

CONSERVATION AND UTILIZATION OF NATURAL RESOURCES AND COMMON SPACES

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Summary

In dealing with conservation and utilization of natural resources and common spaces, a distinction between different types of natural resources should be made. Own natural resources of a State, i.e. those allocated within the national territory, in the continental shelf or the exclusive economic zone, fall under sovereignty rights. Therefore, they might be utilized and conserved by the State according to its own will. Recent developments in international law, however, show that the international community expresses a legitimate interest in conserving these natural resources. This might lead to a redefinition of sovereignty in the near future. Natural resources shared by two or more States form a different category. Most of the numerous treaties concluded are based on the principle of equitable utilization. This principle, a technique to ensure that the

possibilities of utilization are equitably distributed between the States sharing the resource, leads to several duties of transboundary co-operation. It has become part of customary law for shared water resources. Common spaces, i.e. areas beyond national jurisdiction, are protected by a series of multilateral treaties. Customary law is not very well developed here. Natural resources lying within common spaces either fall under the concept of common property or under the concept of common heritage of mankind. The first one is applicable to living resources, and the second has been developed for certain non-living resources.

1. Introduction

“Genuine” international environmental law is composed of rules protecting the environment from pollution. These rules are complemented by obligations affecting the conservation and utilization of natural resources. Their aim is to avoid an over-exploitation and permanent loss of natural resources. They are, therefore, of a mainly economic nature. But as natural resources form an integral part of the environment, the rules protecting them from economic abuse have also got an environmental impact.

Natural resources are those parts of the environment which are used and exploited by man. They can be either living or non-living, renewable or non-renewable. Almost the whole fauna and flora is part of natural resources, but also air, water, and soil when used by man. Usually, in treaties as well as in many other international documents, a terminological distinction is made between the environment itself and the natural resources. Nevertheless, natural resources do form a specific part of the environment. In other words: Natural resources are those parts of the environment which are of economic interest and, therefore, lead to conflicts between States.

Traditionally, international law has protected natural resources indirectly by determining the way property and sovereignty rights are allocated among States. This “distribution” of natural resources between States (see Sovereignty over, Ownership of, and Access to Natural Resources) in order to avoid an over-exploitation is one way of protecting them. More recently, however, international law has developed direct means to protect natural resources by obliging States to conserve and protect them. These rules are of particular significance to living resources, but also affect non-living resources as well as the use of water, air, and common spaces.

The utilization of natural resources is closely linked to the notion of sovereignty. A sovereign State is free in using its natural resources. The obligations to conserve them, however, have to be explicitly imposed, either by customary or by treaty law. It is only in the last decades that problems concerning conservation and utilization of natural resources have been recognized as a distinct and important field of international concern. The law in this area is still scattered. No single body of doctrine has yet emerged which can appropriately be described as an “international law of natural resources”. It is still uncertain whether the many different types of natural resources, the diverse problems they encompass and the different legal systems which are of influence can be handled within a single framework of rules. In dealing with conservation and utilization of natural resources, a distinction should, therefore, be made between

different types of natural resources: those being under the control of a single State, those being shared between two or more States and those allocated within common spaces.

2. Own Natural Resources

2.1. Natural resources within the national territory

Natural resources are allocated to sovereign States according to their territorial boundaries. Control over natural resources depends on the acquisition of sovereignty over a certain part of the earth. The national territory consists of the land territory, including inland waters, ground waters, internal waters and the territorial sea, as well as the air space up a height of 90-100 km, where outer space begins. Natural resources lying within the national territory of a State fall under its sovereignty. The State has got the exclusive right to freely use and exploit its natural resources. This sovereign right extends to all types of natural resources, may they be living or non-living, renewable or non-renewable.

