Back to The Future?

PSNR and State Regulation

of Petroleum Resources

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Abstract

This thesis is an exploration of the evolution of State regulation of upstream oil and gas activities, whether this evolution reflects the emergence of a change in the content of the permanent sovereignty over natural resources doctrine as a rule of customary international law and what the implications of that would be for international law. The study of the evolution of State regulation is carried out through case studies of State practice of twenty-five countries in three specific areas that are: government take, nationalizations, and local development, with regard to hydrocarbon upstream activities.

These changes in regulation are looked at from the point of view of the justifications that States have given for them, either domestically or in international fora. These justifications are then assessed under rules of international law that could affect the scope of the primary norms or secondary rules of State responsibility. As regards the former concepts such as legitimate expectations, energy security, equity, and conflicts of rules are analysed. As to the latter, circumstances precluding wrongfulness including state of necessity and *force majeure* are the key elements.

These case studies are then analysed and compared in the light of these concepts. The conclusion of the thesis is that there is evidence that State practice in relation to upstream hydrocarbon activities has evolved to the extent that the concept of permanent sovereignty over natural resources has evolved to include concerns such as the protection of local communities, but continues to include the long-standing concern with regard to energy security.

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V. CHAPTER 1: INTRODUCTION

As is not infrequently the case with doctoral theses, the subject of this thesis has shifted over time, not only due to the obvious effects of investigation on knowledge, but also due to the changes that have occurred in the hydrocarbon and international law environment. When this project started it was motivated by what appeared to be an increase in hydrocarbon-related arbitrations in international fora, and arguments being presented by States, in the context of arbitrations involving large energy companies challenging State action, based on the permanent sovereignty over natural resources (PSNR) doctrine, the defence of state of necessity under international law, obligations related to guaranteeing energy supply, and other obligations relating to sustainable development, local communities and local indigenous peoples.

This thesis focuses on whether or not customary international law is developing in what are considered the key aspects of regulation of upstream hydrocarbon regimes from the perspective of the State acting in its sovereign capacity. Those key aspects are: where the revenues generated from a non-renewable resource within the territory of the State are affected, i.e. government take; where the development of local communities is affected, either through environmental regulations or through measures related to the development of local community, including indigenous peoples rights; and nationalisation of the hydrocarbon industry or parts thereof.

These areas are sufficiently indicative of evolution of the PSNR doctrine as they are either the areas where, in the past, the PSNR doctrine was invoked by States

as a defence for measures related to the hydrocarbon industry, or areas where, currently, States are adopting measures that relate to obligations to their local communities and that, additionally, have correlated obligations under international law.

The example that triggered interest in developing this issue can be found in the Decision on Liability in *Burlington v Ecuador.* That case was brought by the US oil and gas company, Burlington Resources Inc. (which is part of the US energy conglomerate, ConocoPhillips Co.), in relation to measures taken by Ecuador through which it increased the government take after oil price increases. There, Ecuador's position was described by the tribunal as referring extensively to evidence of other States taking similar fiscal action in the face of unforeseen increases in oil prices:

> When an unforeseen increase in prices affects the economics of the contract, the contract must be readjusted, taking into account the widely accepted assumption that the State, as the owner of the non renewable resource, is to be the main beneficiary of extra revenues resulting from high oil prices. Numerous other countries have acted just like Ecuador in similar circumstances. In 1980, the United States enacted an Oil Windfall Profit Tax in response to the oil price spike of the 1970s. And since 2002, no less than 16 countries, including developed countries such as the United States, the United Kingdom and Canada, have adopted similar measures.[1]

The intrigue, which led to the proposal to study this issue in this thesis, was with the implications of Ecuador's argument that sixteen other States have taken similar fiscal measures 'in similar circumstances'. One possible explanation for that

[1] *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012), para 137 (footnotes omitted).

argument could be that, from the point of view of customary international law, Ecuador was arguing that this trend (thus its reference to sixteen countries) reflects a belief that it is lawful to apply that type of fiscal measures (i.e., readjustments in contracts to increase government take) when the price of oil rises significantly: that is, that there is State practice reflecting the emergence of a rule of customary international law that allows them to do this in those circumstances.

In order to determine whether this emerging norm of custom could exist, it is necessary to refer to what has been described as the 'fluid nature of custom'[2] noting that after a breach of an existing rule of customary international law '[t]he next state will find it somewhat easier to disobey the rule, until eventually a new line of conduct will replace the original rule by a new rule.'[3] In this sense, the ICJ's decision in *Nicaragua* is on point. The Court there held that '[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared by other States, tend toward a modification of customary international law'.[4] Though the Court there rejected the emergence of a trend toward a modification of customary international law as States did not justify 'their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition',[5]

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[2] Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law', (2001) 95 AJIL 757, 784.

[3] Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 97.

[4] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14, para 207.

[5] ibid.

the underlying reasoning, that such justifications could change customary international law, is what this thesis will address.

Another possible explanation for Ecuador's argument could have been that, under the bilateral investment treaty (BIT) applied in the specific case (the U.S-Ecuador BIT), Burlington should have expected that this type of measure would occur, i.e., that it should have been within what has been described in international investment law as the investor's legitimate expectations. In some cases, however, regulation by States has not been considered a violation of international law when it is 'normal' practice. In this sense, Thomas Waelde and Abba Kolo asserted on the basis of the United States' *Restatement of the Law, Third*, that '"normal" state practice in countries seen as well governed is unlikely to constitute an expropriatory taking; it rather reflects the toll that investors have to accept as a price for doing business and for getting access to the infrastructure of the host state's economy and society at large'.[6] Both of these issues will be addressed in this thesis: the first, in relation to the evolution of customary international law; and the second referring to the

[6] Thomas Waelde and Abba Kolo, 'Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty', (2007) 35(8/9) Intertax 424, 443 (footnotes omitted). The authors base their arguments on the American Law Institute, (1987) 2 *Restatement (Third) of the Law, The Foreign Relations Law of the United States*, §712 com (g), which notes that '[a] state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, … or other action of the kind that is commonly accepted as within the police powers of the state, if it is not discriminatory'. They also base their position on the US Model BIT (post 2004) which states that the fair and equitable treatment standard includes 'the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with principle of due process embodied in the principal legal systems of the world'.

relationship between contractual obligations, bilateral investment treaties, and customary international law.

As may already be evident at this stage, the argument made by Ecuador recalls, in part, the principle of PSNR which, as will be developed below, has been recognised as a principle of customary international law. Thus, this thesis will focus on whether its content may have evolved in the context of customary international law.

The object of this thesis is, thus, to determine the evolution of the principle of PSNR in customary international law and the relationship of such evolution to changes in regulations or contracts related to oil and gas exploration and production.[7] This necessarily leads to a study of certain areas of the law of treaties and the law of state responsibility as they are relevant to determine the existence of conflicting obligations under international law and what the result of this conflict might be. The conclusions reached will have to be interpreted in particular circumstances. In this sense it is important to recall that though general conclusions in international law are part of the natural evolution of the discipline, 'it frequently appears that no behaviour can permanently be qualified as simply "lawful" or "unlawful". In a recent opinion, the ICJ sought to examine whether the threat or use nuclear weapons might be prohibited "in all circumstances"[,] … demonstrating the

[7] Whether these changes are brought about through the Constitution or laws or decrees or at the national or provincial level is irrelevant to this thesis, as what is definitive is whether there is such a change, what its reasons are, how it impacts hydrocarbon upstream activities and how many States have similar positions.

law's reluctance to set up determinate hierarchies concerning abstract forms of behaviour, [through] its constant reference to an appreciation of circumstances'.[8]

A. PSNR and Oil and Gas Revenues: A History

Historically, the interplay between the rule of customary international law of PSNR and the protection of foreign investments has been a key discussion in international law.[9] Perhaps the clearest example is reflected in the context of the evolution of the PSNR General Assembly (GA) resolution[10] and its impact on litigation at the time.

As from 1952 with GA Resolution 626(VII) on the issue of sovereignty over natural resources[11] and throughout the following decade there was an evolving discussion, largely brought by developing countries in the decolonization process,[12]

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[8] Martti Koskenniemi, 'Hierarchy in International Law: A Sketch' (1997) 8 Eur J Intl L 566, 573.

[9] Rudolf Dolzer, 'International Co-operation in Energy Affairs' (2015) 372 Recueil des Cours de l'Académie de Droit International 397, 413; Ian Brownlie, 'Legal Status of natural resources in international law (some aspects)' (1979) 162 Recueil des Cours 249, 270-271.

[10] For an in-depth study of the history and interpretations of the PSNR principle *see* Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP 1997); George Elian, 'Le principe de la souveraineté sur les resources nationales et ses incidences juridiques sur le commerce international' (1976) 149 Recueil des Cours 1; Kamal Hossain, Subrata Ray Chowdhury, *Permanent Sovereignty over Natural Resources* (St. Martin's Press 1984); Karol N. Gess, 'Permanent Sovereignty over Natural Resources. An Anatomical Review of the United Nations Declaration and its Genesis' (1964) 13 ICLQ 398. It is not the purpose of this thesis to go in-depth into the history of the principle, which has been extensively studied by other authors, but rather to analyse its key characteristics and origins to develop an understanding of what the implications of current State practice are on that principle in the context of upstream oil and gas activities.

[11] UNGA Res 626 (VII) (21 December 1952). Some refer to UNGA Res 523 (VI) (12 January 1952) as the starting point, however, in that case despite the fact that the GA referred to the right of 'under-developed countries' to 'determine freely the use of their natural resources' it also subjected that right to the objective of furthering 'the expansion of the world economy'. That reference to 'world economy' was not repeated in the context of the PSNR principle, Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP 1997) 41.

[12] George Elian, 'Le principe de la souveraineté sur les resources nationales et ses incidences juridiques sur le commerce international' (1976) 149 Recueil des Cours 1, 12-13; Ian Brownlie, 'Legal status of natural resources in international law (some aspects)' (1979) 162 Recueil des Cours 249, 255.

as regards the relationship of sovereign States to their natural resources.[13] In 1962 the GA of the United Nations (UN) adopted GA Resolution 1803 on PSNR. This GA resolution was considered a reflection of existing customary international law.[14] Indeed, as sole arbitrator Dupuy noted in *Texaco v Libya*, '[t]he 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'.[15] As noted, there was particular emphasis on the issue of nationalisation when this resolution emerged.

This resolution was also considered a motor for change in the terms of agreements or legislation in relation to petroleum extraction; historic long-term concessions gave way to new forms of agreements, as will be developed further below, at around this time. Thus, GA Resolution 1803 has also been referred to as 'the moving force in the evolution of alternative regimes for petroleum development

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[13] Rudolf Dolzer, 'International Co-operation in Energy Affairs' (2015) 372 Recueil des Cours 397, 415-416.

[14] Karol N. Gess, 'Permanent Sovereignty over Natural Resources. An Anatomical Review of the United Nations Declaration and its Genesis' (1964) 13 ICLQ 398, 409. The International Court of Justice confirmed that this principle continues to be reflective of a rule of customary international law in 2005, however, the precise content of the principle is not addressed in the decision of the court, which limits itself to just confirming its customary nature. *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v *Uganda*), [2005] ICJ Rep 168, 251-252. As to the character of GA resolutions as evidence of customary international law, *see* Ian Brownlie, 'Legal Status of natural resources in international law (some aspects)' (1979) 162 Recueil des Cours 249, 260.

[15] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic*, Award (19 January 1977), (1979) 53 Intl L Rep 389, para 87.

structured to enable host states to retain ownership of the resources in situ and allowed IOCs to conduct petroleum operations for mutual benefit'.[16]

In 1976 Professor Elian referred to this principle, as reflected in GA Resolution 1803, as being limited by its object, that is, that it must be executed for the development of the people of the country.[17] This may have proven to be indicative of limitations on the exercise of the principle, when there is a disagreement on whether an agreement signed with regard to the exploitation of natural resources is for the benefit of the people. Elian continued by stating that the benefits of that exploitation must be distributed proportionally. He also noted that GA Resolution 1803 foresees the possibility of nationalisation, expropriation or requisition, for reasons of *utilité publique*, security or national interest, which could be recognised as having priority over 'simple' private interests.[18]

In 1978, Judge Jiménez de Aréchaga asserted, at his course on international law at the Hague Academy, that 'a corollary of the principle of permanent sovereignty' was 'the right of every State to nationalize foreign-owned property, even if a predecessor State or a previous government engaged itself, by treaty or

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[16] Mohd Naseem and Saman Naseem, 'World petroleum regimes' in Kim Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014) 150.

[17] George Elian, 'Le principe de la souveraineté sur les resources nationales et ses incidences juridiques sur le commerce international' (1976) 149 Recueil des Cours 1, 50 ('L'idée mérite d'être soulignée: la souverineté des Etats sur les ressources naturelles est un principe supérior et incontestable, mais la mise en pratique de la souveraineté, l'exercice de ses attributs doivent se réaliser seulement pour la croissance des peuples, pour leur développement économique et social.').

[18] George Elian, 'Le principe de la souveraineté sur les resources nationales et ses incidences juridiques sur le commerce international' (1976) 149 Recueil des Cours 1, 51.

contract, not to do so.'[19] In 1979, Professor Brownlie opined, at his course on international law at the Hague Academy that this proposal by Judge Jímenez de Aréchaga 'could only occur if and when the principle of permanent sovereignty emerges as a new peremptory norm of general international law (*jus cogens*).'[20] He then went on to note that '[i]t is a striking fact that the key formulations in the resolutions are not very helpful in indicating the precise corollaries of the concept of permanent sovereignty. No doubt the particular ramifications of the concept may be elaborated and consolidated by the practice of States in due course.'[21]

Contrary to this position, others have held that GA Resolution 1803 represents an affirmation of the binding nature of agreements, the obligations of compensation and recourse to international arbitration. Professor Gess stated that, '[f]rom the legal point of view, the 1962 United Nations resolution … is noteworthy as a positive reaffirmation of four basic principles of international law: 1. That compensation must be paid in the event of a lawful taking of rights and property; 2. That such compensation must be paid in accordance with international law; that is it must meet international standards; 3. That investment agreements between States and private parties have a binding effect; 4. That arbitration agreements between States and private parties have a binding effect.' He added that '[t]he

[19] Eduardo Jimenez de Arechaga, 'International law in the past third of a century' (1978) 159 Recueil des Cours 1, 297.

[20] Ian Brownlie, 'Legal Status of natural resources in international law (some aspects)' (1979) 162 Recueil des Cours 249, 270.

[21] ibid.

resolution further affirms the right of peoples and nations to permanent sovereignty over natural resources … [b]ut while this right has not been under attack, the principles set forth have been so attacked, both within the United Nations and without, and their reaffirmation in the resolution thus calls for greatest emphasis.'[22] A similar position was put forth by Professor Lowenfeld.[23]

The customary international law nature of what the International Court of Justice (ICJ) considered the 'principle' of PSNR continues to be accepted today, not only by the ICJ in the *Armed Activities* case,[24] but also in context of the WTO.[25] Notably, the principle has also been reinforced in treaty texts such as the ICCPR[26], ICESR[27] (both referring to 'peoples'), and the Energy Charter Treaty.[28]

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[22] Karol N. Gess, 'Permanent Sovereignty over Natural Resources. An Anatomical Review of the United Nations Declaration and its Genesis' (1964) 13 ICLQ 398, 448.

[23] Andreas F Lowenfeld, *International Economic Law* (OUP 2008) 493-511.

[24] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*), [2005] ICJ Rep 168, 251-252.

[25] WTO, *China: Measures related to the Exportation of various Raw Materials-Reports of the Panel* (5 July 2011) WT/DS394/R, WT/DS395/R, and WT/DS398/R, para 7.381; WTO, *China: Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum-Reports of the Panel* (26 March 2014) WT/DS431 ver/R, WT/DS432/R and WT/DS433/R, n. 209; Manjiao Chi, 'From Ownership-Orientation to Governance-Orientation' in Marc Bungenberg and Stephan Hobe (eds), *Permanent Sovereignty over Natural Resources* (Springer, 2015); Sonia E. Rolland, 'China-Raw Materials: WTO Rules on Chinese Natural Resources Export Dispute' (2012) 16(21) ASIL insights.

[26] Article 47, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) refers to the fact that '[n]othing 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'.

[27] Article 25, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3 (ICESR) refers to the fact that '[n]othing 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'.

[28] Article 18, Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 (Energy Charter Treaty); Thomas Waelde, *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International 1966) 402.

GA Resolution 1803 was adopted in a climate of particular concern by newly independent States regarding their obligations under previously executed agreements touching upon their natural resources. As explained by Judge Schwebel, the importance of this concern was manifest in discussions of an Algerian amendment to the preamble proposing the following text:

> *Considering* that the obligations of international law cannot apply to alleged rights acquired before accession to full national sovereignty of formerly colonized countries and that, consequently, such alleged acquired rights must be subject to review as between equally sovereign states.[29]

As Judge Schwebel went on to observe, '[i]ntensive negotiations then began between the representative of Algeria and representatives of the United States and the United Kingdom which resulted in an agreement to amend the resolution so as to make clear that it is without prejudice to questions of succession of states and governments.'[30]

States' concerns regarding newly independent States' obligations in relation to previous agreements were not limited to nationalisation. Nationalisation was one of the expressions of an underlying issue, which included securing benefits to peoples living in the State and economic sovereignty. One of the leading commentators on PSNR, Schrijver, described these in the following terms:

> Since the early 1950s this principle was advocated by developing countries in an effort to secure, for those peoples still living under colonial rule, the benefits arising from the exploitation of natural resources within their territories and to provide newly independent

[29] Stephen M. Schwebel, 'The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources' (1963) 49 American Bar Association J 463, 466 (footnotes omitted).

[30] ibid.

> States with a legal shield against infringement of their economic sovereignty as a result of property rights or contractual rights claimed by other States or foreign companies.[31]

These benefits referred not only to the ownership of the natural resources at issue but, additionally, to the benefits generated in their exploitation.

That is, at the time, there appeared to be a consensus regarding the application of the PSNR doctrine to nationalisation but also to issues regarding benefits, though that concept of "benefits" seems to have been limited to revenues. Professor Higgins referred to the PSNR doctrine as having 'settled down' to concerns of States regarding their resources, and that, in cases of obligations assumed in the early years of independence 'out of line with commercial realities' and 'for very long periods of time' tribunals would look 'at ways to liberate the state from the disadvantageous contract'. She additionally noted that '[a]ttempts to secure negotiated change will today be tolerantly regarded',[32] though, of course this 'today' was over twenty years ago; currently it is frequently the case that international oil companies and governments negotiate when circumstances change. Other than that, this statement is evidence of how this doctrine has evolved over time.

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[31] Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP 1997), 3. See also Lila Barrera-Hernández, 'Sovereignty over Natural Resources under Examination: The Inter-American System for Human Rights and Natural Resource Allocation' (2006) 12 Annual Survey of Intl & Comparative L 43, 45 ('The principle of permanent sovereignty over natural resources owes its existence to the struggles of newly independent and developing states in the post World War II era. At its core was the plight of those states to end economic dominance by powerful developed state interests.').

[32] Rosalyn Higgins, *Problems and Process, International Law and How We Use It* (OUP 1995) 141-142 (footnotes omitted).

Of particular relevance for this thesis—in referring to exploration and production of offshore resources—Professor Higgins noted the importance of ensuring, 'notwithstanding the contractual arrangements with the foreign investor [, that] the proper sovereign concerns of a government are met'. She described these 'proper sovereign concerns' in terms that significantly overlap with the areas that will be addressed in this thesis: 'health, safety, and regulatory standards; for ensuring that the local population do not suffer shortages on the one hand, and secure proper economic benefits from their natural resource on the other'.[33]

Authors have argued that during the 1990s the evolution of BITs accompanied by a lack of discussion within the UN of the concept of PSNR have led to developments in international law where developing States 'are eager to host more foreign investors' and industrialized States 'no longer demand "capitulation"-type clauses and acknowledge that foreign investors are in principle subject to the laws of the country in which they operate'.[34] However, over the past decade it seems that this tendency may have shifted. Professor Dolzer explains that 'on the whole, States have in the past decade been more inclined than before to assume more of the rights that have been previously held by foreign companies'.[35] Thus, though BITs have, apparently, become a permanent feature in international law this does not

[33] ibid, 139.

[34] Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP 1997) 193; Thomas Waelde, 'Renegotiating acquired rights in the oil and gas industries: Industry and political cycles meet the rule of law', (2008) 1 J of World Energy L and Business 55; Peter D Cameron, 'Stability of Contract in the International Energy Industry', (2009) 27(3) J of Energy & Natural Resources 305.

[35] Rudolf Dolzer, 'International Co-operation in Energy Affairs' (2015) 372 Recueil des Cours 397, 421.

necessarily mean that States have accepted more stringent limits to their exercise of sovereignty over natural resources, particularly exhaustible ones.[36]

These links between sovereignty and benefits, either as revenues or including other concepts as posited by Professor Higgins, are evidence that the areas chosen for case studies in this thesis are appropriate to analyse the evolution of the content PSNR doctrine.

A classic example of State concerns with securing the benefits of oil and gas exploration and production is reflected in the position of Kuwait in the *Kuwait v Aminoil* case.[37] There the parties to the Concession Agreement, Kuwait and Aminoil, renegotiated its terms on several occasions increasing, on each occasion, the royalty rate and tax level.[38] In 1975, however, Kuwait requested the application of the 'Abu Dhabi Formula' to the Concession and this led to a new round of negotiations.[39] The aim of the Government of Kuwait in these negotiations was, amongst other things 'to recoup what it termed "windfall profits", *i.e*. profits which were attributable to the "explosion" of oil prices rather than to the concessionaire's efforts'.[40] No

[36] The nature of an exhaustible resource is different from other renewable resources. This is addressed further below. An example of the particular nature of these resources in international law is reflected in the particular GATT exception, reflected in Article XX(g), which protects measures 'relating to the conservation of exhaustible natural resources'.

[37] *Government of Kuwait v American Independent Oil Company (Aminoil)*, Award (24 March 1982), (1984) 66 Intl L Rep 518.

[38] ibid, 551-553.

[39] ibid, 555.

[40] ibid.

agreement was reached between the parties, and the position of Kuwait at that time, 1977, was described in the award in the following terms:

> The Government of Kuwait had just crowned its petroleum policy by the completed nationalization of the Kuwait Oil Company. In the world at large, the view points of the petroleum-producing countries and of OPEC had in great measure triumphed. Even when the companies' oil revenues, amassed in consequence of the increases in the price of petroleum products, were lodged abroad in foreign bank accounts in the name of the concession company, they were psychologically considered by the producing States as being morally their property, apart from the modest amounts the Governments would be willing to leave to the Companies as remuneration for their services of extraction, processing and marketing.[41]

That is, the position of the State was that such increases in revenues should be more equitably distributed to the State, as they were 'psychologically considered by the producing States as being morally their property'. In its conclusions the tribunal acknowledged that the renegotiation in the distribution of revenue generated by the resources to make the distribution more equitable 'rest[ed] on the implied concept of a progressive process of justice revealing itself in the course of a *sufficiently general historical evolution to be recognized for what it is by the Parties*. This is how they can be said to have based themselves in advance on the assumption that a division of profits equitable today will need to be modified in order still to be regarded as equitable tomorrow'.[42]

Additionally, the link between distribution of revenues generated by these natural resources and 'sovereignty' is reflected in the Solemn Declaration of the

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[41] ibid, 577.

[42] ibid, 564 (emphasis added).

Conference of Sovereigns and Heads of State of OPEC Member Countries, Algiers, 4-6 March 1975:

> The Sovereigns and Heads of State reaffirm the solidarity which unites their countries in safeguarding the legitimate rights and the interests of their peoples, reasserting the sovereign and inalienable right of their countries to the ownership, exploitation and pricing of their natural resources and rejecting any idea or attempt that challenges those fundamental rights and, thereby, the sovereignty of their countries.[43]

As recently as 2013, in its Moscow Declaration of the 2nd Gas Summit, the Gas Exporting Countries Forum (GECF) *reaffirmed* the 'absolute and permanent sovereignty of GECF countries over their natural resources'.[44]

As noted above, the ICJ has reaffirmed the continuing customary international law nature of the PSNR doctrine, in general terms.[45] In the same sense, despite it being argued as a defence by States in international investment arbitration—as previously noted—its precise content is glossed over in the final awards. In this regard Professor Dolzer asserted that '[m]ore important [than the ICJ's ambivalent remarks] is the review of more than 100 arbitration tribunals dealing with sovereignty of the host State and the rights of the foreign investor.

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[43] I Solemn Declaration of the Conference of Sovereigns and Heads of State of OPEC Member Countries, Algiers, 4-6 March 1975, 1.

[44] Moscow Declaration, The Second Gas Summit of the Heads of State and Government of GECF Member Countries, 1 July 2013, Moscow, Russia. The previous Doha Declaration of 15 November 2011, corresponding to the First Gas Summit also *endorsed* the 'absolute and permanent sovereign rights of the Member Countries over their natural gas resources'.

[45] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*), [2005] ICJ Rep 168, 251-252.

Conspicuously, no single Tribunal attaches any legal significance to the principle in the sense that specific conclusions would flow from its existence and recognition'.[46]

That the interpretation of an agreement by investment arbitration tribunals could override a principle of customary international law clearly acknowledged by the ICJ, is a surprising proposition. Dolzer concludes that 'the appropriate interpretation of the viewpoint expressed by the ICJ in the *Congo* case is that, if the principle should be accorded any legal significance at all, it has to be considered as the point of confluence of the accepted rules of territorial jurisdiction and self-determination as applied to the domain of foreign investment'.[47] Note that, in light of the weight he accords to the decisions of arbitral tribunals' decisions, the principle, upheld by the ICJ, is reduced to the phrase: 'if the principle should be accorded any legal significance at all'. It is my position that customary international law, and therefore the evolution of the content of the principle of sovereignty over natural resources, is developed through State practice and *opinio juris*, and not through the decisions of arbitral tribunals, thus I would dispute the assertion that one could interpret, through investment tribunal decisions, the *de facto* extinction of the principle, as suggested by Professor Dolzer, particularly given its continued acceptance by States.[48] Throughout this thesis I will analyse recent State practice

[46] Rudolf Dolzer, 'International Co-operation in Energy Affairs' (2015) 372 Recueil des Cours 397, 424.

[47] ibid.

[48] *See, for example,* GA Resolution A/RES/72/240 (21 December 2017) on the Permanent Sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources with 163 votes

and *opinio juris* in order to determine the current state of the law as regards the principle of PSNR. I believe it would be a mistake to attempt to determine that content from the decisions of *ad hoc* arbitral tribunals exclusively, though this is an element in the evolution of custom as will be developed in the next chapter.

Through an analysis of State practice, I will seek to determine whether there is evidence of a trend that could be reflective of a modification of the content of the principle of sovereignty over natural resources in customary international law, and what the significance of that modification could be in relation to States' rights to modify their regulations in the area of oil and gas exploration and production and in relation to international disputes

Though perhaps States' concerns regarding sovereignty over natural resources changed during the 1990s, tending, as noted above, towards a more foreign-investor-friendly position,[49] it is my thesis that now they have now returned to many of the positions originally espoused in the 1960s and 1970s incorporating more current concerns, such as those of sustainable development, energy security, and protection of local population.[50] Throughout this thesis this will be explored

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in favour, 6 against (Canada, Israel, Marshall Islands, Micronesia, Nauru and United States) and 11 abstentions.

[49] Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP 1997) 193; Thomas Waelde, 'Renegotiating acquired rights in the oil and gas industries: Industry and political cycles meet the rule of law', (2008) 1 J of World Energy L and Business 55; Peter D Cameron, 'Stability of Contract in the International Energy Industry', (2009) 27(3) J of Energy & Natural Resources 305.

[50] Interestingly, Professor Dolzer notes that the text of the article 18 of the Energy Charter Treaty (1994) which refers to the concept of permanent sovereignty is 'tantamount to a return to resolution 1803, adopted as a North-South compromise in 1963 by the UN General Assembly, and adopted as an East-West approach in 1994'. Rudolf Dolzer, 'International Co-operation in Energy Affairs' (2015) 372 Recueil des Cours 397, 438.

through aspects of the regulation of oil and gas exploration and production, linked to government take of revenues, nationalisation, and local development concerns.

B. Why Hydrocarbons?

This thesis will concentrate on regulation of upstream activities in relation to hydrocarbons. Upstream activities include exploration and production of hydrocarbons. Though there are different techniques for the extraction of oil and gas according to their geological situation, this thesis will generally refer to conventional oil and gas exploration and production. When other types of exploration and production are at issue the thesis will specifically refer to them. Distinctions in the process of exploration and production may be relevant as they affect cost structures as well as the environmental impact of the processes.

Hydrocarbons include crude oil and natural gas. When the term 'hydrocarbons' is used it will refer to both. When the terms 'oil' or 'gas' are used they will refer to each of these resources separately.

It is important to distinguish between crude oil and natural gas. Although they are both the basic exhaustible raw materials used to produce energy[51] and they are generally treated jointly, there are some basic differences between them.[52] Crude oil is a commodity which can be easily transported between different

[51] Of course, energy is also produced through solar power, wind power, hydroelectric generators, but these are renewable energy sources and therefore not the topic of this thesis.

[52] *See* Rudolf Dolzer, 'International Co-operation in Energy Affairs' (2015) 372 Recueil des Cours 397, 432.

jurisdictions.[53] On the other hand, natural gas is more difficult to transport.[54] Given these restrictions there is no international reference price for natural gas as there is for crude oil (albeit, subject to the quality of the crude oil). Thus, natural gas cannot be considered a freely tradable commodity as crude oil usually is.

However, as natural gas and crude oil are substitutes for producing energy there is an economic discussion regarding (whether there is) a relationship between the price of crude oil and the price of natural gas.[55] This discussion is not relevant for this thesis but it is indicative that the two resources cannot be treated completely independently.

We have chosen hydrocarbons as the specific area of study here because the characteristics that they have make them uniquely subject to this type of undertaking by States. Hydrocarbons, as noted, are non-renewable sub-soil natural resources that are unevenly distributed around the globe. They are, currently, necessary to produce energy in the entire world, which makes them extremely significant at the economic and political level.[56] They are at the centre of the origin

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[53] One could argue that there is no "free market" price for crude oil given the influence of groups of States over that price. However, there are, at least, international reference prices.

[54] Natural gas requires pipelines or a plant to transform the natural gas into liquid natural gas that can then be transported, subject to certain safety requirements. The ports where liquid natural gas can be delivered are also limited, as a processing plant to turn the liquid natural gas into natural gas is also required.

[55] Research: The Fundamental Relationship Between Natural Gas and Crude Oil Prices in North America, Baker Institute for Public Policy, available at: http://bakerinstitute.org/center-for-energy-studies/research-fundamental-relationship-between-natural-gas-and-crude-oil-price/, last accessed 8 September 2015.

[56] Rudolf Dolzer, 'International Co-operation in Energy Affairs' (2015) 372 Recueil des Cours 397, 428.

of the PSNR principle,[57] though, of course, it is a principle that covers all natural resources.

Moreover, hydrocarbons are distinct from other natural resources in that States need them to produce energy for their populations, and they are also exhaustible. This means that when a State does not have sufficient oil and gas to generate energy for the country it must import it at a cost for the balance of payments. Further, the exploration and extraction processes for hydrocarbons are generally capital-intensive high-risk projects.

The exhaustible nature of these resources makes them a particularly interesting object of study because that characteristic means they are especially vulnerable to States adopting conservation or distributive measures. In the area of international trade law, there are special rules applicable to exhaustible natural resources. GATT article XX(g) provides that, subject to some restrictions regarding arbitrary or unjustifiable discrimination, 'nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: … (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'.[58] In *China-Raw Materials* the Appellate Body held that that article thus permitted 'trade measures relating to the conservation of

[57] Raphael J. Heffron, Anita Rønne, Joseph P. Tomain, Adrian Bradbrook and Kim Talus, 'A Treatise for Energy Law' [2018] J of World Energy L and Business 1, 6-8.

[58] General Agreement on Tariffs and Trade (GATT) (14 April 1994), article XX(g).

exhaustible natural resources when such trade measures work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource'.[59]

C. Why international law?

If the changes studied here are reflective of States acting in their sovereign capacity and in relation to contracts or agreements under domestic law, why is international law relevant in this analysis? The first question to be addressed here is, therefore, the interplay between these two legal systems. There are three clear situations in which international law has a role to play in domestic legislation.

The first is in the case of an internationalised contract: this can either be because the parties include the State and an international oil company[60] or because the parties have chosen international law as the law applicable to the contract. International arbitrations in the second half of the twentieth century in relation to oil and gas concessions frequently turned to international law as the applicable law

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[59] WTO, *China: Measures related to the Exportation of various Raw Materials-Report of the Appellate Body* (20 January 2012) WT/DS394/AB/R, WT/DS395/AB/R and WT/DS398/AB/R, para 356.

[60] As explained in the Saudi Aramco arbitration, *Saudi Arabia v Arabian American Oil Company (Aramco)*, Award (23 August 1958), (1963) 27 Intl L Rep 117, 172; see also *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic*, Award (19 January 1977), (1979) 53 Intl L Rep 389, 455-457 (referring to 'economic development agreements'); *Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation*, Case No. 16 10 0137 76, Arbitral Award (24 August 1978), (November 1978) 17(6) Intl L Materials 1321; Rosalyn Higgins, 'Natural Resources in the Case Law of the International Court' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999) 88; Robert Jennings, 'State Contracts in International Law' (1961) 37 BYBIL 156; Symposium on Private Investors Abroad-Rights and Duties (Southwestern Legal Foundation 1965) p. 123; Francis A. Mann, 'The Law Governing State Contracts' (1944) 21 BYBIL 11; Jean-Flavien Lalive, 'Contracts between a State or a State Agency and a Foreign Company' (1964) 13 ICLQ 987; but see Christopher Greenwood, 'State Contracts in International Law – the Libyan Oil Arbitrations' (1982) 53(1) BYBIL 27, 43.

in deciding disputes.[61] In fact, Professor Greenwood noted that this was one of the consequences of the PSNR GA Resolution. Referring to paragraph 8 of GA Resolution 1803[62] he noted: 'The fact that this resolution, generally considered at the time to be evidence of customary international law, appeared to equate the duty to observe agreements to which only one party was a State with the duty to observe treaties between States gave further support to the notion that at least some State contracts came within the sphere of international law.'[63]

The second is in the case of diplomatic protection or, currently, the protection of an international investor under a bilateral investment treaty,[64] that is where the issue of protection of the rights or interests of foreigners is in dispute.[65] In both cases though the agreement may refer to a specific applicable law, international law comes into play when the dispute is brought before an international tribunal.[66] As

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[61] *Saudi Arabia v Arabian American Oil Company (Aramco)*, Award (23 August 1958), (1963) 27 Intl L Rep 117; *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic*, Award (19 January 1977), (1979) 53 Intl L Rep 389; *Government of Kuwait v American Independent Oil Company (Aminoil)*, Award (24 March 1982), (1984) 66 Intl L Rep 518.

[62] Paragraph 8 of UNGA Resolution 1803(XVII) (14 December 1962) states: 'Foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith.'

[63] Christopher Greenwood, 'State Contracts in International Law – the Libyan Oil Arbitrations', (1982) 53(1) BYBIL 27, 42 (footnotes omitted).

[64] This is different from the mere reference to international arbitration in the agreement, as postulated by Professor Dupuy (*Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic*, Award (19 January 1977), (1979) 53 Intl L Rep 389, 455) and criticised by, amongst others, Professor Greenwood (Christopher Greenwood, 'State Contracts in International Law – the Libyan Oil Arbitrations', (1982) 53(1) BYBIL 27, 51-52).

[65] *Case of Oscar Chinn* (*United Kingdom v Belgium*) (Merits) PCIJ Rep Series A/B No 63, p. 81.

[66] Exceptionally, international litigation may be contract based and rely solely on domestic law. However, this is exceptional and will not apply when there is a bilateral investment treaty at stake. Domestic tribunals may also apply international law in interpreting an investment treaty.

States cannot argue domestic law as defences for breaches of international law, international law prevails.[67]

As noted, there are several historical examples of international law being applicable to unilateral changes in agreements or concessions. The only decision of the ICJ where this issue was discussed at length in reference to hydrocarbon concessions was in the *Anglo-Iranian Oil case.* There, the United Kingdom requested that the ICJ declare that the 'putting into effect of the Iranian Oil Nationalization Act of the 1st May 1951, in so far as it purports to effect an unilateral annulment, or alteration of the terms, of the Convention concluded on 29th April 1933, between the Imperial Government of Persia and the Anglo-Persian Oil Company, Limited, contrary to Articles 21 and 26 thereof, would be an act contrary to international law for which the Imperial Government of Iran would be responsible'.[68] Additionally the United Kingdom went on to argue other violations of international law in light of alleged violations of the provisions of the previously referred to Convention.

On a jurisdictional point, the United Kingdom argued that 'the agreement signed by the Iranian government and the Anglo-Persian Oil Company on April 29th 1933, has a double character, the character of being at once a concessionary contract between the Iranian Government and the Company and a treaty between the two Governments'.[69] The ICJ rather concluded that it 'cannot accept the view that the

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[67] Article 27, Vienna Convention on the Law of Treaties (adopted on 23 May 1969, entry into force on 27 January 1980) 1155 UNTS 331 (Vienna Convention on the Law of Treaties of VCLT).

[68] *Anglo-Iranian Oil Co. Case (UK v Iran)* (Preliminary Objection) [1952] ICJ Rep 95.

[69] ibid, 111-112.

contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character', noting in particular that '[i]t does not regulate in any way the relations between the two governments'.[70]

In his dissenting opinion, Judge Alvarez referred to Iran's argument that the nationalization of the oil industry was within its '*reserved domain* and that the Court therefore had no jurisdiction to deal with the case', defining reserved domain as 'established by classical international law as a natural consequence of the *individualistic regime* and of the absolute sovereignty of states upon which this law was founded'.[71]

Further, Judge Levi Carneiro's dissenting opinion noted that 'I do not believe that the Concession Agreement of 1933 can be regarded simply as a private convention, or that the act by which it was cancelled can be regarded as a purely private matter'. [72] He stressed that, though not an international treaty, the Concession Agreement was an agreement 'of international significance'.[73] He then went on to look in some more depth at the issue of nationalisation or expropriation as possible violations of international law and asked: 'can a State carry out a nationalization, expropriate a concession, when it has bound itself to respect it always? In other words, can a State renounce or restrict the exercise of its "police

[70] ibid, 112.

[71] *Anglo-Iranian Oil Co. Case (UK v Iran)* (Preliminary Objection) (Judge Alvarez) [1952] ICJ Rep 127.

[72] *Anglo-Iranian Oil Co. Case (UK v Iran)* (Preliminary Objection) (Judge Levi Carneiro) [1952] ICJ Rep 152-153.

[73] ibid, 152.

power"?'[74] These questions remain unanswered as he referred them to the merits of the dispute, which were not addressed by the Court.

Although, as noted above, the United Kingdom attempted to argue that the Concession Agreement between Iran and the Anglo-Iranian Oil Company (originally Persia and the Anglo-Persian Oil Company) was a type of international agreement because it was a result of the settlement of the previous dispute regarding the D'Arcy Concession of 1903 that had been brought before the League of Nations, this position was ultimately not upheld by the Court. Regardless of the fact that this agreement and any other contract in relation to the extraction and production of oil and gas are not international treaties or conventions, arguments are regularly made in the international plane attempting to establish international responsibility of States in relation to modifications of them.

International responsibility in these cases is essentially argued on the basis of an obligation to observe contracts entered into, or the principle of *pacta sunt servanda*, particularly in cases where the other party to the agreement is a foreign national.[75] The United Kingdom referred to the obligation as: '*prima facie* an international obligation upon a State to observe the terms of a concession granted to a foreigner—an obligation towards the State of which the latter is a national—and the international responsibility of the grantor State is engaged, if there is a

[74] ibid, 159.

[75] In cases where bilateral investment treaties are applicable foreign investors rely on provisions relating to fair and equitable treatment or umbrella clauses in relation to changes in the terms of existing agreements.

breach of this obligation'.[76] It is this sphere, notwithstanding the manifestly non-treaty nature of these instruments, that this thesis will address.

Later though, Professor Brownlie put forth that the incorporation (at the suggestion of the U.S. and the U.K.) of paragraph 8 of GA Resolution 1803 [77] 'constitutes evidence for the view that contemporary law confers a higher status on such agreements than did the older customary law'.[78] That is, though the ICJ quite clearly set out in the *Anglo-Iranian Oil Co.* case that the concession agreement was not an international agreement, there is support for the proposition that these agreements are relevant under international law.[79]

In this sense, the fora which are nowadays frequently, though not uniquely, used to gauge the international responsibility of States with regard to investors in hydrocarbons tend to be international arbitral tribunals. International arbitrations are decided on the basis of both international law and domestic law, though the intent of this thesis is not to delve into the interplay between those different

[76] *Anglo-Iranian Oil Co. Case* (*UK v Iran*) ICJ Pleadings 78.

[77] Paragraph 8 of GA Resolution 1803 reads: 'Foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith…'

[78] Ian Brownlie, 'Legal Status of natural resources in international law (some aspects)' (1979) 162 Recueil des Cours 249, 309.

[79] The choice of the term "relevant" is significant in so far as it would be excessive to state that they determine the existence of obligations under international law, as Professor Brownlie himself states '[w]hen a concession contract is made with a foreign interest, it is quite unrealistic to treat this contract as a fundamental law, overriding the power of legislation within the State concerned and producing rigidity in the economy.' Ian Brownlie, 'Legal Status of natural resources in international law (some aspects)' (1979) 162 Recueil des Cours 249, 309.

regimes,[80] just to focus on the international law effects of these changes in State practice.

It is in this context that it seems reasonable to address what States have argued (or may argue) under international law as a legal justification for these changes in terms of existing agreements—referring to the ILC Articles on State Responsibility and the Vienna Convention on the Law of Treaties. In this sense, reference to the United Kingdom's pleadings in the *Anglo-Iranian Oil Co.* case continues to be relevant, because as regards contractual obligations and private law the United Kingdom asserted that 'there is *always* the obligation binding on the State towards the concessionaire to observe the concession', whereas there is '*always* an obligation under the general rules of international law … to observe the concession and restricting, within certain limits and subject to certain conditions, its right to nationalize or expropriate concessionary rights' and, finally, 'there is *sometimes* … a *contractual* obligation under international law to observe the concession'.[81] These pleadings are allusive to the discussion developed in this thesis as to: when, if at all, under current international law, there are limits and conditions to the obligations to observe concessions entered into in the sphere of oil and gas exploration and production; why those limits and conditions exist, in so far as they may be reflected

[80] There is some discussion on the role of national law in the investment treaty context and the relationship between it and international law. On this issue see, for example, Hege Elizabeth Kjos, *Applicable Law in Investor-State Arbitration* (OUP 2013).

[81] *Anglo-Iranian Oil Co. Case* (*UK v Iran*) ICJ Pleadings 79.

in State practice; and whether there is any unique feature of oil and gas that States consider distinguishes this industry from others.

An interesting point made by Iran was '*[i]l ne se trouve plus personne aujourd'hui pour contester le droit d'un État à la nationalisation des industries-clefs qui sont pour la collectivité nationale un élément essentiel de prospérité ou simplement de vie et de comportement social. La nationalisation se distingue de l'expropriation en vue d'un service public en ce qu'elle fait intervenir les conceptions fondamentales qui sont à la base de régime politique et économique de l'État et par conséquent constituent l'élément essentiel de ce qu'on appelle "le droit des peuples à disposer d'eux-mêmes"*'. [82] The argument was based the State's right to nationalise a concession, and in this particular case a hydrocarbon concession, on the nature of the hydrocarbon industry, and the fact that it was a key industry and an essential element of prosperity and, interestingly, that it was an essential element of the right to self-determination.

Some of these arguments are still current today. Contemporaneously, States modify regulations in relation to hydrocarbon exploration and production agreements referring to different justifications. In addition to those referred to historically, States also invoke other obligations under international law, for example obligations related to human rights and indigenous peoples, [83]

[82] *Anglo-Iranian Oil Co. Case* (*UK v Iran*) ICJ Pleadings 286-287.

[83] Native Title Act (1993) [Australia].

environmental obligations,[84] the need to share equitably in the distribution of exhaustible natural resources,[85] energy security of supply,[86] etc.[87]

Thus, the applicable international law for this thesis will include not only the potential evolution that the principle of PSNR may have had under customary international law, that is the scope of the primary norm, but additionally, and related thereto, two areas of law which are relevant to international obligations of States and which could be (or in some cases have been) referred to by them in order to justify changes in existing agreements in relation to exploration and production of hydrocarbons. One is the justification for changes in scope, invalidity, termination of treaties, and interpretation of conflicting treaties, in accordance with the Vienna Convention on the Law of Treaties of 1969, and the other is the circumstances precluding wrongfulness in the ILC Articles on State Responsibility. As regards the former, States have referred to these justifications outside of the treaty context and in international law generally. For example, in cases such as the *Mavrommatis Concessions*, the PCIJ applied the principle that an error in relation to an element that

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[84] *Maria Aguinda and others v. Chevron Texaco Corporation*, Proceeding No. 002-2003 (at first instance), Provincial Court of Sucumbíos, Sole Division (Corte Provincial de Justicia de Sucumbíos, Sala Única de la Corte Provincial de Justicia de Sucumbíos), Nueva Loja, Ecuador, Decision of 14 February 2011 [Ecuador].

[85] United States General Accountability Office, Report to the Chairman, Committee on Energy and Natural Resources, U.S. Senate, 'Oil and Gas Resources, Actions Needed for Interior to Better Ensure a Fair Return' (December 2013) p 23. Historically, this has also been a relevant issue, *see*, for example, Ian Brownlie, 'Legal Status of natural resources in international law (some aspects)' (1979) 162 Recueil des Cours 249, 273.

[86] Argentina's expropriation of 51% of the shares of YPF S.A. Law No. 26.741.

[87] These issues are dealt with at length in Chapters 3, 4 and 5 of the thesis.

was not an essential condition of the granting of the concession did not invalidate the concession.[88]

The chapter in the ILC Articles on State Responsibility on circumstances precluding wrongfulness is particularly illustrative of the relevance of these norms for these cases as they indicate that, historically, States have referred to those defences both in cases of state to state disputes as well as in cases of disputes with private parties. In fact, the 'category of circumstances precluding wrongfulness was developed by the ILC in its work on international responsibility for injuries to aliens'.[89] For example in the *Serbian Loans* and *Brazilian Loans* cases, the Serbian government argued that it could not cancel its bonds in gold francs due to *force majeure*, as a result of the mandatory currency regime in France.[90] Other examples include the *Russian indemnity* cases[91] and the various arbitrations in relation to Argentina's economic crisis as from 2002.[92] *Prima facie* circumstances precluding wrongfulness do not annul or terminate an obligation, they have been argued as 'a justification or excuse for non-performance while the circumstance in question

[88] *Case of the Mavrommatis Jerusalem Concessions* (*Greece v United Kingdom*) (Merits) PCIJ Reports Series A, No. 5, pp 30-31.

[89] ILC, 'Report of the International Law Commission on the work of its 53rd session', UN GAOR, 56th Sess., Supp. No. 10, Chapter IV, Commentary to Chapter V, para 6, U.N. Doc. A/56/10 (2001).

[90] *Case Concerning the Payment of Various Serbian Loans Issued in France/Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France* (*France v Kingdom of Serbs, Croats and Slovenes/France v Brazil*) (Merits) PCIJ Rep Series A, Nos. 20-21, pp. 39-40.

[91] *Russian Indemnity Case* (*Russia* v *Turkey*) (1912) 11 R.I.A.A. 421, 439.

[92] Amongst others: *CMS Gas Transmission Co. v Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005) paras 304-331; *LG&E Energy Corp, LG&E Capital Corp., and LG&E International, Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) paras 201-266.

subsists',[93] that is, once it has been established that there is a breach of an international obligation while a circumstance precluding wrongfulness exists the breach would not be such during the time that the circumstance continues to exist. However, the question remains when and how that obligation re-emerges.

Notwithstanding the above, some of the justifications provided by States are arguments *ex ante* that there is no violation of international law by these changes in regulation and, in those cases, there is no need to resort to the legal defences referred to above and developed below. Those cases are: first, where justifications are made on the basis of industry practice, in which case the legal argument of the State would be based on an existing expectation in the hydrocarbon industry for these changes to take place in certain circumstances; second, where States justify their changes in regulation due to other obligations under international law, in which case a systematic interpretation of potentially conflicting obligations must be carried out in terms of the law of treaties; and third, if it were concluded that there is sufficient State practice and *opinio juris* to establish the existence of custom allowing for these types of measures to be adopted, then there would also not be a breach of international law that would require a legal justification.

Where changes in agreements are warranted, however, though not foreseen under the existing international law, States may argue a series of defences under international law.

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[93] ILC, 'Report of the International Law Commission on the work of its 53rd session', UN GAOR, 56th Sess., Supp. No. 10, Chapter IV, Commentary to Chapter V, para 2, U.N. Doc. A/56/10 (2001).

D. Sovereignty

Though this thesis is not about 'sovereignty' in itself, it is one of the elements of the principle of permanent sovereignty over natural resources, as the text itself indicates. The definition of State sovereignty is a discussed and evolving concept relating to a State's capacity to manage its internal and external affairs.[94] However, for the purposes of this thesis Professor Endicott's use of the term is helpful; he notes: '[a] state is sovereign if it has power over the community, and power and independence in external affairs that are complete for the purposes of a good state.' [95] The relevant questions for this thesis are, how does State practice demonstrate an evolution in the concept of sovereignty when States limit their ability to regulate certain aspects of domestic legislation, through international agreements or contracts? How are those limits consistent with the concept of sovereignty? Does State practice demonstrate that such limits cannot affect certain basic areas where a State must retain its right to regulate? And is this reflected in the evolving concept of PSNR?

An interesting position on the issue is taken by Professor Endicott in conclusion after a comparative analysis of State sovereignty and individual freedoms on the basis of Mill's *On Liberty*. He concludes that 'States do, however, stand to lose their sovereignty (to a greater or lesser extent) if rules of international

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[94] On the current state of the debate about sovereignty see Samantha Besson, 'Sovereignty' in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (April 2011).

[95] Timothy Endicott, 'The Logic of Freedom and Power' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 247.

law or treaty obligations prevent them from exercising the freedom and power that they need in order to act justly and effectively as states. That can conceivably happen through illegitimate developments in international law (or even through trade treaties that make it impossible for a state to engage in just and effective labour market regulation or environmental regulation)'.[96] Thus, the concept of sovereignty over natural resources, for the purposes of this thesis, relates to the right of a State to regulate over the natural resources within its territory.

E. Key Actors

Other than governments, which are obvious actors in the study of changes in regulation with regard to upstream hydrocarbon activity from the point of view of international law,[97] there are some other key actors which should be briefly introduced in this chapter.

The first are National Oil Companies, or NOCs; these are oil and gas companies that are owned or controlled by national governments, or in which national governments have significant participation. Traditionally, these actors were smaller than the international oil companies, that shall be developedbelow. However, currently, NOCs have grown exponentially and they carry out upstream (and in some cases downstream[98]) activities not only in their own territory but in

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[96] Timothy Endicott, 'The Logic of Freedom and Power' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 259.

