INTERNATIONAL DEVELOPMENT LAW AND PUBLIC INTERNATIONAL LAW

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Summary

This is one of three articles in the topic that focuses on the relationship between international development law and other branches of the law. The two remaining articles analyze the relationship between international development law and international economic law on the one hand, and municipal/national law on the other.

While the three branches of the law included in the present study of the relationship with international development law are not in any way on an equal or even comparable footing in their relationship or mutual interactions with international development law, this article will examine principally the relationship between international development law and public international law. Two ensuing articles will in turn pursue their respective enquiry into the relevancy and relationship between international development law and international economic law, followed by a study of a comparable subject relating municipal law or national law.

First and foremost, it should be pointed out that the relationship between international development law and public international law is primarily circumscribed by the extent to which a State may at will freely adopt any national plan for the development of the country, whether economic, social or otherwise without violating any rules of public international law. In this article, public international law may be viewed as a body of rules confirming freedom of action for every State in the drafting, preparation and adoption of its own

national development plan and enabling it to proceed freely and unimpeded with the selection of its own methodology and its own time-frame for the implementation of the national plan without adversely affecting or harming the essential or vital interests of other States.

In the present context, the term International Development Law bears an intimate connection with a major branch of the law which is known as the law of nations or public international law. This major branch of the law has given rise to a growing number of newly emerged sub-branches of international legal studies. The law of nations itself has expanded and extended its coverage to embrace new areas of progressive legal developments from Bentham's international law to Jessup's transnational law. Public international law is no longer confined to the regulation of relations between States and governments but must take into account the emerging new international legal personalities and entities such as the galaxy of international and regional organizations and the rights and duties recognized not only for these international governmental bodies, but also for individuals and multinational corporations as well as non-governmental instruments, agencies and organizations. Among the many novel fields of operation of international law must be mentioned international humanitarian law, international human rights, international environmental law, international investment law and international development law.

An account is taken of the close connection of international development law with international economic law, international trade law and international financial institutions, the first of which will be examined in the next article, and the inextricably mixed contents and mingled evolution of rules of international law generated by the practice of States through their national legislation and case-law which will be in the third and last article of this topic. There appear to be numerous other sub-areas and sub-branches of public international law which must be treated under the present heading.

It is proposed that this article will cover first the inherent relationship between international development law and public international law in general, and thereafter to identify in some detail the relationship between international development law and a selection of recently developed divisions or sub-branches of international law.

1. International Development Law as an Offshoot of Public International Law

Public international law provides the reasons and justifications for the birth of international investment law as it does for international development law, which is a twin brother or the other side of the same coin, albeit with reverse emphasis. Public international law is not purely limitative or restrictive in deliminating the scope or setting an appropriate limit to the power of a State to do whatever it pleases within the territorial confines of its exclusive domain. It is also constitutive and collaborative in the affirmative sense in which public international law may be said to have furnished the legal basis and foundation for most principal sources of international development law, formal, material as well as evidentiary.

Indeed, no rule of international development law could have come into being without the pre-existing system of international legal order based on rules of public international law. Neither a nation State nor the international community could have prescribed rules regulating national development without the fundamental principle that a State is sovereign

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and its authority is absolute and unlimited within its national boundaries, except as limited by itself or by rules of public international law.

In this manner, the system of international development law owes its existence and establishment to an earlier and more basic branch of the law, namely, public international law. In other words, international development law could be regarded as an offshoot if not an offspring of public international law. It derives its authority from the law of nations and shares many sources and common principles with public international law.

2. Public International Law as Provider of Material Sources of International Development Law

Public international law is not only a fountain of international development law. It further furnishes material sources for its growth and productivity. Lawlessness resulting from the exercise of unlimited power by States even within their own national frontiers must at all costs be avoided. Hence, relevant rules of international law may be invoked and relied upon by States in their individual and collective efforts to achieve the desired objectives of their carefully planned national economic development.

The very law that governs orderly national development from the perspective of world order is mainly identified, in greater parts, with the rules of public international law, chiefly as recognized, interpreted and applied by States as well as international organizations, their principal and subsidiary organs and specialized agencies and regional commissions, including to a minor but increasing extent also by innumerable non-governmental organizations (NGOs) of national, regional, sub-regional, inter-regional and global or universal character.

Thanks to the variety of traditional and new subjects of public international law, international development law continues to receive an inexhaustible supply of material sources for continuing progressive evolution through the practice of States and international organizations, governmental and non-governmental.

