Sovereignty over natural resources

Balancing rights and duties

Nico Schrijver
Institute of Social Studies, The Hague

CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge CB2 1RP, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge, CB2 2RU, United Kingdom
40 West 20th Street, New York, NY 10011-4211, USA
10 Stamford Road, Oakleigh, Melbourne 3166, Australia

First published 1997

Typeset in Swift 9.75/13 pt

A catalogue record for this book is available from the British Library

Library of Congress Cataloguing in Publication data

Schrijver, Nico, 1954–
Sovereignty over natural resources / Nico Schrijver.
p. cm.
Includes bibliographical references.
ISBN 0 521 56269 4 (hardback)
1. Natural resources – Law and legislation. 2. Sovereignty.
3. Government ownership – Law and legislation. I. Title.
K3478.S37 1997
341.7'62 – dc20 96-33595 CIP

ISBN 0 521 56269 4 hardback

Transferred to digital printing 2002

VN

Contents

Boxes, figures and tables

1 Introduction

Objectives of the study

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

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

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

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

[1] Röling (1960: chapter III); Falk (1969: see particularly pp. 43–8).
[2] Brownlie (1990: 287). [3] Steinberger (1987: 397).
[4] See 'The State of the Nation-State', in *The Economist*, 22 December 1990, p. 76.
[5] Berman (1988: 105).

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

Genesis of permanent sovereignty as a principle of international law

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

[6] Adam Smith pointed out in his *Wealth of Nations* (1776, 4th edn, 1850: xxxii) that:
> water, leaves, skins, and other spontaneous productions of nature, have no value, except what they owe to the labour required for their appropriation. The value of water to a man on the bank of a river depends on the labour necessary to raise it to his lips; and its value, when carried ten or twenty miles off, is equally dependent on the labour necessary to convey it there. Nature is not niggard or parsimonious. Her rude products, powers, and capacities are all offered gratuitously to man. She neither demands nor receives an equivalent for her favours. An object which may be appropriated or adapted to our use, without any voluntary labour on our part, may be of the very highest utility; but, as it is the free gift of nature, it is quite impossible it can have the smallest value.

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

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

The international context

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

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

[8] Akinsanya (1980: 11).

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

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

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

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

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

2 Deteriorating *terms of trade* of developing countries. The trend in the prices of industrial products continued upward while prices of raw materials sharply fluctuated around an overall downward trend. During the early 1950s it became obvious that the 1948 Havana Charter, which resulted from the UN Conference on Trade and Employment at Havana and which sought to provide for regulatory mechanisms for commodity prices, would not come into effect.[14] The Economic Commission for Latin America (ECLA) at an early stage drew attention to the terms of trade which were so problematic for developing countries.

3 *Promotion and protection of foreign investment.* At the Havana Conference, agreement had been reached on a substantive article dealing with the treatment of foreign investment.[15] It recognized, on the one hand, the great value of such investment in promoting economic development and social progress and it requested member States to provide adequate security and to avoid discrimination. On the other hand, it provided for certain rights of host States, including the right to non-interference in their internal affairs and domestic policies and the right to determine whether, to what extent, and on what terms they would admit foreign investment in the future. In the early UN debates, different opinions as to the role of foreign investment in the development process were voiced. Western countries, and also countries such as India and Haiti, openly acknowledged the positive role of foreign investment, while others, for example Bolivia, Uruguay and Colombia, explicitly stressed its adverse effects.

4 *State succession.* As a result of the process of decolonization, newly independent States were established to replace the former colonial powers in the responsibility for the administration and the international relations of the territories. This raised important but complicated questions as to whether these new States have a right to start with a clean slate (*tabula rasa*) and to be released from obligations entered into by the former colonial powers, or that, for example, certain treaties and concessions ought to be continued in view of the interests at stake of third States and third parties in the continuation of these relationships (*pacta sunt servanda*). The issue was raised in the early stages of the permanent sovereignty debate and led the General Assembly in 1962 to request the International Law Commission to take up this issue, making 'appropriate reference to the views of States which have achieved independence since the Second World War'.[16]

[14] On the Havana Charter for an International Trade Organization, see Wilcox (1949).

[15] Article 12, entitled 'International Investment for Economic Development and Reconstruction', of the Havana Charter for the International Trade Organization.

[16] GA Res. 1765 (XVII). This effort finally resulted in the Vienna Conventions on Succession of States in Respect of Treaties (1978) and in Respect of State Property, Archives and Debts (1983), but they were concluded at a time when the

5 *Nationalization.* The early debates in the United Nations on permanent sovereignty took place at a time when memories of the Mexican oil nationalizations of 1938 were still fresh, when the Anglo-Iranian Oil Company dispute (1950–2) was still a 'hot issue', and nationalizations were also taking place or were seriously considered in Latin America. For example, in 1951, Bolivia nationalized its tin mines, Guatemala was about to launch an agrarian-land-reform programme under which it would take over United Fruit Company properties, and other Latin American countries (including Chile and Argentina) were considering similar action. Later in the decade, there were dramatic experiences arising from the nationalization of the Suez Canal Company (in 1956) and of Dutch property in Indonesia (in 1958).

6 *Cold War rivalry* added to the heat of the debate. The ideological competition between the two major social and economic systems had a profound impact on the debate on permanent sovereignty. There were significant opposing views on the rights of colonial peoples, on issues of State succession, on the right to property protection and the respect for acquired rights, on the role of foreign investment in the development process and on the inclusion of the right to self-determination and of socio-economic rights in international human rights law.

7 The demand for *economic independence and strengthening of sovereignty.* The decolonization process entailed a claim to economic self-determination. This came especially to the fore in the context of a draft article on the right of peoples to self-determination to be included in the Human Rights Covenants. In addition, Latin American countries grew increasingly unhappy about their unequal relationship with the USA and sought to demonstrate their independence. In an effort to avoid having to take sides in the evolving Cold War between the Western and Eastern blocs, the newly independent countries of Asia and Africa and liberation movements in non-self-governing territories combined forces in the search for a politically and economically independent position, later termed 'non-alignment'.[17]

8 The formulation of *human rights.* In the UN Commission on Human Rights, the Economic and Social Council (ECOSOC) and the Third Committee (charged with humanitarian and social affairs) of the UN General Assembly, the question was discussed whether the *right* to self-determination included an *economic* corollary: in particular the right of peoples and nations to have free disposal of their natural wealth and resources.

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

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

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

The subjects: a widening and a contracting circle

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

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

[18] Röling (1960: 73–86) and (1982: 181–209).
[19] Among a vast body of literature see the pioneering book of Claude (1967: 49–72 and 115–18).
[20] See in general terms Mosler (1984) and Menon (1990).
[21] Oppenheim (1912: 19).
[22] *ICJ Reports* (1949), p. 174.
[23] See Kokkini-Iatridou and de Waart (1983: 117–24 and 129–31) and (1986: 323–5).
[24] As reviewed in chapter 6, pp. 185–7.

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

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

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

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

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

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

[29] See chapter 10, pp. 311–19.

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

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

Meaning of terms

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The objects to which permanent sovereignty applies

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

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

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

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

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

[40] See chapter 5, pp. 152–6.