[97] Catherine Redgwell, 'International Regulation of Energy Activities' in Martha M Roggenkamp, Catherine Redgwell, Anita Rønne, Iñigo del Guayo (eds.) *Energy Law in Europe* (OUP 2016) 20-21.

[98] For example, in the case of PdVSA [Venezuela] and YPF [Argentina].

other countries as well.[99] This increase in activity is sometimes related to distribution of risk and in other cases related to access to international markets to commercialise their production.

The second group of actors are International Oil Companies, or IOCs; these are oil and gas companies that are not controlled by any government, though governments may hold shares in these companies. Traditionally they were the largest actors in the international energy community; however, with the current growth of the NOCs they have lost some of their previous dominance. Examples of these companies are Royal Dutch Shell, Chevron, Exxon-Mobil and Total, amongst others.

The third set of actors that will be referred to in this thesis are international financial institutions such as the World Bank, the Inter-American Development Bank, the International Monetary Fund and the International Finance Corporation. These are financial institutions that play a role in the hydrocarbon upstream industry because they frequently participate in financing the activities in the sector. This financing is, generally, linked to conditions concerning compliance with international environmental norms or obligations in relation to protection of human rights of local communities or indigenous populations. Thus, despite not having a capacity to regulate or being the executors of the upstream activities themselves, in so far as their approval is required for a project to move forward, their position on

[99] Paul Stevens, 'National oil companies and international oil companies in the Middle East: Under the shadow of government and the resource nationalism cycle' (2008) 1(1) J of World Energy L & Business 23-27.

certain issues is also determinative of what a State or oil company will accept. In the Indus River Treaty (not related to oil and gas, but related to an infrastructure project with financing from the World Bank), for example, the World Bank was one of the parties to the treaty.[100]

Finally, the thesis will refer to a series of international organizations related to energy and hydrocarbons. Though many of these organizations do not issue binding instruments, they do generally issue declarations or statements which reflect the positions of their members. Some of these organizations are consumer-based and others are producer-based.[101] In the latter, members tend to be the largest oil and gas producers and reserve holders, and therefore the declarations issued are relevant to understand the positions of these States with respect to certain issues. The international organizations include the Organization of Petroleum Exporting Countries (OPEC), the International Energy Agency (IEA), the International Energy Forum (IEF), and the Gas Exporting Countries Forum (GECF), each of which is addressed briefly in turn.

OPEC is an intergovernmental organisation created in 1960. Its objective is 'to coordinate and unify the petroleum policies of its Member Countries and ensure the stabilization of oil markets in order to secure an efficient, economic and regular supply of petroleum to consumers, a steady income to producers and a fair return

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[100] *Indus Rivers Kishenganga Arbitration* (*Pakistan v India*), PCA Case, Award (20 December 2013) para 2.

[101] Sijbren de Jong and Jan Wouters, 'Institutional actors in international energy law' in Kim Talus (ed.) *Research Handbook on International Energy Law* (Edward Elgar 2014) 18.

on capital for those investing in the petroleum industry.'[102] It currently has a total of 14 member countries, and members must have 'substantial net export of crude petroleum'.[103] OPEC issues Conference Resolutions which are adopted unanimously in Conferences; these Resolutions become effective within 30 days of the Conference, giving an opportunity to participating and absentee members to voice their opposition in that time period.[104] The Secretary General of OPEC is the legally authorised representative of the organisation.[105]

The IEA is an autonomous body within the OECD framework. It was created in 1974 as a response to OPEC.[106] Its mission is 'to ensure reliable, affordable, and clean energy for its 29 member countries and beyond'.[107] It is a consumer-based organisation.[108] The principal organ of the IEA is the Governing Body, which issues Conclusions, binding on all member countries. Decisions which impose new obligations on member States must be taken unanimously.[109]

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[102] OPEC, 'Our Mission' available at: http://www.opec.org/opec_web/en/about_us/23.htm, last accessed 15 December 2017.

[103] Article 7, OPEC Statute (entry into force on 1 October 1960) 443 UNTS 247.

[104] Article 11, OPEC Statute.

[105] Article 27, OPEC Statute.

[106] Sijbren de Jong and Jan Wouters, 'Institutional actors in international energy law' in Kim Talus (ed.) *Research Handbook on International Energy Law* (Edward Elgar 2014) 21.

[107] IEA, 'Our Mission', available at: https://www.iea.org/about/, last accessed 15 December 2017.

[108] Sijbren de Jong and Jan Wouters, 'Institutional actors in international energy law' in Kim Talus (ed.) *Research Handbook on International Energy Law* (Edward Elgar 2014) 21.

[109] Article 61, Agreement on an International Energy Program (adopted on 18 November 1974, entry into force on 19 January 1979) 1040 UNTS 271.

The IEF was created in 1991 as bridge between exclusively consumer- and producer-based organisations.[110] Its aim is to 'foster greater mutual understanding and awareness of common energy interests among its members'.[111] It has 72 member countries which include producers, consumers and 'transit' States. The IEF Charter does not create any legally binding rights or obligations between or among its member States.[112]

The GECF is an international governmental organization created in 2001 'to support the sovereign rights of its Member Countries over their natural gas resources and their ability to independently plan and manage the sustainable, efficient and environmentally conscious development, use and conservation of natural gas resources for the benefit of their people.'[113] It currently has 12 members[114] and 6 observers.[115] Its members and observers hold approximately 70% of the world's natural gas reserves, and approximately 50% of the natural gas production.[116] It is also a producer-based organisation.

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[110] Sijbren de Jong and Jan Wouters, 'Institutional actors in international energy law' in Kim Talus (ed.) *Research Handbook on International Energy Law* (Edward Elgar 2014) 23.

[111] IEF, 'IEF Overview', available at: https://www.ief.org/about-ief/ief-overview.aspx, last accessed 15 December 2017.

[112] Article 1, IEF Charter.

[113] GECF, 'GECF Objectives', available at: https://www.gecf.org/about/mission-objectives.aspx, last accessed 15 December 2017.

[114] Algeria, Bolivia, Egypt, Equatorial Guinea, Iran, Libya, Nigeria, Qatar, Russia, Trinidad and Tobago, UAE, and Venezuela.

[115] Iraq, Kazakhstan, Netherlands, Norway, Oman, and Peru.

[116] BP Report on oil and gas reserves and production (2012).

F. Oil and Gas Industry

There are several different forms that the regulation of oil and gas exploration and production may take. In order for the sample analysed for the purposes of this thesis to be relevant for establishing a trend that is sufficiently broad to be evidence of the emergence of a rule of customary international law—as developed in Chapter 2—it has included States that have representative regimes in oil and gas exploration and production.

There are basically four types of investment arrangements in the area of agreements relating to oil and gas.[117] These 'arrangements' are generally referred to as regimes.[118] These are the concession agreement or licence, joint ventures, production sharing agreements and service contracts. Though distinct, States may apply these in combination or overlapping over different periods of time. Regardless, for the purposes of this thesis it useful to provide a brief overview of what each of these types of regime entails.

As Erdokan explains, concession agreements were the traditional type of contract for oil and gas exploration and production. During the term of the concession they grant the concessionaire or licensee an exclusive right to explore, develop, and sell petroleum from what is defined as the concession area. They are

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[117] Legislation regarding the exploration and production of oil and gas differs significantly around the world. Since the purpose of this thesis is not a thorough analysis of the different legal regimes applicable to these practices, the following is a brief description of them and their main characteristics. Mohd Naseem and Saman Naseem, 'World petroleum regimes' in Kim Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014).

[118] Mohd Naseem and Saman Naseem, 'World petroleum regimes' in Kim Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014) 149.

characterised, generally, as granting 'an administrative authorization to explore, develop and produce hydrocarbons', they are usually subject to taxes and royalties.[119] In general the oil or gas produced under these agreements belong to the investor,[120] who bears all the risk of the exploration and production. Though this is the oldest system adopted, it is still used in many countries such as Argentina, the United Kingdom, and Brazil.

Production sharing agreements are currently more popular, particularly amongst developing States.[121] They were first introduced by Indonesia in the 1950s. In these contracts investors 'are granted the rights to explore and develop a petroleum field' and they are the risk bearers during that process. [122] After petroleum is discovered and produced in commercial quantities the oil produced will be divided in two parts. The first part—known as 'cost oil'—will be paid to the investor reimbursing its exploration and production costs. The second part, or 'profit oil', will be divided between the investor and host State or national oil company in the way described in the agreement. Ownership of the petroleum produced under these agreements, as well as in the ground, rests with the State until

[119] Mustafa Erkan, *International Energy Investment Law, Stability through Contractual Clauses* (Wolters Kluwer 2011) 8.

[120] Mohd Naseem and Saman Naseem, 'World petroleum regimes' in Kim Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014) 151.

[121] Bernard Taverne, 'Production Sharing Agreements in Principle and in Practice', in Martyn R. David (ed), *Upstream Oil and Gas Agreements* (London, Sweet & Maxwell 1996) 67.

[122] Mustafa Erkan, *International Energy Investment Law, Stability through Contractual Clauses* (Wolters Kluwer 2011) 8.

it reaches the delivery point.[123] This type of agreement is used, for example, in Indonesia, Egypt, India, China, Russia, and Nigeria.

Service contracts are usually characterised by the company carrying out a service for the national oil company or government and getting paid for that service. Service contracts may include *Risk Service Contracts* and *Service* Contracts (non-Risk).[124] The former have been, thus far, frequently found in Iran and may be cancelled in cash or in kind. The latter are usually cancelled through payment of a flat rate, which is a percentage of the oil produced. In this type of agreement, the State or the NOC remain the title-holders of the area and the hydrocarbons. In the case of risk service contracts, the contractor provides the risk capital for the exploration and development of the hydrocarbon, but hands it back to the State or the NOC for production once it is commercially realizable.[125] Service contracts are used, for example, in Venezuela, Brazil, Iran and Iraq.[126]

Joint ventures are usually established between international or independent oil or gas companies and national oil companies or host governments, and they usually are based on sharing of risks of exploration and production and profits. The parties 'pool their resources and join together to share the risk and rewards of a

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[123] Mohd Naseem and Saman Naseem, 'World petroleum regimes' in Kim Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014) 159.

[124] Mohd Naseem and Saman Naseem, 'World petroleum regimes' in Kim Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014) 175.

[125] Mohd Naseem and Saman Naseem, 'World petroleum regimes' in Kim Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014) 176.

[126] Mohd Naseem and Saman Naseem, 'World petroleum regimes' in Kim Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014) 180.

commercial venture'.[127] The first of these agreements was entered into between ENI (the Italian national oil company, through its subsidiary AGIP Mineraria) and the National Iranian Oil Company (NIOC).[128]

Bearing in mind this diversity of form, may a common element be identified in relation to the permanent sovereignty over natural resources principle regarding oil and gas production because of their sovereign rights over the underlying natural resources? It is my position that this is still possible when one is able to determine what the rationale is for each decision that the State makes and one is able to systematise whether those reasons coincide or not.

G. Methodology, scope and structure

The methodological aspects of this thesis are fairly straightforward. As regards primary obligations under international law, international conventions on the treatment of hydrocarbon upstream activities are rare, with the only relevant binding multilateral agreement specific to the area being the Energy Charter Treaty.[129] However, international law has advanced in its influence on energy law '[l]argely as a result of environmental and developmental considerations'. [130]

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[127] Mohd Naseem and Saman Naseem, 'World petroleum regimes' in Kim Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014) 157.

[128] Mohd Naseem and Saman Naseem, 'World petroleum regimes' in Kim Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014) 157.

[129] Though the Energy Charter Treaty refers to hydrocarbons, it does not establish substantive rules on upstream activities and States' obligations or rights to regulate in that area, but does refer to permanent sovereignty over natural resources.

[130] Adrian Bradbrook, 'Energy Law as an Academic Disciple' (1996) 14 J Energy and Nat Resources L 193, 211.

Additionally, there are customary international law rules, such as the PSNR principle, whose content we are yet to define. Though much of the substantive content of regulation of hydrocarbon upstream activities is a matter of municipal law, through contracts and administrative law, as noted, international law has been historically referred to in decisions regarding treatment of hydrocarbon exploration and production activities.[131] This thesis will examine the development of customary international law rules as relevant in the regulation of oil and gas activities, to determine the scope of those primary obligations.

In order to analyse the development of customary international law rules, I will examine State practice as regards regulation of hydrocarbon upstream activities, as reflected in arguments made by States in international disputes, domestic legislation of States, domestic judicial decisions, and statements made in international fora.

The method chosen for carrying this out was to select twenty-five States that reflect a cross section of the especially relevant States with a broad representation of States with different legal systems. The criteria looked at in choosing the States were: their level of oil and gas reserves and production (according to the U.S. Energy Information Administration, the IEA, and British Petroleum's statistical data, over the most recent period of time), thus making sure that the principal actors were included; whether or not it had a national oil company; the Human Development

[131] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic*, Award (19 January 1977), (1979) 53 Intl L Rep 389, *Government of Kuwait v American Independent Oil Company (Aminoil)*, Award (24 March 1982), (1984) 66 Intl L Rep 518.

Index; date of independence; the region; party to the Energy Charter Treaty; percentage of State revenues; discovery of first oil field; a member of OPEC; whether it was a net oil or gas importer.[132]

Further, this thesis will analyse the application of secondary rules[133] in this area. In this sense, in Chapter 6, it will compare the different explanations given by States in each of the areas of regulation under analysis, determine whether there are common trends, and link these, whenever possible, to changes in scope, circumstances precluding wrongfulness and causes for termination or suspension of treaties.[134]

In order to conclude whether there is a trend in State practice, which might be evidence of an emerging rule of customary international law, it is necessary to recall how the existence of such rules are determined, which will be undertaken in the following chapter.

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[132] The full table of all the States chosen is contained in Appendix A. In some cases, finding information for the countries proved difficult due to language or access barriers. In those cases, as far as possible, I used secondary materials to access the relevant information. If no reliable secondary information could be found I did not analyse that specific State in relation to the particular issue, as indicated in the table.

[133] These are developed in Chapter 2 of the thesis.

[134] The International Law Commission explained in its commentaries to its Draft Articles on State Responsibility that it was only referring to 'secondary rules of state responsibility' and excluding those referred to 'whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted' as well as '*mutatis mutandis*, for other "sources" of international obligations such as customary international law', which 'is a matter for the law of treaties', ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, General Commentary, paras 1, 4 U.N. Doc A/56/10 (2001)). However, those rules in the law of treaties relating to interpretation, suspension and termination of international obligations may also be considered 'secondary rules' in the broad sense of the term, *see* H.L.A. Hart, *The Concept of Law* (OUP 1962) 92 and Joost Pauwelyn, 'The Role of Public International Law in the WTO: How far can we go?' (2001) 95 AJIL 535, n. 8.

This thesis contains seven chapters.

Following this introductory chapter, Chapter 2 looks at the fundamental legal concepts from public international law that are relevant for the thesis. This legal analysis refers to customary international law, its characteristics and how its evolution is analysed, and underscores the content and evolution of key concepts such as energy security, equity as well as specific areas of the law of treaties and state responsibility. This analysis is the basis for the conclusions in Chapters 6 and 7 on the evolution of PSNR.

Chapters 3, 4 and 5 are the case studies for the thesis. Chapter 3 analyses the different regimes regarding government take of revenues generated by hydrocarbons, adopting a comparative approach. It also considers what levels of prices have been used as parameters for increases in government take and whether there is a similar basis for that determination. As regards justifications by countries for those increases in government take, they are briefly contextualised by reference to relevant case law and legislation, identifying those instances where the reasons are comparable.

Chapter 4 contains a study of past and current nationalisations within the oil and gas sector. There are few recent examples of this but given the historical relevance of nationalisations for the development of the PSNR doctrine it is necessary to revisit them here. It also provides comparative analysis with the earlier nationalisations, looking specifically at what their evolution has been and whether distinctions should be made with regard to reasons given in current

nationalisations. The justifications for those nationalisations are briefly analysed there as well.

Chapter 5 looks at instances or projects where there has been regulation of oil and gas production and exploration in light of concerns regarding local development and the environment. It is a comparative study of different specific cases of local, provincial or national legislation, and international case law, as well as a closer look at regulatory requirements of international financing agencies like the World Bank Group (WB), the International Monetary Fund (IMF) and the International Finance Corporation (IFC). As regards justifications for those changes in regulation, they are also briefly analysed and compared in this chapter.

Chapter 6 is a comparative synthesis of the reasons given for the measures described in the previous three chapters. It also provides a legal analysis of what those reasons imply, relating the reasons given in chapters 3, 4, and 5 with the fundamental legal concepts addressed in chapter 2. It is a chapter feeding into the conclusions in the sense of looking in detail at the reasons given by States in the State practice provided earlier for the final chapter to be able to conclude whether there is significant trend in the cases studied in the thesis and what the relevance of the permanent sovereignty over natural resources doctrine is for this trend.

Chapter 7 concludes by looking at whether the State practice and reasons referred to in the previous chapter can be considered sufficiently widespread to constitute an evolution of PSNR under customary international law. Through this it is determined that though the PSNR doctrine continues to be a reflection of customary international law, and much of the concept continues in the same vein as

initially postulated including in relation to energy security, its content has evolved to include concepts such as the protection of local communities, the environment and equitable distribution of benefits of oil and gas upstream activities.

VI. CHAPTER 2: FUNDAMENTAL LEGAL CONCEPTS

Chapters 1 and 2 of this thesis are introductory chapters necessary to understand the underlying issues on which the research carried out in the case studies in Chapters 3 to 5 is based. They provide context for, and legal background and analysis of, the contours of the different concepts that States could or have used as justifications for their changes in regulations explored in the case studies, permitting Chapter 6 then to focus on analysing and comparing the results of the case studies. Accordingly, Chapter 1 referred to the general background issues and definitions necessary to understand the industry where this research is located. This chapter provides the legal background and current context of the legal concepts that will then be returned to in Chapter 6.

This chapter is structured in two parts, divided between concepts relating to primary and secondary rules. Concepts relevant for the thesis are further explained in each part, chosen because States have implicitly, or explicitly, justified the adoption of measures in each of the case studies provided in Chapters 3, 4 and 5 by reference to one or more of these concepts. The concepts referred to under primary rules include: how rules of customary international law custom are formed and evolve; energy security; equity or equitable distribution; how conflicts with other primary obligations under international law are resolved; legitimate expectations;

supervening impossibility of performance; and *rebus sic stantibus*. The secondary rules referred to are: state of necessity and *force majeure*.

As noted in Chapter 1, the object of this thesis is to determine whether there has been an evolution in the concept of PSNR under customary international law through State practice. Thus, this chapter commences with a brief introduction to the concept of custom and explanation of how it develops through State practice is necessary to understand if the methodology chosen, and applied, in the thesis is sustainable under international law.[135]

Energy security, introduced under the heading of primary rules, is frequently referred to by States in the context of justifying measures related to oil and gas.[136] As linked to security of supply and balance of payment obligations of States, it is also closely related to *rebus sic stantibus*, state of necessity and *force majeure* as an essential interest that States attempt to protect.

Equity and equitable distribution must be addressed here as these concepts are frequently referred to be States in the context of measures related to government take (equitable distribution of benefits), [137] but also to local

[135] States also make arguments on this basis, for example, as explained in Chapters 1 and 3, where Ecuador argues in *Burlington v. Ecuador* that its increase in government take was also applied by other States.

[136] As seen in Chapter 4, energy security is frequently invoked by States as a basis for nationalisation of oil and gas activities.

[137] See Chapter 3.

development (again, on the basis of benefitting or compensating the specially affected local community).[138]

This section also addresses conflicts with other obligations under international law: some States have justified measures adopted, particularly in relation to local development,[139] based on other obligations under international law, such as human rights obligations, obligations to consult with local communities, environmental obligations, and obligations in relation to guarantee security of supply of energy. Thus, a brief introduction of the issue and what its implications are under international law is necessary for the purposes of this thesis. An example of a conflicting obligation is legitimate expectations, an expression used within the context of international investment law and frequently argued by investors when a change in regulation occurs after they made the initial investment in the country.[140] A brief explanation of this concept is, therefore, also warranted to understand what these arguments are and what they imply under international law.

Finally, this section refers to the concepts of supervening impossibility of performance and *rebus sic stantibus*. In relation to the former, it is frequently confused with the concepts of state of necessity and *force majeure*. States are not specific when they justify measures domestically, for example in "whereas" clauses. Thus, the introduction of these concepts is necessary to interpret, under

[138] See Chapter 5.

[139] See Chapter 5.

[140] It is used, for example, in Chapter 3.

international law (and thus as examples of State practice for the development of custom), what States are putting forth as justifications for these measures. As to the latter, it is relevant as States have justified measures adopted in relation to government take on the basis that there was a fundamental change in circumstances, due to outstanding increases in oil prices.[141]

The secondary rules referred to are limited to state of necessity and *force majeure*. Again, the introduction of both of these concepts is necessary to distinguish them from supervening impossibility of performance. They are also closely related to energy security and States justify measures as protecting this essential interest.[142] Thus, understanding what the nature of these secondary rules is and what their implications are under international law is necessary to analyse exactly how States are justifying the measures at issue here and whether they consider that there is a justified breach of a primary rule or a change in the primary rule (for example under customary international law).

In addition to the primary and secondary rules of international law developed below one could also refer to the issue of countermeasures as, historically, States have put forth that they were adopting certain nationalisation measures (e.g. in the case of Bolivia and Libya) in response to breaches of international law by the country of nationality of the concessionaire.[143] However,

[141] See Chapter 3.

[142] See Chapter 4.

[143] See Chapter 4.

though historically relevant, I have not found current cases where this argument was made by States and thus consider it unnecessary to introduce this concept for the purposes of this thesis.

A. Concepts related to primary rules

1. Custom

The first concept looked at is custom; although this is not a thesis on customary international law, as noted in Chapter 1, a key methodological issue is how custom evolves and what evidence is necessary to identify it. That is why, despite this not being a thesis on custom *per se*, it is necessary to have this, significant, section given its methodological importance.

Customary international law is defined in the statute of the ICJ as: 'a general practice accepted as law'.[144] It is, as distinct from conventional or treaty law, 'binding on all members of the international community to whom it is addressed'.[145] However, customary international law, by its very definition, is not static over time, but evolves with modifications in State practice and *opinio juris*.[146] In this sense,

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[144] Article 38(1)(b), Statute of the International Court of Justice (adopted on 29 June 1945, entry into force on 24 October 1945) 33 UNTS 993 (Statute of the ICJ). There have been some attempts, particularly in international criminal law to define the concept of customary international law excluding these two criteria, however that discussion is not the focus of this thesis and appears limited to international criminal law and international human rights law, *see* Roozbeh (Rudy) B. Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates' (2010) 21.1 Eur J Intl L 173.

[145] Shabtai Rosenne, 'The perplexities of modern international law: general course on public international law' (2001) 291 Recueil des Cours 9, 53.

[146] Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law', (2001) 95 AJIL 757, 784. This is not to suggest that treaties might not also evolve, through subsequent practice, modification, agreement, or evolutive interpretation: see eg Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (OUP, 2014).

although the PSNR principle continues to be recognised as a principle of customary international law[147] the analysis of this thesis will be whether the *content* of that principle may have changed.[148]

a. State practice

There are vast number of sources of evidence of State practice in the international sphere.[149] This thesis will refer to several of them as detailed below. As explained by Professor Mendelson, some of the key evidentiary sources of State practice in customary international law are

> Diplomatic correspondence, including protests; declarations of government policy (including statements to the legislature); the advice of government legal advisers; press communiqués; official manuals dealing with legal questions, for example manuals of military law; executive practice or decisions; orders to the armed forces, such as rules of engagement; votes in international organizations; the observations of Governments on projects produced by the International Law Commission or similar bodies; national legislation; domestic court decisions; pleadings before international tribunals; and so on.[150]

In its work on formation and evidence of customary international law the ILC describes one of the issues that it will have to address as 'the relative weight to be

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[147] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v *Uganda*) (Merits) [2005] ICJ Rep 168, 251.

[148] For recent discussion of the methodology used by the ICJ to determine customary international law (*see* posts by Stefan Talmon, Omri Sender and Sir Michael Wood, Harlan G. Cohen, and Fernando Lusa Bordin on 'Determining Customary International Law: The ICJ's Methodology and the Idyllic World of the ILC', EJIL). The method used in this thesis stems, in part, from practice before the ICJ and analysis of such practice by the ILC. The object of this thesis is not, however, to analyse the methodology for the determination of customary international law nor the reasons behind such chosen practices.

[149] Luigi Ferrari Bravo, 'Méthodes de Reserches de la Coutume Internationale dans la Pratique des États' (1987) 192 Recueil des Cours 237, §2, 260; Maurice H. Mendelson, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours 155, 204.

[150] Maurice H. Mendelson, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours 155, 204.

accorded to empirical research into State practice, as against deductive reasoning'.[151] As regards the position of States on the formation and evidence of customary international law, the Special Rapporteur notes that 'the approaches of States may be gleaned from their statements on particular issues as well as from pleadings before courts and tribunals'.[152] It seems reasonable thus to use, in part, a similar methodological approach for this thesis in ascertaining the relevant State practice.[153] Similarly, the American Law Institute's *Restatement of the Law, Third, the Foreign Relations Law of the United States* indicates that evidence of customary international law may be gleaned from 'pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.'[154]

Initially, the methodology to be followed was a direct application, in part, of the ILC's description of the empirical research method, that is to determine, through their statements and positions in international litigation, how States were justifying changes in their legislation in oil and gas exploration and production in relation to the specific issues linked to concerns of sovereignty, as described above:

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[151] ILC, 'First Report on formation and evidence of customary international law by Michael Wood, Special Rapporteur', UN Doc. A/CN.4/663, para 21.

[152] ibid, para 48.

[153] For an in-depth analysis of the difference between traditional and modern custom and the relative value of both see Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law', (2001) 95 AJIL 757, however this distinction does not appear relevant in this thesis as the hypothesis is the lack of existence of international declarations such as could constitute modern custom.

[154] American Law Institute, *Restatement of the Law, Third, the Foreign Relations of the United States* (St Paul, Minn.: American Law Institute Publishers 1987) § 103(2)(d).

nationalisations, government take, and development of local communities.[155] However, as there was not sufficient case law available for the study to be broad enough to come to reliable conclusions regarding trends in general State practice, this investment treaty arbitration analysis has been complemented by analysis of other sources of State practice such as State legislation, domestic courts, statements by public officials. The use of State legislation to establish State practice is also accepted.[156] For example, Professor Rosenne noted '[n]ational legislation as an internal evidence of State practice, and insistence on other States acting in that way as external evidence of State practice, are surer as evidence of State practice'.[157] This is, in contrast with 'internal judicial precedent', which, though also useful and referred to in this thesis,[158] was considered by him 'fragile' as evidence of international practice.[159]

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[155] Reference to international arbitrations as evidence of customary international law was also made by the Secretary General of the United Nations in his 'Ways and Means of Making the Evidence of Customary International Law more Readily Available: Preparatory work within the purview of article 24 of the Statute of the International Law Commission - Memorandum submitted by the Secretary-General', UN Doc A/CN.4/6 and Corr.1, pp. 27-37 amongst others.

[156] For example, the ILC and the Secretary General in their studies of the Ways and Means of Making the Evidence of Customary International Law more Readily Available refer to state legislation as described by states in official and unofficial publications: 'Ways and Means of Making the Evidence of Customary International Law more Readily Available: Preparatory work within the purview of article 24 of the Statute of the International Law Commission - Memorandum submitted by the Secretary-General', UN Doc A/CN.4/6 and Corr.1, pp. 9-25; ILC, 'Yearbook of the International Law Commission', 1950, UN Doc. A/Cn.4/Ser.A/1950, Vol. II, pp. 370-371.

[157] Shabtai Rosenne, 'The perplexities of modern international law: general course on public international law' (2001) 291 Recueil des Cours 9, 58.

[158] For example, the decisions of the Ecuadorian courts in relation to the rights of the indigenous populations regarding the alleged contamination by Texaco (now Chevron), see Chapter 4.

[159] Shabtai Rosenne, 'The perplexities of modern international law: general course on public international law' (2001) 291 Recueil des Cours 9, 58. But note that reference to domestic litigation as evidence of customary international law was also mentioned by the Secretary General of the United Nations in his 'Ways and Means of Making the Evidence of Customary International Law more Readily Available: Preparatory work within the purview of article 24 of the Statute of the

In the *Jurisdictional Immunities* case, the Court partially overlapped the evidence that it found of State practice and *opinio juris*, as it held 'State practice in the form of judicial decisions … accompanied by *opinio juris*, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts'.[160] This is an interesting evolution in the understanding of the evidentiary requirements to establish the existence of custom as it is arguable that this overlapping by the Court of the evidence required to determine both elements may imply that they are not, in fact, as distinct as has been historically set forth. In any case, it is useful in our analysis as judicial decisions will be looked at, evidencing both State practice as well as *opinio juris*.

Although there is great uncertainty as regards how to determine the formation[161] of custom[162] some requirements can be drawn from the *North Sea Continental Shelf* cases to determine what evidence is necessary to conclude what the content of a rule of customary international law is. The Court in that decision

International Law Commission - Memorandum submitted by the Secretary-General', UN Doc A/CN.4/6 and Corr.1, pp 58-66; ILC, 'Yearbook of the International Law Commission', 1950, UN Doc. A/Cn.4/Ser.A/1950, Vol. II, p 370.

[160] *Jurisdictional Immunities of the State* (*Germany* v *Italy*, *Greece intervening*) (Merits) [2012] ICJ Rep 100, para 77.

[161] On the issue of the methodology followed by the ICJ to determine the existence of custom, see Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) Eur J Intl L 417.

[162] Maurice H. Mendelson, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours 155, 175.

noted that practice had to be 'extensive and uniform' particularly as regards 'States whose interests are specially affected.'[163]

As regards 'extensive and uniform' practice, also referred to as timeliness and consistency, the State practice that will be analysed here are recent developments, in order to ascertain whether a modification or development in customary international law has occurred. The importance of the recent nature of State practice is particularly striking as regards the PSNR principle, where the evolution of the concept, which only emerged in the 1960s, necessarily must be analysed in current practice.[164]

As to consistency, it is useful to recall the ICJ's decision in the *Nicaragua case* on the principle of non-intervention where, though the Court stressed the importance of consistency in State practice it also referred to the importance of States' justifications for and reactions to actions that are inconsistent with customary rules.[165] Thus, this thesis will analyse not only State conduct but also their justifications and other States' reactions, as indicators of the evolution of custom.

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[163] *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark/Federal Republic of Germany v Netherlands*) (Merits) [1969] ICJ Rep 3, para 74; *see also* Maurice H. Mendelson, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours 155, 219.

[164] In relation to the evolution of the concept of PSNR see, Rosalyn Higgins, 'Natural Resources in the Case Law of the International Court' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development* (OUP 1999) 88, 93.

[165] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v *United States of America*) (Merits) [1986] ICJ Rep 14, para 186.

In order to establish the existence of custom it is necessary to determine 'that there is wide acceptance of the view that the conduct conforms to the law and is required by the law, with experience of conduct consistent with that.'[166] Though, as the ICJ made evident in the *Burkina Faso* case, it is not necessary for there to be universal acceptance of a practice for it to amount to customary international law.[167] As it is not feasible to undertake a detailed study of legislation of all States in this sector, and it has been recognised that evidence of customary international law may rely on 'a substantial number of countries'[168] I have gone through a selection process resulting in 25 States to examine.[169] As explained in Chapter 1, the States chosen represent widespread but relevant criteria,[170] including oil and gas production and reserves,[171] geographic distribution, legal systems, levels of development, net importers and exporters, at varying times since independence.[172]

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[166] Shabtai Rosenne, 'The perplexities of modern international law: general course on public international law' (2001) 291 Recueil des Cours 9, 58.

[167] *Case concerning the Frontier Dispute* (*Burkina Faso* v *Republic of Mali*) (Merits) [1986] ICJ Rep 554, para 20.

[168] 'Ways and Means of Making the Evidence of Customary International Law more Readily Available: Preparatory work within the purview of article 24 of the Statute of the International Law Commission - Memorandum submitted by the Secretary-General', UN Doc A/CN.4/6 and Corr.1, p. 105; Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law', (2001) 95 AJIL 757, 767.

[169] The number of States chosen is relevant in relation to the 'specially affected' States with hydrocarbon upstream regimes and reserves.

[170] This choice of criteria has sought to fulfil the requirement that the practice be 'not only extensive, but representative, including therefore all major participants or groups of participants in the activity in question'. Maurice H. Mendelson, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours 155, 226.

[171] Thus, indicating that they are 'specially affected' in the terms described above.

[172] Of course, in this review of State practice there are some logistical difficulties which makes access to information in some countries easier than in others and it is acknowledged that this may affect the outcome of the study. But this is always a factor in the study of the development of customary

This diversity in the States examined is extremely important for it to be possible to reach conclusions regarding the evolution of *general* rules of customary international law. Regional analysis has already been undertaken in this area. For example, in his book on *International Energy Investment Law* Professor Cameron analysed changes in regulation focusing on Latin America, Central Europe and the CIS.[173] He justified this regional analysis given the prevalence of investor-State disputes regarding those areas in recent years. Though the existence of investor-State disputes in relation to energy disputes may have prevailed in these geographical areas, it is my position that this does not imply that State practice in other areas may not also be reflective of similar principles. To maintain an analysis limited to the area where such prevalence might exist could be understood to indicate that the issue studied here is a regional issue rather than a global one. However, it is my position that there is evidence that that is not the case, as described below:

> This list might suggest that resource nationalism is the province exclusively of African, Eastern European and South American states. However, the governments of Australia (which threatened a Super Profits Tax), the Canadian province of Alberta (which increased the royalty rates applicable to oil sands project) and the United Kingdom (which has periodically imposed higher taxes on North Sea oil and gas production) have been the subject of criticism and furious lobbying by oil companies.[174]

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international law, *see* Maurice H. Mendelson, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours 155, 225-226.

[173] Peter D. Cameron, *International Energy Investment Law* (OUP 2010) chs 6, 7.

[174] Mark Clarke and Tom Cummins, 'Resource Nationalism: A Gathering Storm?' (2012) 6 Intl Energy L Review 220 221.

Accordingly, and in contrast with Professor Cameron, the focus of this analysis is global and on the evolution of general customary international law.[175] Though the purpose of this thesis is an inquiry into the existence and evolving content and function of a global rule of customary international law, it is important to recall that a particular rule of custom may 'also be restricted to a particular ideological group, or a group of which share the same policies on a specific issue, irrespective of their location.'[176]

b. Opinio Juris

In relation to the subjective element, *opinio juris*, there has been some discussion as to how to determine that there is evidence of a State's belief, or even if there is a need to establish the existence of *opinio juris*.[177] It is my position, however, that it is generally recognised as an element of customary international law and that a State's intent may be determined, inter alia, by its internal legislation. This is the case particularly as regards the theme of this thesis, regulation of hydrocarbons.[178] Professor Mendelson, for example, notes that 'it is more a question of the *positions*

[175] His analysis does not delve in the issue of whether these changes are reflective of an evolution of customary international law.

[176] Maurice H. Mendelson, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours 155, 216; Luigi Ferrari Bravo, 'Méthodes de Reserches de la Coutume Internationale dans la Pratique des États' (1987) 192 Recueil des Cours 237, 245.

[177] Maurice H. Mendelson, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours 155, 285.

[178] *Anglo-Iranian Oil Co. Case* (*United Kingdom v Iran*) (Preliminary Objections) [1952] ICJ Rep 93, 107.

taken by the organs of the State about international law, in their internal processes, and in their interactions with other States, than of their *beliefs*.'[179]

As regards the need and means to determine the existence of *opinio juris*, though the ICJ frequently refers to the need for this element in its decisions,[180] when it has had to establish its existence, the evidence it relied on does not necessarily require express manifestations of that belief, but tacit acceptance. For example in the *S.S. Wimbledon* case, in determining the content of the neutrality rule under customary international law, the PCIJ noted that, despite the declarations of neutrality of the United States during the first part of World War I and that the United States allowed war ships to cross the Panama Canal, '[i]t has never been alleged that the neutrality of the United States, before the entry into the war, was in any way compromised by the fact that the Panama Canal was used by belligerent men-of-war'.[181]

D'Amato, in his treatise on *The Concept of Custom in International Law* describes *opinio juris* as 'a requirement that an objective claim of international legality be *articulated* in advance of, or concurrently with, the act which will constitute the quantitative elements of custom'. [182] In the recent *Jurisdictional*

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[179] Maurice H. Mendelson, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours 155, 269-270 (footnotes omitted).

[180] *North Sea Continental Shelf Cases* (*Federal Republic of Germany* v *Denmark/Federal Republic of Germany* v *Netherlands*) (Merits) [1969] ICJ Rep 3, para 77, *Case Concerning the Continental Shelf* (*Libyan Arab Jamahiriya* v *Malta*) (Merits) [1985] ICJ Rep 13, para 27, amongst others.

[181] *Case of the S.S. Wimbledon* (*United Kingdom, France, Italy, Japan*, v *Germany, Poland intervening*) (Merits) PCIJ Rep Series A No 1, 28.

[182] Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 74.

Immunities case, the ICJ held that *opinio juris* was 'demonstrated by the positions taken by States and the jurisprudence of a number of national courts'.[183] Thus, evidence of *opinio juris* in the development of custom may be approached from different angles. On the one hand, it will be an articulation by a state of its belief that a certain act is in accordance with international law; on the other hand, it will be acquiescence or acknowledgement by other states to the action or omission carried out by a State.

2. *Energy security*

a. Concept

The second concept to be analysed here is energy security. As mentioned above this concept is related to the issue of an essential interest to be protected by the State. There is both a legal and policy content to energy security. This thesis will refer to both. As a legal concept energy security is linked to a source of primary concern that relates to an essential interest in the defence of necessity as a circumstance precluding wrongfulness. Additionally, it has been considered an exculpating factor on the basis of a treaty, for example in the *China-Raw Materials* case.[184] As a political concept, it could be considered as conditioning the scope of an obligation: 'energy security' refers to security of supply of an exhaustible resource necessary to produce

[183] *Jurisdictional Immunities of the State* (*Germany* v *Italy, Greece intervening*) (Merits) [2012] ICJ Rep 100, para 77.

[184] WTO, *China: Measures related to the Exportation of various Raw Materials-Report of the Appellate Body* (20 January 2012) WT/DS394/AB/R, WT/DS395/AB/R and WT/DS398/AB/R.

the energy required in a certain country. It is also linked to the affordable nature of access to those resources, as well as issues related to sustainable development. The IEA defines 'energy security' as

> [T]he uninterrupted availability of energy sources at an affordable price. Energy security has many aspects: long-term energy security mainly deals with timely investments to supply energy in line with economic developments and environmental needs. On the other hand, short-term energy security focuses on the ability of the energy system to react promptly to sudden changes in the supply-demand balance.[185]

The issue of security of supply is key, but the concept of energy security is broader than that, 'though the importance of oil to economic growth is reflected in the relative weight of international regulations pertaining to oil security in particular'.[186] That is, it also refers to security of infrastructure and personnel and, some argue, 'a stable legal and political climate for energy investments'. [187] However, 'energy security' is not a static concept, '[i]nitially concerns related primarily to oil, while today energy security implicates a wide range of problems, in many cases more pressing than oil, such as the dependability of electricity transmission systems, gas contracts, and central coordination under conditions of

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[185] Definition of 'energy security' available at: http://www.iea.org/topics/energysecurity/, last accessed 2 December 2015.

[186] Catherine Redgwell, 'International Energy Security' in Barry Barton, Catherine Redgwell, Anita Rønne, Donald N. Zillman (eds), *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment* (OUP 2004) 18.

[187] ibid.

market liberalization'.[188] For the purposes of this thesis, which focuses on upstream activities, the concept will be limited to security of supply.[189]

b. Supply of natural resources

Arguments based on a need to secure a certain supply of a natural resource are not unusual in international law. In the specific case of oil, it is worth recalling that the IEA was specifically created 'to guard against serious supply disruption through stockpiling and emergency sharing obligations'.[190] As to energy resources, for example, 'Russian President Putin has relied on the concept of energy resources as a "strategic good" for Russia, drawing on his own dissertation written in St. Petersburg'.[191]

In the case law of the PCIJ the Court considered the importance of the 'good' subject to a concession in relation to the economy of the country. For example in *Oscar Chinn* the Court highlighted that '[i]n the first place is to be noted the peculiar importance of fluvial transport for the whole economic organization of the colony'.[192] Additionally, the Court noted that Belgium argued that the measures

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[188] Barry Barton, Catherine Redgwell, Anita Rønne, Donald N. Zillman, 'Energy Security in the Twenty-First Century' in Barry Barton, Catherine Redgwell, Anita Rønne, Donald N. Zillman (eds), *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment* (OUP 2004) 458, 459.

[189] Adrian Bradbrook, 'Energy Law as an Academic Disciple' (1996) 14 J Energy and Natural Resources L 193, 207.

[190] Catherine Redgwell, 'International Energy Security' in Barry Barton, Catherine Redgwell, Anita Rønne, Donald N. Zillman (eds), *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment* (OUP 2004) 18, 29.

[191] Rudolf Dolzer, 'International Co-operation in Energy Affairs' (2015) 372 Recueil des Cours 397, 429.

[192] *Case of Oscar Chinn* (*United Kingdom v Belgium*) (Merits) PCIJ Rep Series A/B No 63, p. 78.

were justified because their 'determining cause', 'was the general economic depression and the necessity of assisting trade', emphasizing that 'the Belgian Government was the sole judge of this critical situation and of the remedies that it called for, subject of course to its duty of respecting its international obligations'.[193] Finally, upon deciding, the Court emphasized the 'exceptional circumstances in which the measures' were adopted and the fact that the measures were of a 'temporary character' and applied to public services, meant that they could not be considered a breach of the freedom of trade in the Congo.[194] Though clearly related to different issues, this reasoning is reminiscent of the IEA's emergency response measures recounted above.

More recently, in *China-Raw Materials*, the WTO Appellate Body interpreted concepts related to guaranteeing security of supply, and the essential character of certain goods as being incorporated in article XI:2(a) of the GATT.[195] This incorporation meant that, under certain circumstances, i.e., when there was a need to secure supply of an essential good for the State, quantitative restrictions on exports may be applied on those goods and that is not a violation of the GATT. Though this decision was not in relation to hydrocarbons, it is instructive as to what

[193] ibid, p. 79.

[194] ibid, p. 86

[195] Which it notes is distinguishable from Article XX(g) because Article XX is an exception to justify measures that would otherwise be inconsistent with GATT obligations, whereas 'if the requirements of Article XI:2(a) are met, there would be no scope for the application of Article XX, because no obligation exists', WTO, *China: Measures related to the Exportation of various Raw Materials-Report of the Appellate Body* (20 January 2012) WT/DS394/AB/R, WT/DS395/AB/R and WT/DS398/AB/R, para 334.

other international tribunals have held as regards measures relating to exhaustible natural resources that are considered essential to States. The GATT article states that the general elimination of quantitative restrictions 'shall not extend to' … 'Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party'.[196]

The Appellate Body referred to 'critical shortage' as 'deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage or turning point'.[197] That is, situations where there is a deficiency in quantity that is critical for the State. In relation to the goods covered under that section, the Appellate Body concluded that they included foodstuffs but also other products that are essential to the Member,[198] so long as they were effectively, essential. As regards the purpose of the measure, the Appellate Body determined that it may be applied 'to alleviate or reduce an existing critical shortage, as well as for preventive or anticipatory measures adopted to pre-empt an imminent critical shortage',[199] that is the measure could be used in an existing situation of shortage or as a preventative measure. Finally, as regards the temporal element, the Appellate Body describes a measure 'applied for a limited duration,

[196] Article XI:2(a), WTO GATT.

[197] WTO, *China: Measures related to the Exportation of various Raw Materials-Report of the Appellate Body* (20 January 2012) WT/DS394/AB/R, WT/DS395/AB/R and WT/DS398/AB/R, para 324.

[198] ibid, para 326.

[199] ibid, para 327.

adopted in order to bridge a passing need, irrespective of whether or not the temporal scope of the measure is fixed in advance'.[200]

These guidelines are useful in referring to the concept of energy security of supply because they show that, given certain circumstances of critical need of an essential good, international provisions foresee that a State may restrict exports quantitatively. Though the *China Raw Materials* case referred to certain minerals and did not include hydrocarbons, the Appellate Body did analyse the applicability of article XI:2(a) for a case of an exhaustible natural resource. Regardless of its specific conclusion, the fact that it considered the provision applicable indicates an acknowledgment by an international tribunal that these types of limitations may be acceptable under international law in certain circumstances.

3. Equity or equitable distribution

The third concept has to do with equity or equitable distribution of resources.[201] A clear historical example of this is in the case of *Kuwait v Aminoil* that has already been analysed in Chapter 1. The concept of equity under international law has broad ranging implications. Although it is not a separate source of international law under article 38(1) of the Statute of the ICJ it has been relied upon extensively in

[200] ibid, para 331.

[201] Though Professor Brownlie strongly rejected the notion of equity as being useful other than to accord tribunals discretion, highlighting '[w]hatever the particular and interstitial significance of equity in the law of nations, as a general reservoir of ideas and solutions for sophisticated problems it offers little but disappointment' (Ian Brownlie, 'Legal Status of natural resources in international law (some aspects)' (1979) 162 Recueil des Cours 249, 288), both tribunals and States have referred to these concepts.

international adjudication linked to other sources,[202] even outside the concept of *ex aequo et bono*.[203] As the ICJ stated in the *Case concerning the Continental Shelf*: 'the legal concept of equity is a general principle directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in light of the circumstances of the case, to be closest to the requirements of justice. Application of equitable principles is to be distinguished from a decision *ex aequo et bono*'.[204]

Sir Robert Jennings[205] explained that the role of equity, as a general principle of law, was to 'mitigate the effects of the application of the rule of law in particular circumstances in which the strict rule of law would work an injustice'.[206] Relevant

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[202] For example in *North Sea Continental Shelf Cases* (*Federal Republic of Germany* v *Denmark/Federal Republic of Germany* v *Netherlands*) (Merits) [1969] ICJ Rep 3, paras 88-92, *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (*Belgium* v *Spain*) (Second Phase) [1970] ICJ Rep 3, paras 92-101, *Case Concerning the Continental Shelf* (*Tunisia* v *Libyan Arab Jamahiriya*) (Merits) [1982] ICJ Rep 18, para 71; *Case Concerning the Continental Shelf* (*Libyan Arab Jamahiriya* v *Malta*) (Merits) [1985] ICJ Rep 13, paras 45-47; *Case Concerning the Frontier Dispute* (*Burking Faso* v *Mali*) (Merits) [1986] ICJ Rep 554, paras 27, 149.

[203] For extensive discussion on the concept of equity under international law see Raúl E. Vinuesa, 'The new role of equity as a source of international law', (1992) XIX Thesaurus Acroasium (Institute of Public International Law and International Relations of Thessaloniki); Francesco Francioni, 'Equity in International Law' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (June 2013); Robert Y. Jennings, 'Equity and Equitable Principles' (1986) XLII Annuaire Suisse de Droit International 27; Prosper Weil, 'L'équité dans la jurisprudence de la Cour Internationale de Justice', in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP 1996) 121; Vaughan Lowe, 'The Role of Equity in International Law' (1988-1989) 12 Australian YB Intl L 54; Thomas M. Franck and Dennis M. Sughrue, 'The International Role of Equity as Fairness' (1992-1993) 81 Georgetown L J 563.

[204] *Case Concerning the Continental Shelf* (*Tunisia* v *Libyan Arab Jamahiriya*) (Merits) [1982] ICJ Rep 18, para 71.

[205] Sir Robert Jennings was a Judge of the International Court of Justice from 1982 through 1995, and its President from 1991 through 1994.

[206] Robert Y. Jennings, 'Equity and Equitable Principles' (1986) XLII Annuaire Suisse de Droit International 27, 32.

equitable doctrines for this thesis include the doctrine of unjust enrichment, which requires taking 'into account all the circumstances of each specific situation'[207] 'to re-establish a balance between two individuals, one of whom has enriched himself, with no cause, at the other's expense'[208].[209]

Conceptually, this may imply limits to territorial sovereignty of States, or obligations that they must abide by in the exercise of that territorial sovereignty. In the case of acceptance of equitable principles as legal obligations this could signify vesting 'fairness and justice in the otherwise unrestricted exercise of territorial sovereignty and the jurisdiction of States'.[210] Equitable principles can thus be a justification for States' changes in domestic regulation but also an obligation on States to change domestic regulation.[211]

Further, principles of equity are contemplated in trade treaty contexts 'to remedy the harsher effects of supply and demand on the weakest parties'.[212] Examples of this can be found in the WTO through the Enabling Clause or 'Decision

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[207] Eduardo Jiménez de Aréchaga, 'International Law in the past third of a century' (1978) 159 Recueil des Cours 300.

[208] Francesco Francioni, 'Compensation for Nationalization of Foreign Property: The Borderline between Law and Equity' (1975) 24 ICLQ 255, 275.

[209] *Sea-Land Service Inc v Iran* (1984) Iran-USCTR 149, 168-169; Vaughan Lowe, 'The Role of Equity in International Law' (1988-1989) 12 Australian YB Intl L 54, 64; Thomas M. Franck and Dennis M. Sughrue, 'The International Role of Equity as Fairness' (1992-1993) 81 Georgetown L J 563, 565-566.

[210] Lilian del Castillo-Laborde, 'Equitable Utilization of Shared Resources' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (January 2010).

[211] As seen in Chapter 3 equitable distribution of resources is invoked by states as both a defence in international litigation as well as a justification in internal legislation.

[212] Thomas M. Franck and Dennis M. Sughrue, 'The International Role of Equity as Fairness' (1992-1993) 81 Georgetown L J 563, 573-576.

on Differential and More Favourable Treatment', which is the legal basis for systems such as the Generalised System of Preferences (GSP) allowing developed countries to 'offer non-reciprocal preferential treatment (such as zero or low duties on imports) to products originating in developing countries'.[213] Other examples include the Lomé (I) Convention and its successors[214] and the United Nations Common Fund for Commodities[215].

In this thesis the relevance of equity is in relation to allegations by States based on equitable distribution of an exhaustible natural resource.[216] GA Resolution 1803(XVII) refers to 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'.[217] This was, in part, a rejection of a previous formulation, in GA Resolution 523(VI) which stated that 'under-developed countries have the right to determine freely the use of their natural resources and that they must utilize such resources … and *to the further the expansion of the world economy'*.[218] GA Resolution 2158(XXI), though not as

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[213] *See* the WTO explanation regarding these provisions, available at: https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm, last accessed 21 October 2015.

[214] ACP-EEC Convention of Lome (adopted on 28 February 1975, entry into force on 1 April 1976) 105 UKTS 5.

[215] Agreement establishing the Common Fund for Commodities (adopted on 27 June 1980, entry into force on 19 June 1989) 1538 UNTS 3.

[216] Francesco Francioni, 'Equity in International Law' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (June 2013), para 29; Thomas M. Franck and Dennis M. Sughrue, 'The International Role of Equity as Fairness' (1992-1993) 81 Georgetown L J 563, 572.

