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The Principle of Permanent Sovereignty over Natural Resources and Its Modern Implications

- LL.M. Master Degree Thesis -

HÁSKÓLI ÍSLANDS

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For the person who provided me with
Inspirational thought

Preface

My first contact with international law brought me right into the middle of a debate over the rights and obligations the principle of permanent sovereignty over natural resources. With the wide range of arguments and opinions concerning the application of the concept in mind, I was particularly interested in its development in the 21st century, especially in the light of *relatively new* fields of international law, in this case international environmental law and indigenous peoples.

Moreover, the recent headlines on the principle in connection with its invocation in party South America prompted me to choose this topic for my LL.M. Thesis. The last months have been spent with much time on reading and research in various fields of international law connected to the topic and have also been some of the most interesting of my studies.

I would also like to take this opportunity to especially thank my thesis supervisor Aðalheiður Jóhannsdóttir for all her insightful advice, criticism and motivating words during this period. I am also grateful for all the support and friendship I have received from so many people throughout the last year, which have made it one my most memorable.

Jane A. Hofbauer
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List of Abbreviations:

Adv. Op.	Advisory Opinion
Art.	Article
BGBl.	Bundesgesetzblatt
BIT	Bilateral Investment Treaty
CERDS	Charter of Economic Rights and Duties of States
Doc.	Document
e.g.	*exempli gratia*
ed.	Editor / Edition
eds.	Editors
et al.	*et alii*
FAO	Food and Agriculture Organization
GAOR	United Nations General Assembly Official Records
i.e.	*id est*
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILA	International Law Association
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Review
ILSA	International Law Students Association
Inter-Am. Ct. H. R.	Inter-American Court of Human Rights
LNTS	League of Nations Treaty Series
No.	Number
p.	Page
pp.	Pages
Prel. Obj.	Preliminary Objections
Prov. Measures	Provisional Measures
PSNR	Permanent Sovereignty over Natural Resources
Res.	Resolution
Supp.	Supplement
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
v.	*versus*
vol.	Volume

Chapter I Introduction

1.1 Study Objective

The past century has severely changed the interface of the international community. The number of States has quadrupled and the rules on statehood have found new addressees. Thus, in the post World War II era, the period of decolonization prompted the forming of a tool which aimed at promoting social and economic development and ensuring equitable resource exploitation – the principle of permanent sovereignty over natural resources (PSNR). Drafted under the premise of rectifying unjustified arrangements especially concerning raw materials, the ownership of which most often still remaining with multinational corporations resident in the former colonial powers, the principle soon took on a life of its own.

In the beginning it was mainly perceived as merely constituting a political statement. In the time since, it has evolved into an established set of rights and obligations in a wide range of different legal regimes. Not only does it touch upon fields such as International Investment Law, the Law of the Sea, International Trade Law and the self-determination of peoples but also has and likewise receives a significant impact on and from International Environmental Law. Moreover, the principle of PSNR has evolved from a tool of developing states into an instrument not only directed at all states, but also being claimed by indigenous peoples.

The importance of their inclusion within the circle of addressees lies in the vulnerable position of indigenous peoples in general. The close link of their physical and cultural survival with the lands they inhabit calls for extra measures to guarantee their preservation and development in the future. This is especially of concern due to the fact that their lands and territories often coincide with such regions which are considered susceptible to development, *i.e.* natural resource extraction, construction and operation of industrial plants and facilities. Thus, indigenous peoples have been actively organizing and engaging themselves over the past decades, and appear on the international level to undertake the efforts of ensuring their inclusion and participation in the world order on an equitable basis.[1] The development of the principle of PSNR is therefore by far not concluded. The concept underwent several changes throughout the 20th century, and most likely this will occur in the 21st century as well.

[1] Committee of Experts on the Application of Conventions and Recommendations: "General Observation concerning Convention No. 169", 2009, ILO Doc. 052009169.

This thesis therefore aims at, firstly, giving an overview over the historical development of the principle to enable an understanding for the reasons paving the way for a change of its scope. Secondly, an outline over the most important elements of PSNR will be provided for in Chapter II. By means of case-studies, recent invocations of the principle with regard to foreign investments in South America will provide a first example of how the principle can be envisioned to be utilized in the 21st century. Furthermore, the relationship of the principle, as a tool aimed at ensuring sovereignty, with evolved environmental norms, which often aim at limiting sovereignty, will be determined. Finally, the applicability of the principle of PSNR to indigenous peoples shall be analyzed. Concerning the findings thereof, case-studies of Greenland and indigenous and tribal peoples in Suriname will be examined to compare the theoretical arguments to practical examples of implementation.

1.2 The Origin and Evolution of the Principle of Permanent Sovereignty over Natural Resources

1.2.1 Initiative Sparks

The creation of new states in the period of decolonization urged the development of a principle which encompassed their various demands and interests. Rooted in the right of self-determination and with the primary aim of enabling economic development for developing states, the principle of PSNR builds on traditional state prerogatives such as territorial sovereignty and sovereign equality of states. This permits states to freely determine and apply laws and policies governing their people and territory under their jurisdiction and choose their own political, social and economic systems.[2]

The origin of PSNR can be traced back to numerous resolutions which passed in the United Nations General Assembly (UNGA).[3] While in general recommendations taken by the

[2] Art. 2(1), Charter of the United Nations, Oct. 24, 1945, 1 UNTS 26; UNGA – Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Oct. 24, 1970, 25 UN – GAOR, Supp. No. 28, p. 123, UN Doc. A/8082; *Corfu Channel* (Merits) (U.K. *v.* Albania), 1949 ICJ 4, p. 35 (Judgment, Apr. 9); *Island of Palmas* (U.S. *v.* Netherlands), 2 *Reports of International Arbitral Awards* 829, pp. 838-840 (Award, Apr. 4, 1928), ; A. Cassese: *International Law*, 2nd ed., Oxford 2005, pp. 48-52; I. Brownlie: *Principles of Public International Law*, 7th ed., Oxford *et al.* 2008, pp. 289-291.

[3] N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, Cambridge 2008, pp. 399-401; UNGA – Res. 626 (VII), Right to exploit freely natural wealth and resources, Dec. 21, 1952, 7 UN – GAOR, Supp. No. 20, p. 18, UN Doc. A/2361; UNGA – Res. 1515 (XV), Concerted action for economic development of economically less developed countries, Dec. 15, 1960, 15 UN – GAOR, Supp. No. 16, p. 9, UN Doc. A/4648; UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217; UNGA – Res. 3016 (XXVII), Permanent sovereignty over natural resources of developing countries, Dec. 18, 1972, 27 UN – GAOR, Supp. No. 30, p. 48, UN Doc.

UNGA have no binding effect on the member states (with decisions taken in budgetary, elective or admissive matters (internal workings) being an exception),[4] there nevertheless have been many instances in which UNGA Resolutions have considerably contributed to the formation of customary international law in one or another way. This has also found evidence in several judgments of the International Court of Justice (ICJ), as well as of other judicial bodies.[5] Thus, the common repetition and recitation of previous resolutions serve as proof of a strong *opinio iuris* that the principle of PSNR has been accepted as a norm of customary international law.[6]

The debate on natural resources reflected the concerns generated due to a "sharp increase in the demand for raw material"[7] after World War II and the desire of newly independent states to ensure equitable and fair exploitation arrangements concerning their natural resources.[8]

1.2.2 Laying the Foundations – United Nations General Assembly Resolution 1803 (XVII)

Among the numerous resolutions the *law-making* UNGA Resolution 1803 (XVII) stands out which was generated after lengthy studies on the topic had been conducted by the Economic

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A/8963; S. R. Chowdhury: "Permanent Sovereignty over Natural Resources – Substratum of the Seoul Declaration" in *International Law and Development*, P. de Waart *et al.* eds., Dordrecht 1988, pp. 61, 64-65.

[4] Arts. 10-17, Charter of the United Nations, Oct. 24, 1945, 1 UNTS 26; *Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 ICJ 4, p. 8 (Adv. Op., March 3); *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, 1962 ICJ 151, pp. 177-178 (Adv. Op., July 20); P. Sands & P. Klein: *Bowetts's Law of International Institutions*, 5th ed., London 2001, p. 29; S. A. Bleicher: "The Legal Significance of Re-Citation of General Assembly Resolutions", *The American Journal of International Law*, vol. 63, no. 3, 1969, p. 445.

[5] *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226, p. 254, para. 70 (Adv. Op., July 8); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 1971 ICJ 16, p. 45, para. 89 (Adv. Op., June 21); *Military and Paramilitary Activities in and against Nicaragua* (Merits) (Nicaragua *v.* U.S.), 1986 ICJ 14, p. 44, para. 72, pp. 106-107, paras. 202-203 (Judgment, June 27); *Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Co. and the Government of the Libyan Arab Republic* (Texaco *v.* Libya), 17 ILM 1, paras. 83-86 (Award, Jan. 19, 1977); G. J. Kerwin: "The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts", *Duke Law Journal* , vol. 1983, no. 4, 1983, pp. 883-890.

[6] *Military and Paramilitary Activities in and against Nicaragua* (Merits) (Nicaragua *v.* U.S.), 1986 ICJ 14, p. 100, para. 188, p. 101, para. 191 (Judgment, June 27); *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226, p. 254, para. 70 (Adv. Op., July 8); K. N. Gess: "Permanent Sovereignty over Natural Resources – An Analytical Review of the United Nations Declarations and Its Genesis", *The International and Comparative Law Quarterly*, vol. 13, no. 2, 1964, p. 400; N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, p. 373.

[7] UNGA – Res. 523 (VI), Integrated Economic Development and Commercial Agreements, Jan. 12, 1952, 6 UN – GAOR, Supp. No. 20, p. 20, UN Doc. A/2119.

[8] N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, pp. 4-5, 36.

and Social Council, the UN Secretariat and the Commission on PSNR,[9] which had been established by UNGA Resolution 1314 (XIII) and had the task of determining the extent of PSNR within the notion of self-determination.[10]

UNGA Resolution 1803 (XVII) stipulates not only that PSNR must be exercised in the interest of national development and well-being of the peoples concerned, but also lays out basic rules concerning the treatment of foreign investors.[11] Linked to their sovereignty, the principle gives states the right to possess, use and dispose freely of any surface and subsurface natural resources, connected with their territory, and for this purpose they may not only regulate their economy but also nationalize or expropriate property, both of nationals and foreigners.[12] Profits derived from the granting of authorization for exploration, development and disposition of natural resources shall be shared proportionally.[13] In cases where the state chooses to nationalize, expropriate or requisition property, it must limit this to sole instances for public purposes, and compensation shall occur in accordance with national legislation.[14] In general however, as far as possible such agreements are to be complied with in good faith.[15] Furthermore, UNGA Resolution 1803 (XVII) emphasizes that the principle shall be exercised with respect for the rights and duties of states under international law, as well as their

[9] K. N. Gess: "Permanent Sovereignty over Natural Resources – An Analytical Review of the United Nations Declarations and Its Genesis", p. 398; B. Broms: "Natural Resources – Sovereignty over" in *Encyclopedia of Public International Law*, R. Bernhardt ed., Amsterdam 1997, (Volume III), p. 521.

[10] UNGA – Res. 1314 (XIII), Recommendations Concerning International Respect for the Rights of Peoples and Nations to Self-determination, Dec. 12, 1958, 13 UN-GAOR, Supp. No. 18, p. 27, UN Doc. A/4090; N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, p. 59.

[11] Art. 1, paras. 1, 4, UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN – Doc. A/5217; S. Zamora: "Economic Relations and Development" in *The United Nations and International Law*, C. C. Joyner ed., Cambridge *et al.* 1997, p. 259; *Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Co. and the Government of the Libyan Arab Republic* (Texaco *v.* Libya), 17 ILM 1, p. 30 (Award, Jan. 19, 1977).

[12] A. Cassese: *Self-determination of Peoples – A Legal Appraisal*, Cambridge 1995, pp. 55-56; N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, pp. 22-24, 264, 285; G. Elian: *The Principle of Sovereignty over Natural Resources*, Alphen an den Rijn 1979, pp. 11-12, 15-16; N. Schrijver: "Permanent Sovereignty over Natural Resources versus Common Heritage of Mankind – Contradictory or Complementary Principles of International Economic Law" in *International Law and Development*, P. de Waart *et al.* eds., Dordrecht 1988, pp. 90-91; K. Hossain & S. R. Chowdhury: *Permanent Sovereignty over Natural Resources in International Law*, London 1984, p. 93; UNGA – Res. 626 (VII), Right to exploit freely natural wealth and resources, Dec. 21, 1952, 7 UN – GAOR, Supp. No. 20, p. 18, UN Doc. A/2361.

[13] B. Broms: "Natural Resources – Sovereignty over", p. 522; Art. 1, paras. 2-3, UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217.

[14] Art. 1, para. 4, UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217; S. Zamora: "Economic Relations and Development", p. 259.

[15] Art. 1, paras. 8, UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217.

sovereign equality, and moreover encourages international cooperation for the economic development of developing countries.[16]

1.2.3 Responding to a Changing World Order

The wide acceptance of the principle of PSNR constituting customary international law was also evidenced by its inclusion in the International Covenant on Civil and Political Rights (ICCPR) as well as in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[17] However, the scope of the principle experienced further clarifications and developments in the following years, resulting finally in the adoption of the Charter of Economic Rights and Duties of States (CERDS).[18] While more concrete guidelines for implementation had begun crystallizing,[19] external circumstances, such as *e.g.* the oil crisis in 1973, nationalizations which sought legitimization *inter alia* in the principle of PSNR and the extension of jurisdiction over resources of the sea, provoked developing states to establish a *New International Economic Order*.[20] The aim was to restructure the existing economic world order to create equal, cooperative and fair terms of trade in particular for developing states.[21] Thus, each state's right to full and permanent sovereignty is confirmed in the center-piece of the CERDS, Article 2, and moreover, especially the sensitive topic of nationalization is elaborated on in more depth.[22] Although it might be mentioned that the majority of developed states either abstained from voting or voted against the resolution, this can be explained by those points touching upon the treatment of transnational corporations and the (incomplete) obligation to pay compensation in cases of nationalization, expropriation or requisition of property, as the chosen regulation of these aspects led to unrest among the developed nations.[23]

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[16] Preamble, Art. 1, paras. 5-7, UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217.
[17] Art. 1(2), International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (1967); Art. 1(2), International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3 (1967).
[18] UNGA – Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, Dec. 12, 1974, 29 UN – GAOR, Supp. No. 31, p. 50, UN Doc. A/9631; B. Broms: "Natural Resources – Sovereignty over", pp. 522-523.
[19] UNGA – Res. 2158 (XXI), Permanent Sovereignty over Natural Resources, Nov. 25, 1966, 21 UN – GAOR, Supp. No. 16, p. 29, UN Doc. A/6518.
[20] S. K. Chatterjee: "The Charter of Economic Rights and Duties of States – An Evaluation after 15 Years", *The International and Comparative Law Quarterly*, vol. 40, no. 3, 1991, pp. 669-670; G. Elian: *The Principle of Sovereignty over Natural Resources*, pp. 104-106.
[21] Preamble, UNGA – Res. 3201 (S – VI), Declaration on the Establishment of a New International Economic Order, May 1, 1974, S – 6, UN – GAOR, Supp. No. 1, p. 4, UN Doc. A/9559.
[22] B. H. Weston: "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth", *The American Journal of International Law*, vol. 75, no. 3, 1981, pp. 437-438**.**
[23] S. K. Chatterjee: "The Charter of Economic Rights and Duties of States – An Evaluation after 15 Years", p. 674.

However, concerns over decreasing foreign investment caused a rethinking of the regulation of the matter.[24] Firstly, as had already been a cornerstone in UNGA Resolution 1803 (XVII), new emphasis was laid on international cooperation for the promotion of development.[25] Models envisioning financial support, transfer of technology and know-how were introduced.[26] Secondly, a result of these active efforts by developing states was the creation of an equitable international regime concerning the exploration and exploitation of natural resources of the sea-bed based on the concept of common heritage of mankind, calling for their utilization for the benefit of mankind as a whole.[27] This regime was also included in Part XI of the United Nations Convention on the Law of the Sea, however, did not receive support until the envisioned management regime, not however the underlying principle, was amended by the 1994 Agreement.[28]

1.2.4 Incorporating International Environmental Law

Due to growing environmental concerns in the aftermath of the 1972 Stockholm Declaration, the foundation of modern international environmental law, General Assembly Resolutions led to the inclusion of more regulations on nature management and exploitation methods.[29] UNGA Resolution 37/7, which adopted the World Charter for Nature, is an example of the recognition of the importance of states incorporating conservation practices when conducting their activities within the scope of the principle of PSNR.[30] International cooperation

[24] A. Ziegler & L.-P. Gratton: "Investment Insurance" in *The Oxford Handbook of International Investment Law*, P. Muchlinski *et al.* eds., Oxford *et al.* 2008, p. 527.
[25] Preamble, Art. 1, para. 6, UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217; UNGA – Res. A/RES/32/176, Multilateral Development Assistance for the Exploration of Natural Resources, Dec. 19, 1977, 32 UN – GAOR, Supp. No. 39, p. 109, UN Doc. A/32/39; N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, pp. 113-114.
[26] G. Elian: *The Principle of Sovereignty over Natural Resources*, pp. 86-88; UNGA – Res. 2626 (XXV), International Development Strategy for the Second United Nations Development Decade, Oct. 24, 1970, 25 UN – GAOR, Supp. No. 28, p. 39, UN Doc. A/8028.
[27] UNGA – Res. 2574 (XXIV), Question of the reservation exclusively for the peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind, Dec. 15, 1969, 24 UN – GAOR, Supp. No. 30, p. 10, UN Doc. A/7630; UNGA – Res. 2749 (XXV), Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, Dec. 17, 1970, 25 UN – GAOR, Supp. No. 28, p. 24, UN Doc. A/8028; Part XI, Section 2, United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3; C. C. Joyner: "Legal Implications of the Concepts of the Common Heritage of Mankind", *The International and Comparative Law Quarterly*, vol. 35, no. 1, 1986, p. 193.
[28] E. Guntrip: "The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed?", *Melbourne Journal of International Law*, vol. 4, no. 2, 2003, pp. 384-385.
[29] J. Thornton & S. Beckwith: *Environmental Law*, 2nd ed., London 2004, p. 29; N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, p. 128.
[30] UNGA – Res. 37/7, World Charter for Nature, Oct. 28, 1982, 37 UN – GAOR, Supp. No. 51, p. 17, UN Doc. A/37/51.

concerning shared natural resources between two or more states also received growing attention, requiring states to accept partly limiting their own conduct due to considerations for other states. Article 3 CERDS constituted a first step in the process resulting in the drafting of the UNEP Guidelines on Shared Resources, which contain proposals for conservation and harmonious utilization methods for states which share natural resources with other states.[31] Due to the fact that diverging views existed whether the sovereignty of states concerning natural resources was to be understood as being *full* or in fact naturally limited, the UNGA merely took note of the guidelines and requested states to incorporate them in good faith.[32]

As international environmental law developed the principle of PSNR underwent further alterations. The 1992 United Nations Conference on Environment and Development ("Earth Summit"), the results of which were proclaimed in the 1992 Rio Declaration, placed new emphasis on the connection of the principle with the aim of development, one of the original intentions of PSNR.[33] Developmental policies thus were moved into greater focus within the Declaration, reemphasizing the importance of the principle of PSNR also again as a tool for many developing states to ensure their rights to exploit and use their natural resources located within their territory. Furthermore, it is stated in several passages within the document that environmental preservation nevertheless shall at all times be incorporated into their development process, reaffirming the importance of sustainable conduct, transnational cooperation, sound resource management and an overall precautionary approach.[34]

The 1992 Rio Conference inspired the drafting of several other environmental treaties, which since then have had considerable influence on the conduct of states in general. Examples can be seen in the UN Framework Convention on Climate Change or in the Convention on Biological Diversity, which both include almost identical provisions to Principle 2 of the Rio Declaration. Article 1 of the Convention on Biological Diversity even

[31] Art. 3, UNGA – Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, Dec. 12, 1974, 29 UN – GAOR, Supp. No. 31, p. 50, UN Doc. A/9631; Environmental Law Guidelines and Principles on Shared Natural Resources, UNEP GC Dec. No. 6/14, May 19, 1978, 33 GAOR, Supp. No. 25, p. 154, UN Doc. A/33/25.

[32] Arts. 2-3, UNGA – Res. A/RES/34/186, Co-operation in the Field of the Environment Concerning Natural Resources Shared by Two or More States, Dec. 18, 1979, 34 UN – GAOR, Supp. No. 46, p. 128, UN Doc. A/34/46; V. P. Nanda: "Environment" in *The United Nations and International Law*, C. C. Joyner ed., Cambridge *et al.* 1997, p. 293.

[33] Art. 1, para. 1, UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217; Principles 2-3, Annex, Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, Aug. 10, 1992, UN Doc. A/CONF.151/26 (Vol. I); Paras. 22, 24-25, Rio Declaration on Environment and Development – Application and Implementation, *Report of the Secretary-General*, Feb. 10, 1997, UN Doc. E/CN.17/1997/8; E. Louka: *International Environmental Law – Fairness, Effectiveness, and World Order*, Cambridge 2006, p. 34.

[34] Principles 1, 4-7, 15, Annex, Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, Aug. 10, 1992, UN Doc. A/CONF.151/26 (Vol. I); N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, pp. 136-138; E. Louka: *International Environmental Law – Fairness, Effectiveness, and World Order*, pp. 32-34.

lists conservation of nature and the fair and equitable use of the benefits arising out of resource exploitation as one of its objectives.[35]

The 2002 Johannesburg Plan of Implementation dedicates a whole chapter to the protection and management of natural resources, within the context of economic and social development.[36] It stresses the importance of a sustainable and integrated implementation strategy of national and regional policies with regard to natural resources.[37] This shall include for example public participation in the decision-making levels, regional arrangements concerning shared resources as well as natural resources which have an effect on other territories and conservation and protection measures where appropriate. Furthermore, competing uses shall be balanced against each other and priority given to basic human needs and the restoration of fragile ecosystems.[38] International coordination and cooperation is especially important with regard to those ecosystems which are essential for global food security, such as oceans and seas.[39]

Thus, unlike early approaches which aimed at guaranteeing states full sovereignty over their resources, the developments in the various fields of international law, under the overarching concept of sustainable development, have resulted in an integrated ecosystem approach concerning the utilization of natural resources.[40] Rooted also in its type of creation – mainly through political instruments – the openness of the principle of PSNR to incorporate newly evolving interests, arguably presents the primary reason for the concept still possessing such

[35] Arts. 1, 3, Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79; Preamble, United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107, UN Doc. A/AC.237/18 (Part II)/Add.1; N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, p. 138.

[36] Chapter IV, Plan of Implementation of the World Summit on Sustainable Development, Sept. 4, 2002, *also available at* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (*last visited on* April 13, 2009); E. Louka: *International Environmental Law – Fairness, Effectiveness, and World Order*, pp. 35-37.

[37] Paras. 24-26, Plan of Implementation of the World Summit on Sustainable Development, Sept. 4, 2002, *also available at* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (*last visited on* April 13, 2009).

[38] Para. 26, Plan of Implementation of the World Summit on Sustainable Development, Sept. 4, 2002, *also available at* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (*last visited on* April 13, 2009).

[39] Para. 30, Plan of Implementation of the World Summit on Sustainable Development, Sept. 4, 2002, *also available at* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (*last visited on* April 13, 2009).

[40] Principle 4, Annex, Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, Aug. 10, 1992, UN Doc. A/CONF.151/26 (Vol. I); Paras. 31-32, Rio Declaration on Environment and Development – Application and Implementation, *Report of the Secretary-General*, Feb. 10, 1997, UN Doc. E/CN.17/1997/8; Preamble, Art. 1, Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79; E. Louka: *International Environmental Law – Fairness, Effectiveness, and World Order*, p. 70; M.-C. Cordonier Segger & A. Khalfan: *Sustainable Development Law – Principles, Practices, & Prospects*, Oxford 2004, p. 112.

relevance in the 21st century. The context under which the extensive set of rights and obligations connected to the principle of PSNR must be analyzed, has partly changed in many aspects, as will be discussed below in Chapter II.

1.3 Defining the Scope

Concerning the application of PSNR it is necessary to determine, on the one hand, which entities can claim entitlement to the set of rights and obligations, and, on the other hand, it must be clarified which objects are intended to fall within the scope of the principle.

1.3.1 Subjects to the Principle

The original intention of the principle of PSNR was to aid peoples under colonial domination as well as developing states in achieving equitable terms concerning natural resources and thus strengthening their social and economic development.[41] Once the decolonization process had reached its end, the wording of the UNGA Resolutions included fewer references to peoples but mainly stressed the principle as constituting a right of all states.[42] These entities traditionally have full legal capacity and international personality, bear all rights and duties, and are capable of maintaining their rights by bringing international claims.[43] While other subjects have come into being also enjoying limited rights and obligations under international law, they must abide by the rules which states have created.[44] Despite the long-lasting predominance of states in international law, a legal definition of the concept of statehood remains lacking.[45] However, Article 1 of the Montevideo Convention on the Rights and Duties of States lists four basic criteria, which have been considered customary international law:[46]

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[41] UNGA – Res. 523 (VI), Integrated Economic Development and Commercial Agreements, Jan. 12, 1952, 6 UN – GAOR, Supp. No. 20, p. 20, UN Doc. A/2119; UNGA – Res. 626 (VII), Right to exploit freely natural wealth and resources, Dec. 21, 1952, 7 UN – GAOR, Supp. No. 20, p. 18, UN Doc. A/2361.

[42] Art. 5, UNGA – Res. 1515 (XV), Concerted action for economic development of economically less developed countries, Dec. 15, 1960, 15 UN – GAOR, Supp. No. 16, p. 9, UN Doc. A/4648; UNGA – Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, Dec. 12, 1974, 29 UN – GAOR, Supp. No. 31, p. 50, UN Doc. A/9631; UNGA – Res. 37/7, World Charter for Nature, Oct. 28, 1982, 37 UN – GAOR, Supp. No. 51, p. 17, UN Doc. A/37/51.

[43] *Reparations for Injuries suffered in the Service of the United Nations*, 1949 ICJ 174, p. 179 (Adv. Op., Apr. 11, 1949); H. J. Uibopuu: „Gedanken zu einem völkerrechtlichen Staatsbegriff" in *Autorität und internationale Ordnung – Aufsätze zum Völkerrecht*, C. Schreuer ed., Berlin 1979, p. 96.

[44] A. Cassese: *International Law*, pp. 71-72; I. Brownlie: *Principles of Public International Law*, pp. 57-58; J. Crawford: *The Creation of States in International Law*, 2nd ed., Oxford 2006, pp. 28-59.

[45] J. Crawford: *The Creation of States in International Law*, p. 37.

[46] D. J. Harris: *Cases and Materials on International Law*, 5th ed., London 1998, p. 102; R. Higgins: *Problems and Process – International Law and How We Use It*, Oxford 1994, p. 39.

> The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.[47]

The circumstance that the obligations contained in PSNR had gained more significance, not only by reference to the fact that the principle was to be exercised in the interest of national development and the well-being of the peoples of the state concerned, but also including more extensive obligations concerning the management and utilizations methods available to states with regard to natural resources, prompted the inclusion of all states within the scope of application of the principle.[48]

However, this does not lead to the conclusion that other subjects are necessarily excluded from the operative range of PSNR. The wording of UNGA Resolution 1803 (XVII), the most widely accepted document defining the extent of the rule as understood as customary international law, stipulates that the principle shall apply to "peoples and nations",[49] and moreover, common Article 1(2) of the ICCPR and the ICESCR declares that "all peoples may, for their own ends, freely dispose of their natural wealth and resources (…)".[50]

Thus, while the application of the principle of PSNR to all states is undisputed, in recent years, the question of extending the scope of the principle to other subjects, *i.e.* indigenous peoples, has become a point of examination.[51]

1.3.2 Objects at Which the Principle is Geared

Most commonly, the principle of PSNR is found to encompass the right to possess, use and freely dispose of one's natural wealth and resources.[52] While developing nations undertook in

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[47] Convention on the Rights and Duties of States, Montevideo, 26 December 1933, 165 LNTS 19 (1934); The central element in the definition of statehood is the requirement of a government, since the other criteria are determined by the extent to which the government, *i.e*. the state organs exercise their power over the territory and population. It is thus necessary, at least in theory, that the government exerts a certain degree of effectiveness and thus is able to carry out its duties in its own capacity. This includes maintaining law and order within the territory, establishing basic institutions and entering into relations with other entities. The permanent population of the state together with its defined territory serve as evidence of a stable community. The size of such has little relevance, as can also be seen in the existence of several microstates, such as Liechtenstein, Nauru and Monaco, each consisting of merely a few thousands inhabitants. Precise delimitation is also not a requirement; *see as the authoritative reference on the subject*: J. Crawford: *The Creation of States in International Law*.

