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THE RELEVANCE OF THE PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN THE CHINESE MINERAL DISPUTES IN THE WORLD TRADE ORGANIZATION (WTO)

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Philippe Meier
Directeur de l'Ecole de Droit

‘Once you proclaim your educatedness
Ignorance of yours becomes more conspicuous’

Ferdowsi (940–1020), Shahnameh “The Book of Kings”

To

Neda & Shervin

Contents

Abbreviations

ABAJ	American Bar Association Journal
AFDI	Annuaire français de droit international
AJIL	American Journal of International Law
ArbIntl	Arbitration International
ASIL	American Society of International Law
AsperRevIntlBusAndTradeL	Asper Review of International Business and Trade Law
BerkeleyJIntlL	Berkley Journal of International Law
BITs	Bilateral Investment Treaties
BYIL	British Yearbook of International Law
CalLRev	California Law Review
CaseWResJIntlL	Case Western Reserve Journal of International Law
ColumJTransnatlL	Columbia Journal of Transnational Law
ColumLRev	Columbia Law Review
ConnecticutJIntlL	Connecticut Journal of International Law
DenvJIntL&Pol	Denver Journal of International Law and Policy
DSB	Dispute Settlement Body
DukeJComp&IntlL	Duke Journal of Comparative & International Law
DukeLJ	Duke Law Journal
ECOSOC	The Economic and Social Council
EEZ	Exclusive Economic Zone
EJIL	European Journal of International Law
EnergyStudRev	Energy Studies Review
EthicsIntlAff	Ethics and International Affairs
EurEconRev	European Economic Review

FAO	Food and Agriculture Organization
FlaJIntlL	Florida Journal of International Law
FordhamIntlLJ	Fordham International Law Journal
FordhamLRev	Fordham Law Review
GATT	General Agreement on Tariff and Trade
GeoJIntlL	Georgetown Journal of International Law
GeoLJ	Georgetown Law Journal
GWashIntlLRev	George Washington International Law Review
HagueYIL	Hague Yearbook of International Law
HarvIntlLJ	Harvard International Law Journal
HJIL	Heidelberg Journal of International
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
ICSIDRev	International Centre for Settlement of Investment Disputes Review
ILC	International Law Commission
ILM	International Legal Materials
ILQ	International Law Quarterly
ILR	International Law Reports
ILSAJIntl&CompL	ILSA Journal of International & Comparative Law

IntEnergLawTaxatRev	International Energy Law and Taxation Review
IntlBusLJ	International Business Law Journal
IntlLaw	International Lawyer
JCPOA	Joint Comprehensive Plan of Action
JDevEcon	Journal of Development Economics
JEH	Journal of Economic History
JIEL	Journal of International Economic Law
JIntlArb	Journal of International Arbitration
JLPol'y&Globalization	Journal of Law, Policy and Globalization
JTransnatLawPol	Journal of Transnational Law and Policy
JWELB	Journal of World Energy Law and Business
JWIT	Journal of World Investment & Trade
JWT	Journal of World Trade
MelbJIntlL	Melbourne Journal of International Law
MFN	Most-Favoured Nation
MichJIntlL	Michigan Journal International Law
MichLRev	Michigan Law Review
MJIEL	Manchester Journal of International Economic Law
NatResourcesJ	Natural Resources Journal
NIEO	New International Economic Order
NILR	Netherlands International Law Review
NwJIntlL&Bus	Northwestern Journal of International Law & Business
NYIL	Netherlands Yearbook of International Law
NYUJIntlL&Pol	New York University Journal of International Law and Politics
OECD	Organization for Economic Cooperation and Development

OPEC	Organization of the Petroleum Exporting Countries
PCIJ	Permanent Court of International Justice
PennStIntlLRev	Pennsylvania State International Law Review
PSNR	Principle of Permanent sovereignty over Natural Resources
QLR	Quinnipiac Law Review
RBDI	Revue Belge de Droit International
Res	Resolution
Rev	Review
RevBelgeDI	Revue Belge de Droit International
RGDIP	Revue Générale de Droit International Public
RIAA	Reports of International Arbitral Awards
SALJ	South African Law Journal
SanDiegoIntlLJ	San Diego International Law Journal
StanJIntlL	Stanford Journal of International Law
StanLRev	Stanford Law Review
SyracuseJIntlL&Com	Syracuse Journal of International Law and Commerce
TempIntl&CompLJ	Temple International and Comparative Law Journal
TexIntlLJ	Texas International Law Journal
TexLawRev	Texas Law Review
TL&D	Trade, Law and Investment
UCDavisJIntlL&Pol	University of California Davis Journal of International Law and Policy
UChiLRev	The University of Chicago Law Review
UCLAJIntlEnvtlL&Pol	UCLA Journal of Environmental Law and Policy

UCLAJIntlL&ForeignAff	The UCLA Journal of International Law and Foreign Affairs
UGhanaLJ	University of Ghana Law Journal
UNCITRAL	United Nation Commission on International Trade Law
UNCLOS	United Nations Convention on Law of Sea
UNFCCC	The United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UPaJIntlEconL	University of Pennsylvania Journal of International Economic Law
UTasLRev	University of Texas Law Review
VaJIntlL	Virginia Journal of International Law
Van JTransnatlL	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on Law of Treaties
WidenerLRev	Widener Law Review
WTO	World Trade Organization
YaleJIntlL	Yale Journal of International Law
YaleJIntlL Online	Yale Journal of International Law Online
YaleLJ	Yale Law Journal

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Table of Legal Instruments

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Agreement between Japan and the Islamic Republic of Iran on Reciprocal Protection and Protection of Investment (2016)

Agreement on Reciprocal Promotion and Protection of Investments between the Republic of Turkey and the Islamic Republic of Iran (1996)

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Atlantic Charter (1941)

British Model Investment Treaty

Charter of the Organization of American States (1948)

Charter of the United Nations (1945)

Convention Africaine sur la Conservation de la Nature et des Ressources Naturelles (2003)

Convention on Continental Shelf (1958)

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The Production Sharing Contract of Indonesia between Pertamina and Overseas Petroleum Investment Corporation and Treasure Bay Enterprise Ltd

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Vienna Convention on State Succession in respect of Treaties (1978)

Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983)

Introduction

Preface

The analysis of the PSNR through the review of its applicability to the Chinese mineral cases (i.e. *China — Raw Materials*[1] and *China — Rare Earths*[2]) forms the basis of the argument developed in this research. The PSNR has not been addressed by the WTO Agreements.[3] More specifically, in the above-mentioned disputes, China relied upon the PSNR to justify its invocation of Article XX (g) of the GATT general exceptions in order to restrict its mineral exportations. To do so, the Panel and the Appellate Body used this principle as a relevant rule of international law in interpreting Article XX (g) of the GATT concerning the 'conservation of exhaustible natural resources'. In addition to the above, a study about the relationship between the exercise of sovereign rights of the WTO Members over their natural resources and the making of appropriate commitments in relation to the export duties/taxes[4] under the WTO Accession Protocol is conducted. Hence, it must be stressed that the scope of this research is confined exclusively to the status of the PSNR within the two legal domains referred to above.

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[1] *China — Measures Related to the Exportation of Various Raw Materials* (WT/DS394, 95 and 98/R) Panel Report, [5 July 2011] and *China — Measures Related to the Exportation of Various Raw Materials* (WT/DS394, 395 and 398/AB/R), Appellate Body Report, [30 January 2012] [hereinafter: *China—Raw Materials*], available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm <accessed 26 September 2019>.

[2] *China — Measures Related to the Exportation of Rare Earth, Tungsten, and Molybdenum* (WT/DS431, 432 and 433/R) Panel Report, [26 March 2014] [hereinafter: *China—Rare Earths*] and *China — Measures Related to the Exportation of Rare Earth, Tungsten, and Molybdenum* (WT/DS431, 432 and 433/AB/R) Appellate Body Report, [7 August 2014] [hereinafter: *China—Rare Earths*], available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm <accessed 26 September 2019>.

[3] 'World Trade Report: Trade in Natural Resources' (2010) WTO Secretariat, Geneva, p. 179, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwjDou2j7O3kAhVDaVAKHdgC20QFjABegQIAhAC&url=https%3A%2F%2Fwww.wto.org%2Fenglish%2Fres_e%2Fbooksp_e%2Fanrep_e%2Fwtr10-0_e.pdf&usg=AOvVaw1AG4MVGo7Af-WzU8VZZ2F- <accessed 26 September 2019>.

[4] Throughout this thesis, the term 'export duties' and 'export taxes' are used interchangeably.

In analyzing the different aspects of the PSNR, the issue of natural resources as a source of national wealth has great relevance to the economic development of States.[5] The emergence of this principle can be traced back to the conflict of interest between resource-owning countries on one hand, and the Colonial Powers on the other hand. It is based upon two interrelated international law concepts, namely the sovereignty of the State and the right to self–determination. In parallel to its political aspect, the right to self–determination includes an economic dimension that plays a

[5] Contrariwise, 'natural resources has the indirect distorting effects upon the decision making structure and management which can be categorized into the mismanagement of governments in using the resources, the weakness of economic policy making and non-use of trade policies including free trade which leads to the economic growth. Nonetheless, from the mid of 20th century most of the empirical surveys recognized that the abundance of natural resources gives rise to the decline in the economic growth. In this respect, they refer to the economic situation of developing countries that they enjoy a lower economic growth comparing to the poorly-endowed resources countries. The abundance of natural resources tends to aggravate the rent seeking behaviours aimed at a distortion of resources allocation, reduction of productive activities and economic efficiency emerged, the increase of social inequalities and the economic growth slowdown of the resource rich countries. Allegedly, since 1960s onwards, the resource-poor economies have shown a better economic function in comparison with the resource-rich countries. According to Ricardo, the natural resource–based economic development is unsustainable. In the economics literature there is a so–called phenomenon of Resource Curse which indicates that the resource–rich economies are failed in boosting their economic growth in spite of resource benefits'. Thorvaldur Gylfason, 'Natural resources, education, and economic Development' 45 (2001) EurEconRev pp. 847-859, available at https://www.sciencedirect.com/science/article/pii/S0014292101001271 <accessed 26 September 2019> and Jeffrey D. Sachs and Andrew M. Warner, 'Natural resources and economic development: the curse of natural resources' 45 (4-6) (2001) EurEconRev pp. 827–838, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwit2qvi7e3kAhUILVAKHf8mBk8QFjAAegQIAhAC&url=https%3A%2F%2Fwww.earth.columbia.edu%2Fsitefiles%2Ffile%2Fabout%2Fdirector%2Fpubs%2FEuroEconReview2001.pdf&usg=AOvVaw27FnEjL4ELBceA2Y1Bt9WW <accessed 26 September 2019>; Torvik Ragnar 'Natural resources, rent seeking and welfare' 67 (2002) JDevEcon pp. 455-470, available at http://www.svt.ntnu.no/iso/ragnar.torvik/jde.pdf <accessed 26 September 2019>; Richard M. Auty & Raymond F. Mikesell, *Sustainable Development in Mineral Economies* (Oxford: Clarendon Press 1998) and David Ricardo, 'The Principles of Political Economy and Taxation' in Piero Sraffa and M. H. Dobb (eds) *Works and Corresponds of David Ricardo,* Vol 1 (London: Royal Economic Society 1851).

pivotal role in the exercise of full sovereign rights over natural resources. Taken together, the PSNR is described as

> [o]ne of the legal expressions of the economic aspects of political sovereignty of States which is a cornerstone of the present organization of the international community. It takes roots in UN resolutions which stress the significance of that principle as a basic constituent of both the right of peoples to self-determination as a human right and the duty of States to cooperate with one another'.[6]

After the establishment of the United Nations, the decolonization process was triggered by the UN which permitted developing countries to pursue their demand for political independence. From the early 1950s, the notion of sovereignty over natural resources came under the attention of the international community through the discourse on economic self–determination. The newly independent countries focused on avoiding the predominant role of former Colonial powers in exploiting their own natural resources. The establishment of the PSNR also resulted in sweeping changes to international investment law. The Principle of Sovereignty over Natural Resources is composed of a set of rights such as the right to exploration, the right to development and the right to utilization and exploitation of natural resources. With respect to the rights and duties of States

> [t]hroughout the entire permanent sovereignty debate an inherent tension can be noted between efforts, on the one hand, to formulate as many rights as possible of (colonial) peoples and developing States and to define them as 'hard' as possible and, on the other hand, efforts to qualify permanent sovereignty by formulating duties incumbent upon right-holders in order to create a balance between the interests of all parties involved and thus to serve best the main objective of permanent sovereignty: to promote development.[7]

[6] Subrata Roy Chowdhury, 'Permanent Sovereignty and its Impact on stabilization Clauses, standards of compensation and Patterns of development Co-operation' in Hossain Kamal and Subrata Roy Chowdhury (eds), *Permanent Sovereignty over Natural resources in International Law* (Frances Printer Publisher 1984) p. 43.

[7] Nico J. Schrijver, *Sovereignty over natural resources: balancing rights and duties* (Cambridge University Press 1997) p. 35.

Discussing the concept of 'sovereignty' as the main element of the PSNR makes it evident that this notion has been evolving over history.[8] 'Sovereignty' has been used, for instance, to claim unfettered discretion and unlimited control over a territory and people, to define the independence of a country, to declare the self–determination of a people, to describe the legitimacy of a government, to express recognition of a State, and to claim government competencies.[9] In this respect, the exercise of sovereign rights over natural resources is subject to the constraints imposed by public international law through for example the membership of States in international organizations such as the WTO. Besides, according to the theories supported by scholars, the notion of 'sovereignty' is defined not only by independence, but through a State's ability to comply with international obligations.[10] Arguably, the economic development pursued by the developing resource–owning countries is not always compatible with environmental goals.[11] The ongoing opposition between conservation and use of natural resources persists.

Structure of the Thesis

This research is composed of an 'Introduction', three 'Chapters' and a 'Conclusion'. The aim of Chapter One is to explore the origin of the PSNR through exploring its key components, i.e. sovereignty and self–determination. A detailed analysis of the principle's development under the UN system is also examined in Chapter One. Chapter Two seeks to highlight the growing influence of the PSNR on international investment law. It further elaborates on the relationship between the protective mechanisms of the bilateral investment treaties (BITs) and exercising sovereignty over

[8] Louis Henkin, 'That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera', 68 (1999) FordhamLRev p. 1 and Sohail H. Hashmi, 'Introduction' in Sohail H. Hashmi (ed) *State Sovereignty: Change and Persistence in International Relations* (Pennsylvania State University Press 1997) p. 1.

[9] Winston P. Nagan & Craig Hammer, 'The Changing Character of Sovereignty in International Law and International Relations', 43 (2004) ColumJTransnatlL pp. 143–45.

[10] Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* (Harvard University Press 1995) p. 26.

[11] Shinya Murase, 'Perspectives from International Economic Law on Transnational Environmental Issues', (1995) 253, Recueil des Cours de l'Académie de Droit International, p. 308.

natural resources. Chapter Three, which is divided into five parts, is the most comprehensive chapter of this research.

After a brief introduction to the *China — Raw Materials* and *China — Rare Earths*, the role of the PSNR in interpreting Article XX (g) of the GATT within the context of Chinese cases is addressed. To this end, analysis of natural resources definitions is made, too. Part three of this Chapter explores the reasoning of the Panel and the Appellate Body reports of the *China — Raw Materials* and *China — Rare Earths* on the limited application of the PSNR; therefore, elaboration on curtailment of the sovereignty is of paramount importance for this part. The requirements of export quantitative restrictions with respect to exhaustible natural resources are discussed in Part four of Chapter Three. Part five of this Chapter examines the exercise of sovereign rights of China via the mechanism of levying export duties on its natural resources. Furthermore, the question of applicability of Article XX (g) of the GATT on China Accession Protocols of the WTO Members is addressed.

The different provisions of the Accession Protocols (including the Working Party Reports of a number of WTO Member States in the field of export duties and their implications for the exercise of sovereign rights on their own natural resources are explored, too. Then, the status of minerals in Iran as an acceding country to the WTO is scrutinized within which the viable lessons for this State during its accession negotiations to the WTO is drawn. The 'Conclusion" part will eventually put forward the findings presented in this research together with some proposals on retaining PSNR within the WTO accession process.

Chapter 1: Development of the PSNR

Part One: Sovereignty as the Main Source of the PSNR

I. General Examination of the Term 'Sovereignty'

A. Context and the Meaning of 'Sovereignty'

The Oxford Dictionary defines 'Sovereignty' as supreme power or authority; the authority of a State to govern itself or another State.[12] The word 'Sovereignty' is derived, via the old French word *soverainete*, from Medieval Latin: 'superanitas', 'supremitas' or 'suprema potestas'.[13] It is also contended that the initiation of the term 'Sovereignty' is derived from the old French term 'soverain', and from Vulgar Latin root 'superānus' from Latin 'super' ('above').[14] Black's Law Dictionary defines 'Sovereignty' as:

> [t]he supreme, absolute, and uncontrollable power by which any independent State is governed; supreme political authority; the supreme will; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a State, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or State, which is sovereign and independent.[15]

[12] https://www.lexico.com/en/definition/sovereignty <accessed 26 September 2019>.

[13] J.H.W. Verzil, *International Law in Historical Perspective*, vol. I, General Subject (Sijthoff 1968) p. 257 and E.N. Van Kleffens, 'Sovereignty in International Law' (1953) 82 Recueil des Cours de l'Académie de Droit International, p. 9.

[14] http://www.memidex.com/sovereign+head-of-state <accessed 26 September 2019>; (cf Italian *sovrano*, Spanish *soberano*).

[15] Black's Law Dictionary (6th edn, West Group 1991) p. 1396.

B. ‘Sovereignty’ during Ancient Times

The concept of sovereignty emerged from Aristotle's Politics, Roman law, and medieval law.[16] Aristotle postulated that there must be a supreme power in the State but that it might belong to one, a few, or many.[17]

The term ‘Sovereignty’ did not exist in ancient times although its framework had been developed by the terms ‘liber’ and ‘liberas’ which is equal to the notion of ‘sovereign and sovereignty, independence and independent’.[18] According to the Romans, although the term ‘Sovereignty’ had not been invented, its quintessence was explained through the requirement for an independent State of being subject only to the State's own laws.[19] Under the Roman law the ‘imperium’, or the source of authority is coupled with the Roman community, which conferred it upon the ruler.[20]

The notion of sovereignty was further developed in the early Middle–Ages as a result of the special situation of the Holy Roman Empire.[21] During the medieval era, the theories of sovereignty developed by the commentators, which relied heavily upon Roman law, were often based upon misconceptions of the original sources.[22]

C. Evolution of the Modern Idea of ‘Sovereignty’

[16] Brad R. Roth, *The Enduring Significance of State Sovereignty*, 56 FLA. L. REV. 1017 (2004) p. 1020.

[17] Charles Edward Merriam, JR., *History of the Theory of Sovereignty since Rousseau* (Kessinger Publishing, LLC 2007) p. 11.

[18] Marek Stanislav Korowicz, ‘Some Present Aspects of Sovereignty in International Law’ (1961) 102 Recueil des Cours de l’Académie de Droit International p. 7.

[19] Ibid., F. H. Hinsley, *Sovereignty* (Cambridge University Press 1986) p. 159.

[20] Merriam, JR (2007) p. 12.

[21] About the history of sovereignty, see also Bengt Broms, ‘States’ in Mohammed Bedjaoui (General Editor), *International Law: Achievement and Prospects* (Martinus Nijhoff Publishers 1991) p. 42 and John Kuhn Bleimaier, ‘The Future of Sovereignty in the 21st Century’ (1993) 6 HagueYIL p. 19.

[22] Kenneth Pennington, ‘Roman and Secular Law, in Medieval Latin’ in F.A. Mantello and A.G. Rigg (eds) *Medieval Latin: An Introduction and Bibliographical Guide* (Scholarly Book Services Inc 1996) p. 258

In this section, a selected number of key theories about the sovereignty are set out. The roots of the modern concept of sovereignty can be specifically found in the view of the French thinker Jean Bodin who defined sovereignty as 'the most high, absolute and perpetual power over the citizens and subjects in a Commonwealth'.[23] He further put forward that there was 'nothing upon earth [...] greater or higher, next unto God, than the majesty of kings and sovereign princes'.[24]

He also established the foundation for absolutism in the Kingdom of France.[25] His theory of sovereignty expressed the consolidation of power in the hands of the absolute monarchs, both internally within their kingdoms and externally against other powers.[26] Bodin's thesis was that a unitary central authority should wield unlimited power over citizens and subjects, essentially unconstrained by law.[27]

Bodin's notion of absolutism came under rigorous scrutiny of Hugo Grotius and Thomas Hobbes. Hugo Grotius introduced the sovereignty as a concept bearing a large number of limitations in the framework of international relations for the first time. While defining sovereignty as a legal power intangible by other sources, the significant contribution of Hugo Grotius lay in his establishment of a theoretical framework for the interplay between sovereigns in the community of nations.[28]

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[23] Jean Bodin, *The Six Books of a Commonwealth*, (Book. I), K.D. McRae (ed) (Harvard University Press, 1962) p. 84

[24] Ibid.; Edgar Grande and Louis W. Pauly, *Complex Sovereignty: Reconstituting Political Authority in the Twenty-first Century* (University of Toronto Press 2007) pp. 9–10; W. R. Bisschop, 'Sovereignty', in Joseph Weiler and Alan T. Nissel (eds), *International Law: Critical Concepts in Law*, vol. II, Fundamental of International Law I (Routledge 2011) p. 379; Pavlos Eleftheriadis, 'Law and Sovereignty', 29(5) (2010) Law and Philosophy pp. 535-542; Samantha Besson, 'Sovereignty' in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law*, vol. IX (Oxford University Press 2012) pp. 368–369; Ronald A. Brand, 'External Sovereignty and International Law' 18 (1994-1995) FordhamIntlLJ pp. 1685, 1688 and John Hilla, 'The Literary Effects of Sovereignty in International law' 14 (2008–2009) WidenerLRev pp. 77, 84.

[25] Julian Franklin, 'Jean Bodin and the End of Medieval Constitutionalism', in Horst Denzer (ed) *Jean Bodin: Verhandlungen der internationalen Bodin Tagung in München*, (Verlag C. H. Beck 1973) p. 151.

[26] Luzius Wildhaber, 'Sovereignty and International Law', in R. St. J. Macdonald and Douglas M. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Martinus Nijhoff Publishers 1983) p. 428.

[27] Joseph A. Camilleri and Jim Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (Edward Elgar Publication 1992) p. 18.

[28] Hilla (2008–2009) p. 92.

Thomas Hobbes expanded the scope of the absolute sovereignty theory beyond what Bodin had proposed. His theory is contractual in nature. The 'Sovereign' in his opinion, enjoys several incommunicable and inseparable rights.[29] Therefore, in comparison to Bodin's theory, Hobbes describes the absolute sovereign as a concept free from any constraints and exception.[30] Pufendorf concedes a contractual basis as a foundational principle of the State but requires the completion of both an agreement to form a civil society and a subsequent agreement between the people, formed by the first agreement and the government.[31]

He also subscribed to a theory that the only essential quality of the sovereign is that it be the supreme authority within the State; therefore it is not essential that the sovereign be absolute.[32] John Locke similarly sought to forge a way to strike balance between Hobbes's absolutism and the limited notions of popular sovereignty.[33] Under his theory, individual members of society voluntarily entered into a social pact to obey the government because governments were merely the 'agents and trustees of the people'.[34] In view of Rousseau, sovereignty also functions as a social compact. He held that:

> the act of association comprises a mutual undertaking between the public and the individuals, and that each individual, in making a contract, as we may say, with himself, is bound in a double capacity; as a member of the Sovereign he is bound to the individuals, and as a member of the State, to the Sovereign.[35]

[29] The historical background of the notion of 'Sovereignty': Besson (2012) p. 369; Thomas Hobbes, Leviathan (Richard Tuck (ed)) (Cambridge University Press 1996) pp. 149–152; Camilleri and Falk (1992) pp. 19–20; Brand (1994–1995) pp. 1685, 1687 and Helen Stacey, 'Relational Sovereignty' 55(5) (2003) StanLRev pp. 2029 and 2032.

[30] Merriam, JR. (2007) p. 26.

[31] Ibid., p. 28.

[32] Ibid., p. 29.

[33] Hilla (2008–2009) pp. 77 and 98.

[34] The Federalist No. 46 (James Madison) (Benjamin Fletcher Wright ed. 1961) p. 330.

[35] Jean–Jacques Rousseau, 'the Social Contract' in J. Adler Mortimer, Clifton Fadiman, and Philip W. Goetz (eds) *Great Books of the Western world* (Encyclopedia Britannica 1952) p. 392.

Jean–Jacque Rousseau's concept of sovereignty embedded the government in the people, imbuing the collective 'people' with the only standard of legal personality possible: the ability to strike a social compact producing a supreme, law-making power.[36] Political sovereignty, accordingly, becomes a mere reflection of popular sovereignty; if the sovereign does not respect popular will, it risks losing its attributions.[37] This sovereignty of people is inalienable, indivisible, and infallible.[38] According to him, 'sovereignty' is absolute as 'sovereignty' is the general will of the people.[39]

Vattel distinguished quite clearly between internal and external sovereignty, considering every nation governing itself without dependence on any foreign power as a sovereign and equal State.[40] John Austin emphasizes 'independence' so as to define both sides of sovereignty in terms of habits of obedience. Law, according to him was the command of a sovereign political superior enforced by a sanction. The definition of sovereignty was a question of fact, not of law, but the existence of a sovereign was a condition of the legal system. [41] In his view, to interpret a legal system, one must first identify a sovereign, or a person or group of people who habitually obeys no one, whose commands are habitually obeyed.[42]

HLA Hart recognizes that Austin's view, namely that law stems from the command of a political superior, did not account for the requisite authoritative component of law; Hart then generally addressed the nature and implications of the missing authoritative element.[43] He concedes that a State's sovereignty cannot excuse it from its international treaty obligations. In his view '[a] State may impose obligations on itself by promise, agreement, or treaty is not consistent with the theory that States are subject only to rules which they have thus imposed on themselves'.[44] Hart further

[36] Merriam, JR (2007) p. 35.

[37] Besson (2012) p. 369.

[38] Wildhaber (1983) p. 431.

[39] Jean–Jacques Rousseau, *The Social Contract and Discourses* (Ernest Rhys ed., G. D. H. Cole trans.) (J. M. Dent & Sons 1913) pp. 26-29.

[40] Hilla (2008-2009) p. 115.

[41] Bernard Gilson, *The Conceptual System of Sovereign Equality* (PEETERS 1984) p. 54.

[42] John Austin, *The Province of Jurisprudence Determined* (J. Murray 1832) pp. 199–212.

[43] Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford University Press 1976) pp. 97-114.

[44] Ibid. p. 219.

adopts an understanding of sovereignty as an 'autonomy'.[45] Sovereignty exists only within the limits of international law and only to the extent that the rules of international law allow.[46]
To recapitulate, it can be understood that the early modern theories of sovereignty identified the 'sovereignty' as a concept which is located in a single organ of the State or concentrated in a person.

D. Westphalian Sovereignty

The most significant event for the development of the modern concept of sovereignty was the Peace of Westphalia in 1648. It is understood that the Peace of Westphalia was the decisive moment for the inception of a European system of authority under the sovereignty of the nation State.[47] The Treaty of Westphalia brought an end to the Thirty Years' War — devastated much of continental Europe[48] — replaced the ruling religious hierarchical structure dominated by the Pope and Holy Roman Emperor with a horizontal structure of independent sovereign States that notionally possessed equal legal legitimacy and authority.[49] The European rulers sought to establish international peace by creating boundaries for State power vis-à-vis another State.[50] It must be pointed out that, in its Westphalian origin, the concept of sovereignty focused on the absolute independence of each sovereign State from any outside authority (i.e. non–intervention in domestic affairs). Under the Treaty of Westphalia, sovereignty is defined as an absolute power and authority of a State within the geographical borders as well as the control over its territory.

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[45] Ibid., pp. 223–224.

[46] Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' 21(4) (2010) EJIL p. 976.

[47] Besson (2012) p. 368 and Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) p. 14.

[48] Michael J. Kelly, 'Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver" Revolutionary International Legal Theory or Return to Rule by the Great Powers?', 10 (2005) UCLAJIntlL&ForeignAff p. 374.

[49] Richard Falk 'A New Paradigm for International Legal Studies: Prospects and Proposal', 84(1975) YaleLJ pp. 980–987.

[50] Kelly (2005) pp. 373–374.

Beyond the borders, however, national sovereignty faces a certain level of limitations vis-à-vis other sovereign States. National sovereignty within the legal structure represents the advent of central power exercising its authority in law–making and law enforcement within a specific territory.[51]

E. Internal and External Manifestations of Sovereignty

'Sovereignty' has been defined as a notion which refers to the capacity of State to exercise control over its territory and then the power to act at the international level, representing that territory and its people.[52] Furthermore, it is contended that sovereignty 'implies a State's lawful control over its territory generally to the exclusion of other States, authority to govern in that territory, and authority to apply law there'.[53]

'Sovereignty' attributes to a State when it enjoys three elements of population, territory and authority. Crawford defines Sovereignty as a notion which refers to the capacity of State to exercise control over its territory and then the power to act at the international level, representing that territory and its people.[54] Sovereignty is a dynamic concept. It might bear a different meaning in different historical periods despite of remaining certain essential characteristics.[55]

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[51] Besides, in 1815, during the Congress of Vienna in which a collection of Great Powers such as Great Britain, Prussia, Russia, and Austria attempted to reorganize European political geography and international law, the evolution of sovereignty incorporated the doctrine of sovereign equality into a system of legalized hegemony. See Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004) pp. 91, 96 and 102.

[52] James Crawford (ed) *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2008) p. 448.

[53] *Boumediene v Bush (President of the United States)*, Decision, Docket No 06-1195, 553 US 723 (2008), 128 S.Ct. 2229 (2008), ILDC 1039 (US 2008), 12th June 2008, Supreme Court [U.S.] para. 50.

[54] Crawford (2008), Ibid.

[55] There are a plenty of the references and the stipulations of the term 'Sovereignty' and the necessity of respecting and adhering to it under the international treaties such as Charter of the United Nations, Charter of the Organization of American States (1948) Paragraph 2 of the Preamble, Article 1 and 5, Convention on International Civil Aviation (1944) Article 1 and 3(c), the Statute of the International Atomic Energy Agency (1957) Article III-D, Article IV-D, Article XVII(A).

According to Oppenheim, 'States are the principal subjects of international law'.[56] There are several criteria upon which a State can be recognized under the international legal system. These criteria can be articulated as:[57] i) people, ii) territory, iii) government and iv) capacity to enter into relations with other States. The latter refers to external sovereignty.

According to Oppenheim and Lauterpacht, apart from international law, there is as yet no superior authority above sovereign States.[58] Oppenheim asserts that the phrase 'sovereign nation' entails two kinds of sovereignty possessed by each State: *dominum*, or territorial sovereignty, which is supreme authority over all persons, items, and acts within that State's territory and *imperium*, or personal sovereignty, which is supreme authority over all citizens of that State, be they at home or abroad.[59]

In the view of Brownlie sovereignty is the basic constitutional doctrine of the law of nations[60] and a major aspect a relation to other States (and to organizations of States) defined by law.[61] He claims that the importance of sovereignty stems from its relationship to the 'equality of States [which] represent[s] the basic constitutional doctrine of the law of nations'.[62]

Historically speaking, Vattel has clearly distinguished between internal and external sovereignty.[63] Internal sovereignty highlights that the State has supreme power prevailing over its people. It implies that the Government of a State is considered the ultimate authority within its borders and jurisdiction.[64] The conception of sovereignty under this category may be equated to the power of a State to determine its tasks; the means that are adequate and necessary for the fulfillment of such

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[56] Robert Jennings and Arthur Watts KCMG QC (eds) *Oppenheim's International Law, Vol. 1 Peace,* (9th edn Longman 1996) p. 16.

[57] Article 1 of Montevideo Convention on the Rights and Duties of States 1933.

[58] Jennings and Watts KCMG QC (1996) pp. 6, 12 and pp. 114-116.

[59] Ibid., p. 123.

[60] Ian Brownlie, *Principles of Public International Law* (6th ed, Oxford University Press 2003) p. 298.

[61] Ibid., p. 287.

[62] Ibid.

[63] Hilla (2008–2009) p. 115.

[64] 'Internal sovereignty is the power of each State freely and autonomously to determine its tasks, to organize itself and to exercise within its territory a monopoly of legitimate physical coercion'. Wildhaber (1983) p. 436.

task; the supreme quality of State power in the sense of a lack of derivation from any other earthly power.[65]

Although sovereignty is a characteristic attribute of the State, meaning that there exists no superior authority above the State to exercise the power of command, sovereignty does not mean that the State may permit itself to do everything. Sovereignty is bound by the rules of international law.[66] Alejandro Alvarez, in his separate opinion stated that:

> […] by State sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States. Sovereignty confers upon States and imposes obligations on them.[67]

In the Islas Palmas Arbitration, the following classic definition of external sovereignty was given by the arbitrator:

> [S]overeignty in the relations between States signifies independence, and that independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other States, the functions of State. This right has, of course, as a corollary, a duty to respect the pertinent international obligations of the State'.[68]

For this reason, 'sovereignty' is sometimes used in lieu of 'independence' as a basic criterion for statehood. It must be pointed out that sovereign independence of States 'does not mean freedom from the law, but merely freedom from control by other States'.[69] Independence as a part of the term 'sovereignty' is the external manifestation of sovereignty. Schwarzenberger, while having

[65] Wildhaber (1983) pp. 435–436.

[66] Marcel Sibert, *Traite de Droit International Public*, tome I (Paris: Librairie Dalloz 1951) p. 250.

[67] Separate Opinion of Judge Alvarez in Corfu Channel Case (United Kingdom of Great Britain and Ireland v. Albania) (Judgement) [1949] ICJ Rep, p. 42.

[68] *Islands of Palmas Case* (Netherlands/United States) (1928) 2 RIAA, p. 829. http://legal.un.org/riaa/cases/vol_II/829-871.pdf <accessed 26 September 2019>.

[69] James Leslie Brierly and Humphery Waldock, *The Law of Nations* (6th edn, Oxford: Clarendon Press 1963) p. 130.

analyzed the jurisprudence of the International Courts, asserted that it leaves no doubt that the International Courts 'regard the independence of sovereign States as one of the cornerstones of the existing individualistic system of international law'.[70] Independence connotes the power of the State to manage its own external affairs without interference of other States.[71] Judge Anzilotti, in his individual opinion in the case concerning Customs Regime between Germany and Austria (Advisory Opinion), held that:

> [I]ndependence [...] is really no more than the normal condition of States according to international law; it may also be described as sovereignty, or external sovereignty, by which is meant that the State has over it no other authority than that of international law.[72]

As Luzius Wildhaber clarifies, within the limits of international law, States are free to determine their international relations, to establish, and to assume membership of, international organizations, and to conclude and revoke treaties. This classification of sovereignty is also dealt with in various other connotations:

- 'It signifies independence, that is, the power of a State to determine its tasks, means and structures independently from any foreign State or organization, subject only to international law;
- It may express claims to absolute independence, subject not even to international law;
- In the same vein, it may mean a purely political claim to a superior status among the states, based upon military strength and comprehensive autonomy in fact or any other factors;

[70] Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. I (Stevens & Sons Ltd. 1949) p. 53.

[71] Isagani A. Cruz, *International Law* (Central Law Book Publishing Co. 2000) p. 31.

[72] *Customs Regime between Germany and Austria* (League of Nations v. Germany and Austria) (19 March 1931) PCIJ Series A/B No. 41. http://www.worldcourts.com/pcij/eng/decisions/1931.09.05_customs.htm <accessed 26 September 2019>. Ralf Alleweldt, 'Customs Regime between Germany and Austria (Advisory Opinion)', in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, vol. II (Oxford University Press 2012) p. 981.

- It is used in the context of decolonization, in order to stress the principles of self-determination and of the equality of all States; and
- It serves as a catchword for claims to a new international economic order, which should allow a factual economic, social and cultural sovereignty of all participants'.[73]

F. The Evolution of 'Sovereignty' under the System of the League of Nations

The League of Nations was formed in 1919. The foundation of this international organization was premised upon the sovereign equality and legalized hegemony.[74] Between 1919–1945, the PCIJ sought to delineate the framework of 'sovereignty'. By way of illustration, in the Islas Palmas Arbitration, the following classic definition of external sovereignty was given by the arbitrator:

> [S]overeignty in the relations between States signifies independence, and that independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other States, the functions of State. This right has, of course, as a corollary, a duty to respect the pertinent international obligations of the State'.[75]

Similarly, the Court in *Austro-German Customs Union* Case provided that sovereignty is:

> the continued existence of [a State] within her present frontiers as a separate State with the sole right of decision in all matters economic, political, financial, or other [...].[76]

[73] Wildhaber (1983) pp. 436–437.

[74] Simpson (2004) p. 154.

[75] *Islands of Palmas Case* (Netherlands/United States) (1928) 2 RIAA, p. 829. http://legal.un.org/riaa/cases/vol_II/829-871.pdf <accessed 26 September 2019>.

[76] *Customs Regime between Germany and Austria*, p. 45.

In clarification of the concept of 'sovereignty', the in *Wimbeldon* Case, the PCIJ held that a State has not necessarily lost its sovereignty simply because it has 'contracted out' various sovereign rights.[77]

G. 'Sovereignty' under the Auspices of the United Nations System

Having offered no definition of sovereignty, the Charter of United Nations sought to attain an identical purpose to the Treaty of Westphalia to avoid war by organizing an international community.[78] Article 2 of the UN Charter stipulates three of the rules of Westphalian sovereignty: 'The Organization is based on the principle of the sovereign equality of all its Members'.[79] Historically, in the opinion of Vattel, sovereign equality as an international law correlative to the natural equality of people is framed under the following paragraph which highlights that:

> [s]ince men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a State of nature, are by nature equal and hold from nature the same obligations and the same rights. […] A dwarf is as much a man as a giant is; a small republic is no less sovereign than the most powerful Kingdom.[80]

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[77] *Case of the SS 'Wimbeldon' (United Kingdom, France, Italy & Japan v. Germany)* [hereinafter: *S.S. 'Wimbledon' case*] (Judgment of 17 August 1923) PCIJ Series A No 1, p. 25. http://www.worldcourts.com/pcij/eng/decisions/1923.08.17_wimbledon.htm <accessed 26 September 2019>. In addition, *Lotus Case* will be discussed in Chapter Three where the limitation on the notion of 'sovereignty' is examined. *Lotus* (France v Turkey) (Judgment of 7 September 1927) PCIJ Series A No. 10. http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm <accessed 26 September 2019>.

[78] UN Charter Article 1(1).

[79] UN Charter Article 2(1).

[80] E de Vattel, 'Le droit de gens, Introduction', Sec. 18 and 19, as cited in Simpson (2004) p. 32.

This provision is recognized as a basis for cooperation among the UN Member States as well as a peremptory norm of international law.[81] It is also maintained that the aim of the principle of sovereign equality is to regulate the inter–state system.[82] Moreover, United Nations Declaration on the Principles of International Law concerning the Friendly and Cooperation Relations between the States provides that '[a]ll States enjoy sovereign equality'. The Declaration offers a definition of sovereignty under which the States are 'juridically equal', possess 'the right freely to choose and develop [their] political, social, economic and cultural systems', and enjoy territorial integrity and political independence'.

> 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'.[83]

> 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'.[84]

The UN Charter however sets forth a limitation to sovereignty. 'The application of enforcement measures under Chapter VII' as provided in the last part of Article 2(7) authorizes international intervention in the affairs of a sovereign State when pursuant to Chapter VII of the UN Charter, there is 'any threat to the peace, breach of the peace, or act of aggression' that threatens international peace and security. In *Military and Paramilitary Activities in and against Nicaragua Case* the ICJ held that:

[81] Ibid., p. 27.

[82] Ibid., p. 39.

[83] UN Charter Article 2(4).

[84] UN Charter Article 2(7).

> A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems.[85]

Further the Court recognized 'the fundamental principle of State sovereignty, on which the whole of international law rests',[86] and the principle of non-intervention into the matters essentially within the domestic jurisdiction of States as part of international customary law.[87]

Part Two: Right to Self–determination as the Fundament of the PSNR

I. Historical Origins of the Right to the Self–determination

By virtue of the self–determination, all nations are empowered to choose their own political, economic, social and cultural destination.[88] The PSNR is in fact 'an extrapolation of the right to self–determination'.[89] The United Nations has adopted various resolutions within which the freedom of people to pursue their overall development and in particular economic development has been confirmed.

In the late eighteen century, the quest by people for independence manifested itself in the Americans movement towards independence and the French revolution.[90] The attainment of

[85] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* [hereinafter: *Military and Paramilitary Activities in and against Nicaragua case*] [1986] ICJ Rep 14, para. 258, available at https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf <accessed 26 September 2019>.

[86] Ibid., para. 263.

[87] Ibid., paras. 205–206.

[88] Ben Saul et al., *The International Covenant on Economic, Social and Cultural Rights* (Oxford 2014) pp. 14–15 and M. K. Nawaz, 'The Meaning and Range of the Principle of Self-determination', 8(Winter 1965) DukeLJ p. 100.

[89] Ian Brownlie, 'Legal Status of Natural Resources in International Law (Some aspects)' (1979) 162 Recueil des Cours de l'Académie de Droit International, p. 255; Milan Bulajic, *Principles of International Development Law* (Martinus Nijhoff Publishers 1986) p. 245; F.V. Garcia–Amador, *The Emerging International Law of Development* (Oceana Publications 1990) p. 132.

[90] John A. Collins, 'Self-determination in International Law: The Palestinians' 12 (1980) CaseWResJIntlL p. 139.

independence by the United States – a country seen as the cradle of popular sovereignty and the doctrine of civil rights – on July 4th 1776, recognized 'people' as the determinants' of their own history.[91] Similarly, the 1791 French Constitution also declares, under title VI, that '[t]he French nation…will never use its forces against the liberty of people'.[92] The Russian October Revolution in 1917 also makes reference to a quotation advocating the freedom of people.[93] The implicit reference to self–determination was accentuated in the following passage embedded in the Wilson Declaration[94] dated January 18, 1918:

> [A] free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.[95]

Despite the text of the Wilson Declaration, no explicit reference is found in the text of the Covenant of the League of Nations except within Article 22.[96] As a direct consequence of this, a commission of jurists appointed by the League of Nations to examine the secessionist demands of Swedish

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[91] Edmond Jouve, *Le Droit des Peuples* (Paris: PUF 1986) p. 9; Daniel Thürer and Thomas Burri 'Self–Determination', in Rüdiger Wolfrum *Max Planck Encyclopedia of Public International law,* vol. IX (Oxford University Press 2012) p. 114.

[92] The English text of the 1791 French Constitution: www.historywiz.com/primarysources/const1791text.html <accessed 26 September 2019>. Antonio Cassese, *Self–determination of Peoples: A Legal Reappraisal*, (Cambridge University Press 1995) p. 11; James Summers, *Peoples and International Law How Nationalism and Self–Determination Shape a Contemporary Law of Nations*, (Martinus Nijhoff Publishers 2007) pp. 100–107.

[93] Manfred Lachs, 'The Development and General Trends of International Law in Our Time' (1980) 169 Recueil des Cours de l'Académie de Droit International p. 43; 'The purpose of free Russia (was) not domination over other peoples [...] but the establishment of a permanent peace on the basis of the self–determination of peoples', quoted in Arno J. Mayer, *Political Origins of the New Diplomacy, 1917–1918*, (Yale University Press 1959) p. 57.

[94] Joachim Schwietzke, 'Fourteen Points of Wilson (1918)', in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, vol. IV (Oxford University Press 2012) pp. 205–206.

[95] Thürer et al. (2012) p. 114, Cassese (1995) pp. 19–23 and Summers (2007) pp. 127–129.

[96] Covenant of the League of Nations, Adopted in Paris on 29 April 1919 https://history.state.gov/historicaldocuments/frus1919Parisv13/ch10subch1 <accessed 26 September 2019>.

residents of the Åland Islands[97] , maintained that the right of people to self–determination had not been laid down in the Covenant of the League of Nations; hence it was to be viewed merely as a political concept.[98]

II. Advancement of Self–determination through the UN System

A. The Role of the UN Charter in the Establishment of the Right to Self–determination

The legal requirements of self–determination were not laid out by the League of Nations. The emergence of the right to self–determination was influenced by the joint declaration of the US President Franklin D. Roosvelt and the British Prime Minister Winston Churchill, known as the 'Atlantic Charter' which in its Paragraphs 2 and 3 stated that:[99]

> [S]econd, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;

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[97] 'Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Åland Islands question 5' (October 1920) League of Nations–Official Journal, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiyrdT1-u3kAhUIiVwKHe1WAX0QFjAAegQIAxAC&url=https%3A%2F%2Fwww.ilsa.org%2FJessup%2FJessup10%2Fbasicmats%2Faaland1.pdf&usg=AOvVaw1aVKh03-KcyDGyQiFajvlJ <accessed 26 September 2019>; More insights is obtainable in Sten Harck, 'Åland Islands', in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, vol. I (Oxford University Press 2012) pp. 279–285; Cassese (1995) pp. 27–31; Summers (2007) p. 31 and pp. 278–293 and Marc Weller, *Escaping the Self–determination Trap* (Martinus Nijhoff Publishers 2008) pp. 17–18.

[98] Malcolm N. Shaw, *International Law* (4th edn, Cambridge University Press 1997) p. 177; Lachs (1980) pp. 44–45; McWhinney, Edward, 'Self–determination of Peoples and Plural–ethnic States (Secession and State Succession and the Alternative, Federal Option)' (2002) 294 Recueil des Cours de l'Académie de Droit International, p. 179.

[99] The 'Atlantic Charter' is viewed as the modern formulation of the right to self–determination. Mohamed Bennouna, 'Atlantic Charter (1941)' in Rüdiger Wolfrum, *Max Planck E-ncyclopedia of Public International law*, vol. I (Oxford University Press 2011) 734; Lachs (1980) p. 45; Thürer et al. (2012) p. 114; Cassese (1995) pp. 37–38; Summers (2007) p. 145.

> Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them.[100]

The UN Charter, as an international legal instrument, sets out the legal purposes and principles, and the establishing organs of the United Nations. The provision concerning the right to self–determination, upon the proposal of the Soviet Union delegation was introduced into the text of the UN Charter.[101] The right to self-determination has been mentioned only twice in the UN Charter. Article 1(2) mentions as one of the Purposes of the United Nations, '[t]o develop friendly relations among nations based on respect for the principle of equal rights and self–determination of peoples […]'**.** The question however that arises is how this concept can be put into practice. Article 55 notes that 'stability and well-being […] are necessary for peaceful and friendly relations among nations [which should be] based on respect for the principle of equal rights and self-determination of peoples […]'**.**[102]

In this respect, the main subject of the principle of self–determination is 'peoples'. The term 'Peoples' encompasses a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, a common economic life and being a certain number.[103]

B. UN General Assembly Resolutions and the Right to Self–determination: From the Political Self–determination to the Economic Self–determination

[100] The full text of 'Atlantic Charter' can be read through www.nato.int/cps/en/natolive/official_texts_16912.htm <accessed 26 September 2019>.

[101] Bruno Simma *et al.*, *The Charter of the United Nations: A Commentary*, vol. I (3rd edn, Oxford, 2012) p. 318.

[102] Jean – Pierre Cot, 'United Nations Charter', in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, vol. X (Oxford University Press 2012) p. 240.

[103] R. N. Kiwanuka 'The Meaning of 'People' in the African Charter of Human and Peoples' Rights' 82 (1988) AJIL p. 80 and Michla Pomerance *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (Martinus Nijhoff 1982) pp. 18–23.

The vast majority of the UN resolutions in the first twenty-five years following the commencement of the activities of the UN reflect decolonization and political independence.[104] Between 1945 and 1979 more than seventy territories were granted independence. Furthermore, from 1980 to 1995, twenty-eight more territories gained their independence. Southern Sudan is the last newly–created State following its independence from Sudan in 2011.[105]

From the mid–1950s, the UN General Assembly made particular reference to the importance of right to self-determination as one of the purposes and principles of the United Nations through a number of resolutions. For instance, thequestion of the right to self–determination was addressed by the UN members in the General Assembly primarily through resolution 421(V). Resolution 523(VI) which for the first time in the history of the United Nations cited the free 'use of natural resources' by the under–developed countries succeeded in implying that the notion of economic self–determination exists.

General Assembly within firmly held that 'disregard for the right to self-determination undermines the basis of friendly relation among nations'.[106] General Assembly resolution 1314(XIII) reaffirmed the notion of permanent sovereignty over natural resources under the context of self–determination. Resolution 1514(XV) of 14 December 1960 entitled 'Declaration on the Granting of Independence to Colonial Countries and Peoples' declared that 'all people have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue

[104] UNGA Res 545(VI) (5 February 1952). There are also a large number of instruments and documents adopted under auspices of the United Nations organs. UNGA Res 421(V) (4 December 1950); UNGA Res 637(VII) (16 December 1952); UNGA Res 1188(XII) (11 December 1957); UNGA Res 1541(XV) (15 December 1960); UNGA Res 2105(XX) (10 December 1965); UNGA Res 2621(XXV) (12 October 1970); UNGA Res 2627(XXV) (24 October 1970); UNGA Res 2734 (16 December 1970); 3203(XXVIII) December 1972; UNGA Res 3314 (14 December 1974) as well as the UNGA Res adopted in the field of the Permanent Sovereignty over Natural Resources which will be discussed on the following pages such as UNGA Res 523(VI) (12 January 1952); UNGA Res 626 (VII) (21 December 1952); UNGA Res 1314 (XIII) (12 December 1958); UNGA Res 1803 (XVII) 14 December 1962; UNGA Res 2158 (XXI) (25 November 1966) and UNGA Res 2386 (XXIII) (19 November 1968).

[105] For more details about this topic see: http://www.un.org/en/events/decolonization50/docs.shtml <accessed 26 September 2019>.

[106] UNGA Res 1188 (XII) (11 December 1957), UNGA Res 2627 (XXV) (24 October 1970) and UNGA Res 2734 (16 December 1970).

their economic, social and cultural development'.[107] Nonetheless, it adds that 'any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.[108] This resolution attributes particular importance to 'a speedy and unconditional end to colonialism'.

Consequently, a special committee on decolonization was established in 1961 to monitor the implementation of resolution 1514(XV).[109] The UN General Assembly resolution 1803(XVII) under the title of 'Permanent Sovereignty over Natural Resources' for the first time, declared the 'permanent sovereignty over natural wealth and resources as a basic constituent of the right to self–determination'.[110] As a complementary to resolutions 523, 626 and 1314, resolution 1803 highlights, by emphasizing on economic development and right of self–determination, the PSNR as an independent principle.[111]

In parallel to the UN General Assembly resolutions, the two Human Rights Covenants of the United Nations which were adopted in 1966, use the same wording in the first paragraph of the first Article of each Covenant, as used in the text of UN General Assembly resolutions: 'All peoples have the right of self–determination. Given that right, they freely determine their political status and freely pursue their economic, social and cultural development'.[112] Article 1 of these Covenants is the essence of the economic aspect of self–determination. During the debates in drafting this Article, it was pointed out that political independence is based upon economic independence; therefore, the realization of the right to self–determination should enable any State to acquire full control of its own natural resources.[113] According to Professor Cassese:

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[107] Gerard Kreijen, 'The Transformation of Sovereignty and African Independence: No Shortcuts to Statehood' in Gerard Kreijen *et al.* (eds) *State, Sovereignty, and International Governance* (Oxford University Press 2002) p. 70.

[108] Thürer et al. (2012) p. 115; Shaw (1997) p. 178.

[109] More information about the "Special Committee on Decolonization (C-24)" is available at https://www.un.org/dppa/decolonization/en/c24/about <accessed 26 September 2019>.

[110] UNGA Res 1803(XVII) (14 December 1962) First paragraph.

[111] UNGA Res 1803(XVII) (14 December 1962) paragraph 1 and 6.

[112] Thürer et al. (2012) p. 116; Shaw (1997) p. 178 and Cassese (1995) pp. 47–55.

[113] Saul et al. (2014) p. 62.

> [g]iven that the people of every sovereign State have a permanent right to choose by whom they are governed, it is only logical that they should have the right to demand that the chosen central authorities exploit the territory's natural resources so as to benefit the people.[114]

It can be, hence concluded that the above Article stipulates a State's duty to act as representative of its own peoples in exploiting the natural resources.[115] More specifically, while the right is clearly a right that belongs to the people, sovereign States will exercise the enjoyment of the right.[116] 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' was adopted on 24 October 1970 through which the principle of equal rights and self–determination of peoples together with other principles of international law such as the sovereign equality of States, good faith and non-intervention were identified.[117] The 1970 Declaration, while discussing the principle of the non–use of force by States in international relations, provides an indication of the principle of self–determination. Likewise, by way of explanation of the requirements of the principle of self–determination, the Declaration, in its first section, sets out that:

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[114] Cassese (1995) p. 55. In this respect, while Article 21 (1) of the 'African Charter on Human and Peoples' Rights' expressly provides that 'All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it'. Article 21(4) of the above Charter recognizes that the sovereign States are responsible to exercise the right to free disposal of their wealth and natural resources: 'States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity'. African Charter on Human and Peoples' Rights, available at https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf <accessed 26 September 2019>.

[115] Kiwanuka (1988) p. 80.

[116] Peter Jones, 'Human Rights, Group Rights, and Peoples' Rights' 21(1) (1999) HRQ, p. 80.

[117] UNGA Res 2625(XXV); Helen Keller, 'Friendly Relations Declaration 1970', in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, vol. IV (Oxford University Press 2012) pp. 250–260; G. Arangio–Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations' (1972) 137 Recueil des Cours de l'Académie de Droit International p. 137; Thürer et al. (2012) p. 116; Andreas R. Ziegler, *Introduction au droit international public* (2e éd. Berne: Stämpfli 2011) p. 44.

> [e]very State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
> (a) To promote friendly relations and cooperation among States; and
> (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned.[118]

In contrast with the text of the above–mentioned Human Rights Covenants, this resolution did not provide any indication on how to answer the question on the control of natural wealth and resources. In the New International Economic Order (NIEO) adopted in 1974[119] and the Charter of Economic Rights and Duties of States adopted in 1974,[120] the right of self–determination was reiterated. The UN General Assembly's Declaration on the Occasion of the Fiftieth Anniversary of the United Nations emphasizes the right to self-determination by providing that the UN Member States will, *inter alia,*

> [c]ontinue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination [...].[121]

In conclusion, the implementation of economic self–determination requires the political capacity to pursue economic development.

[118] UNGA Res 2625(XXV).

[119] UNGA Res 3201 (S-VI) (1 May 1974), Paragraph 4 (d).

[120] UNGA Res 3281 (XXIX) (12 December 1974), Article 1.

[121] UNGA Res. 50/6 (24 October 1995).

C. Self–determination in the ICJ Case Law

Although the term 'self–determination' was used in the separate opinions of several judges[122], the Court made no reference to it until the Namibia Case in 1971 where the Court recognized the application of self–determination to non–self–governing territories.[123] Furthermore, the

[122] Separate Opinion of Judge Bustamante in *South West Africa Cases* (Ethiopia v South Africa; Liberia v South Africa) [hereinafter: *South West Cases*] [1962] ICJ Rep at 350–351, available at https://www.icj-cij.org/files/case-related/47/047-19621221-JUD-01-02-EN.pdf <accessed 26 September 2019>; for further insights, see Christof Heyns and Magnus Killander, 'South West Africa', in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, vol. IX (Oxford University Press 2012) pp. 335–347. Dissenting Opinion of Judge Bustamante, *Case Concerning Northern Cameroons* (Cameroon v United Kingdom) (Judgement) [1963] ICJ Rep p. 178, available at https://www.icj-cij.org/files/case-related/48/048-19631202-JUD-01-09-EN.pdf <accessed 26 September 2019>; see also Clemens Feinäugle, 'Northern Cameroons Case' in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, vol. VII (Oxford University Press 2012) pp. 813–816. Dissenting Opinion of Judge Wellignton Koo in *South West Africa Cases*, at 234, available at https://www.icj-cij.org/files/case-related/47/047-19660718-JUD-01-04-EN.pdf <accessed 26 September 2019>. Dissenting Opinion of Judge Tnaka in *South West Africa Cases*, at 302–304, available at https://www.icj-cij.org/files/case-related/47/047-19660718-JUD-01-06-EN.pdf <accessed 26 September 2019>. Dissenting Opinion of Judge Padilla Nervo in *South West Africa Cases*, at 470, available at https://www.icj-cij.org/files/case-related/47/047-19660718-JUD-01-08-EN.pdf <accessed 26 September 2019>. Separate Opinion of Judge Ammoun, Barcelona Traction (Belgium v. Spain) (Second Phase) (Judgement) [hereinafter: *Barcelona Traction case*] [1970] ICJ Rep at 304, available at https://www.icj-cij.org/files/case-related/50/050-19700205-JUD-01-10-EN.pdf <accessed 26 September 2019>; see also Stephan Wittich, 'Barcelona Traction Case', in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, vol. I (Oxford University Press 2012) pp. 832–840.

[123] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [hereinafter: Namibia case] [1971] ICJ Rep at 52, available at https://www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-00-EN.pdf <accessed 26 September 2019>; *South West Africa cases*, para. 52–53, available at https://www.icj-cij.org/files/case-related/47/047-19660718-JUD-01-00-EN.pdf <accessed 26 September 2019>. There are other instances where the principle of self–determination has been invoked by national and international bodies such as: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [hereinafter: *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*] [2004] ICJ Rep. available at https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf <accessed 26 September 2019>; Summers (2007) pp. 260–265; *Greco-Bulgarian Communities Opinion (Interpretation of the Convention between Greece and Bulgaria Respecting Reciprocal Emigration, Signed at Neuilly-sur-Seine on November 27th, 1919*

International Court of Justice confirmed that 'the application of the right of self–determination requires a free and genuine expression of the will of the peoples concerned'.[124]

III. Legal Status of the Right to Self–determination

A. Self–determination as a Rule of Customary International Law

1. General Overview of the Customary International Law

Article 38 of the Statute of the ICJ enumerates the sources of international law,[125] to be applied in settling submitted disputes:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(Question of the "Communities") (Advisory Opinion) (31 July 1930) PCIJ Series B, No. 17, 22, available at http://www.worldcourts.com/pcij/eng/decisions/1930.07.31_greco-bulgarian.htm <accessed 26 September 2019>; *Case concerning the Frontier Dispute* (Burkina Faso/Republic of Mali) (Judgement) [hereinafter: *Frontier dispute case*] [1986] ICJ Rep 567; https://www.icj-cij.org/files/case-related/69/069-19861222-JUD-01-00-EN.pdf <accessed 26 September 2019>; see also Peter Tomka, 'Frontier Dispute Case (Burkina Faso/Republic of Mali)' in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, vol. IV (Oxford University Press 2012) pp. 265-270; Tatarstan and Chechnya Case before the Russian Constitutional Court quoted in Cassese (1995) p. 11; Summers (2007) pp. 274–278; Re-secession of Quebec case in Canadian Supreme Court (Summers (2007) pp. 293–301; The decision of the African Commission on Human and peoples' Right in Katangese Peoples' Congress v. Zaire quoted in Cassese (1995) p. 11; the Bantida Opinions Nos. 1, 2 and 3 in Cassese, Ibid; Summers (2007) pp. 267–271.

[124] *Namibia case*, at 52; see also M. Hidayatullah, *The South–West African Case* (Asia Publishing House 1967) pp. 13–19; *Western Sahara* (Advisory Opinion) [hereinafter: *Western Sahara case*] [1975] ICJ Rep at para. 12, 31–33 and 54–59, available at https://www.icj-cij.org/files/case-related/61/061-19751016-ADV-01-00-EN.pdf <accessed 26 September 2019>; More information is obtainable in Clemens Feinäugle, 'Western Sahara (Advisory Opinion)', in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, vol. X (Oxford University Press 2012) pp. 861–869; Cassese (1995) p. 11; Summers (2007) pp. 301–315.

[125] *Military and Paramilitary Activities in and against Nicaragua case*, para. 92.

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.

Customary law is one of the primary sources of international law under Article 38(1) of the Statute of the ICJ. Article 38(1)(b) defines customary international law as 'international custom, as evidence of a general practice accepted as law'. Although the wording of the Article does not provide an exact definition of customary international law, there is widespread acceptance that Article 38(1)(b) lays down two criteria which are required for the creation of customary international law.[126] The first is the practice of States and the second is acceptance of this practice as law, usually referred to as *opinio juris*. The *opinio juris* transforms these practices into the legally–binding rules of customary law.[127]

Likewise, the ICJ has identified 'recognized methods by which new rules of customary international law may be formed'[128], and refers to the elements mentioned above as 'elements usually regarded as necessary.'[129] It further explains that the formation of customary international law requires looking 'primarily in the actual practice and *opinio juris* of States'.[130]

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[126] Dispute regarding Navigational and Related Rights between Costa Rica and Nicaragua, (Costa Rica v Nicaragua) [hereinafter: *Navigational Dispute case*] ICJ Rep paras. 140–143, available at https://www.icj-cij.org/files/case-related/133/133-20090713-JUD-01-00-EN.pdf <accessed 26 September 2019>.

[127] Gennadi Mikhailovich Danilenko, *Law–Making in the International Community* (Martinus Nijhoff Publishers 1993) p. 81.

[128] *North Sea Continental Shelf Cases* (Federal Republic of Germany/Netherlands) and (Federal Republic of Germany/Denmark) [hereinafter: *North Sea Continental Shelf Cases*] 1969] ICJ Rep at 41, available at https://www.icj-cij.org/files/case-related/52/052-19690220-JUD-01-00-EN.pdf <accessed 26 September 2019>.

[129] Ibid. 42.

[130] *Case concerning the Continental Shelf case* (Libya v Malta) [hereinafter: *Continental Shelf case*] [1985] ICJ Rep. 29, available at https://www.icj-cij.org/files/case-related/68/068-19840321-JUD-01-00-EN.pdf <accessed 26 September 2019>.

2. General Assembly Resolutions as a Rule of Customary International Law

The practice of international organizations may contribute to the formation of customary international law. Likewise, together with treaties, resolutions of international organizations and particularly the non–binding UN General Assembly resolutions may have influence on the creation of customary international law.

In this respect, in its Advisory Opinion in the *Nuclear Weapons case* for example, the ICJ noted that:

> [G]eneral Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris.* To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradua1 evolution of the *opinio juris* required for the establishment of a new rule.[131]

The implications of the resolutions of the General Assembly for the creation of customary international law were also analyzed by the Iran–United States Claims Tribunal. It concluded that:

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[131] *Legality of Threat or Use of Nuclear Weapons* (Advisory Opinion) [hereinafter: *Advisory Opinion on Legality of Threat or Use of Nuclear Weapons*] [1996] ICJ Rep 226, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=2ahUKEwiHnLfaiu7kAhUKhlwKHUrjAN8QFjADegQIAhAC&url=https%3A%2F%2Fwww.icj-cij.org%2Ffiles%2Fcase-related%2F95%2F095-19960708-ADV-01-00-EN.pdf&usg=AOvVaw2UZuc_6O-6Y92hkjWn79hh <accessed 26 September 2019>. See also the decisions and the opinions of the ICJ in the following cases: *Military and Paramilitary Activities in and against Nicaragua*, at 14; *Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Judgment) [hereinafter: *Arrest Warrant case*] [2002] ICJ Rep 3, available at https://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-00-EN.pdf <accessed 26 September 2019> and *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, at 136.

> [i]t is generally accepted that such resolutions in certain specified circumstances may be regarded as evidence of customary international law or can contribute—among other factors—to the creation of such law".[132]

Judge Tanaka in his dissenting opinion to the *South West Africa cases (Ethiopia v S. Africa)* opined that General Assembly resolutions might be used as evidence of general practice in the process of the formation of a customary international law norm.[133] He further argued that in the UN General Assembly forum, every State 'has the opportunity, through the medium of an organization, to declare its position to all members of the organization and to know immediately their reaction on the same matter'.[134]

The effects of the voting procedure of a General Assembly resolution is considered as another important factor in the formation of a customary rule of international law. The existence of significant dissent, numerous abstentions or the objection of a few States that play a crucial role in the activities in question can be an impediment to the creation of a customary rule.[135] Moreover, if a State, during the voting for a specific resolution in the UN General Assembly, expressly emphasizes that, in its view, the resolution in question is merely a political statement without any legal content, then that resolution may not be invoked against the State in question.[136]

a. The Binding Force of the General Assembly Resolutions

The General Assembly, under Article 13(1) of the UN Charter is empowered to make recommendations for the purpose of 'promoting international cooperation in the economic […] fields […]'. Apart from certain matters concerning the internal management of the UN including

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[132] *SEDCO, Inc. v National Iranian Oil Company, Iran,* 25 ILM (1987) 629 para. 33, available at https://jusmundi.com/en/document/decision/en-sedco-inc-v-national-iranian-oil-company-and-the-islamic-republic-of-iran-award-award-no-419-128-129-2-thursday-30th-march-1989#decision_4991 <accessed 26 September 2019>.

[133] Dissenting opinion of Judge Tanaka, in *South West Africa Cases,* para. 291.

[134] Ibid.

[135] *Advisory Opinion on Legality of Threat or Use of Nuclear Weapons,* para. 225.

[136] *Military and Paramilitary Activities in and against Nicaragua case,* paras 106–107.

budgetary resolutions that are binding, the General Assembly can only make recommendations which are not binding. The legal effect of General Assembly resolutions has been the subject of numerous debates. Although resolutions of the General Assembly are not listed as a formal source of international law categorized by Article 38(1) of the Statute of the International Court of Justice, Shaw emphasizes that the resolutions may have some notable legal implications[137] and Brownlie indicates that the extent to which 'the resolutions have no effect on the shaping of the international law is a capital error'.[138]

Articles 10 through 14 of the UN Charter predominantly provide that recommendations issued by the General Assembly are non-binding in nature; however, the States concerned are under an obligation to consider the content of these recommendations and these can also be consolidated with other sources and evidence which may then crystallize as customary law.[139] Thus, in my opinion, the content of the resolutions must be evaluated against the required elements of customary international law as analyzed earlier.

Finally, these resolutions can be used as a means for the development of customary rules (*de lege ferenda*).[140] In the *Texaco* Arbitration case, it was ruled that '[u]nder Article 10 of the UN Charter, the General Assembly only issues 'recommendations', which have long appeared to be texts having no binding force and carrying no obligations for the Member States'.[141] It continued that

[137] Shaw (1997) p. 595.

[138] Ian Brownlie 'Legal Status of Natural Resources in International Law (Some aspects)' (1979) 162 Recueil des Cours de l'Académie de Droit International, p. 260.

[139] See generally, Simma et al.(2012) pp. 461–566, Franz Cede and Lilly Sucharipa-Behrmann (eds) *The United Nations Law and Practice*, (Kluwer Law International 2001) p. 29; Oscar Schachter, *International Law in Theory and Practice*, (Martinus Nijhoff Publishers 1991) pp. 84–90, Constantin Economides, 'Les actes institutionnels internationaux et les sources du Droit international' (1988) 34(1) AFDI p. 134; Joachen A. Frowein, 'The Internal and External Effects of Resolutions by International Organizations', 49 (1989) HJIL p. 778 ff and Blaine Sloan, 'General Assembly Resolutions Revisited (Fifty Years After)' (1987) 58 BYIL, pp. 39 ff.

[140] Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic, [hereinafter: *Texaco v Libya*] 17(1) ILM (1978).

[141] Ibid, p. 28.

'[t]he legal value of the resolutions […] can be determined on the basis of circumstances under which they were adopted'.[142]

3. Self–determination as a Customary Rule of International Law

Article 1(2) of the UN Charter as well as Article 1 of the two Human Rights Covenants have generated custom. Moreover, the pertinent UN General Assembly resolutions, like the treaty provisions, and in particular, the Declaration Granting Independence to Colonial Countries and Peoples and the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the UN, are of particular importance in creating the custom. The ICJ has also played an important role in the development of custom. The ICJ in analyzing the legal effects of the 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the UN' stated that: [143]

> [t]he effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolutions by themselves.[144]

B. Significance of the Recognition of Self–determination as a *Jus Cogens* Norm

1. Characteristics of a Peremptory Norm

[142] Ibid, p. 30.

[143] For example, see *Western Sahara case*, p. 12 and *Namibia case*, p. 16.

[144] *Military and Paramilitary Activities in and against Nicaragua case*, para 99.

A *jus cogens*[145] rule holds the highest hierarchical position among all other norms and principles.[146] According to Article 53 of the Vienna Convention on the Law of Treaties:

> [a] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

One of the strongest policy reasons for the concept of *jus cogens* lies in the overriding need for public order.[147] Therefore, a peremptory norm can only be modified by a subsequent international norm of the same character.

> Some rules of international law are accepted and recognized by the international community of States as peremptory, thereby permitting no derogation, and ultimately prevailing over and invalidating international agreements and other rules of international law in conflict with them.[148]

[145] The terms '*jus cogens*', 'peremptory norms' and 'peremptory norms of general international law' are used interchangeably. Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge University Press 2017) pp. 11ff.

[146] See also Joachen A. Frowein, 'Ius Cogens' in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, vol. VI (Oxford University Press 2012) pp. 443–446; Ulf Linderfalk, 'The Effects of *Jus Cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' 18(5) (2007) EJIL pp. 853–871; Ziegler (2011) pp. 74–75; Anthony Aust, *Handbook of International Law* (2nd edn, Cambridge University Press 2010) p. 10 and M. Cherif Bassiouni, 'A Functional Approach to General Principles of International Law' 11 (1990) MichJIntlL pp. 801–809.

[147] Gordon A. Christenson, 'The World Court and Jus Cogens' 81(1987) ASIL p. 93.

[148] Restatement of Foreign Relations Law of the United States (Revised) s 331(2) (Draft No. 6 Vol. 2, 1985).

The protection of States 'from agreements concluded against some values and general interests of the international community of States as a whole' is the purpose of a jus cogens norm.[149] Jus cogens is a norm which 'enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules'.[150] It derived from the fundamental values in view of the international community.[151] In view of the Swiss Federal Supreme Court, the *Jus Cogens* norms are 'binding on all subjects of international law'[152] which reflects the universal feature of such norms. It is recognized as a higher form[153] and an elite subset[154] of customary international law, too.

2. Self–determination: *Jus Cogens* or Not?

The right to Self–determination is a classical norm of *jus cogens* as described by the ILC. Entertaining the various aspects of the notion of *jus cogens* as recognized by Article 53 of the Vienna Convention on the Law of Treaties, ILC has exemplified the right to self–determination as a rule of *jus cogens*.[155] Likewise, the ILC commentary to Article 26 of the Draft Articles on State Responsibility provides a non–exhaustive list of *jus cogens* norms in which the right to self–

[149] *Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros,* Case No. 259, Judgment of 24 August 2004, Supreme Court of Argentina, para. 29.

[150] *Prosecutor v. Furundžija,* Case No. IT-95-17/1-T, Judgment of 10 December 1998, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, at p. 569, para. 153.

[151] *Siderman de Blake v. Republic of Argentina*, United States Court of Appeals, 965 F.2d 699 (9th Cir 1992) p. 715.

[152] *Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Case No. 1A 45/2007, Administrative appeal judgment of 14 November 2007, Federal Supreme Court of Switzerland, BGE 133 II 450, para. 7.

[153] *Kazemi Estate v. Islamic Republic of Iran*, File No. 35034, Appeal decision of 10 October 2014, Supreme Court of Canada, 2014 SCC 62, [2014] 3 S.C.R. 176, p. 249, para. 151.

[154] *Siderman de Blake v. Republic of Argentina*, Ibid.

[155] Yearbook of International Law Commission, 1966, vol. II, p. 248, available at http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1966_v2.pdf&lang=EFS <accessed 26 September 2019>.

determination is recognized as a *jus cogens* rule[156] which firmly rooted in the legal conviction of the Community of States.[157] Some commentators also view the principle of self–determination as a rule of *jus cogens*.[158] Judge Ammoun called the right of self–determination a 'norm of the nature of *jus cogens*, derogation from which is not permissible under any circumstances'.[159]

For example, in the *East Timor case* the ICJ further declared that 'the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes*[160] character which is irreproachable'.[161] It holds that the right to self–determination 'is one of the essential principles of contemporary international law'.[162] The ICJ in its advisory opinion

[156] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) p. 85. http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf <accessed 26 September 2019>. Developing countries are supporters of the view that self–determination is a norm of *jus cogens; see* Cassese (1995) p. 137.

[157] *Saharawi Arab Democratic Republic and Others v. Cherry Blossom and Others*, Judgment of the High Court of South Africa of 15 June 2016, para. 39ff.

[158] For more details, see Brownlie (2003) p. 489; Mohammed Bedjaoui, *International Law : Achievement and Prospects* (Netherlands: UNESCO 1991) pp. 1184–1185; Cassese (1995) pp. 170–172, Grigory Tunkin 'International Law in the international Law System' (1975) 147 Recueil des Cours de l'Académie de Droit International, pp.1–218; Denis Touret 'Le Principle de L'egalite souveraine des Etats, Fondement du Droit International', (janvier –mars 1973) Revue Générale de Droit International Public pp. 136–199.

[159] Separate Opinion of Judge Ammoun in *Namibia case*, pp. 89–90.

[160] The term *erga omnes* means 'towards all'. In the *Barcelona Traction case*, the ICJ ruled that: [a]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former is the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. *Barcelona Traction case*, para. 32. In the *Barcelona Traction case*, the ICJ identified two features of obligations *erga omnes*: [t]he first one is universality, in the sense that obligations *erga omnes* are binding on all States without exception. The second one is solidarity, in the sense that every State is deemed to have a legal interest in their protection. *Ibid*. paras 33–34; Maurizio Ragazzi, *The Concept of International Obligations 'erga Omnes?* (London: Clarendon Press 1997) p. 17.

[161] *Case Concerning East Timor (Portugal v Australia)* [hereinafter: *East Timor case*] [1995] ICJ Rep 90 and 102. https://www.icj-cij.org/files/case-related/84/084-19950630-JUD-01-00-EN.pdf <accessed 26 September 2019>.

[162] Ibid.

concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory reconfirmed its previous opinions.[163]

To conclude, it is believed that attributing the *jus cogens* status to the right to self-determination, due to the aforementioned characteristics of such status, would ban its violation and has the potential to impact the political legitimacy of its breaches. However, it can be argued that whether or not right to self-determination is a norm of *jus cogens*, this issue will not have any implication for its operation in the international community.

IV. Linkage with the PSNR

The evolution of right to self-determination is rooted in the human quest to be free from oppression and has predominately become attached to a right for peoples to both territorial and political sovereignty. The natural resources sovereignty–related aspect of right to self-determination was therefore emerged from this angle.

Right to self-determination can be defined as the freedom of participation in power, respect, enlightenment, well-being, wealth, skill, affection and rectitude.[164] More specifically, right to self-determination is a fundamental part of a more comprehensive social process in which people by implement coherent strategies, attaining their rights over natural resources.[165] The aim of international instruments is accordingly to prevent people from being deprived of enjoying the use of their natural resources. Hence, any State concerned is trusted to faithfully serve the people in achieving the above objectives particularly utilizing their natural resources. Thus, the end results of self–determination are designed to guarantee that the interests of the people are safeguarded against any attempt denying them the enjoyment of their natural resources.

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[163] *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, at 199.

[164] Oluwasegun Obebe, 'The Right to Economic Self-Determination: Nigeria under the Shagari Government' 39 (1987–1988) TempIntl&CompLJ p. 18.

[165] Ibid.

Part Three: Inception of the PSNR

I. Introductory Remarks on the PSNR

First of all, it must be indicated that under the Human Rights law approach, people(s), by virtue of their right to self–determination, are the main beneficiaries of the PSNR.[166]
The fact that the PSNR should be attributable to States rather than being a right of the people(s) is the result of unclear wording in most documents referring to the PSNR in international law which underlines the right of peoples and nations to permanent sovereignty over their natural resources but at the same time confers on States the right to exercise sovereignty.[167] Duruigbo has described the relationship between the 'People' and 'State' in the implementation of the right over natural resources:

> [t]he right of peoples to sovereignty over natural resources necessarily imports an entitlement to demand that governments manage these resources to the maximum benefit of the people. It has been correctly observed that, 'if the phrase 'rights of peoples' has any independent meaning, it must confer rights on peoples against their own governments'. [...] Primarily, this duty would restrain irresponsible use and management of resources by public officials and positively utilize the resources for peoples' benefit'.[168]

Developing countries and in particular newly–independent States concentrated their efforts in the General Assembly of the United Nations on the attainment of their demands, which had been repressed over decades, which were aimed at the legal proclamation of their economic sovereignty

[166] Lachs (1980) p. 55.

[167] See also UNGA Res. 1803.

[168] Emeka Duruigbo, Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law, 38 (2006) GWashIntlLRev p. 65.

in particular sovereignty over their own natural resources.[169] It was also discussed in other organs and organizations of the United Nations.[170] In this research, however, the resolutions of the UN General Assembly are analyzed.

II. Foundations of the PSNR in the UN Charter

One of the main points of dispute between developed and developing countries in the middle of the 20th century was the issue of exploitation of natural wealth and resources by the European colonial powers.[171] The UN Charter does not have any clear reference to the principle of Sovereignty over Natural Resources. Nonetheless, it contains a number of underlying principles which are embodied in principles such as the equality of States and self–determination.[172] The origin of the PSNR are rooted in the principle of self–determination.

Thus, Article 55 of the UN Charter which, *inter alia*, indicates that the UN shall promote 'economic and social progress' and 'development' as well as respect for human rights and fundamental freedoms 'with a view to the creation of conditions of stability and well-being […] is based on respect for the principle of equal rights and self-determination of peoples'. This Article, is a basis for furtherance of the purposes of the UN enshrined in Article 1 (2) of the UN Charter which provides that one of the purposes of the UN is 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'. These two Articles by implication, refer to the PSNR.[173]

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[169] Nico J. Schrijver, 'Fifty Years Permanent sovereignty over Natural Resources: The 1962 UN Declaration as the Opinio Juris Communis' in Marc Bungenberg and Stephen Hobe, *Permanent Sovereignty over Natural Resources* (Springer 2015) pp. 16–17.

[170] UNSC Res 330 (1970), UNCTAD I dated 16 June 1964, UNCTAD III Res.46 (III) (18 May 1972), TDB Res. 88 (XII) (19 October 1972), UNCTAD IV Res 93(IV) and UNIDO II dated 27 March 1975.

[171] Antony Anghie, 'The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case', 34 (2) (1993) HarvIntlLJ p. 474.

[172] Nico J. Schrijver, 'Permanent Sovereignty over Natural Resources', in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, Vol. VII (Oxford University Press 2012) p. 535. It must be noted here that professor Schrijver has extensively discussed this topic in his book: Schrijver (1997).

[173] Ibid.

A. Role of General Assembly Resolutions in the Creation of the PSNR

1. The Early Stage of the Emergence of the Term 'Permanent Sovereignty over Natural Resources'

As the first Resolution in which the PSNR was implicitly articulated, the UN General Assembly resolution 523(VI) (12 January 1952) is mainly concerned with economic self–determination through which the rights of the developing countries to freely determine the use of their natural resources is emphasized. This is the first international instruments in which 'under–developed countries' are—in conjunction with self–determination— empowered to use their 'natural resources' in the interest of economic national development. In this resolution, the UN Members are also encouraged to *inter alia* take into account the possibility of facilitating the development of natural resources through commercial agreements. By ensuring the freely use of natural resources by States so as to meet their specific economic needs with due regard to the free flow of capital in a spirit of international co-operation, the UN General Assembly resolution 626(VII) (21 December 1952), entitled the '*Right to Exploit Freely Natural Wealth and Resources'*, was adopted.[174]

Roughly a year after the adoption of resolution 523, the General Assembly of the UN recognized that 'the right of peoples freely to use and exploit their natural resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations [...]'.[175] This resolution was invoked by the Government of Guatemala as a supporting

[174] The Resolution expressly provides that 'all Member States in the exercise of their right to freely use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development, to have due regard, consistently with their sovereignty, to the need for maintaining the flow of capital in conditions of security, mutual confidence, and economic co-operation among nations'.

[175] A comprehensive discussion on this resolution as well as the negotiations on its draft have been provided in: James N. Hyde, 'Permanent Sovereignty over Natural wealth and Resources' 50(4) (1954) AJIL pp. 854–867; Bulajic (1986) p. 249 and Garcia-Amador (1990) p. 132.

argument for its right to take possession of the property of the United Fruit Company, a United States company in Guatemala.[176]

The legal effects of the two resolutions mentioned above has been analyzed by the Civil Tribunal of Rome, in reviewing the Iranian Oil nationalization and the Japan case relating to the Anglo-Iranian Oil Company.[177] The tribunal referred to the General Assembly resolutions which provides that '[…] individual States should not be prevented from exploiting their natural resources'.[178] In the *Anglo-Iranian Oil Company v. Idemitsu Kosan Kabushiki Kaisha* case, the court, while recognizing the sovereignty of States over natural resources held that:

> [t]he resolution adopted by the General Assembly of the United Nations on December 22, 1952 [...] shows that the Nationalization Law coincides in its ideas with the recommendations adopted by the General Assembly of the United Nations concerning the exploitation of natural resources [...] The Court comes to the conclusion that it has no power to deny the validity of nationalization law.[179]

The General Assembly in its resolution 837(IX) (14 December 1954) mandated the Commission on Human Rights[180] to complete its recommendations concerning the international respect for the permanent sovereignty of peoples and nations over their natural wealth and resources.[181]

Resolution 1314(XIII) (12 December 1958) also laid emphasis upon the right of peoples and nations to self-determination includes Permanent Sovereignty over Natural Resources. Moreover,

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[176] 'The Department of State Bulletin' 29 (14 September 1953) pp. 357–360.

[177] Karol N. Gess, 'Permanent Sovereignty over Natural Resources: An analytical review of the United Nations declaration and its genesis' 13(2) (1964) ILQ p. 408. See also Samuel Nakasian, 'The Anglo–Iranian Oil Case, A Problem in International Judicial Process' 41(1952–1953) GeoLJ pp. 459–494.

[178] Hersch Lauterpacht (ed) International Law Reports (ILR) (Cambridge University Press 1958) pp. 40–41; see also Alexander Orakhelashvili, 'Anglo-Iranian Oil Case', in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, vol. I, (Oxford University Press 2012) pp. 396–400.

[179] Hersch Lauterpacht (ed) International Law Reports (ILR) (Cambridge University Press 1957) p. 309.

[180] Beate Rudolf, 'United Nations Commission on Human Rights/United Nations Human Rights Council', in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, vol. X (Oxford University Press 2012) pp. 281–288.

[181] UNGA Res 837(IX) (14 December 1954).

within this Resolution, the Commission on Permanent Sovereignty over Natural Resources was created to make survey on the extent of such sovereignty over natural resources.[182]

2. Resolutions Adopted in the 1960s

The close relationship between decolonization and control over natural resources was expressed in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (UN General Assembly resolution 1514 (XV) (15 December 1960). The declaration took a major step by affirming the rights of newly independent States to take full control over their natural resources. Its preamble affirms that 'peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, given the principle of mutual benefit, and international law'.

The UN General Assembly resolution 1515 (XV) (15 December 1960) reflects the interrelated nature of the principle of the right to self–determination and the PSNR by stating that: '[…] all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development […]'.

The landmark resolution 1803(XVIII) dated 14 December 1962 entitled 'Permanent Sovereignty over Natural Resources' constitutes the most explicit declaration of the UN on the subject.[183] It addresses two main topics: sovereignty over natural resources and the legal framework applicable to the investment made by developed countries. The perspective of international investment law drawn from this resolution will be thoroughly discussed in Chapter Two. The resolution declares that:

> [t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well–being of the people of the State concerned.

[182] Bulajic (1986) pp. 250–251 and Ahmad Ali Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration* (Wolters Kluwer 2015) p. 21.

[183] Brownlie (1979) p. 256 and Garcia-Amador (1990) pp. 134–140.

It further reaffirmed that 'the free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States in accordance with their sovereign equality'. While stressing the paramount importance of Permanent Sovereignty over Natural Resources, it also covers in particular 'the exploitation of the raw materials of one State by individuals or juridical persons who are nationals of another State'[184] which specifically refers to arrangements between States and foreign private companies for the exploitation of natural resources, particularly oil and minerals in developing countries.

Resolution 1803 affirmed that 'permanent sovereignty over natural wealth and resources, has long been recognized as a principle of international law'.[185] Therefore, violation of the sovereignty over natural resources is 'contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace'. Besides, in the General Assembly resolution 2158 (XXI) adopted on 25 November 1966, under the title of 'Permanent Sovereignty over Natural Resources', 'the inalienable right of all countries to exercise permanent sovereignty over natural resources' was reaffirmed. Pursuant to this resolution, the PSNR is safeguarded, and further it ensures that the developing countries benefit from their efficient and strategic application of resources.

It further confirms that the exploitation of natural resources should always be based upon a country's national laws and regulations.[186] Furthermore, this Resolution provides that:

> [t]he General Assembly […] recognizes the right of all countries, and in particular of the developing countries, to secure and increase their share in the administration of enterprises which are fully or partly operated by foreign capital and to have a greater share in the advantages and profits derived there from on an equitable basis, with due regard to the development needs and objectives of the peoples concerned and to mutually acceptable contractual practices […].

[184] Gess (1964) p. 398.

[185] Peters, Schrijver and de Waart, 'Responsibility of States in Respect of the Exercise of Permanent Sovereignty over Natural Resources' 36(3) (1989) NILR p. 292.

[186] UNGA Res 2158 (XXI) (25 November 1966) paragraph 4.

3. Further Recognition of the PSNR in the 1970s

Within the UN General Assembly resolution 2626 (XXV) (24 October 1970) the PSNR was associated with the 'International Strategy for the Second United Nations Development Decade' by stating that:

> [f]ull exercise by developing countries of permanent sovereignty over their natural resources will play an important role in the achievement of the goals and objectives of the Decade. Developing countries will take steps to develop the full potential of their natural resources. Concerted efforts will be made, particularly through international assistance, to enable them to prepare an inventory of natural resources for their more rational utilization in productive activities'.[187]

Resolution 2626 indicates the interdependence among all States by laying emphasis upon the developing countries' re-organizing their natural resources as well as the existing gap between developed and developing countries owing to the consequences of the colonization.

The question of permanent sovereignty over natural resources of both developing countries and territories under colonial and foreign domination or subjected to the apartheid régime was discussed in the UN General Assembly resolution 3171 (XXVIII) (17 December 1973). This resolution literally refers to — as an 'inviolable principle'— regulatory sovereignty relating to economic development within the framework of the PSNR. It also discusses the use of coercion against States exercising their sovereign rights over their natural resources.[188] These two above resolutions accentuate the need for affirmative contributions from industrialized Sates owing to their historical economic dominance.

The 1970s saw a new approach adopted by developing countries on the question of sovereignty over their natural resources which is often described as the New International Economic Order

[187] Brownlie (1979) p. 262.

[188] Ibid p. 263.

(NIEO).[189] Encouraged by the success of the oil–producing countries in boycotting Western States and the sharp oil price increase, as well as the prevailing spirit of economic independence in Latin America, several resolutions were passed that called for a 'New International Economic Order'.[190] The position of these States was supported by the PSNR proclaimed in paragraph 4(e) of the Declaration on the New International Economic Order (NIEO) which provides that:

> [i]n order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right.'[191]

As a supplementary instrument to the NIEO, a Charter of Economic Rights and Duties of States was adopted by the General Assembly resolution 3281(XXIX) 12 December 1974.[192] Unlike the resolutions of 1960s on permanent sovereignty over natural resources, the NIEO–related resolutions were adopted in an atmosphere of confrontation which resulted in these resolutions being adopted with less votes'.[193] It can be said that political motivations were an underlying cause which provoked the adoption of the Charter. It may be described as an integral part of the resolutions entitled the New International Economic Order.

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[189] The UN General Assembly resolution 3201 (S-VI) (1 May 1974) and Christoph Schreuer, 'Investments, International Protection', in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, vol. VI (Oxford University Press 2012) p. 328.

[190] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2008) pp. 15–18.

[191] It also talks about the issue of raw materials and development.

[192] The notion of 'Charter' found its most significant expression in the United Nations Charter. In explaining that, the title of 'Charter' better corresponds to the constitution of a general international organization than 'pact' (League of Nations). It is also argued that the 'Charter' refers to a treaty content while the 'Pact' indicates a contractual form of content. Bulajic (1986) pp. 129 and 114–117.

[193] Schrijver (1997) p. 83. The issue of voting will be discussed in Chapter Two.

One of the main features of the international instruments dealing with the PSNR mainly before 1962 have referred to 'State' and 'peoples' as the right holders. There is no place for 'peoples' within the context of the PSNR when 'peoples' in a State gained independence. In other words, 'if governments are vested with a right, it is not necessary to also vest it in the people they represent'.[194] For this reason, few or no references to 'peoples' can be found after 1962 under the international instruments.[195] There are however, strong grounds for peoples to be entitled to the right to permanent sovereignty.[196] For instance 'peoples' can challenge to their government's decision permitting multinational companies to operate in the natural resource sector.[197] The realization of such right as belonging also to peoples guide the States to use natural resources for 'the well–being of their peoples'.[198]

B. PSNR as a Rule of Customary International Law

The General Assembly resolutions have great relevance in the recognition and establishment of the PSNR as a part of customary international law. This reflects the evolution of 'State practice' and *opinio juris* leading to the recognition of the PSNR as having the status of customary international law.[199]

The United Nations Framework Convention on Climate Change[200] adopted in 1992 reconfirms the sovereignty of the State in its Preamble: 'States have, in accordance with the Charter of the United

[194] Duruigbo (2006) p. 49.

[195] Ibid., p. 52.

[196] Ricardo Pereira, 'The Exploration and Exploitation of Energy Resources in International Law' in Karen E Makuch and Ricardo Pereira (eds), *Environmental and Energy Law* (Blackwell 2012) p. 202.

[197] Ibid., p. 203.

[198] UN Doc A/RES/1803, para 1, Antonio Cassese, *International Law* (Oxford University Press, 2nd ed, 2005) p. 491.

[199] See also Article 13 of the '1978 Convention on Succession of States in respect of Treaties' and Article 15(4) of the '1981 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts'; Article 1 (2) of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, the Preamble, the Principle, Article 3 and 15(1) of the 1992 Convention on Biodiversity.

[200] Kyoto Protocol to the UN Framework Convention on Climate Change which is adopted in 1997 in Article 2 provides: that States are free to decide freely in the matters affecting their own environment through mechanisms such

Nations and the principles of international law, the sovereign right to exploit their own resources […]'. Paragraph (d) of the Preamble of the International Tropical Timber Agreement[201], adopted in 2006 provides that: '[...] States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources […]'. Another evidence of State practice demonstrating legal recognition of the PSNR is its incorporation in national constitutions. For instance, Article 311(I)(2) of the Constitution of Bolivia provides that '[t]he natural resources are the property of the Bolivian people and shall be managed by the State […]'.[202] The Constitution of the Bolivarian Republic of Venezuela in Article 12 indicates that: '[m]ineral and hydrocarbon deposits of any nature that exist within the territory of the nation, beneath the territorial sea bed, within the exclusive economic zone and on the continental shelf, are the property of the Republic, are of public domain, and therefore inalienable and not transferable. […]'.[203] Article 21 of the Constitution of the State of Kuwait, an oil rich country, emphasizes that: '[a]ll of the natural wealth and resources are the property of the State. The State

as implementing national policies on energy efficiency, promoting sustainable management of forests. The Kyoto Protocol which entered into force on 16 February 2005 is an international agreement linked to the United Nations Framework Convention on Climate Change, which commits its Parties by setting internationally binding emission reduction targets. Available at www.unfccc.int/resource/docs/convkp/kpeng.pdf <accessed 26 September 2019>; Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing 2011) pp. 160–164.