[217] GA Resolution 1803(XVII), para 1.

[218] GA Resolution 523(VI) (emphasis added).

generally accepted as reflective of customary international law, explicitly provides that it '[r]ecognizes the right of all countries, and in particular the developing countries, to secure and increase their share in the administration of enterprises which are fully or partly operated by foreign capital and have a greater share in the advantages and profits derived therefrom *on an equitable basis*, with due regard to the development needs and objective of the peoples concerned'.[219] One example of this principle in treaty text may be found in the Convention on Biological Diversity.[220]

Equitable distribution of resources (generally) has been looked at by the ICJ as well.[221] In this sense, in the *Jan Mayen* decision, upon determining delimitation of the fishery zones between Greenland and Jan Mayen, the Court specifically referred to having to consider 'whether any shift or adjustment of the median line, as fishery zone boundary, would be required to ensure equitable access to the capelin fishery resources for the vulnerable fishing communities concerned', and, consequently, went on to modify the median line.[222]

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[219] GA Resolution 2158(XXI); *see also generally* Yinka Omorogbe, 'Property Rights in Oil and Gas under Domanial Regimes' in Aileen McHarg, Barry Barton, Adrian Bradbrook, Lee Godden (eds), *Property and the Law in Energy and Natural Resources* (OUP 2010).

[220] Articles 1, 8, 15, 19, Convention on Biological Diversity (adopted on 5 June 1992, entry into force on 29 December 1993) 1760 UNTS 79.

[221] *See*, for example, Prosper Weil, 'L'équité dans la jurisprudence de la Cour Internationale de Justice', in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP 1996) 121, 140.

[222] *Case concerning Maritime Delimitation in the area between Greenland and Jan Mayen* (*Denmark v Norway*) (Merits) [1993] ICJ Rep 38, paras 75, 90. The Court referred to its earlier case law (*Case of the Gulf of Maine*) wherein such adjustments were warranted to avoid 'catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned'.

In the context of exhaustible (or scarce) natural resources, arguments have been made on the need for States to contemplate fair and equitable sharing of benefits: '[c]onflicting interests in terms of the utilization of scarce natural resources on which the whole of society depends have provided comprehensive challenges to traditional law thinking, and present a need to redefine the traditional role of private property rights in order to ensure fair and equitable sharing of benefits'.[223]

In the *Gabcikovo-Nagymaros* case the ICJ introduced an additional facet to the concept of equitable distribution, albeit of shared resources,[224] in noting that though '[t]he suspension and withdrawal of [Hungary's consent in the 1977 Treaty] constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation: but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an

[223] Anita Rønne, 'Public and Private Rights to Natural Resources and Differences in their Protection?' in Aileen McHarg, Barry Barton, Adrian Bradbrook, Lee Godden (eds), *Property and the Law in Energy and Natural Resources* (OUP 2010) 79; *see also* generally Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds.), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 42.

[224] Though hydrocarbons are, in some cases, shared resources, States have not generally consented to their being studied as such by the ILC, states generally argued that these were bilateral or highly technical issues (see ILC 'Shared natural resources Comments and observations received from governments' (4 May-5 June and 6 July-7 August 2009) UN Doc A/CN.4/607; ILC 'Shared natural resources Comments and observations received from governments' (3 May-4 June and 5 July-6 August 2010) UN Doc A/CN.4/633). As regards this thesis, the issue of hydrocarbons as a shared natural resource shall not be addressed as the relevance here is to State regulation of upstream activities, and these are not developed jointly, States generally relying on the rule of capture in this regard. In so far as regulation could create transboundary harm, an interesting issue could be studied under international law, but that is not the topic of this thesis. *See* Catherine Redgwell and Lavanya Rajamani, 'Energy Underground: What's International Law Got to Do With it?' in Donald N. Zillman, Aileen McHarg, Adrian Bradbrook, and Lila Barrera-Hernandez *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014).

international watercourse.'[225] That is, there may be a supervening 'basic right' to an 'equitable and reasonable sharing of resources'.

The principle of 'intergenerational equity', a corollary of equity under international law,[226] has been defined as stating that 'every generation holds the Earth in common with the members of the present generation and with other generations, past and future'.[227] The concept of intergenerational equity is reflected, for example, in Article 3 of the United Nations Framework Convention on Climate Change (UNFCCC).[228] It is also relevant for the concept of sustainable development. Some would even argue that it is 'the foundation of sustainable development'.[229] Both the principle of 'intergenerational equity' and equitable principles under environmental law are still in process of development and cannot be considered as 'having hardened into specific rights and duties' thus principles of equity are more

[225] *Case concerning the Gabcikovo Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, para 78; *see also* Rosalyn Higgins, 'Natural Resources in the Case Law of the International Court' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999) 110 (footnotes omitted).

[226] Edith Brown Weiss, 'Intergenerational Equity', in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (February 2013) para 2.

[227] ibid, para 1.

[228] Article 3, United Nations Framework Convention on Climate Change (adopted on 9 May 1992, entry into force on 21 March 1994) 1771 UNTS 107 (United Nations Framework Convention on Climate Change); *see also*, linking this concept with that of distributive justice, Catherine Redgwell, 'Shared International Responsibility for Transboundary Harm Arising from Energy Activities' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds.), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 42.

[229] Edith Brown Weiss, 'Intergenerational Equity', in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (February 2013) para 1; Report of the World Commission on Environment and Development: Our Common Future, §3.

relevant there.[230] They are, however, relevant for this thesis for two reasons: first, intergenerational equity could be a central issue in the exploitation of an exhaustible resource like hydrocarbons. Additionally, in so far as it is relevant to the concept of sustainable development, both concepts will be addressed in detail in Chapter 5, when referring to local development, particularly as a local community can be defined to include future generations that will be resident in the area currently being explored or produced.

4. Conflict with other obligations under international law

The fourth issue to be addressed is conflicting obligations under international law. In the specific area studied in this thesis, conflicts occur between an existing agreement or legislation regulating upstream hydrocarbon activities and supervening obligations under a treaty or customary international law in relation, for example, to the environment. Additionally, there could be apparent conflicts between States' obligations under bilateral investment treaties to guarantee the terms of investments made and obligations under human rights treaties related to development. Finally, there could be conflicts with obligations to guarantee energy security or general rules of international law such as equity.

In the *Gabcikovo-Nagymaros* case, the ICJ referred to the 'relationship between bilateral agreements concerning natural resources and developments in

[230] Vaughan Lowe, 'The Role of Equity in International Law' (1988-1989) 12 Australian YB Intl L 54, 73.

general law, including environmental law'.[231] Particularly, the Court emphasized that new rules and standards as regards the environment ought to be considered 'not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development'.[232] The apparent conflict here would be between new norms and standards of protection of the environment and existing agreements, for example related to the development of natural resources.

The 1969 Vienna Convention on the Law of Treaties ('1969 Vienna Convention') addresses the relationship between subsequent conflicting treaties,[233] in article 30.[234] There is not, as suggested in *Gabcikovo*, an express provision as to what occurs in case of a conflict between a treaty and a rule of customary international law.[235]

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[231] Rosalyn Higgins, 'Natural Resources in the Case Law of the International Court' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999) 111.

[232] *Case concerning the Gabcikovo Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, para 140.

[233] The ILC Study Group on Fragmentation found that, despite referring to 'the same subject matter' this article is applicable to treaties 'invoked in regard to the same matter, or if, in other words, as a result of interpretation, the relevant treaties seem to point to different directions in their application by a Party' ILC, 'Fragmentation of International Law', Report of the Study Group of the ILC, UN Doc. A/CN.4/L.682, p 21, para 23.

[234] *See* Alexander Orakhelashvili, 'Article 30 Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties A Commentary* (OUP 2011) Vol 1, p 764.

[235] Though *jus cogens* norms, in particular, are addressed in articles 53 and 64, but they are not relevant here.

As regards conflicts between treaties, an interesting position is that reflected by Fitzmaurice as Special Rapporteur on the issue where he asserted that Article 103 of the U.N. Charter, 'might oblige a Member State to break a treaty with a non-member …, yet it cannot *release* or absolve the Member State from *liability* in respect of those obligations'.[236] Thus even in cases where a State might argue a conflicting obligation under international law with the UN Charter which establishes its precedence, the result may continue to be its responsibility with regard to the breached obligation.[237]

What has been held as a starting point in the area of customary international law conflicts is article 31(3)(c),[238] which does not refer to the application of customary rules but deals with this issue as a matter of interpretation, noting that in interpretation of treaties '[t]here shall be taken into account, together with the context: … (c) Any relevant rules of international law applicable in the relations

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[236] ILC, 'Third report on the law of treaties, by Mr. G. G. Fitzmaurice, Special Rapporteur' [1958] II Yearbook of the International Law Commission, U.N. Doc. No. A/CN.4/115, p 43, para 86.

[237] Conflicts between treaties that do not necessarily establish a hierarchy but have been considered as such by international tribunals are those relating to human rights law and humanitarian law. In this sense, several international tribunals have determined the precedence of these obligations over others under international law, but not referred to what the result of this precedence is with regard to the breach of the other international obligation. *See Kindler v Canada*, Communication No. 470/1991, UN Doc. CCPR/C/48/D/470/1991 (1993); *Evan Julian and others v New Zealand*, Communication No. 601/1994, UN Doc. CCPR/C/59/D/601/1994 (1997); *Matthews v United Kingdom* App no 24833/94 (ECtHR, 18 February 1999); *Soering v UK* App no 14038/88 (ECtHR 7 July 1989). As regards norm conflicts *see* Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) pp. 236-260; Marko Milanovic, 'Norm Conflict in International Law: Whither Human Rights?', (2009) 20 Duke J Comparative & Intl L. 69; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003).

[238] Philippe Sands, 'Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999).

between the parties'. This is the applicable article when there is what has been referred to as an 'apparent conflict'.[239]

The relationship between customary international law and treaties is frequently referred to in the context of treaty interpretation. As explained by Professor Sands, '[t]he potential for customary norms to influence treaty interpretation and application thus arises with increasing frequency as the fields of international law proliferate, as the norms within those fields multiply'.[240]

There is limited judicial[241] and doctrinal[242] discussion on the application of article 31(3)(c) of the 1969 Vienna Convention.[243] As regards the conflict between

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[239] Joost Pauwelyn, *Conflict of Norms in Public International Law* (CUP 2003) 237-274.

[240] Philippe Sands, 'Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999) 111.

[241] The ICJ referred to this concept briefly in the *Oil Platforms* case (*Case concerning Oil Platforms* (*Iran v United States of America*) [2003] ICJ Reports 161, para 41). The WTO panel in the *China Rare Earths* case also applied article 31(3)(c) in its analysis of the relevance of the international law principles of PSNR and sustainable development (WTO, *China: Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum-Reports of the Panel* (26 March 2014) WT/DS431/R, WT/DS432/R and WT/DS433/R, para 7.262), article 31(3)(c) was also applied in the *Shrimp-Turtle* case (WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, para 158. There have been some cases before the Iran-U.S. Claims Tribunal, in relation to the determination of nationality, and the ECtHR where reference was made to Article 31(3)(C) as a method of interpretation of a treaty provision (for example *Esphahanian v Bank Tejara* (1983) 2 Iran-USCTR 157; *Case no A/18* (1984) 5 Iran-USCTR 251; *Demir and Baykara v Turkey* App no 34503/97, ECtHR (12 November 2008); *Bosphorus Hava Yollari Turzim ve Tikaret Anonim Siketi v Ireland* App no 45036/98, ECtHR (30 June 2005); *Al-Adsani v United Kingdom* App no 35763/97, ECtHR (21 November 2001); *Golder v United Kingdom* App no 4451/70, ECtHR (21 February 1975).

[242] Campbell McLachlan 'The Principles of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54(2) ICLQ 279; Jean-Marc Sorel and Valerie Bore Eveno 'Article 31 Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties A Commentary* (OUP 2011) Vol. 1, pp. 828-829; Marc E. Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) pp. 432-434.

[243] Philippe Sands, 'Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999) 50-51.

treaty and custom, however, in 1955 the *Institute de Droit International* controversially asserted[244] that:

> There is no *a priori* hierarchy between treaty and custom as sources of international law. However in the application of international law, relevant norms deriving from a treaty will prevail between the parties over norms deriving from customary law.[245]

Others have argued that the interpretation of article 31(3)(c) should be such that, upon a conflict between a treaty and a subsequent rule of customary international law, a tribunal should 'apply a presumption that [any primarily self-contained system of rules] is to be interpreted consistently with general international law, and that the customary rule is to apply, unless it can be shown that such application would undermine the object and purpose of the' [246] self-contained system of rules.

The ICJ in its advisory opinion on *Namibia* had to interpret certain provisions of the Covenant of the League of Nations. Though at the time the 1969 Vienna Convention was not yet in force, the Court considered 'the subsequent development of law, through the Charter of the United Nations and by way of customary law' in interpreting those provisions—which it noted 'were not static, but were by definition evolutionary'. Its relevant conclusion was that 'an international instrument has to be interpreted and applied within the framework of the entire

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[244] This actual conclusion was passed by a small number of votes as explained in ibid.

[245] Institut de Droit International, 'Problems Arising from a Succession of Codification Conventions on a Particular Subject' [1995] Resolutions, Conclusion 11.

[246] Philippe Sands, 'Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999) 60.

legal system prevailing at the time'.[247] This approach was also followed by the ICJ in the *Gabcikovo-Nagymaros* case,[248] as well as by the WTO in the *Shrimp-Turtle* case,[249] though, as explained there is still 'significant controversy around what is permissible under an "evolutionary interpretation" of treaty terms', in light of considerations on the treaty's object and purpose, it seems to be accepted that some sort of evolutive interpretation of treaty texts is reasonable.[250] The ILC has also referred to this issue in its 'Treaties over Time' study. This does not resolve the issue of application of subsequent development of custom but its use in interpretation of existing treaty rules. This is, again, relevant to this thesis in understanding how potentially conflicting rules, either in existence contemporaneously or supervening, are generally dealt with under public international law.

5. Legitimate Expectations

The fifth concept developed here is that of legitimate expectations. As explained at the outset, this is relevant in interpreting obligations under bilateral investment treaties frequently referred to in the thesis, and in particular in the case law related

[247] *Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 274 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 53.

[248] *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, para 112; *Island of Palmas Case* (*Netherlands v USA*) (1928) II RIAA 829.

[249] WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R.

[250] Callum Musto and Catherine Redgwell, 'US-Import Prohibition of Certain Shrimp and Shrimp Products (1998)' in Eirik Bjørge and Cameron Miles (eds) *Landmark Cases in Public International Law* (Bloomsbury 2017); Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 125–7.

to government take.[251] In the area of international investment law, where bilateral investment treaties set out the standards of treatment for foreign investors,[252] there is usually a reference to an obligation to provide fair and equitable treatment. There has been a great deal of discussion regarding the extent of the fair and equitable treatment obligation.[253] In one of its interpretations,[254] it has been considered the equivalent of a protection for the 'legitimate expectations' of investors.[255] The first

[251] For example, in Chapter 3, see the tribunal's decision in *Total v. Argentina*.

[252] Some have argued that they also set out obligations for foreign investors, including general references to international law that imply that these investors have obligations with regard to human rights, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07/26, Award (8 December 2016) paras 1143-1155.

[253] A very detailed and in-depth study of this issue may be found at Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013). There has been much written on the fair and equitable treatment standard, some references to extended works follow, Marc Jacob and Stephan Schill, 'Chapter 8: Standards of Protection I. Fair and Equitable Treatment' in Marc Bungenberg and others (eds.) *International Investment Law* (C.H. Beck, Hart, Nomus 2015) 700; Stephen Vasciannie, 'The Fair and equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYBIL 99; UNCTAD, *Fair and Equitable Treatment* (United Nations 1999), UNCTAD, *Fair and Equitable Treatment: A Sequel* (United Nations 2012).

[254] There are, of course, other perhaps more correct ones, see *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken (3 July 2010) para. 3; Nicolas Angelet, 'Fair and Equitable Treatment' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (March 2011); in the NAFTA context, the State Parties issued an interpretative note, expressly adopting an interpretation of the fair and equitable treatment standard as 'the customary international law minimum standard of aliens' and 'does not require treatment in addition to or beyond that which is required by the customary international law minimum standard', NAFTA, 'Notes of Interpretation of Certain Chapter 11 Provisions' [31 July 2001]. This interpretation was then elaborated on in Waste Management v Mexico stating that the minimum standard was 'infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves lack of due process leading to an outcome which offends judicial propriety.' *Waste Management Inc. v Mexico*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) para 98

[255] *Walter Bau v Thailand*, UNCITRAL Award (1 July 2009) para 11.7; *Bayindir Insaat Turizim Ticaret Ve Sanayi A.S. v Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) para 178; *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) para 216; *El Paso Energy International Services v. Argentina*, ICSID Case No. ARB/03/15, Award (31 October 2011) para 348; *Total S.A. v Argentina*, ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010) paras 113-124; *Charanne B.V. and Construction Investments S.A.R.L. v Spain*, SCC Case No. 062/2012, Award (21 January 2016) para 486; *Frank Charles Arif v Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013) para 533; *Oxus Gold plc v Uzbekistan*, UNCITRAL Case, Final Award (17 December

references to the concept of legitimate expectations in the context of investment treaty cases was based on the principle of good faith.[256] Later authors and tribunals have attempted to justify this interpretation of the standard of fair and equitable treatment on the basis that the origin of this concept of legitimate expectations is found in municipal law.[257] In these cases the authors and tribunals have referred to English, German and E.U. law, and additionally they have sometimes referred to obscure concepts in Argentine and Venezuelan law.

Regardless of the origin of this concept, and whether or not it is the correct interpretation of the fair and equitable treatment standard in BITs, it is now more or less generally accepted in international investment law. This acceptance, regrettably, has come about—as many concepts do in international investment law—through repetition rather than substantive reasoning.[258] For the purposes of

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2015) para 318; *Saluka Investments B.V. v Czech Republic*, UNCITRAL Case, Partial Award (17 March 2006) para 302; *Peter A. Allard v Barbados*, PCA Case No. 2012-06, Award (27 June 2016) para 217.

[256] *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) para 154.

[257] Francisco Orrego Vicuna, 'Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society', (2003) 5(3) Intl L Forum 188, 193-195 (referring to English case law); see also Stephen Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Law' in Stephen Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 151, 164; Michele Potestà, 'Legitimate Expectations in Investments Treaty Law: Understanding the Roots and the Limits of a Controversial Concept', (2013) 28(1) ICSID Review 88 (referring to German, EU, English, and Argentine law); Soren Schonberg, *Legitimate Expectations in Administrative Law* (OUP 2000) (referring to English, French and EU Law); *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010) paras 128-130; *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) para 576; *Crystallex International Corporation v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) para 546.

[258] Michele Potestà, 'Legitimate Expectations in Investments Treaty Law: Understanding the Roots and the Limits of a Controversial Concept', (2013) 28(1) ICSID Review 88, 90-93. This is also the case on the issue of shareholder claims, *see* Gabriel Bottini, 'The Admissibility of Shareholder Claims: Standing, Causes of Action, and Damages' (PhD Thesis, University of Cambridge 2017).

this thesis, whether or not this is the correct interpretation is not relevant; what is relevant is what impact, if any, that concept may have in changes in legislation or agreements regarding oil and gas upstream activities. Accordingly, I will examine how that concept has been interpreted.

The seminal decision linking fair and equitable treatment to legitimate expectations is *Tecmed v. Mexico*, where the tribunal explained:

> The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle[259]

[259] *Técnicas Medioambientales Tecmed S.A. v Mexico*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) para 154.

This decision (sometimes referred to as *Tecmed's plan for good governance*) has been strongly criticised on the basis that the standard set by this tribunal is unattainable by a government.[260] For example, the annulment committee in *MTD v. Chile* noted that a State's obligations cannot be based on the expectations of an investor, but only on the applicable investment treaty.[261] Other tribunals have noted that an investor's legitimate expectations cannot legitimately include the stability of the legal or economic environment, unless there was an explicit commitment to that effect. In *Parkerings v Lithuania* the tribunal held that:

> It is each State's undeniable right and privilege to exercise its sovereign legislation power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws evolve over time.[262]

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[260] However, surprisingly, there have been tribunals that continue to hold that an 'implicit' undertaking or representation by a host State may create legitimate expectations (*Gold Reserve Inc. v Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) para 571), the basis, under international law, for this interpretation of the fair and equitable treatment standard to include an 'implicit' undertaking or representation is only a reference to a 'authoritative' writings, which seems unthinkable as a basis for an obligation on States. How, for example, does a State identify if it is making an implicit undertaking or representation? How can it be determined if it was made with an intention to bind the State, in the terms of the *Nuclear Tests* cases? This interpretation seems untenable as a matter of international law.

[261] *MTD Equity Sdn Bhd. & MTD Chile S.A. v Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (21 March 2007) para 67.

[262] *Parkerings-Compagniet A.S. v Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007) para 332; *Venezuela Holdings B.V. and others v Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014) para 256; *Crystallex International Corporation v Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) para 547; *El Paso Energy International Services v Argentina*, ICSID Case No. ARB/03/15, Award (31 October 2011) paras 350, 352; *Phillip Morris Brands S.A.R.L., Phillip Morris Products S.A. and Abal Hermanos S.A. v Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016) paras 426-427.

Though some tribunals have limited that understanding holding that, in the case a change in legislation is made, it may not be unreasonable, contrary to the public interest or disproportionate.[263] What the international law basis for those limitations to changes in general legislation are, is not clear from the case law.

Still others have held that these 'legitimate expectations' must be interpreted in light of all the circumstances of the case. In *Toto v Lebanon* the tribunal explains: '[f]inally, legitimate expectations are more than the investor's subjective expectations. Their recognition is the result of a balancing operation of the different interests at stake, taking into account all circumstances, including the political and socioeconomic conditions prevailing in the host State.'[264]

The relationship between legitimate expectations and agreements has also been dealt with in some cases, distinguishing a contractual breach from a breach of international law. In *Convial Callao v Peru* the tribunal held that the existence of an agreement may generate expectations but these are not necessarily protected under international law.[265] A similar position was put forth by the tribunal in *Hamester v Ghana*, noting that mistakenly granting such a characteristic to any agreement and

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[263] *Charanne B.V. and Construction Investments S.A.R.L. v. Spain*, SCC Case No. 062/2012, Award (21 January 2016) para 510.

[264] *Toto Costruzioni Generali S.p.A. v Lebanon*, ICSID Case No. ARB/07/12, Award (7 June 2012) para 165; *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010) paras 113-124; *Saluka Investments B.V. v Czech Republic*, UNCITRAL Case, Partial Award (17 March 2006) para 304; *El Paso Energy International Services v Argentina*, ICSID Case No. ARB/03/15, Award (31 October 2011) paras 358-364.

[265] *Convial Callao S.A. and CCI-Compañía de Concesiones de Infraestructura S.A. v Peru*, ICSID Case No. ARB/10/2, Final Award (21 May 2013) paras 577-578.

any breach would imply that the fair and equitable treatment standard was equivalent to an umbrella clause.[266]

Thus, the interpretation of the concept of legitimate expectations, though originally overly broad, seems to have been reined in to instances where an express commitment has been made to an investor, not a general law, and that express commitment must be read in light of all the circumstances of the case. Additionally, not all breaches in an agreement are necessarily a breach of international law.

6. Supervening impossibility of performance

As indicated above, the sixth concept developed here is that of supervening impossibility of performance. This is relevant for the thesis in so far as States make general assertions regarding the need to adopt certain measures, for example nationalisation in Chapter 4, to guarantee the protection of essential interests of their population. At times it is unclear what rule of international law is being referred to and it is therefore necessary briefly to develop these here to distinguish them from other legal concepts below. Historically, the supervening impossibility of performance has not been frequently invoked by States, thus the ILC notes that there is limited State practice in relation to this.[267] However, the PCIJ considered (and rejected) such a plea in the *Serbian* and *Brazilian Loan Cases*; although in that

[266] *Gustav F W Hamester GmbH & Co KG v Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010) paras 332-338.

[267] ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 61, para 2, U.N. Doc A/6309/Rev.1 (1966); Pierre Bodeau-Livanec and Jason Morgan-Foster, '1969 Vienna Convention Article 61 Supervening Impossibility of Performance' in Oliver Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011) 1382, 1385.

instance it was referred to as *force majeure*,[268] the PCIJ rejected the plea of impossibility of performance on the basis that 'this is a case of loan contracts between a State and private persons or lenders', but acknowledging that 'it appears to be quite impossible to obtain "gold francs" of the sort … deemed to be required by the Serbian loan contracts' in the case of *Serbian Loans*.[269] In the *Brazilian Loans* case, it held 'there is no impossibility because of inability to obtain gold coins, if the promise be regarded as one for the payment of gold value. The equivalent in gold value is obtainable'.[270] Hungary also attempted to invoke this ground in the *Gabcikovo-Nagymaros case*[271] though the Court rejected this argument on the basis of Hungary's 'own breach of an obligation flowing from that treaty'[272] without concluding whether 'the term "object" in Article 61 can also be understood to embrace a legal regime'.[273]

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[268] Mark E. Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 754.

[269] *Case concerning the Payment of Various Serbian Loans issued in France* (*France v Serbia*) (Merits) PCIJ Rep Series A No 14, 5, 39-40.

[270] *Case concerning the Payment in Gold of Brazilian Federal Loans contracted in France* (*France v Brazil*) (Merits) PCIJ Rep Series A No 15, 93, 120.

[271] The Court recalled that 'cases such as the impossibility to make certain payments because of serious financial difficulties', 'could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty'. *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, 63

[272] *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, 64.

[273] *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, 63.

Supervening impossibility of performance (sometimes referred to as an instance of *force majeure*[274]) has elements that have allowed it to be identified as both a primary and secondary rule of international law. The distinction being that, in the first instance, it was a case 'of the direct application of state responsibility', and in the second case 'of the application of the principle as a means of defence against failure to perform a treaty'.[275] In the latter case it has been referred to as *force majeure* as will be developed below. The ILC also referred to this distinction, noting '[t]he Commission appreciated that such cases might be regarded simply as cases where *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance of the treaty. But it considered that, when there is a continuing impossibility of performance recurring obligations of a treaty, it is desirable to recognize, *as a part of the law of treaties*, that the operation of a treaty may be suspended temporarily'.[276]

As regards the law of treaties, article 61 of the Vienna Convention on the Law of Treaties (1969), which the ICJ has considered a reflection of customary

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[274] Pierre Bodeau-Livanec and Jason Morgan-Foster, '1969 Vienna Convention Article 61 Supervening Impossibility of Performance' in Oliver Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011) 1382, 1396-1398.

[275] '62nd meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (9 May 1968) UN Doc A/CONF.39/C.1/SR.62, 365 (para 43) [Sir Humphrey Waldock]; Pierre Bodeau-Livanec and Jason Morgan-Foster, '1969 Vienna Convention Article 61 Supervening Impossibility of Performance' in Oliver Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011) 1382, 1384.

[276] ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 61, para 3, U.N. Doc A/6309/Rev.1 (1966).

international law,[277] foresees that a party may invoke the impossibility of performance of a treaty to terminate or withdraw from it, if the impossibility results from the permanent disappearance or destruction of an object indispensable for its execution.[278] If the impossibility is temporary, the party may request the suspension of the treaty.[279] The ILC explained that 'the type of cases envisaged by the article is the submergence of an island, the drying up of a river or the destruction of a dam or hydro-electric installation indispensable for the execution of a treaty.'[280] The case refers to a complete impossibility to perform the treaty that exceeds the will of the parties (supervenes), thus the object must be indispensable to the execution of the treaty.[281]

At the United Nations Conference on the Law of Treaties a second paragraph was added to the initial draft provided by the ILC, including an exception to the possibility of invoking such circumstance if the impossibility is the result of a breach—by the party invoking this circumstance—of an obligation under the treaty

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[277] *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, 38, 63.

[278] It is distinguishable from obsolescence which 'refers to the impossibility of applying a treaty due to the disappearance of a legal situation which constituted one of its essential conditions. In contrast to Article 61 of the Vienna Convention, which deals with the *material impossibility* of performance due to the disappearance of an object indispensable for the performance of a treaty, in the case of obsolescence, what is at issue is a *legal impossibility*' (Marcelo G. Kohen, '21. Desuetude and Obsolescence of Treaties' in Enzo Cannizzaro *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 350, 358).

[279] Article 61, Vienna Convention on the Law of Treaties (1969).

[280] ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 61, para 2, U.N. Doc A/6309/Rev.1 (1966).

[281] Mark E. Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 756.

or international law.[282] This amendment, proposed by the Netherlands, was an 'exception derived from the general principle of law that a party could not take advantage of its own wrong'.[283] In the discussions during the Conference of this proposed amendment, several delegations questioned whether this issue was actually one of responsibility, and not part of the primary rule,[284] a purely subjective factor, while the object of the article was an objective event,[285] or that it represented a general principle of law and that 'treaties could only be interpreted in the light of good faith, which implied that the party invoking the grounds laid down in article 58 could not do so lawfully unless it had no cause for self-reproach'.[286] Others supported the amendment,[287] for example on the basis that it introduced the 'cause of the disappearance or destruction of the object, because there were some causes connected with a party's behaviour which should not entitle it to make use of the

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[282] This exception was in Sir Humphrey Waldock's Fifth Report ('Fifth Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur', U.N. Doc. A/CN.4/183, 37 (para 9)), though it was later not supported in the draft articles approved by the Commission; Mark E. Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 759.

[283] '62nd meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (9 May 1968) UN Doc A/CONF.39/C.1/SR.62, 362 (para 7) [Netherlands].

[284] '62nd meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (9 May 1968) UN Doc A/CONF.39/C.1/SR.62, 363 (para 16) [U.S.A.], 364 (para 32), 364 (para 26) [France], 364 (paras 31-32) [Poland].

[285] '62nd meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (9 May 1968) UN Doc A/CONF.39/C.1/SR.62, 363 (para 19) [Bulgaria], 363 (para 25) [Cuba].

[286] '62nd meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (9 May 1968) UN Doc A/CONF.39/C.1/SR.62, 365 (para 40) [Trinidad and Tobago].

[287] '62nd meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (9 May 1968) UN Doc A/CONF.39/C.1/SR.62, 362 (para 14) [Malaysia], 364 (para 35) [Singapore].

disappearance as a pretext for evading its obligations'.[288] Sir Humphrey Waldock, the Expert Consultant at the Conference, held that the text of the amendment had been considered by the Commission and that, though it had decided to exclude the text from [draft] article 58, it had considered that the text in [draft] article 59 (fundamental change in circumstances) 'applied to a great extent to both articles'.[289] The amendment was adopted with 30 votes in favour, 10 against and 40 abstentions.[290]

This ground for termination or suspension of a treaty, further, does not operate automatically but must be invoked by the party requesting the termination or suspension of a treaty.[291] The ILC set forth that a preference was to be had for suspending the treaty.[292]

Though the PCIJ rejected the possibility of applying the supervening impossibility of performance to a loan agreement,[293] the application of principles of

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[288] '62nd meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (9 May 1968) UN Doc A/CONF.39/C.1/SR.62, 363 (para 21) [Congo, Brazzaville], 364 (para 33) [U.S.S.R.].

[289] '62nd meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (9 May 1968) UN Doc A/CONF.39/C.1/SR.62, 365 (para 43).

[290] '62nd meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (9 May 1968) UN Doc A/CONF.39/C.1/SR.62, 365 (para 45).

[291] ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 61, para 5, U.N. Doc A/6309/Rev.1 (1966); Mark E. Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 757.

[292] ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 61, para 4, U.N. Doc A/6309/Rev.1 (1966).

[293] *Case concerning the Payment of Various Serbian Loans issued in France* (*France v Serbia*) (Merits) PCIJ Rep Series A No 14, 5, 39-40.

treaty law to the regime of international investment law, in addition to the possibility, not rejected in the *Gabcikovo-Nagymaros case*, that the object of a treaty may include a legal regime or 'a juridical object'[294], makes this brief introduction into the issue of supervening impossibility of performance necessary for this thesis because the object of a bilateral investment treaty may include the protection of investments in the hydrocarbon industry.

7. Rebus sic stantibus

The seventh concept developed here is that of *rebus sic stantibus*. It is relevant for the thesis in so far as States regularly refer to a change of circumstances when prices of oil and gas fluctuate, as well as when their availability becomes scarce in a country.[295] A fundamental change of circumstances may be invoked as a ground for terminating, suspending[296] or withdrawing from a treaty, under certain conditions. The basis of the ground for terminating the treaty is that 'if circumstances do change substantially, the equivalence of treaty obligations … may become imbalanced and

[294] Pierre Bodeau-Livanec and Jason Morgan-Foster, '1969 Vienna Convention Article 61 Supervening Impossibility of Performance' in Oliver Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011) 1382, 1391.

[295] See, for example, in Chapter 3, where States refer to extraordinary increases in prices to increase government take, or restrictions on exports in light of fluctuations in supply and demand (for example in the United States) or nationalisations in light of concerns of sovereignty, in Chapter 4, (this is particularly the case in transit States like Argentina).

[296] This was incorporated at the United Nations Conference on the Law of Treaties as an amendment proposed by Canada and Finland, '65th meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (11 May 1968) UN Doc A/CONF.39/C.1/SR.65, 383 (para 37).

treaties lose their object and purpose. It would appear unduly formalistic nevertheless to expect the parties to continue to perform the treaty.'[297]

Historically, the concept, from municipal law, that '[e]very contract is to be understood as being based on the assumption of things remaining as they were at the time of its conclusion', was first introduced in international law by Gentili.[298] Gentili, Grotius, and Vattel referred to it. They considered it to be a tacit or implicit condition to a promise.[299] Vattel, however, also held that it was a rule that must be used with extreme reserve—as it was likely to be abused—only a change with respect to the reasons why the promise was given and that are essential could be invoked.[300]

In Gentili's treatise *De Jure Belli Libri Tres*, when referring to the permissibility of telling falsehoods to the enemy, he stated '[f]or example, why should an oath give authority to injustice and aid deceivers? An oath is understood *rebus sic stantibus*, and just as it cannot undo an action that has taken place, so it

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[297] Mark E. Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 769.

[298] Mark E. Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 767-786.

[299] Wolff Heintschel von Heinegg, 'Treaties, Fundamental Change of Circumstances' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (August 2006), para 21. The idea that the *rebus sic stantibus* principle was implicit in any agreement was explicitly rejected by the ILC 'the Commission considered the fiction to be an undesirable one since it increased the risk of subjective interpretations and abuse. For this reason, the Commission was agreed that the theory of an implied term must be rejected' (ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 59, para 7, U.N. Doc A/6309/Rev.1 (1966)).

[300] Emer de Vattel, *Le droit des gens ou principes de la loi naturelle* (London, 1758) Bk II, Ch. XVII, para 296.

cannot cause an act to have taken place which did not occur or was not even thought of.'[301] Grotius also referred to this principle: '[t]he question also is commonly raised, whether promises contain in themselves the tacit condition, "if matters remain in their present state." To this question a negative answer must be given, unless it is perfectly clear that the present state of affairs was included in that sole reason of which we made mention.'[302] Gentili's interpretation indicates that the change in circumstances must not have been contemplated by the parties, whereas Grotius's interpretation establishes a stringent limit that the circumstances which changed must have been essential to the reasons for the agreement.

This principle was not generally accepted as customary international law until much later; the PCIJ, for example, avoided deciding on its existence.[303] When it was accepted, it was not as implicit in all agreements, but as an 'objective rule of law'. [304] The customary international law doctrine, now reflected 'in many

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[301] Alberico Gentili, *De Jure Belli Libri Tres* (John C Rolfe tr, OUP 1933), vol. II, p. 151.

[302] Hugo Grotius, *De jure belli ac pacis* (Francis W. Kelsey tr (1925), Lonang Institute 2005), book II, ch. 16, para XXV.

[303] *Case of the Free Zones of Upper Savoy and the District of Gex* (*France v Switzerland*) (Merits) PCIJ Rep Series A/B No 46, p. 158 ('[a]s the French argument fails on the facts, it becomes unnecessary for the Court to consider any of the questions of principle which arise in connection with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law'). See also, Lord McNair, *The Law of Treaties* (OUP 1961) pp 9, 681-691.

[304] ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 59, para 7, U.N. Doc A/6309/Rev.1 (1966).

respects'[305] in Article 62 of the Vienna Convention on the Law of Treaties of 1969,[306] was formulated 'as an objective rule of law by which, on grounds of equity and justice, a fundamental change of circumstances may, under certain conditions, be invoked as a ground for terminating the treaty'.[307]

The ILC discarded the use of the term *rebus sic stantibus* as a title for this article, holding that those terms had too many doctrinal interpretations,[308] but it acknowledged that the principle of fundamental change in circumstances is 'commonly spoken of as the doctrine of *rebus sic stantibus*'.[309]

The tension between this article and the principle of *pacta sunt servanda* is one of the issues that was discussed in the United Nations Conference.[310] This

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[305] *Fisheries Jurisdiction Case* (*Federal Republic of Germany v Iceland*) (Jurisdiction) [1973] ICJ Rep 49, 63 para 36; *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, 38, para 46.

[306] *Fisheries Jurisdiction Case* (*Federal Republic of Germany v Iceland*) (Jurisdiction) [1973] ICJ Rep 49, 63 para 36; *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, 38, 62. Though during the United Nations Conference on the Law of Treaties there was much discussion as to the precise content of the principle of *rebus sic stantibus* and whether it should be included in the Convention '63rd meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (10 May 1968) UN Doc A/CONF.39/C.1/SR.63, 367 (para 11) [U.S.A.], 367-368 (para 21) [Netherlands], 368 (para 22) [Ukrainian S.S.R.], 368 (para 28) [Switzerland], 370 (paras 43-46) [Bolivia]; '64th meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (11 May 1968) UN Doc A/CONF.39/C.1/SR.64, 373 (para 26) [Australia]

[307] ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 59, para 7, U.N. Doc A/6309/Rev.1 (1966).

[308] ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 59, para 7, U.N. Doc A/6309/Rev.1 (1966).

[309] ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 59, para 1, U.N. Doc A/6309/Rev.1 (1966).

[310] '63rd meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (10 May 1968) UN Doc A/CONF.39/C.1/SR.63, 365-366 (para 2-3) [Viet-Nam], 368 (para 26) [Switzerland], 370 (para 43) [Bolivia], '64th meeting of the Committee of

principle has been described as 'an **exception to the rule of *pacta sunt servanda***'.[311] However, it seems more useful to consider it as necessary for the survival of international law.[312] In this sense, the ILC describes it as necessary to avoid a party from 'ultimately being driven to take action outside the law' because of an undue burden being placed on it due to a change in circumstances.[313] It has also been referred to as 'escape clause',[314] which would help push parties to finding an agreed solution or adopt the treaty to the change in circumstances.[315]

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the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (11 May 1968) UN Doc A/CONF.39/C.1/SR.64, 371 (para 13) [Poland], 375 (para 65) [Ecuador]; *but see* '63rd meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (10 May 1968) UN Doc A/CONF.39/C.1/SR.63, 367 (para 18) [Netherlands], '64th meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (11 May 1968) UN Doc A/CONF.39/C.1/SR.64, 370 (para 5) [Cuba], 373 (para 27) [Afghanistan], 374 (para 40) [Sierra Leone], 375 (para 550) [Chile], '65th meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (12 May 1968) UN Doc A/CONF.39/C.1/SR.65, 379 (para 13) [Hungary].

311 Thomas Giegerich, 'Article 62' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties A Commentary* (Springer 2012) 1069 (emphasis in the original); Malcolm N. Shaw and Caroline Fournet '1969 Vienna Convention Article 62 Fundamental change of circumstances' in Oliver Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011) 1411, 1412.

312 Indeed, it has been referred to as 'one of the "fundamental articles" of the Vienna Convention' (Thomas Giegerich, 'Article 62' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties A Commentary* (Springer 2012) 1068).

313 ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 59, para 6, U.N. Doc A/6309/Rev.1 (1966); *see also* Mark E. Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 770.

314 Thomas Giegerich, 'Article 62' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties A Commentary* (Springer 2012) 1070.

315 Thomas Giegerich, 'Article 62' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties A Commentary* (Springer 2012) 1070.

There is not significant case law addressing this ground for termination,[316] however, although States have resorted to in practice.[317] Though its 'existence' was not usually disputed either by States in their arguments or as invoked before the United Nations[318] the conditions of its application were.[319] This situation has been adverted to by the ICJ, which has acknowledged the existence of the principle, as set out in Article 62, under customary international law.[320]

Though it had been originally drafted as such by Special Rapporteur Fitzmaurice, the ILC rejected limiting the application of this principle to perpetual treaties, holding that '[w]hen a treaty had been given a duration of ten, twenty, fifty or ninety-nine years, it could not be excluded that a fundamental change of circumstances might occur which radically affected the basis of the treaty … [i]f the doctrine were regarded as an objective rule of law founded upon the equity and

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316 Thomas Giegerich, 'Article 62' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties A Commentary* (Springer 2012) 1071.

317 *See* declarations of Finland and Austria in Oliver Dörr, 'Codifying and Developing Meta-Rules: The ILC and the Law of Treaties' (2009) 49 Georgetown YB Intl L 129, 153; Wolff Heintschel von Heinegg, 'Treaties, Fundamental Change of Circumstances' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (August 2006), paras. 5-17.

318 ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 59, paras 1-5, U.N. Doc A/6309/Rev.1 (1966); Malcolm N. Shaw and Caroline Fournet '1969 Vienna Convention Article 62 Fundamental change of circumstances' in Oliver Corten and Pierre Klein (eds.) *The Vienna Conventions on the Law of Treaties* (OUP 2011) 1411, 1419.

319 In fact, 'almost all cases in which the doctrine *rebus sic stantibus* has been invoked before an international tribunal, the latter, while not rejecting it in principle, has refused to admit that it could be applied to the case before it' (Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (9th ed, OUP 2008) 1307.

320 *Fisheries Jurisdiction Case* (*Federal Republic of Germany v Iceland*) (Jurisdiction) [1973] ICJ Rep 49, 63 para 36; *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, 38, 62.

justice of the matter, there did not seem to be any reason to draw a distinction between "perpetual" and "long term" treaties'.[321]

As was the case in Grotius's work, the text was written in the negative, to reinforce the restrictive nature of the application of this provision.[322] Other limitations to its application were expressly incorporated in the text. The change must be: (a) with respect to circumstances existing at the time the treaty was celebrated; (b) fundamental; (c) nor foreseen by the parties; (d) the circumstances must have been 'an essential basis of the consent of the parties'; (e) its effect must be to 'radically transform the scope of obligations still to be performed under the treaty'.[323] Further the ILC considered that this ground for termination or withdrawal of a treaty could not be invoked with regard to treaties 'establishing a boundary' or when 'the fundamental change is the result of breach by the party invoking it' of an obligation under the treaty or a different international law obligation.[324]

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[321] ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 59, para 8, U.N. Doc A/6309/Rev.1 (1966).

[322] Contrary to Article 28 of the Harvard Draft Convention on the Law of Treaties which set out that a treaty 'may be declared … to have ceased to be binding … when that state of facts has been essentially changed', though subjecting termination to a competent international authority, it allowed for suspension, pending that decision; *see also* Article 15 Convention on Treaties (Havana) (1928), available at: http://www.oas.org/juridico/spanish/tratados/a-28.html, last accessed 6 April 2017.

[323] ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 59, para 9, U.N. Doc A/6309/Rev.1 (1966).

[324] ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 59, paras 11-12, U.N. Doc A/6309/Rev.1 (1966).

With regard to the first set of restrictions, that is, the type of change in circumstances that could lead to this ground being invoked for termination of the treaty, both the requirement that the change not have been foreseen by the parties and that it affect an essential basis of their consent are similar to the requirements put forth by Gentili and Grotius, respectively.

The circumstances referred to in this article that might trigger the ground for termination include 'the factual basis of the parties' consent', 'political upheavals' and 'legal developments'. [325] In *Gabcikovo-Nagymaros*, the ICJ analysed 'the prevalent political conditions', 'the economic system in force' and 'the new developments in the state of environmental knowledge and of environmental law'[326] as possible changing circumstances. It rejected Hungary's argument because they were not 'so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties', in the first two cases and in the latter that it 'cannot be said to have been completely unforeseen'.[327] However, the circumstances were not rejected *per se*, which implies that they if they were sufficiently essential and unforeseen they could bring about this ground for termination. The ECJ also included the outbreak of hostilities as a possible change in

[325] Thomas Giegerich, 'Article 62' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties A Commentary* (Springer 2012) 1081-1082.

[326] *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, 64-65, para 104.

[327] *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, 64-65, para 104.

circumstances,[328] despite the Vienna Convention strictly not applying to such situations (art. 73).

With regard to the effect of the change, 'radically to transform the extent of the obligations',[329] the ICJ held that it 'must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken'.[330] However, Special Rapporteur Fitzmaurice, in referring to this set out that 'the suggestion is not that the change in circumstances has rendered realization by performance impossible, but that it has so altered the *conditions* of performance for the party concerned (either by increasing their onerousness or diminishing the value to be gained by further performance)'.[331] It is reasonable to consider that the radically altered obligations can both increase the burden of one of the parties, or decrease their benefits.

At the UN Conference, there was also some concern on the exception to the application of the principle of *rebus sic stantibus* to border treaties[332] and how that

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[328] C-162/96 *Racke GmbH & Co v Hauptzollamt Mainz* [1998] ECR I-03655, paras 53-60.

[329] Article 62(1)(b), Vienna Convention on the Law of Treaties [1969].

[330] *Fisheries Jurisdiction Case* (*Federal Republic of Germany v Iceland*) (Jurisdiction) [1973] ICJ Rep 49, 63 para 43.

[331] ILC, 'Report of the International Law Commission on the Work of its 9th Session', U.N. GAOR 12th Sess., Supp. No. 9, Part II, Ch. II, Second Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur, 60, para 151, U.N. Doc A/3623 (1957); *see also* Thomas Giegerich, 'Article 62' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties A Commentary* (Springer 2012) 1089.

[332] As well as the proposal by the United States that it be extended to treaties 'otherwise establishing territorial status'.

correlated with the principle of self-determination or other impositions by colonial powers.[333] This fear was allayed by the Expert Consultant (Sir Humphrey Waldock), who explained:

> The Afghan representative had asked what was the relation between that provision, and self-determination, and illegal and unequal colonial boundary treaties. The answer had to be found in the present convention itself. The question of illegality was dealt with in the two articles treating of *jus cogens*. The question of self-determination was also covered in the commentary. In the Commission's view, self-determination was an independent principle which belonged to another branch of international law and which had its own conditions and problems. The Commission had not intended in paragraph 2 (a) to give the impression that boundaries were immutable, but article 59 was not a basis for seeking the termination of a boundary treaty.[334]

Further the ILC, in its commentaries, had dealt with this issue, noting '[b]y excepting treaties establishing a boundary from its scope the present article would not exclude the operation of the principle of self-determination in any case where the conditions for its legitimate operation existed'.[335] Thus the principle in article 62(2)(a) sets out that a fundamental change in circumstances cannot be used to terminate a boundary treaty, but other reasons might. Though the matter of boundary treaties is not strictly relevant to this thesis, the relationship between the

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[333] '63th meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (10 May 1968) UN Doc A/CONF.39/C.1/SR.63, 370 (para 45) [Bolivia]. '64th meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (11 May 1968) UN Doc A/CONF.39/C.1/SR.64, 370 (para 3) [Cyprus], 371 (para 7) [Cuba], 373 (paras 28-29) [Afghanistan], 376 (para 66) [Ecuador], '65th meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (12 May 1968) UN Doc A/CONF.39/C.1/SR.65, 379 (para 16) [Morocco].

[334] '65th meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (12 May 1968) UN Doc A/CONF.39/C.1/SR.65, 381 (para 31).

[335] ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentary to Article 59, para 11, U.N. Doc A/6309/Rev.1 (1966).

principle of *rebus sic stantibus* and the principle of self-determination and other impositions by colonial powers is, as it was one of the relevant issues in the origins of the PSNR doctrine.

As to the exception with regard to the fundamental change being the result of a breach by the party of the treaty or other international law obligations owed to the other party to the treaty (article 62(2)(b)), this exception is based on the principle of good faith.[336] The exception applies where there has been a breach that has brought about the change in circumstances. However, if the change is the result of a lawful act by a party to the Treaty it may be invoked as a ground to terminate the treaty.[337]

B. Concepts related to secondary rules

This thesis refers to both circumstances precluding wrongfulness as well as grounds for termination of treaties and conflicting treaty obligations.[338] As the ICJ has held in the *Gabcikovo-Nagymaros* case that in some instances these overlap, it is important to recall what the implications of each of these is. A circumstance precluding wrongfulness is a secondary rule that is, in theory, applicable once it has

[336] Thomas Giegerich, 'Article 62' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties A Commentary* (Springer 2012) 1094.

[337] Thomas Giegerich, 'Article 62' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties A Commentary* (Springer 2012) 1094.

[338] In this section we have referred, on occasion to the positions of Aristotle, as interpreted by Strauss, Thucydides, and Grotius on these issues. These historical references, we believe, give context to the meaning of such elements as 'essential interest'.

been determined that certain behaviour was contrary to an international law obligation.[339]

Thucydides referred to the defence of necessity as being above the law and excluding compliance with justice.[340] In his book, *Natural Right and History*, Strauss looks at Aristotelian natural right teaching. In this analysis he states that the 'second assertion regarding natural right which Aristotle makes … is that all natural right is changeable'. [341] He describes this assertion as meaning that: 'Civil society is incompatible with any immutable rules, however basic; for in certain conditions the disregard of these rules may be needed for the preservation of society; but, for pedagogic reasons, society must present as universally valid certain rules which are generally valid'.[342]

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[339] There is some discussion here as, for example, the *CMS v Argentina* annulment committee noted, in distinguishing state of necessity under customary international law from a circumstance precluding wrongfulness, that '[o]ne could wonder whether state of necessity in customary international law goes to the issue of wrongfulness or that of responsibility.' This issue was not finally addressed by the committee. *CMS Gas Transmission Co. v Argentina*, ICSID Case No. ARB/01/8, Decision on Annulment (September 25 2007) para 132.

[340] As Athens held that 'in human disputation justice is then only agreed on when the necessity is equal; whereas they that have odds of power exact as much as they can, and the weak yield to such as they can'. (Thucydides, *The History of the Peloponnesian War* (tr Thomas Hobbes) Book V, para 89), this same argument was also presented previously by the Athenians in speaking to the Lacedaemonians, stated 'they that have the power to compel need not at all go to law.' *Id.,* Book I, para 77; *see also* Clifford Orwin, *The Humanity of Thucydides* (1997) 99 ('Justice prevails only among equals in power—among such equals, not justice but equality in power prevails. Where right reigns, just as where it does not, it defers to compulsion.'); Leo Strauss, *The City and Man* (1978) 185 ('The issue is not what is just but what is feasible—what the Athenians can do to the Melians and the Melians can do to the Athenian; questions of right arise only when the power to compel is more or less equal on both sides; if there is so great inequality as between Athens and Melos, the stronger does what he can and the weaker yields.').

[341] Leo Strauss, *Natural Right and History* (1965) 157.

