SOVEREIGNTY OVER NATURAL RESOURCES:

BALANCING RIGHTS AND DUTIES IN AN INTERDEPENDENT WORLD

Proefschrift

ter verkrijging van het doctoraat in de Rechtsgeleerdheid aan de Rijksuniversiteit Groningen op gezag van de Rector Magnificus Dr F. van der Woude in het openbaar te verdedigen op donderdag 2 maart 1995 des namiddags te 2.45 uur precies

door

Nicolaas Jan Schrijver

geboren op 21 mei 1954 te Warmenhuizen
Promotores:
Prof. Dr W.D. Verwey
Prof. Dr P.J.I.M. de Waart
To the memory of
Cornelis Schrijver, Bert Röling
and Subrata Roy Chowdhury
The fact that the Rio Grande lacks sufficient water to permit its use by the inhabitants of both countries does not entitle Mexico to impose restrictions on the United States which would hamper the development of the latter’s territory or deprive its inhabitants of an advantage with which nature had endowed it and which is situated entirely within its territory. To admit such a principle would be completely contrary to the principle that the United States exercises full sovereignty over its national territory.


... the emphasis on national sovereignty is partly a transitional problem which has to be experienced but which will pass by. But it is also undoubtedly the expression of the new state’s weakness, of its need for protection against external influences. In the Charter of the U.N., this protective law is expressed in the principles of ‘sovereign equality’ and of self-determination.


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

Preface and Acknowledgements

My interest in natural resource management has deep roots. Born into a farming family in a small village in West Friesland, in the north of the Netherlands, I have always cherished the products of nature, initially because of the economic value they represent. We lived in a coastal region at sea-level, safely protected by three dikes which have served as lines of defence against flooding since the late 15th century. They were called De Waker (‘The Watchman’), De Dromer (‘The Dreamer’, to be awakened whenever the water would reach its foot) and De Slaper (‘The Sleeper’). Only later was I to become aware of the beauty of these dikes and the surrounding landscape and of the vulnerability of the natural environment.

As a student of Dutch law at the University of Groningen, I took optional courses in international law, the sociology of international relations, peace research and the economics of development, and became acquainted with Third World efforts to establish a New International Economic Order. These efforts included claims to full permanent sovereignty over natural resources and demands for more equitable commodity prices. During this period the Netherlands and the USA were confronted with an oil embargo imposed by Arab petroleum-exporting countries as a reaction to the formers’ pro-Israeli stand in the aftermath of the Yom Kippur War in 1973. The deterioration in the terms of trade of many developing countries, the notions of an optimal division of labour and of a reshaping of the international order, as well as mounting concern about environmental deterioration, poverty and development as sources of dispute have made a lasting impression on me. Although my work over the years has often followed different paths, I have frequently returned to consider the successes and failures of the UN’s contribution to promoting development and respect for human rights, to preserving the environment, to maintaining peace and to developing and consolidating international law. Participants and staff at the Institute of Social Studies (ISS) in The Hague, colleagues in the Evert Vermeer Foundation, the National Advisory Council for International Development Co-operation, the International Law Association and at the UN Secretariat in New York have formed an inspiring multicultural and interdisciplinary community which has profoundly influenced my perspective on the role of international law in international as well as domestic affairs.

With great pleasure I would like to record my deep appreciation to Professor W.D. Verwey of the University of Groningen and to Professor P.J.I.M. de Waart
of the ‘Vrije Universiteit’ in Amsterdam for skilfully guiding me during the long
march of writing this dissertation, often blocking my way when I was distracted
by attractive side-roads. I have good and colourful memories of very stimulating
academic debates with Professor Verwey, and greatly value the rich inspiration
and very pertinent advice on the structure of this study provided by Professor de
Waart. I would also sincerely like to thank Professors J.B. Opschoor (Vrije Uni-
versiteit, Amsterdam), J.J. Vis (University of Groningen) and K.C. Wellens (Uni-
versity of Nijmegen) for giving their precious time to read and assess this study.

This dissertation has also greatly benefited from the wise advice and valuable
comments of a number of colleagues and friends. Paul Peters, formerly with the
Royal Dutch/Shell companies, patiently read various drafts of this study and gra-
ciously shared with me his wide knowledge and experience, especially in the
field of international law on foreign investment and the law of the sea; Professor
Arthur Westing, formerly with SIPRI and author of books on environment and
security, also read the whole draft and made important suggestions for its im-
provement; Professor Barbara Kwiatkowska of Utrecht University kindly gave
comments on issues related to the law of the sea and environmental law; Johan
Kaufmann, former Netherlands Ambassador to the United Nations, and Jan van
Ettinger, former Director of Jan Tinbergen’s RIO Project, urged me to make this
study also accessible to readers not well versed in international law and made
numerous suggestions to this end; Karin Arts, Godfried van Benthem van den
Bergh, Ige Dekker, Marnix Krop, Surya Subedi and my skating partner Paul
Slijpen have always lent me their ears and eyes and questioned me on the main
purpose and line of reasoning of this study.

