

# SOVEREIGNTY OVER, OWNERSHIP OF, AND ACCESS TO NATURAL RESOURCES

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## Contents

1. Introduction
2. Sovereignty Over Natural Resources
  - 2.1. Absolute Territorial Sovereignty and Integrity
  - 2.2. Community of Property
  - 2.3. Relative Territorial Sovereignty and Integrity
  - 2.4. Present Trends
    - 2.4.1. Collision of Relative Sovereignty and Integrity in the Light of Rising Utilization Pressure and Scientific Knowledge
    - 2.4.2. Multilateral Agreement Approach towards Global Environmental Problems
    - 2.4.3. Social and Economic Issues
    - 2.4.4 The Other Side of the Coin: Proceduralization
3. Ownership of Natural Resources
  - 3.1. Public Ownership of Natural Resources
  - 3.2. Public Law Constraints on Private Ownership Rights
  - 3.3. Ownership and Economic Instruments
    - 3.3.1 Water Marketing
    - 3.3.2 Tradable Emission Certificates
- Bibliography
- Biographical Sketch

## Summary

Sovereignty and ownership are the most fundamental legal concepts governing the relationship between humankind and its natural environment. By dissecting the environment into artificial legal units, it is possible to attribute single “parts” of the environment to certain subjects. Today, the gap between these legal fictions underlying

the legal “compartmentalization” of the environment and the environment’s physical unity is widened—it seems nearly intransigently—by the hitherto unknown scale of anthropogenic pressure and in the light of the growing scientific knowledge on the consequences of human activities on the environment’s life support systems.

The attempt to close this gap by radically revising the concepts of sovereignty and ownership has to be rejected since modern complex societies would be unthinkable without the provision of clearly demarcated legal entitlements over natural resources. International state practice and national legislation, modifying the states’ sovereignty and the individuals’ ownership rights over natural resources, show, however, that these legal instruments are undergoing a slow but persistent transformation as response to changing circumstances.

Several such trends can be detected in public international law. States increasingly resort to coordinated actions towards transboundary environmental problems associated with the utilization of natural resources by concluding multilateral agreements and thereby voluntarily restricting sovereign rights. Some agreements addressing global environmental problems (climate change, loss of biodiversity) enjoy close to universal participation. The frequent introduction of the concept of conservation in the rising number of environmental agreements clearly indicates that States have come to realize the fundamental necessity of securing the long-term availability of natural resources. The installment of the regime of the “common heritage of mankind” over the non-state deep sea bed shows another remarkable break with century long habits: Non-state areas are not appropriated anymore by those States capable of and interested in appropriating them.

Developing countries lacking the technological and financial assets to participate in the appropriation of the polymetallic nodules located on the deep sea bed and fearing the interference of such exploitation with traditional international trade of natural resources—a main source of income for many of them—were at least partly able to influence the legal outcome according to their concerns and interests. The social and economic disparities between developed and developing states has, furthermore, led to formulation of the principle of “common but differentiated responsibilities”, thereby acknowledging that the formal equity of sovereign rights neither reflects the different contributions of states to environmental degradation nor their different capabilities to counteract these problem.

Private property in natural resources has always existed in the legal systems of the world. Correspondingly, such property has ever since been restricted to the benefit of the public. Public welfare considerations and private interests can either be balanced by exempting certain natural resources, such as running surface waters, from private ownership or by restricting the content of private ownership rights. Classical instruments of environmental law, e.g. permit requirements, emission and technical standard prescriptions, can be viewed as such restrictions on private ownership rights. In contrast to this regulatory approach, economic instruments aim at facilitating environmental protection by allocating private rights optimally over the market and thereby stimulating the efficient use of scarce natural resources.

## 1. Introduction

In legal writings superlatives are rarely found. However, the institutions of sovereignty of States over and the individual's ownership of natural resources can rightly be called supreme cultural achievements. Both share a common basic structure and function: The rightholder enjoys all powers of use and disposal allowed by law to the exclusion of others. Exclusive attribution of natural resources (and of all the goods produced therefrom) by right and not by sheer might is the fundament on which the whole genesis from simple social formations (e.g. tribes) to the complex globalized world-society is based. Individual persons and States were thus enabled to develop cooperative mechanism with profits lying far beyond the barriers of the zero-sum game of brute seizure and protection. The individual's freedom and the physical and planning security derived from this process form *the conditiones sine quae non* for the dynamic differentiation of society, e.g. the division of labor and production processes.