[342] ibid, 158.

Further, he goes on to state 'that in extreme situations the normally valid rules of natural right are justly changed, or changed in accordance with natural right; the exceptions are as just as the rules'.[343] Now this can be read in two different ways: on the one hand, as implying that natural right is above the principles of law and that therefore when one acts in accordance with natural rights it can override the principles of law, and is therefore in accordance with the law; on the other hand, as implying that at times there are exceptions to the law that are not in accordance with the law but that must be permitted in light of natural rights.

1. State of necessity

For many centuries, States have relied on the defence of necessity as a circumstance precluding wrongfulness for the breach of an international obligation. The defence of necessity has been used in armed conflicts as well as in situations related to environmental or economic crises. Necessity is also used in the context of municipal law, in relation to the right to property, for example as an exception to the right to exclude.[344] Further, necessity has been invoked, at times successfully, in the context of international investment arbitrations against private companies as a circumstance precluding wrongfulness.[345]

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[343] ibid, 160.

[344] John G Sprankling, *The International Law of Property* (OUP 2014) 320-321.

[345] John G Sprankling, *The International Law of Property* (OUP 2014) 322; *see also LG&E Energy Corp., LG&E Capital Corp., LG&E International Corp.*, ICSID Case No. ARB/02/1, Decision on Liability (2 October 2006) para 245.

Here, the state of necessity defence will generally be linked to the concept of 'energy security', introduced earlier in this chapter. As noted above the concept of security of supply could be an essential interest of the state that it aims to protect through certain regulations.[346] That there be an essential interest that is affected is a condition *sine qua non* to be able to invoke the defence of necessity under customary international law.

In 2001 the ILC published its Draft Articles on State Responsibility of which the General Assembly took note in its Resolution 56/83 ("Draft Articles"). In its Draft Articles the ILC basically refers to six cumulative requirements for a state to rely on the defence of necessity to preclude wrongfulness where it has carried out an act not in conformity with an international obligation. Those requirements are spelled out in Article 25:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

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[346] The United States, for example, has invoked Section 232 of the Trade Expansion Act of 1962 [United States]—under which a President may take action in relation to the imports of an article so that they will not impair national security—to impose quotas, created and increased licensing fees and supplemental fees per barrel, on the imports of petroleum and petroleum derived products, on the basis of there being a threat to national security. The national security objective was to discourage importation into the U.S. of foreign oil, therefore creating incentives to increase domestic production of oil and refinery capacities to decrease the U.S. dependency on foreign oil (*Federal Energy Administration and others v Algonquin SNG Inc and others* 456 U.S. 548 (1976) [United States]). These decisions were before the creation of the WTO. After its creation the U.S. has rejected imposing this type of measures on oil arguing that it 'could result in the loss of a significant number of jobs in many non-petroleum sectors' and 'strain relations with our close trading partners who would most likely seek relief under the North American Free Trade Agreement (NAFTA) or World Trade Organization (WTO) rules' (U.S. Department of Commerce, Bureau of Export Administration *The Effect on the National Security of Imports of Crude Oil and Refined Petroleum Products* (November 1999) p ES-9, available at: https://bis.doc.gov/index.php/forms-documents/section-232-investigations/87-the-effect-of-imports-of-crude-oil-on-national-security-1999/file, last accessed 21 April 2017). Though we cannot know what, if anything, the WTO would have said in this regard as the measures were not taken.

> (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>
> (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> (a) The international obligation in question excludes the possibility of invoking necessity; or
>
> (b) The State has contributed to the situation of necessity.

This article (and its previous drafts) has been used by international tribunals in determining whether or not state actions have been carried out in a state of necessity. The fact that a State may act, under a state of compulsion, in a certain sense that is contrary to an existing obligation binding on it has been historically important, even prior to the creation of the Westphalian idea of statehood as we now know it. Although there are some distinctions between those prior incidents and the defence as it is currently accepted under international law, the analysis below includes references to its origins as a useful historical guide to determining its current application.

The requirements established in the Draft Articles by the ILC have been acknowledged as generally reflecting customary international law by the ICJ in its

Decision on the *Gabcikovo-Nagymaros Project*[347] and its Advisory Opinion on the *Legal Consequences of the Construction of a Wall*.[348]

Under the ICSID cases against Argentina, arbitral tribunals have revisited the issue of state of necessity. In their approach to this issue, they have relied, generally, on the requirements codified by the ILC under Article 25 of the Draft Articles.[349] Although there are differences in the analysis carried out by the arbitral tribunals in the Argentina cases,[350] there are some conclusions relevant to this thesis that can be drawn from them. The cases acknowledge that the requirements established by the ILC in its Draft Articles reflect the principles of customary international law that may

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[347] *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary v. Slovakia*) (Judgment) [1997] ICJ Rep 7, paras 51-52.

[348] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ 136, para 140.

[349] One clarification must be made in this regard. Argentina argued two separate defences in these cases, the defence of state of necessity under customary international law and the defence under the non-precluded measures provision (or article XI of the US-Argentina BIT). Although some of these tribunals have referred to these issues jointly (*CMS*, *Enron*, *Sempra*) others have analysed the two arguments separately (*Continental* and *LG&E*), only referring to the customary international law defence when it was useful to interpret the meaning of Article XI of the US-Argentina BIT. Even though the *ad hoc* annulment committee in the *CMS* case (composed, amongst others of Professor Crawford, the Special Rapporteur for the ILC 2001 Articles of State Responsibility) clearly stated that the two defences were separate and had different requirements and consequences (this was also upheld in the *Sempra v Argentina*, ICSID Case No. 02/16, Decision on Annulment (29 June 2010) paras 216-218) there are some who continue to argue that they are, in fact, the same thing (*see* Jose E. Álvarez and Kathryn Khamsi, 'The Argentine Crisis and Foreign Investors' [2008/2009] The Yearbook on International Law and Policy 379, 427-440). We disagree. We consider that the two defences are separate and that that was the intention of the parties to the BIT originally. Otherwise the US arguments in Nicaragua regarding the self-judging nature of a similar provision of the US-Nicaragua FCN Treaty as well as the presentations made by the State Department before the Senate for the ratification of treaties including the NPM clause make no sense. But this is not the issue of this thesis.

[350] There have generally been two trends followed by the arbitral tribunals in the investment arbitration cases against Argentina. One has been a narrower reading of the requirements (as reflected in the *CMS v Argentina*, *Enron v Argentina*, *Sempra v Argentina*, *BG Group v Argentina* and *National Grid v Argentina* cases) and the other has been a wider reading of the requirements (as reflected in the *LG&E v Argentina* and *Continental Casualty v Argentina* cases).

be applied to investment disputes[351] even though they are not state-to-state cases.[352]

a. Necessity as a circumstance precluding wrongfulness

The defence of necessity has been acknowledged to be an exceptional remedy and this is reflected in the negative wording of the ILC's article:[353] 'Necessity may not be invoked … unless the act.' Grotius also alludes to the restrictive character of the defence of necessity, so that it may not be abused.[354]

Grotius refers to necessity not as a justification for an action, but an excuse for having breached an obligation.[355] He cites several authors on this analysis,

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[351] *CMS Gas Transmission Co. v Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005) paras 315, 318; *LG&E and others v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) paras 245-246; *Enron Corp. and Ponderosa Assets, LP v Argentina*, ICSID Case No. ARB/01/3, Award (22 May 2007) para 303; *Continental Casualty Co. v Argentina*, ICSID Case No. ARB/03/9, Award (5 September 2008) paras 168, 222; *National Grid plc v Argentina*, UNCITRAL Case, Award (3 November 2008) paras 256-257; and *Sempra Energy International v Argentina*, ICSID Case No. ARB/02/16, Award (18 September 2007) para 344.

[352] There is the sole exception of the decision by the tribunal in the *BG v Argentina* case, wherein the tribunal stated that 'Article 25 may relate exclusively to international obligations between sovereign States. From this perspective, Article 25 would be of little assistance to Argentina as it would not disentitle BG, a private investor, from the right to compensation under the Argentina-UK BIT.' *BG Group plc v Argentina*, UNCITRAL Case, Award (24 December 2007) para 408.

[353] ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, commentary to Article 25, para 14, U.N. Doc A/56/10 (2001).

[354] Hugo Grotius*, The Rights of War and Peace,* edited and with an Introduction by Richard Tuck, from the Edition by Jean Barbeyrac (Indianapolis: Liberty Fund 2005), Book II, Chap. II(VII).

[355] ibid, Book III, Chap. XI (IV)(7)

including Thucydides.[356] This is similar to the ILC's reading of the customary international law defence of necessity as a circumstance precluding wrongfulness.

The ILC considers that the necessity defence is a circumstance precluding wrongfulness.[357] This position has been accepted by the ICJ in the *Gabcikovo-Nagymaros* case, and in its *Legal Consequences* advisory opinion.[358]

b. ILC Requirements of Necessity

The requirements as established by the ILC can be broken down into the following six: (i) the act must be the only way to safeguard; (ii) an essential interest; (iii) against a grave and imminent peril; (iv) it must not seriously impair an essential interest of the other State or the international community; (v) the obligation must not exclude the possibility of invoking necessity; and (vi) the State must not have contributed to the situation of necessity. This thesis will only focus on the first three of these requirements.

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[356] Grotius uses a different translation from Hobbes' in referring to the response of the Athenians to the Boetians, his translation is as follows: 'It is highly probable, that GOD himself is willing to forgive those, who are compelled by War, or otherwise necessitated to do any Thing; for the sacred Altars have been ever allowed sure Places of Refuge for them to fly unto, as have unwillingly offended; and the Name of Crime is given to unlawful Actions, which are committed on purpose, and not to those which extreme Necessity gives Courage to commit.' Thucydides, *History of the Peloponnesian War*, Book IV, para 98, although this translation is different from the above the essence is the same in as far as necessity excuses breach.

[357] ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, commentary to Article 25, para 3, U.N. Doc A/56/10 (2001).

[358] *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, paras 51-52; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 140.

Only means

There are essentially two issues regarding the "only means" part of the requirement to invoke the defence of necessity. On the one hand, should the only means be adjudged *ex post facto* in light of the information available to the breaching party at the time? On the other hand, what degree of deference should be given to a party making that decision at the time by an independent third party?

As regards the requirement of being the only means, the ILC sets out that '[t]he plea is excluded if there are (otherwise lawful) means available, even if they are more costly or less convenient.'[359] In its 1978 comments on *force majeure*, distinguishing it from state of necessity, it clarified that 'the appreciation of the danger and of the unavoidability of the means used to avert it is subject to the *modus operandi* of the defense of "state of emergency" and, at least initially, to the subjective interpretation of the State which acts.'[360]

The ICJ rejected, in both the *Gabcikovo-Nagymaros*[361] case and the *Legal Consequences* advisory opinion[362] that the requirement of 'only means' had been met. In arbitral decisions this issue has also been discussed. In *LG&E v. Argentina* the

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[359] ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, commentary to Article 25, para 15, U.N. Doc A/56/10 (2001).

[360] Secretariat of the ILC, '"*Force majeure*" and "fortuitous event" as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine', para 30, U.N. Doc. A/CN.4/315 (1978).

[361] *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, para 55.

[362] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 140.

arbitral tribunal held that 'an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed.'[363] This decision also stated that '[s]uch circumstances, in principle, have been left to the State's subjective appreciation, a conclusion accepted by the International Law Commission.'[364] The contrary position was put forth in the *CMS v Argentina*,[365] *Sempra v Argentina*[366] and *Enron v Argentina*[367] cases, although the last of these was later annulled precisely on the basis of a lack of analysis of the 'only means' requirement.[368]

Essential interest

The main issue here is to determine what interests can be considered essential in light of the necessity defence. Thucydides referred to interests that may be protected through necessity as including references to self-preservation, [369]

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[363] *LG&E and others v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) para 257.

[364] ibid, para 248.

[365] *CMS Gas Transmission Co. v Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005) para 323.

[366] *Sempra Energy International v Argentina*, ICSID Case No. ARB/02/16, Award (18 September 2007) para 350.

[367] *Enron Corp. and Ponderosa Assets LP v Argentina*, ICSID Case No. ARB/01/2, Award (22 May 2007) paras 308-309.

[368] *Enron Corp. and Ponderosa Assets LP v. Argentina*, ICSID Case No. ARB/01/2, Decision on Annulment (20 July 2010) paras 369-378.

[369] Self-preservation is manifested in Euphemus' speech to at Camarina. He justifies the need for strengthening the Athenian empire against the Peloponnesus states because 'to seek means for one's own preservation, is a thing unblameable. And is it is for our own safety's cause that we are now here.' Thucydides, *The History of the Peloponnesian War* (tr Thomas Hobbes) Book VI, paras 82-87.

reputation,[370] and even profits.[371] Noting that necessity overcomes what is the 'natural law' in relation to issues of habitation[372] and drinking water.[373] In Strauss's description of Aristotle's principles of natural law, he also refers to self-preservation as an essential interest.[374]

Grotius referred to several different types of essential interests which justify necessity. Initially he referred to it as a reason to use force thus favouring war;[375] for self-defence of life, limb and liberty;[376] for the defence of property;[377] and for the separation of a part from the whole if essential to its preservation.[378] Grotius also referred to necessity outside the area of armed conflict: at sea, when there is scarcity of provisions; in case of fire, permitting the demolishing of a neighbour's house; to

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[370] In Pericles' funeral orations, he stresses that the only justification for the war is its necessity, for the preservation of the community and to uphold her reputation. Clifford Orwin, *The Humanity of Thucydides* (1997) 21.

[371] In the Athenian speech to the Laecedemonians they justify that they were forced to expand their empire, 'chiefly for fear, next for honour, and lastly for profit.' Thucydides, *The History of the Peloponnesian War* (tr Thomas Hobbes) Book I, para 75.

[372] ibid, Book II para 16.

[373] The Athenians explained 'that for the water, they meddled with it upon necessity; which was not to be ascribed to insolence, but to this, that fighting against the Boetians that had invaded their territory first, they were force to sue it.' ibid Book IV, para 98.

[374] 'Let us call an extreme situation a situation in which the very existence or independence of a society is at stake. In extreme situations there may be conflicts between what the self-preservation of society requires and the requirements of commutative and distributive justice. In such situations, and only in such situations, it can justly be said that the public safety is the highest law.' Leo Strauss, *Natural Right and History* (1965) 160.

[375] Hugo Grotius*, The Rights of War and Peace,* edited and with an Introduction by Richard Tuck, from the Edition by Jean Barbeyrac (Indianapolis: Liberty Fund 2005) Book I, chap. II, 3

[376] ibid, Book I, chap. II, 3

[377] ibid, Book II, Chap. I(XI)

[378] ibid, Book II, Chap. VI(V)

disentangle a ship from the cables and nets of another ship; or to seize another's goods.[379]

In general terms, it has been agreed that the essential interest includes peril to an interest that is essential to the State—or the international community—as may be brought about by a threat to the peace,[380] ensuring the safety of a civilian population,[381] environmental considerations,[382] and economic considerations.[383] Here the ILC's criteria seem to fall in line with those expressed above.

Furthermore, Crawford distinguished between an essential interest of the State and a threat to the very existence of the State, holding that only the first was necessary to uphold the defence of necessity.[384] He added that 'no *a priori* definition of an essential interest can be offered,' leaving it to be defined on a case-by-case basis.[385] In the *Gabcikovo-Nagymaros* case, the ICJ concluded that it 'had no difficulty in acknowledging that the concerns expressed by Hungary for its natural

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[379] ibid, Book II, Chap. II(VI)(3); *see also* ibid, Book III, Chap. XVII(I)(1).

[380] ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, commentary to Article 25, para 5, U.N. Doc A/56/10 (2001) (referring to the *Caroline* incident).

[381] ibid, para 14.

[382] ibid, paras 6, 9, 11 (referring to the *Russian Fur Seals* controversy, the *Torrey Canyon* controversy and the *Gabcikovo-Nagymaros* case, respectively).

[383] ibid, paras 7, 8 (referring to the *Russian Indemnity* case and the *Société Commerciale de Belgique* case, respectively).

[384] ILC, 'Second Report on State Responsibility, Special Rapporteur James Crawford', U.N. G.A., ILC, 51st Session, Geneva, 23 July 1999, U.N. Doc. A/CN.4/498/Add 2, para 281.

[385] ibid, para 281.

environment in the region affected by the Gabcikovo-Nagymaros Project related to an "essential interest" of the State.'[386]

Grave and imminent peril

The fundamental issues to be looked at as regards the requirements of grave and imminent peril are the severity of the danger that is faced by the state, which will be related to the essential interest invoked as analysed *supra*, as well as the imminence and definiteness of the threat. Characteristics of gravity of the threat may be exacted from Thucydides's description of the Peloponnesian war (destruction or dominion).[387] Grotius referred to the requirement of imminence of the threat or danger, when he stated: "If the Danger be so pressing, that Time will not allow to consult the Sovereign, here also Necessity grants an Exception."[388] Grotius also required that the necessity be extreme, limiting it to a situation that occurs within a war.[389]

The ILC has established that 'a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly

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[386] *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary* v *Slovakia*) (Merits) [1997] ICJ Rep 7, para 53.

[387] In the Melian dialogue Thucydides reflects that both the Melians as well as the Athenians considered that they were in a state of Necessity. The Melians faced the option of 'yield or be destroyed' (Michael Walzer, *Just and Unjust Wars* (1977) 5) whereas the Athenians 'must expand their empire … or lose what they already have.' (ibid, 5); *see also* Clifford Orwin, *The Humanity of Thucydides* (1997) 102 ('by defeating Melos they will dash the hopes of their restive subjects, thereby safeguarding their existing dominions. It is out of self-defense that Athens must engulf Melos.' Here Orwin refers to self-defence but it seems to more a situation of necessity given that there is no prior attack which Athens has to defend itself from.)

[388] Hugo Grotius*, The Rights of War and Peace,* edited and with an Introduction by Richard Tuck, from the Edition by Jean Barbeyrac (Indianapolis: Liberty Fund 2005) Book I, Ch. III, IV

[389] ibid, Book III, Chap. XVII(I)(1).

established on the basis of the evidence reasonably available at the time.'[390] The ILC further clarifies that in questions relating to the environment 'there will often be issues of scientific uncertainty and different views may be taken by informed experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances.'[391]

In the *Gabcikovo-Nagymaros* case, the ICJ acknowledged that 'a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, and that the realization of that peril, however far off it might be, is not thereby any less certain and imminent.'[392]

2. Force majeure

The ILC has included *force majeure* as one of the circumstances precluding wrongfulness in its Draft Articles, it has been drafted as article 23.[393] It has also been applied as a general principle of law.[394] The ILC explains that 'a distinction must be drawn between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The circumstances in chapter V operate as a

[390] ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, commentary to Article 25, para 16, U.N. Doc A/56/10 (2001).

[391] ibid, para 16.

[392] *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary* v *Slovakia*) (Merits) [1997] ICJ Rep 7, para 54.

[393] ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, commentary to Article 23, U.N. Doc A/56/10 (2001).

[394] Case 101/85 *Commission of the European Communities v Italy* [1985] ECR 2629, para 16.

shield rather than a sword.'[395] The example given by the ILC in this sense is particularly instructive for this thesis. It explains that '[w]hile the same facts may amount, for example, to *force majeure* under article 23 and to a supervening impossibility of performance under article 61 of the Vienna Convention, the two are distinct'.[396]

This issue brings to the fore the distinction between the law of treaties and the law of state responsibility and the difference between what the ILC has dubbed primary and secondary norms of international law. As explained in these same commentaries, '[*f*]*orce majeure* justifies non-performance of the obligation so long as the circumstance exists; supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61.'[397]

Draft Article 23 refers to the situation that might be considered *force majeure*. It states:

> 1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
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> 2. Paragraph 1 does not apply if:

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[395] ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, commentary to Chapter V, para 2, U.N. Doc A/56/10 (2001).

[396] ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, commentary to Chapter V, para 4, U.N. Doc A/56/10 (2001).

[397] ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, commentary to Chapter V, para 4, U.N. Doc A/56/10 (2001).

(a) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) the State has assumed the risk of that situation occurring.

What distinguishes a situation of *force majeure* from a situation of necessity (seen above) is that in the case of the former 'the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.'[398]

There are three elements that the ILC has identified as necessary for a situation of *force majeure* to exist: '(a) the act in question must be brought about by an irresistible force or an unforeseen event; (b) which is beyond the control of the State concerned; and (c) which makes it materially impossible in the circumstances to perform the obligation'.[399] Paragraph 2 of the draft article adds two additional limitations: the first is that a State cannot invoke a situation of *force majeure* if it is due to its own conduct; and the second is that it cannot be invoked if the State had assumed the risk of it occurring.

Both of these limitations can also be found in the state of necessity defence referred to above. However, the first of these defences make this 'secondary rule' distinguishable from the supervening impossibility of performance of the law of treaties. In the latter case, a State is only limited in invoking the situation as ground

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[398] ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, commentary to article 23, para 1, U.N. Doc A/56/10 (2001).

[399] ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, commentary to article 23, para 2, U.N. Doc A/56/10 (2001).

for termination of a treaty when the situation was the result of a breach of the treaty or another obligation of international law. In this case, the act of the State may be legal, but if it caused the state of *force majeure* a State could still not invoke this circumstance precluding wrongfulness.

Another distinction with the law of treaties is what is meant by the supervening impossibility of performance. In the case of the ground for termination of a treaty an object that was indispensable for the execution of the treaty must have been destroyed or disappeared. However, in this case, there is no reference to an object. The ILC refers to a broader range of examples of situation which may lead to 'making it materially impossible', such as 'a natural or physical event (e.g. stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or … human intervention (e.g. loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two. Certain situations of duress or coercion involving force imposed on the State may also amount to force majeure if they meet the various requirements of article 23.'[400]

When analysing the element of unforeseeability, the ILC refers to a series of decisions where it has been invoked by States before arbitral tribunals to evade

[400] ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, commentary to article 23, para 3, U.N. Doc A/56/10 (2001).

responsibility in relation to damage to foreigners in unexpected insurgencies[401]. One of those cases rejects the responsibility of the State on the basis that it could not have known of the raid attempted, '[s]uch was the secrecy with which this particular affair was planned that I can not say it escaped the knowledge of Her Majesty's officers in Canada because of the want of diligence on their part'.[402]

Another rejects the responsibility on the basis that the 'raid was one of those occasional and unexpected outbreaks against which ordinary and reasonable foresight could not provide'.[403] In the third case each of the Commissioners has a separate opinion, one holding that Venezuela should have no responsibility for there is not a guarantee of protection to foreigners above the protection granted to nationals;[404] a second holding that there was no responsibility for the attack as it was an ambush;[405] and a third holding that there was no responsibility as Venezuela 'had no means of knowing or anticipating such a murderous outbreak'.[406] In the final case the tribunal found Mexico to be responsible for damages, though it

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[401] ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, commentary to article 23, para 7, U.N. Doc A/56/10 (2001).

[402] *The Saint Albans Raid Case* (*United Kingdom v. United States*) (1873) IV John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898) 4054.

[403] *The Wipperman Case* (*U.S.A. v Venezuela*) (1889) III John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898) 3039, 3043.

[404] *The case of Brissot and others* (*U.S.A. v Venezuela*) (1889) III John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898) 2949, 2966.

[405] *The case of Brissot and others* (*U.S.A. v Venezuela*) (1889) III John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898) 2949, 2967.

[406] *The case of Brissot and others* (*U.S.A. v Venezuela*) (1889) III John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898) 2949, 2969.

acknowledged the principle that a 'situation of a very sudden nature' could lead to the impossibility to take immediate and decisive measures where no responsibility would be admitted.[407]

This implies that the ILC interpreted the unforeseeability criteria as a requirement that, under reasonable circumstances a State has no exuberant responsibility to foresee possible but unlikely situations. In all these cases, though there may have been unrest in the country at the time, this was not sufficient for the tribunals to consider that the State had established some sort of guarantee to protect foreigners and their property.

In the *Lighthouse* cases the tribunal considered that the Greek government could not be considered responsible for the destruction of one of the lighthouses during a bombardment, and that such circumstance was a case of *force majeure* that would have occurred regardless of whose hands the lighthouse was in at the time.[408]

The element of 'material impossibility' was also analysed in a series of cases (these are also referred to as cases of impossibility of performance, above), all of them rejecting the existence of the circumstance precluding wrongfulness as the situation was not one of impossibility, but rather of increased hardship.[409] In the case of the *Rainbow Warrior*, the tribunal specifically held that 'the excuse of *force*

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[407] *The Gill Case* (*Mexico v. U.K.*) (1931) 5 RIAA 157, 159.

[408] *Affaire relatives à la concession des phares de l'Empire ottoman* (*Greece v France*) (1956) 12 RIAA 155, 219-220.

[409] *Case concerning the Payment of Various Serbian Loans issued in France* (*France v Serbia*) (Merits) PCIJ Rep Series A No 14, 5, 39-40; *Case concerning the Payment in Gold of Brazilian Federal Loans contracted in France* (*France v Brazil*) (Merits) PCIJ Rep Series A No 15, 93, 120.

majeure is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.'[410]

With regard to the exceptions to its application, though the ILC draft article excludes it if the situation was the result of actions by the State,[411] it concludes its commentaries interpreting that provision as requiring that 'the State's role in the occurrence of *force majeure*' be 'substantial'.[412] That is, not any contribution by a State to a situation of *force majeure* would be sufficient to exclude the possibility of invoking it as a circumstance precluding wrongfulness.

The second exception refers to a situation where the State had assumed the risk of *force majeure* occurring. The assumption of risk in this case 'must be unequivocal and directed towards those to whom the obligation is owed'.[413]

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[410] *Case concerning the difference between New Zealand and France concerning the interpretation of application of two agreements, concluded on 9 July 1986 between the two States and which relate to the problems arising from the Rainbow Warrior Affair* (*New Zealand v France*) (1990) 20 RIAA 215, 253.

[411] Which is exemplified in the *Libyan Arab Foreign Investment Company v Burundi* arbitral decision (*Libyan Arab Foreign Investment Company v Burundi*, Award (4 March 1991), (1994) 96 Intl L Rep 279, para 55 ('it is not possible to apply this provision [at the time this was draft article 31] to the case before the Tribunal because the alleged impossibility is not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of a unilateral decision of the State').

[412] ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, commentary to article 23, para 9, U.N. Doc A/56/10 (2001).

[413] ILC, 'Report of the International Law Commission on the Work of its 53rd Session', U.N. GAOR 56th Sess., Supp. No. 10, Ch. IV, Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts, commentary to article 23, para 10, U.N. Doc A/56/10 (2001).

Historically, in international law the concept of state of necessity and *force majeure* have been frequently amalgamated and confused. The most essential distinction between both circumstances precluding wrongfulness is 'the difference between the notions of "necessary act" and "voluntary act". Cases of *force majeure* tend to create conditions in which the conduct adopted is not only "necessary" but also "involuntary", while, as has been said, contravention of the law in an emergency amounting to necessity "always means an intentional act or omission of the tortfeasor"'.[414]

C. Conclusion

The concepts developed here will be used in interpreting the reasons given by States in the case studies explored in Chapters 3, 4 and 5. This is particularly important because, as is evident in what follows, States are not necessarily clear when they are justifying measures domestically as to their basis under international law. In order to interpret and to assess those reasons under international law, this brief introduction of those concepts is thus necessary to comprehend what States are saying (and doing) in the light of international law, and the implications for this thesis. For example, it is not the same thing, if one is analysing, as is the case here, the evolution of custom, for a State to argue that its measures do not breach international law (primary rules), as for them to argue that their measures, though

[414] '"*Force Majeure*" and "Fortuitous event" as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine – study prepared by the Secretariat' U.N. Doc. A/CN.4/315 (1978) p. 72, para 25.

in breach of international law are justified (secondary rules). This introductory chapter has thus provided the necessary underpinning for assessing the justifications relied on by States in Chapter 6 and finally in the concluding Chapter 7.

VII. CHAPTER 3: GOVERNMENT TAKE

A. Origins of the issue

As mentioned in Chapter 1, the impetus for this thesis was Ecuador's argument put forward in the Decision on Liability in *Burlington v Ecuador* relating to increases in the government take on increasing oil prices. Ecuador's position was described by the Tribunal as referring extensively to evidence of other States taking similar fiscal action in the face of extraordinary increases in oil prices:

> When an unforeseen increase in prices affects the economics of the contract, the contract must be readjusted, taking into account the widely accepted assumption that the State, as the owner of the non renewable resource, is to be the main beneficiary of extra revenues resulting from high oil prices. Numerous other countries have acted just like Ecuador in similar circumstances. In 1980, the United States enacted an Oil Windfall Profit Tax in response to the oil price spike of the 1970s. And since 2002, no less than 16 countries, including developed countries such as the United States, the United Kingdom and Canada, have adopted similar measures.[415]

The purpose of this chapter is to determine what measures States take and why, in relation to government take, in light of an increase in the prices of oil and gas. In this chapter I will explore whether or not there is an international trend in State practice, and what justification are given for such measures.[416] Additionally, I will consider the extent to which State justifications for such measures rely on concerns regarding equitable distribution and exhaustibility of these natural resources as related to issues of sovereignty.

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[415] *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012) para 137 (footnotes omitted).

[416] We have already referred, in Chapter 2 of this thesis, to customary international law and what evidence is examined to determine whether a rule of customary international law has emerged.

As explained in Chapter 2, the study of State practice in this case is a combination of looking to States positions in international litigation, how States' justify changes in their legislation in oil and gas exploration and production, as well as an analysis of State legislation. In cases where access to information on specific legislation has proved impossible due to it not being publicly available or difficult to access for reasons such as language, the thesis will also rely on secondary sources.[417]

There are several different ways in which a government can reflect its concern with distribution of revenues for oil and gas, not necessarily limited to windfall profit taxes, but also including the use of a sliding scale, limits on the rate of return, and R-factors.[418] Different States indicate their intention to increase government take in situations of extraordinary increases in oil prices through different mechanisms. Some, for example Tanzania and Trinidad, introduced what is called an excess profit tax.[419] Others determine that the profit oil in production sharing agreements is to be distributed as a function of the effective rate of return, that is the price of oil and the volume of production. It has been noted that this was attempted in Liberia and Equatorial Guinea but not with the success hoped for 'because of difficulties in putting into effect the necessary calculations'.[420] Still

[417] See Chapter 1, 'Methodology, Scope and Structure'.

[418] An R-factor is 'calculated each year as the ration of the contractor's cumulative net revenue to this cumulative investments', Nadine Bret-Rouzat and Jean-Pierre Favennec, *Oil and Gas Exploration and Production, Reserves, costs, contracts* (Paris, Editions Technip 2011) 208.

[419] Nadine Bret-Rouzat and Jean-Pierre Favennec, *Oil and Gas Exploration and Production, Reserves, costs, contracts* (Paris, Editions Technip 2011) 208.

[420] ibid.

others distribute profit oil in production sharing agreements according to a probability ratio or R-factor.[421] Again, net revenue will be a function of the volume of oil produced and the price of the oil, thus the R-factor also increases the government or national oil company's take when there are extraordinary oil prices. India, Egypt, Ivory Coast, Algeria, Libya, Nicaragua, Peru and Cameroon have adopted this method.[422]

Prior to the analysis of the selected States, however, it is useful to determine what the justifications for such increases in government take have been. It will be shown that the nexus between government take of these exhaustible natural resources and concerns of sovereignty has historically been significant, and that current patterns reflect these earlier concerns.

B. Theoretical justifications for increases in government take

Justifications for increases in government take in the context of rises in oil and gas prices are wide-ranging. Historically, States put forward positions relying upon the permanent sovereignty over natural resources doctrine, arguing that extraordinary increases in oil prices should principally benefit the owners of the resources, i.e. the States, and not the concessionaires. This led to changes in contract structures in the industry, replacing, in many cases, concessions with service contracts or production

[421] ibid.

[422] ibid.

sharing agreements, and the rebalancing of risk of exploration and production.[423] This was followed, in many cases, by a return to concession contracts in search of increased investments during the 90s, for example in the cases of Venezuela and Ecuador. With renewed increases in oil prices in the early 2000s after a decade of stability in the 1990s, many states renewed their revision of existing oil exploration and production contracts. The equilibrium between investments and distribution of revenues appears to elude parties; however, what is important, for the purposes of international law, are the justifications for these changes.

Different countries have adopted diverging approaches in their justification for the application of taxation or increases in government take upon what they have considered to be extraordinary increases in prices.

In some cases, it is simple to draw at least expressed intention from the whereas clauses or explanations for legislation enacted. In others, it is useful to look to case law to determine what justification those countries give for the measures adopted. Although the justification given in these arbitrations is *ex post facto* and thus may be arguably self-serving, in so far as they are expressions of the position of the government they may still be useful in determining what the legal justification for these measures is. In some cases, there is access to both these instruments.

[423] See, Chapter 1, 'Oil and Gas Industry'.

Further, as noted above the ILC has indicated that States' pleadings before courts and tribunals may be useful in indicating their positions on certain issues.[424]

Some countries, like Venezuela, have justified measures of increasing government take on the basis of the impact of the increase of oil prices on the economy, thus implying that they have to take measures to avoid the effect in fiscal, exchange and monetary equilibrium that such increase could have.[425] This position is similarly held by Argentina,[426] China,[427] and the United Kingdom.[428]

Others, like Ecuador, highlight that the extraordinary increases in oil prices unilaterally modified conditions of contracts in favour of oil companies and that they must adopt measures to criteria of 'justice and equity'.[429] Ecuador further justified these measures on the basis that the State was the owner of a non-renewable resource and thus had to be the main beneficiary of those extraordinary revenues.[430] In Australia, increases in government take were justified as a need for an

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[424] ILC, 'First Report on formation and evidence of customary international law by Michael Wood, Special Rapporteur', UN Doc. A/CN.4/663, para 48.

[425] Article 1, Decree 8807, Law that creates a special contribution for extraordinary and exorbitant prices in the international hydrocarbon market (20 February 2013) [Venezuela], available at: http://www.asambleanacional.gob.ve/documentos_leyes/ley-que-crea-contribucion-especial-por-precios-extraordinarios-y-precios-exorbitantes-en-el-mercado-internacional-de-hidrocarburos.pdf, last accessed 28 December 2017.

[426] Ministry of Economy Resolution 532/2004 [*Resolución MEyP*] (4 August 2004) [Argentina].

[427] Guo Fa [2006] No. 13 [China], available at: http://www.asianlii.org/cn/legis/cen/laws/dotscotcospi668/, last accessed 28 December 2017.

[428] Justyna Bremen and Peter Roberts, 'United Kingdom' in Eduardo G Pereira and Kim Talus (eds), *Upstream Law and Regulation* (Globe Law and Business 2013) 424-425.

[429] Law 2006-42 [Ecuador] (free translation). *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012) para 155.

[430] *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012) para 137.

'appropriate return' for the community from a non-renewable resource,[431] while the U.S. refers to a 'fair return to the public'.[432] Similar arguments are put forth in Angola.[433]

In the cases of Ecuador and Venezuela, it has been additionally argued, respectively, that: in the case of the former IOCs had an obligation to renegotiate the contracts; and in the latter, IOCs have accepted increases in government take when they are granted a profit margin, so long as they do not upset the economic balance of the investment.[434]

C. Extraordinary prices

This section of the thesis relates to increases in government take upon occasions of increases in the price of hydrocarbons. However, different governments have different positions as regards when the price of hydrocarbons reached has become extraordinary and when it has not. This is linked to costs of production of crude oil and gas, which change according to the type of project that it is at issue and the type

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[431] Exposure Draft, Petroleum resource rent tax extension, explanatory material (2011), para 1.3, [Australia] available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&cad=rja&uact=8&ved=0CEoQFjAF&url=http%3A%2F%2Farchive.treasury.gov.au%2Fdocuments%2F2124%2FRTF%2FPRRT_ExplanatoryMaterial.rtf&ei=nxkvU9XOCJDTkQeS7IGQBQ&usg=AFQjCNEdjkHUOmq1QbsVVI518GYE1kGkYQ&sig2=LSt1vIOW3m06Wj1YwhiUPg&bvm=bv.62922401,d.eW0, last accessed 28 December 2017.

[432] United States General Accountability Office, Report to the Chairman, Committee on Energy and Natural Resources, U.S. Senate, 'Oil and Gas Resources, Actions Needed for Interior to Better Ensure a Fair Return' (December 2013) p 2-3.

[433] Bernard Taverne, 'Production Sharing Agreements in Principle and in Practice' in Martyn R. David (ed.) *Upstream Oil and Gas Agreements* (London, Sweet & Maxwell 1996) 64.

[434] Julián Cárdenas García, 'Rebalancing Oil Contracts in Venezuela', (Spring 2011) 33(2) Houston J Intl L 235, 262.

of crude oil that is produced. Production costs of hydrocarbons vary if the production is conventional, unconventional[435] or tertiary production.[436] Further, refining costs and availability differs when light, heavy or extra heavy crude oil (as in the case of crude oil from the Orinoco in Venezuela) is at issue.[437]

In a report of July 2014 in a United States Energy Information Administration (EIA) Conference, Information Handling Services (IHS) identified global unconventional oil and gas plays and referred to the breakeven economics of the top ten non-U.S. tight/shale oil plays. The areas looked at are: Russia, Argentina, China, North Africa, Mexico, Australia Colombia, Algeria and Brazil. The range of prices for the breakeven economics, as indicated in that report, being from $40 to $200, with the averages between $40 and $100.[438]

In order to determine what is considered an extraordinary oil price it is useful to look at prices when measures were adopted that described the prices of oil as a justification for the adoption of a certain measures.

In the case of Ecuador, windfall profits taxes were incorporated through Law 2006-42 of 20 April 2006. In its whereas clauses the government indicates that the

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[435] Unconventional oil and gas production is defined by the EIA as 'an umbrella term for oil and natural gas that is produced by means that do not meet the criteria for conventional production', it normally includes extra heavy oil (API lower than 10º), oil sands, oil shale, tight gas, coal bed methane, shale gas, natural gas hydrates.

[436] Tertiary production involves Enhanced Oil Recovery (EOR) and Tertiary Oil Recovery (TOR) methods which are usually used when production is near the end of its declining curve.

[437] D. Hackett, L. Noda, S. Grissom, M.C. Moore, J. Winter, 'Pacific Basin Heavy Oil Refining Capacity', (Feb. 2013) 6(8) *The School of Public Policy, SPP Research Papers*.

[438] IHS Presentation, 'Going Global: Tight Oil Production' (July 2014), available at: http://www.eia.gov/conference/2014/pdf/presentations/webster.pdf, last accessed 28 December 2017.

measures are warranted because international prices for the sale of crude oil that were in effect when the contracts were executed[439] differ enormously from prices at that time and therefore the economic conditions of those contracts solely benefit the contracting companies. According to the EIA U.S. FOB Costs of Ecuadorian Oriente Crude Oil increased from between $11 and $19/barrel through the 1990s to almost $45/barrel in 2006.[440]

In the case of Venezuela the government take started to increase in 2005 when, due to a policy of recovering 'Full Sovereignty over Oil'[441] and increases in oil prices, 'the net economic benefit of reneging on its contracts was greater than the net benefit of complying with those contracts'.[442] However, the windfall profits tax was only introduced in 2008 when oil prices reached $145/barrel,[443] at the rate of 50% when the price of oil was $70/barrel and 60% when it exceeded $100/barrel.[444] In 2011 the windfall profits tax was reformed, considering that 'extraordinary' prices were taxed in the following manner: 20% between the price

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[439] Most contracts were production sharing agreements executed as of 1993 when Law 1993-44 introduced them as a form of hydrocarbon exploration and production agreement. Petroecuador, *El Petróleo en el Ecuador, La nueva era petrolera* (2013) pp 42-43.

[440] http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=IEC0500004&f=A, last accessed 28 December 2017.

[441] Rafael Ramírez Carreño, Venezuelan Minister of Energy and Petroleum, 'Full Sovereignty Over Oil', Speech at the Third OPEC International Seminar (Sept. 2006), transcript available at http://sch.pdvsa.com/index.php?tpl=interface.en/design/readmenu.tpl.html&newsid_obj_id=2990&newsid_temas=110, last accessed 28 December 2017.

[442] Julián Cárdenas García, 'Rebalancing Oil Contracts in Venezuela' (Spring 2011) 33(2) Houston J Intl L 235, 240.

[443] The reference price used by Venezuela is that of the international quote for the basket of Venezuelan liquid hydrocarbons.

[444] Julián Cárdenas García, 'Rebalancing Oil Contracts in Venezuela' (Spring 2011) 33(2) Houston J Intl L 235, 242.

fixed by the Venezuelan budget ($40/barrel) and $70/barrel; 80% on oil prices above $70/barrel; 90% when prices reach $90/barrel; and, 95% when the price exceeds $100/barrel.[445] This was reformed again in 2013 where the bands were set as follows: 20% between the price fixed by the Venezuelan budget ($55/barrel) and $80/barrel; 80% on oil prices above $80/barrel; 90% when prices reach $100/barrel; and, 95% when the price exceeds $110/barrel.[446]

In most countries finding precise information on these levels is difficult due to intricate legal structures; however, the following prices are prices at which countries have developed different levels of "extraordinary" taxation: Angola subjects its price cap excess fee, according to some sources at $45 (2008 dollars) brought forward at US CPI; China set the price at $55 in 2013; the US gives royalty relief for deepwater projects in the Gulf of Mexico, in 2013 the threshold was between $35.92 and $46.64 for deepwater oil, depending on the year when the lease was given;[447] The UK has set a trigger to reduce supplementary charge upon a drop in oil prices below a trigger price of £45/bbl.[448]

Brazil has incorporated a special participation that varies according to volumes of production or high earnings. Interestingly these percentages vary

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[445] Julián Cárdenas García, 'Rebalancing Oil Contracts in Venezuela' (Spring 2011) 33(2) Houston J Intl L 235, 245. The reform also includes waivers for specific types of projects.

[446] Decree 8807, Law that creates a special contribution due to extraordinary and exorbitant prices in the international hydrocarbon market (20 February 2013) [Venezuela]; 'Venezuela pone en marcha reforma impositiva a las ganancias petroleras' Reuters América Latina (21 February 2013).

[447] http://www.boem.gov/Oil-and-Gas-Energy-Program/Energy-Economics/Price-Thresholds/econPT.aspx, last accessed 28 December 2017.

[448] Justyna Bremen and Peter Roberts, 'United Kingdom' in Eduardo G Pereira and Kim Talus (eds), *Upstream Law and Regulation* (Globe Law and Business 2013) 424-425.

according to the depth at which the production takes place, production at lower depths is more cost-intensive, as well as the amount of time that has passed since production began.[449]

Colombia has a system of increasing royalties according to volumes of production.[450] Additionally, after cumulative production of liquid hydrocarbons is greater than 5 million barrels or gas has been produced for five years and is exported, when the WTI price or the U.S. Gulf Coast Henry Hub price (for gas) is above a certain base price a percentage of that difference in price is paid, net of royalties, as an economic right for high prices. For liquid hydrocarbons the reference price varies according to the API degree, the depth at which the discovery is located and whether it is an unconventional project; for natural gas it varies according to the distance to the delivery point and whether it is at a liquid natural gas plant. Additionally, the percentage of this participation varies according to how much higher the price is, in relation to the reference price.[451] The reference price is set in each agreement, and it is then brought forward for subsequent years in accordance with variations in the US PPI Finished Goods WPUSPOP 3000 index. For the year 2014, for example, the prices for liquid hydrocarbons were ($/Bbl): Greater than 29° API: $35.22; From 22° API to 29° API: $36.59; From 15° API to 22° API: $37.95;

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[449] Articles 21-27, Decree 2705/1998 [Brazil].

[450] Law 756/2002 [Colombia].

[451] *See* Model Hydrocarbon Exploration and Production Contract [Colombia] available at: http://www.anh.gov.co/en-us/Asignacion-de-areas/Contratacion-EyP-y-TEAS/Contratacion/Minuta%20EyP%20(PDF).pdf, last accessed 28 December 2017.

Discoveries at depths greater than 300 mts: $43.37; From 10° API to 15° API: $54.20; Unconventional production: $87.48. The prices for natural gas were ($/MBTU): at a distance up to 500 kms. from point of delivery to point of receipt: $8.15; at a distance from 500 to 1000 kms.: $9.49; at a distance greater than 1000 kms. or a LNG plant: $10.85.[452]

Although there are some cases, such as Columbia, where measures are enacted for natural gas on the basis of prices of U.S. Henry Hub, natural gas must be distinguished from crude oil in this respect. Given the issues with its transportation, natural gas is not a freely tradable and exportable commodity like crude oil[453] and international reference prices may not be relevant in internal price setting mechanisms.

Thus, what determines an extraordinary oil price varies according to which country is regulating the measure. However, in general terms even when there is a price set by the legislation, the price will vary moving forward according to some sort of inflation index and will vary according to the type of production that is at issue and its cost.

D. Evidence of State Practice

As noted previously there are different ways in which increases in government take of oil or gas production revenues linked to extraordinary oil or gas prices may

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[452] ANP Circular No. 03 of 31 January 2014, For: E&P and TEA Contractors From: Javier Betancourt Valle (President of ANP) [Colombia], available at: http://www.anh.gov.co/la-anh/Normatividad/Circular%2003%20de%202014.pdf, last accessed 28 December 2017.

[453] See, Chapter 1, distinction between oil and gas.

become manifest. I have examined evidence of this trend in various publicly available sources including case law, state legislation and secondary sources as will be shown below. Seven of the selected jurisdictions are examined in depth below, followed by an overview of the measures adopted in the remainder.[454] At the end of this section there is a table summarising the different countries.

With respect to States where there is no case law, the focus of the research is on primary legislation. I have relied in particular on the database prepared by the Vale Columbia Center on fiscal reform since the 1990s for some oil-rich states.[455] Although the database is not exhaustive, given some of the difficulties in accessing information on these issues due to lack of transparency, language issues and the privacy of contracts, it is a good starting point for this analysis. In as far as possible, the information there has been complemented by primary or secondary sources as available.[456] The purpose here is not to explore in detail the tax regimes of the States considered here, but rather to identify trends in regulatory approaches and the manner and extent to which such approaches are justified by reference to sovereignty concerns.

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[454] These seven jurisdictions were chosen as they were representative of different regimes in oil and gas exploration and production in place, different degrees of development in the oil and gas sector as well as different degrees of development in the states themselves. Additionally, availability of information in the public domain, for example in international investment arbitration case law was a contributing factor.

[455] Database available online at: http://ccsi.columbia.edu/work/projects/fiscal-regimes-for-natural-resources/, last accessed 28 December 2017.

[456] There have been come states where access to information has been particularly difficult, Kuwait and Saudi Arabia are examples of this.

1. *Angola*

Some of the difficulties in accessing this type of information is manifest in the case of Angola.[457] There, regulation of exploration and production of hydrocarbons is currently underscored by its Constitution of 2010.[458] Aside from prospecting licences, production of oil and gas is regulated through concession agreements which are performed by interested companies joining up with the national concessionaire (a department of Sonangol). These ventures may be carried out through: '(i) the incorporation of a company; (ii) the entering into of a consortium agreement; or (iii) the entering into of a production sharing agreement.'[459]

What is relevant for this chapter is the fact that in Angola's regulation contracting groups may be subject to a price cap excess fee,[460] which is ultimately due to the Angolan state, or to make contributions for social projects,[461] and the sliding scale distribution of 'profit oil' incorporated in PSAs. This price cap excess

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[457] There are several international organisations which have complained about this lack of transparency in regard to Angolan oil exploration and production contracts, *see, for example*, Global Watch, *Rigged? The Scramble for Africa's Oil, Gas and Minerals* (January 2012); Human Rights Watch, *Some Transparency, No Accountability, The Use of Oil Revenue in Angola and Its Impact on Human Rights* (January 2004).

[458] Paolo Esposito and Patrícia Rosário, 'Angola' in Eduardo G Pereira and Kim Talus (eds), *Upstream Law and Regulation* (Globe Law and Business 2013) 26; Yinka Omorogbe and Peter Oniemola, 'Property Rights in Oil and Gas under Domanial Regimes' in Aileen McHarg, Barry Barton, Adrian Bradbrook, and Lee Godden (eds), *Property and the Law in Energy and Natural Resources* (OUP 2010) 130-131.

[459] Helena Prata, Sofia Cerqueira Serra and João Pedro Honorato, 'Recent trends in the Angolan oil and gas sector' in *Energy and Infrastructure: Sub-Saharan Africa 2013* (Euromoney Trading Limited, 2013) 46-47.

[460] Article 55, Law 13 of 24 December 2004 [Angola].

[461] EY Global Oil and Tax Guide 2013, 8 available at: http://www.ey.com/gl/en/services/tax/global-tax-guide-archive, last accessed 30 June 2015.

fee is 'intended to increase government revenue when oil prices rise above a certain level'.[462] The origin of this price cap is in the Petroleum Law of 1978 and the 1979 model Production Sharing Agreement.[463]

> At the end of 1979 the terms of the envisaged production sharing contracts were made public. The terms appeared to follow the Egyptian style, except that an operating committee fulfils the role of the board of directors of the Egyptian joint operating company and except that the payment of an excess profit tax was required per barrel profit oil. The levy equalled the difference between the barrel's market value and a certain indexed base price. In 1984 the price cap amounted to US$ 22.70. The excess profit tax reflected the Angolan government's preoccupation with creaming off excess profits generated by the high price prevailing in the early 1980s.[464]

In its report of 2007 the World Bank refers to both these issues. The description does not precisely coincide with the information available on the Sonangol website. According to the World Bank, the PSAs executed between 1979 and 1991 had both a sliding scale of distribution of profit oil (from 40% to 90% to the government) and a price cap set at $20 per barrel in 1984 and brought forward according to inflation,[465] this description matches that of 1989, also by the World Bank.[466] However, PSAs executed after 1991 would only be subject to profit oil

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[462] OSISA Angola, Global Witness, *Oil Revenues in Angola, much more information but not enough transparency* (February 2011) 24.

[463] Renato Aguilar and Andrea Goldstein, 'The Chinisation of Africa: The Case of Angola' in David Greenaway (ed), *The World Economy, Global Trade Policy 2009* (Wiley Blackwell 2010) 50.

[464] Bernard Taverne, 'Production Sharing Agreements in Principle and in Practice' in Martyn R. David (ed), *Upstream Oil and Gas Agreements* (London, Sweet & Maxwell 1996) 64.

[465] World Bank, 'Angola, Oil, Broad-based Growth, and Equity, A World Bank Country Study' (2007) 45.

[466] Joint UNDP/World Bank Energy Sector Assessment Program, 'Angola: Issues and Options in the Energy Sector', Report No. 7408-ANG (May 1989) 155-156; *see also* Gordon Barrows, 'A survey of incentives in recent petroleum contracts' in Nicky Beredjick and Thomas Wälde (Eds.), *Petroleum Investment Policies in Developing Countries* (Kluwer 1988) 228-229.

sharing 'as a function of the contractor's achieved after-tax rate of return'.[467] Similar information is expressed elsewhere.[468] On the Sonangol website, however, there is a model PSA Agreement, which must post-date 2007 as it refers to possible decrees of 2008, wherein Article 13 refers to the 'Price Cap Excess Fee' set above $45 (brought forward in accordance with the US Consumer Price Index).[469] According to information provided by Sonangol, the total amount of price cap excess fees in 2008 exceeded $1 billion.[470] In fact, in its Financial Statements for 2012 the company explains that it received funds in the concept of Price Cap Excess Fee of almost $1 billion.[471] There are other sources which also continue to refer to the price cap excess fee as an element of the PSAs in Angola.[472]

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[467] World Bank, 'Angola, Oil, Broad-based Growth, and Equity, A World Bank Country Study' (2007) 45.

