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Centre' in ICSID Doc. ICSID/8, entitled 'Contracting States and Measures Taken by them for the Purpose of the Convention', October 1993. Guyana and Israel withdrew their earlier notifications.

[50] Paraguay (1983), El Salvador (1984), Ecuador (1986), Honduras (1989), Chile (1991), Costa Rica (1993), Peru (1993), Argentina (1994), Bolivia, Nicaragua and Venezuela (1995) and Panama (1996). In addition, three further Latin American countries had signed but not (yet) ratified: Haiti (1985), Uruguay (1992) and Colombia (1993).

On a regional basis, one agency was established in 1974, namely the Inter-Arab Investment Guarantee Agency Corporation which reportedly functions quite effectively.[51]

In 1985, following a proposal of the Board of Governors of the World Bank, a Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention) was adopted. MIGA's main purpose is to issue guarantees to investors against non-commercial risks, in particular those related to investments in developing countries, and thus to encourage the flow of investments for productive purposes to developing countries.[52] MIGA is designed to operate on a self-sustaining basis. In addition to its guarantee operations, it also provides a forum for international co-operation among capital-importing and capital-exporting countries as well as foreign investors.[53] On 12 April 1988, the Convention entered into force when the required number of ratifications was achieved.[54]

The MIGA Convention as an international instrument aims to influence the investment climate at the national level, but it does not encroach on the notion of natural-resources jurisdiction of the host State and thus easily comes to terms with the Calvo doctrine. Criteria for eligibility of investments for coverage by MIGA include:

1. compliance by the investor with the host country's laws and regulations (Article 12(d)(ii));
2. consistency of the investments with the declared development objectives and priorities of the host country (Article 12(d)(iii));
3. host-country approval of the issuance of the guarantee by MIGA (Article 15).

These conditions are intended to ensure that control over admission of foreign investment and MIGA involvement rests with the host country. In principle, the MIGA Convention does not deal with substantive aspects of the standard of treatment of a foreign investment. It merely provides that, in guaranteeing an investment, MIGA 'shall satisfy itself as to ... the investment conditions in the host country, including the availability of fair

[51] See Taha (1990: 99–118) and Moinuddin (1987: 177).

[52] See Preamble to the Convention and Voss (1987: 8–9) and Shihata (1988).

[53] Schedule A to the Convention provides a classification of individual countries. For voting and some other purposes, countries are classified as belonging either to Category One (industrialized) or Category Two (developing). All Third World participants belong to Category Two (together with several OECD member States: Greece, Portugal, Spain and Turkey).

[54] As of 16 December 1996, MIGA had been signed by 158 States: twenty Category One and 138 Category Two States. Of these signatories, 139 States were full members upon ratifying the Convention and paying the membership fees.

and equitable treatment and legal protection for the investment'.[55] In a case where MIGA is of the view that fair treatment and legal protection is not adequately assured under the domestic laws of the host country or under an investment treaty, it may conclude an agreement with the host country, or make other arrangements on the treatment to be extended to the investment in question.[56]

It could be argued that certain aspects of the dispute-settlement procedure, outlined in Chapter IX of the Convention, are of a clearly international character and thus against the Calvo doctrine. For example, Article 56 provides that any question of interpretation or application of the Convention arising between a member and MIGA or among members shall be submitted to the Board of Directors of MIGA for its decision, with a possibility of appeal to the Council of Governors. Disputes between MIGA and a host country arising from subrogation may be referred by either party to international arbitration according to the procedures specified in Annex II of the Convention. The parties are free to agree on alternative methods for the settlement of such disputes, such as conciliation. Under certain circumstances this could mean that a MIGA member may involuntarily become involved in international arbitration, albeit, as Shihata puts it, in 'a conflict between two international persons, two subjects of international law, unlike the typical case of a dispute between a foreign investor and the host government to which both the traditional objection to international arbitration and the Calvo doctrine apply'.[57] However, as discussed above, the Calvo doctrine has a wider scope than the Calvo clause and has frequently been invoked by Latin American countries to object to any form of international arbitration.

MIGA's responsibilities also include improving the general investment conditions in developing countries. This may entail, but formally only at the request of the government of a member State, advice on such matters as the drafting of investment codes and reviewing investment-incentive programmes. In addition, MIGA is directed to promote and facilitate the conclusion of agreements, among its members, on the promotion and protection of investments.[58]

[55] Article 12(d).
[56] See Art. 23(b)(ii).
[57] Shihata (1988: 264). Shihata also points out that submission to international arbitration of disputes concerning financial transactions between an international financial institution and a member State is accepted, for example, in loan agreements of the World Bank and the Inter-American Development Bank.
[58] Article 23(b)(iii).

EU–ACP co-operation

The various Lomé Conventions, concluded between the European Union (EU) and developing States in Africa, the Caribbean and the Pacific (ACP States),[59] initiated programmes related to the promotion and protection of foreign investments. Lomé IV, the latest Convention, contains an extensive chapter on investments (Articles 258–74), with sections on investment protection and promotion, and on investment financing and support. The latter focuses on promotion and development of small and medium-size enterprises. Article 258 provides that 'fair and equitable treatment' must be granted to private investors who comply with ACP–EU development co-operation objectives and priorities and with the appropriate laws and regulations of their host and home States. In Article 260 the contracting parties 'affirm the need to promote and protect either party's investments on their respective territories'. In this context they also affirm 'the importance of concluding between States, in their mutual interest, investment and protection agreements which could also provide the basis for insurance and guarantee schemes'. In a separate Annex to the Convention (No. LIII) the contracting parties agree to study the main clauses of a model bilateral agreement on investment promotion and protection, with particular attention to:

1. legal guarantees to ensure fair and equitable treatment and protection of foreign investors;
2. protection in the event of expropriation and nationalization; and
3. international arbitration in the event of disputes between investor and the host State.

Increasing popularity of bilateral investment treaties

The bilateral treaty of Friendship, Commerce and Navigation (the so-called FCN treaty) served for a long period as one of the common instruments of traditional diplomacy. In addition to their 'friendship' function, these treaties used to cover a broad range of topics relating to: the rights of the nationals of each party and the protection of their property abroad; trade, including such issues as national treatment and most-favoured-nation treatment; and navigation and consular jurisdiction. After 1960, as a result of the conclusion of multilateral trade instruments such as GATT and of special bilateral trade treaties, the relevance of FCN treaties rapidly decreased. In the immediate post-war period, FCN treaties were retooled

[59] See VerLoren van Themaat and Schrijver (1992: 97–111).

and became instrumental in the promotion and protection of foreign investment. However, capital-exporting States, in particular Germany and France, soon began negotiating bilateral treaties exclusively focusing on the promotion and protection of foreign investment. The number of bilateral investment treaties (BITs) grew rapidly, and up to 1996 more than 1,000 had been concluded, involving nearly 165 States, including more than 100 developing countries.[60] Most BITs are treaties between an industrialized and a developing country, or between an industrialized and a former communist country. But it is interesting to note that in recent decades a growing number of BITs between two developing countries and between a (former) communist country and a developing country have been concluded.[61]

The main objectives of these treaties are: the promotion of foreign investment; protection of acquired rights; minimization of loss and risk in the case of expropriation; and dispute settlement. With a few exceptions, they include rules on: the right of 'entry' and the establishment of a company; fair treatment; most-favoured-nation treatment and national treatment; repatriation of capital, profits and other assets; the conditions applying to expropriation and nationalization, including compensation standards, and to losses or damages due to war and revolution; due process of law; and dispute settlement through international arbitration.

It is interesting to note that model bilateral investment treaties were not only drafted by several Western countries,[62] but that in 1981 the Asian–African Legal Consultative Committee also drew up three model treaties with different degrees of liberality. The features of one of these are basically the same as those of Western countries.

A question to be briefly discussed here relates to the legal merits of BITs, a topic which has given rise to divergent opinions. It can be inferred, from Article 38 of the Statute of the ICJ, that uniform State practice (*usus*) and the conviction that one ought to perform in this way (*opinio iuris*), give rise to the emergence of customary international law. Where customary international

[60] As of 1 March 1996, twenty-three OECD countries, twenty-two former Soviet Union and Eastern European countries and 108 developing countries. See Peters (1996: 1,130) and information provided to the author by Paul Peters. For data and extensive analyses, see Peters (1992b: 115–16) and Dolzer and Stevens (1995).

[61] For example, since 1982 China has concluded seventy-five BITs, approximately one-third of them with OECD countries and the others with Central and Eastern European countries such as Romania (1983), Poland (1988), Hungary (1991) and Slovenia (1993), and with fellow Third World countries including Thailand (1985), Malaysia (1988), Korea (1992), Viet Nam (1992), Laos (1993), Indonesia and Chile (1994), Morocco (1995), Saudi Arabia and Bangladesh (1996). For an early analysis, see Li (1988: 167–82).

[62] For the US model, see Bergman (1983).

law is crystal clear, treaties can merely confirm its content. However, where customary international law is unclear, or even controversial in certain respects, as in the case of the regulation of foreign investment, treaties may serve to clarify (and expand) the law. The question then arises to what extent these BITs can have an impact on the genesis and content of customary international law, in particular for non-parties. The element of State practice is certainly an important asset of the BITs: a total of over 1,000 of them, in which 75 per cent of all States, representing all regions of the world, participate, cannot be ignored.

More problematic is the significance of this body of bilateral treaty practice for the genesis of an *opinio iuris*: more specifically, whether such an impressive body of State practice can be said to reflect and reinforce 'general practice accepted as law', either by consolidating traditional principles of customary international law or introducing new ones. Academic views are divided on this issue.[63] In general terms, Akehurst has argued that where numerous bilateral treaties in the same subject area contain uniform or very similar clauses on a certain matter and the actions of States generally are consistent with these treaties, then such treaty provisions could be accepted as evidence of a rule of customary international law.[64] Peters quotes Verzijl who pointed out that 'the frequency of a particular class of bilateral treaty ... or the constant repetition therein of particular clauses may in itself create a practice corroborated by a general *opinio iuris*'.[65] But Schwarzenberger observed, in 1969, that to the extent that these treaties include less than an international minimum standard, 'even a whole series of bilateral agreements ... hardly constitutes by itself evidence of any change in the relevant rules'. He asserts that 'such treaties are the result of complex and highly pragmatic considerations, but not of any change in the governing rule of international customary law by desuetude'.[66] There are authors such as Sornarajah and Chowdhury who take a critical view of BITs. Sornarajah concludes that the 'bilateral investment treaties do not create any norms of international law'.[67] Chowdhury claims that these BITs are often the product of 'unequal bargaining powers on a take it or leave it basis and admittedly in an inhospitable investment climate'. If these treaties create special regimes for a closer form of economic co-operation in which property protection is one of the aspects, it means, in his view, that 'developing states reconciled

[63] See for an extensive discussion of this issue Verwey and Schrijver (1984: 84–8). Peters (1991: 99–101 and 151–3). [64] Akehurst (1974–5: 42–52). [65] Verzijl (1968: 40).
[66] Schwarzenberger (1969: 8–9). [67] Sornarajah (1986: 40).

themselves as a matter of commercial bargain and not in response to any legal obligation'.[68] Also Schachter is of the opinion that, as a general rule, 'the repetition of common clauses in bilateral treaties does not create or support an inference that those clauses express customary law' and concludes that the various BITs are 'essentially contractual, the product of negotiation based on a variety of considerations influencing the parties'.[69] Bring views BITs only as a *lex specialis* between parties, merely designed to create a mutual regime of investment protection.[70] It should be noted that the aforementioned views were expressed when the number of BITs and the number of countries involved were significantly smaller than they are now, and when the number of States rejecting them (particularly communist and Latin American countries) was considerable. However, in 1994 Sornarajah, while acknowledging that the resorting to such treaties is 'a new phenomenon' and that they are 'potentially law creating', still takes the view that it would be too far-fetched to claim that customary principles of law could emerge from them.[71] In contrast, Shihata emphasizes the contribution of BITs to 'an emerging international acceptance of common standards for the treatment of foreign investment'.[72]

In the author's view, the impressive body of BITs may not in itself be able to reflect or generate customary international law including an *opinio iuris communis*, but can certainly serve to clarify and consolidate widely accepted principles of international investment law as well as to identify new trends, such as the option of resort to international arbitration without prior exhaustion of local remedies and compensation standards. Now that the days of sharply divided doctrinaire debates on these issues in the UN seem to be over and hardly any nationalizations are taking place, the entire debate on the legal merits of BITs has become rather theoretical. For, the various developments concerning the international regulation of foreign investment all point in the same direction, i.e., a more business-like approach on the side of both developing States, which are eager to host more foreign investors and are willing to accept international rules, and industrialized States, which no longer demand 'capitulation'-type clauses and acknowledge that foreign investors are in principle subject to the laws of the country in which they operate.

[68] Chowdhury (1984a: 35 and 39). See also Chowdhury (1984b: 83).
[69] Schachter (1984: 126–7). [70] Bring (1980: 127).
[71] Sornarajah (1994: 25 and 276): here he states that '[t]he overzealous and excessive claims that they have created customary international law on many points must ... be rejected'. [72] Shihata in his preface to Dolzer and Stevens (1995), p. v.

International settlement of investment disputes

At the international level various mechanisms have been used to settle international investment disputes. They will be briefly mentioned here,[73] while their relevance for the appraisal of the status and the interpretation and application of the principle of permanent sovereignty over natural resources will be reviewed in Part III, pp. 000–00.

So far, the ICJ has dealt with only a few cases pertaining to foreign investment issues. In the *Anglo-Iranian Oil Company case* (*UK* v. *Iran*) (1952), the court found that it had no jurisdiction to deal with the merits of the case. In the *Barcelona Traction case* (*Belgium* v. *Spain*) (1970) the court addressed, *inter alia*, issues of nationality of companies and shareholders and their status in international law. Lastly, in the *ELSI case* (*USA* v. *Italy*) (1989), a Chamber of the ICJ pronounced on the requisition of a US company in Italy and alleged violation of the bilateral FCN treaty. It led to an interesting judgment on such issues as interpretation and status of an FCN treaty, exhaustion of local remedies and compensation for damages.[74]

Up to the early 1970s, only a few arbitrations are on record: *Abu Dhabi* (1951), *Qátar* (1953), *Aramco* (1958) and *Sapphire* (1963). All of them dealt with efforts by oil-producing States in the Middle East to terminate or renegotiate oil concessions. These arbitration tribunals did not yet apply newly emerging principles such as permanent sovereignty over natural resources and the *clausula rebus sic stantibus*, but instead based their decisions on 'general principles of law', international case law and the actual terms of the concessions concerned. Between 1971 and 1974 Libya nationalized the interests and properties of foreign oil companies. Three arbitration tribunals were established to settle the disputes arising from the acts of nationalization. For each tribunal a sole arbitrator was appointed: Arbitrator Lagergren in the *BP case*; Arbitrator Dupuy in the *Texaco case*; and Arbitrator Mahmassani in the *Liamco case*. Their rulings on the lawfulness of the Libyan nationalizations and the compensation to be paid differ considerably. All of them also dealt with the impact of the UN resolutions on permanent sovereignty over natural resources, particularly the extent to which they challenged customary international law in the fields of concern. Similarly, in 1982 an international tribunal rendered an interesting award in the *Kuwait* v. *Aminoil case* which also addresses such issues as 'stabilization clauses', the 'appropriate compensation' formula and the status of Resolution 1803 and the NIEO resolutions.

Following the release of American hostages in Tehran, the Iran–US

[73] See also Appendix III, p. 410. [74] For a critical comment see Mann (1992).

Claims Tribunal was established in The Hague to deal with claims over disputes then outstanding between US nationals and the government of Iran arising out of 'expropriations or other measures affecting property rights'. The tribunal mainly operates through three Chambers, composed of a 'neutral' President and an American and an Iranian arbitrator. In practice, all significant decisions have been rendered by a majority, mostly consisting of the neutral and the American arbitrator. Their awards address a large number of issues including: the applicability of the 1955 US–Iran Treaty of Amity, Economic Relations and Consular Rights; the lawfulness of nationalization and standards; and methods of valuation of compensation. Some of its most significant awards will be examined in chapters 9 and 10 dealing with the rights and duties arising from the principle of permanent sovereignty over natural resources. Yet, it is not easy to identify common trends in the awards of the often deeply divided Chambers and to assess their impact on international investment law and expropriation law in general.

Another category is a series of arbitration awards under the institutionalized procedures of the ICSID such as those in the *Jamaican Bauxite cases* (all discontinued in 1977), *Amco* v. *Indonesia* (1983 and 1984), *Klöckner* v. *Cameroon* (1983), *Liberian Eastern Timber Corporation (Letco)* v. *Liberia* (1987) or *Asian Agricultural Products/Sri Lanka* (1990). These awards are especially relevant from the perspective of the interpretation of applicable law clauses and will be examined in Part III.

Finally, reference can be made to the UNCITRAL Arbitration Rules[75] and the International Chamber of Commerce Rules of Conciliation and Arbitration.[76] Both of them provide rules on matters such as the choice of arbitrators, the applicable law, and the place and language of arbitration proceedings.[77] As UNCITRAL as such is not an administered form of arbitration, disputes cannot be brought before the UNCITRAL Centre (other than regional centres). The ICC Court of Arbitration serves as an international centre for the settlement of commercial disputes between parties to international contracts. Parties often involve governments or State-owned organizations. These disputes are often dealt with under strict confidentiality. Hence, they have not been examined in Part III.

Trend towards pragmatism

At various levels of investment regulation an increasing trend towards pragmatism, which bridges differences rather than exposing doctrinaire

[75] Text in 15 ILM (1978), p. 701. [76] ICC Publication No. 447, 1988.
[77] Sacerdoti (1977).

viewpoints, can be discerned. This was induced by the sharp decrease in new direct foreign investment in developing countries (especially in Africa) during the 1980s, by changing ideologies with respect to the role of the private sector and the market (especially since the end of the Cold War), as well as by the activities of transnational corporations operating in developing countries. This trend is apparent at various levels of investment regulation:

1 at the *national level* of developing countries where investment regulations are being drawn up to generate confidence among potential foreign investors and maximize their contribution to national development;
2 at the *bilateral* level in the increasing number of bilateral investment treaties, concluded both between industrialized and developing countries, and between developing countries themselves;
3 at the *regional* level in multilateral investment treaties such as the Inter-Arab Investment Protection Treaty (1981) and the ASEAN Investment Treaty (1987) as well as in NAFTA's investment chapter (1992);
4 at the *inter-regional* level, for example, in the inclusion of investment promotion provisions in the Lomé Conventions between the EU and the ACP countries and in the Energy Charter Treaty (1994) or the development of Draft Model Bilateral Agreements for Promotion, Encouragement and Protection of Investments by the Asian–African Legal Consultative Committee (1981); and
5 at the *multilateral* level in the expanding work of the IFC, the establishment of MIGA (1986), the increasing number of contracting parties to the ICSID Convention and OECD/WTO efforts to arrive at a Multilateral Investment Agreement.[78]

Through *international dispute-settlement* procedures it has been possible to reach satisfactory decisions in a number of cases, balancing the interests of commercial companies and the interests of host States, sometimes through institutionalized procedures such as those of the ICJ and ICSID, otherwise on an *ad hoc* basis such as in the *Libya Oil Nationalization cases* (1973–7), the *Kuwait* v. *Aminoil case* (1982) or in the context of the Iran–US Claims Tribunal in The Hague.

[78] See pp. 383–4.

Box 6.1 Characteristic examples of Calvo-flavoured provisions in legal instruments

Latin American constitutions

Article 24 of the Constitution of Bolivia

Foreign subjects and enterprises are subject to Bolivian laws, and in no case may they invoke exceptional position or have recourse to diplomatic claims.

Article 27 of the Constitution of Mexico

The State may grant the same right [to acquire ownership of lands, waters, and their appurtenances, or to obtain concessons for the exploitation of mines or of waters] to foreigners, provided they agree before the Ministry of Foreign Relations to consider themselves as nationals in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto; under penalty, in case of non-compliance with this agreement, of forfeiture of the property acquired to the nation.

Article 136 of the Constitution of Peru

Foreign enterprises domiciled in Peru are subject without restrictions to the laws of the Republic. In any agreement which the State signs with foreigners or with juridical persons, or in the concessions which are granted to them, the express acceptance by the former of the jurisdiction of the laws and the courts of the Republic and their renunciation to any diplomatic recourse must be made clear . . .

The State and juridical persons can submit disputes stemming from agreements with foreigners to judicial and arbitral courts established by virtue of international agreements in which Peru is a party.

Article 127 of the Constitution of Venezuela

In contracts involving the public interest, when not unnecessary because of the nature thereof, there shall be considered incorporated, even if not expressly stated, a clause by which any questions and disputes which may arise concerning such contracts and which are not amicably settled by the contracting parties shall be decided by competent courts of the Republic, in accordance with its laws, and they may not for any reason or cause give rise to foreign claims.

Box 6.1 (cont.)

Regional conventions

Article 9 of the Montevideo Convention on Rights and Duties of States, (1933)

Nationals and foreigners are under the same protection of the law and the national authorities and foreigners may not claim rights other or more extensive than those of nationals.

Article 7 of the Pact of Bogotá (1948)

The High Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective State.

Other regional instruments

Articles 50 and 51 of the 1970 Andean Foreign Investment Code, commonly known as 'Decision 24' (no longer in force)

50 Member countries shall not grant to foreign investors any treatment more favourable than that granted to national investors.

51 In no instrument relating to investment or to the transfer of technology shall there be clauses that remove possible conflicts or controversies from the national jurisdiction and competence of the recipient country or allow the subrogation by States to the rights and actions of their national investors.

Box 6.2 Permanent-sovereignty-related provisions in the draft UN Code of Conduct on Transnational Corporations

7 Transnational corporations shall respect the national sovereignty of the countries in which they operate and the right of each State to exercise its permanent sovereignty over its natural wealth and resources;

8 An entity of a transnational corporation is subject to the laws, regulations and established administrative practices of the country in which it operates.

10 Transnational corporations should carry out their activities in conformity with the development policies, objectives and priorities set out by the Governments of the countries in which they operate and work seriously towards making a positive contribution to the achievement of such goals . . .

19 With respect to the exhaustion of local remedies, transnational corporations should not request Governments to act on their behalf in any manner inconsistent with paragraph 65.

47 In all matters relating to the Code, States shall fulfil, in good faith, their obligations under international law.

49 Transnational corporations shall receive fair and equitable treatment in the countries in which they operate.

50 . . . entities of transnational corporations should be entitled to treatment no less favourable than that accorded to domestic enterprises in similar circumstances.

55 It is acknowledged that States have the right to nationalize or expropriate the assets of a transnational corporation operating in their territories, and that adequate compensation is to be paid by the State concerned, in accordance with the applicable rules and principles.

56 An entity of a transnational corporation is subject to the jurisdiction of the country in which it operates.

57 Disputes between States and entities of transnational corporations, which are not amicably settled between the parties, shall be submitted to competent national courts or authorities. Where the parties so agree, or have agreed, such disputes may be referred to other mutually acceptable or accepted dispute settlement procedures.

64 States should not use transnational corporations as instruments to intervene in the internal or external affairs of other States and should take appropriate action within their jurisdiction to prevent transnational corporations from engaging in activities referred to in paragraphs 16 and 17 of this Code.

65 Government action on behalf of a transnational corporation operating in another country shall be subject to the principle of exhaustion of local remedies provided in such a country and, when agreed among the Governments concerned, to procedures for dealing with international legal claims. Such action should not in any event amount to the use of any type of coercive measures not consistent with the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Box 6.3 Some illustrative provisions of the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment

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Recognizing that the promotion of private foreign investment is a common purpose of the International Bank of Reconstruction and Development, the International Finance Corporation and the Multilateral Investment Guarantee Agency;

I.1 These Guidelines may be applied by members of the World Bank Group institutions to private foreign investment in their respective territories, as a complement to applicable bilateral and multilateral treaties and other international instruments, to the extent that these Guidelines do not conflict with such treaties and binding instruments, and as a possible source on which national legislation governing the treatment of private foreign investment may draw . . .

I.2 The application of these Guidelines extends to existing and new investments established and operating at all times as *bona fide* private investments, in full conformity with the laws and regulations of the host State.

II.1 Each State will encourage nationals of other States to invest capital, technology and managerial skill in its territory and, to that end, is expected to admit such investments in accordance with the following provisions.

II.3 Each State maintains the right to make regulations to govern the admission of private foreign investments. In the formulation and application of such regulations, States will note that experience suggests that certain performance requirements introduced as conditions of admission are often counterproductive and that open admission, possibly subject to a restricted list of investments (which are either prohibited or require screening and licensing), is a more effective approach . . .

III.2 Each State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in these Guidelines.

III.3 . . . In all cases, full protection and security will be accorded to the investor's rights regarding ownership control and substantial benefits over his property, including intellectual property.

III.7 Each State will permit and facilitate the reinvestment in its territories of the profits realized from existing investments and the proceeds of sale or liquidation of such investments.

IV.1 A State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation.

IV.2 Compensation for a specific investment taken by the State will be deemed 'appropriate' if it is adequate, effective and prompt.

V.1 Disputes between private foreign investors and the host State will normally be settled through negotiations between them and failing this, through national courts or through other agreed mechanisms including conciliation and binding independent arbitration.

7 The law of the sea: extension of control over marine resources

'Planet Ocean'

Two-thirds of the surface area of our planet consists of seas and oceans. For centuries the main principle governing the uses of these areas was freedom of the seas, under which everyone could navigate, conduct commerce and fish, as long as the rights of others to do so were not hindered. Sovereignty was only recognized for a narrow belt of sea along the coast: more or less three miles,[1] as far as one could see or fire with a cannon from ashore. During the twentieth century this situation has changed drastically, as evidenced by the 1982 UN Convention on the Law of the Sea in which territorial sovereignty over adjacent maritime areas has been substantially extended. Permanent sovereignty over natural resources as applied to the seas has found recognition in the form of extensive continental shelves and 200-mile exclusive economic zones. The rush of coastal States to claim more of the sea was halted by what remains of the principle of the freedom of the high seas, as well as by the introduction of a new principle applicable to the deep sea-bed and its resources: the common heritage of mankind. Criteria for the delimitation of the maritime zones are far from clear and potential conflicts as a result of competing claims are numerous which underscores the relevance of the elaborate scheme for international dispute settlement under the 1982 Convention. Both permanent sovereignty over natural resources and the common heritage of mankind have evolved as two main principles of the international law of the sea; are they compatible or contradictory?

[1] Throughout this study 'mile' refers to a nautical mile (1.852 m).

Classical law on the territorial sea: from 'cannonshot' to 'fixed distance'

The notion of sovereignty over the sea occupied only a modest place in the classical law of the sea. Sovereignty was accepted for internal waters and a narrow coastal strip. Beyond these narrowly defined territorial waters the principle of the freedom of the high seas prevailed.[2]

Internal waters include lakes, rivers, canals, ports, harbours and the waters on the landward side of the baseline, which normally is the low-tide-water line used for measuring the width of the territorial sea. They form part of the natural wealth of a country.

The notion of the territorial sea evolved in the course of debates in the seventeenth and eighteenth centuries between the advocates of 'the freedom of the sea' or '*mare liberum*' (such as Hugo Grotius in 1609)[3] and proponents of 'closed seas' or '*mare clausum*' (John Seldon in 1635). While the former position prevailed for some 350 years, Grotius never claimed that all seas were open to use by all persons. It was generally accepted that coastal States enjoyed the right to regulate certain activities in waters adjacent to their coasts, for example for defence purposes or for the protection of their fisheries against foreign fishermen. In his *De dominio maris dissertatio* (1703) Van Bynkershoek was the first to identify 'freedom of the high seas' and 'sovereignty' of the coastal State over its adjacent sea as the twin pillars of the law of the sea.

The maximum width of the territorial sea was a source of controversy until recently. Vague criteria were used for determining the area falling under a State's sovereignty, such as visibility and defence capacity. For example, in 1693 Van Bynkershoek was one of the first to advocate the doctrine that coastal-State jurisdiction extended up to the point at which it could be defended by shore-based cannons ('cannonshot' rule). Scandinavian States claimed maritime *dominium* for a fixed distance along the whole coastline. Although originally further, the final distance agreed upon was the four-mile Scandinavian 'league'.[4] Eventually, the 'cannonshot' and 'fixed distance' approaches merged and resulted in a three-mile limit adhered to by the major maritime powers.

During the 1930 Hague Codification Conference, under the auspices of the League of Nations, efforts were made to reach agreement on the width of the territorial sea. A majority of twenty out of thirty-six States supported

[2] See Verzijl (1970–1), vols. III and IV.

[3] See also Gentili, *Hispanicae Advocationis* (1613), text in Abbott (1921).

[4] Churchill and Lowe (1988: 65).

a three-mile territorial sea (twelve States held to six miles and the four Scandinavian States continued to claim four miles), but no general agreement could be reached.[5] Between 1930 and 1958, the year in which the first UN Conference on the Law of the Sea took place, the three-mile rule failed to receive more widespread support and strong pressure emerged in favour of a wider area of coastal State jurisdiction. Emphasis shifted from the sea 'as an avenue of transportation and communication' to the sea as an important economic zone for the exploitation of natural resources.[6] Consequently, the law of the sea's evolution shifted from a law of movement to a law of appropriation.[7]

During the first (1958) and second (1960) UN Conferences on the Law of the Sea various proposals for the breadth of the territorial waters were put forward. A US–Canadian proposal for a six-mile territorial sea plus an additional six-mile fishery zone fell only one vote short of the two-thirds majority required for adoption. The first Conference only adopted a resolution on the rights of coastal States which are especially dependent on the fisheries resources in high seas areas adjacent to their coasts.[8] State practice with respect to coastal-State jurisdiction was still very much in a state of flux and, whatever rule might have been adopted, would soon have become outdated. Iceland did not even wait for the outcome of the UN negotiations and claimed twelve-mile territorial waters in 1958. In addition, Latin American States and newly independent States in Asia and Africa put forward claims for wider territorial waters.

The principle that coastal States may exercise sovereignty over the territorial sea had not been challenged at the 1930 Hague Codification Conference and has remained unquestioned ever since. In 1958, the Convention on the Territorial Sea and Contiguous Zone was adopted.[9] Article 1.1 states:

> The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

Article 2 provides that this sovereignty extends to the territorial sea-bed and its subsoil. During the present century the exploitation of mineral deposits in the sea-bed and its subsoil has become technically possible.[10] To this end, it was acknowledged that the bed of the territorial sea and its subsoil are

[5] Ibid., p. 66 and Akehurst (1987: 173). [6] Sharma (1989: 329). [7] Dupuy (1974: 9).

[8] UN Doc. A/CONF.13/L.56, in 2 *Geneva Conference Reports* (1958), p. 114.

[9] UN Doc. A/CONF.13/L.52, adopted on 28 April 1958. The Convention entered into force on 10 September 1964. Text also in 516 UNTS (1964), p. 205.

[10] In the last century, mining of offshore areas around England was already possible by tunnelling out from the mainland, as provided for under the Cornwall Submarine Mines Act of 1858.

part of the territory of a coastal State, which thus exercises sovereign and exclusive jurisdiction over both the fishery resources in the territorial waters and the living and non-living resources of the sea-bed and its subsoil.

Extension of territorial sovereignty over maritime areas

The failure of the 1958 and 1960 Conferences to reach agreement on the maximum width of the territorial sea and the establishment of exclusive fishery zones provoked States to take matters into their own hands and resulted in a proliferation of divergent State practices. While most Western nations maintained the three-mile limit, Latin American and newly independent African States began to claim much wider territorial seas.[11] Coastal developing countries felt it was necessary to put a halt to the large-scale exploitation by foreign fishing fleets of what they perceived as *their* fishery resources. The trend towards proclaiming wider territorial seas culminated in the 200-mile territorial sea first claimed by Chile, El Salvador and Panama. It should be noted that not all of these 'territorial sea' claims followed the definition embodied in the 1958 Convention and they were often a mixture of 'territorial sea' and 'functional jurisdiction' claims.

After the emergence and recognition of concepts such as the continental shelf during the 1940s and 1950s and the exclusive economic zone during the 1970s, it finally became possible to reach agreement on the width of the territorial sea in the 1982 Convention. Article 3 of the UN Convention on the Law of the Sea provides that the territorial sea may extend up to a limit 'not exceeding twelve nautical miles'. By September 1996, out of 151 coastal States, a vast majority (130) had proclaimed territorial seas not exceeding twelve nautical miles.[12] Only eight coastal States stuck for various reasons to a narrower territorial sea (for example Denmark, Greece and Norway).[13] On the other hand, in 1996 ten Latin American and African States still claimed 200-mile territorial seas.[14]

[11] See Verwey (1981b: 395–7), Hjertonsson (1973: 22–36), Rembe (1980: 90–5) and Anand (1983: 185–6 and 198).

[12] 'Law of the Sea: Report of the Secretary-General', UN Doc. A/51/645, 1 November 1996, p. 11.

[13] Harris (1991: 353). The extension to twelve miles was effected by the USA in 1988, the UK in 1987 (and around the Falklands, South Georgia and South Sandwich Islands in 1989), and by Australia in 1990. In 1995, Finland extended its territorial sea from four to twelve miles, with the exception of the Gulf of Finland where the limit is three miles.

[14] Harris (1991: 353) and 'Law of the Sea: Report of the Secretary-General', UN Doc. A/51/645, 1 November 1996, p. 11. In 1993, Brazil, the leader of the 'territorialists', enacted legislation by which it renounced its territorial sea claim of 200 miles and established a twelve-mile territorial sea and a 200-mile exclusive economic zone; see Kwiatkowska (1993–4).

Baselines

The recognition of a twelve-mile territorial sea and of other concepts has brought considerable parts of maritime areas under territorial sovereignty.[15] In the first place, while as a general rule the low-tide water line is employed to determine the breadth of the territorial sea,[16] geography and coastal lines often pose measurement problems. In its 1951 judgment in the *Anglo-Norwegian Fisheries case*, the ICJ affirmed the legality of using *straight baselines* for Norway's deeply indented coastline.[17] In addition, the court recognized that 'special economic interests of a region' – a reference which obviously has to do with the exploitation of the sea's resources – could also be taken into consideration in the delimitation of a territorial sea:

> one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests to a region, the reality and importance of which are clearly evidenced by a long usage.[18]

Both the 1958 and the 1982 Conventions allow the use of straight baselines where a coastline is deeply indented, and recognize special economic interests 'if their reality and importance is clearly evidenced by long usage'.[19]

Bays

In addition, recognition of the right to draw straight baselines through *bays* with a maximum length of twenty-four miles has brought substantial parts of bay waters on the landward side of the baseline or within the regime of internal waters, in other words under the full territorial sovereignty of the coastal State. Under specific circumstances, even claims that all the waters of certain 'historic bays' or 'historic waters' constitute part of the internal waters of a coastal State have been recognized.[20]

Islands

Furthermore, the 1982 Convention introduces a more elaborate regime for *islands*.[21] In both the 1958 and the 1982 Conventions, islands are defined as 'a

[15] See Churchill and Lowe (1988: chapter 2).

[16] Article 3, 1958 Convention; Art. 5, 1982 Convention. [17] *ICJ Reports* (1951), p. 143.

[18] *ICJ Reports* (1951), p. 133. See also ILC Yearbook 1956 (New York: United Nations, 1957), vol. II, pp. 267–8. [19] Articles 4.4 and 7.5 respectively.

[20] Bouchez (1964: 281) defines the concept of historic bays as 'waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States'. See also Bouchez (1992: 357–9). Neither in the 1958 nor in the 1982 Convention is the concept of historic bays defined. Article 10.6 of the 1982 Convention only makes a reference to it (as does Art. 7.6 of the 1958 Convention).

[21] See Bowett (1979), Symmons (1979) and Jayaraman (1982).

naturally formed area of land, surrounded by water, which is above water at high tide'.[22] Both Conventions recognize that islands have a territorial sea, which under the 1982 Convention is substantially wider than at the time of the 1958 Convention. The 1982 Convention differentiates between islands and 'rocks which cannot sustain human habitation or economic life of their own'.[23] While such rocks are denied both a continental shelf and an exclusive economic zone, they do have a surrounding territorial sea. However, low-tide elevations such as sandbanks have explicitly been excluded.

Archipelagoes

Last, but certainly not the least important, the introduction of the concept of *archipelagic States* should be mentioned.[24] The 1982 Convention recognizes the special position of such States in its Part IV, in which an 'archipelago' is defined as 'a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such'.[25] Such States now obtain the right to draw archipelagic baselines around the outermost edges or fringes of their outermost islands and to consider the waters within these baselines as archipelagic waters. Beyond these baselines, archipelagic States may still claim a territorial sea and other maritime spaces. The consequence is that vast ocean spaces which formerly belonged to the high seas and the marine natural resources therein now are enclosed by archipelagic baselines and governed by the territorial sovereignty of archipelagic States. Indonesia, the Philippines and a number of South Pacific island States are the chief beneficiaries of this new archipelagic regime.

Extension of exclusive economic jurisdiction over marine resources

The continental shelf

Legal evolution

Unlike in geology and geography, the term 'continental shelf' is relatively new in international law.[26] During the first part of this century the interest

[22] Article 10 of the 1958 Convention; and Art. 121 of the 1982 Convention.
[23] Article 121.3 of the 1982 Convention. See Kwiatkowska and Soons (1990: 144).
[24] See Dubner (1976), Goldie (1992: 241–3) and Munavvar (1995).
[25] Article 46 of the 1982 Convention.
[26] On the continental shelf generally see Mouton (1952) and Pulvenis (1991).

of coastal States arose in the bed and subsoil of adjacent marine areas, but the question of jurisdiction and property rights over their mineral resources was hardly brought up before the Second World War. During this war, as a result of awareness among the allied States of their dependence on the supply of strategic minerals from overseas, oil companies in the industrialized States began to develop technologies enabling them to exploit the mineral resources of the sea-bed. Continental shelves are often rich in mineral resources such as oil and gas as well as in sand and gravel. In addition, most fish stocks are found in the waters above continental shelves.

The 'Truman Proclamation' of 28 September 1945 is generally considered as the point of departure for coastal States' claims to exclusive economic jurisdiction over the continental shelf.[27] President Truman stated that:

> Having concern for the urgency of conserving and prudently using its natural resources the United States regards the natural resources of the subsoil and sea-bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.[28]

Thus jurisdiction was claimed only over the *natural resources* of the continental shelf, not over the sea-bed and its subsoil as such. Moreover, it was explicitly stated that 'the character as high seas of the waters above the continental shelf' would be maintained. It is interesting to note that in this Truman Proclamation the claim to jurisdiction over the resources of the continental shelf was described as:

> reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon co-operation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities over its shores which are of their nature necessary for utilization of these resources.[29]

Soon other coastal States issued similar proclamations, either claiming the resources or the shelf itself.[30] Some Latin American States submitted claims

[27] In fact, the origin of the continental shelf can be traced back to the 1942 Agreement between the UK and Venezuela whereby the common shelf of Trinidad and Venezuela under the Gulf of Paria was divided. See García-Amador (1984: 16).

[28] Text in 40 AJIL (1946), Supplement of documents, p. 45. [29] Ibid., p. 45.

[30] For example, on 29 October 1945 Mexico issued a Presidential Statement by which it claimed 'the whole continental shelf adjacent to its coasts and all and every one of its natural riches, known or still to be discovered, which are found in it'. On 9

to economic jurisdiction over the superjacent waters and airspace above or over a 200-mile territorial sea, under such appealing titles as 'patrimonial' and 'matrimonial' sea.[31]

Against this background the International Law Commission (ILC) drafted a Convention on the Continental Shelf, which was adopted at the first UN Conference on the Law of the Sea in 1958.[32] Article 1 embodies the following definition of 'continental shelf':

> For the purposes of these articles, the term 'continental shelf' is used as referring (a) to the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the sea-bed and subsoil of similar submarine areas adjacent to the coasts of islands.

Although both the '200 metres' and the 'exploitability' criterion were soon to be questioned due to rapid advances in technology and the fear of developing countries that technologically advanced countries would abuse the open-ended exploitability criterion to exploit marine mineral resources wherever they could, the concept as such gained currency in international law remarkably soon. In its judgment in the *North Sea Continental Shelf case* (1969), the ICJ underscored the firm status of coastal States' rights with respect to the continental shelf:

> the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right.[33]

The continental-shelf regime under the 1982 Convention

The 1982 Convention reproduces the essential characteristics of the 1958 regime with respect to a coastal State's right over the continental shelf. As under the 1958 Convention, coastal States have sovereign rights for the purpose of exploring the shelf and exploiting its natural resources which

October 1946, Argentina issued a 'Declaration proclaiming sovereignty over the epicontinental sea and continental shelf': see 41 AJIL (1947), Supplement of Documents, p. 14.

[31] See Dupuy (1974: 39–45); Verwey (1981b), Hjertonsson (1973) and Rembe (1980: 117).

[32] UN Doc. A/CONF.13/L.55. The Convention was adopted on 29 April 1958 and entered into force on 10 June 1964. Text in 499 UNTS, p. 311.

[33] *ICJ Reports* (1969), p. 122, para. 19. See Jennings (1969).

include not only mineral and other non-living resources, but also living organisms belonging to sedentary species.[34]

Some new elements were introduced on the breadth of the continental shelf and the delimitation between States with adjacent or opposite coasts. The emphasis is no longer on exploitability for determining the outer edge of the continental shelf. Article 76 provides that in principle every coastal State has a 200-mile continental shelf. Like its predecessor, the 1982 Convention clearly differentiates the legal notion of a continental shelf from the geological continental shelf. Geologically, the continental shelf commences where the land meets the sea and ends at the upper edge of the continental slope. Legally, it begins where the territorial sea-bed regime stops and it stretches at least to 200 nautical miles from the coast, even if the geological edge of the continental shelf does not extend so far. Moreover, the geographically favoured broad-margin States (such as Brazil) may extend it further, in accordance with strictly defined criteria, up to a maximum of 350 miles from the territorial baselines or 100 nautical miles from the 2,500 metres isobath (the line connecting points with a depth of 2,500 metres).[35] These coastal States are obliged to make contributions for the exploitation of the non-living resources of their continental shelves beyond 200 miles. However, these payments are only due after five years of production while developing States which are net importers of the minerals in question will be exempted. The payments will be made to the International Sea-bed Authority which will distribute them equitably among States Parties to the Convention taking into account the interests and needs of developing States, particularly the least developed and land-locked among them.[36] The Convention thus introduces a kind of international tax (royalty) on the exploitation of minerals when a continental shelf exceeds 200 miles, although in practice this may not be very effective as a result of the exemption clauses.

[34] These are defined as 'organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or its subsoil'. Article 77.4 of the 1982 Convention (nearly identical to Art. 2.4 of the 1958 Convention).

[35] Articles 76.5*ff*. On this complex issue see Klemm (1992: 804–6). Klemm notes that Art. 76 has halted the gradual extension of coastal State claims, albeit at a very far point and concludes that the effect of 'the gradual emancipation of the legal continental shelf from its geographical equivalent is one of the largest distributions of newly accessible areas in history' (p. 806). See also Annex II to the 1982 Convention on the establishment and functions of the Commission on the Limits of the Continental Shelf and Annex II to the Final Act of the Convention, which contains a Statement of Understanding concerning a Specific Method to be Used in Establishing the Outer Edge of the Continental Margin of India and Sri Lanka in the Southern Bay of Bengal. For a progress report, see UN Doc. A/51/645, 1 November 1996, pp. 24–7.

[36] See Art. 82.

In future, the continental-shelf regime may be extended as a result of sea-level rise and the landward shift of baselines caused by this rise.[37] If so, under certain circumstances the peculiar situation may emerge whereby seaward limits of the continental shelf are permanent as provided for in Article 76 of the Law of the Sea Convention, while the landward limits are not.[38]

Exclusive economic zone

Evolution of the concept

With the failure of both the 1958 and 1960 Conferences to agree on the width of the territorial sea, the door was opened to distinguish jurisdiction over fisheries from that over the territorial sea. Apart from economic reasons, the establishment of fishery zones became imperative as awareness increased of the growing depletion of fishery resources through over-fishing and the need to take conservation measures. Initiated by the establishment of a twelve-mile exclusive fishery zone by Iceland in 1958, a practice emerged of claiming an exclusive fishery zone up to twelve miles beyond the outer limits of the territorial sea. In 1974, in the *Fisheries Jurisdiction cases (UK/Germany* v. *Iceland)*, the ICJ found that after the 1960 Conference the twelve-mile fishery zone 'crystallized as customary international law'.[39] By that time several coastal States already went far beyond twelve miles and the issue before the court was in fact whether Iceland was entitled under international law to claim a fifty-mile fishery zone. However, in view of the then ongoing negotiations at UNCLOS III, the court decided that it could not 'render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down'.[40] In general terms, the court recognized the right of the coastal State to priority in the exploitation in adjacent waters in situations of specific dependence on such fisheries. As discussed above, States proclaimed functional (including fishery) jurisdiction over extended marine areas, by reference to a number of doctrines.[41]

These claims of coastal States have now been overtaken by the proclamation of 200-mile exclusive economic zones (EEZs) to which they are entitled under Part V of the 1982 UN Convention on the Law of the Sea. The EEZ is defined as 'an area beyond and adjacent to the territorial sea', which 'shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured'.[42] An EEZ accrues to the land territory of a coastal State as well as to its islands, but not to rocks and

[37] For a detailed analysis of the effects of sea-level rise on maritime limits and boundaries, see Soons (1990). See for a discussion of various policy options Kwiatkowska (1991: 164–67). [38] See Soons (1990: 225).

[39] *ICJ Reports* (1974), p. 23. [40] Ibid., pp. 23–4. [41] See p. 205 above. [42] Article 57.

artificial islands. While the phrase '[exclusive] economic zone' was introduced by Kenya in the UN Sea-bed Committee only in 1972, the eventual concept of the EEZ was accepted in international law remarkably soon.[43] In 1982, in the *Continental Shelf case* between Tunisia and Libya, the court based its judgment in part on 'new accepted trends' during the Third UN Conference on the Law of the Sea (by then not yet completed) and stated that 'the concept of the exclusive economic zone . . . may be regarded as part of modern international law'.[44] In 1984, in the *Gulf of Maine case*, a chamber of the court stated that EEZ provisions of the Convention may be regarded as 'consonant at present with general international law on the question';[45] and in 1985, in its judgment in the case on the *Continental Shelf between Libya and Malta*, the court stated that the practice of States showed that the institution of the exclusive economic zone had become part of customary international law and that it could extend up to 200 miles.[46] By September 1996, ninety States had proclaimed a 200-mile exclusive economic zone.[47] In 1991, Chile asserted the unprecedented claim to '*mar presencial*' (presential sea) extending far beyond that limit. So far, this new concept of a zone of high seas adjacent to the EEZ is not yet completely clear, a main aim being 'to be present' without excluding others.[48] However, in 1994 Chile claimed the right to carry out environmental monitoring programmes in the presential sea. The Chilean claim may also be in support of its claim to a part of Antarctica and adjacent maritime zones.

Resource rights of coastal States in the EEZ

As in the case of the continental shelf, a coastal State does *not* enjoy complete sovereignty over the EEZ, but only sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and subsoil and the superjacent waters.[49] It is notable that these sovereign rights also extend to other economic activities, such as the production of energy from the water, currents and winds. This enables coastal States to benefit from new technological developments.

[43] On the EEZ in general see the extensive studies Attard (1987); Kwiatkowska (1989) and Dupuy (1991a: 275–307). [44] *ICJ Reports* (1982), p. 74, para. 100.

[45] *ICJ Reports* (1984), p. 294, para. 94.

[46] *ICJ Reports* (1985), p. 33, para. 34 and p. 35, para. 39; as confirmed in *Denmark* v. *Norway Maritime Boundary in the Area Between Greenland and Jan Mayen*, *ICJ Reports* (1993), p. 59. [47] UN Doc. A/51/645, 1 November 1996, p. 11.

[48] For the Chilean presential sea (including a map), see Francalanci and Scovazzi (1994: 148–9). [49] Article 56 of the 1982 Convention.

Duties and responsibilities of coastal States in the EEZ

The coastal State is under a duty to conserve the resources within its EEZ and to avoid over-exploitation. It has to design measures 'to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors . . . and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards'. Account must be taken of 'the best scientific evidence available' and where appropriate the coastal State must co-operate with 'competent international organizations'.[50]

Articles 62 and 63 require coastal States to determine both 'the allowable catch of the living resources in its exclusive economic zone' and 'its capacity to harvest the living resources of the exclusive economic zone'. If the former exceeds the latter, the difference is defined as a 'surplus'. The Convention provides that the surplus is to be made available to other States, particularly neighbouring land-locked or geographically disadvantaged States.[51] However, this does not apply to coastal States whose economy is overwhelmingly dependent on the exploitation of the living resources of its EEZ.[52] In addition, it is entirely up to the discretion of the coastal State to decide whether or not it will allow other States to fish in its EEZ. The Convention formulates a number of criteria to be taken into account, including the 'significance of the living resources of the area to the economy of the coastal State and its other national interests' and 'the need to minimize economic dislocation in States whose nationals have habitually fished in the zone'. These provisions are therefore of a 'programmatory' ('soft law') character rather than creating hard-core rights for land-locked and geographically disadvantaged States and corollary obligations for coastal States.[53] If fishermen of third States are given access to any surplus, the coastal State can prescribe and enforce relevant regulations such as the licensing of fishermen and determining the species which may be caught. In the event of stocks occurring within the exclusive economic zone of two or more coastal States and in the case of highly migratory species, coastal States are required to co-operate, either directly or through appropriate international organizations.[54] In addition, States are under an obligation to protect and preserve the marine environment and to take all kinds of measures to prevent, reduce and control pollution. These duties are spelled out in Part XII of the Convention, in particular in Article 193:

[50] Articles 61.3 and 61.5, respectively. [51] Articles 62.2, 69 and 70. [52] Article 71.
[53] See Subedi (1987) and Verwey (1981b: 402–7). [54] See Hey (1989: Parts II and III).

States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

A halt to the seaward rush: the common heritage of mankind

The decline of the freedom of the high seas

The traditional freedom of the high seas as defined since the days of Grotius was based on several assumptions. Firstly, that the sea cannot be the object of private or State appropriation. Secondly, that the resources of the sea are inexhaustible. Thirdly, that the use of the high seas by one State should leave the medium available for use by others. Fourthly, that humankind was not capable of seriously impairing the quality of the marine environment and that the oceans were so vast and the number of users so limited, that serious conflicts of interest were almost impossible.[55]

The most authoritative attempt to codify the rules emanating from the principle of freedom is to be found in Article 2 of the 1958 Convention on the High Seas:[56]

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas . . . comprises, *inter alia*, both for coastal and non-coastal States:

1 Freedom of navigation;
2 Freedom of fishing;
3 Freedom to lay submarine cables and pipelines; and
4 Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

The text of this Article leaves room for other freedoms of the high seas not listed in Article 2 but it does not say whether, for example, exploration and exploitation of the natural resources of the deep sea-bed is a freedom of the high seas covered by the term '*inter alia*' used in Article 2. Before the middle of the 1960s this question was hardly relevant. Only a few uses had been made of the deep sea-bed beyond the continental shelf and few were

[55] See Koers (1973: 17).
[56] UN Doc. A/CONF.13/L.53. See also the ILC Commentary in ILC Yearbook 1956 (New York: United Nations, 1957) vol. II, p. 278. The Convention entered into force on 30 September 1962. Text also in 450 UNTS, p. 11.

foreseen. However, the question of deep sea-bed mining became relevant in the 1960s when the exploitation of manganese (or polymetallic) nodules at great depths was considered to be technically possible. Polymetallic nodules will be an exhaustible resource if they grow (through sedimentation) more slowly than they are exploited. These nodules are not accommodated by the concept which Grotius developed on the freedom of the high seas and equal access for all States, concerning resources and uses that seem to have been created by nature for common use. Equal access may be denied developing countries in the future if prime mining sites are exploited by now technologically advanced countries. The USA and some other industrialized countries argued, however, that sea-bed mining is one of the freedoms of the high seas to which Article 2 of the 1958 Convention implicitly refers. They referred to the *travaux préparatoires* and the commentaries of the International Law Commission. However, these documents are ambiguous on this question simply indicating a lack of interest in deep sea-bed mining at the time.[57] Exploitation of the continental shelf had just started in the 1940s and the concept of sovereign rights of coastal States over the continental shelf for the purpose of exploring and exploiting the natural resources had just evolved as a new principle of the law of the sea. Consequently, during the days of the first (1958) and second (1960) UN Conferences on the Law of the Sea it seemed of little practical use to deal with deep sea-bed mining. Thus it can be concluded that no convincing evidence indicates that the ILC or the member States participating in the first and second Conferences were of the opinion that deep sea-bed mining was covered by the term '*inter alia*' in Article 2.

In addition to technological developments, the awareness of the scarcity of natural resources (as indicated, for example, in the 1972 Club of Rome Report, 'Limits to Growth') and the dependence of industrialized States on the supply of vital commodities (as exemplified by the 1974 oil embargo against the US and the Netherlands) triggered the global discussion on an ocean regime. Growing population pressure and new technology resulted, moreover, in an enormous increase in the catch of fish. Some species were being over-fished, while some were even on the verge of extinction. Moreover, between 1958 and 1967, the year in which the discussion on a new law of the sea started, forty-one new countries had joined the United Nations where they soon challenged many of the principles and rules of the law of the sea which had been codified in the 1958 Convention. They argued that the high seas freedoms favoured the technologically advanced nations

[57] See Van Dyke and Yuen (1982).

in the use of the oceans. A protectionist tide coincided with the proclamation by developing countries of claims to sovereign rights over adjacent waters. Ironically, they did so in the wake of President Truman who in 1945 initiated, as noted above, the great seaward rush. Coastal developing countries began to apply the principle of permanent sovereignty over natural resources to the resources in their adjacent waters. They used this principle as a legal shield to protect themselves against foreign fishing fleets and oil companies.

Legal evolution of the common heritage of mankind

From this spirit of the time a new principle of the law of the sea emerged. While at the 1958 Conference on the Law of the Sea, there was no support for its President, Prince Wan Waithayakon of Thailand, when he stated that the sea was 'the common heritage of mankind' and that the law of the sea should ensure 'the preservation of that heritage for the benefit of all',[58] in 1966 US President Johnson stated:

> Under no circumstances, we believe, must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottom are, and remain, the legacy of all human beings.[59]

In 1967, Ambassador Arvid Pardo of Malta proposed that the General Assembly declare the sea-bed and the ocean-floor, beyond the limits of national jurisdiction, to be the common heritage of mankind (now increasingly referred to as the common heritage of humankind). Earlier, in 1967, the UN General Assembly had declared outer space, including the moon and other celestial bodies, to be 'the province of all mankind' (Article 1 of the Outer Space Treaty).[60] Ambassador Pardo appealed for the introduction of the common heritage of mankind as 'a new legal principle' in international law and proposed the creation of an organization to assure jurisdiction over this area as 'a trustee for all countries'.[61] In 1969, the General Assembly adopted the so-called Moratorium Resolution,[62] recom-

[58] Official Records, UN Conference on the Law of the Sea, first plenary meeting, UN Doc. A/CONF.13/SR.1 (1958), p. 3.

[59] Quoted in UN Doc. A/C.1/PV. 1524, 1 November 1967, p. 4.

[60] In June 1967, the term common heritage of mankind was also used by the Argentinian Ambassador Cocca in the context of the UN Committee on Outer Space. See Bulajić (1993: 330).

[61] GA Official Records, twenty-second session (1967), First Committee Meeting, 1 November, 1967, UN Doc. A/C.1/PV.1515.

[62] GA Res. 2574D (XXIV), 15 December 1969.

mending that States and corporations should be bound to refrain from sea-bed mining until an international regime could be established to govern this activity. Both Western countries and Eastern European countries voted against, recalling the universal nature of the classic law of the sea. Soon, however, the Sea-Bed Committee began to serve as the preparatory commission for reconsidering the entire law of the sea. In 1970 the General Assembly adopted the important 'Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction'.[63] It elaborated Pardo's proposals and set out to elevate the principle of the common heritage of mankind into a norm of international law. At the same time, the General Assembly decided to convene the third UN Conference on the Law of the Sea (UNCLOS III),[64] which started in 1973. The Conference lasted for nine years and resulted in the 1982 UN Convention on the Law of the Sea, which as a result of its comprehensive character is also called 'a comprehensive constitution for the oceans'.[65] The 1982 Convention contains an extensive Part XI regulating future deep sea-bed mining and envisaging the establishment of an International Sea-bed Authority. However, commercial deep sea-bed mining has yet to begin and after 1982 it was increasingly clear that Part XI had to be changed in order for the Convention to become universally acceptable. In view of the continuing controversies on the deep sea-bed mining regime and in an effort to seek wider participation from the industrialized States in the 1982 Convention, in 1990 UN Under-Secretary-General Nandan initiated a series of informal consultations aimed at achieving a universally acceptable regime. During the period 1990–4, fifteen meetings were convened which resulted in a Draft Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea of 10 December 1982.[66] On 28 July 1994, the General Assembly adopted the Agreement by 121 votes to none, with seven abstentions.[67] The Agreement substantially accommodates the US and other Western nations' objections to the deep sea-bed mining regime set forth in Part XI.[68] It eliminates major stumbling

[63] GA Res. 2749 (XXV), 17 December 1970, adopted by 108 votes in favour, with none against and fourteen abstentions. [64] GA Res. 2750 (XXV), 17 December 1970.

[65] Koh, President of the Third UN Conference on the Law of the Sea, in *The Law of the Sea: United Nations Convention on the Law of the Sea* (New York: United Nations, 1983) (UN Doc. Sales No. E.83.V.5), pp. xxxiii–xxxvii.

[66] See Report of the Secretary-General, UN Doc. A/48/950, 9 June 1994, pp. 2–7. Text of the Agreement also in 33 ILM (1994), pp. 1,309–27. See also the statements of Ambassador Nandan in UN Doc. A/48/PV.99, 27 July 1994, pp. 1–6 and UN Legal Counsel Corell in UN Doc. A/48/PV.101, 28 July 1994, pp. 19–21.

[67] The abstentions were from Russia, Thailand and some Latin American countries.

[68] See Li (1994: chapter VIII).

blocks, such as a production limitation in favour of land-based producers of minerals, and mandatory transfer of technology, and significantly restrains the role of the envisaged supranational mining company, the UN Enterprise. The Agreement is also designed to respond to political and economic changes which have occurred since 1982, in particular 'a growing reliance on market principles' and 'the growing concern for the global environment'.[69] Yet, the principle of the common heritage of mankind is reaffirmed in the preamble as well as in the body of the Agreement.