[48] N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, p. 8.

[49] UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217; F. X. Perrez: "The relationship between "permanent sovereignty" and the obligation not to cause transboundary environmental damage", *Environmental Law*, vol. 26, no. 4, 1996, p. 1194.

[50] Art. 1(2), International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (1967); Art. 1(2), International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3 (1967); H. Reinhard: *Rechtsgleichheit und Selbstbestimmung der Völker in wirtschaftlicher Hinsicht – Die Praxis der Vereinten Nationen*, Berlin 1980, p. 2.

[51] *See* Chapter III, subsection 3.3.

the more pro-active period during the 70s to include economic activities connected therewith, these efforts found little support by developed nations, and more recent instruments have returned to the original phrasing of natural wealth and resources.[53] This is understood to include not only natural resources but also production facilities for their processing.[54]

To date, no legal definition of the term natural resources has been agreed upon. Depending on the field of expertise, it is possible to identify several methods. For example, a geological scientist will define natural resources as any material phenomena of nature freely given to man and his activities, the elements of land, air and sea associated with such, as well as their means of use for human beings, and an economist will depart from similar elements, however focusing on their economic value for man.[55] Other scholars choose to create categories, differentiating between natural resources (as stemming from nature), man-made resources (created by mankind), and induced resources (the results of natural resources used by man-kind in *e.g.* agriculture).[56]

A wide understanding of the term can include climate, population, cultural, intellectual, technological and economic resources as well as non-extractive industries.[57] However, from a practical point of view, and drawing from international treaties which contain definitions of resources within their scope of application, natural resources in general consist of *natural* occurrences of nature, such as oil, gas, minerals, fresh water, oceans, seas, air, forests, soils, genetic material and other biotic components of ecosystems with actual or potential use or value for humanity.[58] Furthermore, as the principle of PSNR is based upon

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[52] *The formulation can be found especially throughout the several UNGA Resolutions that have been dealt with above*; Art. 1(2), International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (1967); Art. 1(2), International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3 (1967).

[53] UNGA – Res. A/RES/41/128, Declaration on the Rights to Development, Dec. 4, 1986, Annex 41 UN – GAOR, Supp. No. 53, p. 186, UN Doc. A/RES/41/128; Preamble, Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, *Report of the International Law Commission on the work of its 53rd session*, 56 UN – GAOR, Supp. No. 10, p. 366, UN Doc. A/56/10 (2001); N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, p. 12; UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217.

[54] H. Reinhard: *Rechtsgleichheit und Selbstbestimmung der Völker in wirtschaftlicher Hinsicht – Die Praxis der Vereinten Nationen*, p. 36.

[55] N. Ginsburg: "Natural Resources and Economic Development", *Annals of the Association of American Geographers*, vol. 47, no. 3, 1957, p. 204; B. J. Skinner: "Earth Resources", *Proceedings of the National Academy of Sciences of the United States of America*, vol. 76, no. 9, 1979, pp. 4212-4213.

[56] B. Husch: "Guidelines for Forest Policy Forumlation", *FAO Forestry Paper 81*, 1987, p. 51 (*drawing from* G. J. Cano: *"*A Legal and Institutional Framework for Natural Resources Management", *FAO Legislative Studies No. 9*, Rome 1975).

[57] G. Elian: *The Principle of Sovereignty over Natural Resources*, pp. 11-12; N. Schrijver: "Permanent Sovereignty over Natural Resources versus Common Heritage of Mankind – Contradictory or Complementary Principles of International Economic Law", pp. 90-91.

[58] Art. 2, Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79; Art. 77(4), United Nations Convention on the Law of the Sea, December 10, 1982, 1988 UNTS 3; G. Elian: *The Principle of Sovereignty over Natural Resources*, pp. 11-12; C. Deere: "Sustainable International Natural Resources Law" in *Sustainable*

territorial sovereignty, it can be assumed that the term includes natural resources found not only on the surface of the earth or on the sea-bed, but also located below and above it.[59]

Nevertheless, due to the vastness of activities and diverse management issues connected therewith, the regulation of natural resources is fragmented by location, exploitation methods and overall aim.[60] Thus, no exhaustive definition of natural resources is listed within one instrument.

Development Law – Principles, Practices, & Prospects, M.-C. Cordonier Segger & A. Khalfan eds., Oxford 2004, pp. 297-298.

[59] Commission on Human Rights: "Prevention of Discrimination and Protection of Indigenous Peoples, Indigenous Peoples' Permanent Sovereignty over Natural Resources", *Final report of the Special Rapporteur, Erica-Irene A. Daes*, July 12, 2004, Annex II, p. 11, para. 11, UN Doc. E/CN.4/Sub.2/2004/30/Add.1; S. T. Bernárdez: "Territorial Sovereignty" in *Encyclopedia of Public International Law,* R. Bernhardt ed., Amsterdam 1997, (Volume IV), North-Holland 2000, p. 824.

[60] C. Deere: "Sustainable International Natural Resources Law", p. 295.

Chapter II Rights and Duties of Permanent Sovereignty over Natural Resources – Revisited from a Current Perspective

2.1 Introduction

As has been elaborated above, the principle of PSNR comes with a wide set of rights, but also obligations which impose limits on such. The most important rights and obligations will be analyzed in the following Chapter, with a special focus on their current status. Moreover, emphasis will be laid on recent invocations in the sensitive domain of regulation of foreign investments as well as on the evolution of the principle in the light of newly developed environmental norms.

2.2 The Rights of Permanent Sovereignty over Natural Resources

2.2.1 The Sovereign Right to Freely Dispose, Use and Exploit Natural Resources

At the heart of the principle of PSNR stands the inalienable right of all peoples and states to freely dispose of their natural resources.[61] Conceptualized as a response to the prior system of foreign ownership and possession of concessions and production facilities, it gives states the means to regain their sovereignty and control over their assets to enable their economic and political development.[62] In order to safeguard this legal capacity the principle builds upon numerous other rights. Thus, for states to be able to determine the fate of their natural resources it is *inter alia* necessary that they enjoy the corollary rights permitting them to regulate the use and exploitation methods, whether this concerns the pre- or post-authorization phase.[63] Therefore, they *e.g.* are entitled to regulate the admission of foreign investors, the

[61] Art. 1(2), International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (1967); Art. 1(2), International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3 (1967); UNGA – Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, 15 UN – GAOR, Supp. No. 16, p. 66, UN Doc. A/4684; Art. 5, UNGA – Res. 1515 (XV), Concerted action for economic development of economically less developed countries, Dec. 15, 1960, 15 UN – GAOR, Supp. No. 16, p. 9, UN Doc. A/4648; Art. 21, African Charter on Human and Peoples' Rights, June 27, 1981, 1520 UNTS 217.

[62] A. Ziegler & L.-P. Gratton: "Investment Insurance", p. 526; S. R. Chowdhury: "Permanent Sovereignty over Natural Resources – Substratum of the Seoul Declaration", pp. 61-62; Art. 1(a), Arab Charter on Human Rights, League of Arab States, May 22, 2004, reprinted in *International Human Rights Report*, vol. 12, 2005, p. 893.

[63] O. Bordukh: *Choice of Law in State Contracts in Economic Development Sector – Is There Party Autonomy?*, Bond University 2008, p. 171; UNGA – Res. 626 (VII), Right to exploit freely natural wealth and resources, Dec. 21, 1952, 7 UN – GAOR, Supp. No. 20, p. 18, UN Doc. A/2361; UNGA – Res. 2158 (XXI), Permanent Sovereignty over Natural Resources, Nov. 25, 1966, 21 UN – GAOR, Supp. No. 16, p. 29, UN Doc. A/6518; Art. 47, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (1967); Art. 25, International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3 (1967); *Award on*

granting of concessions concerning the exploitation of certain natural resources, the length of period the authorization is valid for, the conduct of entities engaged in the exploitation and the distribution of profits.[64]

In its original conception,[65] the ultimate control over natural resources falls to and remains at all times – hence *permanent* - with the state, and accordingly, activities related to their development, exploitation and utilization are subjected to the state's national laws.[66] A state can rely on the principle to invalidate existing agreements and re-negotiate existing concessions.[67] Moreover, it may choose to enter into international or national contracts granting other entities access to its natural resources and is free to create an environment encouraging foreign and domestic investments by guaranteeing certain minimum degrees of investment protection.[68] This occurs in the form of regional and multilateral trade agreements (which include investment provisions) but most often takes place *via* investment codes or Bilateral Investment Treaties (BITs).[69] In general, such include provisions ensuring foreign investors *fair and equitable* treatment concerning their activities within the host state.[70]

However, contracts entered into may not permanently infringe the state's sovereign rights (legislation, executive and judicial powers) and furthermore must be *entered into*

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the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Co. and the Government of the Libyan Arab Republic (Texaco *v.* Libya), 17 ILM 1, para. 59 (Award, Jan. 19, 1977); Arts. 56(1)(a), 77, 193, United Nations Convention on the Law of the Sea, December 10, 1982, 1988 UNTS 3; Preamble, International Tropical Timber Agreement, Jan. 27, 2006, *available at* http://untreaty.un.org/English/notpubl/XIX_46_english.pdf (*last visited on* June 17, 2009); Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 ILM 532; Preamble, Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone, Nov. 30, 1999, *available at* http://www.unece.org/env/lrtap/full%20text/1999%20Multi.E.Amended.2005.pdf (*last visited on* June 24, 2009); Art. IV, Treaty for Amazonian Cooperation, July 3, 1978, 1202 UNTS 71; Art. 5(c), Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, June 17, 1999, UN Doc. MP.WAT/2000/1, EUR/ICP/EHCO 020205/8Fin.

[64] *See also* subsection 2.2.3.

[65] *The possible developments in this matter with regard to indigenous peoples will be analyzed in* Chapter III.

[66] Art. 3, UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217.

[67] S. R. Chowdhury: "Permanent Sovereignty over Natural Resources – Substratum of the Seoul Declaration", p. 62; H. Reinhard: *Rechtsgleichheit und Selbstbestimmung der Völker in wirtschaftlicher Hinsicht – Die Praxis der Vereinten Nationen*, p. 57.

[68] A. Ziegler & L.-P. Gratton: "Investment Insurance", p. 528.

[69] A. Ziegler & L.-P. Gratton: "Investment Insurance", p. 528.

[70] *A list of BITs can be found on* Investment Instruments Online *by* United Nations Conference on Trade and Development, currently there are over 2265 BITs, concerning 176 countries, *available at* http://www.unctadxi.org/templates/DocSearch____779.aspx (*last visited on* June 18, 2009); *as an example*: Art. 3 (Behandlung von Investitionen) (1): „Jede Vertragspartei gewährt Investitionen durch Investoren der anderen Vertragspartei eine gerechte und billige Behandlung sowie vollen und dauerhaften Schutz und Sicherheit", Abkommen zwischen der Republik Österreich und der Republik Kuba über die Förderung und der Schutz von Investitionen samt Protokoll, Sept. 14, 2001 (BGBl. III Nr. 232/2001); United Nations Conference on Trade and Development: *Bilateral Investment Treaties 1959 – 1999*, New York & Geneva, p. 20, UN Doc. UNCTAD/ITE/IIA/2 (Dec. 15, 2000); V. Lowe: *International Law*, Oxford & New York 2007, p. 202.

freely.[71] From this follows, that in those situations in which circumstances at the time of conclusion of an agreement, or even occurring after, lead to situations which notoriously violate the rights of peoples and states concerned, the subjects of the principle are empowered to re-evaluate and adjust treaties and contracts.[72]

In order to ensure the full enjoyment of these rights it is therefore in certain instances necessary for states to be able to take full control over their natural resources by nationalizing, expropriating and requisitioning property, leading to a transfer of ownership, whether the property concerned is owned by nationals of the state or by foreign entities.[73] Pre-requisites and conditions connected with this very sensitive topic will be discussed in sub-section 2.2.3.

2.2.2 The Freedom to Choose One's Own Economic, Environmental and Developmental Policies

2.2.2.1 The *Reasoning* Principles

A further basic component of the principle of PSNR is the freedom to decide on the best suitable policies concerning the environment, development and economy of the nation. This roots in two fundamental ideas of the law of nations: the sovereign equality of states on the one hand and on the other hand the duty not to intervene in matters within domestic jurisdiction.[74] Concerning the former, as the world order consists of states which enjoy equal rights and duties, their choice of political, economic, social and cultural systems does not alter their standing within a hierarchy in which all states in their relations to one another are understood to be on a horizontal level.[75] The Friendly Relations Declaration (UNGA Resolution 2625 (XXV)) confirms the inclusivity of this element as part of the wider category

[71] Principle 5.2, Seoul Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order, reprinted in *International Law and Development*, P. de Waart *et al.* eds., Dordrecht 1988, p. 409; Art. 8, UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217; UNGA – Res. 3171 (XXVIII), Permanent Sovereignty over Natural Resources, Dec. 17, 1973, 28 UN – GAOR, Supp. No. 30, p. 52, UN Doc. A/9030; S. R. Chowdhury: "Permanent Sovereignty over Natural Resources – Substratum of the Seoul Declaration", pp. 62-63.

[72] S. R. Chowdhury: "Permanent Sovereignty over Natural Resources – Substratum of the Seoul Declaration", pp. 63-64.

[73] Art. 4, UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217; P. Muchlinski: „Policy Issues" in *The Oxford Handbook of International Investment Law*, P. Muchlinski *et al.* eds., Oxford *et al.* 2008, p. 27.

[74] G. Abi-Saab: "Permanent Sovereignty over Natural Resources and Economic Activities" in *International Law: Achievements and Prospects*, M. Bedjaoui ed., Dordrecht *et al.* 1991, pp. 597-618; N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, pp. 274-275.

[75] Art. 2(1), Charter of the United Nations, Oct. 24, 1945, 1 UNTS 26.

of the principle of sovereign equality.[76] Moreover, the duty not to intervene implies that the choice of policies of another state cannot give a state the right to intervene, whether directly or indirectly, *e.g.* by exercising economic or political coercion.[77] On the contrary, states are rather under the duty to cooperate with one another *inter alia* in order to maintain international peace and security.[78]

2.2.2.2 The Free Choice of Economic, Environmental and Developmental Policies

Introduced in the Friendly Relations Declaration, the Charter of Economic Rights and Duties of States re-emphasizes in its Article 1 that states enjoy the sovereign right to freely choose their economic systems.[79] The extent of this liberty is further specified in its subsequent articles. For example, Article 4 lays out that states may, irrespective of their economic, social or political systems, engage in and regulate freely their foreign economic relations and investments.[80] In order to achieve the aim of development, they are free to choose the model which in their opinion will suit best.[81]

In addition, states have "the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies."[82] Included into the Rio Declaration especially due to efforts of developing states, the clause is rooted in their concern that environmental considerations would be used by industrialized nations as an excuse for

[76] Principle 6(e) (The principle of sovereign equality of states), UNGA – Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Oct. 24, 1970, 25 UN – GAOR, Supp. No. 28, p. 123, UN Doc. A/8082; G. Abi-Saab: "Permanent Sovereignty over Natural Resources and Economic Activities", p. 598.

[77] Principle 3 (The duty not to intervene in matters within the domestic jurisdiction of any state), UNGA – Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Oct. 24, 1970, 25 UN – GAOR, Supp. No. 28, p. 123, UN Doc. A/8082; Art. 2(7), Charter of the United Nations, Oct. 24, 1945, 1 UNTS 26; B. Conforti: "The Principle of Non-Intervention" in *International Law: Achievements and Prospects*, M. Bedjaoui ed., Dordrecht *et al.* 1991, pp. 470, 472; H. Reinhard: *Rechtsgleichheit und Selbstbestimmung der Völker in wirtschaftlicher Hinsicht – Die Praxis der Vereinten Nationen*, pp. 280-281.

[78] Principle 4 (The duty of States to co-operate with one another), UNGA – Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Oct. 24, 1970, 25 UN – GAOR, Supp. No. 28, p. 123, UN Doc. A/8082.

[79] Art. 1, UNGA – Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, Dec. 12, 1974, 29 UN – GAOR, Supp. No. 31, p. 50, UN Doc. A/9631.

[80] Art. 4, UNGA – Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, Dec. 12, 1974, 29 UN – GAOR, Supp. No. 31, p. 50, UN Doc. A/9631.

[81] Art. 7, UNGA – Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, Dec. 12, 1974, 29 UN – GAOR, Supp. No. 31, p. 50, UN Doc. A/9631; G. Abi-Saab: "Permanent Sovereignty over Natural Resources and Economic Activities", p. 599.

[82] Principle 2, Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, Aug. 10, 1992, UN Doc. A/CONF.151/26 (Vol. I); *see also*: Preambular para. 8, United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107, UN Doc. A/AC.237/18 (Part II)/Add.1; Preambular para. 15, United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Oct. 14, 1994, 1954 UNTS 3.

interfering within their domestic affairs, and moreover that developing states would become subject to unachievable conditions in international developmental and trade agreements with regard to environmental protection.[83] While this does not exempt developing states from certain obligations arising from international law with regard to the conservation and utilization of their natural resources,[84] the goal of achieving development is moved into greater concern.[85]

Finally, while the freedom to decide upon one's own policies applies with regard to interstate-relations as well, states nevertheless remain under the duty to formulate and pursue policies which comply with their international obligations as will be shown in sub-section 2.3.

2.2.3 The Right to Freely Regulate, Expropriate and Nationalize Foreign Investments

Foreign investments constitute both a valuable but at the same time partly dangerous asset for the development of a state's national economy. For a developing country it is inevitable to stimulate its own development by attracting foreign investors.[86] However, at the same time, the concessions and authorizations granted to multinational corporations often hand over control over some of the most important resources of the state.[87] Thus, for a state to retain an effective saying in the exploitation and development of its natural resources and domestic policies, it is necessary for them to enjoy the freedom to regulate foreign investments, and then ultimately to also have the right in limited circumstances to expropriate and nationalize foreign investments.

2.2.3.1 Clarification of Terms

In the context of PSNR, a *foreign investment* will be understood as comprising:

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[83] Art. 3, Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79; Principle 21, Stockholm Declaration of the United Nations Conference on the Human Environment, UN Doc. A/CONF. 48/14 (1972), *reprinted in* (1972) 11 ILM 1416; Art. 193, United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3; N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, pp. 275-276; E. Louka: *International Environmental Law – Fairness, Effectiveness, and World Order*, p. 29.

[84] *See* subsection 2.3.2; N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, p. 274; Paras. 21, 23, Rio Declaration on Environment and Development – Application and Implementation, *Report of the Secretary-General*, Feb. 10, 1997, UN Doc. E/CN.17/1997/8.

[85] Principles 1, 2(a), Annex III, Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, *Report of the United Nations Conference on Environment and Development*, June 2-14, 1992, UN Doc. A/CONF.151/26 (Vol. III).

[86] Preface, Organization for Economic Co-operation and Development, Guidelines for Multinational Enterprises, June 27, 2000, 40 ILM 237 (2001); S. A. Riesenfeld: "Foreign Investments" in *Encyclopedia of Public International Law*, R. Bernhardt ed., Amsterdam 1995, (Volume II), p. 436.

[87] P. Malanczuk: *Akehurst's Modern Introduction to International Law*, 7th ed., London 1997, p. 235; M. Sornarajah: *The International Law of Foreign Investment*, 2nd ed., Cambridge 2004, p. 40.

> the transfer of tangible or intangible assets from one country into another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets.[88]

Moreover, UNGA Resolutions and treaties usually differentiate between *nationalizations* and *expropriations*. In general, *nationalization* will imply the taking of property as part of an industry- or economy-wide measure due to social or economic reform.[89] An *expropriation* appears as the taking of a specific private property or enterprise, usually in connection with the transfer of ownership rights, whether occurring directly or indirectly.[90] However, non-discriminatory regulatory measures aimed at the general welfare do not amount to an expropriation or nationalization, and therefore do not lead to compensation claims.[91] Concerning the treatment of investors following each of these takings of property, it can be said though that to a great extent no difference can be found.[92]

2.2.3.2 The Regulation of Foreign Investments

The freedom to regulate foreign investments includes the right of the state to prescribe the conditions of entry and conduct of foreign corporations, as well as equips them with the power to enforce their national laws and regulations.[93] National investment codes, often coupled with BITs or multinational investment treaties, provide for an extensive legal framework on the national economic policies of the state concerned.[94]

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[88] M. Sornarajah: *The International Law of Foreign Investment*, p. 7; *see also*: S. D. Amarasinha & J. Kokott: "Multilateral Investment Rules Revisited" in *The Oxford Handbook of International Investment Law*, P. Muchlinski *et al.* eds., Oxford *et al.* 2008, p. 120.

[89] United Nations Conference on Trade and Development: "Taking of Property", *UNCTAD Series on issues in international investment agreements*, New York & Geneva 2000, p. 2, UN Doc. UNCTAD/ITE/IIT/15.

[90] United Nations Conference on Trade and Development: "Taking of Property", *UNCTAD Series on issues in international investment agreements*, New York & Geneva 2000, p. 2, UN Doc. UNCTAD/ITE/IIT/15; A. Reinisch: "Expropriation" in *The Oxford Handbook of International Investment Law*, P. Muchlinski *et al.* eds., Oxford *et al.* 2008, p. 408.

[91] *Saluka Investments BV (The Netherlands)* v. *The Czech Republic*, UNCITRAL, para. 255 (Partial Award, March 17, 2006).

[92] United Nations Conference on Trade and Development: "Key Terms and Concepts in IIAs: A Glossary", *UNCTAD Series on issues in international investment agreements*, New York & Geneva 2004, p. 67, UN Doc. UNCTAD/ITE/IIT/2004/2; Art. 13, The Energy Charter Treaty, Dec. 17, 1994, 2080 UNTS 95.

[93] Arts. 2-3, UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217; Art. 4, UNGA – Res. 2158 (XXI), Permanent Sovereignty over Natural Resources, Nov. 25, 1966, 21 UN – GAOR, Supp. No. 16, p. 29, UN Doc. A/6518; Art. 2, UNGA – Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, Dec. 12, 1974, 29 UN – GAOR, Supp. No. 31, p. 50, UN Doc. A/9631; H. Reinhard: *Rechtsgleichheit und Selbstbestimmung der Völker in wirtschaftlicher Hinsicht – Die Praxis der Vereinten Nationen*, p. 57; G. Abi-Saab: "Permanent Sovereignty over Natural Resources and Economic Activities", p. 605.

[94] A. R. Parra: "Principles Governing Foreign Investments, As Reflected In National Investment Codes" in *Legal Treatment of Foreign Investments – The World Bank Guidelines*, I. F. I. Shihata ed., Dordrecht & Boston 1993, p. 311; W. Peter *et al.*: *Arbitrations and Renegotiation of International Investment Agreements*, 2nd ed., The Hague *et al.* 1995, p. 26.

In general, the issues regulated encompass provisions on admission, the general standard of treatment, expropriation, including conditions and the regulations of compensation, and dispute settlement.[95] Mostly promotional towards foreign investments, offering various incentives such as special tax benefits, they can also contain provisions limiting or excluding the access to certain sectors or imposing heavier burdens and profit-sharing arrangements on multinational corporations.[96] The treatment afforded towards foreign investors often is formulated as a non-discriminatory duty, which *via* a most-favoured-nation clause or provisions on national treatment analyzes comparatively whether the foreign investor has received its deserved treatment.[97] Another possibility can frequently be found in instruments prescribing a *minimum standard of treatment,* requiring the parties to determine whether they have been treated by *fair and equitable* terms.[98]

2.2.3.3 Expropriation and Nationalization of Foreign Investments

Development of the Right within the Context of the Principle of Permanent Sovereignty over Natural Resources

The aspect which traditionally raises the most controversial issues is the freedom of a state to expropriate and nationalize foreign investments. However, that states have the capacity to expropriate and nationalize is not disputed in international law, and existed already prior to World War II.[99]

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[95] A. R. Parra: "Principles Governing Foreign Investments, As Reflected In National Investment Codes", p. 312.

[96] S. A. Riesenfeld: "Foreign Investments", p. 437; W. Peter *et al.*: *Arbitrations and Renegotiation of International Investment Agreements*, p. 26; *as an example of efforts to harmonize fiscal incentives within a region to prevent a race to the bottom*: "Agreement on the Harmonisation of Fiscal Incentives to Industry, No. 32", *Caribbean Common Market*, Guyana 1973, *available at* http://www.unctad.org/sections/dite/iia/docs/Compendium//en/32%20volume%202.pdf (*last visited on* June 24, 2009).

[97] T. J. Grierson-Weiler & I. A. Laird: "Standards or Treatment" in *The Oxford Handbook of International Investment Law*, P. Muchlinski *et al.* eds., Oxford *et al.* 2008, p. 262; *An example of a typical formulation*: Art. 10, National treatment and most favoured Nation: "In all matters relating to the treatment of investments the investors of each Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Party." Agreement between the Belgo-Luxembourg Economic Union and Bosnia and Herzegovina on the Reciprocal Promotion and Protection of Investments, 2004, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/BLEU-Bosnie-eng.pdf (*last visited on* June 24, 2009).

[98] T. J. Grierson-Weiler & I. A. Laird: "Standards or Treatment", p. 262; *An example of a typical formulation*: Art. 3, Protection of investments: "All investments, whether direct or indirect, made by investors of one Contracting Party shall enjoy a fair and equitable treatment in the territory of the other Contracting Party." Agreement between the Belgo-Luxembourg Economic Union and Bosnia and Herzegovina on the Reciprocal Promotion and Protection of Investments, 2004, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/BLEU-Bosnie-eng.pdf (*last visited on* June 24, 2009).

[99] A. Cassese: *International Law*, pp. 523-524; A. Reinisch: "Expropriation", p. 408; G. Abi-Saab: "Permanent Sovereignty over Natural Resources and Economic Activities", pp. 608-609.

The development of the right in the context of PSNR can be traced back to one of the first UNGA Resolutions on the principle, UNGA Resolution 626 (VII) which, although not mentioning the terms explicitly, goes back to initiatives to confirm a state's right to expropriate and nationalize.[100] Two further United Nations documents have had considerable influence on the scope and understanding of this right. Firstly, Article 4 of UNGA Resolution 1803 (XVII):

> 4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.[101]

Secondly, Article 2(c) of UNGA Resolution 3281 (XXIX):

> (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.[102]

In comparison, the differences between the two provisions concerns, firstly, the circumstances in which nationalizations, expropriations or requisitions are permissible. UNGA Resolution 1803 (XVII) explicitly spells out that only in situations based on reasons of public utility, security and national interests these acts are justified. These conditions are left out in UNGA Resolution 3281 (XXIX).[103] The public purpose requirement, along with three more, non-discrimination, payment of compensation and due process, has been accepted as reflecting customary international law, and can be found in numerous cases and treaties. Nevertheless, it might be added, that due to the fact, that it is the state concerned which determines whether or not an activity falls with the *public purpose*, only very seldom will this decision be

[100] H. Reinhard: *Rechtsgleichheit und Selbstbestimmung der Völker in wirtschaftlicher Hinsicht – Die Praxis der Vereinten Nationen*, p. 34.
[101] Art. 4, UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217.
[102] Art. 2(c), UNGA – Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, Dec. 12, 1974, 29 UN – GAOR, Supp. No. 31, p. 50, UN Doc. A/9631.
[103] B. H. Weston: "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth", p. 439.

questioned.[104] Therefore, in this point only little practical difference between the two documents exists.

The second major divergence between the two provisions is related to the method of compensation. While UNGA Resolution 1803 (XVII) states that appropriate compensation shall be paid "in accordance with international law", Article 2(c) of the latter Resolution lacks any reference to international law, and leaves it to domestic law to settle any disputes on the matter. In *Texaco Overseas Petroleum* et al. v. *Libyan Arab Republic*, Arbitrator Dupuy analyzed the discrepancy between the two provisions. On UNGA Resolution 1803 (XVII), he arrived at the conclusion that due to the near unanimous vote on the text that it represented a reflection of customary law, especially also with regard to nationalizations and compensation.[105] In contrast, he found that the provision as contained in Article 2(c) of UNGA Resolution 3281 (XXIX), and the interpretations given to it by the Libyan Government that it must be understood as permitting decisions on compensation solely by reference to their national law, did not find support throughout the various representatives legal and economical systems.[106]

Industrialized nations and international courts and tribunals have followed a similar line of argumentation, as also the voting record of states on the latter Resolution reveals.[107] Thus, it can be concluded that in the case of nationalization or expropriations, the standard of compensation shall be measured by international law, as can also be evidenced by the numerous BITs which include provisions in conformity with the position of the industrialized states.[108]

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[104] United Nations Conference on Trade and Development: "Taking of Property", *UNCTAD Series on issues in international investment agreements*, New York & Geneva 2000, p. 12, UN Doc. UNCTAD/ITE/IIT/15; *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *The Republic of Hungary*, International Centre for Settlement of Investment Disputes, Case No. ARB/03/16, para. 432 (Award, Oct. 2, 2006); B. H. Weston: "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth", p. 440.