[468] Sritha Reddy, 'Fiscal Reforms in the Oil Sector Since the 90's Highlighting Introduction of Progressive Fiscal Elements' (Vale Columbia Center, January 2013); *see also* Kirsten Bindemann, *Production-Sharing Agreements: An Economic Analysis* (Oxford Institute for Energy Studies, October 1999) 70, available at: http://www.oxfordenergy.org/wpcms/wp-content/uploads/2010/11/WPM25-ProductionSharingAgreementsAnEconomicAnalysis-KBindemann-1999.pdf, last accessed 28 December 2017; Nadine Bret-Rouzat and Jean-Pierre Favennec, *Oil and Gas Exploration and Production, Reserves, costs, contracts* (Paris, Editions Technip 2011) 208.

[469] Article 13, Model PSA Agreement [Angola], available at: http://www.sonangol.co.ao/Style%20Library/Pdf/licitacoes/bid07_cpp_KON11_KON12_cabindaCentro_en.pdf, last accessed 28 December 2017.

[470] OSISA Angola, Global Witness, 'Oil Revenues in Angola, much more information but not enough transparency' (February 2011) 32.

[471] Financial Statements of Sonangol, E.P. as of 31 December 2012, 43, available at: http://www.sonangol.co.ao/English/AboutSonangolEP/AccountsAndReport/Documents/Relatorio2012.PDF, last accessed 28 December 2017.

[472] Maria Lya Ramos, *Angola's Oil Industry Operations* (OSISA), available at: http://www.osisa.org/sites/default/files/angola_oil_english_final_less_photos.pdf, last accessed 28 December 2017.

In addition to this, the link between increases in price of oil and increases in government take is expressed in the whereas clauses of Law 13/04, the Oil Taxation Law, where the government states that '[t]he risk-sharing by investors and the protection of national interests in the exploitation of non-renewable resources led to the creation of new fiscal systems characterized essentially by the increase in tax burdens with increases in production and the price of oil on the international market'.[473]

2. Argentina

In *Total v Argentina* there is evidence of Argentina's position as regards the imposition of 'export taxes' on crude oil, LPG and natural gas.[474] These were enacted '[i]n response to [Argentina's] financial crisis and other situations that arose in the Argentine energy market'.[475] Argentina defended the measures questioned in the arbitration by referring to 'the fundamental principle of the priority of domestic market supply enshrined in the Hydrocarbons Law.'[476] In particular, in referring to the export duties, it described them as 'a lawful and a legitimate exercise of State sovereignty not giving rise to an obligation to compensate'.[477]

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[473] Law 13/04 [Angola], the translation is provided by Sonangol on its website: <http://www.sonangol.co.uk/wps/wcm/connect/f7d4ac804275ad53b8d0bc84497d7a5e/Law+13-04.pdf?MOD=AJPERES&CACHEID=f7d4ac804275ad53b8d0bc84497d7a5e>, last accessed 11 September 2015.

[474] *Total SA v Argentina*, ICSID Case No. ARB/04/1, Decision on Liability (27 December 2010) paras 370, 374-376, 380.

[475] Ibid, para 364.

[476] Ibid, para 407.

[477] Ibid, para 410 (footnotes omitted).

The reasonableness of these measures was argued in light of 'Argentina's crisis', 'the abandonment of the currency board system, the severe devaluation of the Argentine peso and the extraordinary increase of the crude oil price in the international market'.[478] Thus, these taxes are referred to as an exercise of State sovereignty and based on the extraordinary increase of the international price of crude oil. Argentina referred to profit taxes in other states in its pleadings[479] and this was referred to by the tribunal in its conclusions.

If one refers to the underlying law which originally created these 'export taxes', their justification was based on protecting the local economy from the impact of the international (temporary) increase in oil prices, capturing the extraordinary revenues especially when the resource is non-renewable considering that their costs have not increased, and that the export duties would not affect the profitability which would be adequate to continue to attract investments.[480] Argentina's concern with capturing the extraordinary revenues especially when the resource is non-renewable is similar to Canada's argument in the *Mobil v Canada* case: that is, it reflects concern for the impact on the local population of the exploitation of this non-renewable resource.[481]

The tribunal in *Total* concluded that these measures were not a violation of Argentina's obligations under the BIT. In its analysis, the tribunal mentions the fact

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[478] Ibid.

[479] Ibid, paras 434-435.

[480] *Resolución MEyP* [Ministry of Economy Resolution] 532/2004 (4 August 2004) [Argentina].

[481] In Argentina, royalties are paid to the provinces on whose territory the natural resource is found.

that there is a general recourse to these fiscal measures by oil-producing and -exporting States, and that appears to be relevant in its analysis of Total's expectations under the Concession Decree and therefore its legitimate expectations which it looks to in analysing the fair and equitable treatment standard.[482]

Interestingly, given the Argentine government's *de facto* decoupling of its internal crude oil prices from international oil prices in the environment of falling crude oil prices (Q3 and Q4, 2014), the internal price of crude oil was higher than the international price: for example, at one point in time the internal price was approximately $84/bbl whereas the international price of WTI and Brent was below $60. Maintaining this higher price was a governmental measure to attempt to generate investment given the apparent need to replace imports of crude oil and LNG with internal production and the cost of exploration and production of unconventional oil and gas plays where these investments are required.

3. Australia

Australia's oil and gas exploration and production regime is basically made up of leases, licences and concessions. In 1987 it incorporated a Petroleum Resource Rent Tax for offshore projects which set a tax rate of 40% on taxable profit.[483] In 2012 the PRRT was extended to onshore petroleum projects.[484] The reason for this extension

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[482] *Total SA v Argentina*, ICSID Case No. ARB/04/1, Decision on Liability (27 December 2010) paras 434-436, 459.

[483] Sritha Reddy, 'Fiscal Reforms in the Oil Sector Since the 90's Highlighting Introduction of Progressive Fiscal Elements' (Vale Columbia Center, January 2013).

[484] Information from the Australian Taxation Office, available at: http://www.ato.gov.au/Business/Petroleum-resource-rent-tax/, last accessed 28 December 2017.

is 'the Australia's Future Tax System Review (AFTS), which recommended that the PRRT and all State based royalty regimes be replaced with one uniform tax rate'.[485] In its explanations of the reason for the extension the government described this tax as 'designed to ensure that the Australian community receives an appropriate return from the development of its non-renewable petroleum resources'.[486]

4. China

China mainly regulates its oil and gas production through production sharing agreements. It has collected profits dependent on prices of oil as from 2006, it also imposes royalties, which have been replaced by a resource tax in 2011 and an export tax since 2006.[487] Additionally, it has X-factor production sharing agreements although the distribution depends on negotiations in each case.[488]

Since 2006 it has 'decided to collect special incomes of petroleum on the excessive incomes obtained by petroleum exploitation enterprises'.[489] The reasons given in the decision were based on petroleum being a strategic resource, that due

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[485] Exposure Draft, Petroleum resource rent tax extension, explanatory material (2011), para 1.43 [Australia], available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&cad=rja&uact=8&ved=0CEoQFjAF&url=http%3A%2F%2Farchive.treasury.gov.au%2Fdocuments%2F2124%2FRTF%2FPRRT_ExplanatoryMaterial.rtf&ei=nxkvU9XOCJDTkQeS7IGQBQ&usg=AFQjCNEdjkHUOmq1QbsVVI518GYE1kGkYQ&sig2=LSt1vIOW3m06Wj1YwhiUPg&bvm=bv.62922401,d.eW0, last accessed 28 December 2017.

[486] ibid, para 1.3.

[487] Sritha Reddy, 'Fiscal Reforms in the Oil Sector Since the 90's Highlighting Introduction of Progressive Fiscal Elements' (Vale Columbia Center, January 2013).

[488] Liang Peng, 'China' in Eduardo G Pereira and Kim Talus (eds), *Upstream Law and Regulation* (Globe Law and Business 2013) 545-550.

[489] Guo Fa [2006] No. 13 [China], available at: http://www.asianlii.org/cn/legis/cen/laws/dotscotcospi668/, last accessed 28 December 2017.

to the increase in oil prices since 2004 the profits of the crude oil industry had increased, affecting other industries and society; thus, their purpose was to improve the balance of distribution of profits, reinforce state control and promote the development of the national economy.[490] The State Council describes this as a non-tax income,[491] the rate varies according to the price of oil from 20% to 40%.[492] In 2012 the threshold was raised from $ 40 to $ 55.[493] This is only applicable to the production of crude oil.

5. Ecuador

Windfall profits taxes were incorporated in Ecuador through Law 2006-42, which was later regulated in Decrees 1672/2006 and 662/2007, setting the rate applicable to extraordinary income at 50% and 99% respectively. This extraordinary income occurred when the price of oil exceeded the price existing at the time the contract was signed expressed in constant terms (i.e. brought forward at the rate of inflation).[494]

Law 2006-42 establishes, in its whereas clauses, that the extraordinary increase in oil prices only modified the conditions of the contracts signed with companies in their favour and that it is 'indispensable' to incorporate into the

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[490] ibid.

[491] ibid.

[492] Cai Qi [2006] No. 72 [China], available at: http://www.asianlii.org/cn/legis/cen/laws/notmofopadtmftaotcospp1332/, last accessed 28 December 2017.

[493] Cai Qi [2011] No. 480 [China]; see also Sinopec Presentation of Price Sensitive Information to the Hong Kong Exchange on 5 January 2012.

[494] Article 2, Law 2006-42 [Ecuador].

hydrocarbons law 'principles of economic-financial equilibrium, as well as legal security, that allow the enforcement of those participation contracts signed by the Ecuadorian State on the basis of criteria of justice and equity for the parties'.[495]

Additional evidence of Ecuador's concern with the distribution of the extraordinary oil revenues is made evident in the case law.

In *Burlington v Ecuador*, Ecuador's position is reminiscent of the position of Kuwait and the conclusions of the tribunal in *Kuwait v Aminoil*. Although most of these arguments were not included in the tribunal's reasoning in the former case this position is relevant as it is evidence of State practice.

Ecuador argued that these windfall taxes were appropriate on the basis of 'the principle of equity' because of the extraordinary oil prices that had developed since 2002.[496] An argument based solely on the concept of the principle of equity is open and difficult to draw conclusions from, though it is important that this concept was invoked by the State. Additionally, it argued that these taxes were justified as 'the State, as the owner of the non renewable resource, is to be the main beneficiary of the extra revenues resulting from the high oil prices'.[497]

Ecuador also argued that '[a]s a result of this imbalance, Burlington had an obligation to renegotiate the PSCs in good faith and Ecuador had a *duty to legislate*

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[495] Law 2006-42 [Ecuador] (free translation).

[496] *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012) para 29.

[497] ibid, para 137.

to obtain a fair allocation of oil revenues'.[498] The tribunal does not refer at length to where Ecuador held its duty to have originated, although reference is made to a 'constitutional mandate to seek a fair allocation of the revenues derived from its hydrocarbons'. [499] The position of Ecuador with regard to property over extraordinary revenues is that the economic equilibrium 'must reflect the oil industry's widely accepted assumption that the State, as the owner of the non-renewable resource, "is to be the main beneficiary of extra revenue resulting from high oil prices"'.[500]

Interestingly, although the tribunal in *Burlington v Ecuador* noted that the Ecuadorian government had appealed to State practice and industry practice[501] it played no role in the decision of the tribunal.

Perenco v Ecuador is a case about the same concessions as *Burlington* where Perenco was the operator; however, the tribunal's reasoning is very different. The tribunal's description indicates that Ecuador also based its arguments on similar responses to escalating oil prices by 'most, if not all major producing oil countries'. [502] Ecuador referred, as well, to a duty to legislate to obtain a fair allocation of resources [503] in light of article 247 of the 1998 Ecuadorian

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[498] ibid, para 155 (emphasis added).

[499] ibid.

[500] ibid, para 377 (footnote omitted).

[501] ibid, paras 137, 377-378.

[502] *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No. ARB/08/11, Decision on remaining issues of jurisdiction and liability (12 September 2014) para 241.

[503] *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No. ARB/08/11, Decision on remaining issues of jurisdiction and liability (12 September 2014) paras 93, 654(i).

Constitution [504] which indicates 'that non-renewable natural resources are considered the "inalienable and imprescriptible property of the State", to be "exploited in light of national interests"'.[505] Ecuador also appears to have argued that Law 42 was to remedy a disequilibrium caused by the increase in oil prices.[506]

The tribunal's decision as refers to the claim related to fair and equitable treatment under the French-Ecuadorian BIT, considers what it describes as industry practice in analysing the claimant's legitimate expectations. It notes that, given industry practice in relation to expected returns and governmental responses to market changes, it 'would be unsurprising to an experienced oil company that given its access to the State's exhaustible natural resources, with the substantial increase in world oil prices, there was a chance that the State would wish to revisit the economic bargain underlying the contracts'.[507] This is indicative of a trend to increase government take with increases in oil prices. Additionally, the Tribunal considers that Perenco's attempts to renegotiate are consistent with this description of industry practice of renegotiation of oil contracts in changing circumstances.[508]

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[504] N.B. the Ecuadorian Constitution was reformed in 2008 and the sections now referring to the issue of production of hydrocarbons have changed, *see* Constitution of Ecuador, articles 1, 313, 315, 408 (2008).

[505] *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No. ARB/08/11, Decision on remaining issues of jurisdiction and liability (12 September 2014) para 654(i) n. 1019.

[506] *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No. ARB/08/11, Decision on remaining issues of jurisdiction and liability (12 September 2014) para 654(ii).

[507] *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No. ARB/08/11, Decision on remaining issues of jurisdiction and liability (12 September 2014) para 588 (footnote omitted).

[508] *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No. ARB/08/11, Decision on remaining issues of jurisdiction and liability (12 September 2014) para 588 (footnote omitted).

In its analysis of whether this attempt by Ecuador to adjust its rent from exhaustible natural resources was arbitrary, unreasonable or idiosyncratic, it looked to the extraordinary market conditions in which Ecuador acted as well as similarity with measures taken by other States at the time.[509] It also considered that the market conditions at the time the measures were adopted were 'objectively speaking' 'profoundly different from those prevailing at the time of contracting and that this fact could hardly be denied in negotiations'.[510]

In *OEPC v Ecuador*, Ecuador appears to have taken a different position. The principal argument that the government put forth as regards Law 42 and its implementing measures—that is the measure imposing windfall taxes—was that they had 'done "nothing more than exercise its indisputable sovereign authority to raise revenue for its governmental operations and the public welfare"'. [511] The government does not seem to have argued, as it did in *Burlington*, that there was some sort of duty on it or the other party to renegotiate, although there was an attempt at negotiation in 2005 as described by the tribunal. It says: '[w]hile the evidence is not clear as to why these negotiations did not lead to an agreement between the parties, it is a fact that they were not successful'.[512]

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[509] *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No. ARB/08/11, Decision on remaining issues of jurisdiction and liability (12 September 2014) para 591.

[510] *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No. ARB/08/11, Decision on remaining issues of jurisdiction and liability (12 September 2014) para 595.

[511] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012) para 470.

[512] ibid, para 519.

There is no reference to equity in the distribution of profits or the right of the government to the extraordinary revenues brought by the prices of oil. The explanation for this difference in argument may be the time of the allegations. In *OEPC v Ecuador* the parties seem to have only addressed the issue of Law 42 in the damages phase of the proceedings. The description of the parties' arguments may also not be accurate. Though Ecuador does not argue the principle of equity in the *OEPC* case, it does base its position on sovereign authority and public welfare. The position in all three cases does not appear to be completely consistent; in the first case Ecuador's concern appears to be the distribution of the revenues of an exhaustible resource, while in the third case its concern appears to be generating revenue for the general well-being of its people, not reflecting concerns of the distribution of the revenue of an exhaustible resource. Nevertheless, the whereas clauses of the original law do indicate concerns regarding equitable distribution of revenues of an exhaustible resource in applying the increases in government take.

6. United States

The United States is a unique jurisdiction as regards exploration and production of oil and gas. Aside from the fact that oil and gas may be owned by individuals, each state has its own regulation 'regarding the development of privately owned minerals' and those owned by the federal government are regulated by federal

regulations.[513] There are many different types of agreements, but the one most generally used is the oil and gas lease.[514]

There are three types of government take in the United States: if the lease relates to federal lands the government 'is entitled to a royalty of one-eighth of all oil and gas produced'; if it is not federal land the royalty will be negotiated with the private owner.[515] The offshore royalty rate has increased from 12.5% to 16.67% in 2007 and to 18.75% in 2008, varying depending on the depth of the wells.[516] Additionally, aside from leases granted between 28 November 1995 and 28 November 2000 which belong to a specific regime,[517] other leases granted by the U.S. Federal Government in the Gulf of Mexico are entitled to royalty relief when the price of oil or gas does not exceed a certain threshold.[518]

A December 2013 report of the Government Accountability Office[519] has some interesting references in relation to the reasons for the fiscal measures

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[513] Andrew B Derman and Debra J Villarreal, 'United States' in Eduardo G Pereira and Kim Talus (eds), *Upstream Law and Regulation* (Globe Law and Business 2013) 277.

[514] ibid, 284.

[515] ibid, 294.

[516] Mike Alberti, 'Oil and gas companies still enjoying 1920s royalty rates', *Map and Data Resources* (20 November 2013), available at: http://www.remappingdebate.org/map-data-tool/oil-and-gas-companies-still-enjoying-1920-royalty-rates-1, last accessed 28 December 2017.

[517] Letter from the United States Department of the Interior to Reporter of 6 November 2009, available at: http://www.boem.gov/DWRRA-Section-304-Leases/, last accessed 28 December 2017; *see also* Statement of C. Stephen Allred, Assistant Secretary, Land and Minerals Management, United States Department of the Interior before the Committee on Energy and Natural Resources United States Senate (18 January 2007).

[518] Department of the Interior, Bureau of Ocean Energy Management, 'Annual Threshold Determinations', available at: http://www.boem.gov/Oil-and-Gas-Energy-Program/Energy-Economics/Price-Thresholds/econPT.aspx, last accessed 28 December 2017.

[519] The Government Accountability Office is a nonpartisan congressional agency that oversees government spending. Its report is useful in that other agencies explain to it how or why they have

applicable to the onshore and offshore federal oil and gas system. Amongst other positions they note that 'Interior acts on behalf of the American people to manage the federal oil and gas system to ensure a fair return to the public for the development of oil and gas resources'.[520] They note in this regard that '[a]ccording to Interior officials and documents, incremental increases in royalty rates were instituted in response to a variety of factors including (1) increased oil and gas prices; (2) perceived improvements in exploration and production technologies, especially in deep water; and (3) the competitive market for offshore leases.'[521] Additionally, '[a]ccording to Interior's *Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 2012-2017*, the minimum bid was raised, in part, to account for increases in oil prices and to encourage optimal timing of leasing.'[522] Finally their concern with the return to the public is noted in that 'we reported that, without routinely evaluating the federal oil and gas system as a whole, including monitoring what other resource owners worldwide are receiving for their energy resources or evaluating and comparing the attractiveness of the United States for oil and gas investment with that of other oil and gas regions, Interior cannot provide reasonable assurance that the public is getting an appropriate share of revenues'.[523]

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issued certain regulations in regards to benefits to taxpayers. In the context of this thesis it is a good source of information as to the reasons for regulations which are otherwise not explained.

[520] United States General Accountability Office, Report to the Chairman, Committee on Energy and Natural Resources, U.S. Senate, 'Oil and Gas Resources, Actions Needed for Interior to Better Ensure a Fair Return' (December 2013) pp 2-3.

[521] ibid, p 14.

[522] ibid, p 15.

[523] ibid, p 23 (footnotes omitted).

Alaska imposed a progressive tax rate called Alaska's Clear and Equitable Share (ACES) in 2007 through House Bill 2001, increasing the rate of taxation from 25% to 75% on net profit depending on the price of crude oil. The Governor noted that the reasons behind the bill were '[b]y receiving an equitable share for our resources, we are now in a position to demand more accountability and seize opportunities to save for future generations'.[524] The bill was repealed in May 2013, incorporating a 35% flat tax.[525]

Other jurisdictions within the U.S. have not modified their tax regulation over the past 5 years and do not have progressive tax rates.[526] However, 'the majority of the fiscal systems having a higher government take than the three federal fiscal systems rely more heavily or entirely on profit-based sliding scale levies. Such levies are usually structured with a lower share to the government when profits are low, with the government share progressively increasing as profitability increases'.[527]

7. Venezuela

Venezuela has recently adopted a series of measures revising its oil and gas regime, relating to the structure of its agreements as well as its government take. For example, as from 2004 it modified the royalty rate applicable to projects in the

[524] Press release: Governor Palin Signs House Bill 2001, available at: http://votesmart.org/public-statement/314434/#.UxtsCud_soQ, last accessed 28 December 2017.

[525] Lynn Doan, 'BP to Conoco Seek Alaskan Oil Comeback as Palin Tax Dies: Energy', *Bloomberg* (8 January 2014) available at: http://www.bloomberg.com/news/print/2014-01-08/bp-to-conoco-seek-alaskan-oil-comeback-as-palin-tax-dies-energy.html, last accessed 28 December 2017.

[526] Irena Agalliu, 'Comparative Assessment of the Federal Oil and Gas Fiscal System', U.S. Department of the Interior, Bureau of Ocean Energy Management (2011).

[527] ibid, p 61.

Orinoco Oil Belt, in 2006 it incorporated an extraction tax and in 2008 it enacted the Windfall Profit Tax law,[528] which it later modified in 2011 and 2013.[529] The laws themselves do not have whereas clauses that indicate their basis; however, their very existence underscores concern with distribution of oil revenues when prices exceed certain levels. Evidence may also be found in the case law, although it is limited.[530]

Exxon Mobil initiated two proceedings in relation to these measures, one was brought against Venezuela before ICSID (Mobil Corporation, Venezuela Holdings BV and others v Venezuela, ICSID Case No. ARB/07/27), and another brought against PdVSA before the ICC.

According to the description given by the tribunal in *Mobil v PdVSA*, the increase applicable to projects in the Orinoco Oil Belt in 2004 was justified, as '[t]he Government had determined that the temporary 1% royalty rate originally granted to the associations under the RRA during a time of low oil prices in the 1990s no longer made sense as prices of oil exceeded everyone's expectations'.[531] The incorporation of the Extraction Tax of 33.33% in 2006 was justified, in the same

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[528] Ley de Contribución Especial sobre Precios Extraordinarios de Mercado Internacional de Hidrocarburos (*Law of Special Contribution on Extraordinary Prices of the International Market of Hydrocarbons*), Official Gazette (15 April 2008) [Venezuela].

[529] Julian Cardenas Garcia, 'Venezuela' in Eduardo G Pereira and Kim Talus (eds), *Upstream Law and Regulation* (Globe Law and Business 2013) 310-314.

[530] Although there is also a decision in *ConocoPhillips v Venezuela* as the decision only analysed the measures in light of whether they were discriminatory or not there was no description of Venezuela's reasons for the measures. *ConocoPhillips Petrozuata BV and others v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and on the Merits (3 September 2013) para 332.

[531] *Mobil Cerro Negro Ltd v Petróleos de Venezuela, S.A. and PDVSA Cerro Negro, S.A.*, ICC Arbitration Case No. 15416/JRF/CA, Final Award (23 December 2011) para 135.

decision, to 'equalize fiscal conditions for all players in the oil industry'.[532] Additionally, '[b]y 2004, the cause motivating the royalty reduction [originally for the production of heavy crude oil] had been eliminated due to the drastic increase in the price of Brent crude oil'.[533]

In *Mobil v Venezuela* there is less evidence of Venezuela's arguments regarding the legitimacy of the measures under analysis here and more on the BIT issues. Venezuela did argue, amongst other issues, that the right of the Government to change the law as regards government takes was previously anticipated in domestic legislation.[534] Additionally they referred to the argument that despite the measures adopted Mobil continued to enjoy profitable operations due to high oil prices.[535]

8. Other states

As regards the analysis of other States, it is easiest to classify them according to the common measures they have put in place as regards increases in government take. Sometimes States have made statements in incorporating this legislation which links it clearly to issues of distribution of non-renewable resources, other times it is manifest in what the measures entail *de facto*.

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[532] ibid, para 151.

[533] ibid, para 451.

[534] *Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014) para 166.

[535] *Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014) para 284.

Some States that have production sharing agreements have put in place sliding scales of distribution of profit oil which change with the rate of return of the project. The rate of return will be linked to increases in prices and volumes of production but will also consider increases in costs. Examples of this are Angola (R-factor),[536] Azerbaijan (R-factor),[537] Canada,[538] China,[539] Iraq (R-factor),[540] India (Investment multiple),[541] Qatar (R-factor).[542] Similarly, Egyptian agreements incorporate a profit margin; though called concession agreements, their terms are more similar to production sharing agreements where the international oil company

[536] Kirsten Bindemann, *Production-Sharing Agreements: An Economic Analysis* (Oxford Institute for Energy Studies, October 1999) 70, available at: http://www.oxfordenergy.org/wpcms/wp-content/uploads/2010/11/WPM25-ProductionSharingAgreementsAnEconomicAnalysis-KBindemann-1999.pdf, last accessed 28 December 2017.

[537] ibid, pp 18, 71-73.

[538] In Alberta, which accounts for approximately 98% of Canada's total oil reserves, there were also several reforms put in place as regards the fiscal regime applicable to the oil and gas sectors. In 2007 a "New Royalty Framework" was implemented the purpose of which was to 'ensure Albertans are getting a fair return on their resources'. Although that framework was later modified on several occasions, the sliding scale incorporated in 2007 continues to apply, with different parameters. Government of Alberta, 'Executive Summary', *The New Royalty Framework* (25 October 2007) available at: https://apps.neb-one.gc.ca/REGDOCS/File/Download/484661, last accessed 28 December 2017; Lisa E. Sachs, Perrine Toledano, Jacky Mandelbaum, with James Otto, 'Impact of Fiscal Reforms on Country Attractiveness: Learning from the Facts', Karl E. Sauvant (ed.) [2011-2012] Yearbook on International Investment Law and Policy 345, 355.

[539] Liang Peng, 'China' in Eduardo G Pereira and Kim Talus (eds), *Upstream Law and Regulation* (Globe Law and Business, 2013) 545-550.

[540] Iraqi contracts, excluding the Kurdish region which has a separate regime have links to oil prices in government take in adopting an R-factor sliding scale method as noted here: 'The R-factor is a sliding-scale method according to which the value of the remuneration fee declines as cumulative cash receipts increase as a function of the incremental oil and gas production (and also higher oil prices).' Ahmed Mousa Jiyad, 'Iraq' in Eduardo G Pereira and Kim Talus (eds), *Upstream Law and Regulation* (Globe Law and Business 2013) 379.

[541] Model Production Sharing Contract of the Ministry of Petroleum and Natural Gas of the Government of India, 2009 [India].

[542] Dario Arias, 'Qatar' in Eduardo G Pereira and Kim Talus (eds), *Upstream Law and Regulation* (Globe Law and Business 2013) 514.

will recover costs and a profit margin and will share the other production 'with EGPC, EGAS or Ganope, one of which, along with the government, will be the other party to the agreement'.[543] Saudi Arabia has also incorporated a varying tax rate for natural gas projects in light of variations in the internal rate of return of the project, which will be linked to natural gas prices.[544]

Other states increase their government take when the price of oil exceeds a certain level. These are: Angola, [545] Argentina, Brazil, [546] Colombia, [547] Ecuador, Indonesia,[548] and Venezuela.

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[543] Loïc Conan and Ghada Kaptan, 'Egypt' in Eduardo G Pereira and Kim Talus (eds), *Upstream Law and Regulation* (Globe Law and Business 2013) 51.

[544] Article 5, Natural Gas Investment Taxation Law [Saudi Arabia].

[545] Although there is some uncertainty as to the applicability of the price cap excess fee to new contracts, as noted there is evidence in the financial statements of Sonangol that they continue to perceive significant revenues under this heading.

[546] Brazil has a special participation applicable to oil and gas production. This special participation is an extraordinary financial compensation payable in cases of large volumes of production or high earnings, the rate varies from 10% to 40%. (Ludmilla Franklin Corkey and Marcelo Viveiros de Moura, 'Brazil' in Eduardo G Pereira and Kim Talus (eds), *Upstream Law and Regulation* (Globe Law and Business 2013) 217. Articles 45-50, Law 9478/1997 [Brazil] and Articles 21-27, Decree 2705/1998 [Brazil]) Additionally Brazil also had set in place a regime with a reduced tax burden for exploration and production in 1999 but it expired in 2007. Sritha Reddy, 'Fiscal Reforms in the Oil Sector Since the 90's Highlighting Introduction of Progressive Fiscal Elements' (Vale Columbia Center, January 2013).

[547] After an extensive reform of its hydrocarbon sector in 2003, Colombia incorporated a new model contract called exploration and production contract. These contracts added windfall profits taxes based on extraordinary oil prices or volumes of production. See Model E&P Contract and Annexes available at: http://www.anh.gov.co/en-us/Asignacion-de-areas/Contratacion-EyP-y-TEAS/Contratacion/Minuta%20EyP%20(PDF).pdf, last accessed 28 December 2017 and http://www.anh.gov.co/la-anh/Normatividad/Acuerdo%20Derechos%20Econ%C3%B3micos%202016.pdf, last accessed 28 December 2017.

[548] Initially there was an excess profits charge applicable in Indonesian PSC agreements. In so far as those PSCs continue in force their terms would appear to remain applicable. However newer generations of PSCs are not described as including such excess profit charges. Bernard Taverne, 'Production Sharing Agreements in Principle and in Practice' in Martyn R. David (Ed.) *Upstream Oil and Gas Agreements* (London, Sweet & Maxwell 1996) 69; Oil and Gas in Indonesia-Investment and

There are other states that have links between increases in government take and increases in oil and gas prices. For example Russia's oil and gas sectors are currently owned principally by state-owned companies.[549] There are two types of agreements concerning subsoil rights: licences and production sharing agreements.[550] As regards government take, the Russian government applies an export duty which changes every month as a function of the actual price per barrel.[551] Excise taxes are applied to petroleum products and revised every six months.[552] An applicable Mineral Extraction Tax is also linked to the price of oil.[553] According to the study carried out at the Vale Columbia Center after 1999 the system of taxation of production and export of hydrocarbons has adapted, reincorporating the Export Duty which had been phased out in 1997 and, although changing

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Taxation Guide 2012, PWC, available at: https://www.pwc.com/id/en/publications/assets/oil-and-gas-guide_2012.pdf, last accessed 28 December 2017.

Again, there are some issues of availability of evidence in this case, the distribution of profit oil in these agreements have changed over generations of PSCs, there have been some reported intentions to impose windfall profits taxes but this has not been reported on. Some evidence points to 2006 PSCs linking profit oil distribution to oil prices: Recent Developments in the Oil and Gas Industry in Indonesia, Lovells, Lee & Lee (April 2009) p 7, available at: https://www.hoganlovells.com/~/media/hogan-lovells/pdf/publication/recentdevelopmentsoilgasindustryinindonesia_pdf.pdf, last accessed 28 December 2017.

[549] U.S. Energy Information Administration, *Russia* (26 November 2013) 6, available at: https://www.eia.gov/beta/international/country.cfm?iso=RUS, last accessed 28 December 2017.

[550] Although PSAs have not been executed since the PSA law was passed in 1995. Anna Ovcharova, 'Russia' in Eduardo G Pereira and Kim Talus (eds), *Upstream Law and Regulation* (Globe Law and Business 2013) 398.

[551] EY Global Oil and Tax Guide 2013, 457 available at: http://www.ey.com/Publication/vwLUAssets/2013_global_oil_and_gas_tax_guide/$FILE/EY_Oil_and_Gas_2013.pdf, last accessed 30 June 2015.

[552] ibid, 463.

[553] ibid, 458.

throughout this time, continues to be linked to the price of crude oil.[554] In a government meeting of May 2013 there were comments regarding the importance of modifying the tax regime in order to incentivise investment in exploration and production in hydrocarbons, proposing the following system '[w]e think the following principles should be adhered to: a flexible tax system with regard to the oil and gas sector if prices for crude go up and providing economic incentives to develop reserves and resources that are hard to extract.'[555]

In 1999 Nigeria incorporated the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Decree 26 of 1999 which established that PSCs 'shall be subject to review to ensure that if the price of crude oil at any time exceeds $20 per barrel, real terms, the share of the Government of the Federation in the additional revenue shall be adjusted … to such extent that the Production Sharing Contracts shall be beneficial to the Government of the Federation.'[556] In 2004 petroleum profits tax were set from 65.75% to 85%, and royalties for joint ventures were set at a range from 16.67% to 20%.[557] Due to difficulties in finding the text of this act it is impossible to determine what the government set as its reasons for this

[554] Sritha Reddy, 'Fiscal Reforms in the Oil Sector Since the 90's Highlighting Introduction of Progressive Fiscal Elements' (Vale Columbia Center, January 2013).

[555] Government Meeting of 30 May 2013, Moscow, available at: http://government.ru/en/news/2170, last accessed 28 December 2017.

[556] Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Decree 26 of 1999, Article 3 [Nigeria].

[557] Sritha Reddy, 'Fiscal Reforms in the Oil Sector Since the 90's Highlighting Introduction of Progressive Fiscal Elements' (Vale Columbia Center, January 2013).

increase, but the timing is similar to those in the other cases indicating concern over distribution due to increases in prices.

Still other States have not linked increases in government take expressly to increases in oil or gas prices but have modified their tax regimes at times when prices of oil or gas were extraordinarily high and done this in light of concerns regarding distribution. For example, in the United Kingdom the fiscal regime for hydrocarbons has been frequently modified, with some fields having different regimes from others.[558] Since 2000 a "supplementary charge" was introduced on profits at a 10% rate, which was increased to 20% and finally in 2011 to 32%.[559] The explanation given by the Chancellor (Mr George Osborne) at the time was that, due to the increases in prices, 'oil companies are making unexpected profits on oil prices that are far higher than those they based their investment decisions on'.[560] He further put forth that he did 'not want an important investment in the North Sea lost' so if the oil price dropped below a certain level 'we will reintroduce the escalator

[558] Lisa E. Sachs, Perrine Toledano, Jacky Mandelbaum, with James Otto, 'Impact of Fiscal Reforms on Country Attractiveness: Learning from the Facts', Karl E. Sauvant (ed), [2011-2012] Yearbook on International Investment Law and Policy 345, 354.

[559] 2011 Economic Report, Oil & Gas UK, pp 56-57; *see also* Lisa E. Sachs, Perrine Toledano, Jacky Mandelbaum, with James Otto, 'Impact of Fiscal Reforms on Country Attractiveness: Learning from the Facts', Karl E. Sauvant (ed), [2011-2012] Yearbook on International Investment Law and Policy 345, 354.

[560] HC Deb 23 March 2011, vol 525, col 965 [United Kingdom]; *see also* Justyna Bremen and Peter Roberts, 'United Kingdom' in Eduardo G Pereira and Kim Talus (eds), *Upstream Law and Regulation* (Globe Law and Business 2013) 424-425.

and reduce the new oil tax in proportion'.[561] In fact this was what happened in 2015.[562]

Iran and Mexico are in the midst of modifying their hydrocarbon exploration and production regime. They are both States which, so far, have not linked payments to international oil companies to oil and gas prices.[563]

I have not found this link to oil and gas prices in all the States reviewed. In Bolivia, after the incorporation of a direct tax on hydrocarbons in 2005 of 32%,[564] on top of the 18% royalty, there does not appear to have been any other change, however, one must recall that Bolivia basically exports natural gas and the price is set in each specific agreement. In Norway, where 'all offshore petroleum resources are owned by the state, and the state has exclusive rights of resource management', the main type of concession is the production licence.[565] There does not appear to be an increase in the percentage of government take according to an increase in prices: the 'petroleum tax' rate is 78% of net income from petroleum activities, of this 50% is a special tax on petroleum production and pipeline transportation

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[561] HC Deb 23 March 2011, vol 525, col 965 [United Kingdom].

[562] HC Deb 3 December 2014, vol 589, col 312 [United Kingdom]; and HC Deb 18 March 2015, vol 594, col 775 [United Kingdom], in this final cut, aside from cutting the supplementary charge the Chancellor also announced cuts in the petroleum revenue tax (from 50 to 35%) and that the government would invest in seismic surveys on the UK continental shelf.

[563] Sara Vakhshouri, 'Iran offers new terms for oil contracts' (26 Feb 2014), available at: http://www.al-monitor.com/pulse/originals/2014/02/iran-oil-contract-sanctions-energy-nuclear.html#, last accessed 28 December 2017; Miriam Grunstein, 'Mexico' in Eduardo G Pereira and Kim Talus (eds), *Upstream Law and Regulation* (Globe Law and Business 2013) 255.

[564] Articles 53-57, Law 3058/2005 [Bolivia].

[565] Ivar Alvik, 'Norway' in Eduardo G Pereira and Kim Talus (eds), *Upstream Law and Regulation* (Globe Law and Business 2013) 371.

activities 'justified on the basis of the state's ownership of the petroleum resources'.[566] However, the high level of participation of Statoil in exploration and production in Norway indicates that the government receives high percentages of return regardless of the price of oil and gas. Interestingly, it has been noted that '[i]f we consider the only overall political risks to exploration and production in petroleum, Norway and Nigeria have a similar overall rating. In addition to this IHS [Energy Group] further argues that Norway has very harsh legal and fiscal terms compared to Nigeria.[567]'[568]

E. Summary of measures

Countries	Contracts	Measures
Angola	Concessions/PSAs	Price cap excess fee and sliding scale of PSAs
Argentina	Concession	Export taxes
Australia	Licence/Lease/Concession	Petroleum Resource Rent Tax (40% taxable profit) incorporated onshore projects in 2012
Azerbaijan	PSA	Linked to IRR
Bolivia	Concessions	Direct hydrocarbon tax, not progressive, incorporated in 2005.
Brazil	PSA/Licenses	Special participation applicable to cases of large volumes of production or high earnings

[566] ibid, 379.

[567] 'Norway's ranking in 84th out of ninety-three countries, while Nigeria ranks 37th' in L. Bossley, IHS Energy Group, 33.

[568] Mustafa Erkan, *International Energy Investment Law, Stability through Contractual Clauses* (Wolters Kluwer 2011) 32.

Canada (Alberta)	License/Lease	Royalty sliding scale imposed in 2007 (New Royalty Regime)
China	PSA	Special income of petroleum on excessive incomes. X-factor production sharing agreements. Export taxes.
Colombia	Exploration and production contract	Windfall profits tax based on extraordinary oil prices or volumes of production.
Ecuador	PSC/Service	Increases in windfall profits tax in process of renegotiation of contracts.
Egypt	Concession	Profit sharing is foreseen in the agreements after costs have been recovered and a profit margin.
Indonesia	PSA	Link of profit oil distribution to oil prices.
India	PSA	Links distribution of profit oil to return on investment.
Iran	Buy-back contracts	In process of reform, but for now profits for companies not linked to price of oil and gas
Iraq	Service Contracts	R-factor scale.
Mexico	Process of reform	So far not related to the value of hydrocarbon production.
Nigeria	PSA	Subject to review if price of oil increases from $20. Increase in petroleum profits tax and royalties for joint ventures in 2006
Norway	Licence	Petroleum tax rate 78%
Qatar	PSA/JV	Sliding scale based on level of production and R-factor.
Russia	Licence and PSAs (mainly licences, mostly national)	Export tax varies according to the price of oil. Excise taxes revised every 6 months.

Saudi Arabia	Lack of information	Link of natural gas taxation to internal rate of return as from 2004.
United Kingdom	Licence	Supplementary charge, linked to oil prices.
United States	Leases	Property owners own underground oil and gas, state specific regulations. In the case of the Gulf of Mexico federal legislation applies. For these leases there were increases in 2007 and 2008 of royalties, from 12.5% to 18.75% and there is a royalty waiver (except in leases from 1995-2000) when prices of oil drop below a certain level. Alaska had a progressive tax from 2007-2013.
Venezuela	JV	Windfall profits tax

F. Conclusion

Through this analysis it is possible to note that there is a trend amongst oil and gas producing States to impose some sort of increase in government take when there is an extraordinary increase in oil prices. As noted previously, there are different regimes for the execution of agreements relating to oil and gas exploration and production, and these different regimes reflect this increase in government take in a variety of ways.

Of the 25 States examined, I have not been able to find complete information in two cases (Kuwait and Saudi Arabia). There are three cases where the information has been unclear (Angola, Nigeria and Indonesia). There is one State where, though extraordinarily high government take is foreseen, it is not linked to increases in oil

or gas prices (Norway). All the other States I analyse here have found links between increases in prices of oil or gas and increases in government take. As noted previously, this was either a direct applicable tax, through a sliding scale of distribution, or through links in other measures with the price of oil or gas. In all of these examples, as detailed above, the reasons the States give for these increases in government take rely on 'equitable distribution' of non-renewable resources and a stated concern for the local population to obtain an appropriate return from resource exploitation.

In conclusion, it appears that Ecuador's argument, recounted at the outset of this chapter, might have been based on State practice as evidence of the emergence of a rule of customary international law based on concerns of sovereignty, which is similar to the position that States held in the 1960s and 1970s as regards extraordinary benefits from oil and gas production. Additionally, there is evidence that such a trend may exist, at least in the area of government take. However, the consequences of the existence of such a trend may be limited in the context of investment arbitration as issues of damages and consistency with pre-existing agreements have not been addressed here.

In the following chapters I will look at whether the trend found in government take is also reflected in other areas where regulation may be based on sovereignty concerns, as originally considered in relation to nationalisation, and as it may have evolved currently, as regards the environment and local communities.

VIII. CHAPTER 4: NATIONALISATIONS

A. Introduction

As set out in the introduction of this thesis, this is the second of three case study chapters. In this chapter I will look at instances of nationalisation of oil and gas exploration and production projects as a second way in which a country could manifest concerns of sovereignty with regard to oil and gas upstream activities. As was the case with the issue of government take set out in the previous chapter, nationalisations were also a typical State reaction to concerns of sovereignty at the time the permanent sovereignty over natural resources principle was discussed in the UN General Assembly. In fact, in many cases, nationalisation was the end result of a process that started through increases in government take.

This chapter will focus on direct expropriations or nationalisations.[569] It will not address cases relating to 'indirect' or 'creeping' expropriations in light of increases in government take or regulation regarding the environment or local community development, though they have, on occasion, been treated as an expropriation,[570] as they are dealt with in Chapters 3 and 5, respectively. As to the

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[569] The meaning of the term nationalisation has been subject, historically, to some controversy (*see* (1952) 44(II) Annuaire de l'Institut de Droit International 279). In this context, it is sufficient to define it as the transfer to the State of property or private rights. Though historically there has been some discussion whether expropriation includes contractual rights (*see* S. Friedman, *Expropriation in International Law* (1953) 220-221) currently there seems to be agreement that contractual rights may be expropriated: *see* Sir Robert Jennings and Sir Arthur Watts (eds.) *Oppenheim's International Law* (OUP 2008) vol I(2), 928-929; G.C. Christie, 'What Constitutes a Taking of Property under International Law?' (1962) 38 BYBIL 305, Thomas Waelde and A. Kolo, 'Environmental Regulation, Investment Protection and Regulatory Taking in International Law, (2001) 50 ICLQ 811, Roslyn Higgins, 'The Taking of Property by the State: Recent Developments in International Law' (1982) 176 Recueil des Cours 263.

[570] For example, in Professor Orrego Vicuña's dissenting opinion in *Burlington v Ecuador* he held that 'A 99% tax level is simply not just an expropriation but a confiscation, even if in this case the investor was allowed to keep a certain minimum income arising from the economy of the PSCs as interpreted by the Respondent.' *Burlington Resources Inc. v Ecuador*, ICSID Case no. ARB/08/5, Dissenting Opinion of Arbitrator Orrego Vicuña (8 November 2012) para 27.

terms used to describe a taking, there is a terminological discussion regarding whether different terms, such as expropriation or nationalisation, have different legal meanings and implications.[571]. It has been put forward that '[t]here is a variety of vocabulary in this area—seizure, confiscation, nationalization, sequestration, condemnation—and an even larger number of ways that property can be expropriated. Expropriation can be direct, indirect, regulatory, creeping, de facto, or a government act may be "tantamount to", "equivalent to", or "have similar effect as" expropriation.'[572] For the purposes of this chapter, the terms "expropriation" and "nationalisation" will be used interchangeably, and as meaning when a person has lost property rights over an oil and gas exploration or production area, or contractual rights to explore or produce oil and gas as reflected in an agreement or other instrument with similar effects.

Historically, a central tension in nationalisation of concessions was between the sovereignty of a State, allowing it to change the terms of previous agreements, and as reflected in the principle of *pacta sunt servanda* and the State's ability to bind itself for the future, particularly where it had guaranteed that there would be no changes in the terms of the agreements. While initial cases upheld the principle of *pacta sunt servanda,*[573] others have denied the predominance of the *pacta sunt*

[571] Alice Ruzza, 'Expropriation and Nationalization' in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (March 2013) para 10.

[572] Christopher Dugan, Don Wallace, Noah Rubins, Borzu Sabahi, *Investor State Arbitration* 450 (OUP, 2008).

[573] E.g. *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)*, Award (23 August 1958), (1963) 27 Intl L Rep 117.

servanda principle in favour of a State's right to expropriate or nationalise under certain conditions.[574]

During the 1960s and 70s there were a wave of nationalisations in the oil and gas sectors in different countries, that brought about a drift towards more generalised acceptance of the right to nationalise or expropriate with compensation. As regards the requirements for an expropriation to be in accordance with international law, the obligation to pay compensation is generally accepted (though the standard of compensation has been the subject of some discussion).[575]

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[574] *N.V. Verenigde Deli-Maatshapijen and N.V. Senembah-Maatchappij v. Deutsch-Indonesische Tabak-Handelsgesellschaft m.b.H.*, 1 U 159/1959 [Germany]; *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic*, Award (19 January 1977), (1979) 53 Intl L Rep 389; *Government of Kuwait v American Independent Oil Company (Aminoil)*, Award (24 March 1982), (1984) 66 Intl L Rep 518.

[575] Historically, the issue of whether there was a requirement to pay full compensation was brought up in the context of the discussions regarding the permanent sovereignty over natural resources principles at the United Nations. Some authors have held that GA Resolution 1803 expressed a position wherein full compensation was not required in instances of expropriation (Christopher F. Dugan, Don Wallace Jr, Noah Rubins, Borzu Sabahi *Investor-State Arbitration* (OUP, 2008) 435). However, GA Resolution 1803 sets forth that 'the owner shall be paid appropriate compensation, in accordance with the rules set forth in the State taking such measures in the exercise of its sovereignty and in accordance with international law'. Thus the compensation required would be that under international law. In fact, other authors have argued precisely the contrary, that GA Resolution 1803 established that 'compensation must be paid in accordance with international law' (Andreas F. Lowenfeld, *International Economic Law* (2008) 489). This was not the case with the following GA Resolutions (3171(1973), 3201(1974), 3281(1974)) where more emphasis was put on compensation in accordance with domestic law, but these resolutions are not considered reflective of customary international law because they were not generally accepted. Currently, this discussion has shifted somewhat, though compensation is a required element of an expropriation, case law has held that an expropriation without compensation does not necessarily imply that the expropriation is illegal, though compensation would then be calculated by the Tribunal. Additionally, there is a discussion as to whether, in the case that that did mean that the expropriation was illegal, the standard of compensation would be different (for example including *lucrum cessans* or lost profits), e.g. *Philips Petroleum v Iran*, 21 Iran-U.S. C.T.R. 79; *Venezuela Holdings B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Bolivia*, ICSID Case No. ARB/06/2, Partially Dissenting Opinion of Professor Brigitte Stern (16 September 2015).

Currently, a state's right to nationalise or expropriate is generally recognised in public international law,[576] albeit subject to certain requirements.[577] A particular instance where this is made clear is in the Permanent Sovereignty over Natural Resources GA Resolution.[578] As noted in Chapter 1, the Permanent Sovereignty over Natural Resources GA Resolution has been considered reflective of customary international law;[579] that expropriation is considered legal under international law is also manifest in agreements relating to the protection of investments.[580]

This chapter examines the reasons States have given for nationalisations of oil and gas resources.[581] This is necessary to determine what justifications States have interpreted as in conformity with international law with regard to expropriation of oil and gas resources, and therefore when there is *opinio juris* in this regard. In light of the thesis, as an expropriation is the most invasive way in

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[576] Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (OUP 2008) vol I(2), 918-919.

[577] For example, that it not be arbitrary, be based on duly adopted legislation, be for a public purpose, not be discriminatory and be compensated. (Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (OUP 2008) vol I(2), 920; Christopher Greenwood, 'State Contracts in International Law – the Libyan Oil Arbitrations', (1982) 53(1) BYBIL 27, 59-60) The issue of whether compensation should be 'adequate', 'just', 'prompt', 'equitable', 'effective' or 'full' is an on-going discussion, *see* Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (OUP 2008) vol I(2), 921-922; Article II(2)(c), Charter of Economic Rights and Duties of States, adopted by the GA in Resolution 3281(XXIX); Point 4, GA Resolution 1803(XVII); ILC, 'Report of the International Law Commission on the work of its 53rd session', UN GAOR, 56th Sess., Supp. No. 10, Chapter IV, Commentary to Article 36, para 13, U.N. Doc. A/56/10 (2001); *Claim against the Union of Soviet Socialist Republics for Damage caused by Soviet Cosmos 954*, Annex A, (July 1979) 18 Intl L Materials 899, 907, para 23; *Delagoa Bay Railroad*, John Basset Moore, 2 *History and Digest of International Arbitrations to which the U.S. has been a party* 1855, 1891 (1898).

[578] 4, GA Resolution 1803(XVII).

[579] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic*, Award (19 January 1977), (1979) 53 Intl L Rep 389, 491.

[580] All Bilateral Investment Treaties (BITs) have a clause referring to expropriation wherein they set out the requirements for an expropriation to be legal. Under those circumstances an expropriation will be considered legal and in conformity with the obligations under the treaty. The ubiquitous nature of these BITs confirms that expropriation is considered legal under international law.

[581] The reasons for focusing on nationalisations as one of the relevant measures in this thesis has been addressed in Chapter 1.

which a State can affect property or rights, it is necessary first to understand whether there is a common pattern emerging or repeating itself from the past as to the oil and gas sector. There is extensive literature on the issue of nationalisations and expropriations, including discussion of the requirements for them to be legal and the consequences of their illegality.[582] This chapter will not deal with those issues. The description of the requirements, generally, for an expropriation to be legal is not necessary for this thesis.

