PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

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P R E F A C E

Natural resources have always been an important source of wealth for nations. However, until a few years ago, the importance of these resources was not fully realized. That is probably because only a few developed and technically advanced countries had the capacity to exploit natural resources. It is no longer the case. Quite a few developing countries have now acquired such capacity. Moreover, some additional factors have contributed to greater awareness of their significance, such as, the rapid population increase and the consequent increase in consumption; the expansion of foreign investments in the developing countries partly through agreements and partly through other means; the realization of the need to control and regulate multinationals which exploit and market such resources for their own profit. The most important factor contributing to this awareness has been the consumption patterns in the developed world of the resources produced in the developing world. So much so, according to the famous study of the Club of Rome, "The Limits to Growth," by 2050, several minerals may be exhausted if the current rate of exploitation and consumption continues. It is only natural that the concern for conserving and gaining control over natural resources deepened.

The concept of permanent sovereignty over natural resources is a manifestation of this concern to conserve, explore and exploit such resources for national development. The concept was

first raised at one of the meetings of the Human Rights Commission in 1952 as part of the agenda. Following this, the subject has been discussed in various United Nations organs and forums. The rationale of the concept, as propounded by the newly independent nations, was that unless there was economic self-determination, there could not be any political self-determination; that sovereignty over natural wealth and resources was essential to economic independence; and that consolidation of the former inevitably strengthen the latter.

Claim of sovereign rights over natural resources was not uncommon in the history of state sovereignty. However, in modern times, the assertion of rights was made dramatically by Iran which nationalized its oil industry in March 1951. Iran claim that it had the right to do so by virtue of its sovereignty over natural resources situated within its national jurisdiction.

The present dissertation, as the title indicates, deals with the extent of state control over natural resources. The main purpose of this dissertation is; (i) to trace the position of state sovereignty under traditional international law; (ii) to identify the major issues involved in the concept as evidenced in the United Nations debates, state practice, academic opinion, and judicial decisions; (iii) to analyze various solutions offered in the United Nations debates and by the doctrinal opinion and (iv) to examine the position of the principle of permanent sovereignty over natural resources under contemporary international law.

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List of Abbreviations

A.J.I.L.	American Journal of International Law
Co.	Company
COPE	Compagnies Orientale des d'Egypte
Doc.	Document
ECOSOC.	Economic and Social Council
EGPC	Egyptian General Petroleum Company
ERAP	Enterprise de Recherches et d'Activities Petrolieres
G.A.	General Assembly
G.A.O.R.	General Assembly Official Records
GUPCO.	Gulf of Suez Petroleum Company
ICJ	International Court of Justice
I.C.L.Q.	International and Comparative Law Quarterly
IEOC.	International Egyptian Oil Company
I.J.I.L.	Indian Journal of International Law
I.L.R.	International Law Reports
INOC.	Iraqi National Oil Company
J.W.T.L.	Journal of World Trade Law
KOC.	Kuwait Oil Company
LIPETCO.	Libyan General Petroleum Corporation
Ltd.	Limited
NNOC.	Nigeria National Oil Corporation
Para.	Paragraph
PETROMIN.	Saudi Arabia Government's General Petroleum and Mineral Organization

PCIJ.	Permanent Court of International Justice
PSC.	Permanent Sovereignty Commission
Res.	Resolution
UAR.	United Arab Republics
UK.	United Kingdom
UN.	United Nations
UNDP.	United Nations Development Programme
US.	United States
USSR.	Union of Soviet Socialist Republics
Vol.	Volume
Z.L.J.	Zambian Law Journal

C O N T E N T S

Chapter I

HISTORICAL CONTEXT

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This chapter attempts to trace the history of the concept of permanent sovereignty over natural resources in the traditional sources of international law and in the United Nations (UN). Under traditional international law, the concept of sovereignty has been identified as one of the ingredients of sovereignty. The idea of economic sovereignty as it evolved especially in its incarnation of permanent sovereignty over natural resources was an offshoot of the traditional norm.

Sovereignty over natural resources is an inherent quality of a statehood under international law. The state, under traditional international law, as put forward by Oppenheim, has the power "to exercise supreme authority over all persons and things within its territory."[1] Philosophers like Jean Bodin, Thomas Hobbes and John Austin spoke of absolute and unrestrained sovereignty in sixteenth, seventeenth and nineteenth centuries respectively.[2] According to Norman Bentwich, "a sovereign decides by his own will, which is the supreme law within his own boundary."[3] The above affirmations, cumulatively, establish that the state is

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1. L. Oppenheim, International Law, vol. I, 8th edn. (New York, 1963), p. 286. Emphasis added.

2 See G.H. Sabine and T.L. Thorston, A History of Political Theory (Oxford, 1973), pp. 377-82 and 433-4.

3 Norman Bentwich et al, Justice and Equity in the International Sphere (London, 1936), p. 25.

independent, sovereign and supreme over its subjects and things situated in its territory. Consequently, no one can question the states' right to control or regulate its natural resources if it chooses to do so. No state will allow any state to interfere in the management of its internal or external affairs. This principle finds a clear expression in the United Nations Charter under Article 2, paragraph 7. However, no state has an unlimited liberty of action in the exercise of its independence and territorial supremacy. Though the state is considered to be independent and territorially supreme, it is required to fulfil certain international obligations. Every state, for instance, is obligated "not to allow knowingly its territory to be used for acts contrary to the rights of other state."[4] But this does not mean that the state loses its territorial supremacy.

The fact that the state is sovereign and supreme, and has the power to control or regulate persons or property situated on its territory within its jurisdiction was a recognised political concept until the twentieth century. Since then, in the words of Friedmann, "a new dimension has been given to the concern of international relations with matters of welfare."[5] This development was occasioned by "the emergence of many states, poor and underprivileged and claiming participation in the wealth and

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4 Corfu Channel Case, I.C.J. Reports, 1949, p. 22.

5 W. Friedmann, The Changing Structure of International Law (New York, 1966), p. 11.

resources of the world."[6] The new name of this concern is permanent sovereignty over natural resources.

Even after the attainment of sovereign independent status and liberation from the bondage of colonial rule, most of the developing countries depended on one or another industrially developed country. As Muhammad A. Mughraby put it: "They discovered that the colonial period had left them with no effective control over the resources" and that they could not assert their economic independence.[7] According to Gunnar Myrdal, "there existed before outbreak of the first World War a much more closely integrated world community than today. But a very small part of the world belonged to it, as it excluded in the main the larger part of the world; peoples of different colour, colonial land, and backward regions in general except for tiny economic enclaves, operated in the interest of the advanced countries."[8]

Human Rights Commission and the Third Committee

It was in this context that the question of permanent sovereignty over natural wealth and resources was brought up in 1952 for the first time at the United Nations. The issue was raised at the 8th Session of the Commission on Human Rights under

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6 Ibid.

7 Muhammad A. Mughraby, Permanent Sovereignty over Oil Resources (Beirut, 1966), p. 12.

8 Gunnar Myrdal, Economic Nationalism and Internationalism (Melbourne, 1967), p. 1.

agenda item 3 entitled: "The Right of Peoples and Nations to Self-determination," when it was engaged in the preparation of the draft International Covenants on Human Rights in pursuance of the General Assembly Resolution 545(VI) of 5 February 1952. In fact, through the General Assembly Resolution 424 B(V) and the Economic and Social Council (ECoSoC) Resolution 349(XII) of 1950, the Assembly and the Council had requested the Human Rights Commission to study ways and means which would ensure the right of peoples and nations to self-determination. But since the Commission was unable to consider it[9] at its Seventh Session, the General Assembly Resolution of 545(VI) at its 6th Session decided to include in the Covenants on Human Rights an article on "the right of all peoples and nations to self-determination" as a reaffirmation of the principle enunciated in the Charter of the United Nations. The Commission debated the subject and adopted the Chilean draft resolution[10] to include paragraph 3 of Article I in the Covenant which read: "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."

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9 UN Doc. E/1992, Chapter V.

10 UN Doc. E/C-N.4/L.24 was adopted by 10 votes to 6, with 3 abstentions.

General Assembly, 1952

The General Assembly adopted three resolutions[11] on economic self-determination in 1952. Considering economic development in general and commercial agreements in particular, the General Assembly by Resolution 523(VI) affirmed that the developing countries have the right to determine freely the use of their natural resources in order to better their economic position and to further the realization of their plans of economic development. Resolution 545(VI) reaffirmed the principle enunciated in the Charter of the United Nations by deciding to include an article on the right of all peoples and nations to self-determination in the International Covenant or Covenants on Human Rights and requested the Human Rights Commission to prepare recommendations concerning international respect for self-determination of peoples and to submit the same to the General Assembly at its 7th Session. Again, by Resolution 626(VII), the General Assembly recognized "the right of peoples freely to use and exploit their natural wealth and resources" as inherent in their sovereignty, recommended that all member states, in the exercise of their rights, "have due regard, consistently with their sovereignty, to the need for maintaining the flow of capital in conditions of security, mutual confidence and economic cooperation among nations," and further recommended "all member

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11 G.A. Res. 523(VI) of 12 January 1952, 545(VI) of 5 February 1952 and 626(VII) of 21 December 1952.

states to refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any state over its natural resources."

In pursuance of the General Assembly decision,[12] the Second Committee at its several meetings in 1952 considered draft resolutions submitted by Uruguay, and a Bolivian amendment[13] and finally adopted a revised draft resolution and presented to the General Assembly at its 7th Session. The Assembly had before it the reports of the Second Committee[14] and the Fifth Committee[15] as well as the amendment submitted by the Indian delegate[16] to paragraph I of the operative part on the right to exploit freely natural wealth and resources. The amendment called for the replacement of the words "the maintenance of" by the words "maintaining the flow of capital in conditions of security." It was adopted by 39 votes to 5 with 16 abstentions and the whole draft resolution, as amended, was adopted by 36 votes to 4 with 20 abstentions.[17] The Western Powers voted against it because it contained no guarantee to the effect that states, in expropriating private property, recognize the rights of private

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12 G.A.O.R. 382 plenary meeting on 17 October 1955.

13 UN Doc. A/C.2/L.165 and corr.1-3; and A/A.2/L.166, later revised as A/C.2/L.165/Rev.1.

14 UN Doc. A/2332.

15 UN Doc. A/2338.

16 UN Doc. A/L.143.

17 G.A.O.R., 7th Session, 411 Plenary Meeting, p. 495.

investors under international law.

General Assembly, 1954 and the Third Committee

As Chile's proposal for inclusion of paragraph 3 of Article I in the Covenant was adopted by the Human Rights Commission, the General Assembly in 1954 at its 9th Session raised the same in which a big controversy between capital-importing and capital-exporting countries was witnessed. The General Assembly, however, recognized that the international flow of private investment for productive activities contributed to the raising of living standards by assisting in the development of natural resources,[18] and requested the Human Rights Commission to make a complete recommendation concerning permanent sovereignty over natural resources, having due regard to the rights and duties of State under international law and the importance of international co-operation in the economic development of developing countries.

In 1955, during the 10th Session of the General Assembly's Third Committee, a Committee composed of 60 member, discussed Article I, paragraph 3, of part I of the draft Human Rights Covenant.[19] The United States, Great Britain, and the Netherlands opposed the insertion of this provision on the ground that it would hinder international economic co-operation, whereas the Asian-

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18 G.A. Res. 824(IX) of 11 December 1954.

19 See UN Doc. E/2573, Annex., ECOSOC 8th Session, Official Records, Supplement No. 7, Annex. 1.

African-Arab States pressed for such a provision.[20] Some other members suggested postponing its adoption so that it could be studied in greater detail.[21] Finally, the Committee appointed a working party[22] in order to work out an acceptable formula. The Working Party after some deliberation suggested a new formula, to the effect: "The peoples may, for their ends, freely dispose of their natural wealth and resources without prejudice to any obligation 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."[23]

General Assembly, 1958

In 1954, the Human Rights Commission had suggested to the General Assembly to have a Commission set up to conduct a full survey of the right of peoples and nations to "permanent sovereignty over their natural resources," but unfortunately the recommendation was not considered in the three successive Assembly

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20 See UN Doc. A/3077 (Report of the Third Committee), p. 34; and G.A.O.R. 10th Session (Third Committee), 638 Meeting, p. 70.

21 Ibid., 644 Meeting, p. 99 and 650 Meeting, p. 130.

22 The Working Committee was composed of representatives of Brazil, Costa Rica, ElSalvador, Greece, India, Pakistan, Syria and Venezuela.

23 For full text adopted by the Third Committee see UN Doc. A/C.2/1.489 and Corr. 1 and 2; the paragraph 29, Article I was adopted by a majority of 26 to 13 with 19 abstentions. The opposing votes were of Australia, Belgium, Canada, China, France, Luxembourg, The Netherlands, New Zealand, Norway, Sweden, Turkey, UK and USA.

Sessions until it was finally referred to the Third Committee in 1958[24] through a vote of 52 to 16 with 4 abstentions, leaving the General Assembly to determine the Commission's composition.[25] Accordingly, the Assembly, on 12 December 1958,[26] decided to establish a Commission composed of 9 members, namely Afghanistan, Chile, Guatemala, the Netherlands, the Philippines, Sweden, the USSR, the UAR and the United States, to conduct a full survey of the status of the right to self-determination for strengthening of the permanent sovereignty of peoples and nations over their natural wealth and resources.[27] Thus, the "Commission on Permanent Sovereignty over Natural Resources" was born.

Commission on Permanent Sovereignty over Natural Resources

The Commission held three Sessions.[28] At its 1st Session, the Commission asked the Secretary-General to prepare a report on the status of permanent sovereignty of peoples and nations over their natural wealth and resources with reference to legal provisions in different countries for consideration in the Second Session. The 2nd Session considered the preliminary study prepared

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24 United Nations Yearbook, 1958, p. 212.

25 Ibid., p. 213.

26 G.A. Res. 1314(XIII), 12 December 1958.

27 See United Nations Yearbook, 1958, p. 213.

28 The 1st Session was held from 18-22 May 1959; the 2nd from 16 February to 17 March 1960; and the 3rd from 8-26 May 1961.

by the Secretariat.[29] A number of suggestions were presented, one of which was for the inclusion of additional information in the Secretariat study, especially factual data on the method of financing the exploitation of natural resources and on the extent of indigenous participation in Trust and Non-Self Governing Territories; the area and relative fertility of agricultural land exploited by foreign companies; a survey of the effects of the present economic blocs in various parts of the world on the exploitation of natural resources; and indication of common features of legislative measures in various countries aimed at promoting foreign investment; transit rights of land-locked countries; and the rights and duties of states under international law. Some representative suggested that the Department of Economic and Social Affairs, the legal office, the Department of Trusteeship and Information from Non-Self Governing Territories, and the Secretariat should be asked to co-operate in furnishing the necessary information.[30] The Commission adopted a resolution requesting the Secretary-General to prepare a revised study for consideration by the Commission at its next Session.