Deep sea-bed resources as the common heritage of mankind

Article 136 of the 1982 Convention on the Law of the Sea proclaims: 'The Area and its resources are the common heritage of mankind.' Article 1 of the Convention defines this 'Area' as 'the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction'. Activities in the Area are defined to mean 'all activities of exploration for, and exploitation of, the resources of the Area'. 'Resources' in turn are defined as 'all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the sea-bed, including polymetallic nodules'.[70] From these definitions it can be inferred that the common heritage of mankind principle applies to the non-living resources of the ocean floor and its subsoil beyond the limits of the Exclusive Economic Zone and the Continental Shelf. Since there appears to be a low probability of exploitable oil or gas deposits being found beyond the extended continental shelf and the EEZ, the mineral resources of the deep sea-bed will probably consist mainly of the polymetallic or manganese nodules.

Implications of the common heritage of mankind for resource management

The following objectives and implications of the common heritage of mankind principle can be derived from the relevant provisions of the 1982 Convention:

1 *Non-appropriation.* Article 137 of the Convention indicates that no part of the Area or its resources may be claimed or appropriated by States, companies or individuals.[71] It can only be used but not owned: 'All rights in the resources of the Area are vested in mankind as a whole.'[72] Natural resources are to be understood as resources in situ

[69] See UN Doc. A/RES/48/263, 28 July 1994, annexing the Agreement. [70] Article 133.a.

[71] Article 11.2 and 11.3 of the Moon Agreement also prohibits claims over or appropriation of the moon, parts thereof and 'natural resources in place'.

[72] Article 137.2.

(not yet removed from the mine or deposits) so that raw materials legitimately extracted from the Area in accordance with the relevant rules are no longer subject to the common heritage of mankind principle and can be freely disposed of. This element of non-appropriation led the arbitral tribunal in the *St Pierre et Micquelon Case (Canada* v. *France)* (1992) to refuse to delimit the continental shelf beyond 200 miles, since this 'would constitute a pronouncement involving a delimitation, not "between the parties" but between each of them and the international community'.[73]

2 *International management.* Industrialized and developing countries have been sharply divided over the system of exploitation of the resources. At the risk of over-generalization, it could be said that most industrialized nations have preferred to establish an agency which would simply register claims of potential miners, allocate mining sites to them, and collect royalties and taxes. In their view such a liberal sea-bed mining regime would best serve their interests and, according to some, those of humankind. The developing countries, on the other hand, have insisted on a strong International Sea- bed Authority invested with the exclusive right to manage the resources, acting for humankind as a whole.[74] During UNCLOS III, after two years of negotiations, at the instigation of US Secretary of State Kissinger, a compromise was reached in the form of the so-called parallel system, embodied in Article 153 and, some six years later, the so-called 'pioneer investors' resolution.[75] The parallel system means that every exploitable site will be divided into two parts, one for the mining company that has made a claim and the other for the UN's 'Enterprise', the operational arm of the International Sea-bed Authority which was scheduled to take part directly in exploitation activities.[76] It is on this point in particular that the new Agreement of 1994 introduces significant changes which considerably confine the activities of Enterprise and require it to conduct its initial operations through joint ventures that accord with 'sound commercial principles'.[77] Be this as it may, the deep sea-bed, which under the 1958 Law of the Sea was an area beyond national jurisdiction and, in the Western view, subject to the freedom of the

[73] *Court of Arbitration for the Delimitation of Maritime Areas between Canada and France (St Pierre et Micquelon)* in 31 ILM (1992), p. 1,172, para. 78.

[74] Article 137.1 and 137.2. Wolfrum (1983: 328) considers this provision, which vests the right to develop the sea-bed and its resources in mankind, as the 'revolutionary new element' of the law of the sea. The Moon Agreement only provides that an international regime will be established 'to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible' (Art. 11.5).

[75] Resolution II of the Final Act.

[76] On the negotiations leading to the deep sea-bed mining regime, see Li (1994: chapter II).

[77] Section 2.2 of the 1994 Agreement.

high seas principle, has now been placed under the jurisdiction, albeit of a limited nature, of an intergovernmental organization.[78]

3 *Sharing of benefits.* Under the 1982 Convention the International Sea-Bed Authority is entrusted with the function of distributing financial and other economic benefits derived from activities in the Area, taking into consideration the interests and needs of developing countries and non-self-governing peoples.[79] This covers not only the financial benefits to be derived from deep sea-bed mining, but also other advantages derived from shared management such as transfer of technology and training of personnel.[80] However, the 1994 Agreement dilutes this power.[81]

4 *Reservation for peaceful purposes.* This phrase occurs only a few times in the 1982 Convention. Military aspects of sea-bed utilization have not been elaborated in the Convention, as a result of pressure from the great powers and of the preoccupation with the economic use of the deep sea-bed. In fact, the only substantive provisions on this matter are embodied in the Sea-bed Arms Control Treaty of 1971.[82] However, this treaty only makes it illegal 'to implant or emplace' nuclear weapons and other weapons of mass destruction on or in the sea-bed. Hence, the deep sea-bed has not been completely demilitarized nor reserved for peaceful purposes only.[83]

5 *Reservation for future generations.* While the Moon Agreement explicitly refers to the interests of future generations,[84] the Law of the Sea Convention does not, nor does it define 'mankind'. Nevertheless, it would seem to be in line with the spirit of the Convention to include not only present but also future generations as beneficiaries.[85] The articles on protecting the marine environment[86] seem to indicate that deep sea-bed resources may be used but not exhausted and that significant environmental problems which would compromise the rights of future generations must be avoided.

[78] See Art. 157.1.

[79] Article 140 in conjunction with Art. 160.2(f)(i). The Moon Agreement lists as one of the main purposes of the international regime to be established: 'An equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration' (Art. 11.7(d)).

[80] See Anand (1976: 249–50) and Pinto (1986: 145–54).

[81] Although Art. 144 and Part XIV of the 1982 Convention are still applicable, section 5.2 of the 1994 Agreement provides that Art. 5 of Annex III, the article detailing the contractors' obligations on transfer of technology, no longer applies. See Li (1994: 251–2).

[82] Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof. Text in 10 ILM (1971), pp. 145–50.

[83] See for an extensive analysis Pinto (1992: 9–53). See also Vukas (1991: 1,295–6 and 1,303–4). [84] Article 4 of the Moon Agreement. [85] See Dupuy (1991b: 583–6).

[86] See in particular Arts. 145, 162 and 165.

Legal status of the common heritage of mankind principle

The views of scholars vary considerably on the legal status of the principle of the common heritage of mankind. Some argue that it is a new peremptory norm of general international law from which no derogation is permitted (a rule of *jus cogens*). They refer to the mandatory wording of Part XI of the 1982 Convention, especially Articles 136–45, and to Article 311.6, which reads as follows:

> States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 and that they shall not be party to any agreement in derogation thereof.

Others maintain that the principle has no legal value and link it with the realm of politics and morality only. By reference to the many unresolved controversies on the content and implications of the common heritage of mankind, some authors even conclude that 'the common heritage as a legal principle is dead'.[87] A more accurate assessment of its status is probably to be found somewhere between these two positions. The principle was explicitly recognized in the *St Pierre et Micquelon arbitration award* (*Canada* v. *France*) (1992).[88] Besides multilateral treaties, such as the 1994 Agreement, the common heritage of mankind has been alluded to in recommendations on the protection of the Antarctic environment and it is referred to albeit implicitly in domestic deep sea-bed mining laws, including those of the USA.[89] During the negotiations on both the 1982 Convention and the Moon Agreement,[90] the common heritage of mankind principle was clarified, its constituent elements were specified and it was included as one of the main features of the new regimes.

Furthermore, during these conferences most States accepted the principle and only disagreed on its modalities and implications but, because exploitation of the sea-bed and the moon is unlikely to take place in the near future, consensus on this issue cannot be expected very soon. Nevertheless, the principle definitely has legal significance. This is far from saying that it has achieved the status of *jus cogens*; at most one may conclude that some of its core elements such as that of the prohibition of appropriation carry this

[87] Brennen and Larschan (1983: 336). [88] See 31 ILM (1992), p. 1,172, para. 78.

[89] Deep Seabed Hard Mineral Resources Act, 28 June 1980, published in 20 ILM (1981), p. 1,228.

[90] Article 11 of the 1979 Moon Agreement provides in its first paragraph that: 'The moon and its natural resources are the common heritage of mankind.' This provision, too, applies especially to minerals. Article 1 of the Moon Agreement, moreover, provides that in principle its provisions shall also apply to other celestial bodies within the solar system, with the exception of the earth.

status.[91] The text of Part XI and Article 311.6 of the 1982 Convention cannot provide convincing arguments to support claims for this status. Apart from the fact that *jus cogens* probably cannot be created spontaneously by treaty,[92] the *travaux préparatoires* of Article 311.6 also mitigate against assuming this status. The present wording is a compromise text, adopted when a Chilean proposal to label the common heritage of mankind principle explicitly as 'a peremptory norm of general international law from which no derogation is permitted' proved to be unacceptable.[93] The precise legal merits of the principle of the common heritage of mankind depend on several factors, including:

1 the question whether, in the near future, there will be 'widespread and representative participation'[94] in the 1994 Agreement and the 1982 Convention including States engaging in exploration and exploitation of the deep sea-bed;
2 the national legislation and actual practice of States whose interests are especially affected;
3 the future development of the International Sea-bed Authority and the implementation of Part XI of the Convention; and
4 the question whether the principle will be adopted in other areas of international law (for example, the Antarctic regime, outer space, environment protection) and will be consolidated and clarified in the course of this process.

International dispute settlement under the law of the sea

Over the centuries the seas and the oceans have often proved to be sources of dispute between States or between States and individuals, especially foreign nationals. Moreover, the proliferation of uses of the seas in recent times can easily lead to an increase in the frequency and intensity of disputes.[95] Sources of disputes about natural resources include:

1 questions of delimitation, such as boundary disputes over land, islands and rocks and their adjacent marine areas over which two or more States claim sovereignty or sovereign rights, and disputes over the delimitation of functional sovereignty over natural resources of the sea, sea-bed and subsoil, both among States and in future

[91] See van Hoof (1986: 64).
[92] See in general Meijers (1978: 8–13), Rozakis (1976) and Frowein (1984: 327–30).
[93] UNCLOS III, Official Records (New York: United Nations, 1982), vol. XIV, p. 129.
[94] Compare the observation of the ICJ in the *North Sea Continental Shelf case, ICJ Reports* (1969), p. 42, para. 73. By 15 October 1995, eighty-one States had ratified or acceded to the 1982 Law of the Sea Convention, but only sixteen of them were bound by the 1994 Agreement. [95] See Buzan (1978) and Sharma (1985).

perhaps also between States and the International Sea-bed Authority;
2 means of implementing the various rights and obligations arising from the international law of the sea, for example, relating to the use of the seas and oceans, especially interference with certain freedoms and rights such as traditional fishing rights or rights of 'innocent passage' and manoeuvring by naval vessels;
3 the use and management of shared resources, such as oil and gas fields or fish stocks which expand or migrate respectively over two EEZs;
4 the conservation and preservation of the marine environment; and
5 the management of natural resources of the high seas and sea-bed.

During the 1958 Conference, attempts were made to codify the practice of 'compromissory clauses' as they appeared in some treaties, whereby parties to a dispute are obliged to refer it to the ICJ. However, these attempts only resulted in an Optional Protocol of Signature concerning the Compulsory Settlement of Disputes.[96] This is not surprising since States do not easily surrender their freedom of choice in the choosing of peaceful means of conflict resolution, by accepting an obligation to submit disputes to a particular settlement procedure. This is all the more so in cases in which their rights and obligations under international law are far from clear, thus making the nature of potential disputes difficult to predict. Hence, the Optional Protocol has had only thirty-six signatories. Similarly, only some sixty States have accepted the compulsory jurisdiction of the ICJ under Article 36.2 of the court's Statute, and only about twenty on unconditional terms.[97]

The ICJ has dealt with an impressive series of cases concerning the law of the sea. In its very first case, the *Corfu Channel case* (*UK* v. *Albania*) (1949), the court dealt with the question of innocent passage through international straits and the obligation of a coastal State not to allow its territory to be used for acts contrary to the rights of other States. The principles developed by the court in this case were included in the 1958 and 1982 Conventions and are also highly relevant today for the regulation of international environmental affairs. In various judgments on fisheries cases, the court has laid down basic rules for the limits of national economic jurisdiction and the delimitation of sea areas, including an exclusive fishing zone and traditional fishing rights of other States (*Anglo-Norwegian Fisheries case*)

[96] Text of this protocol in 450 UNTS, p. 169 and reproduced in Kapteyn *et al.* (1981: I.A.6.3.e). Signed at Geneva, 29 April 1958.

[97] See United Nations, 'Multilateral Treaties Deposited with the Secretary-General. Status as of 31 December 1994', UN Doc. ST/LEG/SER.E/13, pp. 12–28 and *ICJ Yearbook* (1993–4), chapter IV, section II.

(1951); *Fisheries Jurisdiction case* (1974)). The contribution of the court to the development of the modern law of the sea has probably been most significant in cases concerning the delimitation of continental shelves such as the *North Sea Continental Shelf cases* (1969), the *Continental Shelf case between Tunisia and Libya* (1982) and that between *Malta and Libya* (1985). Relevant also are the cases in which the court had to fix maritime boundaries, such as in the *Gulf of Maine case* (*Canada* v. *USA*) (1984), *Guinea-Bissau and Senegal* (1991), the *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras, with Nicaragua intervening* (1992) and the *Area between Greenland and Jan Mayen Island* (*Denmark* v. *Norway*) (1993).

International dispute settlement under the 1982 Convention

At the very outset the drafters of the 1982 Convention declared their intent to settle all issues relating to the sea and to 'promote the peaceful uses of the seas and oceans'. The Convention establishes an elaborate scheme for the settlement of disputes arising from the interpretation and implementation of the Convention.[98] As the Convention embodies a comprehensive framework for the regulation of nearly every aspect of jurisdiction, use and management of the seas and oceans, the sections on dispute settlement are important. They consist of Part XV and Annexes V–VIII as well as Part XI, section 5: a total of nearly 100 articles.

The general section of Part XV proceeds from the UN Charter principles of peaceful settlement and of free choice of means.[99] If States have earlier agreed to use other settlement procedures, for example, EU member States are bound to submit fishery disputes among themselves to the European Court of Justice, the 1982 Convention recognizes that such a procedure, which entails a binding decision, takes priority, unless the parties agree otherwise or no settlement can be reached. If the parties cannot resolve their dispute through agreed procedures, the Convention first directs them to procedures which do not entail binding decisions by a third party: to seek settlement by negotiations or other means[100] and one of them may invite the other to submit the dispute voluntarily to conciliation.[101] If such an invitation is not accepted or if the recommendations of the report resulting from the conciliation are rejected, the conciliation procedure is deemed to

[98] Adede (1987: 248–50), Rosenne and Sohn (1989: 3–149), and Merrills (1991: 155–7).

[99] Articles 279–80. See also Art. 33 of the UN Charter, the 1970 Declaration on Principles of International Law (GA Res. 2625 (XXV), Annex) and the Manila Declaration on the Peaceful Settlement of International Disputes (UN Doc. A/RES/37/10, Annex).

[100] Article 283.

[101] Article 284. Details are laid down in Annex V to the Convention.

be terminated. Subsequently, section 2 on 'Compulsory procedures entailing binding decisions' comes into play.[102] This is a far-reaching obligation, which is only somewhat mitigated by maintaining a substantial degree of flexibility and parties' freedom of choice of methods (in line with the traditional principle of freedom of choice) and by making ample provision for exceptions. Parties may choose one or more of the following fora:[103] a new International Tribunal for the Law of the Sea;[104] the International Court of Justice; an arbitral tribunal;[105] or a special arbitral tribunal.[106] The last forum is exclusively mandated to deal with disputes concerning such sensitive topics as fisheries, environmental protection, scientific research or navigation. If a State has not made a choice or if the parties to a dispute have chosen different fora, the dispute will be referred to an arbitral tribunal established under Annex VII.[107] Whatever procedure is selected, under the Convention parties are required to submit their disputes to a form of compulsory settlement, which is unprecedented in international law. There are, however, some major exceptions which relate to the exercise by a coastal State of sovereign rights and jurisdiction.

Major limitations and exceptions to procedures entailing binding decisions

Section 3 of Part XV contains complex and detailed 'Limitations and exceptions' to the applicability of the compulsory settlement scheme but basically it provides that certain types of international disputes on marine

[102] Article 286.

[103] On signing, ratifying or acceding to the Convention, a State may make a formal declaration choosing one or more of the four settlement mechanisms available as the means by which its disputes concerning the interpretation or application of the Convention may be settled. For text of declarations, see *UN Law of the Sea Bulletin* (June 1994), No. 25.

[104] Its regulations are laid down in Annex VI. The Tribunal would have twenty-one members, elected by the parties to the Convention so as to ensure both geographical representation and representation of the principal legal systems of the world. The Tribunal's quorum is eleven. It is also empowered to operate through special chambers of three or five members. A special and more elaborate procedure relates to the eleven-member Sea Bed Disputes Chamber, which may itself operate through *ad hoc* chambers of three members.

[105] See Annex VII. The arbitral tribunals are composed of five members, one chosen by each of the parties and the other three chosen jointly by the parties from a panel list.

[106] The procedure of establishment and terms of reference are laid out in Annex VIII. Each party to a dispute may choose two arbitrators, of whom only one may be its national. A special feature is that, with the agreement of the parties to the dispute, these tribunals may also be used for fact-finding.

[107] See Art. 287. See also Rosenne (1986a: 173–8).

scientific research in the EEZ or on the continental shelf of a coastal State and fisheries involving coastal State's rights must be submitted mandatorily to conciliation if one party is not prepared to accept a procedure with binding decisions.[108] Contrary to the above-mentioned conciliation procedure, in this case a State is not free to decide not to participate. However, respect for the coastal State's sovereignty under the law of the sea does not allow the conciliation commission to question a State's discretion to decide whether or not it should grant third parties permission for scientific research, except when the commission finds that the refusal was based on manifestly impermissible grounds. Similarly, States are not required to accept compulsory settlement procedures entailing binding decisions relating to their sovereign rights with respect to fishing in the EEZ. The conciliation commission cannot question the way a State exercises its sovereign rights, subject to the exception mentioned below; for example, it has no competence to decide that a coastal State has failed to fix total allowable catches and harvesting capacities or that a coastal State has not made an appropriate allocation of surpluses to other States. Only in cases of manifest failure or arbitrary refusals, the compulsory conciliation commission can act.[109]

For disputes on the international sea-bed special procedures are laid down in section 5 of Part XI of the Convention, which provides that such disputes should normally be referred to the Sea-Bed Disputes Chamber or an *ad hoc* chamber thereof. It is noteworthy that the Convention itself confers jurisdiction to the Chamber (subject to exceptions in Article 188) and that these dispute-settlement procedures can involve not only States, but also the Authority and its various organs, such as the Enterprise, as well as mining companies, whether or not State-owned. Disputes concerning contracts may be referred to commercial arbitration under the UNCITRAL rules, or such other rules as the parties to the dispute may agree. In cases where contractors appear before the Chamber, their home States can also appear but are not obliged to do so, in line with the usual discretion of a State to determine whether or not it will grant diplomatic protection to its nationals. If a contractor brings an action against a State which is not its home State, that State may require the sponsoring State (i.e., normally the home State) to appear, failing which the respondent State may choose to be represented by a legal person (company). As in the case of the ICSID arbitration procedures, this procedure entails innovative features insofar as it provides non-State actors with a *locus standi* before a kind of public

[108] Article 297.2 and 3 and Annex V, section 2.

[109] Article 297.3(b).

international court, whose decisions are enforceable in municipal courts.

Finally, special exceptions to opt out of the compulsory settlement system are made for disputes of extreme political sensitivity, such as those concerning sea-boundary delimitation, military and law enforcement activities, and disputes in which the Security Council is exercising its functions. The exclusion of disputes over sea-boundary delimitation results from the unclear delimitation criteria under the law of the sea. The exclusion clause entails that coastal States have the right to declare that they do not accept any or all compulsory settlement procedures over the boundaries of their territorial sea, continental shelf, EEZ or historic bays. However, if no agreement is reached within a 'reasonable' time they have to accept compulsory conciliation and, should this fail, other procedures entailing binding decisions unless the dispute also involves a question of sovereignty or other rights over land territory.

This elaborate and complicated international dispute-settlement scheme is very much part and parcel of the Convention. No reservations to it are permitted.[110] Thus the Convention offers a combination of traditional means of dispute settlement (including negotiation, voluntary conciliation, resort to the ICJ, and arbitration) and newly created mechanisms such as the International Tribunal for the Law of the Sea and its Deep Sea-bed Disputes Chamber as well as compulsory conciliation procedures and special arbitration tribunals. The Convention takes great care to maintain the parties' freedom of choice at various stages. One of the most innovative and encouraging features is that, apart from States, non-State actors also have access, however limited, to some of the dispute-settlement mechanisms.

At the same time, there is reason to share Judge Jennings' concern about the multiplicity of new institutions and procedures which could lead to a somewhat confusing dispute-settlement scheme through which it will be very difficult to develop a coherent and consistent, let alone uniform, jurisprudence.[111] Similarly, the Convention's strong emphasis on conciliation rather than adjudication in sensitive, sovereignty- and resource-related disputes is questionable, although it may ease States' readiness to resort to international procedures.

[110] See Art. 309. See also Rosenne and Sohn (1989: 212–23).

[111] Speech by Sir Robert Jennings, President of the ICJ, to the UN General Assembly, in UN Doc. A/48/PV.31, at pp. 2–4 (1993), reprinted in 88 AJIL (1994), pp. 421–4, at 423–4.

Permanent sovereignty *versus* common heritage of humankind?

In the context of their newly acquired independence, developing countries have deepened and broadened permanent sovereignty over their natural resources. They have deepened it by claiming as many rights as possible on the basis of the principle of permanent sovereignty over natural resources, thereby 'nationalizing' resource management. They have broadened the scope of permanent sovereignty over natural resources by claiming exclusive rights over the natural resources of the sea in waters adjacent to their coast. To a considerable extent these claims have been accepted and recognized in the modern law of the sea. Following President Truman's proclamations, which extended US jurisdiction to the resources of the continental shelf and regulated fishing in superjacent waters, developing countries succeeded in introducing new principles in the law of the sea which restrict the classical law of freedom of the high seas and replace it with a law of appropriation and protection. The latter not only safeguards the economic security of coastal States and their inhabitants, but also makes them responsible for proper management of marine resources.

At the same time it was claimed that the principle of the common heritage of mankind applied to the resources of the deep sea-bed and to geographically remote areas, such as the moon. The specific rights and duties derived from this principle have still not crystallized, but this does not affect its firm status in international law. The law of freedom of the seas, which all too often results in a 'first come, first served' advantage for industrialized nations, was supplemented by a new law of international co-operation and protection of the interests of developing countries and humankind as a whole. It should, however, be noted that the size of the 'Area', to which the common heritage of mankind principle applies, has been significantly reduced by the establishment of 200-mile EEZs and by the extension of the continental shelf area under national economic jurisdiction further beyond that limit. On a worldwide basis EEZs (claimed or claimable) cover some 35 per cent of the marine area and are estimated to include approximately 90 per cent of the living resources at present under commercial exploitation, tuna and whales being the main exception.[112]

When in 1967 Ambassador Pardo presented a very high estimate of US$6billion annual income from exploitation of the international sea-bed area, he included benefits from the oil and gas deposits in the continental shelf beyond the 200-metres depth line. But these now come under the EEZ

[112] Carroz (1989: 123).

and the extended continental shelf regime. For this reason the Area has been popularly described as the part of the sea-bed left over after the coastal States have grabbed whatever portions they think can be of value to them in the foreseeable future. The question can be asked if the national and international resource regimes are therefore in competition: the common heritage of mankind regime can only start where the permanent sovereignty over natural resources regime ends. Permanent sovereignty over natural resources basically establishes exclusive jurisdiction of States (or peoples) over natural resources in areas where they can exercise sovereign rights, while the principle of the common heritage of mankind is to share the world's natural resources. This situation led Verwey to conclude that the practical impact of NIEO-oriented provisions in the new law of the sea 'aimed at "bridging the welfare gap and securing prosperity for all" is marginal at best'.[113]

Nonetheless, it would be simplistic to conclude that the two resource regimes and the two principles are contradictory. Both principles are pillars underpinning the same movement in international law to strengthen the strategic position of developing countries in response to the intensifying exploitation of their resources by other States and foreign companies and to prevent this happening with the resources of the deep sea-bed. The developing countries advocated these two new principles in an effort to promote a redistribution of global wealth in order to be in a better position to realize their development plans. The benefits accruing to developing countries from sea-bed activities are not only financial profits collected by the International Sea-bed Authority, but also non-financial benefits such as participation in decisions affecting the sea-bed, training of their nationals and obtaining access to Western technology under an international regime.[114]

Although these twin principles of the law of the sea may not be contradictory, the practical significance of the common heritage of mankind regime for developing countries may be very limited until mining of manganese nodules becomes economically feasible, while the introduction of the new continental shelf and EEZ regimes will primarily benefit developing countries with long coastlines.

[113] Verwey (1992: 294). [114] See Anand (1976: 249–50).

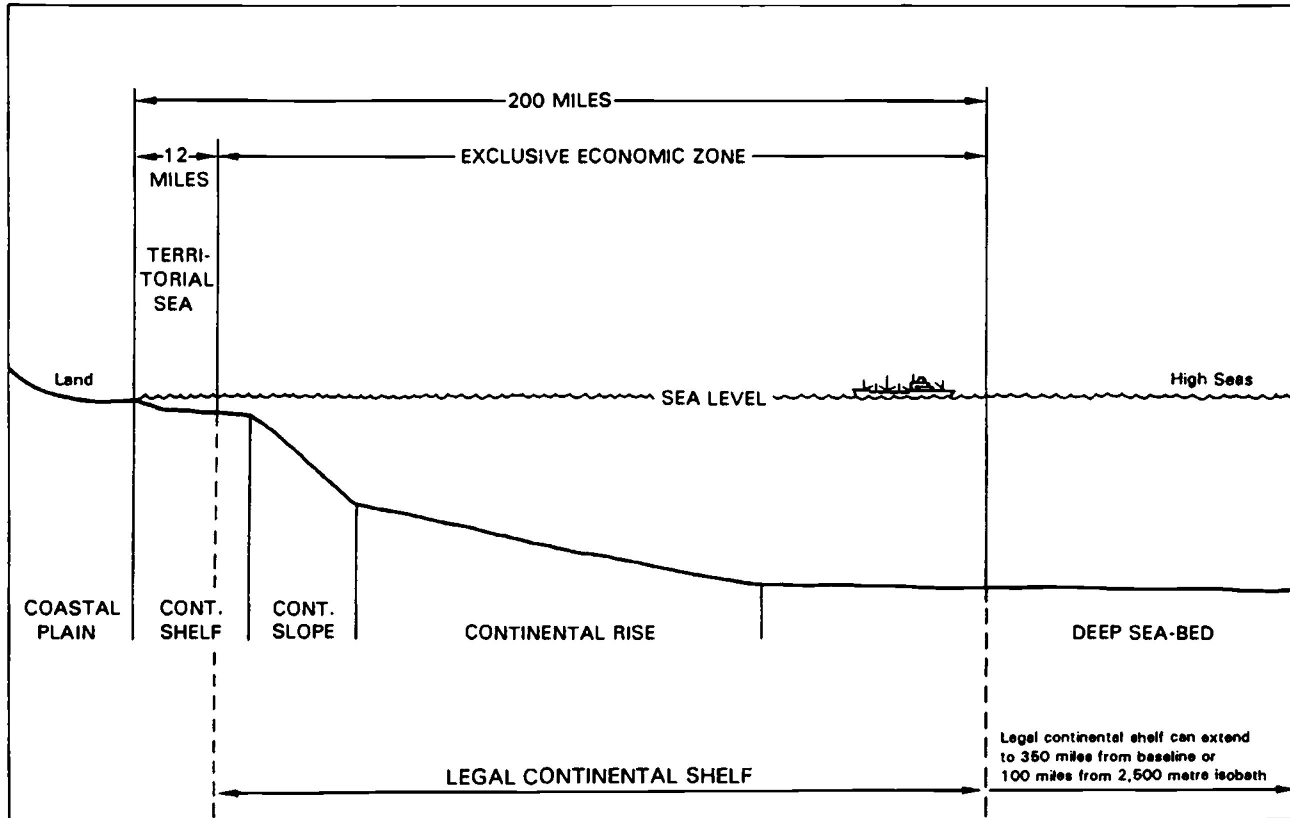

Figure 7.1 National jurisdiction over marine resources

8 International environmental law: sovereignty *versus* the environment?

This chapter identifies and analyzes emerging international norms which are relevant to nature conservation and environmental protection and which have a bearing on the scope and substance of permanent sovereignty over natural resources. The chapter discusses: the concept of international environmental law; the development of international environmental law and its codification; international case law as far as relevant to the concept of sovereignty and environmental preservation; twelve main principles of international environmental law as they emerge from various sources of international law; and the question whether contradictions and tensions exist between the concept of sovereignty, including sovereignty over natural resources, and international environmental law.

The concept of international environmental law

International environmental law is a relatively young branch of international law. Since the 1970s, in particular, it has developed in response to a mounting concern for the state of the environment.[1] However, this is not to say that before the 1970s environmentally relevant law did not exist. As early as the nineteenth century, marine fisheries agreements[2] were concluded as were treaties containing anti-polluting provisions and treaties regulating fisheries in international rivers.[3] During the first decades of this century treaties relating to the protection of certain species of wildlife (migratory birds and fur seals) and flora and fauna in general

[1] See the pioneering article by Contini and Sand (1972).

[2] For example, the 1882 North Sea Fisheries Convention.

[3] See Lammers (1984: 124–47).

were adopted[4] and, since the 1930s, anti-pollution treaties have been concluded.

Furthermore, legal arrangements came into being which are environmentally relevant even though inspired by other objectives. Examples are the provisions in the GATT of 1947 dealing with the protection of animal or plant life and the conservation of natural resources, particularly Article XX(b) and (g),[5] Article 130R of the 1992 Maastricht Treaty on European Union and the preamble of the 1994 Agreement Establishing the New World Trade Organization which includes among its goals the 'optimal use of the world's resources in accordance with the objective of sustainable development'. Similarly, other Uruguay Round texts, for example the Agreement on Agriculture, make reference to the need to protect the environment.[6]

In addition to treaty law, several general principles of classical international law are relevant for States' rights and obligations with respect to nature conservation and environmental protection. First and foremost, the principle of *territorial sovereignty*. Although in earlier times States assumed 'full' and 'absolute' sovereignty to mean that they could freely use resources within their territories regardless of the impact this might have on neighbouring States (the so-called 'Harmon doctrine'),[7] few would argue today that territorial sovereignty is an unlimited concept enabling a State to do whatever it likes. Of course, State sovereignty cannot be exercised in isolation because activities of one State often bear upon those of others and, consequently, upon their sovereign rights. As Oppenheim put it as early as 1912:

> a State, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State – for instance to stop or to divert the flow of a river which runs from its own into neighbouring territory.[8]

Thus the principle of territorial sovereignty finds its limitations where its exercise touches upon the territorial sovereignty and integrity of another State. Consequently, the scope for discretionary action arising from the principle of sovereignty is determined by such principles and adages as

[4] For example, in 1900 a Convention on the Preservation of Wild Animals, Birds and Fish in Africa was signed in London, followed by, in 1902, a Convention for the Protection of Birds Useful to Agriculture (Paris), and in 1911 a Convention on the Preservation and Protection of Fur Seals (Washington).

[5] Charnovitz (1991: 44–5), GATT Secretariat (1992), Petersmann (1993: 67–72), de Waart (1992: 93–8).

[6] The relevant texts are reproduced in 33 ILM (1994), pp. 1–52. For a critical analysis see Cameron (1993: 116–21).

[7] See chapter 10, p. 339.

[8] Oppenheim (1912: 243–4).

'good neighbourliness' and *sic utere tuo ut alienum non laedas* (you should use your property in such a way as not to cause damage to your neighbour's) as well as by the principle of State responsibility for actions causing transboundary damage. It is not easy to trace the exact origin of such principles nor to determine their precise implications. Apart from references in the literature,[9] the strongest support for these principles and their implications can be found in international case law.[10]

In summary, international environmental law has roots in classical international law. Yet, it could be argued that international environmental law has emerged as a new branch of international law only recently, by reference to the increasing number of treaties which have resulted from the perceived need for a legal response to global environmental degradation.[11] Over-exploitation of natural resources, loss of biodiversity, desertification, (tropical) deforestation, pollution of international waters, threat of global warming, and ozone layer depletion are among the most pressing concerns.[12]

Codifying international environmental law

In recent decades international environmental law has evolved gradually, especially through the elaboration of various rules in specific treaties. This has partly been done through 'disaster law' and partly through more systematic regulation to prevent environmental damage by proper conservation of nature and natural resources. The first category includes measures taken in the aftermath of disasters involving, for example, oil tankers (*Torrey Canyon, Amoco Cadiz, Sandoz, Exxon Valdez*), the dumping of toxic waste, salt discharges or nuclear explosions. A case in point is the accident at the Chernobyl nuclear power station in May 1986 which led to the speedy adoption, in September 1986, of two international agreements in the context of the International Atomic Energy Agency (IAEA) on early notification and international assistance following international nuclear accidents.[13]

Examples of more systematic regulation include: Part XII of the UN Convention on the Law of the Sea (1982) on the Protection and Preservation

[9] See, for example, Pop (1980: chapter V); Kirgis (1972: 316–17) and Smith (1988: 83–5).

[10] See pp. 236–40 and pp. 338–9 below.

[11] Major textbooks include Kiss and Shelton (1991); Birnie and Boyle (1992) and Sands (1995). See also Sands (1993).

[12] See World Commission on Environment and Development (1987: 27–37).

[13] Text in 25 ILM (1986), pp. 1,370 and 1,377.

of the Marine Environment; the Vienna Convention on the Protection of the Ozone Layer (1985) and its Montreal Protocol (1987, subsequently amended); the Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989);[14] the UN Framework Convention on Climate Change (1992); the Biodiversity Convention (1992); the environmental provisions in the Treaty of Maastricht on European Union (1992); the North American Free Trade Agreement (1992); the UN Convention to Combat Desertification (1994); and the Energy Charter Treaty (1994). In addition, various multilateral treaties have been concluded for the protection of environment and public health[15] and of fauna and flora[16] as well as numerous regional instruments[17] dealing with resource conservation, fisheries, maritime management, hazardous waste, etc.[18] This category of more systematic regulation has a particularly important bearing on the scope of State sovereignty over natural resources. By ratifying (or acceding to) a treaty a State accepts the obligations under it, for example as regards the protection of wetlands, forests, wildlife or biological resources.[19]

It is illustrative of the proliferation of international instruments in this field that UNEP's updated 1991 register of treaties in the field of the environment lists 152 treaties for the period 1921–89, of which only forty-eight were concluded before 1970.[20] The recent, unprecedented rise in the number of these treaties[21] (from an average of one per year before 1970 to five per year since then), as well as that of the signatories, exemplifies the increasing willingness of States to accept international obligations to conserve nature and natural resources, both at an international level and within their boundaries. Yet, at the same time we have to note that law-making by treaty has been fragmentary rather than systematic.[22]

[14] Amended in March 1994 to include a complete ban on export from 1998.

[15] The 1963 Partial Test Ban Treaty can also be considered as an important environmental and public health instrument.

[16] For example, the Convention on Wetlands (1971), the World Heritage Convention (UNESCO, 1972) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, 1973).

[17] Examples are the 1968 (OAU) African Convention on the Conservation of Nature and Natural Resources, the 1978 Treaty for Amazonian Co-operation, the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources and the Protocol on Environmental Protection to the Antarctic Treaty (1991).

[18] A useful survey is contained in Sand (1992).

[19] See chapter 10, pp. 327–35 for details.

[20] See UNEP Doc. GC.16/Inf.4, Nairobi, 1991.

[21] See Kiss and Shelton (1994).

[22] Goldie's criticism of the 'fire-brigade mentality' of negotiators in producing *ad hoc* agreements with limited general application seems to be still largely correct. Goldie (1972: 104), quoted by Dixon and McCorquodale (1995: 523). See also Adede (1992: 90) on the 'piece-meal approach' to treaty-making in the environmental field.

Moreover, it is one thing to conclude a treaty, but more important are the number of ratifications and its actual implementation, both internationally and, if appropriate, at the domestic level.[23] Here we are confronted with a fundamental weakness of international law: it is a body of law not yet endowed with sophisticated monitoring and control mechanisms and an authoritative and binding method of settling disputes,[24] although in recent years considerable progress has been achieved in this regard in the environmental field.[25]

The UN International Law Commission is working on three environmentally relevant instruments which concern State Responsibility, Non-Navigational Uses of International Watercourses (see p. 249 below), and International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law. In 1992, the General Assembly called for a convention to combat desertification in countries experiencing serious drought and/or desertification, particularly in Africa.[26] The UN Convention to Combat Desertification, a fervent wish of African States, was opened for signature in Paris on 14 October 1994.[27]

Reference should be made to UNEP's ongoing efforts to develop international environmental law by the adoption of multilateral conventions (such as its role in drafting the 1985 Ozone Layer Convention in the 1989 Hazardous Wastes Convention, and the 1992 Biodiversity Convention) or regional conventions (for example, in the context of its Regional Seas Programme) and of 'softer' legal instruments such as guidelines or codes of conduct.[28] A major example of the latter is the 1978 UNEP resolution embodying 'Draft Principles of Conduct in the Field of Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States', as discussed in chapter 4.

In addition to the work of UN organs, regional and interregional institutions such as the OECD, the EU and the OAU have made important contributions to the field of environmental regulation, by adopting standards, guidelines and codes of conduct. Furthermore, various NGOs have submitted interesting proposals. Examples are: the Helsinki Rules on the Uses of the Waters of International Rivers (1966) and the Montreal Rules of International Law Applicable to Transfrontier Pollution (1982) of the ILA; the proposed Legal Principles for Environmental Protection and Sustainable Development by an Experts Group on Environmental Law established

[23] Wellens (1984) and Spector and Korula (1993: 372). [24] See Palmer (1992: 283).

[25] For an account, see chapter 4 of Birnie and Boyle (1992) and Sands (1995: Part III).

[26] UN Doc. A/RES/47/188, 22 December 1992.

[27] Text in 22 ILM (1994), pp. 1,309–82. [28] See Burhenne (1993).

by the Brundtland Commission;[29] the IUCN proposals for a Draft Covenant on Environment and Development (fifth draft, 1994); the Business Charter for Sustainable Development of the International Chamber of Commerce (1990) and the Declaration of the Business Council for Sustainable Development (1992).[30] While such documents have no formal status, they can contribute to identifying the legal issues at stake and to indicating the direction for further evolution of 'international sustainable development law'.

Territorial sovereignty in international case law: 'bending before all international obligations'?

Several decisions of international courts and tribunals can give a lead in interpreting the meaning and implications of territorial sovereignty as a principle of international environmental law, which gives rise to obligations as well as rights.

In the *Island of Palmas case* (*United States* v. *The Netherlands*) (award in 1928) the sole arbitrator Huber, who was then President of the Permanent Court of International Justice, declared:

> Territorial sovereignty involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory.[31]

In the *Trail Smelter case* (*United States* v. *Canada*) (awards in 1938 and 1941) the arbitral tribunal decided that, first of all, Canada was required to take protective measures in order to reduce the air pollution in the Columbia River Valley caused by sulphur dioxide emitted by zinc and lead smelter plants in Canada, only seven miles from the Canadian–US border. Secondly, it held Canada liable for the damage caused to crops, trees, etc. in the state of Washington and fixed the amount of compensation to be paid. Finally, the tribunal concluded more generally, in what no doubt constitutes its best-known paragraph:

[29] Experts Group on Environmental Law of the World Commission on Environment and Development (1987).

[30] The Declaration was accompanied by a report entitled 'Changing Course: A Global Business Perspective on Development and on the Environment'.

[31] *Island of Palmas case*, 2 RIAA (1949), pp. 829–90. See also Jessup (1928: 735–52) and Lagoni (1981: 223–4).

under the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[32]

The tribunal reached this conclusion on air pollution, but it is also applicable to water pollution and is now widely considered to be part of general international law. This prohibition of causing significant harm to others or to places outside the State's territory as well as the duty to take into account and protect the rights of other States has also been referred to and elaborated in other cases.

For example, in 1949, in the *Corfu Channel case* (*UK* v. *Albania*) the International Court of Justice rendered a judgment (in fact in its very first case) on the responsibility of Albania for mines which exploded within Albanian waters which resulted in the loss of human life and damage to British naval vessels and on the question whether the UK had violated Albania's sovereignty. The court came to the conclusion that the laying of the minefield in the waters in question could not have been accomplished without the knowledge of Albania. The court held that the Corfu Channel is a strait used for international navigation and that previous authorization of a coastal State is not necessary for innocent passage. In view of the passage of foreign ships, the court held therefore that it was Albania's obligation to notify, 'for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters' and to warn 'the approaching British warships of the imminent dangers to which the minefield exposed them'.[33] Since Albania failed to do so on the day of the incident, the court held Albania responsible for the damage to the warships and the loss of life of the British sailors and determined the amount of compensation to be paid.[34] For our purposes it is relevant that the court referred to:

every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[35]

It is also relevant to refer to the *Lac Lanoux case* (*Spain* v. *France*) (award in 1957) on the utilization by France of the waters of Lake Lanoux in the

[32] Text as in Harris (1991: 245). [33] *ICJ Reports* (1949), p. 22.

[34] However, the court determined that the mine-sweeping operations of the British Navy in Albanian waters one month later 'violated the sovereignty of . . . Albania'. It is notable that the court decided on this particular question unanimously, i.e., with the concurring vote of the British Judge McNair. This is one of the rare exceptions in the practice of the court of a judge not supporting the position of his own government.

[35] *ICJ Reports* (1949), p. 22.

Pyrenees for generating electricity. For this purpose, part of the water had to be diverted from its course through the transboundary Carol river to another river, the Arišge. According to Spain, this would affect the interests of Spanish users, but France claimed that it had ensured restoration of the original waterflow and had given guarantees so that the needs of Spanish users would be met. France and Spain were unable to resolve this issue by negotiation, and therefore submitted it to arbitration in 1956. This led to an interesting award dealing with the rights and duties under general international law of riparian States in relation to an international watercourse.[36] The tribunal concluded that the works envisaged by France did not constitute infringements of the Spanish rights under the Treaty of Bayonne and its Additional Act of 1866, because France had taken adequate measures to prevent damage to Spain and Spanish users, and for other reasons. As to the question whether the prior consent of Spain would be necessary, the tribunal was of the opinion that such an essential restriction on sovereignty could only follow from exceptional circumstances, such as regimes of joint ownership, co-imperium or condominium but not from the case in question:

> To admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States, is to place an essential restriction on the sovereignty of a State, and such restriction could only be admitted if there were clear and convincing evidence.

According to the tribunal, prior agreement would amount to 'admitting a "right of assent", a "right of veto", which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another'. However, France was under an obligation to provide information to and consult with Spain and to take Spanish interests into account in planning and carrying out the projected works. According to the tribunal, France had sufficiently done so. While the tribunal clearly emphasized the hard-core nature of the principle of territorial sovereignty, it also admitted that it must function within the realm of international law: 'Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their source, but only for such obligations.'[37] From this award is derived in general international law, as Lammers puts it, 'a duty for the riparian States of an international watercourse to conduct in good faith consultations and negotiations designed to arrive through agreements at settlements of conflicts of interests'.[38] This duty has been referred to in

[36] For an extensive review and discussion of this case, see Lammers (1984: 508–17); Laylin and Bianchi (1959: 34–49); and Gervais (1960: 372–434).

[37] 24 ILR (1957), p. 120. [38] Lammers (1984: 517).

subsequent cases, such as the *North Sea Continental Shelf cases* where the court refers to the obligation to enter into 'meaningful negotiations'.[39]

Reference may also be made to the *Barcelona Traction case* (*Belgium* v. *Spain*) in which the court pointed out that:

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[40]

This concept of the *obligatio erga omnes* could in the future be of relevance when global environmental problems are at issue, such as depletion of the ozone layer, the extinction of the world's biodiversity, the pollution of international waters, and the threat of climate change. The world's climate and biodiversity were identified as a 'common concern' of mankind in the 1992 Conventions on Climate Change and Biodiversity. These concepts, and the principle of the common heritage of mankind as discussed in chapter 7, point to the emergence of environmental duties to the international community as a whole.

While in the *Nuclear Tests case* (*New Zealand* v. *France*) (1995), the court found that it had no jurisdiction to deal with New Zealand's request for an examination of the situation resulting from the resumption of nuclear testing by France in 1995, it pronounced that its order was 'without prejudice to the obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment'.[41] Similarly, in response to a question from a deeply divided UN General Assembly[42] the court concluded: 'The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of

[39] *ICJ Reports* (1969), p. 3. See on negotiation in general de Waart (1973) and Merrills (1991: chapter 1).

[40] *ICJ Reports* (1970), p. 32, para. 33. In the next paragraph the court stated that such obligations may derive, for example, in contemporary international law, 'from the outlawing of acts of aggression, and of genocide, as also from principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'. In such cases a State has obligations *vis-á-vis* the international community as a whole and every other State can hold it responsible and institute a so-called *actio popularis* in protection of the community's interest.

[41] ICJ Order of 22 September 1995, in *ICJ Reports* (1995), p. 306, para. 64.

[42] UN Doc. A/RES/49/75 K, entitled 'Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons', 15 December 1994, adopted by seventy-eight votes in favour, forty-three against, with thirty-eight abstentions.

international law relating to the environment.'[43] The court stated that additional protection for the environment flows from Protocol I of 1977 to the Geneva Conventions, which prohibits warfare causing long-term and severe damage to the natural environment, and from the 1977 Convention on Environmental Modification Techniques, which prohibits the use of weapons which have widespread, long-lasting or severe effects on the environment. Hence, the court found that:

> while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.[44]

Another relevant case is the current dispute over the Danube Dam between Hungary and Slovakia.[45]

Principles of international environmental law and state sovereignty

The main principles of international environmental law concerning nature conservation and environmental protection, emerging from treaty law,[46] international case law, 'soft law' instruments such as the Stockholm and Rio Declarations, and the literature are summarized below. Not every principle has the same scope or status in international law of course. Some are well established, while others are still emerging. Some entail first and foremost injunctions or prohibitions for States (and peoples) to act in a certain way in their own jurisdictions, while others primarily relate to obligations with respect to neighbours, 'international areas' or the global environment as such. The following twelve principles can be identified.[47]

[43] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, *ICJ Reports* (1996), para. 29.

[44] Ibid., para 33.

[45] For information on the *Danube Dam case*, see 32 ILM (1993), pp. 496–503. Furthermore, on 19 July 1993, the ICJ established a seven-member Chamber of the Court for Environmental Affairs, in view of 'the developments in the field of environmental law and protection which have taken place in the last few years, and considering that it should be prepared to the fullest possible extent to deal with any environmental case falling within its jurisdiction'. See ICJ Communiqué No. 93/20, 19 July 1993. See also Chapter 39.10 of the UNCED 'Agenda 21' and the Statement by Sir Robert Jennings to the UNCED, reproduced in *ICJ Yearbook* (1991–2), No. 46, pp. 212–18.

[46] See the relevant conventions listed in Appendix II, p. 402.

[47] See Kiss and Shelton (1991: 96–113); Birnie and Boyle (1992: 89–127); Koester (1990: 17–18); Lammers (1984: 556–80); Wolfrum (1990); Adede (1992: 95); Gündling (1992); Sand (1993); Schrijver (1993); and chapter 4 of this study.

Permanent sovereignty over natural resources

It is a well-established practice, accepted as law, that – within the limits stipulated by international law – every State (and under certain conditions a people) is free to manage and utilize the natural resources within its jurisdiction and to formulate and pursue its own environmental and developmental policies.[48]

However, States have to conserve and utilize their natural wealth and resources for the well-being of their peoples, as stipulated in paragraph 1 of the 1962 Declaration on Permanent Sovereignty and Article 1 of the Human Rights Covenants, and they have to take into account the interests of other States as well as those of present and future generations of humankind.[49]

Due care for the environment and precautionary action

The principles of 'due diligence' or 'due care' with respect to the environment and natural wealth and resources are among the first basic principles of environmental protection and preservation law. They take root in ancient and natural law as well as in religion (for example, in the Christian notion of 'stewardship'). Apart from constant monitoring, it may require an assessment of the environmental impact of plans envisaged. There is an increasing emphasis on the duty of States to take preventive measures to protect the environment.[50] The emergence of this 'precautionary' principle is reflected in multilateral treaty law, such as the GATT, the 1982 Law of the Sea Convention, the 1985 Ozone Layer Convention and its 1987 Montreal Protocol, the 1991 ECE Convention on Environmental Impact Assessment, the 1992 Climate Change and Biodiversity Conventions, the 1994 Convention to Combat Desertification and the 1994 Energy Charter Treaty.[51] In its work on International Liability, the ILC stresses 'foreseeability' as an important factor in determining whether a State is liable or not.[52] The 'precautionary approach' is also incorporated in Principles 15 and 19 of the Rio Declaration. However, what the precautionary approach exactly entails and what its hard-core

[48] See Principle 21 of the Stockholm Declaration, Principle 2 of the Rio Declaration and Article 3 of the Biodiversity Convention. For a discussion, see chapter 4, pp. 125–39.

[49] See, for example, Art. 30 of the CERDS and the Stockholm and Rio Declarations.

[50] Hey (1992) and Hohmann (1992b).

[51] See, for example: Art. XX(b) and (g) of the GATT; Arts. 192, 204 and 206 of the 1982 Law of the Sea Convention; preambles to the 1985 Ozone Layer Convention and its 1987 Montreal Protocol; Art. 3.3 of the Climate Change Convention; Art. 6 of the Biodiversity Convention; Art. 4 of the Convention to Combat Desertification; and Art. 19.1 of the Energy Charter Treaty.

[52] See Birnie and Boyle (1992: 96) and Sands (1995: 208–13).

consequences are has not yet crystallized. This is small wonder since it touches deeply on the discretion of States with regard to policy. While it may be somewhat premature to label the precautionary principle as established in international law, it can without doubt be termed an emerging principle.[53]

Inter- and intragenerational equity

According to this 'emerging' principle coined by Weiss,[54] States must take into account the interests of both present and future generations. States are under an international obligation to manage their natural environment in such a way as to conserve its capacity for sustainable use by future generations as well as to conserve their fauna and flora, including endangered wildlife species and wetlands of international importance. An intragenerational equity stipulating equitable use of natural resources to take into account the needs of other users and necessitating assistance by the industrialized States to developing States, forms – as Weiss argues – an inherent part of the fulfilment of our intergenerational obligations.[55] The principle of intergenerational equity is amply reflected in international law. Early environmental treaties, including the 1946 Whaling Convention[56] and the World Heritage Convention, refer to safeguarding the resources for future generations. Increasingly treaties seek to preserve particular natural resources and other environmental assets for the benefit of present and future generations.[57] Principle 1 of the 1972 Stockholm Declaration notes a 'solemn responsibility to protect and improve the environment for present and future generations'. The principle of intergenerational equity has also been increasingly referred to in international and domestic courts. In the *Nuclear Tests case* (*New Zealand* v. *France*) (1995), Judge Weeramantry noted that the 'principle of intergenerational equity' is 'an important and rapidly developing principle of contemporary environmental law ... which must inevitably be a concern of this Court'.[58] The practical implementation of the principle in the sense of a legal standing of members of the present generation to sue on the right to the environment as an intergenerational right was highlighted in a landmark decision by the Philippine Supreme court in 1993. The court ruled that petitioners had

[53] See Birnie and Boyle (1992: 98).
[54] See the impressive book by E. B. Weiss (1989) and also Chowdhury (1992).
[55] Weiss, E. B. (1989: 97).
[56] Its preamble recognizes the 'interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks'.
[57] See for numerous examples chapter 10, pp. 327–35.
[58] Dissenting opinion of Judge Weeramantry, in *ICJ Reports* (1995), p. 341.

standing to sue on behalf of the succeeding generations based on 'the concept of inter-generational responsibility insofar as the right to a balanced and healthful ecology is concerned . . . as every generation has a responsibility to the next'.[59]

Good neighbourliness

Good neighbourliness gave rise, among other things, to the well-established principle that States may not use their territory and resources under their jurisdiction in such a way as to cause significant harm to the environment of other States (*sic utere tuo ut alienum non laedas*) and, more recently, to areas beyond national jurisdiction. It may not be easy to determine the exact scope of this obligation and its implications. Certainly not all instances of transboundary damage resulting from activities within a State's territory can be prevented or are unlawful. This clearly follows from the *Trail Smelter* and the *Lac Lanoux awards* mentioned above and other sources. There is an increasing trend to demand environmental impact assessment, within the context of national or regional arrangements.[60] Important criteria for determining what is permissible and what is prohibited might be: (a) the likelihood of significant harmful effects on the environment and on potential or current activities in another State; (b) the ratio between prevention costs and any damage; (c) the impact on other States' capacity to use their natural wealth and resources in a similar way; and (d) the health of the population of another State.[61]

Equitable utilization and apportionment

This principle is closely related to the previous one and implies, firstly, that States should utilize resources and the environment in such a way that other States can utilize them as well or at least obtain a reasonable and equitable share.[62] From this it follows, secondly, that States must co-ordinate and co-operate for the 'optimum use' (in international fisheries law also referred to as 'maximum sustainable yield') of resources and

[59] See case report of *Juan Antonio Oposa et al.* v. *Secretary of Department of Environment and Natural Resources*, Supreme Court of the Philippines, 30 July 1993, reproduced in 33 ILM (1994), p. 173.

[60] See the 1991 ECE Convention on Environmental Impact Assessment in a Transboundary Context, Espoo (Finland).

[61] See Principle 3 of the UNEP Draft Principles of Conduct on Shared Natural Resources and Arts. 10–12 of the General Principles Concerning Natural Resources and Environmental Interferences as adopted by the Brundtland Commission's Expert Group on Environmental Law.

[62] See Lammers (1984: 364–71), Schachter (1977: 64–74) and Brundtland Expert Group's Legal Principle 9.

prevent appreciable transboundary damage. This principle is relevant to all forms of shared resources, including fresh water resources, land, fisheries resources and gas and oil deposits.[63] At the same time, its meaning in practice often raises serious controversy.[64]

Prior information, consultation and early warning

Whenever transboundary resources are at stake or activities within the territory of one State may seriously affect the environment in other States, or persons or property therein, States are under an obligation to inform and consult these other countries well in advance. In the event of a transboundary environmental disaster (such as a tanker accident, nuclear explosion or toxic discharge) or even less acute environmental problems, States are under an obligation to warn other States and to co-operate to contain and solve these problems.[65]

State responsibility and liability

States have a duty to abstain from measures of economic and environmental policy which are incompatible with their international obligations. Initially, this implied first and foremost a prohibition against causing significant environmental harm to other States.[66] In modern international law this prohibition extends to 'international areas' (high seas, deep sea-bed and outer space), which are beyond the limits of national jurisdiction. The emergence of obligations emanating from principles such as 'due diligence', 'intergenerational equity' and protection of the rights of indigenous peoples may in future also give rise to State responsibility for policies with respect to conservation of natural resources and wealth within a State's own territory. Since 1949 the topic

[63] See Art. 83.1 of the 1982 Law of the Sea Convention and Art. 11 of the 1994 Convention to Combat Desertification. See also the ICJ in *Continental Shelf case (Tunisia/Libya)*, *ICJ Reports* (1981), p. 3 and in *Continental Shelf case (Libya/Malta)*, *ICJ Reports* (1981), p. 13. [64] See chapters 9 and 10.

[65] See IAEA Convention on Early Notification of a Nuclear Accident, Vienna, 26 September 1986, which entered into force 27 October 1986, and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, Vienna, 26 September 1986, which entered into force 26 February 1987; UN Convention on the Transboundary Effects of Industrial Accidents, 17 March 1992; the Nordic Convention on the Protection of the Environment, 5 October 1976; and also the ILC work on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law. See also Principle 19 of the Rio Declaration.

[66] Under classical international law, the victim State had to meet rather restrictive standards before it could successfully invoke the responsibility of another State for transboundary harm. For example, the *Trail Smelter* arbitral tribunal referred to 'clear and convincing evidence of significant harm'.

of State responsibility has been on the agenda of the ILC, but the ILC has still not finalized the codification of international law with respect to State responsibility for wrongful international acts and for injurious consequences arising from acts not prohibited by international law. The question is when damage caused by a country to its own environment and to its natural resources and wealth or to those of a neighbouring State amounts to an international act which gives rise to liability and an obligation to make amends, financially or otherwise. In its Draft Article 19 on State Responsibility, the ILC included among international crimes: 'a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.'[67] The 1992 Rio Declaration does not address the substance of this matter but merely calls - as did the 1972 Stockholm Conference (Principle 22) - for the further development of international law regarding liability and compensation for external environmental damage (Principle 13).

Termination of unlawful activities and the making of reparation

From the previous principle it follows that States are under an obligation to terminate activities which have been found to be unlawful or incompatible with their international obligations and make reparation for damage inflicted. In principle, reparation should be designed to restore previous conditions (*restitutio in integrum*) or, if this is not possible, to compensate, financially or *in natura*, for damage and injury inflicted. In environmental texts, the second aspect of this principle is also referred to as 'the polluter-pays principle' or as 'the principle of compensation for the victims of environmental damage'.[68] However, the polluter-pays principle is of a much wider scope since it also includes such concepts as internalization of environmental costs in prices of goods and services and the passing on by the State of the reparation costs to polluters, such as private parties, rather than upon society at large.

[67] Article 19.3(d) of the Draft Articles on State Responsibility, *ILC Yearbook* (1980), vol. II, Part 2, pp. 30-4 and ILC Yearbook (1985), vol. II, Part 2, pp. 24-5.

[68] See, for example, OECD Recommendations in 14 ILM (1975), p. 234 and 28 ILM (1989), p. 1,320 and the recently concluded Council of Europe's Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Lugano, 1993. In these texts the polluter-pays principle relates especially to the relationship between the public authorities of a State and polluters within that State. See also Principles 16 and 13 of the Rio Declaration.