[105] *Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Co. and the Government of the Libyan Arab Republic* (Texaco *v.* Libya), 17 ILM 1, para. 87 (Award, Jan. 19, 1977).

[106] *Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Co. and the Government of the Libyan Arab Republic* (Texaco *v.* Libya), 17 ILM 1, paras. 88-90 (Award, Jan. 19, 1977).

[107] E. Penrose *et al.*: "Nationalization of Foreign-Owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation", *The Modern Law Review*, vol. 55, no. 3, 1992, p. 355; S. K. Chatterjee: "The Charter of Economic Rights and Duties of States – An Evaluation after 15 Years", p. 674; P. Malanczuk: *Akehurst's Modern Introduction to International Law*, pp. 236-237.

[108] *As an example of a typical formulation*: Art. 6: "1.- Neither Contracting Party will undertake, directly or indirectly, measures of nationalization or expropriation, nor any other measure having an equivalent effect, against investments of investors of the other Contracting Party, except in cases when any of such measures have been adopted for a public purpose, on a non-discriminatory basis, under due process of law, and against prompt, adequate and effective compensation. 2.- The compensation shall be paid promptly, it shall amount to the fair market value of the investment expropriated immediately before expropriation or impending expropriation became public knowledge, and it shall be effectively realizable and be freely transferable. The amount of such

The Term "Compensation"

The term *appropriate compensation* as used in both UNGA Resolution 1803 (XVII) and UNGA Resolution 3281 (XXIX) has caused many judicial and academic debates.[109] From cases concerning expropriation in the first half of the 20th century, the general understanding of the notion was understood as in the Hull formula.[110] Thus, compensation is often meant to be *prompt, adequate and effective*, which implies that it should be paid without delay, based on the fair market value and in a freely usable currency.[111]

Others argue that *appropriate compensation* must be assessed through determination by equitable principles, taking into consideration the relevant situations such as condition of natural resources, state of economy and any possible environmental damage.[112] Due to these diverging standards, the general method chosen by states to go about this issue has been to include their agreed-about formulation in investment agreements regulating compensation for investments.[113]

2.2.3.4 Case Studies – Recent Developments in Venezuela, Bolivia & Ecuador

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compensation shall include interest from the date of dispossession of the expropriated property until the date of payment, according to a normal commercial rate for the currency in which it will be paid.", Agreement on encouragement and reciprocal protection of investments between the Republic of Costa Rica and the Kingdom of the Netherlands, *also available at* http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_costarica.pdf (*last visited on* June 24, 2009); Art. III: "1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount in their consequences to expropriation or nationalization ("expropriation") except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.", Treaty between the United States of America and the Republic of Bulgaria Concerning the Encouragement and Reciprocal Protection of Investment, *also available at* http://www.unctad.org/sections/dite/iia/docs/bits/us_bulgaria.pdf (*last visited on* June 24, 2009).

[109] M. Sornarajah: *The International Law of Foreign Investment*, p. 437; E. Penrose *et al.*: "Nationalization of Foreign-Owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation", p. 352; T. W. Wälde & B. Sabahi: "Compensation, Damages, and Valuation" in *The Oxford Handbook of International Investment Law*, P. Muchlinski *et al.* eds., Oxford *et al.* 2008, pp. 1068-1069.

[110] P. M. Norton: "A Law of the Future or a Law of the Past? Modern Tribunals the International Law of Expropriation", *The American Journal of International Law*, vol. 85, no. 3, 1991, pp. 475-476.

[111] United Nations Conference on Trade and Development: "Taking of Property", *UNCTAD Series on issues in international investment agreements*, New York & Geneva 2000, p. 14, UN Doc. UNCTAD/ITE/IIT/15; *for the meaning of the terms:* Art. IV, paras. 3, 7-8, World Bank Guidelines on the Treatment of Foreign Direct Investment, 2000, *also available at* http://bvc.cgu.gov.br/bitstream/123456789/791/1/Guidelines+on+the+Treatment+of+Foreign+Direct+Investment.pdf (*last visited on* June 24, 2009); T. W. Wälde & B. Sabahi: "Compensation, Damages, and Valuation", pp. 1070, 1106.

[112] United Nations Conference on Trade and Development: "Taking of Property", *UNCTAD Series on issues in international investment agreements*, New York & Geneva 2000, p. 14, UN Doc. UNCTAD/ITE/IIT/15.

[113] M. Sornarajah: *The International Law of Foreign Investment*, p. 441.

After the wave of expropriations and nationalizations reached its peak in the 1970s in connection with the oil crisis, cases concerned with such instances declined in the years to follow.[114] Two primary reasons for this can be identified. On the one hand, the sectors which had previously been subject to nationalizations had already gone through the process and states were not seeking to go further in this aspect but instead began preferring to encourage the inflow of investments.[115] On the other hand, due to the crisis, several states were forced to turn to international help from institutions such as the International Monetary Fund.[116] Thus, their freedom of action and choice of policies was not unlimited anymore.

However, most recently South American states, *inter alia* Venezuela, Bolivia and Ecuador, have *re-found* the principle of PSNR in their economic policies and have begun nationalizing foreign investments in their energy sector.[117] In the following, the most important aspects of their *new* policies will be outlined, as well as the legislative steps taken analyzed. Then it will be determined whether the rules concerning nationalization and compensation as crystallized in the previous century have been adhered to in the most recent examples of application of these rights in the context of the principle of PSNR.

Venezuela

After a period in the 1990s ("Apertura Petrolera") in which Venezuela encouraged foreign investments by offering various incentives, such as low income taxes and minority stakes in the national oil company, Petroleos de Venezuela S.A. (PDVSA), a regime change[118] altered

[114] United Nations Centre on Transnational Corporations: "The New Code Environment", *UNTC Current Studies*, New York 1990, Series A, No. 16, p. 18 *also available at* http://unctc.unctad.org/data/e90iia7a.pdf (*last visited on* June 24, 2009); M. S. Minor: "The Demise of Expropriation as an Instrument of LDC Policy – 1980-1992", *Journal of International Business Studies*, vol. 36, no. 1, 1994, p. 178; *Examples of Laws passed in that period*: Organic Law Reserving to the State the Industry and Commerce of Hydrocarbons, Aug. 29, 1975, 14 ILM 1492 (Venezuela); Constitutional Amendment Concerning Natural Resources and their Nationalization, July 15, 1971, 9 ILM 1067 (Chile); Law Nationalizing British Petroleum Exploration Company, Dec. 7, 1971, 11 ILM 380 (Libya).

[115] M. S. Minor: "The Demise of Expropriation as an Instrument of LDC Policy – 1980-1992", p. 180.

[116] M. S. Minor: "The Demise of Expropriation as an Instrument of LDC Policy – 1980-1992", pp. 181-182; E. Penrose *et al.*: "Nationalization of Foreign-Owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation", p. 351; E. M. G. Denters: "IMF conditionality: economic, social and cultural rights, and the evolving principle of solidarity" in *International Law and Development*, P. de Waart *et al.* eds., Dordrecht 1988, pp. 236-237.

[117] The Bolivarian Republic of Venezuela: Decree No. 1510 (Organic Law of Hydrocarbons), Nov. 2, 2001, *Gaceta Oficial de la Republica Bolivariana de Venezuela*; The Republic of Bolivia: Presidential Supreme Decree No. 28701 (Nationalization of Hydrocarbons Sector), May 1, 2006, *reprinted in* 45 ILM 1020 (2006); A. Reinisch: "Expropriation", pp. 408-409.

[118] *H. Chavez was elected president in 1998.*

the state's policies.[119] The new constitution stated explicitly that all minerals and hydrocarbons were owned by the state and that petroleum activity fell within the ambit of public interest and thus the state could enact its own policy freely on the matter.[120] Moreover, in 2001, a reformed law on hydrocarbons was passed which essentially led to the nationalization of all foreign investors engaged in the gas and petroleum sector.[121] If foreign oil companies wished to continue to operate in Venezuela, they were under the obligation to enter into a joint venture with PDVSA as the majority share holder, and moreover, they were faced with royalties of 30 %, compared to 1 % in the beginning of the 1990s.[122]

Basing these steps on the national sovereignty of Venezuela, the policies conceptualized by the new government aimed at reinstating full control over its oil resources.[123] As part of a broader National Social and Economic Development Plan, including also nationalization plans for telecommunications, petrochemicals and other natural resource sectors, many policy decisions which had been taken by the previous government were revised and reverted.[124]

By 2007, the majority of oil companies engaged in the region eventually re-negotiated their existing contracts and accepted the new working terms, however ConocoPhillips and Exxon Mobil chose to withdraw from their operations and began negotiating compensation

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[119] E. A. Witten: "Arbitration of Venezuelan Oil Contracts: A Losing Strategy?", *Texas Journal of Oil, Gas and Energy Law*, vol. 4, no. 1, 2008-2009, p. 56; L. B. Pascal & R. A. Azpurua: "The Venezuelan Oil and Gas Sector – Are There Still Opportunities in the Era of Petronationalism?", *Latin American Law And Business Report*, vol. 16, no. 6 (part I), 2008, p. 1; A. Kennedy & G. Parra-Bernal: "Chavez May Nationalize Venezuela Phone, Oil Companies" in *Bloomberg.com*, Jan. 8, 2007, *available at* http://www.bloomberg.com/apps/news?pid=20601087&sid=aGFj.LUj539Y&refer=home (*last visited on* June 24, 2009).

[120] Arts. 12, 302, Constitución de la República Bolivariana de Venezuela, 1999, *available at* http://pdba.georgetown.edu/Constitutions/Venezuela/ven1999.html (*last visited on* June 24, 2009).

[121] Art. 3: "The existing oilfields in the national territory, whatever its nature, including the ones located under the sea bed of the territorial sea, in the continental platform, in the economic zone and within the national borders, belong to the Republic and are resources of public domain, therefore inalienable", Art. 9: "The activities of exploration, extraction, transport and storage of hydrocarbons are denominated in this decree as "primary activites." According to Art. 302 of the National Constitution, these primary activities and the work needed to its development are reserved to the State.", The Bolivarian Republic of Venezuela: Decree No. 1510 (Organic Law of Hydrocarbons), Nov. 2, 2001, *Gaceta Oficial de la Republica Bolivariana de Venezuela*; Editorial: „Investing in Venezuela", *Oil and Gas Journal*, vol. 104, issue 14, 2006, p. 17; L. B. Pascal & R. A. Azpurua: "The Venezuelan Oil and Gas Sector – Are There Still Opportunities in the Era of Petronationalism?", p. 3.

[122] Arts. 12, 18, 22, 44, The Bolivarian Republic of Venezuela: Decree No. 1510 (Organic Law of Hydrocarbons), Nov. 2, 2001, *Gaceta Oficial de la Republica Bolivariana de Venezuela*; E. A. Witten: "Arbitration of Venezuelan Oil Contracts: A Losing Strategy?", p. 57.

[123] Petróleos de Venezuela S.A.: "Full Sovereignty – True Nationalization", *available at*: http://www.pdvsa.com/ (*last visited on* June 24, 2009).

[124] G. Parra-Bernal: "Venezuela to Pay Companies in Nationalization Plan" in *Bloomberg.com*, Jan. 10, 2007, *available at* http://www.bloomberg.com/apps/news?pid=20601086&sid=aRkCVK06o1T0&refer=latin_america (*last visited on* June 24, 2009); "Venezuela says completes Exterran nationalization" in *Thomson Reuters*, June 11, 2009, *available at* http://www.reuters.com/article/oilRpt/idUSN1152830120090612 (*last visited on* June 24, 2009); "Venezuela Extends Industry Nationalization" in *Thomson Reuters*, June 17, 2009, *available at* http://www.cnbc.com/id/31400790 (*last visited on* June 24, 2009).

for their investments.[125] Both corporations requested market value in cash as a compensation standard, however Venezuela insisted on paying book value in crude or reserves.[126] The difference in their stakes was considerable, as ConocoPhillips claimed a market value of $ 7 billion compared to a said book value of $ 4.5 billion, and Exxon Mobil claimed more than $ 2 billion compared to $ 750 million.[127] Thus, in 2007, both corporations independently decided to call upon international arbitration at the International Centre of Settlement of Investment Disputes (ICSID) concerning the issue of compensation.[128] To date, no decision has been reached in either case yet.[129]

International statements on the matter confirm that the acts of nationalizations are in themselves not questioned; however that fair and just compensation is expected.[130] From the side of Venezuela, the obligation to pay compensation is not denied, though it is carefully avoided to promise *full* compensation. Instead, the term *fair* can be found.[131] A complete refusal to pay compensation would not only not hold in front of any arbitral tribunal, but also severely discourage any future foreign investor, for the times in which the foreign money-flow might be needed again. Moreover, Venezuela has agreed that the book value of an investment shall be taken as a starting point for calculations and maintains that compensation can take the form of bonds and reserves.[132]

Bolivia

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[125] J. R. Crooke: "U.S. Response to Venezuelan Nationalizations", *The American Journal of International Law*, vol. 101, no 3. 2007, p. 645; E. A. Witten: "Arbitration of Venezuelan Oil Contracts: A Losing Strategy?", p. 58.
[126] *On the difficulty of determining the value especially with regard to petroleum explorations*: T. W. Wälde & B. Sabahi: "Compensation, Damages, and Valuation", p. 1073.
[127] E. A. Witten: "Arbitration of Venezuelan Oil Contracts: A Losing Strategy?", p. 58.
[128] L. B. Pascal & R. A. Azpurua: "The Venezuelan Oil and Gas Sector – Are There Still Opportunities in the Era of Petronationalism?", p. 1.
[129] *Mobil Corporation and Others* v. *Bolivarian Republic of Venezuela*, International Centre for Settlement of Investment Disputes, Case No. ARB/07/27, *latest action*: the Respondent files a reply on jurisdiction (June 15, 2009); *ConocoPhillips Company and Others* v. *Bolivarian Republic of Venezuela*, International Centre for Settlement of Investment Disputes, Case No. ARB/07/30, *latest action*: The Respondent files a counter-memorial on the merits (July 27, 2009).
[130] *See e.g.*: Remarks made by U.S. Ambassador W. Brownfield "states have a sovereign right to nationalize enterprises but they must do so in a transparent and legal way, and (...) offer fair and quick compensation." (*reprinted in*: J. R. Crooke: "U.S. Response to Venezuelan Nationalizations", p. 646); Spokesman of the U.S. State Department: "The government of Venezuela, like any other government, has the right to make these kinds of decisions to change ownership rules. We want to see them meet their international commitments in terms of providing fair and just compensation." (*reprinted in*: S. Mufson: "Conoco, Exxon Exit Venezuela Oil Deals", *The Washington Post*, June 27, 2007, p. D01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/06/26/AR2007062602061.html (*last visited on* Aug. 1, 2009)).
[131] G. Parra-Bernal: "Venezuela to Pay Companies in Nationalization Plan".
[132] A. B. Derman & E. A. Miskel: "Venezuelan Oil Seizure: Not a License to Steal" in *Industry Today – World News*, June 5, 2009, *available at* http://www.industrytoday.com/article_view.asp?ArticleID=we173 (*last visited on* June 24, 2009).

Similar to Venezuela, Bolivia likewise underwent a period of privatizations with regard to their natural resources in the 1990s. In this period, foreign corporations had nearly unlimited freedom in choice of their policies concerning the contracted areas and only paid little revenues to the state.[133] With the passing of the Bolivian Supreme Decree No. 28701 (2006), ownership of hydrocarbons below the soil returned to the Bolivian state. Moreover, the state *nationalized* the policies concerning the decision-taking, implementation, production, oversight and control of hydrocarbons, and redistributed the revenues.[134]

The Bolivian Supreme Decree No. 28701 furthermore regulated the engagement of corporations and their activities in the gas and petroleum production industry, obliging them to hand over their hydrocarbon production to Yacimientos Petroliferos Fiscales Bolivianos (YPFB) which is then responsible for distributing the resources.[135] Moreover, YPFB is the authoritative instance to decide upon the amount of investments and conditions of allocation between foreign and domestic markets.[136] The act of legislation also foresees a period of transition of 180 days, after which foreign investors which do not comply with the regulation and apply for new contracts may not continue to operate in the country. In the transition period, resource fields which yield more than 100 million cubic feet per day are forced to give the state 82 % of the production value. Furthermore, YPFB is made majority shareholder in several corporations by nationalizing shares.[137] The Supreme Decree itself does not contain any clear regulations concerning compensation, however it has been stated that investors will receive compensation "based on the actual value of the asset".[138]

While the Morales administration threatened in the beginning that they would not pay compensation in those cases in which the companies "have recovered their investment"[139] or in which they considered the contracts existing to have been without legal foundation, since

[133] N. DiMascio & J. Pauwelyn: "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?", *The American Journal of International Law*, vol. 102, no. 1, 2008, p. 53; Interview with C. Villegas, Bolivia's Minister of Hydrocarbons and Energy, "Bolivia Asserts Oil Sovereignty" in *Mulitnational Monitor*, September/October 2007, p. 27.
[134] Interview with C. Villegas, Bolivia's Minister of Hydrocarbons and Energy, "Bolivia Asserts Oil Sovereignty", p. 28.
[135] The Republic of Bolivia: Presidential Supreme Decree No. 28701 (Nationalization of Hydrocarbons Sector), May 1, 2006, *reprinted in* 45 ILM 1020 (2006).
[136] Interview with C. Villegas, Bolivia's Minister of Hydrocarbons and Energy, "Bolivia Asserts Oil Sovereignty", p. 28.
[137] The Republic of Bolivia: Presidential Supreme Decree No. 28701 (Nationalization of Hydrocarbons Sector), May 1, 2006, *reprinted in* 45 ILM 1020 (2006).
[138] Interview with C. Villegas, Bolivia's Minister of Hydrocarbons and Energy, "Bolivia Asserts Oil Sovereignty", p. 29.
[139] J. L. Alexander & N. C. Berryman: "Capital Perspectives – Resource Nationalism Repeating Itself", *Oil & Gas Financial Journal*, vol. 5, issue 1, 2008.

no public record on the sales could be found, in the end an agreement on the payment of compensation has been reached.[140]

Ecuador

The most recent state which has renewed its policies on state control over natural resources is Ecuador.[141] While analysts do not consider it likely that the state will take the final step to nationalize the oil and mining industries, resulting in high costs and the burden to regulate and conduct such huge industries on their own, the government has taken several steps to strengthen their sovereignty and control over their natural resources.[142]

Firstly, to pressure oil companies to enter into renegotiations for their existing contracts, taxes for revenues which were made due to record high oil prices were raised to 99 percent.[143] Secondly, activities related to exploration in the mining sector were banned for one year.[144] Other tactics such as seizing subsidiaries and withholding payment of debts to strengthen the negotiating position have also been experienced during the last years.[145]

The new contracts shall guarantee more state control in the key industries, including higher profit-sharing arrangements, guaranteeing the protection of the interests of the Ecuadorian people.[146]

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[140] World – Politics, "Bolivia unconcerned about legal action by Glencore, VP says" in *Detailed News*, Feb. 14, 2007, *available at* http://news.notiemail.com/noticia_print.asp?nt=10600433&cty=200 (*last visited on* June 24, 2009); D. Kosich: "Bolivia, Glencore in Talks – Vinto tin smelter seizure negotiations extended until February" in *Mineweb*, Jan. 7, 2008, *available at* http://www.mineweb.com/mineweb/view/mineweb/en/page60?oid=43778&sn=Detail (*last visited on* June 24, 2009); "Bolivia-Glencore settlement close" in *ITRI*, Dec. 23, 2008, *available at* http://www.itri.co.uk/pooled/articles/BF_NEWSART/view.asp?Q=BF_NEWSART_308848 (*last visited on* Aug. 1, 2009).

[141] Reuters: "Ecuador says key sectors to be nationalized" in *STV*¸ May 24, 2009, *available at* http://news.stv.tv/business/98346-ecuador-says-mining-oil-must-be-in-state-hands/ (*last visited on* June 24, 2009).

[142] *Burlington Resources Inc. and others* v. *Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (PetroEcuador)*(Prov. Measures), ICSID Case No. ARB/08/5, para. 35 (Procedural Order No. 1, June 29, 2009); M. Choy: "Factbox – Ecuador's moves against foreign investors" in *Thomson Reuters*, June 18, 2009, *available at* http://www.reuters.com/article/oilRpt/idUSN1834165020090618 (*last visited on* July 1, 2009).

[143] Legislative Decree No. 662, Oct. 18, 2007 (Ecuador); A. Soto: "Update 3 – Ecuador vows tougher line on oil companies" in *Thomson Reuters*, June 8, 2009, *available at* http://www.reuters.com/article/companyNewsAndPR/idUSN0827742020090608 (*last visited on* July 1, 2009); J. Monahan: "Ecuador throws down oil gauntlet" in *BBC News*, Dec. 12, 2007, *available at* http://news.bbc.co.uk/2/hi/business/7132767.stm (*last visited on* July 1, 2009); E-Mail correspondence from former advisor of Texaco in Ecuador, M. A. Rodas-Talbott, *received on* July 5, 2009.

[144] M. Choy: "Factbox – Ecuador's moves against foreign investors" in *Thomson Reuters*, June 18, 2009, *available at* http://www.reuters.com/article/oilRpt/idUSN1834165020090618 (*last visited on* July 1, 2009).

[145] M. Choy: "Factbox – Ecuador's moves against foreign investors" in *Thomson Reuters*, June 18, 2009, *available at* http://www.reuters.com/article/oilRpt/idUSN1834165020090618 (*last visited on* July 1, 2009).

[146] A. Soto: "Ecuador's Correa is tough, but avoids takeovers" in *Ecuador Rising – Hatarinchej*, June 19, 2009, *available at* http://ecuador-rising.blogspot.com/2009/06/ecuadors-correa-tough-but-avoids.html (*last visited on* July 1, 2009).

2.2.3.5 Nationalizations – Just the Beginning?

The recent wave of nationalizations has brought the principle of PSNR back into the headlines concerning its implications for foreign investments. The cases confirm that the principle of PSNR is firmly accepted in international law, as is the contained right to nationalize foreign investments. Likewise, the diverging opinions and approaches of capital-exporting and capital-importing states towards compensation have received new evidence. A decision of the ICSID Tribunal in either one of the cases presently pending in connection with Venezuela will give direction to what standard of compensation the recent use of PSNR is expected to adhere to. Other states such as Ecuador have already announced similar policies and strive for more government control in the key sectors of their national economy, especially concerning energy production.[147]

Furthermore, there is a renewed tendency of the states concerned to reawake their early positions that possible disputes arising would be settled domestically. Evidence of this can also be found in Bolivia's and Ecuador's withdrawal from ICSID, the first countries to do so.[148] Thus, they maintain that the arbitration of future contractual disputes shall take place within the states concerned, and in application of their domestic laws.[149] Whether this will evolve into them also putting forth to judge compensation amounts by domestic law (and therefore follow possible interpretations concerning Article 2(c) of UNGA Resolution 3281 (XXIX)), will only show itself once their national courts take the first decisions.

However, the present world crisis, which analysts have found to at least equal the 1970s oil crisis, and its economic impacts will also have an influence on the policies of these states. Depending on their resources, states will have to choose if they can afford further nationalizations to strengthen their own assets and independence, or opt to encourage foreign

[147] Reuters: "Ecuador says key sectors to be nationalized" in *STV*, May 24, 2009, *available at* http://news.stv.tv/business/98346-ecuador-says-mining-oil-must-be-in-state-hands/ (*last visited on* June 24, 2009).

[148] News Release from the International Centre for Settlement of Investment Disputes, May 16, 2007, *available at* http://icsid.worldbank.org/ICSID/StaticFiles/Announcement3.html (*last visited on* June 24, 2009); News Release from the International Centre for Settlement of Investment Disputes, July 9, 2009, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement20 (*last visited on* Aug. 1, 2009); *Venezuela has announced similar plans*: "Bolivia withdraws from ICSID" in *Latin Lawyer*, May 22, 2007, *available at* http://www.americasnet.net/news/Bolivia_ICSID.pdf (*last visited on* June 24, 2009); Editorial: "Treaty Developments Related to Bolivia, Ecuador and Venezuela" in *International Disputes Quarterly*, Fall 2007, *available at* http://www.whitecase.com/idq/fall_2007/ia1/ (*last visited on* July 1, 2009); Latin America Advisor: "Impact of Ecuador ICSID Exit" in *Latin Business Chronicle*, June 30, 2009, *available at* http://www.latinbusinesschronicle.com/app/article.aspx?id=3502&usg=AFQjCNGSx4WXMoMyrPI68MWrTLqzyLVaWg (*last visited on* July 1, 2009).

[149] Interview with C. Villegas, Bolivia's Minister of Hydrocarbons and Energy, "Bolivia Asserts Oil Sovereignty", p. 30.

investments to boost their own economy and state's finances as well as provide for the inflow of technology and knowledge, since the short-term gains possibly will soon be outweighed by the negative impacts of lacking investments.[150]

2.3 The Duties of Permanent Sovereignty over Natural Resources

As mentioned above, in an interconnected world rights will very seldom come without the opposite side of the coin. Though the principle of PSNR had its origin mainly as an instrument of developing states to strengthen their position with respect towards the *old world*, soon developments began putting borders towards their exercise of the right. Obligations deriving from various sectors of law which are directed towards all states have created an extensive legal framework in which the conduct of states is no longer without limitations. The most important will be dealt with in the following.

2.3.1 The Duty of a State to Exercise Permanent Sovereignty over Natural Resources in the Interest of National Development and the Well-being of the People

UNGA Resolution 1803 (XVII) declares explicitly that PSNR:

> must be exercised in the interest of (…) national development and of the wellbeing of the people of the State concerned.[151]

Thus, even though every state has the right to freely dispose, exploit and use its natural resources, and for this purpose regulate its economy, in practice this shall only occur to further their national development and benefit the well-being of their people.[152] Within one article two obligations, which not necessarily are always in compliance, are laid down.[153]

The duty to use one's natural resources to improve the nation's progress and economic development serves at the same time as justification for many of the extensive rights connected to the principle.[154] With one of the aims of PSNR being to eliminate previous injustices and create equal players in the modern world, the rights which peoples and states

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[150] C. Zissis: "Bolivia's Nationalization of Oil and Gas" in *Backgrounder*, May 12, 2006 *available at* http://www.cfr.org/publication/10682/ (*last visited on* June 24, 2009); E-Mail correspondence from former advisor of Texaco in Ecuador, M. A. Rodas-Talbott, *received on* July 5, 2009.
[151] Art. 1, UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217.
[152] G. Elian: *The Principle of Sovereignty over Natural Resources*, p. 98.
[153] N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, p. 293.
[154] S. R. Chowdhury: "Permanent Sovereignty over Natural Resources – Substratum of the Seoul Declaration", p. 62; M. Bedjaoui: "The Right to Development" in *International Law: Achievements and Prospects*, M. Bedjaoui ed., Dordrecht *et al.* 1991, p. 1184.

become bearers of are linked therewith and thus, shall be used in accordance.[155] At the same time, steps taken to further the development shall ultimately benefit the people of the state.[156] While only one succeeding UNGA Resolution repeats the same obligation,[157] the incentive underlying it has provided the background for various other acts of legislation.[158]

2.3.2 The Duty to Respect Environmental Norms

2.3.2.1 The Evolution of the Principle of Permanent Sovereignty over Natural Resources in the Light of Environmental Norms

As environmental law developed,[159] the need for international co-operation in this field became apparent. Environmental degradation and pollution can originate in one territory but have an effect in another.[160] Thus, the sovereignty of states concerning their policies and conduct experienced a confrontation with newly evolving environmental principles.[161] Their value and ability to create binding obligations on states is variable and therefore the following will elaborate on the most important of these.

The Obligation not to Cause Damage

The obligation not to cause damage to the territory of another state can be traced back to the *Trail Smelter* arbitration in which the tribunal came to the conclusion that:

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[155] M. Bedjaoui: "The Right to Development", p. 1177; Preamble, UNGA – Res. 3201 (S – VI), Declaration on the Establishment of a New International Economic Order, May 1, 1974, S – 6, UN – GAOR, Supp. No. 1, p. 4, UN Doc. A/9559.