Words of thanks are also due to other colleagues in the International Studies
Group of the ISS—Jessica Byron, Professors Bas de Gaay Fortman, Jeffrey Har-
rod and Joop Syatauw, as well as Joost Kuitenbrouwer and Thanh-Dam Truong
—for the stimulating and harmonious working atmosphere within our group; to
the librarians of the ISS, the T.M.C. Asser Institute and the Peace Palace and to
Fred Steenbergen, Frank Berteling and Ton Schipper of the documentation sec-
tion of the Netherlands Ministry of Foreign Affairs; to the ISS as such for its
excellent facilities and unfailing support; and to the ISS computer department,
particularly to Ank van den Berg, a very efficient and knowledgeable computer
expert who, even after being called to high office at the ISS, assisted me after
office hours in overcoming my computer inaptitudes. I sincerely thank Gary
Debus and Josephine Bosman of the ISS publications department for their unre-
mitting interest in my work and for skilfully editing this text as well as making
useful comments; Karen Scully and Joy Misa for preparing the text for publica-
tion and Koos van Wieringen for preparing an illustration. On many occasions
Janna van der Meulen provided me with efficient and invaluable assistance for
this and other projects while remaining cheerful in the midst of growing piles of
papers and ringing telephones.
I thank my mother for her constant encouragement. My wife, Yuwen Li, recently published a doctoral thesis on among other things the common heritage of humankind, a principle which has put a halt to State sovereignty over natural resources. Similarly, she was instrumental in her own ever-stimulating and decisive way in making me realize that my own personal sovereignty is not permanent and subject to duties as well as rights.

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

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

The Hague, January 1995

Nico Schrijver
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# Abbreviations