Preservation of *res communis* and the common heritage of (hu)mankind

These principles relate first of all to areas beyond national jurisdiction, such as the high seas, the ocean floor, outer space and perhaps Antarctica.[69] The principle takes root in the concern that the natural resources of certain areas beyond national jurisdiction should not be exploited solely by those few States whose commercial enterprises are able to do so, but rather constitute the common heritage of humankind, to be utilized for the benefit of all States. Various conventions provide that these areas may not be used as waste-dumping places and that their resources should be used in the interest of humankind as a whole.[70] As discussed in the previous chapter,[71] the common heritage of humankind principle implies, among other things, non-appropriation, regulated access to resources, sharing of benefits, reservation for peaceful purposes and due regard to the interests of future generations. In future, these principles may also gain relevance for the protection and conservation of the intrinsic value of nature and the environment and of what belongs to all of us, such as major ecological systems of our planet and biological diversity. For example, the 1985 Ozone Layer Convention seeks to prevent such adverse effects as 'changes in climate which have significant deleterious effects on human health, or on the composition, resilience and productivity of natural and managed ecosystems or on materials useful to mankind'.[72] The third paragraph of the preamble to the 1992 Convention on Biological Diversity provides that conservation of biological diversity is 'a common concern of humankind'. Similarly, it is acknowledged 'that change in the earth's climate and its adverse effects are a common concern of humankind'.[73] Although this backsliding of the notion of 'heritage' to that of 'concern' is unfortunate, the reference to the interest of the international community as a whole in preserving the environment is maintained. In the *Nuclear Tests cases* (*Australia/New Zealand* v. *France*) (1974), Australia suggested that there is a general interest of all States, a right *erga omnes*, to seek the protection of

[69] It is a controversial question whether the Antarctic continent and the Antarctic environment can be viewed as part of the *res communis* or the common heritage of humankind. Antarctica is still subject to territorial claims by seven States. However, these claims are 'frozen' under the 1959 Antarctic Treaty. The 1991 Protocol to the Antarctic Treaty on Environmental Protection has prohibited mineral exploitation for fifty years. See Pinto (1994a: 599–607), Hey (1989: 119–22) and Lefeber (1990: 105–16).

[70] See Art. 4 of the 1979 Moon Agreement and Art. 140 of the 1982 Law of the Sea Convention. [71] See pp. 218–20 above.

[72] Article 1.15 of the Vienna Convention on the Protection of the Ozone Layer.

[73] Preamble to the 1992 Convention on Climate Change. See also Art. 3 of the 1995 Draft IUCN Covenant: 'The global environment is a common concern of humanity.'

important environmental rights, *in casu* the right of the international community that atmospheric testing does not take place.[74]

Duty to co-operate in solving transboundary environmental problems

The duty of States to co-operate is well established, as exemplified by Chapter IX of the UN Charter and the 1970 Declaration on Principles of International Law. At the bilateral and regional level and sometimes at the global level,[75] international co-operation to solve transboundary environmental problems requires prior information, consultation and negotiation. From a North–South perspective there is a duty of industrialized countries to assist developing countries in protecting the global environment.[76] There is also the duty of industrialized countries to contribute to developing countries' efforts to pursue sustainable development. In both cases such assistance may entail financial aid, transfer of environmentally sound technology and co-operation through international organizations. UNEP's Regional Seas Programme and the establishment of the Global Environment Facility, a joint project of the World Bank, UNEP and UNDP, which has entered its Phase II (1994–7), can be seen as the first major step in carrying out this obligation. Transfer-of-technology provisions are most notably included in the Montreal Protocol to the Ozone Layer Convention, the Climate Change Convention and the Biodiversity Convention.

Common but differentiated obligations

As in other fields of international law, such as international trade and monetary law, international environmental instruments differentiate between industrialized and developing countries. In practical terms, it means that different standards, delayed compliance timetables or less stringent commitments may be appropriate for different groups of countries, including 'economies in transition' (the Central and Eastern European States). An example is the Climate Change Convention,[77] the objective of which is to achieve the stabilization of greenhouse-gas concentrations in the atmosphere at a level which would prevent dangerous anthropogenic interference with the climate system and which commits industrialized countries to take measures with the aim of returning by the year 2000 to the

[74] See Memorial by Australia to the ICJ, reproduced in part in Dixon and McCorquodale (1995: 530–1). [75] For example, the CFC and CO_2 problems.

[76] See, for example, the Vienna Convention on the Protection of the Ozone Layer, Vienna, 22 March 1985, which entered into force 22 September 1988; the 1987 Montreal Protocol and the 1990 London and 1992 Copenhagen amendments to this Protocol. See Koskenniemi (1992) and also the Climate Change and Biodiversity Conventions. [77] See Kuik *et al.* (1994: 6–8).

1990 emission level of greenhouse gases. The rationale for differentiation is two-fold. Firstly, it is recognized that so far the bulk of global emissions of greenhouse gases have originated in industrialized countries and that they should thus bear the main burden of combating climate change. Secondly, developing countries need access to resources and technologies in order to be able to achieve sustainable development. All States are subject to a number of duties, including the duty to take precautionary measures with respect to climate change and the obligation to co-operate in preparing for adaptation to the impacts of climate change, and the duty to develop integrated plans for especially vulnerable areas and resources.[78] Article 4.7 of the Climate Convention provides that the extent to which developing countries will effectively implement their commitments under the Convention will depend on the provision of financial resources and technology by industrialized countries. It is recognized that social and economic development and poverty eradication are the first priorities of developing countries. The Convention identifies various sub-categories of developing countries, nearly all of which are characterized by special geographical features (for example, being a small island or land-locked) or environmental features (such as low-lying coastal areas or fragile ecosystems), and designates special measures for them.

Peaceful settlement of environmental disputes

Most international environmental treaties embody provisions spelling out how disputes should be settled. The majority stipulate that the parties involved should first aim to resolve disputes through negotiation. If this is unsuccessful, most treaties provide for further arrangements which may involve the assistance of third parties. For example, Article 11 of the Vienna Convention on the Protection of the Ozone Layer provides for mediation and conciliation. Article 19 of the 1991 Madrid Protocol on Environmental Protection to the 1959 Antarctic Treaty includes the possibility of having resort to either an arbitral tribunal or the ICJ. Other treaties provide that the dispute will be submitted either to arbitration or to the ICJ if negotiations have proved unsuccessful.[79] However, in virtually all of these cases the dispute-settlement clauses are optional.[80]

[78] Articles 3.3, 3.4 and 4.1(e).

[79] Examples include: Art. 11 of the 1985 Ozone Layer Convention; Art. 20 of the 1989 Basle Convention; Art. 14 of the 1992 Climate Change Convention; and Art. 27 of the 1992 Biodiversity Convention.

[80] For an exception see Part XV of the 1982 Law of the Sea Convention, discussed in chapter 7, pp. 225–7.

Chapter 39.10 of 'Agenda 21' addresses modalities for avoidance and settlement of disputes in the field of sustainable development and recommends, where appropriate, recourse to the ICJ. The court established an Environmental Affairs Chamber in 1993. However, since international organizations (other than UN specialized agencies in the context of advisory procedure), environmental associations and potentially affected individuals have no direct standing with the court, the need for a new International Court for the Environment has recently been advocated by international environmental lawyers.[81] As far as dispute avoidance is concerned, it is relevant to refer to the Draft Articles on International Watercourses, adopted by the International Law Commission. These include provisions on prior notification, consultation, negotiation and fact-finding.[82]

Sovereignty versus the environment?

During recent decades it has become clear that in the field of natural resources States in many respects have become interdependent, for example as a result of: the growing scarcity of resources; the allocation of resources to development; the conservation of biodiversity; and environmental preservation in general. In response, attempts have been made to protect the environment, both nationally and internationally. In 1987, the Brundtland Commission adopted the concept of 'sustainable development', in order to balance the competing claims of the preservation of the environment and those of the desire for development. The trends in international environmental law summarized in this chapter have given rise to the obligation of States not only to manage their natural wealth and resources in such a way as to avoid significant harm to (the 'sovereign' territory of) other States, but also to manage their natural wealth and resources properly for the sake of their own people, including future generations. In addition, these trends provide a framework for international co-operation required to protect the environment.

The Brundtland Commission observed that 'legal regimes are being rapidly outdistanced by the accelerating pace and scale of impacts on the environmental base of development'. It recommended accordingly: 'Human laws must be reformulated to keep human activities in harmony

[81] See Rest (1994). See also the Draft Resolution of the International Committee on Environmental Law, in 24 EPL (1994: 204).

[82] See 1994 ILC Report, 'The Law of Non-Navigational Uses of International Watercourses: Report of the International Law Commission', pp. 259–80, para. 322, in UN Doc. A/49/10, September 1994. Extracts in 24 EPL (1994), no. 6, pp. 335–68.

with the unchanging and universal laws of nature.'[83] Similarly, the Rio Conference on Environment and Development called for the further development of international law in the field of sustainable development.[84] This applies not only to the responsibilities of States for environmental degradation, but equally to companies, individuals and associations of individuals. This would undoubtedly require a further evolution of present international law, which is mainly State-oriented and under which national resource regimes co-exist but barely interact, towards one which is humankind-oriented and under which environmental preservation and sustainable development are approached from a global perspective: in short an international law under which international co-operation will seek to ensure equitable sharing, management of the global commons and its preservation for future generations. Within this emerging international legal framework, national sovereignty over natural resources, as an important cornerstone of environmental rights and duties, may well continue to serve as a basic principle.

[83] World Commission on Environment and Development (1987: 330).

[84] Principle 27 of the Rio Declaration on Environment and Development; see also 'Agenda 21', chapter 39.

Appraisal of Part II

This Part reviewed some important developments in international law relevant to natural-resource jurisdiction. In all three areas studied – investment regulation, control over marine resources and environmental protection – there have been significant efforts by developing countries to deepen and broaden permanent sovereignty over natural resources. They have deepened it by claiming as many rights as possible on the basis of the principle of permanent sovereignty, thereby 'nationalizing' resource management. These developing countries have also broadened the scope of permanent sovereignty by claiming exclusive rights over the natural resources of the sea in waters along their coast. However, it was noted in all three areas that earlier assertions of permanent sovereignty over natural resources are now increasingly being complemented by a trend towards international co-operation and the formulation of obligations incumbent on States.

Assertions of economic sovereignty of host States now include recognition of obligations, for example to respect international law, to observe in good faith contractual and treaty obligations and to provide fair treatment to foreign investors, including appeal possibilities and recourse to international dispute-settlement mechanisms in the case of a dispute. Simultaneously, home States are under an obligation to recognize the economic jurisdiction of host States over investors in their territories and not to interfere in their internal affairs. At various levels of investment regulation, an increasing trend towards pragmatism and co-operation can be discerned, as exemplified by multilateral and bilateral investment promotion and protection treaties.

To a considerable extent, claims to extended economic jurisdiction of coastal States over marine resources have been accepted and recognized in the modern law of the sea. The classic law of freedom of the high seas has

been largely replaced by a law of appropriation and protection. However, coastal States have been made responsible for proper management of marine resources. Living resources should be utilized in an optimal manner and surpluses should, in principle, be shared with neighbouring land-locked or otherwise geographically disadvantaged States. Non-living resources, such as those of the continental shelf, must be exploited so as to avoid damage to the marine environment and taking into account the interests of neighbouring countries in the case of transboundary natural resources. The principle of the common heritage of mankind applies to the resources of the deep sea-bed beyond the limits of national jurisdiction and to geographically remote areas, such as the moon. This principle has obtained a firm status in international law and put a halt to the seaward rush of coastal States, albeit at a very late stage. Thus, the law of freedom to use resources of the seas, which has all too often resulted in a 'first come, first served' advantage for industrialized nations, has also been replaced to a considerable extent by a new law of international co-operation and protection aimed at proper management of sea resources and preservation of the marine environment, while taking into account the interests of developing countries and humankind as a whole.

Territorial sovereignty, including sovereignty over natural resources, features as a main principle of nearly every branch of evolving international environmental law.[1] However, the days of 'absolute' or 'full' sovereignty in the sense of an unfettered freedom of action of States are long passed. Today, the principle of sovereignty over natural resources gives rise in international environmental law to both rights and duties of States. On the one hand, States have the right to pursue freely their own economic and environmental policies, including conservation and utilization of their natural wealth and the free disposal of their natural resources; on the other hand, obligations and responsibilities have emerged which confine States' freedom of action. These two sides of the same coin are examined in detail in Part III. Here it may suffice to say that in important areas of modern international law relevant to natural-resource jurisdiction, the trend towards 'nationalizing' resource management is being complemented by a duty to co-operate with other States and peoples.

[1] Exceptions include the environmental regimes for the high seas, the deep sea-bed and Antarctica.

PART III

Balancing rights and duties in an increasingly interdependent world

Introductory remarks to Part III

Permanent sovereignty over natural resources, while a legal concept, is typically a product of the interaction of politics, economics and sociology of international relations. The decolonization process marked its genesis; and the efforts of newly independent States to enhance their opportunities for development had a profound impact on its evolution. Political and academic discussion of permanent sovereignty has focused on rights rather than on obligations.[1] This is due to the fact that the newly independent States have looked upon permanent sovereignty as a counteracting factor, if not as an 'antidote' to the more traditional rights connected with resource management, such as the inviolability of contracts, a strict interpretation of *pacta sunt servanda* and of respect for acquired rights, and the right of home States to grant diplomatic protection to their nationals abroad. Developing countries challenged these rights by invoking 'permanent sovereignty' as the basis for claiming, among other things, the right to regain effective control over natural resources, to choose freely their own socio-economic system, the right to use freely their own natural resources and the right to expropriate or nationalize foreign property rights.

Logically, developing States were more interested in formulating rights reinforcing their sovereignty than in obligations restricting it. For a long time they tended to perceive any reference to obligations as a potential encroachment on their 'permanent', 'full' and 'inalienable' natural-resource sovereignty. All of these traditional rights and concepts are currently subject to change and are being replaced or complemented by new, usually more flexible insights. Today, State sovereignty is becoming increasingly qualified, partly due to a significant trend towards international economic co-operation. Perceptions of the role of the State and foreign

[1] For an exception see de Waart (1977); see also E. B. Weiss (1990).

investment in economic development are changing rapidly. Self-determination of peoples, including indigenous peoples, outside a colonial context, is being highlighted, both as a human right and as a principle of international law concerning friendly relations between States in accordance with the UN Charter. This necessitates the interrelating of sovereignty and self-determination. Moreover, our earth is increasingly being seen as an interdependent entity and the 'environmental pressure' on it is widely recognized as a problem of global concern. Both States and peoples are identified as guardians of the environment. These challenges and trends influence the current interpretation and application of the principle of permanent sovereignty and are manifested in international law which emphasizes duties as well as rights.

The art of balancing rights and duties (*ars aequi*) is an inherent characteristic of nearly every legal system, including international law. States may be 'sovereign' and endowed with 'sovereign rights' and peoples may be entitled to 'self-determination', but this does not mean that either are above the law and inherently immune from duties.[2] This subsequently raises the question of the scope of jurisdiction of States and peoples and which limitations or obligations arise from the rights which accrue to others, whether they are third States, peoples or humankind as such.

Exploring beyond the immediate text and interpretation of the permanent-sovereignty resolutions and examining various branches of international law relevant to natural-resource jurisdiction, this Part identifies and analyzes, firstly, key legal rights and claims of States and peoples which emanate from the principle of permanent sovereignty over natural resources and assesses the extent to which they have become recognized in relevant sources of international law (chapter 9). Secondly, and according to a similar scheme, chapter 10 extensively considers the other side of the permanent-sovereignty coin: duties. The hypothesis is that assertions and formulations of permanent-sovereignty-inspired rights are often accompanied or followed up by the imposition of duties, thus seeking (to restore) a balance between the rights and interests of all parties involved and protecting the quality and diversity of the natural-resource base, also for future generations. Thirdly, this Part provides conclusions by examining issues arising from the questions posed in chapter 1. The final chapter will draw out the main points and conclusions based on the examination in this study of: (1) the origin, development and legal status of the principle of permanent sovereignty in current international law; (2) the impact of the

[2] See Hart (1992: 217–18) and Raz (1978: 5–43).

various challenges to State sovereignty and of the changing perceptions of the role of the State in economic development on the current relevance and interpretation of permanent sovereignty; and (3) the new directions of permanent sovereignty in an interdependent world.

9 Rights and claims: seeking evidence of recognition in international law

The grammar of rights

For a long time the grammar of permanent sovereignty was a grammar of rights: the right to dispose freely of natural resources, the right to expropriate, the right to compensation for damages to natural resources caused by third States or enterprises, to mention just a few. The invocation of such rights often led to serious controversy between States, especially between Western and developing countries. Various attempts were made to formulate, in general terms, the relevant rules of international law in treaty law, for example in the 1948 Havana Charter, the 1965 ICSID Convention, the 1966 Human Rights Covenants, the 1967 OECD Draft Convention on the Protection of Foreign Property and the 1982 Law of the Sea Convention. In addition, efforts were made, in the context of both intergovernmental and professional bodies, to formulate 'codes of conduct', 'declarations' or 'guidelines'.[1]

Claims to and exercise of 'sovereign' rights have often been the subject of diplomatic protest and international litigation, occasionally before the International Court of Justice (such as the *Anglo-Iranian Oil Company case*) but more often before international arbitration tribunals. Examples of the latter include the Libyan oil nationalization tribunals, ICSID tribunals and

[1] While recognizing that there are varying orientations and statuses, examples include: (i) the draft UN Code of Conduct on Transnational Corporations (last text of 1990); (ii) Guidelines for International Investments by the International Chamber of Commerce (ICC, 1972); (iii) OECD Declaration on International Investment and Multinational Enterprises (1976, subsequently reviewed in 1979, 1984 and 1991); (iv) the Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order as adopted in Seoul by the International Law Association (ILA, 1986); (v) the Third Restatement of the Foreign Relations Law of the United States by the American Law Institute (ALI, 1987); and (vi) the Guidelines on the Treatment of Foreign Direct Investment as adopted in the context of the World Bank Group (1992).

the Iran–US Claims Tribunal. Finally, it goes without saying that heated debates and duels between lawyers occurred and these have given rise to an abundant literature describing historic controversies in which the battle-lines in this field have been drawn.

This chapter analyzes key legal rights emanating from the set of permanent-sovereignty-related UN resolutions referred to in Part I, and seeks to identify the extent to which they have become recognized in relevant sources of international law.[2] Working from the text and meaning of the permanent-sovereignty resolutions, the chapter undertakes an analytical search of evidence of recognition of these rights in:

1 relevant treaty law, particularly multilateral treaties in the fields of human rights, law of the sea, foreign investment, international trade, and the environment;
2 major trends in State practice, especially those arising from bilateral investment-protection treaties;
3 decisions of international courts and tribunals as far as relevant to the interpretation and application of the principle of permanent sovereignty over natural resources;[3]
4 international instruments other than UN resolutions on foreign-investment regulation, such as guidelines and codes of conduct;
5 the work of public and private bodies, such as the UN International Law Commission, the International Law Association and the American Law Institute; and
6 international law literature.

Before taking up this task, it may be relevant to dwell for a moment on the notion of a 'right', which is a 'much ill-used and over-used word'.[4] In Greek philosophy, Roman law and in the work of theologians such as Thomas Aquinas, the word 'right' (*jus*) primarily meant that which was 'right' and 'just', 'fair' or 'that which is fair'. In modern law a distinction is often made between 'moral' rights, arising from principles of morality or natural justice, and 'legal' rights, recognized (and protected) by rules of law. Legal rights generally denote benefits conferred on its holder and the ability to enforce the correlative duties of another subject, although sometimes – especially in international law – there is a lack of correspondence between rights of one subject and duties of another. A further distinction is between 'positive' and 'negative' rights. The former are associated with claims of a

[2] It should be put on record that extensive excursion through these sources of law was greatly facilitated and guided by: Bernhardt (1981–90, Instalment 2); Higgins (1983); Dixon and McCorquodale (1995); World Bank Group (1992), vol. I; Makarczyk (1988: chapters 5 and 6); Brower (1993) and Mouri (1994).

[3] See Appendix III, p. 410.

[4] Walker (1980: 1,070).

holder to a certain performance (act or acquiescence) of another subject, while the latter imply that one's rights are respected and not infringed or violated.[5] There may also be claims which fall short of rights but which nonetheless are legally relevant.[6] Examples in kind include the entitlement of developing countries to receive development aid from industrialized countries or to receive 'remunerative' or 'fair and just' prices for their exported raw materials, as often stated in UN and in particular UNCTAD resolutions. The implementability of such claims basically depends on the goodwill and fulfilment of a political commitment accepted by another subject. In this chapter we will seek evidence of recognition in international law of rights and claims (to be) derived from the principle of permanent sovereignty over natural resources.

The right to dispose freely of natural resources

One of the basic tenets of permanent sovereignty is no doubt the 'sovereign'[7] right of a State or a (colonial) people to dispose freely of its natural resources and wealth within the limits of national jurisdiction.[8] This is clearly reflected in virtually all permanent-sovereignty-related resolutions.

As far as treaty law is concerned, it is most explicitly recognized in Article 1 of the 1966 Human Rights Covenants ('All peoples may, for their own ends, freely dispose of their natural wealth and resources') and Article 21 of the 1981 African Charter on Human and Peoples' Rights ('All peoples shall freely

[5] Finnis, building on the work of the American jurist Hohfeld (Hohfeld (1919)) distinguishes between a 'claim-right' and a 'liberty'. For example, A has a *claim-right* that B should perform in a certain way (A claims, B must); and B has a *liberty* (relative to A) to act, if, and only if, A has *no-claim-right* ('a no-right' or inability) that B should act in a certain way (B may, A cannot). See Finnis (1980: 199). See also Walker (1980: 1,070–1).

[6] Here one may also use the term '(legitimate) expectation' or 'entitlement'. Verwey, who defines such an 'expectation' as '[e]ntitlement whose implementability is not guaranteed by a corresponding obligation to the extent necessary to render it a subjective right' or – as he puts it more loosely – 'the kind of legally "grey zone" commitment, which is more than an offer without engagement but less than a legal obligation (or duty)'. See Verwey (1984: 548). See also Professor Amartya Sen's theory of 'entitlements' and 'metarights', referred to by Chowdhury (1992: 242).

[7] This qualification is used in GA Res. 523 (VI), 626 (VII) and 3175 (XXVIII), and UNCTAD I, General Principle 3, UNCTAD Res. 46 (III) and TDB Res. 88 (XII).

[8] This right to dispose freely of natural resources is closely related to the principle that every State has the right to adopt the social and economic system which it deems most favourable to its development. This is recognized in many UN resolutions, including the 1970 Declaration on Principles of International Law ('Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference by another State', Principle III.4) and Res. 3171 (XXVIII) which reaffirms this as an 'inviolable principle' (preamble, para. 3).

dispose of their wealth and natural resources').[9] The 1992 Biodiversity Convention reaffirms that States have 'sovereign rights ... over their natural resources', and that 'the authority to determine access to genetic resources rests with governments and is subject to national legislation'.[10] The 1994 Energy Charter Treaty recognizes State sovereignty and sovereign rights over energy resources and provides that the treaty 'shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources'. The treaty specifies that each State continues to hold the right to decide which geographical areas within its territory are to be made available for exploration and development of energy resources.[11] The right freely to dispose of natural resources is also recognized in decisions of arbitration tribunals. For example, in the *Texaco Award* (1977) dealing with Libyan oil-nationalization measures it is pointed out:[12]

> Territorial sovereignty confers upon the State an exclusive competence to organize as it wishes the economic structures of its territory and to introduce therein any reforms which may seem to be desirable to it. It is an essential prerogative of sovereignty for the constitutionally authorized authorities of the State to choose and build freely an economic and social system. International law recognizes that a State has this prerogative just as it has the prerogative to determine freely its political regime and its constitutional institutions.

In the *Liamco case* (1977) a similar view was expressed when the sole arbitrator Mahmassani observed that Resolution 1803 (XVII) recommended respect for States' sovereign right to dispose of their wealth and natural resources and concluded that 'the said Resolutions, if not a unanimous source of law, are evidence of the recent dominant trend of international opinion concerning the sovereign right of States over their natural resources'.[13] The *Aminoil Award* (1982) notes that many constitutions provide that all natural resources are the property of the State.[14]

[9] Article 21.1. In addition, Art. 21.3 of the African Charter provides: 'States parties ... shall individually and collectively exercise the right to free disposal of their wealth and resources.' [10] Preamble and Art. 15.1.

[11] Article 18.3 of the ECT, signed in Lisbon, 17 December 1994. Text in 37 *Official Journal of the European Communities*, No. C 344, p. 15 and in 34 ILM (1995), p. 360.

[12] *Texaco* v. *Libyan Arab Republic*, reprinted in 17 ILM (1978), pp. 3–37, para. 59; also in 53 ILR, p. 389.

[13] *Liamco* v. *Libya*, reprinted in 20 ILM (1981), pp. 1–87, at p. 53, para. 100; 62 ILR, p. 140, para. 100.

[14] *Kuwait* v. *Aminoil*, reprinted in 21 ILM (1982), pp. 976–1,053. For example, the Kuwaiti Constitution provides: 'All of the natural wealth and resources are the property of the State' (Art. 21) and 'Any concession for the exploitation of a natural resource or of a public utility shall be granted only by law and for a determinate period' (Art. 152).

Arbitral procedures and academic analyzes have stimulated considerable debate on the question to what extent States have the right to dispose of natural resources within their territories by entering into contracts with other subjects, and to what extent States retain a right to terminate or change contractual arrangements with foreign investors; in other words, what is the meaning and what are the implications of the adjectives 'permanent',[15] 'inalienable'[16] and 'full'[17] before 'sovereignty'.

The *Texaco Award* clearly indicates that the right of States to dispose of their natural resources includes the right to exercise their sovereignty by undertaking international commitments *vis-à-vis* other States and non-State partners, intergovernmental organizations or private foreign entities:

> The State by entering into an international agreement with any partner whatsoever exercises its sovereignty whenever the State is not subject to duress and where the State has freely committed itself through an untainted consent.[18]

For this purpose the sole arbitrator Dupuy introduced a distinction between 'enjoyment' and 'exercise' of sovereignty: in his view the notion of permanent sovereignty can be completely reconciled with the conclusion by a State of agreements which leave to the State control of the activities of the other contracting party within its territory.[19] To decide otherwise would be to consider any contract entered into between a State and a foreign private company to be contrary to the rule of *jus cogens* whenever it concerns the exploitation of natural resources. Similarly, the *Liamco Award* calls the right to conclude contracts 'one of the primordial civil rights acknowledged since olden times'.[20] With respect to the Kuwaiti claim that permanent sovereignty over natural resources has become an imperative rule of *jus cogens* prohibiting States from affording, by contract or treaty, guarantees of

[15] This adjective is used in nearly all permanent sovereignty resolutions, with the exception of GA Res. 523 (VI) and 626 (VII).

[16] Reference to permanent sovereignty as an 'inalienable right' of States (and occasionally of peoples) is made in GA Res. 2158 (XXI), 3171 (XXVIII) and 3281 (XXIX).

[17] See GA Res. 2386 (XXIII), 2626 (XXV), 3171 (XXVIII), 3201 (S-VI), 3202 (S-VI, section VIII), 3281 (XXIX), 3336 (XXX), 3517 (XXX), 32/9, 41/128 and ECOSOC Res. 1737 and 1956.

[18] *Texaco* v. *Libya*, 17 ILM (1978), paras. 66–7.

[19] According to Dupuy a concessionary contract is not an alienation of such sovereignty, but only a limitation: 'The State retains, within the areas which it has reserved, authority over the operation conducted by the concession holder and the continuance of the exercise of its sovereignty is manifested, for example, by the various obligations imposed on its contracting party': *Texaco* v. *Libya*, 17 ILM (1978), p. 26, para. 77. The findings of Dupuy have been the object of extensive analyses, some highly critical: see, among others, Kooijmans (1981), Higgins (1983), Atsegbua (1993), Rigaux (1978) and Sterne (1980). See also Delaume (1981: 796–806).

[20] *Liamco* v. *Libya*, 20 ILM (1981), p. 105, section V-5.

any kind against the exercise of the public authority in regard to all matters relating to natural riches, the *Aminoil* tribunal straightforwardly concludes: 'This contention lacks all foundation.'[21]

According to Jiménez de Aréchaga, permanent sovereignty over natural resources means that 'the territorial State can *never* lose its legal capacity to change the destination or the method of exploitation of those resources, *whatever* arrangements have been made for their exploitation'.[22] The inalienable and permanent character may also mean that the right to dispose freely of natural wealth and resources can always be regained, if necessary unilaterally, notwithstanding contractual obligations to the contrary.[23] Seidl-Hohenveldern is of the view that the word 'permanent' should be understood as indicating that the State concerned 'can avail itself of this sovereign right at any time', but that it does not entitle the State concerned 'to disregard at its whim the earlier waiver or transfer of such rights'.[24] Many would agree that the purpose of expressing such views is to emphasize that, as Abi-Saab puts it: 'sovereignty is the rule and can be exercised at any time, that limitations are the exception and cannot be permanent, but limited in scope and time.'[25]

It is also widely recognized that a State has considerable discretion in the management of its natural resources and may accept obligations with regard to the exercise of its permanent sovereignty by arrangements freely entered into, as long as they do not amount to a transfer of its sovereign powers to a private party. The question then arises where the discretion of a State reaches its limits, taking the alleged 'inalienable' and 'permanent' nature of sovereignty into account. In view of the fact that in a North–South context foreign-investment agreements were often perceived – as Nigeria put it during the debate on General Assembly Resolution 1803 (XVII) – as 'agreements between a lion and a rabbit',[26] the stipulation that such agreements be 'freely entered into'[27] seems to be an important yardstick underlining the right of States to dispose freely of their natural resources.

During recent years attempts have been made to resolve the controversy regarding the alleged inalienability of permanent sovereignty by a more precise analysis of how it works in practice. The arbitral awards referred to above and the work of, among others, the ILA have been instrumental in

[21] *Kuwait* v. *Aminoil Award*, 21 ILM (1982), p. 1,021, para. 90(2).
[22] Emphasis added. Aréchaga (1979: 297). [23] See Banerjee (1968: 515–46).
[24] Seidl-Hohenveldern (1992: 28). [25] Abi-Saab (1984: 48, para. 58).
[26] UN Doc. A/C.2/SR.845, 20 November 1962, p. 295, para. 34.
[27] Paragraph 8 of the 1962 Declaration on Permanent Sovereignty over Natural Resources.

this. The ILA included the following paragraph in its 1986 Seoul Declaration: 'Permanent sovereignty ... is inalienable. A State may, however, accept obligations with regard to the exercise of such sovereignty, by treaty or by contract, freely entered into.'[28] It follows that, in each particular case, verification should occur as to whether the act would in fact alienate the sovereignty of a State over its natural resources. This would also include verification in the case of changed circumstances. As Chowdhury suggested:[29]

> the principle could similarly be invoked in cases where due to changed circumstances an agreement may be regarded as having become so onerous or disadvantageous to a State as to amount to a derogation of the sovereignty of that State. The State could not be expected to allow such arrangements to operate which were manifestly against the interest of its people.

In conclusion, it is now commonly accepted that the principle of permanent sovereignty precludes a State from derogating from the essence of the exercise of its sovereign rights over its natural resources or – as Dupuy puts it – 'alienating' its sovereignty over them, but that a State may by agreement *freely entered into* accept a partial limitation of the exercise of its sovereignty in respect of certain resources in particular areas for a specified and limited period of time.[30]

The right to explore and exploit natural resources freely

Obviously, the right of free disposal of natural resources and wealth is the seminal source of a series of corollary rights of the State, including the right freely to determine and control the prospecting, exploration, development, exploitation, use and marketing of natural resources and to subject such activities to national laws and regulations within the limits of its exclusive economic jurisdiction under prevailing international law. All these rights (of States, nations and peoples) are specifically mentioned in UN resolutions, particularly in General Assembly Resolutions 626, 1803, 2158 and 3171. States are said to have the right 'freely to use and exploit'[31] and 'exercise effective control over them and their exploitation',[32] countries and nations the right 'freely to dispose' or 'determine the use of',[33] and peoples

[28] Seoul Declaration, Principle 5.2. [29] Chowdhury (1988: 64).
[30] See also the findings of the tribunal in the *Aminoil case*, 21 ILM (1982), p. 1,021, para. 90(2), and chapter 11, pp. 374–7. [31] GA Res. 626 (VII), 21 December 1952.
[32] Paragraph 4(e) of the NIEO Declaration, GA Res. 3201 (S-VI, 1974).
[33] GA Res. 523 (VI) and 1803 (XVII); UNCTAD I, General Principle 3 (1964); UNCTAD Res. 46 (III, 1972); and TDB Res. 88 (XII, 1972).

the right 'freely to use and exploit'[34] their natural wealth and resources. General Assembly Resolution 2158 (XXI) includes the right of developing countries to 'effectively exercise their choice in deciding the manner in which the exploitation of their natural resources should be carried out'. These rights were formulated by developing countries with the aim of securing effective control over their natural resources and to maximize the benefits arising from their exploitation.[35]

As far as treaty law is concerned, these rights are referred to most emphatically in the law of the sea treaties. The 1958 Convention on the Continental Shelf provides that the coastal State exercises over the continental shelf 'sovereign rights for the purpose of exploring it and exploiting its natural resources' and adds that these rights 'are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State'.[36] This phrase has been repeated literally in Article 77.1 of the 1982 Convention on the Law of the Sea. Article 56.1(a) on the Exclusive Economic Zone contains a more elaborate provision, declaring that in the EEZ the coastal State has:

> sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.

The Human Rights Covenants of 1966 formulate the 'inherent right of peoples to enjoy and utilize fully and freely their natural wealth and resources'.[37] In Article IV of the Treaty for Amazonian Co-operation (1978), the contracting parties declare that 'the exclusive use and utilization of natural resources within their respective territories is a right inherent in the sovereignty of each State'.[38] The 1994 Energy Charter Treaty recognizes

[34] GA Res. 626 (VII), preamble, para 3.

[35] Paragraph 4(e) of the NIEO Declaration articulates it as follows: 'In order to safeguard these resources . . .' [36] Articles 2.1 and 2.3 respectively.

[37] International Covenant on Civil and Political Rights, Art. 25; International Covenant on Economic, Social and Cultural Rights, Art. 47. See also chapter 2, p. 56.

[38] Text in 17 ILM (1978), p. 1,045. See also the preamble and section II on Environmental Policy in the Declaration of San Francisco de Quito (1989) of the Ministers of Foreign Affairs of the parties to the Treaty of Amazonian Co-operation, and paragraph 4 of the Amazon Declaration (1989) in which the Presidents of the States parties to the Treaty for Amazonian Co-operation 'reaffirm the sovereign right of each country to manage freely its natural resources', while referring to their 'sovereign responsibilities to define the best ways of using and conserving this wealth'.

sovereign rights of States parties over energy resources, in particular the rights to determine in which areas of their territories exploration and development of energy resources can take place and at what rate, and to participate in such exploration and exploitation, *inter alia*, through direct participation by the government or through State enterprises.[39]

In the *Fisheries Jurisdiction cases* (1974), the ICJ recognized that under customary international law, as it had crystallized after the 1958 and 1960 Conferences on the Law of the Sea, a coastal State had the right to establish a twelve-mile exclusive fishery zone and preferential rights of fishing in adjacent waters 'to the extent of the special dependence of its people upon the fisheries in the seas around its coasts for their livelihood and economic development'.[40]

Various arbitral awards have recognized the increased role of States in the management and exploitation of natural resources. For example, the tribunal in the *Aminoil case*, which had been instructed to have 'due regard to . . . the principles of law and practice prevailing in the modern world', noted the 'profound and general transformation in the terms of oil concessions that occurred in the Middle East, and later throughout the world' by which 'the State thus became, in fact if not in law, an associate whose interests had become predominant'. Consequently, it considered the Kuwaiti decision to terminate Aminoil's concession for exploration and exploitation of petroleum and natural gas was in itself lawful in order to enable Kuwait 'to take over full ownership of its oil resources and put them under national management'.[41] In the international law literature no one is casting any doubt on this corollary right.

In conclusion, there is general agreement that the right freely to explore and exploit natural resources is one of the core rights derived from the principle of permanent sovereignty.

The right to regain effective control and to compensation for damage

As discussed in chapter 5,[42] since 1972 a series of UN resolutions have stated that permanent sovereignty is also valid for peoples and territories under

[39] Article 18.3 of the ECT.

[40] *ICJ Reports* (1974), Merits, p. 34, para. 79. See also p. 23, para. 55.

[41] *Kuwait* v. *Aminoil*, 21 ILM 1982, pp. 1,019–27, paras. 97–114. The tribunal considered the nationalization decree as 'a necessary protective measure in respect of essential national interests which it [i.e., the Kuwaiti Government] was bound to safeguard' (p. 1,027, para. 114).

[42] See pp. 143–60 above.

alien occupation, foreign domination or *apartheid*. This was the *leitmotiv* for the UN Council for Namibia in drawing up Decree No. 1 for the Protection of the Natural Resources of Namibia (1974) and for the General Assembly in adopting resolutions pertaining to the rights of the Palestinian and Arab peoples in territories occupied by Israel.[43] Likewise, paragraph 4(f) of the NIEO Declaration provides that the NIEO should be founded, among other things, on respect for the following principle:

> All States, territories and peoples under foreign occupation, alien and colonial domination or apartheid have the right to restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those States, territories and peoples.[44]

These and other efforts attempted to vest the right to *permanent* sovereignty over natural wealth and resources in peoples of occupied States and non-self-governing territories and to ensure that even those who could *not yet or no longer exercise* their right of sovereignty over these resources should still be entitled to claim ownership over them. Security Council Resolution 687 (1991), which embodies the comprehensive peace package imposed on Iraq after the Gulf War in 1990–1:

> reaffirms that Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and depletion of natural resources . . . as a result of Iraq's unlawful invasion and occupation of Kuwait.[45]

Such a resolution could be interpreted as an effort to protect the natural resources of States and peoples in times of armed conflict, and brings it within the purview of concerns of peace and security.[46] The most important general reflection of this type of claim in treaty law may be found in the 1966 Human Rights Covenants: 'In no case may a people be deprived of its own means of subsistence.'[47]

With respect to permanent sovereignty over 'national' resources in the territories occupied by Israel, both the Security Council and the General Assembly have recognized the applicability of the law of belligerent occupation in general and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War in particular. A basic rule of the law of belligerent occupation is that rights of sovereignty do not pass to the occupier. This and other basic rules are codified in, among other

[43] In more general terms, Res. 3175, 3201, 3281 and 3336 address this issue.
[44] Article 16.1 of the CERDS and para. 33 of the Lima Declaration (UNIDO II, 1975) express this in similar terms.
[45] UN Doc. S/RES/687, 3 April 1991, para. 16.
[46] Schrijver (1994c).
[47] Article 1.2. See also Art. 25 and Art. 47 of the two Covenants, respectively.

documents, the Regulations respecting the Laws and Customs of War on Land, annexed to the Hague Convention No. IV of 1907, adopted at the second Hague Peace Conference. They include rules with respect to property.[48] Movable property, belonging to the occupied State and which may be used for military operations, may be taken. With respect to immovable property it is provided in Article 55 of The Hague Regulations that:

> The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied territory. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.[49]

The concept of 'usufruct' of a property emphasizes that the occupying State may not own but only use it, subject to the requirement that the occupying State 'must safeguard the capital of these properties'. While usufruct of renewable resources may give no rise to particular problems (except for creating vested interests for continued occupation), its application to non-renewable resources such as minerals is controversial. For example, the applicability of this article to the question of land and other natural resources in territories occupied by Israel was the subject of intensive discussion, especially regarding Israel's exploration for and production of oil in the Sinai and the Suez area.[50] Some argued that the extraction of minerals was a depletion of capital, if not spoliation of natural resources. Others argued that Article 55 only prohibits wanton dissipation or destruction or abusive exploitation of public resources.

[48] As a general rule, private property cannot be confiscated and requisitions may only be made for the needs of the army of occupation. For example, the Supreme Court of Israel has reportedly held that the requisitioning of private land in the occupied territories for the establishment of settlements not required for security reasons was contrary to Art. 52 of the Hague Regulations. See Blaine Sloan, 'Study of the Implications, under International Law, of the United Nations Resolutions on Permanent Sovereignty over Natural Resources on the Occupied Palestinian and other Arab Territories and on the Obligations of Israel concerning its Conduct in these Territories', reproduced in UN Doc. A/38/265, 21 June 1983, p. 13.

[49] In addition, Art. 147 of the Fourth Geneva Convention provides that 'grave breaches' of the Convention, if committed against persons or property protected by the Convention, include 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'.

[50] See US Department of State Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez, in 16 ILM (1977), p. 733; Israeli Ministry of Foreign Affairs Memorandum of Law on the Right to Develop New Oil Fields in Sinai and the Gulf of Suez, 17 ILM (1978), p. 432. See also Gerson (1977: 729–33) and, for a somewhat different view, Clagett and Johnson (1978).

With reference to the interpretation rule of Article 31 of the Vienna Convention on the Law of Treaties (in accordance with 'the ordinary meaning of the terms'), Sloan concludes that to 'safeguard the capital' any exploitation of mineral resources should be prohibited.[51] He also takes the view that the law of belligerent occupation gives some support to the principle of permanent sovereignty, while in its turn this principle enhances and reinforces the law of belligerent occupation with respect to natural resources in occupied territories.[52] Yet, in practice, difficult questions can still arise. For example, the use of sand, water and building materials by the occupying powers is probably not wrongful, especially if it is used in the interests of the inhabitants of the area itself. Would this by definition be different for the use of oil and gas? If these are used for trading rather than for domestic use, this obviously would be a different matter. It can fairly be stated that under international law a breach of the obligations of an occupying State with respect to natural resources in occupied territories involves a duty to make reparation. Compensation should be paid anyhow by the occupying State to the legitimate government, whether or not the act is regarded as wrongful in international law. The obligation to make reparation is reinforced by that element of the principle of permanent sovereignty calling for restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources of territories and peoples under foreign occupation.

The legal instruments referred to in this section and the main trend in literature emphasize the right of peoples of occupied States and non-self-governing territories to regain effective control and to restitution of natural resources and compensation for damage inflicted by third States or enterprises. The right to *restitutio in integrum* or equivalent compensation, financially or otherwise, is a principle applicable to both the law of belligerent occupation and to the law of permanent sovereignty where the rights of States and peoples have been violated. Both of them have as an important objective the protection of sovereign rights to land and natural resources in occupied territories and to reserve the benefits from their exploitation for the legitimate holders of these rights.

The right to use natural resources for national development

The rights freely to dispose of and to exploit natural resources are closely related to the right of States and peoples to use natural resources for their

[51] Sloan (1983: 14–15, para. 32). [52] Ibid., p. 21, para. 52.

development plans; mention of such rights regularly recurs in UN resolutions. For example: General Assembly Resolution 626 (VII) stipulates that States may exercise their rights freely to use and to exploit their natural wealth and resources 'wherever deemed desirable by them for their own progress and economic development'; Resolution 1803 (XVII) refers in this connection to 'the interest of ... national development and of the well-being of the people of the State concerned' and emphasizes that economic (including investment) agreements '*shall* be such as to further [the developing countries'] independent national development and *shall* be based upon respect for their sovereignty over their natural wealth and resources' (emphasis added); the Namibia Decree and the General Assembly resolutions on permanent sovereignty over national resources in territories occupied by Israel obviously purport to reserve the use of natural resources for the benefit of the Namibian and of the Palestinian and other Arab peoples, respectively; and, finally, Article 7 of CERDS provides that 'each State has the right and the responsibility ... fully to mobilize and use its resources' in order 'to promote the economic ... development of its people'.

Resolution 2158 (XXI) was the first to link up the right to permanent sovereignty with claims of developing countries to obtain a larger share in the processing, marketing and distribution of natural resources.[53] This claim is also included in the NIEO resolutions, albeit not always in permanent-sovereignty-related paragraphs but in those claiming a right to attain 'just' and 'stable, equitable and remunerative' prices[54] and a right to concert pricing policies, co-ordinate production policies and to assemble in producers' associations.[55] Lastly, in Principle 2 of the 1992 Rio Declaration the words 'and developmental' were added to the well-known Stockholm Principle 21 formula. The added words express the conviction of developing countries that environmental policies cannot override their developmental policies, especially not in respect of exploitation of natural resources.

In treaty law there is no immediate, explicit recognition of the right of States to use and exploit their natural resources for their own economic and

[53] The General Assembly recognizes in this resolution that 'the natural resources of the developing countries constitute a basis of their economic development in general and of their industrial progress in particular', that 'it is essential that their exploitation and marketing should be aimed at securing the highest possible rate of growth of the developing countries', and that 'this aim can better be achieved if the developing countries are in a position to undertake themselves the exploitation and marketing of their natural resources'. Res. 3171 (XXVIII) and ECOSOC Res. 1737 (LIV, 1973) specify that a 'better utilization and use of natural resources must cover all stages, from exploration to marketing'. [54] See also Schachter (1975: 101).

[55] Cf. GA Res. 3171 (XXVIII), operative para. 7 and Art. 5 of CERDS. See also Khan (1982: 17–23).

developmental policies. For example, the International Tropical Timber Agreements (1983 and 1994) merely reaffirm 'the sovereignty of producing members over their natural resources'. The 1992 Climate Change Convention is one of the few multilateral treaties which include an explicit reference to 'the sovereign right to exploit their own resources pursuant to their own ... developmental policies'.[56] One of the objectives of the 1994 Energy Charter Treaty is to assist the Commonwealth of Independent States (CIS) and the countries of Central and Eastern Europe to develop their energy potential and to catalyze economic growth. In addition, the permanent-sovereignty-related articles of the State-succession treaties of 1978 and 1983 implicitly intend to reserve the benefits of the exploitation of natural resources for the peoples of newly independent States. Similarly, a major *leitmotiv* in initiating the drafting of a new convention on the law of the sea during the early 1970s was the need to reserve natural resources in sea areas, within the limits of a substantially extended economic jurisdiction, for promoting coastal (developing) States' development.[57]

The developing countries' efforts to give legal expression to their claim to have a larger share in the processing, marketing and distribution of their natural resources are evident in other areas of international economic law as well, for example in the Convention on a Code of Conduct of Liner Conferences (1974).[58] The Convention aims to increase the share of developing countries in the transportation of world freight up to 40 per cent.[59] The Lomé IV Convention (1989), the framework for international development co-operation between the European Community and African, Caribbean and Pacific States, includes amongst its objectives:

> to contribute to optimal and judicious exploration, conservation, processing, transformation and exploitation of the ACP States' natural resources in order to enhance the efforts of ACP States to industrialize and to achieve economic diversification.[60]

In addition, various commodity agreements are intended to stabilize and, if possible, increase commodity prices, while also raising the share of

[56] See chapter 4, p. 139.

[57] See chapter 7, pp. 205–14. See also the preambular paragraph of the 1982 Convention, where the States parties, with due regard for the sovereignty of all States, refer to the objective to 'promote the equitable and efficient utilization of their resources'.

[58] Text in 13 ILM (1974), pp. 917–47. It should be noted that exports by liner consist largely of packaged, processed and semi-processed goods and raw materials in small quantities only. Most raw materials are shipped by bulk carriers which are time- or voyage-chartered.

[59] See Mahalu (1986: 269–70).

[60] Article 220(f). See also Art. 186.1.

commodity-exporting countries in the processing, marketing and distribution phases.[61]

In the 1947 GATT text only one clause was included on commodity-trade regulation, in the article dealing with 'exceptions'. Under Article XX(h) measures undertaken in pursuance of obligations under any intergovernmental commodity agreement may, under exceptional circumstances, deviate from the Most-Favoured-Nation standard and other GATT requirements for trade liberalization. GATT Article XVIII, entitled 'Governmental Assistance to Economic Development', is a forerunner of the application of the emerging principle of preferential treatment and economic protection of developing countries.[62] It provides 'those contracting parties the economies of which can only support low standards of living and are in the early stages of development' with the opportunity, under specific circumstances, to protect their infant industries and other 'production structures'.[63] In 1965, a new chapter was added to GATT entitled 'Trade and Development'. Obviously inspired if not provoked by UNCTAD I (1964), it is acknowledged in Part IV that there is a need to provide 'a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development'. Part IV expresses a strong awareness of the dependence of many developing countries on commodity exports and calls for 'more acceptable conditions of access to world markets for these products' and 'measures designed to attain stable, equitable and remunerative prices'.[64] This development-based approach to international commodity regulation was further elaborated in the 1976

[61] For an analysis see Khan (1982: 17–23) and Chimni (1987: 37–59).

[62] Verwey (1990: 125–8). See also Verwey (1983: 374–6 and 391–9).

[63] Sections A and C. Section B is intended to safeguard their development programmes by allowing measures aimed at maintaining or acquiring adequate levels of monetary reserves. With respect to tariff negotiations, this has been exemplified in Art. XXVIII *bis*, especially para. 3(b) which, *inter alia*, provides 'adequate opportunity to take into account the needs of less developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of those countries to maintain tariffs for revenue purposes'.

[64] Article XXXVI of the GATT, as amended in 1965. In the subsequent Arts. XXXVII and XXXVIII the contracting parties committed themselves to take individual and joint action towards these objectives, albeit not in the form of hard-core binding obligations but in terms of 'shall to the fullest extent possible' and 'accord high priority'. In 1994 these texts were maintained. According to Art. XIV.1 of the Agreement Establishing the World Trade Organization (WTO) all previous GATT Agreements shall apply to the WTO Agreement as well as some thirty new Uruguay Round Agreements annexed to it. This is referred to as the 'single agreement approach' or the 'single undertaking approach'. See also the First Report of the Committee on International Trade Law of the International Law Association, *Report of the Sixty-Sixth Conference, Buenos Aires, Argentina* (1994) pp. 244*ff*.

Integrated Programme for Commodities, adopted by UNCTAD IV,[65] and in the Agreement Establishing the Common Fund for Commodities.[66]

As far as arbitral decisions are concerned, the progressive recognition of the right of States to use their natural resources for their own development may be illustrated by comparing the 1958 *Aramco Arbitration* and the 1982 *Aminoil Arbitration*. The issue at stake in the former was the interpretation of a concession agreement of 1933, by which Aramco had acquired from Saudi Arabia 'the exclusive right, for a period of sixty years ... to explore, prospect, drill for, extract, treat, manufacture, deal with, carry away and export petroleum'. When, in 1954, Saudi Arabia concluded an agreement with shipowner Onassis for the transport of all oil produced in Saudi Arabia, Aramco challenged this agreement. An arbitration tribunal was set up, which found that Saudi Arabia had infringed upon Aramco's rights under the 1933 agreement: 'the rights and obligations of the concessionary company are in the nature of acquired rights and cannot be modified without the Company's consent'.[67] In contrast, the Aminoil Award acknowledged the transformations in the oil-concession regimes in many developing countries and throughout the world[68] and the tendency of States to take

[65] UNCTAD Res. 93 (IV), 30 May 1976.

[66] Text in 19 ILM (1980), pp. 896–937. The Common Fund, with headquarters in Amsterdam, has three main functions:

1. to contribute, through its First Account, to the financing of international buffer stocks;
2. to finance, through its Second Account, diversification of production in developing countries and to expand processing, marketing and distribution of primary products by developing countries with a view to promoting their industrialization and increasing their export earnings; and
3. to promote co-ordination and consultation with regard to measures in the field of commodities.

The Agreement entered into force on 19 June 1989 after ratification by ninety States which together had subscribed to two-thirds of the obligatory contributions and contributed 50 per cent of the envisaged voluntary contributions. See for an insider's account Megzari (1989: 205–30).

[67] The tribunal pointed out: 'Nothing can prevent a State in the exercise of its sovereignty, from binding itself irrevocably by the provision of a concession and from granting to the concessionaire irretractable rights' (text in 27 ILR (1963), pp. 117–233, at p. 168). One arbitrator, Mr Hassan from Egypt, filed a dissenting opinion. In his view, the exclusive rights granted to Aramco only related to activities within the concession area in Saudi Arabia and the tribunal was wrong to construe an exclusive right of maritime transport. Higgins notes that the *Aramco Award* so heavily emphasizes the rights that are to be deduced from the legal nature of an oil concession, and from the established practice of the oil industry, that it never really addresses the question of whether a State's sovereign right to engage in regulatory action would warrant abrogation of contractual rights. See Higgins (1983: 341). Cf. also Mouri (1994: 227) and Makarczyk (1988: 311 at note 39).

[68] *Kuwait* v. *Aminoil*, 21 ILM (1982), pp. 1,023–4, paras. 97–9.

a major role in the management of their natural resources in order to secure more benefits:

> This Concession – in its origin a mining concession granted by a State whose institutions were still incomplete and directed to narrow patrimonial ends – became one of the essential instruments in the economic and social progress of a national community in full process of development. This transformation, progressively achieved, took place at first by means of successive levies going to the State, and then through the growing influence of the State in the economic and technical management of the undertaking ... and the regulation of works and investment programmes. The contract of Concession thus changed its character and became one of those contracts in regard to which, in most legal systems, the State, while remaining bound to respect the contractual equilibrium, enjoys special advantages.

In summary, the emergence of the principle of permanent sovereignty over natural resources is closely linked to the cause of promoting the development of developing countries and of protecting the right of peoples which are as yet unable to exercise their right to political self-determination. In treaty law, arbitral decisions and the literature there is recognition of the right of States and peoples to use their natural resources in order to promote their national development.

The right to manage natural resources pursuant to national environmental policy

During the early 1970s, especially at and after the Stockholm Conference, a debate took place on how to balance permanent sovereignty over natural resources with a State's responsibility to preserve the environment. While some duties and responsibilities with respect to the latter were formulated,[69] it was consistently acknowledged that every State had the right to pursue its own environmental policies. This is clearly reflected in Principle 21 of the 1972 Stockholm Declaration and its nearly identical counterpart in the 1992 Rio Declaration.[70] Principle 21 reads:

> 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.

[69] See pp. 324–7 below.

[70] See chapter 4, pp. 125–40 for a discussion and comparison of the Stockholm and Rio Declarations.

In treaty law this is most explicitly spelled out in Article 193 of the 1982 UN Convention on the Law of the Sea:

States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

Several other multilateral conventions refer to or repeat the substance of Principle 21, including the Ozone Layer Convention (1985), the Climate Change and Biodiversity Conventions (1992), and the Desertification Convention (1994). The 1971 Wetlands Convention provides that the inclusion of national sites in the international List of Wetlands does 'not prejudice the exclusive sovereign rights of . . . the party in whose territory the wetland is situated'.[71] The UNESCO World Cultural and Natural Heritage Convention (1972) contains a general reference to sovereignty of States over their natural heritage.[72] Article 19.3 of the Energy Charter Treaty (1994) contains slightly different terms where it provides for the right of each State 'to regulate the resource conservation and the environmental and safety aspects' of the exploration and development of energy resources. In view of their traditional emphasis on such principles as sovereignty and non-interference, it is no surprise that, among the regional and interregional documents, Latin American conventions and declarations include the most explicit references to the right of States freely to manage their natural resources pursuant to their own environmental policies.[73] Other regional conventions, such as the African Convention on the Conservation of Nature and Natural Resources (1968), the Convention on the Conservation of European Wildlife and Natural Habitats (1979) and the ASEAN Agreement on the Conservation of Nature and Natural Resources (1985), are less assertive in this respect. However, the ECE Convention on Long-Range Transboundary Air Pollution (1979) does embody a reference to Principle 21 of the Stockholm Declaration.[74]

The 1992 summit meeting of the Non-Aligned Movement, which took place only a few months after the Rio Conference, reaffirmed the sovereign right of all States to use their natural resources pursuant to their own environmental policies. It was added that, therefore, industrialized countries and international institutions 'should not use environmental considerations as an excuse for interference in the internal affairs of the

[71] Article 2.3. It is notable that such a phrase is not included in CITES (1973).

[72] Article 6.1.

[73] Examples include the Treaty for Amazonian Co-operation (1978), the Declaration of San Francisco de Quito (1989) and the Amazon Declaration (1989). Text in Hohmann (1992a: 1,564*ff.*).

[74] See preamble, para. 5.

developing countries or to impose conditionalities in aid, trade or development or development financing'.[75]

The right of States to conserve and manage natural resources pursuant to their own environmental policies undoubtedly is an important element of permanent sovereignty. Modern international (environmental) law also imposes, however, corollary duties and responsibilities on States which qualify this right. These will be discussed in chapter 10.

The right to an equitable share in benefits of transboundary natural resources

The sharing of transboundary natural resources constitutes a major bone of contention among many States. Only a few UN resolutions address the concept of shared natural resources, among them CERDS which provides in Article 3:[76]

> In the exploitation of natural resources shared by two or more countries, each State must cooperate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.

It can be inferred that a State has a right to be informed and consulted by neighbouring States, should the latter consider projects involving the use of natural resources of a transboundary character. In addition, some texts provide for equitable utilization of transboundary resources. For example, the Action Plan adopted by the UN Water Conference in Mar del Plata (Argentina, 1977) included the following recommendation:[77]

> In relation to the use, management and development of shared water resources, national policies should take into consideration the right of each State ... to equitably utilize such resources.

These rights are also emphasized in the UNEP 'Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States',[78] which the General Assembly requested States to use

[75] Final Documents of the Tenth Conference of Heads of State or Government of Non-Aligned Countries, Jakarta, 1–6 September 1992, p. 37, para. 68. See for a discussion Syatauw (1994: 157–60). [76] See chapter 4, pp. 129–34.

[77] UN Doc. E/CONF.70/29, Recommendation No. 91, 1977, p. 53, adopted by consensus.

[78] UNEP GC Dec. No. 6/14, 19 May 1978, adopted by consensus, and reproduced in UN Doc. A/33/25, pp. 154–5. For a brief discussion and appraisal, see chapter 4, pp. 131–3.

as 'principles and guidelines in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States'.[79]

The new law of the sea, in particular international fisheries law, provides for a series of arrangements on equitable utilization and shared responsibilities for the proper management of transboundary fish stocks with a view to achieving a maximum sustainable yield and equitable utilization.[80] Article 83.3 of the 1982 Law of the Sea Convention provides that, pending agreement on delimitation of the EEZ and the continental shelf, the States concerned must make every effort to enter into provisional arrangements of a practical nature and not to jeopardize or hamper the reaching of the final delimitation. International joint development, that is the common exercise of sovereign rights by two or more States for the purpose of exploration and exploitation of the natural resources in an agreed area, is one such provisional arrangement.[81] Sharing of resources can also relate to resource deposits which lie across limits of national jurisdiction and thus are partly subject to the principle of the common heritage of humankind and partly to the natural-resource sovereignty of the coastal State concerned. Article 142 of the Law of the Sea Convention provides that activities in the Area shall be conducted with due regard to the rights and legitimate interests of such coastal States. Similarly, international nature conservation agreements include provisions relating to management of shared resources. Examples in kind include the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals and the 1985 ASEAN Nature Agreement, which stipulates that resource-sharing parties cooperate concerning their conservation and 'harmonious utilization'.[82] Lastly, reference may be made to the 1994 UN Convention on Desertification which provides for 'agreed joint programmes for the sustainable management of transboundary natural resources' as one of the forms of cooperation to combat desertification and mitigate the effects of drought.[83]

There is an extensive body of case law of the ICJ and arbitration tribunals, especially but not exclusively in the field of the law of the sea, with respect to the concept of 'equitable utilization' of shared resources and equitable principles applicable to maritime boundary delimitation.[84] Whereas in the *Norwegian Fisheries case* (1951) the resolution of the resource dispute was

[79] UN Doc. A/RES/34/186, 18 December 1979. [80] See Hey (1989: chapter 5).