[156] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96, paras. 57-58 (2001); Preamble, UNGA – Res. A/RES/41/128, Declaration on the Right to Development, Dec. 4, 1986, 41 UN – GAOR, Supp. No. 53, p. 186, UN Doc. A/41/925; M. S. Choudhury: "Oil and Water do Mix: The Case of Saudi Arabia", *The Journal of Developing Areas*, vol. 37, no. 2, 2004, pp. 169-170; N. J. Udombana: "The Third World and the Right to Development: Agenda for the Millennium", *Human Rights Quarterly*, vol. 22, no. 3, 2000, p. 766.

[157] Art. 2, UNGA – Res. 2692 (XXV), Permanent Sovereignty over natural resources of developing countries and expansion of domestic sources of accumulation for economic development, Dec. 11, 1970, 25 UN – GAOR, Supp. No. 28, p. 63, UN Doc. A/RES/2692.

[158] Art. 5, The Bolivarian Republic of Venezuela: Decree No. 1510 (Organic Law of Hydrocarbons), Nov. 2, 2001, *Gaceta Oficial de la Republica Bolivariana de Venezuela*; Art. II, African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, 1001 UNTS 3; Art. 12, Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, 1946 UNTS 5; Interview with C. Villegas, Bolivia's Minister of Hydrocarbons and Energy, "Bolivia Asserts Oil Sovereignty", p. 30.

[159] *See* subsection 1.2.4.

[160] J. Thornton & S. Beckwith: *Environmental Law*, p. 29.

[161] N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, p. 240.

> (…) no State has the right to use or permit the use of its territory in such a manner as to cause injury (...) in or to the territory of another (...) when the case is of serious consequence and the injury is established by clear and convincing evidence.[162]

Later on, the International Court of Justice stated in its judgment in the *Corfu Channel* case that every state has the obligation to ensure that its territory was not to be used for acts which would infringe the rights of other states.[163] Those instances in which the conduct amounts to a breach of an international obligation will entail state responsibility and states will be under the obligation to terminate their unlawful activity.[164]

The obligation not to cause damage has direct effect on a state's exercise of its PSNR, as due to the circumstance that they have often been drafted into one single provision, it is evident that a balance between both sides shall be reached.[165] Thus, neither a state's exercise of its sovereignty over its natural resources, nor the obligation not to cause damage are absolute.[166] The emphasis will shift from the right of one state to the right of another when certain thresholds are fulfilled, such as being a result of human activity, having physical consequences (unlike *e.g.* economical), or crossing national boundaries. The most vague and therefore difficult to determine of the thresholds is, however, that the damage caused must be serious or significant.[167]

The principle as such has found reflection in international conventions and resolutions and is depicted *e.g.* in Principle 21 of the 1972 UN Declaration on the Human Environment (Stockholm Declaration) and in Principle 2 of the 1992 Rio Declaration on the Environment and Development.[168] That the obligation to not cause damage is considered to constitute

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[162] *Trail Smelter Case* (U.S. *v.* Can.), 3 *Reports of International Arbitral Awards* 1905, p. 1965 (Award, April 16, 1938; March 11, 1941).
[163] *Corfu Channel* (Merits) (U.K. *v.* Albania), 1949 ICJ 4, p. 22 (Judgment, Apr. 9); E. Louka: *International Environmental Law – Fairness, Effectiveness, and World Order*, pp. 476-477.
[164] Para. 16, UNSC – Res. 687, April 13, 1991, 46 UN – SCOR, p. 14, UN – Doc. S/RES/687; N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, pp. 244-245; Arts. 1-2, UNGA – Res. 56/83, Annex, Responsibility of States for Internationally Wrongful Acts, Dec. 12, 2001, 56 UN – GAOR, Supp. No. 10, p. 2, UN Doc. A/RES/56/83.
[165] Principle 21, Stockholm Declaration of the United Nations Conference on the Human Environment, UN Doc. A/CONF. 48/14 (1972), *reprinted in* (1972) 11 ILM 1416; Principle 2, Annex, Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, Aug. 10, 1992, UN Doc. A/CONF.151/26 (Vol. I); F. X. Perrez: "The relationship between "permanent sovereignty" and the obligation not to cause transboundary environmental damage", p. 1202.
[166] O. Schachter: "The Emergence of International Environmental Law", *Journal of International Affairs*, vol. 4, issue 2, 1991, pp. 463-464; F. X. Perrez: "The relationship between "permanent sovereignty" and the obligation not to cause transboundary environmental damage", p. 1202.
[167] O. Schachter: "The Emergence of International Environmental Law", p. 464; *Trail Smelter Case* (U.S. *v.* Can.), 3 *Reports of International Arbitral Awards* 1905, p. 1965 (Award, April 16, 1938; March 11, 1941).
[168] Principle 21, Stockholm Declaration of the United Nations Conference on the Human Environment, UN Doc. A/CONF. 48/14 (1972), *reprinted in* (1972) 11 ILM 1416; Principle 2, Annex, Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, Aug. 10, 1992, UN Doc. A/CONF.151/26 (Vol. I); T. Kuakkonen: *International Law and the Environment – Variations on a Theme*, Helsinki 2002, pp. 66, 94; M. N. Shaw: *International Law*, 6th ed., Cambridge 2008, p. 853; Preamble,

customary law has also been stated by Judge Weeramantry in his dissenting opinion on the *Legality of the Use of Nuclear Weapons*:

> Principle 21 has a direct relevance (…) for it deals specifically with the obligations of states not to damage or endanger significantly the environment beyond their jurisdiction. Principle 2 of the Rio Declaration gives expression to the same principle. Both may be said to be articulations, in the context of the environment, of general principles of customary law (…)[169]

Moreover, the limitation of the principle of PSNR, which some say is inherent in the notion of the principle itself,[170] has found considerable support in international law, and it has been furthermore confirmed by international tribunals that in application of the obligation not to cause damage states must choose the measures and procedures which they deem necessary for the avoidance of damage, or else for its remediation.[171]

The Concept of Sustainable Development

The often cited passage of the 1987 Brundtland Report describes the essential idea underlying the concept of sustainable development:

> Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[172]

Three sectors – economic, social and environmental – function in interplay with each other, and the relationship to one-another has been subject to much discourse.[173] For example, K. Bosselmann provides models for the two most commonly accepted models, weak and strong sustainable development. While weak sustainable development provides each element with an equal value, and seeks to reach development *via* compromises, concentrating thus on the

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Convention for the Protection of the Ozone Layer, March 22, 1985, 1513 UNTS 293; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, March 22, 1989, 1673 UNTS 125.

[169] *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226, 429, p. 504 (Adv. Op., Diss. Op. of Judge Weeramantry, July 8); *see also*: J. Thornton & S. Beckwith: *Environmental Law*, p. 42; A. E. Boyle: "Globalising Environmental Liability: The Interplay of National and International Law", *Journal of Environmental Law*, vol. 17, issue 1, 2006, pp. 3-4.

[170] F. X. Perrez: "The relationship between "permanent sovereignty" and the obligation not to cause transboundary environmental damage", p. 1212.

[171] United Nations Compensation Commission, Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning the Third Installment of "F4" Claims*, Dec. 18, 2003, p. 15, para. 50, UN Doc. S/AC.26/2003/31.

[172] UNGA – Res. 42/187, Report of the World Commission on Environment and Development, Dec. 11, 1987, 42 UN – GAOR, p. 154, UN Doc. A/RES/42/187.

[173] K. Bosselmann: "The Concept of Sustainable Development" in *Environmental Law for a Sustainable Society*, K. Bosselmann & D. Grinlinton eds., Auckland 2002, pp. 82, 87-88; G. Winter: "A Fundament and Two Pillars – The Concept of Sustainable Development 20 Years after the Brundtland Report" in *Sustainable Development in International and National Law*, H. C. Bugge & C. Voigt eds., Groningen 2008, pp. 27-28.

common grounds between the three sectors, strong sustainable development prescribes the achievement of economic and societal development within the overarching factor of ecology.[174]

Within the concept, the International Law Association has identified several principles which have gained an independent standing by themselves, the most prominent being: the principle of common but differentiated responsibility; the principle of inter- and intragenerational equity; the principle of sustainable use; and the precautionary principle.[175]

Standing above these principles, as a conceptual framework of *integrated thinking*, functions the principle of integration.[176] Two parts can be identified: firstly, each aforementioned principle shall be understood as part of an inter-related network, and their application shall supplement and not exclude each other; secondly, the principle of integration prescribes that all social, economic, financial, environmental and human rights aspects shall be taken into consideration when taking decisions with regard to development.[177] This shall be implemented on all levels of governance, and in the case of conflict used as the underlying *Grundnorm* for reaching a solution.[178]

The Principle of Common but Differentiated Responsibilities

The essence of this principle is that while all states have the common responsibility to protect the environment, their responsibilities in this regard must be viewed differentiated. Taking into account the historical injustices, developed states carry the bigger responsibility for the current state of environment and therefore shall also take a larger share in the restitution.[179] Its

[174] K. Bosselmann: "The Concept of Sustainable Development", pp. 90-92.
[175] M.-C. Cordonier Segger: "Sustainable Development in International Law" in *Sustainable Development in International and National Law*, H. C. Bugge & C. Voigt eds., Groningen 2008, p. 166; International Law Association: "New Delhi Declaration: The Principles of Law Relating to Sustainable Development of April 2, 2002 – The 70th Conference of the International Law Association, held in New Delhi, India", *reprinted in: International Environmental Agreements: Politics, Law and Economics*, vol. 2, no. 2, 2002, pp. 211-216.
[176] M.-C. Cordonier Segger & A. Khalfan: *Sustainable Development Law – Principles, Practices, & Prospects*, p. 102; Para. 31, Rio Declaration on Environment and Development – Application and Implementation, *Report of the Secretary-General*, Feb. 10, 1997, UN Doc. E/CN.17/1997/8.
[177] International Law Association: "New Delhi Declaration: The Principles of Law Relating to Sustainable Development of April 2, 2002 – The 70th Conference of the International Law Association, held in New Delhi, India", p. 216; Principle 4, Annex, Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, Aug. 10, 1992, UN Doc. A/CONF.151/26 (Vol. I).
[178] Paras. 33-34, Rio Declaration on Environment and Development – Application and Implementation, *Report of the Secretary-General*, Feb. 10, 1997, UN Doc. E/CN.17/1997/8.
[179] Preamble, UNGA – Res. 2849 (XXVI), Development and Environment, Dec. 20, 1971, 26 UN – GAOR, p. 70, UN Doc. A/RES/2849; Principle 7**,** Annex, Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, Aug. 10, 1992, UN Doc. A/CONF.151/26 (Vol. I); Art. 3, United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107, UN Doc. A/AC.237/18 (Part II)/Add.1; T. Kolari: "The Principle of Common but Differentiated Responsibilities as

vague status between a political and moral obligation directed towards states and its capability to create binding legal norms leads to its frequent utilization in negotiations as well as incorporation in various environmental agreements.[180] Thus, with the overall objective of encouraging universal participation in environmental treaties, depending on the economic capabilities of a state, different legal obligations and standards will be applicable, granting *e.g.* longer transition periods or less stringent commitments in general.[181]

Moreover, to decrease the gap of development, developed states to their capabilities shall assist developing states by providing financial aid, consulting them on and transferring environmentally sound technology.[182] Whereas earlier efforts within the principle of PSNR included a similar duty, the special emphasis on environment concretizes the aim and therefore more effectively contributes to sustainable development and its goal of eradication of poverty.[183] Thus, the early claim of developing states of a "common and shared responsibility"[184] concerning economic and social progress evolved into the principle of "common but differentiated responsibility", realized through the same means, however in an environmental context.

The Principle of Inter- and Intragenerational Equity

In general, the principle of inter- and intragenerational equity shall ensure an equitable distribution of responsibilities and resources among the world population, for present and future generations.[185] In connection with the objective of eradication of poverty, the peoples

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Contributing to Sustainable Development through Multilateral Environmental Agreements" in *Sustainable Development in International and National Law*, H. C. Bugge & C. Voigt eds., Groningen 2008, p. 252.

[180] T. Kolari: "The Principle of Common but Differentiated Responsibilities as Contributing to Sustainable Development through Multilateral Environmental Agreements", p. 253.

[181] Para. 46, Rio Declaration on Environment and Development – Application and Implementation, *Report of the Secretary-General*, Feb. 10, 1997, UN Doc. E/CN.17/1997/8; Art. 26, Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 29 December 1972, Nov. 7, 1996, 37 ILM 1; Arts. 4, 12, United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107, UN Doc. A/AC.237/18 (Part II)/Add.1; Art. 175(5), Consolidated Version of the Treaty Establishing the European Community of 29 December 2006, 2006 O.J. 39.

[182] Para. 46, Rio Declaration on Environment and Development – Application and Implementation, *Report of the Secretary-General*, Feb. 10, 1997, UN Doc. E/CN.17/1997/8; Preamble, Art. 16, Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79; Arts. 5-6, United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Oct. 14, 1994, 1954 UNTS 3; D. French: "Developing States and International Environmental Law: The Importance of Differentiated Responsibilities", *The International and Comparative Law Quarterly*, vol. 49, no. 1, 2000, p. 42.

[183] T. Kolari: "The Principle of Common but Differentiated Responsibilities as Contributing to Sustainable Development through Multilateral Environmental Agreements", pp. 252-253, 255.

[184] Para. 10, UNGA – Res. 2626 (XXV), International Development Strategy for the Second United Nations Development Decade, Oct. 24, 1970, 25 UN – GAOR, Supp. No. 28, p. 39, UN Doc. A/8028.

[185] Principle 2, Stockholm Declaration of the United Nations Conference on the Human Environment, UN – Doc. A/CONF. 48/14 (1972), *reprinted in* (1972) 11 ILM 1416; Art. 3(1), United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107, UN Doc. A/AC.237/18 (Part II)/Add.1; N. Schrijver:

of one generation shall enjoy fair access to their entitlement of available natural resources, and at the same time states, when utilizing their resources and deciding upon their policies, must take into consideration the long-term effects their conduct will have.[186] In fulfillment of this principle, aspects can be determined which influence the understanding of the principle.

Firstly, as also underlies the principle of common but differentiated responsibilities, arrangements concluded under the overall concept of equity shall take into consideration the responsibility for the problem.[187] Secondly, equity reflects the rights/entitlements of each individual to certain common goods and benefits such as climatic stability and biological diversity.[188] And finally, equity shall be utilized from a comparative viewpoint. Each state's capacity to act shall relate to their afforded efforts, and thus strong states shall contribute to a greater extent to the public good and assist others.[189] Therefore, initiatives shall be taken at an international, regional and national level to ensure sustainability concerning natural resource management and economic and social development and, in particular, the increasing energy consumption of developing states shall be provided for with regionally appropriate and environmentally sound technology.[190]

The Principle of Sustainable Use

As mentioned above, states on the one hand enjoy sovereignty over their natural resources, on the other hand they are under the obligation to not cause damage to the territories of other states. This interplay between the two separate sets of rules has led to the development of an

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Sovereignty over Natural Resources – Balancing Rights and Duties, pp. 242, 247-248; E. Louka: *International Environmental Law – Fairness, Effectiveness, and World Order*, p. 54.

[186] International Law Association: "New Delhi Declaration: The Principles of Law Relating to Sustainable Development of April 2, 2002 – The 70th Conference of the International Law Association, held in New Delhi, India", pp. 213-214; M.-C. Cordonier Segger: "Sustainable Development in International Law", p. 168.

[187] X. Wang: "Sustainable International Climate Change" in *Sustainable Development Law – Principles, Practices, & Prospects*, M.-C. Cordonier Segger & A. Khalfan eds., Oxford 2004, p. 352.

[188] X. Wang: "Sustainable International Climate Change", p. 353; M.-C. Cordonier Segger & A. Khalfan: *Sustainable Development Law – Principles, Practices, & Prospects*, p. 121.

[189] X. Wang: "Sustainable International Climate Change", p. 353; Para. 7, Plan of Implementation of the World Summit on Sustainable Development, Sept. 4, 2002, *also available at* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (*last visited on* April 13, 2009); Art. 15(7), Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79.

[190] Para. 9, Plan of Implementation of the World Summit on Sustainable Development, Sept. 4, 2002, *also available at* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (*last visited on* April 13, 2009); International Law Association: "New Delhi Declaration: The Principles of Law Relating to Sustainable Development of April 2, 2002 – The 70th Conference of the International Law Association, held in New Delhi, India", pp. 213-214.

independent principle – the principle of sustainable use.[191] The Convention on Biological Diversity defines sustainable use as follows:

> "Sustainable use" means 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.[192]

While the application of the principle often causes problems, *inter alia* who determines what is *sustainable*, or other procedural aspects, it reflects at least the minimum requirements of installing rational management plans concerning the long-term (living and non-living) natural resource planning and cooperating with regard to creating joint international monitoring systems.[193]

Moreover, numerous conventions include the obligation on states which have ratified the document to establish conservation and protection measures, limiting their choice of policies and conduct, not only in a transboundary context, but also concerning their national resources.[194] Thus, the growing trend to recognize certain resources as global public goods has necessitated a re-conceptualized approach to the principle of PSNR, requiring integrative measures between resource management and environmental protection.[195]

The Precautionary Principle

Scientific evidence predicting possible consequences of human action can often be inconclusive or insufficient to state with certainty that environmental damage will occur.[196]

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[191] African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, 1001 UNTS 3; M.-C. Cordonier Segger & A. Khalfan: *Sustainable Development Law – Principles, Practices, & Prospects*, pp. 109-110.

[192] Art. 2, Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79.

[193] Art. 61, United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3; UNGA – Res. 2849 (XXVI), Development and Environment, Dec. 20, 1971, 26 UN – GAOR, p. 70, UN Doc. A/RES/2849; M.-C. Cordonier Segger & A. Khalfan: *Sustainable Development Law – Principles, Practices, & Prospects*, pp. 110, 116.

[194] African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, 1001 UNTS 3; Art. 193, United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3; Chapter IV, Plan of Implementation of the World Summit on Sustainable Development, Sept. 4, 2002, *also available at* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (*last visited on* April 13, 2009); Preamble, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 UNTS 154; M.-C. Cordonier Segger & A. Khalfan: *Sustainable Development Law – Principles, Practices, & Prospects*, p. 116.

[195] International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 UNTS 72 ("common interest to achieve the optimum level of whale stocks"); United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107, UN Doc. A/AC.237/18 (Part II)/Add.1 ("change in the Earth's climate and its adverse effects are a common concern of humankind"); Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79 ("conservation of biological diversity is a common concern of humankind"); Art. VI, African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, 1001 UNTS 3.

[196] J. Thornton & S. Beckwith: *Environmental Law*, p. 43.

To compensate for such shortcomings, the precautionary principle has developed, which declares that states, when a threat of serious or irreversible damage is present, must not await full scientific certainty but instead take necessary action.[197]

According to P. Sands, the principle as such has been accepted as constituting customary international law,[198] however the application can cause difficulties as the level of risk necessary to prompt action, and the extent of the required conduct cannot easily be determined. Attributes which might play a role in considering possible steps are the cost-effectiveness or the complexity of the actions envisioned.[199] Thus, following a comprehensive evaluation of the risk connected with a certain substance or activity, based on most recent scientific information, the risk of environmental damage must be weighed up against the probability of occurrence and the consequences following from the setting of restrictions or other actions.[200]

The Principle of Equitable Utilization

With regard to transboundary natural resources (especially concerning the allocation of water resources as well as the delimitation of the continental shelf) the principle of equitable utilization has crystallized. In particular in those instance where a state shares its resources with one or more it shall take due care in its utilization that the other state can also enjoy an equitable share and thus must cooperate and coordinate its efforts in this regard.[201] Therefore, a process of prior consultation and negotiation shall take place.[202] The parties shall then reach

[197] Principle 15, Annex, Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, Aug. 10, 1992, UN Doc. A/CONF.151/26 (Vol. I); Bergen Declaration, Ministerial Declaration on Sustainable Development in the ECE Region, May 16, 1990, UN Doc. A/CONF.151/PC/10, Annex 1, *reprinted in: Yearbook on International Environmental Law*, vol. 1, 1990, p. 429; Convention for the Protection of the Ozone Layer, March 22, 1985, 1513 UNTS 293; Art. 174, Consolidated Version of the Treaty Establishing the European Community of 29 December 2006, 2006 O.J. 39; E. Louka: *International Environmental Law – Fairness, Effectiveness, and World Order*, p. 50; J. Thornton & S. Beckwith: *Environmental Law*, p. 43.

[198] P. Sands: *Principles of International Environmental Law*, 2nd ed., Cambridge 2003, pp. 268, 272.

[199] C. R. Sunstein: "Beyond the Precautionary Principle", *University of Pennsylvania Law Review*, vol. 151, no. 3, 2003, p. 1012; Principle 15, Annex, Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, Aug. 10, 1992, UN Doc. A/CONF.151/26 (Vol. I).

[200] Case E-3/00, *EFTA Surveillance Authority* v. *The Kingdom of Norway* (2001), paras. 30-31 (Judgment, April 5); Case C-6/99, *Association Greenpeace France* et al. v. *Ministère de lÀgriculture et de la Pêche* et al. (2000), para. 44 (Judgment, March 21).

[201] N. Schrijver, *Sovereignty over Natural Resources – Balancing Rights and Duties*: p. 243; E. Louka: *International Environmental Law – Fairness, Effectiveness, and World Order*, p. 53.

[202] *Lake Lanoux Arbitration* (France *v.* Spain), 12 *Reports of International Arbitral Awards* 281 (Award, Nov. 16, 1957); O. McIntyre: *Environmental protection of international watercourses under international law*, Hampshire 2007, p. 58.

an agreement based on *equitable* terms, a formulation which introduces a certain discretion to create fairness.[203]

Most notably concerning transboundary watercourses, the sovereignty of states over their natural resources has been relativized by perceiving shared resources as units, their utilization decided as whole.[204] Equity can thus mean a fifty-fifty allocation, or taking into consideration the special needs of those using the resource, prior usage or its location.[205] An example of factors which shall be taken into account when negotiating can be found in the 1997 United Nations Watercourses Convention which proposes non-exhaustively: the natural character of the international watercourse; the social and economic needs of the states; the dependency of the population; the effects flowing from the use on other watercourse states; the existing and potential uses; conservation, protection, development and economy of use of the water resource; and the availability of alternatives.[206] It remains to the parties to determine the weight each factor shall have in the deliberations, giving the principle a weak legal value apart from providing for incentives in which behavior can be expected.

2.3.2.2 Have Environmental Norms Altered the Principle of Permanent Sovereignty over Natural Resources?

The principle of PSNR became prominent and received support from the world community before international environmental law and its accompanying evolved norms appeared in such a clear form as they are being advocated today. As analyzed in the first Chapter, one of the characteristics of the principle of PSNR is however to incorporate newly evolving developments of international law. Thus, the environmental norms can be said to have found their reflection in the obligations opposing the rights of PSNR. However, the consequences of these new principles on the scope of the principle are not as far-reaching as they might appear at first glance. When analyzed, two points may be made.

Firstly, some of the abovementioned principles, *i.e.* the obligation not to cause damage and the principle of equitable utilization, partly limit a state's sovereignty over natural

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[203] O. McIntyre: *Environmental protection of international watercourses under international law*, p. 66; Resolution on Utilization of Non-Maritime Watercourses (Except for Navigation), *reprinted in* "The Salzburg Session of the Institut de Droit International", *The American Journal of International Law*, vol. 66, no. 3, 1962, p. 737.

[204] UNGA – Res. A/51/49, Annex, Arts. 5-6, Convention on the Law of Non-Navigational Uses of International Watercourses, May 21, 1997, 51 UN – GAOR, Supp. No. 49, UN Doc. A/RES/51/229.

[205] *Fisheries Jurisdiction Case* (Merits) (United Kingdom *v.* Iceland), 1974 ICJ 3, pp. 31-31, para. 71 (Judgment, July 25); E, Louka: *International Environmental Law – Fairness, Effectiveness, and World Order*, pp. 53, 172.

[206] UNGA – Res. A/51/49, Annex, Art. 6(1)(a-g), Convention on the Law of Non-Navigational Uses of International Watercourses, May 21, 1997, 51 UN – GAOR, Supp. No. 49, UN Doc. A/RES/51/229.

resources. However, in general, these limits would not apply until the rights of others, which also are subjects to the same rights, are concerned. Therefore, while states are not free to decide on all their national policies in this regard, the origins of these limitations lay less in concerns for the environment, but more rather stem from another entity's right to sovereignty over natural resources.

Secondly, other principles, such as the principle of common but differentiated responsibilities and the principle of intra-generational equity, indeed create obligations for states. However, their similar underlying topic to the principle of PSNR, namely to re-correct previous unjust arrangements and situations, merely reaffirms several aspects which originate in the principle itself. While placed in an environmental context, and thus requiring developed states to engage in environmental protection and conservation, the principle at the same time emphasizes the rights of developing nations to receive support in their undertakings to achieve development. Moreover, the obligations of developed states to transfer know-how, consult and contribute financially are re-affirmed.

Thus, the majority of environmental norms have not significantly altered the principle of PSNR concerning its application to developing states. However, on the other side, it can be said, that through the principles of inter-generational equity and sustainable use, some minimum requirements concerning environmental protection have been introduced also with regard to developing states. Paired with recognition of the fact that secure access to natural resources is key to the general aim of poverty reduction, long-term rational management plans of natural resources and comparable *efforts* in terms of environmental protection and conservation have been incorporated by several developing states. As compiled by the *World Resources Report*,[207] various regions in the world have taken on transposing the broad environmental obligations from the international level into national policies and now provide for legal frameworks with regard to *e.g.* forestry, wildlife and fisheries.[208]

[207] The *World Resources Report* is put together through a partnership of the UN Environment Programme, the UN Development Programme, the World Bank and the World Resources Institute.

[208] World Resources Institute (*in collaboration with* United Nations Development Programme, United Nations Environment Programme, and World Bank): "The Wealth of the Poor: Managing Ecosystems to Fight Poverty", *World Resources*, Washington 2005, pp. 92-97; *see also e.g. the engagement of developing countries with regard to numerous Regional Fisheries Management Organizations such as the Caribbean states in the* CRFM (Caribbean Regional Fisheries Mechanism); Haughton, M. O.: "Fisheries Subsidy and the Role of Regional Fisheries Management Organisations: The Caribbean Experience", *Caribbean Regional Fisheries Mechanism*, Belize, *available at* http://www.unep.ch/etu/Fisheries%20Meeting/submittedPapers/MiltonHaughton.pdf (*last visited on* Aug. 1, 2009), p. 12.

Chapter III Indigenous Peoples and the Principle of Permanent Sovereignty over Natural Resources

3.1 Introduction

Indigenous peoples for a long time were perceived as mere objects of international law, which often failed to respond to their special needs and circumstances. The international community decided on their regulation, without consulting or enabling the participation of indigenous peoples. However, through much engagement by their side, the system has become more inclusive and numerous conventions and instruments have been formed which incorporate new approaches and methods of integration.[209]

Especially within the fields of international environmental law and human rights law the rights of indigenous peoples increasingly have been recognized, leading to greater awareness concerning their situation at large. Debates on self-determination as well as the special relationship of indigenous peoples with their lands, has moreover led to their claim to enjoy sovereignty over their natural resources.

Thus, this chapter will focus on the position of indigenous peoples with regard to the principle of PSNR, its relationship with self-determination and the consequences flowing thereof. Finally, two cases will be used to illustrate the theoretical findings in a practical manner.

3.2 Indigenous Peoples and International Law

3.2.1 Defining Indigenous Peoples

3.2.1.1 Attempts of a Definition

Before analyzing the legal status of indigenous peoples under international law, it is necessary to determine who may be included within the term itself. A precise definition of indigenous peoples is hard to agree upon, due the circumstance that on the one hand, flexibility with regard to the understanding of the term as well as to the right of each indigenous people to define themselves is desired, and on the other hand, a capturing of the diversity within one definition always carries with it the danger of limitation and exclusion of possible other

[209] L. Swepston: "Indigenous Peoples in International Law and Organizations" in *International Law and Indigenous Peoples*, J. Castellino & N. Walsh eds., Leiden & Boston 2005, p. 53.

subjects that might be considered to fall within the term.[210] Instead, several common characteristics have been identified which distinguish this distinct, vulnerable, social and cultural group from the society which now prevails in the territory.[211]

The Commission on Human Rights has identified four – non-exhaustive – elements which have found consensus among international organizations and legal experts. Firstly, the indigenous peoples have occupied and used a specific territory prior to others.[212] Secondly, their self-identification as being distinct, and thirdly, the will to preserve such distinctiveness especially with regard to one's culture, including language, social organization, religion, spiritual values, and methods of production, laws and institutions.[213] And finally, they have been subject to dispossession, marginalization or discrimination, causing injustices today.[214]

A further element which has been considered implicative is the collective attachment of indigenous peoples to their ancestral territories, including the natural resources located

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[210] Sub-Commission on Prevention of Discrimination and Protection of Minorities: "Standard-setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples", *Working Paper on the concept of "indigenous people" by Chairperson-Rapporteur Erica-Irene A. Daes*, June 10, 1996, paras. 68, 71, UN Doc. E/CN.4/Sub.2/AC.4/1996/2; The World Bank Operational Manual, Operational Directive 4.10 on Indigenous Peoples, Jan. 2005, para. 3, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html (*last visited on* July 1, 2009).

