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Permanent sovereignty over natural resources of state under international law: An analysis

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Abstract

State have every right over its natural resources, they have the right to exploit and preserve their natural resources. Under International Law states have permanent sovereignty over their natural resources. The natural resources located within the territorial jurisdiction of sovereign state belong to the community i.e. the people themselves. Never the less the principle has received the renewed emphasis offer the initiation of the ages of decolonization. The principle of the permanent sovereignty over natural resources has been develop and reiterated in number of pertinent initiatives taken by the international organizations. There are number of provisions relating to permanent sovereignty over natural resources are embodied in the resolutions of the United Nations General Assembly while other are contained in international contentious or treaties.

This paper will be analyzing the concept of sovereignty of the state over the natural resources. The right of state over its natural resources has been an inherent right of every nation. Paper will be analyzing the various initiatives taken by the international organization for the protection of this concept of sovereignty of states over natural resources. This entitlement of the rights to the state will ensure the Human Rights to its nationals.

Keywords: Permanent sovereignty over natural resources; International Law; International Convention; Human Rights

1. Introduction

Man's relation with the natural resources is acomplex one. In one hand he is subjected to certain controls, on the other hand he also acts as a dominant force against the Earth's physical and biological system. Gradually such relationship has changed with time and the man started rampantly altering the physical environment around him to fulfill his selfish desire and to satisfy his own style of living conditions. Consequently, he created a long-term problem, which is equally catastrophic to the natural environment as well to the human kind. The consistent invasion upon the natural environment has accumulated a serious environment threat in the area of the bio-diversity. This threat to the bio-diversity also gives the threat to the sovereignty of the country over its natural resources. The right to exploit its natural resources is also the important human right which constitutes sovereign right of the nation.

The state is ensured with the sovereignty over its natural resources which exist within its territory. So the concept of the permanent sovereignty over its natural resources is the inherent right of the state and its subject and they cannot be deprived of it.

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2. Permanent Sovereignty over Natural Resources (PSNR)

The natural resources located within the territorial jurisdiction of the sovereign state belong to the community, i.e. the people themselves. Nevertheless the principle has received renewed emphasis and reappraisals since early fifties with the progress of the decolonization process in the early independent state-which found that many of the legal agreement of the colonial period under which foreign investors were exploiting their natural wealth and resources were unfair, inequitable and detrimental to the interest of the people themselves who were the owner of the resources.In one of the earliest resolution General Assembly recognized the right of the people to use and exploit the natural wealth and resources is inherent in their sovereignty.The principle of the permanent sovereignty over natural resources has been develop and reiterated in a number of pertinent resolutions inter alia, of the general assembly. The resolutions include, 532 (VI)of 12 January 1952, 626 (VII) of 21 December 1952, 837 (IX) of 14 December 1954, 1314 (XIII) 12 December 1958, 1515 (XV) 15 December 1960, popularly describe the land mark resolution.

The process eventually culminated in the incorporation of the principle permanent sovereignty over the natural resources in Article 2 of the Charter of economic rights and duties of the state adopted by the general assembly. Ever since the adoption of the resolution on the New International Economic order (NIEO) by general assembly, the economic and social council (ECOSO)and the committee of natural resources have continued to monitor the development in the field of permanent sovereignty over natural resources.The analytical approach to the aforesaid resolution speaks about the evolution and the development of the permanent sovereignty over the natural resource can be divided four stages.

During the first stage that is from 1952 till adoption of the 1803 (XVII) of December 1962, the emphasis is on the formulation of the right of the people to use and exploit their natural resources as a right ‘inherent in the sovereignty’. During the second stage from 1962 to 1973 the land mark resolution of 1803 (XVII) was adopted, reiterated and reaffirmedin number of other resolutions. The third stage is related to the resolution of the sixth special session on May 1974, it eventually led to the adoption of the resolution 3281 (XXIX) of 12 December 1974. This brought the controversy about the rights conferred under the 1803 resolution and the rights provided by this resolution. The fourth phase marked the important development relevant to the exercise of the right of permanent sovereignty from 1974 onward, particularly in the impact of the series of investment treaties concluded to the period, required to be examined.The whole concept of PSNR depends how the treaty and resolutions are effectively implemented. So for this there should be an effective method of treaty interpretation for the assurance of these rights.