At its 3rd Session, the Commission appreciated the revised Secretariat study[31] as "a practical and constructive" guide for

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29 UN Doc. A/AC.97/5 and Corr. 1 and Add. 1.

30 For the full text, see Commission Report, United Nations Sales No. 62, vol. 6, pp. 240-1.

31 UN Doc. A/AC.97/5 and Corr. 1 and Add. 1.

governments in considering the problems of sovereignty over natural wealth and resources. On the other hand some members felt that the study did not reflect the real situation in the field of exploitation of natural wealth of non-self-governing territories, trust territories and less developed countries by foreigners. However, the Commission adopted three resolutions and transmitted to the ECOSOC, with a request to recommend their adoption to the General Assembly.[32] Two resolutions submitted by the Soviet Union and Chile were debated. The Soviet draft was rejected.[33] The Chilean draft[34] was adopted by 8 to 1 votes with no abstentions. Two more resolutions adopted recommended, inter alia, that the United Nations continue its work on a permanent basis and that the Secretariat study together with the Commission's report[35] be transmitted to the 32nd Session of the ECOSOC.

Economic and Social Council, 1955

The Economic and Social Council had before it two draft

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32 UN Doc. E/3511-A/AC.97; Report of the Commission on Permanent Sovereignty over Natural Resources. For the full text, see Commission Report, United Nations Sales No. 62, vol. 6, Annex I, Resolution I, II and III, pp. 244-6.

33 UN Doc. A/AC.97/L.2 Rev.1; E/3511-A/AC.9713, p. 243. Rejected by 4 votes to 3 with 1 abstention; UAR, Afghanistan and USSR voted for the resolution; United States, the Netherlands, Sweden and Philippines voted against, and Chile abstained.

34 UN Doc. A/AC.97/L.3, Rev.2.

35 UN Doc. E/3511.

resolutions submitted by the Human Rights Commission for transmission to the General Assembly.[36] Controversy continued over the concept of permanent sovereignty in the ECOSOC. The capital-exporting states, led by the United States, argued that the principle of self-determination had nothing to do with control over natural resources as it has been an accepted attribute of state sovereignty. On the other hand, capital-importing states pointed out that the experience of colonial exploitation prompted them to regard the concept of permanent sovereignty over natural resources as closely linked to that of economic self-determination and independence. John C. Barker, the US representative introduced an alternative proposal for the establishment of an ad hoc Commission of 5 members appointed by the Secretary-General to study the concept of self-determination.[37] Although the US proposal was rejected in the Human Rights Commission, the Council finally agreed to transmit it, along with the other two, to the General Assembly for its consideration.

General Assembly, 1960

In 1960, the General Assembly, by Resolution 1515(XV), reiterated that it was the prime duty of the United Nations to accelerate the economic and social advancement of the developing countries and thus safeguarding their independence, and helping

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36 UN Doc. E/2731, 4 May 1955, pp. 48-51.

37 UN Doc. E/AC.7/SR, pp. 334-8.

to close the gap between the developed and developing countries. It "encouraged technical assistance, technical training, for the economic development of the under-developed countries" and recommended further that "the 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."[38]

Second Committee and General Assembly, 1962

At its 16th Session, the General Assembly proposed discussion of the resolution transmitted to it by the ECOSOC to the 17th Session. On 15 November 1962, the Second Committee took up the draft resolution with amendment of the Commission on Permanent Sovereignty over Natural Resources.[39] Referring to operative paragraph 4 of the draft resolution, the USSR representative raised the question of expropriation and compensation and stated that compensation could not be paid in accordance with international law, for, according to him, international law did not make any provision for compulsory payment of compensation.

However, in order to preserve good international relations in the interest of both capital-exporting and capital-importing countries, representatives from various developing countries, like Ghana, Pakistan, Malaysia, Mauritania and Ceylon, stressed the need for taking into account the above reactions while drafting

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38 For the full text, see G.A. Res. 1515(XV), 15 December 1960, in G.A.O.R., 15th Session, Supplement No. 16.

39 UN Doc. A/C.2/L.655, L.668, L.669 and L.670.

the resolution. The representative of Lebanon introduced a new draft amendment.[40] After a heated argument, the Second Committee, finally adopted[41] the draft resolution as a whole as amended and recommended to the General Assembly. Subsequently, the General Assembly at its plenary meeting[42] adopted the draft resolution as a whole by 87 votes to 2 with 12 abstentions. The US voted against and the Communist bloc, including Cuba, Ghana and Burma, abstained for various reasons. The adoption of Resolution 1803(XVII) by the General Assembly at its 17th Session was one of the most important events. It affirmed various provisions and granted recognition to the inalienable right of all the states to dispose of their natural wealth and resources in accordance with national interests and with the respect for the economic independence of states. The declaration raised sensitive economic legal issues.

Post-1962 Developments

Part III of General Assembly Resolution 1803(XVII) requested the Secretary-General to continue the study on various aspects of the subject. The Secretary-General, accordingly, in November 1963, issued a report[43] dealing with the problems arising out of

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40 UN Doc. A/C.2/L.697.

41 Adopted by 60 votes to 5 with 22 abstentions.

42 See G.A.O.R., 1193rd and 1194th Plenary Meetings on 14 December 1962.

43 UN Doc. E/3840.

the process of national measures which affected the ownership or use of natural resources by alien nationals. The ECOSOC at its 37th Session in July-August 1964 at Geneva, after considering the Secretary-General's Report, could not adopt any resolution on the subject of permanent sovereignty but only decided to submit its comments together with the report to the 20th Session of the General Assembly.

The Special Committee on the Principles of International Law Concerning Friendly Relations and Co-operation Among States established by General Assembly Resolution 1966(XVIII), held its first Session in Mexico City in 1964. There, discussing the General Assembly's Resolution, the developing nations and the Communist bloc countries expressed strong anti-colonial sentiments. In the course of the discussion on sovereign equality of states as a basic component of peaceful co-existence, the Czechoslavakian delegate made the point that "the sovereignty of state is based on the inalienable right of every nation to determine freely its own destiny and its social, economic and political system and to dispose freely of its natural wealth and resources...."[44] The suggestion, however, was rejected by a majority of members. Subsequently, the issue of permanent sovereignty was considered briefly in the Second Committee at its 20th Session. Two joint resolutions, one by Ceylon and Equador, requested the Secretary-General to submit a report on various matters including formulating

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44 UN Doc. A/5746, 16 November 1964, p. 148.

standards and procedures for the investment of foreign capital in the developing countries to the ECOSOC and the General Assembly. The other draft resolution[45] proposed by Poland, Algeria, UAR and Tanzania provided for intensive efforts by the United Nations to secure permanent sovereignty of the developing nations over their natural wealth and resources. An amendment submitted by the US emphasized the right of the developing countries to conclude for the development of their natural resources with foreign investors. However, in view of the many problems, the Committee left further discussion of the matter to the 21st Session of the General Assembly.

In March-April 1966, some of the implications of the concept of permanent sovereignty were discussed by the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States.[46] At its New York meeting, Yugoslavia re-introduced the Czech proposal stating that the proposal was "in keeping with the principles adopted by the United Nations Conference on Trade and Development and by the Cairo Conference of Non-Aligned countries"[47] The resolution was supported by Algeria[48] but objected to by capital-exporting

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45 UN Doc. A/C.12/L.828, Add. I.

46 See S.K. Banerjee, "The Concept of Permanent Sovereignty Over Natural Resources: An Analysis," I.L.I.L., vol. 8, 1968, p. 538.

47 UN Doc. A/AC.125/SR.5, p. 7.

48 Ibid. 6, pp. 10-11.

countries. The Conference, however, could not reach any consensus on the draft.[49]

In October-November 1966, the Second Committee of the General Assembly resumed its consideration of permanent sovereignty over natural resources. The Committee had before it the Report of the Secretary-General and the relevant records of the ECOSOC. The UAR introduced a draft resolution[50] which was supported by many developing countries. The draft emphasized the inalienable rights of the states to dispose of their natural resources, with the concomitant right to utilize, develop, exploit and market them.[51] The Pakistani delegate emphasized that unless that was the case "the exercise of their (developing countries) permanent sovereignty over their natural resources could only be of purely academic interest."[52] The Indian delegate, while supporting the idea of appropriate compensation and the duty of the state to honour contractual obligations, nevertheless suggested short-term agreements in order to avoid the creation of vested permanent interest, and argued in favour of periodically reviewable provisions to adapt to the changing circumstances.

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49 UN Doc. A/AC.125/L.33.

50 The draft resolution was co-sponsored by Algeria, Burma, Iran, Iraq, Panama, Poland, Syria, Ukhraine Soviet Socialist Republic, Tanzania and Yugoslavia.

51 See UN Doc. A/C.2/SR.1050 and 1053.

52 Ibid., 1053 and 1057.

Finally, on the recommendation of the Second Committee, the General Assembly, on 25 November 1966, adopted Resolution 2158(XXI) by 100 votes to none with 6 abstentions, which reaffirmed "the inalienable right of all countries to exercise permanent sovereignty over their natural resources in the interest of their national development" and that "the exploitation of natural resources shall be in accordance with its national laws and regulations."

The 23rd Session of the General Assembly in 1968 had before it a report prepared by the Secretary-General on permanent sovereignty over natural resources[54] submitted in pursuance to General Assembly Resolution 2158(XXI). In paragraph 18 of the report, the Secretary-General stated that the report should be considered as a progress report and that it would be supplemented on the basis of questionaires to Governments. Following discussion on the report, the General Assembly adopted Resolution 2386(XXIII) which reaffirmed the guidelines contained in Resolution 2158(XXI) for the Secretary-General, urged him to undertake further elaboration of the report and requested him to include a comprehensive account of the implementation of the principles and recommendations set forth in General Assembly Resolution 2158(XXI), in particular paragraphs 5, 6 and 7 of section I.

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54 G.A.O.R., 23rd Session, Annexes, agenda item no. 39; UN Doc. A/7268.

In compliance with General Assembly Resolutions 2158(XXI) and 2386(XXIII), the Secretary-General prepared a comprehensive report[55] on the basis of up-to-date information collected from the responses of the member states to the questionaires, periodicals, United Nations official publications and other documents. The report was grouped into three parts dealing with the implementation of the principles of permanent sovereignty over natural resources and the practices in various states, and was submitted to the 25th Session of the General Assembly in 1970.

The General Assembly at its 1926th plenary meeting, passed Resolution 2692(XXV) on 21 December 1970 which reaffirmed the concept and further took into account the development plans of the developing countries, the share in their profit of foreign investments undertaken in their countries. Further the resolution invited the ECOSOC to instruct the Committee on Natural Resources to include in its programme a periodic report on the progress achieved by the developing countries in the exercise of permanent sovereignty over natural resources. It also requested the Secretary-General to continue his study and submit a further report to the General Assembly at its 27th Session through the ECOSOC.

Pursuant to paragraph 5 of the General Assembly Resolution 2692(XXV), the Committee on Natural Resources was formed and

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55 See UN Doc. A/8058, 14 September 1970.

had its Ist Session from 22 February to 10 March 1971,[56] on the item of permanent sovereignty over natural resources of developing countries.[57] Operative paragraphs 5, 6 and 7 of the General Assembly Resolution 2692(XXV) were highlighted for implementation by the Director of the Division of Public Finance and Financial Institution.

During the debates, many delegations strongly stressed the importance of permanent sovereignty over natural resources as the basic element of economic development and the need to control the inflow and outflow of capital. Many of them pointed out the need for United Nations assistance on various aspects of exploiting natural resources. The Committee decided to include the item on periodic reports in the provisional agenda for its 2nd Session. By Resolution 1572 C(L), the ECOSOC endorsed the measures and actions recommended by the Committee in paragraphs 131 to 134 of its report.[58]

The Committee on Natural Resources held its 2nd Session at Nairobi from 31 January to 11 February 1972. It had before it the progress report of the Secretary-General of the United Nations.[59] In the discussion, attention was drawn to (a) the

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56 UN Doc. ECOSOC Official Records, 50th Session, Supplement No. 6 (1971), p. 29.

57 See UN Doc. E/C.7/12 at its 17th and 18th meetings.

58 ECOSOC Official Records, 50th Session, 1971, Supplement No. 6, p. 31.

59 UN Doc. E/C.7/17, 23 November 1971.

role of transfering technology under favourable conditions to assist developing countries in the exploitation of natural resources; (b) the increasing tendency of nationalization of important sectors in the developing countries; (c) the legal aspects of the principle; and (d) the right of self-determination including the right to dispose freely of natural resources as they deemed fit.[60] The Committee suggested that the Secretary-General should undertake case studies and recommended to the ECOSOC that a study be made of the fiscal, commercial, financial, industrial, technological, social ecoromic and legal aspects of the principles of permanent sovereignty over natural resources of developing countries.

Second Committee and the General Assembly, 1972 and After

The Second Committee approved the text on 4 December 1972 by 28 votes to none with 24 abstentions and recommended its adoption to the General Assembly, which the Assembly did by 102 votes to none with 22 abstentions [Resolution 3016 (XXVII)]. The resolution reaffirmed the right of states to permanent sovereignty over their natural resources on land, sea-bed and sub-soil thereof within their national jurisdiction and in the superjacent waters. The Assembly further reaffirmed the declaration to that effect in the Principles of International Law

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60 ECOSOC Official Records, 52nd Session, Supplement No. 5 (1972), p. 14.

Concerning Friendly Relations and Co-operation Among States, which had further recognised that no state shall use or encourage the use of economic, political or any other type of measures to coerce another state to obtain its own interest in the exercise of its sovereign rights. The Secretary-General was requested to supplement his report which was prepared in response to the Assembly's request of 11 December 1970,[61] by taking into account the right of states and the factors impending them while exercising permanent sovereignty over their natural resources. The ECOSOC was also asked to accord high priority to the question of permanent sovereignty over natural resources by taking into account the Secretary-General's report to its session in 1973, and his report to the General Assembly's at its session of 1973.

In 1973, the General Assembly in its Resolution 3171(XXVIII), after taking note of previous resolutions and the Secretary-General's report,[62] strongly reaffirmed the inalienable rights of states to permanent sovereignty over their natural resources on land, in the sea-bed and in the sub-soil thereof within national jurisdiction. Requests were made to the ECOSOC and the Secretary-General for the consideration of the Secretariat report in its 56th session and to prepare a supplement to that report in the light of the discussions that took place at the 56th session of the Council and the General Assembly's 29th session, respectively.