[211] M. Scheinin: "What are Indigenous Peoples?" in *Minorities, Peoples and Self-Determination – Essays in Honour Of Patrick Thornberry*, N. Ghanea & A. Xanthaki eds., Leiden & Boston 2005, p. 3.

[212] Sub-Commission on Prevention of Discrimination and Protection of Minorities: "Standard-setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples, *Working Paper on the concept of "indigenous people" by Chairperson-Rapporteur Erica-Irene A. Daes*, June 10, 1996, para. 69, UN Doc.E/CN.4/Sub.2/AC.4/1996/2; Statement by A. Malhotra, Representative of India, in *General Assembly adopts Declaration on Rights of Indigenous Peoples*, Sept. 13, 2007, UN Doc. GA/10612.

[213] Sub-Commission on Prevention of Discrimination and Protection of Minorities: "Standard-setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples, *Working Paper on the concept of "indigenous people" by Chairperson-Rapporteur Erica-Irene A. Daes*, June 10, 1996, para. 69, UN Doc. E/CN.4/Sub.2/AC.4/1996/2; M. Scheinin: "What are Indigenous Peoples?", p. 3; The World Bank Operational Manual, Operational Directive 4.10 on Indigenous Peoples, Jan. 2005, para. 4(a – d), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html (*last visited on* July 1, 2009); Preambular para. 2, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295; J. M. Cobo: *Study of the Problem of Discrimination Against Indigenous Populations — Volume 5: Conclusions, Proposals and Recommendations*, p. 379, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (March 1987).

[214] Sub-Commission on Prevention of Discrimination and Protection of Minorities: "Standard-setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples, *Working Paper on the concept of "indigenous people" by Chairperson-Rapporteur Erica-Irene A. Daes*, June 10, 1996, para. 69, UN Doc. E/CN.4/Sub.2/AC.4/1996/2; M. Scheinin: "What are Indigenous Peoples?", p. 4; Preambular para. 6, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295; J. M. Cobo: *Study of the Problem of Discrimination Against Indigenous Populations — Volume 5: Conclusions, Proposals and Recommendations*, p. 379, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (March 1987).

therein, which influences their history, identity and culture, as well their traditional economic activities.[215]

Article 1 of the Convention No. 169 of the International Labour Organization includes a definition of indigenous peoples for the purpose of the application of the Convention:

> (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
>
> (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
>
> 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.[216]

Thus, it can be said that especially the elements of priority, self-identification and distinctiveness are decisive in determining which groups fall within the wide term of *indigenous peoples*.[217]

3.2.1.2 A Minority or A People?

The treatment of indigenous peoples in international law will depend on their categorization as a *minority* or a *people*. Reaching a decision on the matter can show some challenges, since neither denomination for itself is without complications.[218]

A definition of the term *minority* is similarly difficult to trying to define indigenous peoples, as also in this regard the diverse range of situations and groups necessitates a broad

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[215] M. Scheinin: "What are Indigenous Peoples?", p. 3; The World Bank Operational Manual, Operational Directive 4.10 on Indigenous Peoples, Jan. 2005, para. 4(b), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html (*last visited on* July 1, 2009); Preambular para. 7, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295; J. M. Cobo: *Study of the Problem of Discrimination Against Indigenous Populations — Volume 5: Conclusions, Proposals and Recommendations*, p. 379, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (March 1987).

[216] ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 UNTS 383.

[217] G. Alfredsson: "Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law" in *Minorities, Peoples and Self-Determination – Essays in Honour Of Patrick Thornberry*, N. Ghanea & A. Xanthaki eds., Leiden & Boston 2005, p. 169; M. Kleist: "The Status of the Greenlandic Inuit – Are the Greenlandic Inuit a People, and Indigenous People, a Minority or a Nation? A Practical, Philosophical and Conceptual Investigation" in *The Right to National Self-Determination – The Faroe Islands and Greenland*, S. Skaale ed., Leiden & Boston 2004, pp. 98-101.

[218] P. Malanczuk: *Akehurst's Modern Introduction to International Law*, p. 105-107; I. Brownlie: "The Rights of Peoples in Modern International Law" in *The Rights of Peoples*, J. Crawford ed., Oxford 1992, p. 5.

and flexible understanding.[219] The following objective and subjective elements have been suggested to determine what constitutes a *minority*: distinctive characteristics, numerical inferiority, a non-dominant position, the consciousness of ethnic, religious or linguistic characteristics and the common will to preserve those.[220] An ethnic minority can constitute itself as a group with an independent culture and history, as well as national and racial origins different from the majority.[221] *Peoples*, on the other hand, are perceived as a *community* with a distinct character and clear identity. Above all, a close link to a territory is of relevance, even if in the past they have been expelled from it.[222]

While the main distinguishing element between the two categories can be found in the fact that minorities are numerically inferior, this can be applied to many instances of indigenous peoples as well. However, despite the fact that indigenous peoples can qualify as minorities,[223] they in general claim more far-reaching rights than contained in Article 27 ICCPR:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[224]

Although *culture* has been understood to include a distinct way of life associated with the use of land resources which are essential for the religion and spirituality of indigenous peoples,[225]

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[219] P. Malanczuk: *Akehurst's Modern Introduction to International Law*, p. 105.

[220] Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities by Special Rapporteur F. Capotorti*, para. 568, UN Doc. E/CN.4/Sub.2/384/Rev.1 (1979); M. Nowak: *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed., Kehl 2005, p. 643; H. Hannum: "The Rights of Persons Belonging to Minorities" in *Human Rights: Concept and Standards*, J. Symonides ed., Paris 2000, p. 287.

[221] M. Nowak: *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, p. 649.

[222] UNGA – Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, 15 UN – GAOR, Supp. No. 16, p. 66, UN Doc. A/4684; I. Brownlie: "The Rights of Peoples in Modern International Law", p. 5; G. Alfredsson: "Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law", p. 170; Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 41, para. 279, UN Doc. E/CN.4/Sub.2/404/Rev.1.

[223] Human Rights Committee, *General Comment 23: The Rights of Minorities (Art. 27)*, April 8, 1994, UN Doc. CCPR/C/21/Rev.1/Add.5, para. 3.2; *Sandra Lovelace* v. *Canada*, Human Rights Committee, Communication No. 24/1977, 68 ILR 17, para. 15, UN Doc. CCPR/C/13/D/24/1977 (Views of July 30, 1981); *Ivan Kitok* v. *Sweden*, Human Rights Committee, Communication No. 197/1985, 96 ILR 637, para. 6.3, UN Doc. CCPR/C/33/D/197/1985 (Views of Aug. 10, 1988).

[224] Art. 27, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (1967).

[225] Human Rights Committee, *General Comment 23: The Rights of Minorities (Art. 27)*, April 8, 1994, UN Doc. CCPR/C/21/Rev.1/Add.5, para. 7; *Chief Bernard Ominayak and the Lubicon Lake Band* v. *Canada*, Human Rights Committee, Communication No. 167/1984, 96 ILR 667, para. 32.2, UN Doc. CCPR/C/38/D/167/1984 (Views of Feb. 14, 1984); *Apirana Mahuika* et al. v. *New Zealand*, Human Rights Committee, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993, paras. 9.8-9.9 (Views of Nov.11, 2000); *Awas Tingni* (Merits) (The Mayagna (Sumo) Indigenous Community of Awas Tingni *v.* Nic.), 2001 Inter-Am. Ct. H. R. (Judgment,

their claims for self-determination especially with regard to ownership and control over their natural resources and land, have led to their at least part inclusion in the scope of the term *peoples* as envisioned in Article 1 of the ICCPR.[226] Based also on their existence in a state prior to the group located there presently, their interests are considered to go further back, thus justifying a larger role of participation in the management of the natural resources and land, as will also be further dealt with in subsection 3.3.[227]

3.2.2 International Law on Indigenous Peoples

3.2.2.1 Historical Development

Modern international law developed against the background of European-oriented political and social organization, based upon territorial entities with a hierarchical and centralized authority.[228] As indigenous peoples were not seen as fulfilling these requirements, up until the early twentieth-century states in general pursued the philosophy of *helping them in their development* by attempting to *civilize* these groups.[229] Administrative regimes which aimed at re-structuring their social and cultural patterns were erected in *e.g.* Great Britain, Canada, Brazil and the United States, providing for the management of their affairs, education and housing.[230] As objects of limited international concern, indigenous peoples received little acknowledgment and their societies were often torn apart in an assimilation process.

As human rights moved into the centre of attention in the post World-War-II era, and as the scope of subjects of international law expanded to also including *e.g.* international organizations, transnational corporations and individuals, the original individual/state

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Aug. 31), p. 75, para. 149, *available at* http://www1.umn.edu/humanrts/iachr/E/tingni9-6-02.html (*last visited on* July 1, 2009); *Maya Indigenous Communities of Toledo District* v. *Belize*, Inter-Am. Ct. H. R., Case No. 12.053, Report No. 40/04, para. 155 (Oct. 12, 2004).

[226] M. Scheinin: "Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights" in *International Law and Indigenous Peoples*, J. Castellino & N. Walsh eds., Leiden & Boston 2005, pp. 11-13.

[227] S. J. Anaya: *Indigenous Peoples in international law*, 2nd ed., Oxford 2004, pp. 97, 100.

[228] J. Castellino: *International Law and Self-determination*, The Hague & Boston 2000, p. 75; F. X. Perrez: *Cooperative Sovereignty – From Independence to Interdependence in the Structure of International Environmental Law*, The Hague 2000, pp. 18-19; H. Hannum: "Special Features: Papers from the American Indian Law Review's 25th Anniversary Symposium: Sovereignty and its Relevance to Native Americans in the Twenty-First Century", *American Indian Law Review*, vol. 23, 1998, p. 487.

[229] S. J. Anaya: *Indigenous Peoples in international law*, p. 34.

[230] S. J. Anaya: *Indigenous Peoples in international law*, pp. 34-36; *see also the international effort concerning Africa from the 1885 Conference of Berlin:* Art. 6, General Act of the Berlin Conference on West Africa, Feb. 16, 1885: "All the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the slave trade. They shall, without distinction of creed or nation, protect and favour all religious, scientific or charitable institutions and undertakings created and organized for the above ends, or which aim at instructing the natives and bringing home to them the blessings of civilization", *available at* http://africanhistory.about.com/od/eracolonialism/l/bl-BerlinAct1885.htm (*last visited on* July 1, 2009).

dichotomy has been loosened up, enabling room for claims of entities which originally were not recognized.[231] However, during the process of de-colonization new entities, irrespective of their pre-colonial composition, were created, rather than granting indigenous peoples a separate legal status.[232]

The particular concerns of indigenous peoples were instead dealt with in a first attempt in the binding International Labour Organisation[233] (ILO) Convention No. 107.[234] Still drafted according to an integrationist philosophy, it contains weak protection clauses and instead perceives indigenous peoples as temporary societies which eventually would become absorbed in the *modern* world.[235] As the Preamble to ILO Convention No. 107 puts it:

> there exist in various independent countries indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community and whose social, economic or cultural situation hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population.[236]

The attitude did not change until the 1970s, when indigenous peoples began to assert their claims more visibly and international organizations responded by conducting studies on the issue. Moreover, human rights principles served as bases for claims brought before international human rights bodies, enhancing the international reception and scholary writing on the subject.[237]

Eventually ILO Convention No. 107 was revised by ILO Convention No. 169, *inter alia* with the intent of "removing the assimilationist orientation of the earlier standards".[238] Incorporating within several provisions participatory rights as well as self-control of indigenous peoples, the Convention marked a turning point in their reception in international law.[239] The major controversy constituted itself in the use of the term *peoples* throughout the

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[231] M. N. Shaw: *International Law*, p. 45.
[232] S. J. Anaya: *Indigenous Peoples in international law*, p. 53.
[233] The ILO is an international organization which is concerned with international labor standards, as well as issues of social justice. Since 1919, 188 binding Conventions on various issues have been concluded under the auspices of the ILO, numbered consecutively.
[234] ILO Convention (No. 107) concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries, June 26, 1957, 328 UNTS 247.
[235] N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, p. 315; International Labour Organization, *Indigenous and Tribal Peoples: Convention No. 107*, *available at* http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm (*last visited on* July 1, 2009).
[236] ILO Convention (No.107) concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries, June 26, 1957, 328 UNTS 247; *for a similar tenor see also* Art. 3, ILO Convention (No. 107).
[237] S. J. Anaya: *Indigenous Peoples in international law*, p. 57.
[238] Preamble, ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 UNTS 383.
[239] S. J. Anaya: *Indigenous Peoples in international law*, p. 59.

document, sparking the fear of many states that this implied an association with the principle of self-determination,[240] also leading to presently only 20 ratifications.[241]

Parallel to these specific instruments dealing with indigenous peoples, several general human rights bodies, whether universal or regional, have also in their studies, views and judgments affirmed the application of all human rights principles equally to indigenous peoples, taking into consideration their particular conditions.[242]

3.2.2.2 United Nations Declaration on the Rights of Indigenous Peoples

The most recent development in the field of international law with regard to indigenous peoples can be found in the United Nations Declaration on the Rights of Indigenous Peoples, which was adopted after two and a half decades of deliberations in 2007.[243] Although non-binding, the Declaration is perceived as "the most universal, comprehensive and fundamental instrument"[244] with regard to indigenous peoples, and exerts influence in its function of specifying and explaining the scope of human rights in the context cultural, historic, social and economic circumstances of indigenous peoples.[245]

Taking one step further than ILO Convention No. 169, the Declaration states in Article 3 explicitly that indigenous peoples "have the right to self-determination", thus being able to "freely determine their political status and freely pursue their economic, social and cultural

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[240] *See e.g.*: A. Cassese: *Self-determination of Peoples – A Legal Appraisal*, p. 112.

[241] Parties to the ILO Convention No. 169: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Norway, Paraguay, Peru, Spain, Bolivarian Republic of Venezuela (*status as of* July 1, 2009); *It shall also be noted that ILO Convention No. 107, although not open for ratification anymore, is still binding for 18 states*: Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Portugal, Syrian Arab Republic, Tunisia (*available at* http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C107, *last visited on* July 1, 2009).

[242] Human Rights Committee, *General Comment 23: The Rights of Minorities (Art. 27)*, April 8, 1994, UN Doc. CCPR/C/21/Rev.1/Add.5; Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23*, Aug. 18, 1997, UN Doc. A/52/18; Human Rights Council: "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development", *Report of the Special Rapporteur, S. J. Anaya, on the situation of human rights and fundamental freedoms of indigenous people*, Aug. 11, 2008, paras. 20-30, UN Doc. A/HRC/9/9.

[243] Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295, *adopted with a vote of 143 in favour, 11 abstentions and 4 against (Australia, Canada, New Zealand, United States)*; C. J. Fromherz: "Indigenous Peoples' Courts: Egalitarian Juridicial Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples", *University of Pennsylvania Law Review*, vol. 156, 2008, p. 1342.

[244] Permanent Forum on Indigenous Issues, *Draft General Comment No. 1 (Article 42 of the Declaration on the Rights of Indigenous Peoples)*, May 5, 2009, para. 6, UN Doc. E/C.19/2009/CRP.12.

[245] Permanent Forum on Indigenous Issues, *Draft General Comment No. 1 (Article 42 of the Declaration on the Rights of Indigenous Peoples)*, May 5, 2009, para. 8, UN Doc. E/C.19/2009/CRP.12; Human Rights Council: "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development", *Report of the Special Rapporteur, S. J. Anaya, on the situation of human rights and fundamental freedoms of indigenous people*, Aug. 11, 2008, para. 40, UN Doc. A/HRC/9/9.

development".[246] Although Article 46(1) puts this under the constraint of the protection of the territorial integrity or political unity of the state, the conceptualization of self-determination[247] in the document, and the broadly phrased rights concerning land and resources, prevented Australia, Canada, New Zealand and the United States from originally voting in favor, four states which are especially concerned with the topic of indigenous peoples.[248] However, convinced by the common perception of the world community that the Declaration – which was drafted under participation of the right-holders – constitutes a fundamental step in creating a universal framework of minimum standards concerning the rights of indigenous peoples, Australia and Colombia, which previously had abstained from voting, endorsed the document in April 2009.[249] The Declaration emphasizes with regard to indigenous peoples their culture and identity, their special needs in the context of fulfillment of human rights, and their right to pursue their own economic, social and cultural development.[250]

Moreover, the particular link of indigenous peoples with their land is recognized in several provisions. The Declaration's Article 10 states that indigenous peoples shall not be forcibly removed from their land, except in circumstances where they have consented prior, freely and informed to such measures, have been compensated fairly and if possible will be granted the option to return, whereas Article 16(2) of ILO Convention No. 169 had not

[246] Art. 3, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295; Human Rights Council: "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development", *Report of the Special Rapporteur, S. J. Anaya, on the situation of human rights and fundamental freedoms of indigenous people*, Aug. 11, 2008, para. 37, UN Doc. A/HRC/9/9.

[247] *More on the concept will be elaborated in* subsection 3.3.2.3.

[248] General Assembly adopts Declaration on Rights of Indigenous Peoples, Sept. 13, 2007, UN Doc. GA/10612; Editorial: "United States Votes Against Adoption of UN Declaration on Indigenous Peoples", *The American Journal of International Law*, vol. 101, no. 4, 2007, p. 884; C. J. Fromherz: "Indigenous Peoples' Courts: Egalitarian Juridicial Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples", p. 1346.

[249] Statement on the United Nations Declaration on the Rights of Indigenous Peoples by Australia's Minster for Families, Housing, Community Services and Indigenous Affairs, April 3, 2009, *available at* http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf (*last visited on* July 1, 2009); Statement by UNHCR spokesperson A. Mahecic: „Colombia's support for UN declaration on indigenous peoples welcomed", April 24, 2009, *available at* http://www.unhcr.org/49f1bc356.html ((*last visited on* July 1, 2009).

[250] Art. 43, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295; Special Rapporteur, R. Stavenhagen, on the situation of human rights and fundamental freedoms of indigenous peoples: *Adoption of Declaration on Rights of Indigenous Peoples a historic moment for human rights*, Sept. 14, 2007, *available at* http://www.unhchr.ch/huricane/huricane.nsf/view01/2F9532F220D85BD1C125735600493F0B?opendocument (*last visited on* July 1, 2009); High Commissioner on Human Rights, L. Arbour: *High Commissioner for Human Rights Hails Adoption of Declaration on Indigenous Rights*, Sept. 13, 2007, *available at* http://www.unhchr.ch/huricane/huricane.nsf/view01/B8C805CF07C5ED86C125735500612DEA?opendocument (*last visited on* July 1, 2009).

formulated the prohibition of relocation as strictly.[251] Moreover, the right of indigenous peoples to their land, territories and resources is laid out explicitly in Article 26 of the Declaration, including their right to own, use, develop and control these, and in instances in which the state wishes to engage in any activity which might affect such, consent must be obtained.[252] In comparison, while ILO Convention No. 169 recognizes the ownership and possession of indigenous peoples with regard to their lands, their rights in relation to natural resources remain merely of a participatory nature.[253] Furthermore, concerning activities connected to resources located on the lands, Article 15(2) of the ILO Convention No. 169 merely prescribes that states shall consult the indigenous people "with a view to ascertaining whether and to what degree their interests would be prejudiced".[254]

Although the document is non-binding as such, states are encouraged to take "appropriate measures, including legislative measures"[255], thus introducing institutional or legal reforms where required, and enabling the full realization of rights and benefits where this is not the case yet.[256] As a response, Bolivia for example has transformed the Declaration fully into national legislation and has subsequently been engaged in operationalizing the rights affirmed, and granting autonomy and self-government to its indigenous peoples.[257] Other states such as Ecuador, Chile and Nepal have also sought for assistance concerning the

[251] Permanent Forum on Indigenous Issues: "A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements", 8th Session, May 18-29, 2009, pp. 16-17, 19, UN Doc. E/C.19/2009/CRP.7.
[252] Arts. 26, 32, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295.
[253] Permanent Forum on Indigenous Issues: "A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements", 8th Session, May 18-29, 2009, p. 24, UN Doc. E/C.19/2009/CRP.7.
[254] Art. 15(2), ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 UNTS 383.
[255] Art. 38, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295.
[256] Human Rights Council: "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development", *Report of the Special Rapporteur, S. J. Anaya, on the situation of human rights and fundamental freedoms of indigenous people*, Aug. 11, 2008, para. 46, UN Doc. A/HRC/9/9; Further guidance on how implementation with regard to the concerned policies shall take shape can be found in recommendations given by the Permanent Forum on Indigenous Issues, *available at* http://www.un.org/esa/socdev/unpfii/en/recommendations.htm (*last visited on* July 1, 2009).
[257] The Republic of Bolivia: National Law No. 3760 as amended by National Law No. 3897 (Rights of Native Peoples), June 26, 2008, *Gaceta Oficial* from July 11, 2008; R. Kearns: "Declaring autonomy in Bolivia" in *Indian Country Today*, April 12, 2009, *available at* http://www.indiancountrytoday.com/archive/42800197.html (*last visited on* July 1, 2009).

implementation of the relevant international standards in their constitutional and legislative reforms.[258]

3.3 The Principle of Permanent Sovereignty over Natural Resources and Indigenous Peoples

The developments of international law concerning indigenous peoples have confirmed that they now enjoy certain rights over their lands and natural resources. Claims to self-determination have moreover led increasingly to the discussion to what extent the principle of PSNR can and shall be applied in this context. On the one hand, states in their conduct are bound by numerous obligations towards indigenous peoples. On the other hand, it has been put forth that indigenous peoples in their own capacity constitute subjects to the principle. The following sections shall therefore determine their position as objects or subjects to the principle and the consequences flowing thereof.

3.3.1 Indigenous Peoples – Just another Obligation of the State?

States, in their exercise of PSNR, shall engage in resource utilization and exploitation in such a manner which benefits the people of the state.[259] With regard to indigenous peoples, states are even more urged to take special care, especially also due to the fact that indigenous peoples often play an essential part in an environmentally friendly management and development of natural resources since their holistic traditional scientific knowledge most often reflects sustainable management practices.[260] Therefore it is necessary that their identity, culture and interests are respected and preserved to enable their continuous participation in the regulation of the matter.[261]

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[258] Statement by S. J. Anaya, Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples, 8th Session of the UN Permanent Forum on Indigenous Issues, May 20, 2008, p. 3.

[259] *See above* subsection 2.3.1.

[260] Principle 22, Annex, Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, Aug. 10, 1992, UN Doc. A/CONF.151/26 (Vol. I); Section III, Chapter 26, para. 1, Recognizing and Strengthening the Role of Indigenous People and Their Communities, *Report of the United Nations Conference on Environment and Development*, Rio, June 3-14, 1992, p. 385, UN Doc. A/CONF.151/26/Rev.1 (Vol. I); Paras. 40 (h)(f), Paras. 24-26, Plan of Implementation of the World Summit on Sustainable Development, Sept. 4, 2002, *at* 14-15, *also available at* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (*last visited on* April 13, 2009).

[261] Principle 22, Annex, Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, Aug. 10, 1992, UN Doc. A/CONF.151/26 (Vol. I); N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, p. 313-315; Section III, Chapter 26, para. 1, Recognizing and Strengthening the Role of Indigenous People and Their Communities, *Report of the United Nations Conference on Environment and Development*, Rio, June 3-14, 1992, p. 385, UN Doc.

Thus, states are under the obligation to incorporate, on a national, regional or international level, models which incorporate and strengthen the role of indigenous peoples especially concerning their lands, territories and natural resources.[262] The latter shall be recognized as property of the indigenous people and protected from activities which might cause damage to the environment, culture or society of the community.[263] Furthermore, for enabling just participation it is also necessary to establish effective mechanisms for prevention and redress within the legislation of the state.[264] Participation models shall be conducted in good faith, and include representatives chosen according to indigenous peoples' own procedures.[265] The process shall be fair, independent, impartial, open and transparent, and reflecting the state's obligation to take into account the distinctive features of its indigenous peoples.[266]

While it can be said that the obligation goes as far as including the requirement to establish legislative schemes, which can be invoked by indigenous peoples to protect their wide range of rights concerning the ownership, control and utilization of natural resources, this has been argued occurs primarily within the range of the state.[267] In their conduct, states are thus responsible for ensuring that their management, planning and development activities cause no adverse impacts on indigenous peoples.[268]

A/CONF.151/26/Rev.1 (Vol. I); Permanent Forum on Indigenous Issues: "A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements", 8th Session, May 18-29, 2009, p. 15, UN Doc. E/C.19/2009/CRP.7.

[262] Section III, Chapter 26, paras. 1, 3(a), 6, Recognizing and Strengthening the Role of Indigenous People and Their Communities, *Report of the United Nations Conference on Environment and Development*, Rio, June 3-14, 1992, p. 385, UN Doc. A/CONF.151/26/Rev.1 (Vol. I).

[263] Art. 26(3), Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295; Section III, Chapter 26, para. 3(a), Recognizing and Strengthening the Role of Indigenous People and Their Communities, *Report of the United Nations Conference on Environment and Development*, Rio, June 3-14, 1992, p. 385, UN Doc. A/CONF.151/26/Rev.1 (Vol. I); Para. 44(f), Paras. 24-26, Plan of Implementation of the World Summit on Sustainable Development, Sept. 4, 2002, *at* 14-15, *also available at* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (*last visited on* April 13, 2009).

[264] Section III, Chapter 26, para. 3(b), Recognizing and Strengthening the Role of Indigenous People and Their Communities, *Report of the United Nations Conference on Environment and Development*, Rio, June 3-14, 1992, p. 385, UN Doc. A/CONF.151/26/Rev.1 (Vol. I).

[265] Permanent Forum on Indigenous Issues: "A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements", 8th Session, May 18-29, 2009, p. 15, UN Doc. E/C.19/2009/CRP.7.

[266] Art. 27, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295; Art. 8(j), Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79.

[267] N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, p. 319.

[268] Art. 24(2)(b), Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks

The argument that indigenous peoples remain objects of the principle can be based on the fact that, firstly, with regard to the rights of indigenous peoples, it is the state which on the international level will be under the obligation to prevent, protect and claim compensation for any possible damage caused by another state.[269] The state will ultimately have the right to the lawful recovery of its property.[270] Secondly, the state in its discretion of choice of policies must take into regard the interests of indigenous people, even if this requires the establishment of new participatory regimes concerning the exploitation of natural resources.

It can therefore be said that states in their exercise of PSNR certainly are bound to respect the special needs and interests of indigenous peoples. If the rights of indigenous peoples in the context of PSNR go any further, *i.e.* whether they can legitimately claim to enjoy the principle in their own name, providing them with a stronger standing in their relations with states, will be analyzed in the following.

3.3.2 Indigenous Peoples as Subjects to the Principle of Permanent Sovereignty over Natural Resources

Indigenous peoples have declared:

> The right of self-determination is fundamental to the enjoyment of all human rights. From the right of self-determination flow the right to permanent sovereignty over land – including aboriginal, ancestral and historical lands – and other natural resources, the right to develop and maintain governing institutions, the right to life and physical integrity, way of life and religion.[271]

Over the course of the last twenty years, the claims made by indigenous peoples to the right of self-determination have received much attention. Constituting an extremely sensitive topic with regard to the concerns of some states for their territorial integrity and unity, nevertheless, as mentioned above, Article 3 of the United Nations Declaration on the rights of indigenous peoples has included this right explicitly. Moreover, in 2004 Special Rapporteur Erica-Irene A. Daes presented a report on *Indigenous peoples' permanent sovereignty over natural resources* for the Commission on Human Rights in which she came to the conclusion by

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and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 UNTS 89; Principle 2.6, Nuuk Declaration on Environment and Development in the Arctic, Sept. 16, 1993, *available at* http://arctic-council.org/filearchive/The%20Nuuk%20Declaration.pdf (*last visited on* July 1, 2009).

[269] P. Malanczuk: *Akehurst's Modern Introduction to International Law*, p. 257.

[270] Art. 3, Protocol Against the Illegal Exploitation of Natural Resources, Nov. 30, 2006, *concluded by* International Conference on the Great Lakes Region, *available at* http://www.icglr.org/key-documents/democracy-good-gov/Protocol%20against%20the%20Illegal%20Exploitation%20of%20Natural%20Resources.pdf (*last visited on* July 1, 2009).