[201] International Tropical Timber Agreement (2006), available at https://www.itto.int/direct/topics/topics_pdf_download/topics_id=3363&no=1&disp=inline <accessed 26 September 2019>. Bharat H.Desai, 'Forest, International Protection', in Rüdiger Wolfrum, *The Max Planck Encyclopedia of Public International Law*, vol. IV (Oxford University Press 2012) pp. 192–193 and Ulrich Beyerlin, 'Sustainable development', in Rüdiger Wolfrum, *The Max Planck Encyclopedia of Public International Law*, vol. IX (Oxford University Press 2012) p. 472.

[202] Constitution of Bolivia (2009) available at https://www.constituteproject.org/constitution/Bolivia_2009.pdf <accessed 26 September 2019>.

[203] Constitution of the Bolivarian Republic of Venezuela (1999) http://www.venezuelaemb.or.kr/english/ConstitutionoftheBolivarianingles.pdf <accessed 26 September 2019>.

shall preserve and properly exploit those resources, heedful of its own security and national economy requisites'.[204]

Finally, Article 9 of the Constitution of the People's Republic of China provides that '[a]ll mineral resources, waters, forests, mountains, grasslands, unreclaimed land, beaches and other natural resources are owned by the State, that is, by the whole people, with the exception of the forests, mountains, grasslands, unreclaimed land and beaches that are owned by collectives as prescribed by law'.[205]

Article 45 of the Constitution of the Islamic Republic of Iran provides[206] that 'wastelands and public wealth, abandoned or unclaimed land of deceased owners, mines, seas, lakes, rivers, and other public bodies of water, mountains, valleys, forests, marshlands, natural prairies […]' are under the control of the Islamic government. It further points out that the relevant laws and regulations 'shall determine the detail and manner of utilization of each of them'. In this respect, Iran's Mining Act adopted in 1998 provides that '[…] the responsibility of exercising sovereignty of State over the all mines of the country […] is vested in Ministry of Mining'. Furthermore, Article 2 of the Petroleum Act of Iran adopted in 2012 has stated that '[…] on behalf of Islamic government, the exercise of ownership and sovereign rights over petroleum resources is vested in Ministry of Petroleum […]'. The above provisions clearly indicate the importance of absolute sovereignty of Iranian government over its natural resources.

Recently, Iran has laid particular emphasis upon its sovereign rights over oil and natural resources. Article 3 of the Decree on "General Conditions, Structure and Model of Upstream Oil & Gas Contracts" adopted in 2016 also provides that:

> All the contracts concluded pursuant to this Decree are governed by the following principles:

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[204] Constitution of Kuwait https://www.constituteproject.org/constitution/Kuwait_1992.pdf?lang=en <accessed 26 September 2019>.

[205] Constitution of the People's Republic of China (2004), available at http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/node_2825.htm <accessed 26 September 2019>.

[206] Constitution of the Islamic Republic of Iran (1989) https://wipolex.wipo.int/en/text/332330 <accessed 26 September 2019>.

> Exercising sovereign rights and public ownership over all country's oil and natural gas resources through the Ministry of Petroleum representing the Islamic Republic of Iran. […].

The Arbitrator in *TEXACO v. Libya*,[207] opined that the UN General Assembly resolution 1803 is a rule of customary international law insofar as the majority of the UN Members assented to the pertinent principles laid down therein. Likewise, this opinion was affirmed in the subsequent arbitral award in *LlAMCO v. Libya*.[208] Additionally, Judge Gunnar Lagergren, in his dissenting opinion in *I.N.A. Corp. v. Iran* opined in a similar manner. [209] The dissenting opinions attached to the *East Timor case*, embraced the view that permanent sovereignty is one of the essential principles of contemporary international law with *erga omnes* character.[210]

In the case concerning *Armed Activities on the Territory of the Congo*, the ICJ affirmed that the 'PSNR' is 'a principle of customary international law' by referring only to three resolutions (not unanimously adopted) of the UN General Assembly, notwithstanding the fact that in the case under consideration the principle was held to be non-applicable:[211]

[t]he Court recalls that the PSNR is expressed in General Assembly resolution 1803 (XVII) of 14 December 1962 and further elaborated in the Declaration on the Establishment of a New International Economic Order (General Assembly resolution 3201 (S.VI) of 1 May 1974) and the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of

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[207] *Texaco v Libya*, p. 28.

[208] Award in Dispute between Libyan American Oil Company (LIAMCO) and The Government of the Libyan Arab Republic relating to Petroleum Concessions, 20(1) [hereinafter: *LIAMCO v Libya*] ILM (1981) pp. 51–52.

[209] *I.N.A. Corp. v. Islamic Republic of Iran* (U.S. v. Iran), 8 Iran–U.S. Cl. Trib. Rep. 373, 386 (1985) (Lagergren, J., dissenting).

[210] Dissenting opinions of Judge Weeramantry at 90, 142, 197–9, 204 and Judge Skubiszewski 264, 270, 276 in *East Timor* (Portugal v Australia).

[211] *Case concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) [hereinafter: *Armed Activities on the Territory of the Congo case*]](Judgment) [2005] ICJ Rep available at https://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-EN.pdf <accessed 26 September 2019> and Robert Uerpmann–Wittzack, 'Armed Activities on the Territory of the Congo cases', in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, vol. I (Oxford University Press 2012) pp. 587–595.

12 December 1974) […] is a principle of customary international law […].[212] The ICJ also held that the PSNR was 'not applicable to the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State'.[213] The PSNR accordingly, cannot be applicable in all kinds of situations, and its limitations become evident at the time of its application.

C. Possibility of Derogation from the PSNR

As explained earlier, the legal nature of the PSNR, as one of the intrinsic elements of State sovereignty, has been proclaimed in a number of the UN General Assembly resolutions.[214] In this regard, the qualification of the principle as *jus cogens* are debated in international law.

1. Arguments Supporting the PSNR as a *Jus Cogens* Norm

By virtue of attributing the status of *jus cogens* to the PSNR not only will it become unlawful for States to derogate from that norm but it also serves to protect the principle.

Arguments to support the *jus cogens* nature of the principle can be found in the recognition of permanent sovereignty as 'inalienable' or 'full', or in Articles 25 of the International Covenant on Economic, Social and Cultural Rights[215] and Article 47 of the International Covenant on Civil and Political Rights[216]. By recognizing the PSNR as a *jus cogens* norm, some members of the ILC in deliberations on drafting the following two conventions opined that any agreement violating the

[212] *Armed Activities on the Territory of the Congo case* at para. 244.

[213] Ibid.

[214] 'Permanent sovereignty over national resources in the occupied Arab territories' UN Doc. A/36/648 (10 November 1981) and Oscar Schachter, 'Sharing the World Resources' 15 (1977) ColumJTransnatlL p. 124.

[215] 'Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources'.

[216] 'Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources'.

PSNR should be void *ab initio*.[217] The 1978 Convention on Succession of States in respect of Treaties in Article 13 stipulates that '[n]othing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources'.[218]

A concerted effort aimed at elevating a particular norm to the rank of *jus cogens* was also provided by the negotiations at the Vienna Conference on Succession of States in Respect of State Property, Archives and Debts.[219] Article 15(4) of this Convention provides that:

> [a]greements concluded between the predecessor State and the newly independent State to determine succession to State property of the predecessor State […] shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

By invoking the Commentary of the ILC which observed that some of the members of the Commission were of the opinion that the infringement of the principle of permanent sovereignty in an agreement between the predecessor State and the newly independent State would invalidate such an agreement, the developing States claimed that the PSNR was a principle of *jus cogens*. However, owing to the lack of support from Western States, who maintained that these efforts were 'an attempt to give legal force to mere notions to be found in various recommendatory material emanating from the General Assembly', it was not possible to ultimately argue in favor of a *jus cogens* nature of the PSNR.[220] Additionally, the 'permanent' feature of the PSNR refers

[217] Draft articles on Succession of States in respect of State Property, Archives and Debts with commentaries, International Law Commission, 36th session (1981) p. 43 and Gennady M. Danilenko, 'International Jus Cogens: Issues of Law-Making' 42(2) (1991) EJIL pp. 60–61.

[218] See generally, Andreas Zimmermann, 'State succession in Treaties', in Rüdiger Wolfrum, *The Max Planck Encyclopedia of Public International Law*, vol. IX (Oxford University Press 2012) pp. 545–550.

[219] See generally, Andreas Zimmermann, 'State succession in Other Matters than Treaties', in Rüdiger Wolfrum, *The Max Planck Encyclopedia of Public International Law*, vol. IX (Oxford University Press 2012) pp. 536–544.

[220] Danilenko (1991) pp. 42–65.

to its inalienability whereby the *jus cogens* nature of the Principle is ascertained.[221] A number of commentators and scholars are of the opinion that whereas the PSNR, emanated from the *jus cogens* principle of self–determination, it is therefore a peremptory norm of contemporary international law.[222] Developing countries similarly seek to establish the idea that the PSNR is a *jus cogens* rule.[223] Quite recently, the legal opinion expressed by one of the counsellor in the *El Paso v Argentina* arbitration was in favour of the *jus cogens* nature of the PSNR.[224]

2. Arguments Rejecting the PSNR as a *Jus Cogens* Norm

In the arbitral award between Kuwait and the American Independent Oil Company (Aminoil)[225], while rejecting the claims concerning the recognition of the PSNR as a rule of *jus cogens*, the award indicated that the relevant resolutions adopted by the General Assembly in the field of sovereignty over natural resources lacked consensus among the States in the adoption of resolutions such as resolution 1803 which is considered as a landmark decision in the field of sovereignty over natural resources.[226]

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[221] The International Bureau of the Permanent Court of Arbitration (ed) *Resolution of International Water Disputes* (Kluwer International Law 2003) p. 344 and Dominique Rosenberg, *Le Principe de Souveraineté des Etats sur leurs Ressources Naturelles* (Libraire Générale de Droit et de Jurisprudence 1983) p. 321.

[222] Bulajic (1986) p. 249; Francois Rigaux, *Droit public et droit privé dans les relations internationales* (Publications de la Revue générale de droit international public) (A. Pedone 1977) p. 284; Jean Touscoz, 'La Nationalisation des Sociétés Pétrolières Françaises en Algérie et le Droit international', (8) (1972) RBDI p. 496 and Subrata Roy Chowdhry, 'Permanent Sovereignty over Natural Resources' (Oxford, April 1982) paper submitted to a Seminar Convened by the ILA and the Centre for Research on the New International Economic Order, p. 91.

[223] M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2004) p. 288.

[224] Legal Opinion of M. Sornarajah attached to Argentina's Rejoinder of 5 March 2007, § 25, 27 in *El Paso Energy International Company v Argentina*, Award, ICSID Case No ARB/03/15, IIC 519 (2011), 27th October 2011, despatched 31st October 2011, para. 168.

[225] *Kuwait v The American Independent Oil Company* [hereinafter: *Kuwait v Aminoil*] 21 ILM (1982) p. 1021–1022.

[226] The reasoning provided in this award is of particular importance: *Texaco v Libya*, pp. 29–30; Hossain Kamal and Subrata Roy Chowdhury (eds) *Permanent Sovereignty over Natural resources in International Law* (Frances Printer Publisher 1984) p. 8; Bulajic (1986) p. 259 and Brownlie (1979) pp. 309–310.

Having discussed the different arguments concerning the *jus cogens* nature of the PSNR, it should be pointed out that the idea of recognition of the PSNR as a *jus cogens* rule, was rejected due to the lack of support by the principally States concerned as laid down by Article 53 of the VCLT.[227] In order to determine whether there is a large majority of States accepting and recognizing the peremptory status of the PSNR is not a method through which the number of States is to be counted. The acceptance and recognition by the international community of States as a whole requires, however that the acceptance and recognition be across regions, legal systems and cultures.[228]

Concluding Summary

The study of sovereignty has shown that it has two features: a) external feature which is the independence of a State with respect to all other States and b) internal feature which deals with the inward manifestations of sovereignty; namely, the right to exercise the power within its territory, to the exclusion of any other State or group.[229] In this framework, sovereignty is recognized by the territoriality in the form of borders making separation between other sovereign powers. In this regard, *the North Atlantic Coast Fisheries Arbitration* stated that '[…]one of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is co-terminous with the sovereignty[...]'.[230]

There are a considerable number of resolutions adopted by the UN General Assembly which proclaim economic self–determination and sovereignty over natural resources. These resolutions

[227] Schrijver (1997) pp. 374-377.

[228] *Michael Domingues v. United States* (Case 12.285, Inter-American Commission on Human Rights, Report No. 62/02 of 22 October 2002, at para. 85.

[229] According to the principle of *quidquim est in territorio est etiam de territorio*, States have absolute legislative power over all individuals and all property contained within their borders, regardless of their nationality and/or domicile of choice. Jennings and Watts KCMG QC (1996) p. 384.

[230] *North Atlantic Coast Fisheries Case (GB v USA)* (1910) Scott Hague Court Rep 180 http://legal.un.org/riaa/cases/vol_XI/167-226.pdf <accessed 26 September 2019>.

address various issues, including natural resources,[231] the right to freely exploit natural wealth and resources,[232] and State sovereignty over natural resources and all economic activities.[233]
Although the notion of the PSNR has been stipulated in a number of multilateral treaties and has been recognized in international arbitral awards,[234] as evident from the prior discussion, there is no consensus that enables one to go as far as to label the principle of permanent sovereignty as *jus cogens*. By virtue of the recognition of the PSNR in numerous UN General Assembly resolutions and its position as a customary rule of international law one may, however reach a conclusion that the PSNR has achieved a 'firm status' in international law.[235]

[231] UNGA Res 523.

[232] UNGA Res 626.

[233] UNGA Res 1803, UNGA Res 3281, § 4(e) and UNGA Res 3201 (S-VI).

[234] For example, in *Texaco v Libya* and *LIAMCO v Libya*. In *Texaco*, the arbitrator concluded that the PSNR expressed the *opinio juris communis* on nationalization of foreign property under international law. *Texaco v Libya,* p. 30.

[235] Schrijver (1997) p. 543.

Chapter 2: Implications of the PSNR for the International Investment Law

Part One: Emergence of the PSNR in the Context of the International Investment Law

I. The Impact of Colonialism on the Exploitation of Natural resources

The economic theory of imperialism is the best way to describe the relation between colonialism and foreign investment which argues that the reason behind countries seeking the acquisition of territories in different areas is to secure sheltered markets for their national investment abroad.[236] For this reason, during the colonial period, the colonial system was intended to pursue the motives of economic exploitation exclusively aimed at serving the interests of European powers.[237] The colonies have been excluded from ownership, control and operation of foreign investment enterprises.[238] Foreign investment was realized mainly in the context of colonial expansion and as such foreign investors exporting capital required minimal protection.[239] Colonial powers accordingly obtained full rights, particularly through concession agreements, over rich natural resources of their colonies throughout the world.[240] By way of illustration, throughout colonized Africa, several companies from European countries acquired extensive concession rights from the African traditional chiefs to exploit and explore natural resources.[241]

The 'East India Company', as another example, played a significant role in introducing commercial regulations in India. Its purpose was to provide a conducive legal environment for the

[236] For further studies see D. Landes, 'Some Thoughts on the Nature of Economic Imperialism', 21 (1961) JEH, pp. 496–512 and P. Svedberg, 'Colonial Enforcement of Foreign Direct Investment', 49 (1981) *The Manchester School,* pp. 21-38.

[237] Samuel Kwadwo Boaten Asante, *Transnational Investment Law and National Development* (JIC Taylor Memorial Lecture Series, Lagos University Press 1981) pp. 22–24.

[238] Ibid.

[239] M Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) p. 9.

[240] Asante (1981) pp. 22–24; Victor Mosoti, 'Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between' 26(1) (2005–2006) NwJIntlL&Bus pp. 104–105 and U.O. Umozurike, *International Law and Colonialism in Africa* (Nwamife Publishers Limited 1979) p. 17.

[241] Asante (1981) pp. 22–24.

commercial activities of British nationals by adopting effective policies achieved through relationship with local governors.[242] To do so, they introduced economic rules facilitated by the establishment of commercial and economic relationships with the colonies' authorities.[243] More specifically, the rights and obligations of investors were defined pursuant to the domestic law of the colonial powers.[244] They also influenced the regulatory and executive bodies of their colonies to reinforce their control on the exploitation of the natural resources of those territories.[245]

Furthermore, in the colonies, the risks related to trade and investment were minimized by monitoring and controlling the adherence to rules introduced by the colonial powers.[246] For this reason, colonial powers established a wide range of legal protective frameworks to manage the exploitation of natural resources.[247] The settlement of investment disputes between investors and colonized States was regulated by the laws of colonial States which offered foreign investors superior legal protection.[248] In other words, it means that such investment did not require protection because the colonial legal systems were integrated with the legal system of the imperial powers and the latter gave sufficient protection for the investments which went into the colonies.[249]

II. The PSNR and the Right to Regulate Foreign Investment in the Post–colonial Era

In the period between the Second World War and the collapse of the Soviet Union, different/numerous confrontations between the growing number of newly–independent developing countries, on the one hand, and the developed countries, on the other, about international

[242] Sornarajah (2004) p. 20.

[243] Mosoti (2005–2006) p.104.

[244] Ibid at 107.

[245] Asante (1981) p. 24.

[246] Antony G. Hopkins, 'Property Rights and Empire Building: Britain's Annexation of Lagos 1861', 40(4) (1980) JEH, p.787 and Mosoti (2005–2006) p.107.

[247] Sornarajah (2004) p. 9.

[248] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) pp. 14-15.

[249] Hopkins (1980) p. 787.

investment law and specifically sovereignty over natural resources took place.[250] These conflict of interests between developing and developed countries were often prompted by, *inter alia,* ideological positions, emphasis on the strict exercise of sovereignty over natural resources and the call for full economic self–determination.[251] Former colonies strongly opined that economic independence over their natural resources was an integral part of acquiring the right to political self–determination, sovereignty, exploration, exploitation, the use and marketing of their natural resources.[252] The proclamation of Sovereignty over Natural Resources by these countries finally gave rise to a major development evidenced by the provision of a secure legal environment for the investors based on respecting the sovereign rights of developing countries over their own natural resources. The utilization of a State's own natural resources as guaranteed by the PSNR might be considered as one of the prerequisites for economic development.[253] Thus, in exercising such sovereignty, the host State is entitled to implement its right to nationalize foreign investments within its territory if it serves the public interest as long as this is accompanied by effective compensation.[254] The justification for such reaction towards foreign investments lies in the fact that the related investment agreements and/or concession agreements were concluded through corruption and the coercion of national authorities especially during the colonial era.[255]

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[250] Jan Wouters, Sanderijn Duquet and Nicholas Hachez, 'International investment law: The perpetual search for consensus' in Olivier De Schutter, Johan Swinnen and Jan Wouters (eds) *Foreign Direct Investment and Human Development: The law and economics of International Investment agreements* (Routledge 2013) pp. 28-33.

[251] Rudolf Dolzer, 'Permanent Sovereignty over Natural resources and Economic Decolonization' 7(2) (1986) HRLJ,p. 217; Stephen M. Schwebel 'The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources' 49 (1963) ABAJ, p. 463; Charles N. Brower and John B. Tepe, 'The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?' 9 (1975) IntlLaw p. 295.

[252] Nina M. Eejima, 'Sustainable Development and the Search for a Better Environment, a Better World: A work in Progress' 18 (1999) UCLAJIntlEnvtlL&Pol pp. 99 and 100.

[253] Ricardo Pereira and Orla Gough, 'Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law', 14(2) (2014) MelbJIntlL p. 462 and Miranda (2012) p. 801.

[254] S. Azadon Tiewul, 'The Evolution of the Doctrine of Permanent Sovereignty over Natural Resources' 15 (1978-1981) UGhanaLJ p. 71 and UNGA Res 1803(XVII).

[255] Homayoun Mafi, 'Iran's Concession Agreement and the role of the National Iranian Oil Company: Economic Development and Sovereignty Immunity' 48(2008) NatResourcesJ pp. 407–408.

A. Nationalization and/or Expropriation

To clarify the various aspects of the links between the international investment law and PSNR, the question of nationalization is of particular importance. To describe the various situations where a host State takes foreign-owned property many terms including expropriation and nationalization can be used. [256]

Expropriation basically refers to the taking of foreign-owned property indicating mentions both the person and the property affected by the dispossession. There are two types of expropriations: direct taking which covers expropriation, nationalization, confiscation, requisition or sequestrations. Indirect taking encompasses creeping expropriation and regulatory takings. In the case of general expropriation, it may be related to changes in the economic or social structure of host State or may be targeted at the exclusion of private capital from a particular sector of the national economy. This term is normally synonymous with 'Nationalization' which refers to a State's undertaking a number of individual expropriations with the common aim of partially or totally restructuring the country's economy. Nationalization, in other words, involves the large–scale expropriation on the basis of an executive or legislative act for the purpose of transferring property or interests into the public domain. Accordingly, nationalization connotes the taking of property in an industry or economy–wide context.[257] Although nationalization and individual expropriation are not exactly equivalent, they both involve the exercise of sovereign authority by

[256] see Jean-Pierre Laviec, *Protection et Promotion des investissement* (Paris : Presses universitaires de France 1985) 159-164, Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers 1995) p. 99 and Ryan Suda, 'The Effect of Bilateral Investment Treaties on Human Rights Enforcement Realization' in Olivier De Schutter (ed) *Transnational Corporations and Human Rights* (Bloomsbury Publishing 2006) p. 92 and Asif H. Qureshi and Andreas R. Ziegler *International Economic Law* (3rd edn, Sweet & Maxwell 2011) pp. 513–522 and Ursula Kriebaum 'Expropriation' in Marc Bungenberg et al., *International Investment Law* (C.H.BECK. HART. Nomos 2015) pp. 959–1030, Giorgio Sacerdoti, 'Bilateral Treaties and Multilateral Instruments on Investment Protection' (1997) 269 Recueil des Cours de l'Académie de Droit International pp. 379–380.

[257] United Nations Conference on Trade and Development, 'Taking of Property', UNCTAD Series on issues in international investment agreements (New York & Geneva 2000) 2, UN Doc. UNCTAD/ITE/IIT/15.

a State over property within its borders to accomplish a compulsory transfer of property rights from private to public ownership.[258]

It should be however noted that despite the above-mentioned differences, most of the investment treaties do not differentiate between expropriation and nationalization.[259] For instance, Article 4(2) of the 'Agreement between Germany and Iran on Reciprocal Promotion and Protection of Investments (2002)' states that:

> '[i]nvestments by investors of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effect of which would be tantamount to expropriation, hereinafter called "expropriation" […]'.[260]

Article III(I) of Treaty between the United States and Ecuador concerning the Encouragement and Reciprocal Protection of Investment (1997), in a similar manner includes the term 'Nationalization' under the general term of 'expropriation':

> '[i]nvestments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation')[…]'.[261]

The majority of nationalization events occurred upon the acquiring independence of former colonies which viewed nationalization of foreign investments is the only way of surviving their economic independence. Nationalization, in this sense, is seen as the complementary of political independence and sovereignty of these countries. Newly–independent countries not only viewed

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[258] Lianlian Lin and John R. Allison, An Analysis of Expropriation and Nationalization Risk in China, 19(1994) YaleJIntlL p. 140.

[259] Dolzer and Stevens (1995) Ibid.

[260] Agreement between Germany and Iran on Reciprocal Promotion and Protection of Investments (2002), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3501/download <accessed 26 September 2019>.

[261] Treaty between the United States and Ecuador concerning the Encouragement and Reciprocal Protection of Investment (1997) https://www.state.gov/wp-content/uploads/2019/03/97-511-Ecuador-Trade-Investment-Treaty.pdf <accessed 26 September 2019>.

political independence as a crucial factor for their survival but reiterated their economic independence and sovereignty over natural resources as the prerequisite for independence. The foreign intervention in economic affairs was, therefore regarded against their independence. Permanent presence of foreign investors in their territories could also pave the way for intervention in internal affairs.[262] Thus, the developing countries under the influence of such attitude and for the protection of their independence and integrity closed the doors to new investors and nationalized previous investments. Emergence of such movement caused an unprecedented crisis for the States of nationality of foreign investors, while the legal mechanisms for the protection of investment were not developed enough.[263]

In this respect, a part of speech of the Iranian Prime Minister during the special session of the UN Security Council concerning the Iranian oil nationalization crisis can well describe the situation:

> Iran's oil resources could provide the most important means by which the country would raise the low standard of living of its people. It should be national industry with the revenues going to improve lives of Iranians. Under the existing conditions before the nationalization, practically none of the revenues went to improve the well–being of the people, or the technical progress or industrial development of Iran. As long as the Company had a monopoly on this great source of wealth it was impossible for the Iranian people to enjoy political independence. […].[264]

This process must, however be subject to the public purpose and carried out on a non-discriminatory basis with the compensation payment.[265] In this respect the compensation is seen as a balancing scale between the sovereignty of States over their own natural resources and respect

[262] Peter T. Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press 2007) p. 82.

[263] Jeswald W. Salacuse and Nicholas P. Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain', 46 (2005) HarvIntlLJ p.75.

[264] The excerpt from the speech of Iranian Prime Minister in the UN Security Council meeting concerning the Iranian Oil nationalization, 15 October 1951, the UN Security Council Off. Rec. 6th year, 560th meeting (1951).

[265] Kriebaum (2015) p. 962.

of the acquired rights of foreign investors.[266] If one wants to mention the critical events of nationalization chronologically, the following can be noted: Nationalization carried out by the Mexican government in 1914, the Soviet Union in 1917.[267] However, nationalization of foreign property, which happened rarely between the two world wars, expanded rapidly after creation of the United Nations.[268] New socialist countries (Poland, Czechoslovakia, Yugoslavia, Hungary, Bulgaria and Romania) nationalized the aliens' properties during 1946-1948. Subsequently, the developing countries followed the socialist countries more seriously. In 1951, Iran nationalized the Anglo-Iranian Oil Company, and Egypt nationalized the Suez Canal Company. After that, Cuba in 1959, Sri Lanka in 1963, Indonesia in 1965, Tanzania in 1966, Bolivia in 1969, Algeria in 1971, Somalia between 1970 and 1972, and Libya in 1978 embarked on nationalization. In fact, these nationalizations occurred in 1960s and 1970s, at the height of the anti-colonial struggles for independence.[269]

In the opinion of the developing countries, the permanent presence of foreign investors in their territories could pave the way for intervention in their internal affairs including economic affairs.[270] All countries however, agree that under international law, nationalizations with the aim of the economic restructuring of a State cannot be considered illegal.[271] In the *Amoco case*, the arbitral tribunal held that the right to nationalization as one of the fundamental attributes of State

[266] Ibid.

[267] Qureshi and Ziegler (2011) p. 493.

[268] As an example we can refer to the events happened in the aftermath of Russian revolution in 1917, Stephen Hobe 'The Development of the Law of aliens and the Emergence of General Principles of Protection under Public International Law' in Marc Bungenberg et al., *International Investment Law* (C.H.BECK. HART. Nomos 2015) p. 9 and Ursula Kriebaum 'Expropriation' in Marc Bungenberg et al., *International Investment Law* (C.H.BECK. HART. Nomos 2015) p. 962.

[269] Stephen Hobe 'The Development of the Law of aliens and the Emergence of General Principles of Protection under Public International Law' in Marc Bungenberg et al., *International Investment Law* (C.H.BECK. HART. Nomos 2015) p. 12. Nowadays, a few countries such as Venezuela and Bolivia still seek nationalization as an economic policy tool. Qureshi and Ziegler (2011) p. 493. For further details about the Bolivia, there is an interesting Chapter written by Bjorn Arp 'The Regulation of Foreign Direct Investment in Bolivia: Some Current Challenges' in Andrea K. Bjorklund (ed) (2012–2013) Yearbook on International Investment Law and Policy pp. 609–619.

[270] Muchlinski (2007) p. 82.

[271] Sornarajah (2004) p. 13.

sovereignty, which is commonly used as an important tool of economic policy by many countries, both developed and developing, cannot easily be considered as surrendered.[272] The newly–independent States claimed that the re-negotiation of unfairly–imposed 'concession agreements' concluded through corruption and specifically coercion imposed by the colonial powers is legally justifiable.[273] Developed countries conversely insisted on the development of an international minimum standard which would duly protect foreign investment but this was opposed by the former colonized States.[274] Furthermore, developed countries sought to establish a reliable and explicit rules of compensation to be applied in cases of nationalization.[275] By contrast, the former European colonies argued that traditional rules of investment law did not reflect their cultural and legal concerns; thus, they pursued the introduction of newly–adapted rules on foreign investment protection. They claimed the Calvo doctrine. Calvo, was an Argentinian jurist was of the opinion that foreigners should not be granted rights and privileges which were more than those given to the nationals of the host State.[276] Furthermore, an independent State was expected to enjoy full freedom and non-intervention in its internal affairs based on the principle of equality.[277] Similarly, Drago an Argentinean Foreign Affair Minister in 1902, elaborated a doctrine according to which 'for the common safety of the South American republics […] the collection of pecuniary claims of citizens of any country against the government of any South American republic should not be effected by armed force'.[278]

From this perspective, it can be understood the process of nationalization became a policy tool for the developing countries to pursue their demands. In the Mexican nationalization case, the US

[272] *Amoco International Finance Corporation. v. The Government of the Islamic Republic of Iran, et al.* (IUSCT Case No. 56) Award No. 310-56-3 of 14 July 1987 (hereinafter: *Amoco v Iran*) para.179.

[273] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge Studies in International and Comparative Law) (1st edn, Cambridge University Press 2007) pp. 212–213.

[274] Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' 24 (1990) IntlLaw pp. 659–661 and Sornarajah (2004) p. 13.

[275] Kate Miles, *The origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) pp. 79–80.

[276] Ibid.

[277] Hobe (C.H.BECK. HART. Nomos 2015) p. 9.

[278] Horacio A. Grigera Naón, 'Arbitration and Latin America: Progress and Setbacks' 21(2)(2005) ArbIntl p. 135.

Government maintained that 'the legality of an expropriation is contingent upon adequate, effective and prompt compensation'.[279] Furthermore, in its opinion, such nationalization must be carried out without any kind of discrimination and only for the 'public interest'. Hence, any attempt at non–compliance with the above-mentioned requirements would have great consequences for the State concerned in the form of the State responsibility and its duty of compensation.[280]

Western States have admitted the legality of nationalization of foreign property. A striking example is when the British Government on 29th July, 1951, handed a Note to the Iranian Government stating that: 'His Majesty's Government recognize on their own behalf, and on that of the Company, the principle of the nationalization of the oil industry in Iran [...]'.[281]

1. Case Study: Iranian Oil Industry Nationalization Case

The Iranian Oil Industry nationalization can be considered as a starting point in the discussion on the question of sovereignty over natural resources as well as on the issue of compensation in the case of nationalization as referred to in the General Assembly resolutions.

A British businessman, William Knox D'Arcy, 28 May 1901, obtained a sixty-year concession to exploit petroleum within Iranian territory by bribing Iranian officials.[282] The contract granted exclusive rights to explore, obtain, and market oil, natural gas, asphalt, and ozocerite. The first oil exploitation company was established in 1903. Eventually, in 1909 the company changed its name

[279] 'The Department of State Bulletin' 2(42) Publication 1454 (April 13, 1940) 381 and for the definition of three mentioned above criterion see Qureshi and Ziegler (2011) p. 518.

[280] Charles Rousseau, *Droit international public*, Tome V (Paris: Les rapports conflictuels Sirey 1983) p. 53; Wil D. Verwey and Nico J Schrijver, 'The Taking of Foreign Property under International Law: A New Legal Perspective' 15 (1984) NYIL pp. 17–19.

[281] Alan W. Ford, *The Anglo–Iranian Oil Dispute of 1951–1952: A Study of the Role of Law in the Relations of States*, (University of California 1954) p. 102.

[282] To read different views on this case I suggest reading the following articles: Sir Reader Bullard, 'Behind the Oil Dispute in Iran: A British View' 31 (1952–1953) Foreign Affairs p. 461; Abolbashar Farmanfarma, 'The Oil Agreement Between Iran and the International Consortium: the Law Controlling' 34 (1955–1956) TexLawRev p. 259 and Rouhollah K. Ramazani, 'Oil and Law in Iran' 2 (1961–1962) John Bassett Moore Society of International Law, p. 56.

to Anglo–Persian Oil Company. The British government continuously provided indirect financial assistance and political backing to D'Arcy's company.[283] In 1914, the Anglo–Persian Oil Company (APOC) was bought by the British government when it acquired a 52.5% stake in its shares. The Company was renamed the Anglo–Iranian Oil Company (AIOC) in 1935 to conform with Rezā Shāh's wish that foreign governments should call the country Iran rather than Persia. Hence, Iran attempted to re-negotiate the terms of original concession contract but it failed.[284] The British government subsequently repeatedly reduced Iran's share of AIOC's revenue. This action served to provoke nationalistic feelings among Iranians. The speech made by the Iranian Prime Minister during the special session of the UN Security Council concerning the Iranian oil nationalization crisis effectively describes the situation:

> Iran's oil resources could provide the most important means by which the country would raise the low standard of living of its people. It should be national industry with the revenues going to improve lives of Iranians. Under the existing conditions before the nationalization, practically none of the revenues went to improve the well–being of the people, or the technical progress or industrial development of Iran. As long as the Company had a monopoly on this great source of wealth it was impossible for the Iranian people to enjoy political independence. […].[285]

The Iranian government was unsuccessful in boosting its revenue from oil wells exploited by the Anglo–Iranian Oil Company.[286] Hence, the Anglo–Iranian Oil Company was nationalized by the Iranian government under the leadership of Mohammad Mosadeq through a 'Single Article Law' on the 20th of March 1951 which states that:

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[283] Mafi (2008) p. 410; S. Marsh 'HMG, AIOC and the Anglo-Iranian Oil Crisis: In Defence of Anglo-Iranian', 12(4) (2001) Diplomacy and Statecraft pp. 148–152.

[284] Mafi (2008) pp. 409–410.

[285] The excerpt from the speech of Iranian Prime Minister in the UN Security Council meeting concerning the Iranian Oil nationalization, 15 October 1951, the UN Security Council Off. Rec. 6th year, 560th meeting (1951).

[286] Isi Foighel 'Nationalization, A study in the protection of Alien Property in International Law' 26 (1956) Nordisk Tidsskrift International Ret, p. 141.

> [f]or the happiness and prosperity of the Iranian Nation and for the purpose of securing world peace, it is hereby resolved that the oil industry throughout all parts of the country without exception be nationalized; that is to say, all operations of exploration, extraction and exploitation shall be carried out by the Government.[287]

Finally, on the 2nd of May, 1951, the Shah of Iran signed 'the Law Regulating Nationalization of Oil Industry' which is composed of 9 Articles.[288] The oil industry Nationalization ultimately provoked a British and American plot to overthrow the elected Iranian government.[289]

Nonetheless, the oil nationalization was not successful, and it was ended in 1953 when legal government of Prime Minister Mosadeq was overthrown by a US military coup. Then, in 1954 the Parliament of Iran authorized the establishment of the consortium to urge participation of international oil companies.[290] This situation continued till the Islamic revolution in 1979. Thereafter, we saw the status of absolute government control over petroleum resources in Iran. The Constitution of the Islamic Republic of Iran has laid down a legal framework under which it elaborates the overall guidelines on how to exercise the sovereign rights over natural resources and natural resources nationalization. For instance, Article 3(5) of the Constitution seeks to the 'complete elimination of imperialism and prevention of foreign influence'. Besides, Article 82 bans the involvement of foreign experts and more importantly, under Article 153 any 'agreement resulting in foreign control over natural resources […] of the country' is prohibited. The Constitution explicitly emphasizes that the government is the only entity that can deal with natural

[287] Ford (1954) pp. 268–269.

[288] Ibid.

[289] See generally: Mafi (2008) pp. 407–430; Foighel (1956) pp. 141–142.

[290] The 1954 Consortium Agreement was the new strategy of Iran in which the government sought to, while reconciling it with the 1951 'Law Regulating Nationalization of Oil Industry' under a complex manner, wanted to open Iran's oil market towards the international oil companies. See Nima Nasrolahi Shahri, 'The Petroleum Legal Framework of Iran: History, Trends and the Way Forward' 8(1)(2010) China and Eurasia Forum Quarterly pp. 111–126.

resources. This issue has been articulated in Article 81 which states that 'granting of concessions to foreigners […] is absolutely forbidden'.[291]

B. Internationalization of Investment Contracts

State contracts as one of the parties is a sovereign State, they have the elements of treaties in international law. In *Serbian Loans* case,[292] the Permanent Court of International Justice held that the contracts signed between a State and private person should be governed by domestic law as stipulated under private international law. Furthermore, in *Kahler v. Midland Bank* the British Court of Appeal ruled that where the contracts between a State and a foreign private company stipulated that the governing law was that of the host country, then the law of the host country not only validates the contract but also empowers the State to 'amend or abrogate their contractual obligations'.[293]

The basis of this principle is that every State has the power to contract with another State or private company. This has been recognized in the literature of international law and elsewhere, such as in the *Wimbledon* case of the Permanent Court of International Justice.[294] In the *Wimbledon* case, the Court held that signing treaties was a manifestation of sovereignty. The investment contracts signed between a State and private companies are exercise of sovereignty. The international practice changed in the middle and latter part of the last century. It must be pointed out the ruling of *Serbian and Brazilian Loans case* was rejected by *Texaco* case:

[291] Despite the legal constraints imposed by the Constitution, the Islamic government could not resist against the oil market realities and the increasing demand for development of oil and gas fields mainly in 1990s onwards. It must be noted that the majority of research and articles have been written in Farsi.

[292] Case Concerning the Payment of Various Serbian Loans Issued in France (France v Kingdom of the Serbs) (Judgment of 12 July 1929) PCIJ Series A/B No 20. p. 41, available at http://www.worldcourts.com/pcij/eng/decisions/1929.07.12_payment1.htm <accessed 26 September 2019>.

[293] *Kahler v Midland Bank* Ltd, [1950] A.C. 56.

[294] *S.S. 'Wimbledon' case*, p. 25.

> This tends more and more to delocalize the contract, or if one prefers, to sever its automatic connections to some municipal law: so much so that today when the municipal law of a given State, and particularly the municipal law of the contracting State, governs the contract, it is by virtue of the agreement between the parties and no longer by a privileged and so to speak mechanical application of the municipal law.[295]

The aim of the internationalization of State contracts is to put the host State and private investors on the same footing. The implications of such attitude towards the State contracts is that any dispute arising out of the contractual relationships between the foreign investor and the host State must be settled pursuant to the principles of international law. [296] Needless to say, 'the public international law regime regulating the interests of private persons sometimes affords greater protection than the private international law'.[297] The Energy Charter Treaty, for instance, requires compulsory investor-State arbitration by a third party. A dispute concerning either agreement must be decided in accordance with the principle of public international law.[298] In *Revere Copper case*, the arbitral tribunal ruled that the nature of State contracts required the governance of international law:

> [t]he international law rule that a government is bound by its contracts with foreign parties notwithstanding the power of its legislature under municipal law to alter the contract has been repeatedly asserted in important international arbitrations and elsewhere.[299]

It also pointed out that:

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[295] *Texaco v Libya*, p. 12.

[296] F.A. Mann, 'A Theoretical Investigation of the Applicable Law of Contracts between State and Private Persons', (1975) RevBelgeDI pp. 564–565.

[297] Ibid., p. 615.

[298] Priscilla M. F. Leung and Guiguo Wang, 'State Contracts in the Globalized World', 7(2006) JWIT, p. 840.

[299] Revere Copper & Brass Inc. v. Overseas Private Investment Corporation (1978) 56 ILR (hereinafter: *Revere* Award), p. 282.

> [...] it was incontestable that these contracts were international contracts, both in the economic sense because they involved the interests of international trade and in the strict legal sense because they included factors connecting them to different States, an international contract having been recently defined as being 'that contract whose elements are not all located in the same territory'.[300]

In practice, the Arbitration Tribunal in *Aramco Case* considered the concession agreement signed between the Saudi Arabian government and a private U.S. company to have an international element. It held that, on grounds of the status of the two parties, one being a State and the other a private company, the long term of the said agreement and it related to the exploitation of natural resources, the concession agreement was an international contract.[301]

Moreover, the internationalization of State contracts can affect the exercise of sovereign power by the host State. For instance, where State contracts are governed by the domestic laws of the host State, the nationalization or expropriation will not necessarily lead to international responsibilities of the host State. Contrariwise, State contracts are containing an international element, when a host State nationalizes foreign investments, it may be held responsible for breach of contract under international law. Similarly, the ILC's Third Report on State Responsibilities provides that a State may not deny its international responsibility based on domestic laws. It further points out that:

> [...] the fact that some particular conduct conforms to the provisions of national law or is even expressly prescribed by those provisions does not make possible to deny its internationally wrong character when it constitutes a breach of an obligation established by international law [...] a State cannot plead the provisions (or deficiencies) of its constitution as a ground for the non-observance of its international obligation. It is indeed one of the

[300] Ibid., p. 11.

[301] *Saudi Arabia v. Arabian American Oil Company (Aramco)* (1958) 27 ILR (hereinafter: *Aramco* Award). pp. 159–164.

great principles of international law, informing the whole system and applying to every branch of it.[302]

C. Resolution 1803: Exercise of the Sovereignty over Natural Resources within Investment Agreements

Resolution 1803 (XVII) 'has been viewed as a balanced accommodation of the conflicting interests'[303] of the capital importing and capital exporting countries in relation to Sovereignty over Natural Resources and investment law. In the negotiations which preceded the adoption of the Resolution 1803, the leading view' of developing and developed countries in formulating the legal framework of strengthening the exercise of sovereignty over natural resources through the investment mechanisms was adopted. This resolution has also been adopted by a majority of Member States representing both developed and developing countries. By way of clarification in relation to the status of votes, the resolution was adopted by 87 votes to 2, with 12 abstentions. South Africa and France were against this resolution. The communist bloc, Ghana and Burma abstained. The United States voted in favour of the resolution.
It provides that:

> […]
> 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

[302] Yearbook of the International Law Commission (1971) Vol. II, p. 227, available at http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1971_v2_p1.pdf&lang=EFSR <accessed 26 September 2019>.

[303] Andrew N. Onejeme, 'the law of natural Resources Development: Agreements between Developing Countries and Foreign Investors' 5(1)(1977) SyracuseJIntlL&Com p. 9.

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 (emphasis added).

[…]

8. Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution (emphasis added).

Paragraph 4 of resolution does not explicitly refer to the PSNR. Nevertheless, this principle creates a reason of national interest within which overlooking of any types of interest in implementation of 'taking' policy in accordance with the exercise of sovereignty of Host State is adequate. In addition, paragraph 3 of this resolution indicates that 'due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural resources'. The fundaments of the PSNR under this resolution are premised upon a State's understanding of the scope of the exercise of its sovereignty together with its own national interests. Through this resolution, an agreement highlighting the fact that the foreign investment agreements concluded by a government must be observed in *good faith* was achieved.[304]

As far as expropriation is concerned, 'the capital-exporting States consider this resolution as an important and decisive evidence' of international law on the legality of expropriation.[305] The question of the standard of compensation was the subject of considerable debates.[306] Within this resolution, it was agreed on 'appropriate' compensation which is a fairly ambiguous term.[307]

[304] 'Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith'; see UNGA Res 1803, para 8.

[305] Brownlie (1979) p. 262.

[306] Stephen Hobe, 'Evolution of the Principle of Permanent Sovereignty over Natural resources', in Marc Bungenberg and Stephen Hobe, *Permanent Sovereignty over Natural Resources* (Springer 2015) p. 6 and Schrijver (2015) pp. 17–18.

[307] Dolzer and Schreuer (2008) p. 13.

Although the delegation of the United States wanted to insert the 'Hull Formula',[308] the final text of the resolution used the term 'appropriate' compensation in lieu of 'adequate, effective and prompt payment'. It was decided that the interpretation of 'appropriate compensation' would equate to the 'Hull Formula' requirements.[309] In the event that foreign property is taken over, compensation must be paid pursuant to international law and the investment agreements between States and private parties and the arbitration clauses therein have a binding effect.[310]

D. The Impact of the New International Economic Order Declaration (NIEO) on the Relationships between the PSNR and International Investment Law

In 1972 the Group of 77, a group of developing countries, proposed the drawing up of a 'Charter of Economic Duties and Rights of States'[311] to the third United Nations Conference on Trade and Development (UNCTAD). In a similar manner, the Economic Declaration of the Algiers Conference of Non-Aligned Countries in September 1973 stipulated the following paragraph:

> The Conference gives its unreserved support to the application of the principle that nationalization carried out by States as an expression of their sovereignty, in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and its mode of payment and that any disputes which might arise should be settled in accordance with the national legislation of each State […].

[308] The Mexican –United States disputes over land holdings and oil operations entailed to the so-called 'Hull Formula' a term stemmed from a communique sent by the US Secretary of State, Cordell Hull who held that 'adequate, effective and prompt payment 'of compensation for seizure of foreign-owned property is unconditionally required under international law. Thomas Pollan, *Legal framework for the Admission of FDI*, (Ultrecht: Eleven International Publishing 2006) pp. 64-65; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) p. 18.

[309] UN Doc. A/C.2/SR.794-874, 327.

[310] Ibid at 489.

[311] 3 UNCTAD, I Proceedings of the United Nations Conference on Trade and Development, U.N. Doc. TD/180, Vol. I (1972) para. 209 at 35.

> The results obtained in the hydrocarbons sector, which was previously exploited for the sole benefit of the transnational oil companies, demonstrate the power and effectiveness of organized and concerted action by producing and exporting countries. Similarly, the determination of an increasing number of developing countries to terminate treaties, agreements and conventions imposed on them by force […] is producing increasingly positive results. This process should be extended, accelerated and coordinated in Latin America, Asia, Africa, the Middle East, and in other developing countries, in order to strengthen solidarity among the developing countries, reverse the trend towards a deterioration of their situation and secure the establishment of a new international economic order which would meet the requirements of genuine democracy.[312]

These countries realized that the existing conditions governing international trade relations and policies were no longer adequate to secure the development objectives of the world economy, and particularly their own economies.[313] They emphasized that the then existing international economic structure and practices failed to bridge the gap between the rich and poor nations, and it called for a set of declarations of rights and duties of states, which could be transformed into an international instrument by which States could proclaim their rights.[314] The importance of nationalization as an expression of sovereignty of States over their natural resources was finally stipulated in UNGA Res 3171:

> [t]he application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is

[312] Political Declaration of the Fourth Conference of Non-Aligned Countries (Algiers, 5–9 Sept. 1973) p. 67. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&ved=2ahUKEwiaiuGQq-7kAhUipHEKHTmKChMQFjAKegQIABAC&url=http%3A%2F%2Fcns.miis.edu%2Fnam%2Fdocuments%2FOfficial_Document%2F4th_Summit_FD_Algiers_Declaration_1973_Whole.pdf&usg=AOvVaw2OgRv0oE1xFpieqOpdBs7o <accessed 26 September 2019> quoted by G. W. Haight, 'The New International Economic Order and the Charter of Economic Rights and Duties of States'9 (1975) IntlLaw p. 591.

