Sovereignty over natural resources
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11 Natural Resource Sovereignty as a Basis for Sustainable Development

This chapter highlights the main points of this study and draws some conclusions on the issues raised by the questions posed in Chapter 1. The first set of questions related to the origin, development and legal status of the principle of permanent sovereignty over natural resources (permanent sovereignty or PSNR). Section 1.1 deals with the twofold origin of the principle, namely the sovereignty of States and self-determination of peoples. The question of the law-creating functions of the UN General Assembly and the status of the principle in current international law, especially whether it can be accorded the status of \textit{jus cogens}, is discussed in sections 1.2 and 1.3.

Principles and rules of international law do not function in a vacuum, but in the living reality of a changing world. In line with the second set of questions, section 2 discusses the changing international context of the principle of permanent sovereignty, in particular the impact of changing perceptions of the scope of State sovereignty in an age of globalization, privatization, fragmentation and environmental deterioration. Section 2.2 deals with developments in international investment law and assesses the current significance of the ‘national’ and ‘international minimum’ standards. Section 2.3 addresses the question of the management of resource and foreign investment-related conflicts and the continuing contribution of the principle of permanent sovereignty as an instrument of protection and development.

The final section 3 discusses the content and role of natural resource sovereignty in an interdependent world and the new directions permanent sovereignty is currently taking. It first deals with the importance of renewed interest in self-determination as a principle of international and human rights law and its effect on the interpretation of permanent sovereignty. Subsequently, it summarizes the rights and duties arising from the principle of permanent sovereignty and reviews the position of this principle within emerging international law concerned with sustainable development.
1. The Origin, Development and Legal Status of the Principle

1.1 Back to the Roots

The principle of PSNR has its roots in two main concerns of the United Nations: (a) the economic development of developing countries; and (b) the self-determination of colonial peoples. Soon after the establishment of the United Nations and on the basis of the Charter’s articles on ‘International Economic and Social Co-operation’ (Chapter IX), the UNGA began a debate on the necessary conditions for development. GA Resolution 523 (VI) introduced the right of ‘underdeveloped countries’ to determine freely the use of their natural resources. In response to immediate post-war concerns over resource scarcity, an effort was made by the industrialized States to balance national and global interests in the management of resources. From 1952, however, developing countries took a more assertive stand, both within and outside the United Nations. The pursuance of PSNR became part of their movement, especially that of Latin American countries, to seek economic independence as well as to support the cause of colonial peoples for self-determination and independence.

On occasion this double origin caused confusion. GA Resolution 626 (VII), for example, provides that ‘the right of peoples to use and exploit their natural wealth and resources is inherent in their sovereignty’ while it also refers to the right of ‘all member States’ freely to use and exploit their natural wealth and resources.\(^1\) The first paragraph of the Declaration of 1962 states:

The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.\(^2\)

The particular formulation of the phrase ‘permanent sovereignty over natural wealth and resources’ was introduced on 16 April 1952 by Chile, in a debate in the UN Commission on Human Rights as a right in the self-determination article of the draft Human Rights Covenants.\(^3\) The main aim was to underscore the right of peoples—as Chile put it—‘to remain masters of their own natural wealth and resources’.\(^4\) The emphasis on peoples and nations had not only to do with preserving the rights of colonial peoples, but can also be explained by experiences of countries like Chile where governments—in the opinion of some critics—‘squadered away’ national natural resources to foreign investors. This Chilean

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1 In both quotations the emphasis is added.
3 UN Doc. E/C.4/L.24, 16 April 1952.
Conclusions

The initiative finally led to the inclusion in Article 1 of the UN Covenants on Human Rights (1966), and subsequently in the Conventions on State Succession (1978 and 1983) and the 1981 African Charter of Human and Peoples’ Rights, of a right of peoples to free disposal of natural resources. Soon, however, the sovereignty of States rather than self-determination of peoples became the main theme in PSNR debates. This change of emphasis resulted from the relatively rapid decolonization process, the way in which (newly-independent) States cherished their sovereignty, and the non-representation of peoples in the intergovernmental United Nations. This conclusion can be illustrated by the fact that initial references to the principle of self-determination and to peoples as subjects of the right to PSNR—as they occur, for example, in GA Resolutions 837 (IX), 1314 (XIII) and 1803 (XVII)—were later abandoned and replaced by an increasing emphasis on sovereignty, first of developing countries and later of all States. Moreover, throughout the debate the principle of PSNR was placed in a developmental context, focusing on the discretion (newly-independent) States had under international law in the management of their natural resources. It is symptomatic of this shift that during the period from the adoption of the 1962 Declaration to 1985, with the exception of the resolutions on the rights of specific peoples under ‘foreign occupation, colonial domination or apartheid’, the PSNR-related GA resolutions are addressed exclusively to States as the subjects of the right to PSNR. This ‘étatist’ orientation in the evolution, interpretation and application of the principle of PSNR can well be understood as part of the economic and political emancipation process of developing countries. However, a recent tendency can be discerned indicating that the principle of self-determination and the rights of peoples in a non-colonial context are receiving revived attention. Examples include the 1986 UN Declaration on the Right to Development which recalls the right of peoples to exercise ‘sovereignty over all their natural wealth and resources’ and the Draft Declaration on the Rights of Indigenous Peoples which proclaims their right to self-determination and confers upon them a series of resource rights.

If this tendency is consolidated, the principle of PSNR will return to its two roots and the twofold aspirations derived from these roots. This would certainly be a laudable development, as it implies that States should be instruments to serve the interests of peoples and not vice versa. As UN Secretary-General Boutros-Ghali indicated in *An Agenda for Peace* (1992), both sovereignty and

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6 GA Res. 41/128, 4 December 1986.
7 See Chapter 10, section 3.
8 See on the original connection between human rights and PSNR, Dolzer (1986).
self-determination are principles of great value and importance and should not be in conflict, but should be complementary to and in balance with each other. This development would also provide support for the thesis that, apart from rights, also duties incumbent on States arise from the principle of PSNR.

1.2 Legal Effects of General Assembly Resolutions

The formation of the principle of PSNR was complicated, progressing as it did by means of UN resolutions rather than conventional methods of international law-making such as evolving State practice or the conclusion of treaties. During the debate on PSNR the UNGA performed a number of key functions: it took stock of demands; identified problems and needs of developing countries; provided a forum for debate between capital-exporting and capital-importing countries; pointed out policy measures to promote development and, later, sustainable development; and, in the end, served as a ‘quasi-law-maker’ or—as Cheng put it in another context—‘midwife for the delivery of nascent rules’.