3. Shaping and Moulding of International Development Law

Having provided a solid foundation and material sources for rules of international development law, public international law further nurtures the soil on which international development law has taken firm root and started to grow and to bear fruits. The necessity for the imposition and maintenance of law and order in the international community dictates the requirement that a State could only design, devise, structure and implement its national plan in accordance with, and without violating, the prevailing relevant rules of public international law.

Several branches or sub-branches of public international law have exerted an influence or materially contributed to the shaping and moulding, if not indeed the actual formulation, of rules of international development law, not to mention international economic law and comparative techniques employed in the survey of national legislation on development law. A wide variety of areas of public international law where national sovereignty is curtailed in the field of development by general rules of public international law may now be

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examined.

3.1. International Liability and International Protection of the Environment

The first instance of a tight relationship or control of development law by rules of public international law is traceable to the application of a basic general principle of law now adopted as general international law, better expressed in the Latin maxim : *"Sic tuo utere ut alienum non laedas"*. In other words, you may use your property only to the extent that you do not harm others. This international obligation incumbent upon every State is owed to immediate adjacent neighboring States and their peoples as well as to far distant areas where harm could be introduced by activities from within the territorial limits of a State or otherwise under its jurisdiction or control.

Thus, Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm, 1972, UN Doc. A/CONF. 48/18,, 11 ILM 1416, 1972) encapsulates one of the first basic principles of international development law as follows :

> *"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 pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."*

Duty to avoid harm

This duty on the part of every State to avoid harm is owed first to every other State and ultimately to the international community in respect of harm to areas beyond national jurisdiction. Accordingly, the international community as such, in addition to each and every State adversely affected by activities generated by or from a State, is credited with the right to reparation by having undone the injurious consequences of otherwise seemingly lawful activities from within the border, jurisdiction or control of that territorial State.

Duty to mitigate damage

As a necessary corrolary to the duty to avoid harm, other secondary obligations follow. The duty to mitigate, abate or reduce the gravities and quaintum of injurious or harmful consequences is contingent upon failure to fulfil the duty to avoid harm.

Polluter pays principle

It follows further that even if the resulting harm has been to some extent successfully abated or mitigated, the residual harmful results, by way of pollution, contamination or otherwise producing injurious effect on the territory of another State, still entail an obligation to make necessary reparations, to undo the consequences of the actual harm sustained. Hence, the polluter, i.e., the State from which pollution occurs or the entities causing harm by way of pollution, must be held liable to make amends, that is to say to pay compensation or make reparation to the extent that the victim or victims could be restored to their positions prior to the infliction and suffering of harm.

Precautionary principles

Precautionary principles are designed to impose strict or almost absolute liability on the

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entities or the State that caused harmful effect on another State or its inhabitants. Apart from direct causation which has to be proven, no other evidence is needed to establish strict liability without proof of fault or negligence. The precautionary principles have found expression, formulation and restatement in various Conventions, such as on transportation of ultra-hazardous substance or nuclear materials on land, by sea, or in the air or outerspace.

Duty to warn and duty to cooperate

From the precautionary principles are derived various ancillary obligations on the part of a State, such as, the duty

- To cooperate with other States and competent international organizations;
- To provide or exchange information and relevant data for the use of shared resources, such as international rivers;
- To give due warning of the clear and present danger, such as the existence of mines within the territorial waters or areas under control of a State or coastal State (Corfu Channel Case, ICJ 1949, Report p.4);
- To perform impact assessment on the environment for any new and on-going economic development project.

Duty to accept bona fide international assistance in the event of a natural disaster

In its national development plan, a State is under a duty not to exclude the possibility of a friendly gesture from a neighboring State or an international organization extending an offer of outside humanitarian assistance without any favor in return and with no string attached. Such an offer which is tendered bona fide cannot be rejected without a reasonable cause. This obligation to accept international help and assistance is consistent with good order in pursuit of national development plan and policies.

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Bibliography

ALSTON. *The Legal Formulation of the Right to Development*, Hague Colloque 59.

AMERASINGHE (1976). *State Responsibility for Injuries to Aliens*.

BARTON and FISHER (1986). *International Trade and Investment, Regulating International Business*, Little, Brown & Co.

BEDJAOUI (1979). *Pour un nouvel ordre économique international* UNESCO.

BROWNLIE (1983). *Principles : System of the Law of Nations : State Responsibility.*

COMMISSION ON HUMAN RIGHTS (UN) (1980). *Report of the Working Group of Government Experts on the Rights to Development*, E/SCN.4/1984/13, GA. Res. 35/174.