What this thesis seeks to address is whether there are common reasons why a State determines that it is necessary to take over property or rights in relation to oil and gas. Whether a State then decides to compensate for that taking and how are issues related to secondary rule of law which is what are the consequences of such a taking. Our dilemma, here, is not whether a State's taking was legal but whether there is a common trend in the case of oil and gas expropriations which is relevant to understand the developing standard of permanent sovereignty over natural resources under customary international law. A trend in State takings in the oil and gas sector justified for reasons of energy security or benefits to the people of that State is indicative of a resurgence of the principle of sovereignty over natural resources. Those same reasons, as will be developed, were the justifications given

[582] *See*, *inter alia*, Peter Cameron, *International Energy Investment Law* (OUP 2010) 219-231; Roslyn Higgins, 'The Taking of Property by the State: Recent Developments in International Law' (1982) 176 Recueil des Cours 259; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 1997) 235-238; Max Sorensen, *Manual of Public International Law* (New York 1968) 485-9; D. P. O'Connell, *International Law* (London 1965) 836-67; Gillian White, *Nationalization of Foreign Property* (New York 1961); B. A. Wortley, *Expropriation in Public International Law* (Cambridge 1959); Konstantin Katzarov, *The Theory of Nationalization* (The Hague 1964); Henry J. Steiner and DetlevF. Vagts, *Transnational Legal Problems* (Mineola 1976) 408-95; William W. Bishop, Jr., *International Law* (Boston 1971) 851-99; Abram Chayes, Thomas Ehrlich, and Andreas F. Lowenfeld, *International Legal Process* (Boston 1969) 838; Marjorie M. Whiteman, *Digest of International Law* (Washington 1967) vol 8, 1020-1185; and Ingrid Delupis, *Finance and Protection of Investments in Developing Countries* (New York 1973).

when the original proposition was brought forth and accepted as a principle of customary international law. Thus, this chapter will focus on: the justifications given by States for expropriations; the terms of the agreements, if any, executed with investors; and the terms of arbitral or judicial decisions deciding on these points.

B. History of nationalisations

In the early twentieth century there were several instances of nationalisations in the oil and gas sector. Initially, these expropriations were characterised by the States of which the expropriated companies or persons were nationals, as violations of international law. However, over time, the States of which these persons were nationals came to accept expropriation as legal, so long as compensation was paid.[583]

In 1968 OPEC[584] issued Resolution XVI.90, where it recommended that Governments *endeavour* 'to explore for and develop their hydrocarbon resources directly' and '[w]here provision for Governmental participation in the ownership of the concession-holding company has not been made, Governments may acquire a reasonable participation, on the grounds of the principle of changing circumstances'.[585] Though this is not legislation concerning a specific nationalisation it is a general statement made on behalf of the Member States of OPEC during the Conference held in Vienna 24-25 June 1968.[586] According to the

[583] Omar L. Ghobashy, 'The Changing Attitudes in the World Oil Community' (Fall 1974) 2(2) Syracuse J Intl L and Commerce 287.

[584] The legal status and constituent instruments of the Organization of Exporting Petroleum Countries (OPEC) have been referred to in Chapter 1 of this thesis.

[585] OPEC Resolution XVI.90, (1968) 7 Intl L Materials 1183, pts. 1 and 2.

[586] The Conference of OPEC is the 'supreme authority' of the Organisation (Article 10, OPEC Statute). It normally holds two Ordinary Meetings a year. The Conference is made up of delegations of the Member Countries, each Full Member shall have one vote at the Conference, and decisions of the Conference require unanimous agreement of the Full Members. The Conference Resolutions become

OPEC Statute, 'Member Countries shall fulfil, in good faith, the obligations assumed by them in accordance with' the Statue.[587] The Resolution is a 'Declaratory Statement of Petroleum Policy' and the provisions mentioned have been drafted as recommendations (*endeavour*, *may acquire*). Yet, given its unanimous nature[588] and the fact that it is meant to be a declaration of petroleum policy approved unanimously, the Resolution is a useful proxy for the positions of the Member States of OPEC as regards the reasons for the nationalisations that took place afterwards.[589] In cases where evidence of the circumstances or legislation at issue in specific nationalisations has proved impossible to obtain, this is an imperfect substitute for the positions of the Full Member States at the time the Resolution was issued.[590]

The following sections will look specifically at the reasons given by different States, over time, in their expropriation or nationalisation measures as well as other sources such as statements by State officials or positions in litigation. These reveal

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effective 20 days after the conclusion of the Meeting. The Conference is responsible for formulating 'the general policy of the Organization and determine the appropriate ways and means of its implementation' (Article 15, OPEC Statute). OPEC held its 16th conference in Vienna where the Member States reached a Resolution that was a 'collective expression of the aspirations of the world's major oil producing countries' with regard to their petroleum policy, in particular, the relationship between foreign capital and host States. MEES, 'The Vienna Resolution on Petroleum Policy' 26 July 1968.

[587] Article 3, OPEC Statute.

[588] OPEC's Statute foresees that, if a Member is absent from the Conference there is a ten day period for it to notify its opposition to the Resolution (Article 11(C), OPEC Statute).

[589] One could argue that *mutatis mutandi* the same *opinio juris* character applies as that given to General Assembly Resolutions (*Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic*, Award (19 January 1977), (1979) 53 ILR 389) as these Resolutions are issued by the Conference, must be unanimous and reflect the States' positions at a certain point in time. Of course this *opinio juris* would only be of the Member States of OPEC and not necessarily reflect general customary international law as the elements of diversity and universality referred to by Professor Dupuy in *Texaco v Libya* are not present here. One could, however, argue in the terms of the *North Sea Continental Shelf* cases that they are significant in so far as they are 'States whose interests were specially affected' (*North Sea Continental Shelf Cases* (*Germany* v *Denmark*, *Germany* v *Netherlands*) (Merits) [1969] ICJ Rep 3, 42-43).

[590] Iran, Iraq, Kuwait, Saudi Arabia, Venezuela, Qatar, Indonesia, Libya, United Arab Emirates.

that they can generally be characterised into four categories of reasons, though they are not mutually exclusive: (a) States that expropriate oil and gas concessions as a response to an act which they consider a violation of international law;[591] (b) States that expropriate oil and gas concessions looking to achieve ownership of the oil, generally to guarantee their energy security or supply;[592] (c) States that expropriate oil and gas concessions to guarantee their independence from foreign influences;[593] and (d) States that expropriate oil and gas concessions due to breaches of contract by international oil companies.[594]

C. Case Studies

Given that the historical section of nationalisations is more prominent than the historical section of other measures analysed in this thesis I have organised this section chronologically, so it will be easier for the reader to follow and to identify patterns.

1. Bolivia

The oil and gas industry in Bolivia has been historically significant. It started with an exploration contract given to Richmond Levering Co. in 1920, that was transferred to Standard Oil Co (New Jersey) almost immediately in 1921. In December 1936 YPFB was created as an agency within the Bolivian government that would oversee the petroleum industry.

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[591] Bolivia, Brazil, Iraq, Indonesia, Nigeria, Libya.

[592] Mexico, Argentina, Indonesia, Venezuela, Nigeria, India, Kuwait, Libya, Saudi Arabia.

[593] Iran, Iraq, India.

[594] Bolivia, (possibly) Iraq.

Standard Oil Company in Bolivia[595] was nationalised[596] in 1937. The decision was made by Decree of 13 March 1937, annulling the concession contract and declaring that all properties would become properties of Y.P.F.B. (the national Bolivian oil company).[597] There are several different positions put forth regarding the reasons for this expropriation: (1) surface taxes that Standard Oil had not paid;[598] (2) the export of petroleum to Argentina in 1925-1926;[599] (3) participation (or lack thereof) in the Chaco War;[600] (4) that Bolivia was seeking Argentina's support in the Chaco Peace talks;[601] and (5) that Standard Oil was not producing oil

[595] This was an investment of The Standard Oil Company of New Jersey in 1922, for 55 years.

[596] Though in this case the State declared the termination of the concession agreement for fraud and non-compliance, this was, therefore, considered a case of 'confiscatory annulment of a contract' and not an expropriation, Joseph L. Kunz, 'The Mexican Expropriations', (1940) XVII(3) New York U L Q Rev 327, 373. For the purposes of this thesis, however, it is still relevant as it is a case of a foreign company losing its rights with regard to a concession agreement.

[597] Executive Resolution of 13 March 1937 [Bolivia] in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 277.

[598] Telegram from the Minister in Bolivia (Norweb) to the Secretary of State of 16 March 1937 in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 279 (after speaking to the Foreign Minister where the taking was justified as 'based on the findings of the Ministry of Mines and Petroleum that a fraud had been committed in illegally exporting oil to the Argentine Republic in 1925-1926; that, however, the most important [factor in?] the Bolivian Government claim is the evasion of taxes amounting to 1,400,000 bolivianos during the early period of exploitation').

[599] Telegram from the Minister in Bolivia (Norweb) to the Secretary of State of 15 March 1937 in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 278 ('the action is based on a claim that the company illegally exported a quantity of petroleum to the Argentine Republic during 1926-1927.'); *see also* Omar Z. Ghobashy, 'The Changing Attitudes in the World Oil Community' (1974) 2(1) Syracuse J Intl L and Commerce 287, 295.

[600] Telegram from the Minister in Bolivia (Norweb) to the Secretary of State of 8 May 1937 in United States Department of State [1937] *Foreign Relations of the United States Diplomatic Papers* 288 (the Bolivian Foreign Minister had justified the actions by the Bolivian government as 'legally and morally justified on account of fraud and the non-cooperative stand taken by the Company during the war, but that it was especially necessary to dispel the impression current throughout the world that the weak and impoverished Bolivia had been merely an instrument of the all-powerful, imperialistic world monster, the Standard Oil Company—that the Chaco war had been fought merely to protect the Standard Oil properties.').

[601] Telegram from the Minister in Bolivia (Norweb) to the Secretary of State of 19 March 1937 in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 280-281.

from its concessions and Bolivia needed that oil. [602] Much of the information available on this expropriation is through the U.S. State Department correspondence as they were following the issue closely due to the nationality of the expropriated company.

The first two of these reasons were referred to expressly in the expropriation decree: that documents proved 'the production of petroleum from the Bermejo wells in 1925 and 1926 and its exportation from the territory of the Republic';[603] and that the company had made 'false statements' regarding production to avoid 'payment of taxes and delivery of the corresponding royalty to the State'.[604] However, both of these seem unlikely as the sole reasons for the expropriation. In the case of the former, the export had occurred over ten years before the decree.[605]

As to the latter, the obligation to pay surface taxes, established in the agreement, was from the date of commencement of production. Such date was not specified, but a Supreme Resolution was issued on July 2, 1931 establishing a retroactive obligation to pay those surface taxes as from 1924.[606] The company

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[602] Telegram from the Minister in Bolivia (Caldwell) to the Secretary of State of 22 September 1937 in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 296-297.

[603] Executive Resolution of 13 March 1937 [Bolivia] in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 277.

[604] Executive Resolution of 13 March 1937 [Bolivia] in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 277.

[605] Additionally, there seems to have been evidence that the petroleum was exported with a certificate of origin and customs declaration from Bolivia (Stephen Cote 'Bolivian Oil Nationalism and the Chaco War' in Bridget Maria Chesterton (ed.) *The Chaco War: Environment, Ethnicity and Nationalism* (Bloomsbury 2016) 157, 170). The 704 tonnes of crude oil were given 'as a gift' to the Standard Oil Company of Argentina (Joseph L. Kunz, 'The Mexican Expropriations', (1940) XVII(3) New York U L Q Rev 327, 369), as acknowledged by the Standard Oil Company itself in attempting to justify its non-payment of certain royalties at the time (Standard Oil Company *Confiscation: A History of the Oil Industry in Bolivia* (New York 1939) 4-5).

[606] Standard Oil Company *Confiscation: A History of the Oil Industry in Bolivia* (New York 1939) 3.

appealed that resolution, but the appeal had not been decided when the confiscation Decree was issued.

The Government expressly based its decision on the company having defrauded the tax collectors. The issue of fraud was in the original contract signed in 1920 with the Richmond Levering Company.[607] When Standard Oil purchased the concession in 1921, it renegotiated its terms, signing a new agreement in 1922. The new agreement did not include this issue of fraud.[608] However, the Petroleum Law of 1921 did contain similar text in article 22.[609] The 1922 Concession is described in the expropriation decree as 'a clarification of the former contract on the same matter signed in 1920',[610] and that the agreement 'stipulated that the Government may declare its abrogation or administrative annulment for defrauding the government interests'.[611] The decree finally declared 'the annulment of all the properties of the Standard Oil Company within the territory of the Republic for proved defrauding of the government interests'.[612] The decree was also challenged before the Supreme Court. It rejected the challenge on the basis that the original transfer from Richmond Levering had been invalid.[613]

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[607] It contained an article 18 which allowed the Government to 'administratively declare forfeiture of the concession in case of fraud', Standard Oil Company *Confiscation: A History of the Oil Industry in Bolivia* (New York 1939) 1-2. (Though this is, blatantly, a publication by the Standard Oil Company to attract interest of the State Department for diplomatic protection, it is useful to understand some of the facts underlying the expropriation.)

[608] Standard Oil Company *Confiscation: A History of the Oil Industry in Bolivia* (New York 1939) 1-2.

[609] Article 22, Organic Petroleum Law (1921) [Bolivia].

[610] Executive Resolution of 13 March 1937 [Bolivia] in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 277.

[611] Executive Resolution of 13 March 1937 [Bolivia] in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 277.

[612] Executive Resolution of 13 March 1937 [Bolivia] in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 278.

[613] Stephen Cote, 'Bolivian Oil Nationalism and the Chaco War' in Bridget Maria Chesterton *The Chaco War: Environment, Ethnicity and Nationalism* (Bloomsbury 2016) 157, 170.

As regards the Chaco War, there is some contemporaneous understanding that the nationalisation was linked to Standard Oil's alleged participation in the Chaco War between 1932 and 1935.[614] Between 1932 and 1935 the Chaco War took place between Bolivia and Paraguay. It was a territorial dispute. There is some suggestion that this is relevant as regards the expropriation for two reasons. In the first place, Standard Oil was suspected of not having been fully collaborative with Bolivia during the war.[615] Second, the Bolivians were looking for Argentine support in the Chaco Peace talks, and apparently that was subject to access to their oil fields, which had been in the hands of Standard Oil.[616] It has been put forth, that:

> The first nationalization had a revanchist motivation. Standard Oil would have acted against Bolivian interests during the Chaco War, in which Bolivia lost a significant part of its territory to Paraguay. Standard Oil would have resisted selling oil to the Bolivian Army, as well as would have been involved in the underground oil export to Argentina and Paraguay. Suspicions like these, and of tax evasion, would have lead to its disappropriation on March 13, 1937, followed by a payment of indemnification.[617]

This may have been a political reason for the expropriation. However, there are simultaneous commentaries by the Foreign Minister of Bolivia stating that they wanted to avoid the impression that the war was fought only so that Standard Oil could protect its concessions,[618] thus is seems unlikely that this is the case.

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[614] Joseph L. Kunz, 'The Mexican Expropriations', (1940) XVII(3) New York U L Q Rev 327, 369-370.

[615] Telegram from the Minister in Bolivia (Norweb) to the Secretary of State of 8 May 1937 in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 288; *see also* Stephen Cote 'Bolivian Oil Nationalism and the Chaco War' in Bridget Maria Chesterton (ed.) *The Chaco War: Environment, Ethnicity and Nationalism* (Bloomsbury 2016) 157, 164-169.

[616] Telegram from the Minister in Bolivia (Norweb) to the Secretary of State of 8 May 1937 in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 288.

[617] Roberto Chacon de Albuquerque, 'The Disappropriation of Foreign Companies Involved in the Exploration, Exploitation and Commercialization of Hydrocarbons in Bolivia' (2008) 14(1) L and Business Rev of the Americas 21, 25.

[618] Telegram from the Minister in Bolivia (Norweb) to the Secretary of State of 8 May 1937 in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 288.

The last reason given by Bolivia for the expropriation to the U.S. delegation was based on oil production. The company was not producing oil from the concession area allegedly because the lower price of oil and limited accessibility made it uneconomical.[619] In September 1937, Caldwell, another U.S diplomat in Bolivia, wrote a telegram to the Secretary of State explaining that it seemed to be 'generally recognized' in La Paz, that the expropriation had not taken place because of the alleged fraud in the 1920s but that the 'real grievance' of the Bolivian Government lay in the fact that Standard Oil 'had proved unwilling to proceed to the development of these oil fields even to the extent of supplying the ordinary necessities of the country', thus 'a leading purpose in the measure of confiscation was the hope of securing the rapid development of oil regions'.[620] This last reason is, likely, the most significant reason for the expropriation.

In 1942, due to pressure from the U.S. State Department blocking loans to Bolivia,[621] a settlement was reached between Bolivia and Standard Oil and $1.7 million in compensation was paid to the company.[622]

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[619] Standard Oil Company *Confiscation: A History of the Oil Industry in Bolivia* (New York 1939) 2-3.

[620] Telegram from the Minister in Bolivia (Caldwell) to the Secretary of State of 22 September 1937 in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 296-297.

[621] Telegram from the Minister in Bolivia (Jenkins) to the Secretary of State of 28 April 1941 in United States Department of State [1941] Foreign Relations of the United States Diplomatic Papers 475-477.

[622] Telegram from the Secretary of State to the *Chargé* in Bolivia (Dawson) of 22 April 1942 in United States Department of State [1942] Foreign Relations of the United States Diplomatic Papers 592; Roberto Chacon de Albuquerque, 'The Disappropriation of Foreign Companies Involved in the Exploration, Exploitation and Commercialization of Hydrocarbons in Bolivia' (2008) 14(1) L and Business Rev of the Americas 21, 25; Omar Z. Ghobashy, 'The Changing Attitudes in the World Oil Community' (1974) 2(1) Syracuse J Intl L and Commerce 287, 295.

2. Mexico

Commercial oil and gas exploration and production started in Mexico at the beginning of the 20th century. International oil companies (like Standard Oil Co and Royal Dutch Shell) started participating in the industry in 1910. In 1917 the Mexican Constitution was reformed, including a reversion of property over subsoil natural resources to the nation. In 1935 the Syndicate of Petroleum Workers was formed.

In 1937, following a labour dispute in which the Syndicate of Petroleum Workers requested higher wages and greater social benefits, there was a decision by the Labour Board upholding the demands of the workers.[623] This decision was later challenged by the oil companies, ultimately before the Mexican Supreme Court.[624] The Supreme Court rejected the complaint by the companies, who then refused to comply with the decision.[625] On 18 March 1938, the government enacted the Expropriation Decree, expropriating all the movable and real estate property[626] of seventeen oil companies, this property was transferred to the newly created Petróleos Mexicanos (Pemex), the national oil company.[627] These companies included the Compañía Mexicana de Petróleo El Aquila S.A., controlled by Royal Dutch Shell, which held approximately 60% of the Mexican oil production, and several companies controlled by Standard of New Jersey Group,[628] the Standard Oil

[623] Joseph L. Kunz, 'The Mexican Expropriations', (1940) XVII(3) New York U L Q Rev 327, 363.

[624] Lorenzo Meyer Cosío 'El conflicto petrolero entre México y los Estados Unidos (1938-1942)' (1966) 7(1) Foro Internacional 99, 105.

[625] Whereas clause, Expropriation Decree of 18 March 1938 [Mexico]; B.A. Wortley, 'The Mexican Oil Dispute 1938-1946' (1957) 43 Transactions of the Grotius Society 15, 21-26.

[626] This included machinery, buildings, installations, pipelines, refineries, storage tanks, communication lines, tank trucks, distribution stations, vessels. Art. 1, Expropriation Decree of 18 March 1938 [Mexico].

[627] Art. 1, Expropriation Decree of 18 March 1938 [Mexico].

[628] Huastaca Petroleum Company, Mexican Petroleum Company, Tuxpam Petroleum Company, Tamiahua Petroleum Company, Cía. Petrolera Ulises S.A., Cía Petrolera Minerva S.A. ('Joint Report of

of California Group,[629] the Sabalo Group,[630] amongst others. This explains the reasons for U.S., U.K. and Dutch interventions in the negotiations, as will be developed below.

Though there is contemporaneous speculation regarding the real reasons for the Expropriation Decree,[631] the reasons provided for therein are as follows. The government stated that, given the lack of compliance by the companies with the Labour Board's decision on the sole basis of alleged economic incapacity, the labour contracts to which the award referred had to be terminated.[632] As, they note, this implied the paralysis of the oil industry. The government was thus under an obligation to intervene in order to guarantee the 'satisfaction of collective needs and the supply of necessary consumer articles to all urban centres, given the consequent paralysis of all means of transport and productive industries, as well as to provide the defence, conservation, development and exploitation of the riches that lie in the oilfields'.[633] Therefore, in the terms of articles 1(V), (VII) and (X), 8, 10 and 20 of the

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Morris J. Cooke and Manuel Zevada to President Roosevelt and President Camacho' in Charles Bevans (comp.) 9 United States Treaties and International Agreements 1153).

[629] California Standard Oil Company of Mexico S.A., Richmond Petroleum Company ('Joint Report of Morris J. Cooke and Manuel Zevada to President Roosevelt and President Camacho' in Charles Bevans (comp.) 9 United States Treaties and International Agreements 1153).

[630] Sabalo Transportation Co, Cía Petrolera "Clarita" S.A., Cía Petrolera Cacalillo S.A. ('Joint Report of Morris J. Cooke and Manuel Zevada to President Roosevelt and President Camacho' in Charles Bevans (comp.) 9 United States Treaties and International Agreements 1153).

[631] Joseph L. Kunz, 'The Mexican Expropriations', (1940) XVII(3) New York U L Q Rev 327, 363 ('The Companies felt that the labor-controversy was from the beginning only a pretext for ultimate confiscation.'). HL Deb 23 May 1938, vol 109, cols 328, 330-331 [U.K.].

[632] Whereas clause, Expropriation Decree of 18 March 1938 [Mexico].

[633] Whereas clause, Expropriation Decree of 18 March 1938 [Mexico] (free translation: '*satisfacción de necesidades colectivas y el abastecimiento de artículos de consumo necesario de todos los centros de población, debido a la consecuente paralización de los medios de transporte y de las industrias productoras, así como para proveer la defensa, conservación, desarrollo y aprovechamiento de la riqueza que contienen los yacimientos petrolíferos*').

Expropriation Law of 1936[634] and article 27(VI) of the Constitution, the decree declared the expropriation of all the property of the companies.

As relevant here, Articles 1(V), (VII) and (X), of the Expropriation Law referred to different reasons of public purpose (*utilidad pública*) including (v) the satisfaction of collective needs in cases of war or internal uprisings, including goods or other necessary products to urban centres; (vii) the defence, conservation, development and exploitation of the natural resources that may be exploited; and (x) the measures necessary to avoid the destruction of natural resources.[635] Article 27(VI) of the 1917 Constitution, as amended in 1934, referred, in the chapeau, to the inalienable dominium over subsoil minerals and substances as being vested in the State, and, later, to the process for declaring private property having a public purpose and to compensation.[636]

Thus, the reasons given for the expropriations of the oilfields at the time related, principally, to guaranteeing the satisfaction of basic needs of the population and the protection of exploitable natural resources. In the exchanges of notes related to the protection of British interests in Mexico, the validity of the decision of the Labour Board and the Supreme Court as well as whether non-compliance warranted expropriation were questioned, justifying their request for restitution instead of adequate compensation, as was the U.S. position.[637] However, the U.S. description of the expropriations held that they were 'based on the "companies' refusal to accept

[634] Articles 8, 10 and 20 referred to the administrative process of the expropriation (including temporary occupation, remedies and compensation) and therefore are not relevant to this thesis.

[635] Articles 1(V), (VII) and (X), Expropriation Law of 23 November 1936 [Mexico].

[636] Article 27(VI), Constitution [Mexico].

[637] HL Deb 23 May 1938, vol 109, col 328 [U.K].

the award" which "brought about as a necessary consequence the application of fraction 21 of article 23 of the Constitution of the Republic in the sense that the respective authority should declare broken the labour contracts derived from the award mentioned". It is also based on consequent inevitable "total suspension of activities of the petroleum industry" and necessity for the national economy to prevent such suspension.'[638]

Prior to this expropriation, there had been a series of diplomatic negotiations between Mexico, the United States, Great Britain, and the Netherlands regarding the implications of Article 27(I) of the 1917 Mexican Constitution.[639] Prior to the 1917 Constitution surface rights were sufficient to exploit oil, and most international oil companies had purchased those surface rights prior to that date.[640] Article 27(I) of the 1917 Constitution created unrest among the oil companies because it appeared to vest ownership of all subsoil natural resources in the State and grant a right to Mexicans to obtain concessions for their exploitation, allowing foreigners to do the same only so long as they accepted a Calvo-type clause.[641] The issue came to rest, temporarily, with the Morrow-Calles Agreement of 1928.[642]

When referring to the subpoena of the oil companies (in addition to the 17 original companies, 12 others were included) a contemporary article referred to the

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[638] Telegram from the Ambassador in Mexico (Daniels) to the Secretary of State of 19 March 1938, [1938] Foreign Relations of the United States Diplomatic Papers 727.

[639] Joseph L. Kunz, 'The Mexican Expropriations', (1940) XVII(3) New York U L Q Rev 327, 360-362.

[640] George Ward Stocking, 'The Mexican Oil Problem' (1938-1939) 19 Intl Conciliation 491, 492.

[641] Wherein foreigners had to accept that they would be treated as nationals and could not request diplomatic protection from their governments. Patrick Julliard, 'Calvo Clause' in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (January 2007); Chittaharanjan F. Amerasinghe *Diplomatic Protection* (OUP 2008) 191-211; Abraham H Feller, 'Some Observations on the Calvo Clause' (Jul. 1993) 27(3) AJIL 261.

[642] George Ward Stocking, 'The Mexican Oil Problem' (1938-1939) 19 Intl Conciliation 491, 497-498.

Mexican Attorney General as 'seemingly hold[ing] that the Mexican Government may seize any property in any way connected with the petroleum industry on the plea of necessity without the formality of an expropriations decree'.[643] Thus it would appear that the justifications given by the Mexican Government at the time for these expropriations related to arguments of necessity, which, given the reasons for the Expropriation Decree must be based on the obligation to guarantee basic needs of the population and protect natural resources, contemplating the inalienable dominium over natural resources being vested in the State.

Compensation for these expropriations was decided in settlements with the United States[644] and Great Britain[645] some years later.[646]

3. Iran

In Iran, expropriations took place in 1951, with the settlement being agreed with the Anglo-Iranian Oil Co. (formerly Anglo Persian Oil Co.) in 1953.[647] Until 1951 the company controlled the domestic Persian oil industry through several long-term exploration and extraction concessions.[648] After a series of attempts at improving the share of profits for Persia that were resisted by the company, the latter was

[643] Joseph L. Kunz, 'The Mexican Expropriations', (1940) XVII(3) New York U L Q Rev 327, 368.

[644] 'Joint Report of Morris J. Cooke and Manuel Zevada to President Roosevelt and President Camacho' in Charles Bevans (comp.) 9 United States Treaties and International Agreements 1153-1154.

[645] Agreement of 7 February 1946 between the UK and Mexico (Cmd 6768).

[646] Kenneth S. Carlston, 'Concession Agreements and Nationalization' (1958) 52 AJIL 260, 272.

[647] Kenneth S. Carlston, 'Concession Agreements and Nationalization' (1958) 52 AJIL 260, 273-274.

[648] Marc Bungenberg, 'Evolution of Investment Law Protection as Part of a General System of National Resource Sovereignty (and Management)', in Marc Bungenberg, Stephan Hobe (eds), *Permanent Sovereignty over Natural Resources* (Springer 2015) 125, 127.

expropriated.[649] The Iranian Prime Minister gave reasons for this decision in a letter to Mr Churchill, saying that it was: '(1) To eradicate foreign influence and agents in the country and thus take charge of the destiny and ensure the political independence of the country; (2) … to improve economic conditions'.[650] He further put forth, in a letter to the President of the United States, 'whether [the Iranian people] had any other alternative but recourse to nationalization of the oil industry, which will enable them to utilize the natural wealth of their country and will put an end to the unfair activities of the Company'.[651] Similar positions were put forth following the UK's attempt to bring the matter of non-compliance with the ICJ Provisional Measures before the Security Council.[652]

The UK, for its part, upon arguing this case before the ICJ 'conceded, however, that departure from this requirement [of expropriations not entailing discrimination against aliens] is justified in exceptional circumstances such as when discriminatory action is dictated by the vital interests of the expropriating state.'[653]

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[649] Marc Bungenberg, 'Evolution of Investment Law Protection as Part of a General System of National Resource Sovereignty (and Management)', in Marc Bungenberg, Stephan Hobe (eds), *Permanent Sovereignty over Natural Resources* (Springer 2015) 125, 127.

[650] Letter to Mr Churchill, Royal Institute of International Affairs, Documents on International Affairs, 341 *cited in* Amir Rafat, 'Applicability of the Public-Purpose Principle to Cases Arising under International Law from the Expropriation of Alien Private Property' (Feb 1966) 43(3) U of Detroit L J 375.

[651] Letter to Mr Truman of 11 June 1951, Other Documents Submitted to the Court (1951-1952) Iranian Communication of 29 June 1951, Annex C(1), 672, 686.

[652] Statement by the Iranian Prime Minister before the Security Council, UN Docs. No. S/PV.560 and S/PV.563 (15 and 17 October 1951). There was no decision of the ICJ with regard to the legality of the expropriation under international law as the Court considered it did not have jurisdiction and that the Concession Agreement was not a Treaty. *Anglo-Iranian Oil Co. Case (UK v Iran)* (Preliminary Objection) [1952] ICJ Rep 112. *See also* Austin T. Foster 'An Unanswered Legal Problem Raised by the Suez and the Iranian Controversies' (1957) 1 Intl L and the Middle East Crisis: A Symposium 63, 66-67.

[653] *Anglo-Iranian Oil Co. Case* (*UK v Iran*) ICJ Pleadings 100; Amir Rafat, 'Applicability of the Public-Purpose Principle to Cases Arising under International Law from the Expropriation of Alien Private Property' (Feb 1966) 43(3) U of Detroit L J 375, 388.

In 1953, following a *coup*, a new consortium took over the oil industry, paying (or buying), in part, compensation to the company.[654] This consortium came to an agreement with the Iranian Government and the National Iranian Oil Co in September 1954, wherein a clause was included stating: 'No general or specific legislative or administrative measures or any other act whatsoever of or emanating from Iran … shall annul this Agreement, amend or modify its provisions or prevent or hinder due and effective performance of its terms.'[655]

In 1973 those agreements were renegotiated,[656] eliminating any reference to an equity share for foreign entities and allowing only for risk service contracts.[657] In the 1979 Iranian Revolution, there were also references to nationalisation of the oil sector, though the exact process is less clear. In that case, there were initial letters sent out by NIOC on 10 March 1979 to the members of the consortium, stating that the agreement of 1973 was inoperative, and that moving forward the members of the consortium would be treated as 'prime customers; under equal terms and conditions'.[658] From December 1978 to March 1979, all oil exports in Iran had been interrupted. They were resumed in March 1979 by NIOC, which was the only company authorized to sell oil.[659] The consortium responded to the letter on 23 March, assuming that it was a renegotiation proposal.[660]

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[654] Kenneth S. Carlston, 'Concession Agreements and Nationalization' (1958) 52 AJIL 260, 274.

[655] Iranian Oil Consortium Agreement of September 19-20, 1954, Art. 41(b); Martin Domke, 'Foreign Nationalizations' (Jul 1961) 55(3) AJIL 585, 593.

[656] Jane Perry and Clark Carey 'Iran and Control of its Oil Business' (1974) 89(1) Political Science Q 147, 157.

[657] Nima Mersadi Tabari, *Lex Petrolea and International Investment Law* (Routledge 2017) 181.

[658] *Mobil Oil Iran, Inc and others v. Iran*, 16 Iran-U.S. C.T.R 3, para. 120 (14 July 1987).

[659] *Phillips Petroleum Co. Iran v. Iran*, 21 Iran-U.S. C.T.R. 79, para 93 (29 June 1989).

[660] *Mobil Oil Iran, Inc and others v. Iran*, 16 Iran-U.S. C.T.R 3, para 121 (14 July 1987).

In April 1979 the new Constitution took effect. The new Constitution 'prohibited the granting of petroleum rights on a concessionary basis or holdings of direct equity stakes in petroleum ventures to foreign companies or individuals'.[661] Nationalisation of the oil industry was also reflected in statements during 1979 by Imam Khomeini, the Minister of Petroleum, the Iranian Revolutionary Council and the Prime Minister.[662] On 8 January 1980, Iran promulgated the Single Article Act Concerning the Nationalisation of the Oil Industry in Iran;[663] this act again referred to the nationalisation act of 1951, holding that 'oil agreements considered … to be contrary to the Nationalization of the Iranian Oil Industry Act shall be annulled'.[664]

4. Argentina

Argentina was one of the first countries to develop its own national oil company, YPF. YPF was created in 1922, as a General Directorate within the Ministry of Agriculture.[665] However, it coexisted with foreign and domestic oil companies. In 1949 the first nationalisation of hydrocarbons was undertaken, during Juan Domingo Perón's first government, although private companies continued to work in Argentina as pre-existing concessions were not nationalised. The Constitution of 1949, which was later derogated, stated that hydrocarbon deposits were 'imprescriptible and inalienable property of the Nation'.[666] This constitution also

[661] W.A. Otman, 'The Iranian Petroleum Contracts: Past, Present and Future Perspectives' (2007) 5(2) Oil, Gas and Energy Law 2, 8; *see also* Arts. 44, 45 and 81, Constitution [Iran].

[662] *Phillips Petroleum Co. Iran v. Iran* 21 Iran-U.S. C.T.R. 79, para 93 (29 June 1989).

[663] *Amoco International Finance Corp. v. Iran*, 15 Iran-U.S. C.T.R. 189, para 72 (Partial Award) (14 July 1987).

[664] *Amoco International Finance Corp. v. Iran*, 15 Iran-U.S. C.T.R. 189, para 72 (Partial Award) (14 July 1987).

[665] National Decree of 3 June 1922 [Argentina].

[666] Constitution of 1949, Article 40 [Argentina] ('propiedad imprescriptible e inalienable de la Nación', free translation).

played a role in reversing the Provinces' rights over hydrocarbon deposits within their territory and granting them to the national government. This has been a constant feature of disagreement in oil and gas politics in Argentina.

There was a shift in the understanding of the nationalisation of hydrocarbons in the early 1950s, interpreting petroleum nationalism to mean energy self-sufficiency, and therefore targeting foreign involvement in exploration and production.[667] In 1954 and 1955 Perón negotiated agreements with Standard Oil California, which included limitations on exports until oil self-sufficiency was obtained.[668] Perón was then overthrown.

The following governments went back and forth; in 1958 Frondizi's government turned to agreements with private companies in the oil and gas sector, though these were annulled in 1963. The decrees announcing the annulment of these agreements (744/1963 and 745/1963) put forth the reasons for the decision, including that: (i) giving access to plans and studies relating to energy reserves to foreign companies seriously affected the security of the country; (ii) the agreements were executed in violation of laws; and, (iii) they were contrary to the interests of the country.[669]

In 1967 the Hydrocarbon Law was issued, re-establishing the possibility of concessions being granted to private companies, though YPF continued to have a key role in the hydrocarbon industry in Argentina.[670] This law was sanctioned

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[667] Nicolas Gadano, *Historia del Petróleo en la Argentina* (Ed. Edhasa 2006) 647. See also Diario de Sesiones Diputados 1955 [Argentina].

[668] Fernando G. Dachevsky, 'Nacionalismo petrolero y peronismo' (2014) 23 Trabajo y Sociedad 267, 276.

[669] Decrees 744/1963 and 745/1963 [Argentina].

[670] Law 17,319 [Argentina].

during a *de facto* government, thus there are not contemporary discussions as to the reasons for it. However, it appears to have been the result of pressure from the oil majors for increased participation in the oil sector.[671] It continues in force, with some modifications to this day. During the 1980s 'Plan Houston' was set up through which the government attempted to create incentives for private investment in order to increase reserves and achieve energy self sufficiency. It blamed over-indebtedness and inefficiencies of State companies, and it therefore authorised YPF to enter into service contracts with private companies.[672] In 1991, in a further move towards privatisation and liberalisation of the upstream oil and gas sector, existing service agreements were converted into concession contracts through a renegotiation process with YPF. In this process concessions were granted to companies which were given 'dominion' over hydrocarbons and 'free disposition',[673] though this was ultimately subject to restrictions of sufficiency of supply as provided for in the Hydrocarbon Law.[674] In 1993 YPF was partially privatized through sales of shares in an IPO; this procedure finished in 1999. I will return to Argentina and its latest nationalisation of shares of YPF in 2012, below, but these comings and goings of the government show fluctuations in national politics, from *de facto* governments to democratically elected governments, attempting to find different ways to resolve the issue of security of supply of hydrocarbons in the country.

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[671] Federico Bernal, *Petróleo, Estado y Soberanía* (Ed. Biblos 2005) 98-99.

[672] Decrees 1443/1985 and 623/1987 [Argentina].

[673] Decree 2411/1991 [Argentina].

[674] Article 6, Law 17,319 [Argentina].

5. Brazil

Until 1938, exploration and production of petroleum in Brazil was relatively minor and it was carried out by the private sector. The use generally given to oil and gas was for kerosene for illumination.[675] In 1937, a Constitution was enacted stating that the law would regulate the progressive nationalisation of mines, mineral deposits, waterfalls or other sources of energy.[676]

On 11 April 1938, just after the Mexican nationalisations, Decree-law 366 stated that all hydrocarbon deposits were the 'property of the nation'.[677] Further, on 29 April 1938 Decree-Law 395 declared that 'refined petroleum constitutes a principal energy source … indispensable to the military and economic defence of the State',[678] that national supply of petroleum was in the public interest,[679] and created the Conselho Nacional de Petróleo (or National Petroleum Council).[680]

In 1946 a new Constitution was enacted, followed by a more liberal position with regard to foreign capital in the oil industry, allowing not only Brazilian nationals but also companies established in Brazil (including foreign ones).[681] This generated tension between the nationalist and more liberal positions, particularly in light of 'national security' concerns that had arisen because of supply problems

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[675] História do Petróleo no Brasil, available at http://www2.fiescnet.com.br/web/pt/site_topo/energia/info/historia-do-petroleo-no-brasil-1, last accessed 18 November 2016.

[676] Article 144, Federal Constitution of 1937 [Brazil].

[677] Decree Law 366 of 11 April 1938 [Brazil] (free translation).

[678] Whereas clauses, Decree Law 395 of 29 April 1938 [Brazil] (free translation).

[679] Article 2, Decree Law 395 of 29 April 1938 [Brazil]. The law also nationalised the refining industry, Article 3, Decree Law 395 of 29 April 1938 [Brazil].

[680] Article 4, Decree Law 395 of 29 April 1938 [Brazil].

[681] Fabio Brandao, 'The Petrobras Monopoly and the Regulation of Oil Prices in Brazil' (OIES, 1998) 16-17.

during WWII,[682] a movement called 'the petroleum is ours'[683] started. After Getulio Vargas was elected President, the nationalist movement prevailed. This led to Law 2004 in 1953 wherein Petrobras was created[684] and the monopoly of oil exploration and production in the territory of the State was granted to the Union,[685] who would act through the CNP and Petrobras. The objective of the law was the reduction of foreign currency spent on petroleum and oil product imports, the impact of increases in consumption on the commercial balance was substantial.[686] Petrobras would be majority state-owned, amongst the federal and state governments, but it could also have the participation of Brazilian individuals, and companies, though, as a reflection of the nationalist movement, these had to be Brazilian (excluding even Brazilians married to foreigners).[687] Petrobras's monopoly on oil and gas activities in Brazil lasted until 1995 when the Constitution was amended once again,[688] though in the 1970s it was allowed to enter into risk service contracts with

[682] Fabio Brandao, 'The Petrobras Monopoly and the Regulation of Oil Prices in Brazil' (OIES, 1998) 17.

[683] Free translation ('o Petróleo é nosso').

[684] Chapter III, Law 2004 (1953) [Brazil].

[685] Article 1, Law 2004 (1953) [Brazil]. We have found very limited (and contradictory) references to compensation paid to existing concessionaires in Brazil with these measures, on the one hand to none being paid as private entry was after the creation of Petrobras (Keith S. Rosenn, 'Expropriation in Argentina and Brazil: Theory and Practice' (Winter 1975) 15(2) Virginia J Intl L 277, 293; Rafael A. Sánchez, 'El desarrollo de la industria petrolera en América Latina' (Jul-Sept 1998) 60(3) Revista Mexicana de Sociologia 157, 165), this does not seem correct as there appear to have been private parties exploring and producing (limited) oil before. On the other hand, a reference to expropriations in Brazil being mostly 'related to monopolization of petroleum extraction and refining by Petrobras…' seems to point in the opposite direction (Walter L. Ness, 'Brazil: Local Equity Participation in Multilateral Enterprises' (1974) 6(4) L and Policy in Intl Business 1017, 1031).

[686] Fabio Brandao, 'The Petrobras Monopoly and the Regulation of Oil Prices in Brazil' (OIES, 1998) 19.

[687] Chapter III, Law 2004 (1953) [Brazil]; Fabio Brandao, 'The Petrobras Monopoly and the Regulation of Oil Prices in Brazil' (OIES, 1998) 21.

[688] Lais Palazzo Almada and Virginia Parente, 'Oil & Gas Industry in Brazil: A Brief History and Legal Framework' (2013) 1(1) Panorama of Brazilian L 223, 227.

international oil companies. This was reversed in the 1988 Constitution,[689] where stricter provisions on state monopoly were incorporated, explicitly forbidding any participation in the exploitation of oil or natural gas deposits[690]. The 1988 Constitution was the result of the return of democracy to Brazil, with nationalist tendencies running high.[691]

6. Angola

The oil and gas industry in Angola was nationalised in 1976, right after Angola's independence from Portugal. The 1975 Constitution established that the State would be the owner of all soil and subsoil natural resources.[692] Decree 57/1976, following that mandate, created Sonangol, the national oil company, which would be the sole concession holder in Angola.[693] Its assets were based on its succeeding Angol, a subsidiary of the Portuguese company SACOR.[694]

Though Angola did not nationalise the entire industry,[695] following the 1975 Constitution[696] it did establish in the Petroleum Law of 1978 that Sonangol would be the only concessionaire and that all hydrocarbons would be the property of the

[689] Lais Palazzo Almada and Virginia Parente, 'Oil & Gas Industry in Brazil: A Brief History and Legal Framework' (2013) 1(1) Panorama of Brazilian L 223, 225-227.

[690] Article 177, Constitution (1988) [Brazil].

[691] Sergio Sampaio Contreras de Almeida, *Recent Changes in the Brazilian Constitution: From Reform to Growth* (GWU April 2000) 16.

[692] Article 11, 1975 Constitution [Angola].

[693] Decree 57/1976 [Angola].

[694] Silvana Tordo and Yahya Anouti, *Local Content in the Oil and Gas Sector: Case Studies* (World Bank Publication 2013) 14.

[695] Phillippe le Billion, 'Angola's Political Economy of War: The Role of Oil and Diamonds, 1975-2000', (2001) 100 African Affairs 55, 65.

[696] Article 11, 1975 Constitution [Angola].

State.[697] This 'nationalisation' seems to have been a peaceful transfer of the assets of Angol, in accordance with the intent to nationalise all Portuguese property in Angola. There was even an agreement signed with SACOR in Portugal as regards the continuity of the workers of the company.[698] Note that other foreign oil companies were not nationalised (Gulf, Petrofina, Texaco) and agreements with Sonangol have continued.[699]

7. Iraq

In 1925, the Iraq Petroleum Company (then known as the Turkish Petroleum Company), which was held by different international oil companies, later including Exxon, Shell, BP, Mobil and Mr Gulbenkian, was granted a concession over most of the territory of Iraq for 75 years.[700] IPC apparently had a reputation for not exploiting the concessions due to the excess oil production that it had in other concessions.[701]

In 1961, through Law 80, Iraq had already taken over the non-producing areas of the Iraq Petroleum Company's concession area (99.5% of the concession area).[702] Law 80/1961 did not give reasons for the decision, merely stating that

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[697] Petroleum Law 13/1978 [Angola], the property of the state over subsoil oil was in accordance with Article 11 of the Constitution (1975) [Angola]. The Petroleum Law was replaced in 2004 by Law 10/2004 [Angola].

[698] Ricardo Soares de Oliveira, 'Business Success, Angola-style: postcolonial politics and the rise and rise of Sonangol' (2007) 45(4) J of Modern African Studies 595, 599-600.

[699] Ricardo Soares de Oliveira, 'Business Success, Angola-style: postcolonial politics and the rise and rise of Sonangol' (2007) 45(4) J of Modern African Studies 595, 599-600.

[700] Iraq Petroleum Company's Concession Agreement, *Selected Documents of the International Petroleum Industry Iraq and Kuwait, Pre-1966* (OPEC, 1974) 7; John M. Blair, *The Control of Oil* (Pantheon Books 1976) 78; Nima Mersadi Tabari, *Lex Petrolea and International Investment Law* (Routledge 2017) 200.

[701] John M. Blair, *The Control of Oil* (Pantheon Books 1976) 83-85.

[702] Law 80/1961 [Iraq], *Selected Documents of the International Petroleum Industry Iraq and Kuwait, Pre-1966* (OPEC, 1974) 103. There is some discussion as to whether this was an expropriation or a

'[t]he defined area of each of the Companies shall be specified as per the schedule appended to the Law'. [703] Though some complaints were made to the Iraqi government in relation to Law 80/1961,[704] negotiations were continued between IPC and Iraq in 1964, after the creation of the Iraq National Oil Company (INOC). In 1962, in a press conference presenting the draft law for the creation of INOC Prime Minister Qasim gave some explanations regarding the reasons for Law 80/1961: he announced that through it 'the people of Iraq regained the rights they had lost under the old regime'[705]. Further, the Explanatory Memorandum on the Draft Law, issued at the same time, held that 'the oil policy of the Government of the Iraqi Republic has two principle and interrelated aims; the first is the recovery of Iraq's legitimate rights from the foreign oil companies which obtained their concessions in an era when the Iraqi people did not enjoy independence and the freedom of action to develop their own natural resources; the second is the establishment of a national petroleum industry…'.[706]

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breach of contract under international law, *see* Nima Mersadi Tabari, *Lex Petrolea and International Investment Law* (Routledge 2017) 208.

[703] Article 2, Law 80/1961 [Iraq], *Selected Documents of the International Petroleum Industry Iraq and Kuwait, Pre-1966* (OPEC, 1974) 103.

[704] In particular, IPC attempted to initiate arbitration under the agreement, naming Lord McNair as their arbitrator and the governments of the UK and US 'made informal representations in support of this request for arbitration'. Apparently the US position was that the issue, as a matter of law, was uncertain because it might be dealt with as a breach of contract rather than an expropriation and there could be justification given IPCs lack of compliance with Iraqi interests. Memorandum of Andreas Lowenfeld for the Undersecretary of State of 24 October 1964, Multinational Corporations and the United States Foreign Policy Hearings before the Subcommittee on Multinational Corporations of the Committee on Foreign Relations United States Senate (93rd Congress), part 7, p. 537.

[705] MEES, 'The Iraq National Oil Company' 5 October 1962.

[706] MEES, 'The Iraq National Oil Company' 5 October 1962; *see also* Michael E. Brown, 'The Nationalization of the Iraqi Petroleum Company' (1979) 10 Intl J Middle East Studies 107, 108.

The INOC was created in 1964 through Law 11/1964.[707] It also established that '[o]il and hydrocarbon resources in areas allocated to the Company … shall remain to be inalienable and imprescriptible property of the State'.[708] It further put forth, in the Preamble, that 'the law has stipulated that the Company's capital shall be purely governmental, in keeping with the principle of sovereignty over mineral resources of the State that are natural monopolies'.[709] In 1967 INOC was granted exclusive rights to the development of the oil reserves that had been nationalised through Law 80/1961.[710]

In June 1972, Iraq nationalised IPC's remaining holdings in Iraq through Law 69,[711] and in March 1973 IPC reached an agreement with Iraq.[712] The agreement included compensation to be paid in oil, though much of it was netted against tax debts to the Iraqi government. The US companies were apparently not fully satisfied by the agreement, pushed through by the Europeans.[713] In 1973 Iraq also nationalised holdings of Royal Dutch Shell, Exxon and Mobil in the Basrah Petroleum

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[707] Law 11/1964 [Iraq], *Selected Documents of the International Petroleum Industry Iraq and Kuwait, Pre-1966* (OPEC, 1974) 110.

[708] Article 7(1), Law 11/1964 [Iraq], *Selected Documents of the International Petroleum Industry Iraq and Kuwait, Pre-1966* (OPEC, 1974) 112.

[709] Preamble, Law 11/1964 [Iraq], *Selected Documents of the International Petroleum Industry Iraq and Kuwait, Pre-1966* (OPEC, 1974) 115.

[710] Article 1, Law 97/1967 [Iraq], (November 1967) 6(6) Intl L Materials 1162.

[711] Article 1, Law 69/1972 [Iraq], (July 1972) 11(4) Intl L Materials 846. Article 4 of the Law 69/1972 foresaw compensation for this nationalisation. The law provides no justification for the measure.

[712] Brandon Wolfe-Hunnicutt, *The end of the Concessionary Regime: Oil and American Power in Iraq, 1958-1972* (PhD Dissertation (Stanford), March 2011) 260; John M. Blair, *The Control of Oil* (Pantheon Books 1976) 90.

[713] Memorandum from the Executive Secretary of the Department of State (Elliot) to the President's Assistant for National Security Affairs (Kissinger), (1969-1976) XXVII Foreign Relations of the United States, Iran; Iraq 1973-1976, Doc. 205 (3 March 1973); Samir Saul, 'Masterly Inactivity as Brinkmanship: The Iraq Petroleum Company's Route to Nationalization, 1958-1972' (Dec. 2007) 29(4) The Intl History Rev 746, 790.

Company (BPC).[714] These nationalisations have been linked to the stance taken by the home countries in the Arab-Israeli war.[715] In all of these cases compensation was to be calculated net of taxes, fees, and debts to the Iraqi government. There was no justification given in the text of these laws regarding the reasons for the nationalisations. The remaining (French and British) holdings in BPC were nationalised in 1975.[716]

8. Indonesia

Indonesia became independent from the Netherlands in 1949. In its Constitution, which was written in 1945, article 33 provided that: 'Land and water and the natural riches therein shall be controlled by the State and shall be exploited for the greatest welfare of the people'.[717] In 1957-1958 PT Pertamina took over Dutch (Shell) oil fields in northern Sumatra.[718] Though I was not able to find the text of Decree 17/1957, it would appear that this decision was made in the context of nationalisations of all Dutch property due to the Dutch role in Irian Barat.

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[714] Law 70/1973 [Iraq], *Selected Documents of the International Petroleum Industry Iraq and Kuwait, 1973* (OPEC, 1975) 110. Law 90/1973 [Iraq], *Selected Documents of the International Petroleum Industry Iraq and Kuwait, 1973* (OPEC, 1975) 112.