[313] Andres Rozental, 'The Charter of Economic Rights and Duties of States and the New International Economic Order', 16(1975–1976s) VaJIntlL p. 310 and Onejeme (1977) p. 6.

[314] Rozental, (1975–1976) p. 310 and Onejeme (1977) p. 6.

> entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures […].[315]

Similarly, Paragraph 4 of the NIEO declaration in emphasizing the role of nationalization on the effective control over natural resources provides that:

> [t]he new international economic order should be founded on full respect for the following principles… (e) Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right […].[316]

In accordance with the principles of sovereign equality, interdependence, and cooperation among all States, the NIEO declaration reaffirmed, *inter alia*, full exercise of Permanent Sovereignty over Natural Resources, together with the right to nationalization or transfer of ownership of foreign property to nationals. Under the NIEO, the priority was given to domestic law to decide questions related to expropriation and compensation to be paid in case a foreign investment expropriation. Not surprisingly, developed countries fiercely opposed these principles.

E. Charter of Economic Rights and Duties of States

[315] UNGA Res 3171 (XXVIII) (17 December 1973).

[316] UNGA Res 3201(S-VI).

The success of the 'Oil Producing and Exporting Countries' (OPEC) in securing Member States' control over world oil prices in 1973[317] could be seen as an example that provoked other natural resources–owned countries to impose their positions by the adoption of a resolution entitled the 'Charter of Economic Rights and Duties of States' in December 1974.[318] Therefore, the question of sovereignty over natural resources was again strongly put forward. The Charter focused only on the developing world's viewpoints about economic sovereignty.[319] Furthermore, developing countries have argued that they should not be bound by existing international law concerning nationalization-related compensation as they had not been participants in the drafting of these laws.[320] They further alleged that some existing international laws including payment of compensation, were formulated for the benefit of the capital-exporting States.[321] It was adopted by a vote of hundred twenty in favour to six against, with ten abstentions.[322]

The PSNR, among fifteen principles listed in the Charter, was reaffirmed and further elaborated pursuant to Article 2(1) which provides that '[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities'. For the first time, several limitations to the exercise of sovereignty over natural resources became evident. The aim to protect, preserve, and enhance the environment are of particular importance under the text of the Charter. It subjects economic, political, and other relationships among States to the principles of sovereignty and territorial integrity. It calls upon the States to use and exploit the natural resources shared by two or more

[317] During the 1973 Arab-Israeli War, Arab members of the Organization of Petroleum Exporting Countries (OPEC) imposed an embargo against a number of countries including the United States. For more details, visit the https://history.state.gov/milestones/1969-1976/oil-embargo <accessed 26 September 2019>.

[318] Onejeme (1977) p. 10. Rozental (1975–1976) p. 317. Burns H. Weston, 'The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-owned Wealth' 75(1981) AJIL p. 467. UNGA Res 3281.

[319] John H. Currie et al, *International Law: Doctrine, Practice, and Theory* (2nd edn, Irwin Law 2014) p. 689; Hobe (C.H.BECK. HART. Nomos 2015) pp. 7–8; Margot E. Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice' 62 (1) (2013) ICLQ p. 31 and S.K. Chatterjee, 'The Charter of Economic Rights and Duties of States: An Evaluation After 15 Years' 40 (1991) ICLQ p. 669.

[320] Rozental (1975–1976) p. 316.

[321] Ibid.

[322] Andreas Lowenfeld, *International Economic Law* (2nd edn, Oxford University Press 2008) p. 493.

countries in a manner that avoids damage to the legitimate interests of others. Finally, it explicitly declares that all States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or to areas beyond the limits of their national jurisdiction.[323] More importantly, Article 2(2)(c) provide that:

> […] this resolution reaffirmed that exhaustible natural resources should be exploited and marketed with the main aim of securing highest possible rate of economic growth for developing countries. 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, […].

Article 2(2)(c) reaffirmed the rights of individual States to permanent sovereignty over their own natural resources. It confirms a State's right to regulate foreign investment pursuant to its own policies and aims. The standard or extent of compensation was to be as 'appropriate' and its determination was left exclusively to the domestic laws of the nationalizing or expropriating country.[324] In other words, the one–sided language of the Charter confined investor–State disputes to the national jurisdiction of the host State without providing any recourse to international tribunals.[325]

In a separate vote, Article 2(2)(c) was adopted by a vote of 104 in favor, 16 against, and only 6 abstentions, Barbados being the only developing country to abstain. Every industrialized country with a market economy either voted against the paragraph or abstained which showed the concern of these States in connection with the new procedure of compensation payments. [326] For this

[323] UNGA Res 2692 (XXV) (11 December 1970), UNGA Res 1991/88 (26 July 1991); UNGA Res 41/65 (3 December 1986).

[324] Onejeme (1977) p. 7.

[325] Hobe (C.H.BECK. HART. Nomos 2015) 21 and Kriebaum (2015) pp. 962–963.

[326] Haight (1975) p. 602. For instance, the United States, West Germany, France, Japan, and the United Kingdom.

reason, the approach followed through the Charter referred to above never gained worldwide recognition in international law.[327] Unlike the 1962 Resolution, the CERDS does not satisfy the demand of developed countries that the question of compensation should be decided according to the principles of international law.[328] For these reasons, in views of the developed countries the Charter of Economic Rights and Duties of States has no legal value.[329]

F. Taking of Foreign Investment in the view of Arbitral Tribunals

As demonstrated earlier, developed countries were of the opinion that the NIEO declaration and the Charter of Economic Rights and Duties of States did not reflect the law.[330] These resolutions, were thus not recognized as the evidence of rules of international customary law. This position was supported in some of the arbitration awards, on the basis that the developed countries were in absolute disagreement with these resolutions.[331] In the arbitration between *Texaco and the Libyan Arab Republic*, Libya invoked the provisions of Article 2(2)(c) of the Charter in its attempt to avoid payment of any compensation, which eventually did not succeed.[332] The arbitrator, Professor Dupuy held that:

> [R]esolution 1803(XVII) of 14 December 1962 was passed by the General Assembly by 87 votes to 2, with 12 abstentions. It is particularly important to note that the majority voted for this text, including many States of the Third World, but also several Western developed countries with market economies, including the most important one, the United States. The

[327] Schwebel (1963) p. 28.

[328] Prabhash Ranjan, 'India and Bilateral Investment Treaties-A Changing Iandscape' 29(2014) ICSID Rev p. 424.

[329] Jeswald W Salacuse, *The Law of Investment Treaties* (2nd edn, Oxford University Press 2015) p. 84.

[330] Schrijver (1997) pp. 98–100 and the US delegation comments, Report of the *Ad hoc* Committee of the Sixth Special Session, UN GAOR, 6th Spec. Sess. (2229th Plenary meeting), UN Doc. A/PV.2229 (1 May 1974)7, para. 81.

[331] *Texaco v Libya*, Ibid.

[332] Bungenberg (2015) p. 128.

> principles stated in this Resolution were therefore assented to by a great many States representing not only all geographical areas but also all economic systems. [333]

He further provided a convincing argument that:

> [t]he conditions under which Resolution 3281(XXIX), proclaiming the Charter of Economic Rights and Duties of States, was adopted also show unambiguously that there was no general consensus of the States with respect to the most important provisions and in particular those concerning nationalization. Having been the subject matter of a roll-call vote, the Charter was adopted by 118 votes to 6, with 10 abstentions.[334] The analysis of votes on specific sections of the Charter is most significant insofar as the present case is concerned. From this point of view, Article 2(2)(c) of the Charter, which limits consideration of the characteristics of compensation to the State and does not refer to international law, was voted by 104 to 16, with 6 abstentions, all of the industrialized countries with market economies having abstained or having voted against it. [335]

To conclude, Dupuy in the *Texaco Arbitration Award* held that Article 2(2)(c) of the Charter of Economic Rights and Duties of States is merely a formulation of Soft law (*de lege ferenda),* hence the Charter of Economic Rights and Duties in its entirety cannot be considered as developing principles of international law or customary international law, as it has been primarily supported by only developing States and economies in transition. Furthermore, it was argued that the States that voted against it or abstained might not be bound by the provisions of the Charter of Economic Rights and Duties as they would remain 'persistent objectors' to the formation of customary law.[336]

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[333] *Texaco v Libya*, p. 28.

[334] The Audiovisual Library of International Law of the United Nations internet website states that 115 UN Members voted in favour of the resolution adoption. http://legal.un.org/avl/ha/cerds/cerds.html <accessed 26 September 2019>.

[335] *Texaco v Libya*, p. 29.

[336] Ibid., p. 112.

By contrast, Arechaga opined that Article 2(2)(c) is a source of contemporary international law as there can be little doubt that Article 2(2)(c) is regarded by many States as an emergent principle and a statement of presently applicable rules.[337]

The *Texaco v Libya case* [338] expanded on how General Assembly resolutions might be used by an investment tribunal as evidence of custom.[339] On these grounds, Professor Dupuy found that Resolution 1803 was the accurate statement of customary international law at that time[340] and it was also recognized later as an authoritative evidence of custom by the Arbitral Tribunal in *Kuwait v Aminoil*.[341] By the same token, the *LIAMCO case*,[342] recognized the right of States to nationalize their natural resources by adopting compensation schemes pursuant to international law under the standard of the UNGA resolution 1803. The award concluded that the nationalization of LIAMCO's rights was not discriminatory, illegal or illegitimate, but the non–payment of compensation by Libya was illegal. The awards issued by the Iran–US Claims Tribunal do not also attach any legal effects to the Charter of Economic Rights and Duties of States since it makes no reference to international law accepted by most of the Western States. The Tribunal further held that the appropriate compensation standard as stipulated by the Charter is not a general principle of international law.[343]

To recapitulate the main differences between the content of resolution 1803 and the Charter of Economic Rights and Duties of States are:

- Resolution 1803 (XVII) sets forth the necessary conditions for compensation. It indicates that in the case of nationalization 'appropriate compensation' 'shall' be paid. Article 2(2)(c) of the

[337] Hossain et al. (1984) pp. 6–7 and Brownlie (1979) p. 268.

[338] Sloan (1989) p. 39.

[339] This dispute dealt with the compensation to be paid by Libya to two US companies by virtue of expropriation of their assets.

[340] *Texaco v Libya*, p. 30.

[341] Ibid at 30.

[342] Bungenberg (2015) p. 127.

[343] *Ebrahimi v Iran* (1994) 30 Iran – US CTR 560-44/46/47-3, ¶ 90 cited by O. Thomas Kohnson JR. and Jonathan Gimblett 'From Gunboats to BITs: The evolution of modern international investment law' in Karl P. Sauvant, Yearbook on International Investment Law & Policy (2010–2011) (Oxford University Press 2012) p. 683.

Charter of Economic Rights and Duties of States, in contrast, declares that each State has the right 'to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures [...]'.[344] Instead of using the word 'shall' that has more legal force, in what is notably a clear differentiation with the resolution 1803, the Charter uses the word 'should'.

- The Charter of Economic Rights and Duties expressly addressed national law, rather than international law, as the standard basis of determining compensation.[345]

III. The Contractual Protection Mechanisms of the Bilateral Investment Treaties (BITs) Affecting the PSNR

As previously expanded upon, the heavy reliance of resource–owning countries on the PSNR had adverse effects including the lack of provision of an effective investment protection mechanism for investors from developed countries.

Developing countries expressed their opposing opinions about the international customary regime of investment protection.[346] The negative approach of developed countries did not therefore permit the creation of any new international customary law norm on investment protection.[347]

Due to inadequate investment protection mechanisms, investor States started to fill this legal gap through the conclusion of BITs.[348] Bilateral investment treaties (BITs) are international investment agreements, often concluded between a developed and a developing State that are designed to establish rules and enforcement mechanisms governing foreign investment and in particular

[344] Richard B. Lillich, *The Valuation of Nationalized Property in International Law*, vol. III (University Press of Virginia 1972) pp. 183–204, Bulajic (1986) pp. 251–252 and Garcia-Amador (1990) pp. 146–155.

[345] UNGA Res 1803, para. 4; Charter of Economic Rights and duties of States, UNGA Res 3281, Art. 2.

[346] Jan Wouters et al., (2013) p. 33.

[347] Miles (2013) p. 89; Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements', 12 (2005) UCDavisJIntlL&Pol pp. 177–179.

[348] Genevieve Fox, 'A Future for International Investment? Modifying Bits to Drive Economic Development' 49 (2015–2016) GeoJIntlL p. 231 and Patrick Dumberry, 'Are BITs Representing the "New'' Customary International Law in International Law' 28 (2009–2010) PennStIntlLRev, p. 679.

investment protection against nationalization without compensation.[349] More specifically, the reasons underlying the development of BITs, can be identified in disagreements about the scope and content of customary international law protecting foreign investors.[350] The BITs are utilized to protect the rights of investors vis-à-vis the host States' obligations.[351] As a result, developed countries sought to sign BITs as a means of reducing investor risk through various provisions protecting their legal interests ranging from non–discriminatory and fair treatment to the limitation on expropriation and nationalization, the payment of full compensation and recognition of the settlement of investment disputes afforded by host governments to foreign investors and their investments.[352] The first ever BIT was concluded between the Federal Republic of Germany and Pakistan in 1959.[353] The majority of BITs contain the following provisions:

- The obligation to accord fair and equitable treatment to the investor and its investment;
- The obligation to accord full protection and security for the investor and its investment;

[349] Fox (2015–2016) p. 230 and Amnon Lehavi and Amir N. Licht, 'BITs and Pieces of Property' 36 (2010) Yale JIntlL p. 120. Iran, as a developing country, has been seeking to boost its economy through protection and promotion of foreign investments. It has ratified 58 BITs by March 2018.[349] These treaties follow the mainstream of universally-recognized BITs. As a general rule, they contain provisions dealing with (i) the fair and equitable treatment procedure with the investor(s), (ii) expropriation and nationalization as well as compensation, (iii) the free transfer of currency and (iv) arbitration process. For further information visit: https://www.investiniran.ir/en/home <accessed 26 September 2019>.

[350] United Nations Centre on Transnational Corporations, *Bilateral Investment Treaties* (Graham and Trotman 1998) p. 1.

[351] Qureshi and Ziegler (2011) p. 498. The BITs formed a reliable context to protect the foreign investment, in this respect see: Chester Brown 'The Evolution of the Regime of International Investment agreements: History, Economics and Politics' in Marc Bungenberg et al., *International Investment Law* (C.H.BECK. HART. Nomos 2015) pp. 177ff and for more details about the protection provided within the BITs see: Kriebaum (2015) pp. 964ff.

[352] Fox (2015–2016) p. 232; Lauge Skovgaard Poulsen, 'The Importance of BITS for Foreign Direct Investment and Political Risk Insurance' in Karl P. Sauvant (ed) Yearbook on International Investment Law and Policy 2009–2010 (Oxford University Press 2010) pp. 539–573 and for a comprehensive study of BITs I recommend reading Giorgio Sacerdoti, 'Bilateral Treaties and Multilateral Instruments on Investment Protection' (1997) 269 Recueil des Cours de l'Académie de Droit International and Qureshi and Ziegler (2011) pp. 499–513 and Miles (2013) pp. 88–89.

[353] Hobe (C.H.BECK. HART. Nomos 2015) p. 13 and Brown (2015) p. 177.

- The obligation not to impair, by unreasonable or discriminatory measures, the maintenance, management, use, enjoyment, or disposal by an investor of its investment;
- The obligation not to expropriate the investments of an investor, unless certain conditions are met, including the payment of prompt, adequate, and effective compensation;
- The obligation to accord investors and their investments treatment which is not less favourable than the treatment accorded to their own investors (i.e. national treatment);
- The obligation to accord investors and their investments treatment which is not less favourable than the treatment accorded to investors from third countries (i.e. most favoured–nation (MFN) treatment);
- The obligation to permit investors to remit or transfer fund and returns from the investment overseas; and
- The obligation to observe any undertakings entered into with respect to that particular investor or investment (known as the 'umbrella clause').[354]

Part Two: Umbrella Clause

Foreign investment capital normally flows from developed to developing countries. A set of activities are envisaged under the BITs to strike balance between rights and obligations of host State and foreign investor, *inter alia*, stipulating the umbrella clause. This clause imposes a requirement on each contracting State to comply with all investment obligations previously entered into with investors from the other contracting State to pursue their investment policies as well as delocalizing the foreign investments from the sphere of the domestic law of the host States.[355] The

[354] Chester Brown 'The Development by States of Model Bilateral Investment Treaties' in Wenhua Shan (ed) *China and International Investment Law: Twenty Years of ICSID Membership*, (Brill. Nijhoff 2014) pp. 120–121. For example, 2012 U.S. Model Bilateral Investment Treaty, available at https://2009-2017.state.gov/documents/organization/188371.pdf <accessed 26 September 2019> and and the BIT between the UK and Colombia (2010): https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3253/download <accessed 26 September 2019>.

[355] Tomas Fecak, *International Investment Agreements and EU Law* (Wolters Kluwer 2016) pp. 40–41.

origins of the umbrella clause can be traced back to disputes over natural resources, particularly the negotiations that followed the nationalization of Iranian Oil.[356]

The umbrella clause, as a larger package of investment protection measures, is a contractual term preventing the host State from exerting its sovereign rights over its natural resources to withdraw binding contractual commitments including the nationalization and concession breaches. The wording of the umbrella clause is not homogeneously used in all BITs. A classic umbrella clause contains words like: '[e]ach contracting party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other contracting party'.[357]

By way of illustration, the majority of Iran's BITs include a specific provision on Umbrella Clause. Although the wording is somehow different, the content is similar. For instance, in Agreement between the Swiss Confederation and the Islamic Republic of Iran on Promotion and Reciprocal Protection of Investments concluded in 1998, Article 11 provides that:

> Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.[358]

Article 10 of the Agreement on Reciprocal Promotion and Protection of Investments between the Republic of Turkey and the Islamic Republic of Iran in 1996, uses the similar wording without having the term 'constantly':

[356] Crawford (2008) p. 630.

[357] Article 2(2) British Model Investment Treaty.

[358]Agreement between the Swiss Confederation and the Islamic Republic of Iran on Promotion and Reciprocal Protection of Investments (1998), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1660/download <accessed 26 September 2019>.

> Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into through this Agreement with respect to the investments of the investors of the other Contracting Party.[359]

Moreover, Article 6 of the Agreement between Japan and the Islamic Republic of Iran on Reciprocal Protection and Protection of Investment in 2016 has replaced the term 'guarantee' with 'observe':

> Either Contracting Party shall observe any obligation it has entered into with respect to the investments of the investors of the other Contracting Party.[360]

This different wording can be resulted in difference in interpretation.[361] The Umbrella clause can therefore be construed in two ways: (i) the broad interpretation under which it is a clause protecting an investment contract which an investor has entered into based on the principle of *pacta sunt servanda* and a breach of which results in a breach of an international treaty obligation[362] and (ii) the narrow interpretation according to which the application of umbrella clause is permitted only if a shared intent of the parties can be identified from the underlying treaty that provides for the elevation of a breach of the relevant obligation to the level of a treaty breach.[363]

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[359] Agreement on Reciprocal Promotion and Protection of Investments between the Republic of Turkey and the Islamic Republic of Iran (1996) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1661/download <accessed 26 September 2019>.

[360] Agreement between Japan and the Islamic Republic of Iran on Reciprocal Protection and Protection of Investment (2016) http://investmentpolicyhub.unctad.org/IIA/treaty/3625 <accessed 26 September 2019>.

[361] Tomas Fecak, *International Investment Agreements and EU Law* (Wolters Kluwer 2016) p. 41.

[362] Omolade Adeyemi Oniyinde and Tosin Ezekiel Ayo, 'The Protection of Energy Investments under Umbrella Clauses in Bilateral Investment Treaties: A Myth or a Reality', 61 (2017) JLPol'y&Globalization p. 165. *Noble Ventures v Romania* (Award) (12 October 2005) ICSID Case No ARB/01/11 (hereinafter: *Noble Ventures v Romania)*; *Fedax v Venezuela* (Jurisdiction) (11 July 1997) ICSID Case No ARB/96/3; *Eureko* BV *v Poland*, Partial Award and Dissenting Opinion, IIC 98 (2005), 19th August 2005, Ad Hoc Tribunal (UNCITRAL); *SGS v Paraguay* (Jurisdiction) (12 February 2010) ICSID Case No ARB/07/29.

[363] *SGS v Pakistan* (Jurisdiction) (6 August 2003) ICSID Case No ARB/01/13, p. 388.

Nowadays, the arbitral tribunals tend to interpret the umbrella clause as a basis upon which the obligations of State party to an investment contract, elevates to an international obligation. In *Noble Venture Inc. v. Romania*, for example, the arbitral tribunal held that the requirements of umbrella clause under the BITs is expansively broad which refers to any commitment and obligation of the host State vis-a-vis the foreign investors. Tribunal held that the phrase: '[...] shall observe any commitment [...]' means the specific obligations such as contractual commitments. It further based its reasoning upon Article 3 of the ILC Draft on Responsibility of State and emphasized that although under normal circumstances the domestic-based obligations do not transform into the international obligations, this rule is not however a *jus cogens*, therefore any violation of such contractual obligations shall entail the treaty breach.[364]

Part Three: Significance of the Stabilization Clauses for Exercising Sovereign Rights over Natural Resources

I. Introduction

The purpose of stabilization clauses is also to strike a balance between the host country and the foreign investor over their rights and obligations. The justification of the stabilization clause is that to make a long-term investment, foreign investors need some certainty so that the related investment risks will be reduced. As the host State enjoys sovereign power and possibly can amend the contract by legislative means, therefore stabilization is necessary for the safeguard of the interests of private investors. The first major issue encountered in the analysis of a stabilization clause is whether, under international law," a State can be bound by such a clause in light of the PSNR.

[364] *Noble Ventures v Romania*, paras 51–55.

II. Definition of the Stabilization Clause

To define the term 'stabilization clause', only two definitions are chosen here: one provided by an arbitral tribunal and the other introduced by one of the law scholars. The Iran – US Claims Tribunal has highlighted a definition under which the stabilization clause is introduced as the

> [c]ontract language which freezes the provisions of a national system of law chosen as the law of the contract as of the date of the contract, in order to prevent the application to the contract of any future alterations of this system.[365]

According to the definition provided by Cameron:

> [t]he term stabilization applies to all of the mechanisms, contractual or otherwise, which aim to preserve over the life of the contract the benefit of specific economic and legal conditions which the parties considered to be appropriate at the time they entered into the contract.[366]

The purpose of such clauses is to protect foreign investors against nationalization.[367] In the contracts, one of the parties to which is a government, there is a permanent risk that the government by adopting laws and regulations, jeopardizes the contract through measures such as levying additional tax and duties. The foreign investor who is party to this agreement normally seeks to stabilize the circumstances of the agreement agreed upon at time of its conclusion.[368] In other

[365] *Amoco v Iran*, para. 189.

[366] Peter D. Cameron, *International Energy Investment Law* (Oxford University Press 2010) p. 69.

[367] Frank Sotonye, 'Stabilisation Clauses and Foreign Direct Investment: Presumptions versus Realities' 16(1) (2015) JWIT p. 91.

[368] Norbert Horn, 'Standard Clauses on contract Adaptation in International Commerce in Adaptation and Renegotiation of Contracts in International Trade and Finance' in Norbert Horn (ed), *Adaptation and Renegotiation of Contracts in International Trade and Finance*, vol. 3 (Kluwer 1985) p. 218 and Antony Crockett, 'Stabilisation clauses and sustainable development: Drafting for the future' in Chester Brown and Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) p. 516.

words, the purpose of a stabilization clause is to avoid the alteration of the circumstances under which the contract is concluded.[369]

Stabilization clauses are valid and host States are legally obliged to enforce them under international law.[370] A significant number of arbitral awards have confirmed the legal force of these clauses. The key awards are *Texaco v Libya*[371], *AGIP v Congo*[372], *Revere Copper v OPIC*[373], *Kuwait v Aminoil*[374], *Mobil Oil Iran v Iran*[375]. Stabilization clauses, are meant 'to secure the investment agreement against future government action or changes in law'.[376] The *raison d'etre* for such clauses is to eradicate the risk of regulatory changes for investors.[377] Below, different types of such clauses are introduced.

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[369] A.F.M. Maniruzzaman, 'The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends', 1(2) (2008) JWELB, p. 121 and T.W. Waelde and G. Ndi, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation', 31 (1996) TexIntlLJ 216 and Frank Sotonye (2015) pp. 89–90.

[370] Lorenzo Cotula, 'Reconciling regulatory stability and evolution of environmental standards in investment contracts: towards a rethink of stabilization clauses' 1(2) (2008) JWELB, pp. 162–164; Abdullah Faruque, 'Validity and Efficacy of Stabilization Clauses: Legal Protection vs Functional Value' 23 (2006) JIntlArb p. 323; Wolfgang Peter, 'Stabilisation clauses in state contracts' 7 (1998) IntlBusLJ pp. 882–883 and Cameron (2010) p. 54.

[371] *Texaco v Libya*, p. 26.

[372] *AGIP v Congo* Award of 30 November 1979, 21 ILM 21 (4) (July 1982) (hereinafter: *Agip v Congo*) pp. 726–739.

[373] *Revere* Award, p.257.

[374] *Kuwait v Aminoil*, p. 976.

[375] *Mobil Oil Iran Inc v Iran* (1987)16 Iran–USCTR, p. 3, available at https://jusmundi.com/en/document/decision/en-mobil-oil-iran-inc-and-mobil-sales-and-supply-corporation-v-government-of-the-islamic-republic-of-iran-and-national-iranian-oil-company-partial-award-award-no-311-74-76-81-150-3-tuesday-14th-july-1987#decision_5039 <accessed 26 September 2019>.

[376] Christopher T. Curtis, 'The Legal Security of Economic Development Agreements' 29 (1988) HarvIntlLJ p. 317.

[377] Katja Gehne and Romulo Brillo, 'Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment, NCCR Trade Regulation (January 2014) Working Paper 2013/46, p. 1, See also: A.F.M. Maniruzzaman, 'Some Reflections On Stabilisation Techniques In International Petroleum, Gas And Mineral Agreements' 4(2005) Int Energ Law Taxat Rev, p. 97 and Arghyrios A. Fatouros, 'International Law and the Internationalized Contract' 74 (1980) AJIL, pp. 134–141; Bertrant Montembault, 'The Stabilisation of State Contracts Using the Example of Oil Contracts: A Return of the Gods of Olympia' 6 (2003) IntlBusLJ, pp. 599–601 and Dolzer and Schreuer (2008) p. 75 and Qureshi and Ziegler (2011) p. 495 and For a different insight into the question of

A. Freezing Clause

'Freezing clauses', refer to the conditions according to which the law applicable to the contract is fixed on the day the contract is concluded and applies throughout the life of the contract.[378]
The 'freezing' stabilization clause prevents the host State from amending or changing unilaterally the legal and fiscal regimes governing the project within the term of the contract.[379] The majority of concession agreements terminated during the nationalization wave have contained such clauses. For instance, Article 21(3) of the Concession Agreement of 1933 between Iran and the Anglo–Iranian Oil Company had provided that:

> Concession shall not be annulled by the Government and the terms therein contained shall not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatever of the executive authorities.[380]

In addition, a limited freezing clause should be adopted such that only certain aspects of the contract concerned can be excluded from any alternation or modification. An example of such an incomplete freezing clause can be found in Section 9 of the Mineral Development Agreement between Liberia and Mittal Steel:

> The Government hereby undertakes and affirms that at no time shall the rights (and the full and peaceful enjoyment thereof) granted by it under Article 19 (Income Taxation), Article 20 (Royalty) and Article 22 (Other Payments to the Government) of this Agreement be derogated from or otherwise prejudiced by any law or the action or inaction of the

classification see: Margarita T.B. Coale, 'Stabilization Clauses in the International Petroleum Transactions, Citation' 30 (2001–2002) DenvJIntlL&Pol pp. 222–223.

[378] Faruque (2006) p. 319.

[379] Curtis (1988) p.346.

[380] Quoted in Mustafa Erkan, *International Energy Investment Law: Stability Through Contractual Clause*, (Wolters Kluwer 2011) p. 105.

Government, or any official thereof, or any other Person whose actions or inactions are subject to the control of the Government.[381]

B. Intangibility Clause

Under this category, any unilateral changes to the agreement within the term of the contract are prohibited; therefore the consent of both parties before making any changes or modifications to the agreement is required.[382] Article 33 of the Exploration and Production Sharing Agreement between the Government of Qatar and Holkar Oil Company states that '[w]ithout prejudice to the Government's prerogative of sovereign powers the mutual consent of the Parties hereto shall be required to annul, amend or modify the provisions of this Agreement'.[383]

C. Economic Stabilization Clause

Under this type of clause, the host State is entitled to apply legislative changes. However, such power can only be exercised with compensation to the investor. The goal of such clauses is to limit

[381] http://www.resourcegovernance.org/sites/default/files/RWI_Liberia_Mittal_0.pdf <accessed 26 September 2019> quoted in Oshionebo Evaristus, 'Stabilization Clauses in natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries', 10(2010) AsperRevIntlBusAndTradeL pp. 3-4.

[382] Curtis (1988) p. 346; Faruque (2006) p. 319 and Dolzer et al (2008) p. 83. Alisher Umirdonov, 'The End of Hibernation of Stabilization Clause in Investment Arbitration: Reassessing Its Contribution to Sustainable Development' 43 (2014–2015) DenvJIntL&Pol p. 461. One of the most striking opinions about the intangibility clauses which casts doubts over its stance under the classification of stabilization clauses has been put forward by Paasivirta who claims that the function of the intangibility clause primarily differs from the stabilization clause as the latter essentially applies to freeze 'the law of host State and thus preventing a State from using its legislative power to modify the contract in its own favour' In his opinion, the nature of stabilization clause, whatever is called, is to freeze the constitutionally–recognized power of a host State not to alter the relevant laws and regulations affecting the substance of the contract and specifically the interests of the investor. Paasivirta (1989) p. 323.

[383] Exploration and Production Sharing Agreement between the Government of Qatar and Holkar Oil Company, 1 January 1976, Selected Documents of the International Petroleum Industry, 1967, p. 249 quoted in Paasivirta (1989) p. 326.

the detrimental effects of legislation changes on the investor.[384] It stabilizes the interests of the investor vis-à-vis the legislation alternation of the State party to the contract. More specifically, the economic balance of the contract which exists prior to the implementation of legal changes should be preserved.[385] The Model of the Production Sharing Agreement of the Kurdistan Regional Government can be an example of such clause under its Article 43.3:

> The GOVERNMENT guarantees to the CONTRACTOR, for the entire duration of this Contract, that it will maintain the stability of the fiscal and economic conditions of this Contract, as they result from this Contract and as they result from the laws and regulations in force on the date of signature of this Contract. The CONTRACTOR has entered into this Contract on the basis of the legal, fiscal and economic framework prevailing at the Effective Date. If, at any time after the Effective Date, there is any change in the legal, fiscal and/or economic framework under the Kurdistan Region Law or other Law applicable in the Kurdistan Region which detrimentally affects the CONTRACTOR, the terms and conditions of the Contract shall be altered so as to restore the CONTRACTOR to the same overall economic position as that which CONTRACTOR would have been in, had no such change in the legal, fiscal and /or economic framework occurred.[386]

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[384] Economic equilibrium clause is another title used for this clause: Oshionebo (2010) pp. 4–5.

[385] Faruque (2006) p. 320; 'Stabilization Clauses and Human Rights' (27 May 2009) a research project conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights, p. vii. and Sotonye (2015) p. 90.
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwis-snXsu7kAhUwy4UKHQWwACgQFjAAegQIABAB&url=https%3A%2F%2Fwww.business-humanrights.org%2Fsites%2Fdefault%2Ffiles%2Fmedia%2Fdocuments%2Fstabilization-clauses-and-human-rights-27-may-2009.pdf&usg=AOvVaw1_jU9yfDrMwkGq3hhiyzDi <accessed 26 September 2019>.

[386]The Model of the Production Sharing Agreement of the Kurdistan Regional Government, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=2ahUKEwjrgpCbs7kAhVQXhoKHStaApkQFjADegQIARAC&url=https%3A%2F%2Fwww.resourcecontracts.org%2Fcontract%2Focds-591adf-6005604716%2Fdownload%2Fpdf&usg=AOvVaw2YAxOaLbsztJLNgOPe6pJB <accessed 26 September 2019> quoted in Peter D. Cameron (2010) p. 75.

Another example of this type of stabilization clause is found within Article 43(1) of the Production Sharing Contract between the Republic of Gabon and Vanco Gabon Ltd.

> [T]he State guarantees to the Contractor, for the duration of the contract, the stability of the financial and economic conditions insofar as these conditions result from the Contract and from the regulations in force on the Effective Date. These obligations resulting from the Contract shall not be aggravated, and the general and overall equilibrium of the Contract shall not be affected in an important and lasting manner for the entire period of validity hereof. However, adjustments and modification of these provisions may be agreed upon by mutual consent.[387]

The last example of such clause provides that:

> [i]n the event that any change in the provisions of any Law, decree or regulation […] which adversely affects the obligations, rights and benefits hereunder, then the Parties shall agree on amendments to the Agreement […] to restore such rights, obligations and forecasted benefits.[388]

D. Hybrid Clause

This type of stabilization clause as a combination of the two previously–explained types (i.e. freezing and economic equilibrium clauses) explicitly rejects any unilateral modification of the investment contract.[389] It safeguards the contract 'against all changes in legislation

[387] Faruque (2006) p. 320.

[388] Model Production Sharing Agreement of Angola (2004), Art 37(2), available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjnn-n8tO7kAhVLzIUKHZRFCogQFjAAegQIAhAC&url=http%3A%2F%2Fwww.eisourcebook.org%2Fcms%2FAngolan%2520Production%2520Sharing%2520Agreement.pdf&usg=AOvVaw3efbus8k-h60I7BKqsuzHr <accessed 26 September 2019> quoted by Sotonye (2015) p. 90.

[389] A.F.M. Maniruzzaman (2008) p. 127.

by stipulating compensation or adjustments to the deal, including exemptions from new laws to compensate the investor when any changes occur'.[390]

In other words, the purpose of this kind of clause is to guarantee the economic equilibrium or payment of compensation when the legal changes adversely affect the interests of the investor.[391] The Concession contract between Libyan–American Oil Company and the Libyan Government affords a good example:

(1) The Government of Libya, the Commission and the appropriate provincial authorities will take all steps necessary to ensure that the Company enjoys all the rights conferred by this Concession shall not be altered except by mutual consent of the parties.

(2) This Concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulation in force on the date of execution of the Agreement of Amendment by which this [paragraph] 2 was incorporated into this Concession Agreement. Any amendment to or repeal of such Regulations shall not affect the contractual rights of the Company without its consent.[392]

III. Discussing the Stabilization Clauses in relation to the Application of the PSNR

A. Supremacy of the PSNR

It was argued that due to the sovereign prerogative granted to the developing States, they cannot be legally bound by means of stabilization clauses contained in an investment contracts.[393] It is therefore argued that freezing clauses in general, restrict the sovereign power of the host State to

[390] 'Stabilization Clauses and Human Rights' (2009) p. 8.

[391] Oshionebo (2010) p. 7.

[392] *LIAMCO v Libya,* p. 31.

[393] Peter (1998) p. 882; Timothy B. Hansen, 'The Legal Effect Given Stabilisation Clauses in Economic Development Agreements'' 28 (1987 – 1988) VaJIntlL, pp. 1017 – 1018 and Qureshi and Ziegler (2011) p. 495.

make law and in particular adversely affects the PSNR.[394] It is argued that the sovereign rights of States over their own natural resources are permanent and inalienable, thus any State concerned cannot cede or alienate, by contractual clauses or statutory provisions, its right to natural resources.[395] Pursuant to the UN General Assembly resolution 1803, the sovereignty of a State over its own natural resources is recognized as an 'inalienable right of all States freely to dispose of their natural wealth and resources'. The use of the word 'permanent' before 'sovereignty over natural resources' indicates the permanent sovereignty as 'inalienable' and 'full'.[396]

The freezing clause would lose its validity vis-à-vis the exercise of sovereignty over natural resources as it limits the sovereignty of State in making laws and regulations.[397] On the contrary, there is another point of view indicating that a 'partial freezing clause' is compatible with the exercise of sovereignty:

> [l]ong and comprehensive 'freezing' clauses seem to run counter to the PSNR, although it may be conceivable that provisions to stabilize the fiscal regime for a reasonable period, so as to assure loan repayment, for example, can be found acceptable under specific conditions.[398]

Hence, it can be concluded that a stabilization clause alienating the State's legislative power is void and unenforceable.[399] It has also been argued that a State can never lose control over any of its natural wealth, notwithstanding contractual arrangements that the State may have made with a

[394] Oshionebo (2010) p. 9.

[395] Julia Ya Qin, 'Reforming WTO discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection', 46(5) (2012) JWT, p. 1165.

[396] 'According to Salem the word 'full' refutes the idea that the sovereignty of a State concerning its natural wealth could be limited by the fact that such wealth may be sorely needed on other parts of the world. The word 'permanent' should be understood as indicating that the State concerned can avail itself of this sovereign right at any time'. Mahmoud Salem, *vers un nouvel ordre économique international: A propos des travaux de la 6eme sessions extraordinaire des Nations Unies* (Clunet 1975) pp. 783–785.

[397] Oshionebo (2010) p. 8.

[398] Report of Secretary General, E/C. 7/119, p. 24, para. 68.

[399] Oshionebo (2010) p. 9.

foreign investor. Several commentators have declared that stabilization clauses are invalid under international law due to the *jus cogens* nature of the PSNR which no derogation is permitted.[400] Accordingly, a stabilization clause would be invalid and a State, making use of principles of public international law, could use of its sovereign powers to terminate agreements without compensation.[401]

B. Dominance of the Stabilization Clauses over the PSNR

Though the international community has recognized sovereignty as the most fundamental right that a nation can assert, complete autonomy of the sovereign State in managing its own internal affairs and its freedom from outside interference has changed over time.[402] Sovereignty, is not absolute but is subject to international law.[403]

Once a State agrees to stipulate a stabilization clause in an investment agreement, it exercises its sovereign rights.[404] In *Aramco*, the tribunal in particular held that a State exercises its sovereignty when it binds itself with clauses in an investment contract.[405] The tribunal held that:

> [b]y reason of its very sovereignty within its territorial domain, the State possesses the legal power to grant rights which it forbids itself to withdraw before the end of the Concession [...]. Nothing can prevent a State, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession [...].

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[400] Brownlie (2003) p. 489. Evidence of the status of sovereignty over natural resources as a *jus cogens* norm stems from UNGA Res. 1803 and the Charter of Economic Rights and Duties of States, December 1974, UNGA Res. 3281.

[401] M. Sornarajah, 'International Contract Law?' (1981)15 JWTL p. 217.

[402] Jackson Nyamuya Maogoto, 'Westphalian Sovereignty in the Shadow of International Justice? A Fresh Coat of Paint for a Tainted Concept', in Trudy Jacobsen, Charles Sampford and Ramesh Thakur (eds) *Re–envisioning Sovereignty: The End of Wetsphalia* (Ashgate 2008) p. 212.

[403] 'Although sovereignty is independence from any superior power, it is not independent from international law'. Wildhaber (1983) p. 438.

[404] Hansen (1987 – 1988) pp. 1018 and 1024–1031.

[405] *Aramco* Award, p. 168.

The nature of the UNGA resolutions reaffirming the PSNR does not discard the contractual obligation of any State to be bound by the stipulation of a stabilization clause.[406]

Every State is vested with an inherent right stemming from its sovereign prerogative to expropriate foreign investment. The UN General Assembly resolution 1803 underscored that 'foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; […]. It further indicates that the sovereignty over natural resources must be respected 'in accordance with the [UN] Charter' and the principles formulated in the said resolution. This approach has been also reaffirmed in *LIAMCO case* in which it was held that the Libyan Government could not exercise its sovereignty and implement nationalization in violation of its specific contractual obligations.[407] Professor Dupuy, as the sole arbitrator in *Texaco,* analyzed the resolutions relating to permanent sovereignty. Initially, he undertook to define the legal scope of the resolutions by examining the circumstances of the votes on each one.'[408] He observed that only Resolution 1803 was approved by a majority of all member States, including developed as well as developing countries.[409] Finally, he concluded that:

> [o]n the basis of the circumstances of adoption... and by expressing an *opinion juris communis*, Resolution 1803 (XVII) seems to this Tribunal to reflect the state of customary law existing in this field.

Professor Dupuy had also stated that the language – 'agreements freely entered into by, or between' - in Resolution 1803 considers that agreements between States, and agreements between a State and a private foreign investor, will be 'on the same footing'.[410]

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[406] Wolfgang Peter, *Arbitration and Renegotiation of International Investment Agreements* (Second Revised and Enlarged edition, Kluwer Law International 1995) p. 222.

[407] *LIAMCO v Libya* at 51–52 and Bungenberg (2015) p.134.

[408] *Texaco v Libya*, pp. 28–30.

[409] Ibid., p. 28.

[410] Ibid., p. 24.

In the *Texaco* case, the tribunal ruled that stabilization provisions in a concession agreement, and in particular, provisions against the nationalization of investment, did not offend the host State's Permanent Sovereignty over Natural Resources because, while these provisions may limit the State's exercise of its sovereignty, they did not prevent the State from enjoying its right to permanent sovereignty.[411] As well-described in the *Texaco* case, '[a] State cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty and cannot, through measures belonging to its internal order, make null and void the rights of the contracting party which has performed its various obligations under the contract'.[412] Hence, once an agreement is unilaterally breached, the host State must compensate the investor.

In *Aminoil*, the tribunal rejected the notion that the PSNR had become a rule *of jus cogens* prohibiting a State from providing contractual guarantees to foreign investors.[413] The tribunal held that although Resolution 1803 could be regarded as the 'state of international law' in 1962, subsequent resolutions regarding the PSNR do not carry the same 'degree of authority'.[414] The tribunal then found that no rule of international law prohibits a State from binding itself with contractual guarantees not to nationalize a foreign investment. In addition, in *Agip v. Congo*, the tribunal held that:

> [t]hese stabilization clauses, freely accepted by the Government, do not affect the principle of its sovereign legislative and regulatory powers, since it retains both in relation to those whether nationals or foreigners, with whom it has not entered into such obligations, and that […] changes in the legislative and regulatory arrangement simply cannot be invoked against the other contracting party'.[415]

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[411] *Texaco v Libya*, p. 26.

[412] *Texaco v. Libya*, para. 68.

[413] *Kuwait v Aminoil*, pp. 1021–1022 and Samuel Kwadwo Boaten Asante, *International Law and Investments,* in Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers 1991) p. 681.

[414] *Kuwait v Aminoil*, p. 1022.

[415] *Agip v Congo*, para. 86.

To recapitulate, the consequence of exercising sovereign rights over natural resources combined with the act of revoking stabilization clauses in investment agreements is the requirement to provide compensation to the investor.[416] Moreover, the tribunal in the *Aminoil* case held that the contractual constraints specifically adopted through the stabilization clause on the exercise of a State's sovereignty are possible if the limitations are 'expressly stipulated for, and [**...**] within the regulations governing the conclusion of State contracts', and 'cover only a relatively limited period'.[417]

Concluding Summary

Attempts have been made over the last decades to meet the demands of both host States as well as capital-exporting countries. The issue of the relationship between the PSNR and the protection of investors' rights has been subject of a number of UNGA resolutions. To enable the exercise of sovereign rights of States over their own natural resources, the compensation payment mechanism is seen as a protective measure which facilitates the uptake of foreign investments. In addition to the above, the growing number of BITs has shaped the regulations concerning the flow of foreign investments into developing countries. Additionally, the substance of these investment agreements, specifically the stipulation of stabilization clauses, served as a springboard which gave rise to further discussions. Admittedly, the stabilization clauses and the internationalization clauses (which make the investment agreement subject to the rules of international law) will continue to have great significance particularly in the drafting of long-term natural resources investment contracts.[418]

It must be emphasized that by impairing the binding nature of these agreements by means of the PSNR, the long–term consequence will be a gradual reduction in the flow of foreign investment. As a result, it can be concluded that investment agreements have limited the scope of exercising sovereign rights over natural resources. A number of the arbitral awards, when reviewing the

[416] Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration,* (HART Publishing 2011) p. 257.

[417] *Kuwait v Aminoil,* p. 1023 para. 95.

[418] Marc Bungenberg (2015) p. 134.

character of a State's rights and obligations in an investment contract with respect to the U.N. resolutions concerning the PSNR, have concluded that the resolutions do not prevent a State from binding itself with a stabilization clause.[419] Accordingly, the argument that the PSNR somehow prohibits a State from agreeing to and binding itself with stabilization clauses in an investment agreement is not supported by language of the relevant U.N. resolutions, nor by the international arbitral awards.

[419] For instance, *Kuwait v Aminoil*, pp. 1021–22; *Texaco v Libya*, pp. 29–31.

Chapter 3: Analysis of the Implementation of the PSNR in relation to the Chinese Mineral Cases in the WTO

Part One: Introduction to the Chinese Cases

I. China — Measures Related to the Exportation of Various Raw Materials (*China — Raw Materials*)

Brief Overview of the Dispute

China imposed export restrictions on a number of key raw materials such as bauxite, coke, fluorspar, magnesium, manganese, silicon metal, silicon carbide, yellow phosphorous and zinc.[420] Some of these raw materials are found exclusively in China.[421] The export restrictions were mainly in the form of export duties (bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus and zinc), export quotas and export quota management (bauxite, coke, fluorspar, silicon carbide and zinc), a minimum export price system, as well as additional requirements and procedures for exporters such as export licensing requirements, administration and publication of trade regulations.[422] These regulatory restrictions resulted in considerable disadvantages for the foreign buyers as they led to an artificial increase in China's export prices and a boost to world prices. The ultimate outcome of China's export restriction policies was to provide the Chinese producers with a significant competitive advantage.