Ownership coordinates the conduct among individuals, whereas sovereignty coordinates the conduct among independent states. Both work on different levels. At the same time, ownership depends on sovereignty: Each sovereign State defines by law the content of ownership and the restrictions within which the individual can exercise the right of ownership. This fact leads to fundamental differences of law making in national law and public international law, and calls for a separate consideration of concepts in the following.

The initial question, however, has to be: Why is it important to review such successful institutions through the lens of environmental protection? Even though the question seems self-explanatory to modern society, the necessity shall be reflected through the contrast of the following quotes.

In 1930, a legal scholar observed that:

“[t]he overview of the productive forces of the world, which the League of Nations has published on the occasion of the world economy conference, was able to ban the ghost of the exhaustion of resources. The statistic of the population, the foodstuffs and raw materials showed with absolute certainty that the natural sources from which the world economy draws are available in undwindling abundance...” (*Hantos*, 1).

In 1972, the delegation from 113 States agreed on the Declaration of the United Nations Conference on the Human Environment, the so called Stockholm-Declaration, which includes the following passage:

“In our time, man's capability to transform his surroundings, if used wisely, can bring to all people the benefits of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment. We see around us growing evidence of man-made harm in many regions of the earth: dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere destruction and depletion of irreplaceable resources [...]” (*Declaration of the United Nations Conference on the Human Environment reprinted in Kiss / Shelton*, 385-390).

Certainty has been replaced by uncertainty; resources are not available in un-dwindling abundance but rather threatened by destruction and depletion. Sovereignty rights and ownership rights are the legal foundations on which the whole relationship between humankind and its environment is based. Carrying foundations are not reconstructed with light thought for the threat of the whole house collapsing. However, the fundamental conceptual change of the relationship between mankind and its environment has led to considerable codifications of sovereignty and ownership rights, which will be analyzed in the following.

## **2. Sovereignty over Natural Resources**

Sovereignty in its purest and widest sense means the supreme, absolute, and uncontrollable power by which any independent State is governed (*Black's Law Dictionary, 1396*). This premise leads to three conclusions. Firstly, it implies the State's right and power of regulating its internal affairs without foreign intervention (Prohibition of Intervention). Secondly, the internally unlimited Sovereignty of States is limited externally by the legal equality of other States (Sovereign Equality of States). Thirdly, public international law, i.e. the body of law governing the relationship between States, is characterized by the absence of a superior power and is therefore created only by consent between the independent sovereign States, who are rulers and subordinates at the same time (Coordinative Character of Public International Law).

As any institution, Sovereignty is a mingled compound of idea, reality and goals. The idea of sovereignty as defined above is under permanent pressure of modification arising from changing goals or changing factual requirements. "History never ends. The future is open. Sovereignty is a legal concept whose basis in social reality requires continuous monitoring" (*Meessen, 1199-2000*). As the temptation to use sovereignty to further political goals is great, and as factual requirements are naturally subject to diversified perception, it is understandable that "Sovereignty is the most glittering and controversial notion in the history, doctrine and practice of public environmental law." (*Steinberger, 397*) The legal assumption that each State governs its territory independently of external influences is contrary to the physical interdependency of the territories. Wind and water simply do not care about borders. In this conflict between normative postulate and factual circumstances, different perceptions have developed in legal writing and State practice from the beginning.

### **2.1. Absolute Territorial Sovereignty and Integrity**

Territorial sovereignty and integrity can both be deduced from the Sovereignty of a State. Territorial sovereignty means the freedom of every State to use its territory without any restrictions. Territorial integrity means the right of each State to prohibit any impacts on its territory arising from the territory of another State. The absolute claim of one State to use its territory freely is incompatible with the absolute claim of integrity of another State considering the transboundary impact of most activities on an industrial scale. The principles virtually exclude each other. Therefore, public international law cannot allow the simultaneous application of both principles.