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61 G.A. Res. 2692(XXV).

62 UN Doc. E/5305, 1 May 1973.

The ECOSOC, at its 54th session, considered agenda item no. 2 on permanent sovereignty over natural resources of developing countries. Earlier in May 1973, the Third Committee on Natural Resources had considered the same item in several meetings and had recommended draft resolutions for adoption by the Council.[63] At the 54th session, 1854 meeting, the ECOSOC's attention was drawn to agenda item no 2, Paragraph 9, of the report which contained a draft resolution, which was adopted by 20 to 2, with 4 abstentions.

The 4th session of the Committee on Natural Resources was held from 24 March to 4 April 1975[64] in which, while considering the Secretary-General's report,[65] many delegations referred to the relevant provisions in the declaration on the establishment of a new international economic order[66] and the Charter of Economic Rights and Duties of States.[67] The Committee particularly expressed concern that the controversial question of nationalization should be settled under domestic law. Some groups, while supporting the concept of permanent sovereignty over natural resources and the right to nationalization, argued that "action

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63 Ibid.

64 ECOSOC Official Records, 59th Session, Supplement No. 3 (1975), p. 28.

65 UN Doc. E/C.7/53: Secretary-General's Report, January 1975.

66 G.A. Res. 3201 (S-VI) and 3202 (S-VI).

67 G.A. Res. 3281 (XXIX).

should be in accordance with transnational or international law and compensation shall be paid prompt, adequate and effective."[68] At its 88th meeting, the Committee adopted a draft resolution submitted by the delegations of the Group 77.[69] However, many delegations expressed their disagreement on the draft resolution.[70] The draft resolution was recommended to the ECOSOC for its adoption.

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68 ECOSOC, n. 64, p. 28.

69 UN Doc. E/C.7/L.33.

70 The reservations were expressed by Austria, Canada, France, U.K., and U.S.A. Also see ECOSOC, n. 64, pp. 29-31.

Chapter II

IDENTIFICATION OF ISSUES

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In this chapter an attempt is made to identify the major issues concerning permanent sovereignty over natural resources; firstly, from the United Nations debates; secondly, from state practice; thirdly, from judicial decisions; and fourthly, from academic literature.

The concern with matters of economic and social welfare first developed internally when the people forced one government after another, with the impact of industrialization, to extend its concern from the traditional fields of defence, foreign affairs, police and justice to the supervision, regulation and active shaping of the economic and social conditions. This concern had a profound effect upon the structure of international relations and consequently on international law.

Though international economic development through trade and investment has proceeded remarkably for a long time during nineteenth and early twentieth centuries, it had been until recently, predominantly an affair of private economic initiative. However, in the words of Friedmann, "a new dimension" was added since World War II and "international economic development has predominantly become the concern of public international relations."[1] Many new states, poor and underprivileged, started

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1 Friedmann, W., The Changing Structure of International Law (New York, 1966), p. 11.

claiming an equitable share in the wealth and resources of the world on the basis of "sovereign equality." The controversy is now dominated by the conflict of interests arising between the capital-exporting countries trying to protect economic investment made by their nationals and the developing countries attempting to acquire control over their natural resources and economic development. The exercise of state sovereignty to nationalize or socialize resources, industries, companies or utilities to any extent it considered proper was not denied by international law, or by any government or responsible writer. The controversy pertains to the payment of compensation, to the question of protection, to the interest of foreign investor and to the standard of "national treatment."[2] The major issues mentioned in different heads can now be examined more elaborately.

I - UNITED NATIONS DEBATES

A scrutiny of the United Nations debates in respect of permanent sovereignty over natural resources reveals differences on many matters, but the primary issues can be formulated as follows:

(a) Nationalization, expropriation and requisition.

(b) Compensation.

(c) Observance of Agreements.

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2 See Ibid., pp. 180-1.

(d) Acquired rights.

(e) Technical Assistance and training of the host country nationals.

(f) Machinery for dispute-settlement.

(a) Nationalization, Expropriation and Requisition

At the very outset, when the "right of peoples freely to use and exploit natural wealth and resources" was considered for inclusion in the Human Rights Covenants, which was narrated in the preceding chapter, the issues of nationalization emerged as one of the most controversial topics.

Although, most of the countries, both developed and developing, agreed that every sovereign state had the right to control its natural wealth and resources in its jurisdiction, many developing countries hesitated to take a positive step either in the form of resolution or declaration in the United Nations fearing that their initiative might receive a disappointingly cool attention from the capital-exporting countries. For instance, in 1952 the delegate of Haiti stated that nationalization was essentially an internal measure, in no way requiring a guarantee by other nations. The adoption of a resolution on the subject, he emphasized, "would weaken an implicit right possessed by all sovereign states."[3] To Belgium delegate, it was not the appropriate time to discuss the subject.[4] But to the delegate of

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3 G.A.O.R., 7th Session, 411th plenary meeting, p. 484.

4 Ibid., pp. 497-8.

Costa Rica, it was quite appropriate, acceptable and "wholly consonant with international conduct and its constitutional precepts."[5] The Bolivian delegate emphasized in his speech at the General Assembly that the existing disparities and the economic and political pressure upon developing countries made the progress of the international community impossible and that this inevitably drove nationalization in order to punish the inhuman exploitation practiced by selfish interest.[6] The delegate of US made it clear that "every government has the constitutional right to nationalize and to denationalize not only its natural wealth, but also any property and any business within its jurisdiction," but still argued and voted against the resolution which ensure the right of sovereign state freely to develop its natural resources.[7]

In the Second Committee in 1962, the representative of Chile stated that the sovereign state had the right to go back on the agreements concluded in whatever manner, but the consequent taking of property should not be arbitrary and should be based on "legitimate grounds of public purpose, security and national interest."[8] The USSR opposed the Chilean text because it claimed that it did not confirm the "inalienable right of

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5 Ibid., p. 486.

6 Ibid., p. 493.

7 Ibid., p. 497.

8 UN Doc. A/C.2/SR.834, pp. 20-21.

peoples to nationalise and expropriate property in the general interest."[9] Where as the representative of Ghana pessimistically held that the controversial questions of expropriation and other forms of taking should not be brought before the United Nations at that stage, for any step on the subject might adversely affect the development of the developing countries;[10] the representative of UAR argued that "nationalization, expropriation and requisitioning should be in conformity with the rules and conditions prescribed by each country taking that step."[11] The representative of Federal Republic of Germany stated in the 6th Special Session, 1974 that his government recognized the right of permanent sovereignty over natural resources, including the right of nationalization because that right had been vested in the rules of international law.[12]

It is universally accepted that every state has the right to nationalise any property within its national domain. Hence, the problem of adopting operative paragraph 4 of Resolution 1803(XVII) was not that big. The first part of the operative paragraph in regard to nationalization and other forms of taking read:

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9 PSC. 3rd Session: A/AC.97/SR.32, pp. 7-8.

10 G.A.O.R., Second Committee, 842th meeting, 1962, p. 271.

11 G.A.O.R., 17th Session, 1193rd plenary meeting, p. 1134.

12 UN Doc. A/PV.2229, p. 51.

> 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.

It might be mentioned that the USSR's draft resolution, which was rejected as an extreme form, had confirmed the inalienable right of peoples and nations to the unobstructed execution of nationalization, expropriation and other essential measures aimed at protecting and strengthening their natural wealth and resources."[13] The rejection of this draft resolution showed that the General Assembly chose to avoid the views of both radicals and conservatives but had choosen the middle path at the right time.

(b) Compensation

The question of compensation arises when a state nationalizes or expropriates property of either nationals or aliens in the exercise of its sovereign right over its resources. Different views were expressed on the question of payment of compensation in the event of nationalization etc. in the United Nations debates. Neither the USSR draft resolution[14] nor the UAR amendment[15] at the 3rd session of PSC made any mention of compensation in the

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13 UN Doc. A/AC.97/L.2 and Rev. I.

14 UN Doc. A/AC.97/L.1 and Rev. I.

15 UN Doc. A/AC.97/L.4.

event of taking. In the debates, the UAR delegate upheld the right of a nation to nationalize "against payment of equitable compensation," and stated further that this conception was supported and laid down in General Assembly Resolution 626(VII) and Article 9(B) of the International Law Commission's draft codification of the principles of state responsibility.[16] However, soon after that, the joint amendment[17] of Afghanistan and UAR was submitted which read: "In such cases (nationalization), the owners shall be paid adequate compensation when and where appropriate...." That meant, the Afghanistan representative said, compensation need not be paid when it was inappropriate to do so.[18] The representative of Sweden noted that nationalization should be in conformity with the generally recognized principles of international law which prescribed the payment of compensation to the foreign owners.[19]

The representative of Chile did not mention any quantum of compensation but spoke of "extreme measures" in the act of taking and maintained that there was the need for "a sufficient sum of compensation" to comply with the rights of investors.[20]

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16 UN Doc. A/AC.97/SR.20, p. 5.

17 UN Doc. A/AC.97/L.7.

18 UN Doc. A/AC.97/SR.27, pp. 5-6.

19 Ibid., 22, p. 6; see also UAR's: Ibid., 30, p. 7.

20 Ibid., 22, p. 8.

On the other hand, the Afghan-UAR draft justified non-payment of compensation by the developing countries.[21] In the view of Philippines, compensation applied only to the private property siezed by the state; it was further stressed that no one should be allowed to help himself unjustly at the expense of others. It was also stated that countries have been driven to nationalization measures because of economic problems, and thus making compensation automatic might endanger their economy and the world as a whole.[22] The majority of members of the Commission held that a state is duty bound to pay compensation in the event of taking and to respect recognized principles of international law.[23] The Chilean draft resolution[24] was one of the most popular resolutions before the PSC at its 3rd session. It provided for "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." There was no discrimination whether the owner was a national of the country or alien.

The meaning of appropriate compensation generated a good deal of debate in various sessions of the United Nations. According to the US delegate, it meant prompt, adequate and effective.[25]

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21 See Ibid., 31, p. 4.

22 Ibid., 834, p. 11.

23 Ibid., 30, pp. 12-13.

24 UN Doc. A/AC.97/SR L./L.3/Rev. 1.

25 UN Doc. A/AC.97/SR.30, p. 7; A/C.2/SR.835, p. 5.

He submitted an amendment[26] to that effect in the Commission-sponsored text.[27] Ireland's delegation interpreted it as "full and fair" compensation.[28] The USSR submitted an amendment[29] which affirmed the principle that the quantum of compensation was to be decided in accordance with the national law of the country taking such measures in the exercise of its sovereignty. The delegate of Cong-Brazzaville supported the Chilean formula.[30] However, the Hungarian delegate said that it was incorrect to say that nationalization with payment of compensation was a generally acceptable principle, but that, it was a question of state sovereignty. It was stressed that "any decision relating to whether and how much compensation should be paid was essentially an internal affair of the state concerned, which therefore was the sole judge in the matter and could brooke no outside interference whatever in the exercise of its sovereignty."[31]

The Italian delegate argued that "no one shall be arbitrarily deprived of his property," because, every expropriating state was as a rule obliged to compensate the owner in accordance

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26 UN Doc. A/C.2/L.668.

27 UN Doc. A/C.2/SR.835, p. 5.

28 Ibid., 848, pp. 12-13.

29 UN Doc. A/C.2/L.670.

30 G.A.O.R., 17th Session, Second Committee, 841st meeting, 1962, p. 270.

31 Ibid., 846th meeting, p. 297.

with the rule of international law.[32] Ireland delegate argued that there should be "equitable treatment and provide for full and fair compensation in the event of nationalization, expropriation or requisition."[33] Compensation, the Soviet delegate stated, had often undermined the right of nationalization and made nationalization impossible.[34] The delegate of Greece, on the other hand, stated that while every sovereign state was entitled to expropriate property which belonged to its nationals or aliens under its jurisdiction, it must pay compensation suitably.[35]

(c) Observance of Agreements

A state has power to control and use its natural wealth and resources. It may thus enter into agreements with any other state or company for the development of the same. It has been generally recognized that the state, in exercising this power, is obliged to act in accordance with international law as well as international agreements. But one cannot dismiss the possibility of a state abusing its power. It is because of this and other reasons that the question of agreement was debated at length in the United Nations.

The US amendment[36] to Chile's revised draft resolution at

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32 Ibid., p. 299.

33 Ibid., 848th meeting, p. 314.

34 Ibid., pp. 314-16.

35 Ibid., 851st meeting, p. 333.

36 UN Doc. A/AC.97/L.9.

the P3C's 3rd session sparked off the debate. The amendment read as follows: "... agreements freely made in each case be faithfully observed and the profits derived must be shared in the proportions as may be so agreed, in each case, between the parties concerned, due care being taken to ensure that there is no impairment, for any reason, of the recipient state's sovereignty over its natural resources." In explanation, the US representative pointed out that paragraph 3 impliedly applied to agreements between states and private foreign investors.[37] It was stated further that not only the agreements in question in the Chilean draft but all the agreements freely made should be observed. The words "between the investors and the recipient state" were sought to be amended as "between the parties concerned" so that it could cover cases where the state was not the owner of the resources.[38] Chile contended that no state was to be restrained from proceeding with the exploitation, development and the use of its natural resources in accordance with its domestic and international law.[39]

Following the rejection of the US amendment in the P3C, another amendment to operative paragraph 9 was moved at the 17th session which read: "In the exercise of permanent sovereignty over their natural wealth and resources, peoples and nations shall faithfully observe agreements freely entered into...." The UK

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37 UN Doc. A/C.2/SR.860, p. 7.

38 UN Doc. A/AC.97/SR.30, pp. 9-10.

39 Ibid., 31, p. 6.

also submitted an amendment[40] to the effect that "agreements freely entered into shall be faithfully observed." Both the US and UK amendments were later replaced by a joint US-UK amendment.[41] A sub-amendment[42] by Lebanon-Syria was also tabled on the subject with limited application. The representatives of those countries pointed out that the agreements meant by the draft resolution were agreements between sovereign states. Hence, agreements concluded between a government and domestic or foreign company "were subject to national legislation and could sometimes be modified by the national legislation."[43] Tunisia made a similar suggestion in the Second Committee (858th meeting).