[81] See Valencia (1990), Fox *et al.* (1989), Fox (1990) and Orrego Vicuña (1994b).

[82] Article 19 of the ASEAN Agreement on the Conservation of Nature and Natural Resources, Kuala Lumpur, 1985. See also Westing (1993).

[83] Article 11 of the UN Convention to Combat Desertification, Paris, 1994.

[84] See Kwiatkowska (1988), with comments by Professor Góralczyk at pp. 165–7.

effected merely by drawing boundaries, the court emphasized over twenty years later in the *Icelandic Fisheries Jurisdiction cases* (1974) that the concept of shared resources and common property fell outside the exclusive control of one State.[85]

The International Law Association's Helsinki Rules (1966) refer to the right of States to 'a reasonable and equitable share in the beneficial uses of the waters'.[86] Likewise, the Brundtland Group of Legal Experts held that equitable utilization may be considered as a well-established principle of international law and included in its Draft Convention on Environmental Protection and Sustainable Development the following Article: 'States shall use transboundary resources in a reasonable and equitable manner.'[87]

Recently, an increasing but still small number of joint development schemes have been agreed to in fisheries or oil resources.[88] The Rumaila oil field between Iraq and Kuwait was an example. It became a *casus belli* in 1990. Gradually, States appear to be more prepared to enter into joint arrangements concerning transboundary resources,[89] a promising avenue of co-operation which could avoid delimitation conflicts and lead to an early exploitation of transboundary resources with shared benefits.[90]

The right to regulate foreign investment

This section discusses some key rights, emerging from permanent-sovereignty resolutions, with respect to foreign-investment regulation. They include: the right to regulate foreign investment in general; the right to regulate admission of foreign investment; and the right to exercise authority over foreign investment.

The right to regulate foreign investment in general

The principle of permanent sovereignty epitomizes the sovereign right of a host State to regulate and control the activities of foreign investors. This includes prescriptive jurisdiction of the legislature, the executive and the judiciary. It has as its corollaries the obligation of the foreign investor to comply with such rules and regulations and to conform with the economic

[85] *ICJ Reports* (1951), p. 116; *ICJ Reports* (1974), p. 175.

[86] Article IV of the ILA Helsinki Rules on the Uses of the Waters of International Rivers (1966). Text in Hohmann (1992a: 227). For the background and commentary see the ILA Report of the Fifty-Second Conference, Helsinki, 1966, p. 477.

[87] Text of and commentary on Art. 9 of the General Principles Concerning Natural Resources and Environmental Interferences, in Munro and Lammers (1987: 72–5).

[88] See Orrego Vicuña (1994a: 172–3).

[89] Valencia (1990) and Kwiatkowska (1993: 86–96).

[90] Fox *et al.* (1989).

and social policies of the host State; and the obligation of the home State of the foreign investor to refrain from measures and policies which infringe on the permanent sovereignty of the host State or otherwise cause substantial injury to it. These topics were at the heart of the ICC Guidelines for International Investments (1972), the OECD Declaration and Guidelines for Multinational Enterprises (1976), and the Draft UN Code of Conduct on TNCs (1990). As a matter of course, such rights and obligations are subject to the requirements of other principles and rules of international law, including the principles of good faith, *pacta sunt servanda* and non-interference in the internal affairs of other States.[91]

General Assembly Resolutions 1803 (XVII), 2158 (XXI) and 3281 (XXIX) are pertinent ones as far as regulation of foreign investment is concerned. They all affirm the right of States to regulate foreign investment according to their own objectives and development plans. Resolution 1803 declares that the use of natural resources as well as the import of foreign capital required for these purposes 'should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities'. However, it specifies that once a State authorizes the admission of foreign capital, the investment will be governed by the terms of the authorization, national legislation and international law, and that agreements freely entered into should be observed in good faith. In contrast, Resolution 2158 declares, in mandatory terms, that the exploitation of natural resources in each country 'shall always be conducted in accordance with its national law and regulations'.[92] Article 2 of CERDS emphasizes that 'no State shall be compelled to grant preferential treatment to foreign investment'.[93] The NIEO Declaration provides that States, on the basis of their full sovereignty, should take measures in the interest of their national economies to regulate and supervise the activities of TNCs operating within their territory.[94]

As regards treaty law, the 1948 Havana Charter included an interesting

[91] These will be analysed in chapter 10.

[92] Paragraph 4 of GA Res. 2158 (XXI), 25 November 1966.

[93] This clause was inserted at the instigation of Mexico (UN Doc. A/C.2/L.1386 Corr.6, 5 December 1974). Earlier Castañeda in his capacity as chairman of the CERDS Working Group had observed: 'Some jurists and countries maintained, of course, that the "minimum-standard" concept existed in international law and that an alien could receive more favourable treatment than the nationals of a country. Naturally that was rejected by the developing countries, which invoked the principle of sovereign equality embodied in the Charter of the UN as being incompatible with preferential treatment of aliens.' UN Doc. A/C.2/SR.1638, 25 November 1974, p. 384.

[94] Paragraph 4(g) of GA Res. 3201 (S-VII), 1 May 1974.

article on the regulation of foreign investment.[95] Among other things, it recognized that a State, insofar as other agreements would permit, had the right to take any appropriate safeguards necessary to: ensure that foreign investment was not used as a basis for interference in its internal affairs or national policies; determine whether and to what extent and upon what terms it would allow future foreign investment; and prescribe and give effect on just terms to requirements as to the ownership of existing and future investments and to other reasonable requirements with respect to such investments.

Although cast in general terms, the International Covenant on Economic, Social and Cultural Rights (1966) could be interpreted to imply that, under certain conditions, developing countries have a right to treat foreign investors differently than their own nationals where it provides that:

> Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.[96]

The Lomé IV Convention refers to compliance with 'the appropriate laws and regulations of their respective States' and 'the development programme' of the ACP State concerned, and stipulates that investment-protection arrangements do not 'infringe the sovereignty of any Contracting State party to the Convention'.[97] The 1987 ASEAN Investment Agreement provides for the right of host States to govern foreign investment.[98] Similarly, the 1994 Energy Charter Treaty provides for the right to regulate foreign investment, subject to the undertakings in this treaty and to other rules of international law.[99]

Especially relevant is the large body of bilateral investment-protection and investment-promotion treaties (BITs), as discussed in chapter 6. These treaties purport to encourage and protect foreign investment by laying down rules, *inter alia*, on fair treatment, most-favoured-nation and national treatment, expropriation and compensation, the right of investors to repatriate capital and revenues, and dispute settlement. A large majority of both industrialized and developing countries are party to such BITs, of

[95] Article 12, entitled 'International Investment for Economic Development and Reconstruction', of the Havana Charter for an International Trade Organization, 24 March 1948. Text in UN Doc. E/CONF.2/78 and Wilcox (1949: 236–7).

[96] Article 2.3. This may be relevant from the point of view of the modalities and practicalities of the right to expropriate and nationalize; see pp. 285–97 below.

[97] Articles 258.1(a), 259(f)(ii), and 261.4, respectively.

[98] Article III.1 of the ASEAN Investment Agreement. Text in 27 ILM (1988), p. 615.

[99] See Arts. 10 and 18 of the ECT.

which there are now more than 1,000.[100]

Regarding non-binding multilateral instruments other than UN resolutions, it is relevant to refer to the 1976 OECD Guidelines which provide that every State has the right to prescribe the conditions under which transnational enterprises operate within its national jurisdiction, subject to international law and to the international agreements to which it subscribes. This is also reflected in the 1986 Seoul Declaration of the ILA and the 1992 World Bank Guidelines, although the latter focus on promoting foreign investment rather than on host States regulating it.

All the instruments referred to above presume that host States have a general right to regulate foreign investment and to subject those operating within their territories to local law. This right is, however, qualified by overriding provisions of international law incorporated in BITs and MITs and/or obligations arising from general international (human rights) law with respect to the treatment of aliens. These issues will be addressed further in chapter 10.

The right to regulate admission of foreign investment

Resolution 1803 declares that the import of capital required for the development of natural resources should conform with the rules that States deem necessary regarding authorization, restriction or prohibition of such activities.

Only a few multilateral treaties contain provisions pertaining to admission of investments. The 1948 Havana Charter recognized the right of each State 'to determine whether and to what extent and upon what terms it will allow future foreign investment'.[101] Such a provision was not included in GATT, neither in its 1947 nor in its 1994 version, since these agreements do not cover investments. Only the 1994 General Agreement on Trade in Services recognizes, in its preamble, the right of States to regulate the supply of services within their territories in order to meet national policy objectives, and the particular need of developing countries to exercise this right.[102]

As far as regional and interregional instruments are concerned, it is striking that in the notes of and comments to the 1967 OECD Draft

[100] See Peters (1996: 1,130). [101] Article 12.1(c)(ii).

[102] This in view of 'asymmetries existing with respect to the degree of development of services regulations' between developed and developing countries. However, the Agreement stipulates that all domestic regulation affecting trade in services should be administered in a 'reasonable, objective and impartial manner': Art. VI.1, text in 33 ILM (1994), p. 52.

Convention on the Protection of Foreign Property it was provided that 'no State is bound – unless it agreed otherwise – to admit aliens into, or permit the acquisition of property by aliens in, its territory'.[103] The 1973 Agreement on Arab Investment recognizes that it is part of the sovereignty of States to determine the procedure, terms and limits which control Arab investment and to designate the sectors in which such investment can be made. The right to regulate the admission of foreign investment can of course be voluntarily restricted, for example in the context of economic integration between States. Thus, the Agreement on Arab Investment and the EC Treaty limit the right of their member States to restrict the freedom of establishment of each other's enterprises. The member States of the European Union recognize the freedom of establishment of each other's nationals and have relinquished the right to regulate the establishment of foreign companies or firms originating from another EU State.[104] NAFTA (1992), however, still provides that each of the three parties has the exclusive right to perform certain economic activities and to refuse to permit the establishment of foreign investment in such activities.[105] The Energy Charter Treaty (1994) declares the right of each State freely to determine which geographical areas within its territory are to be made available for exploration and development of energy resources, and its right to participate in such exploration and exploitation, for example through State enterprises.[106]

Most BITs contain an explicit provision that foreign investment must be admitted in conformity, and should be consistent, with domestic legislation or that the obligation ('shall') to admit a foreign investment is subject to the contracting parties' right to exercise discretionary powers conferred on them by their own legislation. Some BITs merely require the parties 'to endeavour' to admit such investments subject to their laws and regulations.[107]

In international jurisprudence and arbitral awards, the admission of foreign investment has not been dealt with *expressis verbis*. It has been acknowledged, especially in the oil-nationalization cases, only that States are free to suspend the admission of foreign investors, subject of course to treaty and contractual obligations.[108]

The ICC Guidelines refer to the right of host countries to reserve certain

[103] Paragraph 9 of Notes and Comments to Art. 1(b) of the 1967 OECD Draft Convention on the Protection of Foreign Property: text in 7 ILM (1968), pp. 117–43, at p. 122.

[104] Article 52 of the EEC Treaty, 1957 (now part of the 1992 Maastricht Treaty on European Union).

[105] Article 1101.2 and Annex III of NAFTA.

[106] Article 18.3 of the ECT.

[107] *Cf.* World Bank Group (1992: 24–5).

[108] See especially the *Liamco* and *Aminoil cases*.

sectors for domestic ownership only, while the OECD Declaration explicitly states that it does not deal with the right of member countries to regulate the entry of foreign investment or the conditions of establishment of foreign enterprises. The Draft UN Code of Conduct on TNCs includes the right of States to regulate the entry and establishment of TNCs and to prohibit or limit the extent of their presence in specific sectors.[109] Also the World Bank Guidelines point out that each State maintains the right to regulate the admission of foreign investment, but recommends a general approach of free admission, with certain exceptions such as inconsistency with national security interests.

There is thus ample evidence that States have a general right to regulate the admission of foreign investment.

The right to exercise authority over foreign investment

Various UN resolutions confirm the right of a host State to regulate and exercise authority over imported capital and the activities of foreign investors within its territory, including the taking of legislative and administrative measures and the exercise of judicial authority.[110] Article 2 of CERDS states, among other things, the right of each State to 'regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities'; and to 'supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies'.[111]

Treaty law provides for an extensive follow-up on these issues. The 1948 Havana Charter recognized that a State, insofar as other agreements permit, has the right to formulate appropriate safeguards which it considers necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies.[112] A number of World Bank instruments are also relevant to this issue. The 1965 ICSID Convention underlines that the primary competence for legislating in respect of foreign investors and for settling investment disputes between host States and foreign investors lies with the authorities of the host

[109] UN Doc. E/1990/94, 12 June 1990, para. 48.

[110] Examples include GA Res. 1803, para. 3, the NIEO Declaration, para. 4(g), Action Programme, section Vb, and CERDS, Art. 2.

[111] See also GA Res. 3201 (S-VI), para. 4(g) and 3202 (S-VI), section Vb as well as ECOSOC Res. 1956 (LIX), 25 July 1975, para. 4.

[112] Article 12.1(c)(1) of the Havana Charter.

State.[113] In the case of arbitration, the applicable law will be the law of the contracting State party to the dispute (including its rules on the conflict of laws), albeit in combination with such rules of international law as may be applicable, unless otherwise agreed by the parties.[114] The 1985 MIGA Convention respects the right of a State to exercise control over foreign investment, stipulating that, in guaranteeing an investment, the Agency 'shall satisfy itself as to ... compliance of the investment with the host country's laws and regulations' and 'consistency of the investment with the declared development objectives and priorities of the host country'.[115] In addition, Article 15 of the Convention stipulates as a condition that the Agency does not conclude any contract or guarantee before the host government has approved the issuance of the guarantee by the Agency against the risks designated for cover. It is, therefore, in the last resort left to the discretion of the State concerned to decide on the extent and nature of any involvement of foreign investors in the exploitation of natural resources. The 1994 Energy Charter Treaty includes the right of each State to tax and to levy royalties on exploration and exploitation of energy resources.[116]

Only a few judgments and arbitral awards have addressed, in general terms, issues related to a State's right to regulate foreign investment in a non-expropriation context. In the *Klöckner Award* (1983), an arbitration under ICSID auspices, the tribunal found that the host State had the right to obtain all information concerning the investment as far as relevant to the State and that the company was under an obligation to disclose it. In various ICSID awards, interpreting the applicable law clause of Article 42.1 of the Convention, it is indicated that tribunals must first scrutinize the host State's laws for applicable law or principles.[117] Only where there are no applicable rules or principles in the host State's laws, or if they conflict with an international law rule or principle, is the tribunal to apply international law. This was stated in the *Letco case* (award in 1986) as follows: 'The law of the contracting State is recognized as paramount within its own territory.'[118] However, this thesis is qualified by the important addition that it 'is nevertheless subjected to control by international law'. From the judgment

[113] ICSID provides only for conciliation and arbitration procedures after local remedies have been exhausted if the host country has so stipulated (but few have done so); see Art. 26 of the ICSID Convention and chapter 6, pp. 185–7 above.

[114] Cf. Art. 42.1 of the ICSID Convention.

[115] Article 12(d)(ii) and (iii).

[116] Article 18.3 of the ECT.

[117] See the *Amoco Annulment Decision*, the *Second Amoco Award*, the *Klöckner Annulment Decision* (1985) and the *Letco Award* (1986). For a review, see Westberg (1993: 6–8).

[118] Text in 26 ILM (1987), pp. 647–79, at p. 658.

of the ICJ Chamber in the *ELSI case* (1989) it can also be inferred that a host State has the right to regulate, legislate and exercise authority over foreign investment.[119]

The ICC Guidelines call on the government of the host country to make known to prospective investors its economic priorities and the general conditions that it wishes to apply to incoming direct private investment. Similarly, the OECD Guidelines recognize that the entities of a transnational enterprise located in various countries are subject to the laws of these countries.[120] The Draft UN Code of Conduct provides that States have the right to determine the role that transnational corporations may play in their economic and social development and declares that an entity of a transnational corporation is subject to the jurisdiction of the country in which it operates.[121] Finally, the ILA Seoul Declaration is somewhat more specific where it provides:[122]

> States have the right to regulate, exercise authority, legislate and impose taxes in respect of natural resources enjoyed and economic activities exercised and wealth held in their own territories by foreign interests subject only to any applicable requirements of international law. Except as otherwise agreed by treaty or contract, no State is required to give preferential treatment to any foreign investment.

This is a good summary of the relevant law as to the right of States to regulate foreign investment.

The right to expropriate or nationalize foreign investment

The right to expropriate or nationalize foreign investment, subject to certain conditions, is inherent in the sovereignty of each State and was generally recognized long before the permanent-sovereignty resolutions were adopted. Nonetheless, its formulation in the context of permanent sovereignty and the conditions applying to it have given rise to considerable debate and controversy in the United Nations, as we saw in Part I. The terms 'expropriation', 'nationalization' and 'taking of property' have often been used interchangeably. 'Expropriation' is commonly understood to refer to unilateral interference by the State with the property or comparable rights of an owner in general terms, while 'nationalization' denotes the transfer of

[119] *ICJ Reports* (1989), pp. 15–82. See for a critical review the case note by Mann (1992: 92–102).

[120] Paragraph 7 of the OECD Guidelines.

[121] See paras. 48 and 56 of the Draft Code of Conduct on TNCs, in UN Doc. E/1990/94, 12 June 1990.

[122] Seoul Declaration, section 5.5.

an economic activity to the public sector as part of a general programme of social and economic reform. 'Taking of property' is the most generic term.[123]

This section discusses, firstly, the right to take foreign property in general. Next, it reviews the claims of a majority of developing countries, in some rather controversial provisions of UN resolutions, that this right also includes: the right to determine freely the objective of a nationalization; the right to refrain from paying compensation or to determine freely its amount; the right to settle nationalization and compensation disputes on the basis of national law; and the right of free choice of means for the settlement of disputes.

The right to take foreign property in general

The right to nationalize is explicitly included in only four of the set of General Assembly resolutions under review.[124] It was deleted from the text of what became Resolution 626 (VII)(which nonetheless was branded as the 'nationalization' resolution).[125] After careful preparation by the Commission on Permanent Sovereignty (1958–61), a compromise formula was incorporated in the well-known operative paragraph 4 of the 1962 Declaration, recognizing the right of a State to nationalize, expropriate or requisition property, both domestic and foreign. In the context of the NIEO resolutions adopted during the early 1970s an attempt was made by the Group of 77 to broaden and 'unconditionalize' the right to nationalize by claiming, among other things, that a State has the right to take foreign

[123] See for a discussion of terminology, including terms with respect to 'creeping expropriation' or 'indirect takings', with references to literature and case law Verwey and Schrijver (1984: 4–6); Domke (1961: 558–9); Christie (1962); Higgins (1983: chapters II and IV); Mouri (1994: chapter II) and Weston (1975: 103); see also the *Starrett, Sedco, Amoco, Mobil Oil, Phillips Petroleum* and *Ebrahimi cases*, Iran–US Claims Tribunal (1987–94) and the *ELSI case, ICJ Reports* 1989. In the latter case a Chamber of the Court recognized that preventing a company managing and controlling its business could amount to 'disguised expropriation'. According to the Chamber this had not occurred in that particular case.

[124] These are GA Res. 1803, 3171, 3201 and 3281. In addition, it is also referred to in para. 2 of UNCTAD TDB Res. 88 (XII), para. 2 of ECOSOC Res. 1956, and para. 32 of UNIDO II's Lima Declaration. It should be noted that the exact meaning of the term 'nationalization' has never been clarified during the debates, let alone in the resolutions themselves. Moreover, next to nationalization, the terms 'expropriation' and 'requisition' were used (*cf.* para. 4 of GA Res. 1803), as were the phrases 'nationalize or transfer of ownership to its nationals' (NIEO Declaration, sub-para. (e)) and 'nationalize, expropriate or transfer of foreign property' (Art. 2.2 of the CERDS). The latter phrases may be interpreted as to allow transfer of ownership to private persons and thus allow discrimination between nationals and foreigners and, in the case of Art. 2 of CERDS, also between foreigners of different nationalities. It goes without saying that Western countries considered this a painful aspect of the NIEO package.

[125] See chapter 2, pp. 42–9 above.

property and to transfer ownership to its nationals. Such attempts by the Group of 77 to provide States with broad discretionary powers were underlined by stipulations that the right of nationalization or transfer of ownership is 'the expression of a sovereign power' (TDB Resolution 88 (XII)), 'inviolable' (General Assembly Resolution 3171) and 'an expression of the full permanent sovereignty of the State' (General Assembly Resolution 3201). However, these attempts never received widespread support, capital-exporting countries being particularly reserved, and efforts to 'unconditionalize' the right to nationalization faded away during the late 1970s.[126]

Among the more general multilateral treaties, only the Havana Charter provided that members had 'the right to prescribe and give effect on just terms to requirements as to the ownership of existing and future investments', a provision which has been interpreted to embrace the right to expropriate.[127] More explicit was the 1967 Draft OECD Convention on the Protection of Foreign Property, albeit that its Article 3 on 'Taking of Property' was cast in negative terms: 'No Party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless the following conditions are complied with . . .' The various regional human-rights treaties which do include the right of individuals to own property also acknowledge the right of the State to take property, subject to certain conditions. Likewise, the regional, interregional and bilateral investment-protection treaties and the investment-related chapters of multilateral treaties such as NAFTA and the Energy Charter Treaty all recognize the right of a host State to expropriate foreign property, subject to international law requirements which we will consider in chapter 10.

International jurisprudence does not really provide a hold in this respect. The *Chorzów Factory case* (PCIJ, 1928) is sometimes quoted as one of the first judgments which recognized a State's right to take foreign property, albeit under exceptional circumstances only.[128] In the *Anglo-Iranian Oil Company case* (1951–2), [129] the first and so far last major ICJ case stemming from an act

[126] The right of a host State to nationalize or expropriate alien property is, according to relevant UN resolutions, subject to a number of conditions. These conditions will be analysed in the next chapter.

[127] See World Bank (1992: 84); see also Wilcox (1949: 146–7).

[128] The case itself dealt with liquidation and transfer of assets of enemy property pursuant to peace treaties, something which the court found to be valid under international law and not to be contrary to *bonos mores*. The court recognized that there might be certain exceptions, albeit limited ones, to the principle of respect for 'vested rights'. According to the PCIJ such exceptions included 'expropriation for reasons of public utility, judicial liquidation and similar measures'. See Merits PCIJ (1926), Series A, no. 7, p. 22. See also Seidl-Hohenveldern (1981: 113–14).

[129] See Dolzer (1992b: 167–8).

of nationalization,[130] the court found that it had no jurisdiction to deal with its merits.[131] It should be noted, however, that the claimant party (the UK) did not at any time during the proceedings question *in abstracto* the right of a State to nationalize.[132] Since the *Anglo-Iranian Oil Company case*, the general right of States to nationalize foreign property has gradually become commonly recognized. For example, in the arbitral awards dealing with the nationalizations of oil companies by Libya the right to nationalize was confirmed and frequent references to the relevant UN resolutions were made. In the *Texaco case*, Dupuy pointed out that the right to nationalize should be regarded as the expression of a State's territorial sovereignty.[133] Similarly, in the *Liamco case* Mahmassani stated that the right of a State to nationalize its wealth and natural resources is a sovereign right.[134] In the *Aminoil* case the right to nationalize was also squarely recognized. The tribunal recalled that the oil company itself had proposed a take-over by Kuwait as one of the options (the concession to be replaced by a service contract)[135] and the tribunal had no difficulty in recognizing that a nationalization of Aminoil was in itself lawful[136] and did not constitute a violation by Kuwait of its obligations towards Aminoil.[137]

In its *Amoco Award* (1987) the Chamber of the Iran–US Claims Tribunal recognized nationalization as a 'right fundamentally attributed to State sovereignty' and 'commonly used as an important tool of economic policy by many countries, both developed and developing', and as a right which 'cannot easily be considered as surrendered'.[138]

The recognition of the right to nationalize in general is also reflected in: the ICC Guidelines;[139] the Draft UN Code of Conduct on TNCs which

[130] The 1989 judgment in the *ELSI case* dealt with requisition and, moreover, only with the particular facts of this case and not with general conditions relating to the right to take property.

[131] Makarczyk (1988: 287) observes that 'the quite possibly justified diligence with regard to its jurisdiction deprived not only one of the sides, but the whole of the international community, of a chance to realize its legitimate expectations concerning the solving of a problem which, as the years passed, grew more and more contentious and whose non-settling at the beginning of the nineteen-fifties was painfully felt over twenty years later'.

[132] The British Government claimed that the right to nationalize was subject to requirements of international law which in its view were not met in that present case. See *ICJ Pleadings* (1952), *Anglo-Iranian Oil Co. case*. See also Schwarzenberger (1969: 66–83).

[133] *Texaco* v. *Libya*, 17 ILM (1978), para. 59.

[134] *Liamco* v. *Libya*, 20 ILM (1981), p. 120. He added: '... subject to the obligation of indemnification for premature termination of concession agreements'.

[135] *Kuwait* v. *Aminoil*, 21 ILM (1982), p. 1,012.

[136] Ibid., p. 1,025.

[137] The tribunal recognized that: 'It is incontrovertible that, though without haste, Kuwait had consistently pursued a general programme aimed at placing the state in control over the totality of the petroleum industry.' See *Aminoil Award*, p. 1,025.

[138] *Amoco Award*, p. 243, para. 179. See also Mouri (1994: 346).

acknowledges that 'States have the right to nationalize or expropriate the assets of a transnational corporation operating in their territories';[140] the ILA Seoul Declaration, where it declares that 'A State may nationalize, expropriate, exercise eminent domain over or otherwise transfer property, or rights in property, within its territory and jurisdiction';[141] and the World Bank Guidelines on the Treatment of Foreign Investment, albeit that these are cast in negative terms:

A State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is done in accordance with applicable legal procedures.[142]

Literature on the right to nationalize is abundant. Academic opinion is divided on the modalities of the exercise of the right to nationalize, particularly with respect to the effect of stabilization clauses, standards of compensation and dispute settlement. But the right of a State to nationalize as – in the words of Kronfol – 'an attribute of its sovereignty in the sense of the supreme power which it possesses in relation to all persons and things within its territorial jurisdiction'[143] has long ceased to be a subject of debate.[144] One may therefore concur with the Iran–US Claims Tribunal Chamber which stated in the *Amoco Award* (1987) that the right to nationalize foreign property 'is today unanimously recognized, even by States which reject the principle of permanent sovereignty over natural resources, considered by a majority of States as the legal foundation of such a right'.[145]

The right to determine freely the conditions of a nationalization

Resolution 1803 (XVII) specifies that 'nationalization, expropriation or requisitioning *shall* be based on grounds or reasons of *public utility, security or the national interest* which are recognized as overriding purely individual or

[139] Section V.3.iv.

[140] Paragraph 55 of the Draft Code, as contained in UN Doc. E/1990/94.

[141] Paragraph 5.5 of the Seoul Declaration.

[142] See section IV.1 of the Guidelines on the Treatment of Foreign Direct Investment issued by the Development Committee, September 1992, in World Bank Group (1992: 41).

[143] Kronfol (1972: 22).

[144] Aréchaga goes somewhat further when he states: 'Contemporary international law recognizes the right of every State to nationalize foreign-owned property, even if a predecessor state or a previous government engaged itself by treaty or contract, not to do so. This is a corollary of the principle of permanent sovereignty of a State over all its wealth, natural resources and economic activities and proclaimed in successive General Assembly resolutions.' Aréchaga (1978: 179); see Wellens (1977b: 40); Amerasinghe (1967: 132); Higgins (1983: 276); Dolzer (1985: 214–21); Carreau *et al.* (1980: 554); Rembe (1980: 14).

[145] *Amoco Award*, p. 222, para. 113.

private interests, both domestic and foreign'.[146] As discussed in chapter 2,[147] a debate took place in 1962 on the term 'public utility' (derived from the Spanish word '*utilidad*') in the Chilean draft, and the question whether it should be phrased as 'public purpose', the common term in traditional legal doctrine.[148] This discussion was 'thwarted' by the 'emotional climate generated by the topic of permanent sovereignty over natural resources'.[149] The dispute over this phrase was perhaps rather irrelevant, since the addition of 'security or the national interest' as alternative grounds would have rendered the replacement of 'utility' by the narrower term 'purpose' meaningless anyway. Subsequently, during the early 1970s, Western efforts to include a reference to 'public purpose' in the NIEO resolutions failed.

NIEO Resolutions 3171 and 3201 introduced the purpose of 'safeguarding ... natural resources' as a reason for nationalization or transfer of ownership, whereas Article 2 of CERDS does not mention any ground or reason after OECD countries failed in their attempt to secure a reference to a 'public purpose'.[150]

Conditions like those referred to in General Assembly Resolutions 1803 (XVII) or 3171 (XXVIII) may be multifarious. For reasons of national security a State may decide to place all companies operating in specific sectors of its economy under State control, for example, in the fields of telecommunications, the defence industry, the media or even the oil industry. President Allende of Chile called nationalization 'a development instrument'.[151] As a matter of policy, a State may also decide to 'indigenize' certain foreign firms,[152] which could come close to (but would not necessarily amount to) 'creeping expropriation'.

Few multilateral treaties explicitly address this issue. Those which do mostly include the requirement of a 'public interest' as will be discussed in chapter 10. The same is true for the bilateral investment treaties. Thus no

[146] Paragraph 4 of GA Res. 1803 (XVII), 14 December 1962, emphasis added.
[147] See p. 66 above.
[148] In view of this particular background of the word Rosalyn Higgins seems to interpret it too literally when she observes: 'A public purpose may indeed be for reasons of public utility, but it may readily be appreciated that not all public purposes necessarily entail the transfer of property to a public utility. Reference to the national interest is obviously much wider than public purpose, but perhaps it covers those public purpose reasons that do not lead to public utility.' (Higgins, 1983: 288). The French equivalent of both 'public purpose' and 'public utility' is '*utilité publique*'.
[149] Gess (1964: 420–1).
[150] See chapter 3, pp. 105–9 above. The Draft Code of Conduct on TNCs does also not mention the requirement of a public purpose for nationalization or expropriation.
[151] Address to the General Assembly, twenty-eighth session, 1973.
[152] This policy has been practised by India and a number of Latin American and African countries. For the Nigerian case see Biersteker (1987).

support can be found in treaty law for the alleged claim that expropriating States are free to determine the conditions for expropriation or nationalization, nor can such evidence be found in decisions of international courts and tribunals. As far as jurisprudence is concerned, one can only refer to a few decisions of the European Court of Human Rights with respect to the property-protection clause of the 1952 Protocol. For example, in the *James case* (1986) the court mentioned that legitimate objectives of public interest 'such as pursued in measures of economic reform or measures designed to achieve greater social justice' could justify interference with property, thus indicating a wide margin of discretion for the taking (European) State.[153] In most relevant arbitral decisions,[154] the view has been taken that a lawful nationalization or expropriation must serve a public purpose[155] (see chapter 10), but sometimes with qualifications. For example, in the *Liamco case* it was held:

> As to the contention that the said measures were politically motivated and not in pursuance of a legitimate public purpose, it is the general opinion in international theory [*sic*] that the public utility is not a necessary requirement for the legality of a nationalisation.[156]

The *Texaco Award* recognizes the existence of a 'public purpose' requirement, but acknowledges the difficulty in assessing it. Also the *Amoco Award* points out that such a requirement is easily satisfied by virtue of the 'wide margin of appreciation' doctrine.[157] This is also the main line of reasoning in relevant literature. While many conclude that the demand of a 'public interest' or 'public purpose' should be maintained, there is recognition of the fact that ultimately it is the taking government which determines the public purpose or utility of a particular expropriation, and that in many cases 'it can be taken as impossible that an international court or

[153] Quoted by Brownlie (1990: 537). [154] See the table in Appendix III, p. 410.
[155] See chapter 10, pp. 345–6 below.
[156] Arbitrator Mahmassani was of the view that natural resources, in general, do not belong any more to the owner of the land, but to the community represented by the State as a privilege of its sovereignty. *Liamco Award*, (1977), p. 93. In addition, he observed: 'Nationalization began to be practised on a larger scale and has taken, in general, the feature of a collective legislative measure motivated by the public social policy of the State. It became characterised as a sovereign act, immune from judicial control and subject to international law whenever foreign elements were at issue. After the Second World War, motivated by a nationalistic spirit to stress their prestige and to control their national economy, many of the "new" States and some other old ones had recourse to general measures of nationalization covering chiefly oil concessions and other natural resources and public utilities.' *Liamco Award* (1977), p. 96. [157] Text in Harris (1991: 540).

organization can form a reasonable judgment on the accuracy of a claim by a State that an action served a public purpose'.[158]

In summary, a State is not completely free to determine the justification and conditions for a nationalization but is bound by certain international law requirements. In practice, however, it has wide margins of discretion.

The right not to pay or to determine compensation freely

As regards the right of a nationalizing State to determine the amount of compensation, it should first be recalled that General Assembly Resolution 626 (VII) marks the beginning of the Third World efforts to render payment of compensation a conditional, instead of an absolute, prerequisite. Although at that time many Third World countries still recognized the obligation to pay compensation for nationalization or expropriation, a US amendment reaffirming this principle was rejected.[159] In 1962, while there was no majority support for the proposal submitted by the United Arab Republic and Afghanistan to add 'when and where appropriate' to the clause on compensation after nationalization, the notion of 'appropriate compensation' was resorted to, albeit that payment of such compensation was said to be compulsory ('shall').

Ten years later, however, the majority of the developing countries, notwithstanding fervent Western opposition, inserted provisional phrases into UNCTAD TDB Resolution 88 (XII) asserting that:

> such measures as States may adopt in order to recover their natural resources are the expression of a sovereign power in virtue of which it is for each State to fix the amount of compensation and the procedure for these measures.[160]

Similarly, in Resolution 3171 (XXVIII) the General Assembly:

> *Affirms* that the application of the principle of nationalization carried out by States, as an expression of their sovereignty . . . implies that each State is entitled to determine the amount of *possible* compensation and the mode of payment.[161]

An identical provision was submitted for inclusion in the 1974 NIEO Declaration, but this proposal was withdrawn by the Group of 77 to facilitate consensus with Western countries. The result is that this

[158] See decision of the Bremen Court of Appeals in the *Indonesian Tobacco case* (1959), critically reviewed by Domke (1960: 305). See also O'Keefe (1974: 281), Delupis (1973: 71) and Wellens (1977b: 51–4).

[159] By seventeen votes in favour and twenty-five against, with five abstentions; 11 December 1952, see UN Docs. A/C.2/L.188 and A/C.2/SR. 237, pp. 281–2.

[160] UNCTAD TDB Res. 88 (XII), 19 October 1972; endorsed by para. 16 of GA Res. 3041 (XXVII), 19 December 1972.

[161] Latter emphasis added.

Declaration does not address the question of compensation at all. The CERDS negotiations resulted in a repetition of moves: the Group of 77 proposed a phrase, according to which 'appropriate compensation *should* be paid by the State taking such measures, provided that all relevant circumstances call for it'.[162] The Western group submitted an amendment reading that 'just compensation in the light of all relevant circumstances *shall* be paid'.[163] Eventually, despite Western readiness to accept compromise proposals, the Group of 77 opted for a Mexican amendment which was even more radical and therefore totally unacceptable to the Western side, namely that 'appropriate compensation *should* be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the *State* considers pertinent'.[164]

One particular aspect deserves attention in this discussion of compensation clauses in permanent-sovereignty resolutions. During the debate on the draft Declaration on Permanent Sovereignty over Natural Resources in 1962, Algeria proposed that a State, which during the colonial period had been dispossessed of its property and had seen enterprises set up in its territory, could *not* be obliged to pay compensation: a statement which reminds us of the very concept of permanent sovereignty of peoples. At its initiative a new paragraph 5 of the preamble was inserted into the 1962 Declaration, which indicates that whatever is said in the Declaration on the obligation to pay compensation will not apply with respect to the taking of 'colonial property':

> *Considering* that nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule;

In treaty law, no evidence can be found for the thesis that a nationalizing State has a right to withhold compensation or is free to determine the amount of compensation. On the contrary, it invariably stipulates an obligation to pay compensation and includes qualifications as to the amount of compensation to be paid, as we will see in the next chapter. Nor can evidence be found in the decisions of international courts and tribunals to the effect that a nationalizing State is free unilaterally to determine the amount of compensation. One can only report here, after a review of relevant arbitral awards and State practice, that it is accepted in most cases

[162] UN Doc. A/C.2/L.1386, 21 November 1974, emphasis added.
[163] UN Doc. A/C.2/L.1404, 3 December 1974, emphasis added.
[164] UN Doc. A/C.2/L.1386/Corr.6, 5 December 1974, emphasis added.

involving lawful large-scale nationalizations of the natural-resource sector that only 'partial' compensation has to be paid. This is because the impact of 'full' compensation on the financial resources and the development plans of the nationalizing country would in practice nullify the effect of the nationalization.

With few exceptions,[165] there have been no decisions of international courts and tribunals which have straightforwardly adopted and applied the 'prompt, adequate and effective' compensation rule.[166] The *Texaco Award*, the *Aminoil Award* and the *Ebrahimi Award*[167] are notable examples of references to the 'appropriate compensation' formula in Resolution 1803. In the *INA Corporation* v. *Iran Award* (1985), the chairperson of the Iran–US Claims Tribunal Chamber, Judge Lagergren, observed that 'in the event of large-scale nationalizations of a lawful character, international law has undergone a gradual appraisal, the effect of which may be to undermine the doctrinal value of any "full" or "adequate" (when used as identical to full) compensation standard as proposed in this case'.[168] He noted that 'the flexible contemporary rule of international law on compensation found its most concrete and widely accepted expression in Resolution 1803 (XVII) of the General Assembly of 1962' and concluded:[169]

> I am inclined to the view that 'appropriate', 'fair', and 'just' are virtually interchangeable notions so far as standards of compensation are concerned ... there is a wide choice of well-established methods of valuation applicable and appropriate under different circumstances. Even the notions 'full' and 'adequate' compensation contain, inevitably and with the best of intentions, a margin of uncertainty and discretion.

In the *Ebrahimi* v. *Iran case* (award in 1994) the tribunal stated, so far most explicitly, that:

[165] *American International Group, Inc. et al.* v. *Iran* (1983) and *Sedco* v. *Iran* (1986). See Mouri (1994: 371–2) and Schachter (1984: 122–3). For a contrary view Mendelson (1985: 414) and Norton (1991: 488–90).

[166] It should be noted, however, that the triple standard is increasingly popular in BITs. See chapter 10, p. 354 below.

[167] *Texaco* v. *Libya*, 17 ILM (1978), p. 30, paras. 87–8; *Kuwait* v. *Aminoil*, 21 ILM (1982), p. 1,032, para. 143; *Ebrahimi* v. *Iran*, Iran–US Claims Tribunal, 12 October 1994, pp. 39–40, para. 88.

[168] The Chamber of the tribunal proved to be deeply divided in this case (as it was in most other cases). Two separate opinions and one dissenting opinion were filed with it. The quoted observation of the chairman was the object of a rebuttal by Judge Holtzmann, the US member of the Chamber. See also Lagergren (1988: 8).

[169] Separate opinion of Judge Lagergren in *INA Corporation* v. *Iran* (1985), reprinted in 8 Iran–US CTR, pp. 385–9. For a discussion see Schachter (1989: 8–9) and Mouri (1994: 348–9 and 366–7).

> while international law undoubtedly sets forth an obligation to provide compensation for property taken, international law theory and practice do not support the conclusion that the 'prompt, adequate and effective' standard represents the prevailing standard of compensation. Rather, customary international law favors an 'appropriate' compensation standard ... The gradual emergence of this rule aims at ensuring that the amount of compensation is determined in a flexible manner, that is, taking into account the specific circumstances of each case. The prevalence of the 'appropriate' compensation standard does not imply, however, that the compensation quantum should be always 'less than full' or always 'partial' ... Considering the scholarly opinions, arbitral practice and Tribunal precedents noted above, the Tribunal finds that once the full value of the property has been properly evaluated, the compensation must be appropriate to reflect the pertinent facts and circumstances of each case.[170]

The *ad hoc* tribunal in the *Aminoil case* also took into account the 'legitimate expectations' an investor could have, including an assessment of 'excessive profits' in the past which were above a 'reasonable rate of return' and which should be deducted from the amount of compensation to be paid.[171] The retroactive excess-profits concept had been applied earlier – for example, by the Chilean government in the nationalization of copper-mining enterprises and the Andean Mining Company,[172] and by the Libyan government[173] with respect to Bunker Hunt – but was fervently opposed by the USA and other Western governments.[174] The rationale for their opposition is that an oil company strikes its profits out of its business on an average. If the excess profits in a very profitable venture would be automatically creamed off, the company can not afford exploration and development in other ventures.

Considering another aspect – that of *lucrum cessans* or profit foregone – in the *Amoco case* (1987) the tribunal held that this was not to be included in the assessment of compensation for lawful takings; it was only required in unlawful takings.[175] This was also the finding of the ICSID tribunal in the *AAPL* v. *Sri Lanka* case (1990).[176]

[170] *Ebrahimi* v. *Iran* (1994), Iran–US Claims Tribunal, 12 October 1994, The Hague, pp. 38–9 and 44, paras. 88 and 95.

[171] *Aminoil Award*, 21 ILM (1982), pp. 1,031–3, paras. 143–4.

[172] See Chile's Decree No. 92 Concerning Excess Profits of Copper Companies, 28 September 1971, published in 14 ILM (1975), p. 983. For the US reaction, see 11 ILM (1972), p. 1,054.

[173] See Libyan Law No. 42 of 11 June 1973, in 13 ILM (1974), pp. 58–9.

[174] See Muller (1981: 35*ff*.).

[175] See for a discussion of the compensation standard in this and some other cases, Mouri (1994: 363–5).

[176] The Award in the case *Asian Agricultural Products Ltd (AAPL)* v. *Republic of Sri Lanka* has been published in 30 ILM (1991), pp. 577–627, with a 'dissenting opinion' by Arbitrator Asante on pp. 628–55. See also case note by Asiedu-Akrofi in 86 AJIL (1992), pp. 371–6.

As to actual State practice, Asante reports that a study commissioned by the UN Centre on Transnational Corporations – on compensation settlements arising out of 154 cases in Asia, Africa and Latin America during the 1970s – found that the formula of 'prompt, adequate and effective' compensation from the investor's perspective or 'appropriate' compensation from the host government's perspective appeared to have played no role in the final settlements, although they were sometimes vigorously asserted in the negotiations. The final settlements were sometimes packages of trade-offs encompassing compensation amounts and ancillary benefits such as credit facilities, service contracts, management fees and tax concessions.[177] Similarly, Lillich *et al.* conducted an impressive research project on expropriation practice and post-war lump-sum agreements under which the respondent State paid a fixed sum ('*en bloc*') to the claimant State, which the latter, generally through a national claims commission, distributed among claimants after assessment and adjudication of these separate claims. The legal status and juridical impact of such agreements is a source of controversy, both in jurisprudence[178] and academic research[179] as well as in the work of professional bodies.[180] These empirical surveys show, on the one hand, that lump sum agreements underpin the customary compensation principle as such, but on the other hand reveal a clear trend towards adopting 'partial' and 'negotiated' compensation arrangements, depending upon the circumstances of each case. As in the case of bilateral investment treaties, such a large mass of State practice and the general trend emerging from it cannot be ignored.

As far as the literature of international law is concerned, opinions on this issue have been deeply divided. For example, Schwarzenberger and Brown find it difficult to see why 'the mere scale of nationalization measures, as compared with individual acts of expropriation, or the rise of new ideologies should by themselves exempt such policies of nationalization from the operation of the governing rules of international customary law'.[181] An increasing number of Western scholars and almost all Third

[177] Asante (1988: 606).

[178] As far as the Iran–US Claims Tribunal is concerned, Mouri reports that 'none of the practices [i.e., 'settlements practice' and 'bilateral treaties practice'] had any substantial influence on the tribunal's choice of the standard of compensation': Mouri (1994: 353). See also the case note on the *SEDCO case* in 80 AJIL (1986: 969–72, at p. 970). [179] See Lillich and Weston (1988).

[180] For example, the American Law Institute observes in its comment to section 7.12 of the Restatement of International Law that: 'those practices which represent partial or less than "full compensation" do not provide persuasive evidence as to what the parties to the settlement believed the relevant law to be'.

[181] Schwarzenberger and Brown (1976: 8).

World scholars, however, hold that in the assessment of compensation to be rendered, factors to be considered include: the expediency and socio-economic necessity of the taking; the capacity of the taking State to pay; and 'reasonableness' and other specific circumstances.[182] Frustrating the process of socio-economic transformation by demanding unbearable nationalization conditions would be incompatible with the principle of State sovereignty over economic affairs.[183] This may especially be so in cases of large-scale nationalizations involving a State's natural resources. As Brownlie acknowledges: 'The principle of nationalization unsubordinated to a full-compensation rule may be supported by reference to principles of self-determination, independence, sovereignty, and equality.'[184]

In conclusion, there is no support for the alleged right to refrain from paying compensation after expropriation or nationalization. Nor is there support for the right of a taking State to determine freely and unilaterally the amount of compensation and its mode of payment. At the doctrinal level, most Western States still adhere to classical international law standards with respect to compensation. In practice a readiness has emerged to take into account, apart from the interests of the dispossessed foreign investor, the interests and needs of the host country, in particular when it is a low-income developing country in the process of socio-economic transformation. In the author's view this is after all perhaps best reflected in the 'appropriate compensation' or, preferably, 'just compensation' formula which is sufficiently flexible to accommodate various interests in each particular case. This formula has also been adopted in the ILA Seoul Declaration, where it refers to 'appropriate compensation as required by international law'.[185] This may be deliberately ambiguous, since both practice and doctrine clearly demonstrate that neither the Hull rule nor the Calvo doctrine provide the final word on this issue.

[182] See Kooijmans (1981: 17); Dolzer (1985: 219); Schachter (1984: 124), (1989: 16–19) and (1991: 324). Schachter (1985: 421) quotes Sohn and Baxter, who wrote as early as 1961 that less than full value would be just compensation when the State would otherwise have 'an overwhelming financial burden': Sohn and Baxter (1961: 560). See also Amerasinghe (1967: 129).

[183] See Wellens (1977b: 101).

[184] Brownlie (1990: 536–37).

[185] In the fourth draft of the ILA NIEO Committee, which was charged with preparing this Declaration, an interesting but cumbersome elaboration of 'appropriate compensation' was included, reading:

> Appropriate compensation to be paid in all cases of nationalization and expropriation shall be just, fair and reasonable and objectively determined giving due consideration to the legitimate expectations of the host State and the foreign investor, and taking into account all pertinent circumstances, relevant criteria of valuation and equitable principles, including the principle of unjust enrichment.

During the Seoul Conference (1986), it was decided to delete this.

The right to settle disputes on the basis of national law

Although both the 1962 Declaration (General Assembly Resolution 1803 (XVII)) and Article 2 of the CERDS (General Assembly Resolution 3281 (XXIX)) stipulate that compensation should be 'appropriate', they differ considerably as regards the law applicable in determining it. The former refers primarily, and the latter exclusively, to the national law of the nationalizing State. The Declaration also refers to 'international law',[186] while the CERDS merely adds after 'its relevant laws and regulations' the phrase 'and all circumstances that the State considers pertinent'. It is obvious that wide discretionary State powers may emanate from such wording. Yet, according to this CERDS provision the nationalizing State remains bound by its 'national law', pursuant to the Calvo doctrine. Apparently, this is not the case according to Resolution 3171 (XXVIII), ECOSOC Resolution 1956 (LV) and UNCTAD TDB Resolution 88 (XII) which give no indication of the law to be applied. The 1976 UNCITRAL Arbitration Rules provide in Article 33 that arbitration tribunals have to apply the law designated by the parties as applicable to the substance of the dispute.[187] If this is not done, the tribunal has to apply the law determined by the rules on conflict of laws which it considers applicable, and in all cases the tribunal must decide in accordance with the terms of the contract, taking into account the usages of the trade applicable to the transaction.

As regards multilateral treaties, Article 42 of the 1965 ICSID Convention instructs arbitral tribunals to decide a dispute in accordance with such rules of law as may be agreed by the parties to the dispute. In the absence of such an agreement the tribunal shall apply the law of the host country (including its rules on the conflict of laws) and such rules of international law as may be applicable. None of the other investment-related multilateral treaties[188] includes a provision on applicable law in their dispute-settlement arrangements; with the exception of (a) the 1980 Agreement on Investment of Arab Capital, which provides that compensation shall be paid for expropriation in accordance with generally applicable legal norms regulating the expropriation (this is ambiguous when the law to be applied is not

[186] In 1962, the Soviet Union proposed that the question of compensation be left to be decided 'in accordance with the national law of the country taking such measures in the exercise of its sovereignty' (UN Doc. A/C.2/L.670, 9 November 1962, p. 2). This amendment was defeated by twenty-eight votes in favour, thirty-nine against, with twenty-one abstentions: UN Doc. A/C.2/SR.858, 3 December 1962, p. 389, para. 41.

[187] Article 33 of the Arbitration Rules of the UN Commission on International Trade Law, adopted by GA Res. 31/98, 15 December 1976.

[188] See Appendix II, 'International regulation of foreign investment', p. 404 below.

defined); and (b) the 1994 Energy Charter Treaty, which provides that arbitration tribunals shall decide issues in dispute in accordance with this treaty and applicable rules and principles of international law.[189]

Most bilateral investment-protection treaties reportedly do not make reference to the specific law to be applied in either intergovernmental arbitration or in arbitration between the host State and the investor.[190] However, some BITs do contain an applicable law clause. On the basis of a detailed analysis of BITs, Peters identified the 'Sri Lanka' clause, which stipulates that the law of the host country will apply.[191] Some other BITs specify the law applicable in their article on intergovernmental arbitration and/or to arbitration between host country and investor.[192]

The issue of the choice of law has been addressed in a number of arbitral awards. Most of them acknowledge the freedom of the parties to choose the law or system of law which governs the contract and the law of procedure applicable to the arbitration. According to Arbitrator Dupuy in the *Texaco case*, this also includes the right to change: 'one does not see why they could not, by mutual consent, agree to change this choice.'[193] In the three Libyan petroleum concessions at stake an applicable-law clause[194] was included, reading:

> This concession shall be governed by and interpreted in accordance with the principles of the law of Libya common to the principles of international law and, in the absence of such common principles, then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.

It is notable that the arbitrators in the three cases reached different conclusions. Arbitrator Lagergren, in the *BP case*, concluded that he failed to identify any principles common to Libyan and international law and that he therefore had to apply 'general principles of law' and the case law of international tribunals.[195] Arbitrator Dupuy, in the *Texaco case*,[196] however,

[189] Article 26.6 of the ECT. [190] Peters (1991: 113–14 and 147–8).

[191] Peters found this clause in fourteen out of 168 BITs concluded in the period between 1980 and the middle of 1991, eleven of which were concluded by Sri Lanka. See Peters (1992a: 231–55, section 2.6).

[192] Peters considers such clauses superfluous, if not confusing, in the case of diverging or even contradictory instructions; for it is not necessary for a bilateral treaty between States to specify that the dispute will be governed, as to the merits, by public international law, while a dispute between a host State and an investor will be handled on the basis of the arbitration rules designated in the BIT, or agreed between the parties to the dispute, for example the ICSID Rules or the UNCITRAL Rules: Peters (1991: 113–14) and (1992a: 240–1).

[193] *Texaco Award*, 17 ILM 1978, p. 12. [194] Clause 28.

[195] *BP case*, 53 ILR (1979), p. 332. [196] *Texaco case*, 17 ILM (1978), paras. 23, 96 and 109.

determined that the arbitration was governed by both international law and Libyan law; and Arbitrator Mahmassani, in the *Liamco case*,[197] identified principles common to Libyan and international law.[198] In the *Aminoil case* the arbitration agreement instructed the tribunal to determine the applicable law 'having regard to the quality of the parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world'. The tribunal interpreted this as meaning that it had to 'decide according to law, signifying here principally international law which is also an integral part of the Law of Kuwait'.[199] Therefore, it held that the law governing the substantive issues[200] could in principle be Kuwaiti law. In contrast to earlier cases (for example, in the *Abu Dhabi* and *Aramco* arbitration cases), this tribunal found that:[201]

> Kuwaiti law is a highly evolved system as to which the Government has been at pains to stress that established public international law is necessarily a part of the law of Kuwait, including general principles of law.

In the *AGIP case* (award in 1979), the tribunal applied Congolese law in the first instance, but supplemented it with international law. In 1985, in a successful procedure aimed at annulling the ICSID award in *Klöckner* v. *Cameroon* (1983), it was ruled that the law of the host State should be applied, as stipulated by Article 42.1 of the ICSID Convention.[202] However, in two other more recent ICSID cases, *Letco* v. *Liberia* (1986) and *AAPL* v. *Sri Lanka* (1990), this was less clearly required. In the latter case Arbitrator Asante filed a dissenting opinion on the particular issue of applicable law, claiming that the tribunal – in view of Article 42.1 of the ICSID Convention – should have more straightforwardly applied Sri Lankan law as the main source of law, together with such rules of international law as might be applicable.[203]

The Iran–US Claims Tribunal has had no difficulty in establishing that international law is generally applicable in resolving the issues related to the standard of compensation and has never indicated in any of its awards that it considered the municipal law of either of the two States involved as

[197] *Liamco case*, 20 ILM (1981), p. 66.

[198] See Sterne (1980: 132–91), Rigaux (1978: 435–79) and Delaume (1981: 797).

[199] *Aminoil Award*, 21 ILM (1982), p. 1,032.

[200] The procedural law of arbitration was the *lex forum*, that is French law.

[201] *Aminoil Award*, p. 1,000.

[202] The *ad hoc* committee pointed out that: 'the arbitrators can have recourse to the principles of international law only after having researched and established the contents of the law of the State party to the dispute'. See de Waart (1987: 133–4).

[203] 30 ILM (1991), pp. 628–55, at pp. 630–2. See also case note by Asiedu-Akrofi in 86 AJIL (1992), pp. 371–6.

being the law on which the findings on the standard of compensation should be based.[204]

As regards non-binding instruments other than UN resolutions, the ICC Guidelines require in the treatment of foreign property respect for the recognized principles of international law. The Draft Code of Conduct on TNCs provides, rather vaguely, that 'adequate compensation is to be paid . . . in accordance with the applicable rules and principles', thus evading the issue whether national or international law should have precedence. The same goes for the World Bank Guidelines which, in the expropriation section, merely refer to 'applicable legal procedures'.[205] In contrast, the ILA Seoul Declaration (1986) stipulates that appropriate compensation must be paid 'as required by international law'.

In conclusion, there is a far from general recognition that States have the right to settle nationalization and compensation disputes solely on the basis of national law. Yet, as is only logical and rational, there is recognition – unless otherwise agreed – that national law (normally) must be considered in the first place in a dispute between the host State and a foreign investor. If the dispute cannot be solved on the basis of national law, it is now recognized by most countries that international law must be invoked as well.[206]

The right of free choice of means for settlement of nationalization disputes

This last paragraph addresses the question of the extent to which a State, under the principle of permanent sovereignty, is free to choose the means for the settlement of disputes concerning nationalization and compensation. Two types of potential disputes are of particular concern: those between States and those between a host State and a foreign investor. Reaching agreement on arrangements for the settlement of disputes of the latter type has always been more problematic. As discussed in chapter 6, Latin American countries took a particularly strong stand on this by

[204] See Brower (1993), Westberg (1993: 9) and Mouri (1994: 297). See also Crook (1989: 310) and Art. V of the 1981 Claims Settlement Declaration: 'The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.'

[205] Yet, in the section on the scope of application it is clearly pointed out that the Guidelines are meant to complement 'applicable bilateral and multilateral treaties and other instruments, to the extent that these Guidelines do not conflict with such treaties and binding instruments': World Bank Group (1992: section I).

[206] See chapter 10, pp. 343–4.

stipulating, in their constitutions and through 'Calvo clauses' in contracts that foreigners should be subject to the law of the host State and should submit investment disputes to the local judiciary only. Western countries emphasized the right of home States to grant diplomatic protection and the right of foreign investors to international adjudication in cases where local courts allegedly were not in a position to provide justice. What do the permanent-sovereignty resolutions say on this issue and what is the trend arising from recent treaties, judgments and arbitral awards?

General Assembly Resolutions 1803 and 3171 and Article 2 of the CERDS are relevant here. Remarkably, their dispute-settlement clauses address disputes over compensation only, leaving settlement of disputes over other aspects of the taking of foreign property – for example, its grounds – undetermined. Resolution 1803 contains the exhaustion of local-remedies rule ('shall') before the claimant can resort to (international) arbitration or international adjudication, unless it has been otherwise agreed. Article 2 of the CERDS is highly Calvo-flavoured and thus exclusively emphasizes dispute settlement by domestic tribunals, unless other peaceful means have been chosen freely.

The rule that local remedies must be exhausted is firmly established in international law, as reflected in treaty law,[207] international jurisprudence[208] and in doctrine. Basically, this rule is founded on the principle of State sovereignty and expresses respect for the territorial jurisdiction of States, whereby aliens are subject to the laws of the State in which they are residing. The local-remedies rule implies that the State against which an *international action* is brought for injuries inflicted upon a non-State party has the right to resist such action if the latter has not exhausted all the judicial remedies available under the law of that State.[209] The rationale is that the State responsible for an international wrong must be given the opportunity to redress the wrong in accordance with a ruling of its own judiciary or administrative-law courts.

Most investment-related multilateral treaties reaffirm the local-remedies rule but also provide, in one way or another, for international dispute-

[207] See, for example, Art. 41.1(c) of the UN Covenant on Civil and Political Rights and Art. 26 of the ICSID Convention.

[208] Reference can be made to the *Ambatielos Arbitration case* (*Greece* v. *UK*), reprinted in 12 RIAA (1956), p. 83 and pp. 118–19, the *Interhandel case*, *ICJ Reports* (1959), p. 6 and the *ELSI case*, *ICJ Reports* (1989), para. 50. The international human rights courts have also widely upheld the principle of the exhaustion of local remedies. See Dixon and McCorquodale (1995: chapter 6).