If the principle of absolute territorial sovereignty were applied, then all States would enjoy the freedom to use their respective territories as they are, that is with all the external influences they are exposed to. At the same time all States would have strong incentives to externalize internal effects since they cannot be held responsible for them. Activities with degrading effects on resources, such as the pollution of natural resources, would be located in such a way that the negative consequences take place outside their territories. It would, for example, be lawful to wholly divert a river and stop it flowing into a neighboring country.

If the principle of absolute territorial integrity were applied, all States would have the right to insist that no activity on the territory of other States' is allowable, if it has an effect on their own territory. Leaving aside that it is virtually impossible to reduce all effects on other States' territory arising from activities on the own territory, even the serious attempt to minimize the external consequences as far as possible would entail a drastic reduction of the freedom of each State and every individual therein.

Both principles lead to results that are based on an anarchic perspective on public international law, which elevates the selfish interests of the States to being their guideline, and which does not provide any solutions for conflicts of interest. Considering the consequences stated above, no State would seriously consider the application of either principle. The appeal of these two positions is not their overall consistency, but the possibility to disguise (short term) political interests in legal terms, as the below mentioned historic examples illustrate.

Research casts doubts on the assumption that either of the principles has ever been part of international public law. The so-called Harmon Doctrine is often cited as evidence of state practice founded on the principle of absolute territorial sovereignty. In 1895, US Attorney General Judson Harmon delivered a legal opinion on request of the US State Department regarding a controversy with Mexico about the diversion of Rio Grande waters by American farmers, which had detrimental effects on the Mexican side. In this legal opinion Harmon stated:

“The fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its own territory [...] The fact that the Rio Grande lacks sufficient water to permit its use by the inhabitants of both countries does not entitle Mexico to impose restrictions on the United States which would hamper the development of the latter's territory or deprive its inhabitants of an advantage with which nature had endowed it and which is situated entirely within its territory. To admit such a principle would be completely contrary to the principle that the United States exercises full sovereignty over its national territory.”

It is doubtful whether the Harmon Doctrine has ever been more than a strategic negotiation tool cloaked as a legal position. Harmon's opinion was referred to at least twice by high State Department officials in communication with Mexico. However, it is not clear that the United States, in the context of the Rio Grande Dispute, actually believed (i.e. had the *opinio iuris*) that the Harmon Doctrine of absolute territorial sovereignty represented an existing rule of international law. Among other evidence for this conclusion it should be noted that the legal advisor of the US State Department, *Green Hackworth*, in a memorandum prepared for the United States agent in the Trail

Smelter arbitration (*Trail Smelter (US vs Canada)*, 3 R.I.A.A. 1905 (1941), reprinted in 35 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 684, (1941))—a case involving transfrontier air pollution rather than the use of an international watercourse—declared the theoretical opposite, the principle of absolute territorial integrity, applicable:

“It is fundamental principle of the law of nations that a sovereign state is supreme within its own territorial domain and that it and its nationals are entitled to use and enjoy their territory and property without interference from an outside source”. (*Memorandum in Relation to the Tail Smelter Case (US vs. Canada)*, Aug. 10, 1937, prepared by Green Hackworth, Legal Adviser, for Swagar Sherley, Agent of the United States, printed in *Territorial Integrity*, 5 *Whiteman DIGEST* §11, at 183, cited in *McCaffrey*, 582).

Ironically, both *Harmon* and *Hackworth* rested their opinion on the same US Supreme Court Decision, *The Schooner Exchange v. McFaddon*. (*The Schooner Exchange v. McFaddon*, 11U.S. (7Cranch) 116(1812)). Both did not take into account that Chief Justice Marshall also wrote in the judgment of this case:

“The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, [...] all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers [...]

A nation would justly be considered as violating its faith, although that faith might not be expressly pledged, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.”

Even though his wording is carefully designed not to deny the ideal of absolute sovereignty, Justice *Marshall* recognized as early as 1812 that the rigid idea must yield to certain factual interdependencies—a very remarkable insight considering that industrialization and the rise of world population had not yet reached its astounding momentum.

Both cases, the Rio Grande Dispute with Mexico and the Trail Smelter Controversy with Canada, ended with a mutually agreed compromise between the United States and its neighbors taking account of the equal sovereign rights of the parties. The Rio Grande Dispute was finally settled by a treaty in 1906 (*Convention Concerning the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes*). The Trail Smelter Dispute, which the governments of the United States and Canada submitted to arbitration, was settled by the decision of the arbitral tribunal.