3. Methods of Treaty Interpretation

A number of provisions relating to PSNR are embodied in resolutions of the UN General Assembly while others are contained in international conventions or treaties.One thread that runs through virtually all of the provisions is the susceptibility to diverse and often divergent interpretations. Because ambiguity, vagueness, and imprecision characterize international provisions on PSNR, doing justice to this subject therefore requires an accurate and acceptable discernment of the intent of the drafters.

Several rules of treaty interpretation have emerged over the years. The most prominent appears in the Vienna Convention on the Law of Treaties (Vienna Convention), believed in many quarters to represent a codification of customary international law on treaty interpretation.According to the Vienna Convention, the primary way to decipher meaning from a treaty provision is by textual interpretation.The justification behind text-based interpretation is that it is a Herculean task to ascertain an original intention of the drafters no longer available to be questioned.

One may, however, resort to the travauxpreparatoires and treaty framers' intent to avoid ambiguity or manifest absurdity from textual interpretation, or to confirm a textual interpretation. Some scholars go further to suggest the Vienna Convention does not necessarily require an ambiguity be found before the preparatory texts are examined. Instead, "the travauxpreparatoires is examined simultaneously with the text and other materials." In any event, it is incontestably an inveterate practice in international law "to resolve potentially troublesome questions of textual interpretation by reference to a treaty's 'object and purpose."

Other interpretive methods outside of the Vienna Convention are substantially similar. Mark Villigier identifies at least five methods of treaty interpretation whose origins long precede the Vienna Convention and which were considered by the International Law Commission in drafting the Vienna Convention's interpretive scheme contained in Articles 31 and 32. These methods include: textual interpretation, which concentrates entirely on the text of the treaty; subjective interpretation, which often utilizes extrinsic material; contextual interpretation, which seeks to locate the treaty text in a wider context; teleological interpretation, which moves beyond the text so as to achieve the treaty's goals; and logical

interpretation, which resorts to reasoning and abstract legal principles . In the interpretation of a treaty, one should also consider not only the particular treaty's context, but also the wider context of conventional or customary international law.

Treaty interpretation should be based on the text of the treaty and attention should also be paid to the object and purpose of the treaty in appropriate cases.

4. The right to dispose freely natural resources

One of the basic tenets of permanent sovereignty is no doubt the 'sovereign' right of a State or people to dispose freely of its natural resources and wealth within the limits of national jurisdiction.This is clearly reflected in virtually all permanent- sovereignty- related resolutions.

As far as treaty law is concerned, it is most explicitly recognized in Article 1 of the 1966. ICCPR and Article 21 of the 1981 African charter on Human and Peoples' Rights. The 1992 Biodiversity Convention reaffirms that States have sovereign rights . . . over their natural resources', and that the authority to determine access to genetic resources rests with governments and is subject to national legislation'.

A number of treaties also contain references to the principle.;The 1994 Energy Charter Treaty recognizes State sovereignty and sovereign rights over energy resources.The treaty specifies that each State continues to hold the right to decide which geographical areas within its territory are to be made available for exploration and development of energy resources. Charter of Economic Rights and Duties of States, indicates every State has and shall freely exercise fully permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activity. ; Declaration on the Establishment of a New Economic Order, providing for "full permanent sovereignty of every State over its natural resources and all economic activities" ; United Nations Convention on the Law of the Sea announcing that "in the exclusive economic zone, the coastal State has sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources" and providing for the "sovereign right of States to exploit their natural resources" ; United Nations Framework Convention on Climate Change ; Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts ; Vienna Convention on Succession of States in Respect of Treaties , affirming permanent sovereignty over natural wealth and resources; International Covenant on Economic, Social and Cultural Rights.

The right to freely dispose of natural resources is also recognized in decisions of arbitral tribunals. For example, in the Texaco Award(1977) dealing with Libyan oil- nationalization measures it is pointed out:

Territorial sovereignty confers upon the State an exclusive competence to organize as it wishes the economic structures of its territory and to introduce therein any reforms which may seem to be desirable to it. It is an essential prerogative of sovereignty for the constitutionally authorized authorities of the State to choose and build freely an economic and social system. International Law recognizes that a state has the prerogative just as it has the prerogative to determine freely its political regime and its constitutional institutions.