Many of the countries stressed in the debate that "agreements not freely entered into" were invalid. For instance, the representative of Nigeria pointed out that the US suggestions placed undue emphasis on "agreements freely entered into." He said, "the majority of such agreements were like agreements between a lion and a rabbit, and it is universally recognized that agreements concluded under duress should be regarded as invalid."[44] This view was supported by Peru and Algeria.[45] The resolution,

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40 UN Doc. A/C.2/L.668.

41 UN Doc. A/C.2/L.686/Rev.2 and Rev. 3 respectively.

42 UN Doc. A/C./L.697.

43 G.A.O.R., Second Committee, 956th meeting, November 1962, p. 11.

44 Ibid., 845th meeting, 20 November 1962, p. 3.

45 See Peru: Ibid., p. 13; Algeria: UN Doc. A/C.2/L.691 and Second Committee, 851st meeting, 23 November 1962, p. 6.

with particular reference to observance of agreements in operative paragraph 8, assumed immense significance.

(d) Respect for Acquired Rights

The United Nations debate on the Chilean resolution[46] in 1961 at the 3rd session of the PSC created conflicting views in regard to the issue of respect for acquired rights. Concern was expressed by the capital-exporting countries about the fate of old investments in former colonial territories after those countries attained independence. The newly independent states were equally concerned about the various obligations under agreements to which they had only succeeded.

The Netherlands expressed the view that operative paragraphs 1 and 2 of the Chilean draft aimed at providing sufficient protection to new investments based on authorizations which constituted a commitment freely entered into by the state; it also asserted that old investments should not be hampered by new laws but should be protected in accordance with the generally recognized principle of international law.[47] It proposed amendments to paragraphs 1 and 2 of the Chilean draft to that effect. Algeria made a differentiation between contracts freely entered into and those concluded under colonial rule of a third state.[48]

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46 UN Doc. A/AC.97/L.3, Rev. I.

47 UN Doc. A/AC.97/SR.28, p. 3.

48 UN Doc. A/C.2/SR.846, p. 7.

The Algerian position was that the standard of international law could not apply to the latter set of agreements.[49] This was supported by Yugoslavia,[50] Ceylon,[51] Syria,[52] and Tanganyika.[53] Hence, Algeria proposed the following paragraph to be inserted between the third and fourth preambular paragraphs of the draft resolution: "Considering that the obligations of international law can not 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."[54] This led to the US-UK revised amendment (Rev. 2) which sought to insert a paragraph between the preambular paragraphs 3 and 4, to the following effect:

> Considering that nothing in paragraph 4 of this resolution in anyway prejudices the position of any member state on any aspect of the question of the rights and obligations of the 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.

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49 Ibid., 851, pp. 6-8.

50 Ibid., 846, p. 6.

51 Ibid., 853, p. 7.

52 Ibid., 855, p. 13.

53 Ibid., 852, p. 8.

54 UN Doc. A/C.2/L.691.

Algeria consequently withdrew its amendment but stated that the amendment in question was aimed at safeguarding "the rights of the former colonies in respect of compensation" because it was left to the states' discretion to decide on the legitimacy of acquired rights and "on the granting an amount of compensation."[55] The Malayan representative commented on the US-UK revised text that it applied only to states formerly under colonial rule and not to those which had never been colonies, but had signed unequal agreements.[56]

(e) Technical Assistance and Training of the Host Country Nationals

The issue of technical assistance and training facilities extended to the host country's nationals was raised in the United Nations debate, as it was felt that the involvement of indigenous technical or capital elements in the exploitation of natural resources was requisite for the achievement of optimum results. Although, the United Nations had a separate item of technical assistance and training facilities outside the forum on permanent sovereignty over natural resources, a great deal of references were made in the debate.

On 1 January 1966, the Expanded Programme of Technical Assistance and the United Nations Special Fund were emerged into a new United Nations Development Programme (UNDP). The former

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55 UN Doc. A/C.2/SR.853, p. 8.

56 Ibid., 856, p. 6.

established in 1950, had provided a broad range of technical advisory services, equipment demonstration, training programmes and fellowships for advance studies abroad. The latter, established in 1959, had focussed on more intensive and more deliberately planned pre-investment activities, ranging from institution building to feasibility studies, by which developing countries could enhance their productive capabilities, make more effective use of their human and natural resources and improve the means for development investment of all possible resources.[57] Some representatives referred to the need for foreign capital in the debates of the Second Committee in 1962. We shall discuss briefly the debates in this respect.

The representative of Ethiopia pointed out that foreign investment agreements were completely different from ordinary ones: "the former created various rights and obligations for the parties concerned, where as the latter imposed no obligations on the recipient countries."[58] The delegate of Senegal suggested the replacement of the words "technical assistance" by the words "technical co-operation," since the term connoted something far more unilateral

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57 See, The Report of the Advisory Committee on the Application of Science and Technology to Development: Natural Resources of Developing Countries: Investigation, Development and Rational Utilization. UN Publication Sales No. E.70.II.B.2 (New York, 1970), p. 55.

58 G.A.O.R., 17th Session, Second Committee, 856th meeting, 30 November 1962, p. 374; Delgado of Senegal and Golsala of Chad supported him. 858th meeting, p. 387.

in nature.[59] The representative of the US expressed the view that it was necessary to provide assistance, such as modern technical skills and training, to the host country nationals especially those of the developing countries, but protecting the private investors, he argued, was equally important as it played a significant role in securing development funds.[60] It was the Indonesian representative who reminded that while in receipt of assistance from abroad in order to accelerate their economic development, the sovereignty of the recipient must be ensured.[61] According to the representative of Ceylon, it was in the interest of the world community that true economic independence be achieved with states having absolute control over their natural resources, and that capital or technical assistance and know-how be employed as a tool to promote economic co-operation among states.[62] He pleaded for mutual understanding between the developed and developing countries. The representative of Ghana pointed out in the Second Committee in 1966 that the developing countries were poor not because of lack of natural resources but because of unilateral actions. He argued that there should be maximum assistance by the United Nations and its various agencies in efforts to redress any imbalance in the

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59 Ibid., p. 375.

60 Ibid., 835th meeting, p. 233.

61 Ibid., 852nd meeting, p. 336.

62 Ibid., 853rd meeting, p. 350.

exploitation of the natural resources of the developing countries.[63]

(f) Dispute Settlement

The Second Committee's debates, preceding the General Assembly's declaration, successfully highlighted the issues arising in the events of nationalization. In paragraph 4 of the declaration, it was stated that "in any case, where the question of compensation gives rise to a controversy, national jurisdiction of the State taking such measure shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international ajudication."[64] The General Assembly in 1973 reaffirmed it in the following manner in its operative paragraph 3: "that the application of the principle of nationalization carried out by States as an expression of their sovereignty in order to safeguard their natural resources; implied that ... any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures."[65] The debate that took place in the United Nations in regard to settlement of disputes is analyzed below.

In 1962, Sweden made a proposal which called for the

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63 G.A.O.R., 21st Session, Second Committee, 1051st meeting, 1966, p. 181.

64 G.A. Res. 1803(XVII), 14 December 1962.

65 G.A.O.R., 28th Session, A/Res/3171(XXVIII), 17 December 1973; The resolution was adopted by 108 votes to 1 with 16 abstentions.

exhaustion of national jurisdiction on disputes arising out of the question of compensation. The draft proposal read: "In case the question of compensation gives rise to an international dispute, it would be appropriate to settle it by international adjudication or arbitration."[66] Afghanistan joined Sweden as co-sponsor with an amendment to the effect: "Provided the parties to the dispute agree to such a procedure."[67] This was supported by the Netherlands.[68] But Chile stressed the importance of domestic jurisdiction.[69] According to the USSR's representative, the question of international adjudication or arbitration arose and applied only to disputes of a legal nature and not to conflict of interests. He submitted an amendment[70] to the Afghanistan-Swedish text which read: "In any case where the question of compensation gives rise to controversy, national jurisdiction shall be resorted to, upon the agreement by the parties concerned, settlement of the dispute may be made through arbitration or international adjudication."

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66 UN Doc. A/AC.97/L.5/Rev.I, 16 May 1961. An earlier text (A/AC.97/L.5) issued on the same date reads: "Any international dispute arising in connection with the question of compensation shall be settled by international adjudication."

67 UN Doc. A/AC.97/Rev.I, 18 May 1961.

68 UN Doc. A/AC.97/SR.29, p. 5.

69 Ibid., 27, p. 9.

70 UN Doc. A/AC.97/L.10.

However, Mauritania argued that the concept of exhaustion of national jurisdiction prejudged the case and cast doubt on the sovereignty of the State; the question of exhaustion of remedies could only be determined by the national jurisdiction.[71] Pakistan suggested that "settlement of disputes may be through arbitration...." Argentina argued that the word "however" weakened the provision. Freedom of state action to enter into prior agreements to resort to international adjudication or arbitration was upheld by Australia,[72] New Zealand[73] and Cyprus,[74] and was also supported by Jordan, Morocco and Thailand with their draft amendment:[75] "However, if no settlement is reached thereunder and if there is agreement to that effect...." It was argued by the Lebanon representative that the agreements between sovereign States alone were covered by the text and that such agreements could not be meant to include agreements between governments and companies, domestic or foreign. Because the agreements of the latter type were subject to national jurisdiction and could be changed or modified from time to time by national legislation. He further argued that if the affairs of domestic

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71 UN Doc. A/PV.1933, p. 31.

72 UN Doc. A/C.2/SR.859, p. 10.

73 Ibid., 867, p. 4.

74 Ibid., pp. 6-7.

75 UN Doc. A/C.2/L.699.

companies were regulated by domestic legislation. It was difficult to see why foreign companies should be given the privilege of recourse to "international legislation."[76] The US delegate stressed that the position of international investors would be placed in jeopardy and there would be no foreign investment if there was no protection from international legislation.[77] In other words, "it would be illogical to exclude recourse to international adjudication after national jurisdiction has been exhausted." The delegate of Ghana conveyed his country's view that the question of settlement of disputes was best left to bilateral negotiations;[78] where as France delegate expressed the doubt that the draft resolution might permit "a state to refuse arbitration or international adjudication when national jurisdiction was exhausted."[79]

The United Nations debates with special reference to dispute-settlement, when scrutinized show wide-spread recognition of the validity of domestic law to the subject. This has clearly upheld in the Declaration of 1962[80] and specifically reiterated in the Charter of Economic Rights and Duties of States.[81]

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76 UN Doc. A/C.2/SR.858, p. 4.

77 G.A.O.R., 17th Session, Second Committee, 858th meeting, p. 373.

78 Ibid., 842nd meeting, p. 271.

79 Ibid., p. 272.

80 G.A. Res. 1803(XVII), Operative Paragraph 4.

81 Article 2(2)(C) of the Charter of Economic Rights and Duties of States. [G.A. Res. 3281(XXIX)].

II - STATE PRACTICE

With the emancipation from political subjection of a fast growing number of states, the questions of their economic independence has gained great importance. Every country adopts specific policies in regard to foreign participation in the exploitation of natural resources. The United Nations Secretariat prepared a study describing state practice on the issues involved in the exercise of permanent sovereignty over natural resources. Discussion on state practice based primarily on that study, could be subsumed under the following heads:

(a) Legislative Provisions with respect to acquired rights.

(b) Nationalization, expropriation and requisition.

(c) Compensation.

(d) Agreements.

(e) Machinery for dispute settlement.

(f) Training of nationals.

(a) Legislative Provisions With Respect to Acquired Rights

States often recognize rights acquired during different stages of foreign operation. In the case of petroleum, states often permit preliminary exploration work on a non-exclusive basis. The Canadian provinces of Alberta, British Columbia and Saskatchewan, and Italy have provisions by which the explorer is entitled to acquire exploitation rights under what is

called "checker board" which means that the state retains blocks within the valuable area explored. The exclusive rights of exploration and exploitation are sometimes linked-up in a single concession.[82] In the case of mineral resources, other than petroleum, exclusive rights are often granted subject to regulation of government authorities.[83]

The Mining Law of Australia[84] distinguishes between categories of minerals in regards to exploration and exploitation. The federal Government reserves for itself specific minerals in terms of both ownership and exploitation. This include rock salt and allied saline minerals.[85] Under the Bituminous Substances Law, the state has the exclusive right to search for and exploit all forms of bituminous substances. The proprietory rights over other minerals vest with the owner of the surface land, but can be explored and exploited with the permission and under the supervision of the state mining authorities only. Minerals called "free minerals" can be explored and exploited with the permission of the mining authorities. There is no necessity to operate under state supervision. In Belgium, minerals can be exploited only under a concession granted, but special authorization is

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82 E.g. Iran, Libya and Venezuela.

83 France and UAR.

84 BGBL, No. 7354.

85 BGILG, No. 375/1938.

needed for bituminous rock, petroleum and combustible gasses.[86] Article 7 of the Bulgarian Constitution reserves all mineral and other natural resources of forests and waters as national property. Article 10 provides that private monopoly agreements and associations such as cartels and trust are prohibited. In Canada, mines and minerals including petroleum and natural gas are reserved to the Crown. The China (Taiwan) Mining Law of 26 May 1930 as amended on 30 July 1959 provides that all mineral deposits are owned by the state and shall be prospected until a mining right is acquired (Art. I); but the prospecting right may be cancelled (Art. 24). Under the Mines (Regulation and Development) Act,[87] India provides that no person may undertake any prospecting or mining operations in any area except under a licence of prospecting and mining lease. The state authority has discretion to ignore priority of application, but must secure the approval of the Central Government (Section II). Under an amendment adopted on 21 May 1976, Article 297 of the Constitution of India lays down that "all lands, minerals and other things of value underlying oceans within the territorial waters or the Continental Shelf of India shall vest in the Union and be held for purposes of the Union." The Mining Law of Iran declares the

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86 Secretariat Study on Permanent Sovereignty Over Natural Resources and Report on the Commission on Permanent Sovereignty Over Natural Resources. UN Publication Sales No. 62, vol. 6, p. 8.

87 Act No. 67 of 1957.

state as the sole owner of resources. The agreements granting exploitations rights must be approved by the legislature (Art. 2).

(b) Nationalization, Expropriation and Requisition

Almost all constitutions contain provisions on nationalization and other forms of taking. El Savaldor, Chile, Costa Rica, Greece, Haiti and Turkey specifically mention that the reasons of expropriation shall be specified at the time of taking. The Constitution of US provides that it takes place in accordance with legally established procedures. Article 17 of Bolivia provides that expropriation can not take place "when property does not serve a social purpose." Section 29 of the Thailand Constitution authorizes exploration "if necessary ... for the exploitation of national resources or other State's interest." Ghana, in Article 13(i) of its constitution states that "no person should be deprived of his property save where the public interest so requires and the law so provides." Article 147 of Brazil's constitution prescribes expropriation to "promote the fair distribution of property with equal opportunities for all." Article XIII, Section 4, of Philippines law states that "it may authorize, upon payment of just compensation, the expropriation of lands to be sub-divided into small lots and conveyed at cost to individuals." The USSR's constitution (Art. 6) provides that the land, its mineral wealth, waters, forests, mills factories, mines, rail and air transport, banks, communication ... are state property.