<table>
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<th>Abbreviation</th>
<th>Definition</th>
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<tbody>
<tr>
<td>AALCC</td>
<td>Asian-African Legal Consultative Committee</td>
</tr>
<tr>
<td>ACP States</td>
<td>African, Caribbean and Pacific States Parties to the Lomé Convention (approx. 70)</td>
</tr>
<tr>
<td>ACUNS</td>
<td>Academic Council on the United Nations System</td>
</tr>
<tr>
<td>AJICL</td>
<td>African Journal of International and Comparative Law</td>
</tr>
<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
</tr>
<tr>
<td>ALI</td>
<td>American Law Institute</td>
</tr>
<tr>
<td>APEC</td>
<td>Asia-Pacific Economic Co-operation</td>
</tr>
<tr>
<td>Area</td>
<td>Sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction in accordance with the 1982 UN Convention on the Law of the Sea</td>
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<tr>
<td>ASEAN</td>
<td>Association of South East Asian Nations</td>
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<td>ASIL</td>
<td>American Society of International Law</td>
</tr>
<tr>
<td>Authority</td>
<td>International Sea-bed Authority</td>
</tr>
<tr>
<td>BISD</td>
<td><em>GATT, Basic Instruments and Selected Documents</em></td>
</tr>
<tr>
<td>BITs</td>
<td>Bilateral investment treaties</td>
</tr>
<tr>
<td>BYIL</td>
<td><em>British Yearbook of International Law</em></td>
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<tr>
<td>Case W. Res. J. Int’l L.</td>
<td><em>Case Western Reserve Journal of International Law</em></td>
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<tr>
<td>CERDS</td>
<td>1974 Charter of Economic Rights and Duties of States</td>
</tr>
<tr>
<td>CHM</td>
<td>Common heritage of (hu)mankind</td>
</tr>
<tr>
<td>CIME</td>
<td>OECD Committee on International Investment and Multinational Enterprises</td>
</tr>
<tr>
<td>CIS</td>
<td>Commonwealth of Independent States</td>
</tr>
<tr>
<td>DD II/III/IV</td>
<td>Development Decades II-IV (of the UN)</td>
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<tr>
<td>ECLAC</td>
<td>Economic Commission for Latin America and the Caribbean (of the UN)</td>
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<td>ECOSOC</td>
<td>Economic and Social Council (of the UN)</td>
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<tr>
<td>EC</td>
<td>European Community</td>
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<tr>
<td>ECE</td>
<td>Economic Commission for Europe (of the UN)</td>
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<tr>
<td>EEC</td>
<td>European Economic Community</td>
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<tr>
<td>EECT</td>
<td>European Energy Charter Treaty</td>
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<td>EEZ</td>
<td>Exclusive economic zone</td>
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<tr>
<td>EJIL</td>
<td><em>European Journal of International Law</em></td>
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<tr>
<td>EPL</td>
<td>Environmental Policy and Law</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Name</td>
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<td>--------------</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>FAO</td>
<td>Food and Agriculture Organization of the United Nations</td>
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<td>FCCC</td>
<td>UN Framework Convention on Climate Change</td>
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<td>FCN Treaties</td>
<td>Friendship, Commerce and Navigation Treaties</td>
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<tr>
<td>FRG</td>
<td>Federal Republic of Germany</td>
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<tr>
<td>GA</td>
<td>General Assembly (of the UN)</td>
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<td>GAOR</td>
<td>General Assembly Official Records</td>
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<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GEF</td>
<td>Global Environment Facility</td>
</tr>
<tr>
<td>GYIL</td>
<td>German Yearbook of International Law</td>
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<tr>
<td>G-77</td>
<td>Group of 77 (developing countries)</td>
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<tr>
<td>IAEA</td>
<td>International Atomic Energy Agency</td>
</tr>
<tr>
<td>IBRD</td>
<td>International Bank for Reconstruction and Development (World Bank)</td>
</tr>
<tr>
<td>ICA</td>
<td>International Co-operative Alliance (a consumers’ organization)</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICJ Reports</td>
<td>International Court of Justice, Reports of Judgments, Advisory Opinions and Orders</td>
</tr>
<tr>
<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Centre for the Settlement of Investment Disputes</td>
</tr>
<tr>
<td>ICSID Convention</td>
<td>Convention Establishing the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States</td>
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<tr>
<td>IDA</td>
<td>International Development Association</td>
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<tr>
<td>IEA</td>
<td>International Energy Agency</td>
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<tr>
<td>IFC</td>
<td>International Finance Corporation</td>
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<tr>
<td>IFDA</td>
<td>International Foundation for Development Alternatives</td>
</tr>
<tr>
<td>IGC</td>
<td>Intergovernmental Committee</td>
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<tr>
<td>IIL</td>
<td>Indian Journal of International Law</td>
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<tr>
<td>ILA</td>
<td>International Law Association</td>
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<tr>
<td>ILC</td>
<td>UN International Law Commission</td>
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<tr>
<td>ILM</td>
<td>International Legal Materials</td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
<tr>
<td>IMS</td>
<td>International Minimum Standard (of Civilization)</td>
</tr>
<tr>
<td>Int’l Org.</td>
<td>International Organization</td>
</tr>
<tr>
<td>Iran-US CTR</td>
<td>Iran-US Claims Tribunal Reports</td>
</tr>
<tr>
<td>ITTA</td>
<td>International Tropical Timber Agreement</td>
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<tr>
<td>IUCN</td>
<td>International Union for Conservation of Nature and Natural Resources (now World Conservation Union)</td>
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</table>
JWT  Journal of World Trade
LJIL  Leiden Journal of International Law
LNTS  League of Nations Treaty Series
Martens NRG  Martens Nouveau Recueil Général de Traité
MERCOSUR  Mercado Común del Sur (trade area between Argentina, Brazil, Paraguay and Uruguay)
MIGA  Multilateral Investment Guarantee Agency
MITs  Multilateral investment treaties
NAFTA  North American Free Trade Agreement
NAM  Non-Aligned Movement
NGOs  Non-Governmental Organizations
NIEO  New International Economic Order
NILR  Netherlands International Law Review
NJB  Nederlands Juristenblad
nm  Nautical mile (1,851.85 m)
NYIL  Netherlands Yearbook of International Law
NYUJILP  New York University Journal of International Law and Politics
NQHR  Netherlands Quarterly of Human Rights
OAU  Organization of African Unity
OECD  Organization for Economic Co-operation and Development
OIC  Organization of the Islamic Conference
OAPEC  Organization of Arab Petroleum Exporting Countries
ODA  Official Development Assistance
ODIL  Ocean Development and International Law
OPEC  Organization of Petroleum Exporting Countries
PCA  Permanent Court of Arbitration
PCIJ  Permanent Court of International Justice
PPP  Polluter Pays Principle
PSNR  Permanent Sovereignty over Natural Resources
PrepCom  Preparatory Committee
Recueil des Cours  Recueil des Cours de l’Académie de Droit International de la Haye
Res.  Resolution
RIAA  Reports of International Arbitral Awards
RIO  Project Reshaping the International Order (A Report to the Club of Rome, Co-ordinator Jan Tinbergen, 1976)
SIPRI  Stockholm International Peace Research Institute
SUNFED  Special United Nations Fund for Economic Development
SWAPO  South West Africa’s [Namibia’s] People’s Organization
TDB  Trade and Development Board (of UNCTAD)
TNCs  Transnational corporations
Sovereignty over Natural Resources