According to Paragraph 11.3 China Protocol of Accession, China was committed to eliminate all export taxes and charges, except those related to measures compatible with Article VIII of the GATT, and except for a list of raw materials that was stipulated in Annex 6 of its Protocol of Accession.[423] These additional commitments incorporated in the Protocol of Accession are known

[420] *China — Raw Materials*, Panel Report, para. 1.1.

[421] USGS (U.S. Geological Survey), '2016 Minerals Yearbook: China' available at https://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/atoms/files/myb3-2016-chn.pdf <accessed 26 September 2019>.

[422] *China — Raw Materials*, Panel Report, paras. 2.1–3.4.

[423] See Protocol on the Accession of the People's Republic of China, [23 November 2001] (WT/L/432) para. 11.3 & Annex 6, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/L/432.pdf <accessed 26 September 2019>.

as WTO–plus commitments.[424] China, under Paragraph 7.2 of the Protocol of Accession was also committed to eliminate and not to introduce export quotas. Thereafter, the United States, the European Union and Mexico brought a case against the export restriction measures applied by China as referred to above.

The complainant argued that China's restricting measures were in violation of WTO rules (especially Article XI:1 of the GATT)[425], and were inconsistent with China's commitments under the Protocol of Accession (the obligation to eliminate export restrictions – duties and quotas) and Annex 6 (the exception that allows conditionally export duties). Contrariwise, China justified its export restrictive measures by relying, *inter alia*, on Article XX(g). It argued that the restricting measures related to 'the conservation of exhaustible natural resources'.[426] Two main issues pertinent to Article XX(g) can be set out as below:

(1) With respect to the applicability of Article XX(g) to violations of commitments stipulated under the China Protocol of Accession (WTO–plus commitments), the Panel concluded that, based upon the wording and the context of Paragraph 11.3 of Protocol of Accession, China does not have the right to invoke Article XX(g) as justification for the violations of its Protocol of Accession.[427]

(2) As regards, the applicability of Article XX(g) to China's export restrictive measures violated related GATT provisions, the Panel found that those measures did not satisfy the

[424] For further discussions about the WTO–plus commitments in the *China – Raw Materials* case, see Qin, J.Y. 'The Challenge of Interpreting 'WTO–PLUS' Provisions' (2010) 44 (1) JWT p. 127; Qin, J.Y., 'The Predicament of China's "WTO–plus" Obligation to Eliminate Export Duties: A Commentary on the China-Raw Materials case', (2011) 11(2) *Chinese Journal of International Law* p. 237; Boris Karapinar, 'China's Export Restriction Policies: Complying with ''WTO plus'' or Undermining Multilateralism 10(6) (2011) *World Trade Review* p. 390; Boris Karapinar, 'Defining the Legal Boundaries of Export Restrictions: A Case Law Analysis' (2012) 15(2) JIEL p. 443.

[425] For instance, the panel further found that a series of measures operated collectively (export restrictions imposed on the exportation of certain raw materials) was inconsistent with Article XI:1 of the GATT. See *China — Raw Materials*, Panel Report, para. 7.224.

[426] China had invoked, *inter alia*, to Articles XI:2, XX(b) and XX(g) of the GATT to support its arguments. *China — Raw Materials*, Panel Report, para. 3.5.

[427] See *China — Raw Materials*, Panel Report, paras 7.158–7.159.

requirements of sub-paragraph (g), thus there was no need to examine the validity of the chapeau of Article XX.[428]

Upholding the Panel's decision concerning the inapplicability of Article XX(g) to justify a violation of Paragraph 11.3 of China's Protocol of Accession[429] the Appellate Body found that Paragraph 11.3 does not have any reference to Article XX of the GATT to justify a violation of China's obligation in Paragraph 11.3 (i.e. elimination of the export duties).[430]

The Appellate Body upheld the Panel's interpretation and examination of the requirements in sub–paragraph (g), except the Panel's interpretation of the requirement 'made effective in conjunction with' in subsection (g).[431] The Appellate Body found no additional condition in subsection (g) such as to ensure the effectiveness of domestic restriction upon production or consumption. It concluded that a measure can meet this requirement if its restriction imposes 'even-handedness' restrictions on the domestic production or consumption of exhaustible natural resources.[432]

Confirming the Panel Report, the Appellate Body finally arrived at conclusion that China, violating its obligations to the WTO pursuant to the Protocol of Accession and pertinent GATT provisions, has restricted the exportation of raw materials.

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[428] See *China — Raw Materials,* Panel Report, paras 7.467–7.469. The Panel found that the measures at issue did not purport to conserve the particular raw materials. It also found an increase in the domestic consumption of these raw materials, a decrease in their domestic prices and a raise in their export prices. It, hence concluded that the measures did not satisfy the Article XX(g) requirements. See *China — Raw Materials,* Panel Report, paras 7.429–7.436.

[429] *China — Raw Materials,* Appellate Body Report, paras 303–306.

[430] See Feld, D.S. & Switzer, S. 'Whither Article XX? Regulatory Autonomy Under Non-GATT Agreements after China – Raw Materials' (2012) 38 YaleJIntlL Online p. 16 (arguing that the Appellate Body in *China – Raw Materials* ruled correctly when it created the presumption that Article XX cannot be applied outside the scope of the GATT, except if the violated provision includes specific reference to Article XX or similar text) at pp. 18 and 30.

[431] The Panel has interpreted this phrase to require that the challenged restricting-measure must ensure the effectiveness of restrictions on domestic production and consumption, *China — Raw Materials,* Panel Report, para. 7.397.

[432] *China — Raw Materials,* Appellate Body Report, paras 356–361.

II. China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (*China — Rare Earths*)

Brief Overview of the Dispute

China, as a top producer of rare earths, is responsible for about 97% of global production of 17 rare earth elements such as lanthanum, cerium, praseodymium, neodymium, promethium, samarium, europium, gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium and lutetium.[433] The rare earths are essential to making a wide range of high tech devices, from smart phones to electric cars. As a result of increasing demand for rare earths, China expanded its production of rare earths.[434]

Accordingly, high-tech industries became dependent on China's mining and pricing policies. In the years leading to the WTO dispute, China imposed export restrictions on various forms of the rare earths tungsten and molybdenum. The measures comprised export duties, export quotas, and certain limitations on enterprises permitted to export the products during 2010. China's restrictive measures pushed up the global prices of the various forms of the rare earths, tungsten[435] and molybdenum[436] due to the reduction of its export quota on the 17 elements by 40% from the preceding year.

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[433] Rare earths are 17 chemical elements in the periodic table, specifically 15 lanthanides (lanthanum, cerium, praseodymium, neodymium, promethium, samarium, europium, gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium, lutetium), as well as scandium and yttrium. For more details about the minerals situation in China see a thorough report issued by USGS (U.S. Geological Survey), '2016 Minerals Yearbook: China'.

[434] Zan Gilani, 'Will China's Outrageous Rare Earths Monopoly Persist?' *Graphite Publications* (3 May 2013) https://graphitedaily.com/will-chinas-outrageous-rare-earth-monopoly-persist/ <accessed 26 September 2019>.

[435] China is the world's largest producer of tungsten. 2019 Mineral Yearbook, Tungsten p. 179, available at https://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/atoms/files/mcs-2019-tungs.pdf <accessed 26 September 2019>.

[436] In descending order of production, China, Chile, the United States, Peru, and Mexico provided approximately 93% of total global molybdenum production. 2019 Mineral Yearbook, Molybdenum, p. 111, available at https://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/atoms/files/mcs-2019-molyb.pdf <accessed 26 September 2019>.

The complainants, the EU, Japan, and the US argued that the Chinese export duties violated the obligation concerning the abolishment of export duties under Paragraph 11.3 its Protocol of Accession to the WTO.[437] Furthermore, China's export quotas on rare earth, tungsten and molybdenum, in view of the complainants, violated GATT Article X1:1, as well as Paragraph 1.2 of Part I of China's Accession Protocol.[438] In defense, China, based its defense on the applicability of Article XX of GATT to Paragraph 11.3 of China's Accession Protocol as its export duties are necessary to reduce pollution from mining and protect health, consistent with GATT Article XX(b); and the export quotas are justified by GATT Article XX(g) as relating to the conservation of exhaustible natural resources.[439] Besides, in China's opinion, these restrictive measures were perfectly consistent with the objective of sustainable development promoted by the WTO.[440]

The majority of Panelists found that general exceptions in Article XX of GATT are not available to justify a violation of Paragraph 11.3 of China's Accession Protocol.[441] Even though it found that Article XX of GATT exceptions were not applicable to justify China's export duties, the Panel decided to examine the merits of China's arguments pursuant to Article XX(b) of GATT. The Panel, however found that China's export duties were not 'necessary to protect human, animal or plant life or health' within the meaning of Article XX(b) of GATT.[442] With respect to China's export quotas, the Panel also agreed that these measures were not justified in accordance with Article XX(g) of GATT.[443]

According to the Panel, a WTO member may not use the conservation of natural resources as a justification for controlling the international market for a resource, as China was doing with its export quotas on rare earths.[444] The Panel also declared that the export quotas were not made effective 'in conjunction with' measures restricting China's domestic use of rare earths, tungsten

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[437] *China — Rare Earths,* Panel Report, para 1.4.

[438] Ibid.

[439] Ibid.

[440] Ibid., para 7.107.

[441] Ibid., paras 7.73–7.117.

[442] Ibid. paras 7.143–7.195.

[443] Ibid. paras 7.680, 7.845 and 7.970.

[444] Ibid. paras 7.658–7.663.

and molybdenum as required by Article XX(g).[445] In this regard, the Panel proposed various alternatives to the export quotas namely administrative measures 'to prevent smuggling rare earths produced beyond the production targets'[446] as well as enforcing the domestic consumption restrictions.[447]

China filed a very limited appeal on the Panel's 'erroneous assessment of the systemic relationship' between specific provisions in China's Accession Protocol and the Marrakesh Agreement and the Multilateral Trade Agreement annexed thereto.[448]

In this regard, China appealed against the Panel's interpretation and application of Article XX(g) with respect to export quotas, including raising claims under Article 11 of the DSU concerning the 'objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements'. The Appellate Body emphasized that the Panel had erred in its interpretation of 'made effective in conjunction with' restrictions on domestic production or consumption, but nevertheless found that the Panel did not err in its application of Article XX(g).[449] The Appellate Body, similar to *China—Raw Materials case*, again concluded that the general exceptions under Article XX of GATT are not available for China to justify export duties violating Paragraph 11.3 of the Accession Protocol.

Part Two: Role of the PSNR in Interpretation of Article XX (g) of the GATT

I. Definition of Natural Resources

Before exploring the essence of Art. XX (g) of the GATT, it must be clarified that owing to the pivotal role of Art. XX (g) of the GATT in the Chinese mineral cases with respect to analyzing the

[445] Ibid. paras 7.568–599, 7.792–807 and 7.919–933.

[446] *China — Rare Earths*, Panel Report, para. 7.666.

[447] Ibid., para. 7.667.

[448] *China — Rare Earths*, Appellate Body Report, para. 5.1.

[449] Ibid., paras 5.75–5.252.

PSNR, this policy exception is examined prior to the question of export duties under Art. XI of the GATT.

in In spite of the importance of the PSNR and the reference to this principle in some of the cases before the ICJ and the WTO DSB, the meaning and scope of the term 'natural resources' is still unclear because a limited amount of literature has been published on this issue. As Professor Schrijver indicates, the term 'natural resources' is often discussed in non–legal literature. However, since the mid–20th century, it has gradually become the subject of legal studies.[450] More specifically, the emergence of the PSNR has been a turning point in this respect.[451] What we are mainly concerned with in this section is to clarify what is meant by the reference to 'natural resources'. Several definitions of natural resources have been proposed in the legal as well as the non-legal fields that will be expanded upon later.[452] The term 'natural resources' is hard to define in the context of international trade. However, a definition should not only identify the substance of natural resources but also distinguish what is and what is not a natural resource.[453]

A. Lexical Meaning of Natural Resources

The Oxford Dictionary defines natural resources as 'the [m]aterials or substances occurring in nature which can be exploited for economic gain'.[454] '[N]atural Resources: capacities (as native wit) or materials (as minerals deposits and water powers) supplied by nature'.[455]

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[450] Schrijver (1997) pp. 12–13.

[451] Ibid.

[452] Friedl Weiss and Bernhard Scherzer, '(Existence of) Common or Universal Principles for Resource Management' in Marc Bungenberg and Stephen Hobe, *Permanent Sovereignty over Natural Resources* (Springer 2015) p. 35.

[453] 'World Trade Report' (2010) p. 46, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwjDou2j7O3kAhVDaVAKHdgC20QFjABegQIAhAC&url=https%3A%2F%2Fwww.wto.org%2Fenglish%2Fres_e%2Fbooksp_e%2Fanrep_e%2Fwtr10-0_e.pdf&usg=AOvVaw1AG4MVGo7Af-WzU8VZZ2F- <accessed 26 September 2019>.

[454] https://www.lexico.com/en/definition/natural_resources <accessed 26 September 2019>.

[455] Philip Babcock Gove, *Webster's third new international dictionary of the English language, unabridged* (G. & C. Merriam Co 1976) p. 1507.

B. Non–legal Definition

In order to define a concept, one can start by looking it up in specialized dictionaries and handbooks. In order to understand the meaning and scope of the term 'natural resources', a number of scientific dictionaries have been referred to.

Natural Resources are referred to as the materials occurring in nature that have actual or potential value to a natural system that supports living organisms. Such material resources include air, water, critical chemicals, plants and animals.[456] With reference to the management of natural resources, an operational definition proposed by Maranga *et al* indicates that '[a] natural resource is any material from nature that has potential economic and ecological value to life such as water, natural tree products, mineral and vital gases'.[457] From the perspective of Economics the following definition is presented:

> [t]he factors of production provided by nature which includes land suitable for agriculture, mineral deposits, and water resources useful for power generation, transport and irrigation. Sea resources, including fish and offshore mineral deposits are also covered by this definition.[458]

Natural Resources under environmental economics are defined as 'any portion of the natural environment, such as the atmosphere, water, soil, land, minerals, wildlife, mangroves, forest, flora, fauna, radiation, beauty, the coast, mountains, and the environmental assets generally'.[459] Besides, the geological approach defines natural resources as any material phenomena of nature freely given

[456] E. K. Maranga et al., 'Concepts, Theories and Principles of Natural Resource Management' in O. Ochola, Pascal C. Sanginga. Isaac Bekalo (eds) *Managing Natural Resources for Development in Africa: A Resource Book* (University of Nairobi Press 2011) p. 50.

[457] Ibid.

[458] John Black, *A Dictionary of Economics* (2nd edn, Oxford University Press 2002) pp. 316–317.

[459] Alan Gilpin, *Environmental Economics A critical overview* (John Wiley & Sons. LTD 2000) pp. 103–104.

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.[460]

It must also be pointed out that some scholars seek to distinguish between natural resources (as deriving from nature), man-made resources (created by mankind), and induced resources (the results of natural resources used by man-kind in agriculture).[461] A wide understanding of the term 'natural resources' may cover climate, population, cultural, intellectual, technological and economic resources as well as non-extractive industries.[462]

The dictionary of human geography makes a distinction between 'stocks' (natural resources that have taken millions of years to form and are considered non-renewable, e.g. mineral and fossil-fuels) and 'flows' (natural resources that are naturally renewable within a short time-span, e.g. solar radiation and tidal power). The middle range of this continuum includes natural resources that are renewable dependent on the levels of their consumption and human investment, i.e. Resource Management'.[463] In the definition provided by James J. King in the Environmental Science Dictionary, natural resources include 'land[464], fish, wildlife, biota, air, water,

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[460] Brian J. Skinner, 'Earth Resources', 76 (9) (1979) Proceedings of the National Academy of Sciences of the United States of America, pp. 4212-4213.

[461] B. Husch, 'Guidelines for Forest Policy Formulation', 81(1987) FAO Forestry Paper, p. 51.

[462] George Elian, *The Principle of Sovereignty over Natural Resources*, (Sijthoff & Noordhoff 1979) pp. 11–12; N. Schrijver: "Permanent Sovereignty over Natural Resources versus Common Heritage of Mankind – Contradictory or Complementary Principles of International Economic Law' in Paul de Waart, Paul Peters and Erik Denters, *International Law and Development* (Martinus Nijhoff Publishers 1988) pp. 90–91.

[463] Roland John Johnston *et al* (eds) *The Dictionary of Human Geography* (4th edn, Oxford: Blackwell 2000) pp. 535–536.

[464] Land is an essential natural resource, both for the survival and prosperity of humanity, and for the maintenance of all terrestrial ecosystems, available at http://www.fao.org/3/x3810e/x3810e04.htm <accessed 26 September 2019>. Natural resources, in the context of "land", are taken to be those components of land units that are of direct economic use for human population groups living in the area or expected to move into the area: near-surface climatic conditions; soil and terrain conditions; freshwater conditions; and vegetation and animal conditions in so far as they provide produce. To a large degree, these resources can be quantified in economic terms. This can be done irrespective of their location (intrinsic value) or in relation to their proximity to human settlements (situational value). 'Planning for Sustainable Use of Land Resources: Towards a New Approach', prepared by the Land and Water Development Division and approved by FAO's Interdepartmental Working Group on Land Use Planning (Rome: Food and

groundwater, and drinking water suppliers'.[465] In addition to the above definitions, Natural Resources might be classified into two groups:

> [r]enewable resources and non-renewable resources. Renewable resources are those natural resources that are regularly replenished through natural processes and thus have the potential to last indefinitely. Examples of such resources include water which is naturally replenished through the water cycle, oxygen - carbon cycle, and those resources, such as timber, plants, animals [...] which are replenished through the reproductive processes of organisms. Non-renewable resources are those resources that exist on earth in fairly fixed amounts and thus have the potential of being used by organisms faster than they are replaced by nature. Such resources include available land space, fossil fuels (oil, coal, natural gas) and minerals. These resources are replenished by natural processes; however, these processes occur very slowly, sometimes requiring millions of years to be completed. Thus the availability of these resources is limited and they have the potential of being depleted'.[466]

C. Legal Definition of Natural Resources

Although international law literature does not provide any harmonized definition of natural resources,[467] there are a few references made in the text of international conventions as well as in the jurisprudence of international trade dispute settlement mechanisms.

1. Definition of Natural Resources in International Instruments

Agriculture Organization of the United Nations 1995) available at www.fao.org/docrep/v8047e/v8047e04.htm#environmental <accessed 26 September 2019>.

[465] James J. King, *The Environmental Dictionary and Regulatory Cross-Reference* (3rd edn, A Wiley–Interscience Publication 1995) p. 422.

[466] John Mongillo and Linda Zierdt-Warshaw, *Encyclopedia of Environmental Science* (Oryx Press 2000) p. 241 and Maranga et al. (2011) p. 49.

[467] Schrijver (1997) pp. 12–15.

Providing a definition of natural resources has been a task for the drafters of international conventions and treaties. In this section, some of these definitions are introduced. It is also mentioned that the early international conventions had only provided a list of certain types of natural resources.[468] More importantly, the context of international conventions, in exploring the meaning of 'natural resources' must be analyzed.[469]

a. United Nations Conventions on the Law of Sea

Article 2(4) of the 1958 Convention on the Continental Shelf provides that

> [t]he natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil. [470]

The same wording was also used in Article 77(4) of the 1982 United Nations Convention on Law of Sea (UNCLOS). [471] Furthermore, parts II, IV, V and VI of the UNCLOS specifically address the sovereignty over natural resources, particularly the exclusive rights of coastal States to the resources located in their territory to the extent defined by the UNCLOS.

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[468] Manijiao Chi, 'Exhaustible Natural Resources' in WTO Law: GATT Article XX (g) Disputes and their Implications' 48(5) (2014) JWT, pp. 942–943.

[469] In order to limit the references to instruments defining 'natural resources', this part, by way of illustration only examines four international instruments.

[470] Article 2(4) of the Convention on Continental Shelf (1958), available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-4&chapter=21&clang=_en <accessed 26 September 2019>.

[471] United Nations Convention on the Law of the Sea (1982), available at https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf <accessed 26 September 2019>.

b. African Convention on the Conservation of Nature and Natural Resources

Article III (1) of the '1968 African Convention on the Conservation of Nature and Natural Resources' indicates that 'renewable resources that is soil, water, flora and fauna' are considered as natural resources.[472] Article V of the revised version of this Convention uses broader wording in defining what natural resources are by including non-renewable resources. It defines natural resources as 'renewable natural resources, tangible and intangible, including soil, water, flora and fauna, as well as non-renewable resources'.[473]

c. Stockholm Declaration

Under Principle 2 of the Declaration of the United Nations Conference on Humans and Environment in 1972 'the air, water, land, flora and fauna and especially representative samples of natural ecosystems […]' are denoted to be the composing elements of natural resources.[474]

d. The UN Convention on Biological Diversity

Pursuant to Article 2(1) of the 1992 UN Convention on Biological Diversity ('CBD'), 'natural resources' refers to, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part […]'.[475]

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[472] African Convention on the Conservation of Nature and Natural Resources (1968) available at https://sedac.ciesin.columbia.edu/entri/texts/african.conv.conserva.1969.html <accessed 26 September 2019>.

[473] Convention Africaine sur la Conservation de la Nature et des Ressources Naturelles (2003) available at http://www.ecolex.org/server2neu.php/libcat/docs/TRE/Full/En/TRE-001395.pdf <accessed 26 September 2019>.

[474] Declaration of the United Nations Conference on the Human Environment (1972), available at http://www.un-documents.net/unchedec.htm <accessed 26 September 2019>.

[475] UN Convention on Biological Diversity (1992), available at https://www.cbd.int/doc/legal/cbd-en.pdf <accessed 26 September 2019>.

2. GATT/WTO Definitions of Natural Resources

The only WTO regulation that explicitly uses the term 'natural resources' is Article XX (g) of the GATT[476] in which a particular emphasis is laid upon the 'exhaustibility' of natural resources.[477] Neither the GATT nor the WTO agreements have defined the exact meaning and scope of the phrase 'exhaustible natural resources'. As far as the negotiation history of Article XX (g) is concerned, it seems that the main idea of the drafters was to limit the extent of the term 'exhaustible natural resources' to non–living organisms.[478] The term 'exhaustible natural resources' has been interpreted broadly to encompass not only the stock resources but also renewable resources.[479] Thus, Article XX (g) of the GATT is silent on the meaning and scope of the term 'exhaustible natural resources'. Article 31 and 32 of the VCLT are of particular importance in interpreting international treaty rules. In doing so, three methods of interpretation can be introduced: the subjective method of interpretation which considers the actual intent of the parties to a treaty at the time of the adoption of the final text of that treaty[480]; the textual method of interpretation which deals with the words of a treaty[481]; and finally the teleological method of interpretation that places emphasis on the objective and purpose of a treaty.[482] After specifying a relevant method of interpretation, the VCLT sets forth a number of sources to be used in the interpretation which include the context, the subsequent practice of parties to the treaty, the practice of certain

[476] Text of GATT (1947) available at https://www.wto.org/english/docs_e/legal_e/legal_e.htm <accessed 26 September 2019>.; see also Wolfgang Benedek, 'General Agreement on Tariffs and Trade (1947 and 1994)' in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International law*, Vol. IV, (Oxford University Press 2012) pp. 312–323.

[477] It must be underlined that this provision is not the only WTO rule that can be applied to trade in natural resources. A number of WTO provisions are also applicable. However, this research is confined to Article XX (g) of the GATT and the regulations concerning the export duties under Article XI of the GATT.

[478] Douglas A. Irwin et al., *The Genesis of the GATT* (Cambridge University Press 2008) p. 163.

[479] Schrijver (1997) p.12; Nele Matz-Lück and Rüdiger Wolfrum 'Article XX lit. g GATT' in Rüdiger Wolfrum, Peter-Tobias Stoll and Holger P. Hestermeyer, *Max Planck Commentary on World Trade Law: WTO-Trade in Goods* (Martinus Nijhoff Publishers 2011) pp. 549–550.

[480] Brownlie (2003) p. 602.

[481] Ibid.

[482] Ibid, p. 607.

organizations such as the ICJ and the preparatory work of the treaty.[483] Article 31(1) of the VCLT provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. This Article addresses the 'textual' interpretation. Article 31(2) of the VCLT, provides a non–exhaustive list of material to be used in the process of ascertaining the ordinary meaning of a term. It states that:

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Furthermore, VCLT, in Article 31(3) indicates that:

> [t]here shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

In addition to Article 31, the VCLT in Article 32 states that 'in order to confirm the meaning resulting from the application of [A]rticle 31, or to determine the meaning when the interpretation according to [A]rticle 31' gives rise to an ambiguous or obscure meaning or a manifestly absurd

[483] Ibid, pp. 605–606.

or unreasonable result, the 'supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion' may be used.

a. Definition of Natural Resources in the GATT Cases

The first case that addressed the issue of 'exhaustible natural resources' was *US—Tuna Canada*[484] in which tuna stocks, in the view of both parties to the dispute were exhaustible natural resources.[485] The Panel did not analyze the term 'exhaustible natural resources'. A similar approach was followed in the *Canada—Herring and Salmon*. The Panel decided, in parallel to the parties, to recognize salmon and herring stocks as exhaustible natural resources.[486]

Furthermore, the Panel in two cases, i.e. *US—Tuna (Mexico)*[487] and *US—Tuna (EEC)*[488], did not interpret the term 'exhaustible natural resources' in a manner to cover living resources such as dolphins. In the *US—Taxes on Automobile* case, the parties to the dispute were in agreement in recognizing carbon fuels as exhaustible natural resources. Again, the Panel did not provide any interpretation of the constituent elements of the term 'exhaustible natural resources'. It only indicated that as 'gasoline was produced from petroleum, an exhaustible natural resource', therefore it must be treated as one of the exhaustible natural resources.[489]

b. Definition of Natural Resources in WTO Disputes

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[484] *United States—Prohibition of Imports of Tuna and Tuna Products from Canada*, Report of the GATT Panel, adopted 22 February 1982 (L/5198, , BISD 29S/91) [hereinafter: *US—Tuna Canada*].

[485] Ibid, at paras. 3.8 and 3.13.

[486] *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon*, Report of the GATT Panel adopted on 22 March 1988 (L/6268-35S/98) [hereinafter: *Canada—Herring and Salmon*] at para. 3.27.

[487] *United States—Restrictions on Imports of Tuna*, Report of the GATT Panel, 3 September 1991, unadopted (BISD 39S/155) [hereinafter: *US—Tuna (Mexico)*].

[488] *United States—Restrictions on Imports of Tuna*, Report of the GATT Panel, 16 June 1994, unadopted (DS29/R) [hereinafter: *US—Tuna (EEC)*]

[489] *United States—Taxes on Automobiles*, Report of the GATT Panel, 11 October 1994, unadopted (DS31/R) [hereinafter: *US—Taxes on Automobile*] para. 5.57.

In *US—Gasoline*, in recognizing 'clean air' as an exhaustible natural resource, the Panel indicated that:

> clean air was a resource (it had value) and it was natural. It could be depleted. The fact that the depleted resource was defined with respect to its qualities was not, for the Panel, decisive. Likewise, the fact that a resource was renewable could not be an objection. A past panel had accepted that renewable stocks of salmon could constitute an exhaustible natural resource. Accordingly, the Panel found that a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX (g).[490]

In *US—Shrimp*, which is the only case in which the question of natural resources definition was plainly analyzed, the Appellate Body provided a more dynamic interpretation.[491] Before referring to the related parts of the Appellate Body Report, it must be highlighted that the Panel did not give any interpretation of exhaustible natural resources through which the sea turtles could be considered as exhaustible natural resources. The Appellate Body, however stated that:

> [t]extually, Article XX(g) is *not* limited to the conservation of 'mineral' or 'non-living' natural resources. The complainants' principal argument is rooted in the notion that 'living' natural resources are 'renewable' and therefore cannot be 'exhaustible' natural resources. We do not believe that 'exhaustible' natural resources and 'renewable' natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, 'renewable', are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently by virtue of human activities. Living resources are just as 'finite' as petroleum, iron ore and other non-living resources.[492]

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[490] *United States—Standards for Reformulated and Conventional Gasoline* (WT/DS2/R) Panel Report, [29 April 1996] [hereinafter: *US—Gasoline*] para. 6.37.

[491] Matz-Lück et al. (2011) p. 550.

[492] *United States — Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R) Appellate Body Report, [12 October 1998] [hereinafter: *US—Shrimp*] para. 128.

It further explained that the wording of Article XX (g)

> was actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement —which informs not only the GATT 1994, but also the other covered agreements— explicitly acknowledges 'the objective of sustainable development […]'.[493] From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'. It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.[494]

[493] *US — Shrimp*, Appellate Body Report, para. 129. According to the report entitled 'Our Common Future' published in April 1987 the sustainable development, as a 'buzzword' of the present era, has been defined as a notion whereby 'the needs of the present without compromising the ability of future generations to meet their own needs' are satisfied. This report also sought to interconnect the interests of the economic development and preservation of the environment through rational use of natural resources. In other words, the rational use of natural resources is the main component of this notion. For further study see: Malgosia A. Fitzmaurice, 'International Protection of the Environment' (2001) 293 Recueil des Cours de l'Académie de Droit International, p. 47. 'Report of the World Commission on Environment and Development: Our Common Future' Transmitted to the General Assembly as an Annex to the UN document A/42/427 (4 August 1987) –Development and International Co-operation: Environment, Paragraph 27, available at http://www.un-documents.net/wced-ocf.htm <accessed 26 September 2019>. The origin of principle of sustainable development traces back to the 1972 Stockholm Declaration and the 1982 World Charter for Nature. Michael Bothe 'Environment, Development, Resources' (2005) 318 Recueil des Cours de l'Académie de Droit International, 492 and Michael Bothe 'Environment, Development, Resources' (2005) 318 Recueil des Cours de l'Académie de Droit International, 479.

[494] Ibid at para. 130.

By virtue of the above-mentioned analysis, *US—Shrimp* is seen as the first case that the WTO Appellate Body recognizes living organisms as exhaustible natural resources under the provision of Article XX (g) of the GATT. In arriving at its conclusion, the Appellate Body referred to the international conventions such as Article 56, 61 and 62 of the UNCLOS 1982 referring to 'living resources' and Article 2 of the Convention on Biodiversity and declarations such as Chapter 17 of Agenda 21 of Rio Declaration[495] which consider natural resources as encompassing both living and non-living resources.[496]

In *China—Raw Materials*, China mentioned that 'refractory-grade bauxite and fluorspar are exhaustible natural resources; they are scarce, are not easily substitutable, and thus need to be managed and protected.'[497] This view was confirmed by the complainants; therefore, the Panel did not discuss the meaning of the raw materials in question.[498] In *China—Rare Earths*, although the parties to the dispute did not raise any objection to the inclusion of rare earths and other minerals in question into the scope of Article XX (g) of the GATT, the complainants argued that the term 'exhaustible natural resources' is 'limited to resources in their raw form and excludes semi-processed and processed materials'.[499] Moreover, in the view of the United States, the recognition of processed or semi-processed materials within the term 'exhaustible natural resource' was doubtful.[500] China, in contrast, did not address this issue even though it argued that the 'product scope covered by Article XX (g) is broad.[501] In this respect, the Panel opined that 'the parties seem to agree that a measure may "relate to the conservation of" an exhaustible natural resource even if that resource in its raw form is not the direct subject of the measure. In the appellate review, the issue of 'processed and semi–processed products was not appealed and therefore it was not analyzed.

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[495] The RIO Declaration on Environment and Development (1992) www.unesco.org/education/pdf/RIO_E.PDF <accessed 26 September 2019>.

[496] *US — Shrimp*, Appellate Body Report, para. 130.

[497] *China—Raw Materials*, Panel Report, para. 7.356.

[498] Ibid, at para. 7.369.

[499] *China—Rare Earths*, Panel Report, para. 7.246.

[500] Ibid.

[501] Ibid.

In analyzing the elements of 'exhaustible natural resources', the Panel, while recognizing that 'there is no internationally agreed definition of exhaustible natural resources'[502] and also 'the precise point at which processed raw materials cease to be considered "exhaustible natural resources" for the purposes of Article XX(g) has never been addressed in WTO dispute settlement',[503] still emphasized that the term 'exhaustible natural resources' cannot be interpreted so broadly as to include resources or other products that are unrelated to, or have no connection with, exhaustible natural resources'.[504] The Panel finally arrived at the conclusion that 'it need not decide the precise meaning or scope of the term "exhaustible natural resources" to resolve this dispute'[505] 'the subject matter of measures contemplated by Article XX (g) is not limited to raw natural resources, so long as the object of the concerned measures is to conserve, directly or indirectly, such raw natural resources'.[506]

II. The Basics of Article XX (g) of the GATT

A. Structure of Article XX

Article XX is made up of ten exceptions illustrating the measures[507] aimed at protecting public morals, human, animal or plant life or health, importations or exportations of gold or silver, patents, trade-marks and copyrights, products of prison labour, national treasures of artistic, historic or archaeological value, conservation of exhaustible natural resources, obligations under any intergovernmental commodity agreement, restrictions on exports of domestic materials and the acquisition or distribution of products in general or in short supply locally. Different terms used in the paragraphs (a) to (j) refer to 'the relationship between the objective and the application of a

[502] Ibid, at para. 7.248.

[503] Ibid.

[504] Ibid, at para. 7.249.

[505] Ibid, at para. 7.250.

[506] Ibid.

[507] The term 'measures' under this Article has been given a broad meaning. Matz-Lück et al. *(*2011) p.548.

measure'.[508] The WTO Member States are free to invoke the GATT general exceptions provided that such measure is not applied, as per the chapeau of Article XX, 'in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. There are two public policy goals under Article XX of GATT that may be specifically relevant for WTO Member States seeking to justify export restrictions on minerals (i) under Paragraph (b) WTO Members may justify measures 'necessary to protect human, animal or plant life or health' and (ii) in accordance with Paragraph (g), measures 'related to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption' may be adopted in derogation of GATT obligations. It must be however noted that for the sake of this research, the effects of Article XX (g) is merely analyzed with respect to the issue of permanent sovereignty over natural resources.

B. An Overview of Article XX (g)

GATT 1947 has not laid down any specific provision pertaining to the natural resources except Article XX (g). The main aim of drafting Article XX (g) was to include mineral resources such as oil.[509] This Article received no modifications during the Uruguay Round.

Article XX(g) of GATT permits the WTO Member States to deviate from GATT obligations when using measures 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'. Article XX(g) has been invoked in *China–Raw Materials* and *China–Rare Earths* to justify a set of export quantitative restrictions imposed on various minerals and metals. The Panel and the Appellate Body in *China–Rare Earths* have thoroughly brought about the interpretation of Article XX(g), as a whole, in order to determine 'the legal test to be applied in considering [specific] Article XX(g)

[508] *US — Gasoline* (WT/DS2/AB/R) Appellate Body Report, [29 April 1996] pp 11ff quoted in Rüdiger Wolfrum 'Article XX GATT [Introduction]' in Rüdiger Wolfrum, Peter-Tobias Stoll and Holger P. Hestermeyer, *Max Planck Commentary on World Trade Law: WTO-Trade in Goods* (Martinus Nijhoff Publishers 2011) p. 457.

[509] Matz-Lück et al. (2011) p. 549.

defence[s]'.[510] Furthermore, the Appellate Body in *China–Rare Earths* indicated that 'Article XX(g) always calls for a holistic assessment of all its constituents elements' to be carried out 'on a case-by-case basis, through scrutiny of the factual and legal context in a given dispute'.[511]
Article XX (g) actually specifies a set of conditions to be fulfilled by a WTO Member State so as to justify its GATT–inconsistent measure including export quotas to conserve its exhaustible natural resources: i) the measure must be related to the conservation of exhaustible natural resources[512]; and ii) the application of such measure must be made effective in conjunction with restrictions on domestic production or consumption.[513]

1. The First Requirement: 'relates to' the Conservation of Exhaustible Natural Resources.

As regards the '*relating to*' requirement, the Appellate Body in China–Rare Earths confirmed the validity of the rational connection test applied in US–Shrimp and recalled by China–Raw Materials where the Panel, under a review of the WTO cases interpreting Article XX(g), concluded that a measure relates to conservation when there is 'a substantial relationship between the export measures and conservation', and 'that a measure must be *primarily aimed at* the conservation of

[510] See *China—Rare Earths*, Panel Report, paras. 7.244–7.337 and *China—Rare Earths*, Appellate Body Report, paras. 5.85–101.

[511] *China—Rare Earths*, Appellate Body Report, paras. 5.94–5.95 and *China—Rare Earths*, Panel Report, para. 7.240.

[512] In regard to the term 'exhaustible natural resources', the Panel in *China—Rare Earths* pointed out that 'the precise point at which processed raw materials cease to be considered "exhaustible natural resources" has never been addressed in WTO dispute settlement bodies'. *China—Rare Earths*, Panel Report, para. 7.248. Recalling the Appellate Body decision in *US — Gasoline*, the Panel clarified that the measures for which Article XX(g) is invoked do not need to be imposed on 'raw natural resources, so long as the[ir] object […] is to conserve, directly or indirectly, such raw natural resources'. *China—Rare Earths*, Panel Report, para. 7.250. Hence, according to the Panel it was unnecessary to define the precise scope of the term inasmuch as export restrictions applied on semi-processed or processed products could also in principle fall within the scope of the concept of 'exhaustible natural resources'. *China—Rare Earths*, Appellate Body Report, para. 5.78.

[513] *China — Rare Earths*, Panel Report, para. 5.162.

exhaustible natural resources [...] to fall within the scope of Article XX(g)'[514] and such relationship must be established on a case-by-case basis.[515]

the Appellate Body in China–Rare Earths further held that the assessment of whether a measure relates to conservation must lay emphasis upon 'the design and structure' of the measure concerned,[516]as an 'objective methodology […] diminishing the uncertainty that would arise in basing such assessment on actual effects or the occurrence of subsequent events'.[517] It was also pointed out that the design and structure of the challenged measures must not be analyzed in isolation but needs to assess such measures 'in their policy and regulatory context'.[518]

The Panel also asserted that:

> references to "conservation" are not sufficient on their own to prove that the challenged measures are "related to" conservation [and] cannot insulate measures from challenge on the basis that their design and architecture do not "relate to the conservation of exhaustible natural resources".[519]

In addition, 'a full and proper explanation of how the [challenged measures] are designed to promote conservation'[520] is of particular importance in establishing the required connection between the assertion of conversation goals and other policy objectives.

The Panel and the Appellate Body in *China— Rare Earths*, in discussing the design and structure of China's export quotas clarified the policy space left for WTO Member States to be used under the conservation exception.

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[514] *China — Raw Materials*, Panel Report, para. 7.370. *China—Rare Earths*, Appellate Body Report, para. 355, citing *US — Shrimp*, Appellate Body Report, para. 136; *China—Rare Earths*, Appellate Body Report, para. 5.90.

[515] *China—Rare Earths*, Appellate Body Report, para. 5.113 and *China—Rare Earths*, Panel Report, para. 7.292.

[516] *China—Rare Earths*, Appellate Body Report, para. 5.96 and paras. 5.111–5.114, citing *US — Shrimp*, Appellate Body Report, para. 137; *US — Gasoline*, Appellate Body Report, pp. 17, 20; *China — Raw Materials*, Appellate Body Report, para. 355.

[517] *China—Rare Earths*, Appellate Body Report, para. 5.112.

[518] *China—Rare Earths*, Appellate Body Report, para. 5.108, citing *China — Rare Earths*, Panel Report, para. 7.289.

[519] *China — Rare Earths*, Panel Report, para. 7.390.

[520] Ibid., para. 7.406 and *China — Raw Materials*, Panel Report, paras. 7.422–7.426.

The imposition of quantitative restrictions 'on the amount of legally produced goods that can be exported', in view of the Panel is 'overbroad', and falls under the US–Shrimp definition of a measure which is 'disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation'.[521] The Panel opined that the use of a measure restricting exports, and only burdening foreign consumers, could not be viewed to have a rational connection to the goal of reducing consumption of illegally produced goods (and finally attaining conservation goals) in China.[522] The Appellate Body further accepted that export quotas 'do or at least can send conservation-related signals to foreign users' insofar as they can provoke foreign consumers and investors to explore alternative sources of supply.[523] It, however maintained that:

> Whereas export quotas may reduce foreign demand for [the restricted goods], they will also stimulate domestic consumption by effectively reserving a supply of low-price raw materials for use by domestic downstream industries. They may also encourage relocation of rare earth consuming industries to China.[524]

The Panel ultimately indicated that the manner in which export quotas are regulated can be considered as a factor in establishing whether they satisfy the '*relating to*' requirement, provided their design demonstrates a 'substantial' connection to the goal of conservation 'regardless of the subjective thoughts or intentions of those who set it'.[525]

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[521] *China — Rare Earths*, Panel Report, paras. 7.425–30, citing *US — Shrimp*, Appellate Body Report, para. 141.

[522] *China — Rare Earths*, Panel Report, paras. 7.436–9.

[523] *China—Rare Earths*, Appellate Body Report, para. 5.156, citing *China — Rare Earths*, Panel Report, para. 7.443

[524] *China—Rare Earths*, Appellate Body Report, para. 5.156, citing *China — Rare Earths*, Panel Report, para. 7.444

[525] *China — Rare Earths*, Panel Report, paras. 7.465–85. It must be also noted that the domestic availability of unused export quota volumes, in view of Panel in *China–Rare Earths* does not in itself exclude a system of export quotas from being conservation-related within the meaning of Article XX(g). *China — Rare Earths*, Panel Report, paras. 7.486–7.488.

2. The Second Requirement: ‘made effective in conjunction with restrictions on domestic production or consumption’

This requirement is composed of two elements: the existence of restrictions on domestic production or consumption, and the relationship between the foreign and domestic restrictions. Therefore, it should be proved that the country imposing export restrictions also imposes domestic restrictions on the same export products.[526] The imposition of both domestic and foreign restrictions is an indicator of the conservation objective of the restrictions.[527]

In China–Rare Earths, the Appellate Body agreed with the Panel that any measure ‘which restricts someone or something, a limitation on action, a limiting condition or regulation’ can be considered to fall within the ambit of Article XX(g).[528]

The Panel, for instance excluded access conditions and environmental regulatory requirements from qualifying as ‘restrictions’ since the former cannot control the amounts of materials extracted or produced by enterprises that are already in the market,[529] and the latter impose compliance costs ordinarily imposed on enterprises to internalize the environmental externalities caused by mining activities.[530] The levying of a resource tax aimed at increasing costs borne by mining companies operating domestically could be contrariwise considered as a restriction, provided that a defendant party is able to submit convincing evidence that this tax was designed in such a way as to have a limiting effect on domestic consumption and/or production.[531]

Furthermore, extraction and production quotas meet the ‘restriction’ requirement to the extent that they are set at a level which is below the level of expected demand and that they are designed to

[526] Ibid., para. 7.361.

[527] Ibid., para. 7.402.

[528] *China—Rare Earths,* Appellate Body Report, para. 5.91, citing *China — Raw Materials,* Appellate Body Report, para. 319 and *China — Rare Earths,* Panel Report, para. 7.307.

[529] *China — Rare Earths,* Panel Report, para. 7.498.

[530] Ibid., paras. 7.556–7.566.

[531] Ibid., para. 7.554. For example, by proving that the introduction and/or increase of a resource tax led to a reduction in the sales of a taxed product.

counteract the perverse incentives associated with export quotas, including appropriate enforcement measures.[532]

The Appellate Body then elaborated on the requirement that conservation-related restrictions are 'made effective in conjunction with' restrictions on domestic production or consumption. In this regard, the Appellate Body noted that it had interpreted the 'in conjunction with' term in the *US — Gasoline* to mean that domestic and export measures must exist jointly, but expressly refused to impose a requirement that the export measures ensure the effectiveness of the domestic measures.[533] Rather than an 'effects' test between the foreign and domestic restrictions, the correct legal test was whether the two sets of restrictions were 'even-handed.'[534] The notion of even-handedness as reflected in the second clause of Article XX(g), in view of the Appellate Body in *China—Rare Earths* demands that a Member 'impose "real" restrictions on domestic production or consumption that reinforce and complement the restrictions on international trade, and particularly so in circumstances where domestic consumption accounts for a major part of the exhaustible natural resource to be conserved'.[535]

The balancing required under Article XX(g) cannot be therefore construed as meaning that the burden of conservation must be 'evenly distributed between foreign producers, on the one hand, and domestic producers or consumers, on the other hand'.[536] Factors considered by the Panel as indicating the fulfilment of the even-handedness requirement in *China–Rare Earths* encompass coordination in the level and timing of the announcements of domestic and export restrictions, correspondence in the product coverage of such measures and the absence of a temporal disconnect between domestic and export restrictions.[537] To conclude, the restrictions must be causally related

[532] Ibid., para. 7.521–44. Similarly, it can be applied for volume restrictions on consumption. Ibid., para. 7.545–7.550.

[533] *China — Raw Materials*, Appellate Body Report, para. 358.

[534] AB Reports, China–Raw Materials, paras.356–357 (quoting *US — Gasoline*, Appellate Body Report, p. 19.) and AB Reports, China–Rare Earths, para. 5.93. It must be however noted that the decision of the Appellate Body in *China — Raw Materials* did not affect the outcome in China's case because China could not show that domestic restrictions were being imposed in addition to export restrictions in pursuit of the conservation of exhaustible resources. *China — Raw Materials*, Appellate Body Report, para 361–363.

[535] *China—Rare Earths*, Appellate Body Report, paras. 5.132.

[536] Ibid., paras. 5.133–5.136.