In 1948, the US recognized the right of the Rumanian Government to nationalize foreign property and stated that "the US Government has consistently recognized the right of a sovereign power to expropriate property rights subject to its jurisdiction and belonging to American nationals."[88] The British Government too did not oppose the practice of nationalization provided it paid compensation to the holder.[89] In accordance with Act No. 851, of 6 July 1960, the Executive of USA is empowered to nationalize "through forced expropriation of the property or enterprises belonging to individuals or legal entities of US nationality" in the interest of defence and public utility. The Government of Cuba, on 6 August 1960, nationalized ESSO, Standard Oil, S.A. (Cuba division), the Texas Company (West Indies) and the Sinclair Cuba Oil Company.[90]

In 1951, Iran enacted an act nationalizing the Anglo-Iranian Company.[91] In 1956, Egypt nationalized the Universal Company[92] of the Suez Maritime Canal in which a majority of shares were held by foreign governments and individuals. The law provided

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88 Department of Bulletin, vol. 9, 1948, p. 403.

89 See, Muna Ndu, "The Nationalization of the Zambian Copper Industry," Zambian Law Journal, 1974, p. 62.

90 Secretary-General's Report, Doc. E/5170, 7 June 1972, p. 7.

91 The enactment of 1 May 1951 was approved by the Senate and the Majlis on 30 April 1951.

92 By Law No. 285 of 26 July 1966.

that all assets, rights and obligations of the Company were to be transferred to the nation and all the organizations and committees operating under its managements were dissolved (Art. 1). The assets and rights of the nationalized Company in Egypt and abroad were frozen (Art. 3).

(c) Compensation

Provisions regarding payment of compensation are also included in most of the constitutions. While in the case of expropriation, typically, compensation is payable in advance of the act of taking, in the case of requisitioning, compensation need not be paid in advance. In certain cases, time-limits are laid down. For instance, Costa Rica and Honduras provide payment of compensation for requisitioning not later than two years after the termination of the state of emergency. Algeria has the time-limit of a month: it is ten years in Turkey, and twenty years in El Salvador. In the case of India and Indonesia, all details concerning the determination of compensation and methods of payment are to be fixed by law. Under the US constitution, compensation has to be "just."[93] Argentina's constitution defines the amount of compensation as based on "original cost minus amortization of any sums in excess of a reasonable profit, which is to be considered as recovery of the capital invested" (Art. 10). Article 30 of Colombia's constitution provides a majority vote of

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93 Fifth amendment of the US constitution.

both houses of legislature to determine cases when no compensation shall be paid. El Salvador, by Article 138 enables the government to expropriate without compensation of entities created from public funds. The agreement concluded between the Algerian government and the government of France on 29 July 1965 provided certain conditions under which the French companies were to be operated. However, the French companies were nationalized on 24 February 1971 and the Algerian government fixed compensation at £(US)100 million on the basis of earlier global experience.

In many cases terms concerning compensation such as "adequate," "equitable," "full" or "just" are used. In Tanzania, only an approved percentage of the assessed value of the property shall be paid as compensation. Countries like Afghanistan, Argentina, Bolivia, Brazil, Cambodia, the Central African Republic, Chile, Congo, El Salvador, Gabon, Greece, Haiti, Honduras, Lebanon, Madagascar, Panama, Peru, Rwanda, Senegal, Togo and Uruguay paid compensation before the property was taken.[94] Compensation shall be "timely,"[95] paid "immediately,"[96] "promptly,"[97]

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94 Secretary-General's Report on the Exercise of Permanent Sovereignty Over Natural Resources and the Use of Foreign Capital and Technology for their Exploitation. Doc. A/8058, 14 September 1970, p. 29.

95 Somalia.

96 Turkey.

97 Kenya, Malawi, Seirra Leone, Uganda and Zambia.

and be "equal to the net value of the patrimonial elements recuperated by the State"[98] and "fixed by the Court,"[99] according to the Greek law. Most of the Latin American States do not grant compensation to the foreigners which can not be claimed by nationals of the state concerned.[100]

(d) Agreements

In this interdependent world, numerous agreements are being concluded in inter-state economic transactions without which the world community would be at a loss. The agreements are often grounded on national rules and regulations set forth for the same purpose.

The agreements concluded since 1966 for the exploration and exploitation of natural gas in Indonesia with foreign oil companies have been "production-sharing agreements" and were based on the following principles:[101]

(i) All the oil and natural gas produced remained the property of the state;

(ii) The management of all the operations by the contractor was in the hands of the state enterprise;

(iii) The contractor should be of utmost service to the state enterprise;

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98 Algeria.

99 Greece.

100 For conditions and determinations of compensation, see Secretary-General's Report, n. 94, p. 30.

101 Secretary-General's Report, n. 94, p. 5.

(iv) All costs of operations incurred in the course of production were borne by the foreign contractor;

(v) The contractor was obliged to invest a minimum amount of capital in exploratory activities during a certain period fixed in the agreement; and

(vi) Import equipment purchased for the programme of work by the contractor became the property of the state enterprise the moment it landed at the port of Indonesia.

In 1971, the Nigeria National Oil Corporation (NNOC) successfully acquired a 35 per cent interest in the French SAFRAD's four on-shore mining licences and the Obagi field. Now it is planning to acquire 51 per cent interest and 50 per cent shareholding in the venture.[102]

In Egypt, all activities concerning petroleum were previously under the control of international oil companies. In the beginning of the 1960's, a joint company was formed on the basis of 50-50 participation in the exploitation and exploration.[103] In December 1968, six oil companies signed agreements for crude oil exploration with Ghana. The agreements were valid for 30 years and renewable for another 10 years on certain conditions.[104] A decree was also issued in the same year empowering the government to take over all minerals produced in Ghana.

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102 Ibid., pp. 6-7.

103 Ibid.

104 E.g. the companies were to pay £700 a block plus £25 annual rent a square mile in the first year, that would be raised to £50 a square mile in the third year.

On 3 February 1968, the Government-owned Iraqi National Oil Company (INOC) concluded an agreement with the French Entreprise de Recherches et d'Activites petrolieres (ERAP). It provided that 50 per cent of the concession would be returned after three years and a further 25 per cent after 5 years. All areas except the producing areas were to be relinquished at the end of 6 years. Also, 50 per cent discovered recoverable reserves were to be set aside as national reserves.[105] A new agreement was signed on 31 December 1961 extending the oil agreement to 17 years. In April 1968, an agreement was concluded between the Libyan General Petroleum Corporation (LIPETCO) and two French firms, Aquitaine and Anxiran by which a joint venture was established, with Aquitaine as the operating company. The period of exploration was set for 10 years. During that period, the company was to relinquish 25 per cent of the area in three stages of five, three and two years.[106] The Saudi Arabian Government's General Petroleum and Mineral Organization (PETROMIN) concluded with AGIP-Saudi Arabia, owned by the Ente Nazional Indrocarburi (ENI) of Italy, which granted the Italian concern exclusive prospecting rights in the area of 80,000 square kilometres. The agreement granted 30 years concession with a provision for renewal every 10 years.[107] In March 1964, the Government of Egypt on the

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105 Secretary-General's Report, n. 90, p. 24.

106 Ibid., pp. 25-26.

107 Ibid.

one hand, and the Egyptian General Petroleum Company (EGPC) and the Pan-American UAR Company (A United States Corporation) on the other, concluded a concession contract. Under this contract the EGPC and Pan-American were each granted a 50 per cent undivided interest in an exclusive concession for the exploration, development and production of petroleum in a granted area of the Gulf of Suez. The contract was valid for 30 years extendable for another 15 years. The development works were to be carried out by an operating company, the Gulf of Suez Petroleum Company (GUPCO) which was established on the basis of a 50-50 sharing by EGPC and Pan American. However, the Government of Egypt reserved the right to purchase up to 20 per cent of the crude oil produced at a price 10 per cent lower than the price obtained by EGPC or Pan American.[108]

(e) Machinery for Dispute Settlement

Whatever may be the position, in the past, present-day state practice shows that any dispute over persons, enterprises and resources arising within the territory of a sovereign state is subject to its courts. Foreign enterprises may and do secure proper treatment according to agreement in the state where they operate. However, it can be pointed out that some states make it quite clear through the constitutional procedures that they did not ascribe to the policy of granting exemption to foreign

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108 Ibid., p. 27.

enterprises from the ordinary courts.[109] Some states agree to settle disputes involving foreign enterprises through other methods agreeable to both parties.[110]

Apart from the detailed provisions in the constitutions or in laws relating to this settlement of dispute over natural resources, there are also laws which allow special provisions in the concession agreements for dispute settlement. For instance, the foreign investment law of Greece provides that dispute "shall be settled by arbitration as prescribed in the instrument of approval, it being understood that a foreign national, who may be a natural person or a legal entity in official capacity or a person of recognized reputation in legal matters, may also be selected as a third arbitrator."[111] Article 40 of the amended convention between the Government of Iraq and the Turkish Petroleum Company provides for the appointment of a referee by the president of the International Court of Justice if the two parties or their arbitrator fail to agree on the dispute. Similar provisions are found in Article 33 of the Offshore Concession Agreement between the Sheikh of Kuwait and the Arabian Oil Company Limited, a subsidiary of Japan Petroleum

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109 E.g. Iran, Turkey, Honduras, Bolivia, Cuba, Colombia, El Salvador, Guatemala, Haiti, Nicaraguaa and Peru.

110 E.g. The Dominican Republic, Chile, Greece, Bolivia, Iran and France.

111 L.D. No. 2687, 31 October 1953, Art. 12, from Secretary-General's Study, n. 86, p. 30.

Trading Company Limited, and between Saudi Arabia and the Japan Petroleum Trading Company Limited. Special negotiations have been prescribed in respect of joint ventures in natural resources development between private foreign investors and governments in certain countries like Burma, India, Pakistan, and Thailand. Ethiopia, Ghana, Indonesia, and Sudan supported the idea in their policy statements.

Unless otherwise provided, therefore, disputes arising out of operations of a foreign enterprise are usually submitted to the courts of the host country. In 1961, the Investment Code of Dehomey provided the nomination of an arbitrator by agreement between the parties or by a highly qualified authority. The Somalia Foreign Investment Law of 1960 provided that "disputes are to be settled by discussion between the parties concerned."[112] In some cases arbitrators were drawn by lot from an officially approved list.

(f) Training of Nationals

Fully aware of the importance of effective participation in the development of natural resources, a number of developing countries attach great importance to the training of their nationals at all levels by the natural resources enterprises and have adopted laws and regulations ensuring the same.

In Ghana, the six agreements concluded in December 1968

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112 Secretary-General's Report, n. 94, p. 31.

with foreign oil companies provided each concessionaire to contribute £60,000 for the establishment and maintenance of a petrochemical department at a Ghanian University. The agreement concluded between the Libyian General Petroleum Corporation and two French firms in 1968 provided for the training of Libyians in French institutions. The firms also agreed to establish a petroleum institute and a petro-chemical industry with experts.[113] On 21 December 1967, the agreement concluded between the Government owned PETROMIN and AGIP-Saudi Arabia which is owned by ENI provided for specialized theoretical and practical training. The firms were also to provide various facilities needed for the educational and other services to the welfare of the people of Saudi Arabia.[114]

The concession agreements concluded in September 1965 between the EGPC and Phillips Petroleum and the International Egyptian Oil Company (IEOC), and between the EGPC and Pan American UAR Oil Company provided for training of the nationals both in technical and management fields. Certain countries like Afghanistan, India, Indonesia, Iran, Liberia, Pakistan, Philippines, Saudi Arabia, Sudan and Turkey have also made provisions for such training in their respective laws.[115]

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113 Secretary-General's Report, n. 90, p. 33.

114 Ibid.

115 Ibid., pp. 33-34.

III - JUDICIAL DECISIONS

Some issues identified in the preceding sections from the United Nations debates and state practice find expression in judicial decisions. The principle of permanent sovereignty over natural resources as such has not been challenged in any court of law, nor has a state's right to nationalize ever questioned as such. It is only when a state, in the exercise of its admitted right, nationalized property in violation of another's rights in an arbitrary or discriminatory way that the question of law relating to the international protection has been raised. International law is assumed to give such protection in the form of compensation. But the issue of compensation itself raises a number of questions: for instance, the quantum of compensation, the conditions of compensation, the machinery to determine compensation, etc. Judicial decisions on these issues faithfully reflect the ambiguity prevalent in the United Nations organs and in state practice.

(a) On Nationalization and Compensation

A wide-spread recognition obtains in judicial and arbitral decisions that nationalization, and expropriation needs to be motivated by reasons of"public utility" or "benefit." In the German Interests in Polish Upper Silesia (Merit) case, the Permanent Court of International Justice (PCIJ) took the position that "expropriation for reasons of public utility, ..." was lawful.[116]

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116 PCIJ, 1962, Series A, No. 7, p. 22

In another case (Sabbatino) the US Court of Appeals, Second Circuit, held that expropriation perpetrated as a retaliatory measure was in violation of International Law. The Court found a Cuban decree expropriating a certain US sugar industry so motivated, was in violation of international law.[117] The Amsterdam District Court found that the Indonesian nationalization of the Dutch-owned Tobacco company was "...a discriminatory measure directed against the Netherlands enterprises in Indonesia in order to lend support to the claims on west New Guinea rejected by the Netherlands, and therefore constitutes a violation of international law as manifest as it is serious...."[118]

Though the International Court of Justice (ICJ) did not pronounce on the merits of the case, the Civil Court of Rome in Anglo-Iranian Oil Company Limited V. Societa S.U.P.O.R. Company stated that "discriminatory laws enacted out of hatred, against aliens or against persons of any particular race or category or against persons belonging to specified social or political groups, can not be applied in Italy because they run counter to the internationally accepted principle of equality of individuals before law."[119] In the same case, the Court observed that the

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117 Banco Nacional de Cuba V. Sabbatino, 307 F 2d (2d Cir, 1962), pp. 864-8.