The Texaco Award clearly indicates that the right of states to dispose of their natural resources includes the right to exercise their sovereignty by undertaking international commitments vis-à-vis other States and non- State partners, intergovernmental organizations or private foreign entities. The state by entering into an internal agreement with any partner whatsoever exercises its sovereignty whenever the State is not subject to duress and where the state has freely committed itself through and untainted consent.

For this purpose the sole arbitrator Dupuy introduced a distinction between 'enjoyment' and 'exercise' of sovereignty: in his view the notion of permanent sovereignty can be completely reconciled with the conclusion by a State of agreements which leave to the State control of the activities of the other contracting party within its territory.To decide otherwise would be to consider any contract entered into between a State and a foreign private company to be contrary to the rule of jus cogens whenever it concerns the exploitation of natural resources.

In the Liamco case (1977) a similar view was expressed when the sole arbitrator Mahmassani observed that resolution 1803(XVII) recommended respect for States' sovereign right to dispose of their wealth and natural resources'.The Aminioil Award (1982) notes that many constitutions provide that all natural resources are the property of the State.

According to Jimenez de Arechaga, permanent sovereignty over natural resources means that the 'the territorial State can never lose its legal capacity to change the destination or the method of exploitation of those resources, whatever

arrangements have been made for their exploitation'.The inalienable and permanent character may also mean that the right to dispose freely of natural wealth and resources can always be regained, if necessary unilaterally, notwithstanding contractual obligations to the contrary. Seidl- Hohenveldern is of the view that the word 'permanent' should be understood as indicating that the state concerned 'can avail itself of this sovereign right at any time', but that it does not entitle the State concerned to disregard at its whim the earlier waiver or transfer of such rights'.

'Permanent Sovereignty is . . . inalienable. A State may however, may accept obligations with regard to exercise of such sovereignty, by treaty or by contract, freely entered into.'It follows that, in each particular case, verification should occur whether the act would in fact alienate the sovereignty of a State over its natural resources. This would also include verification in the case of changed circumstances. As Chowdhury suggested:

The principle could similarly be invoked in cases where due to changed circumstances an agreement may be regarded as having become so onerous or disadvantageous to a State as to amount to a derogation of the sovereignty of that State. The State could not be expected to allow such arrangements to operate which were manifestly against the interest of its people.

Thus the principle of permanent sovereignty precludes a State from derogating from the essence of the exercise over its natural resources.

5. Permanent Sovereignty: A norm of jus cogens

Jus cogenshas been recognized as a principle of permanent sovereignty. The argument put forth in support of such a thesis is :

- The fairly consistent use of the word 'permanent'before 'sovereignty over natural resources' and the frequent identification of permanent sovereignty as 'inalienable'or 'full' .
- 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 resource.' The Vienna Convention 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. 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 the definition

- Only widely accepted and recognized norms of general international law can potentially gain the status of jus cogens.The principle of permanent sovereignty meets this test of being widely accepted and recognized.
- No derogation is permitted. 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 derogation is permitted – it has to be considered as null and void. The prohibition to deprive a people of its means of subsistence,are non-derogable norms of International Law.

6. Conclusion

The international legal system is a state centric body of rules and institution. From that perspective it takes little effort to view international precepts and concepts as being applicable solely or primarily to States. The principal of permanent sovereignty over natural resources has not escaped this natural pattern of construing things in international arena.

Compliance with ethical standards

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[1] Ashish Kaushik, Assistant Professor, Institute of Legal Studies, Ch. Charan Singh University, Meerut

[2] Resolution number 626 (VII) of 21December 1952.

[3] Resolution number 3281 (XXIX) of 12 December 1972

[4] By its Resolution number 3281 (LXII) of 4 august 1977

[5] Hossainkamal, Subrata Roy Chowhury,Permanent Sovereignty over Natural Resources in International Law, Frances Publisher, London, 1984, pp 2-6

[6] UN General Assembly Resolutions on permanent sovereignty over natural resources (PSNR) in addition to those already mentioned include: Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), art. 2, U.N. Doc. A/9631 (Dec. 12, 1974).