[537] *China—Rare Earths*, Panel Reports, paras. 7.572–7.599.

to the 'conservation of exhaustible natural resources,' but not necessarily to the implemented domestic measures.[538] This interpretation of Article XX (g) of GATT grants the WTO Member States greater flexibility in designing a conservation regime, allowing them to identify the most effective measures from each of the available international and domestic measures to attain their goals, without the burden of establishing a cause and effect relationship between the international and domestic measures.

C. Chapeau of Article XX

Before addressing the implications of Chapeau (introductory part) of Article XX for the China's restrictive measures, it is essential to understand the requirements of this part of Article.
According to the Chapeau (introductory part) of Article XX, to justify a measure under one of the sub-paragraphs of Article XX, that measure must not be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. It provides that:

> [s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures […].

The Panel in *China — Rare Earths* declared that the aim of Chapeau is to consider the manner in which a measure is applied and preventing abuses of Article XX exceptions.[539] Therefore, the requirements imposed by the Chapeau:

> impart meaning to one another [so that] the kind of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable

[538] *China — Raw Materials*, Appellate Body Report, paras 353–360.

[539] *China — Rare Earths*, Panel Report, para. 7.348, citing *US — Gasoline*, Appellate Body Report, p. 22.

discrimination" may also be taken into account in determining the presence of a "disguised restriction" on international trade'.[540]

With respect to the 'arbitrary or unjustifiable discrimination' clause, the Appellate Body decision in *US—Shrimp* was recalled as it imposes three requirements: a) arbitrary discrimination between countries where the same conditions prevail; b) unjustifiable discrimination between countries where the same conditions prevail; or c) a disguised restriction on international trade.[541]

The first condition refers to both most–favoured nation (MFN) and national treatment types of discrimination.[542] The Panel, hence rejected China's argument that its export duties were applied consistently with the 'arbitrary or unjustifiable discrimination' clause because they did not make a distinction 'according to the destination of the products being produced'.[543] Recalling the Appellate Body's decision in Brazil– Retreaded Tyres, the Panel in *China — Rare Earths* asserted that the analysis of whether or not discrimination is justifiable under the Chapeau of Article XX should be premised upon whether the 'reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective', and also consider the effects of the discrimination.[544] Thus, the Panel found that an export quota remains unfilled does not necessarily imply that it has no discriminatory impact as long as its persistence over time induces international markets to adjust to long-term distortions.[545] As regards the issue whether unfilled export quota could not cause a price gap between foreign and domestic prices, the Panel noted that the decreasing of the price gap cannot be persuasively established when the effects of other factors, such as the price effects of export

[540] *China — Rare Earths*, Panel Report, para. 7.349, citing *US — Gasoline*, Appellate Body Report, p. 22.

[541] *China — Rare Earths*, Panel Report, para. 7.350, citing *US — Shrimp*, Appellate Body Report, para. 150.

[542] *China — Rare Earths*, Panel Report, para. 7.350, citing *US — Shrimp*, Appellate Body Report, para. 150.

[543] *China — Rare Earths*, Panel Report, paras. 7.189–7.190.

[544] *China — Rare Earths*, Panel Report, para. 7.352, citing Brazil — Measures Affecting Imports of Retreaded Tyres (WT/DS332/AB/R) Appellate Body Report, [3 December 2007] [hereinafter: *Brazil —Retreaded Tyres*], paras. 227–230.

[545] *China — Rare Earths*, Panel Report, paras. 7.630–7.635.

duties applied concurrently with export quotas, are difficult to isolate.[546] In this respect, The Panel in *China — Rare Earths* opined that:

> […] the presence of the export duty may at times lead to the quota to have no apparent effect on foreign price, in the case in which the duty reduces the quantity demanded to below the export quota level. However, it would be erroneous to conclude that in this circumstance the export quota has no effect at all.[547]

The Panel, in its assessment, referred to other relevant aspects affecting the above issue:
a) differences in the denomination of export and production quotas, which could lead to 'inflating the amount that appears to be exported';[548]
b) differences in the scope of the production and export quotas reflecting a 'structural imbalance' in favour of domestic users to the detriment of foreign consumers;[549] and
c) differences in the criteria used for the allocation of the quotas between domestic and foreign users.[550]
The Panel also stated that discrimination may be arbitrary or unjustifiable 'where alternative measures exist which would have avoided or at least diminished the discriminatory treatment'.[551] The Panel further pointed out that, when WTO–consistent alternative means exist, which could achieve the desired level of protection as export quotas while avoiding the discrimination effects produced by such quotas, the 'arbitrary or unjustifiable discrimination' requirement pursuant to the Chapeau of Article XX cannot be satisfied.[552] The Appellate Body in *US–Gasoline* confirmed that:

[546] Ibid., paras. 7.636–7.649.

[547] Ibid., para. 7.644.

[548] Ibid., para. 7.650.

[549] Ibid., para. 7.651.

[550] Ibid., paras. 7.652–7.657.

[551] Ibid., para. 7.354, citing *US — Gasoline*, Appellate Body Report, pp. 26–27.

[552] *China — Rare Earths*, Panel Report, paras. 7.675–7.677.

> "disguised restriction" […] may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX.[553]

Panel finally concluded that a simple statement that an export duty is an indispensable part of a WTO Member State's environmental policy, without providing any explanation of the criteria used to determine the duty rates, cannot be considered as 'tailored to' protect the environment.[554]

III. China — Raw Materials and the PSNR

China — Raw Materials is the first dispute in the history of the GATT/WTO jurisprudence in which the PSNR was discussed. In justifying the adoption of its restrictive measures on the export of various raw materials, China invoked the PSNR.

As already discussed, pursuant to Article XX(g), a WTO inconsistent measure may be justified if it is related to the conservation of exhaustible natural resources. In support of its arguments, China put forward its opinion that its export duties were measures to be covered by the ambit of Article XX(g). Accordingly, China sought to invoke the PSNR to elaborate its arguments emanating from Article XX(g).

China claimed that 'Article XX (g) protects its sovereign right to adopt an overarching and sustainable mineral conservation policy, taking into account China's social and economic development needs'.[555] Article XX (g) in the view of China, had to be interpreted in a manner consistent with the recognition of its sovereign rights over natural resources.[556] China argued that:

> these rights must be exercised in the interests of a Member's own social and economic development, as well as in light of the objective of sustainable development as stated in the Preamble to the WTO Agreement. China posits that sustainable development requires that

[553] Ibid., para. 7.349, citing *US — Gasoline*, Appellate Body Report, p. 16.

[554] *China — Rare Earths*, Panel Report, paras. 7.191–7.192.

[555] *China — Raw Materials*, Panel Report, para. 7.363.

[556] Ibid., para. 7.364.

> economic development and conservation be aligned through the effective management of scarce resources, as the term "conservation" refers to the management of a limited supply of exhaustible natural resources over time. China considers that its export restraints "relate to conservation" because they are part and parcel of China's measures that manage the limited supply of refractory-grade bauxite and fluorspar, which are exhaustible natural resources.[557]

The complainants, however, were in disagreement with China with regard to invoking the Preamble of the WTO Agreement as a basis of exempting a WTO member from the scope of Article XX (g). The European Union recalled that:

> the WTO Preamble calls for the optimal use of the world's resources, and expresses the desire of WTO Members to contribute to the objectives of the WTO by entering into reciprocal and mutually advantageous arrangements directed at the substantial reduction of tariffs and other barriers to trade.[558]

The complainants further argued that:

> […] this principle is not at issue in this dispute. In their opinion, Article XX (g) does not call into question this sovereign right of all WTO Members. Under Article XX(g), what is at issue is whether a Member has satisfied the conditions of that provision when it maintains an otherwise GATT-inconsistent measure affecting trade in its natural resources.[559]

> China's attempt to incorporate into the term "conservation" the notion of exercising rights over natural resources "in the interests of a Member's own social and economic

[557] Ibid., para.7.381.

[558] Ibid., para. 7.365.

[559] Ibid., para. 7.367.

development" seeks to change Article XX (g) into an exception based on a WTO Member's desire to create opportunities for growth for its downstream processing industries.[560]

It must be noted that the PSNR was only discussed in the Panel proceedings. The Appellate Body did not carry out a detailed examination about the said principle. The Panel opined that the PSNR is seen as the 'relevant rules of international law applicable in the relations between the parties' that should be considered together with the context in interpreting a treaty, which falls under Article 31 (3) (c) of the VCLT.[561]

In order to ascertain what is meant by 'rules of international law', for instance, the Panel in *EC — Approval and Marketing of Biotech Products* clarified the substance of Article 31(3)(c) of the VCLT:

> [t]extually, this reference seems sufficiently broad to encompass all generally accepted sources of public international law, that is to say, (i) international conventions (treaties), (ii) international custom (customary international law), and (iii) the recognized general principles of law.[562]

[560] Ibid., para. 7.368.

[561] Ibid., para. 7.377. In United States — Import Prohibition of Certain Shrimp and Shrimp Products– Recourse to Article 21.5 of the DSU by Malaysia (WT/DS58/RW5) Panel Report [15 June 2001] [hereinafter: *US—Shrimp* – Recourse to Article 21.5], the Panel referred to Article 31(3) (c) of the VCLT when considering agreements that had been ratified by both parties but not by all WTO Member States. *US—Shrimp* – Recourse to Article 21.5 of the DSU by Malaysia, Panel Report, para. 5.57. Another example of analyzing Article 31(3) (c) of the VCLT can be found in *Peru — Additional Duty on Imports of Certain Agricultural Products*, (WT/DS457/AB/R) Appellate Body Report [20 July 2015] [hereinafter: *Peru — Agricultural Products*].

[562] *European Communities — Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS/291, 292 and 293/R) Panel Report, [26 November 2006] [hereinafter: *EC – Approval and Marketing of Biotech Products*] para. 7.67. (citing Appellate Body Report in *US—Shrimp* para. 158).

Thus, 'rules of international law' refers to the rules emanating from formal sources of international law enumerated in Article 38(1) of the ICJ Statute.[563] For this reason, as already discussed in Chapter One, the PSNR is also recognized under the category of 'general principle of law recognized by civilized nations', as described in Article 38(1)(c) of the ICJ Statute. It therefore qualifies as an interpretive tool under the VCLT. In addition, the term 'relevant' is construed as the rules 'touching on the same subject matter as the treaty provisions or provisions being interpreted or which in any way affect that interpretation'.[564] As highlighted by the Appellate Body in *EC — Large Civil Aircraft, '*a rule is 'relevant' if it concerns the subject matter of the provisions at issue'.[565]

More importantly, the Appellate Body in *EC — Large Civil Aircraft,* in analyzing the applicability of a non–WTO rule under the provisions of Article 31(3)(c) of the VCLT held that:

> [i]n a multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members.[566]

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[563] Daniel Rosentreter, *Article 31 (3) (c) of the Vienna Convention on the Law of Treaties and the Principle of Systematic Integration in International Investment Law and Arbitration* (Nomos 2015) p. 101.

[564] Panos Merkouris, *Article 31 (3) (c) VCLT and the Principle of Systemic Integration* (Brill, Nijhoff 2015) p. 21.

[565] *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft* (WT/DS316/AB/R) Appellate Body Report [18 May 2011] [hereinafter: *EC — Large Civil Aircraft*] para. 846. In *Peru — Agricultural Products*, Peru attempted to use the FTA concluded with Guatemala and certain Articles of the ILC to depart from its WTO obligations under Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994. Rejecting Peru's argument, the Appellate Body by recalling United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (WT/DS379/AB/R) Appellate Body Report [hereinafter: *US — Anti-Dumping and Countervailing Duties (China)*] [11 March 2011] held that '[i]n order to be ''relevant'' for purposes of interpretation, rules of international law within the meaning of Article 31(3)(c) of the Vienna Convention must concern the same subject matter as the treaty terms being interpreted'. *Peru — Agricultural Products*, Appellate Body Report, para. 5.101 citing *US — Anti-Dumping and Countervailing Duties (China)*, para. 308 and *EC — Large Civil Aircraft*, Appellate Body Report, para. 846.

[566] Ibid., para. 845.

While recognizing the PSNR as 'an important element of State sovereignty',[567] the Panel in finding the legal basis of the PSNR made reference to a number of UNGA resolutions and the Preamble of the Convention on Biological Diversity.[568] Having referred to Article 31(3)(c) of the VCLT, the Panel in interpreting Article XX(g) viewed the PSNR as the context under which the term 'conservation' must be interpreted. For the Panel

> […] [t]he principle of sovereignty over natural resources affords Members the opportunity to use their natural resources to promote their own development while regulating the use of these resources to ensure sustainable development. Conservation and economic development are not necessarily mutually exclusive policy goals; they can operate in harmony. So too can such policy goals operate in harmony with WTO obligations, for Members must exercise their sovereignty over natural resources consistently with their WTO obligations. […].[569]

In addition to the above, the Panel asserted that the function of the PSNR 'is plausible at two levels where a) it gives the WTO Member State the opportunity to use the natural resources, and b) it helps the WTO Member State to promote their own development in parallel to regulating such use.[570] In this respect, WTO Member States are entitled to determine their own conservation policies on the also by means of a 'comprehensive policy comprising a multiplicity of interacting measures'.[571]

IV. China — Rare Earths and the PSNR

[567] *China — Raw Materials*, Panel Report, para. 7.380.

[568] Ibid.

[569] Ibid., para. 7.381.

[570] Ibid.

[571] China — Raw Materials, Panel Reports, para. 7.375, citing *Brazil — Retreaded Tyres*, Appellate Body Report, para.151.

The second case brought before the WTO DSB in which the PSNR was thoroughly discussed is *China — Rare Earths*.

In this case, the PSNR plays a pivotal role in the interpretation of pertinent parts of Article XX (g) of the GATT.[572] China in its submissions repeatedly referred to the PSNR by which the WTO Members are provided with 'the opportunity to use their natural resources to promote their own development'.[573] In making this interpretation, China invoked the Preamble of the WTO Agreement arguing that 'the WTO Members have a large measure of autonomy to make policy choices and select priorities in designing policies'.[574] At the same time, such opportunity is combined with 'regulating the use of these resources to ensure sustainable development'.[575] China eventually proposed an interpretation that economic development and conservation under the scope of Article XX (g) should be carried out in harmony.[576] In contrast, according to complainants, China, in interpreting Article XX (g), had taken a 'selective view' and had not taken into account all the relevant factors.[577] They underscored that the sovereignty over natural resources had to be exercised in a consistent manner with the WTO obligations, too. This interpretation had already been made by the Panel in *China — Raw Materials*.[578]

Recalling the findings of the Panel in *China — Raw Materials* in providing the ordinary meaning of the term 'conservation', the Panel used the 'context' of the WTO Agreement to interpret Article XX (g). According to the Panel:

> [a] proper reading of Article XX(g) in the context of the GATT 1994 and the WTO Agreement should take into account the objective of using and managing resources in a sustainable manner that ensures the protection and conservation of the environment while at the same time not interfering with economic development. In other words, the objective

[572] *China — Rare Earths*, Panel Report, paras. 7.111 and 7.266.

[573] Ibid., para. 7.252.

[574] Ibid.

[575] Ibid.

[576] Ibid.

[577] Ibid., para. 7.254.

[578] Ibid.

> of sustainable development is relevant to the interpretation of Article XX(g). However, this does not mean that sustainable development can be invoked as a basis to deviate from the requirements of subparagraph (g) of Article XX.[579]

The Panel also reaffirmed the conclusion reached by the Panel in *Raw Materials* highlighting that the PSNR, the conservation of exhaustible natural resources and economic development can operate in harmony:

> The principle of sovereignty over natural resources thus recognizes that WTO Members have the right to use their natural resources to promote their own development while also encouraging the regulation of such use to ensure sustainable development. According to the principle, then, conservation and economic development are not mutually exclusive policy goals; they can operate in harmony.[580]

The Panel further noted that the WTO Member States, pursuant to their sovereign rights over their own natural resources may adopt conservation measures that are not merely concerned with 'preserv[ing] the natural resources in their current state'.[581] The notion of 'conservation' as laid down in Article XX (g) of the GATT does not actually mean placing a moratorium on the exploitation of natural resources, but includes also measures that regulate and control such exploitation pursuant to a Member's development and conservation objectives.[582] In arriving at the above conclusion, the Panel invoked the PSNR as a relevant rule of international law applicable in this case, to interpret Article XX(g) of GATT, and especially the word 'conservation'.

Resource-endowed WTO Members are entitled to develop conservation policies on the basis of, or taking into account, a full range of policy considerations and goals, including the need to preserve resources in their current state as well as the need to use them in a sustainable manner.[583]

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[579] Ibid., para.7.261.

[580] Ibid., para. 7.265.

[581] Ibid., para.7.266.

[582] Ibid.

[583] Ibid., para. 7.267.

The right to adopt conservation policies cannot be however invoked to 'excuse export restrictions adopted in aid of economic development if they operate to increase protection of [a] domestic industry' in contradiction of other Article XX exceptions, such as Article XX(i)'[584]

Moreover, given States' permanent sovereignty over their natural resources, WTO Members, including China, are entitled to determine their own conservation objectives. Additionally, a Member's sovereign rights over its own natural resources means that, in principle, it is entirely in that Member's discretion whether its conservation measures should 'decrease the absolute quantity' of materials extracted or 'control the speed' of such extraction, provided that its measures do not cause damage to the environment of other States or of areas beyond the limits of the regulating Member's national jurisdiction. In this connection, the Panel was agreed with China that 'conservation' as used in Article XX(g) is not merely limited to 'preservation of natural resources'.[585] In expanding upon the relationship between exercising sovereign rights of a WTO Member State over its own natural resources and its implications for the international markets of rare earths, the Panel asserted that:

> [t]his permanent sovereignty over natural resources and the right of WTO Members to adopt conservation programmes pursuant to Article XX(g) allows WTO Members to develop and implement processes, means, or tools that put into practice a conservation policy in a way that responds to a Member's development and conservation concerns. It is not, however, a general right to regulate and control a natural resource market for any purpose. As the Appellate Body recognized in US – Softwood Lumber IV, natural resource products that will necessarily enter the market and are available for sale are subject to GATT disciplines in the same way as any other product.[586]

WTO regulations are not applicable to natural resources until they are extracted or harvested. They only apply to extracted minerals, lumber after it has been cut down; and to marine species after

[584] Ibid., para. 7.270

[585] Ibid., para. 7.266.

[586] Ibid., para. 7.268.

they have been caught.[587] The Panel stated that the exercise of sovereignty over national resources cannot be intended to enable Article XX(g) to allow a WTO Member to allocate the available stock of a product between foreign and domestic consumers because, once extracted and in commerce, natural resources are subject to WTO law.[588]

According to the Panel, the term 'conservation' for the purpose of Article XX(g) of the GATT has a broad meaning which strikes an appropriate balance between trade liberalization, sovereignty over natural resources, and the right to sustainable development.[589]

Part Three: Limitations on Exercising Sovereignty within the PSNR

I. Introductory Remarks

As discussed in the previous section, the PSNR has played a role in supporting China's arguments on Article XX (g). In the absence of examination by the Appellate Body, the Panels, in these two disputes, briefly discussed the different aspects of exercising sovereignty over natural resources. In order to understand the implications of WTO membership for exercising sovereignty over natural resources, the limits of sovereign rights are analyzed in this section.

II. Discussions on the Curtailment of Sovereignty

[587] 'World Trade Report' (2010) p. 162.

[588] *China — Rare Earths,* Panel Report, para. 7.462.

[589] Ibid., para. 7.277. On appeal, there was no discussion on the issue of the PSNR. Saudi Arabia, as the third party to the dispute in the Appellate review, in reference to the invocation of the PSNR merely put forward an argument emphasizing that 'an important aspect of any dispute concerning conservation and use of natural resources, such as the claims in these disputes under Article XX(g), is the context provided by the PSNR'. Saudi Arabia also focused on the role of the PSNR which allows Members endowed with natural resources to use their resources 'to promote economic and social development, [which] is in line with the objectives of the WTO as recorded in the first recital of the preamble of the Marrakesh Agreement'. *China — Rare Earths,* Appellate Body Report, para. 7.242.

Pursuant to the prevailing doctrine of sovereignty in the nineteenth and a large part of the twentieth century, States were only bound by those rules of law to which they had agreed, either by the conclusion of treaties or customary international law. Such an absolutist approach to sovereignty is epitomized by the statement of Chief Justice Marshall of the US Supreme Court in the *Schooner Exchange vs. Mc Faddon case*, which states that 'the jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself'.[590] Sovereignty must be identified only as a relative supremacy, subject to international law.[591] External sovereignty (independence) is a necessary condition of membership in the community of nations, being the principal test of possession by a State of a separate international personality.[592] Schachter opined that 'no State […] nor its autonomy (or sovereignty) is absolute in law whereas it is limited by international law which is viewed as the collective expression of sovereign wills'.[593]

The ILC in Article 14 of the Draft Declaration on Rights and Duties of States of 1949 supports the supremacy of international law over sovereignty: [594]

> [e]very State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.

[590] *The Schooner Exchange v. McFaddon*, 11 U.S. 7 Cr. 116 (1812) available at https://supreme.justia.com/cases/federal/us/11/116/case.html <accessed 26 September 2019>.

[591] 'Although sovereignty is independence from any superior power, it is not independent from international law'. Wildhaber (1983) p. 438.

[592] Charles G. Fenwick, *International Law* (3rd edn, New York and London: Appleton–Century–Crofts 1948) p. 29.

[593] Oscar Schachter, 'The Decline of the Nation–State and its Implications for International Law', 36 (1998) ColumJTransnatlL p. 7.

[594] Yearbook of the International Law Commission (1949) p. 288, available at http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a_cn4_13.pdf&lang=E <accessed 26 September 2019>.

For this reason, sovereignty is subject to increased limitations in areas such as international human rights law and international economic law.[595] In short, sovereignty does not mean freedom from law, but freedom within the law[596] and it implies responsibility, not just power.[597] Hence, sovereignty certainly is no longer sacrosanct.[598]

A. The Role of the United Nations Charter in Imposing limitations on Sovereignty

Since the creation of the Charter of the United Nations, there are now significant factors affecting the alteration and limitation of State sovereignty including the legal obligations taken on by the States. Article 2(2) of the UN Charter provides that Member States 'shall fulfill in good faith the obligations assumed by them' in conformity with the UN Charter. To be a signatory of a treaty or convention, the States are obliged to adopt a certain level of international control and supervision under the legal provisions of such treaties and conventions.

One of the UN Charter's primary purposes is to constrain sovereign behaviour which is inconsistent with its key percepts. Nagan indicates that 'sovereignty in the UN Charter is most visible in the context of sovereign equality' of States. He maintains that 'outside this context, the term 'sovereignty' is rarely used in the text of the Charter'. As a matter of fact, Article 2(7) of the UN Charter uses the term 'domestic jurisdiction' as a percept that seems intentionally less inclusive than the term 'sovereign' actually suggests.[599] Under Article 2 of the UN Charter:

> [a]ll members shall give the United Nations every assistance in any action it takes in

[595] Nico Schrijver, 'The Changing Nature of State Sovereignty' (1999) 17 BYIL (Clarendon Press 2000) p. 72.

[596] James Crawford, 'Sovereignty as a Legal Value', in Crawford and Koskenniemi (eds) *The Cambridge Companion to International Law*, (Cambridge University Press 2012) p.122.

[597] Kofi Annan, 'The Question of Intervention. Statements by the Secretary-General' (New York: UN Department of Public Information 1999) p. 6.

[598] Jarat Chopra and Thomas Weiss, 'Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention', (6) (1992) EthicsIntlAff p. 95.

[599] Winston P. Nagan, 'International Criminal Law and the Ad hoc Tribunal for the Former Yugoslavia', 6(1) (1995) DukeJComp&IntlL p. 146.

> accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.

Such assistance includes the payment of its corresponding share not merely for administrative expenses but also for expenditure for the peace-keeping operations of the organization. In its Advisory Opinion of July 20, 1961, the International Court of Justice opined that money used by the United Nations Emergency Force in the Middle East and in Congo could be viewed as 'expenses of the United Nations' under Article 17(2) of the UN Charter. For this reason, all its members must bear their corresponding share in such expenses. Another example is that Article 105 of the UN Charter also limits the sovereignty of the member States within their own territories by stipulating that diplomatic immunities and privileges must be respected.

B. Role of the International Tribunals in Providing Interpretations on the Limitation of Sovereignty

The Panel in *China — Raw Materials* referred to a number of cases decided by international tribunals that had great importance in the formation of legally–binding constraints over sovereignty.[600] In *Wimbeldon*, the PCIJ held that the granting of an unfettered right of passage to vessels of all nationalities through the Kiel canal would 'imply the abandonment by Germany of a personal and imprescriptible right, which forms an essential part of her sovereignty'. The PCIJ elaborated the issue by stating that:

> [s]overeignty, in other word, was not be understood as an unfettered freedom from external constraint, but rather as a way of describing a capacity for binding others to, and being bound by, international law. It was no longer something that had any innate content (such as describing certain natural rights or prerogatives), nor something that could be raised as an objection to legal obligation once entered into.[601]

[600] *China — Raw Materials*, Panel Report, para. 7.379.

[601] *S.S. 'Wimbledon' case*, p. 25.

Then, the Court further declined

> [t]o see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of sovereignty. No doubt, any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagement is an attribute of State sovereignty.[602]

In clarification of 'sovereignty', the PCIJ therefore asserted that sovereignty had no static content and a State has not necessarily lost its sovereignty simply because it has 'contracted out' various sovereign rights.

A State, therefore could exercise its sovereignty by binding itself to a particular arrangement. It was further highlighted in the Permanent Court of International Justice's Advisory Opinion on the *Exchange of Greek and Turkish Populations* in 1925.[603] This finding was based on the idea that international treaties are not binding by virtue of State sovereignty but due to the fact that States are free—due to their sovereignty—to become party to such treaties.[604] It is also confirmed by the ICJ in *Nicaragua* that: '[a] State [...] is sovereign for purposes of accepting a limitation of its sovereignty'.[605]

It is a generally recognized principle of international law that all the restrictions on the sovereignty of States should be interpreted narrowly, and that they may not be recognized unless they are clearly expressed; in all cases where a restriction upon sovereignty is relevant, it is not permissible

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[602] *S.S. 'Wimbledon' case,* p. 25. Clemens Feinäugle, 'The Wimbeldon', in Rüdiger Wolfrum, *The Max Planck Encyclopedia of Public International Law*, vol. X (Oxford University Press 2012) pp. 888–891.

[603] *Exchange of Greek and Turkish Populations (Greece v Turkey)* (Advisory Opinion) (1925) PCIJ, Series B, No 10, p. 21, available at http://www.worldcourts.com/pcij/eng/decisions/1925.02.21_greek_turkish.htm <accessed 26 September 2019>.

[604] Feinaugle (2012) pp. 890–891.

[605] *Military and Paramilitary Activities in and against Nicaragua case*, para. 259, cf. James Crawford, 'Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)', in Rüdiger Wolfrum, *The Max Planck Encyclopedia of Public International Law*, vol. VII (Oxford University Press 2012) pp. 73– 83.

to apply analogy.[606] Therefore, in case of doubt, the limitation of sovereignty must be construed restrictively.[607]

It is further declared that 'each State acts and decides in a sovereign way; but to the extent to which it contracted some obligation, it is committed to act and decide in conformity with these obligations'.[608] It was also maintained that the 'restrictions on the exercise of sovereign rights accepted by treaty by the State concerned cannot be considered as an infringement of sovereignty'.[609] In the *Lotus* Case, while attributing greater levels of State prerogative to the notion of sovereignty, the PCIJ held that the freedom of State action and the consent of State are the main pillars of international law; thus, binding obligations essentially presuppose consent of the State concerned, and so limitations on its independence must not be presumed. The Court also asserted that:

> International law governs relations between independent States. The rules of law binding upon States, therefore, emanate from their own free will as expressed in conventions or in usage generally accepted as expressing principles of law and established in order to regulate the relations between the coexisting independent communities or with a view to the independence of States cannot, therefore, be presumed'.[610]

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[606] *German Reparation Case (Germany/Reparation Commission)* (1926) 2 RIAA, p. 761, available at http://legal.un.org/riaa/cases/vol_II/755-774.pdf <accessed 26 September 2019>.

[607] *Free Zones of Upper Savoy and the District of Gex (France v Switzerland)* (Order of 6 December 1930) PCIJ Series A No 24, p. 12, available at http://www.worldcourts.com/pcij/eng/decisions/1929.08.19_savoy_gex.htm <accessed 2 April 2018> and *Free Zones of Upper Savoy and the District of Gex (France v Switzerland)* (Judgment of 7 June 1932) PCIJ Series A/B No 46, p. 167; cf. Andrea Gattini, 'Free zones of Upper Savoy and Gex Case', in Rüdiger Wolfrum, *The Max Planck Encyclopedia of Public International Law*, vol. IV (Oxford University Press 2012) pp. 246– 250; *Affaire des forêts du Rhodope central (question préalable) (Grèce contre Bulgarie)* (1931) 1 RIAA, p. 1400, available at http://legal.un.org/riaa/cases/vol_III/1389-1436.pdf <accessed 26 September 2019>.

[608] *Affaire relative à l'acquisition de la nationalité polonaise (Allemagne contre Pologne)* (1924) 1 RIAA, p. 420. http://legal.un.org/riaa/cases/vol_I/401-428.pdf <accessed 26 September 2019>.

[609] *Jurisdiction of the European Danube Commission between Galatz and Braila* (Advisory Opinion) (1927) PCIJ, Series B, No 14, p. 36, available at http://www.worldcourts.com/pcij/eng/decisions/1927.12.08_danube.htm <accessed 26 September 2019>.

[610] *Lotus case (France v Turkey)* p. 18.

The ICJ in *Asylum case* also reaffirmed that: '[e]ncroachment on sovereignty cannot be presumed'.[611]

III. Restrictive Consequences of the WTO Membership on the Exercise of Sovereign Rights over Natural Resources

The Panel in *China — Raw Materials* also discussed the implications of the WTO Membership for China's exercise of its sovereign rights over natural resources. According to the Panel, an important aspect of sovereignty is the ability of a State to conclude international agreements such as the WTO agreements where an acceding State, while complying with the WTO rights and obligations, gains a number of trade–related advantages such as 'respect to its natural resources'.[612] The Panel maintained that:

> […] the ability to enter into international agreements – such as the WTO Agreement – is a quintessential example of the exercise of sovereignty. In joining the WTO, China obtained significant commercial and institutional benefits, including those in respect of its natural resources. It also committed to abide by the WTO rights and obligations.[613]

The Panel in line with China, asserted that:

> [...] the WTO Members have an inherent and sovereign right to regulate trade. WTO Members and China have exercised this right, inter alia, in negotiating and ratifying the

[611] *Asylum Case (Colombia v Peru)* (Judgment) [1950] ICJ Rep., pp. 274–275, available at https://www.icj-cij.org/files/case-related/7/007-19501120-JUD-01-00-EN.pdf <accessed 26 September 2019> and *Interpretation of the Statute of the Memel Territory* (Judgment of 11 August 1932) PCIJ Series A/B No 49 p. 313, available at http://www.worldcourts.com/pcij/eng/decisions/1932.08.11_memel.htm <accessed 26 September 2019>. cf. Marcelo G. Kohen, 'Memel Territory Statute, Interpretation of, Case', in Rüdiger Wolfrum, *The Max Planck Encyclopedia of Public International Law*, vol. VII (Oxford University Press 2012) pp. 87–89.

[612] *China — Raw Materials*, Panel Report, para. 7.382.

[613] Ibid., para. 7.382.

> WTO Agreement. China has exercised its inherent and sovereign right to regulate trade in negotiating, among other actions, the terms of its accession into the WTO.[614]

In the view of the Panel

> [...] the implication of China's argument is that because it has an inherent right to regulate trade, this right prevails over WTO rules intended to govern the exercise of that right. In the Panel's view, it is China's sovereign right to regulate trade that enabled it to negotiate and agree with the provisions of Paragraph 11.3 of its Accession Protocol. Thus, there is no contradiction between China's sovereign right to regulate trade, the rights acquired, and the commitments undertaken by China that are contained in its Accession Protocol, including in Paragraph 11.3. On the contrary, China's Accession Protocol and its various rights and obligations, are the ultimate expression of China's sovereignty.[615]

Thereafter, the Panel recommended to China that it respect the requirements of Article XX (g) in exercising its sovereign rights over its own natural resources.[616] In conclusion, the Panel asserted that China's right to economic development and its sovereignty over its natural resources are not in conflict with China's rights and obligations as a WTO Member. It added that when China chose to join the WTO in full exercise of its sovereignty, China made the concurrent decision that its sovereign rights over its natural resources would thereafter be exercised within the parameters of the WTO provisions, including those of Article XX (g).[617]

In contrast to the Panel report, no mention of the PSNR can be found throughout the report of the Appellate Body in *China — Raw Materials*. It only highlighted the benefits gained by China as a result of accession to the WTO by virtue of adapting the exercise of its sovereignty within the framework of its Accession Protocol to the WTO.[618] This issue had been formerly reaffirmed by

[614] Ibid., para. 7.156.

[615] Ibid., para. 7.157.

[616] Ibid., para. 7.383.

[617] Ibid., para. 7.405.

[618] *China — Raw Materials case,* Appellate Body Report, para.81.

the Appellate Body in *Japan — Alcoholic Beverages II* as follows: '[i]n exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement'.[619] More specifically, it could be argued that the above reasoning advanced by the Panel in *China — Raw Materials* plays a pivotal role in justifying the curtailment of the exertion of sovereign rights of States over their natural resources. As already expanded upon, by virtue of signing an international agreement, a State accepts a certain level of constraints on its sovereign rights. The increasing interdependence of the States through international organizations has led to argue that sovereignty no longer exists in its traditional sense:

> [w]here the defining features of the international system are connection rather than separation, interaction rather than isolation, and institutions rather than free space, sovereignty as autonomy makes no sense. The new sovereignty is status, membership, "connection to the rest of the world and the political ability to be an actor within it.[620]

Multilateral agreements, for instance regulate the internal as well as external conduct of States through international organizations in which the membership is premised upon the consent–based process such as WTO.[621] The following Paragraph may clarify the impact of WTO agreements on the Member States:

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[619] *Japan — Taxes on Alcoholic Beverages* (WT/DS8, 10 and 11/AB/R) Appellate Body Report, [4 October 1996] [hereinafter: *Japan — Alcoholic Beverages II*] p. 14.

[620] Cohan John Alan, 'Sovereignty in a Post–sovereign World', 18 (2006) FlaJIntlL p. 939.

[621] For instance, pursuant to Article 2 of Agreement Establishing the WTO, Member States are committed to comply with the rules established by the outside authority. Additionally, WTO not only requires national treatment for imports; it also creates a DSB to resolve trade disputes. Eric Posner & John Yoo, 'Judicial Independence in International Tribunals', 93(1) (2005) CalLRev pp. 44-51 and Andrew T. Guzman, 'Global Governance and the WTO' 45(2)(2004) HarvIntlLJ p. 346. Moreover, a few, such as the International Monetary Fund and the World Bank, have reoriented their missions and become more interventionist in the domestic affairs of modern States. For further study see also Ngaire Woods, *The Globalizers: The IMF, The World Bank, and Their Borrowers* (Cornell University Press 2006).

> The WTO Agreement is a treaty - the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interest, for the Members of the WTO, it can be stated that they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.[622]

As far as the WTO system is concerned, it can also limit the policy options of Member States in areas such as the introduction of national policies covering the importation of goods.[623] The WTO as an international organization, would limit the sovereign rights of Member States even though the Sovereign States delegate power to the WTO to pursue their benefits. Additionally, the specific features of the Dispute Settlement system of the WTO have a limiting effect on the sovereignty of Member State concerned, specifically by limiting their ability to violate their obligations.[624] The DSB of the WTO authorizes the imposition of economic sanctions against those countries that do not implement its decisions.[625] It is also argued that the membership of the WTO has two dimensions for the sovereignty of Member States: vertical and horizontal. The vertical dimension is the effect on State sovereignty as a result of the relationship established between the WTO and each Member State. The horizontal dimension focuses on how WTO membership affects interstate relations.[626] The horizontal and vertical implications for State sovereignty resulting from membership of the WTO should be assessed in the light of both the increasing interdependence and globalization of the international system and the power asymmetries that exist between the Member States.[627] To conclude, on the question of whether or not the sovereign rights of the WTO Member States are restricted because of today's requirements of the world economy, the Supreme Court of the Philippines held that:

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[622] *Japan — Alcoholic Beverages II*, Appellate Body Report, p. 15.

[623] Julian Ku & John Yoof, 'Globalization and Sovereignty' 31 (1)(2013) BerkeleyJIntlL p. 218.

[624] Andrew T. Guzman, 'Global Governance and the WTO' 45(2)(2004) HarvIntlLJ p. 346.

[625] Tina Potuto Kimble, 'Anticipatory Compliance with WTO Rules and the Erosion of U.S. Sovereignty' 25 (1)(2006–2007) QLR p. 114.

[626] Joshua Meltzer, 'State Sovereignty and the Legitimacy of the WTO' 26 (2005) UPaJIntlEconL p. 695.

[627] Ibid.

> By their inherent nature, treaties really limit or restrict the absoluteness of sovereignty. By their voluntary act, nations may surrender some aspects of their State power in exchange for greater benefits granted by or derived from a convention or pact. After all, States, like individuals, live with coequals, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit the exercise of their otherwise absolute rights. Thus, treaties have been used to record agreements between States concerning such widely diverse matters, such as, the lease of naval bases, the sale or cession of territory, the termination of war, the regulation of conduct of hostilities, the formation of alliances, the regulation of commercial relations, the settling of claims, the laying down of rules governing conduct in peace and the establishment of international organizations. The sovereignty of State therefore cannot in fact and in reality be considered absolute. Certain restrictions enter into the picture: (1) limitations imposed by the very nature of membership in the family of nations and (2) limitations imposed by treaty stipulations. As aptly put by John F. Kennedy, ‘’today, no nation can build its destiny alone. The age of self-sufficient nationalism is over. The age of interdependence is here.[628] […] the benefits of the reciprocal obligations involved outweigh the costs associated with any loss of political sovereignty.[629]

Part Four: Export Quantitative Restrictions on the Exhaustible Natural Resources

I. WTO Regulations on Export Quantitative Restrictions: Article XI:1 of the GATT

In drafting the text of Article XI:1[630], the US delegation viewed the authorization of quantitative restrictions, in general, is an obstacle to the trade liberalization. More specifically, its negative

[628] Tañada, et al., v. Angara, et al., G.R. No. 118295, May 2, 1997, Supreme Court of the Philippines, p. 272.

[629] Ibid.

[630] Rüdiger Wolfrum, ‘Article XI GATT’ in Rüdiger Wolfrum, Peter-Tobias Stoll and Holger P. Hestermeyer, *Max Planck Commentary on World Trade Law: WTO-Trade in Goods* (Martinus Nijhoff Publishers 2011) p. 284.

impacts upon world economy after the destructive consequences of the Second World War. This approach was challenged by the European countries as they sought to revive their vulnerable post–war economies. The current text of Article XI:1 of GATT together with the related exceptions were however agreed upon during the ITO negotiations.[631] Article XI:1 General Elimination of Quantitative Restrictions provides that:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Article XI:1 of the GATT contains a general obligation to eliminate any types of quantitative restriction on exports, from prohibitions to quotas, from licensing schemes to minimum export prices, from ports of exit restrictions to any other measures[632] that have a limiting effect on the volume of exports. According to Panel in *Japan Trade in Semi-Conductors:*

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[631] Ibid.

[632] It covers a wide range of measures as mentioned and explained by the various GATT/WTO cases. For further details about the examples of 'other measures' see: *Japan—Trade in Semi–Conductors* (L/6309–35S/116) GATT Panel Report [4 May 1988]; US—Manufacturing Clause, BISD 31S/74, para. 34; *EEC—Program of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables* (L/4687–25S/68) GATT Panel Report, [18 October 1978] para. 4.14; *Canada — Certain Measures Concerning Periodicals* (WT/DS31/AB/R) Appellate Body Report, [30 June 1997], 17ff; *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (WT/DS90/R) Panel Report, [23 August 1999] [hereinafter: *India — Quantitative Restrictions*], para. 5.134 and 5.142; *Colombia— Indicative Prices and Restrictions on Ports of Entry* (WT/DS366/R) Panel Report [27 April 2009] [hereinafter: *Colombia — Ports of Entry*], para. 7.275. As Panel report in *India—Autos* stressed out, 'other measure' suggests a 'broad scope' as to the types of government actions that are covered. *India—Measures Affecting the Automotive Sector* (WT/DS146, 175/R) Panel Report, [21 December 2001], para. 7.246. The WTO Members are the only authority who can apply Article XI. Nonetheless, government policy could impact upon the private sector conduct in exerting Article XI provision. Kyle Bagwell et al. 'Border Instruments' in Henrik Horn and Petros C. Mavroidis (eds) *Legal and Economic Principles of World Trade Law* (Cambridge University Press 2013) p. 146.

> [t]he wording of Article XI:1 is comprehensive: It applies to all measures instituted or maintained by a Member prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges.[633]

It further asserts that 'Article XI:1, unlike other provisions of the General agreement, did not refer to law or regulations but more broadly to measures'.[634] 'Prohibition' refers to the total ban on export and import.[635] The term 'restriction' was defined by the Panel in *India — Quantitative Restrictions,* as a limitation on action, a limiting condition or regulation.[636] Then in *Colombia — Port of Entry* held that the term 'restrictions' 'refers to measures that create uncertainties and affect investment plans, restrict market access for imports, or make importation prohibitively costly'.[637] The Appellate Body in *China — Raw Materials* case stated that this Article 'covers those prohibitions and restrictions that have limiting effect on the quantity or amount of a product being imported or exported'.[638]

Albeit the term 'quantitative restriction' has not been clearly defined by the WTO agreements, Article XI:1 of the GATT 1994 is the only provision which implicitly provides a definition through giving some examples of such trading behaviour. Its wording addresses the 'tariff-only approach' whereby tariffs are used as the best tool so as to govern the trade-in-goods for the economic and administration reasons.[639] The WTO Council for Trade in Goods provides an illustrative list of quantitative restrictions which includes: prohibition, prohibition except under defined conditions, global quota, global quota allocated by country, bilateral quota (anything less than a global quota),

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[633] *Japan — Trade in Semi-Conductors*, Panel Report, para. 104.

[634] Ibid., para. 106.

[635] Wolfrum, 'Article XI GATT' (2011) p. 286.

[636] *India — Quantitative Restrictions,* Panel Report, para. 5.142, quoted in Wolfrum, 'Article XI GATT' (2011) Ibid.

[637] *Colombia — Ports of Entry*, Panel Report, para. 7.240.

[638] *China — Raw Materials case,* Appellate Body Report, para. 320.

[639] Wolfrum, 'Article XI GATT' (2011) p. 283.

automatic licensing, non-automatic licensing, QRs made effective through state-trading operations, mixing regulation, minimum price triggering a QR, and 'voluntary' export restraint.[640] *China — Raw Materials* case has specifically arisen out of the use of Article XI–inconsistent 'restrictions' on the export of minerals. In this case, the Panel clarified that '[e]xport quotas are inconsistent with Members' obligation by virtue of Article XI:1 because they have a restrictive or limiting effect on exportation'.[641] In *China — Raw Materials*, the Panel expanded upon the applicability of Article XI:1 GATT to export licensing schemes. It clarified that the categorization of a licensing system as automatic or non-automatic serves no purpose for determining whether or not a measure is permissible under Article XI:1.[642]

However, the key is whether the licensing system is designed and operates in a manner that by its nature it does not have a restrictive or limiting effect on importation or exportation;[643] The Panel asserted that an automatic export licensing scheme that operates by granting an import or export licence to each and every applicant would not breach Article XI:1 GATT since it would not imply 'any restriction or limiting effect on importation or exportation in connection with the application and granting of the licence'.[644] Besides, a system requiring an applicant to meet a number of prerequisites before being granted an import or export licence would not necessarily violating Article XI:1. In this respect, with regard to 'discretionary' licensing requirements, Panel maintained that

> [i]f a licensing system is designed such that a licensing agency has discretion to grant or deny a license based on unspecified criteria, this would not meet the test we set out above in order to be permissible under Article XI:1'.[645]

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[640] 'Decision on Notification procedures for Quantitative Restrictions', G/L/59, Annex, 10 January 1996, p. 3. https://docsonline.wto.org/dol2fe/Pages/SS/DirectDoc.aspx?filename=t%3A%2Fg%2Fl%2F59.doc& <accessed 2 April 2018>.

[641] *China — Raw Materials*, Panel Report, paras. 7.206–7. For further reading see also Rüdiger Wolfrum, 'Article XI GATT' (2011) pp. 286–287.

[642] *China — Raw Materials*, Panel Report, para. 7.915.

[643] Ibid., para. 7.918.

[644] Ibid., para. 7.916.

[645] Ibid., para. 7.921.

The Panel in *China — Raw Materials* elaborated on minimum export prices as a violation of Article XI:1 of GATT:

> the authority to determine and require exporters to follow a particular export price level and not deviate below it without facing what amounts to a strict penalty, including revocation of the right to export altogether, has the potential to restrict trade. The restriction or limitation on exportation arises from the possibility that a price is set at such level that exporters cannot find a potential buyer in order to sell their product […].

In *China — Raw Materials*, the Panel further added that any measure having 'the very potential to limit trade […] constitute[s] a "restriction" within the meaning of Art. XI:1 of the GATT 1994'.[646]

II. Article XI:2 GATT: The Critical Shortage of Supply

Pursuant to Article XI:2(a), the general prohibition contained in Article XI:1 shall not extend to:

> […]
>
> (*a*) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
>
> (*b*) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
> […].