118 Domke, "Indonesian Nationalization Measures before Foreign Courts," A.J.I.L., vol. 54, 1960, pp. 305 and 308.

119 Anglo-Iranian Oil Co. Ltd. V. Societa S.U.P.O.R. Co., Lauterpacht, I.L.R., 1955, p. 40.

oil nationalization law was intended to protect the interest of foreign nationals as such and that the economic content which appears from the text of the Iranian law of 26 November 1953 showed that the true purpose of the nationalization was to be safeguarded nationals property and was not aimed at persecuting the aliens.[120]

In the Anglo-Iranian Oil Company Ltd. V. Saffrate and others (Rose Mary), the Aden Supreme Court stated categorically that "expropriation without compensation is contrary to international law."[121] In Anglo-Iranian Oil Company V. Idemitsu Kosan Kabushiki Kaisha, a court of Tokyo held that "when an industrial nationalization law of a country was enforced without discrimination, against nationals of the enacting State and aliens alike, such law would not infringe international law even if it did not provide for compensation unless there existed a special international treaty."[122]

(b) Exhaustion of Local Remedies

On the question of exhaustion of local remedies, the World Court stated in the Ambatielos case that "the State against which an international action is brought for injuries suffered

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120 Ibid.

121 Rose Mary case, Lauterpacht, I.L.R., 1953, p. 328.

122 Anglo-Iranian Oil Company V. Idemitsu Kosan Kabushiki Kaisha, Lauterpacht, I.L.R., 1953, p. 307.

by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State."[123]

In the Interhandel case, the ICJ held that "the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the state where the violation occured should have an opportunity to redress it by its own domestic legal system."[124]

(c) On Quantum of Compensation

On the issue of quantum of compensation, the Court of Venice (Italy) in Anglo-Iranian Oil Company Ltd. V. S.U.P.O.R. Company observed: "It is not required either by our law or by the generally accepted provisions of international law that the quantum of the compensation must appear actually equivalent to the value of the property forming the subject of the expropriation.

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123 Ambtielos Claim (Greece V. U.K.), Lauterpacht, I.L.R., 1956, pp. 3 and 334.

124 Interhandel case, Judgement of 21 March 1959, ICJ Reports, 1959, p. 27.

That is to say, it is enough that there is some compensation for the expropriation to be lawful. Dissentient opinions among writers who endeavour to maintain the necessity of payment of compensation equivalent to the value of the property, have not found much support so that only in cases where the compensation is purely fictitious, illusory and non-existent can the expropriation be deemed to be unlawful."[125] In the Curfu Channel case, the World Court stated that "it has jurisdiction to assess the amount of the compensation."[126]

The courts also do not ignore the fact that compensation must be equitable. It was observed in the Interhandel case by ICJ that "the use of the expression 'equitable' which must connote taking into account the circumstances of each individual case and therefore, taking into consideration also the public interest (which has been given priority by law), rules out the possibility of any intention to make the expropriation dependent on the payment of compensation equivalent to the value of the property."[127]

There arose a dispute between Kennecott Copper Company and the Chilean government on the Chilean constitution amendment[128]

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125 Anglo-Iranian Oil Co. Ltd. V. Societa S.U.P.O.R. Co., Lauterpacht, n. 119, p. 36.

126 Curfu Channel Case, ICJ Reports, 1949, p. 26.

127 Interhandel Case, n. 124, p. 37.

128 See, International Legal Materials, 1971, p. 1068.

which provided that all or part of the "excess profits" of nationalized companies and their predecessors made between 5 May 1955 and 31 December 1971 should be deducted from payable compensation. Under this provision, excess profits obtained during that period by Kennecott in the commercialization of the Teniente Copper mine were estimated to be £410 million, exceeding by £310 million the value of Kennecott's investments between 1955 and 1971. Therefore, the Company was declared as not entitled to any compensation. Kennecott was a US corporation which asked a Paris Court, the Tribunal de Grande Instance, to order that payment be blocked on a 1,250 tons shipment of the Chilean State Copper (Codelco) bound for France. Kennecott claimed property rights in the cargo and obtained the proceeds of the transaction from the Court which were £1.9 million. Without investigating the substance of the dispute, the Court granted a provisional injunction on 30 October 1972.[129] What displeased the Company most was not the nationalization but the method of determining compensation.

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129 Kennecott Case, see, Emiko Atimomo, "Natural Resources and the United Nations," Journal of World Trade Law, vol. 7, 1973, pp. 376-7.

N.B. At the 1972 Session of the UNCTAD Development Board, Chile, aggrieved of her subjection to a Paris Court, described the French Courts' provisional order as a flagrant violation of both international law and the principles of non-intervention and self-determination of peoples set forth in the United Nations Charter. A serious debate took place on the subject followed by a declaration: "that expropriation and subsequent nationalization of natural

(Contd. on next page)

As far as the concessionary agreements are concerned, the Court of Japan said in Anglo-Iranian Oil Company Ltd. V. Idemitsu Kosan Kabushiki Kaisha, that it must be regarded "as a private agreement entered into between the Government of a certain country and a foreign corporation in connection with the right to extract oil" and that "such rights and interests may be properly made subject to the municipal law."[130]

IV - ACADEMIC OPINIONS

A majority of the leading writers consider that a state has sovereignty over its natural resources. To quote Hall, "a full proprietary right on the part of a state is not only a reasonable deduction of law, but a necessary protection of the proprietary rights of the members of a state sovereignty ... a right of property consequently, in order to possess international value, must be asserted by the state as a right belonging to itself."[131] However, there appears to be a divergence of opinion among academicians as to the exercise of this right. The major issues identified in the academic literature in respect of

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resources are acts of undeniable sovereignty within the exclusive competence and subject to the sole decision of the State in which resources are situated, in conformity with its national constitution, laws and regulations." Doc. TD/B/SR.330. The declaration appears in TD/B/421, Annex III.

130 Lauterpacht, n. 122, pp. 308 and 312.

131 Hall, quoted in Wortley, B.A., Expropriation in Public International Law (Cambridge, 1959), p. 73.

permanent sovereignty over natural resources are discussed below under the following heads:

(a) Nationalisation.

(b) Compensation.

(c) Respect for concessionary agreements.

(d) The exhaustion of local remedies.

(a) Nationalisation

It is a universally accepted norm under international law that every sovereign State has the right to nationalise or expropriate foreign or locally-owned property. Francesco Francioni defined nationalization as "the compulsory transfer to the state by virtue of legislative or executive act of a general or impersonal character of private property or activities, for the purpose of their direct management and control by public bodies, or for their assignment to private individuals or entities, in view of the fulfilment of a public interest as determined by the nationalizing state."[132] A similar definition was given by the Institute de Droit International, in 1952, which read: "Nationalization is the transfer to the State by legislative act and in the public interest of property or private rights of a designated character with a view to their exploitation or control by the state as to their direction to a new objective by the

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132 Francesco Francioni, "Compensation for nationalization of foreign property: the borderland between law and equity," I.C.L.Q., vol. 24, 1975, p. 257.

state."[133] But Paul de La Pradelle put it differently when he stated that the "aim of nationalization is to abolish or limit the field of private property for the purpose of economic and social reform.... If its aim is other than this finality of domestic reform, the nationalization, while formally valid, can be considered as irregular and bereft of international effects."[134] According to Max Sorensen, "expropriation must not discriminate between foreigners in general or between certain categories of foreigners in particular."[135] In the opinion of Herz H. John, "international practice does not make any distinction between ordinary expropriation for public utility, and an act deemed to be arbitrary adoption."[136] However, nationalisation or taking of property is, in principle, for public utility. This has been supported by various General Assembly resolutions of the United Nations.[137]

(b) Compensation

Compensation has been the subject of controversy among writers. There is no unanimity on the extent of the compensation payable in the event of taking property. Traditionally, requisition

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133 Institute de Droit International Annuaire, 1952, p. 283.

134 Ibid., 1967, p. 666.

135 Max Sorensen, Principles de Droit International Public, 1960, p. 178.

136 Herz H. John, "Expropriation of foreign property," A.J.I.L., vol. 35, 1941, p. 248.

137 See, G.A. Res. 1803(XVII), Appendix I.

is conditioned on restoration at the earliest possible moment.[138] A Soviet commentator expressed the view that "international law does not have a uniform practice and generally recognized rule obligating State to pay compensation to owners for nationalised property ... justice demands not compensation to the foreign monopolies but retribution by the colonialists for the harm they caused to the colonies and their peoples by prolonged colonial rule."[139] This view is however, considered as part of the socialist ideology. The Committee on International Law of the Association of the Bar of the city of New York, on the other hand, issued the statement that "international law requires a state to provide compensation for the taking of alien-owned property. And there is no sound basis in the treaties, practice of states or judicial and arbitral decisions for a limitation requiring in addition a retaliatory purpose and a discrimination against nationals of a particular country." It indicated that absence of compensation was an international wrong.[140] A statement made by Radha Binod Pal to the International Law Commission pointed out

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138 D. P.O'Connel International Law, vol. 2 (London, 1970), p. 775.

139 Sapozhnikov, "Sovereignty over Natural Resources," Soviet Yearbook of International Law, 1964-65, p. 76. (English translation of the substance at pp. 93, 95); see also P. J. O'keefe, "the UN and permanent sovereignty over natural resources," J.W.T.L., vol. 8, no. 3, 1974, p. 263.

140 Committee on International Law "The Compensation requirement in the taking of alien property," 22 Record of the Association of the Bar of the Society of New York, 1967, pp. 195-204.

that every state is entitled to fix its own terms of compensation and employ its own agencies for that purpose under international law.[141]

The criteria to be adopted in fixing standards of compensation is more controversial. The manner in which the value of the property is determined is based on norms such as: "prompt, adequate and effective," "partial," "reasonable" or "equitable."[142] According to General Assembly declaration of 14 December 1962, "appropriate compensation" shall be paid to the owner.

M. K. Nawaz in his comments on the declaration stated: "Negatively, it (appropriate) means that it is not the same thing as "prompt, adequate, and effective" compensation; positively, it means that the payment of compensation ought to be reasonable in the circumstances of the case. No hard and fast rule can be laid down on the quantum of compensation."[143] Commenting on the same subject, Mughraby said, "at first glance, it seems that the new term is flexible enough to be construed according to the wishes of the party interested. But the term 'appropriate,' if it may be construed to mean 'adequate and effective,' is far from suggesting 'prompt'."[144]

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141 Yearbook of International Law Commission, vol. I, 1957, p. 158.

142 See, P. J. O'Keefe, n. 139, p. 268.

143 M. K. Nawaz, "Nationalization of Foreign Companies - Libyan Decree of 1 September 1973," I.J.I.L., vol. 14, 1974, p. 75.

144 M. A. Mughraby, Permanent Sovereignty over Oil Resources (Beirut, 1966), p. 29.

The concept of compensation was analyzed by Amerasinghe in the following manner:

(i) The total amount to be paid must be fixed promptly, i.e. within a "reasonable period";

(ii) Interest must be paid as it falls due for delay in payment from the date of nationalization;

(iii) Payment must be made at least over a "reasonable" period to be determined by the circumstances of the case but not exceeding 10 to 12 years;

(iv) Payment must, at least, be spread proportionately over this period;

(v) Satisfactory guarantees must be given that future payments will in fact be made so that the full sum may be raised immediately on the security of future payments. 145

According to UK's Memorial submitted in the Anglo-Iranian Oil Company case, compensation must be "effective" to enable the recipient state make use of it. It further contended that:

> He must, for instance, be able, if he wishes, to use it to set up a new enterprise to replace the one that has been expropriated or to use it for such other purposes as he wishes. Monetary compensation which is in blocked currency is not effective because, where the person to be compensated is a foreigner, he is not in a position to use it or to obtain the benefit of it. The compensation therefore must be freely transferable from the country paying it and, so far as that country's restrictions are concerned, convertible into other currencies. 146

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145 Amerasinghe, State responsibility for Injuries to Aliens, 1967, p. 165; quoted from P. J. O'Keefe, n. 139, p. 269.

146 Memorial of the UK, ICJ, Anglo-Iranian Oil Co. case (UK v. Iran), 1952, Pleadings, p. 106.

Garcia-Amador also supported the view that the minimum requirement for compensation was that it be "just or adequate, equitable, fair or reasonable."[147]

Many writers subscribe to the view that the principles such as unjust enrichment, abuse of rights, good faith, and other relevant factors should be weighed in the process of determining the amount of compensation. However, none deny that there was no generally recognized standard of compensation for the valuation of expropriated property in international law.[148]

Accepting that the State has broad discretionary powers in connection with nationalization, the question of excess profit still would be inseparable from the question of compensation. Francisco Orrego Vicuna was somewhat critical when he said that "if the measure could be justified but if as a result of its application, the standard of just, adequate, equitable, or reasonable compensation is not met, it could be argued that municipal law exceeded the limits of the flexibility contemplated by international law."[149]

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147 Garcia Amador, Fourth Report on International Responsibility, Yearbook of International Law, Common Wealth, vol. 2, 1959, pp. 19-20.

148 Weigel and Weston, Valuation upon the Deprivation of foreign Enterprise: A policy-oriented Approach to the problem of compensation under international law in the valuation of nationalized property in International Law. R. Lillich, ed. 1973, pp. 3-39.

149 Francisco Orrego Vicuna, "Some International Law problems posed by the nationalization of the Copper Industry by Chile," A.J.I.L., vol. 67, 1973, p. 725.

(c) Concessionary Agreements

One form of state contracts is called economic concessions. Concessions are usually limited in duration. However, the contract may be also terminated at any time by the concessionaire if the obligations are not fulfilled. The United Nations General Assembly declaration on permanent sovereignty over natural resources[150] provides in paragraph 8 that "foreign investment agreements freely entered by or between sovereign States shall be observed in good faith." One of the problems faced by scholars relates to unilateral abrogation of concessionary agreements. Some writers believe that they are international agreements.[151] According to O'Connell, concessionary agreements are contracts which give rise to something in the nature of jus ad rem which was protected by international law.[152] Carlston said, "unilateral termination - if not contemplated by an agreement - is an act Jura imperii to which international law but not municipal law applies."[153] The above views emphasize that concessionary agreements are governed by international

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150 G.A. Res. 1803(XVII) of 14 December 1962.

151 E.g. see Kenneth S. Carlston, "Concession agreements and Nationalization," A.J.I.L., vol. 22, 1958, pp. 207-9.

152 D. P. O'Connel, "A Critique of the Iranian Oil Litigation," I.C.L.Q., vol. 4, 1955, pp. 268-70. For an exposition on acquired rights and concessions, see, D. P. O'Connel, "Economic concession in the law of succession," British Yearbook of International Law, vol. 27, 1950, p. 93.