But sovereignty itself does not impede private or foreign ownership of natural resources. This developed into a problem newly independent States had to face after 1945. Important parts of their natural resources, notably their mineral and oil resources, rested in the hands of private owners within the former mother countries. The response of the developing States was to create the principle of “permanent sovereignty over natural resources”. Their efforts resulted in the adoption of a resolution by the UN General Assembly in 1954. Further resolutions were adopted in the years to follow. These resolutions emphasized the apparently untrammelled sovereignty over natural resources, implying that any restrictions would for the most part require agreement between the States concerned. Two years after the 1972 Stockholm Environment Conference, the UN General Assembly adopted the Declaration on the Establishment of a New International Economic Order. Its article 4e reaffirms permanent sovereignty over natural resources and the right to nationalize them. This was followed by the adoption of the Charter of Economic Rights and Duties in the same year. Article 2 lays down that every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over its wealth, natural resources and economic activities.

Whilst not binding, these documents affected the development of international law considerably. Some States, mainly the developing countries, regard the principle of permanent sovereignty over natural resources as being part of customary law. The principle has also been cited and relied on as evidence of the existing law by international arbitral tribunals. The industrialized States, on the contrary, are traditionally opposed to the principle. In reality, however, the strong dissent between the two groups of States only refers to the inherent right to nationalize or control foreign-owned resources and industries. The heart of the principle, the right to exploit freely the natural resources, a consequence of sovereignty itself, was never questioned. Sovereignty over a certain territory leads, therefore, to the right to exploit freely all natural resources located there. This comprehensive sovereign right extends to all types of natural resources in question.

Natural resources located in the continental shelf and the exclusive economic zone form a different category. The sovereignty of a coastal State does not extend to the waters themselves (they remain part of the High Seas), but it has got sovereign rights over the resources located there. These sovereign rights, developed as part of customary international law, were later codified in international treaties.

2.2. Natural Resources within the Continental Shelf

The continental shelf of a coastal State consists of the natural prolongation of its land territory underneath the sea. The discussion about sovereign rights in this area started in 1945. The Truman Proclamation concerning the continental shelf declared natural resources of the continental shelf as falling under the jurisdiction and control of the United States, whilst the sea above continued to be part of the High Seas. The reason for this proclamation was the development of new techniques allowing for the exploitation of natural resources, mainly oil resources, of the deep sea bed. Several similar proclamations of coastal States followed. There was almost unanimity among those concerned that sovereign rights over natural resources in the continental shelf had become part of customary international law this way. In 1959, the concept found specification in the Convention on the Continental Shelf. Later on, it was explicitly regulated in the United Nations Convention on the Law of the Sea 1982 (UNCLOS).

Even though some questions concerning the exact delimitation of the continental shelf remain open, it is accepted by customary international law that the continental shelf comprises the sea bed and subsoil of the submarine areas extending beyond the territorial sea to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines where the outer edge of the continental margin does not extend up to that distance. In this area the coastal State exercises exclusive sovereign rights for the purpose of exploring and exploiting natural resources. The natural resources referred to here consist of the mineral and other non-living resources of the sea bed and subsoil together with living organisms belonging to sedentary species. In the continental shelf, the right to exploit freely natural resources is thus limited to certain types of them. However, this right does not depend on occupation, effective or notional, nor on any proclamation.

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Biographical Sketch

Kerstin Odendahl was born in Hamburg, Germany, and grew up in Mexico. She studied law and international politics in Bonn, Aix-en-Provence and Trier (1988 – 1994). She obtained her Certificat d’Etudes politiques, Section Relations Internationales (1992), passed the First State Examination on Law in Trier (1994) and the Second State Examination of Law in Cottbus (1998). In 1997 she obtained her Ph.D. in International Environmental law at the University of Trier (Ethics Award 1997). From 1998 to 2000 she was Coordinator of the Postgraduate-Program “European Studies” in Berlin. From 2000 to 2004 she was Assistant Professor at the University of Trier leading a research project on the protection of the cultural heritage. Since 2004 she is Professor of Public International law and European law at the University of St. Gallen, Switzerland. She has published several books and journal articles on international, European and German public law. She is fluent in German, English, French and Spanish.