China — Raw Materials case, for the first time thoroughly analyzed this exception. In *China— Raw Materials*, the defendant sought to justify its imposed restriction on exportation of various

[646] Ibid., para. 7.1081

minerals relying upon the preservation of environment. The Panel clarified that the burden to prove that the requirements under Article XI:2(a) are met, and therefore that no inconsistency arises under Article XI:1, lies on the defendant party.[647] Accordingly, the Panel noted that a measure cannot be justified under Article XI:2 by arguing that the complainants failed to demonstrate that a measure did not fall within the terms of Article XI:2(a).[648] The Panel and the Appellate Body then interpreted Article XI:2(a) GATT relevant legal terms: 'temporarily applied', 'essential products' and 'critical shortage' are of particular importance.[649]

A. 'Temporarily applied'

The first requirement was interpreted to demand that the period of implementation of an export restriction or prohibition be finite, that is, limited in time.[650] In its argument, China stated that the term temporarily contained in Article XI:2(a) of the GATT connotes that 'the application of an export prohibition or restriction must be limited in time and linked to the prevention or relief of a critical shortage of a product essential to the exporting Member'.[651] The complainants maintained that the limited reserve of the disputed product cannot be considered as an element constituting the 'critical shortage' requirement under the said Article.[652] Before going through the arguments of both parties, Panel commenced with the clarifying the meaning of the disputed term 'temporarily'. It means 'for a time (only)' and 'during a limited time'.[653] Panel opined that 'restriction or ban applied under Article XI:2(a) must be of a limited duration and not indefinite.[654]

[647] Ibid., para. 7.210.

[648] Ibid., para. 7.211.

[649] *China — Raw Materials case*, Appellate Body Report, para. 328.

[650] *China — Raw Materials*, Panel Report, paras. 7.255 and 7.260; *China — Raw Materials case*, Appellate Body Report, para. 323.

[651] *China — Raw Materials*, Panel Report, para 7.251.

[652] Ibid., para 7.253.

[653] Ibid., para 7.255.

[654] Ibid., para 7.258.

As the relevant context in interpreting the shortage of supply exception, the Panel and the Appellate Body used Article XX(g) and Article XX(j) of GATT related to the issue of exhaustibility. According to Article XX(g), WTO Members may justify a measure in breach of a GATT obligation when it is 'related to the conservation of exhaustible natural resources' and provided it is 'made effective in conjunction with restrictions on domestic productions or consumption'.

Having determined a fixed time–limit within Article XI:2 (a) of the GATT, Panel referred to the interpretation rules as stipulated in Article 31 of the VCLT in particular the contextual interpretation of Article XI:2 (a).[655] Therefore, Panel maintained that a measure designed for a limited time and given a special circumstances under Article XI:2 (a) 'would be in harmony with the protection that may be available to a Member under Article XX(g), which addresses the conservation of exhaustible natural resources',[656] therefore, application of a measure under Article XI:2 (a) for an unlimited time period would make the rationale of Article XX(g) 'very much undermined, if not rendered redundant'.[657] Panel concluded that the temporary export restriction measure can only be justified pursuant to Article XI:2 (a).

Article XX(g) which 'incorporates additional protections in its chapeau to ensure that the application of a measure does not result in arbitrary or unjustifiable discrimination or amount to a disguised restriction on international trade', in view of Panel, is a relevant context in interpreting Article XI:2(a).[658] It eventually entails to application of a limited duration measure under Article XI:2(a).[659] Following the above, Appellate Body held that the provisions of Article XX(g) and Article XI:2(a) are not 'mutually exclusive'.[660] The scope of Article XI:2(a) and Article XX(g) are 'intended to address different situations and thus must mean different things'.[661] Accordingly, these two Articles have different functions and contain different obligations.[662] In this respect

[655] Ibid., para 7.256.

[656] Ibid., para 7.257.

[657] Ibid., para 7.298

[658] Ibid., para 7.258

[659] Ibid.

[660] Ibid.

[661] Ibid., para 7.300.

[662] *China — Raw Materials case,* Appellate Body Report, para 337.

whilst Article XI:2(a) addresses measures taken to prevent or relieve 'critical shortages' of foodstuffs or other essential products Article XX(g) deals with the measures relating to the conservation of exhaustible natural resources.[663] Due to such difference, 'an Article XI:2(a) measure might operate simultaneously with a conservation measure complying with the requirements of Article XX(g)'.[664]

Appellate Body held that it did not 'exclude that a measure falling within the ambit of Article XI:2(a) could relate to the same product as a measure relating to the conservation of an exhaustible natural resource'.[665] More importantly, the question of preservation of exhaustible natural resources can be pursued through either Article XI:2 (a) or Article XX(g).[666] By the same token, Appellate Body reaffirmed the Panel's findings on the question of temporary nature of export restriction measure.[667] Panel held that there must be a time limit set before the imposition of any export restriction measure under Article XI:2 (a) otherwise the temporariness of a the contested measure cannot be established.[668] Such a time-limit would show that when the measure will be withdrawn. Appellate Body, however, by rejecting Panel's interpretation held that any short-term or long-term restrictive measure is not required any type of time-limit fix in advance.[669] In other words, Appellate Body disagreed that the term 'temporary must always connote a time-limit fixed in advance'.[670]

Another relevant context in interpretation of shortage of supply exception is Article XX(j) of GATT which permits WTO Member States to take measures that are 'essential to the acquisition or distribution of products in general or local supply' in derogation of GATT provisions. It further requires that 'any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such

[663] Ibid.

[664] Ibid.

[665] Ibid.

[666] *China — Raw Materials*, Panel Report, para 7.2570.

[667] *China — Raw Materials case,* Appellate Body Report, paras. 330 and 344.

[668] *China — Raw Materials*, Panel Report, para 7.350.

[669] *China — Raw Materials case,* Appellate Body Report, para. 331 and *China — Raw Materials*, Panel Report, para. 7.453.

[670] *China — Raw Materials case,* Appellate Body Report, para. 331.

measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist' […]. The Appellate Body, by drawing a contrast between the wording of Article XI:2(a) and Article XX(j) of GATT, held that:

> [c]ontrary to Article XI:2(a) […] Article XX(j) does not include the word 'critical' or another adjective further qualifying the short supply. We must give meaning to this difference in the wording of these provisions. To us, it suggests that the kinds of shortages that fall within Article XI:2(a) are more narrowly circumscribed than those falling within the scope of Article XX(j).[671]

B. 'Essential' Products

As no criteria found in Article XI:2 (a) concerning the 'essentialness' of a product to the economy of a WTO Member State, China argued that this issue can be determined through 'assessing the contribution of a product to a Member's gross domestic product, or to education, healthcare, infrastructure, technological progress, or scientific research'.[672]

Panel maintained that 'a product may be 'essential' within the meaning of Article XI:2(a) when it is 'important' or 'necessary' or 'indispensable' to a particular Member'.[673] The determination of whether a particular product is 'essential' within the meaning of Article XI:2(a) should consider 'the particular circumstances faced by that Member at the time when a Member applies a restriction or prohibition'.[674] Nonetheless, 'the mere designation of a product as essential or the imposition of conservation related restrictions imposed on extraction or processing should not be relevant to the assessment of whether a product is "essential" to a Member' for it would in effect 'allow a Member to manufacture "essentialness" when none exists'.[675] Furthermore, the Appellate Body

[671] Ibid., para. 325.

[672] *China — Raw Materials*, Panel Report, para 7.263.

[673] Ibid., para 7.282. *China — Raw Materials case,* Appellate Body Report, para. 326.

[674] *China — Raw Materials*, Panel Report, para. 7.277.

[675] Ibid., para. 7.345.

'does not limit the scope of other essential products to only foodstuffs'.[676] 'The input to an important product or industry' is also seen as an essential product.[677] In case of shortages foodstuff or other essential products having equivalent value like the foodstuff even industrial products[678], the derogation from the general prohibition of quantitative restrictions aimed at prevention or dealing with critical situations is authorized.

It also found that 'the determination of whether a product is 'essential' to that Member should take into consideration the particular circumstances faced by that Member at the time when a Member applies a restriction or prohibition under Article XI:2(a)'.[679] Having no exhaustive guiding list on the essentialness requirement, the Panel and the Appellate Body noted criteria such as the product's importance in use, the contribution to national economic development, and the complexity in substitutability can be used as indicative of the essentialness of a product.[680]

C. 'Critical shortage'

According to *China — Raw Materials* case, the 'temporarily applied' requirement contextually informs the notion of 'critical shortage' in that the restrictions should be applied in the interim, to provide relief in extraordinary conditions in order to bridge a passing need'.[681]

The limited availability of a product is therefore insufficient to constitute a 'critical shortage' because 'if there is no possibility for the shortage ever to cease to exist, it would not be possible to "relieve or prevent" it through an export restriction applied only for a limited period of time'.[682]

The 'critical shortage' requirement refers to 'those deficiencies in quantity that are crucial, that amount to a situation of decisive importance or that reach a vitally important or decisive stage, or

[676] *China — Raw Materials case,* Appellate Body Report, para. 326.

[677] *China — Raw Materials*, Panel Report, para. 7.453.

[678] Wolfrum, 'Article XI GATT' (2011) p. 291.

[679] Ibid., para 7.276.

[680] Ibid., paras. 7.340–7.345.

[681] *China — Raw Materials*, Appellate Body Report, para. 330 and *China — Raw Materials,* Panel Report, para. 7.297.

[682] Ibid.

a turning point'.[683] As a result, any long–term measure 'with no indication that [it] would be withdrawn and every indication that it will remain in place until the reserves have been depleted' would be in contrary to Article XI:2(a),[684] irrespective of whether it is subject to annual review.[685] Hence, situations of permanent shortages cannot be addressed within the scope of Article XI:2(a).[686]

Part Five: Retaining Sovereignty over Natural Resources through the Formulation of Proper Export Taxes Provisions on Natural Resources in the WTO Accession Protocols

I. WTO Regulations on Export Duties: Article XI:1 of the GATT

Export duties have become an increasingly important policy tool for many countries. Export taxes have focused on natural resources, such as fish products, minerals, forestry products and fuel.[687] However, little attention has been drawn to the issue of export taxes in the history of GATT.[688] According to Mavroidis the 'significant lack of practice in the field of export taxes […] is probably the single most important reason explaining why the founding fathers did not spend time and effort designing a mechanism for negotiation of export tariffs à la Article II of the GATT'.[689] Export taxes have been considered as non-tariff measure since the inception of the GATT.[690] In this

[683] *China — Raw Materials case,* Appellate Body Report, para. 324 and *China — Raw Materials*, Panel Report, paras. 7.284 – 7.285.

[684] *China — Raw Materials*, Panel Report, para. 7.350.

[685] *China — Raw Materials case,* Appellate Body Report, paras. 339–344.

[686] *China — Raw Materials*, Panel Report, para. 7.351.

[687] Joelle Latina et al., 'Natural Resources and Non-Cooperative Trade Policy', WTO - Staff Working Paper, No ERSD-2011-06, 6 May 2011, p. 7.

[688] Kyle Bagwell, Robert W. Staiger and Alan O. Sykes 'Border Instruments' in Henrik Horn and Petros C. Mavroidis (eds) *Legal and Economic Principles of World Trade Law* (Cambridge University Press 2013) p. 178.

[689] Petros C. Mavroidis, *Trade in Goods* (2nd edn, Oxford University Press 2012) p. 59.

[690] See E/PC/T/C.6/9 (23 January 1947, 24 January 1947) and E/PC/T/C.6/W.4 (3 February 1947).

respect, as Staiger notes: 'it is import tariffs alone that are the policy measure with which negotiated market access commitments are made through negotiated tariff bindings and in this way, tariffs have a special place relative to all non-tariff measures in the GATT/WTO'.[691] Furthermore, although Export duties or taxes have been classified as non-tariff measures by the GATT Secretariat in 1968,[692] there has been some instances of the inclusion of export duties under the schedule of concession of a number of States in the GATT/WTO.[693]

Under the Indicative List of Notifiable Measures annexed to the 1993 Decision on Notification Procedures adopted at the Uruguay Round, export taxes were included within the category of non-tariff measures.[694] Almost one third of the WTO Member States levy export taxes.[695] The resource–owning Member States specifically consider the imposition of export duties on natural resources as a trade policy tool.[696] Imposing export taxes on natural resources in comparison with other sectors is more frequent.[697] According to the 2010 World Trade Report, around 11 percent of trade in natural resources is covered by export taxes.[698]

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[691] Robert W. Staiger, 'Non-Tariff Measures and the WTO' Economic Research and Statistics Division Working Paper No. 2012-01, p. 6.

[692] The First Inventory on Non–Tariff Measures of the Committee on Industrial Products (GATT Doc. COM.IND/6, 11 December 1968).

[693] For instance, United Kingdom in 1947 and Australia during Uruguay Round. See J. Y. Qin, 'Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection', 46 (2012) JWT, p. 1152.

[694] GATT Doc MTN.GNG/NG2/W/40 of 8 August 1989, p. 4 available at https://docs.wto.org/gattdocs/q/.%5CUR%5CGNGNG02%5CW40.PDF <accessed 26 September 2019>.

[695] Roberta Piermartini, 'The Role of Export Taxes in the Field of Primary Commodities' (2004) WTO Discussion Paper, p. 2. Available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiP3J6zp_PkAhVOZlAKHVbPB1wQFjAAegQIAxAC&url=https%3A%2F%2Fwww.wto.org%2Fenglish%2Fres_e%2Fbooksp_e%2Fdiscussion_papers4_e.pdf&usg=AOvVaw15gUcmv7kao0kifivBlpIR <accessed 26 September 2019>.

[696] J. Kim, 'Recent Trends in Export Restrictions' (2012) OECD Trade Policy working Paper, p. 5. As regards the political economy of export duties see Petros C. Mavroidis, *Trade in Goods* (2nd edn, Oxford University Press 2012) pp. 59 – 60.

[697] 'World Trade Report' (2010) p. 166.

[698] Ibid., pp. 116 –117.

According to the 2012 World Trade Report, among the new restrictive trade measures from 2008 to 2011, the proportion of the export tax/export restrictions accounted for 7%.[699]
The applicability of export taxes however faces a number of limitations specifically related to the accession process to the WTO. Even though there is no specific provision under the GATT/WTO law referring to export duties, pursuant to Article XI:1 of the GATT, export taxes are allowed so long as they are transparent in nature. This Article provides that:

> [n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Another Article which deals with the issue of export duties is Article II:1 (a) (Schedule of Concessions) of the GATT which provides that

> [e]ach contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

[699] 'World Trade Report, Trade and Public Policies: A Closer Look at Non–tariff Measures in the 21st Century', (2012) WTO Secretariat, Geneva, p. 121, available at https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf <accessed 26 September 2019>.

Although this Article does not explicitly refer to export duties, the general term of 'commerce' encompasses both importation and exportation.[700] Moreover, Article XXVIII*bis*:1 of the GATT[701] is seen as a justification for covering export taxes under Article II:1(a) of the GATT.[702]

In this respect, Roessler stated that export duties can be bound under Article II.[703] In contrast, Professor Jackson opines that the issue of export duties is unregulated under the GATT.[704] The GATT neither prohibits export duties nor requires the imposition of export duties.[705] A few WTO members have bound their export tariffs under GATT Article II.[706] The prevailing view is that the GATT does not truly regulate export tariffs, duties and other charges. In *China — Rare Earths*, the Panel, accordingly opined that Article II has no relevance to export duties.[707] In this case, a separate view of a panelist provides that GATT Article II and China's Accession Protocol should be read together, and that China's commitment to eliminate export duties is binding under the GATT Article II.[708]

To conclude, from a historic point of view during the GATT era, with reference to the role of the PSNR, in a reassessment in 1979 of export restrictions and charges, India was of the opinion that:

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[700] A.L.C. de Mestral and T. Gruchalla-Wesierski, *Extraterritorial Application of Export Control Legislation: Canada and the USA* (Martinus Nijhoff 1990) p. 45.

[701] 'The contracting parties recognize that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of individual contracting parties, are of great importance to the expansion of international trade.[…]'.

[702] Mitsu Matsushita, 'Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources' 3(2) (2011) TL&D, pp. 273–274. Mavroidis (2012) p. 61.

[703] Frieder Roessler, 'GATT and Access to Supplies', 9 (1) (1975) JWTL p. 35.

[704] John H. Jackson, *World Trade Law and the Law of GATT*, (Bobbs-Merrill Company 1969) p. 499.

[705] Melaku Geboye Desta, 'The Organization of Petroleum Exporting Countries, the World Trade Organization and Regional Trade Agreements', 37(3) (2003) JWTL. p. 540.

[706] Ibid., p. 533.

[707] *China — Rare Earths*, Panel Report, paras. 7.94–7.95.

[708] Separate opinion of a panelist in *China — Rare Earths*, Panel Report, para. 7.138.

> it would be our understanding that when the CONTRACTING PARTIES address themselves to the task of reassessing the GATT provisions relating to export restrictions and charges, two of the guiding principles would be the sovereignty of States over their natural resources and the need for developing countries to utilize their resources for their development in the most optimal manner as considered appropriate by them, including processing of their raw materials, setting up industries to diversify their economies and ensuring supplies to domestic industries.[709]

II. Export Taxes in the light of the WTO Accession Protocols

A. Preliminary Review

Due to the lack of an effective GATT discipline on export duties, a small number of WTO Member States have made commitments on export duties which fall under two categories: i) commitments made under the GATT; and ii) commitments under the WTO accession protocols.[710]

As an example of the first category, during the Uruguay Round in 1994, Australia agreed not to impose any export duty on certain minerals.[711] This commitment was made in the schedules of concession of Australia annexed to the GATT.[712] In the following section the standing of export duties in the Accession Protocols of a number of WTO Member States are analyzed in which different sets of commitments have been made by the acceded Member States to the WTO.[713]

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[709] General Agreement on Tariffs and Trade, Multilateral Trade Negotiations Group 'Framework', Statement by the Delegation of India (MTN/FR/W/23, 6 April 1979) Quoted in *China — Rare Earths case*, Panel Report, para. 7.273. In a similar manner, Mexico asserted that any consideration of export restrictions must take into account the PSNR. General Agreement on Tariffs and Trade, Trade Negotiations Committee (MTN/P/5, 9 July 1979), p. 63 quoted in *China — Rare Earths case*, Panel Report, para. 7.274.

[710] Ya Qin (2012) p. 1151.

[711] Available at https://www.wto.org/english/thewto_e/countries_e/australia_e.htm <accessed 26 September 2019> quoted by Ya Qin (2012) p. 1152.

[712] Ya Qin (2012) p. 1152.

[713] The following article has a great relevance to the question at issue: Ya Qin (2012) pp. 1152–1153 and 1161–1162.

B. A Concise Review of the Status of the Accession Protocols

Article XII of the Marrakesh Agreement establishing the WTO is the legal basis for the accession of States to the WTO. It reads as follow:

> 1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.
> 2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.
> 3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

The Accession Protocol is a bilateral treaty concluded between the WTO on one hand, and the acceding State on the other hand. It must be underlined that an Accession Protocol includes protocol approved by the Ministerial Conference and references to some parts of the Working Party Report.[714] Textually, each of the accession protocols contains a clause stating that it is an 'integral part' of the WTO Agreement.[715] A Technical Note on the Accession Process, prepared by the WTO Secretariat provides that '*[t]his Protocol, which shall comprise the commitments referred to in Paragraph…of the Working Party Report, shall be an integral part of the WTO Agreement'*.[716]

[714] Jingdong Liu, 'Accession Protocol: Legal Status in the WTO Legal system' 48 (4) (2014) JWT p. 751.

[715] Julia Ya Qin, 'The Conundrum of WTO Accession Protocols: In Search of Legality and Legitimacy'55 (2014-2015) VaJIntlL p. 372.

[716] Technical Note on the Accession Process, Note by the Secretariat, [28 Nov. 2005] (WT/ACC/10/Rev.3) p. 42.

Thus, Accession Protocol is composed of 'agreed terms with the WTO' and it is an 'integral part' of the WTO Agreements. More specifically, the 'agreed terms' refers to the provision of the Accession Protocol which imposes further obligations upon the acceding country. Once a provision of the Accession Protocol lays down an additional commitment compared to the other Member States, it becomes the 'WTO– plus' obligation. According to a number of WTO acceding States, they should not be expected to undertake more stringent obligations (referred to as 'WTO–plus obligations') than present WTO Members.[717] In their view, this would be an abuse of economic power.[718] In addition, the most controversial aspect of the accession protocols is their undefined link with the WTO Agreement and its annexes which has been subject to academic debates.[719]

C. Export Taxes under the China's Accession Protocol

China, in relation to the reserves of rare earths and certain raw materials occupies a substantial role in the global market. These minerals are vital to many high technology industries mainly within the industrial countries. Such a substantial role in the trade in a number of critical minerals will certainly affect the world market and specifically the price of such minerals.[720] During China's accession negotiations, the issue of its export duties came under the scrutiny of a number of the Accession Working Party Member States as 'in their view, such taxes and charges should be eliminated unless applied in conformity with GATT Article VIII[721] or listed in Annex 6 to the Draft Protocol'.[722] Annex 6 lists a total of 84 tariff lines (8-digit HS), with maximum levels of

[717] Technical Note on the Accession Process, Note by the Secretariat, [11 January 2010] (WT/ACC/10/Rev.4) p. 38.

[718] Ibid.

[719] Ya Qin, (2014-2015) pp. 370–450.

[720] Bagwell et al. (2013) p. 199.

[721]Article VIII allows WTO Members to impose, at the border, a wide range of fees or charges insofar as they are limited in amount to the approximate costs of services rendered and that they are imposed on or in connection with importation or exportation.

[722] Report of the Working Party on the Accession of China to the World Trade Organization, WT/ACC/CHN/49, 1 October 2001 [hereinafter: China Accession Working Party Report], para. 155 and Annex 6, (Products Subject to Export Duty) of China Accession Protocol (WT/L/432) p. 93.

export duties. China also confirmed that it would maintain the applied rates imposed at the time of the agreement and would consult with those of its trade partners who would potentially be affected, if under 'exceptional circumstances', it had to increase its applied rates (still not to exceed the maximum level indicated in Annex 6).

Paragraph 11.3 of its Accession Protocol provides that China 'shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of GATT 1994'.[723]

D. Applicability of the GATT Exceptions to China's Export Taxes Commitments through its Accession Protocol

1. China — Raw Materials Case Findings

a. Panel Review

Under paragraph 11.3 of China's Accession Protocol, China has agreed upon a general obligation to eliminate all taxes and charges applied to exports, unless the restrictions in question are applied in conformity with Article VIII of the GATT 1994 or to the eighty-four products listed in Annex 6 of the Accession Protocol. Paragraph 11.3 of the China's Accession Protocol provides that 'China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994'.[724]

According to the Note to Annex 6, the applied export duty on listed products may be increased insofar as it does not exceed the maximum rate indicated for each product in the Annex when 'exceptional circumstances' occur and only after consultation with the affected parties. The Note to Annex 6 states:

[723] Protocol on the Accession of the People's Republic of China, para. 11.3.

[724] Ibid.

> China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution'.

In this case, China imposed export duties on a number of minerals not listed in Annex 6.[725] Moreover, the export duties on some of the minerals that are listed in Annex 6 exceeded the maximum rates indicated.[726] *China — Raw Materials* is a dispute in which the question of the applicability of Article XX of the GATT's general exceptions on imposition of export duties in relation to certain raw materials was raised by China. In China's opinion, those general exceptions aimed at protecting the environment[727] and conserving its natural resources[728] are applicable to the commitment of not levying export duties on certain raw materials.[729] By contrast, an argument underlined by the complainants noted that China's use of Article XX of the GATT to justify its imposition of export duties are in conflict with Paragraph 11.3 of its Accession Protocol to the WTO.[730]

Referring to the previous decision of the Appellate Body in the *China — Publications and Audiovisual Products*,[731] China sought to justify its imposition of export duty commitments through Paragraph 5.1 of the Accession Protocol which provides that '[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement […]'.[732] In

[725] *China — Raw Materials*, Panel Report, para. 3.2.

[726] Ibid.

[727] Article XX (b) of the GATT.

[728] Article XX (g) of the GATT.

[729] *China — Raw Materials*, Panel Report, para. 7.110.

[730] Ibid., para. 7.111.

[731] *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (WT/DS363/AB/R) Appellate Body Report, [19 January 2010] [hereinafter: *China — Publications and Audiovisual* Products].

[732] Protocol on the Accession of the People's Republic of China, para. 5. 1.

analyzing the implications of Paragraph 5.1 of China's Accession Protocol to the current dispute, the Panel was of the opinion that:

> Paragraph 11.3 [which states that China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994] does not include an introductory clause such as that found in Paragraph 5.1, which refers generally to "without prejudice to China's rights to regulate trade in a manner consistent with the WTO Agreement". […] in China – Publications and Audiovisual Products, the Appellate Body interpreted this introductory clause to mean that the provisions of Article XX are available, by way of incorporation, as a defence to violations of Paragraph 5.1 of China's Accession Protocol.[733]

The Panel further stated that in contrast to the language of Paragraph 5.1 of the Accession Protocol there is no general reference to the WTO Agreement or even to the GATT 1994 under Paragraph 11.3.[734] Furthermore, the Panel by using a narrow textualism approach asserted that 'paragraph 11.3 of China's Accession Protocol does not include any express reference to Article XX of the GATT 1994, or to provisions of the GATT 1994 more generally'.[735] That Paragraph only refers to 'the provisions of Article VIII of the GATT 1994'. The Panel concluded that the language used in paragraph 11.3 of China's Accession Protocol explicitly includes, on the one hand, Article VIII of the GATT 1994 but, on the other, does not refer to any other specific provisions of the GATT 1994 available as exceptions such as Article XX,[736] and also any general references to the WTO Agreement that could be construed as indicating that paragraph 11.3 incorporates the Article XX, in contrast to other Paragraphs of China's Accession Protocol.[737]

[733] *China — Raw Materials case,* Panel Report, para. 7.124.

[734] Ibid., 7.129.

[735] Ibid., para. 7.124.

[736] *China — Raw Materials*, Panel Report, paras. 7.126–7.129.

[737] Ibid., 7.124.

The Panel found support for this interpretation in the context provided by the other sub-paragraphs of paragraph 11 – which both include the phrase 'in conformity with the GATT 1994'[738] – and by the relevant provisions of the Working Party Report, which prohibit the use of export duties providing for the same set of specific exceptions – those covered in Annex 6 and in GATT Article VIII – without incorporating any GATT 1994 flexibilities. The Panel then found that China and the WTO Member States had deliberately agreed upon the wording of Paragraph 11.3:

> The deliberate choice of language providing for exceptions in Paragraph 11.3, together with the omission of general references to the WTO Agreement or to the GATT 1994, suggest to us that the WTO Members and China did not intend to incorporate into Paragraph 11.3 the defences set out in Article XX of the GATT 1994.[739]

More particularly, in relation to China, the point that Paragraph 11.3 of its Accession Protocol allows it to invoke the justifications of Article XX has been confirmed by the provisions of Paragraph 170 of its Working Party Report.[740] Paragraph 170 provides that 'upon accession, China would ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and exports would be in full conformity with its WTO obligations, including Articles I, III:2 and 4, and XI:1 of the GATT 1994[...]'.

The Panel provided that:

> the provisions of Paragraph 170 of the Working Party Report, like those of Paragraph 11.3 of the Protocol, are binding on China but impose different obligations: Paragraph 170 deals with domestic taxes imposed on imports and exports and that must respect the specific rules of the GATT, while Paragraph 11.3 deals with an obligation that does not otherwise exist in the GATT 1994.[741]

[738] Ibid., paras. 7.136–7.138.

[739] Ibid., para. 7.129.

[740] Ibid., para. 7.130.

[741] *China — Raw Materials*, Panel Report, para. 7.142.

Hence, the Panel could not find any explicit or implicit provision in China's Working Party Report that would allow China to invoke the general exceptions of Article XX of the GATT 1994 to justify violations of Paragraph 11.3 of its Accession Protocol.[742] In the Panel's opinion, there is no general umbrella exception in the Marrakesh Agreement and each WTO agreement provides its own set of exceptions or flexibilities applicable to the specific obligations found in each covered agreement.[743] In addition, Panel noted that:

> Article XX provides that "nothing in this Agreement should be construed to prevent the adoption or enforcement ... of [certain] measures...:" *A priori*, the reference to *this* "Agreement" suggests that the exceptions therein relate only to the GATT 1994, and not to other agreements. On occasion, WTO Members have incorporated, by cross-reference, the provisions of Article XX of the GATT 1994 into other covered agreements.

The Panel finally concluded that:

> there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations in Paragraph 11.3 of the Accession Protocol. To allow such exceptions to justify a violation when no exception was apparently envisaged or provided for, would change the content and alter the careful balance achieved in the negotiation of China's Accession Protocol.[744] The Panel, however opined that 'even assuming that Article XX of the GATT 1994 was available to justify export duties in violation of China's Accession Protocol, China has not demonstrated that its export duties […] are justified pursuant to Article XX(g) of the GATT 1994'.[745]

[742] Ibid., para. 7.149.

[743] Ibid., para. 7.150. For example, Article XIV of the GATS contains general exceptions, too.

[744] Ibid., para.7.159.

[745] Ibid., para. 7.468.

b. Appellate Body Procedure

On appeal, China sought to confirm its right to invoke Article XX of the GATT to deviate from its export duties obligations under its Accession Protocol.[746] The Appellate Body upheld the panel's opinion that Paragraph 11.3 of China's Accession protocol lacked textual reference to Article XX of the GATT.[747] In this respect, the Appellate Body explained its reasoning in *China – Audiovisual* for invoking the introductory clause of Paragraph 5.1 of China's Accession Protocol.[748] The introductory clause of Paragraph 5.1 provides that 'without prejudice to China's rights to regulate trade in a manner consistent with the WTO Agreement'. Hence, in the view of the Appellate Body, the absence of this type of introductory clause in Paragraph 11.3 had made the general exceptions of GATT unavailable for China.

Moreover, the Appellate Body explained that the language of paragraph 11.3, read in conjunction with the Annex 6 and the Note to Annex 6 clearly emphasized that China could not apply export duties on products not listed in Annex 6.[749] It also noted that the 'exceptional circumstances' provided for in the Note to Annex 6 could not be invoked to impose export duties on non-listed products.[750]

The Appellate Body further held that China could increase the applied export duties only up to the maximum rate set out in Annex 6 for the eighty-four listed products[751] by invoking the 'exceptional circumstances' exception provided for in the Note to Annex 6, but only insofar as it fulfilled the prior consultation requirement.[752] In supporting its claim, China had also referred to the language contained in the Preamble to the WTO Agreement, as well as other related

[746] *China — Raw Materials case,* Appellate Body Report, paras. 9–10.

[747] Ibid., para. 293.

[748] Ibid., paras. 291 and 304.

[749] Ibid., para. 284.

[750] Ibid.

[751] Ibid., para. 285.

[752] Ibid., para. 287.

agreements[753] to argue that the Panel's assessment 'distorted the balance of rights and obligations established in China's Accession Protocol'.[754] China further claimed that on the basis of the Panel's finding, China had lost its right to impose export duties 'to promote fundamental non-trade-related interests, such as conservation and public health'.[755] The Appellate Body recognized that 'the preamble concludes with the resolution 'to develop an integrated, more viable and durable multilateral trading system'.'[756] It further asserted that this language addressed 'the balance struck by WTO Members between trade and non-trade-related concerns'.[757] The Appellate Body explained that 'none of the objectives listed above, nor the balance struck between them, provides specific guidance' on the applicability of Article XX general exceptions to Paragraph 11.3 of China's Accession Protocol.[758] The Appellate Body upheld the findings of the Panel and ruled that the Article XX(g) exception(s) are unavailable to Paragraph 11.3 of China's Accession Protocol.[759]

2. China — Rare Earths Case Findings

a. Panel Review

Both the Panel and the Appellate Body in *China - Raw Materials* ruled that due to the absence of textual reference in Paragraph 11.3 of China's Accession Protocol', the exceptions under GATT Article XX(g) were not available for China to defend its export-duty measures being inconsistent

[753] Ibid. para. 305. Agreement on the Application of Sanitary and Phytosanitary Measures (the 'SPS Agreement'), Agreement on Technical Barriers to Trade (the 'TBT Agreement'), the Agreement on Import Licensing Procedures (the 'Import Licensing Agreement'), the GATS, and the Agreement on Trade–Related Aspects of Intellectual Property Rights (the 'TRIPS Agreement').

[754] Ibid, para. 305.

[755] Ibid.

[756] Ibid., para. 306.

[757] Ibid.

[758] Ibid.

[759] Ibid., para. 307.

with commitments in Paragraph 11.3 of the Protocol. In this dispute, the complainants asserted that China subjected various forms of rare earths, tungsten, and molybdenum to export duties and that those materials were not listed in Annex 6 of China's Accession Protocol.[760]

The question here was whether or not China was entitled to invoke GATT exceptions in defending its export duties on rare earths, tungsten, and molybdenum.

In *Rare Earths Case*, China once again defended its position on the applicability of Article XX general exceptions as a justification for imposing export duties on the contested rare earths and other materials. Firstly, China claimed that although there is no explicit textual language connecting the content of Paragraph 11.3 of its Accession Protocol to the general exceptions contained in Article XX of the GATT, 'such textual silence does not mean that it was the Members' common intention that no such defense should be available to China'.[761] Furthermore, China argued that 'Paragraph 11.3 of China's Accession Protocol has to be treated as an integral part of the GATT 1994'.[762] In support of its argument, China made reference to the second sentence of Paragraph 1.2 of its Accession Protocol which provides that '[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement'. In addition to the above, China invoked Article XII:1 of the Marrakesh Agreement, which states that:

> a State or separate customs territory possessing full autonomy in the conduct of its external commercial relations 'may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto'.[763]

These two provisions referred to above have been used by China as a basis upon which it argued that Accession Protocol must be considered as a part of the Marrakesh Agreement. For this reason, each of the Accession Protocol specific provisions, in the view of China, are in essence an integral

[760] *China — Rare Earths*, Panel Report, para. 2.9.

[761] Ibid., para. 7.62.

[762] Ibid.

[763] Ibid., para. 7.75.

part of one of the Multilateral Trade Agreements.[764] In this respect, China opined that Paragraph 11.3 of China's Accession Protocol stipulated a commitment to trade in goods which is intrinsically related to the GATT, specifically Articles II and XI. Accordingly, Paragraph 11.3 is subject to the general exceptions of Article XX of the GATT.[765]

China, in its third argument, used the phrase 'nothing in this agreement' laid down in the beginning of Article XX of the GATT. In its view, this phrase does not prevent China from invoking Article XX of the GATT general exceptions on its Accession Protocol which relates to goods and as a result is an integral part of the GATT.[766] In the last claim, China stated that '[a]n appropriate holistic interpretation, taking due account of the object and purpose of the WTO Agreement, confirms that China may justify export duties through recourse to Article XX of the GATT 1994'.[767] China in justifying the invocation of Article XX in relation to its Accession Protocol obligation of export duties finally emphasized that 'the international trade obligations Members have assumed, do not prevent them from taking measures to promote other fundamental societal interests recognized in the covered agreements'.[768] With respect to the issue of the 'silence' of its Accession Protocol in reference to Article XX of the GATT exceptions, China underlined the Appellate Body Report in *US — Carbon Steel* that:

> [t]he task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement. Such silence does not exclude the possibility that the requirement was intended to be included by implication.[769]

[764] Ibid., para. 7.76.

[765] Ibid.

[766] Ibid., para. 7.103.

[767] Ibid., para. 7.105.

[768] Ibid., para. 7.106.

[769] *US — Countervailing Duties on Certain Corrosion –Resistant Carbon Steel Flat from Germany* (WT/DS213/AB/R) Appellate Body Report, [28 November 2002] [hereinafter: *US — Carbon Steel*], para. 65.

The Panel opined that there was no incompatibility between the reasoning advanced by the Appellate Body in *China — Raw Materials* as it had not cited the decision taken in *US — Carbon Steel*.[770] In justifying its position, the Panel stated that the Appellate Body in *Raw Materials case* had not considered the textual silence as a 'dispositive factor'.[771] Lastly, the Panel asserted that China's argument underlining that 'textual silence in a treaty provision is not, in and of itself, dispositive' cannot be viewed as a 'cogent reason' for departing from the Appellate Body's finding about the non–applicability of Article XX of the GATT on Paragraph 11.3 of China's Accession Protocol.[772]

As explained above, China's argument was based upon two main provisions: a) Paragraph 1.2 of its Accession Protocol, which provides that '[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement'; and b) Article XII:1 of the Marrakesh Agreement, which provides that a State or separate customs territory possessing full autonomy in the conduct of its external commercial relations 'may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto'.[773] China claimed that each provision of its Accession Protocol including Paragraph 11.3 was an integral part of the GATT 1994 based on its 'intrinsic relationship' with the GATT 1994.[774]

In elaborating on China's argument, the majority of the Panel, while rejecting China's claim, were of the opinion that individual provisions of the Accession Protocol could be part of one or more of the Multilateral Trade Agreements, but this would only be the case if relevant language was expressed in the individual provision.[775]

Furthermore, the majority of the Panel opined that China had misconstrued Article XII:1 of Marrakesh Agreement. They underlined that this provision was designed for States and customs territories to accede and had laid down that the accession process must apply 'across the board,

[770] *China — Rare Earths,* Panel Report, para. 7.65.

[771]Ibid., para. 7.66.

[772] Ibid., para. 7.72.

[773] Ibid., para. 7.75.

[774] Ibid., para. 7.76.

[775] Ibid., para. 7.80.

and not just with respect to one or some WTO Agreements.' Moreover, they referred to several other Multilateral Agreements which serve to specify obligations under the GATT without, making the individual provisions of those agreements an integral part of the GATT.[776]

The next question dealt with the intrinsic link between the Accession Protocol and the WTO Multilateral Agreements. The majority of the Panel were in disagreement with China's claim that there was an intrinsic link between paragraph 11.3 on one hand and Articles II and XI on the other hand, as there was no GATT provision requiring Member States to eliminate export duties. Moreover, Paragraph 11.3 did not pertain to the same subject matter as Article II and XI. The majority of the Panel also reconfirmed the decision of the Appellate Body in *Raw Materials* in relation to the lack of explicit treaty language in Paragraph 11.3 of China's Accession Protocol for the application of Article XX general exceptions.[777] China developed another argument about the interpretation of the phrase 'nothing in this Agreement' as contained in the beginning of Article XX of the GATT. China was of the opinion that as its Accession protocol was intrinsically related to the text of GATT, therefore the stipulation of the phrase 'nothing in this Agreement' broadly extends even to the provision of the Accession Protocol.[778] As regards this argument, the Panel confirmed the decision of the panel in the *Raw Materials case* that 'the reference to this 'Agreement' suggests that the exceptions therein relate only to the GATT 1994, and not to other agreements'.[779]

China finally argued that the consequence of the decision of the Appellate Body in *Raw Materials* on the non-applicability of Article XX general exceptions as a defense to a violation of Paragraph 11.3 is that 'trade liberalization must be promoted at whatever cost – including forcing Members to endure environmental degradation and the exhaustion of their scarce natural resources'.[780] Therefore, China claimed that '[a]n appropriate holistic interpretation, taking due account of the object and purpose of the WTO Agreement, confirms that China may justify export duties through

[776] Ibid., para. 7.92.

[777] *China — Raw Materials*, Appellate Body Report, para. 292 and *China — Rare Earths*, Panel Report, para. 7.96.

[778] *China — Rare Earths*, Panel Report, para. 7.100.

[779] *China — Raw Materials*, Panel Report, para. 7.153 and *China — Rare Earths*, Panel Report, para. 7.101.

[780] *China — Rare Earths*, Panel Report, para. 7.105.

recourse to Article XX of the GATT 1994'.[781] Hence, it is inconsistent with the object and the purpose of the WTO Agreement. The Panel in rejecting China's argument stated that the only result of the Appellate Body's decision in *China — Raw Materials* is that:

> when seeking to address environmental concerns and protect the life and health of its population, China must use instruments and means other than export duties to do so (unless those export duties are imposed on products within the maximum rates "specifically provided for" in Annex 6 of China's Accession Protocol). Such alternative instruments and means include the entire universe of instruments and means that governments maintain to protect the environment and human health, and that do not violate WTO obligations - or that may violate one or more WTO obligations, but which may be justified under Article XX of the GATT 1994.[782]

Eventually, Panel concluded that:

> assuming for the sake of argument that there could be situations in which the imposition of export duties could make a material contribution to addressing environmental concerns and to protecting the life and health of a population, China, notwithstanding its extensive argumentation on the applicability of Article XX of the GATT 1994 to Paragraph 11.3 in this dispute, has never presented any argument in support of the premise that export duties are the only type of instrument and means that can be used to address environmental concerns and protect the life and health of its population. Indeed, in response to a question from the Panel, China itself indicated that it "would find it difficult to conceive that export duties are the only instrument that can be used to protect the environment or to conserve exhaustible natural resources and China's position is indeed not based on such an assumption'.[783]

[781] Ibid., para. 7.105.

[782] Ibid., para. 7.112.

[783] Ibid., para. 7.113.

To conclude, the Panel could not be convinced by China's arguments mentioned above. Thus, the non–applicability of the general exception(s) contained in Article XX of the GATT on levying export duties was confirmed.[784] The Panel in *China — Rare Earths,* with one distinction reaffirmed the findings of the Panel and the Appellate Body in *China — Raw Materials.* There was a separate opinion over the applicability issue in the Panel, which opined that, in order to invoke a GATT–exception in defense of a violation of specific provisions under the Accession Protocol, an implicit connection is required. Under this view, when explicit linkage is absent, if the issue in question is of the kind addressed in particular GATT provisions, then the Accession Protocol obligation can be deemed to be an integral part of the GATT, and consequently the GATT exceptions would be available.[785]

The panelist considered that China's obligation with respect to export duties under Paragraph 11.3 of its Accession Protocol 'expands' its obligations under Articles II and XI:1 of the GATT, which deal with, *inter alia,* the overlapping subject matter of border tariff duties.[786] In accordance with this 'close relationship', the panelist believed that Paragraph 11.3 of China's Accession Protocol must be read 'cumulatively and simultaneously' with Articles II and XI of the GATT. Thus, in the panelist's view, upon accession of China, Paragraph 11.3 of its Accession Protocol became an integral part of the GATT as that agreement applies between China and the WTO Members.[787] Furthermore, the panelist noted that 'the defenses provided in the GATT are automatically available to justify any GATT–related obligations, including border tariff-related obligations - unless a contrary intention is expressed by the acceding Member and the WTO Members'.[788] The panelist therefore concluded that 'unless China explicitly gave up its right to invoke Article XX of GATT 1994, which it did not, the general exception provisions of the GATT 1994 are available to China to justify a violation of Paragraph 11.3 of its Accession Protocol'.[789]

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[784] Ibid., paras. 7.115–7.117.

[785] *China — Rare Earths*, Panel Report, paras. 7.118–7.137.

[786] Ibid. para. 7.136.

[787] Ibid.

[788] Ibid., para. 7.137.

[789] Ibid., paras. 7.136–7.138.

b. Appellate Body Procedure

China decided to appeal the findings of the Panel on the non–enforceability of Article XX of the GATT general exceptions to Paragraph 11.3 of its Accession Protocol. It argued that that the legal effect of Article XII:1 of the Marrakesh Agreement and paragraph 1.2 of the Marrakesh Agreement is to make China's Accession Protocol an 'integral part' of the WTO Agreement and to make each of the Accession Protocol's provisions an integral part of one of the Multilateral Trade Agreements annexed to the Marrakesh Agreement to which the provision 'intrinsically relates'.[790] In support of its argument, China maintained that a treaty interpreter would first determine whether the 'WTO–plus' provision relates to the same subject-matter addressed by one of the covered agreements, and then apply both the 'WTO–plus' provision and that covered agreement harmoniously.[791] China argued that as paragraph 11.3 relates to goods, it is intrinsically related to the GATT 1994, in particular Articles II:1(a) and XI:1.[792] Accordingly, Paragraph 11.3 must be viewed as an integral part of GATT 1994 and is subject to the general exceptions therein, unless there is explicit language to the contrary. China also claimed that the Panel had erred in concluding that the reference to the 'WTO Agreement' in paragraph 1.2 of China's Accession Protocol was to the Marrakesh Agreement alone.

Rather, the Panel should have found that this reference meant that China's Accession Protocol should be treated as an 'integral part' of the WTO Agreement as a whole, including its annexes of the Multilateral Trade Agreements.[793] At first, the interpretation of Article XII:1, the second sentence, of the Marrakesh Agreement, which provides: '[s]uch accession shall apply to this Agreement and to the Multilateral Trade Agreements annexed thereto,' was discussed. China underlined that this Article states that the specific terms of accession, including WTO–plus provisions, must intrinsically relate to either the Marrakesh Agreement or one of the Multilateral

[790] *China — Rare Earths*, Appellate Body Report, paras. 2.10 and 2.13.

[791] Ibid., para. 2.24.

[792] Ibid., para. 2.188 (It refers to the China's argument modification.).

[793] Ibid., para. 2.11.

Trade Agreements attached thereto.[794] The Appellate Body ruled that the term(s) 'such accession' referred to the legal act of acceding to the Marrakesh Agreement, but this did not mean that the legal instruments embodying the terms of accession must be incorporated into these Agreements.[795]

More specifically, the Appellate Body held that the second sentence of Article XII:1 of the Marrakesh Agreement merely reflected the general rule that an acceding State must accede to the rights and obligations as set out in these Agreements as a single undertaking, but did not address the 'specific relationship between individual provisions of an accession protocol and individual provisions of the Marrakesh Agreement and the Multilateral Trade Agreements'.[796] Paragraph 1.2 of the Accession protocol was another controversial point in the appellate review and it states that 'this Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement'.[797]

China had argued that the reference to the WTO Agreement must include the multilateral trade agreements otherwise it would mean that 'new Members would not necessarily accede to the latest agreements.[798] The Appellate Body, in rejecting China's argument ruled that:

> [t]hus, read in the immediate context of the remainder of the text of Paragraph 1.2, the context provided by other provisions of Part I of China's Accession Protocol, as well as the context provided by the Decision of the Ministerial Conference of 10 November 2001 to which China's Accession Protocol is annexed and the preamble of China's Accession Protocol, it appears that the term 'the WTO Agreement" in the second sentence of Paragraph 1.2 may refer to the Marrakesh Agreement, that is, to 'the WTO Agreement" excluding the Multilateral Trade Agreements. At the same time, an examination of the term 'the WTO Agreement', as used throughout China's Accession Protocol, indicates that the definition of "the WTO Agreement" contained in the preamble does not necessarily

[794] Ibid., para. 5.31.

[795] Ibid.

[796] Ibid., para. 5.34.

[797] Protocol on the Accession of the People's Republic of China, para. 1.2.

[798] *China — Rare Earths,* Appellate Body Report, para. 5.42.