There can be little doubt that the hallmark of this process was not the Charter of Economic Rights and Duties of States (CERDS) of 1974, but the Declaration on Permanent Sovereignty over Natural Resources of 1962. This Declaration is widely considered as embodying a balance between permanent sovereignty rights and international legal duties of States; its preparation was careful, its adoption was virtually unanimous, and it received an extensive follow-up. All these elements were fundamentally different for the CERDS.

It is no longer a source of great controversy that certain categories of UN resolutions can have legal effects beyond their status as mere recommendations. GA resolutions can explain and specify principles and rules of the UN Charter. The Decolonization Declaration may serve as an example of such

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13 For a list of variables to test the legal significance of a resolution, see Verwey (1981a: 26-27).
14 See, for example, the ICJ in the Namibia and Western Sahara advisory opinions; ICJ Reports 1971, p. 31 and ICJ Reports 1975, pp. 31-32.
‘interpretative resolutions’, although the UN Charter itself did not outlaw colonialism.\footnote{Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV) of 14 December 1960. Its paragraph 1 declares: ‘The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.’} Today, this Declaration is widely seen as the legal basis for outlawing colonialism and as having in this respect \textit{de facto} amended or otherwise superseded the UN Charter. The 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations is widely considered as an authoritative interpretation of the UN Charter which clarifies and elaborates upon the meaning of its principles, including self-determination.\footnote{See the Chapters XI, XII and XIII on Non-Self-Governing Territories and the trusteeship system. See on ‘Charter colonialism’ also Roethof (1951), Röling (1973: 64-67) and Verwey (1977: 132-35).} Moreover, UN resolutions—especially declarations—\footnote{This is not to say that ‘interpretative resolutions’ encroach upon the right of States in international law to make their own interpretations. For a critical comment on the 1970 Declaration see Arangio-Ruiz (1979).}—often have been the forerunner of treaties or provisions thereof. Examples include: the Universal Declaration of Human Rights (1948); the Declaration of Principles Governing the Sea-Bed, and the Ocean Floor and the Subsoil Thereof, Beyond the Limits of National Jurisdiction (1970); and—albeit to a far lesser extent—UNCTAD’s Integrated Programme for Commodities (1976).\footnote{Asamoah (1966).}

Apart from treaties and other manifestations of State practice, UN resolutions can be considered as providing evidence of customary law in so far as they identify, specify, confirm or reformulate rules of customary law. As Bowett puts it: ‘While they cannot create direct legal obligations for member States they can embody a consensus of opinion about what the law is, so that, indirectly, they become evidence of international law’.\footnote{UNCTAD Res. 93-IV, 31 May 1976.} Elements of the 1962 Declaration on PSNR could be placed in this category of ‘declaratory resolutions’, in so far as it formulated a new \textit{opinio juris communis} with respect to the principle of PSNR. However, parts of this Declaration and of later PSNR resolutions also contain controversial elements which bring it within the group of what Röling has called

\begin{footnotesize}
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\item Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV) of 14 December 1960. Its paragraph 1 declares: ‘The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.’
\item See the Chapters XI, XII and XIII on Non-Self-Governing Territories and the trusteeship system. See on ‘Charter colonialism’ also Roethof (1951), Röling (1973: 64-67) and Verwey (1977: 132-35).
\item This is not to say that ‘interpretative resolutions’ encroach upon the right of States in international law to make their own interpretations. For a critical comment on the 1970 Declaration see Arangio-Ruiz (1979).
\item Asamoah (1966).
\item UNCTAD Res. 93-IV, 31 May 1976.
\item Bowett (1982: 46). See also Higgins (1963: 5); ‘...the body of resolutions, taken as indications of a general customary international law, undoubtedly provides a rich source of evidence’.
\end{itemize}
\end{footnotesize}
‘permissive resolutions’, that is resolutions which do not so much impose obligations as formulate rights, even rights to do things which until then were not allowed under international law. As Röling pointed out:

If certain forms of behaviour not usually permissible were recommended, exceptions were created from prohibitive provisions. Many States were eager to rely on these exceptions. It was difficult for States to object to this, now that the action objected to had been recommended by the General Assembly by a majority of more than two-thirds. Action, on the one hand, (with an opinio juris based on the resolution), and no objection on the other, can very easily lead to recognized customary law. 22

Thus, legitimization of certain behaviour may gradually lead to legalization, through concurrent and widely-accepted State practice (customary law) and by including it in binding legal instruments. The 1952 ‘nationalization’ resolution, 23 provisions of the 1962 Declaration on PSNR and the NIEO resolutions 24 are important examples of texts with a ‘permissive’ character as far as PSNR is concerned. The 1962 Declaration, for example, differentiates between property acquired under colonial rule (which can therefore be nationalized under less stringent conditions) and rights acquired since independence. Its paragraph 4 deviates from the traditional international minimum standard governing the treatment of foreign investors, in so far as it formulates certain new principles with respect to nationalization. For example, as far as compensation is concerned, it does not stipulate—in the view of the Assembly’s majority—the triple standard (‘prompt, adequate and effective’) but ‘appropriate’ compensation. This would entitle, ‘permit’, a nationalizing government to take into account not only damage incurred by foreign investors, but also its own economic situation, including its capacity to pay. 25 This view may not be indisputable in so far as some uncertainty exists over the meaning of such an ambiguous term as ‘appropriate’. Nonetheless, this Declaration as a whole can be considered as one of the landmark documents in reformulating standards of international investment law.

A category more or less diametrically opposed to that of permissive resolutions is that of resolutions claiming to impose obligations. 26 Examples of this

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22 Röling (1973: 23).
23 GA Res. 626 (VII), 21 December 1952.
25 See Chapter 9, section 9.3, and Chapter 10, sections 8.3 and 8.4.
26 Kapteyn (1977: 29) uses the term ‘mandatory resolutions’. Because of its connotation with binding Security Council resolutions adopted under Chapter VII of the UN Charter, the present author prefers to use here the phrase ‘resolutions claiming to impose obligations’.
kind include the PSNR-related, environmentally-relevant resolutions and certain principles of the Stockholm and Rio Declarations which formulate duties with respect to resource management and environmental preservation.27 Finally, various PSNR-related resolutions also bear the characteristics of what in French literature is called droit programmatoire. Dupuy has inventively developed this concept of ‘programmatory resolutions’.28 Certain resolutions are prospective in nature, proclaim principles and rules which are new and not yet generally observed, or recommend measures which have not yet been instituted. The very first PSNR resolution, GA Res. 523 (VI), which calls for the recognition of the right of underdeveloped countries to determine freely the use of their natural resources and which calls for integrated development and commercial agreements, may well fit this category. The same applies to the important programmatory GA Resolution 2158 (XXI) on PSNR which calls for a greater share of developing countries in exploiting, marketing and processing their natural resources and in managing foreign enterprises operating in these fields as well as training of local personnel and, given environmental constraints, proper resource exploitation. One can also refer to the set of environmentally-relevant PSNR-related resolutions, including the Stockholm and Rio Declarations.

