OIL SUPPLY, OIL SECURITY, AND ENVIRONMENTAL OBJECTIVES IN INTERNATIONAL LAW

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Keywords: Oil supply, oil security, environment, international law, sovereignty, natural resources, commodity organizations, OPEC, IEA, Energy Charter Treaty, liability for environmental damage, global warming, greenhouse gases, climate change, Stockholm Declaration, oil pollution of the ocean, environment and the law of war, UNCLOS, FCCC, Kyoto Protocol

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Summary

This article surveys the interrelations of oil supply, oil security, and the international law of the environment. The traditional legal rule at work in these sectors is the rule of state sovereignty, which ensures to each state the right to regulate its natural resources, including oil and its products, and to do so freely in accordance with state interests and policy. That right is qualified, however, by the other applicable rules of international law, mainly customary law and treaty law. States generally are free to exploit their resources or not, to trade them or not, to act individually in making resource decisions, or to organize into commodity or other international organizations that may result in limitations on their freedom of action. This is seen for the Organization of Petroleum Exporting Countries in its members' decisions about oil production and price levels, and for the International Energy Agency (IEA) in its oil sharing and other procedures for dealing with oil supply disruptions, and in its long-term energy solutions to reduce dependency on imported oil. Similarly, the Energy Charter Treaty is regulating energy

trade and investment among the parties to that treaty, covering a broad spectrum of energy activity.

In addition, international law has now developed a body of rules about liability and the environment. Legally binding rules govern the liability for misuse of resources, such as the liability of a state, which allows its territory to be used for industrial or other activity that results in damage to neighboring states, as in the case of production of noxious gases that flow over the border and cause damage in other countries. The international law of the sea protects the marine environment by well-developed rules concerning pollution of the oceans, oil wastes, and oil spills. Moreover, states are not free to use environmental destruction as a method or means of armed conflict, as the United Nations Security Council confirmed in the Gulf Crisis in 1991.

The tension between the freedom of state sovereignty, on the one hand, and regulation for environmental protection, on the other hand, has been evolving in favor of the environment, as seen in the contemporary problems of global warming and climate change. The United Nations Framework Convention on Climate Change and its Kyoto Protocol have set the stage for long-term solutions to these problems, in providing the forum and main policy objectives for state actions to reduce greenhouse gas emissions responsible for global warming. State actions may well lead eventually to radical reductions in the use of fossil fuels, mostly coal and oil for heating, electricity generation, transport, and other uses. Although the attempts to develop hard law in this field have been largely unsuccessful so far, the Framework Convention on Climate Change system is in place to develop and implement more concrete international law when the political conditions for such actions become more favorable.

1. Introduction

Throughout most of the twentieth century, questions of oil supply, oil security, and environment were inseparable in international law and in national policy, and this close relationship will inevitably continue—and even intensify—during the twenty-first century. Legal issues of fundamental importance in these fields abound. They begin with the notion of state sovereignty applied to perennial questions of ownership and control of natural resources, exploration, development, resource production rates, distribution, processing, uses, and applications **(see *International Law and Sovereignty in the Age of Globalization*).** Legal issues extend to new forms of international organizations with rule-making powers, to other legal forums, and to policy making to remedy the potential for resources to bring harm and loss as well as benefits to individual states and to the international community.

In the petroleum field, the sovereignty rules emphasizing the powers of states made room in the second half of the twentieth century for systematic international cooperation, first among the oil-producer states and later among the oil-consuming states and among other groupings of interested states. New international organizations became the forum for cooperative actions in Organization of Petroleum Exporting Countries (OPEC) countries in 1960, and then in the International Energy Agency (IEA), grouping the major oil-consumer states in 1974. Further cooperative arrangements were established in the 1990s by the Energy Charter Treaty, which

brought together some fifty states of Europe and other regions of the world. Each of the treaties establishing these organizations contains new legal rules applicable to the petroleum resource, reflecting the different perspectives of their respective contracting parties. Meanwhile, related environmental concerns came into sharp focus with the Stockholm Conference of 1972 and later under the United Nations (U.N.) with the responses to the growing problem of global warming and broader questions arising out of the use of fossil fuels which gave rise to the Framework Convention on Climate Change (FCCC) in 1992 and to the Kyoto Protocol in 1997. These concerns continue to play a major—and perhaps dominant—role in energy law and policy.