> preclude the annexed Multilateral Trade Agreements from also falling within the scope of the term 'the WTO Agreement' in some instances. This term may, depending on the specific context, include a reference to the annexed Multilateral Trade Agreements, or it may refer to the Marrakesh Agreement alone. For example, as the Appellate Body found in China – Publications and Audiovisual Products, the phrase 'in a manner consistent with the WTO Agreement' in the introductory clause of Paragraph 5.1 of China's Accession Protocol refers to 'the WTO Agreement as a whole, including its Annexes'. In contrast, where a specific provision of 'the WTO Agreement" is referred to, such as in the last sentence of Paragraph 18.1 (referring to 'paragraph 5 of Article IV of the WTO Agreement'), the term is properly understood in its narrow sense as the Marrakesh Agreement. Therefore, the term 'the WTO Agreement', as used in China's Accession Protocol, may have either a broad or a narrow connotation depending on the context in which it is used.[799]

It must be emphasized that the Appellate Body did not entertain the idea that 'determining the scope of the term WTO Agreement in Paragraph 1.2 was dispositive of the key legal question before the Panel concerning the specific relationship between individual provisions of China's Accession Protocol and the individual provisions of the Marrakesh Agreement and the Multilateral Trade Agreements'.[800]

The Appellate Body held that the aforementioned Paragraph 1.2 and particularly its stipulation that the Protocol is to be an 'integral part' of 'the WTO Agreement', basically serves to build a bridge between the package of protocol provisions and the existing package of WTO rights and obligations under the Marrakesh Agreement and the Multilateral Trade Agreements.[801] It continued that the specific relationship between the provisions of China's Accession Protocol, on the one hand, and the provisions of the Marrakesh Agreement and the Multilateral Trade Agreements, on the other hand, must also be determined on a case-by-case basis through a proper

[799] Ibid., para. 5.46.

[800] Ibid., para. 5.49.

[801] Ibid., para. 5.50.

interpretation of all related provisions including the Accession Working Party Report as well as the nature of the measure at issue and of the violation.[802]

In the view of the Appellate Body, the express textual references, or the lack thereof, to a covered agreement (such as the GATT 1994), a provision thereof (such as Article VIII or Article XX of the GATT 1994), or 'the WTO Agreement' in general, are not dispositive in and of themselves.[803] Furthermore, the existence of an express reference to a GATT provision (Article VIII of the GATT 1994) in a protocol provision does not compel the conclusion that Article XX of the GATT 1994 is available to justify a breach of the Accession Protocol provision.[804] Article VIII of the GATT covers '[a]ll fees and charges of whatever character imposed by [WTO Members] on or in connection with importation or exportation' and it explicitly excludes export duties which are the main question under Paragraph 11.3 of China's Accession Protocol.[805] Therefore, the provision of Article XX of the GATT does not extend to the export duties commitment under the Accession Protocol. Lastly, the Appellate Body ruled that:

> China's position that a provision in its Accession Protocol is necessarily an integral part of either the Marrakesh Agreement or one of the Multilateral Trade Agreements by virtue of an 'intrinsic relationship', and in particular its position that the applicability of Article XX of the GATT 1994 arises from the 'intrinsic relationship' alone, sits uncomfortably with our interpretation set out above that rights and obligations cannot be automatically transposed from one part of the WTO legal framework to another.[806]

Pursuant to the reasoning as referred to above, the Appellate Body rejected China's entire argument pertaining to the applicability of Article XX of the GATT on the commitment to impose export duties undertaken in its Accession Protocol.

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[802] Ibid., para.5.57.

[803] Ibid., para. 5.61.

[804] Ibid., para.5.63.

[805] *China — Raw Materials*, Appellate Body Report, para. 290.

[806] *China — Rare Earths*, Appellate Body Report, para. 5.68.

3. Critical Insights to the Foregoing Findings

The WTO's Appellate Body has taken a strict textualism approach, under which the applicability of GATT exceptions to the export duties commitment is subject to the availability of explicit textual reference. The Appellate Body in both the aforementioned disputes did not accept the applicability of general exceptions of Article XX of the GATT to China's export-duty commitments, due to the absence of a textual link in paragraph 11.3 of China's Accession Protocol. The purpose of general exceptions of Article XX of the GATT is to safeguard important public policies and non-trade values from being infringed upon by obligations to liberalize trade. Pursuant to the results of the above cases, without stipulation of an express textual link, trade-liberalization obligations can be interpreted to distort public policy aims. According to Article 31(1) of the VCLT 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The 'context' is defined broadly under Article 31(2) of the VCLT to encompass both the textual context of the treaty, 'including its preamble and annexes', and any prior agreement concluded between all the parties in connection with the treaty.

Article 31(3) of the VCLT also provides that in interpretation of a treaty, together with the context, any subsequent agreement and practice that forms agreement between the parties regarding the interpretation of the treaty, as well as 'any relevant rules of international law applicable in the relations between the parties' must be taken into account. Furthermore, the VCLT stipulates a broad contextualist approach towards treaty interpretation. If the result of interpretation, according to its Article 31, 'is manifestly absurd or unreasonable', Article 32 permits the use of 'supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion' to finally determine the meaning.[807] The Appellate Body in the

[807] WTO jurisprudence has shown that non–WTO documents can be used as the circumstances of conclusion of a WTO agreement within the context of Article 32 of the VCLT. See European Communities — Customs Classification of Frozen Boneless Chicken Cuts: Complaint by Brazil, (WT/DS269/R) Panel Report [30 May 2005], paras. 7.360 and 7.364. Furthermore, a bilateral or multilateral non–WTO treaty can also qualify as the 'circumstance of conclusion' under Article 32 of the VCLT. See European Communities—Measures Affecting the Importation of Certain Poultry Products (WT/DS69/AB/R) Appellate Body Report [13 July 1998], para. 83.

above cases focused narrowly on the text of paragraph 11.3 and limited its contextual observation to a few paragraphs in China's Accession Protocol and the Working Party Report, to the exclusion of all other elements articulated in Articles 31 and 32 of the VCLT.

In interpreting Paragraph 11.3 of China's Accession Protocol, it must be pointed out that the absence of a term (reference to Article XX of the GATT) in a treaty provision does not necessarily mean that nothing is implied. In this respect, the common intention despite the absence of an explicit reference to Article XX of GATT in Paragraph 11.3 must be analyzed. The Appellate Body in *China — Raw Materials* held that:

> the task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement. Such silence does not exclude the possibility that the requirement was intended to be included by implication.[808]

Moreover, there is no reason why such commitments should be excluded from public policy considerations. The Accession Protocol sets out the terms of accession for a particular Member State that cover various commitments and subjects under the WTO system. Thus, it does not provide a coherent set of general exceptions on its own. The export–duty commitments are related to the GATT obligations concerning customs tariffs and quantitative restrictions. Therefore, this GATT obligation can be subject to the exceptions in Article XX. In interpreting the absence of explicit commentary/textual references in Paragraph 11.3, one should explore the relationship between the elements utilized in treaty interpretation under the VCLT. In this case under examination, while the object of interpretation is the absence of a term, the 'ordinary meaning' of the term does not exist; therefore, its effects can only be interpreted contextually through the examination of all other elements laid down in Articles 31 and 32 of the VCLT. As long as the Accession Protocol constitutes 'an integral part' of the WTO Agreement, then according to Article 31(2) of the VCLT, the textual context of the Accession Protocol should encompass the entire WTO Agreement, including its preamble and annexes.

[808] *US — Carbon Steel*, Appellate Body Report, para. 65.

The GATT 1994, as an annex to the WTO Agreement, should be considered as part of the 'context' of the Accession Protocol. Besides, the export restriction provisions of the GATT and the exceptions applicable to them should all be treated as the relevant context of Paragraph 11.3 and be considered in the process of interpretation in the absence of definite references.

Under Article 31(1) of the VCLT, the interpretation of such silence shall be made 'in the light of object and purpose' of the treaty. In interpreting Paragraph 11.3, the Appellate Body referred to the various objectives listed in the preamble of the WTO Agreement, including those of environmental protection and preservation, sustainable development and the development of an integrated multilateral trading system. The Appellate Body opined that pursuant to the language of the preamble, it understood 'the WTO Agreement, as a whole, to reflect the balance struck by WTO Members between trade and non-trade-related concerns.'[809] Nonetheless, it continued that none of the above–listed objectives, nor the balance struck between them, provide specific guidance on the issue of whether Article XX of the GATT 1994 is applicable to Paragraph 11.3 of China's Accession Protocol.[810]

Instead of using the objectives of the WTO Agreement, the Appellate Body was merely looking for 'specific guidance' on a particular interpretive question. In addition, Article 32 of the VCLT provides that, when an interpretation according to Article 31 of the VCLT 'leads to a result which is manifestly absurd or unreasonable', then supplementary means of interpretation may be resorted to ascertain the meaning. In the opinion of the author of this research, the interpretation done by the Appellate Body should have been recognized as 'manifestly unreasonable' since 'the supplementary means' under Article 32 of the VCLT, including the preparatory work and the circumstances surrounding the conclusion of the Accession Protocol have not been taken into account, to determine the intention behind the silence in Paragraph 11.3. The Appellate Body only held that as China's obligation to eliminate export duties arises exclusively from China's Accession Protocol, not from the GATT 1994, they considered it reasonable to assume that, had there been a common intention to provide access to GATT Article XX, in this respect, language

[809] *China — Raw Materials*, Appellate Body Report, para. 306.

[810] Ibid.

to that effect would have been included in Paragraph 11.3 or elsewhere in China's Accession Protocol.[811]

E. Review of the WTO Accession Protocols Export Taxes Obligations

1. Applicability of Article XX Exceptions

Vietnam, Ukraine, Russia and Kazakhstan as the WTO Member States can retain their right to use the general exceptions of Article XX in relation to their commitments on export duties. In the Working Party Reports of the above countries, the term of 'the GATT 1994' has been explicitly inserted. An example of such phrase is found in the following Paragraph of Vietnam's Working Party Report:

> The representative of Viet Nam confirmed that Viet Nam would apply export duties, export fees and charges, as well as internal regulations and taxes applied on or in connection with exportation in conformity with the GATT 1994.[812]

In a similar manner, Ukraine has included the right to invoke Article XX general exception in reference to the imposition of export taxes: '[…] Ukraine would not increase export duties, nor apply other measures having an equivalent effect, unless justified under the exceptions of the GATT 1994 […]'.[813]

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[811] Ibid., para. 293.

[812] Report of the Working Party on the Accession of Vietnam to the World Trade Organization [27 October 2006] (WT/ACC/VNM/48) para. 260, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/ACC/VNM48.pdf <accessed 26 September 2019>.

[813] Report of the Working Party on the Accession of Ukraine to the World Trade Organization [25 January 2008] (WT/ACC/UKR/152) para. 240, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/ACC/UKR152.pdf <accessed 26 September 2019>.

More interestingly, the Russian Federation's export duty commitments have been inserted in the Part V of the Schedule of Concessions as stipulated by Article II:1 (a) of the GATT. It binds export duties applied on over 700 tariff lines, including fish products, mineral wood fuel and base metals. Hence, as already discussed, it is argued that the regulation of Article XXVIII bis:1 of GATT concerning the 'Modification of Schedules' can be applicable to Russia's export duty commitments.[814] Paragraph 638 of the Russian Federation Working Party Report provides that:

> The representative of the Russian Federation confirmed that the Russian Federation would implement, from the date of accession, its tariff concessions and commitments contained in Part V of the Schedule of Concessions and Commitments on Goods of the Russian Federation. Accordingly, products described in Part V of that Schedule would, subject to the terms, conditions or qualifications set-forth in that Part of the Schedule, be exempt from export duties in excess of those set-forth and provided therein. The representative of the Russian Federation further confirmed that the Russian Federation would not apply other measures having an equivalent effect to export duties on those products. He confirmed that, from the date of accession, the Russian Federation would apply export duties in conformity with the WTO Agreement, in particular with Article I of the GATT 1994. Accordingly, with respect to export duties and charges of any kind imposed on, or in connection with exportation, any advantage, favour, privilege or immunity granted by the Russian Federation to any product destined for any other country shall be accorded immediately and unconditionally to the like product destined for the territories of all other WTO Members […].[815]

In addition, the introductory section to Part V of the Schedule of Concessions and Commitments on Goods of the Russian Federation, by using the term 'GATT 1994' confirms that the Russian

[814] Ya Qin (2012) pp. 1160–1161.

[815] Report of the Working Party on the Accession of Russian Federation to the World Trade Organization [17 November 2011] (WT/ACC/RUS/70) para. 638, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/MIN11/2.pdf <accessed 26 September 2019>.

Federation could invoke the exceptions stipulated in Article XX of the GATT: '[t]he Russian Federation undertakes not to increase export duties, or to reduce or to eliminate them, in accordance with the following schedule, except in accordance with the provisions of the GATT 1994'.

Whether or not these provisions are applicable to the export duties, these provisions must be however construed under a teleological method, (i.e. under the current circumstances of multilateral trading system).[816] As emphasized by Article II:7 of the GATT, '[t]he Schedules annexed to [the GATT] are hereby made an integral part of [the GATT 1994].[817] Furthermore, the title of Article XXVIII which refers to 'Modification of Concessions', applies in a similar manner to the Schedules annexed to the GATT 1994 as stipulated by Article II:7 of the GATT 1994 and eventually encompasses the export duties, too.[818] In the most recent example, Kazakhstan emphasized on the issue of export duties in its Working Party Report. Kazakhstan agreed to bind its export duties for 370 tariff lines of which 55 are bound at 0%.[819] Furthermore, Kazakhstan 'would not apply other measures having an equivalent effect to export duties on those products'.[820] It provides that 'from the date of accession, Kazakhstan would apply export duties in conformity with the WTO Agreement, specifically with Article I of the GATT 1994'.[821] Finally, as highlighted in the introductory section of Part V of its Schedule of Concessions, by using the term 'GATT 1994', Article XX exceptions are also applicable to the export duty provisions under its Working Party Report. In this respect, Part V of the Schedule of Concessions–Export Duties provides that:

> The Republic of Kazakhstan undertakes not to increase export duties, or to reduce or to eliminate them, in accordance with the following schedule, and not to reintroduce or increase

[816] Ibid.

[817] Article II:7 of the GATT.

[818] Ya Qin, (2012) 1160.

[819] Report of the Working Party on the Accession of Republic of Kazakhstan to the World Trade Organization, [23 June 2015] (WT/ACC/KAZ/93) para. 530, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/ACC/KAZ93.pdf <accessed 26 September 2019>.

[820] Ibid., para. 540.

[821] Ibid.

them beyond the levels indicated in this schedule, except in accordance with the provisions of GATT 1994.

Furthermore, the Accession Protocol of Kazakhstan in Paragraph 5 recognizes the above Annex (Schedule CLXXII) which states that: '[t]he Schedules reproduced in the Annex to this Protocol shall become the Schedule of Concessions and Commitments annexed to the General Agreement on Tariffs and Trade 1994 (hereinafter: referred to as the "GATT 1994")[…]'.[822]

2. Non–applicability of Article XX Exceptions

Mongolia which is among the first States acceded to the WTO[823] is not allowed to deviate from its export duty–related obligations by invoking Article XX of the GATT as the term 'GATT 1994' has not been inserted in the text of its Working Party Report:

> [t]he representative of Mongolia also stated that his government would maintain the prohibition on the export of raw cashmere only until 1 October 1996, when an export duty at the rate of not more than 30 per cent ad valorem would be introduced. That export duty would be phased out and eliminated within 10 years of the date of Mongolia's accession to the WTO.[824]

The Non-applicability of Article XX general exceptions to the export duties obligation of Saudi Arabia has been drafted under the following Paragraph of its Working Party Report:

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[822] Protocol on the Accession of the Republic of Kazakhstan, [30 July 2015] (WT/L/957) para. 5.

[823] Mongolia is a member of the WTO since 1997, available at https://www.wto.org/english/thewto_e/countries_e/mongolia_e.htm <accessed 26 September 2019>.

[824] Report of the Working Party on the Accession of Mongolia to the World Trade Organization [27 June 1996] (WT/ACC/MGN/9) para. 24, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/ACC/MNG12.pdf <accessed on 26 September 2019>.

> […] the representative of Saudi Arabia stated that Article XI of the GATT 1994 expressly permitted the imposition of export duties, and did not restrict the right to impose such duties. Export duties applied only to un-tanned hides and skins, falling under HS Nos. 4101, 4102 and 4103. The rate of export duty was SAR 2000/ton (roughly 20 per cent). The representative of Saudi Arabia confirmed that Saudi Arabia would not impose export duties on iron and steel scrap. The Working Party took note of this commitment.[825]

Afghanistan, as a newly–acceded Member State to the WTO, has assumed its export duties obligation in a manner similar to China's Accession Protocol in relation to the applicability of Article XX of the GATT. It might be asserted that this approach is in anticipation of further explorations/discoveries of rich reserves of natural resources and consequently the role of Afghanistan in the future of the global market of minerals.

This country is also not able to apply Article XX of the GATT to its export duties commitment. The following Paragraph expressly refers to Article VIII of the GATT[826], but not other GATT provisions, including Article XX. Part V of its Schedule of Concessions and Commitments on Goods provides that:

> [t]he representative of Afghanistan confirmed that upon accession, Afghanistan would not introduce and would eliminate all duties, taxes, fees and charges applied to exports (with the exception of the 2% fixed tax on exports, which would be eliminated prior to 1 January 2021), unless specifically provided for in Annex 12 to this Report or applied in conformity with the provisions of Article VIII of the General Agreement on Tariffs and Trade 1994.[827]

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[825] Report of the Working Party on the Accession of Kingdom of Saudi Arabia to the World Trade Organization [1 November 2005] (WT/ACC/SAU/61) para. 184, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/ACC/SAU61.pdf <accessed on 26 September 2019>.

[826] Article VIII of the GATT 1994 contains rules on customs fees and charges other than import or export duties.

[827] Report of the Working Party on the Accession of the Islamic Republic of Afghanistan [13 November 2015] (WT/ACC/AFG/36 and WT/MIN(15)/6)) para. 145, available at

III. Lessons for the Accession of Iran to the WTO

A. Brief Introduction to Iran's Economic Situation

The economy of Iran has undergone enormous upheavals since the Islamic Revolution in 1979. It has faced numerous grave events such as international sanctions, its foreign assets freezing, capital flight, the Iraqi-imposed war and foreign exchange constraints.[828] According to the World Bank, Iran is the second largest economy in the Middle East and North Africa region with an estimated Gross Domestic Product (GDP) in 2017 of US$ 447.7 billion.[829] Iran's economy is characterized by a large hydrocarbon sector as well as small scale agriculture and services sectors.[830] This country holds the second largest reserves of natural gas in the world[831] and in relation to crude oil is the third in the world in terms of proven reserves.[832]

B. Review of the Mineral Resources of Iran

https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=225079&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True <accessed on 26 September 2019>.

[828] Accession of the Islamic Republic of Iran, Memorandum on the Foreign Trade Regime [2009] (WT/ACC/IRN/3) p. 1 http://en.iccima.ir/images/stories/DATA/International/Iran_Foreign_Trade_Regime_English.pdf <accessed on 26 September 2019>.

[829] Available at https://www.worldbank.org/en/country/iran/overview <accessed 26 September 2019>.

[830] For more information about Iran, see Statistical Centre of Iran, Yearbook (2016–2017) https://www.amar.org.ir/english/Iran-Statistical-Yearbook/Statistical-Yearbook-2016-2017 <accessed 26 September 2019>.

[831] Available at https://www.hydrocarbons-technology.com/features/feature-the-worlds-biggest-natural-gas-reserves/ <accessed 26 September 2019>.

[832] Available at https://www.opec.org/opec_web/en/data_graphs/330.htm <accessed 26 September 2019>.

According to a number of globally–reliable statistical sources, more than seven percent of the world's mineral reserves are located in Iran.[833] Iran is also among the 15 top major mineral and metal rich countries, with about 37 billion tonnes of proven reserves, and more than 57 billion tonnes of potential reserves – worth an estimated total of $800 billion in 2014. Iran also has an extensive mineral and metal based production and processing industry; more than 70 metals and mineral commodities are refined or manufactured.

This includes more than 2% of the world's output of barite, feldspar, nitrogen and sulfur; and more than 1% of the world's output of cement, industrial sand (or glass), iron ore, and molybdenum. This country also ranks as the world's largest holder of zinc reserves, holds the 9th largest copper reserves, the 12th largest iron reserves, is the 5th largest producer of strontium, is the producer of 1.6% of the world's total output of cement and is the 10th largest cement export in the world. Iran also has the world's 11th largest reserves of lead, is the producer of 1.2% of the world's total output of sodium chloride, is the holder of 3.7% of the world's barite reserves, and is the world's 2nd largest producer of gypsum after China with an estimated 9% of the world's output. It is also recognized as the world's oldest, finest and largest producer of turquoise stone. More specifically, the following information specifies the status of a number of mineral reserves in Iran:[834]

[833] It must highlighted that the data and statistics used in this section have been collected from the following sources : 'Mining and Quarrying' Statistical Centre of Iran, Yearbook (2016–2017), https://www.amar.org.ir/Portals/1/yearbook/1395/06.pdf <accessed 26 September 2019>; US Mineral Commodity Summaries (2019) available at https://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/atoms/files/mcs2019_all.pdf <accessed 26 September 2019> and World Mineral Production (2013-2017) available at https://www.bgs.ac.uk/downloads/start.cfm?id=3512 <accessed 26 September 2019>.

[834] The data collected in this section have been principally extracted from the Iranica Encyclopedia's article written by Mansur Qorbani and Anoshirvan Kani,'Mining in Iran I: Mines and Mineral Resources', available at http://www.iranicaonline.org/articles/mining-in-iran-i <accessed 26 September 2019>. See also Sinan Hastorun et al, Recent Trends in the Nonfuel Mineral Industry of Iran, (US Geological Survey 2016) available at https://pubs.usgs.gov/circ/1421/circ1421.pdf <accessed 26 September 2019>.

Antimony: Fifteen ore deposits and indications of antimony are known to occur in Iran, out of which only three are actively mined.

Arsenic: Although there are no estimates of the amount of arsenic reserves in Iran, the presence of 17 ore deposits and indications of this metal point towards the vast occurrence of arsenic in Iran.

Barite: The number of barite deposits and indications in Iran exceeds 50, with overall reserves of 10 million tons. Additionally, there is a high probability of discovering new reserves.

Bentonite: Going as far back as ancient times, bentonite has been utilized in Iran, and at present there are more than 100 deposits and indications of it in various parts of Iran.

Boron (Borax): There are seven known deposits and indications of boron in Iran; however, the favorable conditions which exist for the formation of economic boron bodies in Iran means that one can expect the discovery of further deposits in various parts of the country.

Chromium (Chromite): The known chromite ore deposits of Iran are of the Alpine type and therefore it is hard to estimate their reserves. However, considering the number of chromite ore deposits and indications (almost 200), and the vast distribution of rock types that are associated with chromite, the possibility of discovering small and medium-sized reserves (or even large-sized bodies, on the basis of geological characteristics) cannot be ruled out.

Copper: Around 500 ore deposits and indications of copper are recognized in Iran, yet only about a hundred of them have been surveyed and explored. Presently, there are 10 active copper mines in Iran and the copper reserves in the country amount to approximately 3 billion tons of ore, containing 30 million tons of copper metal and this comprises 9 percent of the world's known copper reserves.

Feldspars: Half of the 100 known feldspar deposits and indications in Iran are currently being extracted. Genetically, these can be divided into two categories; those associated with acidic intrusive bodies and those of a volcanic and tufaceous origin.

Fluorite: The known fluorite resources of Iran number more than 30 with reserves estimated at 500,000 tons with a base reserve of around 1 million tons.

Iron: Over 200 ore deposits, indications, or anomalies of iron are recognized in Iran, whose reserves amount to almost 4.5 billion tons of iron ore. The average grade of iron in these reserves varies from 45 to 60 percent.

Kaolin: Over 70 deposits and indications of kaolin occur in Iran, most of which are suitable to be utilized in the ceramic industry.

Lead-Zinc: The lead-zinc ore deposits and indications in Iran number more than 600. An observational study of the average grade of the ores has indicated that the amount of lead and zinc metals is estimated at 18 and 5 million tons, respectively. There is also a high probability of finding new large reserves as exploration techniques become more advanced.

Manganese: Over 45 ore deposits and indications of manganese are recognized in Iran, out of which 10 deposits are of medium tonnage, and the rest are either small deposits or indications revealing the fact that Iran is poorer in terms of manganese as compared to iron. Though iron production has gone up in recent years, manganese production has stayed unchanged. However, new exploration techniques may result in the discovery of further valuable manganese ore deposits.

Mica: Various reserves and resources of mica are known to occur in Iran; there are over 40 deposits and indications of this mineral, amounting to overall reserves of more than 1 million tons.

Molybdenum: There are considerable amounts of molybdenum associated with the porphyry copper deposits in Iran. In addition, a number of vein type copper deposits in Iran show high levels of this metal.

Perlite: The large reserves of perlite deposits of Iran are associated with shallow marine acid volcanic rocks.

Phosphate: Over 80 phosphate occurrences and indications are known to exist in Iran. Based on the available exploration data, the proven reserves of the country can be genetically categorized into sedimentary and igneous types.

Rhenium: Some of the porphyry type copper deposits of Iran contain significant quantities of trace elements such as rhenium.

Strontium: Considerable reserves of celestite (strontium sulfate) are known, and 10 sites where deposits occur in commercially viable quantities are being extracted.

C. Export Duties Policies under Iran's Economic Development Plans

As a candidate State to the WTO, Iran is faced with the task of properly tackling with the significant problems associated with the process of accession negotiations specifically in relation

to export duty commitments. In order to analyze the role of export duties on the natural resources of Iran, an appropriate starting point would be the study of the five–year 'Economic, Social and Cultural Development Plans' of Iran which has great relevance to the research in question. The five–year Plan is a legal instrument that enunciates the general framework of the activities of the government.

1. The First Economic, Social and Cultural Development Plan of Iran (1989–1993)

The implementation of economic development plans which had commenced during the Pahlavi regime, was suspended following the Islamic Revolution in 1979 and this suspension continued right through until the end of the war. The First Economic, Social and Cultural Development Plan of the Islamic Republic of Iran took effect in 1989 for a five-year period. In this period the focus of the government's economic policies was on empowering the domestic industries in order to encourage exports.[835]

2. The Second Economic, Social and Cultural Development Plan of Iran (1994–1999)

In the Second Development Plan the government pursued its export encouragement policy as well as the increase of the capabilities of domestic producers to compete with their foreign rivals. The Government also decided to reduce the dependency of Iran's economy on oil revenues and to promote the expansion of Iran's non–petroleum exports.[836]

3. The Third Economic, Social and Cultural Development Plan of Iran (2000–2004)

[835] Article 4 of the First five–year Economic, Social and Cultural Development Plan of Iran (1989–1994).

[836] Article 9(25) of the Second five–year Economic, Social and Cultural Development Plan of Iran (1994–1999).

The implementation of previous plans from 1989 to 1999, the development of production bases and the reconstruction of war-torn regions had prepared the country's economy to enter a new stage which required constructive interplay with the world economy.[837] Hence, pursuant to this Plan, an outward-oriented development strategy in parallel with the focus on export promotion was emphasized. The government also decided to meet these mentioned objectives through the adoption of various legislations facilitating the establishment of market economy principles. The issue of Iran's participation in the world economy was defined as one of the main goals of this Plan. Pursuant to Article 113 of the Plan, no export duties were permitted and '[i]n order to further promote and boost exportation of commodities, goods […] the commodities and services to be exported shall not be subject to payment of charges, duties and taxes'.

4. The Fourth Economic, Social and Cultural Development Plan of Iran (2005–2010)

For the first time after the establishment of the Islamic Republic of Iran, an explicit international trade strategy was adopted to streamline trade and increase the country's stake in international trade and the exportation of non–petroleum goods.[838] Article 33(d) of the Plan authorized the imposition of special duties on unprocessed raw materials:

> [l]evying any tax or duty for the export of non-oil goods and services is prohibited during the Plan. The Government is authorized, so as to preserve resources and their optimum use, levy and collect special duties on exports of unprocessed raw materials.[839]

[837] For further information, see Iran's Memorandum on the Foreign Trade Regime, p. 1, available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Language=ENGLISH&SourcePage=FE_B_009&Context=Script&DataSource=Cat&Query=%40Symbol%3DWT%2FACC%2FIRN*&DisplayContext=popup&languageUIChanged=true# <accessed on 26 September 2019>.

[838] Article 33 of the Fourth five–year Economic, Social and Cultural Development Plan of Iran (2005–2010).

[839] Ibid., Article 33(d).

After nine years of the submission of more than twenty–two requests to the WTO General Council, Iran finally became an observer member to the WTO on 26 May 2005.[840]

5. The Fifth Economic, Social and Cultural Development Plan of Iran (2010–2015)

According to Plan, Iran intended to develop its interactions with international organizations specifically the WTO. To do so, Iran was under an obligation to harmonize its related trade laws and regulations with the multilateral and regional trading arrangements.[841] It had been laid down that no tax or duty was to be levied on the exportation of non-petroleum based goods.[842] However, it must be pointed out that the government was still authorized to levy special duties on the exportation of raw materials.[843] Pursuant to Note 2 of Article 104(b), in order to preserve Iran's natural resources, Iranian Government was authorized to impose special duties on the exportation of raw materials or low value added products. In reference to the above Article, the exportation of some items including certain raw materials were subject to export duties.

6. The Sixth Economic, Social and Cultural Development Plan of Iran (2016–2021)

The sixth economic, social and cultural development plan of the Islamic Republic of Iran was formulated at a time when sustainable economic growth, creation of sufficient number of job opportunities and enhancement of public participation are amongst the most important strategic objectives of the plan. In general, the development plan provides a good basis for necessary reforms of Iran's economy. In line with this, establishment of security, stability and calm is one of the most significant prerequisites for boosting foreign investment as well as motivating the process

[840] Available at https://www.wto.org/english/thewto_e/acc_e/a1_iran_e.htm <accessed 26 September 2019>.

[841] Article 104 (f) of the Fifth five–year Economic, Social and Cultural Development Plan of Iran (2010–2015).

[842] Ibid., Article 104 (b).

[843] Ibid., Note 2 of Article 104 (b).

of domestic production and eventually raising the rate of economic growth reaching the annual figure of eight percent. While growth has been slow, Iran's economy has expanded since 2016 with implementation of the JCPOA that was signed in July 2015 by Iran, members of the United Nations Security Council and Germany. This legal instrument caused the removal of economic sanctions pertaining to Iran's nuclear energy programme, in return for assurances that the programme would not be adapted to the construction of weapons. Nonetheless, as a result of the US withdrawal from the JCPOA in May 2018, a number of US sanctions were resumed. The US sanctions and more severe restrictions thereafter significantly have diminished Iranian oil exports.[844]

The Iranian economy continues to remain heavily dependent on oil and gas revenues, and is therefore vulnerable to oil and gas price. In this respect, this Plan, in contrast to previous strategies, provides for '[…] export promotion of minerals having high added value'[845] by means of which the Iranian government will be able to increase its revenues.

D. Accession Negotiations of Iran and the Issue of Export Duties

Nowadays Iran is a huge market of 83 million educated and dynamic people. Notwithstanding the occasional internationally-related ambivalences under the form of sanctions, Iran is capable of playing a pivotal role in the regional and global structures of the world's economy and politics. Production of value-added goods, reduction of the crude material export volume and increase in the non-oil export volume are measures to tackle with the US sanction. Iranian government's revenues from oil production have been declining owing to the US sanctions and low oil prices.

Iran, after submission of twenty–two WTO membership requests to the Secretariat of the WTO since 1996, could ultimately obtain the unanimous approval of the General Council of the WTO in 2005. Since then, Iran has been granted the status of observer in the WTO. Although Iran's

[844] Available at https://www.mporg.ir/En/wid/a3b4a294-6fa8-4099-a561-0cc1159e84b2/id/94652/ <accessed 26 September 2019>.

[845] Article 43 (5)(c)(3) of the Sixth five–year Economic, Social and Cultural Development Plan of Iran (2016–2021).

WTO Working Party was established on 26 May 2005, by virtue of myriad international political pressures mainly the US sanctions, the meeting of the Working Party has not been yet held.[846] Iran, as a WTO observer needs to draft its negotiating strategies in accordance with its requirements to cover every single aspect of the accession process. As already demonstrated, due to the outstanding position of Iran by virtue of possessing a vast amount of mineral resources, the question of preserving sovereign rights over natural resources is of particular importance for the Iranian accession negotiators. Thus, the experience of other WTO Member States can be advantageous for Iran in the sense that by preserving their optimal interests over their natural resources, it will finally be able to accede to the WTO by applying export duties to certain minerals. The method followed by the Russian Federation in making its commitments in relation to export duties can be a good example for Iran to utilize as a practical strategy during the accession negotiations, which would support Iran in pursuing its policies to effectively retain its sovereignty over its own natural resources particularly its mineral reserves.

Concluding Summary

In *China — Raw Materials*, it was agreed that the interpretation of Article XX(g) must be done in connection with the PSNR.[847] In deciding whether or not the PSNR – as an important element of State sovereignty– provides a compelling legal basis by which the demands of the WTO Member States are met, the Panel in the *China — Raw Materials* maintained that Article 31(3)(c) of the VCLT authorized the invocation of the said Principle (i.e. together with the context, 'any relevant rules of international law applicable in the relations between the parties towards the interpretation of Article XX (g) of the GATT.[848] With respect to the definition of natural resources, no legal definition of the term natural resources has been agreed upon. Depending on the field of study, it is possible to have myriad definitions. Natural resources, under the non–legal definitions are

[846] More information is available at https://www.wto.org/english/thewto_e/acc_e/a1_iran_e.htm<accessed 26 September 2019>.

[847] *China — Raw Materials*, Panel Report, para. 7.380.

[848] Ibid., para. 7.377.

generally referred to as the accumulation of valuable elements in the crust of the earth or on its surface.[849] In international treaties, the term 'natural resources', refers to a number of natural elements 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.[850]

Having analyzed the export quantitative restrictions requirements under GATT, in *China — Raw Materials* case, it was underlined that the exception contained under Article XI:2(a) is not qualified for adopting long-term export restrictive measures to be applied to exhaustible natural resources which their depletion is inevitable. In other words, physical scarcity or exhaustibility of essential mineral resources cannot be invoked to justify the measure adopted under Article XI:2(a) GATT.[851] It does not however preclude a WTO Member State from imposing an export restriction under Article XI:2(a) with due observance of the duration of the restrictive measure. In this respect, if a WTO Member State decides to exercise sovereign rights over its own natural resources through invoking such exception, it must prove that such export restriction aims at alleviating or preventing an impending situation of decisive importance[852] or extraordinary crisis.[853]

The *China—Rare Earths* and *China—Raw Materials* cases demonstrate that as global demand for natural resources increases, States may be persuaded to apply export restrictions to ensure domestic supply of key natural resources.[854]

Acceding to the WTO, China undertook more extensive international trade obligations on exports than other WTO Member States. The focus was accordingly on China's Protocol of Accession and whether China had the right to invoke GATT Article XX exceptions with regard to commitments

[849] Michael Bothe 'Environment, Development, Resources' (2005) 318 Recueil des Cours de l'Académie de Droit International, p. 353.

[850] Article 2 of the Convention on Biological Diversity (1992) and Article 77(4) of the United Nations Convention on the Law of the Sea (1982).

[851] In *China — Rare Earths*, China did not invoke Article XI:2(a) GATT to justify the export restrictions.

[852] *China — Raw Materials*, Appellate Body Report, para. 324 and *China — Raw Materials*, Panel Report, paras. 7.284–7.285.

[853] *China — Raw Materials case*, Appellate Body Report, para. 330 and *China — Raw Materials*, Panel Report, para. 7.297.

[854] Marco Bronckers and Keith E Maskus, 'China Raw Materials: A Controversial Step Towards Evenhanded Exploitation of Natural Resources' 13 (2014) World Trade Review, p. 2.

arising from this document rather than from the GATT per se. In both cases, the answer was eventually negative. It completely hinges upon the bargaining power of the acceding country during the accession negotiations and particularly their contributions to the global trade in natural resources. The room to adopt export taxes through policy by these new Members is limited to a varying degree owing to their own commitments. The export tax commitments of these Members are also made under circumstances which envisage that the WTO Agreement has no relevant general regulation on export taxes.

Conclusion

Prologue

Generally speaking, sovereignty is regarded as the basic idea and a distinctive characteristic of the political and legal authority of a modern State.[855] Sovereignty is a basic criterion of the State as a subject of International law, and a foundation of the entire system of law. There is no international law without sovereign States which create it.[856] Sovereignty is seen as a legal basis for the exercise by a State of full and exclusive rights over its territory. In this respect, natural resources are the property of the State in the territory in which they are found. Ownership of natural resources located in the territories in international law rests on the concept of sovereignty. This entitle the States to determine and apply laws and policies governing their people and territory under their jurisdiction and choose their own political, social and economic systems.[857]

The PSNR is based upon the traditional State prerogatives such as territorial sovereignty which extends over national territory, [858] inland waters, territorial waters, EEZ and the continental shelf which falls into the internal feature of the sovereignty and sovereign equality of States which is one of the elements of external sovereignty. Whereas the PSNR is premised upon territorial

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[855] Helmut Steinberger, 'Sovereignty', in Rudolf Bernhardt (ed) *Encyclopedia of Public International Law*, vol. 10 (North-Holland 1987) p. 397.

[856] Korowicz (1961) p. 16.

[857] By way of illustration, Article 16 of the Angolan Constitution stipulates that:

'[t]he solid, liquid and gaseous natural resources existing in the soil and subsoil, in territorial waters, in the exclusive economic zone and in the continental shelf under the jurisdiction of Angola shall be the property of the State, which shall determine the conditions for concessions, surveys and exploitation, under the terms of the Constitution, the law and international law'. Constitution of Angola, 2010, available at https://www.constituteproject.org/constitution/Angola_2010.pdf <accessed 26 September 2019> and Article 9 of the Constitution of Congo provides that:

'[t]he State exercises permanent sovereignty over the Congolese soil, subsoil, water resources and woods, air space, rivers, lakes and maritime space as well as over the Congolese territorial sea and the continental shelf'. Constitution of Congo, 2005, available at http://www.parliament.am/library/sahmanadrutyunner/kongo.pdf <accessed 26 September 2019>.

[858] Robert Jackson, *Sovereignty Evolution of Idea* (Polity 2007) p. 104.

sovereignty, it can be assumed that 'natural resources' encompasses natural resources found not only on the surface of the earth or on the sea–bed, but also located below and above it.[859]

The creation of the PSNR can be traced back to the struggle for sovereignty over natural resources in the aftermath of World War II during which the newly–created States and the developing countries sought to assert full sovereignty over their own natural resources. The purposes for inception of the PSNR were initially to secure the benefits arising from exploiting natural resources for peoples living under colonial regimes. More specifically, States must manage their natural resources in the interests of economic development of their population.

Having inferred from the UNGA resolutions, in the early stages of development of the principle, the exercise of sovereignty over natural resources pursuant to economic development policies of developing countries was seen as the main goal of developing countries. A number of rights are derived from the PSNR, *inter alia*, the right to dispose freely of natural resources; the right to explore and exploit natural resources freely; the right to use national resources for national development and the right to regulate foreign investment. Besides, UNGA resolution 1803 in a specific manner adopted the related issues of the implementation of sovereign rights over natural resources by consensus of the UN Members. However, after two decades from the formulation of the PSNR, the developing countries gradually decided to pursue their interests in changing the international economic order through envisaging the NIEO which due to its biased and one–sided nature eventually did not receive a worldwide acceptance.

The inception of various elements of the PSNR and its evolution over history were examined and finally it is evident that the implementation of the PSNR has consistently been constrained by a number of factors. A few decades ago, the PSNR provided countries with considerable independence and control in relation to the management and the use of their natural resources. In this respect, questions such as governance, management and allocation of natural resources on a State's territory had traditionally been viewed as an essential component of the sovereign power

[859] 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, 11, para. 11, UN Doc. E/CN.4/Sub.2/2004/30/Add.1; Santiago Torres Bernárdez, 'Territorial Sovereignty' in Rudolf Bernhardt (ed) *Encyclopedia of Public International Law,* (Volume IV) (North-Holland 2000) p. 824.

of the State and, therefore, falling outside the scope of international law.[860] Recent international legal developments have had a huge impact on the manner by which a State deals with the domestic issues of resource allocation, development and management. Thus, the traditional position of exercising sovereign rights over natural resources has been increasingly challenged by the realities of ecological and economic interdependence as well as the need for the sustainable and rational use of these resources.[861] Non-economic objectives such as the sustainable development have also limiting effects on the PSNR.[862] The interdependence of States has shaped a new paradigm whereby the necessity to work in a direction which serves common interests in relation to the use of natural resources has become inevitable.

In this regard, albeit the notion of 'Westphalian sovereignty'– as the main component of the Principle– may still be understood as an essential foundation of international relations, its dimensions have been increasingly under the sway of the constraints placed by the requirements of the internationalization of production, trade and finance; the globalization of the security dilemma; the escalating impact of ecological change; and the rise of local and transnational consciousness[863] through the shared compliance with the international law. Sovereignty consists in membership in good standing in the regimes that make up the substance of international life as

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[860] Phoebe Okowa, 'Sovereignty Contests and the Protection of Natural Resources' 66 (2013) Current Legal Problems p. 33.

[861] Schrijver (1997) pp. 24–25.

[862] Bungenberg (2015) p. 131.

[863] Camilleri and Falk (1992) p. 242. By way of illustration, there are other ways in which the sovereignty of States has been weakened. a) limits to the use of force, (Article 2(4) UN Charter) b) limits to intervention c) being bound by norms of *Jus cogens* d) sovereign equality e) respect for human rights. Henry Steiner & Philip Alston, *International Human Rights in Context: Law, Politics and Morals* (Oxford University Press 1996) pp. 535–551, Jeffrey Herbst, 'Challenges to Africa's Boundaries in the New World Order' 46(1992) Journal of International Affairs pp.17–30, Alexis Heraclides, 'Secession, Self–determination and Non-Intervention: In Quest of a Normative Symbiosis' in 45(1992) Journal of International Affairs, pp. 399-420, D.J. Harris *Cases and Materials in International Law* (Sweet & Maxwell1997) pp. 106–1077, 190 & 627, 835–837. For instance, the ILC Articles on State Responsibility, which directly attribute responsibility for wrongful conduct of an individual acting in the official capacity to the State they represent. Cassese (2005) p. 52. 'Recognising the standing of individuals is a departure from conventional international legal concepts […] this standing is still the result of voluntary choices by states'. Stephen Krasner, *Sovereignty: Organised Hypocrisy* (Princeton University Press 1999) p. 114.

well as submission to the pressures that international regulations impose. Accordingly, the freedom of States to act independently and in their perceived self-interest can no longer be the solution.[864] Hence, this approach has resulted in some changes from the traditional rights–based perception when exercising sovereign rights over natural resources to a situation where obligations to the wider-community take center stage. Furthermore, it was underscored that the sovereign States are able to admit foreign investments, to conclude concession agreements in relation to the exploitation of natural resources and under certain conditions to take foreign investments.[865] As a result, it was also understood that international investment agreements have limited the full sovereignty of States over their natural resources.[866]

The Chinese mineral cases showed that the PSNR –without examining its quintessence– has preserved its standing in international disputes and more specifically in the trade–related cases under the WTO system. While China adopted a totally inclusive position towards the implementation of the PSNR in justifying its measures aimed at conserving natural resources, the Panel and the Appellate Body conversely focused on the limited context of the principle. Conclusion of the international agreements, the requirements of international trade in mineral resources, compliance with international environmental law and the membership in the international organizations such as the United Nations and the WTO are viewed as the restricting factors to the implementation of the PSNR.

More specifically, the issue of levying export duties on natural resources was seen as a factor in the implementation of the PSNR. Export duty obligations of the WTO Members indicate a high level of diversity. A number of the WTO Members are permitted to invoke policy exceptions under Art. XX GATT 1994, but others cannot. The analysis of the Accession Protocol of China and specifically its export duty-related commitments shows that the balance of rights and obligations of China and other WTO Member States with similar obligations have been disturbed. In addition, the ruling of the Appellate Body in the Chinese mineral disputes has strengthened the position of the above approach towards export duties.

[864] Chayes and Handler Chayes (1995) p. 27.

[865] Bungenberg (2015) p. 126.

[866] Ibid., p. 138.

Epilogue

The question of retaining sovereignty over natural resources by a State, whilst simultaneously meeting its commitments to the WTO is of particular importance. There is no amendment procedure for the WTO Accession Protocol. Furthermore, no Accession Protocol amendment request has yet been submitted to the WTO Secretariat. In theory, two contrasting viewpoints can, however be raised:[867] i) the terms agreed upon in the accession protocols – as the preconditions for joining the WTO are unchangeable[868] and ii) WTO Accession Protocols form an integral part of the WTO Agreement.[869]

The different agreed terms of Working Party Reports and Accession Protocols to the WTO, therefore underline that there is a potential challenge, namely the commitment to export duties, while simultaneously seeking to preserve sovereignty over natural resources. So as to gain the optimal benefits in using export duties for the mineral resource–owned countries in the accession process, the Russian model must, therefore be followed. While laying down an explicit reference to the GATT in drafting export duties provisions which permits to invoke those general exceptions contained in Article XX of the GATT, the export duties must be stipulated under the Schedule of Concessions and Commitments on Goods under Article II:1 (a) of the GATT. This method, at least provides the acceding country with a margin of safety in connection with the levy of export duties on a number of raw materials as a trade policy tool for the purpose of preserving its sovereign rights over natural resources.

[867] Ya Qin (2012) pp. 1157–1158.

[868] Any modification or amendment would have a huge impact on the concessions made during the accession negotiations. Nonetheless, the choice for the WTO Member State concerned is to withdraw from the WTO system. It could use the market accession commitments incorporated into the schedules of GATT and GATS, which can be adjusted pursuant to the GATT and GATS procedures respectively.

[869] Consequently, they can be subject to the amendment process stipulated for other WTO Agreements. This possibility has never been tested.

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