1.3 Permanent Sovereignty: A Norm of Jus Cogens?

Main elements of the principle of PSNR have been included in several multilateral treaties, most notably: the two Human Rights Covenants (1966); the African Convention on Human and Peoples’ Rights (1981); the two Vienna Conventions on Succession of States (1978 and 1983); the UN Convention on the Law of the Sea (1982); and the Climate Change and Biodiversity Conventions (1992). It has also been recognized in a series of arbitral awards.29 For example, on the basis of the circumstances of adoption of the 1962 Declaration on PSNR, Dupuy as arbitrator in the Texaco versus Libya Case (award in 1977) concluded that this Declaration expressed the opinio juris communis on nationalization of foreign property under international law.30 As far as doctrine is concerned, hardly any contemporary international lawyer would deny the principle of PSNR legal value. At the other extreme, it is doubtful whether one could go as far as to label the principle of PSNR as a norm of jus cogens. There are some governments (for example, those of Algeria, Libya and Kuwait), as well as some international lawyers (for example, Aréchaga, Chowdhury and Rigaux), who feel this status has

27 See Chapters 4 and 10 of this study.
29 See Chapters 9 and 10 and Appendix V of this study.
been achieved. There are, indeed, a number of arguments in support of such a thesis:

a. The fairly consistent use of the word ‘permanent’ before ‘sovereignty over natural resources’ in PSNR and the frequent identification of PSNR as ‘inalienable’ or ‘full’.

b. The identical Articles 25 and 47 of the two International Covenants on Human Rights, reading: ‘Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.’ The Vienna Conventions on State Succession and some multilateral environmental treaties contain comparable provisions.

In order to assess further this thesis it is relevant to refer to Article 53 of the Vienna Convention on the Law of Treaties (1969) which gives a description of the concept of *jus cogens* which is seldom disputed. The term *jus cogens* is not used in the text of the article itself but has been equated in the title to a peremptory norm of general international law. It is defined as follows:

For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

A number of criteria can be derived from this definition:

i. Only widely-accepted and recognized norms of general international law can potentially gain the status of *jus cogens*. Otherwise, the whole concept of *jus cogens* would become fluid and unmanageable. Authors differ as to the requirement of express consent or acceptance by States as a constitutive element in the evolution of a rule of law towards a norm of *jus cogens*.

iii. A very large majority of States must have accepted and recognized a norm as peremptory. It can be derived from the *travaux préparatoires* that acceptance by all States is not a condition, since—in Sinclair’s words—‘no individual State should have the right of veto in determining what were and what were not peremptory norms’. Thus the words ‘international community of States as a whole’ should be flexibly interpreted. It seems to be the prevailing view of contemporary international lawyers that, unless a large majority

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of States, including States having a direct interest in the matter to which the
norm pertains, accept and recognize a norm as peremptory, it cannot be said
to have gained that character. Here we run into difficulties with the qualification
of PSNR as a peremptory norm, since it clearly follows from the voting
records and the travaux préparatoires that PSNR as a peremptory norm has
not gained the support of many States principally concerned.

iii. No derogation is permitted. The test against this criterion is the most per-
plexing one. For it will be difficult to prove that a State, acting in the exer-
cise of its sovereignty, has concluded a treaty or a contract or has accepted
provisions therein which derogate from the norm. Of course, if a treaty
would permit slave trade, piracy or genocide—as these acts are among the
few widely-accepted legal prohibitions in international law from which no
derogation is permitted—it has to be considered as null and void. In connect-
ion with PSNR, however, it would be more difficult to sustain such a thesis.
One might argue that some elements of PSNR, especially the prohibition to
deprive a people of its means of subsistence as formulated in Article 1 of the
Human Rights Covenants, are non-derogable norms of international law.
However, even in the case of a reduction ad absurdum (for example, a long-
term contract tantamount to the dispossession of a country’s natural resources
or a contract reserving large sites for the dumping of industrial waste from
abroad), it would currently be very difficult, if not impossible, to answer the
question whether or not particular clauses of international treaties, concession
agreements or contracts (for example, stabilization or immutability claus-
es)\(^{33}\) amount to an alienation of sovereignty and/or to bargaining away peo-
les’ right to natural resources. Furthermore, a State is free to enter into
negotiations and agreements with other States on boundary corrections, asso-
ciation or even integration with another independent State.\(^{34}\) This indicates
that territorial sovereignty is not inalienable in every respect and it is, there-
fore, hard to conclude that economic sovereignty is non-derogable and in-
alienable under all circumstances.

It can be concluded, therefore, that despite its complicated genesis the principle
of permanent sovereignty over natural resources has achieved a firm status in
international law and is now a widely-accepted and recognized principle of inter-
national law. However, it cannot be accorded the status of *jus cogens*. This im-
plies that PSNR does not override other principles of international law and more-

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\(^{33}\) For a debate on these issues, see Chowdhury (1984b: 46–57) and de Waart et al. (1984:
93–100).

\(^{34}\) See the principle of equal rights and self-determination of peoples of the 1970 Declaration
on Principles of International Law concerning Friendly Relations and Co-operation among
States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV).
over can evolve in the light of new rules and new practices accepted as law, thereby allowing it, for example, also to encompass new duties.

2. Changing Perceptions on Sovereignty, Foreign Investment and the Role of International Law

2.1 The End of Permanent Sovereignty in an Age of Globalization, Privatization and Fragmentation?

In recent years the principles of State sovereignty in general and PSNR in particular have been subject to a number of trends and exposed to an impressive series of challenges which have had a profound impact on the political and legal sphere surrounding their application and interpretation. They include:

a. The current erosion of the traditional scope of State sovereignty

State sovereignty, as the traditional backbone of public international law, is undergoing a significant change within the framework of international law which is, increasingly and substantially, limiting the scope of matters which—in the words of Article 2.7 of the UN Charter—are ‘essentially within the domestic jurisdiction of any State’. Human rights law, Security Council resolutions on the maintenance or restoration of peace and security, and the progressive development of international environmental law, all embody this trend. Furthermore, efforts in several parts of the world towards regional economic co-operation and integration significantly affect the room of manoeuvre of individual States, most notably in the context of the European Union. Reference can also be made to: ASEAN in South-East Asia; the Asia-Pacific Economic Co-operation (APEC); ECOWAS in West Africa and the Common Market for Eastern and Southern Africa; NAFTA in North America; CARICOM in the Caribbean; and MERCOSUR in the southern part of Latin America. It is also worth noting the expectation of a gradual inclusion of the former centrally-planned economies of Eastern Europe and ex-USSR into a greater European ‘economic area’. Lastly, State sovereignty is affected by the increasing recognition of the claims of peoples to their land and natural environment. The cause of indigenous peoples and the increasing environmental awareness of citizens, all over the world, bring this to the fore. Gradually, developments in human rights law and in international environmental law are beginning to meet in postulating a new human right: the right to an environment which is adequate for health and conducive to development.35 The African Charter on Human and Peoples’ Rights and the Convention on the Protection of Biodiversity both embody this trend.