UNESCO – EOLSS SAMPLE CHAPTERS

FELICIANO (1966). *Legal Problems of Private International Enterprise* 118 Hague Receuil 209.

GARCIA-AMADOR (1955). *State Responsibility in the Light of New Trends in International Law,* 49 A.J.I.L. 339

HAGUANI (1979). *Le Droit au Développement : Fondement et Sources* Hague Colloque 22.

HENKIN (1978). *The Rights of Man Today*.

LILLICH (1963). *International Law of State Responsibility for Injuries to Aliens.*

M'BAYE (1979). *Le Droit au développement.* Hague Colloque 72.

MEIDINGER (1980-81). *The Public Uses of Eminent Domain : History and Policy,* 11, Environmental Law 1.

OKEKE (1990). *A Note on the Right of Secession as a Human Right*, III GGU Annual Survey.

RICH (1983). *The Right in Development as an Emerging Human Right.* 23Va.J.I.L. 287.

SOHN & BAXTER (1961). *Responsibility of States for Injury to the Economic Interest of Aliens* 55 A.J.I.L. 55.

SORNARAJAH (1986). *The Pursuit of Nationalized Property.* Nijhof.

SCHACHTER (1976). *The Evolving International Law of Development,* 15 Col.J. Transnational Law.

SEIDL-HOHENVELDERN (1979). *International Economic "Soft" Law,* 163 Hague Receuil 169.

THEMAAT (1981) .*The Changing Structure of International Economic Law,* The Hague.

VASAK (1977). *A 30-Year Struggle.* Nov. issue UNESCO Courier 32.

VERZEIJL. *International Law in Historical Perspective.*

VIRALLY (1974). *La Charte des Droits et Devoirs Economiques des Etats* 20 Annuaire français de droit international 57.

Biographical Sketch

Dr. Sompong Sucharitkul is currently Associate Dean and Distinguished Professor of International and Comparative Law at Golden Gate University School of Law, San Francisco, USA. He also directs the Golden Gate Center for Advanced International Legal Studies and the LL.M. and S.J.D. International Programs.

He holds B.A. (Hons. Jur.), M.A., B.C.L., Doctor of Philosophy (D. Phil.) and Doctor of Civil Law (D.C.L.) from Oxford; Docteur en Droit (D.E.S.D.I.Pub.) from Paris; and Master of Laws (LL.M.) from Harvard. He also has a Diploma from the Hague Academy of International Law and is Barrister-at-Law of the Middle Temple, United Kingdom.

For 15 years, Dr. Sucharitkul served as Ambassador of Thailand to BENELUX, Japan and four other European countries as well as the European Economic Community and UNESCO. For nearly three decades, he has frequently been Representative of Thailand to the United Nations General Assembly, and served as Chairman of the Delegation to the Third U.N. Conference on the Law of the Sea. He served 10 years as a Member of the International Law Commission, 9 years as Special Rapporteur of the Commission and sometimes as its First Vice-Chairman and Chairman of the Drafting Committee.

Ambassador Sucharitkul has been a Member of the Permanent Court of Arbitration (Thai National Group) and is currently a Member of the Commercial Arbitration Centre at Cairo, of the Regional Arbitration Centre at Kuala Lumpur, and Member of the Panels of Arbitrators and of Conciliators of ICSID (International Centre for the Settlement of Investment Disputes), World Bank, Washington D.C. He is a Member of World Intellectual Property Organization (WIPO) Mediation and Arbitration Center, Geneva, and a Commissioner of the United Nations Compensation Commission (UNCC), Geneva. He is also serving as Commissioner of the United Nations Compensation Commission (UNCC), Geneva. He is an elected Member of the Institute of International Law (Geneva) and a Corresponding Collaborator of

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UNIDROIT (Rome); he is currently serving as President of the ASEAN Investment Dispute Tribunal.

As a teacher of international law, apart from at universities in Thailand, Dr. Sucharitkul has served as Fulbright Professor of International Law and World Affairs at the University of North Carolina at Charlotte, USA, as Visiting Professor of Law at the National University of Singapore, as Robert Short Professor of International Law and International Human Rights at Notre Dame Law School, USA, as Visiting Professor of International Law and Business at Lewis & Clark Northwestern School of Law, USA. and as Cleveringa Professor of International Law at the University of Leiden, the Netherlands.

Dr. Sucharitkul has conducted research and published extensively in international law and world affairs. His publications include eight U.N. reports for the International Law Commission. His works are mainly in English, French and Thai.

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