If one does not look exclusively at the opinion delivered by *Harmon* and *Hackworth* but rather at the final equitable solutions the United States sought, there is no doubt that the principles of absolute territorial sovereignty and of absolute territorial integrity have never been more than a strategic negotiation tool in the state practice of the United States. (See *Lammers*, 270: “Attorney General *Harmon*’s opinion has never been followed either by the United States or by any other country of which I am aware....”). *Andrassy* also concludes after a

survey of State practice that the alleged principle of absolute sovereignty has never been acted upon by any state, and must be relegated to the realm of abstraction.

## 2.2. Community of Property

The principle of Community of Property has been explored by *Friedrich Berber* in his classical study on transnational waters: He concluded that any disposition over a transnational river requires approval of all States on whose territories the natural resource is situated. No single State can unilaterally dispose of the waters. The Principle of Community of Property, therefore, resembles the private law notion of joint ownership. Berber, among others, has identified traces of this principle with regard to transnational waters in legal writing and state practice.

For example *Farnham* states:

“A river which flows through the territory of several states or nations is their common property [...] It is a great natural highway conferring, besides the facilities of navigation, certainly incidental advantages, such as fishery and the right to use the water for power and irrigation. Neither nation can do any act which will deprive the other of the benefits of those rights and advantages. The inherent right of a nation to protect itself and its territory would justify the lower down the stream in preventing by force the one further up from turning the river out of its course, or in consuming so much of the water for purposes of its own as to deprive the former of its benefits [...] The gifts of nature are for the benefit of mankind, and no aggregation of men can assert and exercise such right and ownership of them as will deprive others having equal rights, and means of enjoying them, of such enjoyment [...] the common right to enjoy the bountiful provisions of Providence must be preserved.”

Again, the merit of the principle of community of property should not be judged by its actual acceptance in practice, but rather by theoretical orientation gained from it. It is the theoretical opposite of the theories of absolute sovereignty and integrity: In contrast to them it takes into account the factual interdependence between the States' territories, and it thus dissolves the notion of clearly divided legal entities. The principle of rights envisages that each state fully acknowledges the consequences that the utilization of the part of the river on its territory entails for the other states. Berber himself concedes critically, that though the principle of community of property is the principle most adequate for a completely integrated community, it is to be doubted that the actual condition of the community of nations can already support such an analogy to the situation found in national law (*Berber*, 14). He certainly did not primarily have in mind that States are not inclined to concede all of their sovereign control over vital parts of their territories, but rather that the realization of this theoretical concept would require institutions to ensure appropriate decision procedures.

The application of this principle to other natural resources would, firstly, be exposed to the same practical skepticism, though in some cases of much greater magnitude. For example, the atmosphere is a global resource, so that the principle would call for a community of property of all states over the atmosphere. However, the practical difficulties to reach a comprehensive consensual utilization scheme between not only some, but all States of the Earth seems virtually impossible. Secondly, the principle

does not only face practical skepticism but also dogmatic criticism. If the principle were applied to all other natural resources, i.e. the whole global life support system itself with all interactions between the environmental media (e.g. cross media pollution), then the legal concept of sovereignty of states would be abandoned as a whole; a small sacrifice when the necessary institutions have matured, but for the time being a utopia which should not be sought as a goal in itself.

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**Leo-Felix Lee** was born in 1972. He studied Law at the University of Trier Law School, Germany, and the Aristotle University Law School, Thessaloniki, Greece from 1991 to 1996. He was Personal Assistant to the Vice-Chair of the German Advisory Council on Global Change (WBGU), Prof. Dr. Juliane Kokott, L.L.M., S.J.D, from 1996 to 1998. From 1998 to 2000 he received the Scholarship of the Deutsche Bundsstiftung Umwelt and was a Lecturer in Public Law at the Faculty of Law, Heinrich-Heine-University, Düsseldorf, Germany. Since 2000 he has been Rechtsreferendar at the Superior Court Düsseldorf. He is currently working at the German Federal Ministry of Education and Research.