[209] See *Ambatielos Arbitration*, reprinted in 12 RIAA (1956), p. 83, reviewed in Harris (1991: 593).

settlement procedures. Under the ICSID Convention a contracting State may require exhaustion of local administrative or judicial remedies before it consents to international arbitration, an option which few States parties have used.[210] The Convention also stipulates that no contracting State grant diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and another contracting State have agreed to submit to ICSID arbitration procedures.[211] The 1967 OECD Draft Convention on the Protection of Foreign Property emphasized international arbitration in disputes between State parties. In addition, investors of the parties could institute proceedings before an arbitral tribunal established by the Convention, subject to: exhaustion of local or other (national or international) compulsory remedies; acceptance of the jurisdiction of the arbitration tribunal by the host State concerned; and renouncement by the home State of its right of espousal, that is to present a claim directly to the respondent State or to bring it before an international tribunal.[212] The 1980 Arab Investment Agreement provides for an Arab Investment Court which has jurisdiction to settle any dispute between States parties or between Arab investors and host States. Article 31 provides that the Arab investor shall first have recourse to the judiciary of the State where the investment was made. In conflicts of jurisdiction between the Arab Investment Court and national courts, the international jurisdiction of the court prevails (Article 32).[213] The dispute-settlement provisions of the 1981 Investment Agreement of the Organization of the Islamic Conference (forty-six member States) offer the opportunity of resorting to national or international arbitration without exhausting local remedies.[214] The same goes for the international arbitration procedure of the ASEAN Investment Agreement.[215] The 1991 NAFTA Agreement includes a detailed and complicated arbitration procedure for dispute settlement between a State party and an investor of another party.[216] There is no reference to the local-remedies rule, which is remarkable in view of Mexico's traditional adherence to the Calvo doctrine. Also the various references to the ICSID

[210] Article 26 of the 1965 ICSID Convention. See chapter 6, pp. 186–7 of this study.
[211] Articles 26–7 of the ICSID Convention.
[212] Article 7 of the OECD Draft Convention on the Protection of Foreign Property. Text with Notes and Comments in 7 ILM (1968), pp. 132–6. See van Emde Boas (1963–4).
[213] It is uncertain whether this court has been set up.
[214] Articles 16–17 of the OIC Investment Agreement. Text in Moinuddin (1987: 203).
[215] Article X on arbitration of the ASEAN Agreement for the Promotion and Protection of Investments (1987).
[216] See North American Free Trade Agreement (Canada-Mexico-US, 1991), chapter 11, section B (Arts. 115–38). Text in 32 ILM (1993), pp. 642–9.

Convention and procedures are notable, since both Canada and Mexico are not (yet) parties to it.[217] Also the 1994 Energy Charter Treaty elaborates on the dispute-settlement mechanisms, differentiating between settlement of disputes between an investor and between contracting parties. In the first case resort to the courts and administrative tribunals is mentioned as an option, not as an obligation. In both cases international arbitration features prominently as dispute-settlement procedure.[218]

Most bilateral investment treaties provide for resort to international arbitration in the event of investment disputes or disputes over the interpretation and application of the bilateral investment treaties concerned. In principle, however, the scope of these international-arbitration clauses is limited by the local-remedies rule. It is surprising that there is a trend to require 'exhaustion' of local remedies within a certain time limit (varying from three to twenty-four months), after which international arbitration is permitted irrespective of whether the judicial or administrative proceedings have been completed. The local-remedies rule may even be renounced altogether.[219] Obviously, this practice operates on a voluntary basis. It is hard, therefore, to distill a new rule of customary international law from it. Yet, as Peters points out, a long line of bilateral investment treaties indicates that – in the field of international investment law – doctrinal views are making way for practical considerations.

In the *ELSI case* (*USA* v. *Italy*) (1989), the ICJ Chamber in interpreting the dispute-settlement clause of the 1955 US–Italian Treaty of Friendship, Commerce and Navigation – which made no explicit reference to the local-remedies rule – found itself 'unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so'.[220] In other words, unless they unequivocally renounce the local-remedies rule by way of a treaty or otherwise,[221] States retain the right to settle disputes through their local judiciary before an appeal can be made to international dispute-settlement procedures, should either party remain unsatisfied with the result achieved in the 'final instance' in the host

[217] However, under ICSID's Additional Facility Rules, ICSID procedures can be extended to nationals of non-contracting parties in the case of a dispute with a contracting State party.

[218] See Art. 26 and Annex I of the ECT. See also chapter 10, pp. 361–4 below.

[219] See Peters (1991: 133–4).

[220] *ICJ Reports* (1989), p. 15, para. 50.

[221] For example, as was done by Iran and the USA when establishing the Iran–US Claims Tribunal in 1981 pursuant to the Declaration of Algiers (text in 20 ILM (1981), p. 2,231).

State.[222] The *ELSI* judgment is particularly notable since it was rendered at a time when the rationale for the local-remedies rule was no longer as obvious as in the past.

In the literature of international law, considerable debate has taken place with respect to the interpretation of the dispute-settlement mechanism, especially that of Article 2.2(c) of the CERDS in comparison with paragraph 4 of Resolution 1803. According to García-Amador the CERDS provision 'seems, by implication, to reject settlement by recourse to arbitration or international adjudication';[223] but, according to Abi-Saab and Chowdhury, in practice differences may be more apparent than real since CERDS does not exclude recourse to international judicial settlement if all parties concerned want it.[224] However, it is difficult to see how this could satisfy the objections of those who prefer that the investor should have the option of an international procedure. The fact that an international judicial (or arbitral?) procedure is allowed by the CERDS does not detract from the fact that it is up to the discretion of the host State to require exclusively domestic procedures.

Despite all the controversies and uncertainties involved, nearly all sources referred to above emphasize the right of States to a free choice of means for the settlement of nationalization and compensation disputes. This freedom includes the right to insist on exhaustion of local remedies in a dispute between a host State and a foreign investor as well as the freedom to resort to other peaceful means which have been freely agreed upon by the parties concerned. This is also reflected in the ILA Seoul Declaration where it provides that 'disputes . . . have to be settled by peaceful means chosen by the parties concerned . . . The principle of local remedies shall be observed, where applicable.'[225] Unlike Article 2.2(c) of the CERDS, the Declaration includes, by using the words 'by the parties concerned', international arrangements between States and foreign investors. We are thus left with the question: in the absence of agreement, should an option of international dispute settlement be open? This question will be addressed as part of the next chapter, which attempts to identify duties emanating from the principle of permanent sovereignty, which represent the other side of the same coin.

[222] It is unlikely that the host State will take the dispute to international arbitration when it is unsatisfied with the verdict of its own courts, but it is entitled to do so under many BITs which allow either party to the dispute (not only the foreign investor) to institute arbitral proceedings.

[223] García-Amador (1980: 51).

[224] See Abi-Saab (1984: 60) and Chowdhury (1984a: 17–19).

[225] ILA's Seoul Declaration, 1986, section 13.1.

10 Duties: the other side of the coin

The concept of duties

Once the principle of permanent sovereignty over natural resources had been formulated, its legal evolution focused initially, as we saw, on the rights arising from it. For obvious reasons States are inclined to formulate rights expanding their sovereignty rather than obligations restricting it. They tend to consider the latter as an encroachment on their sovereignty. Similarly, academic discussion on the content of permanent sovereignty has long focused on the rights emanating from it, in particular the right to take foreign property.

Less attention has been paid to the question whether duties are incumbent on States in the exercise of their permanent sovereignty over natural resources and if so what they entail. This chapter intends to analyze what kind of duties the principle of permanent sovereignty may give rise to, especially for States. As in previous chapters, it takes as a starting point the set of permanent-sovereignty-related UN resolutions analyzed in Part I and investigates to what extent permanent-sovereignty-related duties have become recognized in treaty law, State practice, decisions of international courts and tribunals,[1] the work of international law bodies and in international law literature. Only those treaties which have a bearing on the exercise of permanent sovereignty over natural resources are discussed with. As regards intergovernmental and professional bodies, documents dealt with include: the ICC Guidelines for International Investments (1972); the OECD Declaration on Multinational Enterprises (1976); the ILA Seoul Declaration (1986); the ALI's Third Restatement of the Foreign Relations Law of the United States (1987); the Draft UN Code of Conduct on Transnational Corporations (1990); the World Bank Guidelines on the Legal Treatment of

[1] See Appendix III, p. 410.

Foreign Investment (1992); the Proposed Legal Principles of the Group of Legal Experts of the Brundtland Commission (1987); and the draft International Covenant on Environment and Development of the World Conservation Union (IUCN, 1994).

It should be pointed out that the concept of duties or obligations is difficult to define in precise terms, as signified by the broad range of expressions used, such as: 'requirements'; 'undertakings'; '(general) obligations'; 'obligations freely entered into'; 'codes of conduct'; 'commitments'; and 'responsibilities'. Strict *obligations* can only be said to exist where a prescribed form of conduct is imposed on an identifiable subject, corresponding to another subject's right to demand such conduct. Obligations *stricto sensu* create 'strict' liability. All too often, however, the nature of the obligation, the subjects concerned and their mutual relationship cannot be clearly identified. In international law such terms as 'duties', 'obligations' or 'commitments' are often used to denote the weaker form of indebtedness associated with framework treaties, codes of conduct, non-mandatory resolutions and the like. However, in the context of State responsibility in public international law the word 'responsibility' has a more stringent meaning. The ILC uses it in connection with wrongful acts and reserves the term 'liability' for injurious consequences arising out of activities not prohibited by international law.[2]

Thus it must be recognized that in general there is considerable confusion in the terminology used in this field. In this chapter the terms 'obligation' and 'duty' are used interchangeably in the sense of a prescribed form of conduct imposed on an identifiable subject. Although they often cannot be enforced through court proceedings, this does not preclude the possibility that in practice they are adhered to as a result of international political pressure or public opinion. They can still be said to be legally relevant insofar as they entail a code of conduct for the addressees and may create 'legitimate expectations' on the part of other parties. The link between addressees and beneficiaries is, however, not as strong as in the case of obligations proper. Yet such weaker forms of obligations and duties can serve as an illustration of the law *in statu nascendi*, insofar as they have the potential to evolve into fully fledged obligations as a result of widespread and consistent State practice.

[2] See Pinto (1985: 24–5) and Peters *et al.* (1989: 286–9).

The exercise of permanent sovereignty for national development and the well-being of the people

General Assembly Resolution 523 (VI) conditioned the right of underdeveloped countries freely to determine the use of their natural resources by the requirement 'that they *must* utilize such resources in order to be in a better position to further the realization of their plans of economic development in accordance with their national interests'.[3] Resolution 626 (VII) puts this in less stringent terms: '... wherever deemed desirable by them [i.e., member States] for their own progress and economic development'. Resolution 1803 (XVII) embodies some specific guidelines for the exercise of the right to permanent sovereignty, stressing in its very first paragraph:

> The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised *in the interest of their national development* and of the *well-being of the people* of the State concerned.[4]

Thus the General Assembly clearly linked the exercise of permanent sovereignty with the requirement to promote national development and the well-being of the inhabitants.[5] These two injunctions are not necessarily in harmony. For example, the exploitation of a copper mine or a forest may be conducive to the development of the national economy but detrimental to the well-being of the local population. Similarly, the benefits of the exploitation of natural resources may accrue mainly to foreign investors and national elites and may not trickle down to the people. By requiring that permanent sovereignty over natural resources must be exercised in the interest of national development and the well-being of the people, the 1962 Declaration seeks to ensure that the whole population should benefit from resource exploitation and the ensuing national development.

This particular phrasing of paragraph 1 of Resolution 1803 was literally reaffirmed only once, in General Assembly Resolution 2692 (XXV).[6] In all

[3] Emphasis added. [4] Emphasis added.

[5] The right-holders and beneficiaries are somewhat ambiguously identified: while permanent sovereignty is formulated as a right of 'peoples and nations', it has to be exercised in the interest of 'national development' and the well-being of the people of the '*State* concerned'. See chapter 1, pp. 7–11 above on this issue. In the French version the text reads as follows: 'Le droit de souveraintè permanent des peuples et des nations sur leurs richesses et leurs ressources naturelles doit s'exercer dans l'intérêt du bien-être de la population de l'Etat intéressé.' It seems likely that some confusion has crept into some texts as a result of the three different meanings of the English word 'people'; corresponding with the French words 'peuple', 'population' and 'les gens'.

[6] 'Permanent Sovereignty over Natural Resources of Developing Countries and Expansion of Domestic Sources of Accumulation for Economic Development', 11 December 1970.

subsequent resolutions dealing with permanent sovereignty either only very general guidelines were included, such as promoting 'national development',[7] or there were no guidelines at all.[8] This could be interpreted as an illustration of the trend during the late 1960s and early 1970s to formulate the right to permanent sovereignty as being as 'hard' and unqualified as possible without any reference to possible restrictions of the discretionary power of the State. For example, Article 2 of the CERDS provides:

> Every State has and *shall* freely exercise *full* permanent sovereignty, including possession, use and disposal, over *all* its wealth, natural resources and economic activities.[9]

Here a general duty is imposed on the State to exercise freely and fully its permanent sovereignty. In view of the political circumstances in which it was drafted and the nationalistic tide then prevailing, this article might be interpreted as an injunction upon States to manage their natural resources in the interest of their national development.

Decree No. 1 for the Protection of the Natural Resources of Namibia puts it more explicitly where it affirms the responsibility of the UN Council for Namibia to ensure that 'these natural resources are not exploited to the detriment of Namibia [and] . . . its people'.[10]

As far as multilateral treaties are concerned, duties are mostly imposed indirectly. Article 1 of the 1966 Human Rights Covenants provides: 'In no case may a people be deprived of its own means of subsistence.'[11] The African Charter on Human and Peoples' Rights stipulates in its permanent-sovereignty Article: 'This right *shall* be exercised *in the exclusive interest of the people*. In no case shall a people be deprived of it.'[12] Several of the provisions

[7] GA Res. 2158 (XXI), operative para. 1. While in this main permanent-sovereignty paragraph no reference is made to 'the well-being of the people', it is notable that its para. 5 on enhancing the share of developing countries in the advantages and profits of foreign enterprises refers to 'the development needs and objectives of the peoples concerned'.

[8] This applies to the NIEO resolutions. Paragraph 4(r) of the NIEO Declaration only formulates '[t]he need for developing countries to concentrate all their resources for the cause of development'.

[9] GA Res. 3281 (XXIX), 12 December 1974, emphasis added.

[10] Decree No. 1 for the Protection of the Natural Resources of Namibia, 27 September 1974: text in chapter 5.

[11] In addition, both Covenants state: 'Nothing in the present Covenant may be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.' Art. 25 of the Economic, Social and Cultural Rights Covenant and Art. 47 of the Civil and Political Rights Covenant.

[12] Article 21.1, emphasis added. Text in 21 ILM (1982), p. 58. Concluded in Banjul, 27 June 1981; in force on 21 October 1986. See also Kiwanuka (1988: 95–9).

of the 1968 African Convention on the Conservation of Nature and Natural Resources underscore the need in managing and utilizing the resources to take into account the social and economic needs of the peoples or States concerned.[13] For example, Article VI obliges States to 'adopt scientifically based conservation, utilization and management plans of forests and rangeland, taking into account the social and economic needs of the States concerned'. Likewise, the 1978 Treaty for Amazonian Co-operation includes amongst its objectives socio-economic development and identifies this as a responsibility 'inherent in the sovereignty of each State'.[14] This goal was reiterated in the 1989 Amazon Declaration, where the presidents of the States parties to the Amazonian Treaty stated:[15]

> Conscious of . . . the necessity of using this potential [i.e., of the Amazon region] to promote the economic and social development of our peoples, we reiterate that our Amazon heritage must be preserved through the rational use of the resources of the region, so that present and future generations may benefit from this legacy of nature . . . We reaffirm the sovereign right of each country to manage freely its natural resources, bearing in mind the need for promoting the economic and social development of its people.

Lastly, a reference can be found in the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources (not in force). In its preamble the six member States recognize the importance of natural resources and the duty, among other things, 'to develop their forestry management plans . . . with a view to maintaining potential for optimum sustainable yield and avoiding depletion of resource capital'.[16]

In international jurisprudence and arbitral awards, no direct indication of duties at the national level with respect to the use of natural resources can be found, although the interests of the local populations and their dependence on the natural resources in what they perceived as their territories and waters were very much at stake. References occur in, for example, the ICJ's *Fisheries Jurisdiction cases* (*UK and Federal Republic of Germany* v. *Iceland*) (1974), the *Western Sahara case* (advisory opinion to General Assembly, 1975) and the *Gulf of Maine case* (*USA* v. *Canada*) (1984). So far international law literature has not addressed the question of exercising permanent sovereignty over natural resources in the interest of national

[13] The African Convention entered into force in 1969 and had thirty States parties in 1992. Text in Hohmann (1992a: 1,530).

[14] In 1978, Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Surinam and Venezuela concluded the Treaty for Amazonian Co-operation. Text in 17 ILM (1978), p. 1,045.

[15] Text in 28 ILM (1989), pp. 1,303–5, at p. 1,304.

[16] Article VI.2(g).

development and the well-being of the people to such an extent that meaningful conclusions can be drawn from it.

To sum up, Resolution 1803 says that permanent sovereignty over natural resources is a right of nations and peoples and requires that it be exercised in the interests of the whole population and national development. This reflects the spirit of the linkage between self-determination and the realization of socio-economic human rights, during the human rights codification process of the 1950s and 1960s, and the subsequent linkage between the decolonization process and the pursuance of development of developing countries, as exemplified in the 1960 Decolonization Declaration and certain development-related resolutions.[17] However, apart from this and a few other UN resolutions, only cursory evidence can be found that under international law States have a duty to exercise their right to permanent sovereignty in the interest of national development and to ensure that their inhabitants benefit from resource exploitation and the resulting national development.

Respect for the rights and interests of indigenous peoples

With respect to the duty of States to exercise their permanent sovereignty in the interest of the well-being of the people, that is all inhabitants residing in a country, in practice the inhabitants of a State are often not a homogeneous community but may be composed of various peoples and minorities, including indigenous peoples. In international law the phrases 'We, the peoples' of the UN Charter, 'all peoples' of Article 1 of the Human Rights Covenants, or 'the people' (in French: '*la population*') as in Declaration 1803, are most likely to be equated with the peoples resident within a defined territory.[18] This raises the issue of State control and development of natural resources as possibly being contrary to the well-being of, for example, indigenous peoples within its territory.

Until the late 1960s, hardly any international political attention was paid to the plight of 'indigenous peoples' and their need for international

[17] For example, GA Res. 1515 (XV) on 'Concerted Action for Economic Development of Economically Less Developed Countries', 15 December 1960 and GA Res. 1710 (XVI) on 'United Nations Development Decade: A Programme for International Economic Co-operation', 19 December 1961.

[18] The same goes for the phrases 'self-determination of peoples' in Arts. 1 and 55 and 'territories whose peoples have not yet attained a full measure of self-government' in Art. 73 of the UN Charter.

protection.[19] Exceptions are a General Assembly resolution on social problems of 'aboriginal populations and other under-developed social groups of the American continent', adopted in 1949 at the initiative of Bolivia,[20] and the 1957 ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (see below).

Since the late 1960s, the question of indigenous peoples received renewed attention within the United Nations in the context of the development of human rights law, particularly relating to anti-discrimination and protection of minorities.[21] Obviously, a certain overlap exists between the general case of minorities and the specific issue of indigenous peoples.[22] On the recommendation of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, ECOSOC initiated in 1971 a study on 'The Problem of Discrimination Against Indigenous Populations'.[23] In 1982, it

[19] See, among a vast body of literature, Miller (1993) and Independent Commission on International Humanitarian Issues (1987). See also Chapter 26 of 'Agenda 21', 'Recognizing and Strengthening the Role of Indigenous People and Their Communities', in UN Doc. A/CONF.151/26, 1992.

[20] GA Res. 275 (III), entitled 'Study of the Social Problems of the Aboriginal Populations and Other Under-Developed Social Groups of the American Continent', adopted on 11 May 1949 by thirty-seven votes to none, with fourteen abstentions. See UNYB (1948–9), pp. 621–2. It recalls the UN Charter objectives of promoting social progress and higher standards of living throughout the world and notably states that: 'the material and cultural development of those populations would result in a more profitable utilisation of the natural resources of America to the advantage of the world.' The USSR and Poland used this item on indigenous groups to attack the human rights record of the USA. In subsequent years, there was no substantive follow-up to this resolution as a result of Cold War rivalry.

[21] The inclusion of Art. 27 dealing with the protection of minorities in the UN Covenant on Civil and Political Rights (1966) is of importance. It reads: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'

[22] See Thornberry (1991: 331).

[23] Special Rapporteur was the Mexican Ambassador Martínez Cobo. His report was published in 1983; see UN Doc. E/CN.4/Sub 2/1982/21/Add.1. The definition of indigenous peoples proposed in the Special Rapporteur's report of 1982 reads:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

established a Working Group on Indigenous Populations,[24] with the mandate to review the human rights of indigenous peoples and to develop standards to protect these rights. Apart from serving as a significant forum for the discussion of the plight of indigenous peoples and of possible responses, both national and international, the major work on which the Working Group embarked was the drafting of a declaration on the rights of indigenous peoples to be adopted by the UN General Assembly. In 1988, a first draft was submitted and in 1993 the Working Group completed its work on a Draft Declaration on the Rights of Indigenous Peoples.[25] In August 1994, the draft was adopted by the Sub-Commission and it was sent for consideration to the UN Commission on Human Rights. The latter established an open-ended working group to discuss further and elaborate the Draft Declaration, in close co-operation with organizations of indigenous peoples.[26] The rights contained in the Draft Declaration are said to constitute 'the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world'.[27] However, this still is a Draft Declaration and it is by no means sure that it will eventually be adopted by ECOSOC and, subsequently, by the General Assembly. The definition of 'indigenous peoples'[28] and the scope of their alleged right to political self-determination are among the most controversial issues.[29]

Concern for the position and rights of indigenous peoples is also reflected in the final documents of the UN Conferences held in Rio (1992) and Vienna (1993). Principle 22 of the Rio Declaration on Environment and Development stresses the need to recognize and support the identity, culture and interests of indigenous people and other local communities, *inter alia*, in recognition of their 'vital role in environmental management and development because of their knowledge and traditional practices'.[30] The Vienna Declaration adopted by the 1993 World Conference on Human Rights recognizes the 'inherent dignity' of indigenous people and calls upon States to take, in accordance with international law, positive steps to ensure

[24] UN Doc. E/RES/1982/34, 9 May 1982, reproduced in UN Doc. E/1982/82, pp. 26–7.

[25] See UN Doc. E/CN.4/Sub.2/1988/25 and Report of the Working Group on Indigenous Populations on its eleventh session annexing the Draft Declaration, UN Doc. E/CN.4/Sub.2/1993/29, 23 August 1993, pp. 50–60, respectively.

[26] See Res. 1996/38 of the Commission on Human Rights, in UN Doc. E/CN.4/1996/L.11, Add.1, 19 April 1996, pp. 60–1, adopted without a vote.

[27] Article 42 of the Draft Declaration.

[28] See for a discussion Brölmann and Zieck (1993: 191–2).

[29] See the detailed review of the Draft Declaration by Iorns (1992: 199–348). See also Burger and Hunt (1994: 410–13) and Hannum (1990: 81–3).

[30] See Chapter 26 of 'Agenda 21' which elaborates on this: UN Doc. A/CONF. 151/26, vol. III, 13 August 1992, pp. 16–19.

respect for all human rights and fundamental freedoms of indigenous peoples.[31] Positive as these developments may be, it is one thing for States to adopt some general statements on the rights of indigenous peoples but another to act upon the content of these rights.

In an early stage of the work of the Working Group it was argued in a common statement by indigenous peoples that: 'From the right of self-determination flows the right to permanent sovereignty over land – including aboriginal, ancestral and historical lands – and other natural resources.'[32] Indeed, several paragraphs of the Draft Declaration on the Rights of Indigenous Peoples deal with elements of the right of indigenous peoples to dispose of their natural resources. In the preamble, concern is expressed that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in 'their colonization and dispossession of their lands, territories and resources'. The conviction is expressed that 'control by indigenous peoples over developments affecting ... their lands, territories and resources will enable them ... to promote their development in accordance with their aspirations and needs'. The forty-five articles of the operative part of the Draft Declaration formulate a number of *rights of indigenous peoples* to land and resources, from which *corollary prohibitions or obligations of States* can be inferred. These include:

1 no subjection of indigenous peoples to any action having the aim or effect of dispossessing them of their lands, territories or resources (Article 7);
2 no relocation from their lands or territories without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation (Article 10);
3 recognition and respect of indigenous peoples' right to the protection of vital medicinal plants, animals and minerals (Article 24);
4 recognition and respect of indigenous peoples' right to their natural wealth and resources, particularly their right:
   (i) to maintain and strengthen their relationship with the lands, territories, waters and coastal seas which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard (Article 25);
   (ii) to own, develop, control or use their lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources (Article 26);

[31] UN Doc. A/CONF.157/23, adopted on 25 June 1993, para. 20. See also the recommendations in paras. 28–32 of the Vienna Declaration, in particular to proclaim a UN Decade of Indigenous Peoples, creating a permanent UN forum for indigenous peoples and providing advisory services in the field of human rights for indigenous peoples. [32] As quoted by Burger and Hunt (1994: 421).

(iii) to restitution of their lands, territories and resources which have been confiscated, occupied, used or damaged, or, where this is not possible, to seek 'just and fair compensation' (Article 27);[33]
(iv) to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international co-operation (Article 28); and
(v) to determine priorities and strategies for the development and use of their lands, territories and other resources.

This requires that States obtain the *free and informed consent* of the indigenous people prior to the *approval* of any project affecting their lands, territories and resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

As far as treaty law is concerned, the most relevant instruments include ILO Conventions No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (1957)[34] and No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989). The 1957 Convention has often been criticized because of its integrationist, if not assimilationist approach.[35] It contains rather weak protection clauses on the rights of indigenous peoples, including those with respect to their lands. Article 12.1 for example provides that:

The populations concerned shall not be removed without their free consent from their habitual territories *except* in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.

Following UN discussions on better standard-setting for the protection of indigenous peoples, the ILO decided in 1985 to convene a meeting of experts with a view to revising the 1957 Convention. Its work resulted in the adoption of Convention No. 169 on 27 June 1989.[36] The new Convention is said to reflect contemporary thought which has abandoned 'assimilation'

[33] It is added that, unless otherwise agreed, compensation shall take the form of lands, territories or resources equal in quality, size and legal status.

[34] Signed on 26 June 1957, entered into force on 2 June 1959. Twenty-seven States have ratified ILO Convention No. 107. Text in 328 UNTS 247. See also ILO Recommendation No. 104 on the Protection of Indigenous and Tribal Populations.

[35] See Brölmann *et al.* (1993: 199–203).

[36] Text in 28 ILM (1989), p. 1,382. Following two ratifications it entered into force on 5 September 1991. As of 1 January 1993 it had been ratified by only four States: Bolivia, Colombia, Mexico and Norway.

in favour of 'preservation'.[37] Part III of the new Convention includes various articles on the protection of lands and territories of indigenous peoples, the term 'territories' being used to cover 'the total environment of the areas which the peoples concerned occupy or otherwise use'.[38] Article 15 deals specifically with safeguarding the rights of the peoples concerned to the natural resources pertaining to their lands: 'These rights include the right of these peoples to participate in the use, management and conservation of these resources.'[39]

The word 'participate' considerably diminishes the value of safeguarding the indigenous people's rights to their natural resources, even in cases where the peoples concerned enjoy ownership and possession of the lands and their natural resources. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments are said to be under an obligation to consult indigenous peoples as regards exploration and exploitation of such resources in their lands. In a non-committal way it is added that the peoples concerned shall, wherever possible, participate in the benefits of such activities. However, they must receive fair compensation for any damage which they may sustain as a result of such activities. Article 16 stipulates that the peoples concerned shall not be removed from the lands which they occupy, but provides some ambiguous and dubious escape clauses:[40]

> Where the relocation of these peoples is considered necessary as an *exceptional* measure, such relocation shall take place *only* with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place *only* following appropriate procedures established by national laws and regulations, including public inquiries *where appropriate*, which provide the opportunity for effective representation of the peoples concerned.[41]

Obviously, this article leaves the State concerned ample discretion and will be of little help to indigenous peoples should they have a dispute with their State government concerning the destruction of their land and resources as a result of, for example, the construction of infrastructural works or resource exploitation.

In the Amazon Declaration (1989) the Council, established under the

[37] Brölmann *et al.* (1993: 215). [38] Article 13.2 of ILO Convention No. 169.

[39] Article 15.1.

[40] *Cf.* Art. 12.1 of the 1957 ILO Convention quoted above, which it is meant to improve, without much success.

[41] Article 16.2, emphasis added. See also some 'whenever possible' clauses in the subsequent paragraphs of Art. 16.

Treaty for Amazonian Co-operation of 1978, linked the exercise of permanent sovereignty over natural resources to the duty to respect the rights and interests of the indigenous peoples: '... we reiterate our full respect for the right of indigenous populations of the Amazonian region to have adopted all measures aimed at maintaining and preserving the integrity of these human groups, their cultures and their ecological habitats, subject to the exercise of the right which is inherent in the sovereignty of each State.'[42]

Reference can also be made to the 1992 Biodiversity Convention, the 1994 International Tropical Timber Agreement (ITTA), the 1994 Desertification Convention and the 1994 Energy Charter Treaty. The Biodiversity Convention recognizes the contribution of indigenous peoples to the conservation of biological diversity and the sustainable use of its components,[43] but falls short of recognizing rights of indigenous peoples, based on their knowledge and practices, to the conservation and sustainable use of biological diversity. It only calls upon governments to 'respect, preserve and maintain' the knowledge of indigenous communities and to promote its wider application with their approval and involvement and the equitable sharing of the benefits arising from the utilization of such knowledge.[44] The ITTA encourages members to support and develop industrial tropical-timber reforestation and forest-management activities as well as to rehabilitate degraded forest land, 'with due regard for the interests of local communities dependent on forest resources'.[45] The UN Convention to Combat Desertification calls on the parties to ensure that decisions on the design and implementation of programmes to combat desertification and/or to mitigate the effects of drought are taken with the participation of populations and local communities.[46] Finally, the Energy Charter Treaty includes amongst its exceptions any preferential measure 'designed to benefit investors who are aboriginal people ... or their investments'.[47] It should be noted, however, that in all these treaties the sovereign rights are vested in the State which is to exercise these rights on behalf of all its peoples and citizens.

As far as judicial decisions are concerned, the ICJ recognized in the *Western Sahara case* (1975) that territories inhabited by socially and

[42] Paragraph 3 of the Amazon Declaration, May 1989. Text in 28 ILM (1989), pp. 1,303–5.

[43] In the preamble the close and traditional dependence of such communities on biological resources is acknowledged. It also addresses the desirability of those possessing local knowledge related to genetic resources to benefit appropriately from its use.

[44] See Art. 8(j) of the Biodiversity Convention.

[45] Text in *Environmental Policy and Law*, 24/2/3 (1994), p. 125. See also p. 334 below.

[46] See Art. 3(a). See also the preamble and Arts. 5(d) and 19.1(a).

[47] Article 24.2(iii) of the ECT.

politically organized tribes and peoples were not to be regarded as *terra nullius* or free for occupation and acquisition. It also found that certain nomadic peoples possessed rights, including rights to the lands in the Western Sahara.[48] The court concluded that the Decolonization Declaration 1514 (XV) was applicable to the Western Sahara and advised that the application of the principle of self-determination be pursued, through the free and genuine expression of the will of the people of the territory.[49] Issues at stake included not only certain political disputes among North African States, but also the disposal of the rich phosphate deposits and fishery zones of the Western Sahara. In 1976, following an agreement between Spain, Morocco and Mauritania, Spain withdrew from the territory; Morocco acquired a large part of the Western Sahara (including phosphate deposits); and Mauritania acquired the rest (including some mineral wealth).[50] However, after strong protests from Algeria and the Saharan liberation movement Polisario, Mauritania renounced its claims and the UN launched a plan for the self-determination of the peoples within the territory, under which the peace-keeping operation MINURSO would supervise a cease-fire and conduct a referendum.[51] So far, however, this has not materialized and in practice Morocco occupies almost the entire Western Sahara.

Finally, reference should be made to a recent policy change of the World Bank Group: in response to mounting criticism of the effects of its projects on indigenous peoples and their economies,[52] the World Bank in March 1992 issued Guidelines on Indigenous Peoples in which it declared to aim at their *informed participation*:[53]

> Thus, identifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists are core activities for any project that affects indigenous peoples and their rights to natural and economic resources.

The above rights of indigenous peoples to the natural resources of their lands are at first glance similar to those of States (to be) derived from the principle of permanent sovereignty, as discussed in Chapter 9. Yet, the essential difference is that indigenous peoples are still an object rather than a subject of international law; at best they can be identified as an emerging subject.[54] Relations of States with indigenous peoples within their territory

[48] Advisory Opinion Western Sahara, *ICJ Reports* (1975), pp. 12–176, at pp. 35–7. See also Franck (1976: 709–11). [49] Ibid., p. 68. [50] See also Franck (1976: 704).

[51] UN Doc. S/RES/658, 27 June 1990 and UN Doc. S/RES/690, 29 April 1991. Text in Wellens (1993: 92–3).

[52] Examples are the Polonoroenk project in Brazil and the Narmada project in India.

[53] World Bank Guidelines on Indigenous Peoples, 2 March 1992.

have long been perceived as matters of internal jurisdiction. Due to the developments in human rights law and attempts to provide indigenous peoples with an internationally recognized status, no State can any longer maintain that its treatment of its citizens and indigenous peoples is an internal matter. Indeed, both the ECOSOC Working Group Draft Declaration and ILO Convention No. 169 fall short of recognizing a fully fledged right to self-determination of indigenous peoples and cautiously limit their rights to aspects of internal self-determination, in other words to rights *within* their States.[55] These documents indicate the gradual recognition, under present international law, of the need for special protection of the rights of indigenous peoples and of the notion that, as the preamble of the Draft Declaration puts it, 'arrangements between States and indigenous peoples are properly matters of international concern and responsibility'. This manifests itself first and foremost in obligations incumbent upon States rather than in rights of indigenous peoples themselves which can be internationally invoked. At the international level, States can be held accountable, both in the context of the ILO Convention and under UN human rights procedures,[56] for their obligation to respect the rights and interests of indigenous peoples regarding their natural wealth and resources, but the decisive authority as regards use and exploitation of indigenous lands and their natural resources ultimately rests with the State.

Duty to co-operate for international development

Global development

In the very first permanent-sovereignty Resolution 523 (VI), it was considered that 'the underdeveloped countries *must* utilize such [natural] resources ... to further the expansion of the world economy'.[57] In subsequent resolutions this phrase has never been repeated. In Resolutions 837 (IX), 1314 (XIII) and 1514 (XV) reference is made to 'obligations arising out of international co-operation'. These words are usually understood to refer to the obligation to fulfil specific commitments made in the course of

[54] See Barsh (1986: 369). See also Heintze (1990: 39–71) and Morris (1986: 277–316).

[55] As is evident from the qualification in Art. 1 of ILO Convention No. 169, the use of the term 'peoples' has no implications as regards the rights which one may attach to the term under international law.

[56] For example, the various communication and complaints procedures in the context of the UN Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Elimination of Racial Discrimination.

[57] GA Res. 523 (VI), 12 January 1952, emphasis added.

co-operation, but could also be interpreted as reflecting a duty to co-operate for international development. The Strategy for DD II points out: 'Every country has the right and duty to develop its ... natural resources'; and provides in its paragraph 73: 'production policies will be carried out in a *global context to achieve optimum utilization of world resources*, benefiting both developed and developing countries.'[58] In the permanent-sovereignty-related paragraphs of the CERDS (as well as in other NIEO resolutions) such requirements are not included. They contain, however, many general references to objectives such as a sustained growth of the world economy, balanced international trade and economic co-operation among States,[59] which, according to Article 33.2, also govern Article 2. Consequently, one may argue that the right to exercise permanent sovereignty over natural resources should be read and understood in the light of Article 33 of the CERDS and the general context of this Charter of Economic Rights and Duties of States.

As far as multilateral treaties are concerned, only general references to a duty to co-operate can be traced, although none of them is directly related to permanent sovereignty over natural resources. The first document to be mentioned is, of course, the UN Charter, especially Chapter IX on International Economic and Social Co-operation.[60]

Secondly, it may be relevant to mention the agreements underlying the post-war international economic and monetary order. Nothing more than an indirect reference to the use of natural resources for world development can be found in the Constitutions of the IMF and the World Bank, of which the former includes the stated intention 'to facilitate the expansion and balanced growth of international trade, and to contribute thereby to ... the development of the productive resources of all members as primary objectives of economic policy'.[61] Similarly, the 1948 Havana Charter aimed 'to increase the production, consumption and exchange of goods, and thus to contribute to a balanced and expanding world economy'. The preamble of GATT (1947) recognizes that international relations in the field of 'trade and economic endeavour should be conducted with a view to raising standards of

[58] GA Res. 2626 (XXV), 24 October 1970, emphasis added.

[59] Articles 6–9 and 33 of CERDS; see also VerLoren van Themaat (1981: 269–73).

[60] For the background and an interpretation of Arts. 55 and 56 of the UN Charter see Pellet and Bouony in Cot and Pellet (1991: 843–63 and 887–93). See also Art. 74 which contains a reference to 'the general principle of good-neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters'.

[61] Article I(ii) of the IMF Constitution; similar objectives can be found in Art. I(i) and (iii) of the Articles of Agreement of the World Bank.

living . . . developing the full use of the resources of the world and expanding the production and exchange of goods'. The constitution of the new World Trade Organization (1994) contains a modified formulation of this objective:

> . . . allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and to preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

Some regional co-operation agreements could also be referred to in this context. For example, the Treaty establishing the European Coal and Steel Community (1951) includes the following objectives:

> to ensure an orderly supply to the common market, taking into account the needs of third countries; . . .
>
> to promote a policy of using natural resources rationally and avoiding their unconsidered exhaustion.[62]

The forty-six member States of the Organization of the Islamic Conference (OIC) have stated their wish to ensure that:[63]

> the economic resources of the Islamic countries could circulate between them so that optimum utilization could be made of these resources in a way that will serve their development and raise the standard of living of their peoples.

The 1994 Energy Charter Treaty aims to promote long-term co-operation in the energy field by promoting exploration and development of energy resources on a commercial and non-discriminatory basis. The facilitating of access to these resources and the security of supply of oil and natural gas served as a major motive for Western States to initiate and join this co-operation.[64]

Finally, the 1982 UN Convention on the Law of the Sea, includes as a general objective the setting-up of 'a legal order for the seas and oceans which will . . . promote . . . the equitable and efficient utilization of their resources . . . both within and beyond the limits of national economic jurisdiction'.[65]

The above-mentioned multilateral instruments set out objectives or aims by which the State parties and organizations concerned should be guided;

[62] Article 3(a) and (d). [63] Preamble. Text in Moinuddin (1987: 197).

[64] See Wälde (1994). See also the EU Council Decision on the signing of the Energy Charter. Draft text (as adopted) in 37 *Official Journal of the European Communities*, No. 94 C 344/01 and 02.

[65] Preamble, para. 4 of the 1982 UN Convention. See also Pinto (1986: 136–45).

they do not impose clear-cut obligations. This is reflected in section 4 on the Duty to Co-operate for Global Development of the Seoul Declaration:

The duty to co-operate in international economic relations implies the progressive development of this duty in proportion to the growing economic interdependence between States and should lead therefore in particular to a reinforced co-operation in the fields of international trade, international monetary and financial relations, transnational investments, the transfer of technology, the regulation of the activities of transnational corporations and of transnational restrictive business practices, the supply of food, energy and commodities, the international protection of the natural environment, the right to development and the co-ordination of the various activities with a view to a coherent implementation of a new international economic order.

Obviously, this formulates the duty to co-operate for global development in exhortatory rather than in binding language. Furthermore, the ILA advocates that such a duty should progressively be developed 'in proportion to the growing economic interdependence between States'. Consequently, it is not easy to identify whether, and if so which, specific international obligations with respect to the use of natural resources arise from this duty to co-operate for global development.

In the aftermath of the use of 'the Arab oil weapon' and the world energy crisis during the early 1970s, some critical literature claimed that the 'free' exercise of permanent sovereignty should be performed or controlled in such a way as to contribute to international peace, world trade and development: 'Natural resources are not always a matter of "domestic concern" or of complete "sovereignty", and a State cannot do whatever it wants with natural resources that happen to be under its control.'[66] Although from the point of view of international law some of these arguments may make sense, at the time they were inspired by *ad hoc* political considerations rather than legal argument. Legally inspired rebuttals came from, among others, Shihata[67] and Bedjaoui[68] who defended the legality of the use of 'the Arab oil weapon' and the 'full' and 'permanent' sovereignty of developing States over their natural resources, respectively. Also Salem argues that the adjective 'full' refutes the idea that the sovereignty of a State over its natural wealth could be limited by the fact that such wealth may be sorely needed in other parts of the world.[69]

[66] See Paust and Blaustein (1974: 420). Reprinted with other commentaries in Paust and Blaustein (1977): see especially Paust and Blaustein (1977: 77–83).
[67] See Shihata (1974: 591–627) and Shihata (1975).
[68] See Bedjaoui (1979: 228). [69] Quoted by Seidl-Hohenveldern (1992: 27).

Development of countries of the 'South'

It is notable that permanent-sovereignty resolutions rarely call on States to exercise their permanent sovereignty, or to exploit and use their natural resources, in order to promote the development of other developing countries. This may be explained, firstly, by the fact that developing countries have themselves advocated the principle of permanent sovereignty in the international community as a means to defend *their* resources against industrialized countries and Western companies in order to secure the benefits from exploitation for themselves. Secondly, the thought of mutual help and solidarity among developing countries only occurred much later.[70] Once it was realized that all States, industrialized or developing, have the right to permanent sovereignty, one may wonder whether the general duty to co-operate for development of developing countries should not imply a specific obligation for States to exploit, use or share their natural resources for the sake of promoting development of developing countries. An indication of the emergence of such an obligation might perhaps be found in the 1982 UN Convention on the Law of the Sea. Firstly, Articles 69 and 70 provide, under specified conditions, for sharing the living resources in the EEZs of coastal States with neighbouring land-locked or otherwise geographically disadvantaged developing States. However, as we noted in chapter 6, the implementation of this obligation depends on the way in which the coastal States concerned interpret it.[71] Secondly, coastal States are in principle under an obligation to make payments or contributions, in respect of the exploitation of the non-living resources of their continental shelves beyond 200 miles, to the International Sea-bed Authority. The latter will distribute them to State parties to the Convention 'on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them'.[72]

In conclusion, while under modern international law States have a duty to co-operate for development, in particular of developing countries, there

[70] See South Commission (1990: 16–18).

[71] Nonetheless, the 1982 UN Convention on the Law of the Sea has identified this participation as a 'right' of land-locked and geographically disadvantaged States, which consequently implies a legal duty on the part of coastal States. Similar resource-related provisions cannot be found in other multilateral treaties such as the Lomé IV Convention, the Agreement Establishing the Common Fund for Commodities or the Agreement on the Global System of Trade Preferences among Developing Countries (GSTP), a so-called South–South treaty which was concluded under the auspices of the Group of 77 in Belgrade in 1988.

[72] See Art. 82 of the 1982 UN Convention on the Law of the Sea.

are no indications that this general duty has been carried to a higher level of obligation namely that of an obligation incumbent on States in the exercise of their right to permanent sovereignty.

Conservation and sustainable use of natural wealth and resources

In 1962, before the preservation of the environment was perceived as an important concern, the General Assembly adopted by consensus a resolution entitled 'Economic Development and the Conservation of Nature'.[73] The resolution shows its consciousness of the extent to which the economic development of developing countries may jeopardize their natural resources, including their fauna and flora, and formulates for the first time the objective that natural resources should not be wasted. It endorses an initiative from UNESCO to recommend action and to introduce effective domestic legislation towards, *inter alia*, the preservation and rational use of natural resources.

The Stockholm Declaration on the Human Environment (1972) points out that careful planning and management are required for safeguarding the natural resources of the earth for the benefit of present and future generations: 'The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments.'[74]

In general terms, it is stated in Principle 2: 'The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.' Principle 13 provides that:

> In order to achieve a more rational management of resources and thus to improve the environment, States *should* adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the human environment for the benefit of their population.

But no specific principles with respect to modalities of national management of resources can be inferred from this Declaration. Ever since the Stockholm Conference, UN resolutions have gradually elaborated standards for nature conservation and utilization of natural resources. For

[73] GA Res. 1831 (XVII), 18 December 1962. [74] Preamble, para. 2.

example, Article 30 of Chapter III of the CERDS, entitled 'Common Responsibilities towards the International Community', reads:

The protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States. All States shall endeavour to establish their own environmental and developmental policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries. All States have 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. All States should co-operate in evolving international norms and regulations in the field of the environment.

Symptomatic of this trend may be the following paragraph of Resolution 35/7 in which the General Assembly:

Solemnly invites Member States, in the exercise of their permanent sovereignty over their natural resources, to conduct their activities in recognition of the supreme importance of protecting natural systems, maintaining the balance and quality of nature and conserving natural resources, in the interests of present and future generations.

This phrase was literally repeated in Resolutions 36/6 and 37/7. In the latter the General Assembly solemnly proclaimed the revised World Charter for Nature.[75] In this document the following conviction is expressed: 'Man can alter nature and exhaust natural resources by his action or its consequences and, therefore, must fully recognize the urgency of maintaining the stability and quality of nature and of conserving natural resources.'

Consequently, it includes principles of conservation. It stipulates that natural resources must not be wasted, but used with restraint in accordance with the following rules:[76]

a Living resources shall not be utilized in excess of their natural capacity for regeneration;
b The productivity of soils shall be maintained or enhanced through measures which safeguard their long-term fertility and the process of organic decomposition, and prevent erosion and all other forms of degradation;
c Resources, including water, which are not consumed as they are used shall be reused or recycled;
d Non-renewable resources which are consumed as they are used shall be

[75] On 2 October 1982, GA Res. 37/7 annexing the Charter was adopted by a recorded vote of 111 to one (the USA), with eighteen abstentions. Originally, this Charter was drafted by the International Union for the Conservation of Nature and Natural Resources (IUCN: now World Conservation Union). See Burhenne and Irwin (1986).
[76] GA Res. 37/7, 28 October 1982, para. 10.

exploited with restraint, taking into account their abundance, the rational possibilities of converting them for consumption, and the compatibility of their exploitation with the functioning of natural systems.

In the section on implementation, it provides that its principles 'shall be reflected in the law and practice of each State' and that each State, taking fully into account sovereignty over its natural resources, must give effect to provisions of the Charter through its competent organs and in co-operation with other States.[77] From this perspective it is disappointing, as noted above,[78] that the 1992 Rio Declaration appears to be a step back since it contains less substantive provisions on natural resources and nature conservation than the Stockholm Declaration.

Some resolutions, while reaffirming the permanent sovereignty of States, indicate that the environmental impact of an irrational and wasteful exploitation of natural resources may amount to a threat to the exercise of permanent sovereignty by other countries, especially by developing countries.[79] The NIEO Declaration (1974) reiterated in general terms 'the necessity for all States to put an end to the waste of natural resources, including food products', while General Assembly Resolution 3326 (XXIX) puts this objective in the context of permanent sovereignty by observing that 'irrational and wasteful exploitation and consumption of natural resources represent a threat to developing countries in the exercise of their permanent sovereignty over natural resources'. This also implies a duty of States to ensure that their natural resources and environment are managed properly, for the benefit of present and future generations.

With respect to the duty to prevent significant harmful effects on the environment of other States or of areas beyond national jurisdiction, the Stockholm Declaration includes as Principle 21:

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.

During its next session the General Assembly included a stronger term in the first operative paragraph of the Resolution on Co-operation between States in the Field of the Environment:[80] 'in the exploration, exploitation

[77] Paragraph 22. Apart from States, individuals and NGOs are also addressed to ensure that the objectives and requirements of the Charter are met (para. 24).

[78] See chapter 4, pp. 139–40 above.

[79] See GA Res. 3129 (XXVIII), 13 December 1973.

[80] This GA Res. 2995 (XXVII) was adopted by 115 votes, with none against and 10 abstentions.

and development of their natural resources, States *must not* produce significant harmful effects in zones situated outside their national jurisdiction.' Recently, there seems to have been a trend to specify this prohibition in particular with respect to exploitation of shared natural resources.

A number of international conventions in the field of environment and development have a bearing, mostly indirectly, on the exercise by States of their permanent sovereignty: regional co-operation treaties; global conservation treaties; and other resource-related multilateral treaties.

Regional co-operation treaties

The first regional co-operation treaty to be mentioned is the 1940 Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere – an early and visionary example of an effort to protect all species in their natural habitat in order to prevent extinction and to preserve extraordinary beauty and striking geological formations, mainly through the establishment of national parks and wilderness reserves.[81] Twenty-one States in the Americas are parties to it and all but one (the USA) are developing countries. It is estimated that their territories include the habitat of approximately 25 per cent of all species on earth as well as the world's largest remaining tropical forests. This Convention, however, is primarily of a promotional nature and a framework for co-operation rather than a source of international legal obligations.

In 1968, the African Convention on the Conservation of Nature and Natural Resources was concluded under the auspices of the OAU. According to the preamble, the Convention is based on the duty 'to harness the natural . . . resources of our continent for the total advancement of our peoples'. Its principal objective is to promote the taking of the necessary measures to ensure the conservation, utilization and development of soil, water, floral and faunal resources of the continent, in accordance with scientific principles and having due regard to the best interest of the people. In addition, parties are required to pay particular attention to issues such as 'controlling bush fires, forest exploitation, land clearing for cultivation' and 'to limit forest grazing to seasons and intensities that will not prevent forest regeneration'.[82] States parties have a particular responsibility for protection of animal or plant species threatened with extinction and which are represented only in the territory of one State.[83] The African Convention

[81] Text in 161 UNTS, p. 193. Concluded under the auspices of the Pan-American Union, now called the Organization of American States. See Lyster (1985: chapter 6).

[82] Article VI of the African Convention on the Conservation of Nature and Natural Resources.

[83] Article 8.

stands out as an early example of integrating the conservation of nature and natural resources with development. However, the Convention is mainly a 'sleeping beauty' since the level of activity in respect of the Convention is reportedly very low.[84]

In 1976, the Apia Convention on Conservation of Nature in the South Pacific was concluded.[85] Its principal objective is to conserve the capacity of the South Pacific to produce renewable natural resources, including indigenous wildlife, as well as to preserve representative samples of ecosystems, 'superlative scenery' and 'striking geological formations'.

As far as Latin America is concerned, the most relevant treaty is the 1978 Treaty for Amazonian Co-operation. Its main objectives include the promotion of 'the harmonious development of the Amazon region', in such a way that it will achieve environmental preservation as well as conservation and rational utilization of the natural resources of these territories.[86] In the Amazon Declaration (1989), the Amazonian Council links the exercise of permanent sovereignty more closely with the duty of conserving the environment and respecting the rights and interests of indigenous peoples:

> 2 Conscious of the importance of protecting the cultural, economic and ecological heritage of our Amazon regions and of the necessity of using this potential to promote the economic and social development of our peoples, we reiterate that our Amazon heritage must be preserved through the rational use of the resources of the region, so that present and future generations may benefit from this legacy of nature.
> 4 We reaffirm the sovereign right of each country to freely manage its natural resources, bearing in mind the need for promoting the economic and social development of its people and the adequate conservation of the environment.

In the second part of paragraph 4, the Declaration welcomes international support for the conservation of the heritage of these territories, on the condition that this does not amount to an infringement of sovereignty.

Apart from the weakness of the co-operation provided for in the Declaration, the dominant position of Brazil and political difficulties in the region have hampered the implementation and further development of the

[84] See Lyster (1985: 26–28) and Sand (1992: 70).

[85] Concluded under the auspices of the South Pacific Commission, Apia, 12 June 1976, in force 28 June 1980. Text in Burhenne (1993: 45).

[86] The Amazon Declaration also reiterates that 'the Amazon heritage must be preserved through the rational use of the resources of the region, so that present and future generations may benefit from this legacy of nature', referred to in p. 30 of this chapter. The text of the Amazon Declaration of 6 May 1989 is published in 28 ILM (1989), pp. 1,303–5.

Amazon Declaration as an effective framework for regional co-operation in natural-resources management.

In 1985, the six members of ASEAN concluded the ASEAN Agreement on the Conservation of Nature and Natural Resources[87] which, however, never entered into force. In the preamble the ASEAN States recognize the importance of natural resources for present and future generations and express the wish to undertake individual and joint action for the conservation and management of living resources and other natural elements on which they depend. The treaty aims at maintaining essential ecological processes and life-support systems, preserving genetic diversity and ensuring the sustainable utilization of harvested resources. It purports to establish a co-operative framework among the ASEAN member States and to serve as a framework of reference for domestic environmental legislation.

In the context of UNEP a series of conventions on regional seas have been concluded. While they primarily aim to protect the marine environment from pollution, most of them also contain standards and co-operative arrangements with respect to natural-resource management in the marine and coastal areas of the regions concerned, with a view to maintaining a balance between economic development and environmental protection. One example is the 1985 Noumea Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.[88] This Convention recognizes the economic, social and cultural value of the natural resources of the region and the need to protect this natural heritage for future generations.

Finally, reference should be made to EU law. The original constitutions of the European institutions did not deal with environmental concerns, but the Single European Act (1987) and the Treaty of Maastricht (1992) inserted several environmentally relevant provisions into EU law. One of the new objectives of the EU is 'to promote through the Community a harmonious and balanced development of economic activities, [and] sustainable and

[87] Text in 15 EPL (1985), p. 64.

[88] Other examples are the 1981 Abidjan Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, the 1981 Lima Convention for the Protection of the Marine Environment and Coastal Areas of the South-East Pacific, the 1982 Jeddah Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, the 1983 Cartagena de Indias Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region and the 1985 Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region. See Gebremedhin (1989: table 12.1, pp. 93–4) and Sand (1992: chapter IV).

non-inflationary growth respecting the environment'.[89] This is specified in Article 130R, which provides that action by the Community in the field of the environment has, *inter alia*, the following objectives: to preserve, protect and improve the quality of the environment; to ensure a prudent and rational utilization of natural resources; and to promote measures at the international level to deal with regional or worldwide environmental problems.

Global conservation treaties

A number of multilateral treaties in the field of nature and natural-resources conservation are relevant. Firstly, the 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat. Like the Washington Convention, this is first of all an intergovernmental framework for international co-operation for the conservation and 'wise use' of wetland habitat and species. The Bureau of the Convention keeps a register of wetlands of international importance, which currently numbers more than 500, involving some sixty States. Co-operation programmes have been set up under the Convention, involving the Netherlands, Switzerland, France and various African States. In addition, in 1990 the Wetlands Conservation Fund was established to assist developing countries in the implementation of the Convention.

Under the 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage, each State party has a duty to identify, protect, conserve and hand on to future generations the cultural and natural heritage which lies in its territory. A major international environmental non-governmental organization, the IUCN, is entrusted with the task of monitoring and reporting on the state of the natural sites. The World Heritage List includes at least 358 sites located in some eighty-three States, of which less than 100 are natural sites.[90]

Although the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) addresses the international trade of faunal and floral resources, its ultimate objective is, of course, to conserve the status of the species concerned. So far, it has been the most important international agreement using trade instruments to protect wildlife. A related treaty is the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals. This multilateral convention purports to protect and conserve migratory species such as seals, small cetaceans and

[89] Article 2 of the Maastricht Treaty on European Union. See also Wilkinson (1992).

[90] Some eighty-four of these are natural and an additional fourteen both natural and cultural. These ninety-eight sites are located in some thirty-eight States.

white storks by restricting harvest, conserving habitat and controlling adverse factors.

The main objectives of the Convention on Biological Diversity are the conservation of biological diversity, the sustainable use of its components and the equitable sharing of benefits of utilizing genetic resources. Sustainable use is defined as 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations'. Thus the Convention incorporates important new principles of international environmental law such as the 'precautionary principle' and 'intergenerational equity'. While recognizing State sovereignty over natural resources, the Convention requires parties to facilitate access to genetic resources for environmentally sound uses by other parties. The Convention provides, *inter alia*, for national monitoring of biodiversity and the development of national strategies for its conservation, including the establishment of measures for specific species and habitats.[91] Thus the Convention obliges States to take effective national action to put a halt to the destruction of biological species, habitats and ecosystems.

The UN Framework Convention on Climate Change (FCCC) aims to stabilize atmospheric concentrations of greenhouse gases at levels that will prevent human activities from interfering dangerously with the global climate system. Such a level is to be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner. Apart from the commitment of industrialized countries 'by the end of the present decade' to 'return individually or jointly to their 1990 levels of those anthropogenic emissions' of greenhouse gases, the FCCC formulates some duties incumbent on *all* parties. They include in general terms duties to protect the climate system for the benefit of present and future generations of humankind, to take precautionary measures with respect to climate change, and to promote sustainable development. More specific resource-related obligations are: to promote and co-operate in the conservation and enhancement of sinks and reservoirs of greenhouse gases, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems; and to co-operate in preparing for adaptation to the impacts of climate change and to develop integrated plans for areas and resources especially vulnerable.[92] The

[91] Articles 7 and 9. [92] See Art. 4.1(d) and (e).

implementation of these general commitments are incumbent on States in the exercise of permanent sovereignty. During the negotiations on the FCCC, developing countries with significant deposits of energy resources – for example, oil, natural gas and coal – asserted their permanent-sovereignty rights and claims, but also indicated that they might be willing to accept self-imposed limitations as a *quid pro quo* for international assistance to adopt more effective pollution abatement measures and to gain access to environmentally sensitive technologies.[93] The Convention provides that industrialized States may implement certain policies and measures 'jointly' with each other or with other States parties, based on criteria to be set by a conference of the parties. Specifically, this would mean that one State may carry out part of its obligations in the territory of another State, for example by investing in pollution-reducing activities. The principle of permanent sovereignty requires, of course, such co-operation to take place on a voluntary basis and to respect the sovereignty of the host State, including its economic and environmental policies.[94]

The UN Convention to Combat Desertification, a follow-up to 'Agenda 21' of UNCED 1992 in Rio de Janeiro, aims at curbing the degradation of drylands worldwide, including semi-arid grasslands as well as deserts. The degradation of fragile drylands threatens the livelihoods of over 900 million people in some 100 countries. The process affects some 25 per cent of the Earth's land area and seems to be occurring at an accelerated rate globally. Causes include overgrazing, overcropping, poor irrigation practices and deforestation, combined with climatic variations. The situation is especially serious in Africa, where 66 per cent of the continent is desert or dryland, and 73 per cent of the agricultural drylands are already degraded. The Convention acknowledges that desertification and drought are problems of global dimension and calls for joint action to prevent the long-term consequences of desertification such as mass migration, loss of plant and animal species, climate change and the need for emergency aid to populations in crisis.[95] It establishes a framework for national, sub-regional and regional programmes and formulates general obligations, obligations of affected-country parties and obligations of developed-country parties to combat desertification and mitigate the effects of drought. Preventing desertification must be a priority in national policies of affected-country parties. They must also promote awareness among citizens and citizens' groups.[96] The Convention calls on the developed countries to support actively the efforts of

[93] Diaz (1994: 161). [94] On this issue see Kuik *et al.* (1994: 163).