153 Kenneth S. Carlston, n. 151, p. 209.

law. However, this is not acceptable to the majority of the nations which consider them to be no more than ordinary contracts subject to municipal law.

(d) Exhaustion of Local Remedies in Relation to Concessionary Agreements

When concessionary agreements give rise to disputes, they are usually referred to arbitration. However, it is generally recognized that a state is responsible to foreign nations for the injuries suffered at its hands only when the local remedies have been exhausted. In other words, international claims may be heard by international tribunals only after local remedies have been sufficiently exhausted. The operative paragraph 4 of the General Assembly declaration affirms the rule that "national jurisdiction of the State ... shall be exhausted."

According to O'Connel, "if an avenue of redress is available under that law, either through appeal to the highest courts or through executive instrumentalities, the injury is not complete until the avenue has been explored in vain."[154] Only the effectiveness of local remedies, said Mughraby, makes it possible to present an international claim after the exhaustion of local procedural channels. And in order to have the effectiveness of local remedies "an international standard of justice" should be construed. But what contributes to the "international

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154 D. P. O'Connel, International Law, vol. 2, 1950, p. 1138.

standard of equity and reasonableness" is left to the discretion of different tribunals called upon to decide specific cases.[155]

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155 M. A. Mughraby, n. 144, p. 35.

Chapter III

CONFLICT-RESOLUTION

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CONFLICT-RESOLUTION

In the preceding chapters an effort was made to present various view points on some issues concerning permanent sovereignty over natural resources. The differences in opinion were presented by reference to the debates in the United Nations organs, state practices and doctrinal opinions. This chapter will analyze various suggestions made in the course of such debates as compromise solutions to important issues.

SUGGESTED SOLUTIONS

(a) In the United Nations Debates

Members of United Nations were confronted by several conflicting views while debating the concept of permanent sovereignty over natural resources in several sessions of the General Assembly. The eagerness to find compromises needs to be appreciated.

While every member accepted in principle the concept of permanent sovereignty over natural resources, they differed in formulating criteria on which this principle was to be based. In the opinion of the socialist countries, the state was entitled to chart its own course in the exercise of this principle and that no one could question its supreme control over its territory. In tune with that position, they pressed their interpretation to the effect that since nationalization was an inherent

right of sovereignty there was no question of compensation to be paid by the nationalizing countries but that it was to be paid by the enterprises which had benefited from extracting the resources of the developing countries. On the other hand, some of the developed countries pressed for a limited view of state sovereignty. They argued in favour of the restraints of the traditional norms of international law in the exercise of permanent sovereignty over natural resources. In the midst of this, some solutions were suggested which made it possible for the United Nations to adopt many resolutions on the subject.

One tactic adopted by some delegates to promote compromise was laying great emphasis on international co-operation while affirming economic independence. As the effective exploration and exploitation of natural resources depended very heavily on technology available in the developed world, and since the developing nations were not sufficiently equipped themselves with technical skills, international co-operation was inevitable and was so recognized in the United Nations debates. In this connection, it is well to recall the suggestion of the delegate of Senegal to use the words "techrical co-operation" instead of "technical assistance."[1] The insistence of the US representative, however, on the necessity of providing technical assistance was

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1 See, G.A.O.R., Second Committee, 856th meeting, 30 November 1962, p. 375.

evidently aimed at securing protection for the private investors.[2] Ghana's suggestion that "maximum assistance" be provided to the United Nations was a diversionary move.[3] Nonetheless, the word "technical assistance" emerged as an accepted vocabulary to both capital-exporting and capital-importing countries. Hence, the General Assembly Resolution 1515(XV) of 15 December 1960 and Resolution 1803(XVII) of 14 December 1962 urged technical assistance and training to the developing countries.

The controversies were certainly not over terminology alone. They touched the core of the concept of permanent sovereignty over natural resources. One may consider the following as an example. Among the prominent proposals, viz. the one of the USSR urging an unfettered right to nationalization; the one by Chile envisaging nationalization for public utility, security and for national interest in accordance with both domestic and international law; and that of the UAR which sought nationalization to strengthen sovereignty over natural resources in accordance with the principles laid down by the Charter of the United Nations, the compromise solution was built around the Chilean draft.[4] In 1962, the General Assembly had proposed that "nationalization, expropriation or requisitioning shall be based on grounds or

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2 See, Ibid., 835th meeting, p. 233.

3 Ibid., 853rd meeting, p. 350.

4 See, PSC 3rd Session, A/AC.97/L.3 Rev.1; A/AC.97/L.2 and Rev. 1; ECOSOC, 23rd Session, E/L.914; G.A. (XVII), A/C.2/L.670.

reasons of public utility, security or national interest."[5] However, there was a subtle shift in emphasis. The General Assembly in 1973, and the ECOSOC[6] in 1975 called upon states to carry out nationalization as an expression of their sovereignty over natural resources. At the same time it was explicitly recognized that such action could not be arbitrary and discriminatory. Chile's original proposal had this balancing formula.

Many suggestions on payment of compensation were also put forward in the United Nations debates. They ranged from one extreme to the other. For instance, countries like Afghanistan, UAR and the Philippines brooked no compensation whatsoever on the ground that it may endanger the economy of the world as a whole.[7] "Prompt, adequate and effective,"[8] "full and fair"[9] compensation were also suggested, but were either withdrawn or rejected. The final solution favoured payment of "appropriate compensation," as suggested by the Chilean delegation, and was embodied in the 1962 declaration in operative paragraph 4. The Charter of Economic Rights and Duties of States, adopted in 1974 reaffirmed the same position. Though the meaning of "appropriate

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5 G.A. Res. 3171(XXVIII), para. 3.

6 ECOSOC, 1975th plenary meeting of 25 July 1975 E/Res./1965(LIX), para. 2.

7 UN Doc. A/AC.97/SR.31, p. 4; A/C.2/SR.834, p. 11

8 U.S.A.: UN Doc. A/AC.97/SR.30, p. 5.

9 Ireland: UN Doc. A/C.2/SR.843, pp. 12-13.

compensation" was not defined, it was assumed to be synonymous with reasonableness and was understood to be determined by both national and international laws. However, it may be interested to recall that in 1972 the UNCTAD had taken the position that each sovereign state had the power to determine the amount of compensation including the procedure for arriving at that figure.[10] The General Assembly Resolution 1317(XXVIII) adopted in 1973 and its reaffirmation by the ECoSOC in 1975[11] also entitled each state to determine the amount of compensation and the mode of payment.

As stated in the preceding chapter, states in the exercise of permanent sovereignty over natural resources, had to resolve the question of dispute-settlement over nationalization. The compromise on this was provided in operative paragraph 4 of the 1962 declaration,[12] to the effect that "in any case, where the question of compensation gives rise to controversy, national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of disputes should be made through arbitration or international adjudication." Similarly, in 1972,

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10 Res. 88(XII), UNCTAD, Doc. TD/B/421.

11 ECoSOC, Doc. E/Res.1956(LIX).

12 UN Doc. A/AC.97/SR.30, p. 5; G.A. Res. 1803(XVII), 14 December 1962.

the UNCTAD put more emphasis on the domestic laws of states.[13] However, the General Assembly and the ECOSOC in their respective resolutions in 1973 and 1975 recognized that the only solution to the principle of nationalization by states as an expression of the permanent sovereignty over natural resources was that any dispute which arose therefrom should be settled in accordance with the national legislation of the concerned state.[14]

The issue of observance of agreements was debated at length in the United Nations. Several suggestions were sought to be included in the General Assembly resolution. The US delegate stated that agreements freely concluded should be faithfully observed.[15] The agreements, according to him, covered those between states, states and international organizations, and states and private investors.[16] The UK supported the US suggestion.[17] Lebanon and Syria sought to limit the agreements to those concluded between sovereign states exclusively.[18] A similar suggestion was made by Tunisia.[19] Nigeria, Peru and Algeria opposed

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13 See, UNCTAD, Doc. TD/B/421-Res. 88(XII) of 19 October 1973, para. 2.

14 G.A. Res. 3171(XXVIII) of 17 December 1973, para. 3 and ECOSOC, Doc. E/Res/1956(LIX) of 25 July 1975, Para. 2.

15 UN Doc. A/AC.97/L.9.

16 UN Doc. A/C.2/SR.850, p. 7.

17 UN Doc. A/C.2/L.668.

18 UN Doc. A/C.2/L.697.

19 G.A.O.R., Second Committee, 858th meeting, 1962.

the insertion of the words "agreements freely entered into" because, according to them, a majority of agreements were concluded under duress.[20] The compromise solution was reached which formed operative paragraph 8 of the 14 December 1962 declaration.[21] According to that paragraph: Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of the peoples and nations over their natural wealth and resources in accordance with the United Nations Charter and the principles set forth in this resolution."

(b) Doctrinal Opinion

With the development of the concept of permanent sovereignty over natural resources in the United Nations, the subject became equally important for publicists as well as lawyers. Some issues identified in the preceding chapter have been extensively analyzed in their writings. Various solutions were offered, which are analyzed below.

Publicists seem to be unanimous in their opinion that the right of a sovereign state to nationalize property can not be questioned. Hans W. Baade stated categorically that all sovereign

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20 Nigeria: Second Committee, 845th meeting, 20 November 1962, p. 11; Peru: Ibid., p. 13; Algeria: Ibid., 861st meeting, p. 6 and UN Doc. A/C.2/691.

21 See, Appendix I.

states were competent enough to nationalize any property unless something contrary clearly appeared from treaties entered into by them or under customary international law.[22] Paul de La Pradlle claimed that the aim of nationalization was to abolish private property in order to reform society.[23] However, it was universally recognized that a reasonable, just and lawful nationalization was only that which was in favour of public interest, utility, security and without discrimination.[24] Judicial decisions support this view.[25]

There appears to be no unanimity among writers on the payment of compensation, however. According to O'Connel, requisition was traditionally subject to restoration at the earliest possible time.[26] Socialist ideology conceived of and advocated compensation to be paid by the foreign enterprisers for the resources exploited and not by the nationalizing state.[27] However,

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22 Richart S. Miller and Roland J. Stanger, Essays on Expropriation, (Ohio State University Press, ed., 1967), p. 18.

23 Institute de Droit International, Annuaire, 1967, p. 666.

24 See, Francesco Frencioni, "Compensation for nationalisation of foreign property: the borderland," I.C.L.Q., vol. 24, 1975, pp. 255-83; Institute de Droit International, Annuaire, 1952, p. 283.

25 German Interests in Polish Upper Silesia (Merit Case), PCIJ, 1926, p. 22; Anglo-Iranian Oil Co. Ltd. V. Societa S.U.P.O.R. Co., 1955 (Civil Court of Rome).

26 D. P. O'Connel, International Law, vol. 2 (London, 1970), p. 775.

27 See, Sapozhnikov, "Sovereignty over Natural Resources," Soviet Yearbook of International Law, 1964-65, p. 76. (English translation of the substance at pp. 93, 95).

as far as the issue of compensation is concerned, absence of compensation and discriminatory compensation in the event of expropriation was universally considered wrong.[28]

Determining international standards for compensation also provoked several suggestions from writers. Nawaz called for reasonable payment of compensation in the circumstances of each case.[29] Mughraby suggested that it could be decided according to the wishes of the party concerned on an "adequate and effective" basis, but that it need not be "prompt."[30] Amerasinghe appeared to be in favour of fixing compensation within a "reasonable period" but not exceeding ten to twelve years.[31] Garcia-Amador subscribed to the "just or adequate, equitable, fair or reasonable" standard of compensation,[32] which was also supported by Francisco Orrego Vicuna.[33] However, in spite of several

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28 See, Committee on International Law, "Compensation requirement in taking of alien property," Record of the Association of the Bar of the Society of New York, vol. 22, 1967, pp. 195-204.

29 See, M. K. Nawaz, "Nationalization of Foreign Companies: Libyan Decree of 1 September 1973," I.J.I.L., vol. 14, 1974, p. 75; Amerasinghe, State Responsibility for Injuries to Aliens, 1967, p. 165.

30 M. A. Mughraby, Permanent Sovereignty over Oil Resources (Beirut, 1966), p. 29.

31 Amerasinghe, n. 29, p. 269.

32 Garcia-Amador, "Fourth Report of International Responsibility," Yearbook of International Law, Commonwealth, vol. 2, 1959, pp. 19-20.

33 Francisco Orrego Vicuna, "Some International Law Problems Posed by the Nationalization of the Copper Industry by Chile," A.J.I.L., vol. 67, 1973, p. 728.

suggested solutions from various scholars, as far as the fixing of standard of compensation is concerned, a majority considered that the best solution was to leave the matter to the states and their agencies to determine such standards on the basis of reasonableness in the circumstances of each case.[34]

Generally, there are two views on concessionary agreements. One view considered it as subject to international law,[35] but another view held that it was a matter subject to municipal law. However, doctrinal opinion did recognize that there was an international law for the settlement of disputes. Taking into consideration the fact of state jurisdiction, it was accepted that recourse can be had to courts on the international level by invoking international law, and to local courts under municipal law. It was, however, agreed that exhaustion of local remedies was a well-established rule of customary international law. Hence, the solution suggested by writers was that the domestic system of law applied first before resort may be made to international courts.[36]

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34 See, Yearbook of the International Law Commission, vol. 1, 1957, p. 158; M. K. Nawaz, n. 29; Amerasinghe, n. 29, p. 165.

35 See, Kenneth S. Carlston, "Concession Agreements and Nationalization," A.J.I.L., vol. 22, 1958, pp. 207-9; D. P. O'Connel, "A Critique of the Iranian Oil Litigation," I.C.L.Q., vol. 4, 1955, pp. 268-70.

36 D. P. O'Connel, n. 26, p. 1138; M. A. Mughraby, n. 30, p. 35; Ambatielos Claim (Greece V. U.K.), 1956, Lauterpacht, I.L.R., pp. 3, 334; Interhandel Case, ICJ Reports, 1959, p. 27.

Chapter IV

CONCLUSION

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In chapter I, an attempt was made to trace the evolution of the concept of permanent sovereignty over natural resources through the various United Nations forums and organs. Chapters II and III presented major issues and the suggested solutions, respectively, in the United Nations organs and in doctrinal opinion. An attempt is made in this chapter to recapitulate the salient features of the discussion in the preceding chapters.

The doctrine of sovereignty is firmly established in international law. However, it is generally recognized that traditional international law failed to cope efficiently with the changing circumstances of the way of life and behaviour of contemporary world societies. But in the mid-twentieth century, the danger of inequality that exists among members of the family of nations was so acute that the deprived and young states moved the World Organization (UN) to assert that every state had the sole authority over its natural resources. In 1952, this drive culminated in the form of the principle of "economic self- determination."[1] Since then the concept of permanent sovereignty over natural resources evolved slowly but surely through various United Nations organs and forums.