[271] *Reprinted in* A. Xanthaki: *Indigenous Rights and United Nations Standards – Self-determination, Culture and Land*, New York & Cambridge, 2007, p. 152.

analyzing international, regional and domestic legislation, adjudication and practice that indigenous peoples indeed had the right to PSNR.[272]

The following sub-sections will therefore firstly analyze the relationship between PSNR and self-determination. With the inherent connection between self-determination and PSNR in mind, then the principle of self-determination will be discussed, and how far indigenous peoples can presently rely on it. Then it will be analyzed what consequences this has for their enjoyment of the principle of PSNR, and whether or not indigenous peoples can claim that they have become subjects to the principle.

3.3.2.1 The Relationship between Permanent Sovereignty over Natural Resources and Self-determination

As mentioned in Chapter I, the principle of PSNR was conceptualized as a tool which, rooted in the right to self-determination, should aid newly evolved entities and developing states achieving economic development. Thus, it was the principle of self-determination which had led to an end of colonial domination. However for it to be effective, further instruments were needed to reach the aspired goal of a fair and just world community. In particular concerning the economic sector previous injustices continued.[273] Thus, the original primarily political focus of self-determination received more and more economic, social and cultural impetus.[274]

The principle of PSNR is the most apparent instrument to self-determination. Thus, in cases where a people or a state is hindered in their exercise of PSNR, their right to self-determination is violated as well.[275] Furthermore, the application of both principles can be traced back to situations in which peoples are either former colonial territories or under other forms of foreign occupation.[276] Their inherent link was recognized in UNGA Resolution 1314 (XIII):

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[272] Commission on Human Rights: "Prevention of Discrimination and Protection of Indigenous Peoples, Indigenous Peoples' Permanent Sovereignty over Natural Resources", *Final report of the Special Rapporteur, Erica-Irene A. Daes*, July 12, 2004, Annex II, p. 9, para. 1, UN Doc. E/CN.4/Sub.2/2004/30/Add.1.

[273] Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 118, para. 687, UN Doc. E/CN.4/Sub.2/404/Rev.1.

[274] J. Crawford: "The Right of Self-Determination in International Law: Its Development and Future" in *Peoples's Rights*, P. Alston ed., Oxford & New York 2001, pp. 20-21.

[275] Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 78, para. 463, p. 121, para. 709, UN Doc. E/CN.4/Sub.2/404/Rev.1.

[276] *Compare the formulations used in*: UNGA – Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Oct. 24, 1970, 25 UN – GAOR, Supp. No. 28, p. 123, UN Doc. A/8082 *and* UNGA – Res. 3202 (S – VI), Programme of Action on the Establishment of a New International Economic Order, May 1, 1974, S – 6 UN – GAOR, Supp. No. 1, p. 5, UN Doc. A/9556.

> the right of peoples and nations to self-determination as affirmed in the two draft Covenants completed by the Commission on Human Rights includes "permanent sovereignty over their natural wealth and resources.[277]

The capability of a state to engage in international trade activities as well as economic transactions with regard to their natural resources in a system based on equality, equity and mutual benefits is decisive for the full enjoyment of self-determination.[278] Thus, political sovereignty and economic sovereignty are dependent upon each other.[279]

3.3.2.2 The Principle of Self-determination

Self-determination re-shaped the world during the past century. Its status as an international legal norm still disputed at the beginning of the 20th century, its inclusion in the UN Charter as underlying friendly relations and cooperation among states was the first indication of it having become a binding principle of international law.[280] Since then it has been incorporated in numerous international instruments and been invoked throughout the de-colonization process.[281]

The contents of the principle in short can be said to be:

> All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[282]

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[277] UNGA – Res. 1314 (XIII), Recommendations Concerning International Respect for the Rights of Peoples and Nations to Self-determination, Dec. 12, 1958, 13 UN-GAOR, Supp. No. 18, p. 27, UN Doc. A/4090; *see also* Art. 1(2): "The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.", UNGA – Res. A/RES/41/128, Declaration on the Right to Development, Dec. 4, 1986, 41 UN – GAOR, Supp. No. 53, p. 186, UN Doc. A/41/925.

[278] Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 78, para. 463, UN Doc. E/CN.4/Sub.2/404/Rev.1.

[279] A. Anghie: *Imperialism, Sovereignty, and the Making of International Law*, Cambridge 2005, p. 211.

[280] Arts. 1(2), 55, Charter of the United Nations, Oct. 24, 1945, 1 UNTS 26; Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 117, para. 680, UN Doc. E/CN.4/Sub.2/404/Rev.1.

[281] Art. 1(1), International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (1967); Art. 1(1), International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3 (1967); UNGA – Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, 15 UN – GAOR, Supp. No. 16, p. 66, UN Doc. A/4684; UNGA – Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Oct. 24, 1970, 25 UN – GAOR, Supp. No. 28, p. 123, UN Doc. A/8082; The Final Act of the Conference on Security and Cooperation in Europe (Helsinki Declaration), Aug. 1, 1975, 14 ILM 1292; Charter of Paris for a New Europe, Nov. 21, 1990, 30 ILM 193.

[282] Art. 1(1), International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (1967); Art. 1(1), International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3 (1967); *see also*: UNGA – Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations

The principle of self-determination is a *collective right* which is applicable to peoples, whether or not they are constituted as independent states.[283] As mentioned above, peoples are distinct entities with a clear identity and which are linked to a specific territory.[284] The original intention of the phrase *equal rights and self-determination of peoples* aimed at restoring the sovereignty of nations after World War II and guiding future peaceful cooperation with one another, soon shifted as the addressees became peoples under colonial domination.[285] Thus, it was the recognition of the need to eliminate inequality, discrimination, colonialism and racism which led to a widening understanding of the term *peoples*, confirmed by the application of the right of self-determination in the struggle of dependent peoples for freedom.[286]

The notion of *self-determination* contains several diverse aspects. It entails that peoples should freely determine their political institution, freely exploit their economic resources as well as decide upon their social and cultural development, without interference from outside.[287] Four elements of the principle can be therefore identified – political, economic, social and cultural self-determination.

Political self-determination

Concerning political self-determination, one must differentiate in the application between the right to *external* and *internal* self-determination. While the former refers to the right of peoples to choose their own international status (independence, free association with another state, secession, union, or the choice of any other political state as freely accepted by the people), the latter is often understood as comprising the right to self-government, *i.e.*

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and Co-operation among States in accordance with the Charter of the United Nations, Oct. 24, 1970, 25 UN – GAOR, Supp. No. 28, p. 123, UN Doc. A/8082.

[283] Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 37, para. 260, p. 37, para. 268, UN Doc. E/CN.4/Sub.2/404/Rev.1.

[284] *See* subsection 3.2.1.2.

[285] A. Cassese: *Self-determination of Peoples – A Legal Appraisal*, pp. 37, 44; P. Malanczuk: *Akehurst's Modern Introduction to International Law*, p. 326.

[286] UNGA – Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, 15 UN – GAOR, Supp. No. 16, p. 66, UN Doc. A/4684; A. Xanthaki: "The Right to Self-determination: Meaning and Scope" in *Minorities, Peoples and Self-Determination – Essays in Honour Of Patrick Thornberry*, N. Ghanea & A. Xanthaki eds., Leiden & Boston 2005, pp. 16-17.

[287] A. Xanthaki: "The Right to Self-determination: Meaning and Scope", p. 17-18; Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 43, para. 288(k), UN Doc. E/CN.4/Sub.2/404/Rev.1.

autonomy within a state.[288] In particular with regard to external self-determination, states have acted cautious in granting the existence of such right.

The traditional opinion has been that the application of external self-determination is only of relevance in two situations. Firstly this applies to peoples who have occupied a geographical area, and who, in absence of foreign domination, would have constituted themselves as an independent state (especially colonial territories). Secondly, it applies to peoples who had already formed an independent state, but whose independence was being threatened by new forms of foreign occupation.[289] This encompasses *alien subjugation, domination and exploitation*, referring to those situations where the people of a territory are dominated by recourse to force by a foreign power.[290]

In the context of political self-determination, internal self-determination is the right of peoples to enjoy the freedom of authentic self-government.[291] As an ongoing right of peoples, it enables them to freely choose their political and economic regimes and leaders and enjoy the rights necessarily linked therewith, such as the right to vote, right of peaceful assembly, freedom of association and freedom of expression.[292] Various possible subjects to the right can be identified: the whole people of a state, racial and ethnically distinct groups and religious or linguistic groups. Thus, not only are singular groups and their right to autonomy and self-government encompassed, but also the general right of a population to a representative and democratic government.[293] In general, this claim as well as the claim of religious or linguistic groups within a state to self-determination has often not received much support on the international level, as, on the one hand, states often maintain their position with

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[288] Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 43, para. 288(b), UN Doc. E/CN.4/Sub.2/404/Rev.1.

[289] UNGA – Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, 15 UN – GAOR, Supp. No. 16, p. 66, UN Doc. A/4684; UNGA – Res. 1541 (XV), Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73(e) of the Charter, Dec. 15, 1960, 15 UN – GAOR, Supp. No. 16, p. 29, UN Doc. A/4684; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 1971 ICJ 16, p. 31, para. 32 (Adv. Op., June 21); Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 40, para. 273, p. 43, para. 288(d), UN Doc. E/CN.4/Sub.2/404/Rev.1; A. Cassese: *Self-determination of Peoples – A Legal Appraisal*, pp. 71, 90.

[290] UNGA – Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Oct. 24, 1970, 25 UN – GAOR, Supp. No. 28, p. 123, UN Doc. A/8082; A. Cassese: *Self-determination of Peoples – A Legal Appraisal*, p. 99.

[291] A. Cassese: *Self-determination of Peoples – A Legal Appraisal*, p. 101.

[292] Arts. 19, 21-22, 25, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (1967); J. Crawford: "The Right of Self-Determination in International Law: Its Development and Future", p. 25.

[293] A. Cassese: *Self-determination of Peoples – A Legal Appraisal*, pp. 102-103.

regard to non-interference within domestic matters and, on the other hand, the abovementioned groups most often fall within the regulation concerning minorities.[294] Especially states which take the position that the right to self-determination extends as far as permitting secession opt for a limited number of subjects to the principle.[295]

With regard to racial groups, their right to internal self-determination can be found incorporated in the conditioned clause of the Friendly Relations Declaration:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[296]

Likewise, an almost identical formulation is stipulated by the 1993 Vienna Declaration and Programme of Action, with the sole difference being the use of the wider phrase of "without distinction of any kind."[297] From this arguably follows that in cases in which a group is being discriminated against or not being represented fairly in the government, they can claim internal self-determination.[298] Only in very limited circumstances, *i.e.* persistent refusal of participation rights, gross and systematic violation of fundamental rights of racial groups and denial of the possibility of a peaceful resolution of the situation, can the right of such groups incorporate elements of external self-determination, and in those cases in which groups, which would be considered as falling within the category of being under foreign occupation are concerned, the denial of their right to internal self-determination can strengthen their claim to external self-determination.[299]

Economic, Social and Cultural Self-determination

Once the political claim to self-determination has been recognized, the right-holders enjoy the other aspects of the right to self-determination, thus, firstly and foremost it necessarily entails

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[294] A. Cassese: *Self-determination of Peoples – A Legal Appraisal*, p. 108.
[295] A. Xanthaki: "The Right to Self-determination: Meaning and Scope", p. 22.
[296] Preamble, UNGA – Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Oct. 24, 1970, 25 UN – GAOR, Supp. No. 28, p. 123, UN Doc. A/8082.
[297] Art. 2(3), Vienna Declaration and Programme of Action, *adopted at* World Conference on Human Rights, June 25, 1993, UN Doc. A/CONF.157/23.
[298] F. L. Kirgis: "The Degrees of Self-Determination in the United Nations Era", *The American Journal of International Law*, vol. 88, no. 2, 1994, p. 306; A. Cassese: *Self-determination of Peoples – A Legal Appraisal*, p. 112.
[299] *Case of Loizidou* v. *Turkey* (Merits), European Court of Human Rights, Application No. 15318/89, Dec. 18, 1996 (Judgment, Concurring opinion of Judge Wildhaber, joined by Judge Ryssdal); A. Cassese: *Self-determination of Peoples – A Legal Appraisal*, pp. 118-120; F. L. Kirgis: "The Degrees of Self-Determination in the United Nations Era", p. 306; S. J. Anaya: *Indigenous Peoples in international law*, p. 109.

the capability of the right-holder to have its own natural resources under control.[300] Moreover, the right to economic self-determination also includes the regulation of fair and just economic trade relations and the common goal of economic prosperity and growth in the international agenda.[301] With the core of the right laying in the economic aspects of the principle of PSNR, the reflection of its *rationale* can be found in instruments such as the Declaration on the Establishment of a New International Economic Order and in the Charter of Economic Rights and Duties of States.[302]

Secondly, the right to self-determination includes the right to social development. International peace and security as well as a fair and equitable advancement of the world community is based on a just social order which enables all human beings to live in dignity and freedom.[303] Everyone shall therefore be able to participate in all levels of society, *i.e.* labor, ownership and property, family, education, housing.[304] The fulfillment of these rights originates in economic development and at the same time reasons the need for such.[305]

Finally, due to the fact that the encouragement and diffusion of culture and education is essential for the attainment of human dignity as well as a reflection of the principle of equality, cultural development constitutes an element of the right to self-determination as

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[300] Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 43, para. 288(g), UN Doc. E/CN.4/Sub.2/404/Rev.1; S. K. Chatterjee: "The Charter of Economic Rights and Duties of States – An Evaluation after 15 Years", p. 671.

[301] Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 13, paras. 75-76, UN Doc. E/CN.4/Sub.2/404/Rev.1.

[302] UNGA – Res. 3201 (S – VI), Declaration on the Establishment of a New International Economic Order, May 1, 1974, S – 6, UN – GAOR, Supp. No. 1, p. 4, UN Doc. A/9559; S. K. Chatterjee: "The Charter of Economic Rights and Duties of States – An Evaluation after 15 Years", p. 670; *The Charter of Economic Rights and Duties of States stipulates that economic relations shall be governed not only by the principle of equal rights and self-determination but also by:* sovereignty, territorial integrity and political independence of States; sovereign equality of all States; non-aggression; non-intervention; mutual and equitable benefit; peaceful co-existence; peaceful settlement of disputes; remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development; fulfillment in good faith of international obligations; respect for human rights and fundamental freedoms; no attempt to seek hegemony and spheres of influence; promotion of international social justice; international cooperation for development; free access to and from the sea by landlocked countries (*see* Chapter 1, UNGA – Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, Dec. 12, 1974, 29 UN – GAOR, Supp. No. 31, p. 50, UN Doc. A/9631).

[303] Preamble, Art. 1, UNGA – Res. 2542 (XXIV), Declaration on Social Progress and Development, Dec. 11, 1969, 24 UN – GAOR, Supp. No. 30, p. 49, UN Doc. A/7630; Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 15, para. 82, UN Doc. E/CN.4/Sub.2/404/Rev.1.

[304] Art. 55(a)(b), Charter of the United Nations, Oct. 24, 1945, 1 UNTS 26; Arts. 6, 10, UNGA – Res. 2542 (XXIV), Declaration on Social Progress and Development, Dec. 11, 1969, 24 UN – GAOR, Supp. No. 30, p. 49, UN Doc. A/7630.

[305] Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 93, para. 551, UN Doc. E/CN.4/Sub.2/404/Rev.1.

well.[306] Cultural life can be understood as the totality of practices and attitudes which have an effect on man's capability of expressing himself, defining his position within the world community, forming his environment, communicating with others and in their totality form part of the common heritage of mankind.[307] This also includes specific, historically originated, ways of living which are often shared with other members of a community, such as a "particular way of life associated with the use of land resources".[308]

Thus, peace and international cooperation must be based on respect for the way of life and customs of peoples.[309] Every people therefore shall enjoy the right and duty to develop its own culture and at the same time co-operate with one another to spread and share their knowledge, skills and talents to enrich cultures.[310]

3.3.2.3 Indigenous Peoples and their Claim to Self-determination

Indigenous Peoples and Their General Status as a Right-Bearer

Historically, indigenous peoples were not within the realm of application of the principle of self-determination, also due to the fact that international law was overall deficient in recognizing them as possible right-bearers.[311] However, with an increased awareness of recognizing indigenous peoples as subjects of international law it has been argued that they

[306] Preamble, Declaration of the Principles of International Cultural Co-operation, *proclaimed by the* 14th Session of the General Conference of the United Nations Educational, Scientific and Cultural Organization, Nov. 4, 1966, *also available at* http://www.unhchr.ch/html/menu3/b/n_decl.htm (*last visited on* July 1, 2009); Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 15, paras. 83-84, UN Doc. E/CN.4/Sub.2/404/Rev.1.

[307] Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 102, para. 587, UN Doc. E/CN.4/Sub.2/404/Rev.1.

[308] Human Rights Committee, *General Comment 23: The Rights of Minorities (Art. 27)*, April 8, 1994, UN Doc. CCPR/C/21/Rev.1/Add.5, para. 7; *Awas Tingni* (Merits) (The Mayagna (Sumo) Indigenous Community of Awas Tingni *v.* Nic.), 2001 Inter-Am. Ct. H. R. (Judgment, Aug. 31), p. 75, para. 149, *available at* http://www1.umn.edu/humanrts/iachr/E/tingni9-6-02.html (*last visited on* July 1, 2009).

[309] Art. 1(3), Declaration of the Principles of International Cultural Co-operation, *proclaimed by the* 14th Session of the General Conference of the United Nations Educational, Scientific and Cultural Organization, Nov. 4, 1966, *also available at* http://www.unhchr.ch/html/menu3/b/n_decl.htm (*last visited on* July 1, 2009).

[310] Arts. 55-56, Charter of the United Nations, Oct. 24, 1945, 1 UNTS 26; Preamble, UNGA – Res. 3148 (XXVIII), Preservation and further development of cultural values, Dec. 14, 1973, 28 UN – GAOR, p. 87, UN Doc. A/RES/3148; Arts. 1(2), 4-5, Declaration of the Principles of International Cultural Co-operation, *proclaimed by the* 14th Session of the General Conference of the United Nations Educational, Scientific and Cultural Organization, Nov. 4, 1966, *also available at* http://www.unhchr.ch/html/menu3/b/n_decl.htm (*last visited on* July 1, 2009); Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments", *Study by Special Rapporteur, A. Cristescu*, 1981, p. 15, para. 86, UN Doc. E/CN.4/Sub.2/404/Rev.1.

[311] Permanent Forum on Indigenous Issues: "A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements", 8th Session, May 18-29, 2009, p. 13, UN Doc. E/C.19/2009/CRP.7.

have the right to political, economic, social and cultural self-determination.[312] Under the concept of self-determination, indigenous peoples have therefore have brought forth claims to exercise their traditional way of life, to have the right to achieve sustainable development *via* indigenous practices, to participate in the benefits derived by the utilization of resources located on their lands, and most importantly to be subjects to the principle of PSNR as well.[313]

Moreover, indigenous peoples have maintained that they enjoy the right to have representative political institutions; to have sufficient access to their lands, territories and natural resources in order to preserve and develop cultural practices and traditions; to be free of adverse discrimination; to receive fair and equitable compensation and reparation for violations of their interests and property occurring without their free, prior and informed consent; to have access to the necessary means to ensure their equitable economic, social and cultural development; and to freely choose their own policies for their development.[314]

States and international institutions often acknowledge that indigenous peoples have achieved the status of beneficiaries of self-determination.[315] It has especially found recognition with regard to such indigenous groups that possess a distinct identity, with historically social, cultural and political diverse elements of society from the majority of the population of a state.[316] S. James Anaya identifies five major sets of rights in relation to self-determination which have been accepted as applying to indigenous peoples: freedom from discrimination; respect for cultural integrity; lands and natural resources; social welfare and

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[312] Art. 3, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295; Human Rights Council: "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development", *Report of the Special Rapporteur, S. J. Anaya, on the situation of human rights and fundamental freedoms of indigenous people*, Aug. 11, 2008, para. 37, UN Doc. A/HRC/9/9; P. Thornberry: "Self-Determination, Minorities, Human Rights: A Review of International Instruments", *The International and Comparative Law Quarterly*, vol. 38, no. 4, 1989, p. 868.

[313] A. Xanthaki: "The Right to Self-determination: Meaning and Scope", p. 30.

[314] Permanent Forum on Indigenous Issues: "A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements", 8th Session, May 18-29, 2009, p. 14, UN Doc. E/C.19/2009/CRP.7; Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23*, Aug. 18, 1997, UN Doc. A/52/18.

[315] J. Castellino: "Conceptual Difficulties and the Right to Indigenous Self-Determination" in *Minorities, Peoples and Self-Determination – Essays in Honour Of Patrick Thornberry*, N. Ghanea & A. Xanthaki eds., Leiden & Boston 2005, pp. 67-68; Permanent Forum on Indigenous Issues: "A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements", 8th Session, May 18-29, 2009, p. 36, UN Doc. E/C.19/2009/CRP.7; Human Rights Committee, *Fourth Periodic Report: Canada – Concluding Observations and Comments*, para. 7, April 7, 1999, UN Doc. CCPR/C/79/Add.105.

[316] S. J. Anaya lists as examples indigenous peoples which enjoy the right of *internal* self-determination the Navajo, Miskito and Maori, *see*: S. J. Anaya: *Indigenous Peoples in international law*, p. 100.

development; and self-government and autonomy concerning internal affairs.[317] However, states remain keen to preserve their territorial integrity. For example, the United Nations Declaration on the Rights of Indigenous Peoples states that:

> Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.[318]

Unlike the formulation contained in the Friendly Relations Declaration, as well as in the 1993 Vienna Declaration, which arguably comprise an escape clause permitting external self-determination in limited circumstances by stipulating the requirement of "a government representing the whole people belonging to the territory without distinction of any kind",[319] the instrument on indigenous peoples remains silent with regard to such an exception. Moreover, statements made in the context of the drafting history of the UN Declaration on the Rights of Indigenous Peoples never failed to stress that states understood the right of self-determination in relation with indigenous peoples as purely internally.[320]

Can Indigenous Peoples Enjoy the Right to External Self-Determination?

Although the generally accepted position seems to be that indigenous peoples merely are subjects to the internal aspects of the principle of self-determination, one may argue differently. The situation of indigenous peoples shows a number of similarities compared to the initial position of colonial peoples. Both have experienced a continued suppression of

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[317] S. J. Anaya: *Indigenous Peoples in international law*, p. 129; Art. 4, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295; L. M. Graham: "Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination "Into Practice" and "Into Peace", *ILSA Journal of International & Comparative Law*, vol. 6, 2000, p. 463.

[318] Art. 46(1), Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295.

[319] Art. 2(3), Vienna Declaration and Programme of Action, *adopted at* World Conference on Human Rights, June 25, 1993, UN Doc. A/CONF.157/23.

[320] *See e.g.*: Canadian Statement to the United Nations Commission on Human Rights Working Group on the Draft Declaration on the Rights of Indigenous Peoples, Oct. 31, 1996: "accepts a right of self-determination for indigenous peoples which respects the political, constitutional and territorial integrity of democratic states.", *reprinted in*: S. J. Anaya: *Indigenous Peoples in international law*, p. 111; Japanese Statement on the Adoption of the UN Declaration of the Rights of Peoples: "The revised version of article 46 correctly clarified that the right of self-determination did not give indigenous peoples the right to be separate and independent from their countries of residence, and that that right should not be invoked for the purpose of impairing the sovereignty of a State, its national and political unity, or territorial integrity", Mexican Statement on the Adoption of the UN Declaration of the Rights of Peoples: "that the rights of indigenous people to self-determination, autonomy and self-government shared be exercised in accordance with Mexico's Constitution, so as to guarantee its national unity and territorial integrity", *both reprinted in*: General Assembly adopts Declaration on Rights of Indigenous Peoples, Sept. 13, 2007, UN Doc. GA/10612.

sovereignty and have been dispossessed of their lands.[321] While in South America the *offspring* of the colonizing powers underwent a decolonization process during the 19th century, and in the 20th century sovereignty was transferred often *via* political means rather than according to *de facto* geologic realities, in both instances the situation of indigenous peoples was largely overlooked.[322] Instead, in most cases their suppression continued under the new bearers of sovereignty. As was stated already early in the *Belgian Thesis* with regard to the application of Article 73 UN Charter:

> ... a number of States were administering within their own frontiers territories which were not governed by the ordinary law; territories with well-defined limits, inhabited by homogeneous peoples differing from the rest of the population in race, language and culture. These populations were disenfranchised; they took no part in national life; they did not enjoy self-government in any sense of the word.[323]

The position reflects that for constituting a *colonized people* which is entitled to self-determination it is regardless if the colonial power governs from overseas or *via* territorial integrity.[324] This concept was formulated as a cynical defense by Belgium in response to criticisms of the traditional western colonial powers and was thus especially rejected by the Group of 77[325], leaving the regulation of indigenous peoples within the set of laws concerning minorities.[326] Moreover, it was argued that only such a colonial territory is included in the right to external self-determination which is "geographically separate and which is ethnically

[321] J. Castellino: "Conceptual Difficulties and the Right to Indigenous Self-Determination", p. 68; S. J. Anaya: *Indigenous Peoples in international law*, p. 110; Commission on Human Rights: "Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous Peoples and their Relationship to Land", *Final working paper prepared by the Special Rapporteur, Erica-Irene A. Daes*, June 11, 2001, pp. 9-10, paras. 21-23, UN Doc. E/CN.4/Sub.2/2001/21.

[322] J. Castellino: "Conceptual Difficulties and the Right to Indigenous Self-Determination", p. 69; P. Keal: "Indigenous Self-Determination and the Legitimacy of Sovereign States", *International Politics*, vol. 44, 2007, p. 293.

[323] *Reprinted in*: P. Thornberry: "Self-Determination, Minorities, Human Rights: A Review of International Instruments", p. 873.

[324] J. L. Kunz: "Chapter XI of the United Nations Charter in Action", *The American Journal of International Law*, vol. 48, no. 1, 1954, p. 109.

[325] This term refers to the collective body of developing states. First used in 1964, a permanent institutional structure has developed, now including over 130 developing states. It is currently the largest Intergovernmental Organization of developing states representing their collective economic interests at the United Nations.

[326] B. Kingsbury: ""Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy", *The American Journal of International Law*, vol. 92, no. 3, 1998, p. 434; Ö. Österud: "The Narrow Gate: Entry to the Club of Sovereign States", *Review of International Studies*, vol. 23, no. 2, 1997, p. 178; P. Thornberry: "Self-Determination, Minorities, Human Rights: A Review of International Instruments", pp. 873-874; C. J. Iorns: "Indigenous Peoples and Self-Determination: Challenging State Sovereignty", *Case Western Reserve Journal of International Law*, vol. 24, issue 2, 1994, *at* fns 253-254.

and/or culturally different from the country that administers it",[327] also known as the *salt water criterion*.[328]

The acceptance of a distinct regulation of indigenous peoples as compared to minorities though,[329] paired with similar views ascertaining indigenous peoples as having experienced the same effects as peoples under colonialism,[330] can cause a rethinking on this matter. *Geographically separate* may also be understood as encompassing not only geographically distinct regions, but also incorporating demarcated lands within state borders, as for example the North West Territory of Canada or Lappland.[331] With regard to the notion that the *territorial integrity* of a state must be upheld, one could furthermore argue on whether the territory concerned may be considered a non-self-governing territory in the sense of Article 73 UN Charter and thus not entitle the state to its territorial integrity.[332]

Moreover, one may ask whether the circumstances in which the *territorial integrity* of a state has been achieved were correct. While settlers had *justified* the dispossession of indigenous peoples by methods of law,[333] for one the requisitions of the land under the title of conquest and discovery often occurred without compensation and at will of the conquerors, and for another, the conclusion of many of the land-ceding treaties occurred under conditions of fraud, misapprehensions or duress, from a current perspective calling for renunciations as void and restitution.[334]

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[327] Principle IV, UNGA – Res. 1541 (XV), Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73(e) of the Charter, Dec. 15, 1960, 15 UN – GAOR, Supp. No. 16, p. 29, UN Doc. A/4684.
[328] Ö. Österud: "The Narrow Gate: Entry to the Club of Sovereign States", p. 178.
[329] *See above* subsection 3.2.1.2.
[330] Preambular para. 6, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295; C. J. Iorns: "Indigenous Peoples and Self-Determination: Challenging State Sovereignty", *at* fns 478-480; J. Castellino: "The "Right" to Land, International Law & Indigenous Peoples" in *International Law and Indigenous Peoples*, J. Castellino & N. Walsh eds., Leiden & Boston 2005, pp. 108-109; M. Kleist: "The Status of the Greenlandic Inuit – Are the Greenlandic Inuit a People, and Indigenous People, a Minority or a Nation? A Practical, Philosophical and Conceptual Investigation", p. 104.
[331] C. J. Iorns: "Indigenous Peoples and Self-Determination: Challenging State Sovereignty", *at* fns 264-265, 471.
[332] C. J. Iorns: "Indigenous Peoples and Self-Determination: Challenging State Sovereignty", *at* fns 467-468.
[333] W. Bradford: ""With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice", *American Indian Law Review*, vol. 27, no. 1, 2002/2003, pp. 26-28.
[334] J. Castellino: "Conceptual Difficulties and the Right to Indigenous Self-Determination", pp. 71-72; J. Castellino: "The "Right" to Land, International Law & Indigenous Peoples", pp. 111-112; W. Bradford: ""With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice", p. 29; Commission on Human Rights: "Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous Peoples and their Relationship to Land", *Final working paper prepared by the Special Rapporteur, Erica-Irene A. Daes*, June 11, 2001, pp. 11-12, paras. 30-32, UN Doc. E/CN.4/Sub.2/2001/21; *Mabo & Others* v. *Queensland (No. 2)*, High Court of Australia, 175 *Commonwealth Law Reports* 1, para. 42 (Judgment, June 3, 1992).