[715] Samir Saul, 'Masterly Inactivity as Brinkmanship: The Iraq Petroleum Company's Route to Nationalization, 1958-1972' (Dec. 2007) 29(4) The Intl History Rev 746, 790.

[716] Samir Saul, 'Masterly Inactivity as Brinkmanship: The Iraq Petroleum Company's Route to Nationalization, 1958-1972' (Dec. 2007) 29(4) The Intl History Rev 746, 791.

[717] Article 33(3), Constitution of 1945 [Indonesia]; *see also* Robert Fabrikant (ed), *Oil Discovery and Technical Change in Southeast Asia: The Petroleum Industry, Miscellaneous Source Materials* (Singapore, Institute of Southeast Asian Studies 1973) 4. Similarly worded article 38 of the 1950 Constitution replaced this article.

[718] Robert Fabrikant (ed), *Oil Discovery and Technical Change in Southeast Asia: The Petroleum Industry, Miscellaneous Source Materials* (Singapore, Institute of Southeast Asian Studies 1973) 9; Donald I. Hertzmark, 'Pertamina, Indonesia's State-Owned Oil Company', The James A. Baker III Institute for Public Policy, Rice University (March 2007) 7; William A. Redfern, 'Sukarno's Guided Democracy and the Takeovers of Foreign Companies in Indonesia in the 1960s' (Ph.D. (History), University of Michigan, 2010) 167.

In 1960 Law 44/1960 was enacted in relation to oil and gas regulation. The law set forth that oil and gas were owned by the State,[719] oil and gas operations would be undertaken only by the State, and exclusively through State-owned companies.[720] Private parties could be appointed as contractors.[721] There ensued negotiations with remaining concessionaires, and an agreement was signed in 1963. The 'Heads of Agreement' on the basis of which Contracts of Work, returning the 'mining rights' to the Government and granting them to the State-owned enterprises, were then signed by the different former concessionaires, and ratified by Parliament. The Heads of Agreement did not refer to the reasons for the change in policy of the government;[722] however, the 'Contracts of Work' did include in the whereas clauses: 'all mineral oil and gas resources in the territory of Indonesia are national assets under the control of the State'; 'mining of mineral oil and gas is a branch of industry which is important to the State and affects the general welfare, and which may be undertaken only by the State and carried out by a State enterprise'.[723]

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[719] Article 1, Law 44/1960 [Indonesia]; William A. Redfern, 'Sukarno's Guided Democracy and the Takeovers of Foreign Companies in Indonesia in the 1960s' (Ph.D. (History), University of Michigan, 2010) 161.

[720] Article 3, Law 44/1960 [Indonesia]; Robert Fabrikant (ed), *Oil Discovery and Technical Change in Southeast Asia: The Petroleum Industry, Miscellaneous Source Materials* (Singapore, Institute of Southeast Asian Studies 1973) 9.

[721] Article 6, Law 44/1960 [Indonesia]; Robert Fabrikant (ed), *Oil Discovery and Technical Change in Southeast Asia: The Petroleum Industry, Miscellaneous Source Materials* (Singapore, Institute of Southeast Asian Studies 1973) 10.

[722] Heads of Agreement (1 June 1963) [Indonesia], (1964) 3 Intl L Materials 81.

[723] Contract of Work between PN Pertambangan Minjak Nasional and PT Stanvac Indonesia (25 September 1963) [Indonesia] (1964) 3 Intl L Materials 248. This situation was accepted by the companies, William A. Redfern, 'Sukarno's Guided Democracy and the Takeovers of Foreign Companies in Indonesia in the 1960s' (Ph.D. (History), University of Michigan, 2010) 203.

These Contracts of Work were criticised by some, noting that they seemed to be more a change of façade, but that the underlying structure of the concessionaire continued in place.[724] In 1965 Indonesia implemented 'take-overs' of the three foreign oil companies, Shell, Stanvac and Caltex. Although these take-overs did not imply proprietorship they did involve 'overseeing' and 'protecting' the companies from uprising in relation to the US's support for Malaysia.[725] Of these three companies, Shell was 'bought out' in December 1965, and Stanvac and Caltex became the only remaining foreign investors in Indonesia.[726] In 1966 Indonesia started using Production Sharing Contracts, which meant an increased participation of the State and a rejection of the traditional concessionaire model.

9. Venezuela

In 1971 Venezuela started adopting a series of measures, a law of reversion—which set forth that all the equipment belonging to the concessionaires would be reverted to the State at the end of the concession—; Decree 832—that set forth that all exploration, production, refining, and sale of oil companies had to be approved by the Ministry of Mines and Hydrocarbons—; and finally the nationalisation of the petroleum industry on 1 January 1976, creating PdVSA.[727] The reason given in the

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[724] Robert Fabrikant (ed), *Oil Discovery and Technical Change in Southeast Asia: The Petroleum Industry, Miscellaneous Source Materials* (Singapore, Institute of Southeast Asian Studies 1973) 12-15.

[725] William A. Redfern, 'Sukarno's Guided Democracy and the Takeovers of Foreign Companies in Indonesia in the 1960s' (Ph.D. (History), University of Michigan, 2010) 401-427.

[726] Agreement for Sale of Assets of PT Shell Indonesia to Indonesian Government (30 December 1965), (November 1966) 5(6) Intl L Materials 1136; William A. Redfern, 'Sukarno's Guided Democracy and the Takeovers of Foreign Companies in Indonesia in the 1960s' (Ph.D. (History), University of Michigan, 2010) 466-467.

[727] Organic Law that Reserves to the State the Industry and Commerce of Hydrocarbons, of 29 August 1975 [Venezuela] [*Ley Orgánica que Reserva al Estado la Industria y el Comercio de los Hidrocarburos*]. In 1971 Venezuela had already adopted the Natural Gas Nationalisation Act [Venezuela] [*Ley de Nacionalización del Gas Natural*].

law is merely 'for reasons of national convenience'.[728] In the mid 1990s Venezuela partly re-opened its petroleum sector (this last event is discussed below).

10. Nigeria

Oil was first discovered in commercial quantities in Nigeria in 1956 and it gained its independence from the United Kingdom in 1960. From 1938 until 1959, the sole concessionaire in Nigeria was Shell D'Arcy Petroleum Development, in 1959 concessions were given to companies of other nationalities, including Mobil, Agip, Gulf, Elf, although Shell continued to be the main concessionaire.[729] In 1969 Nigeria passed the Petroleum Act (No. 51) stating that '[t]he entire ownership and control of all petroleum in, under or upon any lands … shall be vested in the State'.[730] Additionally, the Petroleum Act established that only Nigerian citizens or companies incorporated in Nigeria could be granted oil exploration, prospecting and mining licenses.[731]

In 1970, the Second Development Plan included the goal of the government to participate in the petroleum industry, because of 'the strategic role oil is going to play in the nation's economy'.[732] In April 1971 it 'acquired' 33.3% in Agip and 35% of Elf, upstream operations.[733] This participation was created on the basis of an

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[728] Art. 1, Organic Law that Reserves to the State the Industry and Commerce of Hydrocarbons, of 29 August 1975 [Venezuela]('*por razones de conveniencia nacional*').

[729] Yinka Omorogobe, 'The Legal Framework for the Production of Petroleum in Nigeria' (1987) 5(4) J of Energy and Natural Resources L 273, 274

[730] 1(1), Petroleum Act (1969) [Nigeria].

[731] 2, Petroleum Act (1969) [Nigeria]; *see also* Yinka Omorogobe, 'The Legal Framework for the Production of Petroleum in Nigeria' (1987) 5(4) J of Energy and Natural Resources L 273, 274.

[732] Federal Ministry of Information, 'Second Development Plan' (1970-1974) 133-134 [Nigeria]; *see also* Chibuike Uche, 'British Petroleum vs. The Nigerian Government: The Capital Gains Tax Dispute, 1972-9' (2010) 51(2) The J of African History 167, 172.

[733] Ann Genova, 'Nigeria's Nationalization of British Petroleum' (2010) 43(1) Intl J of African Historical Studies 115, 120.

existing agreement, signed in 1965.[734] In May 1971 Nigeria created the Nigerian National Oil Corporation, through an executive decree. In July 1971 Nigeria joined OPEC. In 1974, equity participation in companies was set at 55% of the petroleum production companies.[735]

However, in 1979, these percentages were increased to 60% (80% in the case of Shell-BP).[736] Most of these participation increases were developed through agreements with the former concession companies.[737] In that year, Nigeria indicated that it would increase its participation to 100% of BP's participation in Shell-BP and BP (Nigeria) Ltd. The public reasons given for this increase were varied.[738] Though the reason given by NNPC (successor to NNOC) in its letter to BP was that the decision 'stemmed from the United Kingdom's (UK) proposed change in policy favoring the resumption of oil supplies to apartheid South Africa',[739] this has also been linked to the UK's position on Rhodesia.[740]

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[734] Kola Adeniji, 'State Participation in the Nigerian Petroleum Industry' (1977) 11(2) J of World Trade 156, n.20.

[735] Leslie L. Rood, 'Nationalisation and Indigenisation in Africa' (1976) 14(3) J of Modern African Studies 427, 432; *see also* Report of the Economic and Social Council, Permanent Sovereignty over Natural Resources, Report of the Secretary General, Table 11, UN Doc. No. A/9716 (20 Sept 1974); Godwin Chukwudum Nwaobi *Oil policy in Nigeria: A Critical Assessment (1958-1992)* available at: https://core.ac.uk/download/pdf/9312754.pdf, last accessed 11 November 2016.

[736] Ann Genova, 'Nigeria's Nationalization of British Petroleum', (2010) 43(1) Intl J of African Historical Studies 115, 121.

[737] Fiona C. Beveridge, 'Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria', (1991) 40 ICLQ 302, 319.

[738] Ann Genova, 'Nigeria's Nationalization of British Petroleum', (2010) 43(1) Intl J of African Historical Studies 115, 116.

[739] Olajide Aluko, 'The Nationalisation of the Assets of British Petroleum', in Olajide Aluko, *Essays on Nigerian Foreign Policy* (George Allen & Unwin 1984) 212-213. Though some, e.g. Ann Genova, have argued that the true reason behind this nationalisation was economic nationalism and not sanctions in relation to oil delivery to South Africa and Zimbabwe, this does not explain why a different treatment was given to BP versus other foreign concession holders.

[740] Fiona C. Beveridge, 'Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria' (1991) 40 ICLQ 302, 320.

11. India

The oil and gas sector started to develop privately in India.[741] In fact, in 1953 an agreement was reached between the Minister of Production and three foreign oil companies (Burma Shell, Esso Stanvac, Caltex) for the construction of refineries where 'the Indian Government promised that there would be no expropriation for twenty-five years and that there would be "reasonable compensation" for any expropriation after that period'.[742] It must be noted that these refineries were built in the context of the Iranian crisis of 1951 and the take-over of the Abadan refinery in Iran, which these majors previously used to import oil products into India.[743] However, that development in upstream activities was limited.[744]

In 1956, through the Industrial Policy Resolution of 30 April, the 'mineral oils'[745] industry was included as part of Schedule A, that is, the industries the 'future development of which will be the exclusive responsibility of the State.'[746] That did not entail a nationalisation of the existing sector, nor did it completely exclude cooperation with 'private enterprises in the establishment of new units when the national interests so require'.[747] The reasons given for this decision at the time were that 'all industries of basic and strategic importance, or in the nature of public utility

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[741] For example the Assam Oil Company, Oil India Ltd, the Indo-Stanvac Petroleum Project. *See* History of ONGC, available at: http://www.ongcindia.com/wps/wcm/connect/ongcindia/Home/Company/History/, last accessed 2 November 2016.

[742] Martin Domke, 'Foreign Nationalizations' (July 1961) 55(3) AJIL 585, 593; Matthew J. Kust 'Treatment of Foreign Enterprise in India' (Winter 1963) 17(2) Rutgers L Rev 351, 354.

[743] Bilap Dasgupta, *The Oil Industry in India* (Frank Cass & Co 1971) 235.

[744] Bilap Dasgupta, *The Oil Industry in India* (Frank Cass & Co 1971) 209.

[745] Note that there is no reference to natural gas at the time.

[746] Para 7, Industry Policy Resolution, 30 April 1956 [India].

[747] Para 8, Industry Policy Resolution, 30 April 1956 [India].

services, should be in the public sector. Other industries which are essential and require investment on a scale which only the State, in present circumstances, could provide, have also to be in the public sector.'[748] However, this assessment did not bring with it any nationalisation of existing concessions but rather a tendency for future exploration to depend on the Oil and Natural Gas Corporation, Ltd (ONGC), though private exploration continued.[749]

In 1956 as well, the Oil and Natural Gas Directorate, within the Ministry of Natural Resources, became the Oil and Natural Gas Commission with increased powers.[750] Since 1993 it is ONGC, a Public Sector Undertaking (PSU) whose majority shareholder, directly and indirectly, is the Government of India.

In 1959, after the Government demanded a share in the crude production,[751] an agreement was reached with regard to the oilfields discovered by a subsidiary of Burmah Oil, Assam Oil in Assam, wherein Oil India Limited was created, taking over the rights of Assam Oil. The Government received, initially one third, and then, in 1961, 50% of the ownership of the company, in exchange for an increase in acreage for exploration.[752] Some authors at the time argued in favour of national participation in oil exploration and production to 'reduce the dependence on foreign crude oil sources, which is so important both for economic and military reasons. It also helps to iron out fluctuations in supply from the world market. Besides this, it

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[748] Para 6, Industry Policy Resolution, 30 April 1956 [India].

[749] Tanvi Madan, *India's ONGC: Balancing Different Roles, Different Goals*, The James A. Baker III Institute for Public Policy, Rice University (March 2007) 11.

[750] *See* History of ONGC, available at: http://www.ongcindia.com/wps/wcm/connect/ongcindia/Home/Company/History/, last accessed 2 November 2016.

[751] Bilap Dasgupta, *The Oil Industry in India* (Frank Cass & Co 1971) 220.

[752] Bilap Dasgupta, *The Oil Industry in India* (Frank Cass & Co 1971) 211.

reduces the foreign exchange cost of energy, which, given the importance of foreign exchange constraint in development planning, is more relevant as a policy variable than the domestic market price for energy.'[753]

In the early sixties some foreign oil companies were authorised to explore for oil.[754] However the majority of E&P in India is still done through the Government.[755] During the oil crisis in the Middle East, oil prices in India, which imported much of its crude oil consumption, became unsustainable in terms of foreign exchange resources. The foreign-owned refineries refused to process oil imported at lower prices (that is not imported by them).[756] This increased the Government's interest in national control over oil, and gave leverage to the nationalising factions within the Government. Between 1974 and 1976 India nationalised downstream oil companies.[757] In 1981, through Act 41 of 1981, India purchased the remaining 50% of Oil India Limited, and through it Assam Oil Company Ltd., held by Burmah Oil Company. That Act states that this purchase was made 'in the public interest' and that such acquisition gave 'effect to the policy of the state towards securing the principle … as the ownership and control of the material resources of the community, to wit, crude oil, gas and petroleum products… would by reason of such

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[753] Bilap Dasgupta, *The Oil Industry in India* (Frank Cass & Co 1971) 231; *see also* Saumitra Chaudhury, 'Nationalisation of Oil Companies in India', (1977) 12(10) Economic and Political Weekly 439-440.

[754] Legislation revised in 1959 classified the sedimentary areas in two groups, one where private companies could work on their own and another one where they had to participate with ONGC. Bilap Dasgupta, *The Oil Industry in India* (Frank Cass & Co 1971) 222.

[755] Matthew J. Kust 'Treatment of Foreign Enterprise in India' (Winter 1963) 17(2) Rutgers L Rev 351, 352.

[756] Shebonti Ray Dadwal, *The Current Oil 'Crisis': Implications for India* (available at: https://www.idsa-india.org/an-may011.html, last accessed 12 December 2016.

[757] Saumitra Chaudhury, 'Nationalisation of Oil Companies in India' (1977) 12(10) Economic and Political Weekly 439.

acquisition become vested in the state and thereby so distributed as best to subserve the common good'.[758]

In 1991, after a series of problems with these public industries,[759] a new approach was taken including 'a greater commitment to the support of public enterprises which are essential for the operation of the industrial economy'[760], giving priority to, amongst others, 'exploration and exploitation of oil and mineral resources'.

In 1994, the Indian Government started to divest its holdings in ONGC, although it continues to hold, directly or through public companies 79.02%.[761] ONGC has an international branch, ONGC Videsh Limited (OVL), which primarily participates in overseas upstream activities. The E&P sector in India has incorporated a New Exploration Licensing Policy which has expanded private sector participation, though much of it is done jointly with ONGC.

12. Kuwait

In September 1977 Kuwait terminated the Aminoil concession agreement through Supreme Decree 124(1977).[762] Though the Decree did not specify the reasons for this decision, evidence of Kuwait's position can be read from the arbitral decision in *Kuwait v Aminoil.* The concession agreement in that case contained a stabilization clause, so one of the issues before the arbitral tribunal was whether those

[758] Act 41 of 1981 [India].

[759] Para 31, Statement of Industrial Policy, 24 July 1993 [India].

[760] Para 32, Statement of Industrial Policy, 24 July 1993 [India].

[761] Shareholding Distribution of ONGC India As On Quarter Ending June 30 2016.

[762] Decree Law 125(1977) [Kuwait], Selected Documents of the International Petroleum Industry, 1977/78 (OPEC, 1979) p 86.

stabilization clauses effectively prohibited Kuwait from nationalising the Concession.[763] The government of Kuwait argued, amongst other positions, that these stabilization clauses could not limit a State from nationalising such concessions as 'permanent sovereignty over natural resources has become an imperative rule of *ius cogens* prohibiting States from affording, by contract or by treaty, guarantees of any kind against the exercise of the public authority in regard to all matters relating to natural riches.'[764] The tribunal rejected this argument holding that 'it would not be possible to deduce from this the existence of a rule of international law prohibiting a State from undertaking not to proceed to a nationalization during a limited period of time.'[765] Further clarifying that 'contractual limitations on the State's right to nationalize are juridically possible, but what that would involve would be a particularly serious undertaking which would have to be expressly stipulated for, and be within the regulations governing the conclusion of State contracts; and it is to be expected that it should cover only a relatively limited period.'[766]

At the time Professor Higgins criticized this reasoning by the tribunal in the following terms: '[w]hile this perhaps represents an imaginative method of reconciling the right to nationalize with stabilization provisions freely entered into

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[763] *Government of Kuwait v American Independent Oil Company (Aminoil)*, Award (24 March 1982), (1984) 66 Intl L Rep 518, 586.

[764] *Government of Kuwait v American Independent Oil Company (Aminoil)*, Award (24 March 1982), (1984) 66 Intl L Rep 518, 587-588.

[765] *Government of Kuwait v American Independent Oil Company (Aminoil)*, Award (24 March 1982), (1984) 66 Intl L Rep 518, 588.

[766] *Government of Kuwait v American Independent Oil Company (Aminoil)*, Award (24 March 1982), (1984) 66 Intl L Rep 518, 589.

…, the present writer confesses to finding it implausible as a matter of construction and unpersuasive as a matter of reasoning.'[767]

13. Libya

Between 1971 and 1974 there were nationalisations of the oil industry in Libya,[768] the result of which were the well-known arbitrations brought by BP, Texaco and Liamco.[769] Although the nationalisation laws did not set out the reasons for these nationalisations, the arbitrations that ensued are useful to determine the justifications for these measures. Libya did not appear in the proceedings. However it made statements prior to the arbitrations and took actions after that could indicate what its position was at the time. Perhaps the most relevant action it took was payment of compensation once the awards were rendered,[770] this payment may be understood as compliance with (and acquiescence in) the awards; however, given Libya's strong statements countering the validity of the decisions, it may just be indicative of a policy of compliance with international decisions, disregarding whether they are considered correct:

> We consider such nationalization an absolute sovereign right of the State, to be exercised according to its discretion, and may not be subject to adjudication in any court of law, let alone an arbitration proceeding. Hence, we do not deem the steps taken by your company following its lawful and effective nationalization, as proper. It follows, logically, that

[767] Roslyn Higgins, 'The Taking of Property by the State' (1982) 176 Recueil des Cours 259, 304.

[768] Amongst others, Law 115/1971 [Libya], Selected Documents of the International Petroleum Industry, 1971 (OPEC, 1973) 183 (BP); Law 42/1973 [Libya], Selected Documents of the International Petroleum Industry, 1973 (OPEC, 1975) 123 (Nelson Bunker Hunt); Law 44/1973 [Libya], Selected Documents of the International Petroleum Industry, 1973 (OPEC, 1975) 142 (51% Occidental); Law 66/1973 [Libya], Selected Documents of the International Petroleum Industry, 1973 (OPEC, 1975) 155 (51% Operating Petroleum Companies).

[769] Marc Bungenberg, 'Evolution of Investment Law Protection as Part of a General System of National Resource Sovereignty (and Management)' in Marc Bungenberg, Stephan Hobe (eds), *Permanent Sovereignty over Natural Resources* (Springer 2015) 125, 127.

[770] *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic*, Award (10 October 1973), (1979) 53 Intl L Rep 297, 298.

> we could not possibly consent to "publishing" documents which we consider null and void.[771]

The United Kingdom's position in relation to Libya's nationalisation of BP's concessions was a reversal of its previous position in the *Anglo-Iranian Oil Case*. In the case of BP, the United Kingdom held that it would 'call upon the Libyan Government to act in accordance with the established rules of international law and make reparation to [BP], either by restoring the Company to its original position in accordance with the concession No. 65 or by payment of full damages'.[772] That is, nationalisation would not be *per se* unlawful, so long as damages were paid in compensation.[773]

In the case of BP, its concession was entirely nationalised in December 1971, through the BP Nationalisation Law.[774] In *BP v Libya*, Judge Lagergren describes the Libyan government's statements regarding the nationalisation of the BP oil concession as a response to the lack of defence by Great Britain in Iran's occupation of Abu Musa, and the Greater and Lesser Tumb.[775] Further, the Libyan government noted that this nationalization 'violated no principle of the Charter or international law; it is in accordance with those principles and also with the General Assembly resolutions concerning the natural resources of States'.[776]

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[771] *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic*, Statement of Libya (1 August 1974), (1979) 53 Intl L Rep 297.

[772] *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic*, Award (10 October 1973), (1979) 53 Intl L Rep 297, 317.

[773] Roslyn Higgins, 'The Taking of Property by the State' (1982) 176 Recueil des Cours 259, 320.

[774] Christopher Greenwood, 'State Contracts in International Law – the Libyan Oil Arbitrations', (1982) 53(1) BYBIL 27, 29.

[775] *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic*, Award (10 October 1973), (1979) 53 Intl L Rep 297, 315-316.

[776] *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic*, Award (10 October 1973), (1979) 53 Intl L Rep 297, 316.

Judge Lagergren decided that the dispute would be subject to 'the general principles of law, including some of those principles as may have been applied by international tribunals'.[777] In his decision he referred to the issue of sovereignty over natural resources in the context of compensation, wherein he rejected BP's contention that the principle of *restitutio in integrum* was applicable, noting that:

> Taking a broad view of State practice over the past decades, there is reason to believe that the sovereignty actually claimed and exercised by modern nations over their natural wealth and resources (with the tacit or explicit acquiescence of other States) constitutes weak support for the contentions of the Claimant in this case as to the remedies available to a concessionaire in circumstances such as the present. The trend of practice has gone another way, and may have become a custom and acquired the force of law.[778]

The position of Libya in *BP v Libya* is distinguishable from *Texaco v Libya* and *Liamco v Libya* wherein, although Libya was argued to have nationalised the oil concessions for political reasons it seems that Libya's position rested on a general policy change to preserve the ownership of its oil.[779]

In the case of Texaco, in September 1973 the Revolutionary Command Council nationalised 51% of the companies' interests in the concessions through the Law No. 66/1973 or Decree of Nationalisation of 1 September 1973. After the arbitration commenced, the remaining interests were also nationalised through Law No. 11/1974 or Decree of Nationalisation of 11 February 1974.[780] In *Texaco v Libya*,

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[777] *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic*, Award (10 October 1973), (1979) 53 Intl L Rep 297, 329.

[778] *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic*, Award (10 October 1973), (1979) 53 Intl L Rep 297, 348.

[779] But see Christopher Greenwood, 'State Contracts in International Law – the Libyan Oil Arbitrations' (1982) 53(1) BYBIL 27, noting: '[a]ll three cases arose out of the Libyan Government's nationalization in broadly similar circumstances of foreign companies' interests under long-term oil concessions which still had many years to run.'

[780] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic*, Award (19 January 1977), (1979) 53 Intl L Rep 389, 398.

while there is no reference by Professor Dupuy to Libya's reasons for the nationalisation, he did conclude that like in other contemporaneous nationalisations, there was 'evidence that the measures taken against the plaintiffs were part of what may have been regarded as a policy of nationalization.'[781] He additionally cited Libya's objections to jurisdiction in a Memorandum sent to the President of the ICJ wherein Libya noted:

> Nationalization is an act related to the sovereignty of the State. This fact has been recognized by the consecutive Resolutions of the United Nations on the sovereignty of States over their natural resources, the last being Resolution No. 3171 of the United Nations General Assembly adopted on December 13, 1973, as well as paragraph (4/E) of Resolution No. 3201 (S. VI) adopted on 1 May, 1974. The said Resolutions confirm that every State maintains complete right to exercise full sovereignty over its natural resources and recognize Nationalization as being a legitimate and internationally recognized method to ensure the sovereignty of the State upon such resources. Nationalization, being related to the sovereignty of the State, is not subject to foreign jurisdiction. Provisions of the International Law [sic] do not permit a dispute with a State to be referred to any Jurisdiction other than its national Jurisdiction. In affirmance of this principle, Resolutions of the General Assembly provide that any dispute related to Nationalization or its consequences should be settled in accordance with provisions of domestic law of the State.[782]

This is an *ex post* Memorandum wherein Libya justifies its objection to the tribunal's jurisdiction by reference to the sovereign right to nationalise. Thus, it does not indicate what reasons, if any, Libya gave for the nationalisation at the time it was undertaken. However, it is still useful as it indicates what the State's position was in regard to nationalisation under international law. Professor Dupuy concluded that the law applicable to the dispute was public international law.[783]

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[781] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic*, Award (19 January 1977), (1979) 53 Intl L Rep 389, 480.

[782] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic*, Award (19 January 1977), (1979) 53 Intl L Rep 389, 484.

[783] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic*, Award (19 January 1977), (1979) 53 Intl L Rep 389, 436.

In the case of Liamco, the Revolutionary Command Council also nationalised 51% of its interests in three oil concessions, through the same Nationalisation Decree, and then followed up the arbitration by nationalising the remaining participation.[784] In *LIAMCO v Libya* Dr Mahmassani referred to Libya's actions — although the source for this determination of these motives is unclear— as 'motivated by the failure of agreement with the Government' after the first nationalisations and 'Libya's motive for nationalization was its desire to preserve the ownership of its oil'. [785] In *LIAMCO v Libya* the tribunal decided that the applicable law was Libyan domestic law, except as incompatible with international law,[786] though it specifically noted that Libyan domestic law's principles, as was the case with Islamic law, 'have common rules and principles with international law.'[787]

14. Saudi Arabia

In Saudi Arabia, government participation in oil exploration and production came about differently from the other Gulf States. Saudi Arabia's participation in ARAMCO, bringing it to become Saudi Aramco, was negotiated between the Government and the previous shareholders of the company, not imposed as in other cases. The process, which started with a participation of 25% on 1 January 1973, ended with full participation of the Saudi Government in 1980.[788]

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[784] *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic*, Award (12 April 1977) (1982) 62 Intl L Rep 140, 142.

[785] *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic*, Award (12 April 1977) (1982) 62 Intl L Rep 140, 195.

[786] *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic*, Award (12 April 1977) (1982) 62 Intl L Rep 140, 173.

[787] *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic*, Award (12 April 1977) (1982) 62 Intl L Rep 140, 175.

[788] Nima Mersadi Tabari, *Lex Petrolea and International Investment Law* (Routledge 2017) 230.

Finding evidence of the objective of the process without any publicly available documents has proven to be difficult. However, two sources have been useful. First, there is Mr Yamani's[789] speech in 1969 at the American University of Beirut. In that speech, Mr Yamani explained that Saudi Arabia's position was not to nationalise the oil concessions, but to increase participation. He justified this position as opposed to nationalisation as 'we see this as the only way to ensure future stability of our income from oil'[790]. Second, there is a contemporary report of the N.Y.U. Law Review, which reviewed the terms of the General Agreement of 1972, negotiated by Yamani on behalf of Saudi Arabia and other Gulf States, where they described this move towards participation as a consequence of the concession being 'felt by host governments to frustrate their aspirations of gaining sovereignty over the development and disposition of their natural resources'.[791]

D. Recent events of nationalisation

Recently, there have been renewed instances of nationalisation. Though in many cases the nationalisations referred to above continued in place,[792] some States, such as Argentina and Venezuela, returned to concession models. In some of these instances, returns to nationalisation were brought about as described below; however, in none of these more recent cases were there industry-wide nationalisations like there were in the examples referred to earlier. Further, in most

[789] Mr. Yamani was the Minister of Petroleum and Natural Resources of Saudi Arabia from 1962 to 1986 and therefore his position is a good proxy of the Government's position on these issues.

[790] MEES, 'Participation vs. Nationalization' 13 June 1969.

[791] Anonymous, 'From Concession to Participation: Restructuring the Middle East Oil Industry' (1973) 48(4) New York U L Rev 774, 815.

[792] For example in Iran, Saudi Arabia, and Iraq. Mexico is an exception that only allowed the return of private companies in 2013.

instances the issues were resolved through agreements between the States and the companies at stake. Where agreements were not achieved, international litigation was started by the companies against the States. This litigation was generally through arbitration, and these arbitrations provide the main source of information regarding national motivations in these cases.

Some authors have referred to nationalisations also taking place in other countries like Ecuador.[793] The measures taken in Ecuador relate to increases in government take rather than nationalisations, and therefore were analysed in Chapter 3.

1. Venezuela

On 31 December 2005, Venezuela converted the Operating Service Agreements in 32 oil fields into mixed companies. This was done through negotiations carried out by PdVSA[794] on the basis of the Organic Hydrocarbon Law.[795] This was followed in April 2006 by the Law Regulating Private Participation in Primary Activities where the Operating Contracts were declared 'incompatible with the rules established in the regime nationalizing petroleum' and violating 'basic principles of sovereignty',

[793] For example: Sergei Guriev, Anton Kolotilin, Konstantin Sonin, 'Determinants of Nationalization in the Oil Sector: A Theory and Evidence from Panel Data' (2011) 27(2) J of L, Economics & Organization 301; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012); *Burlington Resources Inc. v Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012).

[794] Gabriela Rachadell de Delgado and Natalija Vojvodic, 'Nationalization Trends in the Venezuelan Oil Industry' [Apr 2008] 2 Transnational Dispute Management 9.

[795] Daniel E. Vielleville, Baiju Simal Vasani, 'Sovereignty over Natural Resources versus rights under Investment Contracts: Which one Prevails?' [Apr 2008] 2 Transnational Dispute Management 2; *see also* PdVSA publication '*Empresas Mixtas al servicio del pueblo*' available at http://www.pdvsa.com/interface.sp/database/fichero/publicacion/1412/60.PDF, last accessed 11 August 2016.

and therefore extinguished.[796] In 2007 President Chavez decreed (through Decree 5200[797] and the Law on the Effects of the Migration Process of the Association Agreements of the Orinoco Belt and of the Exploration at Risk and Profit Sharing Agreements[798]) the conversion of all concessions in the Orinoco Belt in Venezuela to mixed companies,[799] noting that they had to comply with the Organic Hydrocarbon Law enacted in 2002 (and later reformed). This required that activities regulated in the law be carried out by the State, State-owned companies, or mixed companies with the State holding more than 50% of the capital of the company. The Organic Hydrocarbon Law noted that all activities regulated by the law would be directed 'to promote the complete, organic and sustained development of the country, paying attention to the rational use of the resource and the preservation of the environment.' [800] The majority of these migrations were carried out through agreements between the parties, though some cases, as will be developed below, led to arbitrations (this is the cases of Eni Dación B.V.,[801] which was later discontinued

[796] Arts. 1 and 2, Law Regulating Private Participation in Primary Activities where the Operating Contracts of 18 April 2006 [Venezuela].

[797] Decree 5200 Concerning the Migration of the Association Agreements of the Orinoco Belt and of the Exploration Risk and Profit Sharing Agreements into Mixed Companies of 26 February 2007 [Venezuela].

[798] Law on the Effects of the Migration Process of the Association Agreements of the Orinoco Belt and of the Exploration at Risk and Profit Sharing Agreements of 8 October 2007 [Venezuela].

[799] In this case mixed companies had to have State participation in excess of 60%. There is some discussion as to whether this was, indeed a nationalisation or expropriation process, *see* Allen R. Brewer-Carias 'The "statization" of the pre 2001 primary hydrocarbons joint venture exploitations: Their unilateral termination and the assets' confiscation of some of the former private parties' [Apr 2008] 2 Transnational Dispute Management.

[800] Article 5, Organic Hydrocarbon Law [*Ley Orgánica de Hidrocarburos*] [Venezuela].

[801] *Eni Dación B.V. v. the Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/4 was registered on 6 February 2007.

due to an agreement between the parties, ConocoPhillips Company[802], and Exxon-Mobil[803]).[804]

Venezuela's position with regard to the reasons for these decisions may also be taken from the arbitrations referred to above. In the *Venezuela Holdings B.V.* case (formerly known as the *Mobil* case), for example, Venezuela argued that the migration process and final termination of the agreements were 'carried out pursuant to a law of public policy, in an orderly and non-discriminatory manner and for a public purpose, in accordance with a process established by duly enacted laws which in fact satisfied most of the oil companies operating in the country. … [It] denie[d] that specific commitments were made by Venezuela surrendering its sovereign right to regulate or even expropriate interests in the oil sector'.[805] The tribunal in that case concluded that 'in reserving its sovereign rights, [Venezuela] reserved *inter alia* its right to expropriate'.[806] The tribunal did not refer to an obligation or right other than this reference to the reservation in the agreements between Venezuela and the different claimants in the case.

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[802] *ConocoPhillips Company and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30 was registered on 13 December 2007.

[803] *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27 was registered on 10 October 2007. The claimants in these proceedings changed somewhat during the process and the case is now referred to as Venezuela Holdings as well. Exxon-Mobil also initiated proceedings under the ICC rules against PdVSA.

[804] Ricardo Chirinos, 'Survey of Recent Governmental Measures in Key Latin American Countries and Comparison with the Venezuelan Case', [Apr 2008] 2 Transnational Dispute Management 4.

[805] *Venezuela Holdings B.V. and others v Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014) para 292.

[806] *Venezuela Holdings B.V. and others v Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014) para 299.

In *ConocoPhillips v Venezuela* there is no final award yet. However, there is a Decision on Jurisdiction and the Merits,[807] where, though the tribunal did not refer in any depth to the reasons for the measures described above, it did refer to statements by President Chavez and the Minister of Energy and Petroleum and President of PDVSA, regarding a 'policy for the recovery of Absolute Oil Sovereignty and management of [Venezuela's] main resource'.[808]

2. Argentina

Argentina faced a severe energy crisis after 2003, with increasing international oil and gas prices and a drop in reserves. The increased imports of oil and gas affected the balance of payments of the country.

In 2012, Law 26.741 declared that achieving self-sufficiency of hydrocarbons was a priority objective and in the national public interest of Argentina. To guarantee this objective, Argentina reversed its previous policy on privatizing YPF, and it expropriated 51% of the shares, all held by Repsol, the Spanish majority shareholder.[809] The expropriation finished in 2014 when the Argentine government paid compensation to Repsol, which dropped all claims it had against the government.[810]

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[807] This decision has been subject to several reconsideration requests, though all of them have been denied by the Tribunal.

[808] *ConocoPhillips Company and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits (3 September 2012) para 211.

[809] Law of Hydrocarbon Sovereignty 26,741 [Argentina].

[810] Repsol had initiated ICSID proceedings against the government, but discontinued them after the payment of compensation. *Repsol S.A. and Repsol Butano S.A. v. Argentina*, ICSID Case No. ARB/12/38, Resolution on Termination of the Proceedings (19 May 2014).

3. Bolivia

On 1 May 2006 the newly appointed Bolivian government issued Law 28701, literally referring to a nationalisation of the hydrocarbon sector.[811] Prior to that, on 17 May 2005, Law 3058 had set a deadline of 180 days for companies to renegotiate their existing licences or concessions to production sharing agreements with YPFB (the Bolivian national oil company).[812] Law 3058 was justified on the basis of a national referendum that had taken place on 18 July 2004, in which voters were asked five questions regarding the natural gas policy. These were whether the existing policy should be repealed, whether the national oil and gas company YPFB should be re-established and reclaim State ownership of hydrocarbon production and whether they should export natural gas. The voters approved all the questions asked of them,[813] on the basis that hydrocarbons were 'strategic resources, that aid the objectives of economic and social development of the country and the foreign affairs of the Bolivian State, including achieving a sovereign and useful exit to the Pacific Ocean.'[814]

Law 28701, established that such deadline had passed and that all the hydrocarbons of the country were nationalised.[815] That meant that all hydrocarbons produced in the State had to be given to YPFB.[816] It also established that companies had 180 days in which to renegotiate their contracts, basically into service

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[811] Supreme Decree No. 28701 (1 May 2006) [Bolivia].

[812] Article 5, Law 3058 (17 May 2005) [Bolivia].

[813] Referendum 2004 [Bolivia] available at: http://www.bolivia.com/Especiales/2004/Referendum/preguntas/index.asp, last accessed 25 July 2017.

[814] Article 4, Law 3058 (17 May 2005) [Bolivia].

[815] Article 1, Supreme Decree No. 28701 (1 May 2006) [Bolivia].

[816] Article 2(1), Supreme Decree No. 28701 (1 May 2006) [Bolivia].

contracts.[817] After the law was issued negotiations ensued and all the companies achieved agreements with the government, either in terms of new service contracts or compensation.[818] Notably, Bolivia withdrew from ICSID in May 2007.[819]

Thus, though nationalisation was peacefully resolved in this instance, the motives behind it were that hydrocarbons were strategic resources, essential to the development of the country. Also, the law mentions hydrocarbons as relevant to the foreign affairs of the State and, though not expressly spelled out, this may imply that this nationalisation was also a way of combating foreign influence forged through hydrocarbon control in Bolivia.

4. Russia

The issue of nationalisation of oil and gas in Russia is more complex. Some authors have held that there is an implicit nationalisation policy of the oil and gas sector in Russia, which manifested itself in the 2030 Energy Strategy.[820] This concern is also explicit in President Putin's policies as described in his doctoral thesis and other publications.[821]

In 2008, the Law on Procedures for Foreign Investments in the Business Entities of Strategic Importance for Russian National Defence and State Security,

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[817] Article 3(1), Supreme Decree No. 28701 (1 May 2006) [Bolivia].

[818] Peter Cameron, *International Energy Investment Law* (OUP, 2010), p. 243.

[819] See ICSID/3, 'List of Contracting States and other Signatories of the Convention' p. 4, available at: https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf, last accessed 25 July 2017.

[820] Peter Cameron, *International Energy Investment Law* (OUP 2010) 317; Kaj Hober, 'Law and Policy in the Russian Oil and Gas Sector' (2009) 27 J Energy & Natural Resources L 420, 424.

[821] Kaj Hober, 'Law and Policy in the Russian Oil and Gas Sector' (2009) 27 J Energy & Natural Resources L 420, 426.

qualified the oil and gas sector as a strategic sector[822] which meant that private participation in that sector required government authorization.[823] Inclusion of sectors in this law was based on the need to protect 'Russian national defence and state security',[824] which is why I can interpret this law as justifying these measures on the basis of national security. This is, additionally, in line with President Putin's own position as well as the 2003 Energy Strategy.[825]

Nationalisation is also said to be manifest in a series of events which brought privately-owned oil and gas companies or licenses under governmental control. One example of this is the Yukos affair (where Yukos's assets were transferred to Rosneft);[826] a second is the Sakhalin II affair, where Royal Dutch Shell was 'forced' 'to give up a controlling stake in its liquefied gas production project' to Gazprom (though an agreement was reached on compensation in this case);[827] a third is the TNK-BP investment in a gas field in East Siberia, where 'TNK-BP would sell its 62.8 per cent stake in the Kovykta field' to Gazprom.[828]

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[822] Article 6(37), Law 57-FZ (8 April 2008) [Russia].

[823] Article 8(1), Law 57-FZ (8 April 2008) [Russia].

[824] Article 1, Law 57-FZ (8 April 2008) [Russia]; Sergey Seliverstov and Ivan Gudkov, 'Energy Law in Russia' in Martha M. Roggenkamp, Catherine Redgwell, Anita Rønne and Iñigo del Guayo (eds), *Energy Law in Europe* (3rd ed., OUP 2016) 1148-1151.

[825] Kaj Hober, 'Law and Policy in the Russian Oil and Gas Sector' (2009) 27 J Energy & Natural Resources L 420, 429-430.

[826] Strictly speaking this was not a nationalisation measure: the Russian government adopted a series of measures based on taxation which ended up in the bankruptcy proceedings of Yukos. These measures were challenged under the Energy Charter Treaty (in several parallel arbitrations by different shareholders), and the tribunals concluded that it was an expropriation (*Yukos Universal Limited v. Russia*, PCA Case No. AA 227, Award (18 July 2014) (amongst others)). These proceedings have been challenged (and annulled) in local courts, on the basis of the tribunal overstepping its jurisdiction, but that is not relevant for the purposes of this thesis. Peter Cameron, *International Energy Investment Law* (OUP 2010) 317; Kaj Hober, 'Law and Policy in the Russian Oil and Gas Sector' (2009) 27 J Energy & Natural Resources L 420, 440.

[827] Leon Aron, 'The political economy of Russian oil and gas' *American Enterprise Institute* (29 May 2013) 5.

[828] Kaj Hober, 'Law and Policy in the Russian Oil and Gas Sector' (2009) 27 J Energy & Natural Resources L 420, 441.

Though this is not a case, strictly speaking, of a nationalisation measure, it is worth noting as measures relating to state control over oil and gas resources whose justification lies in energy security mandates.[829]

E. Conclusion

In the 1970s, which is when many of the early nationalisations developed, Professor Jiménez de Aréchaga described the right to expropriate as 'the right of every State to nationalize foreign-owned property, even if a predecessor State or a previous government engaged itself, by treaty or contract, not to do so. This is a corollary of the principle of permanent sovereignty of a State over its wealth, natural resources and economic activities…'.[830] He added, '[t]he description of this sovereignty as *permanent* signifies that the territorial State can never lose its legal capacity to change the destination or the method of exploitation of those resources, whatever arrangements have been made for their exploitation and administration'.[831] This description is intriguing as it would appear to establish a right of States out of which they cannot contract. That is, regardless of the existence of an arrangement under a treaty or a contract, a State may change its mind with regard to the destination or method of exploitation of its natural resources. Professor Jiménez de Aréchaga put forth that this distinction had implications for issues of compensation, as these nationalisations would no longer be treated as internationally wrongful acts, and

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[829] *See* Sergey Seliverstov and Ivan Gudkov, 'Energy Law in Russia' in Martha M. Roggenkamp, Catherine Redgwell, Anita Rønne and Iñigo del Guayo (eds), *Energy Law in Europe* (3rd ed., OUP 2016) 1144.

[830] Eduardo Jimenez de Arechaga, 'International law in the past third of a century' (1978) 159 Recueil des Cours 1, 297.

[831] Eduardo Jimenez de Arechaga, 'International law in the past third of a century' (1978) 159 Recueil des Cours 1, 297, ibid., 307.

therefore the standard of compensation would not necessarily be that of compensation for illegal acts under customary international law.[832]

Contrario sensu, the decisions in the Libyan oil cases indicate that a State 'may enter into binding contractual undertakings which restrict its right of nationalization',[833] but, with the restriction that 'these undertakings do not amount to an attempted surrender of that sovereignty'[834] (i.e., that the State retains certain rights and that the restriction is limited in time[835]). The existence of possible exceptions to the rule of *pacta sunt servanda* under the 'international law of contracts' has also been contemplated. Judge Greenwood explains that '[n]othing in the award [*Texaco* v *Libya*] precludes the possibility that the international law of contracts may include some concept of fundamental change of circumstances, similar to that of the law of treaties, or a duty based upon notions of equity to renegotiate in the event of changed economic conditions'.[836]

In *ConocoPhillips v Venezuela*, Venezuela does not appear to have justified the termination of the agreements at issue; rather, at least in the majority of the tribunal's description, it concentrates on the good faith in the negotiations of the parties on the compensation regarding such nationalisation.[837] This lack of

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[832] Eduardo Jimenez de Arechaga, 'International law in the past third of a century' (1978) 159 Recueil des Cours 1, 297-305.

[833] Christopher Greenwood, 'State Contracts in International Law – the Libyan Oil Arbitrations' (1982) 53(1) BYBIL 27, 60; *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic*, Award (19 January 1977), (1979) 53 ILR 389.

[834] Christopher Greenwood, 'State Contracts in International Law – the Libyan Oil Arbitrations', (1982) 53(1) BYBIL 27, 80.

[835] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic*, Award (19 January 1977), (1979) 414-415, 482.

[836] Christopher Greenwood, 'State Contracts in International Law – the Libyan Oil Arbitrations' (1982) 53(1) BYBIL 27, 64-65 (footnotes omitted).

[837] *ConocoPhillips Petrozuata BV and others v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and on the Merits (3 September 2013), section VII(B)(4).

justification but agreement on the requirement of compensation recalls the position of Libya in the cases referred to above. Reference was made to GA Resolution 1803 in a speech by the Minister of Hydrocarbons to the National Assembly noting that the nationalisation was a sovereign act and that the Government was not refusing to indemnify the company.[838] The State's arguments in the proceedings are not clear as regards the underlying reason for the nationalisation, perhaps indicating that it did not consider it to be necessary to justify the decision to nationalise. However, this may also be the result of the tribunal's description of the parties' positions and its decision to treat the quantum phase separately.

In the beginning of this chapter I referred to four categories under which nationalisation justifications could be found: (a) States that expropriate oil and gas concessions as a response to an act which they consider a violation of international law; (b) States that expropriate oil and gas concessions looking to achieve ownership of the oil, generally to guarantee their energy security or supply; (c) States that expropriate oil and gas concessions to guarantee their independence from foreign influences; (d) States that expropriate oil and gas concessions due to breaches of contract by international oil companies. In recent nationalisations, reasons (b) and (c) are given as justifications, that is nationalisations are generally carried out for reasons related to energy security.[839]

Venezuela, in a letter dated 8 September 2013, noted its non-compliance with this proceeding and decision, available at: http://italaw.com/sites/default/files/case-documents/italaw1583.pdf, last accessed 17 December 2013.

[838] *ConocoPhillips Petrozuata BV and others v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and on the Merits (3 September 2013) para 399.

[839] The link between energy security and the defence of necessity is addressed in Chapter 2 of this thesis, particularly as an essential interest to be protected by the State.

The conclusion that can be drawn from this analysis is that, despite the on-going nationalisation issue under international law in relation to oil and gas, there has been a shift in the positions of oil and gas companies and States in relation to their bargaining positions. There does not appear to be, currently, a discussion regarding the legality of the nationalisation measure; rather, the discussion is limited to compensation issues. This can be seen in the examples given above. In the few cases where international arbitrations were brought against the host State (mainly Venezuela), it was because the parties were not able to achieve an agreement on compensation. In all the remaining cases, in Argentina, Bolivia, Russia, and the other Venezuelan concessions, agreement was reached between the parties. This demonstrates, on the one hand, increased recognition by the international oil companies of a State's right to nationalise,[840] particularly in light of security concerns, while on the other hand it is indicative of increased recognition by States of their obligation to compensate in cases where nationalisation has taken place.

[840] Although IOC's motivations may vary, they may, for example be, linked to attempting to maintain relations with the government in light of other investments. However, the overwhelming evidence shows that, contrary to what occurred in the past, these companies are more willing to sit down to negotiate a settlement with the nationalising country.

IX. CHAPTER 5: LOCAL DEVELOPMENT

A. Introduction

As explained in Chapters 1 and 2, the purpose of this thesis is to analyse the changes in State regulation in oil and gas exploration and production in relation to three areas where its sovereignty is paramount. The first and second of these areas, government take and nationalisation, have been addressed in chapters 3 and 4, respectively.

As regards the third and final example of what I am describing here as 'local development', there are several various aspects that require elaboration.[841] As analysed in more detail by other authors,[842] there is some discussion as to what constitutes a local community and its geographic extent. In this sense, a local community may refer to the surrounding area of exploration and production activity, the local municipality or province or state, or even include in this concept future generations.[843]

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[841] This chapter of the thesis is focused on State regulation with regard to local communities. It is worth noting, however, that there are instances where the international community, NGOs, international organisations and other industry associations are pushing to force companies to adopt their own policies regarding interactions with local communities. These developments have not matured to binding legal norms as yet, but they may, in the future, be a force for change in this area as well. *See* Oxfam briefing paper, 'Community Consent Index 2015', 2015, https://www.oxfam.org/en/research/community-consent-index-2015; UN Guiding Principles on Business and Human Rights; UN Global Compact; Daniel M. Franks, Rachel Davis, Anthony J. Bebbington, Saleem H. Ali, Deanna Kemp, and Martin Scurrah, 'Conflict translates environmental and social risk into business costs' (2014) 111(21) Proceedings of the National Academy of Sciences 7576; Jennifer Loutit, Jacqueline Mandelbaum, Sam Szoke-Burke, 'Emerging Practice in Community Development Agreements' 2016, Colombia Center on Sustainable Development; Rae Lindsay, Robert McCorquodale, Lara Blecher, Jonathan Bonnitcha, Antony Crockett, and Audley Sheppard, 'Human rights responsibilities in the oil and gas sector: applying the UN Guiding Principles' (2013) 6(1) J World Energy L and Business 2; among others.

[842] Iñigo del Guayo, 'Regional and Local Energy Communities—A European Union Perspective on Community Benefits' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds.), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 42.

[843] On the concept of energy community and the different extents that have been attributed to it see Barry Barton and Michael Goldsmith, 'Community and Sharing' in Lila Barrera-Hernández, Barry

Hydrocarbon exploration and production naturally has an impact on the communities where the project is undertaken.[844] States' reactions to or preventions of this impact may be reflected in many ways. Authorities might: incorporate consultation obligations (or what is sometimes referred to as a social licence to operate or as free and informed consent) to a local community prior to a project being approved by a central or provincial government;[845] compensate a local community for any damages caused to it by the activity; impose corporate social responsibility obligations on companies;[846] incorporate international obligations related to sustainable development, human rights or the environment in their own domestic law.[847]

Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds.), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 26.

[844] On issues of the impact of oil and gas exploration and production in local communities *see* David Waskow and Carol Welch, 'The Environmental, Social, and Human Rights Impacts of Oil Development' in Revenue Watch Open Society Institute, *Covering Oil, A Reporter's Guide to Energy and Development* (Open Society Institute 2005) 101.