[95] See Westing (1994: 113).

[96] Danish (1995: 134) calls the 'bottom-up approach' the hallmark of the Desertification Convention.

affected developing countries, to provide 'substantial' financial resources and to transfer anti-desertification technologies to developing countries.

Other resource-related multilateral treaties

According to Article 1 of the Constitution of the FAO (1945), the organization's functions include 'the conservation of natural resources'. The 1982 UN Convention on the Law of the Sea includes innovative principles and rules on environmental protection and preservation of the marine environment in rational exploitation and conservation of the living and non-living resources of the sea. While resources in extensive sea areas may be brought under national economic jurisdiction as a result of the establishment of a 200-mile EEZ and by extension of the continental shelf, obligations have been formulated as regards the protection and preservation of the marine environment in these areas. This dual approach is reflected in Article 193:

> States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

Part XII of the Convention formulates a number of specific responsibilities for environmental preservation. These relate in particular to the prevention, reduction and control of pollution, including pollution originating in areas under national economic jurisdiction.[97] Article 235 provides that States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment, and that 'they shall be liable in accordance with international law'. Articles 61 and 62 include specific responsibilities of coastal States as regards the conservation and utilization of living resources in their EEZ.[98]

[97] See in particular Art. 194.2 of the UN Convention on the Law of the Sea which reads:
States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

[98] On 28 July 1994, the General Assembly adopted a supplementary Agreement relating to the implementation of Part XI of the UN Convention on the Law of the Sea. This Agreement substantially modifies some of the controversial parts of the envisaged deep sea-bed mining regime in an effort to accommodate objections of the industrialized countries and to seek in this way universal participation in the 1982 Convention. The Agreement does not concern natural resources which come within the exclusive economic jurisdiction and the permanent sovereignty of coastal States, with the exception of the eroded protection of developing land-based producers of minerals. The text of the 1994 Agreement is annexed to UN Doc. A/RES/48/263, 17 August 1994 and has been published in 33 ILM (1994), p. 1,309. For a discussion see Li (1994: chapter VIII).

The 1983 International Tropical Timber Agreement and its 1994 successor may also serve as examples of an attempt to include international environmental regulation in a resource-related multilateral treaty. In the preamble to the 1983 Agreement the parties recognized 'the importance of, and the need for, proper and effective conservation and development of tropical timber forests with a view to ensuring their optimum utilization while maintaining the ecological balance of the regions concerned and of the biosphere'. While bearing in mind the sovereignty of producing member States over their natural resources, Article 1(h) lists as one of the objectives of the Agreement: 'To encourage the development of national policies aimed at sustainable utilization and conservation of tropical forests and their genetic resources, and at maintaining the ecological balance in the regions concerned.' A slightly modified version is incorporated in the 1994 Agreement. Recognizing the sovereignty of members over their natural resources, it sets out: 'To encourage members to develop national policies aimed at sustainable utilization and conservation of timber producing forests and their genetic resources and at maintaining the ecological balance in the regions concerned, *in the context of tropical timber trade*.'[99]

Firm decisions to reach sustainability in timber production by the year 2000 were still considered to be impossible and, consequently, only objectives were formulated. The International Tropical Timber Council can only stimulate and at best assess sustainable utilization and conservation of tropical forests, but it cannot prohibit unsustainable production.

Other individual commodity agreements also contain conservation paragraphs. For example, the International Tin Agreement (1977, later renewed) provides that participating countries 'shall encourage the conservation of the natural resources of tin by preventing the premature abandonment of deposits'.[100] This relates to the need to avoid wasteful production methods. The International Rubber Agreement (1979) merely invests its Council with the right to initiate, upon the request of one State party, a consultation procedure on domestic natural rubber policies directly affecting supply or demand.

The Lomé IV Convention (1989) includes amongst its principles of co-operation 'a sustainable balance between its economic objectives, the rational management of the environment and the enhancement of natural ... resources'.[101] Article 14 specifies that co-operation shall entail 'mutual responsibility for preservation of the natural heritage' and:

[99] Article 1(l). Text in EPL 24/2/3 (1994), p. 125, emphasis added.
[100] Article 45(c)(iii). [101] Article 4.

shall help promote specific operations concerning the conservation of natural resources, renewable and non-renewable, the protection of ecosystems and the control of drought, desertification and deforestation; other operations on specific themes shall also be undertaken (notably locust control, the protection and utilization of water resources, the preservation of tropical forests and biological diversity).

The environment is included in a first, but rather general, chapter on areas of ACP–EU co-operation.[102] It includes provisions concerning the protection and enhancement of the environment, the halting of the deterioration of land and forests, the restoration of ecological balances and the preservation of natural resources and their rational exploitation. For these purposes EC support is to be provided 'with a view to bringing an immediate improvement in the living conditions of their populations and to safeguarding those of future generations'. In November 1995, as a result of the Mid-Term Review of the Lomé IV Convention, a new Protocol 10 was added on Sustainable Management of Forest Resources. Its objectives included 'supporting the development of ACP national policies aimed at the sustainable utilization and preservation of tropical timber producing forests and their genetic resources as well as the maintenance of an ecological balance in the regions concerned within the context of the tropical timber trade'. Yet, all of these objectives and duties in the Lomé IV (1989) and the Lomé IV *bis* (1995) Conventions seem to be of a promotional nature and no clear-cut obligations can be discerned. The only exceptions thereto are provisions concerning transboundary movements of hazardous and radioactive wastes.[103] The EU is under an obligation to prohibit all exports of such wastes to the seventy ACP States which are, in turn, required to prohibit import of such wastes from the EU States. In addition, the ACP States are obliged to ban such waste imports from 'any other country'.[104]

Finally, reference can be made to the environment provisions of NAFTA and the Energy Charter Treaty (1994). It is notable that the latter treaty makes reference to the concept of 'sustainable development' and calls on each State to minimize in an economically efficient manner harmful environmental impacts, occurring either within or outside its territory, as a result of activities in the energy sector.[105]

[102] Title I, Part 2.

[103] As defined in Annex VIII to the Lomé Convention's Final Act. See also Art. 39. (Annex VIII incorrectly refers to Art. 33.)

[104] See also the Convention on the Ban of the Import into Africa and the Control of Transboundary Movements and Management of Hazardous Wastes Within Africa, also known as 'the Bamako Convention'. Text in 30 ILM (1991), p. 775, not yet in force.

[105] Article 19 of the ECT.

International jurisprudence and arbitral awards have so far focused mainly on the obligation for a State to prevent significant damage to the environment of other States.[106] There have been no specific international cases related to natural resources and the environment. There are certain relevant awards such as those in the *Trail Smelter* and *Lac Lanoux cases* as well as the ICJ *Nuclear Tests cases* (*Australia/New Zealand* v. *France*, 1974) and (*New Zealand* v. *France*, 1995). In the 1973–4 case Australia suggested a general right of all States, a right *erga omnes*, to seek to enforce important environmental obligations.[107] However, the court did not respond to this in its 1974 judgment. In 1995 the court, while dismissing the case, stated that its order was 'without prejudice to the obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment'.[108]

In conclusion, legal development has focused on State obligations with respect to the environment of other, mostly neighbouring, States, as is clearly reflected in Principle 21 of the Stockholm Declaration. However, a distinct tendency can be discerned from UN resolutions and treaty law to impose duties on States with respect to the management of their natural wealth and resources so as to ensure sustainable production and consumption, in the interest of the peoples of their own and other States and of humankind including future generations. Reference has been made to obligations to make rational use of natural resources, to maintain and improve the habitat of wildlife, migratory birds, endangered flora and striking natural beauty, to protect biodiversity and to diminish the consequences of over-exploitation of soil, deforestation, over-fishing and pollution. These obligations respond to environmental problems of international if not global concern, both to present and future generations. Gradually, it has become recognized under international law that natural-resources management should no longer fall within the exclusive domestic jurisdiction of individual States. This constitutes a deflection from the extended domestic realm – that is, 'matters which are essentially within the domestic jurisdiction of any State' – protected by Article 2.7 of the UN Charter.

The equitable sharing of transboundary natural resources

Boundaries of States do not exist for water, fish, wildlife, oil, gas and atmospheric resources. For obvious reasons, consultation and co-operation

[106] See chapter 8, pp. 236–40. [107] See chapter 8, pp. 242–3.

[108] *ICJ Reports* (1995), p. 306, para. 64. Similarly, in ICJ Nuclear Weapons Opinion (1996), para. 33.

are required in order to prevent disputes over concurrent national uses of internationally shared natural resources and their environmental consequences. These issues have featured on many international agendas and induced numerous arrangements on such aspects as freedom of navigation in international rivers, management of boundary waters, 'equitable' apportionment of freshwater resources and other uses of international watercourses.[109] The UN debate on the question of 'shared resources' got off to a late start due to serious differences of opinion, especially among developing countries.[110] It focused on the question of which mutual obligations neighbouring States have as regards such resources, and what their relation is to the permanent sovereignty of each State. The ILA Helsinki Rules on the Uses of the Waters of International Rivers (1966) have served as a model for the further development of international norms in this field. Yet, it proved impossible to include a substantive paragraph on transboundary resources in the 1972 Stockholm Declaration.

In 1973, it was finally agreed that it was important to develop an effective system of co-operation for the conservation and exploitation of natural resources shared by two or more States. UNEP was mandated to formulate international standards for the conservation and harmonious exploitation of such resources, pertaining, among other things, to a system of information and prior consultation.[111] Subsequently, the General Assembly included a substantive provision in CERDS on this issue:[112]

> In the exploitation of natural resources shared by two or more countries each State must co-operate on the basis of a system of information and prior consultation in order to achieve optimum use of such resources without causing damage to the legitimate interests of others.

In 1978, work by UNEP resulted in the adoption by its Governing Council of Principles of Conduct in the Field of the Environment for the Guidance of States in the Harmonious Utilization of Natural Resources Shared by Two or More States, but the General Assembly merely took note of those draft principles and recommendations 'without prejudice to the binding nature of those rules already recognized as such in international law'.[113] The

[109] The latter term denotes rivers, lakes or groundwater resources shared by two or more States. [110] See chapter 4, pp. 129–34 above.

[111] This initiative resulted in the adoption of GA Res. 3129 (XXIX), entitled 'Co-operation in the Field of the Environment Concerning Natural Resources Shared by Two or More States'.

[112] Article 3 of the CERDS, GA Res. 3281 (XXIX). Although this was already a compromise text, the separate vote on this article revealed continuing controversies: it was adopted with eight votes against and twenty-eight abstentions.

[113] Paragraph 1 of GA Res. 34/186, 18 December 1975.

principles aim at the rational use of shared natural resources in a manner which would not adversely affect the environment and which would encourage the States involved to co-operate.[114]

Quite a number of bilateral and regional treaties and action plans have been concluded. However, few embody an integrated approach to environmental, ecological and economic aspects.[115] An interesting exception is the 1987 Action Plan for the Environmentally Sound Management of the Common Zambezi River System,[116] which obviously draws upon the UNEP principles.

The concept of absolute sovereignty is gradually being replaced by the concept of 'equitable utilization'. This finds support in some early judicial and arbitral decisions. Godana recalls an arbitration case in 1898 between Costa Rica and Nicaragua concerning the *San Juan River*, in which the US President served as arbitrator and held:[117]

> The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing, at her own expense and within her own territory, such works of improvement, provided such works of improvement do not result in the destruction or serious impairment of the navigation of the said River or any of its tributaries at any point where Costa Rica is entitled to navigate the same.

Birnie and Boyle refer to the *River Oder case* (PCIJ, 1929), dealing with the duty of lower riparians to award freedom of navigation for all riparian States over the whole navigable course of the river.[118] Reference has often been made to the *Lac Lanoux Award* (1957), in which the arbitral tribunal found that France was under an obligation to consult with Spain concerning diversion works constructed entirely within French territory but which considerably affected the rights of Spanish users of the watercourse. These documents and decisions do not imply that territorial sovereignty has been replaced by shared jurisdiction or common management, but suggest that States today are under an obligation to recognize the correlative rights of other States and at least to consult with them as regards concurrent uses of transboundary resources. It would be useful if the international community could agree on a framework multilateral treaty for this purpose, but this seems unlikely in the near future. It is difficult to reconcile the principle of permanent sovereignty with the duty to co-operate for equitable sharing, let alone joint management of transboundary resources.

[114] See chapter 4, pp. 132–3 above.

[115] See Westing (1989a), Birnie and Boyle (1992: chapter 6) and Westing (1993). See also chapter 9, pp. 276–8 above.

[116] Text in 27 ILM (1988: 1,109).

[117] See Godana (1985: 24).

[118] Birnie and Boyle (1992: 220).

Nonetheless, little by little, General Assembly and UNEP resolutions and comprehensive action plans, such as the one for the Zambezi River, set a trend for the progressive development of international law regarding the conservation, joint development and 'equitable use' of natural resources shared by two or more States. In any case, they provide examples of cases in which the States involved move away from the concept of 'absolute sovereignty' which would entitle them to use resources freely within their territory regardless of any impact this may have on the use made by neighbouring States. This last concept was postulated in the so-called Harmon doctrine, named after the US Attorney-General who in 1895 asserted:

> The fact that the Rio Grande lacks sufficient water to permit its use by the inhabitants of both countries does not entitle Mexico to impose restrictions on the United States which would hamper the development of the latter's territory or deprive its inhabitants of an advantage with which nature had endowed it and which is situated entirely within its territory. To admit such a principle would be completely contrary to the principle that the United States exercises full sovereignty over its national territory.[119]

Respect for international law and fair treatment of foreign investors

UN resolutions on permanent sovereignty have seldom referred explicitly to the obligation to respect international law and the rights of other States. In Resolution 837 (IX), the General Assembly requested the Commission on Human Rights to complete its draft Article on the right of peoples and nations to self-determination, including recommendations concerning their permanent sovereignty, with the phrase 'having due regard to the rights and duties of States under international law'.[120] Similarly, in Resolution 1314 (XIII) the General Assembly instructed the Commission on Permanent Sovereignty to include a reference to 'due regard to the rights and duties of States under international law'. The 1962 Declaration, which resulted from the latter Commission's work, employs in its operative part a somewhat different formulation which puts the emphasis on sovereign equality: 'The free and beneficial exercise of the sovereignty of peoples and

[119] US Attorney-General Harmon, 21 *Opinions of the Attorney-General of the United States* (1895), p. 283. Text in Godana (1985: 32–8) and Birnie and Boyle (1992: 218, note 25).

[120] Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-Determination, adopted 14 December 1954.

nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.'[121]

Paragraph 8 of this Declaration stipulates: 'Foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith.' The term 'Agreements . . . entered into . . . *by* . . . States' relates to contracts with non-State entities, normally transnational corporations; those entered into *between* States are treaties. The former seems to imply that non-State entities enjoy the protection of *pacta sunt servanda* directly under international law. In line therewith, paragraph 3 provides that, in cases where authorization is granted, 'the capital imported and the earnings on that capital *shall* be governed by the terms thereof, by the national legislation, and by international law'. It should be recalled, however, that the scope of these provisions is limited to investment agreements freely entered into by independent States, while the drafting of rules with respect to 'property acquired before the accession to complete sovereignty of countries formerly under colonial rule' was left to the ILC.

Resolution 2158 (XXI, 1966) includes a reference to 'mutually acceptable contractual practices', a phrase which was proposed as an alternative to a clear-cut reference to international law obligations.[122] Article 2 of the CERDS contains no direct reference to international obligations, but is subject to the Fundamentals of International Economic Relations listed in Chapter I of this Charter, including 'fulfilment in good faith of international obligations' (sub-paragraph (j)).[123]

As far as multilateral treaties are concerned, ample evidence can be found for the proposition that States have to observe international law in exercising their permanent sovereignty and their corollary right to regulate foreign investment. The most explicit reference to general international law obligations relating to permanent sovereignty can be found in Article 1 of the 1966 Human Rights Covenants:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to *any obligations* arising out of international economic co-operation, based upon the principle of mutual benefit, and *international law*.[124]

[121] Paragraph 5 of GA Res. 1803 (XVII), 14 December 1962. Emphasis added. After the adoption of the Decolonization Declaration (1960), the General Assembly had recommended in Res. 1515 (XV) on Concerted Action for Economic Development of Economically Less Developed Countries: 'The sovereign right of every State should be respected in conformity with the rights and duties of States under international law' (para. 5).

[122] Paragraph 5. See for the drafting history chapter 3, p. 87 above.

[123] Cf. Art. 33 of CERDS.

[124] Article 1.2 of the Human Rights Covenants, emphasis added.

As observed above, the value of this assurance, however, has to be judged in the light of Articles 25 and 47: 'Nothing in the present Covenant may be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources'.[125]

The African Charter on Human and Peoples' Rights (1981) confirms: 'The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of international economic co-operation based on mutual respect, equitable exchange *and the principles of international law.*'[126]

The 1982 UN Convention on the Law of the Sea clearly points out that the coastal State, in exercising its rights within the EEZ, 'shall have due regard to the rights and duties of other States'.[127] The rights of other States in the EEZ include three of the four traditional high-seas freedoms.[128] As regards the continental shelf it is provided that: 'The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention.'[129] Equally relevant is the general provision in the Convention with respect to good faith and abuse of rights.[130]

As regards multilateral investment-related treaties, the ICSID Convention (1965) contains one relevant reference to the applicability of international law. It provides that, in the absence of an agreement on the law applicable for the interpretation and application of a contract, the tribunal shall apply the law of the contracting host-State party to the dispute '*and* such rules of international law as may be applicable'.[131] According to the 1980 Inter-Arab Investment Protection Treaty,[132] the host State merely undertakes to protect the investor and to safeguard his investments and rights (Article 2). Similarly, the OIC Investment Treaty (1981) lays down the standard of 'adequate protection and security' which is to be enjoyed by the 'invested capital' and accordingly is designed to safeguard investments after they have been admitted.[133] Although in this case there is no explicit reference to international law either, a further guarantee is provided to the extent that the rights and obligations arising under the Treaty are valid even in the case

[125] Articles 25 and 47 of the Economic Rights and Civil and Political Rights Covenants, respectively. [126] Article 21.2, emphasis added. [127] Article 56.2.

[128] Article 58. For obvious reasons the freedom of fishing is excluded. [129] Article 78.2.

[130] Article 300: 'States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.'

[131] Article 42, emphasis added.

[132] Unified Agreement for the Investment of Arab Capital in the Arab Countries, Amman, 26 November 1980, in force 19 May 1987. [133] Article 2.2.

of withdrawal of the host State from the Treaty.[134] Likewise, the ASEAN Investment Treaty,[135] NAFTA[136] and the Energy Charter Treaty[137] guarantee investors of other contracting parties fair and equitable treatment and full protection and security.

Since the main motive behind bilateral investment treaties is the encouragement of foreign investment through protection of foreign investors, it is not surprising that the requirement of fulfilment of international obligations and fair treatment is a common characteristic of all these treaties.

Decisions of international courts and tribunals provide ample evidence of the recognition that international law and rights of other States should be respected. This clearly follows from, for example, the ICJ judgment in the *Barcelona Traction case* (1970)[138] and the court's series of judgments with respect to delimitation of maritime areas,[139] awards of arbitral tribunals regarding oil nationalizations, and decisions of the Iran–US Claims Tribunal. As regards the latter, reference may be made, for example, to the award in the *Amoco case* (1987), in which the tribunal explicitly referred to the Treaty of Amity between Iran and the USA (as *lex specialis*) as well as to customary international law (as *lex generalis*), to fill possible lacunae and to provide proper interpretation of ambiguous provisions of the Treaty of Amity.[140]

The ICC Guidelines unequivocally call on the government of the host country to respect the recognized principles of international law, including fair and equitable treatment of foreign property. The 1976 OECD Declaration, in an annex with guidelines for multinational enterprises, refers to 'the understanding that Member countries will fulfil their responsibilities to treat enterprises equitably and in accordance with international law'. The ALI Third Restatement of the US Foreign Relations Law is silent on this issue since it is beyond its scope to address it directly. The Draft UN Code of Conduct on Transnational Corporations embodies the following proposal: 'In all matters relating to the code, States *shall* fulfil, in good faith, their

[134] Article 7. [135] Articles III and IV.

[136] Article 1105.1. [137] Article 10.

[138] The Court stated: 'When a State admits into its territory foreign investments . . . it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them': *ICJ Reports* (1970), p. 32, para. 33.

[139] Examples include the *North Sea Continental Shelf cases* (1969), the *Continental Shelf case between Tunisia and Libya* (1982), the *Gulf of Maine Area* (*Canada* v. *USA*) (1984), the *Continental Shelf between Libya and Malta* (1985) and the *Maritime Delimitation case in the Area between Greenland and Jan Mayen* (*Denmark* v. *Norway*) (1993).

[140] See 27 ILM (1988), pp. 1,314–90, particularly at p. 1,343, para. 112. See for a discussion of this and other cases Mouri (1994: 306–9) and Westberg (1993: 9–10).

international obligations, including generally recognized international legal rules and principles.' It adds in another paragraph that: 'Transnational corporations *should* receive fair and equitable treatment in the countries in which they operate.'[141] The latter paragraph relates to one of the main outstanding issues in the negotiations. Western proposals to add the phrase 'consistent with their international obligations' (i.e., of the host country) or 'consistent with international law'[142] were unacceptable for some members of the Group of 77. The ILA Seoul Declaration makes several references to the obligation to respect international law, for example: 'Permanent sovereignty implies the national jurisdiction of a State over natural resources, economic activities and wealth without exempting it from the application of the relevant principles and rules of international law.' While permanent sovereignty is called 'inalienable', it is also added that: 'A State may, however, accept *obligations* with regard to the exercise of such sovereignty, by treaty or by contract, freely entered into.'[143] This implies that a State which freely enters into treaties or contracts affecting its permanent sovereignty, must fulfil any obligations arising therefrom in good faith.[144] In addition, the exercise of rights in respect of foreign interests – in natural resources, economic activities and wealth – is conditioned by the obligation to comply with international law. The Declaration, however, contains no specific guidelines on fair treatment of foreign investors by States. The 1992 World Bank Guidelines imply a role for international law where they state that the Guidelines serve as a 'complement to applicable bilateral and multilateral treaties and other international instruments'.[145] In addition, the Guidelines stipulate that each State extend to investments, established in its territory by nationals of any other State, fair and equitable treatment according to the standards recommended in these Guidelines.

In conclusion, the main permanent-sovereignty resolutions require States, in the exercise of their permanent sovereignty over natural resources, to respect the rights of other States and to fulfil their international obligations in good faith. This duty is also recognized in many relevant treaties and decisions of international courts and tribunals. Apart from the important body of evidence included in numerous bilateral

[141] See paras. 49 and 51 of the Draft UN Code of Conduct on TNCs, UN Doc. E/1990/94. Emphasis added.

[142] See the draft text of May 1987 of the UN Code of Conduct on TNCs, UN Doc. E/1987/73.

[143] Emphasis added. Section 5 of the Seoul Declaration.

[144] See also the interesting section 2 of the Seoul Declaration formulating the principles of *pacta sunt servanda* and *clausula rebus sic stantibus*.

[145] Section I.1.

investment treaties and multilateral investment treaties, the obligation to provide fair treatment to foreign investors is seldom addressed explicitly in other instruments of international law. The reason could be that Western States have traditionally perceived this as covered by the general injunction to respect international law, whereas developing States have traditionally stipulated that this falls within their domestic jurisdiction. Recently, a consensus seems to have been reached, also as part of the evolution of human rights law, that fair treatment of aliens and their property and other rights is an obligation under international law. This consensus is reflected, among other documents, in the Draft Code of Conduct on TNCs, albeit somewhat ambiguously,[146] and the World Bank Guidelines.[147]

Obligations related to the right to take foreign property

From the early 1950s up to the late 1970s the legal evolution of permanent sovereignty and the debate on its guiding principles have been seriously affected by conflicts over the right to nationalize, in particular its modalities. Obligations relating to the right to nationalize or expropriate as they arise from Resolution 1803 and subsequent resolutions are concerned with the following conditions of legality:[148] (i) public purpose; (ii) non-discrimination; (iii) payment of compensation; (iv) standard of compensation; (v) due process; and (vi) right to appeal.[149]

Public purpose

It suffices here to recall our findings in the previous chapter,[150] that the nationalizing State has wide margins of discretion in determining what is necessary on grounds or reasons of 'public utility, security or the national interest' (paragraph 4 of General Assembly Res. 1803) or for the purpose of 'safeguarding the natural resources' (NIEO Declaration). But should it be possible to require the nationalizing State also to be able to prove, at the international level, that its public interest is at stake?

[146] Paragraph 47 of the Draft Code of Conduct on TNCs unequivocally states that: 'States shall fulfil, in good faith, their obligations under international law'; while para. 49 is somewhat more vague: 'Transnational corporations shall receive fair and equitable treatment in the countries in which they operate.' See UN Doc. E/1990/94, 12 June 1990. [147] Section III.2.

[148] As referred to in chapter 9, there are opposing views on whether (i) expropriation and nationalization are lawful only when certain conditions are fulfilled; or (ii) certain conditions arise after expropriation has taken place. Virtually all BITs and MITs are based on view (i); UN resolutions and some arbitral awards on view (ii).

[149] This section builds on the previous work of Verwey and Schrijver (1984: 9–22 and 51–8). [150] See pp. 289–92.

As far as treaty law is concerned, Article 1 of the 1952 Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) clearly states that no one shall be deprived of his possessions except in 'the public interest'. The American Convention on Human Rights (1969) refers to 'public utility or social interest' and the African Charter on Human and Peoples' Rights (1981) refers to 'public need' or 'the general interest of the community'.[151] Likewise, the OECD Draft Convention on the Protection of Foreign Property (1967),[152] the Inter-Arab Investment Agreement (1980)[153] and the OIC Investment Agreement (1981),[154] all state that it is permissible to expropriate the investment 'in the public interest'. The ASEAN Investment Agreement (1987) refers in this connection to 'public use ... purpose, or ... interest',[155] and the Energy Charter Treaty (1994) to 'a purpose which is in the public interest'.[156] Reverting to the most traditional formula, however, NAFTA (1992) straightforwardly stipulates a 'public purpose'.[157]

While the terms used are varied, it is obvious that the large majority of bilateral investment treaties stipulate *some public cause* of a non-political nature. The valid grounds or reasons prescribed for the taking of foreign property include: 'public purpose' ('*d'utilité publique*'); 'public purpose related to internal needs'; 'public interest'; and 'national security and public utility'.[158]

The public-purpose condition was invoked in a number of well-known nationalization cases. For example, the British government contested the nationalization by Libya of assets of the BP Exploration Company, observing that 'nationalization measures ... motivated by considerations of a political nature unrelated to the internal well being of the taking State are, by a reference to those principles [of international law], illegal and invalid'.[159]

The public-purpose requirement was recognized by the PCIJ in the *German Interests in Polish Upper Silesia case* (1926) and in the *Chorzów Factory case* (1928); by Arbitrator Lagergren in the *BP case* (1974); by the tribunal in the *Aminoil case* (1982); and by the Iran–US Claims Tribunal in the *American International Group case*, the *INA Corporation case* and the *Amoco case*.[160] In the latter case the tribunal noted that 'a precise definition of the "public purpose" for which an expropriation may be lawfully decided had neither been agreed upon in

[151] Articles 21 and 14 respectively. [152] Article 3.i of the OECD Draft Convention.
[153] Article 9.2. [154] Article 10.2. [155] Article VI.1. [156] Article 10.1(a).
[157] Article 1110.1(a).
[158] Verwey and Schrijver (1984: 69–70); Higgins (1983: 371) and Peters (1994b: 2).
[159] See 13 ILM (1974), p. 769. See for other examples the next section on prohibition of discrimination. [160] See Verwey and Schrijver (1984: 15) and Mouri (1994: 324–7).

international law nor even suggested', but that 'as a result of modern acceptance of the right to nationalize, this term is broadly interpreted, and that States, in practice are granted extensive discretion'.[161]

Likewise, the American Law Institute (ALI) acknowledges:

the concept of public purpose is broad and not subject to effective re-examination by other states. Presumably, a seizure by a dictator or oligarchy for private use could be challenged under this rule.[162]

In the accompanying Reporter's Notes it is observed:[163] 'As the general understanding of "public purpose" broadens, the likelihood of a successful challenge on that basis grows smaller.'

Higgins points out that the problem is not so much that the terms 'public utility, security, or the national interest' are unreasonable, but that in a decentralized legal system they are open to different interpretation and abuse.[164] While recognizing the wide discretion of the nationalizing State, Wellens points out that the 'public utility' requirement can best be tested by assessing whether the nationalization measure is within the limits of abuse of justice and good faith.[165] Likewise, Moinuddin concludes that the minimum function of the requirement would probably be the deterrence of expropriations which are manifestly in violation of the principle of public utility.[166] From the close link between permanent sovereignty over natural resources and socio-economic development, one may draw the conclusion that public utility must be of a *public socio-economic nature*,[167] not of a purely or even predominantly political nature. As O'Keefe puts it, the major protective importance of this requirement occurs 'in a case where the acknowledged object of an expropriation is to force a foreign sovereign to yield to a political demand'.[168]

Thus we may conclude that in general terms a nationalizing State has wide margins of discretion but must be able to prove, also at the international level, that a public interest is served by the act of nationalization, thus excluding take-overs for non-public interests.

Non-discrimination

Two types of discrimination can be at issue: discrimination between foreigners and nationals; and discrimination among foreigners. It is

[161] *Amoco International Finance Corporation* v. *Iran*, 15 Iran-US CTR (1987), p. 189, at p. 233, para. 145. [162] American Law Institute (1987: 200).

[163] American Law Institute (1987: 210). [164] Higgins (1983: 288).

[165] Wellens (1977b: 53–4). [166] Moinuddin (1987: 159).

[167] However, it would not be appropriate for a State to use its power of expropriation and nationalization for the sole purpose of increasing the State's resources: see Dolzer (1985: 217). [168] O'Keefe (1974: 259).

uncertain whether, under Resolution 1803, discrimination between nationals and foreigners should be considered as prohibited in view of the phrase that nationalization must be based on grounds 'which are recognized as overriding purely individual or private interests, *both domestic and foreign*'. The drafting history shows that not only Western delegates but also various delegates from the South pointed out that their constitutions vested the same rights in nationals and foreigners,[169] but only some of them expressly mentioned that the text of the Declaration prescribed this. It has been said that the non-discrimination requirement originated in Latin America,[170] the continent which gave birth to principles such as those embodied in the Calvo and the Drago doctrines. Latin American States were also those that introduced the principle of permanent sovereignty into the United Nations during the early 1950s. As mentioned above, by 1974 the Group of 77 was no longer prepared to accept formulations which either explicitly or implicitly prohibited discrimination between nationals and foreigners. On the contrary, under sharp protest from the Western group the right to practise such discrimination was inserted in the NIEO Declaration, where it is stated: 'each State is entitled to . . . the right to nationalization *or transfer of ownership to its nationals*'.[171] The fact that the words 'to its nationals' have not been repeated in Article 2.2(c) of the CERDS may, from a Western point of view, be interpreted as a positive sign; but the term 'transfer of ownership' without further specification could equally well be interpreted as also entitling the taking State to discriminate between foreigners of different nationalities, albeit that this has not been suggested during the negotiations on this provision.[172]

It is not entirely clear to what extent a condition of non-discrimination can be derived from rules of international law not specifically related to the treatment of foreign property. The International Covenant on Economic, Social and Cultural Rights[173] provides that developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals (Article 2.3).

[169] For example, Peru and Argentina: UN Docs A/C.2/SR.845, 20 November 1962, p. 295, para. 39, and A/C.2/SR. 859, 4 December 1962, p. 397, para. 34.

[170] Francioni (1975: 253–85); see also Peters and Schrijver (1992: 355–60).

[171] Paragraph 4.e of GA Res. 3201 (S-VI), 1 May 1974, emphasis added.

[172] See statements by Chile and Malaysia: UN Doc. A/C.2/SR.834, 12 November 1962, p. 231, para. 42 and A/C.2/SR.845, 20 November 1962, p. 295, para. 36.

[173] The protection of private property has, however, found a place in other human rights instruments: for example, in Art. 1 of the First Protocol to the European Convention on Human Rights, Art. 21 of the American Convention on Human Rights and Art. 14 of the African Charter on Human and Peoples' Rights. See Schabas (1991: 163–8).

This potential deviation under UN law from the principle of non-discrimination has had no follow-up in legal instruments relating to regulation of foreign investment. Multilateral investment treaties and bilateral investment treaties invariably recognize it. The Inter-Arab Treaty explicitly guarantees full non-discriminatory treatment, while the OIC Agreement stipulates that expropriation shall be 'without discrimination'. Similarly, the ASEAN Investment Agreement, NAFTA and the Energy Charter Treaty refer to 'a non-discriminatory basis'. Most bilateral investment treaties also provide explicitly for full non-discriminatory treatment: foreign investors shall enjoy treatment not less favourable than that accorded to nationals or companies of the host State *or* to investments of nationals or companies of any third State, if the latter is more favourable to the investor (most-favoured-nation treatment).[174]

In State practice alleged discrimination has often been a major bone of contention in nationalization cases. For example, it was mainly on this legal basis that the Netherlands government rejected the legality of the nationalization of Dutch property by Indonesia in 1958, noting that the law in question explicitly referred to its connection with the dispute over Irian Jaya (former Dutch New Guinea) and recalling that the President of Indonesia had warned that 'if, in the question of West Irian, the Dutch remain stubborn, if, in the question of our national claim, they remain headstrong, then all the Dutch capital, including that in mixed enterprises, will bring its story to a close on Indonesian soil'.[175] Other examples include the US government's rejection of the claim regarding the legality of Cuban Law No. 851 (1960), which specifically referred to the US sugar boycott, describing the nationalization measures as 'a luminous and stimulating example for the sister nations of America and all the under-developed countries of the world to follow in their struggle to free themselves from the brutal claws of imperialism'.[176] The US administration also contested the legality of the 1971 Libyan nationalization of the Texaco oil company, referring to the Libyan statement that expropriation had been undertaken as a 'cold slap in the insolent face' of the investor's government.[177]

[174] In Peters' sample of 145 BITs, 105 provide for national treatment and most-favoured-nation treatment. All 145 provide for most-favoured-nation treatment (thus allowing discrimination between nationals and the investor).

[175] See preamble to Act No. 86 of 31 December 1958, text in 6 NILR (1959), p. 291. See also the Netherlands Note of 18 December 1959, text in 54 AJIL (1960), p. 487, in which the speech of the President of Indonesia is quoted. For a review of the question of discrimination in Indonesian Nationalization Measures Before Foreign Courts, Domke (1961: 315–16 and 322–3). [176] As quoted by Higgins (1965: 62–3).

[177] Referred to in American Law Institute (1987: 210).

Several awards refer explicitly to the prohibition of discrimination. For example, in the *BP case* Judge Lagergren found that Libya had violated 'public international law' as the expropriation was 'arbitrary and discriminatory in character'.[178] In the award in the *Amoco case*, the Iran–US Claims Tribunal stated: 'Discrimination is widely held as prohibited by customary international law in the field of expropriation.'[179]

The non-discrimination rule is also upheld in various codes and guidelines with respect to foreign investment. Thus, the ICC Guidelines call for 'the avoidance of unreasonable and discriminatory measures'.[180] Similar terms are used by the ILA Seoul Declaration, the ALI Third Restatement of US Foreign Relations Law,[181] the Draft UN Code of Conduct on TNCs[182] and the World Bank Guidelines.[183] We may therefore conclude that the prohibition of discrimination is a well-established condition of legality for nationalization.[184] However, this is not to say that all distinctions between foreigners and nationals are necessarily prohibited. As it is worded in the Third Restatement:[185]

> Discrimination implies unreasonable distinction. Takings that invidiously single out property of persons of a particular nationality would be unreasonable; classifications, even if based on nationality, that are rationally related to the state's security or economic policies might not be unreasonable.

This kind of reasoning was applied in the *Aminoil case*, where the tribunal found that nationalizing one company but not another did not violate international law in that particular case.[186] Moreover, discrimination in favour of foreigners may be permitted, as the French nationalizations of parts of the banking sector in the early 1980s suggest; the French Constitutional Council found that the constitutional principle of equality is not violated where largely domestic banks are nationalized while largely foreign banks are not.[187]

[178] ILR, p. 297, p. 329. In the *Liamco Award* the arbitrator came to the conclusion that, in the given case, there was insufficient proof to declare that the act of the nationalizing State was of a purely discriminatory character. See 20 ILM (1982), p. 60.

[179] ILM (1988), p. 1,350, para. 140.

[180] Section V.3.a(ii).

[181] In Section 712 it is stated: 'A state is responsible under international law for injury resulting from ... a taking by the State of the property of a national of another state that ... is discriminatory': American Law Institute (1987: 196).

[182] Paragraph 50 calls, subject to certain exceptions, for treatment of transnational corporations to be no less favourable than that accorded to domestic enterprises in similar circumstances. See UN Doc. E/1990/94, 12 June 1990.

[183] See Section IV.1.

[184] See Weston (1981: 446–7), Mouri (1994: 159–60), Higgins (1983: 362).

[185] American Law Institute (1987: 200).

[186] *Kuwait* v. *Aminoil*, award in 1982, in 21 ILM (1982), pp. 1,019–20.

[187] Quoted in Reporter's Note, American Law Institute (1987: 211).

Payment of compensation

Despite all attempts to dilute or even negate the issue, one may conclude that the main permanent-sovereignty resolutions reaffirm an obligation to pay compensation in the case of nationalization and expropriation. In 1962 all Soviet and other amendments aimed at denying the existence of such a duty were defeated.[188] Thus it was provided in the 1962 Declaration on Permanent Sovereignty that 'the owner *shall* be paid appropriate compensation'. As shown in previous chapters, some NIEO resolutions entailed intensive efforts to erode this obligation and to render payment of compensation a discretionary, instead of an absolute, prerequisite, for example by proposals to replace the term 'appropriate' by 'possible'.[189] However, these efforts failed to receive widespread support. Subsequently, the obligation to pay compensation has been rarely denied but also rarely reaffirmed in UN resolutions. It could certainly be argued that each reference in UN resolutions to 'obligations arising out of international law' implies compulsory payment of compensation. The reference in paragraph 55 of the Draft UN Code of Conduct on TNCs that a State has the right to expropriate assets of a TNC under payment of adequate compensation, in accordance with the applicable rules and principles, could – but will not generally – be interpreted accordingly.

In the previous chapter[190] we saw that treaty law amply recognizes the obligation to pay compensation. Article 1 of the First Protocol to the Council of Europe Convention does not explicitly provide for an obligation, but the phrase 'subject to the conditions provided for by general international law' is widely interpreted to cover it, at least in the case of non-nationals.[191] Clear-cut obligations to compensate can be found in Article 21.2 of the American Convention on Human Rights (1969) and in the multilateral investment treaties and in virtually all bilateral investment treaties.

As far as jurisprudence and arbitral awards are concerned, reference can be made first to the PCIJ, which recognized this obligation in its judgments in the *Mavrommatis Jerusalem Concessions case* (1925),[192] the *German Interests in Polish Upper Silesia case* (1926)[193] and the *Chorzów Factory case* (1928).[194] So did Arbitrator Huber in the *Spanish Zones of Morocco Claims* (1923)[195] and the arbitrator in the *Shufeldt Claim* (*USA* v. *Guatemala*) (1930).[196] Although the

[188] See chapter 2, pp. 75–6 above.
[189] See in particular UNCTAD TDB Res. 88 (XII), 19 October 1972 and GA Res. 3171 (XXVIII), 17 December 1973. [190] See p. 293.
[191] See Higgins (1983: 363 and 368–9). [192] PCIJ, Series A, no. 5 (1925), p. 51.
[193] PCIJ, Series A, no. 7 (1926), p. 32. [194] PCIJ, Series A, no. 17 (1928), p. 42.
[195] RIAA (1949), vol. II, p. 615.
[196] Ibid., vol. II, pp. 1,079–102. The case dealt with the cancellation of a concession to extract chicle.

ICJ has so far not dealt with clear-cut nationalization or compensation issues,[197] it has acknowledged the compensation obligation in the *Temple of Preah-Vihear case* (1962).[198] The arbitral awards in the *BP, Texaco* and *Liamco* v. *Libya cases* as well as in the *Kuwait* v. *Aminoil case* explicitly recognize it.[199] The latter case places application of the relevant rules within the context of development financing in North–South relations. The tribunal was particularly aware of the need to maintain trust and stability for foreign investors and pointed out that the need for a continuous flow of private capital called for nationalizing States to approach compensation issues in a manner which 'should not be such as to render foreign investment useless, economically'.[200] Awards of the Iran–US Claims Tribunal amply recognize that both under customary international law (as *lex generalis*) and under the 1955 Treaty of Amity between Iran and the USA (as *lex specialis*) compensation is due.[201] In its first award on the merits of a compensation case, *American International Group Inc.* v. *Iran* (1983), the tribunal unequivocally recognized that:

> it is a principle of public international law that even in a case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken.[202]

In its 1994 award in the *Ebrahimi case*, the tribunal repeated that 'international law undoubtedly sets forth an obligation to provide compensation for property taken'.[203]

The ICC Guidelines, the Draft UN Code of Conduct on TNCs, the ILA Seoul Declaration, the ALI Third Restatement and the World Bank Guidelines, all require payment of compensation in the event of expropriation or nationalization. Literature abundantly confirms the obligation, either as a condition of legality or at least as a product of lawful taking and, *a fortiori*, of an unlawful taking.[204] For the adherents to the international minimum standard,[205] it arises either – in the case of a lawful taking – from the

[197] See p. 194. [198] *ICJ Reports* (1962), pp. 36–7.

[199] See 53 ILR, p. 297; 53 ILR, p. 389; and 62 ILR, p. 146. In the latter case, Arbitrator Lagergren found that the fact that no offer of compensation had been made indicated that the taking was indeed confiscatory. [200] ILM (1982), p. 1,033.

[201] See Mouri (1994: 310).

[202] AIG Award (of 19 December 1983), reprinted in 4 Iran–US CTR on p. 105.

[203] *Ebrahimi* v. *Iran*, Iran–US Claims Tribunal, 12 October 1994, p. 38, para. 88.

[204] For example, Fatouros (1962: 314–15) writes that 'compensation is a legal duty arising out of related measures, not as a condition precedent to the lawfulness of the measures'. Similarly, see Asante (1988), Bring (1980) and Schachter (1984: 121) and (1985: 420). However, virtually all BITs treat it as a condition precedent by allowing the taking only if compensation is provided for at the time of the taking or before. [205] See chapter 6, pp. 176–7.

prohibition of 'unjust enrichment', or – in the case of an unlawful taking – from the obligation to eliminate all damaging consequences of an unlawful act.

Consequently, there is no doubt that the obligation to pay compensation for expropriation or nationalization is generally recognized, whatever the impact of the principle of permanent sovereignty may be or have been. The problems at stake revolve around the question of the moment, proper amount and modes or, in sum, the standard of compensation.

Standard of compensation

A number of Western countries, on the one hand, have consistently maintained the position that compensation should be in accordance with the 'triple standard', that is 'prompt, adequate and effective'; a demand reaffirmed during the debates on the Declaration on permanent sovereignty, the NIEO Declaration, as well as the CERDS. As we noted above in chapters 6 and 9, in its traditional form, the standard held that, where restitution (*restitutio in integrum*) was not possible, compensation was to be achieved by payment of a sum corresponding to *damnum emergens et lucrum cessans*, and that payment of such compensation had to be 'prompt, adequate, and effective', the so-called Hull formula.

The developing countries, on the other hand, have consistently denied the existence of a 'generally accepted practice' in this respect. The drive for a consensus resulted in the formula of 'appropriate' compensation included in the 1962 Declaration, a 'deliberate ambiguity', which was repeated in the CERDS, albeit in the context in a non-committal formula. While the provocative phrase 'possible compensation' of earlier drafts[206] was not included, the phrase 'appropriate compensation should be paid' was ambiguous enough. This left developments to take their own course, since both the adherents to the triple standard and those of new doctrines pertaining to 'capacity to pay', 'excess profits' and 'unjust enrichment' could (ab)use the term as part of their ammunition in legal battles. The Draft Code of Conduct on TNCs is far from helpful in this respect, as it leaves all options open by providing that: 'adequate compensation is to be paid by the State concerned, in accordance with the applicable legal rules and principles.'[207]

In view of the continuing controversies surrounding the compensation issue, it is small wonder that, apart from multilateral investment treaties,

[206] UNCTAD TDB Res. 88 (XII), 19 October 1972 and GA Res. 3171 (XXVIII), 17 December 1973. [207] UN Doc. E/1990/94, 12 June 1990, para. 55.

few multilateral treaties address the question of the compensation standard. Significantly, as regards the moment of payment, the traditional formula 'prompt' or 'without delay' is sometimes replaced by 'without undue delay' as is exemplified by its insertion in the OECD Draft Convention on the Protection of Foreign Property and by 'without unreasonable delay' as in the ASEAN Agreement. The Inter-Arab Investment Agreement provides that compensation must be paid within a period not exceeding one year from the date on which the expropriation decision has become final, while the OIC Agreement requires 'prompt payment'. Likewise, NAFTA uses the traditional term 'without delay'.[208] The Energy Charter Treaty provides for expropriation to be accompanied by the payment of 'prompt compensation'.[209]

As to the *amount* of compensation, an early draft (1946) of the Havana Charter provided that 'just compensation' to a foreign national be granted in case of the 'prescription of requirements as to the ownership of existing or future investments'.[210] This draft was, however, heavily criticized by the ICC and was eventually abandoned.[211] The 1967 OECD Draft Convention provided that measures of expropriation must be accompanied by a provision for the payment of 'just compensation'. Such compensation had to represent the genuine value of the property affected and had to be transferable to the extent necessary to make it effective for the party entitled thereto. Likewise, the 1969 American Convention on Human Rights refers in its Article 21.2 to the concept of 'just compensation'. The 1980 Inter-Arab Investment Agreement stipulates 'equitable compensation',[212] while the 1981 OIC Agreement requires 'adequate and effective compensation to the investor in accordance with the laws of the host State regulating such compensation'.[213] Moinuddin identifies this phrase as 'blending' between the classical compensation formula and the Calvo clause as embodied in Article 2.2(c) of the CERDS.[214] The ASEAN Agreement embodies the concept of 'adequate

[208] Article 1,110.3 of the NAFTA.

[209] Article 13.1(d) of the ECT. No specification of the term 'prompt' is given.

[210] In addition, 'just compensation' was defined as follows: '[A] Member's obligation to ensure the payment of just consideration or just compensation to a foreign national (in so far as it is an obligation to make payment in currency) is essentially an obligation to make payment in the local currency of that Member.' It goes without saying that payment in local currency was unacceptable to the business community and Western countries.

[211] See World Bank Group (1992: 88).

[212] Article 9.2. Such compensation is to be effected within a period not to exceed one year from the date the expropriation decision becomes final.

[213] Article 10.2(a).

[214] Moinuddin (1987: 163). The reference should of course be to the Calvo doctrine.

compensation',[215] while the qualifications used by NAFTA and the Energy Charter Treaty concur with the 'prompt, adequate and effective' standard.[216]

With some exceptions[217] and many variations, it appears that the classical formula of 'prompt, adequate and effective compensation' is retained in BITs, albeit often – as discussed above – in more flexible wording. In a sample of 145 bilateral investment treaties signed in the period 1990–3, Peters found that the Hull formula occurred ninety-one times (63 per cent of the total). In ninety-four bilateral investment treaties the compensation is required to be paid 'without delay', in forty-six bilateral investment treaties 'without undue delay'. 'Adequate' is by far the most popular term, but occasionally other qualifications are used such as 'just' or 'fair' (thirteen times in all). The value of the investment which forms the basis for the determination of the compensation is described in such terms as 'market value' (forty-four times), 'real' or 'genuine' value (twenty-five times), 'full value' (once), 'actual value' or 'value' without qualification (thirty-eight times).[218]

As regards decisions of international courts and tribunals, one may first refer to the *Norwegian Shipowners Claims* arbitration (1922), a case dealing with the requisitioning of alien property by the USA for wartime purposes. The tribunal determined that 'just compensation' should be paid, to be determined by 'fair actual value at the time and place ... in view of all surrounding circumstances'.[219] An early and frequently quoted source is the *Chorzów Factory case*,[220] in which the PCIJ referred to 'just compensation' and stated that, when expropriation was prohibited by a treaty, 'the dispossession of an industrial undertaking ... involves the obligation to restore the undertaking and, if this is not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible'.[221] However, both cases deal with specific

[215] Article VI of the ASEAN Investment Agreement. It specifies that such compensation shall amount to the market value of the investments affected, immediately before the measure of dispossession became public knowledge and it shall be freely transferable in freely usable currencies from the host State. The compensation shall be settled and paid without unreasonable delay.

[216] See Art. 1,110.2–6 of NAFTA and Art. 13.1 of the ECT.

[217] A rare reference to 'appropriate compensation' or 'appropriate value' can be found in the BITs of China with France (1984), Thailand (1985) and Laos (1993).

[218] Peters (1994b: 2).

[219] *Norwegian Shipowners Claims Arbitration* (*Norway* v. *USA*) (1922), RIAA, vol. I (1948), pp. 307–46, at pp. 339–41.

[220] *Case Concerning the Factory at Chorzów* (*Merits*), PCIJ, Series A, no. 17, (1928), p. 42.

[221] Ibid., p. 48.

war-time circumstances. The ICJ so far has not addressed the standard-of-compensation issue.

In the three Libyan oil nationalization cases the three arbitrators differed in their legal reasoning with respect to the compensation and calculation of damages.[222] In the *BP case* Lagergren referred to *restitutio in integrum* being available 'as a vehicle for establishing damages'[223] rather than as the remedy itself which a State acts in breach of a concession agreement.[224] In the *Texaco case*, Dupuy considered the Libyan nationalization of Texaco unlawful and concluded that both under Libyan law and under public international law *restitutio in integrum* was required. Thus he ordered Libya to resume performance under the concession agreement.[225] Finally, in the *Liamco case* arbitrator Mahmassani awarded Liamco 'equitable compensation', in this particular case including a calculation of the profits lost by the claimant.[226] The *Aminoil* tribunal awarded the company 'appropriate compensation' for what it considered to be a lawful taking of its property interests in Kuwait.[227] The determination of what appropriate compensation amounted to required an 'inquiry into all the circumstances relevant to the particular case', including the question what would be 'a reasonable rate of return' from the investment and the value of Aminoil's investment as 'a going concern'.[228]

With some exceptions – notable ones are the 1987 *Sola Tiles case*[229] and the 1987 *Amoco case*, the latter involving a large-scale nationalization of oil industry – the Iran–US Claims Tribunal has found that 'full' compensation representing the full equivalent of the property taken[230] is required under customary international law and under the 1955 Treaty of Amity, both in cases involving expropriation and in those involving large-scale nationalizations. Such full compensation has to be equal to the 'going-concern' value of the property taken, including not only the physical and financial assets of

[222] See Dixon and McCorquodale (1995: 520). [223] ILR, p. 347.

[224] Finally, the case was settled out of court by an agreement of November 1974 under which Libya paid approximately £17.4million in cash to BP. See Dolzer (1992a: 506).

[225] Ultimately, in 1977 the parties settled their claims by an agreement under which Libya undertook to deliver the companies a large amount of crude oil within fifteen months. See Dolzer (1981a: 170).

[226] *Liamco Award* (1977), 20 ILM (1981), at pp. 54–6, 76 and 81. [227] ILR, pp. 566–94.

[228] *Amoco Award*, pp. 611–13.

[229] It should be noted, however, that the Tribunal stated that attempts to invest the terms 'appropriate' or 'fair' or 'just' with a concrete meaning revealed that 'the distance between rhetoric and reality is narrower than might at first glance appear'. *Sola Tiles, Inc.* v. *Iran*, Award 22 April 1987, reprinted in 14 Iran–US CTR, p. 223, para. 43, at p. 235.

[230] This does not automatically imply that the whole triple standard of 'prompt, adequate (full) and effective compensation' is met.

the undertaking but also intangibles such as goodwill and likely future profits. In the *Amoco* award, however, it was explicitly established that 'future capitalization of the revenues which might be generated by such a concern after the transfer of property resulting from the expropriation (*lucrum cessans*)'[231] should *not* be taken into account in the assessment of compensation due for a lawful taking. Yet, the award includes compensation for 'goodwill and commercial prospects'. Judge Brower, who served as a judge in that particular case, filed a separate opinion, and noted later during his Hague Academy lectures that it is difficult to see the difference between 'lost profits' and 'commercial prospects'.[232] Also in the *Ebrahimi case* (1994), the tribunal pointed out that additional compensation for *lucrum cessans* is conditional on a prior characterization of the taking as unlawful.[233] In some other cases such as the *Phillips Petroleum case* (1989), the tribunal did not differentiate and applied a single standard of compensation as provided for in the Treaty of Amity and interpreted this as to require compensation representing the 'full equivalent of the property taken'.

A vast body of literature exists on this question, reflecting a mosaic of views; as already noted in the previous chapter, scholarly opinion is deeply divided. It is hard to draw conclusions from it. The same goes for the various foreign-investment guidelines and codes of conduct. One can conclude, however, that during recent decades a certain readiness has emerged to interpret the rules of traditional doctrine as to the amount of compensation less strictly, by observing the interests and financial capacity of the taking State.

As regards the requirement of *promptness*, expert literature – like State practice – no longer provides significant support for the traditional claim – as still reflected in the 1970 Hickenlooper Amendment – that the amount of compensation should be established and payment be made at the time of, or even prior to, the act of dispossession. ILC Special Rapporteur García-Amador observed as early as 1959:

> the time-limit for the payment of the agreed compensation necessarily depends on the circumstances in each case and, in particular, on the expropriating State's resources and actual capacity to pay. Even in the case of 'partial compensation', very few States have in practice been in a sufficiently strong economic and

[231] *Amoco Award*, para. 264. [232] See Brower (1993: 348).

[233] In this particular case the claimants did seek compensation for damnum emergens only (including compensation for tangible and intangible assets and future prospects). The tribunal concluded that: 'The appropriate amount to be awarded shall therefore be determined in such a manner as to include damnum emergens but not lucrum cessans': *Ebrahimi Award*, 12 October 1994, p. 44, para. 96.

financial position to be able to pay the agreed compensation immediately and in full.[234]

Similarly, Schwarzenberger observes that 'in equity, prompt compensation does not necessarily mean immediate compensation. It means compensation after a reasonable interval of discussions on all relevant aspects of the expropriation.'[235] The ICC Guidelines include the 'without delay' formula; while the ILA Seoul Declaration and the Draft UN Code of Conduct on TNCs do not address this element. The ALI Third Restatement requires, in the absence of exceptional circumstances, payment at the time of the taking, or within a reasonable time thereafter with interest to be paid from the date of taking.[236]

The World Bank Guidelines continue to equate 'prompt' to 'without delay', but agree that where the taking State faces exceptional circumstances compensation may be paid 'within a period which will be as short as possible and which will not in any case exceed five years from the time of the taking, provided that reasonable, market-related interest applies to the deferred payments in the same currency.'[237]

As regards the requirement of '*adequacy*' or 'full value' of compensation, the strict interpretation of this requirement is no longer convincingly supported in the literature.[238] It is difficult to maintain that adequate compensation is usually considered to be an amount representing the market value or 'going concern' value of the enterprise and that indemnity should always and exclusively be determined on the basis of *damnum emergens* (the going-concern value) plus *lucrum cessans* (the value of future earning prospects). As early as 1972, the ICC Guidelines (re-)introduced the concept of 'just compensation'. The ILA Seoul Declaration employs the phrase 'appropriate compensation as required by international law'; while the Draft UN Code of Conduct on TNCs mentions 'adequate compensation ... in accordance with the applicable legal rules and principles'. The ALI Third Restatement notably uses the term 'just compensation', equated – in the absence of exceptional circumstances – to an amount equivalent to the value of the property taken; and the World Bank Guidelines embody the

[234] UN Doc. A/CN.4/119 (1959), p. 59 and *Yearbook of the ILC 1959* (New York: United Nations, 1959), vol. II, p. 22, para. 86. However, in 1961 Domke maintained that the '*ad hoc* arrangements' on instalment payments agreed to by some capital-exporting countries 'cannot alter principles as fundamental as the requirement of prompt compensation for taking of foreign property': see Domke (1961: 606).

[235] Schwarzenberger (1969: 11).

[236] American Law Institute (1987: section 712).

[237] Section IV.8 of the 1992 World Bank Guidelines.

[238] See Schachter (1984: 122–4); but compare the comments by Mendelson (1985: 414) and Schachter's reaction to this in Schachter (1985: 420).

traditional formula of 'adequate' in the sense of fair market value. The Guidelines contain detailed provisions on how to arrive at a reasonable determination of the market value of the investment.[239]

As regards the requirement of *effectiveness* of compensation, this usually refers to compensation 'in convertible foreign exchange'. Payment of compensation in the form of bonds of which the income cannot be transferred, has been rejected as 'ineffective'. As Wellens puts it, this requirement should be interpreted today in a liberal manner.[240] What counts is that the compensation is made 'in a beneficial form which is of real economic value to the owner'.[241] Indeed, State practice provides numerous examples of compensation in a non-monetary form, for example in the form of commodities.[242] On various occasions the US government has agreed with taking governments on a compensatory package deal. Interesting examples include the settlement of the taking by Venezuela of American oil interests in 1974 and the taking by Peru of the Marcona ore company in 1975.[243] In both cases, agreement was reached on a combination of moderate amounts of cash and a substantial long-term business relationship involving service, marketing, transport, production, sales and other contracts.[244] As already referred to above, huge deliveries of crude oil were made by Libya to its claimants. The ICC Guidelines merely include the word 'effective' in the compensation clause; the ALI Third Restatement refers to 'a form economically usable by the foreign national'; and the World Bank Guidelines equate effective compensation to payment in 'the currency brought in by the investor where it remains convertible, in another currency designated as freely usable by the International Monetary Fund or in any other currency accepted by the investor'.[245]

In conclusion, widespread support exists for the rule that compensation *must* be paid for the taking of foreign property and interests with the exception of property acquired under colonial rule. A difference of opinion continues to exist with respect to the standard and mode of payment, but

[239] Section IV.5 and 6 of the World Bank Guidelines. There is a notable exception clause in para. 10: 'In case of comprehensive non-discriminatory nationalizations effected in the process of large-scale social reforms under exceptional circumstances of revolution, war and similar exigencies, the compensation may be determined through negotiations between the host State and the investor's home State and failing this, through international arbitration.' [240] Wellens (1977b: 75).