Therefore, in a process of balancing the two competing claims with each other, on the one hand, the claim of indigenous peoples to external self-determination, on the other hand, the claim of the state to its territorial integrity, the interests of the two sides shall be weighed up against each other as well as the consequences. Thus, it can be argued, that in such situations in which indigenous peoples have certain characteristics which are in common with those of *peoples* in general, the right to external self-determination in such limited circumstances as prescribed above should be a possible alternative.[335] Such an opportunity must be available as an ultimate solution in those cases in which otherwise the protection of the identity and culture of a group cannot be achieved by any other possible means.[336]

3.3.2.4 Indigenous Peoples and the Principle of Permanent Sovereignty over Natural Resources

From the Background...

As elaborated in Chapter II, the principle of PSNR is an extensive set of rights and obligations, which flow from the basic premises that one can freely dispose, use and regulate one's natural resources. Moreover, the principle includes the right to choose one's own economic, environmental and developmental policies as well as regulate activities which have an effect on such. This is counter-balanced especially by the obligations to exercise these rights in the interests of development and the well-being of the population, as well as to respect environmental norms.

With regard to the application of this principle to indigenous peoples, as mentioned above, Special Rapporteur Daes stated that:

> The proposition, and indeed the conclusion (…), that the principle of permanent sovereignty over natural resources must now be applied to indigenous peoples, in one that has emerged from international law.[337]

Indigenous claims with regard to PSNR occur against the background of their close link with their lands, territories and resources. The Sub-Commission on the Promotion and Protection

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[335] C. J. Iorns: "Indigenous Peoples and Self-Determination: Challenging State Sovereignty", *at* fns 54-55, 123, 467; S. Errico: "The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview", *Human Rights Law Review*, vol. 7, no. 4, p. 748.

[336] Ramos – Horta, J.: „Self-Determination: The Case of East Timor" in *The Question of Self-Determination – The Cases of East Timor, Tibet and Western Sahara*, Conference Report of the *Unrepresented Nations and Peoples Organizations*, March 25-26, 1996, p. 40; C. J. Iorns: "Indigenous Peoples and Self-Determination: Challenging State Sovereignty", *at* fns 129-130.

[337] Commission on Human Rights: "Prevention of Discrimination and Protection of Indigenous Peoples, Indigenous Peoples' Permanent Sovereignty over Natural Resources", *Final report of the Special Rapporteur, Erica-Irene A. Daes*, July 12, 2004, Annex II, p. 9, para. 1, UN Doc. E/CN.4/Sub.2/2004/30/Add.1.

of Human Rights defines this profound connection by three elements: (1) the relationship constitutes itself *via* social, cultural, spiritual, economic and political dimensions and responsibility; (2) the relationship consists especially of elements of collectivity; and (3) it is understood under the over-arching aspect of inter-generationality.[338] Thus, if indigenous peoples possessed the right, it would encompass guarantees for their exercise of traditional activities and practice of their culture as well as enable their development by capacitating them to utilize their natural resources and share the benefits obtained.[339]

Special Rapporteur Daes lists five main reasons why the principle of PSNR shall be applied to indigenous peoples: First, indigenous peoples are in a similar position as colonized peoples; second, they likewise are subject to unjust and unequitable economic arrangements concerning their lands and resources; third, PSNR is thus necessary to re-evaluate this situation and create new arrangements; fourth, indigenous peoples have the right to development; and fifth, the natural resources concerned by the principle of PSNR have belonged to the indigenous peoples, just as their lands and territories, since times before they came under alien domination.[340]

...To the Foreground

The United Nations Declaration on the Rights of Indigenous Peoples includes numerous provisions which concern the rights of indigenous peoples in relation to their lands and natural resources. As the Declaration as such is non-binding, it is especially important to concentrate on those rights included which are also contained in binding legal instruments such as the ILO Conventions. It is stipulated in the Declaration that:

> 1. indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.[341]

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[338] Commission on Human Rights: "Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous Peoples and their Relationship to Land", *Final working paper prepared by the Special Rapporteur, Erica-Irene A. Daes*, June 11, 2001, p. 9, para. 20, UN Doc. E/CN.4/Sub.2/2001/21.

[339] A. Xanthaki: "The Right to Self-determination: Meaning and Scope", p. 30; Commission on Human Rights: "Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous Peoples and their Relationship to Land", *Final working paper prepared by the Special Rapporteur, Erica-Irene A. Daes*, June 11, 2001, p. 7, para. 12, UN Doc. E/CN.4/Sub.2/2001/21.

[340] Commission on Human Rights: "Prevention of Discrimination and Protection of Indigenous Peoples, Indigenous Peoples' Permanent Sovereignty over Natural Resources", *Working Paper by Erica-Irene A. Daes*, July 30, 2002, p. 3, para. 7(a-e), UN Doc. E/CN.4/Sub.2/2002/23.

[341] Art. 26, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295; *see also* Art. 14(1), ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 UNTS 383;

Traditional land tenure regimes of indigenous peoples have become recognized as constituting *sui generis* forms of land and resources rights, despite lacking a title of ownership in the ordinary sense.[342] While the right to property is an internationally accepted human right,[343] with regard to indigenous peoples additionally their *collective* interest and relationship with the concerned land is recognized, and thus their integrity with "the total environment of the areas which the peoples concerned occupy or otherwise use"[344] shall be respected and maintained.

Furthermore, lands, territories and resources which indigenous peoples have traditionally owned and that they have been dispossessed of, shall be restituted or at minimum compensated for.[345] They enjoy the right to develop their own political, economic and social systems and determine and develop their priorities for the development of their lands, territories and resources.[346] Moreover, states shall ensure that no damaging or hazardous activities for the environment or productive capacity of the lands, territories and resources of indigenous peoples occur, without these consenting to such.[347]

Application-Oriented Difficulties

The above has shown that indigenous peoples enjoy land and resource rights *sui generis* over their lands and resources.[348] However, it remains questionable if it can be said that they enjoy

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Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23*, para. 5, Aug. 18, 1997, UN Doc. A/52/18; *Aurelia Cal.* et al. v. *Attorney General of Belize*, Supreme Court of Belize, Claim No. 121/2007, para. 131 (Judgment, Oct. 18, 2007).

[342] *Awas Tingni* (Merits) (The Mayagna (Sumo) Indigenous Community of Awas Tingni *v.* Nicaragua), 2001 Inter-American Court of Human Rights, pp. 75-76, paras. 150-151 (Judgment, Aug. 31), *also available at* http://www1.umn.edu/humanrts/iachr/E/tingni9-6-02.html (*last visited on* July 29, 2009); *Delgamuukw* v. *British Columbia*, Supreme Court of British Columbia (Judgment, Dec. 11, 1997), pp. 6-7, *also available at* http://csc.lexum.umontreal.ca/en/1997/1997rcs3-1010/1997rcs3-1010.pdf (*last visited on* July 29, 2009); J. Anaya: *Indigenous Peoples in international law*, p. 142.

[343] Art. 17, UNGA – Res. 217 (III), International Bill of Human Rights (Universal Declaration of Human Rights), Dec. 10, 1948, 3 UN – GAOR, Supp. No. 13, p. 71, UN Doc. A/810; Art. 21, American Convention on Human Rights, Nov. 21, 1969, 1144 UNTS 143; T. R. G. van Banning: *The human right to property*, Antwerpen & New York 2002, pp. 33-81.

[344] Art. 13(2), ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 UNTS 383; *see also*: Art. 25, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295; S. J. Anaya: *Indigenous Peoples in international law*, p. 142.

[345] Art. 28, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295.

[346] Arts. 20, 32, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295; *see also* Art. 7(1), ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 UNTS 383.

[347] Art. 29, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295.

[348] S. J. Anaya: "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State, *Arizona Journal of International & Comparative Law*, vol. 21, no. 1, 2004, p. 38.

the full right of PSNR. Whether one states that the principle of PSNR flows from self-determination or *vice versa*, the final line defining who is the right-bearer is determined by who possesses the territorial authority.[349] Thus, while one can be entitled to self-determination without being independent, it is difficult to imagine how one can be a full subject to PSNR without enjoying self-determination.

In situations which grant autonomy but not full self-determination to the peoples concerned, PSNR, and the consequences flowing thereof, *i.e.* that the resource shall be utilized for the benefit of the whole, will remain with the entity which has the final authority over the territory.[350] In most cases, it will therefore be the state which can freely opt on which policies and activities to pursue and further its national development. Thus, especially in regions where the resource in question may be required for the fulfillment of interests concerning the population in total, claims of indigenous peoples for utilization of the resource in pursuit of their development hardly have a chance of prevailing.

Instead, states most often reserve the right to *extinguish* the rights and land titles of indigenous peoples, without their consent, *i.e.* they expropriate or purchase the land, commonly without just compensation.[351] In such cases, states will often invoke criteria of their *national interest*, putting the general aim of economic development of a region ahead of the specific interest of an indigenous people's interest in the area.[352]

Therefore, from this point of view, it must be stated, that in those situations that indigenous peoples do not qualify as subjects to external self-determination, their standing as subjects to PSNR is highly questionable. However, it is possible to argue differently.

In determining whether or not an entity qualifies as a beneficiary of PSNR, one can approach the matter by analyzing to what degree it possesses control over, and participates in the decision-making concerning the management, development and use of the natural

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[349] C. J. Iorns: "Indigenous Peoples and Self-Determination: Challenging State Sovereignty", *at* fn 419.
[350] C. J. Iorns: "Indigenous Peoples and Self-Determination: Challenging State Sovereignty", *at* fn 419-421.
[351] Commission on Human Rights: "Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous Peoples and their Relationship to Land", *Final working paper prepared by the Special Rapporteur, Erica-Irene A. Daes*, June 11, 2001, pp. 14-15, para. 42, UN Doc. E/CN.4/Sub.2/2001/21.
[352] *Delgamuukw* v. *British Columbia*, Supreme Court of British Columbia (Judgment, Dec. 11, 1997), pp. 101-102, para. 165, *also available at* http://csc.lexum.umontreal.ca/en/1997/1997rcs3-1010/1997rcs3-1010.pdf (*last visited on* July 29, 2009); Commission on Human Rights: "Indigenous Issues – Human rights and indigenous issues", *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65*, Jan. 21, 2003, p. 5, paras. 6, 8, UN Doc. E/CN.4/2003/90.

resource.[353] For example, with regard to lands, territories and resources the United Nations Declaration on the Rights of Indigenous Peoples states:

> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[354]

From this can be seen that primarily the decisions with regard to lands, territories and resources shall be taken by the indigenous people concerned. And moreover, in those situations, in which the state wishes to engage in an activity which will affect the indigenous people, the state must firstly consult and cooperate with the group concerned, and secondly, for conducting the wished activity, the indigenous people shall have given their free, prior and informed consent to the project.[355]

Not only must the consultation for being have been undertaken in good faith,[356] but the process thereof, and the participation of indigenous peoples in the decision-making, shall reflect their right of choice concerning their political, economic, cultural and social development and therefore accommodate their representative institutions, laws, traditions and customs.[357] Moreover, as a means to ensure that the rights of indigenous peoples cannot be

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[353] Commission on Human Rights: "Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous Peoples and their Relationship to Land", *Final working paper prepared by the Special Rapporteur, Erica-Irene A. Daes*, June 11, 2001, p. 26, para. 83, UN Doc. E/CN.4/Sub.2/2001/21.

[354] Art. 32(1)(2), Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295.

[355] *Application to the Inter-American Court of Human Rights in the Case of Twelve Saramaka Clans against the Republic of Suriname*, Inter-American Commission on Human Rights, Case No. 12.338, para. 154 (June 23, 2006); Permanent Forum on Indigenous Issues: "A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements", 8th Session, May 18-29, 2009, p. 23, UN Doc. E/C.19/2009/CRP.7; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination – Ecuador*, June 2, 2003, pp. 3-4, para. 16, UN Doc. CERD/C/62/CO/2.

[356] *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 Supreme Court of Canada 73 (Judgment, Nov. 18, 2004); *Delgamuukw* v. *British Columbia*, Supreme Court of British Columbia (Judgment, Dec. 11, 1997), pp. 103-104, para. 168, *also available at* http://csc.lexum.umontreal.ca/en/1997/1997rcs3-1010/1997rcs3-1010.pdf (*last visited on* July 29, 2009); Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made under Article 24 of the ILO Constitution by the Confederacion Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), Nov. 14, 2001, para. 38, ILO Doc. GB.282/14/2.

[357] Permanent Forum on Indigenous Issues: "A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements", 8th Session, May 18-29, 2009, p. 15, UN Doc. E/C.19/2009/CRP.7; Permanent Forum on Indigenous Issues: "Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples", Feb. 17, 2005, p. 12, para. 47, UN Doc. E/C.19/2005/3.

overridden by state policies,[358] the consent required must be *free, prior and informed*.[359] Thus, it shall occur without coercion, intimidation or manipulation; after consent has been sought sufficiently in advance; and information with regard to *inter alia* scope, duration, impacts as well as the purposes of the activity has been conveyed.[360] Furthermore, in particular situations, as especially with regard to forced removal, legislative and administrative measures which may affect them, storage and disposal of hazardous material, and projects which affect their lands, territories and resources,[361] the obligation of a state to obtain *free, prior and informed* consent can even establish a *veto right* of indigenous peoples over state actions, and with respect to other situations at minimum shall create enough space to meaningfully engage in negotiations and consultations concerning the planned activity.[362]

Therefore, one can argue that in effect, the rights of indigenous peoples to participate in, and be consulted with regard to decisions taken which affect their lands, territories and resources, and the obligation to secure their consent, helps create a *de facto* sovereignty over natural resources.

3.3.3 Hypothetical Deliberations – A Possible Means for Claiming Independence?

As stated in Chapter I, for constituting a state in international law four basic criteria have been identified: (1) permanent population; (2) defined territory; (3) government; and (4) the capacity to enter into relations with other states.[363] The first criterion, permanent population, is fulfilled in situations in which an aggregate of individuals lives together as a community

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[358] S. Errico: "The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview", pp. 752-753.

[359] *Mary and Carrie Dann* v. *United States*, Inter-American Commission of Human Rights, Case No. 11.140, Report No. 75/02, para. 131 (Dec. 27, 2002); *Awas Tingni* (Preliminary Objections) (The Mayagna (Sumo) Indigenous Community of Awas Tingni *v.* Nic.), 2000 Inter-Am. Ct. H. R. (Judgment, Feb. 1), para. 22 (*citing* para. 142 of Report No. 27/98 of the Inter-American Commission), *available at* http://www1.umn.edu/humanrts/iachr/C/66-ing.html (*last visited on* July 1, 2009).

[360] Permanent Forum on Indigenous Issues: "Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples", Feb. 17, 2005, p. 12, para. 46, UN Doc. E/C.19/2005/3.

[361] Arts. 10, 19, 29, 32, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295.

[362] S. J. Anaya: Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples have in Lands and Resources", *Arizona Journal of International & Comparative Law*, vol. 22, no. 1, 2005, p. 17; Permanent Forum on Indigenous Issues: "A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements", 8th Session, May 18-29, 2009, p. 19, UN Doc. E/C.19/2009/CRP.7; World Bank Group Management Response: "Striking a Better Balance – The World Bank Group and Extractive Industries", *The Final Report of the Extractive Industries Review*, Sept. 17, 2004, p. 22, *also available at* http://siteresources.worldbank.org/INTOGMC/Resources/finaleirmanagementresponse.pdf (*last visited on* August 1, 2009).

[363] Art. 1, Convention on the Rights and Duties of States, Montevideo, 26 December 1933, 165 LNTS 19 (1934).

with the intention to inhabit a territory permanently.[364] Concerning, indigenous peoples which are settled in a specific region, this cannot be disputed.[365]

Moreover, the element of territory closely links to the question of the bearer of territorial sovereignty, *i.e.* who may exercise the activities of the authority in the delimited area.[366] The territorial control of indigenous peoples as elaborated above, even though not unfettered, paired with their freedom of choice concerning one's political, economic, social and cultural development, in particular including the right to authentic self-government, fulfils two further conditions required for constituting a state. Finally, entities shall possess the capacity, *i.e.* the political, technical and financial capabilities, to enter into relations with other states.[367] As can be seen in the case of micro-states, some of the powers to perform at an international level can be delegated to an agent state, as long as the delegating entity retains the final right of instruction.[368] Thus, while the right of indigenous peoples to participate at an international level in policy-making, as well as to conclude treaties and agreements with states has been recognized,[369] their partly still existing:

> Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.[370]

Therefore, the legitimate question may be asked, whether or not an indigenous people may claim independence also in situations in which it does not enjoy external self-determination, but a *de facto* PSNR.

First, international law, which is based on the concept of nation-states, is experiencing changes, and the emphasis is shifting from the theory of sovereign states which regulate und

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[364] D. Raič: *Statehood and the Law of Self-Determination*, Leiden & Boston, 2002, p. 58.
[365] *Elements describing indigenous peoples further confirm this assumption, as e.g.* their inhabitation of a certain area already prior to others; self-identification; preservation of distinctiveness; their claim for collective rights; their common spiritual link to the territory they inhabit. *See also*: Sub-Commission on Prevention of Discrimination and Protection of Minorities: "Standard-setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples, *Working Paper on the concept of "indigenous people" by Chairperson-Rapporteur Erica-Irene A. Daes*, June 10, 1996, para. 69, UN Doc. E/CN.4/Sub.2/AC.4/1996/2.
[366] *Island of Palmas* (U.S. *v*. Netherlands), 2 *Reports of International Arbitral Awards* 829, pp. 838 (Award, Apr. 4, 1928).
[367] D. Raič: *Statehood and the Law of Self-Determination*, Leiden & Boston, 2002, p. 73.
[368] D. Raič: *Statehood and the Law of Self-Determination*, p. 74.
[369] Preambular para. 14, Art. 37, Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295; *see for example the participation regime contained in the* Arctic Council, *available at* http://arctic-council.org/section/the_arctic_council (*last visited on* Aug. 1, 2009).
[370] Art. 3, UNGA – Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, 15 UN – GAOR, Supp. No. 16, p. 66, UN Doc. A/4684.

control international relations towards a more diversified and fragmented concept of regional entities.[371]

Second, it must furthermore be asked whether the rights and obligations that a state has towards indigenous peoples in sum equates that a state in its conduct must act similarly as with regard to a third state. The greater the autonomy of an indigenous community with regard to their internal affairs, the more a state will be obliged to follow traditional paradigms of inter-state relations, such as the duty of non-interference as well as the obligation not to cause damage.

In many cases the territory of one indigenous people transcends across several states and a uniform regulation of the community and the rights they enjoy remains particularly difficult when multiple state interests, laws and policies are applicable to one community.[372] Moreover, many issues, *inter alia* concerning the environment, are often regulated at a global level, mostly without granting indigenous peoples access to the international law-making process.[373]

While it can hardly be argued from a present point of view that states might be willing to grant independence to the majority of indigenous groups, recognizing indigenous peoples as *state-like entities* would dissolve many of the abovementioned difficulties. The acceptance of indigenous peoples as *de facto* beneficiaries to the concept of PSNR and the consequential territorial control flowing thereof constitutes a first step in the process of creating a just and equitable international world order, the original intention underlying the principle of PSNR, also with regard to indigenous peoples.

3.3.4 Examples of Implementation of Indigenous Peoples' Sovereignty over Natural Resources

The following two case-studies will determine in how far the principle of PSNR and its corresponding rights have found reflection in practice. Firstly, in the case of Greenland, a country is concerned which stands on the verge of independence. As a resource-reach entity,

[371] L. M. Graham: "Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination "Into Practice" and "Into Peace", pp. 458-459; A. L. Parrish: "Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights", *American Indian Law Review*, vol. 31, no. 2 (Symposium: Lands, Liberties, and Legacies: Indigenous Peoples and International Law), 2006/2007, pp. 296, 302-303.

[372] Commission on Human Rights: "Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous Peoples and their Relationship to Land", *Final working paper prepared by the Special Rapporteur, Erica-Irene A. Daes*, June 11, 2001, p. 25, para. 80, UN Doc. E/CN.4/Sub.2/2001/21; R. Osburn: „Problems and Solutions regarding Indigenous Peoples Split by International Borders", *American Indian Law Review*, vol. 24, no. 2, 1999/2000, p. 482.

[373] T. Koivurova & L. Heinämäki: „The participation of indigenous peoples in international norm-making in the Arctic", *The Polar Record*, vol. 42, issue 2, 2006, pp. 101-102.

Greenland's claims to enjoy sovereignty over their natural resources have been consistent throughout the process, and thus, it is evident that this plays an important role in Greenland's strive for self-determination. This case will especially serve as an example for the first possibility of being a beneficiary to PSNR, namely through the enjoyment of full self-determination. Secondly, two cases regarding indigenous peoples and their entitlements to lands, territories, and natural resources in the Republic of Suriname have recently been dealt with by human rights bodies, the Committee on the Elimination of Racial Discrimination, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. While the latter issues binding judgments, recommendations made by the other bodies are non-binding.[374] However, decisions are based on universally applicable standards and therefore can serve as precedents on a global level as well. The second case study will serve as an example for the second possible method of claiming PSNR, by enjoying a *veto right* with regard to activities having an effect on one's lands, territories and resources.

3.3.4.1 Greenland

A Road to Independence?

Through an amendment of the Danish Constitution on June 5, 1953, Greenland which had been a colonized by the Danes since 1721:

> became an integral part of the Danish Realm with a constitutional status equal to that of other parts of Denmark.[375]

As elaborated above, it is undisputed that colonial peoples have the right to full self-determination, *i.e.* to freely determine their international political status.[376] Thus, Greenland could have opted for independence, self-government, integration or any other status.[377] Following the constitution amendment, the UNGA therefore stated in Resolution 849 (IX) that the people of Greenland by opting for integration had freely exercised their right to self-determination.[378]

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[374] I. Brownlie: *Principles of Public International Law*, pp. 571, 583.
[375] UNGA – Res. 849 (IX), Cessation of the transmission of information under Article 73 e of the Charter in respect of Greenland, Nov. 22, 1954, 9 UN – GAOR, p. 27, UN Doc. A/RES/849.
[376] *See* subsection 3.3.2.2.
[377] G. Alfredsson: "Greenland under Chapter XI of the United Nations Charter – A Continuing International Law Dispute", in *The Right To National Self-Determination – The Faroe Islands and Greenland*, S. Skaale ed., Leiden 2004, p. 50; J. E. Rytter: „Self-Determination of Colonial Peoples – The Case of Greenland Revisited", *Nordic Journal of International Law*, vol. 77, no. 4, 2008, p. 367.
[378] Para. 4, UNGA – Res. 849 (IX), Cessation of the transmission of information under Article 73 e of the Charter in respect of Greenland, Nov. 22, 1954, 9 UN – GAOR, p. 27, UN Doc. A/RES/849.

However, the Provincial Council of Greenland, to which the first proposals on integration were presented, was not representative of all people of Greenland as it was elected without participation of the people living in Northern and Eastern Greenland.[379] Moreover, after a mere two day deliberation process they consented to the proposal, and flowing from that, to integration into the Danish Realm. In addition, neither had the Commission responsible for the drafting of the amendment included any Greenlandic members, nor was the referendum on the amendment extended to Greenland, ironically due to the fact they still constituted colonial peoples.[380] Instead, the Danish Prime Minister had stated:

> We Danes have reason to expect that the Greenlanders wish to form their future together with us under the Danish flag and we have a duty to exercise our influence so that the future can become as bright and happy as possible.[381]

Moreover, when asked why no referendum was held in Greenland in relation to their *freedom of choice*,[382] a Danish delegate stated at the United Nations that they felt that Greenland "would feel offended if it was asked whether it really wished to be integrated in Denmark".[383]

Against the background of these steps, it has therefore been argued that the integration of Greenland in Denmark did not correspond to substantive and procedural pre-requisites of the root of self-determination, namely the "free and genuine expression of the will of the people concerned",[384] demanding an informed choice concerning one's status.[385] G. Alfredsson even argues that although UNGA Resolution 849 (IX) ended Denmark's reporting obligation under Article 73(e) of the UN Charter, the international status of Greenland remained unchanged, and thus the people of Greenland are still entitled to external self-determination.[386]

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[379] J. E. Rytter: „Self-Determination of Colonial Peoples – The Case of Greenland Revisited", p. 388.
[380] G. Alfredsson: "Greenland under Chapter XI of the United Nations Charter – A Continuing International Law Dispute", p. 53.
[381] Statement made by Danish Prime Minister H. Hedtoft, 1948, *reprinted in* G. Alfredsson: "Greenland under Chapter XI of the United Nations Charter – A Continuing International Law Dispute", p. 55.
[382] Principle A(2), Annex, UNGA – Res. 742 (VIII), Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government, Nov. 27, 1953, 8 UN – GAOR, Supp. No. 17, p. 21, UN Doc. A/RES/742
[383] *Reprinted in* G. Alfredsson: "Greenland under Chapter XI of the United Nations Charter – A Continuing International Law Dispute", p. 84.
[384] *Western Sahara*, 1975 ICJ 12, pp. 31-32, para. 55 (Adv. Op., Oct. 16); *see also* Principle IX, UNGA – Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, 15 UN – GAOR, Supp. No. 16, p. 66, UN Doc. A/4684; Principle 2, UNGA – Res. 637 (VII), The right of peoples and nations to self-determination, Dec. 20, 1952, 7 UN – GAOR, p. 26, UN Doc. A./RES/637.
[385] J. E. Rytter: „Self-Determination of Colonial Peoples – The Case of Greenland Revisited", pp. 383, 390; G. Alfredsson: "The Rights of Indigenous Peoples with a Focus on the National Performance and Foreign Policies of the Nordic Countries", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 59, 1999, p. 531.
[386] G. Alfredsson: "Greenland under Chapter XI of the United Nations Charter – A Continuing International Law Dispute", p. 91.

Although this conclusion might be hard to sustain,[387] the last 55 years have showed a subsequent development towards more independence. In 1978, the Greenland Home Rule Act was passed in the Danish Parliament, granting Greenland responsibilities concerning almost all internal policy areas.[388] The Act was accepted by a large majority in a referendum held in Greenland in the following year, and consequently legislative and executive powers were transferred from the Danish Parliament to the Greenlandic Home Rule Parliament and Government in a number of fields concluded in a non-exhaustive annex.[389] Thus, the Home Rule Authority was responsible for enacting and executing legislation with regard to *inter alia* taxation, trade (including fisheries and hunting), education, transport and communications, social security, labor, housing, environmental protection and conservation of nature and health services.[390] Still largely dependent on subsidies by Denmark however, in many fields in which such were needed, the Danish Parliament established the framework of many policies, only leaving the specifics to the Greenlandic Home Rule Authority.[391] Powers of direction were also retained by Denmark with regard to the fulfillment of international treaties and obligations.[392]

However, the Home Rule Act did not alter the constitutional status of Greenland, it therefore remained under the sovereignty of the central authorities of the Danish Realm, and had no say concerning external relations, defense and monetary policies.[393] Moreover, concerning mineral resources, a special provision was inserted into the Home Rule Act, providing for a joint decision-making power of national and Home Rule authorities. While

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[387] J. E. Rytter: „Self-Determination of Colonial Peoples – The Case of Greenland Revisited", pp. 396-400.

[388] The Greenland Home Rule Act, Act. No. 577, Nov. 29, 1978, *available at* http://www.stm.dk/_p_12712.html (*last visited on* Aug. 1, 2009); Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples: "The Greenland Home Rule Arrangement in brief", *Background paper prepared by Ms. T. S. Pedersen*, Dec. 15-17, 2003, para. 1.04, UN Doc. HR/GENEVA/TSIP/SEM/2003/BP.5.