The question of the legal effect of the resolutions on permanent sovereignty over natural resources is very important

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1 See G.A. Res. 545(VI) of 5 February 1952.

and needs to be examined. In fact, the same question was raised especially over General Assembly Resolution 626(VII) of 21 December 1952.[2] The resolution was posed as an expression of existing law and no claim was made to establish new law. Syria, however, asserted that the resolution might create "a new legal basis" for the developed and developing countries. France and Japan held that it had its basis in international law and that it was derived from the principle of self-determination, which itself was not yet established and accepted internationally.

Although, in the ordinary sense, the General Assembly is not a legislature,[3] it is generally recognized to possess law-making powers in some fields; for example, in the internal operation of the United Nations (i.e., in respect of budgetary matters and in regard to its punitary powers like suspension/expulsion). Nevertheless, the legal quality of its resolutions has generated quite a controversy. There are two schools of thought. One of them denies that the General Assembly resolutions create binding norms of international law and regards them merely as possessing a moral weight. The other school of thought

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2 See, Gees, "Permanent Sovereignty over Natural Resources: Analytical Review of the United Nations Declaration and its Genesis," I.C.L.Q., vol. 13, 1964, p. 407.

3 A proposal by the Philippine delegate at the United Nations Conference suggesting that the Assembly be given legislative power was defeated overwhelmingly. Doc. 507, 11/2/22, 9 U.N.C.C. 10. Docs. 70 (1945), cited from Samuel A. Bleicher, "The Legal Significance of Re-citation of General Assembly Resolutions," A.J.I.L., vol. 63, 1969, p. 445.

considers that the resolutions have a legal significance in that they lead to the development of customary international law.[4]

If one were to accept the views of the latter school of thought, the various General Assembly resolutions on permanent sovereignty over natural resources could be regarded as an instance of the "progressive development of international law." Continual re-citation and reaffirmation by the General Assembly of the principle of "economic self-determination" since 1952 till today, with overwhelming majorities, can be considered as creating binding obligations upon states and as establishing a customary rule of international law.[5]

Nationalization is widely recognized as a right by most international lawyers. However, various resolutions adopted by the General Assembly on permanent sovereignty over natural resources in special reference to nationalization did not put a stop to discussion. They did lay down certain criteria for nationalization. It seems logical that nationalization be based on public interest. But the question may be asked whose public interest, and determined by whom? Since international law recognizes that all sovereign states are free to choose their own

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4 For the argument put forward in favour and against the two schools of thought, see, Asamoah O.Y, The Legal Significance of the Declarations of the General Assembly of the United Nations (The Hague, 1966), pp. 2-15.

5 See, Brownlie, Principles of Public International Law (London, 1973), p. 14.

economic and social systems, a state taking such a measure must necessarily have a right to exclusive determination. The declaration of 14 December 1962,[6] can be considered as an attempt to diminish rather than to increase international law restrictions upon states' right to nationalize. Moreover, the General Assembly resolution of 17 December 1973[7] reaffirmed the "principle of nationalization carried out by States as an expression of their sovereignty in order to safeguard their natural resources," but was silent in regards to public interest and security. However, since states were free to decide with whom to trade and with whom to stop dealing, they might be supposed to have the right to discriminate, too. According to Asamoah, "it is conceivable for takings to be applied only to the nationals of a particular country or countries in the 'national interest.' But it is conceivable that an international tribunal will lightly claim the competence to determine what the national interest of a country requires." He further emphasized that the declaration of 14 December 1962 does not touch upon the unresolved conflict as to whether measures applied to nationals and non-nationals alike can be discriminatory.[8] The General Assembly did not define nationalization or expropriation. While there seems to be no difficulty in identifying cases of requisition, it is

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6 See, Appendix I, Para. 4.

7 G.A. Res. 3171(XXVIII), see, Appendix II.

8 Asamoah, n. 4, p. 94.

difficult to say whether or not "creeping expropriation," such as excessive or arbitrary taxation and manipulation of exchange control regulations, can be considered as expropriation. It also appears that nationalization in breach of a treaty and involving arbitrary discrimination is deemed unlawful expropriation, even if compensation is paid. Again, as Amerasinghe pointed out, "although the weight of authority appears to be in favour of the view that a public purpose is necessary, the principle can not be said to have been established beyond doubt even in regard to expropriation."[9] Some commentators considered "public purpose" as merely creating confusion.[10] However, it may be concluded that international law does not have a definition of public purpose but leaves it to the expropriating state to judge the usefulness and welfare of the people.[11]

Until 1962, two main international legal doctrines were pressed into service in the debate on the question of compensation. The one called the "Calvo" doctrine, advocated by a group of Latin American nations, affirmed that compensation was to be wholly determined by municipal law. The other doctrine, asserted by the industrial powers, posited it as an obligation under international law.

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9 Amerasinghe, State Responsibility for Injuries to Aliens, 1967, p. 137.

10 Brownlie, n. 5, p. 528.

11 See, Herz H. John, "Expropriation of Foreign Property," A.J.I.L., vol. 35, 1941, p. 253.

The problem is how does one, and who will, determine the appropriateness of compensation. The answer given by the 14 December 1962 declaration was that appropriate compensation should be paid "in accordance with the rules in force in the State ... and in accordance with international law." If the two systems differ and give rise to a controversy, national jurisdiction will have to be exhausted according to the General Assembly Resolution 1803(XVII). But asserting permanent sovereignty over natural wealth and resources as an inalienable right, the state commits no wrong in taking private property. In other words, the action of a state must be presumed to be in conformity with international law, even if a country expropriates without compensation when the nationalization measure is in conformity with the national law; for, cannot one argue that national laws on the subject are an offshoot of the grand norm of international law, viz. the principle of sovereignty of states.

The term "appropriate" is confusing. According to Mughraby, the term was flexible enough and could be used according to the wishes of the interested party in one way or the other. Hence, he concluded that the nationalized property may be compensated for in instalments over a reasonable period of time.[12] M. K. Nawaz agrees with Mughraby but rejects all his three

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12 Mughraby, Permanent Sovereignty over Oil Resources (Beirut, 1966), pp. 29-30.

(prompt, adequate and effective) criteria.[13] In the present submission, the declaration of 14 December 1962 neither meant by appropriate compensation "prompt, adequate and effective," as the same term was rejected in the Committee sponsored text,[14] nor the other extreme position, viz. the Calvo doctrine of nationalization without compensation, as the same term was also rejected in the Committee.[15] Thus it may mean that the party affected by the nationalization must be paid reasonably within a reasonable period of time. However, the fact that the General Assembly Resolution 3171(XXVIII) of 17 December 1973 and the Committee's draft resolution,[16] provided that every state could determine the amount of compensation and the mode of payment, indicates that the question of compensation has been left to national discretion to be decided in accordance with the socio-economic policies of nations and not according to international law.

But a big difference could be seen in the period of fourteen years when the first and the last resolutions were adopted[17]

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13 M. K. Nawaz, "Nationalization of Foreign Companies - Libyan Decree of 1 September 1973," A.J.I.L., vol. 1974, p. 75.

14 UN Doc. A/C.2/SR.835, p. 5; U.S.A. draft amendment, A/C.2/L.668.

15 Soviet draft amendment, Doc. A/C.2/L.670.

16 UN Doc. E/C.7/L.33.

17 The Resolutions are given in Appendix I and II respectively.

in regard to dispute-settlement. The 14 December 1962 resolution had categorically stated that national jurisdiction had to be exhausted first before any dispute was referred to arbitration or international adjudication. The resolution of 17 December 1973, however, only mentioned that such disputes be settled in accordance with the national legislation of each state carrying out such measures. Does that mean national remedies are the final resort? Does that also mean that every dispute of this nature has no relevance whatsoever to international law? As far as the first question is concerned, the local remedies rule is well-established in international law and hence the provision makes no innovation. But as far as the second question is concerned, although the resolution is silent on the question of international law, international jurisdiction can hardly be foreclosed.

Going back to the 1962 declaration, it is difficult to understand why it referred to national jurisdiction. It needs to be pointed out that jurisdiction and remedies are not synonymous. Asamoah stated that national jurisdiction probably implied all forms of remedies including administrative and judicial exhaustion.[18] Operative paragraph 8 of that resolution under which "agreements freely entered into by or between sovereign States shall be observed in good faith" is questionable. Though pacta sunt servanda is a well-established principle in international

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18 See, Asamoah, n. 4, p. 98.

law, it is difficult to put the same into practice. Agreements are hardly entered into freely. Past practice shows that agreements have been made under pressure or duress, and in that case, almost every agreement made under colonial domination could be considered void with reference to this declaration.

Whatever may be the case, the evolution of the permanent sovereignty over natural resources is considered significant in the sense that the "inalienable rights" of every state is guaranteed and recognized under this concept. One can agree with Mughraby that the United Nations declaration of 14 December 1962 was a "manifesto of economic nationalization" in the more legalistic form of permanent economic sovereignty.[19] It is obvious that the developing group of states was seeking to re-establish economic equality of states by re-asserting economic sovereignty of its members in the face of the powerful international corporations and international private investors in control of its sources of wealth under old and inequitable agreements. The developed countries of the world have more than moral duty to help the developing world to achieve economic equality, for such a duty is cast upon them by Article I, paragraphs 2 and 3 and Article 55 of the United Nations Charter. As a strategy to uplift the downtrodden sections of the world community, the concept of permanent sovereignty over natural resources, has played, and will continue to play, a significant role in the history of the United Nations.

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19 See, Mughraby, n. 12, p. 39.

APPENDIX I

APPENDIX I

General Assembly Resolution No. 1803(XVII)

Adopted by the United Nations General Assembly on 14 December 1962 concerning permanent sovereignty over natural resources:

The General Assembly,

Recalling its resolutions 523(VI) of 12 January 1952 and 626(VII) of 21 December 1952,

Bearing in mind its resolution 1314(XIII) of 12 December 1958, by which it 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 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 the economic development of developing countries,

Bearing in mind resolution 1515(XV) of 15 December 1960, in which it 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 the 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 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,

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

Considering that it is desirable to promote international co-operation for the economic development of developing countries, and that economic and financial agreements between the developed and the the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination,

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 developing countries and securing their economic independence,

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

Desiring that there should be 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 that of the developing countries,

I

Declares that:

1. 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 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 the 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 and 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, the national jurisdiction of the State taking such measures shall be exhausted. However, upon the agreement by foreign States and other parties concerned, settlement of the dispute should be made 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 developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.

7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles with the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.

8. Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; 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 Charter and the principles set forth in the present resolution.

II

Welcomes the decision of the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly.

III

Requests the Secretary-General to continue the study of the various aspects of permanent sovereignty over natural resources, taking into account the desire of Member States to ensure the protection of their sovereignty rights while encouraging international co-operation in the field of economic independent, and to report to the Economic and Social Council and to the General Assembly, if possible at its eighteenth session.

119th Plenary meeting
14 December 1962

APPENDIX II

Appendix II

General Assembly Resolution No. 3171(XXVIII)

Adopted by the United Nations General Assembly on 17 December 1973 concerning permanent sovereignty over natural resources:

The General Assembly,

Reiterating that the inalienable right of each State to the full exercise of national sovereignty over its natural resources has been repeatedly recognized by the international community in numerous resolutions of various organs of the United Nations,

Reiterating also that an intrinsic condition of the exercise of the sovereignty of every State is that it be exercised fully and effectively over all its natural resources of the State, whether found on land or in the sea,

Reaffirming the inviolable principle that every country has the right to adopt the economic and social system which it deems most favourable to its development,

Recalling its resolutions 1803(XVII) of 14 December 1962, 2158(XXI) of 25 November 1966, 2386(XXIII) of 19 November 1968, 2625(XXV) of 24 October 1970, 2629(XXV) of 11 December 1970 and 3016(XXVII) of 18 December 1972 and Security Council resolution 330(1973) of 21 March 1973, which relate to permanent sovereignty over natural resources,

~~Recalling its resolutions 1803(XVII) of 14 December 1962,~~

Recalling, in particular, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which proclaims that no State may use or encourage the use of economics, political or any other type of measures to coerce another State in order to obtain from it the subordination of the rights and to secure from it advantages of any kind,

Considering that the full exercise by each State of sovereignty over its natural resources is an essential condition of achieving the objectives and targets of the Second United Nations Development Decade, and that this exercise requires that action by States aimed at achieving a better utilization and use of those resources must cover all stages, from exploration to marketing,

Taking note of the section VII of the Economic Declaration adopted by the Fourth Conference of Heads of State or Government of Non-Aligned Countries held at Algiers from 5 to 9 September 1973,

Taking note also of the Secretary-General on permanent sovereignty over natural resources (E/5425 and Corr. 1, E/5425/Add.1),

1. Strongly reaffirms the inalienable rights of States to permanent sovereignty over all their natural resources, on land within their international boundaries, as well as those in the sea-bed, in the sub-soil thereof, within their national jurisdiction and in the superjacent waters;

2. 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;

3. Affirms that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is 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;

4. Deplores acts of States which use force, armed aggression, economic coercion or any other illegal or improper means in resolving disputes concerning the exercise of the sovereign rights mentioned in paragraphs 1 to 3 above;

5. Re-emphasizes that actions, measures or legislative regulations by States aimed at coercing, directly or indirectly, other States or peoples engaged in the reorganization 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 of the United Nations and

of the Declaration contained in General Assembly resolution 2626(XXV) and contradict the targets, objectives and policy measures of the International Development Strategy for the Second United Nations Development Decade, and that to persist therein could constitute a threat to international peace and security;

6. Emphasizes the duty of all States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the territorial integrity of any State and the exercise of its national jurisdiction;

7. Recognizes that as stressed in Economic and Social Council resolution 1737(LIV) of 4 May 1973, one of the most effective ways in which the developing countries can protect their natural resources is to establish, promote or strengthen machinery for co-operation among them which has its main purpose to concert pricing policies, to improve conditions to access to markets, to co-ordinate production policies and, thus, to guarantee the full exercise of sovereignty by developing countries over their natural resources;

8. Requests the Economic and Social Council, at its fifty-sixth session, to consider the report of the Secretary-General mentioned in the last preambular paragraph above and further requests the Secretary-General to prepare a supplement to that report, in the light of the discussions that will take place at the fifty-sixth session of the Council and of any other

relevant developments, and to submit that supplementary report to the General Assembly at its twenty-ninth session.

2203rd Plenary meeting
17 December 1973

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