[7] Antony Anghie, The Heart of My Home: Colonialsism, Environmental Damage, and the Nauru Case, 34 Harv. Int'l L. J. 445, 473 (1993)(noting the lack of clarity in the language of the instruments espousing the principle of PSNR, particularly the content of the right and the meaning of the term "peoples," leaving them open to several conflicting interpretations).

[8] See NicoSchrijver, Sovereignty over Natural Resources379-80 (1997). (noting that the African Charter is ambiguous on the point of who is vested with the right to permanent sovereignty over natural resources).

[9] Mark J. Kadish, Article 36 of the Vienna Convention on Consular Relations: A Search for Right to Consul, 18 Mich. J. Int'l L. 565, 590 (1997(stating that the Vienna Convention on the Law of Treaties governs the interpretation of treaties).

[10] Vienna Convention on the Law of Treaties arts. 31-33, May 23, 1969, 1155 U.N.T.S. 331, 340.

[11] Some scholars dispute the assertion that the Vienna Convention codifies customary international law on treaty interpretation. See, e.g., Philip M. Nichols,GATT Doctrine, 36 Va. J. Int'l L. 379, 429 (1996)(stating that "whether the interpretive method suggested by the Vienna Convention has become customary is debatable" and citing to the conclusion of another scholar that Articles 31 and 32 of the Vienna Convention constitute an innovative scheme that does not represent a codification of custom).

[12] Vienna Convention on the Law of Treaties, art 31-33,may 23,1969, 1155 U.N.T.S. at 340, art. 31.

[13] Bicentennial Celebration of the District of Columbia Circuit: Panel IV--Equality Decisions of the District of Columbia Circuit Courts, 204 F. R. D. 499, March, 9, 2001, pp. 626 -627. (remarks of American University Dean Claudio Grossman).

[14] This term has been defined as "the international equivalent of legislative history" of the treaty, consisting of the "preparatory and conclusory circumstances of a treaty." Haitian Ctrs. Council, Inc. v. Mc Nary, 969 F. 2d 1350,1362 (2d Cir. 1992).

[15] Vienna Convention on the Law of Treaties. See also Nichols, GATT, ("The Vienna Convention gives primacy to the text and context of a treaty; recourse to other materials including preparatory materials is available only to confirm a textual interpretation or when a textual interpretation is ambiguous or absurd.").

[16] Michael S. Straubel, Textualism, Contextualism and the Scientific Method in Treaty Interpretation: How Do We Find the Shared Intent of the Parties?,23 Wayne L. Rev. 1191, 1205 (1994).

[17] See also Sir Ian Sinclair, The Vienna Convention on the Law of Treaties 115-16 (2d ed. 1984).

[18] Laurence R. Helfer& Anne-Marie Slaughter,Towards a Theory of Effective Supranational Adjudication, 107 Yale L. J. 273, 378 (1997). See also PemmarajuSreenivasaRao, Multiple International Judicial Forums: A Reflection of the Growing Strenghth of International law or Its Fragmentations., 25 Mich. J. Int'l L. J. 929, 952 2004. ("Treaties

should be interpreted in good faith and in accordance with the ordinary meaning of terms in pertinent provisions, keeping in view the object, purposes, and the overall text of the treaty.").

[19] Supra n. 8. Also see Mark Villigier, Customary International Law and Treaties 327 (1985).

[20] Ibid, See also Philip M. Nichols, Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority, 28 N.Y.U. J. Int'l & Pol. 711, 742 n.105 (1996).