[241] See Notes and Comments to Art. III of the 1967 OECD Draft Convention, 7 ILM (1968), p. 128. [242] For some early examples, see Kronfol (1972: 117–18).

[243] Gantz (1977: 485–7) and Rogers (1978: 7–11).

[244] See also Asante (1979: 341–68), who discusses various possibilities of establishing joint ventures and entering into service and other co-operation contracts.

[245] Section IV.7 of the World Bank Guidelines.

over the years the rules arising from the triple standard have been relaxed, or at least their interpretation has been given a substantial degree of flexibility. Admittedly, it could be argued forcefully that the triple standard enjoys an increasing popularity through bilateral investment treaties and is also included in NAFTA, but these treaties do not necessarily incorporate the *alpha* and the *omega* of international investment law. It is therefore somewhat surprising that the World Bank Guidelines provide that, as a general principle, the term 'appropriate' nowadays should be equated to 'adequate, effective and prompt', albeit with detailed qualifications as to valuation methodologies, and so on.[246] On the other hand, it is simplistic to equate the Hull formula to 'full compensation' (thus disregarding the qualifications 'prompt' and 'effective') and to conclude, mainly on the basis of the decisions of tribunals in the cases concerning nationalizations by Libya, Kuwait and Iran, that the customary international law compensation standards of the 1950s and 1960s have been resurrected.[247]

The formula of 'appropriate compensation', as in the 1962 Declaration and the ILA Seoul Declaration, or the formula of 'just' or 'equitable' compensation which the present author would prefer, may be the best to ensure that in determining compensation for a lawful taking of foreign property the interests of both host and home States, and those of the party whose property is taken, are accounted for. This may come close to what the Iran–US Claims Tribunal stated in its *Amoco Award* (1987): 'The choice of all the available methods must ... be made in view of the purpose to be attained, in order to avoid arbitrary results and to arrive at an equitable compensation in conformity with the applicable legal standards. The use of several methods, when possible, is also commendable.'[248]

Due process

Although it is often stated that, as Higgins puts it, 'the manner of an expropriation may not be ... lacking in just procedures',[249] it is notable that not a single permanent-sovereignty resolution spells out such procedural requirements, at least not in unequivocal terms. Arguably one could read a procedural requirement into Article 2.2(c) of the CERDS, where it provides that any controversy over the question of compensation 'shall be settled under the domestic law of the nationalizing State and by its tribunals'. In contrast, due process of law or specific elements thereof are mentioned in

[246] See Section IV.2 of the Guidelines. See also Shihata (1993b: 4–6).

[247] See Norton (1991: 474–505, at 476 and 503–4).

[248] *Amoco Award*, reprinted in 15 Iran–US CTR, p. 256, para. 220.

[249] Higgins (1965: 56). For a discussion see also Wellens (1977b: 55–77).

all multilateral investment treaties[250] and in many bilateral investment treaties.[251] The 1967 OECD Draft Convention deals at some length with 'the notion of due process of law', which is said to be akin to the requirements of the 'rule of law'.[252] In Peters' sample a reference to due process (of law) as a condition precedent occurs in 98 out of 145 bilateral investment treaties; sometimes other words are used, such as 'based on law' or 'lawful', which can be considered equivalent to the requirement of due process of law.[253] In this connection the 1969 American Convention on Human Rights refers to 'established by law' (Article 20.2) and the 1981 African Convention to 'in accordance with . . . appropriate laws' (Article 14).

The requirement of a due process of law has played a role in the refusal by Western courts and governments to recognize the legality of a number of 'nationalizations', for example the Chilean copper cases.[254] Whereas the Chilean copper nationalization law accepted the principle of compensation, it provided that this should be reduced by the amount of excess profits the copper-mining companies had obtained in the past. This amount was to be fixed in a discretionary manner by the head of State, at that time President Allende, without any possibility of appeal.[255] In certain cases this not only led to a refusal of compensation, but also to a finding that the nationalized company owed the Chilean State a considerable sum of money ('negative indemnification'). This absence of an impartial element in the assessment of excess profits to be deducted from the amount of compensation led to protests in Western circles. For example, the US government rejected the retroactive excess-profit concept 'which was not obligatory under the expropriation legislation adopted by the Chilean Congress'.[256]

The due-process requirement is not always recognized in the literature as constituting an essential part of the 'international standard' and a necessary condition for a lawful taking. For example, Schwarzenberger – the prominent advocate of the 'international standard' – writes: 'so long as an expropriation takes place for public purposes and is accompanied by full

[250] OECD Draft Convention, Art. III.1; Inter-Arab Investment Treaty, Art. 9.2(a); OIC Agreement, Art. 10.2(a); ASEAN Investment Treaty, Art. VI.1; NAFTA Art. 1,110.1(c); and Art. 13.1(c) of the Energy Charter Treaty. [251] Verwey and Schrijver (1984: 66).

[252] According to the OECD Draft Convention the notion of due process of law is not exhausted by a reference to the national law of the parties concerned. The due process of law of each of them must correspond to the principles of international law. See Art. III.1. [253] Peters (1994b: 2).

[254] See Orrego Vicuña (1973: 711–27) and Seidl-Hohenveldern (1975b: 114–16).

[255] *Cf.* the Special Copper Tribunal Decision on the Question of Excess Profits of Nationalized Copper Companies in Chile, in 11 ILM (1972), p. 1,054.

[256] See 10 ILM (1971), p. 1,307.

or adequate, prompt and effective compensation, it is legal'.[257] Due process is not mentioned as one of the elements in US international law pronouncements in case of expropriation or nationalization of US interests, nor is it cited in the ALI Third Restatement. The ICC Guidelines call on the avoidance of 'unreasonable measures'. The World Bank Guidelines vaguely refer to 'applicable legal procedures',[258] while the ILA Seoul Declaration and the Draft UN Code of Conduct on TNCs have no reference to due process.

In conclusion, procedural requirements relating to the right to take foreign property are referred to in some treaty law, judicial decisions and international law literature as constituting an additional requirement. But what 'due process' entails is by no means clear; it may be interpreted as encompassing a right of access to the courts.

Right to appeal?

It is uncertain to what extent a host State is obliged to grant interested parties a right to appeal against a decision of first instance, in particular whether there should be an option of supra-national dispute settlement, subject to the observance of the 'local-remedies rule'.[259] The latter rule precludes, in principle, diplomatic protection as well as international adjudication or arbitration, as long as the plaintiff has not exhausted the domestic administrative and judicial system in the State concerned, unless that State obviously denies or obstructs the alien's access to the domestic courts (*déni de justice*),[260] or unless the State has clearly indicated that it is willing to forego the local-remedies rule.

In analyzing this issue, one should take into account that, until recently, natural and legal persons had not acquired a *locus standi* before any international tribunal or arbitral institution, and the possibility of their being a party to *investment* disputes before an international forum hardly existed before ICSID was established in 1966.[261] An exception are the 'Rules of Arbitration and Conciliation for Settlement of International Disputes between two Parties of which only one is a State', drafted in the context of the Permanent Court of Arbitration.[262] At the level of governments, the lack

[257] Schwarzenberger (1969: 4). See also Wellens (1977b: 57 and 93).

[258] World Bank Group (1992: section IV.1).

[259] See, generally, Dühring (1981: 136–40).

[260] See Brownlie (1990: 546–7).

[261] See the ICSID Convention, Arts. 25–7.

[262] Text in 57 AJIL (1963), pp. 500–12. In 1993 these rules have been modernized and renamed as 'Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between two Parties of which only one is a State'. See Permanent Court of Arbitration, *93rd Annual Report* (The Hague, 1993), paras. 6 and 19. See also Schlochauer (1981: 157–63), Permanent Court of Arbitration (1991) and Jonkman (1994).

of reference to compulsory international judicial settlement in many relevant documents and writings may be explained by the fact that – rightly or wrongly – it was considered reprehensible or superfluous. On the one hand, Latin American countries and some other developing countries consistently opposed intergovernmental interference with investment disputes between a foreign investor and the host State.[263] On the other hand, according to Western countries in cases in which the host States' tribunals would not settle investment disputes with foreigners in accordance with the rules of (international) law, the right of diplomatic protection would provide sufficient guarantees to ensure either an intergovernmentally negotiated settlement or an agreement to submit the dispute to international conciliation, arbitration or adjudication. However, a close link between transnational corporations and their home States, and a correspondence of interests between them, can no longer be assumed.

The Inter-Arab Investment Agreement lists as a condition of legality that 'the investor shall have the right to contest the measure of expropriation in the competent court of the host state' (Article 10.2(a)). However, this local-remedies rule seems to be interchangeable with the 'choice of court' clause of Article 16, by virtue of which the investor may raise any complaint either in the national courts of the host State or before an arbitral tribunal. The ASEAN Agreement points out that the national or company affected by expropriation has the right, under the law of the contracting party, to prompt review by a judicial body or another body independent of that contracting party. Article X of this Agreement indicates that such a dispute may be brought before the ICSID, UNCITRAL or regional arbitration centres. If parties cannot agree within three months on a suitable body for arbitration, a three-member arbitral tribunal must be formed. NAFTA and the Energy Charter Treaty also contain elaborate provisions on a right to review and international dispute settlement, particularly arbitration. Both of them make reference to the ICSID Convention and procedures.[264]

Many bilateral investment treaties reportedly contain a clause in the expropriation article, giving the investor access to the courts of the host State, sometimes to test the legality of the taking as well as the valuation of his investment or the amount of compensation paid or offered, sometimes only to test the amount.[265] Virtually all bilateral investment treaties have a general arbitration clause. On the basis of his research on bilateral investment treaties, Peters noted that during the 1980s the resistance to international arbitration of disputes between the host country and the

[263] See chapter 6, pp. 177–80.
[264] See NAFTA, Chapter 11, section B (Arts. 115–38) and ECT, Part V (Arts. 26–8) and Annex I. See also chapter 9, pp. 303–4 above.
[265] Peters (1994b: 3).

foreign investor was significantly reduced. He notes as a remarkable trend 'the virtual abandonment – even in most Latin American countries, notwithstanding the Calvo doctrine – of the principle that local remedies must be exhausted before international arbitration is permissible', either by a renunciation of this rule or – as is more often the case – by limiting the time available for recourse to local remedies to a short period, for example, three or six months.[266] In Peters' view the trend of giving way to practical considerations is a positive trend: the investor perceives recourse to the local courts – before going to international arbitration – often as a waste of time, while for the host State the acrimony caused by public proceedings in its courts may harm the investment climate and could be embarrassing if the verdict of its highest court would subsequently be 'quashed by "foreign" arbitrators.'[267]

In the Chilean case, the absence of an impartial element in the assessment of excess profits to be deducted from the amount of compensation to be paid was a *faux pas* of the Allende government. In 1973, the Supreme Court of Hamburg – which was called upon to deal with a request for seizure and forfeiture of Chilean copper – objected to the fact that 'legal channels have been closed to the parties concerned'.[268] The US government likewise protested against the fact that Chile's nationalization law 'bypasses established Chilean judicial appeals procedures, including access to the Supreme Court'.[269]

The ICC Guidelines provide that the host State should 'in suitable circumstances' enter into arrangements for the settlement of disputes with the investor by international conciliation or arbitration. Similarly, the OECD Guidelines encourage the use of 'international dispute-settlement mechanisms, including arbitration ... as a means of facilitating the resolution of problems arising between enterprises and member countries'. The Draft UN Code of Conduct on TNCs emphasizes national dispute-settlement procedures, but offers the possibility of recourse to 'other mutually acceptable or accepted dispute-settlement procedures'. The ALI Comment on the Third Restatement calls for an effective administrative or judicial remedy for reviewing the legality under international law of an action causing economic injury to an alien and adds that, in the case of a taking of property, this may be done by an 'independent domestic tribunal, an ad hoc or previously agreed arbitration, or an international tribunal'.[270]

[266] See Peters (1991: 151). [267] Ibid., p. 134.
[268] See text in 13 ILM (1973), p. 275. See also Seidl-Hohenveldern (1975b: 110 and 115).
[269] See 11 ILM (1972), pp. 91–2.
[270] American Law Institute (1987: 202). See also Section 713 (with Comments and Reporters' Notes) on Remedies for Injury to Nationals of Other States, pp. 217–29.

According to the World Bank Guidelines: 'Disputes between private foreign investors and the host State will normally be settled through negotiations between them and failing this, through national courts *or* through other agreed mechanisms including conciliation and binding independent arbitration.'[271]

It is notable that in the ILA Seoul Declaration, settlement of nationalization disputes is subject to its general section on peaceful settlement of disputes which reads:

> Disputes on questions related to international economic relations have to be settled by peaceful means chosen by the parties concerned, in particular by recourse to international adjudication, international or transnational arbitration, or other international procedures for the settlement of disputes. The principle of local remedies shall be observed, where applicable;

Existing institutionalized dispute settlement arrangements, in particular on questions of international trade and investments, should be further developed and reinforced and new arrangements of a similar kind should be envisaged in other important areas, where international disputes are of growing importance, e.g., the fields of international monetary, financial and tax relations, transnational corporations and the natural environment. In comparing the two, one could argue that the World Bank Guidelines emphasize local dispute settlement (negotiations between investor and host state, national courts, and independent arbitration – which can be either national or international), while the ILA Seoul Declaration stresses international dispute settlement.

In conclusion, the permanent-sovereignty resolutions stipulate that a foreign investor has a right to seek review from a decision in the first instance regarding expropriation or nationalization of his investment. However, a local review often does not suffice and in practice there is clearly a need for independent arbitration or adjudication, following or instead of a review by the local courts of the host country. In State practice, as evidenced by multilateral investment treaties and a long line of bilateral investment treaties, there is an important tendency towards resorting to international arbitration, often without full exhaustion of local remedies. Together with the increasing applicability of human rights law to the treatment of aliens, this shows how much foreign-investment disputes have become internationalized.

[271] Section V.1 of the World Bank Guidelines, emphasis added. Paragraphs 2 and 3 of this section emphasize the merits of independent arbitration and recommend the ICSID procedures.

Box 10.1 Global significance of national management of tropical rain forests

Tropical rain forests and biodiversity are among the most precious forms of natural wealth on our earth and contain many natural resources. It is estimated that the tropical rain forests provide a habitat to more than half of the world's plant and animal species. They serve as essential sources of food, fuel, shelter, medicines and many other products for people living in these areas or elsewhere. They are essential for the maintenance of biological diversity and for the protection of soil and water resources. In addition, tropical rain forests serve as important natural carbon sinks. Deforestation by burning or rotting processes not only releases carbon dioxide but also diminishes the capacity to absorb it. Thus, tropical rainforests and biodiversity play an important role in ecosystems and are important for human life.

Tropical rain forests are at present being destroyed at an alarming rate. Every year more than 15 million hectares – an area four times as large as the Netherlands! – are lost. The basic reasons for tropical deforestation include increasing needs for agricultural and pasture land, as a result of rapid population growth, and for fuel, timber, pulp and hard currency. Recently it has been estimated that at least 100 million hectares of tree planting worldwide are necessary for ecological rehabilitation, especially in tropical regions.

Tropical rain forests are part of the natural wealth of countries and thus are subject to the permanent sovereignty of the States where they are located. Consequently, their management is first of all the responsibility of these States. With the important exceptions of Australia (Queensland) and French Guyana, virtually all of them are developing countries. Permanent sovereignty does not mean, however, that other countries have nothing to do with the present and future management of this natural wealth. Tropical timber production and forestry management reflect *overall development problems* for which the international community as a whole should bear responsibility. Poverty and population pressure are among the driving forces in the depletion of tropical forests since people increasingly need land, fuel, shelter, etc. For some developing countries, timber production is a source of income and foreign exchange which they badly need in view of their international debt problems. Prices paid for tropical timber are, however, unstable and relatively low. This results in 'cut-and-run' patterns of commercial exploitation rather than in sustainable use.

It is now recognized that the destruction of tropical forests can have a severe impact on the *ecological balance* of neighbouring countries, and even on the global environment. As regards the latter, it has been suggested that forest fires in Brazil and Indonesia have contributed to global warming. In short, here we have yet another example of effects of national sovereignty or inadvertent acts in a certain country on other States and their environment.

Box 10.2 Examples of nationalization clauses in bilateral investment treaties

Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela, 22 October 1991, Article 6

Neither Contracting Party shall take any measures to expropriate or nationalise investments of nationals of the other Contracting Party or take measures having an effect equivalent to nationalisation or expropriation with regard to such investments, unless the following conditions are complied with:

- a the measures are taken in the public interest and under due process of law;
- b the measures are not discriminatory or contrary to any undertaking which the Contracting Party taking such measures may have given;
- c the measures are against just compensation. Such compensation shall represent the market value of the investments affected immediately before the measures were taken or the impending measures became public knowledge, whichever is the earlier; it shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.

Agreement between the People's Republic of China and the Government of the Socialist Republic of Vietnam concerning the Encouragement and Reciprocal Protection of Investments, 2 December 1992, Article 4

1. Neither Contracting State shall expropriate, nationalize or take similar measures (hereinafter referred to as 'expropriation') against investments of investors of the other Contracting State in its territory, unless the following conditions are met:
   - a in the public interest;
   - b under domestic legal procedure;
   - c without discrimination;
   - d against compensation.
2. The compensation mentioned in Paragraph 1(d) of this Article shall be equivalent to the value of the expropriated investments at the times when expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay.
3. Investors of one Contracting State who suffer losses in respect of their investments in the territory of the other Contracting State owing to war, a state of national emergency, insurrection, riot or other similar events, shall be accorded by the latter Contracting State, if it takes relevant measures, treatment no less favourable that that accorded to investors of a third State.

11 Sovereignty over natural resources as a basis for sustainable development

This chapter highlights the main points of this study and draws some conclusions on the issues raised by the questions posed in chapter 1. The first set of questions related to the origin, development and legal status of the principle of permanent sovereignty over natural resources ('permanent sovereignty'). This chapter deals with the two-fold origin of the principle, namely the sovereignty of States and the self-determination of peoples. The question of the law-creating functions of the UN General Assembly and the status of the principle in current international law, especially whether it can be accorded the status of *jus cogens*, are then discussed in turn.

Principles and rules of international law do not function in a vacuum, but in the living reality of a changing world. In line with the second set of questions, this chapter discusses the changing international context of the principle of permanent sovereignty, in particular the impact of changing perceptions of the scope of State sovereignty in an age of globalization, privatization, fragmentation and environmental deterioration. The developments in international investment law and the current significance of the 'national' and 'international minimum' standards are considered, as well as the question of the management of resource- and foreign-investment-related conflicts and the continuing contribution of the principle of permanent sovereignty as an instrument of protection and development.

Finally, the content and role of natural-resource sovereignty in an interdependent world and the new directions permanent sovereignty is currently taking are discussed, dealing first with the importance of the renewed interest in self-determination as a principle of international and human rights law and its effect on the interpretation of permanent sovereignty, and subsequently with the rights and duties arising from the principle of permanent sovereignty and the position of this principle

within emerging international law concerned with sustainable development.

The origin, development and legal status of the principle

Back to the roots

The principle of permanent sovereignty over natural resources has its roots in two main concerns of the United Nations: (i) the economic development of developing countries; and (ii) the self-determination of colonial peoples. Soon after the establishment of the United Nations and on the basis of the Charter's articles on 'International Economic and Social Co-operation' (Chapter IX), the General Assembly began a debate on the necessary conditions for development. General Assembly Resolution 523 (VI) introduced the right of 'under-developed countries' to determine freely the use of their natural resources. In response to immediate post-war concerns over resource scarcity, an effort was made by the industrialized States to balance national and global interests in the management of resources. From 1952, however, developing countries took a more assertive stand, both within and outside the United Nations. The pursuance of permanent sovereignty became part of their movement, especially that of Latin American countries, to seek economic independence as well as to support the cause of colonial peoples for self-determination and independence.

On occasion this double origin caused confusion. General Assembly Resolution 626 (VII), for example, provides that 'the right of *peoples* to use and exploit their natural wealth and resources is inherent in their *sovereignty*' while it also refers to the right of 'all *member States*' freely to use and exploit their natural wealth and resources.[1] The first paragraph of the Declaration of 1962 states:

> The right of *peoples and nations* to permanent sovereignty over their natural wealth and resources must be exercised in the interest of *their national* development and of the well-being of the people of the *State* concerned.[2]

The particular formulation of the phrase 'permanent sovereignty over natural wealth and resources' was introduced on 16 April 1952 by Chile, in a debate in the UN Commission on Human Rights as a right in the self-determination article of the draft Human Rights Covenants.[3] The main aim was to underscore the right of peoples – as Chile put it – 'to remain

[1] In both quotations the emphasis is added.
[2] GA Res. 1803 (XVII), 14 December 1962, emphasis added.
[3] UN Doc. E/CN.4/L.24, 16 April 1952.

masters of their own natural wealth and resources'.[4] The emphasis on peoples and nations had not only to do with preserving the rights of colonial peoples, but can also be explained by experiences of countries like Chile where governments – in the opinion of some critics – 'squandered away' national natural resources to foreign investors. This Chilean initiative finally led to the inclusion in Article 1 of the UN Covenants on Human Rights (1966), and subsequently in the Conventions on State Succession (1978 and 1983) and the 1981 African Charter on Human and Peoples' Rights, of a right of peoples to free disposal of natural resources. Soon, however, the sovereignty of States rather than self-determination of peoples became the main theme in permanent-sovereignty debates. This change of emphasis resulted from the relatively rapid decolonization process, the way in which newly independent States cherished their sovereignty, and the non-representation of peoples in the intergovernmental United Nations. This conclusion can be illustrated by the fact that initial references to the principle of self-determination and to peoples as subjects of the right to permanent sovereignty – as they occur, for example, in General Assembly Resolutions 837 (IX), 1314 (XIII) and 1803 (XVII) – were later abandoned and replaced by an increasing emphasis on sovereignty, first of developing countries and later of all States. Moreover, throughout the debate the principle of permanent sovereignty was placed in a developmental context, focusing on the discretion newly independent States had under international law in the management of their natural resources. It is symptomatic of this shift that during the period from the adoption of the 1962 Declaration to 1985, with the exception of the resolutions on the rights of specific peoples under 'foreign occupation, colonial domination or *apartheid*', the permanent-sovereignty-related General Assembly resolutions are addressed exclusively to States as the subjects of the right to permanent sovereignty over natural resources. This 'étatist' orientation in the evolution, interpretation and application of the principle of permanent sovereignty can well be understood as part of the economic and political emancipation process of developing countries, but equating peoples and States undoubtedly further strengthens the State and subordinates the rights of the people to the whims of those in power.[5] However, a recent tendency can be discerned indicating that the principle of self-determination and the rights of peoples in a non-colonial context are receiving revived attention.[6] Examples include the 1986 UN Declaration on the Right to Development which recalls the right of peoples to exercise 'sovereignty over all their natural wealth

[4] UN Doc. E/CN.4/SR.260, 21 April 1952, p. 6. [5] See also Crawford (1988b: 55).
[6] Iorns (1992), Hannum (1993) and de Waart (1994a) and (1994c).

and resources'[7] and the Draft Declaration on the Rights of Indigenous Peoples which proclaims their right to self-determination and confers upon them a series of resource rights.[8] In its judgment of 30 June 1995 in the *Case Concerning East Timor* the court, while deciding that it could not exercise jurisdiction, pronounced in an *obiter dictum* that 'Portugal's assertion that the right of peoples, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character is irreproachable'.[9]

If this tendency is consolidated, the principle of permanent sovereignty will return to its two roots and the two-fold aspirations derived from these roots.[10] This would certainly be a laudable development, as it implies that States should be instruments to serve the interests of peoples and not *vice versa*. As UN Secretary-General Boutros-Ghali indicated in *An Agenda for Peace* (1992), both sovereignty and self-determination are principles of great value and importance and should not be in conflict, but should be complementary to and in balance with each other.[11] This development would also provide support for the thesis that, apart from rights, also duties incumbent on States arise from the principle of permanent sovereignty.

Legal effects of General Assembly resolutions

The formation of the principle of permanent sovereignty was complicated, progressing as it did by means of UN resolutions rather than conventional methods of international law-making such as evolving State practice or the conclusion of treaties. During the debate on permanent sovereignty the General Assembly performed a number of key functions:[12] it took stock of demands; identified problems and needs of developing countries; provided a forum for debate between capital-exporting and capital-importing countries; pointed out policy measures to promote development and, later, sustainable development; and, in the end, served as a 'quasi-law-maker'[13] or – as Cheng put it in another context – 'midwife for the delivery of nascent rules'.[14]

There can be little doubt that the hallmark of this process was *not* the Charter of Economic Rights and Duties of States (CERDS) of 1974, but the

[7] GA Res. 41/128, 4 December 1986. [8] See chapter 10, pp. 314–15.

[9] *ICJ Reports* (1995), p. 102, para. 29.

[10] See on the original connection between human rights and permanent sovereignty over natural resources, Dolzer (1986). See also Muchlinski (1983: 75–6), who identifies permanent sovereignty as 'the oldest of the economic rights claimed as part of the right to self-determination'. [11] Boutros-Ghali (1992: 10).

[12] See generally on the functions of international organizations VerLoren van Themaat (1981: 31–5) and Kaufmann (1988: 6–11).

[13] See Falk (1966: 782) and Bowett (1982: 46). [14] Cheng (1965: 39).

Declaration on Permanent Sovereignty over Natural Resources of 1962. This Declaration is widely considered as embodying a balance between the permanent-sovereignty rights and the international legal duties of States; its preparation was careful, its adoption was virtually unanimous, and it received an extensive follow-up.[15] All these elements were fundamentally different for the CERDS.

It is no longer a source of great controversy that certain categories of UN resolutions can have legal effects beyond their status as mere recommendations.[16] General Assembly resolutions can explain and specify principles and rules of the UN Charter.[17] The Decolonization Declaration[18] may serve as an example of such 'interpretative resolutions', although the UN Charter itself did not outlaw colonialism. Today, this Declaration is widely seen as the legal basis for outlawing colonialism[19] and as having in this respect *de facto* amended or otherwise superseded the UN Charter. The 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations is widely considered as an authoritative interpretation of the UN Charter which clarifies and elaborates upon the meaning of its principles, including self-determination.[20] Moreover, UN resolutions – especially declarations[21] – have often been the forerunner of treaties or provisions thereof. Examples include: the Universal Declaration of Human Rights (1948); the Declaration of Principles Governing the Sea-Bed, and the Ocean Floor and the Subsoil Thereof, Beyond the Limits of National Jurisdiction (1970); and – albeit to a far lesser extent – UNCTAD's Integrated Programme for Commodities (1976).[22]

Apart from treaties and other manifestations of State practice, UN resolutions can be considered as providing evidence of customary law

[15] For a list of variables to test the legal significance of a resolution, see Verwey (1981a: 26–7).

[16] See, for example, the ICJ in the Namibia and Western Sahara advisory opinions: *ICJ Reports* (1971), p. 31 and *ICJ Reports* (1975), pp. 31–2.

[17] See Schachter (1991: 86–7).

[18] Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV) of 14 December 1960. Its para. 1 declares: 'The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.'

[19] See the Chapters XI, XII and XIII on non-self-governing territories and the trusteeship system. See on 'Charter colonialism' also Roethof (1951), Asamoah (1966: 164), Röling (1973: 64–7) and Verwey (1977: 132–5).

[20] This is not to say that 'interpretative resolutions' encroach upon the right of States in international law to make their own interpretations. For a critical comment on the 1970 Declaration see Arangio-Ruiz (1979).

[21] Asamoah (1966: Part I).

[22] UNCTAD Res. 93 (IV), 31 May 1976.

insofar as they identify, specify, confirm or reformulate rules of customary law. As Bowett puts it: 'While they cannot create direct legal obligations for member States they can embody a consensus of opinion about what the law is so that, indirectly, they become evidence of international law.'[23] Elements of the 1962 Declaration on Permanent Sovereignty could be placed in this category of 'declaratory resolutions', insofar as it formulated a new *opinio juris communis* with respect to the principle of permanent sovereignty. However, parts of this Declaration and of later permanent-sovereignty resolutions also contain controversial elements which bring it within the group of what Röling has called 'permissive resolutions', that is resolutions which do not so much impose obligations as formulate rights, even rights to do things which until then were not allowed under international law. As Röling pointed out:

> If certain forms of behaviour not usually permissible were recommended, exceptions were created from existing prohibitive provisions. Many States were eager to rely on these exceptions. It was difficult for other States to object to this, now that the action objected to had been recommended by the General Assembly by a majority of more than two-thirds. Action, on the one hand (with an *opinio juris* based on the resolution), and no objection, on the other, can very easily lead to recognized customary law.[24]

Thus, legitimization of certain behaviour may gradually lead to legalization, through concurrent and widely accepted State practice (customary law) and by including it in binding legal instruments. The 1952 'nationalization' resolution,[25] provisions of the 1962 Declaration on Permanent Sovereignty and the NIEO resolutions[26] are important examples of texts with a 'permissive' character as far as permanent sovereignty is concerned. The 1962 Declaration, for example, differentiates between property acquired under colonial rule (which can therefore be nationalized under less stringent conditions) and rights acquired since independence. Its paragraph 4 deviates from the traditional international minimum standard governing the treatment of foreign investors, insofar as it formulates certain new principles with respect to nationalization. For example, as far as compensation is concerned, it does not stipulate – in the view of the Assembly's majority – the triple standard ('prompt, adequate and effective') but 'appropriate' compensation. This would entitle ('permit') a nationaliz-

[23] Bowett (1982: 46). See also Higgins (1963: 5): 'the body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provide a rich source of evidence.' [24] Röling (1973: 23). [25] GA Res. 626 (VII), 21 December 1952.

[26] Especially GA Res. 3171 (XXVIII) of 17 December 1973, GA Res. 3201 and 3202 (S-VI) of 1 May 1974 and GA Res. 3281 (XXIX) of 12 December 1974.

ing government to take into account not only damage incurred by foreign investors, but also its own economic situation, including its capacity to pay.[27] This view may not be indisputable insofar as some uncertainty exists over the meaning of such an ambiguous term as 'appropriate'. Nonetheless, this Declaration as a whole can be considered as one of the landmark documents in reformulating standards of international investment law.

A category more or less diametrically opposed to that of permissive resolutions is that of resolutions claiming to impose obligations.[28] Examples of this kind include the permanent-sovereignty-related, environmentally relevant resolutions and certain principles of the Stockholm and Rio Declarations which formulate duties with respect to resource management and environmental preservation.[29] Finally, various permanent-sovereignty-related resolutions also bear the characteristics of what in French literature is called '*droit programmatoire*'. Dupuy has inventively developed this concept of 'programmatory resolutions'.[30] Certain resolutions are prospective in nature, proclaim principles and rules which are new and not yet generally observed, or recommend measures which have not yet been instituted. The very first permanent-sovereignty resolution, General Assembly Res. 523 (VI), which calls for the recognition of the right of underdeveloped countries to determine freely the use of their natural resources and which calls for integrated development and commercial agreements, may well fit this category. The same applies to the important programmatory General Assembly Resolution 2158 (XXI) on permanent sovereignty which calls for a greater share of developing countries in exploiting, marketing and processing their natural resources and in managing foreign enterprises operating in these fields as well as training of local personnel and, given environmental constraints, proper resource exploitation.

Permanent sovereignty: a norm of *jus cogens*?

Main elements of the principle of permanent sovereignty have been included in several multilateral treaties, most notably: the two Human Rights Covenants (1966); the African Convention on Human and Peoples' Rights (1981); the two Vienna Conventions on Succession of States (1978 and 1983); the UN Convention on the Law of the Sea (1982); the Climate Change

[27] See chapter 9, pp. 292–7, and chapter 10, pp. 352–9 above.

[28] Kapteyn (1977: 29) uses the term 'mandatory resolutions'. Because of its connotation with binding Security Council resolutions adopted under Chapter VII of the UN Charter, the present author prefers to use here the phrase 'resolutions claiming to impose obligations'.

[29] See chapter 4, pp. 136–40 and chapter 10, pp. 324–6 above.

[30] Dupuy (1977).

and Biodiversity Conventions (1992); and the Energy Charter Treaty (1994). It has also been recognized in a series of arbitral awards.[31] For example, on the basis of the circumstances of adoption of the 1962 Declaration on Permanent Sovereignty, Dupuy as arbitrator in the *Texaco* v. *Libya case* (award in 1977) concluded that this Declaration expressed the *opinio juris communis* on nationalization of foreign property under international law.[32] As far as doctrine is concerned, hardly any contemporary international lawyer would deny the principle of permanent sovereignty a legal value. At the other extreme, it is doubtful whether one could go as far as to label the principle of permanent sovereignty as a norm of *jus cogens*. There are some governments (for example, those of Algeria, Libya and Kuwait), as well as some international lawyers (for example, Aréchaga, Chowdhury and Rigaux), who feel this status has been achieved. There are, indeed, a number of arguments in support of such a thesis:

1 The fairly consistent use of the word 'permanent' before 'sovereignty over natural resources' and the frequent identification of permanent sovereignty as 'inalienable' or 'full'.
2 The identical Articles 25 and 47 of the two International Covenants on Human Rights, reading: 'Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.' The Vienna Conventions on State Succession and some multilateral environmental treaties contain comparable provisions.

In order to assess further this thesis it is relevant to refer to Article 53 of the Vienna Convention on the Law of Treaties (1969) which gives a description of the concept of *jus cogens* which is seldom disputed. The term *jus cogens* is not used in the text of the article itself but has been equated in the title to a peremptory norm of general international law. It is defined as follows:

> For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

A number of criteria can be derived from this definition:

1 Only widely accepted and recognized norms of general international law can potentially gain the status of *jus cogens*. Otherwise, the whole concept of *jus cogens* would become fluid and unmanageable. Authors

[31] See chapters 9 and 10 above and Appendix III, p. 410 below.
[32] *Texaco Award* (1977), reprinted in 17 ILM (1978), p. 320, paras. 84–8.

differ as to the requirement of express consent or acceptance by States as a constitutive element in the evolution of a rule of law towards a norm of *jus cogens*.[33] The principle of permanent sovereignty meets this test of being widely accepted and recognized.

2 A very large majority of States must have accepted and recognized a norm as peremptory. It can be derived from the *travaux préparatoires* that acceptance by all States is not a condition, since – in Sinclair's words – 'no individual State should have the right of veto in determining what were and what were not peremptory norms'.[34] Thus the words 'international community of States as a whole' should be flexibly interpreted. It seems to be the prevailing view of contemporary international lawyers that, unless a large majority of States, including States having a direct interest in the matter to which the norm pertains, accept and recognize a norm as peremptory, it cannot be said to have gained that character. Here we run into difficulties with the qualification of permanent sovereignty as a peremptory norm, since it clearly follows from the voting records and the *travaux préparatoires* that permanent sovereignty as a peremptory norm has not gained the support of many States principally concerned.

3 No derogation is permitted. The test against this criterion is the most perplexing one. For it will be difficult to prove that a State, acting in the exercise of its sovereignty, has concluded a treaty or a contract or has accepted provisions therein which derogate from the norm. Of course, if a treaty would permit slave trade, piracy or genocide – as these acts are among the few widely accepted legal prohibitions in international law from which no derogation is permitted – it has to be considered as null and void. In connection with permanent sovereignty, however, it would be more difficult to sustain such a thesis. One might argue that some *elements* of permanent sovereignty, especially the prohibition to deprive a people of its means of subsistence as formulated in Article 1 of the Human Rights Covenants, are non-derogable norms of international law. However, even in the case of a *reductio ad absurdum* (for example, a long-term contract tantamount to the dispossession of a country's natural resources or a contract reserving large sites for the dumping of industrial waste from abroad), it would currently be very difficult, if not impossible, to answer the question whether or not particular clauses of international treaties, concession agreements or contracts (for example, stabilization or immutability clauses)[35] amount to an alienation of sovereignty and/or to bargaining away peoples' right to natural resources. Furthermore, a State is free to enter into

[33] Rozakis (1976) and Van Hoof (1983: 157–61). [34] Sinclair (1984: 219).

[35] For a debate on these issues, see Chowdhury (1984b: 46–57) and Peters *et al.* (1984: 93–100).

negotiations and agreements with other States on boundary corrections, association or even integration with another independent State.[36] This indicates that territorial sovereignty is not inalienable in every respect and it is, therefore, hard to conclude that economic sovereignty is non-derogable and inalienable under all circumstances.

It can be concluded, therefore, that despite its complicated genesis the principle of permanent sovereignty over natural resources has achieved a firm status in international law and is now a widely accepted and recognized principle of international law. However, it cannot be accorded the status of *jus cogens*. This implies that permanent sovereignty does not override other principles of international law and moreover can evolve in the light of new rules and new practices accepted as law, thereby allowing it, for example, also to encompass new duties.

Changing perceptions on sovereignty, foreign investment and the role of international law

The end of permanent sovereignty in an age of globalization, privatization and fragmentation?

In recent years the principles of State sovereignty in general and permanent sovereignty over natural resources in particular have been subject to a number of trends and exposed to an impressive series of challenges which have had a profound impact on the political and legal sphere surrounding their application and interpretation. They include the following.

The current erosion of the traditional scope of State sovereignty

State sovereignty, as the traditional backbone of public international law, is undergoing a significant change within the framework of international law which is, increasingly and substantially, limiting the scope of matters which – in the words of Article 2.7 of the UN Charter – are 'essentially within the domestic jurisdiction of any State'. Human rights law, Security Council resolutions on the maintenance or restoration of peace and security, and the progressive development of international environmental law, all embody this trend. Furthermore, efforts in several parts of the world towards regional economic co-operation and integration significantly

[36] See the principle of equal rights and self-determination of peoples of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV).

affect the room of manoeuvre of individual States, most notably in the context of the European Union. Reference can also be made to: ASEAN in South-East Asia; the Asia-Pacific Economic Co-operation (APEC); the Economic Community of West African States (ECOWAS) in West Africa and the Common Market for Eastern and Southern Africa; NAFTA in North America; CARICOM in the Caribbean; and MERCOSUR in the southern part of Latin America. It is also worth noting the expectation of a gradual inclusion of the former centrally planned economies of Eastern Europe and ex-Soviet Union into a greater European 'economic area'. Lastly, State sovereignty is affected by the increasing recognition of the claims of peoples to their land and natural environment. The cause of indigenous peoples and the increasing environmental awareness of citizens, all over the world, bring this to the fore. Gradually, developments in human rights law and in international environmental law are beginning to meet in postulating a new human right: the right to an environment which is adequate for health and conducive to development.[37] The African Charter on Human and Peoples' Rights and the Convention on the Protection of Biodiversity both embody this trend.

Economic trends undermining permanent sovereignty

A significant trend, especially after 1989, towards a global economy can be noted. This is exemplified by the establishment of a new World Trade Organization in 1995 and a series of related international agreements as a result of the GATT Uruguay Round, the rapid globalization of the international money market, and the expanding role of transnational corporations. Also a trend towards privatization can be discerned. While during the 1950s, 1960s and 1970s an important role was foreseen for State enterprises, especially in natural-resource management, there are now widespread doubts about the effectiveness and appropriateness of State-owned enterprises and in many countries an increased role for the private sector is being advocated, including foreign investment in the development process. For the time being, cries for nationalization sound like a voice from a distant past. Mention should also be made of the steady decline of world prices in real terms for minerals (including crude oil) and other primary commodities, which is usually regarded as disadvantageous to developing countries.[38] However, many developing countries have recently become net

[37] See Birnie and Boyle (1992: 190–3), Kiss and Shelton (1991: 21–31), and Weiss, E. B. (1992).

[38] Temporary relief can be provided under the Compensatory Financing and Contingency Facility of the IMF and the Stabex and Sysmin systems of the Lomé Convention.

importers of commodities, so that simply equating all developing countries with commodity-exporting countries is no longer correct. This means, for example, that many newly industrializing countries are not keen to join *Group of 77* forces in demanding higher and more stable commodity prices.

A changing approach to the exploitation of natural resources

For many years, the chief objective of the main permanent-sovereignty-related UN resolutions and treaties was to achieve full use of natural resources. In doing so, they often ignored effects on the environment and natural wealth.[39] Recently, however, there has been an increasing appreciation of the intrinsic value of natural wealth and natural resources and the effects of exploiting them are now often included in environmental impact-assessments. The modern trend is towards that of an integrated ecosystem approach. This approach is gradually being incorporated in, for example, fisheries agreements and is reflected in the Biodiversity Convention, based on a recognition of the global significance of environmental issues and an awareness of the limits to the 'environmental utilization space'.[40] A rising number of duties sets limits to a State's jurisdiction over its natural wealth and resources by requiring it to manage them more carefully.

This study has shown that over the years permanent-sovereignty-related UN resolutions have responded dynamically to changed circumstances and insights, by integrating developmental and environmental concerns and by elaborating policy measures that are needed at the national and international level to implement fully the principle of permanent sovereignty. For example, the initial interest in the nationalization of the natural-resources sector and in the role of State enterprises has now been replaced by increasing emphasis on market principles and privatization and on encouraging foreign investment.[41] In addition, environmental concerns are now an integral part of the permanent-sovereignty debate. Thus the permanent-sovereignty resolutions reflect the changing 'development ideology' of the United Nations.[42]

It would be incorrect to assert that, as a result of the trend towards globalization, fragmentation and privatization, the principle of permanent sovereignty is dead or no longer serves any function in international law and in international relations. In a world in flux and with a low level of international organization, reasons abound for emphasizing the continued value of the principle of permanent sovereignty as a framework for

[39] Lyster (1985: 300). [40] Opschoor (1992b). [41] See Wälde (1983: 247–8).
[42] The term was introduced by Virally (1972: 314–20). On the development ideology of the United Nations, see generally Singer (1989) and Schrijver (1990: 7–14).

international economic co-operation and for the accountability of States at the domestic and international level. The challenge of the next two or three decades will be how to balance permanent sovereignty over natural resources with other basic principles and emerging norms of international law – including the duty to observe international agreements, grant fair treatment to foreign investors, pursue sustainable development at national and international levels and to respect human and peoples' rights – and in this way to serve best the interests of present and future generations.

International investment regulation: the need for an integrated global approach

For a long time the evolution of permanent sovereignty and the debates on this principle have been characterized by deep-rooted differences of opinion with respect to the treatment of foreign investors, in particular a host State's right to expropriate foreign property. Foreign investments were either branded as the prolongation of colonial domination by other means or advocated as the main vehicle for the development of developing countries. Western countries demanded strict respect for the rule of *pacta sunt servanda* (agreements must be performed in good faith) and other requirements arising from the 'international minimum standard' of civilization, while developing countries often invoked the *clausula rebus sic stantibus* (fundamental change of circumstances) and the Calvo doctrine as major lines of defence to safeguard their political independence and to promote economic self-determination.

The General Assembly has served as a forum for debate in which each group of countries could advance its position and seek support and legitimization for its policies, which were often unacceptable to other groups. Examples are General Assembly Resolutions 626 (VII), 3171 (XXVIII) and Article 2 of the CERDS. After thus allowing these groups to let off steam, the General Assembly could sometimes play a useful role in efforts to promote foreign investment in developing countries and in generating a new consensus regarding principles and rules for investment regulation. The 1962 Declaration on Permanent Sovereignty and its follow-up General Assembly Resolution 2158 (XXI) fall in this category. With respect to expropriation and nationalization, the most balanced outcome of these efforts is still the 1962 Declaration on Permanent Sovereignty. On the one hand, it requires respect for acquired rights and international law, and fair treatment of foreign investment. On the other hand, it squarely recognizes the economic sovereignty of host States and their right to regulate foreign investment and to expropriate or nationalize foreign property. The latter is, however, subject to a number of conditions, which include: a public

purpose; prohibition of arbitrary discrimination; payment of compensation; and a right of interested parties to seek review. Over the years these principles have been consolidated, reformulated and specified in legally relevant instruments of a widely varying nature. They include some multilateral and hundreds of bilateral investment treaties, lump-sum compensation agreements between OECD countries and virtually all Eastern European communist countries and some developing countries, decisions of arbitral tribunals, national investment codes, and various international guidelines and codes of conduct. The NIEO resolutions have been the last major bone of contention regarding these issues.

During the 1980s and 1990s the controversies concerning the 'national standard' versus the 'international minimum standard' seem to have lost much of their colour and relevance. As reflected in the debates in the United Nations and the World Bank, the arguments are less doctrinaire and more pragmatic, aimed at bridging gaps rather than exposing differences. Perhaps this was induced by the sharp decrease in new direct foreign investment in developing countries (especially in Africa) during the early 1980s, but certainly also by changing ideologies with respect to foreign investment, the private sector and the market (especially since 1989, the end of the Cold War). After declining sharply in the 1970s and early 1980s foreign investment flows to developing countries, especially to East and South-East Asia, increased substantially during most of the 1980s and early 1990s. As a result, developing countries accounted for 33 per cent in 1992 and an estimated 41 per cent in 1993 of foreign direct investment flows.[43] Foreign investment flows respond to perceptions of the political and economic climate, including labour costs, availability of skilled labour, political risk, international law protection and national foreign investment legislation.[44]

This increasing trend towards pragmatism can be discerned at various levels of investment regulation.[45] At the national level this trend is apparent in new or revised national investment regulations. Nearly all developing countries, including centrally planned economies such as the People's Republic of China and Viet Nam, have enacted national legislation in order to promote the flow of foreign investment to their economies, while attempting to tailor it as much as possible to local circumstances and to ensure a maximum contribution to their national development. At the *bilateral* level it is reflected in the increasing number of bilateral investment treaties, now involving more than 100 developing countries which also

[43] See for a wealth of information and analysis, UNCTAD's *World Investment Report 1994* (New York and Geneva: United Nations, 1994), particularly at pp. 9–18. See also the annual reports of the Development Assistance Committee of the OECD.

[44] Pfefferman and Madarassy (1992: 1–2).

[45] See chapter 6, pp. 195–6 above.

frequently conclude bilateral investment treaties with each other, and in the development of Draft Model Bilateral Agreements for Promotion, Encouragement and Protection of Investments by the Asian–African Legal Consultative Committee (1981). This trend was reinforced by the establishment and activities of transnational corporations with parent companies in developing countries. At the *regional and interregional* level reference can be made to investment treaties such as: the Inter-Arab Investment Protection Treaty (1980); the OIC Investment Agreement (1981); the ASEAN Investment Treaty (1987); and the investment promotion provisions in the Lomé Conventions between the European Community and the ACP countries. Finally, at the global level this trend is apparent in the expanding work of the IFC, a substantial increase in the number of contracting parties to the ICSID Convention and in the membership of MIGA, and in the conclusion of the 1994 Uruguay Round Agreement on Trade-Related Aspects of Investment Measures. Nearly all developing countries, in one way or another, take part in multilateral efforts to promote and regulate foreign investment. Furthermore, by using international dispute-settlement procedures, satisfactory decisions have been reached in a number of contentious cases, balancing the interests of commercial companies and those of host States, sometimes using institutionalized procedures such as those of the ICJ, ICSID, the Iran–US Claims Tribunal, and sometimes using *ad hoc* procedures such as in the *Libyan Oil Nationalization cases* (1973–7) and the *Kuwait* v. *Aminoil case* (1982).

These developments illustrate that the days of easy simplifications are over and that simply equating developing countries with capital-importing and industrialized countries with capital-exporting countries is outdated. Sometimes it is even unclear which State is the relevant home or host State.[46] Apart from the fact that host States bear certain responsibilities *vis-à-vis* home States, and vice versa, a State or a transnational corporation may nowadays also be called to account in an international organization such as the UN, the ILO,[47] the OECD,[48] the EU,[49] ASEAN or NAFTA, or in a

[46] In the *Barcelona Traction Case* (1970) the ICJ indicated that, in the case of a Spanish subsidiary of a Canadian holding which itself was owned by Belgian interests, Canada was to be regarded as the home State to provide diplomatic protection, but that Belgium might have been regarded as the home State in certain circumstances.

[47] See the 1977 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Text in 17 ILM (1978), p. 422 and Kunig *et al.* (1989: 578).

[48] The OECD Committee on International Investment and Multinational Enterprises (CIME), which administers the OECD Guidelines, set up an active complaints procedure in the late 1970s. CIME has also developed procedures to deal with conflicting requirements made by its member States against multinational enterprises.

non-governmental organization, such as a trade union or business organization or associations thereof (for example, the Trade Union Advisory Committee and the Business and Industry Advisory Committee to OECD).

It could also be argued that the traditional doctrines relating to a national standard and to an international minimum standard are losing relevance as a result of modern trends in international economic law including those relating to international dispute settlement and according a functional status to TNCs in international law.[50]

Most of the instruments referred to above cover only a few aspects of investment regulation and are addressed either to the host country or to the investor. The bilateral investment treaties and multilateral investment treaties are concluded between States, but the subject-matter is also very much a matter of concern to foreign investors. The OECD Guidelines for Multinational Enterprises are addressed, as the title indicates, to multinational enterprises, known as TNCs in the UN context. In contrast, the 1992 World Bank Guidelines for the Treatment of Foreign Investment only contain rules for host States. The IFC, ICSID and MIGA play an important role in promoting and safeguarding international investment, but they are limited to their specific fields of competence.

In view of these limitations of the available instruments and the current conducive international political climate, it would be relevant to include the main rules of modern international investment law in a global multilateral investment convention.[51] The set-up could be modelled along the lines of the nearly forgotten ICC Guidelines for International Investments (1972), which in a balanced manner set out rights, duties and responsibilities of the three parties concerned: investor, host government and home government.[52] The permanent-sovereignty-related UN resolutions and the Draft UN Code of Conduct on TNCs, the Draft OECD Convention on the Protection of Foreign Property (1967), the bilateral investment treaties and the multilateral investment treaties, the arbitral awards, the lump-sum agreements and the World Bank Guidelines – all provide useful reference material upon which such a global multilateral convention might ultimately be based. Currently, there are two separate and perhaps competing developments towards such a multilateral invest-

[49] An example in the past was the EEC code of conduct for companies with interests in South Africa.

[50] See Kokkini-Iatridou and de Waart (1986: 323–5), and chapter 6, pp. 194–6 above.

[51] See also Sornarajah (1994: 21 and 187) and Art. 10.4 of the Energy Charter Treaty which provides that a supplementary treaty on treatment of investments be drafted during the period 1995–8.

[52] ICC, Paris, Publication no. 272 (1973). Text also in Kunig *et al.* (1989: 589).

ment agreement: one through the OECD, the other through the World Trade Organization (WTO). The OECD project seems well on its way: in May 1996, the OECD Council of Ministers adopted a timetable based on completion of negotiations by the middle of 1997 when the treaty is to be opened for signature by both its twenty-five member States and developing and formerly communist States. The treaty would contain 'high-standard, state-of-the-art provisions for liberalization, investment protection and dispute settlement and provid[e] for a satisfactory balance of commitments'. The hard core of its provisions will most likely follow the example of the bilateral investment treaties: post-investment protection of investors' interests and compulsory international arbitration. The USA and some other OECD countries reportedly want it to include, in addition, the protection of pre-investment interests of foreign investors, such as a right of entry and establishment on the basis of national treatment. There can be little doubt that such an OECD treaty would not include specific obligations on the home States and on the investors, including with regard to environmental and labour issues. Although non-OECD member States would be encouraged to join the treaty and some might do so, this would essentially remain a treaty among developed States. The second route, through the WTO, would have a better chance of attracting global participation and of including some of the items and concerns missing in the OECD project. However, it is far from sure whether the WTO can agree to take up and complete such a project. Whatever may happen, permanent sovereignty, international economic co-operation and international arbitration arrangements should be the cornerstones of such a new multilateral investment convention. Permanent sovereignty will enable the host State to allow only those foreign investments which it really wants and on such terms as it deems in its national interest. International economic co-operation, including ACP–EU co-operation and membership of multilateral institutions such as ICSID and MIGA, will promote the flow of investments to developing countries. International arbitration will protect the legitimate interests of both the host State and foreign investor more effectively than national courts can, if only because the award of the arbitral tribunal has a better chance of international recognition. The adoption of such a multilateral convention would help to generate trust and reduce suspicion and risk between industrialized and developing countries, as well as between host States and foreign investors.[53]

[53] See also Peters (1988: 131).

Resource conflicts and sovereignty as an instrument of protection

The increasing use of the world's natural wealth and resources can easily lead to conflicts over access to wealth and resources. Resource and investment disputes usually involve major issues of policy and are often connected with wider aspects of relations among the parties concerned. Occasionally, such conflicts have led to the overthrow of governments such as that of Mossadeq in Iran in 1952 and Allende in Chile in 1973. In some other situations they were a *casus belli*, for example in the Suez crisis in 1956 and the Kuwait crisis in 1990–1.[54]

Two types of potential disputes are of particular concern: those between States and those between a host State and a foreign investor. Disputes between States can in principle be settled through any of the conventional methods listed in Article 33 of the UN Charter. The right of States to free choice of the means for international dispute settlement is widely recognized.[55] As confirmed in the dispute-settlement clauses of many permanent-sovereignty-related treaties, negotiation is still the basic means of settling an inter-State dispute peacefully. If negotiations fail, there is the option of resorting to third-party assistance, sometimes institutionalized through a conciliation commission procedure or an international arbitration procedure. In particular, the 1982 Law of the Sea Convention offers a full range of dispute-settlement arrangements with many novelties.[56] In some international environmental law treaties a trend can be discerned of increased readiness in the last instance to submit a dispute to the International Court of Justice.

Agreeing on arrangements for the settlement of disputes between a host State and a foreign investor has always been more problematic. Latin American States took a particularly strong stand by stipulating – in their laws and constitutions and, through 'Calvo clauses', in contracts – that foreigners, like nationals, should be subject to the law of the host State and should submit disputes to the local judiciary only. Western countries emphasized the right of the home State to grant diplomatic protection and the right to international adjudication in cases where local courts were allegedly not in a position to dispense justice.

This study concluded that, on the basis of the principle of permanent

[54] In July 1990, Iraq accused Kuwait of 'stealing oil' from the Iraqi part of the transboundary Rumailah oilfield and committing 'economic aggression' against Iraq. At stake also were access to the sea and sovereignty over the islands of Warbah and Bubiyan. [55] See de Waart (1973: 4–5) and Merrills (1991: 2).

[56] See chapter 7, pp. 224–7 above.

sovereignty, States have the right to try and settle resource and investment disputes first through local remedies, thus providing national authorities a chance to redress a wrong.[57] Although the contrary has been claimed in various UN resolutions, there is far from general recognition that States have the right to settle such disputes solely on the basis of national law. Yet, unless otherwise agreed, the primacy of national law is recognized in the case of a dispute between the host State and a foreign investor. If the dispute cannot be solved on the basis of national law, international law will frequently be invoked as well. While often reaffirming the local-remedies rule, many permanent-sovereignty-related and investment-related legal instruments provide in one way or another for international dispute-settlement procedures which have been freely agreed to by the parties to the dispute; it is interesting to note that doctrinal views increasingly make way for practical considerations.[58] This often involves internationalized dispute-settlement procedures through international conciliation and arbitration, sometimes on an *ad hoc* basis and sometimes institutionalized through ICSID or another channel. This is a laudable development. Conciliation and to a certain extent arbitration address first and foremost the issue of what should be done rather than what has happened. If this trend is consolidated, both the right to grant diplomatic protection (so often abused by Western States for other purposes not directly related to the dispute) and the Calvo doctrine (the logical response to it) can be given their *requiem*.

The developing countries originally saw permanent sovereignty as a vehicle to gain control over their natural resources which in the past had often been exploited by Western States and companies. Thus, the principle of permanent sovereignty played a pivotal role in their efforts to seek protection and genuine sovereign equality among States. As Röling pointed out, as early as 1960, the 'idolization of sovereignty' was an expression of 'the new state's weakness, of its need for protection against external influences'.[59] In this process it was unavoidable that rights of full disposal were granted to peoples and States on the basis of territorial sovereignty rather than a principle of sharing the world's resources. However, this has consolidated very unequal situations, since natural wealth and resources are not evenly distributed over our planet. Some countries are rich in resources and/or endowed with fertile soil and rich lakes and seas, while others suffer from aridity and/or find themselves in a geographically disadvantaged situation. So far, it has proven to be impossible to share the benefits of natural-resources exploitation on an international basis, for

[57] See chapter 9, pp. 301–5. [58] See Wälde (1977) and Peters (1991: 150–3).
[59] Röling (1960: 78).

example in the context of a regional organization. Various authors have speculated whether in the long run it may become possible to re-interpret 'territorial' and 'permanent' sovereignty over natural resources as different kinds of 'functional sovereignty', in other words, jurisdiction over specific uses of a resource rather than absolute and unlimited jurisdiction within a given geographical space, so as to create a 'decentralized planetary sovereignty' within a network of strong international institutions.[60] Furthermore, Röling predicted that the strong emphasis on national sovereignty would be superseded by a law of co-operation and interdependence.[61] In modern international law States are under a duty to co-operate with each other, to promote international development, particularly of developing countries, and to protect the common environment. However, within the field of specific permanent-sovereignty-related international law no rules can (yet) be identified which carry this general duty to a 'harder' level of fully fledged obligation for resource-rich States.

Permanent sovereignty in an interdependent world

Towards peoples', indigenous and 'planetary' sovereignty in a world of States

The reason for adopting the first permanent-sovereignty-related General Assembly Resolutions 523 (VI) and 626 (VII) was to enhance opportunities for economic development of 'under-developed countries'. Subsequently, the self-determination and human rights codification movement of the 1950s became identified with permanent sovereignty over natural resources. This led to the formulation of the right of 'peoples and nations' to permanent sovereignty.[62] As a result of the decolonization process during the 1960s the emphasis on the right to permanent sovereignty of 'peoples' and its connection with 'self-determination' diminished and gradually shifted to 'States' and, subsequently, to 'developing countries'. In the 1962 Declaration, the term 'peoples' is used eight times, while the term 'States' features as many as twenty times. But there is no reference to 'peoples' in follow-up Resolution 2158 (1966), where the emphasis is on 'developing countries' a term which is used twelve times. The marine-resource-related Resolution 3016 (1972) and the nationalization Resolution 3171 (1973) provide further testimony of this trend.

[60] See Tinbergen (1976: 83–4). See also Krieger (1993), who introduces the term 'universal sovereignty'. [61] Röling (1960: 78) and (1982: 204–9).

[62] Examples include GA Res. 837 (IX) of 14 December 1954, 1314 (XIII) of 12 December 1958 and 1803 (XVII) of 14 December 1962.

During the NIEO period the trend developed further to 'every State' or 'all States'.[63] There is no rational argument as to why, under international law, developing countries would have a right to permanent sovereignty but industrialized countries would not. However, in order to emphasize claims to independence or a restoration of sovereignty, the General Assembly gave specific attention to the rights of peoples in territories under foreign occupation, alien and colonial domination, or *apartheid*, and of particular States, such as Panama and Arab territories under Israeli occupation.