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b. Economic trends undermining permanent sovereignty

A significant trend, especially after 1989, towards a global economy can be noted. This is exemplified by the establishment of a new World Trade Organization (WTO) in 1995 and a series of related international agreements as a result of the GATT Uruguay Round, the rapid globalization of the international money market, and the expanding role of transnational corporations. Also a trend towards privatization can be discerned. While during the 1950s, 1960s and 1970s an important role was foreseen for State enterprises, especially in natural resource management, there are now widespread doubts about the effectiveness and appropriateness of State-owned enterprises and in many countries an increased role of the private sector is being advocated, including foreign investment in the development process. For the time being, cries for nationalization sound like a voice from a distant past. Mention should also be made of the steady decline of world prices in real terms for minerals (including crude oil) and other primary commodities, which is usually regarded as disadvantageous to developing countries. However, many developing countries have recently become net importers of commodities, so that simply equating all developing countries with commodity-exporting countries is no longer correct. This means, for example, that many newly-industrializing countries are not keen to join G-77 forces in demanding higher and more stable commodity prices.

c. A changing approach to the exploitation of natural resources

For many years, the chief objective of the main PSNR-related UN resolutions and treaties was to achieve full use of natural resources. In doing so, they often ignored effects on the environment and natural wealth. Recently, however, there has been increasing appreciation of the intrinsic value of natural wealth and natural resources and the effects of exploiting them are now often included in environmental impact assessments. The modern trend is towards that of an integrated ecosystem approach. This approach is gradually being incorporated in, for example, fisheries agreements and is reflected in the Biodiversity Convention, based on a recognition of the global significance of environmental issues and an awareness of the limits to the ‘environmental utilization space’. A rising number of duties sets limits to a State’s jurisdiction over its natural wealth and resources by requiring it to manage them more carefully.

36 Temporary relief can be provided under the Compensatory Financing and Contingency Facility of the IMF and the Stabex and Sysmin systems of the Lomé Convention.

37 Lyster (1985: 300).

38 Opschoor (1992b).
This study has shown that over the years PSNR-related UN resolutions have responded dynamically to changed circumstances and insights, by integrating developmental and environmental concerns and by elaborating policy measures that are needed at the national and international level to implement fully the principle of PSNR. For example, the initial interest in nationalization of the natural resource sector and in the role of State enterprises has now been replaced by increasing emphasis on market principles and privatization.\textsuperscript{39} In addition, environmental concerns are now an integral part of the PSNR debate. Thus the PSNR resolutions reflect the changing ‘development ideology’ of the United Nations.\textsuperscript{40}

It would be incorrect to assert that, as a result of the trend towards globalization, fragmentation and privatization, the principle of PSNR is dead or no longer serves any function in international law and in international relations. In a world in flux and with a low level of international organization, reasons abound for emphasizing the continued value of the principle of PSNR as a framework for international economic co-operation and for the accountability of States at the domestic and international level. The challenge of the next two or three decades will be how to balance PSNR with other basic principles and emerging norms of international law—including the duty to observe international agreements, grant fair treatment to foreign investors, pursue sustainable development at national and international levels and to respect human and peoples’ rights—and in this way to serve best the interests of present and future generations.

\section*{2.2 International Investment Regulation: The Need for an Integrated Global Approach}

For a long time the evolution of PSNR and the debates on this principle have been characterized by deep-rooted differences of opinion with respect to the treatment of foreign investors, in particular a host State’s right to expropriate foreign property. Foreign investments were either branded as the prolongation of colonial domination by other means or advocated as the main vehicle for development of the developing countries. Western countries demanded strict respect for the rule of \textit{pacta sunt servanda} (agreements must be performed in good faith) and other requirements arising from the ‘international minimum standard (of civilization)’, while developing countries often invoked the \textit{clausula rebus sic stantibus} (fundamental change of circumstances) and the Calvo doctrine as major lines of defence to safeguard their political independence and to promote economic self-determination.

\textsuperscript{39} See Wälde (1983).

\textsuperscript{40} The term was introduced by Virally (1972: 314-20). See generally on the development ideology of the United Nations Singer (1989) and Schrijver (1990: 7-14).
The UNGA has served as a forum for debate in which each group of countries could advance its position and seek support and legitimization for its policies, which were often unacceptable to other groups. Examples are GA Resolutions 626 (VII), 3171 (XXVIII) and Article 2 of the CERDS. After thus allowing these groups to let off steam, the Assembly could sometimes play a useful role in efforts to promote foreign investment in developing countries and in generating a new consensus regarding principles and rules for investment regulation. The 1962 Declaration on PSNR and its follow-up GA Resolution 2158 (XXI) fall in this category. With respect to expropriation and nationalization, the most balanced outcome of these efforts is still the 1962 Declaration on PSNR. On the one hand, it requires respect for acquired rights and international law, and fair treatment of foreign investment. On the other hand, it squarely recognizes the economic sovereignty of host States and their right to regulate foreign investment and to expropriate or nationalize foreign property. The latter is, however, subject to a number of conditions, which include: a public purpose; prohibition of arbitrary discrimination; payment of compensation; and a right of interested parties to seek review. Over the years these principles have been consolidated, re-formulated and specified in legally relevant instruments of a widely varying nature. They include some multilateral and hundreds of bilateral investment treaties, lump-sum compensation agreements between OECD countries and virtually all Eastern European communist countries and some developing countries, decisions of arbitral tribunals, national investment codes, and various international guidelines and codes of conduct. The NIEO resolutions have been the last major bone of contention regarding these issues.