[21] Supra n. 8. See also Sir Ian Sinclair, The Vienna Convention on Law of Treaties 2nd ed. 1994 pp. 115-116. ("Every treaty provision must be read not only in its own context, but in the wider context of general international law, whether conventional or customary")

[22] Nichols, GATT, Some scholars dispute the assertion that the Vienna Convention codifies customary international law on treaty interpretation. See, e.g., Philip M. Nichols, GATT Doctrine, 36 Va. J. Int'l L. 379, 429 (1996) [hereinafter Nichols, GATT] (stating that "whether the interpretive method suggested by the Vienna Convention has become customary is debatable" and citing to the conclusion of another scholar that Articles 31 and 32 of the Vienna Convention constitute an innovative scheme that does not represent a codification of custom)., at 429

[23] This qualification is used in GA Res. 523 (VI), 626(VI) and 3175 (XXVIII), and UNCTAD I, General Principle 3. UNCTAD Res. 46 (III) and TDB Res. 88(XII).

[24] This right to dispose freely of natural resources is closely related to the principle that every state has the right to adopt the social and economic system which it deems most favorable to its development. This is recognized in many UN resolutions, including the 1970 Declaration on Principles of International Law ('Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference by another State', Principle III.4) and Res. 3171 (XXVIII) which reaffirms this as an 'inviolable principle' (preamble, para. 3).

[25] Preamble and Article 15.1.

[26] The treaty 'shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources'.

[27] Article 18.3 of the ECT, signed in Lisbon, 17 December 1994. Text in 37 Official Journal of the European Communities, No. C 344, p.15 and in 34 ILM (1995), p. 360.

[28] G.A. Res. 3281 (XXIX), art. 2, U.N. Doc. A/9631 (Dec. 12, 1974).

[29] G.A. Res. 3201 (S-VI), P 4(e), U.N. Doc. A/9559 (May 1, 1974).

[30] Arts. 56, 93, Nov. 16, 1994, 1833 U.N.T.S. 397.

[31] Mar. 21, 1994, 1771 U.N.T.S. 107.

[32] Art. 38.2, U.N. Doc. A/CONF.117/14 (Apr. 7, 1983), reprinted in 22 I.L.M. 306 (1983).

[33] Art. 13, U.N. Doc A/CONF.80/31 (Aug. 22, 1978), reprinted in 17 I.L.M. 1488 (1978).

[34] G.A. Res. 2200 (XXI), arts. 1(2), 11(2)(a), 25, U.N. Doc. A/6316 (Dec. 19, 1966).

[35] Texaco v. Libyan Arab Republic, reprinted in 17 ILM (1978), pp. 3-37. Also see in 53 ILR, P. 389.

[36] ibid.

[37] According to Dupuy a concessionary contract is not an alienation of such sovereignty, but only a limitation: 'The state retains, within the areas which it has reserved, authority over the operation conducted by the concession holder and the continuance of the exercise over the sovereignty is manifested.

[38] Limaco v. Libya, reprinted in 20 ILM (1981), pp. 1-87, at p. 53, para. 100; 62 ILR, p. 140, para. 100.

[39] Kuwait v. Aminoil, reprinted in 21 ILM (1982), pp. 976- 1053. For example, the Kuwaiti Constitution provides: 'All of the natural wealth and resources are the property of the state' (Article 21) and 'Any concession only by law and for a determinate period' (Article 152).

[40] Emphasis added. Arechaga(1979:297).

[41] See Banerjee (1968: 515 -46).

[42] Seidl- Hohenveldern, International Economic Law, 2nd ed., 1992, p. 28.

[43] Seoul Declaration, 1986, Principle 5.2.

[44] S. R. Chowdhury, Permanent Sovereignty over Natural Resources: Substratum of the Seoul Declration, in de Waart et al., 1988, p.64.

[45] NicoSchrijver, Sovereignty over Natural Resources, Cambridge University Press, Cambridge, 1997, p. 375.

[46] This adjective is used in nearly all permanent sovereignty resolutions, with the exception of GA Res. 523 (VI) and 626 (VII).

[47] Reference to permanent sovereignty as an 'inalienable right' of States (and occasionally of peoples) is made in GA Res. 2158 (XXI), 3171(XXVIII) and 3281(XXIX).

[48] See GA Res. 2386 (XXIII), 2626 (XXV), 3171 (XXVIII), 3201 (XVI), 3202 (XVI, section VIII), 3281 (XXIX), 3336 (XXX), 3517 (XXX), 32/9, 41/128 and ECOSOC Res. 1737 and 1956.

[49] Article 1 of 1966, ICCPR