2. Sovereignty over Natural Resources: The Legal Dimension

The fundamental international legal doctrine governing state powers over petroleum resources is found in the classic doctrine of territorial sovereignty. As stated by Jennings and Watts in *Oppenheim's International Law* (Vol. I, p. 382, 1996):

Sovereignty has different aspects. Inasmuch as it excludes subjection to any other authority, and in particular the authority of another state, sovereignty is *independence.* It is *external* independence with regard to the liberty of action outside its borders. It is *internal* independence with regard to the liberty of action of a state inside its borders. As comprising the power of a state to exercise supreme authority over all persons and things within its territory, sovereignty involves *territorial* authority (*dominium, territorial sovereignty*). As comprising the power of a state to exercise supreme authority over its citizens at home and abroad, it involves *personal* authority (*imperium, political sovereignty*).

And more specifically with regard to natural resources:

The territorial authority of a state over everything within its territory includes sovereignty over the state's natural resources, such as mineral deposits (p. 384).

The notion of sovereignty is reflected in Article 2.1 of the U.N. Charter, which refers to the "sovereign equality" of all members of the organization. Sovereignty was also reaffirmed with respect to petroleum resources in the Energy Charter Treaty of 1994 (34 ILM 360 (1998); **see *Section 5. The Energy Charter Treaty*)** as follows:

Sovereignty Over Energy Resources

(1) The Contracting Parties recognize state sovereignty and sovereign rights over energy resources. They affirm that these must be exercised in accordance with and subject to the rules of international law.

Sovereignty means that a state is free to act as it wishes on natural resources, subject to the rules of international law, in its dealings within the state and in its relations with other states as well as international organizations. Thus a state may trade or not trade resources and their products may permit its nationals to do so or not, for whatever policy or legal reasons seem appropriate, subject to the U.N. rules and decisions, and to customary international law and the terms of applicable treaties. Sovereignty also means

that in the internal regulation of the oil resource, states remain largely free to legislate in their interest or in a wider context of shared interests as they see them, subject to the rules of international law in the form of evolving customary law as well as to the terms of treaties by which they have taken legal obligations on energy resource matters, as they have notably in OPEC, the IEA, the Energy Charter Treaty, and more broadly in the environment field.

It is a commonplace and still quite viable notion that oil in the ground is a natural resource, historically subject to exclusive control of the territorial sovereign with respect to ownership, transfer, exploitation, and regulation. Yet the scope of sovereign control has not been free from international controversy. One of most poignant international legal disputes in the management of resources under sovereign control involved two actions of the U.N. General Assembly on the concept of sovereignty and its practical applications in the field of expropriation of foreign property. The different approaches of the industrialized countries on the one hand and the developing countries on the other hand were then the subject of an international arbitration that sought to reconcile the apparent differences between the two General Assembly actions.

The first action, entitled "Resolution on Permanent Sovereignty over Natural Resources" and adopted on December 14, 1962 (Resolution 1803(XVII, 2 ILM 223 (1963)), set the basic pattern. Recognizing and applying the international law dimension, the resolution declared (emphasis has been added by this author) that:

- The 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.
- The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.
- In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force and by *international law* . . .
- 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* . . .
- 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 based on their sovereign equality . . .
- 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.

The second action came over ten years later, with less emphasis on international law and more provisions that recognized the concerns of the developing countries. The Charter of Economic Rights and Duties of States, adopted on December 12, 1974 (Resolution 3281 (XXIX, 14 ILM 251 (1975)), provides in Article 2 (emphasis has been added by this author) that:

- Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
- Each State has the right:
- To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment; . . .
- To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the *domestic law of the nationalizing State and by its tribunals*, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

The problems of reconciling the two texts on expropriation and of determining whether to apply international law or domestic law were taken up in 1977 by the sole arbitrator, in the case of *Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. the Government of the Libyan Arab Republic* (17 ILM 1(1978)) in which the plaintiffs sought relief from the Libyan government's nationalization of their property. The Arbitrator, René-Jean Dupuy of France, decided that the arbitration clause in the concession agreements referred to international law as the rule of decision, rather than the national law of the host state. Then he examined the content of the "international law" that was to govern. One aspect of these problems is dealt with below in the award (emphasis has been added by this author): 85. . . . The 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. 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, paragraph 2(c) of Article 2 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 . . .86. . . . As this Tribunal has already indicated, the legal value of the resolutions which are relevant to the present case can be determined on the basis of circumstances under which they were adopted and by analysis of the principles which they state: With respect to the first point, the absence of any binding force of the resolutions of the General Assembly of the United Nations implies that such resolutions

must be accepted by the members of the United Nations in order to be legally binding. In this respect, the Tribunal notes that only Resolution 1803 (XVII) of 14 December 1962 [the Permanent Sovereignty resolution quoted above] was supported by a majority of Member States representing all of the various groups. By contrast, the other Resolutions mentioned above [including the Charter quoted above], and in particular those referred to in the Libyan Memorandum, were supported by *a majority of States but not by any of the developed countries with market economies which carry on the largest part of international trade.*