During the 1980s and 1990s the controversies concerning the ‘national standard’ versus the ‘international minimum standard’ seem to have lost much of their colour and relevance. As reflected in the debates in the United Nations and the World Bank, the arguments are less doctrinaire and more pragmatic, aimed at bridging gaps rather than exposing differences. Perhaps this was induced by the sharp decrease in new direct foreign investment in developing countries (especially in Africa) during the early 1980s, but certainly also by changing ideologies with respect to foreign investment, the private sector and the market (especially since 1989, the end of the Cold War). After declining sharply in the 1970s and early 1980s foreign investment flows to developing countries, especially to East and South-East Asia, increased substantially during most of the 1980s and early 1990s. As a result, developing countries accounted for 33 per cent in 1992 and an estimated 41 per cent in 1993 of foreign direct investment flows.41 Foreign investment flows respond to perceptions of the political and economic climate,

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including labour costs, availability of skilled labour, political risk, international law protection and national foreign investment legislation.\textsuperscript{42}

This increasing trend towards pragmatism can be discerned at various levels of investment regulation.\textsuperscript{43} At the \textit{national} level this trend is apparent in new or revised national investment regulations. Nearly all developing countries, including centrally-planned economies such as the People’s Republic of China and Viet Nam, have enacted national legislation in order to promote the flow of foreign investment to their economies, while attempting to tailor it as much as possible to local circumstances and to ensure a maximum contribution to their national development. At the \textit{bilateral level} it is reflected in the increasing number of bilateral investment treaties (BITs), now involving more than 100 developing countries which also frequently conclude BITs with each other, and in the development of Draft Model Bilateral Agreements for Promotion, Encouragement and Protection of Investments by the Asian-African Legal Consultative Committee (1981). This trend was reinforced by the establishment and activities of transnational corporations with parent companies in developing countries. At the \textit{(inter-) regional level} reference can be made to investment treaties such as: the Inter-Arab Investment Protection Treaty (1980); the OIC Investment Agreement (1981); the ASEAN Investment Treaty (1987); and the investment promotion provisions in the Lomé Conventions between the European Community and the ACP countries. Finally, at the \textit{global} level this trend is apparent in the expanding work of the IFC, a substantial increase in the number of Contracting Parties to the ICSID Convention and in the membership of MIGA, and in the conclusion of the 1994 ‘Uruguay Round’ Agreement on Trade Related Aspects of Investment Measures. Nearly all developing countries, in one way or another, take part in multilateral efforts to promote and regulate foreign investment. Furthermore, by using international dispute settlement procedures, satisfactory decisions have been reached in a number of contentious cases, balancing the interests of commercial companies and those of host States, sometimes using institutionalized procedures such as those of the ICJ, ICSID, the Iran-US Claims Tribunal, and sometimes using \textit{ad hoc} procedures such as in the \textit{Libya oil nationalization cases} (1973–77) and the \textit{Kuwait v. Aminol Case} (1982).

These developments illustrate that the days of easy simplifications are over and that simply equating developing countries with capital-importing and industrialized countries with capital-exporting countries is outdated. Sometimes it is

\textsuperscript{42} Pfefferman and Madarassy (1992: 1-2).

\textsuperscript{43} See Chapter 6 of this study, Peters (1991) and Schrijver (1994b).
Conclusions

even unclear which State is the relevant home or host State. Apart from the fact that host States bear certain responsibilities vis-à-vis home States, and vice versa, a State or a transnational corporation may nowadays also be called to account in an international organization such as the UN, ILO, OECD, EU, ASEAN or NAFTA, or in a non-governmental organization, such as a trade union or business organization or associations thereof (for example, the Trade Union Advisory Committee and the Business and Industry Advisory Committee to OECD).

It could also be argued that the traditional doctrines relating to a national standard and to an international minimum standard are losing relevance as a result of modern trends in international economic law including those relating to international dispute settlement and according a functional status to TNCs in international law.

Most of the instruments referred to above cover only a few aspects of investment regulation and are addressed either to the host country or to the investor. The BITs and multilateral investment treaties (MITs) are concluded between States, but the subject-matter is also very much a matter of concern to foreign investors. The OECD Guidelines for Multinational Enterprises are addressed, as the title indicates, to multinational enterprises, known as TNCs in the UN context. In contrast, the 1992 World Bank Guidelines for the Treatment of Foreign Investment only contain rules for host States. IFC, ICSID and MIGA play an important role in promoting and safeguarding international investment, but they are limited to their specific fields of competence.

In view of these limitations of the available instruments and the current conducive international political climate, it would be relevant to include the main rules of modern international investment law in a global multilateral investment

44 In the Barcelona Traction Case (1970) the ICJ indicated that, in the case of a Spanish subsidiary of a Canadian holding which itself was owned by Belgian interests, Canada was to be regarded as the home State to provide diplomatic protection, but that Belgium might have been regarded as the home State in certain circumstances.


46 The OECD Committee on International Investment and Multinational Enterprises (CIME), which administers the OECD Guidelines, set up an active complaints procedure in the late 1970s. CIME has also developed procedures to deal with conflicting requirements made by its member States against multinational enterprises.

47 An example in the past was the EEC code of conduct for companies with interests in South Africa.

48 See Kokkini and de Waart (1986), and Chapter 6, section 5 of this study.
convention. The set-up could be modelled along the lines of the nearly forgotten ICC Guidelines on International Investments (1972), which in a balanced manner set out rights, duties and responsibilities of the three parties concerned: investor, host government and home government. The PSNR-related UN resolutions and the Draft UN Code of Conduct on TNCs, the Draft OECD Convention on the Protection of Foreign Property (1967), the BITs and MITs, the arbitral awards, the lump sum agreements, and the World Bank Guidelines all provide useful reference material upon which such a global multilateral convention might ultimately be based. Permanent sovereignty, international economic co-operation and international arbitration arrangements should be the cornerstones of such a convention. Permanent sovereignty will enable the host State to allow only those foreign investments which it really wants and on such terms as it deems in its national interest. International economic co-operation, including ACP-EU cooperation and membership of multilateral institutions such as ICSID and MIGA, will promote the flow of investments to developing countries. International arbitration will protect the legitimate interests of both the host State and foreign investor more effectively than national courts can, if only because the award of the arbitral tribunal has a better chance of international recognition. The adoption of such a multilateral convention would help to generate trust and reduce suspicion and risk between industrialized and developing countries, as well as between host States and foreign investors.

2.3 Resource Conflicts and Sovereignty as an Instrument of Protection

The increasing use of the world’s natural wealth and resources can easily lead to conflicts over access to wealth and resources. Resource and investment disputes usually involve major issues of policy and are often connected with wider aspects of relations among the parties concerned. Occasionally, such conflicts have led to the overthrow of governments such as that of Mossadeq in Iran in 1952 and Allende in Chile in 1973. In some other situations they were a casus belli, for example in the Suez crisis in 1956 and the Kuwait crisis in 1990–91.

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49 See also Sornarajah (1994: 21 and 187) and Art. 10.4 of the European Energy Charter Treaty which provides that a supplementary treaty on treatment of investments be drafted during the period 1995-98.