[389] Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples: "The Greenland Home Rule Arrangement in brief", *Background paper prepared by Ms. T. S. Pedersen*, Dec. 15-17, 2003, paras. 1.06-1.07, UN Doc. HR/GENEVA/TSIP/SEM/2003/BP.5.

[390] The Greenland-Danish Self-Government Commission's Report on Self-Government in Greenland, Executive Summary, April 2008, pp. 2-3, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/46185A4413C54A3D89D3D16F1D38F0D3.ashx (*last visited on* Aug. 1, 2009).

[391] M. Kleist: "The Status of the Greenlandic Inuit – Are the Greenlandic Inuit a People, and Indigenous People, a Minority or a Nation? A Practical, Philosophical and Conceptual Investigation", p. 110; Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples: "The Greenland Home Rule Arrangement in brief", *Background paper prepared by Ms. T. S. Pedersen*, Dec. 15-17, 2003, para. 1.11, UN Doc. HR/GENEVA/TSIP/SEM/2003/BP.5.

[392] Committee on Economic, Social and Cultural Rights: "Reports submitted by States Parties in accordance with Articles 16 and 17 of the Covenant, 3rd periodic report of Denmark", May 17, 1999, para. 9, UN Doc. E/C.12/1999/SR.13.

[393] Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples: "The Greenland Home Rule Arrangement in brief", *Background paper prepared by Ms. T. S. Pedersen*, Dec. 15-17, 2003, para. 1.13, UN Doc. HR/GENEVA/TSIP/SEM/2003/BP.5.

this gave indigenous peoples a veto-right regarding the development and exploitation of mineral resources, this also resulted in a limitation of their own right to decide upon own policies without taking interests of the whole Danish Realm into consideration.[394]

The process of *Greenlandisation* continued, with the aim of strengthening and preserving the culture and heritage of the indigenous peoples of Greenland.[395] In 2000, a Commission on Self-Governance was established, which had the aim of studying the possibility of expansion of autonomy, by enabling more self-governance and economic self-sufficiency. In 2003 the Commission identified in its report six possibilities for the future of Greenland: independence; to form a union with a second country; to enter into a free association with a second country; to join a federation; increased self-government; or complete integration with Denmark.[396]

From this followed that after a 2008 referendum on the transfer of more competences to the Greenlandic government, on June 21, 2009, a new era of self-government was introduced, reserving only foreign, defense, monetary and security policies, the constitution, nationality, and the Supreme Court to the Danish Realm.[397] However, agreements and treaties with foreign states and International Organizations which exclusively concern Greenland may be concluded by *Naalakkersuisut* (Greenland Government).[398] The most significant changes affected the regulation of natural resources.[399] Thus, the exploration and exploitation of all resources will be conducted under the control and regulation of Greenland, and accordingly, all revenues from licenses, taxation of license holder and public authority stakes flow to the

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[394] Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples: "The Greenland Home Rule Arrangement in brief", *Background paper prepared by Ms. T. S. Pedersen*, Dec. 15-17, 2003, para. 1.15, UN Doc. HR/GENEVA/TSIP/SEM/2003/BP.5.

[395] Committee on Economic, Social and Cultural Rights: "Reports submitted by States Parties in accordance with Articles 16 and 17 of the Covenant, 3rd periodic report of Denmark", May 17, 1999, para. 7, UN Doc. E/C.12/1999/SR.13.

[396] *See* G. Alfredsson: "Greenland under Chapter XI of the United Nations Charter – A Continuing International Law Dispute", pp. 92-93.

[397] Chapter 4, Art. 11, Schedule to the Act, Act on Greenland Self-Government, June 21, 2009, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/F74BAB3359074B29AAB8C1E12AA1ECFE.ashx (*last visited on* Aug. 1, 2009); The Greenland-Danish Self-Government Commission's Report on Self-Government in Greenland, Executive Summary, April 2008, pp. 5-7, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/46185A4413C54A3D89D3D16F1D38F0D3.ashx (*last visited on* Aug. 1, 2009).

[398] Chapter 4, Art. 12, Act on Greenland Self-Government, June 21, 2009, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/F74BAB3359074B29AAB8C1E12AA1ECFE.ashx (*last visited on* Aug. 1, 2009).

[399] A. Smith: "The Big Question: Is Greenland ready for independence, and what would it mean for its people?" in *The Independent*, Nov. 27, 2008, *available at* http://www.independent.co.uk/news/world/europe/the-big-question-is-greenland-ready-for-independence-and-what-would-it-mean-for-its-people-1036735.html (*last visited on* Aug. 1, 2009).

Greenland Self-Government authorities.[400] Of revenues which exceed DKK 75 million, 50 % will be used to be deducted from the received Danish subsidies until that amount reaches zero, in which case negotiations on the further economic relationship between both sides will be initiated.[401] Furthermore, Greenlandic became the official language of Greenland.[402]

Finally, the Self-Government Act is understood to be a first step towards assuming sovereignty over the Greenland territory. Once the people of Greenland opt for independence, negotiations with Denmark will follow, concluded by a referendum in Greenland.[403]

Legal Entitlements

In his speech on the day of inauguration of Greenland's Self-Government, the Premier K. Kleist stated:

> (...) now we have been recognised as a people. Greenland has now positioned herself as a leading country and an example to indigenous peoples everywhere.[404]

Moreover, the Greenland-Danish Self-Government Commission arrived at the same conclusion, that the people of Greenland constitute a *people* within the meaning of international law.[405] Colonized during the 18th century, the Danish implemented their political

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[400] Chapter 3, Art. 7, Act on Greenland Self-Government, June 21, 2009, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/F74BAB3359074B29AAB8C1E12AA1ECFE.ashx (*last visited on* Aug. 1, 2009).

[401] Chapter 3, Art. 8, Act on Greenland Self-Government, June 21, 2009, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/F74BAB3359074B29AAB8C1E12AA1ECFE.ashx (*last visited on* Aug. 1, 2009); The Greenland-Danish Self-Government Commission's Report on Self-Government in Greenland, Executive Summary, April 2008, p. 9, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/46185A4413C54A3D89D3D16F1D38F0D3.ashx (*last visited on* Aug. 1, 2009).

[402] Chapter 7, Art. 20, Act on Greenland Self-Government, June 21, 2009, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/F74BAB3359074B29AAB8C1E12AA1ECFE.ashx (*last visited on* Aug. 1, 2009).

[403] Chapter 8, Art. 21, Act on Greenland Self-Government, June 21, 2009, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/F74BAB3359074B29AAB8C1E12AA1ECFE.ashx (*last visited on* Aug. 1, 2009); The Greenland-Danish Self-Government Commission's Report on Self-Government in Greenland, Executive Summary, April 2008, pp. 13-14, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/46185A4413C54A3D89D3D16F1D38F0D3.ashx (*last visited on* Aug. 1, 2009).

[404] Celebration-speech by Premier K. Kleist on inauguration of Greenland Self-Government, June 21, 2009, p. 1, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/B4AEEBAAF21347D4946F475B6AA95CBA.ashx (*last visited on* Aug. 1, 2009).

[405] The Greenland-Danish Self-Government Commission's Report on Self-Government in Greenland, Executive Summary, April 2008, p. 5, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/46185A4413C54A3D89D3D16F1D38F0D3.ashx (*last visited on* Aug. 1,

social order, including their concepts of law, religion and property ownership, asserting sovereignty over the island.[406]

At the same time, the Arctic Inuit are undisputedly recognized as an indigenous people, and thus put forth the claim to enjoy rights as such.[407] As the original inhabitants of Greenland, for the protection of their distinct culture, heritage and language especially the rights contained in the United Nations Declaration on the Rights of Indigenous Peoples play an important role.[408]

Furthermore, the case of Greenland shows especially well the importance of PSNR for achieving a significant amount of control over one's own development. As a country which boasts significant amounts of natural resources such as cryolite, coal, marble, zinc, lead, silver, oil, gold, niobium, uranium, iron and diamonds,[409] sovereignty over resources in Greenland is seen as a means to eventually reach independence.[410] Having the authority to administer and manage the day-to-day activities with regard to licenses concerning the exploitation and utilization of mineral resources, enables effective control and choice of policies concerning the island's development.[411] Currently still indebted to Denmark due to yearly subsidies received, by having sovereignty over their natural resources, Greenland in

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2009); Preamble, Act on Greenland Self-Government, June 21, 2009, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/F74BAB3359074B29AAB8C1E12AA1ECFE.ashx (*last visited on* Aug. 1, 2009).

[406] N. Loukacheva: *The Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut*, Toronto & Ontario 2007, p. 21.

[407] A. Lynge: "Being Inuit in the New Greenland", *United Nations Permanent Forum on Indigenous Issues*, May 18, 2009, p. 3, *also available at* http://www.missionfnnewyork.um.dk/NR/rdonlyres/6FC0A486-9599-45B9-978A-12E7208C2263/0/AqqalukGLSelfGovtProcess18May20092.pdf (*last visited on* Aug. 1, 2009); Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples: "The Greenland Home Rule Arrangement in brief", *Background paper prepared by Ms. T. S. Pedersen*, Dec. 15-17, 2003, para. 1.05, UN Doc. HR/GENEVA/TSIP/SEM/2003/BP.5; M. Kleist: "The Status of the Greenlandic Inuit – Are the Greenlandic Inuit a People, and Indigenous People, a Minority or a Nation? A Practical, Philosophical and Conceptual Investigation", p. 107.

[408] M. Kleist: "The Status of the Greenlandic Inuit – Are the Greenlandic Inuit a People, and Indigenous People, a Minority or a Nation? A Practical, Philosophical and Conceptual Investigation", pp. 98-99, 107; Celebration-speech by Premier K. Kleist on inauguration of Greenland Self-Government, June 21, 2009, p. 1, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/B4AEEBAAF21347D4946F475B6AA95CBA.ashx (*last visited on* Aug. 1, 2009).

[409] Resources and Industry, *NANOQ*, *available at* http://uk.nanoq.gl/Emner/About/Resources_and_industry.aspx (*last visited on* Aug. 1, 2009).

[410] The Greenland-Danish Self-Government Commission's Report on Self-Government in Greenland, Executive Summary, April 2008, pp. 7-8, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/46185A4413C54A3D89D3D16F1D38F0D3.ashx (*last visited on* Aug. 1, 2009).

[411] Celebration-speech by Premier K. Kleist on inauguration of Greenland Self-Government, June 21, 2009, p. 2, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/B4AEEBAAF21347D4946F475B6AA95CBA.ashx (*last visited on* Aug. 1, 2009); Bureau of Minerals and Petroleum (BMP), *available at* http://www.bmp.gl/ (*last visited on* Aug. 1, 2009).

future wishes to end this dependency and become a state of its own.[412] Thus, increased economic viability of Greenland will result in increased Greenlandic authority.

Nevertheless, the susceptibility of the claim of Greenland to independence for the world community, and especially Denmark, most probably can be traced to their geographical distinctness from Denmark, as well as their largely untouched society, due to the fact that for a large period of time no permanent Danish settlers remained in Greenland.[413]

3.3.4.2 Suriname

The Republic of Suriname, a Dutch colony until 1975, has a national economy which to a large degree is dependent on the natural resource extraction industry, *i.e.*, mining and logging.[414] During the last 20 years, many concessions and exploration permits have been granted to foreign and national corporations, in most cases without informing, consulting with or participating local indigenous or tribal peoples.[415] Moreover, their rights to lands and resources in general have received little legal recognition and guarantees,[416] and Article 41 of 1987 Constitution declares:

> Natural riches and resources are property of the nation and shall be used to promote economic, social and cultural development. The nation shall have the inalienable right to take complete possession of the natural resources in order to apply them to the needs of the economic, social and cultural development of Suriname.[417]

Thus, these circumstances have led to judicial activity in two cases, firstly, concerning mining activities in the territory of the *Kaliňa and Lokono* people, and secondly, concerning logging in the territory of the *Saramaka* people.

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[412] The Greenland-Danish Self-Government Commission's Report on Self-Government in Greenland, Executive Summary, April 2008, pp. 5, 8, *available at* http://uk.nanoq.gl/sitecore/content/Websites/uk,-d-,nanoq/Emner/Government/~/media/46185A4413C54A3D89D3D16F1D38F0D3.ashx (*last visited on* Aug. 1, 2009).

[413] N. Loukacheva: *The Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut*, pp. 20, 22; M. Kleist: "The Status of the Greenlandic Inuit – Are the Greenlandic Inuit a People, and Indigenous People, a Minority or a Nation? A Practical, Philosophical and Conceptual Investigation", p. 111.

[414] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination – Suriname*, March 13, 2009, p. 3, para. 12, UN Doc. CERD/C/SUR/CO/12.

[415] Human Rights Committee, *Concluding observations of the Human Rights Committee – Suriname*, May 4, 2004, p. 5, para. 21, UN Doc. CCPR/CO/80/SUR; NGO Report: "Submission of the Forest Peoples Programme Concerning the Republic of Suriname and its Compliance with the International Covenant on Civil and Political Rights", Jan. 30, 2002, para. 32, *available at* http://www.forestpeoples.org/documents/law_hr/suriname_hrc_ngo_rep_jan02_eng.shtml#V_A (*last visited on* Aug. 1, 2009).

[416] Free, Prior and Informed Consent: Two Cases from Suriname, *Forest Peoples Programme, March 2007, FPIC Working Papers*, p. 2, *available at* http://www.forestpeoples.org/documents/law_hr/fpic_suriname_mar07_eng.pdf (*last visited on* Aug. 1, 2009).

[417] Art. 41, Constitution of Suriname, 1987, with Reforms of 1992, *available at* http://www.oas.org/juridico/Mla/en/sur/en_sur-int-text-const.pdf (*last visited on* Aug. 1, 2009).

The Kaliňa and Lokono people of West Suriname

Since 1997, Suriname has been issuing bauxite mining concessions in the territory of the *Kaliňa and Lokono* people of West Suriname without informing, consulting or undertaking to obtain their consent in advance, thus endangering their culture and identities which are inherently linked to their close and spiritual relationship with their lands and resources.[418] While this case currently is still being dealt with at the Inter-American Commission on Human Rights, the Committee on the Elimination of Racial Discrimination has issued several statements on this matter.

The Committee has found that, firstly, Suriname has failed to respect the rights of the indigenous communities concerned in all sectors of society with regard to employment, education, culture and participation, *i.e.*, their rights to land and resources and their right to be consulted with regarding mining concessions.[419] Secondly, Suriname has not adopted an adequate and effective legal framework guaranteeing the aforementioned rights of indigenous communities.[420] Thirdly, the Committee recognized the right of the state to PSNR, however stressed that this shall be exercised in accordance with the rights of indigenous peoples to:

> possess, develop, control and use their communal lands and to participate in the exploitation, management and conservation of the associated natural resources.[421]

Finally, the informed consent of the affected indigenous peoples shall be obtained as far as possible, especially in situations in which the planned resource exploitation and associated activities pose substantial threats to the affected indigenous communities.[422] Thus, the Committee on the Elimination of Racial Discrimination has found with regard to information received from the *Kaliňa and Lokono* people that several essential rights have crystallized in international law which at minimum alter the freedom contained in the principle of PSNR for states by requiring it to be exercised in accordance with the interests of indigenous peoples.

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[418] *The Kaliňa and Lokono Peoples – Suriname* (Admissibility), Inter-American Commission on Human Rights, Report No. 76/07, Petition 198-07, paras. 3-4, 13, 22 (Oct. 15, 2007).
[419] *Decision 3 (62) Suriname*, Committee on the Elimination of Racial Discrimination, June 3, 2003, para. 3, UN Doc. CERD/C/62/Dec/3.
[420] Committee on the Elimination of Racial Discrimination, *Concluding Observations on Suriname*, Apr. 28, 2004, para. 11, UN Doc. CERD/C/64/CO/9; *Decision 1(67) on Suriname*, Committee on the Elimination of Racial Discrimination, Nov. 1, 2005, para. 4(a), UN Doc. CERD/C/DEC/SUR/4.
[421] Committee on the Elimination of Racial Discrimination, *Concluding Observations on Suriname*, Apr. 28, 2004, para. 11, UN Doc. CERD/C/64/CO/9.
[422] *Decision 3 (66) Suriname*, Committee on the Elimination of Racial Discrimination, April 27, 2005, para. 2, UN Doc. CERD/C/DEC/SUR/1; Committee on the Elimination of Racial Discrimination, *Concluding Observations on Suriname*, Apr. 28, 2004, para. 13, UN Doc. CERD/C/64/CO/9; *Decision 1(67) on Suriname*, Committee on the Elimination of Racial Discrimination, Nov. 1, 2005, paras. 3, 4(b), UN Doc. CERD/C/DEC/SUR/4.

Twelve Saramaka Clans

After the government of the Republic of Suriname granted logging concessions to operate in the territory which the *Saramaka* people have traditionally inhabited, without informing, participating or consulting the affected communities in advance, they filed several complaints with the state government, without receiving an answer.[423] Thus, they brought action at the Inter-American Commission on Human Rights and in 2006, the Commission adopted Report 09/06, in which it found that the right of property, cultural integrity and due process of the *Saramaka* people had been violated, and after no sufficient response was taken by the Surinamese authorities, the case was submitted to the Inter-American Court of Human Rights.[424]

The Commission in particular held, that the state, when granting the forestry and mining concessions in the affected territory neither consulted with, nor obtained the free and informed consent of the *Saramaka* people, which as tribal people have a close and spiritual connection with the land, and furthermore are dependent on the woods for their survival.[425] Through substantial analysis the Commission determined that the *Saramaka* people under international law had a communal ownership right to their land, even if not recognized in legislative measures by the state.[426]

Moreover, while recognizing the right of Suriname to development, the Commission stated that such shall occur under the premises of ensuring that indigenous peoples are appropriately consulted and consent obtained from in cases of natural resources exploitation.[427] And further, it stated that:

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[423] Free, Prior and Informed Consent: Two Cases from Suriname, *Forest Peoples Programme, March 2007, FPIC Working Papers*, pp. 7-8, *available at* http://www.forestpeoples.org/documents/law_hr/fpic_suriname_mar07_eng.pdf (*last visited on* Aug. 1, 2009).

[424] *Application to the Inter-American Court of Human Rights in the Case of Twelve Saramaka Clans against the Republic of Suriname*, Inter-American Commission on Human Rights, Case No. 12.338, paras. 11, 69 (June 23, 2006).

[425] *Application to the Inter-American Court of Human Rights in the Case of Twelve Saramaka Clans against the Republic of Suriname*, Inter-American Commission on Human Rights, Case No. 12.338, paras. 82, 89, 107, 111, 136 (June 23, 2006).

[426] *Application to the Inter-American Court of Human Rights in the Case of Twelve Saramaka Clans against the Republic of Suriname*, Inter-American Commission on Human Rights, Case No. 12.338, paras. 146-148 (June 23, 2006).

[427] *Application to the Inter-American Court of Human Rights in the Case of Twelve Saramaka Clans against the Republic of Suriname*, Inter-American Commission on Human Rights, Case No. 12.338, para. 154 (June 23, 2006).

> in light of the way international human rights legislation has evolved with respect to the rights of indigenous peoples, that the indigenous people's consent to natural resource exploitation activities on their traditional territories is always required by law.[428]

The Inter-American Court of Human Rights passed its judgment on the case in 2007, confirming much of the Commission's findings. Firstly, it held that the *Saramaka* people constitute a tribal people, with distinct social, cultural and economic characteristics, and a close link to their territories.[429] Secondly, it confirmed that *Saramaka* people possessed a right to their *communal* territories, and were entitled to its protection, requiring positive state action to ensure the respect for and control over the lands the indigenous peoples are entitled to.[430]

Finally, the Court declared that indigenous and tribal peoples „have the right to own the natural resources they have traditionally used within their territory."[431] Necessary for the physical and cultural survival of such entities, the entitlement to ownership and control over natural resources guarantees their protection from extinction.[432] The Court also reasoned that the mere right to use and enjoy their territory would be rendered meaningless if they did not enjoy the same rights with regard to the natural resources located on and within the land.[433]

However, at the same time the Court held, that, while it recognized that the granting of logging and mining concessions would affect the rights of the *Saramaka* people, restrictions of property rights are permissible in limited circumstances, *i.e.* when previously established by law; necessary; proportional; with the aim of achieving a legitimate objective in a democratic society; and when it does not deny the survival of the *Saramaka* people.[434] Furthermore, the Court listed three safeguards, referring also to Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples: effective participation of the people concerned; inclusion in the distribution of any benefits derived from the planned activity; prior environmental and social impact assessment.[435]

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[428] *Application to the Inter-American Court of Human Rights in the Case of Twelve Saramaka Clans against the Republic of Suriname*, Inter-American Commission on Human Rights, Case No. 12.338, para. 154 (June 23, 2006).
[429] *Case of the Saramaka People* v. *Suriname* (Prel. Obj., Merits, Reparations, and Costs), 2007 Inter-Am. Ct. H. R., paras. 84-86 (Judgment, Nov. 28).
[430] *Case of the Saramaka People* v. *Suriname* (Prel. Obj., Merits, Reparations, and Costs), 2007 Inter-Am. Ct. H. R., paras. 96, 115 (Judgment, Nov. 28).
[431] *Case of the Saramaka People* v. *Suriname* (Prel. Obj., Merits, Reparations, and Costs), 2007 Inter-Am. Ct. H. R., para. 121 (Judgment, Nov. 28).
[432] See also *Case of the Yakye Axa Indigenous Community* v. *Paraguay* (Merits, Reparations and Costs), 2005 Inter-Am. Ct. H. R.,paras. 135-136 (Judgment, June 17).
[433] *Case of the Saramaka People* v. *Suriname* (Prel. Obj., Merits, Reparations, and Costs), 2007 Inter-Am. Ct. H. R., para. 122 (Judgment, Nov. 28).
[434] *Case of the Saramaka People* v. *Suriname* (Prel. Obj., Merits, Reparations, and Costs), 2007 Inter-Am. Ct. H. R., paras. 126-128 (Judgment, Nov. 28).
[435] *Case of the Saramaka People* v. *Suriname* (Prel. Obj., Merits, Reparations, and Costs), 2007 Inter-Am. Ct. H. R., paras. 129, 131 (Judgment, Nov. 28).

Most importantly, the Court came to the conclusion that in situations which are linked to:

> large-scale development or investment projects within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions.[436]

To conclude, for the *Saramaka* people to effectively enjoy their rights over their lands and territories, it is necessary that they also are the right-bearers with regard to any natural resources located on and within their areas, and the state in principle is not permitted to interfere with their ownership rights. However, in limited circumstances, the state may claim an own entitlement to PSNR and use the resources for the aim of development. Especially in those instances where this touches upon the subsistence of the affected indigenous peoples though, activities may only be undertaken after obtaining their *free, prior, and informed* consent.

This judgment therefore carries the rights identified within the reports of the Committee on the Elimination of Racial Discrimination even one step further, providing a future framework for the recognition of the principle of PSNR not only applicable to states, but also to indigenous and tribal peoples, and that thus, in decisions concerning natural resources which both entities could claim entitlement to, a balancing process is required, with both sides possessing a possible *veto right* in instances where their subsistence should otherwise be endangered.

3.3.4.3 Concluding Remarks

The two case-studies were conducted to underline the possible implications flowing from the recognition of indigenous peoples as subjects to the principle of PSNR. Firstly, in the case of Greenland, the importance of having full control over natural resources for an effective claim to self-determination could be seen. Economic self-sufficiency constitutes the first step in the process of becoming independent since it provides for the means to advance also in sectors of development. However, due the geographical separateness of Greenland from its colonial ruler, Denmark, it is unclear whether other indigenous peoples could find a likewise recognition of their claims to independence once their claims to full PSNR have been accepted. More practical in terms of application (since many indigenous peoples do not strive

[436] *Case of the Saramaka People* v. *Suriname* (Prel. Obj., Merits, Reparations, and Costs), 2007 Inter-Am. Ct. H. R., para. 134 (Judgment, Nov. 28); *see also* Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination – Ecuador*, June 2, 2003, pp. 3-4, para. 16, UN Doc. CERD/C/62/CO/2.

for full independence anyhow) are the results from the second case-study. The recognition of the Inter-American Court of Human Rights that full enjoyment of land rights for indigenous peoples is necessarily linked to likewise concerning their natural resources, and that activities which threaten the subsistence of indigenous peoples may only be conducted by the state, even if acting under the *title* of PSNR, after obtaining consent from the indigenous peoples concerned, creates a first step in recognizing indigenous peoples as right bearers of PSNR in their own right. Thus, in their relations to states, one can state that indigenous peoples are one step further in being recognized as *equal* players.

Chapter IV Conclusions

The concept of PSNR has been an internationally accepted principle since approximately 50 years. Throughout this period, the rights and obligations which can be considered to fall within its scope have expanded and incorporated newly arising interests. This was the case with regard to international investment law as well as international environmental law. Nevertheless, the primary intention of PSNR, to rectify previous injustices and create new and equitable terms for international relations, has always prevailed.

This also allows for an understanding why the original right underlying the principle – the right of peoples and states to freely dispose, use and exploit their natural resources in the interest of national development and for this purpose to regulate their economy – has remained hardly untouched by evolving norms, *e.g.* in the field of international investment law or international environmental law.

The ability of the principle to function as a tool to eliminate inequality, discrimination, colonialism and racism also explains why indigenous peoples have come into discussion as constituting new subjects in this regard. As shown in sub-sections 3.3.2.3 and 3.3.2.4, their experiences in the past show little difference compared to *colonial peoples* recognized as such. Therefore, they should be entitled to equal mechanisms in the remediation of their previous injustices and in the creation of equitable terms for their development as well.

The problematic issue in this regard is that only in very limited circumstances will indigenous peoples be entitled to external self-determination, and thus, in the traditional sense, enjoy full authority over their lands, territories and resources. The case-study of Greenland shows that although economic sufficiency flowing from control over natural resources is inevitable for independence, it is their perception as constituting a *colonized people* which sparks the international community to accept their quest for independence. Thus, even if states grant extensive rights to indigenous peoples with regard to their lands, territories and resources, and recognize their traditional land tenure systems as title to ownership, the state in general will remain in full control over its territory and therefore be able to freely utilize the lands, territories and natural resources to pursue its national development as well as choose its economic, environmental and developmental policies.

To resolve this problem, it is however possible to construe a *de facto* entitlement of indigenous peoples to PSNR. The United Nations Declaration on the Rights of Indigenous

Peoples serves as an example of how the status of indigenous peoples has been perceived by the international community. As shown in subsection 3.2.2.2, the world community has judged the document to constitute a compilation of existing rights with regard to indigenous peoples.

As analyzed throughout Chapter III, the Declarations lays out that especially with regard to the lands, territories and resources of indigenous peoples, states, when wishing to conduct an activity therewith, must consult and participate aforementioned, as well as obtain their free, prior and informed consent.

Thus, in situations where this goes as far as equipping indigenous peoples with a *veto right*, it can legitimately be stated, that they indeed enjoy a *de facto* sovereignty over their natural resources. As shown by the case-study with regard to Suriname, this takes indigenous peoples one step further in creating fair and equitable terms for their relationships with the state.

Moreover, in this thesis, limits of the principle of PSNR have been identified in those instances in which the exercise of the right of PSNR would infringe another subject's right. Where other states cannot claim entitlements to rights which have the same weight as rights derived from a state's sovereignty, as is for example in the case when a state wishes to exercise its right to regulate its national economy by nationalizing foreign investments, the freedom of the latter will remain to a large degree untouched. This can also be drawn from the case-studies on recent developments in Venezuela, Bolivia and Ecuador. The right of each of these states to regulate their economy in the interest of their national development, and thus to alter the investment agreements as were prevailing, was in no case questioned. Merely the amount of compensation due from their conduct posed a point of debate, and the cases pending at international tribunals and domestic courts will give answers on this matter.

At the same time though, by recognizing limits, it is clear that the right to enjoy PSNR is not absolute, but other factors and interests must be taken into consideration in some circumstances. This is especially obvious in the case of the recognition of the obligation not to cause damage to others, and the duty to, with regard to shared resources, cooperate in order to achieve equitable utilization. Thus, recognizing indigenous peoples as *de facto* beneficiaries to the principle of PSNR would not cause new problems with regard to the application, but create situations which can be compared to interstate-conduct. Two entities, each with the same entitlements would therefore be positioned at the negotiating table, and neither of their claims could be perceived as absolute.

In sum, one can therefore see that the development of the principle of PSNR is by far not concluded. Thus, merely currently debates concern the range of subjects which can claim entitlement to the concept, as well as the rights, especially in connection with international investment law, and obligations, in particular with regard to evolving environmental norms. But, as was seen, the developmental process concerning this principle, which often was complemented by political initiatives, has always remained open for new developments.

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