87. With respect to . . . the appraisal of the legal value on the basis of the principles stated, it appears essential to this Tribunal to distinguish between those provisions stating the existence of a right on which the generality of the States has expressed agreement and those provisions introducing new principles which were rejected by certain representative groups of States and having nothing more than a *de lege ferenda* value only in the eyes of the States which have adopted them; as far as the others are concerned, the rejection of these same principles implies that they consider them as being *contra lege*. With respect to the former, which proclaim rules recognized by the community of nations, they do not create a custom but confirm one by formulating it and specifying its scope, thereby making it possible to determine whether or not one is confronted with a legal rule. As has been noted by Ambassador Castañeda, "[such resolutions] do not create the law; they have a declaratory nature of noting what does exist" (129 RCADI 204 (1970), at 315).

On the basis of the circumstances of adoption mentioned above and by expressing an *opinio juris communes*, Resolution 1803 (XVII) seems to this Tribunal to reflect the state of customary law existing in this field. Indeed, on the occasion of the vote on a resolution finding the existence of a customary rule, the States concerned clearly express their views. The consensus by a majority of States belonging to the various representative groups indicates without the slightest doubt universal recognition of the rules therein incorporated, i.e., with respect to nationalization and compensation the use of the rules in force in the nationalizing State, but all this in conformity with international law.

Thus the tribunal declined to accept the majority vote in the General Assembly for texts stating international legal principles on expropriation of resources unless there was a general consensus reflecting the views not only of the majority but also the minority on that issue. The International Court of Justice employed similar reasoning in its opinion on the *Legality of the Threat or Use of Nuclear Weapons* (35 ILM 809, paras 68–71 (1996)). Yet two other provisions of the 1974 Charter have roles to play in the resources issues examined here. They relate to the situation of international commodity organizations, of which there have been a number in such fields as coffee, cocoa, sugar, tin, and wheat, among others. These organizations received strong support in the 1974 Charter as follows (emphasis has been added by this author):

Article 5

All States have the right to associate in organizations of primary commodity producers in order to develop their national economies, to achieve stable financing for their

development and, in pursuance of their aims, to assist in the promotion of sustained growth of the world economy, in particular accelerating the development of developing countries. Correspondingly, all States have the duty to respect that right by refraining from applying economic and political measures that would limit it.

Article 6

It is the duty of States to contribute to the development of international trade of goods, particularly by means of arrangements and by the conclusion of long-term commodity agreements, where appropriate, and taking into account the interests of producers and consumers . . .

However, like Article 2(c) taken up in the *Texaco* case above, Articles 5 and 6 as well as the rest of the 1974 Charter failed to receive sufficient consensus support to be accepted as stating rules of customary international law, because a number of important industrial market economy countries voted against the entire charter. Under the arbitrator's reasoning in the *Texaco* case, the limiting features of Article 5 (the "duty" of states to refrain from applying economic or political measures) may therefore be seen as essentially political and aspirational in character. These articles reflected the wishes of the developing countries but do not state customary international law on this subject. However, there is no legal objection to commodity organizations in general, of course. They are fully recognized by the world community in Article XX(h) of the General Agreement on Tariffs and Trade (GATT) of 1947 and 1994 (see www.wto.org). In the meantime, the 1974 Charter has diminished in standing and application.

The foregoing legal authorities establish without doubt the continuing conceptual role of state sovereignty in the management of foreign petroleum problems. The oil resource states are still in control. Moreover, if the major international oil companies once controlled much of the daily management of foreign oil resources (due largely to the companies' available capital, expertise, and entrepreneurial spirit), by the early 1970s that power was assumed by the governments of resource states.

These states began to exercise more direct operational control, aided by the doctrine of territorial sovereignty and by their cooperation in OPEC. This brought about the first systematic international organization cooperation and international agreements on oil. These far-reaching actions would lead in turn to the historic oil price, supply, and political embargo crisis of 1973/74 and the consumer countries' reluctant recognition of OPEC's strong role in world oil markets, which continues to the present day.

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Biographical Sketch

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