51 See also Peters (1988).

52 In July 1990, Iraq accused Kuwait of ‘stealing oil’ from the Iraqi part of the transboundary Rumailah oilfield and committing ‘economic aggression’ against Iraq. At stake were also access to the sea and sovereignty over the islands of Warbah and Bubiyan.
Two types of potential disputes are of particular concern: those between States and those between a host State and a foreign investor. Disputes between States can in principle be settled through any of the conventional methods listed in Article 33 of the UN Charter. The right of States to free choice of the means for international dispute settlement is widely recognized. As confirmed in the dispute settlement clauses of many PSNR-related treaties, negotiation is still the basic means of settling an inter-State dispute peacefully. If negotiations fail, there is the option of resorting to third party assistance, sometimes institutionalized through a conciliation commission procedure or an international arbitration procedure. In particular, the 1982 Law of the Sea Convention offers a full range of dispute settlement arrangements with many novelties, as discussed in section 6 of Chapter 7. In some international environmental law treaties a trend can be discerned of increased readiness in the last instance to submit a dispute to the International Court of Justice.

Agreeing on arrangements for the settlement of disputes between a host State and a foreign investor has always been more problematic. Latin American States took a particularly strong stand by stipulating—in their laws and constitutions and, through ‘Calvo clauses’, in contracts—that foreigners, like nationals, should be subject to the law of the host State and should submit disputes to the local judiciary only. Western countries emphasized the right of the home State to grant diplomatic protection and the right to international adjudication in cases where local courts were allegedly not in a position to dispense justice.

This study concluded that, upon the basis of the principle of PSNR, States have the right to try and settle resource and investment disputes first through local remedies, thus providing national authorities a chance to redress a wrong. Although the contrary has been claimed in various UN resolutions, there is far from general recognition that States have the right to settle such disputes solely upon the basis of national law. Yet, unless otherwise agreed, the primacy of national law is recognized in the case of a dispute between the host State and a foreign investor. If the dispute cannot be solved upon the basis of national law, international law will frequently be invoked as well. While often reaffirming the local remedies rule, many PSNR- and investment-related legal instruments provide in one way or another for international dispute settlement procedures which have been freely agreed to by the parties to the disputed; it is interesting to note that doctrinal views increasingly make way for practical considerations. This often involves internationalized dispute settlement procedures through international conciliation and arbitration, sometimes on an ad hoc basis and sometimes

54 See Chapter 9, section 9.5.
institutionalized through ICSID or another channel. This is a laudable development. Conciliation and to a certain extent arbitration address first and foremost the issue of what should be done rather than what has happened. If this trend is consolidated, both the right to grant diplomatic protection—so often abused by Western States for other purposes not directly related to the dispute—and the Calvo doctrine—the logical response to it—can be given their requiem.

The developing countries originally saw PSNR as a vehicle to gain control over their natural resources which in the past had often been exploited by Western States and companies. Thus, the principle of PSNR played a pivotal role in their efforts to seek protection and genuine sovereign equality among States. As Röling pointed out, as early as 1960, the ‘idolization of sovereignty’ was an expression of ‘the new State’s weakness, of its need for protection against external influences’.56 In this process it was unavoidable that rights of full disposal were granted to peoples and States on the basis of territorial sovereignty rather than a principle of sharing the world’s resources. However, this has consolidated very unequal situations, since natural wealth and resources are not evenly distributed over our planet. Some countries are rich in resources and/or endowed with fertile soil and rich lakes and seas, while others suffer from aridity and/or find themselves in a geographically disadvantaged situation. So far, it has proven to be impossible to share the benefits of natural resource exploitation on an international basis, for example in the context of a regional organization. Various authors have speculated whether in the long run it may become possible to re-interpret ‘territorial’ and ‘permanent’ sovereignty over natural resources as different kinds of ‘functional sovereignty’, in other words, jurisdiction over specific uses of a resource rather than absolute and unlimited jurisdiction within a given geographical space, so as to create a ‘decentralized planetary sovereignty’ within a network of strong international institutions.57 Furthermore, Röling predicted that the strong emphasis on national sovereignty would wane and be increasingly superseded by a law of co-operation and interdependence.58 In modern international law States are under a duty to co-operate with each other, to promote international development, particularly of developing countries, and to protect the common environment. However, within the field of specific PSNR-related international law no rules can (yet) be identified which carry this general duty to a ‘harder’ level of fully-fledged obligation for resource-rich States.

56 Röling (1960: 78).


3. Permanent Sovereignty in an Interdependent World

3.1 Towards Peoples’, Indigenous and ‘Planetary’ Sovereignty in a World of States

The reason for adopting the first PSNR-related GA Resolutions 523 (VI) and 626 (VII) was to enhance opportunities for economic development of ‘underdeveloped countries’. Subsequently, the self-determination and human rights codification movement of the 1950s became identified with PSNR. This led to the formulation of the right of ‘peoples and nations’ to PSNR. As a result of the decolonization process during the 1960s the emphasis on the right to PSNR of ‘peoples’ and its connection with ‘self-determination’ diminished and gradually shifted to ‘States’ and, subsequently, to ‘developing countries’. In the 1962 Declaration, the term ‘peoples’ is used eight times, while the term ‘States’ features as many as twenty times. But there is no reference to ‘peoples’ in follow-up Resolution 2158 (1966), where the emphasis is on ‘developing countries’ a term which is used twelve times. The marine resource-related Resolution 3016 (1972) and the nationalization Resolution 3171 (1973) provide further testimony of this trend.

During the NIEO period the trend developed further to ‘every State’ or ‘all States’. There is no rational argument as to why, under international law, developing countries would have a right to PSNR but industrialized countries would not. However, in order to emphasize claims to independence or a restoration of sovereignty, the UNGA gave specific attention to the rights of peoples in territories under foreign occupation, alien and colonial domination, or apartheid, and of particular States, such as Panama and Arab territories under Israeli occupation.

In treaty law a similar trend can be discerned. The 1966 Human Rights Covenants vest the right to PSNR in ‘all peoples’. The African Human Rights Charter is rather ambiguous on this point. While paragraph 1 of Article 21 refers to ‘all peoples’, paragraph 4 provides that ‘States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity’. Similarly, the 1978 Convention on State Succession in respect of

59 Examples include GA Res. 837 (IX) of 14 December 1954, 1314 (XI) of 12 December 1958 and 1803 (XVII) of 14 December 1962.

60 See GA Res. 3201 and 3202 (S-VI) of 1 May 1974 as well as GA Res. 3281 (XXVIII) of 12 December 1974.

Treaties awards this right to both ‘every people’ and ‘every State’. Conversely, the law of the sea conventions and international environmental treaties, such as the 1992 Biodiversity and the Climate Change Conventions, and the 1994 European Energy Charter Treaty consistently vest the right to PSNR in States only.