TRIMs

UAR

UCN

UK

UN

UNCED

UNCIO

UNCITRAL

UNCLOS

UNCTAD

UNCTC

UNDP

UNEP

UNESCO

UNGA

UNIDIR

UNIDO

UNITAR

UNTAG

UNTS

UNYB

USA

USSR

WCED

WMO

WTO

WW II

ZaöRV

TRIMs

UAR

UCN

UK

UN

UNCED

UNCIO

UNCITRAL

UNCLOS

UNCTAD

UNCTC

UNDP

UNEP

UNESCO

UNGA

UNIDIR

UNIDO

UNITAR

UNTAG

UNTS

UNYB

USA

USSR

WCED

WMO

WTO

WW II

ZaöRV

Trade-Related Investment Measures

United Arab Republic (of Egypt and Syria, 1958-61: Egypt up to 1971)

Ultra Centrifuge Nederland

United Kingdom

United Nations

UN Conference on Environment and Development

UN Conference on International Organization (the San Francisco Conference, June 1945)

UN Commission on International Trade Law

UN Conference on the Law of the Sea

UN Conference on Trade and Development

UN Centre on Transnational Corporations

UN Development Programme

UN Environment Programme

UN Educational, Scientific and Cultural Organization

UN General Assembly (also given as GA)

UN Institute for Disarmament Research

UN Industrial Development Organization

UN Institute for Training and Research

UN Transition Assistance Group (in Namibia)

UN Treaty Series

UN Yearbook

United States of America

Union of Soviet Socialist Republics

World Commission on Environment and Development

World Meteorological Organization

World Trade Organization

World War II

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
Main Symbols Used in UN Documents

The basic series elements of principal UN organs are:

A/– General Assembly. Starting with the 31st session of the General Assembly, symbols were expanded to include Arabic numerals denoting the session (e.g., A/31/–, A/32/–, A/C.1/31/–, etc.)

A/S– General Assembly Special Session. From the first to the seventh special session ‘S’ followed by a Roman numeral denoting the session, was added to the normal Resolution symbols (e.g., GA Res. 3202(S-VI)). With regard to documents no special mention was made. Starting with the eighth special session in 1978, the symbol ‘S’ was followed by Arabic numeral(s) denoting the session (e.g., A/S–8/2, A/Res/S–8/1)

E/– Economic and Social Council
S/– Security Council
ST/– Secretariat

Special basic series symbols have been established for certain bodies:

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

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

–/AC.–/– Ad hoc committee or similar body
–/C.–/– Standing, permanent or sessional committee
–/CN.–/– Commission
–/CONF.–/– Conference
–/GC.–/– Governing Council
–/WG.–/– Working Group
–/WP.–/– Working Party

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

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

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

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

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

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

Glossary

casus belli: reason to resort to war.
clausula rebus sic stantibus: doctrine that a treaty is no longer necessarily binding after there has been a fundamental change of circumstances.
damnum emergens: actual damage.
ex aequo et bono: equitable settlement of a dispute, overruling, if necessary, existing law.
inter se: among themselves, i.e., among the parties to a specific agreement.
jus cogens: peremptory norms of general international law, binding irrespective of the consent of individual parties to be bound.
lex ferenda: rule of law which it is desired to establish.
lex lata: rule of law that is in force.
locus standi: capacity to institute legal proceedings before a specific court or tribunal for a particular remedy.
lucrum cessans: the loss of potential profits.
mare clausum: ‘closed sea’, a defined area of the sea claimed by a State to be under its jurisdiction.
mare liberum: the notion of the freedom of the sea.
obiter dictum: proposition of law expressed in a judgment not directly related to the principal matter at issue.
obligatio erga omnes: obligation toward all members of a legal community.
opinio juris: opinion that a certain rule is a rule of law; together with usus (actual application of the rule) the constituent elements of customary law.
opinio juris communis: commonly held legal opinion.
pacta sunt servanda: the principle that agreements are binding and are to be observed in good faith.
ratione materiae: the subject matter to which a particular rule applies.
ratione personae: the persons to which a particular rule applies.
ratione temporis: a period of time to which a particular rule applies.
res communis: object which cannot be owned by anyone and which is subject to use by all.
res nullius: object owned by no one but subject to appropriation.
restitutio in integrum: restoration of previous status quo.
sic utere tuo ut alienum non laedas: the principle of using your property in such a way as not to cause damage to your neighbour’s.
tabula rasa: ‘clean slate’, the doctrine that a newly-independent State should have maximum discretion in rejecting arrangements made by the predecessor State.
ultra vires: beyond the jurisdiction of the authority concerned.

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