In treaty law a similar trend can be discerned. The 1966 Human Rights Covenants vest the right to permanent sovereignty in 'all peoples'. The African Human Rights Charter is rather ambiguous on this point. While paragraph 1 of Article 21 refers to 'all peoples', paragraph 4 provides that: '*States parties* to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.'[64] Similarly, the 1978 Convention on State Succession in respect of Treaties awards this right to both 'every people' and 'every State'.[65] Conversely, the law of the sea conventions and international environmental treaties, such as the 1992 Biodiversity and the Climate Change Conventions, and the 1994 Energy Charter Treaty consistently vest the right to permanent sovereignty in States only.

In various permanent-sovereignty-related UN resolutions and multilateral treaties the term 'mankind' (or 'humankind' as it is now termed) occurs. As a principle of international law, the common heritage of mankind gained currency remarkably quickly with respect to areas and resources beyond the limits of national jurisdiction, sometimes referred to as 'the global commons'. However, some of its implications have proved to be major bones of contention, especially between technologically highly developed industrialized countries and developing countries.[66] It has been argued that the atmosphere – indivisibly surrounding the entire planet – should be regarded as a common heritage.[67] Verwey advocates identifying the environment as such as a new common heritage of humankind.[68] In

[63] See GA Res. 3201 and 3202 (S-VI) of 1 May 1974 as well as GA Res. 3281 (XXVIII) of 12 December 1974.

[64] African Charter on Human and Peoples' Rights, 1981; text in 21 ILM (1982), p. 58, emphasis added.

[65] The 1983 Convention on State Succession in respect of State Property, Debt and Archives only refers to the permanent sovereignty of 'every people' (Arts. 15.4 and 38.2). See for the text of these treaties, The Work of the International Law Commission (New York: United Nations, 4th edn, 1988), pp. 323 and 343, and 17 ILM (1978), p. 1,488 and 22 ILM (1983), p. 306.

[66] See Li (1994: 44–60).

[67] Westing (1990).

[68] Verwey (1995: 37).

addition, during the preparations for the 1992 UN Conference on Environment and Development proposals were made to characterize biodiversity and genetic resources,[69] and the world's ecological zones and forests as the common heritage of humankind.[70] Developing countries strongly resisted any implication that third parties would enjoy proprietary rights over resources under their jurisdiction without their consent since this would severely infringe upon their permanent sovereignty. The outcome of this process was that the concept of 'common concern' rather than 'common heritage' was accepted. Thus, the Climate Change Convention recognizes that 'change in the Earth's climate and its adverse effects are a common concern of humankind';[71] and the Biodiversity Convention recognizes that 'the conservation of biological diversity is a common concern of humankind'. In contrast, the concept of 'common concern' does not feature in the Forestry Statement. While reaffirming the applicability of the principle of permanent sovereignty over all types of forests, it provides that their 'sound management and conservation [are] of concern to the Governments of the countries to which they belong and are of value to local communities and to the environment as a whole'. This comes close to what is stated in various documents of the parties to the Amazonian Treaty (1978)[72] which, for example, provides that 'the exclusive use and utilization of natural resources within their respective territories is inherent in the sovereignty of each State'.[73] In the Amazon Declaration (1989), the Amazonian Council links the exercise of permanent sovereignty more closely with the duty of promoting development of its peoples, of respecting the rights and interests of indigenous peoples and of conserving the environment.[74] The Council welcomes international support for the conservation of the heritage of these territories, on condition that this does not amount to an infringement of sovereignty. The ASEAN Agreement on the Conservation of Nature and Natural Resources also makes reference to the importance of natural resources for present and future generations, but not to the rights and

[69] See also FAO Conference Res. 8/83, embodying the International Undertaking on Plant Genetic Resources. Article 1 provides that 'plant genetic resources are a heritage of mankind and consequently should be available without restriction'. Text in Hohmann (1992a: 114). [70] See Diaz (1994: 167).

[71] In GA Res. 43/53 of 27 January 1989, the Assembly stated that 'climate change is a common concern of mankind, since climate is an essential condition which sustains life on earth'.

[72] In 1978, Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Surinam and Venezuela concluded the Treaty for Amazonian Co-operation. Text in 17 ILM (1978), p. 1,045.

[73] Article IV of the Treaty for Amazonian Co-operation.

[74] The text of the Amazon Declaration of 6 May 1989 is published in 28 ILM (1989), pp. 1,303–5 and in Hohmann (1992a: 1,578).

interests of indigenous peoples. The 1994 Convention on Desertification acknowledges that desertification and drought are problems of global dimension and stipulates that human beings in affected areas should be at the centre of concerns to combat desertification and to mitigate the effects of drought.

In summary, a clear tendency can be discerned to confine the circle of direct permanent sovereignty subjects solely to States, that is all States. There is no longer a special position for developing countries. Simultaneously, the interests of peoples, indigenous peoples and humankind are receiving increasing attention in international instruments in the sense that States are under an obligation to exercise permanent sovereignty on behalf and in the interests of their (indigenous) peoples. This implies that States are increasingly accountable, also at an international level, for the way they manage their natural wealth and resources, but also that for the time being (indigenous) peoples, humankind and the environment as such are objects rather than subjects of international law. Apart from UN reporting procedures and a few complaints procedures in the context of the UN Human Rights Covenants and the ILO, *peoples* have no standing at the international level,[75] let alone trees or future generations.[76] Yet, as in other areas of international law, such as peace and security and human rights, a trend can be discerned toward monitoring and reporting, multilateral consultation and co-operation, and sometimes even verification and on-site inspection. The institution of sanctions in case of non-compliance is rare. In the field of international environmental law, exceptions include the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the 1987 Montreal Protocol to the Ozone Layer Convention.[77]

Balancing rights and duties

Throughout its evolution, the principle of permanent sovereignty has been extensively recognized as giving rise to a series of resource-related and foreign-investment-related rights or as re-emphasizing rights emanating from other principles such as territorial sovereignty and economic jurisdiction. If we confine ourselves to the rights of States, it has been widely

[75] Crawford (1988b: 55–67).

[76] See the thought-provoking article by Stone (1972). See also Weiss, E. B. (1989) and (1990: 203–7).

[77] The trade measures of the Montreal Protocol not only affect States but also non-State parties and include bans on the import and export of hazardous substances and export prohibition for relevant technologies.

acknowledged that each State has, within the framework of other principles and rules of international law, the right:

1 to possess, use and freely dispose of its natural resources, though with the qualification under modern international law that this applies as long as a State is possessed of a government representing the whole people belonging to the territory as the 1970 Declaration on Principles of International Law puts it;
2 to determine freely and control the prospecting, exploration, development, exploitation, use and marketing of natural resources;
3 to manage and conserve natural resources pursuant to national developmental and environmental policies;
4 to regulate foreign investment, including a general right to admit or to refuse the admission of foreign investment and to exercise authority over the activities of foreign investors, including the outflow of capital; and
5 to nationalize or expropriate property, of both nationals and foreigners, subject to international law requirements.

Some developing countries have made the controversial claim that the principle of permanent sovereignty also includes the right:

1 to share in the administration and management of local subsidiaries of foreign companies;
2 to withdraw from unequal investment treaties and to renounce contractual relations when the other party is alleged to enrich itself unjustly thereby;
3 to revise unilaterally the terms of an agreed arrangement in the exercise of its legislative competence;
4 to determine unilaterally the amount, timing and mode of payment of compensation for expropriation; and
5 to settle investment disputes solely upon the basis of national law and by national remedies.

In addition to rights, an increasing numbers of duties arise from the principle of permanent sovereignty. These include:

1 The duty to exercise permanent-sovereignty-related rights in the interest of national development and to ensure that the whole population benefits from the exploitation of resources and the resulting national development. This includes the duty to respect the rights and interests of indigenous peoples and not to compromise the rights of future generations.
2 The duty to have due care for the environment. This means first of all the duty to exercise permanent sovereignty in such a way as to prevent significant harm to the environment of other (neighbouring)

States or of areas beyond national jurisdiction. Recently, it has become possible to discern a tendency, both in UN resolutions and treaty law, for duties to be imposed on States with respect to the management of their natural wealth and resources so as to ensure sustainable production and consumption, both in the interest of their own peoples, other States and humankind in general, including future generations. As discussed in chapters 4, 8 and 10, this implies: a rational, prudent use of natural resources to maintain and improve the habitat of wildlife, migratory birds, endangered flora and fauna and areas of outstanding natural beauty; to protect biodiversity; and to diminish the effects of over-exploitation of soil, deforestation, over-fishing and pollution. These duties respond to environmental problems of common concern, to present and future generations. Gradually, it has become recognized that, under international law, natural-resources management should no longer exclusively be within the domestic jurisdiction of individual States.

3 Duties to recognize the correlative rights of other States to transboundary resources and at least to consult with them as regards concurrent uses with a view to arriving at equitable apportionment and use of these resources.
4 Duties to observe international agreements, to respect the rights of other States and to fulfil in good faith international obligations in the exercise of permanent sovereignty. This duty is epitomized in the regulation of 'taking' foreign investments. For example, in general terms a nationalizing State has wide margins of discretion but it must also be able to prove, at the international level, that its 'public interest' is served by the act of nationalization; thus takeovers which are not in the public interest (but, for example, for the private gain of a ruling elite) are not permitted. Similarly, arbitrary discrimination between foreigners and nationals or among foreigners is prohibited. There can be no doubt that States are under an obligation to pay compensation for expropriation or nationalization. Difference of opinion continues to exist with respect to the standard and mode of payment, but over the years the rules arising from the triple standard ('prompt, adequate and effective compensation') have been relaxed or their interpretation has become subject to a substantial degree of flexibility. Lastly there should be a 'due process' and a possibility to institute an appeal against 'a decision in the first instance'.

Permanent sovereignty as a corner-stone of international sustainable development law

The rapid development of international environmental law has had a profound impact on the interpretation of the principle of permanent

sovereignty over natural resources in modern international law. While main elements of the principle have been reaffirmed and consolidated in various international environmental instruments, the corollary duties with respect to nature conservation and environmental protection are receiving increasing emphasis. Hence, permanent sovereignty serves no longer merely as the source of every State's freedom to manage its natural resources, but also as the source of corresponding responsibilities requiring careful management and imposing accountability at national and international levels. This view is most empathetically reflected in such non-binding UN documents as the Stockholm Declaration and the World Charter of Nature (and, though to a far lesser extent, in the Rio Declaration). It also follows from customary international law principles such as *sic utere tuo ut alienum non laedas* (use your own property so as not to injure the property of another) and State responsibility and from binding legal instruments. In the last category the 1968 African Convention on the Conservation of Nature and Natural Resources and the 1985 ASEAN Conservation Agreement stand out as efforts to achieve an integrated management of nature and natural resources, though in practice the States concerned are encountering many problems in implementing these treaties.[78] The two global conventions opened for signature in Rio de Janeiro in 1992, namely the Climate Change and Biodiversity Conventions, may in future also have an important bearing on natural-resources management and thus on the principle of permanent sovereignty. For example, the Biodiversity Convention reaffirms that biological resources within a State are subject to its permanent sovereignty, but also provides at various places that conservation of biodiversity is 'a common concern of humankind'. The Convention states as its objectives: 'the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding'. Thus the Convention skilfully balances rights and duties of resource-endowed countries and the interests of these countries and those of third States. This Article 2 admirably succeeds in capturing the essence of the term 'sustainable development'.[79] Tropical deforestation is an issue which

[78] See Lyster (1985: 126–8 and 301–3).

[79] See the definition of 'sustainable use' in Art. 2 of the Biodiversity Convention: 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations'.

is closely related to both climate change and loss of biodiversity. It epitomizes the global significance of national management of natural wealth and resources.

The Rio Declaration[80] and 'Agenda 21' call for the further development of international law on sustainable development.[81] This requires a normative framework for international economic relations which would be conducive to sustainable development. The new international law of sustainable development would thus comprise not only the rules of law which were hitherto understood to constitute 'international environmental law',[82] but also elements of what hitherto has been described as 'international development law'. As Chapter 39 of 'Agenda 21' puts it, the further development of international law on sustainable development will have to pay special attention to 'the delicate balance between environment and development concerns', and calls for effective participation by all countries concerned in reviewing the past performance and effectiveness of existing international instruments and institutions as well as priorities for future law-making on sustainable development.[83] The latter is to include further study in the area of avoidance and settlement of disputes.

Permanent sovereignty over natural resources is a key principle of both international economic law and international environmental law. As such it can play an important role in the blending of these two fields of law with the aim of promoting sustainable development. As regards natural-resources management, there is a need for an integrated and comprehensive approach with respect to: international assistance for the exploration and sustainable exploitation of natural resources; poverty alleviation; terms of trade of resource-endowed countries which are heavily dependent for their income on export of natural resources; and access to, and transfer of, environmentally sound technology to assist countries in coping with adverse environmental consequences. In view of its strong developmental and increasingly environmental orientation, the principle of permanent sovereignty can serve as an important cornerstone of this proposed international sustainable-development law.

This new role of permanent sovereignty coincides with the current re-interpretation of some of the traditional connotations of State sovereignty which can no longer be equated to unfettered freedom of action and

[80] Principle 27 of the Rio Declaration on Environment and Development.

[81] Hossain (1992: 260–1) and (1995: 20).

[82] The present author would prefer the term 'international law of development' or 'international law relating to development'. See Schrijver (1990: 100–1). See also Fox (1992) and Bulajić (1992: 100–1).

[83] See also Sand (1993).

is bound to become interpreted in a functional sense.[84] Various strands of international law, especially in the fields of human rights, development and environmental protection, increasingly impinge on the traditional bulwarks of sovereignty. Consequently, international law and organization are progressively developing in a direction in which the range of 'matters which are essentially within the domestic jurisdiction of any State' (Article 2.7 of the UN Charter) is becoming increasingly qualified. At the same time, it is obvious that neither sovereignty in general nor permanent sovereignty over natural resources in particular will totally wither away. Ever since the Peace of Westphalia, sovereignty has served as the backbone of public international law and sovereign States continue to be the principal actors in international relations, albeit by no means the only actors. There is no reason to believe that this will be essentially different in the next decades.[85] It is not the existence of sovereignty and permanent sovereignty as principles of international law which is at stake, but rather what these principles represent in a changing world. Changes in the interpretation of the principle of permanent sovereignty will go hand in hand with the continuing evolution of international law. Currently, this is still a mainly State-oriented law under which national resource regimes co-exist but barely interact. However, a trend can be discerned towards a law which is humankind-oriented, under which both States and (groups of) individuals can be held responsible for environmental degradation and under which sustainable development and environmental preservation are approached from a global perspective. Furthermore, there is also a trend towards co-operation for the implementation of everybody's right to development, the proper management of natural wealth and resources, equitable sharing of transboundary natural resources and the global commons, and preservation for future generations. Within this emerging legal framework, sovereignty over natural resources as an important cornerstone of rights and duties can very well continue to serve as a basic principle.

[84] Louis Henkin advocates a new vocabulary: 'it is time to bring sovereignty down to earth, cut it down to size, discard its overblown rhetoric; to examine, analyse, reconceive the concept and break out its normative content; to repackage it, even rename it, and slowly ease the term out of polite language in international relations, particularly in law': Henkin (1994: 352). Yet, it will not be easy and may for quite some time to come not be very useful to ban sovereignty from the jargon of international law and international relations.

[85] See Camilleri and Falk (1992).

Appendices

Appendix I
United Nations resolutions and other decisions

I.A General Assembly resolutions on permanent sovereignty over natural resources

GA Resolution	Date of adoption	Voting record	Title
523 (VI)	12 January 1952	Adopted unanimously	Integrated Economic Development and Commercial Agreements
626 (VII)	21 December 1952	36 (60%)-4-20	Right to Exploit Freely Natural Wealth and Resources
837 (IX)	14 December 1954	41 (75%)-11-3	Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-Determination
1314 (XIII)	12 December 1958	52 (69%)-15-8	Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-Determination
1720 (XVI)	19 December 1961	85 (94%)-0-5	Permanent Sovereignty over Natural Resources
1803 (XVII)	14 December 1962	87 (86%)-2-12	Permanent Sovereignty over Natural Resources
2158 (XXI)	25 November 1966	104 (95%)-0-6	Permanent Sovereignty over Natural Resources
2386 (XXIII)	19 November 1968	94 (91%)-0-9	Permanent Sovereignty over Natural Resources
2692 (XXV)	11 December 1970	100 (92%)-6-3	Permanent Sovereignty over Natural Resources of Developing Countries and Expansion of Domestic Sources of Accumulation for Economic Development
3016 (XXVII)	18 December 1972	102 (82%)-0-22	Permanent Sovereignty over Natural Resources of Developing Countries
3171 (XXVIII)	17 December 1973	108 (86%)-1-16	Permanent Sovereignty over Natural Resources
3201 (S-VI)	1 May 1974	Adopted without vote	Declaration on the Establishment of a New International Economic Order
3202 (S-VI)	1 May 1974	Adopted without vote	Programme of Action on the Establishment of a New International Economic Order
3281 (XXIX)	12 December 1974	120 (88%)-6-10	Charter of Economic Rights and Duties of States
32/176	19 December 1977	130 (94%)-0-8	Multilateral Development Assistance for the Exploration of Natural Resources
33/194	29 January 1979	Adopted without vote	Multilateral Development Assistance for the Exploration of Natural Resources

I.B General Assembly resolutions relevant to the question of sovereignty over natural resources

GA Resolution	Date of adoption	Voting record	Title
1514 (XV)	14 December 1960	89 (91%)- 0- 9	Declaration on the Granting of Independence to Colonial Countries and Peoples
1515 (XV)	15 December 1960	Adopted unanimously	Concerted Action for Economic Development of Economically Less Developed Countries
1813 (XVII)	18 December 1962	Adopted unanimously	Economic Development and the Conservation of Nature
2626 (XXV)	24 October 1970	Adopted without vote	International Development Strategy for the Second United Nations Development Decade
2849 (XXVI)	20 December 1971	85 (70%)- 2- 34	Environment and Development
2995 (XXVII)	15 December 1972	115 (92%)- 0- 10	Co-operation between States in the Field of Environment
3129 (XXVIII)	13 December 1973	77 (62%)- 5- 43	Co-operation in the Field of Environment Concerning Natural Resources Shared by Two or More States
3362 (S-VII)	16 September 1975	Adopted unanimously	Development and International Economic Co-operation
3517 (XXX)	15 December 1975	123 (94%)- 0- 8	Midterm Review and Appraisal of Progress in the Implementation of the International Development Strategy for the Second United Nations Development Decade
34/99	11 December 1979	Adopted without vote	Development and Strengthening of Good Neighbourliness Between States
34/186	18 December 1979	Adopted without vote	Co-operation in the Field of Environment Concerning Natural Resources Shared by Two or More States
35/7	30 October 1980	Adopted without vote	Question of the Draft World Charter of Nature
35/56	5 December 1980	Adopted without vote	International Development Strategy for the Third United Nations Development Decade
37/7	28 October 1982	111 (85%)- 1- 18	World Charter of Nature
37/217	20 December 1982	Adopted without vote	International Co-operation in the Field of Environment
41/65	3 December 1986	Adopted without vote	Principles Relating to Remote Sensing of the Earth from Space
41/128	4 December 1986	146 (94%)- 1- 8	Declaration on the Right to Development
S-18/3	1 May 1990	Adopted without vote	Declaration on International Economic Co-operation, in particular the Revitalization of Economic Growth and Development of the Developing Countries
45/199	21 December 1990	Adopted without vote	International Development Strategy for the Fourth United Nations Development Decade

I.C Relevant resolutions of other United Nations organs

Resolution	Date of adoption	Voting record	Title
Security Council			
S/Res/330 (1973)	21 March 1973	12 (80%)-0-3	Strengthening of International Peace and Security in Latin America
ECOSOC			
ECOSOC Res. 1737 (LIV)	4 May 1973	20 (77%)-2-4	Permanent Sovereignty over Natural Resources of Developing Countries
ECOSOC Res. 1762 (LIV)	18 May 1973	17 (65%)-0-9	Question of the Establishment of a United Nations Revolving Fund for Natural Resources Exploration
ECOSOC Res. 1956 (LIX)	25 July 1975	26 (72%)-5-5	Permanent Sovereignty over Natural Resources
ECOSOC Res. 2120 (LXIII)	4 August 1977	38 (76%)-1-11	Permanent Sovereignty over Natural Resources
ECOSOC Res. 1985/52	25 July 1985	Adopted without vote	Permanent Sovereignty over Natural Resources
ECOSOC Res. 1987/12	26 May 1987	Adopted without vote	Permanent Sovereignty over Natural Resources
ECOSOC Res. 1989/10	22 May 1989	Adopted without vote	Permanent Sovereignty over Natural Resources
ECOSOC Res. 1991/88	26 July 1991	Adopted without vote	Permanent Sovereignty over Natural Resources
UNCTAD			
UNCTAD I	16 June 1964	94 (81%)-4-18	General Principle Three of the Final Document of UNCTAD I
UNCTAD III Res. 46 (III)	18 May 1972	72 (70%)-15-18	Principles Governing International Trade (Principles II and XI)
TDB Res. 88 (XII)	19 October 1972	39 (61%)-2-23	Permanent Sovereignty over Natural Resources
UNCTAD IV Res. 93 (IV)	30 May 1976	Adopted without vote	Integrated Programme for Commodities
UNIDO			
UNIDO II	27 March 1975	82 (92%)-1-7	Lima Declaration and Plan of Action on Industrial Development and Co-operation
Paragraph 32		76 (78%)-10-11	Paragraph on permanent sovereignty over natural resources

Appendix II

Table of multilateral treaties

This list includes treaties which are relevant to this study. Under the various headings the treaties are listed in a chronological order

I. CONSTITUTIONS OF WORLDWIDE INSTITUTIONS

Articles of Agreement of the International Monetary Fund (IMF), Bretton Woods, 22 July 1944, in force 27 December 1945, 2 UNTS, p. 39 and 726 UNTS, p. 266

Articles of Agreement of the International Bank for Reconstruction and Development (IBRD), Bretton Woods, 22 July 1944, in force 27 December 1945, 2 UNTS, pp. 39 and 134; and 606 UNTS, p. 295

Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945, 1 UNTS, p. xvi and UKTS 67 (1946), Cmd 7015

Constitution of the Food and Agriculture Organization of the United Nations (FAO), City of Quebec, adoption and entry into force 16 October 1945, 1 UNTS, p. 207.

Havana Charter for an International Trade Organization, 24 March 1948, not in force, text in UN Doc. E/CONF.2/78 and Wilcox (1949: 227)

Articles of Agreement of the International Finance Corporation (IFC), 25 May 1955, in force 20 July 1956, 264 UNTS, p. 117 and UKTS 37 (1961), Cmnd 1377

II. CONSTITUTIONS OF REGIONAL ECONOMIC INSTITUTIONS AND OTHER FORMS OF REGIONAL AND INTERREGIONAL CO-OPERATION

Treaty Establishing the European Coal and Steel Community (ECSC), Paris, 18 April 1951, in force 25 July 1952, 261 UNTS, p. 140 and UKTS 16 (1979), Cmnd 7461

Treaty Establishing the European Economic Community (EEC), Rome, 25 March 1957, in force 1 January 1958, 298 UNTS, p. 11 and UKTS 15 (1979), Cmnd 7480; amended by the European Single Act of 28 February 1986 and the Treaty on European Union of 7 February 1992

Statute of the Organization of Petroleum-Exporting Countries (OPEC), Baghdad, 14 September 1960, in application 1 May 1965, 443 UNTS, p. 427 and 4 ILM (1965), p. 1,175

Convention on the Organisation for Economic Co-operation and Development, Paris, 14 December 1960, in force 30 September 1961, 888 UNTS, p. 179 and UKTS 20 (1962), Cmnd 1646

Articles of Association for the Establishment of an Economic Community of West Africa, Accra, 4 May 1967, in force 4 May 1967, 595 UNTS, p. 287

Charter of the Islamic Conference, Jeddah, 4 March 1970, in force 28 February 1973, 914 UNTS, p. 111

Agreement on an International Energy Program, Paris, 18 November 1974, in force 19 January 1976, 1040 UNTS, p. 272 and *Decision Establishing an International Energy Agency of the OECD*, Paris, 15 November 1974, 14 ILM (1975), p. 1

Agreement on the Establishment of the Association of South-East Asian Nations (ASEAN) Secretariat, Bali, 24 February 1976, 1331 UNTS, p. 243 (see also 1471 UNTS, p. 71)

Treaty for the Establishment of the Economic Community of Central African States (Chapter XI and Annex XIV), Libreville, 19 October 1983, in force 1 January 1985, 23 ILM (1984), p. 945

Fourth ACP-EEC Convention (Lomé IV), Lomé, 15 December 1989, in force 1 September 1991, 29 ILM (1990), p. 809 and *The Courier*, no. 120, (March/April 1990), p. 1 and UKTS 47 (1992), Cmnd 1999. Revised version signed in Mauritius, 4 November 1995, *The Courier*, no. 155, (January/February 1996), p. 1

Agreement and Protocol Establishing the Commonwealth of Independent States, Minsk and Alma Ata, 8–21 December 1991, in force for each of the High Contracting Parties from the moment of its ratification, 31 ILM (1992), p. 143

Treaty on European Union, Maastricht, 7 February 1992, in force 1 November 1993, 31 ILM (1992), p. 247

Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA), Kampala, 5 November 1993, not yet in force, 33 ILM (1994), p. 1,067

III. REGULATION OF INTERNATIONAL TRADE IN GOODS AND SERVICES

General Agreement on Tariffs and Trade (GATT), Geneva, 30 October 1947, provisionally in force since 1 January 1948 under the 1947 Protocol of Provisional Application, 55 UNTS, p. 194; the 1947 Protocol, 55 UNTS, p. 308

Convention on a Code of Conduct for Liner Conferences, Geneva, 6 April 1974, in force 6 October 1983, 1334 UNTS, p. 15, 1365 UNTS, p. 360 and 13 ILM (1974), p. 917

Agreement on the Global System of Trade Preferences among Developing Countries, Belgrade, 13 April 1988, in force 19 April 1989, 27 ILM (1988), p. 1,208

North American Free Trade Agreement, (NAFTA), Washington, Ottawa and Mexico City, 17 December 1992, in force 1 January 1994, 32 ILM (1993), pp. 289 and 605

Agreement Establishing the World Trade Organization, Marrakesh, 15 April 1994, in force 1 January 1995, 33 ILM (1994), p. 13

General Agreement on Trade in Services, 15 December 1993, in force 1 January 1995, 33 ILM (1994), p. 44

General Agreement on Trade-Related Investment Measures (TRIMs), 15 December 1993, in force 1 January 1995

IV. INTERNATIONAL COMMODITY CO-OPERATION

International Tin Agreement (fifth, prolonged), Geneva, 21 June 1975, in force 14 June 1977, 1014 UNTS, p. 43, 14 ILM (1975), p. 1149 and UKTS 10 (1977), Cmnd 7033, p.

1,149; sixth International Tin Agreement, Geneva, 26 June 1981, provisionally in force 1 July 1982, 1282 UNTS, p. 205

Agreement Establishing the Common Fund for Commodities, Geneva, 27 June 1980, in force 19 June 1989, 19 ILM (1980), p. 896, UN Doc. TD/IPC/CF/CONF/24

Agreement Establishing the Association of Tin Producing Countries (ATPC), London, 29 March 1983, no longer in force, 1335 UNTS, p. 75 and 23 ILM (1984), p. 1,009

International Wheat Agreement, 1986, comprising of:

1. *Wheat Trade Convention*, London, 14 March 1986, in force 1 July 1986, Doc. IWA (86) 1 of the International Wheat Council and UKTS 94 (1991), Cm 1734
2. *Food Aid Convention*, London, 13 March 1986, in force 1 July 1986, Doc. IWA (86) 1 of the International Wheat Council and UKTS 94 (1991), Cm 1734

International Agreement on Olive Oil and Table Olives, Geneva, 1 July 1986, in force 1 December 1988, 1445 UNTS, no. 24591, as amended and extended by protocol, Geneva, 10 March 1993, not yet in force, UN Doc. TD/OLIVEOIL-9/4, 1219 UNTS, p. 135 and 1369 UNTS, p. 355

International Cocoa Agreement 1986, Geneva, 25 July 1986, provisionally in force 20 January 1987, UN Doc. TD/COCOA.7/22, prolonged 16 July 1993, not yet in force

International Natural Rubber Agreement 1987, Geneva, 20 March 1987, in force 3 April 1989, UN Doc. TD/RUBBER.2/EX/R.1/Add.7 and UKTS 36 (1993), Cm 2253

Constitution of the Association of Natural Rubber-Producing Countries, London, 21 May 1968, 1045 UNTS, p. 173

International Agreement on Jute and Jute Products, Geneva, 3 November 1989, provisionally in force 12 April 1991, UN Doc. TD/JUTE.2/EX/L.1 and Add.1

International Sugar Agreement 1992, Geneva, 20 March 1992, provisionally in force 20 January 1993, UN Doc. TD/SUGAR.12/6

International Coffee Agreement, London, as extended, adopted on 30 March 1994, provisionally in force 1 October 1994, Resolution no. 366 of the International Coffee Council

International Tropical Timber Agreement, 26 January 1994, not yet in force, 24 EPL, p. 124 and 33 ILM (1994) p. 1,016

V. INTERNATIONAL REGULATION OF FOREIGN INVESTMENT

Francophone African Community (France, Chad, Central African Republic, Congo, Madagascar, Mali and Senegal), *Treaty on Fundamental Rights, including Investment Protection*, 22 June 1960, in force 3 July 1960

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Establishing the International Centre for the Settlement of Investment Disputes (ICSID), Washington, 18 March 1965, in force 14 October 1966, 575 UNTS, p. 159, 4 ILM (1965), p. 532 and UKTS 25 (1967), Cmnd 3255

Arab League (twenty-one member States), *Unified Agreement for the Investment of Arab Capital in the Arab Countries*, Amman, 26 November 1980, in force 19 May 1987

Organization of the Islamic Conference (forty-six member States), *Treaty on Promotion, Protection and Guarantee of Investments among Member States*, Baghdad,

June 1981 (Multinational Arab Guarantee Agency), in force 26 February 1988, text in Moinuddin (1987: 197)

Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), Seoul, 11 October 1985, in force 12 April 1988, 24 ILM (1985), p. 1,605 and UKTS 47 (1989), Cm 812

ASEAN, *Treaty for the Promotion and Protection of Investments among ASEAN Member States*, Manila, 15 December 1987, in force 23 February 1989, 27 ILM (1988), p. 612

Arab Maghreb Union, *Treaty on Promotion and Protection of Investments*, 23 July 1990

North American Free Trade Agreement (NAFTA), Chapter 11, Ottawa, Washington and Mexico City, 17 December 1992, in force 1 January 1994, 32 ILM (1993), p. 289 and p. 605 (supplementary agreements in 32 ILM (1993), pp. 1,480, 1,499 and 1,519

Energy Charter Treaty, Lisbon, 17 December 1994, not yet in force, 37 *Official Journal of the European Communities*, no. C 344 (6 December 1994), 34 ILM (1995), p. 360

VI. HUMAN AND PEOPLES' RIGHTS TREATIES

European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS, p. 221 and UKTS 71 (1953), Cmd 8969

Protocol I to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1952, in force 18 May 1954, 213 UNTS, p. 262 and UKTS (1954), Cmnd 9221

ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, Geneva, 26 June 1957, in force 2 June 1959, 328 UNTS, p. 247

International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 UNTS, p. 3, 6 ILM (1967), p. 360 and UKTS 6 (1977), Cmnd 6702

International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS, p. 171, 1057 UNTS 407, 6 ILM (1967), p. 368 and UKTS 6 (1977), Cmnd 6702

American Convention on Human Rights, San José, 22 November 1969, in force 18 July 1978, 1144 UNTS, p. 123, 9 ILM (1970), p. 673 and 18 ILM (1979), p. 1,189

African Charter on Human and Peoples' Rights, Banjul, 26 June 1981, in force 21 October 1986, 21 ILM (1982), p. 59

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, San Salvador, 14 November 1988, not yet in force, 28 ILM (1989), p. 161

ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, 27 June 1989, in force 5 September 1991, 28 ILM (1989), p. 1,384

VII. GLOBAL ENVIRONMENTAL TREATIES

Treaty Banning Nuclear Weapon Testing in the Atmosphere, in Outer Space and Under Water, Moscow, 5 August 1963, in force 10 October 1963, 480 UNTS, p. 43 and UKTS 3 (1964), Cmnd 2245

Convention on Wetlands of International Importance Especially Waterfowl Habitat and

1982 Protocol, Ramsar, 2 February 1971, in force 21 December 1975, 996 UNTS, p. 245, 11 ILM (1972), p. 963 (amended in 1987) and UKTS 34 (1976), Cmnd 6465

Unesco Convention for the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 1037 UNTS, p. 151 and 11 ILM (1972), p. 1,358

International Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Washington, 3 March 1973, in force 1 July 1975, 993 UNTS, p. 243, 12 ILM (1973), p. 1,085 and UKTS 101 (1976), Cmnd 6647

Convention for the Prevention of Marine Pollution from Land-Based Sources, Paris, 4 June 1974, in force 6 May 1978, 13 ILM (1974), p. 352 and UKTS 64 (1978), Cmnd 7251

Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Geneva, 18 May 1977, in force 5 October 1978, 1108 UNTS, p. 151 and 16 ILM (1977), p. 88

Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, UNTS no. 28395 and 19 ILM (1980), p. 15

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Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basle, 22 March 1989, in force 5 May 1992, 28 ILM (1989), p. 657

United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 ILM (1992), p. 849

Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 ILM (1992), p. 818

UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 17 June 1994, not yet in force, 33 ILM (1994), p. 1,328

VIII. REGIONAL ENVIRONMENTAL TREATIES

Convention Relative to the Preservation of Fauna and Flora in their Natural State, London, 8 November 1933, in force 14 January 1936, 172 LNTS 241; UKTS 27 (1930), Cmnd 5280

Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, Washington, 12 October 1940, in force 1 May 1942, 161 UNTS, p. 193

African Convention on the Conservation of Nature and Natural Resources, Algiers, 15 September 1968, in force 16 June 1969, 1001 UNTS, p. 3 and IEL 968:68

Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts, Gdansk, 13 September 1973, in force 28 July 1974, 1090 UNTS, p. 54, 12 ILM (1973), p. 1,291

Nordic Convention on the Protection of the Environment, Stockholm, 19 February 1974, in force 5 October 1976, 13 ILM (1974), p. 591

Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, 22 March 1974, in force 3 May 1980, 13 ILM (1974), p. 546

Convention for the Protection of the Mediterranean Sea against Pollution and Protocols, Barcelona, 16 February 1976, in force 12 February 1978, 1102 UNTS, p. 27, 15 ILM (1976), p. 290

Convention on Conservation of Nature in the South Pacific, Apia, 12 June 1976, in force 28 June 1990, IEL 976:45

Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (and Protocol), Kuwait, 24 April 1978, in force 1 July 1979, 17 ILM (1978), p. 511; 1140 UNTS, p. 133

Convention Relating to the Status of the River Gambia, Natural Resources, Water Sources, 30 June 1978, no. 134 ST/ES 17/141 (1989)

Treaty for Amazonian Co-operation, Brasilia, 3 July 1978, in force 2 August 1980, 1202 UNTS, p. 51, 17 ILM (1978), p. 1,045

Convention on Long-Range Transboundary Air Pollution, Geneva, 13 November 1979, in force 16 March 1983, 1302 UNTS, p. 217 and 18 ILM (1979), p. 1,442

Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region and Protocol, Abidjan, 23 March 1981, in force 5 August 1984, 20 ILM (1981), p. 746

Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific and Agreement, Lima, 12 November 1981, in force 19 May 1986, UN Doc. UNEP-CPPS/IG. 32/4

Protocol on the Conservation of Common Natural Resources, Khartoum, 24 January 1982, IEL 982:10

Regional Convention for the Conservation of the Red Sea and the Gulf of Aden Environment and Protocol, Jeddah, 14 February 1982, in force 20 August 1985, 9 EPL 1982, p. 56

Benelux Convention on Nature Conservation and Landscape Protection, Brussels, 8 June 1982, in force 1 October 1983, text in I. Rummel-Bulska and S. Osafa (eds.), *Selected Multilateral Treaties on the Environment* (Cambridge: Grotius Publications, 1991), vol. II, p. 163

Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region and Protocol, Cartegena de Indias, 24 March 1983, in force 11 October 1986, 22 ILM (1983), p. 227

ASEAN Agreement on the Conservation of Nature and Natural Resources, Kuala Lumpur, 9 July 1985, not yet in force, 15 EPL (1985), p. 64

Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Noumea, 25 November 1986, in force 22 August 1990, 26 ILM (1987), p. 41

Convention on Environmental Impact Assessment in a Transboundary Context (in Europe), Espoo, 25 February 1991, not yet in force, 30 ILM (1991), p. 802

Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 17 March 1992, not yet in force, UN Doc. E/ECE/1267 and 31 ILM (1992), p. 1,312

IX. CONVENTIONS ON THE LAW OF THE SEA AND ON OUTER SPACE

International Convention for the Regulation of Whaling, Washington, 2 December 1946, in force 10 November 1948, 161 UNTS, p. 72, UKTS 5 (1949), Cmd 7604 and UKTS 68 (1959), Cmnd 849

Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958, in force 10 September 1964, 516 UNTS, p. 205 and UKTS 3 (1965), Cmnd 2511

Convention on the Continental Shelf, Geneva, 29 April 1958, in force 10 June 1964, 499 UNTS, p. 311 and UKTS 39 (1964), Cmnd 2422

Convention on the High Seas, Geneva, 29 April 1958, in force 30 September 1962, 450 UNTS, p. 11 and UKTS 5 (1963), Cmnd 1929

Convention on Fishing and Conservation of the Living Resources of the High Seas, Geneva, 29 April 1958, in force 20 March 1966, 559 UNTS, p. 285 and UKTS 39 (1966), Cmnd 3082

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, London, Moscow and Washington, 27 January 1967, in force 10 October 1967, 610 UNTS, p. 205, 6 ILM (1967), p. 386 and UKTS 10 (1968), Cmnd 3519

Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, New York, 5 December 1979, in force 11 July 1984, 1363 UNTS, p. 3 and 18 ILM (1979), p. 1,434

UN *Convention on the Law of the Sea*, Montego Bay, 10 December 1982, in force 16 November 1994, 21 ILM (1982), p. 1,261

Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea of 10 December 1982, New York, 28 July 1994, in force 28 July 1996, 33 ILM (1994), p. 1,309

X. CONVENTIONS ON THE ANTARCTIC

Antarctic Treaty, Washington, 1 December 1959, in force 23 June 1961, 402 UNTS, p. 71 and UKTS 97 (1961), Cmnd 1535

Convention for the Conservation of Antarctic Seals, London, 11 February 1972, in force 11 March 1978, 1080 UNTS, p. 175, 11 ILM (1972), p. 251 and UKTS 45 (1978), Cmnd 7209

Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980, in force 7 April 1982, 1329 UNTS, p. 47, 19 ILM (1980), p. 841 and UKTS 48 (1982), Cmnd 8714

Convention on the Regulation of Antarctic Mineral Resource Activities, Wellington, 2 June 1988, not in force, 27 ILM (1988), p. 868

Protocol on Environmental Protection to the Antarctic Treaty, Madrid, 4 October 1991, not yet in force, 30 ILM (1991), p. 1,461

XI. THE LAW OF TREATIES

Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS, p. 331, 8 ILM (1969), p. 679 and UKTS 58 (1980), Cmnd 7964

Vienna Convention on Succession of States in respect of Treaties, Vienna, 23 August 1978, not yet in force, 17 ILM (1978), p. 1,488

Vienna Convention on Succession of States in respect of State Property, Archives and Debts, Vienna, 8 April 1983, not yet in force, 22 ILM (1983), p. 306

Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, Vienna, 21 March 1986, not yet in force, 25 ILM (1986), p. 543

XII. CONVENTIONS ON INTERNATIONAL DISPUTE SETTLEMENT

Convention for the Pacific Settlement of International Disputes (Hague I), The Hague, 18 October 1907, 54 LNTS 435 and UKTS 6 (1971), Cmnd 4575

Statute of the International Court of Justice, San Francisco, 26 June 1945, in force 24 October 1945, *ICJ Acts and Documents,* no. 4, p. 61 and UKTS 67 (1946), Cmd 7015

American Treaty on Pacific Settlement (Pact of Bogotá), Bogotá, 30 April 1948, in force 6 May 1949, 30 UNTS, p. 55

Revised 1928 General Act for the Pacific Settlement of International Disputes, New York, adopted by the General Assembly (GA Res. 268 A (III)) on 28 April 1949, in force 20 September 1950, 71 UNTS, p. 101

European Convention for the Peaceful Settlement of Disputes, Strasbourg, 29 April 1957, in force 30 April 1958, 320 UNTS, p. 243, *European Treaty Series,* no. 23 and UKTS 10 (1961), Cmnd 1298

Optional Protocol (to the 1958 Law of the Sea Conventions) Concerning the Compulsory Settlement of Disputes, Geneva, 29 April 1958, in force 30 September 1962, 450 UNTS, p. 169 and UKTS 60 (1963), Cmnd 2112

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, in force 7 June 1959, 330 UNTS, p. 3 and UKTS 26 (1976), Cmnd 3655

Protocol of the Commission of Mediation, Conciliation, and Arbitration of the Organization of African Unity, Cairo, 21 July 1964, 3 ILM (1964), p. 1,116

Convention on the Settlement of Investment Disputes between States and Nationals of Other States Establishing the International Centre for the Settlement of Investment Disputes, (ICSID), Washington, 18 March 1965, in force 14 October 1966, 575 UNTS 159, 4 ILM (1965), p. 532 and UKTS 25 (1967), Cmnd 3255

UN Convention on the Law of the Sea (Part XV on Settlement of Disputes), Montego Bay, 10 December 1982, in force 16 November 1994, 21 ILM (1982), p. 1,322

Appendix III
Survey of main cases

Name of the case and parties	Court/tribunal and year of judgment/ award	Nature of the dispute	Main points of law relevant to this study	Main findings with respect to States' rights and duties
Norwegian Shipowners' Claims Arbitration (Norway *v.* USA)	Permanent Court of Arbitration, *ad hoc* international tribunal, 1922	Requisitioning of alien property for US war-time purposes.	Concept of taking of property. Applicable law. Requirements of compensation.	US action constituted exercise of eminent domain. Municipal law (of US) was applicable as long as international public order was not thereby violated. 'Just compensation' to be determined by fair actual value at the time and place in view of all surrounding circumstances.
Mavrommatis Palestine Concessions case (Greece *v.* Great Britain)	PCIJ, 1924–5	Termination of concession agreement.	Diplomatic protection. Exhaustion of local remedies.	Right of home State to protect its nationals abroad.
Chorzów Factory case; and Certain German Interests in Polish Upper Silesia (Germany *v.* Poland)	PCIJ, 1926; PCIJ, 1925–9	Liquidation and transfer of assets of the German Reich.	Non-exhaustion of negotiations. Liquidation of property rights.	Liquidation pursuant to peace treaties constitutes an exception to general rule of international law of no expropriation without indemnity. In the case of a lawful taking, the deprived party is entitled to the value of the undertaking that has been taken, including any potential future profits; in the case of an unlawful taking, the injured party is entitled to restitution of his property and, if restitution is impossible or impracticable, the full value.
North American Dredging Co. of Texas (USA *v.* Mexico)	US–Mexican General Claims Commission, 1926	Breach of contract.	Calvo clause. Diplomatic protection. Compensation. Exhaustion of local remedies.	Purpose of Calvo clause is to prevent abuse of the right to diplomatic protection. An alien cannot deprive his government of its right to exercise diplomatic protection in the case of violations of international law. However, in this case, the company had fully ignored legal remedies under Mexican law and could therefore not rightfully present a breach of contract claim to the home government.

Neer Claim (USA *v.* Mexico)	US-Mexican General Claims Commission, 1926	Murder of a US national.	State responsibility. Treatment of aliens. International minimum standard.	Treatment of an alien could be said to amount to an outrage, to bad faith, to wilful neglect or duty, or to an insufficiency of governmental action, so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.
Trail Smelter Arbitration (USA *v.* Canada)	Tribunal, first decision, 1938; second decision, 1941	Transboundary air pollution and damage as a result of sulphur dioxide discharges by Canadian company.	State responsibility. Compensation. Alleged violation of sovereignty.	Canada was held responsible for the hazardous activities. USA was awarded compensation and a permanent regime was established over the smelter's emissions to prevent future damage.
Corfu Channel Arbitration (UK *v.* Albania)	ICJ, first judgment, 1948; second judgment, 1949; third judgment, 1949	Explosion of mines in Albanian waters causing loss of human life and damage to British naval vessels during mine-sweeping operations.	Right of passage through sea straits. State responsibility.	Previous authorization of coastal State not necessary for innocent passage. Albania was under an obligation to notify and to warn of the imminent dangers. Albania was held responsible for the damage and loss of human life.
Abu Dhabi case (Petroleum Development Co. (Trucial Coast) Ltd *v.* Sheikh of Abu Dhabi)	Tribunal, 1951 (Lord Asquith of Bishopstone as sole arbitrator)	Scope of concession area: does it include sea-bed of Abu Dhabi?	Applicable law. Definition of continental shelf and state of customary international law.	Absence of applicable Abu Dhabi law. Resort to principles of 'civilized nations' (English common law). Continental shelf beyond territorial zone not included in concession.
Anglo-Iranian Oil Company case (UK *v.* Iran)	ICJ, 1951 (interim measures), 1952 (jurisdiction)	Annulment of a 1933 concession agreement; nationalization.	Jurisdiction of the ICJ.	Concessionary contract cannot be considered to be an international treaty. ICJ has no jurisdiction to deal with the merits of the case.
Qátar case (Ruler of Qátar *v.* International Maritime Oil Company Ltd)	Tribunal, 1953 (Sir Buckvill as sole arbitrator)	Amount of money in exchange for oil concessions.	Applicable law.	Agreement not to be governed by Islamic law but by principles of justice, equity and good conscience.

Survey of main cases (*continued*)

Name of the case and parties	Court/tribunal and year of judgment/award	Nature of the dispute	Main points of law relevant to this study	Main findings with respect to States' rights and duties
Lac Lanoux Arbitration (France *v.* Spain)	Tribunal, 1957	Diversion of water flow from Lac Lanoux for generating electricity.	Rights and duties of riparian States in relation to an international watercourse.	France was under obligation to provide information to and consult with Spain. France had taken sufficient measures to safeguard the rights and interests of Spain. No prior agreement of Spain required, since this would amount to essential restriction on sovereignty of France.
Aramco case (Saudi Arabia *v.* Arabian American Oil Company)	Tribunal, 1958	Transportation of oil as part of the oil concession.	Applicable law.	The law governing the arbitration itself is international law; the law governing the merits is the law of Saudi Arabia but to be interpreted and supplemented by the general principles of law, by the custom and practice in the oil business and by notion of pure jurisprudence. Acquired rights should be respected. The concession only covered Aramco's transport activities within Saudi Arabian territory.
Sapphire International Petroleum *v.* NIOC (Sapphire International Petroleum Ltd *v.* National Iranian Oil Company)	Tribunal, 1963	Non-performance of contract.	Applicable law. Compensation. State responsibility.	Iranian law not applicable, but the principles of law generally recognized by civilized nations.
Fisheries Jurisdiction cases (UK *v.* Iceland; Federal Republic of Germany *v.* Iceland)	ICJ, 1972 and 1973 (interim protection), 1973 (jurisdiction), 1974 (merits)	Establishment of a 50-mile fishery zone.	Lawfulness of exclusive fishery zone beyond 12 miles.	Coastal state has right to preferential exploitation in adjacent waters in situations of special dependence on their fisheries, but should have due regard to established fishing rights. Mutual obligation to undertake negotiation in good faith to agree on an equitable apportionment of fishery resources.

BP *v.* Libya (British Petroleum Exploration Company (Libya) *v.* Libyan Arab Republic)	Tribunal, 1973, (Lagergren as sole arbitrator)	Nationalization.	Applicable law. Interpretation and application of a 'stabilization clause' in a concession agreement. Compensation.	General principles of law applicable in case of difference between Libyan law and international law. Libya had violated both Libyan and international law by terminating unilaterally the agreement. Libya was liable to pay damages.
Texaco *v.* Libya (or TOPCO case) (Texaco Overseas Oil Company and California Asiatic Oil Company *v.* Libyan Arab Republic)	Tribunal, 1975 (jurisdiction), 1977 (merits), (Dupuy as sole arbitrator)	Nationalization.	Applicable law. Interpretation and application of a 'stabilization clause' in a concession agreement. Nature and amount of compensation.	'Appropriate' compensation is required under current international law for a lawful expropriation. In case of unlawful expropriation *restitutio in integrum* compensation is due. The latter is required in this case. Dispute is directly governed by international law. International arbitration as evidence of the internationalization of the contract.
Liamco *v.* Libya (Libyan American Oil Company *v.* Libya)	Tribunal, 1977, (Mahmassani as sole arbitrator)	Nationalization.	Applicable law. Interpretation and application of a 'stabilization clause' in a concession agreement. Compensation.	Acquired rights should be respected. No requirement to compensate loss of profits. Equitable compensation to be paid.
Revere Copper *v.* OPIC (Revere Copper and Brass Inc. *v.* Overseas Private Investment Corporation)	Tribunal, 1978	Extra-contractual payments amounting to creeping expropriation in Jamaica.	Concept of expropriation. Stabilization clause. Applicable law.	Jamaican law applicable for all ordinary purposes of the agreement. International law principles applicable for some purposes (e.g. responsibility of States for injuries to aliens), because the agreement could be regarded as belonging to the category of long-term economic development contracts (internationalized contract). Stabilization clause was lawful. Repudiation of the agreement by the government constituted an expropriatory action. Compensation had to be paid.
AGIP *v.* Congo	ICSID Tribunal, 1979	Expropriation of an Italian oil-distribution company.	Applicable law. Standard of compensation.	Applicable law is in first instance Congolese law, supplemented by international law. Nationalization was irregular and according to Congolese law AGIP should be compensated for the damage it suffered (*damnum emergens* and only nominal *lucrum cessans*).

Name of the case and parties	Court/tribunal and year of judgment/ award	Nature of the dispute	Main points of law relevant to this study	Main findings with respect to States' rights and duties
Kuwait v. Aminoil (American Independent Oil Company v. Kuwait)	Tribunal, 1982 (Reuter as President)	Compensation for nationalization.	Applicable law. Stabilization clause. Compensation. 'Reasonable' rate of return. Distinction between 'lawful' and 'unlawful' expropriation.	Appropriate compensation formula is *opinio juris communis*. Factors in determining it include fair market value, reasonable rate of return, unjust enrichment, taxation and royalties due to Kuwait, reasonable rate of interest (7.5 per cent), and inflation rate. Compensation for lost profits is not required. Both Kuwaiti law and public international law being a part of Kuwaiti law are applicable. Host State's attitude towards compensation should not be such as to render foreign investment useless, economically.
Klöckner v. Cameroon (Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon)	ICSID, 1983, annulled in 1985; second award in 1988	Frustration of the construction of a factory in Cameroon by German company.	Applicable law.	Applicable law is first of all law of the contracting State party to the dispute. Principles of international law have a dual role: complementary or corrective. International law can only be resorted to after identification and application of the rules of the State's law.
AIG case (American International Group Inc. v. Iran)	Iran–US Claims Tribunal, 1983	Large-scale nationalization of American interests in Iranian insurance company in 1979. First award on merits of a compensation dispute.	Lawfulness of nationalization. Standard of compensation. Applicable law.	General principles of public international law are applicable and require compensation for the property taken. Nationalization was lawful. Appropriate compensation standard for a lawful expropriation/nationalization is the going-concern value, taking into account the net book value of the assets, the goodwill and likely future profitability of the company. This is also due in case of lawful large-scale nationalization of an entire industry. Not correct that modern developments in international law required that only a 'partial' compensation standard be applied. Relevant factors in determining the value of the enterprise taken include prior changes in the general political, social and economic conditions which might have affected the enterprise's business prospects as of the date the enterprise was taken.

INA Corporation *v.* Iran	Iran–US Claims Tribunal, 1985	Formal nationalization of a 20 per cent interest in Iranian insurance company pursuant to Iranian 'Law of Nationalization and Credit Enterprises'.	Standard and valuation methods of compensation.	First case to apply the 1955 Treaty of Amity standard. Full compensation not *ipso facto* required under international law, but in present case 'full equivalent standard' applied, i.e., claimant's purchase price for the shares one year before the nationalization of Iranian insurance industry. In the event of large-scale nationalization of a lawful character, international law has undergone a gradual reappraisal, the effect of which may be to undermine the doctrinal value of any 'full' or 'adequate' compensation standard. 'Full equivalent of property taken' means in the case at issue the fair market value of the shares at the date of nationalization.
Sedco case (Sedco Inc. *v.* National Iranian Oil Company and Iran)	Iran–US Claims Tribunal, 1986–7	Appointment of temporary government managers. Expropriation of oil drilling rights and interest in oil companies (SEDIRAN).	Interpretation of phrase 'interest in property'. Relevance of lawfulness of the taking in determining compensation under the treaty. Standard of compensation under customary international law.	Protection of nationals under Treaty of Amity also applies to claims of non-US companies, in which US nationals have a property interest. In the case of discrete expropriations of alien property, both customary international law and the Treaty of Amity require full compensation for the full value of expropriated interest regardless of whether or not the taking was lawful. Fair market value of the property is 'what a willing buyer and a willing seller would reasonably have agreed on as a fair price at the time of the taking in the absence of coercion on either party'. General state of political, economic and social conditions must be considered.
Letco *v.* Liberia	ICSID Tribunal, 1986	Breach of concession agreement.	Applicable law.	First of all, Liberian law is applicable and 'paramount within its own territory'. International law serves as 'regulator' of systems of national law and problems arising in case of a divergence. According to the tribunal Liberian law was in conformity with international law.

Name of the case and parties	Court/tribunal and year of judgment/ award	Nature of the dispute	Main points of law relevant to this study	Main findings with respect to States' rights and duties
Amoco case (or Khemco case) (Amoco International Finance Corporation *v.* Iran)	Iran–US Claims Tribunal, 1987	Nationalization of American share in joint stock company for installation and operation of a natural gas-production plant on Kharg island in Persian Gulf.	Standard of compensation. Definition of expropriation and nationalization.	Right to nationalize foreign property is today unanimously recognized, while the rules of customary international law relating to the determination of the nature and amount of the compensation to be paid, as well as the conditions of its payment, are less well settled. Lost profits not to be included in assessment of compensation for lawful takings and only required in unlawful takings. Value of the expropriated entity to be reduced by taking into account the economic effects of the possibility of future lawful taking. Treaty of Amity is *lex specialis*, customary international law is *lex generalis* and useful to fill the lacunae of the treaty and to aid interpretation and application of its provisions. Reference to ILA Seoul Declaration with respect to 'appropriate compensation' standard and to equitable compensation. Neither party should experience any unjust enrichment or deprivation.
Mobil Oil case (Mobil Oil Iran Inc. *v.* Iran)	Iran–US Claims Tribunal, 1987	Repudiation and breach (alternatively, expropriation) of rights under a 1973 sale and purchase agreement under which an American consortium was involved in extracting, refining and marketing Iranian oil and gas.	Definition of what constitutes expropriation. Standard of compensation.	No repudiation of contract or expropriation of rights since parties had agreed not to revive the 1973 sale and purchase agreement, in 1979 suspended by *force majeure*, but to negotiate a reconciliation of their interests. This was interrupted by the November 1979 events. Claimants are contractually entitled to compensation for the losses they could have expected to recover pursuant to their negotiations with the National Iranian Oil Company (NIOC).

Phillips case (Phillips Petroleum Company Iran *v.* Iran)	Iran–US Claims Tribunal, 1989	Nullified oil agreement. Taking of contractual rights to share in the oil produced from the areas allocated to joint structure agreement.	Definition of what constitutes expropriation. Standard of compensation.	Acts complained of by the claimants are 'more closely suited to the assessment of the taking of foreign-owned property under international law than to the assessment of the contractual aspects of the relationship'. Article 4.2 of the Treaty of Amity prevails in principle as *lex specialis* over general rules, provides a single standard of compensation ('just compensation' representing the 'full equivalent of the property taken'), regardless of whether that taking was lawful or unlawful.
ELSI case (Elettronica Sicula SpA) (USA *v.* Italy)	Chamber of the ICJ, 1989	Requisition of US company in Italy and alleged violation of bilateral FCN treaty.	Interpretation of FCN treaty. State responsibility. Compensation for damages. Exhaustion of local remedies.	Preventing a company from managing and controlling its affairs could amount to a 'disguised expropriation'. No compensation for the requisition in this case since it was not unlawful under international law. Local-remedies rule is a principle of customary international law.
AAPL *v.* Sri Lanka	ICSID Tribunal, 1990 (with dissenting opinion by Asante)	Claims for damages following destruction of AAPL's installation by Sri Lankan forces in the civil war with the Tamils.	Applicable law. Compensation for losses due to armed conflict.	Applicable law is law of the host State and international law. Bilateral investment treaty is *lex specialis. Lucrum cessans* should not be allocated and compensated. Asante was of the opinion that Sri Lankan law should be applicable as main source of law. International law, including the bilateral investment treaty is fully incorporated into the country's law.

Survey of main cases (*continued*)

Name of the case and parties	Court/tribunal and year of judgment/ award	Nature of the dispute	Main points of law relevant to this study	Main findings with respect to States' rights and duties
Ebrahimi v. Iran	Iran–US Claims Tribunal, 1994 (Arbitrators: G. Arangio-Ruiz, R. C. Allison, M. Aghahosseini)	Alleged expropriation. Government's appointment of temporary directors of construction company and interference with ownership rights. Impact of these measures on shareholders interests.	Concept of deprivation or taking of property. Applicable law. Standard and valuation of compensation.	Government took control by appointing provisional managers, thereby depriving claimants of their ownership rights in the company. State may not avoid liability for compensation by showing that its actions were carried out pursuant to or in accordance with national law. International law theory and practice do not support the conclusion that the 'prompt, adequate and effective' compensation standard represents the prevailing standard of compensation. Reference to paragraph 4 of GA Res. 1803 (XVII). The gradual emergence of the 'appropriate compensation' rule aims at ensuring that the amount of compensation is determined in a flexible manner that takes into account the specific circumstances of each case. The prevalence of the 'appropriate' compensation standard does not imply, however, that the compensation quantum should be always 'less than full' or always 'partial'. Compensation to be awarded must be appropriate to reflect the pertinent facts and circumstances of each case. In the case at issue, it includes *damnum emergens* but not *lucrum cessans*.

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