In various PSNR-related UN resolutions and multilateral treaties the term ‘mankind’, or ‘humankind’ as it is now termed, occurs. As a principle of international law, the Common Heritage of Mankind gained currency remarkably quickly with respect to areas and resources beyond the limits of national jurisdiction, sometimes referred to as ‘the global commons’. However, some of its implications have proved to be major bones of contention, especially between technologically highly-developed industrialized countries and developing countries. It has been argued that the atmosphere—indisvisibly surrounding the entire planet—should be regarded as a common heritage. Verwey advocates identifying the environment as such as the common heritage of humankind. In addition, during the preparations for the 1992 UN Conference on Environment and Development (UNCED) proposals were made to characterize biodiversity and genetic resources, and the world’s ecological zones and forests as the common heritage of humankind. Developing countries strongly resisted any implication that third parties would enjoy proprietary rights over resources under their jurisdiction without their consent since this would severely infringe upon their PSNR. The outcome of this process was that the concept of ‘common concern’ rather than ‘common heritage’ was accepted. Thus, the Climate Change Convention recognizes that ‘change in the Earth’s climate and its adverse effects are a common

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63 See Li (1994: Chapter VIII).

64 Westing (1990).


66 See also FAO Conference Resolution 8/83, embodying the International Undertaking on Plant Genetic Resources. Article 1 provides that ‘plant genetic resources are a heritage of mankind and consequently should be available without restriction’. Text in Hohmann (1992a: 113).

concern of humankind" \(68\) and the Biodiversity Convention that ‘the conservation of biological diversity is a common concern of humankind’. In contrast, the concept of ‘common concern’ does not feature in the Forestry Statement. While reaffirming the applicability of the principle of PSNR over all types of forests, it provides that their ‘sound management and conservation [are] of concern to the Governments of the countries to which they belong and are of value to local communities and to the environment as a whole’. This comes close to what is stated in various documents of the parties to the Amazonian Treaty (1978) \(69\) which, for example, provides that ‘the exclusive use and utilization of natural resources within their respective territories is inherent in the sovereignty of each State’ \(70\). In ‘The Amazon Declaration’ of 1989, the Amazonian Council links the exercise of PSNR more closely with the duty of promoting development of its peoples, of respecting the rights and interests of indigenous peoples and of conserving the environment. \(71\) The Council welcomes international support for the conservation of the heritage of these territories, on condition that this does not amount to an infringement of sovereignty. The ASEAN Agreement on the Conservation of Nature and Natural Resources also makes reference to the importance of natural resources for present and future generations, but not to the rights and interests of indigenous peoples. The 1994 Convention on Desertification acknowledges that desertification and drought are problems of global dimension and stipulates that human beings in affected areas should be at the centre of concerns to combat desertification and to mitigate the effects of drought.

In summary, a clear tendency can be discerned to confine the circle of direct PSNR subjects solely to States, that is all States. There is no longer a special position for developing countries. Simultaneously, the interests of peoples, indigenous peoples and humankind are receiving increasing attention in international instruments in the sense that States are under an obligation to exercise PSNR on behalf and in the interests of their (indigenous) peoples. This implies that States are increasingly accountable, also at an international level, for the way they manage their natural wealth and resources, but also that for the time being (indigenous) peoples, humankind and the environment as such are objects rather than subjects of international law. Apart from UN reporting procedures and a few

\[68\] In GA Res. 43/53 of 27 January 1989, the Assembly stated that ‘climate change is a common concern of mankind, since climate is an essential condition which sustains life on earth’.


\[70\] Art. IV of the Treaty for Amazonian Co-operation.

complaints procedures in the context of the UN Human Rights Covenants and the ILO, peoples have no standing at the international level, let alone trees or future generations. Yet, as in other areas of international law, such as peace and security and human rights, a trend can be discerned toward monitoring and reporting, multilateral consultation and co-operation, and sometimes even verification and on-site inspection. The institution of sanctions in case of non-compliance is rare. In the field of international environmental law, exceptions include the 1973 Convention in International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the 1987 Montreal Protocol to the Ozone Layer Convention.

3.2 Balancing Rights and Duties
Throughout its evolution, the principle of PSNR has been extensively recognized as giving rise to a series of resource- and foreign investment-related rights or as re-emphasizing rights emanating from other principles such as territorial sovereignty and economic jurisdiction. If we confine ourselves to the rights of States, it has been widely acknowledged that each State has, within the framework of other principles and rules of international law, the right:

• to possess, use and freely dispose of its natural resources—though with the qualification under modern international law that this applies as long as a State is possessed of a government representing the whole people belonging to the territory as the 1970 Declaration on Principles of International Law puts it;
• to determine freely and control the prospecting, exploration, development, exploitation, use and marketing of natural resources;
• to manage and conserve natural resources pursuant to national developmental and environmental policies;
• to regulate foreign investment, including a general right to admit or to refuse the admission of foreign investment and to exercise authority over the activities of foreign investors, including the outflow of capital; and
• to nationalize or expropriate property, of both nationals and foreigners, subject to international law requirements.

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72 Crawford (1988).
73 See the thought-provoking article by Stone (1972). See also Weiss (1989 and 1990).
74 The trade measures of the Montreal Protocol not only affect States but also non-State Parties and include bans on the import and export of hazardous substances and export prohibition for relevant technologies.
Some developing countries have made the controversial claim that the principle of PSNR also includes the right:

- to share in the administration and management of local subsidiaries of foreign companies;
- to withdraw from unequal investment treaties and to renounce contractual relations when the other party is alleged to enrich itself unjustly thereby;
- to revise unilaterally the terms of an agreed arrangement in the exercise of its legislative competence;
- to determine unilaterally the amount, moment and mode of payment of compensation for expropriation; and
- to settle investment disputes solely upon the basis of national law and by national remedies.

In addition to rights, an increasing numbers of duties arise from the principle of PSNR. These include:

a. The duty to exercise PSNR-related rights in the interest of national development and to ensure that the whole population benefits from the exploitation of resources and the resulting national development. This includes the duty to respect the rights and interests of indigenous peoples and not to compromise the rights of future generations.

b. The duty to have due care for the environment. This means first of all the duty to exercise PSNR in such a way as to prevent significant harm to the environment of other (neighbouring) States or of areas beyond national jurisdiction. Recently, it has become possible to discern a tendency, both in UN resolutions and treaty law, for duties to be imposed on States with respect to the management of their natural wealth and resources so as to ensure sustainable production and consumption, both in the interest of their own peoples, other States and humankind in general, including future generations. As discussed in Chapters 4, 8 and 10, this implies: a rational, prudent use of natural resources to maintain and improve the habitat of wildlife, migratory birds, endangered flora and areas of outstanding natural beauty; to protect biodiversity; and to diminish the effects of over-exploitation of soil, of deforestation, over-fishing and of pollution. These duties respond to environmental problems of common concern, to both present and future generations. Gradually, it has become recognized that, under international law, natural resource management should no longer exclusively be within the domestic jurisdiction of individual States.

c. Duties to recognize the correlative rights of other States to transboundary resources and at least to consult with them as regards concurrent uses with a view to arriving at equitable apportionment and use of these resources.
d. Duties to observe international agreements, to respect the rights of other States and to fulfil in good faith international obligations in the exercise of PSNR. This duty is epitomized in the regulation of ‘taking’ foreign investments. For example, in general terms a nationalizing State has wide margins of discretion but it must be able to prove, also at the international level, that its ‘public interest’ is served by the act of nationalization; thus takeovers which are not in the public interest (but, for example, for the private gain of a ruling élite) are not permitted. Similarly, arbitrary discrimination between foreigners and nationals or among foreigners is prohibited. There can be no doubt that States are under an obligation to pay compensation for expropriation or nationalization. Difference of opinion continues to exist with respect to the standard and mode of payment, but over the years the rules arising from the triple standard (‘prompt, adequate and effective compensation’) have been relaxed or their interpretation has become subject to a substantial degree of flexibility. Lastly there should be a ‘due process’ and a possibility to institute an appeal against ‘a decision in the first instance’.

3.3 Permanent Sovereignty as a Corner-stone of International Sustainable Development Law

The rapid development of international environmental law has had a profound impact on the interpretation of the principle of PSNR in modern international law. While main elements of the principle have been reaffirmed and consolidated in various international environmental instruments, the corollary duties with respect to nature conservation and environmental protection are receiving increasing emphasis. Hence, PSNR serves no longer as merely the source of every State’s freedom to manage its natural resources, but also as the source of corresponding responsibilities requiring careful management and imposing accountability at national and international levels. This view is most empathetically reflected in such non-binding UN documents as the Stockholm Declaration and the World Charter of Nature (though to a far lesser extent in the Rio Declaration). It also follows from customary international law principles such as *sic utere tuo ut alienum non laedas* (use your own property so as not to injure the property of another) and State responsibility and from binding legal instruments. In the last category the 1968 African Convention on the Conservation of Nature and Natural Resources and the 1985 ASEAN Conservation Agreement stand out as efforts to achieve an integrated management of nature and natural resources, though in practice the States concerned are encountering many problems in implementing these treaties. The two global conventions opened for signature in Rio de Janeiro in 1992, namely the Climate Change and Biodiversity Conven-

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75 See Lyster (1985: 126-28 and 301-03).
Conclusions

...lations, may in future also have an important bearing on natural resource management and thus on the principle of PSNR. For example, the Biodiversity Convention reaffirms that biological resources within a State are subject to its PSNR, but also provides at various places that conservation of biodiversity is ‘a common concern of humankind’. The Convention states as its objectives: ‘the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding’. Thus the Convention skilfully balances rights and duties of resource-endowed countries and the interests of these countries and those of third States. This Article 2 also admirably succeeds in capturing the essence of the term ‘sustainable development’. Tropical deforestation is an issue which is closely related to both climate change and loss of biodiversity. It epitomizes the global significance of national management of natural wealth and resources.

The Rio Declaration and Agenda 21 call for the further development of international law on sustainable development. This requires a normative framework for international economic relations which would be conducive to sustainable development. The new international law of sustainable development would thus comprise not only the rules of law which were hitherto understood to constitute ‘international environmental law’, but also elements of what hitherto has been described as ‘international development law’. As Chapter 39 of Agenda 21 puts it, the further development of international law on sustainable development will have to pay special attention to ‘the delicate balance between environment and development concerns’, and calls for effective participation by all countries concerned in reviewing the past performance and effectiveness of existing international instruments and institutions as well as priorities for future law-making on sustainable development. The latter is to include further study in the area of avoidance and settlement of disputes.

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76 See the definition of ‘sustainable use’ in Article 2 of the Biodiversity Convention: ‘the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations’.

77 Principle 27 of the Rio Declaration on Environment and Development.


79 The present author would prefer the term international law of development or international law relating to development. See Schrijver (1990: 100-101). See also Fox (1992) and Bušijačić (1992: 100-101).

80 See also Sand (1993).
PSNR is a key principle of both international economic law and international environmental law. As such it can play an important role in the blending of these two fields of law with the aim of promoting sustainable development. As regards natural resource management, there is a need for an integrated and comprehensive approach with respect to: international assistance for the exploration and sustainable exploitation of natural resources; poverty alleviation; terms of trade of resource-endowed countries which are heavily dependent for their income on export of natural resources; and access to, and transfer of, environmentally-sound technology to assist countries in coping with adverse environmental consequences. In view of its strong developmental and increasingly environmental orientation, the principle of PSNR can serve as an important corner-stone of this proposed international sustainable development law.

This new role of PSNR coincides with the current re-interpretation of some of the traditional connotations of State sovereignty which can no longer be equated to unfettered freedom of action and is bound to become interpreted in a functional sense. Various strands of international law, especially in the fields of human rights, development and environmental protection, increasingly impinge on the traditional bulwarks of sovereignty. Consequently, international law and organization are progressively developing in a direction in which the range of ‘matters which are essentially within the domestic jurisdiction of any State’ (Art. 2.7 UN Charter) is becoming increasingly qualified. At the same time, it is obvious that neither sovereignty in general nor PSNR in particular will totally wither away. Ever since the Peace of Westphalia, sovereignty has served as the backbone of public international law and sovereign States continue to be the principal actors in international relations, albeit by no means the only actors. There is no reason to believe that this will be essentially different in the next decades. It is not the existence of sovereignty and PSNR as principles of international law which is at stake, but rather what these principles represent in a changing world. Changes in the interpretation of the principle of PSNR, will go hand in hand with the continuing evolution of international law. Currently, this is still a mainly State-oriented law under which national resource regimes co-exist but barely interact. However, a trend can be discerned towards a law which is humankind-oriented, under which sustainable development and environmental preservation are approached from a global perspective and where co-operation aims at imple-

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81 Louis Henkin advocates a new vocabulary: ‘...it is time to bring sovereignty down to earth, cut it down to size, discard its own rhetoric; to examine, analyse, reconceive the concept and break out its normative content; to repackage it, even rename it, and slowly ease the term out of polite language in international relations, particularly in law.’ Henkin (1994: 351-58). Yet, it will not be easy and may for quite some time to come not be very useful to ban sovereignty from the jargon of international law and international relations.

mentation of everybody’s right to development, the proper management of natural wealth and resources, equitable sharing of transboundary natural resources and the global commons, and preservation for future generations. Within this emerging legal framework, sovereignty over natural resources as an important corner-stone of rights and duties can very well continue to serve as a basic principle.