[845] For example, in Colombia, *see* Milton Montoya, 'Participation of Territorial Authorities in Mining Activities in Colombia' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds.), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 366; and in Mexico, *see* José Juan Gonzalez Márquez, 'Social and Environmental Liability of Private Companies in the Energy Sector and the Mexican Energy Reform' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds.), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP, 2016) 251; David Waskow and Carol Welch, 'The Environmental, Social, and Human Rights Impacts of Oil Development' in Revenue Watch Open Society Institute, *Covering Oil, A Reporter's Guide to Energy and Development* (Open Society Institute 2005) 101, 113.

[846] For example, in Argentina the most recent reform to the Hydrocarbons Law (Law 27,007) imposes obligations on companies benefitting from a specific regulatory regime to make corporate social responsibility contributions to producing provinces equivalent to 2,5% of the initial investment of the project (Article 21, Law 27,007 [Argentina]).

[847] For example, the application of the 1999 Environmental Management Act by the judiciary in Ecuador (*Maria Aguinda and others v. Chevron Texaco Corporation*, Proceeding No. 002-2003 (at first instance), Provincial Court of Sucumbíos, Sole Division (*Corte Provincial de Justicia de Sucumbíos, Sala Única de la Corte Provincial de Justicia de Sucumbíos*), Nueva Loja, Ecuador, Decision (14 February 2011) [Ecuador]).

There are seven several types of measures—again, not necessarily mutually exclusive: (i) international standards, legal instruments, norms and frameworks;[848] (ii) industry standards (industry association, enforced by peers); (iii) corporate standards and policies;[849] (iv) domestic government regulation;[850] (v) conditions on finance and share market activism; (vi) social regulations, campaigns and activism; (vii) litigation.

This chapter focuses on measures that states have advanced or justified on the basis of consulting, compensating or benefitting a community, including future generations.[851] Though there is discussion regarding whether future generations should be included in the concept of local community, in the context of this chapter, which refers to the degree to which states adopt regulations to protect the local community, it is relevant to address future generations as they are linked to the concept of sustainable development—which in the Brundtland Report includes such

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[848] Though the UN Guiding Principles on Business and Human Rights are recommendations, the first Guiding Principle sets out that States have a duty to protect individuals in their territory and/or jurisdiction from human rights abuses. This may have been an incentive in States' changes in legislation in this regard since these Guiding Principles were issued (in 2011). Rae Lindsay, Robert McCorquodale, Lara Blecher, Jonathan Bonnitcha, Antony Crockett, and Audley Sheppard, 'Human rights responsibilities in the oil and gas sector: applying the UN Guiding Principles' (2013) 6(1) J World Energy L and Business 2, 8.

[849] A study was carried out by the Special Representative to the Secretary General on Business and Human Rights, John Ruggie, regarding the 'chilling effect' of stabilisation clauses in oil and gas agreements. It 'concluded that the evidence gathered by the study supported the hypothesis that stabilization clauses could have a chilling effect on a host state's ability to implement its international obligations with regard to human rights. [Andrea Shemberg, 'Stabilization Clauses and Human Rights: A Research Project Conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights' (11 March 2008) 5 http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/StabilizationþPaper.pdf4.],' Rae Lindsay, Robert McCorquodale, Lara Blecher, Jonathan Bonnitcha, Antony Crockett, and Audley Sheppard, 'Human rights responsibilities in the oil and gas sector: applying the UN Guiding Principles' (2013) 6(1) J World Energy L and Business 2, 49.

[850] Domestic regulation can be national, provincial or local, using law and policy ("Command and Control regulation"). An example is the requirement to develop an environmental impact assessment or a closure plan. Another option is to use Market Based Instruments, such as a bond put up by the company before the government to guarantee closure.

[851] The justifications given by States as developed below are condensed and analysed in Chapter 6 of the thesis.

future generations [852] —especially as hydrocarbons are an exhaustible natural resource. These measures will include those relating to prior consultation, compensation, benefits and environmental concerns, including sustainable development. The communities referred to will include those that are or will be in the surrounding area of a certain activity, municipalities and provinces, or local indigenous communities as described in each case by the measures referred to in this chapter. In this chapter I will not refer to measures taken in relation to indigenous communities that are not geographically proximate to the upstream activities being regulated.[853] In some cases, for example in the case relating to the local indigenous communities against Texaco, States have based their position on international law obligations,[854] either treaty, customary or as a general principle; also, states have referred to considerations of equity or equitable distribution of an exhaustible resource.[855]

[852] World Commission on Environment and Development, *Our Common Future* (OUP 1987).

[853] Although as in the case of the Native Title Act in Australia this may be an interesting area to develop, it is not within the scope of this thesis.

[854] *Maria Aguinda and others. v. Chevron Texaco Corporation*, Casación Decision of 12 November 2013 [Ecuador], pp 54-55.

[855] As explained in Chapter 2, this could also be arguably an international law obligation.

The binding nature of sustainable development obligations[856] on States has been questioned under international law,[857] and although the concept has been invoked by the ICJ some cases,[858] there remains hesitance as to its binding nature.[859]

[856] The content of sustainable development is also greatly discussed under international law, though, for present purposes, Nico Schrijver's table of seven elements of the concept of sustainable development suffices: 'sustainable use of natural resources, sound macro-economic development, environmental protection, time dimension: temporality, longevity and promptness, public participation and human rights, good governance, integration and interrelatedness' Nico Schrijver, 'The Evolution of Sustainable Development in International Law: Inception, Meaning and Status' (2008) 329 Recueil des Cours 217, 366.

[857] For an in-depth discussion on the mandatory nature of the concept of "sustainable development" *see* Nico Schrijver, 'The Evolution of Sustainable Development in International Law: Inception, Meaning and Status' (2007) 329 Recueil des Cours 217; Ulrich Beyerlin, 'Different Types of Norms in International Environmental Law Policies, Principles, and Rules' in Daniel Bodansky, Jutta Brunée, Ellen Hey (eds), *Oxford Handbook of International Environmental Law* (OUP 2008); Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (OUP 2009) 125-127; Rajendra Ramlogan *Sustainable Development. Towards a Judicial Interpretation* (Nijhoff Leiden, 2011) 37-48; Philippe Sands, Jaqueline Peel, *Principles of International Environmental Law* (CUP 2012) 206-217; Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Norm' (2012) 23(2) Eur J Intl L 377; Ulrich Beyerlin, 'Sustainable Development' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (October 2013).

[858] *Case concerning the Gabcikovo Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, para 140; *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Merits) [2010] ICJ Rep 14, para 177. Though in the Kishenganga arbitration these decisions are referred to as invoking the principle of sustainable development, *see In the Matter of the Indus Waters Kishenganga Arbitration* (*Pakistan v India*), Partial Award (18 February 2013) paras 449-450.

[859] Vaughn Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan E Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999); Alan E Boyle and David Freestone, 'Introduction' in Alan E Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999); on the relationship between sovereignty and sustainable development in areas other than oil and gas see Philippe Sands, 'International Law in the Field of Sustainable Development', (1995) 81 BYBIL 303, 342-343. Some authors have held that the Principle 23 of the Río Declaration—'[t]he environment and natural resources of people under oppression, domination and occupation shall be protected'—, interpreted as requiring resource preservation and environmental protection 'is relevant from a jurisprudential perspective' (Jorge E. Viñuales, 'The Río Declaration on Environment and Development' in Jorge E. Viñuales (ed), *The Río Declaration on Environment and Development: A Commentary* (OUP 2015) 53). However, the reference to the ICJ decisions in this context refer to the Preliminary Objections Decision in *Certain Phosphate Lands in Nauru*, and two dissenting opinions in the *East Timor Case* which do not appear sufficient to establish jurisprudential relevance. Although the reference in the *Armed Activities case* (*Democratic Republic of the Congo v Uganda*) to the exploitation of the DRC's natural resources by Uganda is more explicit, the Court is careful to state that it is not applying the principle of sovereignty over natural resources, but rather the laws of war (*Case Concerning Armed Activities in the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) [2005] ICJ Rep 168, paras 244-245.

The principle of 'sustainable development' has been reflected 'in a vast array of non-binding' instruments (which may nonetheless exert normative influence)[860] as well as in international treaties.[861] However, in the latter case the references to 'sustainable development' are mainly in the Preamble or do not impose binding obligations on states as they tend to have hortatory language, though they may have legal effect.[862] Some authors consider that it has gained status as a principle of customary international law.[863] For the purpose of this thesis whether or not obligations relating to sustainable development are binding is relevant for two reasons: first, it is relevant to determine whether it is possible to invoke it as a conflicting obligation on states or companies when they have executed agreements

[860] UN Stockholm Declaration on the Human Environment (1972); UN Conference on Environment and Development in Rio de Janeiro (1992); United Nations Millennium Declaration, A/RES/55/2 (15 September 2000); Johannesburg Declaration on Sustainable Development, A/CONF.199/20 (4 September 2002); UN General Assembly 2005 World Summit Outcome, A/RES/60/1 (24 October 2005); The Future We Want, A/RES/66/288 (11 September 2012).

[861] Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Norm' (2012) 23(2) Eur J Intl L 377. Including: UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (adopted on 14 October 1994, entry into force on 26 December 1996) 1954 UNTS 3; Energy Charter Treaty (1994); North American Free Trade Agreement (adopted on 8 December 1992, entry into force 1 January 1994) 32 Intl L Materials 289; Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (adopted on 5 September 2000, entry into force on 19 June 2004) 227 UNTS 43 (UN Fish Stocks Agreement (1995)).

[862] Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Norm' (2012) 23(2) Eur J Intl L 377, for example in the WTO *Shrimp-Turtle* case, relying on the preamble of the WTO Agreement, the Appellate Body acknowledged the 'recognition by WTO Members of the objective of sustainable development'. WTO: *United States – Import Prohibition of Certain Shrimp and Shrimp Products-Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R, para 131. Other examples are the UN Framework Convention on Climate Change (Article 3(4) The Parties have a right to, and should, promote sustainable development…); the Energy Charter Treaty (Article 19 In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall strive to minimize in an economically efficient manner harmful Environmental Impacts…).

[863] Philippe Sands, *Principles of International Environmental Law* (CUP 2003) 254; *Case concerning the Gabcikovo Nagymaros Project* (*Hungary v Slovakia*) (Merits) (Judge Christopher Weeramentry) [1997] ICJ Rep 104; or a principle of international law: Philippe Sands, Jaqueline Peel, *Principles of International Environmental Law* (CUP 2012) 217.

that do not respect obligations relating to sustainable development; second, it is relevant in analysing justifications given by states for measures they have adopted.

Another source of normative influence in this area is found in practice in the international financial organizations' requirements for giving loans in cases related to large infrastructure projects. Particularly in the area of oil and gas, companies also occasionally rely on World Bank guidelines 'as a benchmark to guide their consultation practices and social and environmental policies'.[864]

As in the previous chapters and as explained in Chapter 1 of the thesis, the methodology applied here is an analysis of relevant case law regarding domestic law measures related to the local communities in the broad sense described above, including future generations and local indigenous communities; that analysis is complemented by the legislation—insofar as it was attainable—of the selected countries.

B. International Financial Institutions

In the development of obligations related to consultation of local communities and environmental assessment obligations, international financial institutions impose obligations that are often followed by companies even when they are not acting as clients to those institutions.[865] The IFC advertises its goals in oil, gas and mining as to 'help developing countries realize these benefits, while helping promote sustainable energy sources' as well as 'work[ing] with companies to ensure that

[864] David Waskow and Carol Welch, 'The Environmental, Social, and Human Rights Impacts of Oil Development', in Revenue Watch Open Society Institute, *Covering Oil, A Reporter's Guide to Energy and Development* (Open Society Institute 2005) 101, 113.

[865] David Waskow and Carol Welch, 'The Environmental, Social, and Human Rights Impacts of Oil Development', in Revenue Watch Open Society Institute, *Covering Oil, A Reporter's Guide to Energy and Development* (Open Society Institute 2005) 101, 113-114.

local communities enjoy concrete benefits from projects'.[866] In 2012 the IFC developed new Performance Standards related to the environment which outline the private sector's role and responsibilities if they are receiving financing from the IFC. These include a requirement of free, prior, informed consent of indigenous communities when there is a reference to consultation, but no requirement of local communities' consent.[867]

In 2004 the World Bank Group carried out its Extractive Industries Review, analysing its 'support for extractive industries in the fight against poverty'[868]. As a response to its results, the WBG now publishes Annual Reviews of their activities in Extractive Industries.[869]

Amongst the issues addressed by the WBG in relation to extractive industries are efforts to strengthen local communities' participation in extractive industry projects, updating its environmental and social performance standards, help

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[866] Overview, IFC Oil, Gas & Mining, available at http://www.ifc.org/wps/wcm/connect/Industry_Ext_Content/ifc_external_corporate_site/OGM+Home, last accessed 3 November 2015; *see also* Discussion Paper 'The Art and Science of Benefit Sharing in the Natural Resources Sector' IFC (Feb 2015), available at: http://commdev.org/wp-content/uploads/2015/07/IFC-Art-and-Science-of-Benefits-Sharing-Final.pdf, last accessed 2 November 2015.

[867] IFC, Performance Requirements No. 1 and 7 (2012); Elisa Morgera, 'Significant Trends in Corporate Environmental Accountability Standards: The New Performance Standards of the International Finance Corporation' (2007) 18(1) Colorado J of Environmental L and Policy 166.

[868] The Extractive Industries Review, though in theory publicly available, does not seem to be accessible, see http://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/industries/oil%2C+gas+and+mining/development_impact/development_impact_extractive_industries_review, last accessed 2 November 2015.

[869] Available at: http://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/industries/oil%2C+gas+and+mining/development_impact/development_impact_extractive_industries_review, last accessed 2 November 2015.

develop capacity among small and local communities and build expertise among local communities.[870]

The World Bank's Indigenous Peoples Policy establishes a requirement for funding that there be 'free, prior and informed consultation in broad community support to the project by the affected indigenous peoples', though it clarifies that this does not imply a veto right, as well as that they should share equitably in the profits.[871]

The Inter-American Development Bank does include a requirement for prior informed consent,[872] although it is of limited application and has been criticised.[873]

An example of the importance of these organisations for the protection and benefits to local communities is seen, for example, in the case of the Chad-Cameroon pipeline, where a joint project was set up including both the WBG and the IFC.[874] The WBG stated that the sustainability of the project was enhanced 'by ensuring that

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[870] *See* http://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/industries/oil%2C+gas+and+mining/development_impact/development_impact_extractive_industries_review, last accessed 2 November 2015.

[871] Operational Manual (World Bank), OP 4.10 – Indigenous Peoples; Emma Barry-Pheby, 'Examining the Priorities of the Canadian Chairmanship of the Arctic Council: Current Obstacles in International Law, Policy and Governance' (2014) 25 Colorado Natural Resources, Energy and Environmental L Rev 287-288.

[872] Inter-American Development Bank, 'Operational Policy on Indigenous Peoples', 22 February 2006, OP-765; Elisa Morgera, 'Significant Trends in Corporate Environmental Accountability Standards: The New Performance Standards of the International Finance Corporation' (2007) 18(1) Colorado J of Environmental L and Policy 166.

[873] Comparative Review of Multilateral Development Bank Safeguard Systems, Main Report and Annexes (May 2015), available at: https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/phases/mdb_safeguard_comparison_main_report_and_annexes_may_2015.pdf, last accessed 10 November 2017.

[874] See generally Mohammed A. Bekhechi, 'The Chad-Cameroon Pipeline Project: Some Thoughts about the Legal Challenges and Lessons Learned from a World Bank-financed Large Infrastructure Project' in Martha M. Roggenkamp, Lila Barrera-Hernandez, Donald N. Zillman, and Inigo del Guayo (eds.), *Energy Networks and the Law: Innovative Solutions in Changing Markets* (OUP 2012).

local populations see tangible benefits from the project and receive an equitable portion of the revenues'.[875] The IFC continues to hail the project as 'a pioneering effort between IFC and the World Bank to demonstrate that large scale crude oil projects, when designed to ensure transparency and effective environmental and social mitigation, can significantly improve prospects for sustainable long-term development.'[876]

C. Case Studies

1. *Angola*

Mimicking the Norwegian model of development through the oil and gas industry, the Angolan government and Sonangol (the national oil company) have pushed for regulation of local content requirements, including employing locals and developing the capacity of local small and medium-sized enterprises.[877] These regulations of local content requirements would seem to be attempts to develop local communities, though not necessarily those affected by the oil and gas project.[878]

Several issues in relation to human rights and transparency have been raised in regard to Angola, though they have merely been raised without solutions being presented.[879]

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[875] Project Appraisal Document, Report No. 19343 AFR of 13 April 2000, p. 21.

[876] IFC, Chad-Cameroon Pipeline Project, available at: http://www.ifc.org/wps/wcm/connect/region__ext_content/regions/sub-saharan+africa/investments/chadcameroon, last accessed 11 November 2017.

[877] Jesse Salah Ovadia, 'Local content and natural resource governance: The cases of Angola and Nigeria' (2014) 1(2) The Extractive Industries and Society 137.

[878] Jesse Salah Ovadía: 'The dual nature of local content in Angola's oil and gas industry: development vs. elite accumulation' (2012) 30(3) J of Contemporary African Studies 395.

[879] Leon Moller, 'The governance of oil and gas operations in hostile but attractive regions: West Africa' (2013) 11(2) Oil, Gas and Energy L 1; Ayesha Dias, 'Oil and Human Rights' (2003) 1(2) Oil, Gas and Energy L 1; Arvind Ganesan, 'Current Human Rights Issues in Extractive Industries' (2004) 2(4)

2. Argentina

Environmental regulatory competence in Argentina is distributed under the 1994 Constitution between the federal government and the provinces. The federal government has the capacity to enact certain minimum standards, while the provinces may complement those rules and have the enforcement power.[880]

The latest integral reform to the Hydrocarbons Law was carried out in 2014 by Law 27,007.[881] Some of those reforms were related to increased tensions between the oil- and gas-producing provinces and the national government (which had recently expropriated 51% of the shares of YPF S.A., the national oil company[882]) as regards distribution of benefits as well as regulatory power. The reform does not go into environmental reform, only mentioning in passing that the national government and the provinces will attempt to establish uniform environmental legislation whose primary objective will be to apply the best practices in environmental management.[883]

However, the reform does foresee a royalty rate of 12% that may be reduced to 5% or increased by 3% depending on the circumstances.[884] It also provides for an incentive—through 'preferential access' to exchange markets and exports—for high

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Oil, Gas and Energy L 1; Guyo Roba, 'Will Angola's efforts be adequate in avoiding the resource curse' (2006) 4(3) Oil, Gas and Energy L 1.

[880] Art. 41, Constitution [Argentina]; Lila Barrera-Hernández, 'Sleeping with the Enemy: The Legal Landscape of Unconventional Gas Development in Argentina' in Donald N. Zillman, Aileen McHarg, Adrian Bradbrook, and Lila Herrera-Hernández (eds), *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014) 192.

[881] Law 27,007 [Argentina].

[882] As referred to in Chapter 3.

[883] Article 23, Law 27,007 [Argentina].

[884] Article 16, Law 27,007 [Argentina].

investment projects where it requires an investment of 2.5% of the initial investment of the project in corporate social responsibility[885] and a 'to be defined' investment in infrastructure projects financed by the national government, destined to the producing provinces.[886]

There are no specific provisions as regards indigenous communities in this reform. Given the distribution of regulatory authority between the provinces and the federal government, the provinces grant permits and concessions in Argentina. Theoretically, provinces should be more sensitive to local concerns given their proximity. This is not always the case, however, and some indigenous and local community complaints continue to date.[887] International treaties prevail over domestic laws in Argentina according to the Constitution,[888] which includes ILO Convention 169. Meaningful prior consultation of indigenous communities as well as participation in the benefits of any project carried out on their land has thus been upheld by the courts as a requirement for the exploration and production of hydrocarbons on their territory.[889]

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[885] Interestingly, in our experience in Argentina the oil and gas companies are keener to invest in local corporate social responsibility projects near the areas where they are producing. The aim is to keep the local community content with the project and its benefits. Provincial governments, however, attempt to draw those benefits out to better serve other areas. This tension is usually resolved through negotiations between the government and the companies on a case by case basis.

[886] Article 21, Law 27,007 [Argentina].

[887] Lila Barrera-Hernández, 'Sleeping with the Enemy: The Legal Landscape of Unconventional Gas Development in Argentina' in Donald N. Zillman, Aileen McHarg, Adrian Bradbrook, and Lila Herrera-Hernández (eds), *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014) 194.

[888] Article 75(22), Constitution [Argentina].

[889] For example in *Petrolera Piedra del Aguila v. Curruhuinca Victorino and others*, Acción de Amparo, First Instance Court of Cutral Có, 17 February 2011 [Argentina]. This decision, contrary to what has been argued elsewhere (Lila Barrera-Hernández, 'Indigenous Peoples and Free, Prior, and Informed Consent in Latin America' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 88-89), does not confirm the existence of a requirement of consent by the indigenous communities (an issue that is still up for debate in Argentina —*Derechos de los Pueblos Indígenas en la Argentina* (September 2015)—), though it does confirm the

3. Australia

Most underground resources in Australia are the property of state and territory governments, rather than the national government.[890] Much of the regulation that I will look at here is therefore state- or territory-based.

As regards the issue of local development, historically, in Australia the Aboriginal Land Rights (Northern Territory) Act of 1976 establishes special protections for traditional aboriginal owners, requiring project proponents to obtain the consent of land councils established to protect the interests of these owners.[891]

Australia also currently relies on its Native Title Act (of 1993)[892] which has, in theory, assisted traditional aboriginal owners in participating in negotiations with energy companies when they are on their territory. In 2000, however, the UN Human Rights Committee held that Australia was not doing enough 'in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources.'[893]

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requirement of meaningful consultation as well as the requirement of participation in the benefits of the project.

[890] Michael Crommelin, 'Australian Responses to Subsurface Conflicts: Greenhouse Gas Storage v. Petroleum' in Donald N. Zillman, Aileen McHarg, Adrian Bradbrook, and Lila Herrera-Hernández (eds), *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014) 424.

[891] Sect 42, Aboriginal Land Rights (Northern Territory) Act of 1976 [Australia]; Mark Rumler, 'Free, prior, and informed consent: A review of free, prior, and informed consent in Australia', 2011, http://business-humanrights.org/sites/default/files/media/oaus-fpicinaustralia-report-1211.pdf, last accessed 28 December 2017; Jeremie Gilbert and Cathal Doyle, 'A New Dawn over the Land: Shedding Light on Collective Ownership and Consent' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 310.

[892] Native Title Act (1993) [Australia].

[893] Concluding Observation on Australia 2000 (A/55/40, 24 July 2000, paras 498-528, section 3: Principal subjects of concern and recommendations); Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 ICLQ 957, 976.

In 2007, when the UN General Assembly approved the Declaration on the Rights of Indigenous Peoples, Australia was one of the four countries who voted against the Declaration.[894] It changed its position in April 2009[895] and since then the UNDRIP has been referred to by Australian tribunals in some cases, although not in relation to energy negotiations.[896]

It has been argued that the Native Title Act 'was enacted against the backdrop of human rights and anti-discrimination treaties incorporated into Australian law'. [897] Indeed there are references to the International Convention on the Elimination of all Forms of Racial Discrimination, the International Covenants on Economic, Social and Cultural Rights and on Civil and Economic Rights, and the Universal Declaration of Human Rights.[898] However, Australia has not ratified the 169 ILO Convention [899] and in reversing its position with regard to UNDRIP it explicitly (and repeatedly) emphasized that it was not binding.[900] The Native Title Act allows for indigenous communities to participate in the negotiating process with energy companies and the government, and on occasion obtain some sort of

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[894] UN Doc. A/61/251 (13 September 2007).

[895] Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (speech, Australian Parliament, Canberra, Australia, 3 April 2009).

[896] *Maloney v. The Queen* [2012] IICATrans 342 (11 December 2012) [Australia]; *Wuridjial v Commonwealth* (2009) 237 CLR 309 [Australia]; *Aurukun Shire Council v. CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 037 [Australia]; Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 Australian Intl L J 38-39.

[897] Lee Carol Godden and Lily O'Neill, 'Agreements with Indigenous Communities' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 137.

[898] Preamble, Native Title Act (1993) [Australia].

[899] ILO Conventions not ratified by Australia, available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210_COUNTRY_ID:102544, last accessed 28 August 2017.

[900] Sheryl R. Lightfoot, 'Selective Endorsement without intent to implement: indigenous rights and the Anglosphere' (2012) 16(1) The Intl J of Human Rights 107-109.

compensation, but it does not give the aboriginal communities a veto right over projects.[901]

In its concluding observations in 2010, the Committee on the Elimination of Racial Discrimination (CERD) recommended that Australia adopt administrative or legislative measures to prevent acts that negatively impact on the rights of indigenous communities domestically or abroad.[902]

4. Azerbaijan

Azerbaijan does not appear to have in place any regime regarding the protection of local communities, requirements of their consent, benefits to them or to local development. As described by the Deputy Head of Division for Legal Support of International Projects, Legal Department of the State Oil Company of the Republic of Azerbaijan (SOCAR), the legal regime applicable to oil and gas in Azerbaijan is not based on an oil and gas law but rather on specific PSAs which are negotiated with oil companies on a case-by-case basis.[903] Although there is some reference in these to local employment requirements, the effects of these provisions on local communities are very limited.

The only measures that appear to fall in line with the focus of this chapter are: (a) the creation of the State Oil Fund (SOFAZ) in 1999, which has, amongst other objectives, the purpose of guaranteeing macroeconomic stability and the

[901] Lee Carol Godden and Lily O'Neill, 'Agreements with Indigenous Communities' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 145.

[902] CERD, Concluding Observations on Australia, UN Doc CERD/C/AUS/CO/15-17, 13 September 2010, para 13.

[903] Nurlan Mustafayev, 'The Legal Framework for Foreign Investments in Upstream Petroleum Industry of Azerbaijan' (2013) 11(5) Oil, Gas and Energy L 1.

preservation of oil revenues for future generations;[904] and (b) the accession to the Aarhus Convention in 2000, [905] although Azerbaijan has not ratified its amendment.[906] In both cases it is not clear from the publicly available evidence whether any progress has been made on issues of local development. To determine whether any progress has been made is particularly difficult where there is no national or regional legislation and negotiations are dependent on a case-by-case basis on each PSA.[907]

5. Bolivia

In 2007, Bolivia incorporated UNDRIP to the Bolivian legal system through Law No. 3760, elevating all 46 articles of the Declaration.[908] In 2009 after a somewhat convoluted period, its new Plurinational Constitution was approved through a referendum. The 2009 Constitution of Bolivia incorporates many rights of indigenous communities,[909] including granting them a great level of autonomy, even at the judicial level. However, the requirements of prior consent for exploration of natural resources on indigenous land are reflected neither in the Constitution nor in

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[904] SOFAZ, Mission, goals and philosophy, available at: http://www.oilfund.az/en_US/about_found/meqsed-ve-felsefe.asp, last accessed 10 November 2017; Svetlana Tsalik, *Caspian Oil Windfalls: Who will benefit?* (Caspian Revenue Watch, 2003).

[905] Though it entered into force in October 2001, UN Treaty Depository, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en, last accessed 10 November 2017.

[906] Azerbaijan used to also participate in the EITI initiative. However, it withdrew in March 2017 when the Board recommended it be suspended. See https://eiti.org/countries/other, last accessed 10 November 2017.

[907] Peter D. Cameron, *International Energy Investment Law* (OUP 2010) 325.

[908] Law 3760 (2007) [Bolivia].

[909] Nataly Viviana Vargas Gamboa and Shirley Gamboa Alba, 'El derecho de los "pueblos y naciones indígena originario campesinos" en la Constitución Política del Estado Plurinacional de Bolivia" in Jane Felipe Beltrao, Jose Claudio Monteiro de Brito Filho, Itziar Gomez, Emilio Pajares, Felipe Paredes, Yanira Zuniga (eds), *Derechos Humanos de los Grupos Vulnerables* (DHES, 2014) 405.

legislation. There is, however, a requirement of prior *consultation* that is reflected both in the Constitution[910] and in some legislation, for example the Hydrocarbon Law.[911] In the latter case, there is an express reference to this consultation being in conformity with articles 6 and 15 of ILO Convention 169. However, if the result of the consultation is negative, then the Hydrocarbon Law grants the State power to overcome that decision.[912]

The Constitution also provides for indigenous communities to participate in the benefits of the exploration and production of natural resources in their territory.[913] The Constitution additionally declares that Bolivian people will have a right to equitable distribution of benefits from natural resources, though priority will be given to the territories where those resources are found and to the indigenous peoples and nations.[914]

6. Brazil

Brazil has very strong (and controversial) government involvement in oil and gas exploration and production. The 1988 Constitution (following the latest constitutional reform) explicitly allows for a federal monopoly in the oil and gas exploration and production sphere.[915] This federal participation has traditionally

[910] Art. 30(15), Constitution (2009) [Bolivia].

[911] Art. 115, Law 3058 (2005) [Bolivia].

[912] Art. 116, Law 3058 (2005) [Bolivia].

[913] Art. 30(16), Constitution (2009) [Bolivia].

[914] Art. 353, Constitution (2009) [Bolivia].

[915] Article 177, Constitution (1988) [Brazil]; Fabio Konder Comparato, 'The Economic Order in the Brazilian Constitution of 1988' (1990) 88 American J of Comparative L 760-761.

been through Petrobras, though recently (2010) another government-owned company (Pre-Sal Petroleos S.A.) was created to participate in the pre-salt area.[916]

Brazil's approach since the pre-salt discovery in 2006 around local development has been through a more intense regulation of royalties and payments received through oil production. In 2010, after much internal negotiation[917] and the creation of an Inter-Ministerial Committee, Federal Law 12351/2010 was enacted, which would not only modify the existing contract structure of oil and gas exploration and production (from concessions to production sharing agreements), give Petrobras much more participation (and power) in the oil and gas industry prioritising local content, but also reengineer the distribution of royalties and monies received through this industry.[918]

Amongst other regulations, this law increased distribution of royalties to the Union, non-producing States and municipalities.[919] The constitutionality of this provision has been questioned, however.[920] The law also created a Social Fund meant to fight poverty, foster the development of education, culture, sport, public

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[916] Federal Law 12304/2010 [Brazil]; Bruno De Luca Drago, 'Brazil: Pre-Salt: A New Legal Framework for the Oil Industry in Brazil' 17 January 2011, available at: http://www.mondaq.com/brazil/x/120464/PreSalt+A+New+Legal+Framework+for+the+Oil+Industry+in+Brazil, last accessed 27 August 2017; Fabricio Germano Alves and Yanko Marcius de Alencar Xavier, 'The Evolution of Brazilian Oil, Gas and Biofuel Industry Regulations' in Yanko Marcius de Alencar Xavier (ed), *Energy Law in Brazil* (Springer 2015) 88-89.

[917] Yanko Marcius de Alencar Xavier and Anderson Souza da Silva Lanzillo, 'The Regulation of Oil and Gas Industry Concerning Exploration and Production in Presalt Layer' in Yanko Marcius de Alencar Xavier (ed), *Energy Law in Brazil* (Springer 2015) 45.

[918] Federal Law 12351/2010 [Brazil].

[919] Article 42, Federal Law 12351/2010 [Brazil]; Yanko Marcius de Alencar Xavier and Anderson Souza da Silva Lanzillo, 'The Regulation of Oil and Gas Industry Concerning Exploration and Production in Presalt Layer' in Yanko Marcius de Alencar Xavier (ed), *Energy Law in Brazil* (Springer 2015) 100.

[920] Yanko Marcius de Alencar Xavier and Anderson Souza da Silva Lanzillo, 'Oil and Natural Gas Royalties and Social Development in Brazil' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 280.

health, science and technology, and address environmental protection and climate change.[921]

Further, Article 231(3) of the Brazilian Constitution establishes that exploitation of mineral resources in indigenous lands may only be carried out with authorization of the National Congress after having heard the communities affected, and those communities are guaranteed participation in the results of those activities.[922]

7. Canada

In Canada, much of the oil and gas regulation is province-based,[923] which is also the case with environmental regulation.[924] Additionally, most oil and gas resources are owned by the provinces. The exceptions are in some provinces where historically they are owned by the land-owner and those on federal lands and off-shore. Where they are owned by the province, this means that benefits go back to the province, though not necessarily the specially affected local community.

In *Mobil v Canada*, Canada argued that the purpose of a modification in legislation in the Province of Newfoundland and Labrador, changing qualitative to

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[921] Article 47, Federal Law 12351/2010 [Brazil]; Yanko Marcius de Alencar Xavier and Anderson Souza da Silva Lanzillo, 'The Regulation of Oil and Gas Industry Concerning Exploration and Production in Presalt Layer' in Yanko Marcius de Alencar Xavier (ed), *Energy Law in Brazil* (Springer 2015) 101.

[922] Article 231(3), Constitution [Brazil]; Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 354.

[923] Alastair Lucas and Veronica Potes, 'Voluntary Approaches and Formal Regulation: Climate Change and Canada's Energy Sector' in Barry Barton, Alastair Lucas, Lila Barrera-Hernández, and Anita Rønne (eds), *Regulating Energy and Natural Resources* (OUP 2006) 321.

[924] Alastair Lucas and Veronica Potes, 'Voluntary Approaches and Formal Regulation: Climate Change and Canada's Energy Sector' in Barry Barton, Alastair Lucas, Lila Barrera-Hernández, and Anita Rønne (eds), *Regulating Energy and Natural Resources* (OUP 2006) 320.

quantitative requirements of research and development (R&D) and education and training (E&T), was based on the intention to establish a 'lasting economic legacy' for the local population.[925] This is described in Canada's Countermemorial on the Merits as local concern on sustainable development after the exhaustion of oil.[926] Canada noted that 'conducting R&D and supporting E&T in the host country are part of the mechanisms used to promote sustainable development', referring to the latter as 'one of the express goals set out in the preamble of the NAFTA' as well as highlighting the link between R&D and development as envisioned in the Rio Declaration, the WTO and the OECD. [927] Canada does not appear to argue that there is an obligation to enforce this type of legislation to protect the local population and thus there is no indication of *opinio juris* arising from this practice. However, Canada does refer to the protection of the local population as the underlying policy for the measures.

Additionally, Canada argues that R&D requirements to support local sustainable development are common in other jurisdictions like Norway and Brazil.[928] Although Canada indicated that these measures were adopted in other jurisdictions, it does not seem clear why it referred to the fact that these measures were not 'uncommon' in other jurisdictions as no argument is then developed on this basis. The tribunal does not refer to these references by Canada in its decisions.

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[925] *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) para 46.

[926] Canada's Counter Memorial (1 December 2009) para 1 in *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No. ARB(AF)/07/4.

[927] ibid para 170.

[928] ibid, para 124.

Claimants in this case argued that GA Resolution 1803 'was considered to constitute customary international law at the time it was passed', emphasizing it as a reflection of the 'principle' that breach of a contract between a State and a foreign investor 'can constitute a violation of international law'.[929] Canada responded that this view 'has since been definitively rejected', relying on Judge Greenwood's analysis of the United Nations debates regarding the Charter on Economic Rights and Duties of States.[930]

Lone Pine v. Canada, another pending investment case against Canada, was brought by Lone Pine Resources, a company that had obtained (through a series of agreements) exploration permits in the St. Lawrence River basin in Quebec, to drill for shale gas in that area.[931] In 2011 the National Assembly of Quebec revoked any existing oil and gas exploration and production licences for that area.[932] Although there are no whereas clauses in the bill and no decisions out yet in the arbitration proceedings, Canada has held that this bill was adopted in order to protect the environment and on the basis of an expert report that explained the environmental challenges of shale gas exploration and production.[933] In particular, Canada held that the principles of sustainable development reflected in the law on sustainable development[934] 'obligated the public administration of Quebec to consider within the framework of different measures, 16 principles developed by international

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[929] Mobil's Reply Memorial (8 April 2010) para 135 in *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No. ARB(AF)/07/4.

[930] Canada's Rejoinder (9 June 2010) paras 145-146 in *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No. ARB(AF)/07/4.

[931] *Lone Pine Resources Inc v. Canada*, UNCITRAL Case, Notice of Arbitration (6 September 2013).

[932] Bill 18 (2011), An Act to limit oil and gas activities [Quebec, Canada].

[933] *Lone Pine Resources Inc v. Canada*, UNCITRAL Case, Counter Memorial (24 July 2015) para 516.

[934] Loi sur le développement durable, RLRQ, Chapter D-8.1.1 (2011) [Quebec, Canada].

environmental law over 20 years' including participation of citizens and protection of the environment.[935]

As regards the issues of compensation for damage in specially affected local communities, this can be especially dramatic in cases of offshore drilling and indigenous communities whose survival is based on natural resources. After the *Deepwater Horizon* incident in the Gulf of Mexico, Canada's National Energy Board (regulator of offshore drilling in Canada's northern waters) undertook a review of the issue of offshore drilling in the Canadian Arctic.[936] Although the existing measures do not seem to be sufficient to guarantee that in the event of a blowout the local communities could be sufficiently compensated,[937] the National Energy Board acknowledged their responsibility to protect the safety of the workers, the public and the environment.[938]

As regards the issue of participation of local communities, in 2013 Alberta published a Discussion Paper on the regulation of unconventional oil and gas[939] in

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[935] *Lone Pine Resources Inc v. Canada*, UNCITRAL Case, Counter Memorial (24 July 2015) para 110 (free translation, the original states: '*oblige l'administration publique du Québec à prendre en compte dans le cadre de ses différentes actions 16 principes développés par le droit international de l'environnement depuis plus de 20 ans*'.).

[936] National Energy Board, 'The Past is always Present – Review of Offshore Drilling in the Canadian Arctic – Preparing for the Future' (December 2011) 2, available at: http://www.neb-one.gc.ca/nrth/rctcffshrdrllngrvw/2011fnlrprt/2011fnlrprt-eng.pdf, last accessed 10 November 2017.

[937] Nigel Bankes and Astrid Kalkbrenner, 'Liability for Oil Spills from Oil and Gas Operations in Canada's Arctic Waters' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds.), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 222.

[938] National Energy Board, 'The Past is always Present – Review of Offshore Drilling in the Canadian Arctic – Preparing for the Future' (December 2011) 1, 54, available at: http://www.neb-one.gc.ca/nrth/rctcffshrdrllngrvw/2011fnlrprt/2011fnlrprt-eng.pdf, last accessed 10 November 2017.

[939] Alberta Energy Resources Conservation Board, 'A Discussion Paper: Regulating Unconventional Oil and Gas in Alberta' (December 2012), available at: https://www.aer.ca/documents/projects/URF/URF_DiscussionPaper_20121217.pdf, last accessed 10 November 2017; Alastair R. Lucas, Theresa Watson and Eric Kimmel, 'Regulating Multistage Hydraulic Fracturing: Challenges in a Mature Oil and Gas Jurisdiction' in Donald N. Zillman, Aileen

which it specifically addressed the issue of involving local communities in the project.[940] Canada's position on the requirements of free, prior and informed consent has shifted, perhaps in light of reports by human rights bodies.[941] On the basis of the Report of the Special Rapporteur on the rights of indigenous people,[942] Canada has stated that it is undertaking measures to increase participation of indigenous communities including through consultation.[943] More recently, the Committee on the Elimination of Racial Discrimination noted that 'environmentally destructive decisions for resource development which affect their [of indigenous peoples] lives and territories continue to be undertaken without the free, prior and informed consent of the indigenous peoples, resulting in breaches of treaty obligations and international human rights law'.[944] It therefore recommended that

McHarg, Adrian Bradbrook, and Lila Herrera-Hernández (eds), *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014) 133.

[940] Alberta Energy Resources Conservation Board, 'A Discussion Paper: Regulating Unconventional Oil and Gas in Alberta' (December 2012) 3, 13, available at: https://www.aer.ca/documents/projects/URF/URF_DiscussionPaper_20121217.pdf, last accessed 10 November 2017.

[941] Though the causality here may be questioned, some authors state that the increased attention to the needs of aboriginal people affected by energy development is because 'the unique social structure of aboriginal people must be taken into account if consultation and participation is to be effective' and that 'aboriginal rights are recognized and protected under section 35 of the Constitution Act 1982', Alastair Lucas and Veronica Potes, 'Voluntary Approaches and Formal Regulation: Climate Change and Canada's Energy Sector' in Barry Barton, Alastair Lucas, Lila Barrera-Hernández, and Anita Rønne (eds), *Regulating Energy and Natural Resources* (OUP 2006) 325.

[942] Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, 'The situation of indigenous peoples in Canada', Addendum, UN Doc. A/HRC/27/52/Add.2 (4 July 2014) paras 6-77.

[943] Statement of the Permanent Mission of Canada on the Report of the Special Rapporteur on the Rights of Indigenous Peoples of 30 October 2014, available at: http://www.international.gc.ca/genev/statements-declarations/report_special_rapporteur-rapport_rapporteur_special.aspx?lang=eng, last accessed 3 November 2017.

[944] CERD, Concluding Observations on Canada, UN Doc CERD/C/CAN/CO/21-23 (13 September 2017) para 19.

Canada '[i]ncorporate the free, prior and informed consent principle in the Canadian regulatory system'.[945]

Notably, in its written response to the questions posed by CERD Canada highlighted the public release of its Principles Respecting the Government of Canada's Relationship with Indigenous Peoples in July 2017. The Government specifically referred to Principle No. 6, in which it acknowledges the importance of consultation when action is proposed which would impact indigenous peoples' rights and resources, including the Supreme Court's confirmation that 'the standard to secure consent of indigenous peoples is strongest in the case of Aboriginal title lands'.[946] It also recognised that free, prior and informed consent is 'identified' in UNDRIP[947] and that these principles are being used as part of a review to 'ensure that Canada is meeting its constitutional obligations with respect to Aboriginal and treaty rights and adhering to international human rights standards, including' UNDRIP.[948]

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[945] CERD, Concluding Observations on Canada, UN Doc CERD/C/CAN/CO/21-23 (13 September 2017) para 20.

[946] *Delgamuukw v British Columbia* [1997] 3 SCR 1010, para 168 [Canada]; Principles respecting the Government of Canada's relationship with Indigenous Peoples (July 2017); Written Response to questions posed by the Committee on the Elimination of Racial Discrimination during the Interactive Dialogue with Canada on August 14-15, 2017 (26 September 2017); Alastair R. Lucas, 'Canadian Participatory Rights in Mining and Energy Resource Development: The Bridges to Empowerment?' in Donald Zillman, Alastair Lucas, and George (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in Sustainable Development of Mining and Energy Resources* (OUP 2002) 305, 309.

[947] Though it is worth noting that there does not seem to be a veto right vested in indigenous or other communities in Canada (or the United States). *See* Judy Stewart, Alastair Lucas and Giorilyn Bruno, 'A transboundary comparative analysis of opportunities for public participation in the regulation of hydraulic fracturing in the Bakken Shale Formation' [2017] J Energy and Natural Resources L 51-52.

[948] Written Response to questions posed by the Committee on the Elimination of Racial Discrimination during the Interactive Dialogue with Canada on August 14-15, 2017 (26 September 2017).

Canada's change in position regarding FPIC is particularly interesting given its initial rejection of UNDRIP, in particular its 'concerns' with respect to 'free, prior and informed consent when used as a veto', and its description of provisions 'dealing with the concept of free, prior and informed consent [as] unduly restrictive'.[949]

CERD also suggested that Canada ought to adopt judicial and non-judicial remedies to ensure access to justice for violations of human rights by transnational corporations incorporated in Canada.[950] This recommendation, also made to the United States, is interesting given that it implies that Canada would have an international law obligation to enforce the protection of such rights even when the acts were committed outside of its territory.

8. Colombia

Colombian law requires that an environmental licence be granted to hydrocarbon exploration and production projects.[951] Decree 2820/2010, where that requirement is made out, is based on Law 99/1993. Neither of these regulations refers to international law principles.

As to international law instruments related to participation of indigenous communities, Colombia ratified the ILO Convention 169 in 1991. Further, it abstained from voting on the General Assembly Resolution approving UNDRIP in 2007, but later endorsed it in 2009.[952]

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[949] Statement by Mr. McNee (Canada), UN Doc. A/61/PV.107 (13 September 2007) 12-13.

[950] CERD, Concluding Observations on Canada, UN Doc CERD/C/CAN/CO/21-23 (13 September 2017) para 21-22.

[951] Article 8, Decree 2820/2010 [Colombia]; Milton Fernando Montoya Pardo, 'Regulation of Unconventional Reservoirs in Colombia' in Donald N. Zillman, Aileen McHarg, Adrian Bradbrook, and Lila Herrera-Hernández (eds), *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014) 244.

[952] UN Doc. A/61/251 (13 September 2007).

As regards previous consultation with indigenous peoples, the Colombian government (and the Constitutional Court[953]) has taken significant steps to confirm the mandatory nature of this previous consultation. Previous consultation has been acknowledged and used, albeit unsystematically, on hydrocarbon projects in Colombia since 1994.[954] In 2001, the ILO Governing Body established that Colombia did not meet the 'fundamental requirements of prior consultation and participation' required by articles 2, 6, 7 and 15 of the Convention, highlighting that '[t]he adoption of rapid decisions should not be to the detriment of effective consultation for which sufficient time must be given to allow the country's indigenous peoples to engage their own decision-making processes'.[955] In 2013, Decree 2613/2013 established that, on the basis of the ILO Convention 169, the national government had a duty to consult with interested peoples when legislative or administrative measures could affect them directly.[956] Attempts at legislating prior consultation have been severely criticised, due to lack of consultation with minority groups in their preparation.[957]

Colombia's Constitutional Court, relying on ILO Convention 169, its incorporation in Colombian law, Constitutional principles, UNDRIP, the case law of

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[953] Due Process of Law Foundation, *Derecho a la consulta y al consentimiento libre, previo e informado en América Latina: avances y desafíos para su implementación en Bolivia, Brasil, Chile, Colombia, Guatemala y Perú* (2015) 47-51.

[954] Gloria Amparo Rodríguez, *De la Consulta Previa al Consentimiento Libre, Previo e Informado a Pueblos Indígenas en Colombia* (U. del Rosario, 2014) 141-146.

[955] ILO Governing Body, 282nd session, November 2001, representation under Article 24 of the ILO Constitution, Colombia, GB.282/14/3, para 79; Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 348.

[956] Preamble, Decree 2613/2013 [Colombia]; *see also* Presidential Directive 1/2010 [Colombia].

[957] Due Process of Law Foundation, *Derecho a la consulta y al consentimiento libre, previo e informado en América Latina: avances y desafíos para su implementación en Bolivia, Brasil, Chile, Colombia, Guatemala y Perú* (2015) 28-31.

the Inter-American Court of Human Rights and the principle of proportionality, has laid to rest the internal discussion on whether the prior consultation requirement has given indigenous (although in Colombia's case, this includes other minority groups) communities a 'veto' power of projects which affect those groups.[958] The Court notes that free, prior, informed consent is necessary in cases where these groups would be removed from their territory or where their physical or cultural existence is threatened or dangerous materials would be used on their territory.[959] Though the case was based on a claim regarding the constitutionality of certain articles of the Mining Code, the Court's reasoning is applicable to any situation where groups would be affected as described.[960] This could include hydrocarbon exploration and production.

The most recent review by the UN's Committee on Economic, Social and Cultural Rights' studied these decisions of the Constitutional Court and, although it applauded its findings, it noted that the process of implementation of free, prior and informed consent was 'inadequate', particularly in relation to natural resource

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[958] *Laura Juliana Santacoloma Méndez and Rodrigo Elías Negrete Montes*, Constitutional Claim (*Demanda de inconstitucionalidad*), Constitutional Court, Grand Chamber, Decision C-389/2016 [Colombia]; Juan C. Herrera, 'The Right of Cultural Minorities to Binding Consent: Case Study of Judicial Dialogue in the Framework of a *Ius Constitutionale Commune en América Latina*', MPIL Research Paper Series No. 2017-11. In previous cases the Court went so far as to halt projects where free, prior and informed consent of the affected communities had not been sought (Constitutional Court of Colombia (*Acción de Tutela*), Chamber 5, T-129 (2011) [Colombia]).

[959] *Laura Juliana Santacoloma Méndez and Rodrigo Elías Negrete Montes*, Constitutional Claim (*Demanda de inconstitucionalidad*), Constitutional Court, Grand Chamber, Decision C-389/2016 [Colombia].

[960] Some authors have been critical of this finding of the Constitutional Court, holding that 'the final decision on the development of mining projects should remain with the national authorities', Milton Fernando Montoya, 'Participation of Territorial Authorities in Mining Activities in Colombia' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* 370 (OUP 2016). This is a fairly common discussion in Latin American countries where the arguments on the federalist/unitary character of the country and natural resources are frequent. As regards issues of local development, that discussion is not relevant so long as the local community's role has been acknowledged (either at the municipal, state or national level).

development and exploitation projects.[961] As a result, it urged Colombia to '[e]nsure that consultations held with a view to obtaining … free, prior and informed consent to decisions … are conducted as an unavoidable and timely step' and to '[s]tep up its efforts to give full effect to Constitutional Court decisions in favour of indigenous and Afro-Colombian peoples'.[962]

9. Ecuador

In the myriad of cases that have arisen out of the conflict between Texaco, Chevron and Ecuador, there are many issues that are not relevant here.[963] Most of the conflicts that have developed between these parties refer to acts that occurred before 1995. However, one relevant area relates to the environmental obligations for which Chevron (ex Texaco) has been found liable in Ecuadorian Courts. In that regard, these courts have looked to several different sources (laws, the constitution and international obligations) of legislation to determine whether Chevron (or Texaco Petroleum) acted in breach of its obligations and had to compensate certain victims.

The main issue that underlies the international case law on this dispute, regarding the relationship between the current local judicial disputes and the

[961] ECOSOC, Concluding observations on Colombia, UN Doc. E/C.12/COL/CO/6 (19 October 2017) para 17.

[962] ECOSOC, Concluding observations on Colombia, UN Doc. E/C.12/COL/CO/6 (19 October 2017) para 18.

[963] There is extensive scholarly work on the Texaco/Chevron v saga. See, for example, Judith Kimmerling, 'Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and *Aguinda v Texaco*' (2006) 38 J Intl L and Politics 413; Howard Erichson, 'The Chevron-Ecuador Dispute, Forum non Conveniens, and the Problem of ex Ante Inadequacy' (2013) 1 Stanford J Complex Litigation 417; Chiara Giorgetti, 'Mass Tort Claims in International Investment Proceedings: What are the Lessons from the Ecuador-Chevron Dispute?' (2013) 34 U of Pennsylvania J of Intl L 787; Zachary Douglas 'International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed' (2014) 63(4) ICLQ 867; Christina Parajon Skinner, 'RICO and International Legal Ethics' (2014) Yale J Intl L Online 20.

Settlement Agreements of 1995 and 1998, will not be addressed here.[964] What is relevant for our purposes is the underlying obligation on which the Ecuadorian courts found Chevron responsible. The plaintiffs that brought the local case before Ecuadorian courts [965] were '42 citizens … who have not requested personal compensation for any damages, but have demanded the protection of a collective right, in accordance with the terms of the LGA [*Ley de Gestión Ambiental*], the reparation of environmental damage, that according to the arguments in these proceedings, affects over 30,000 persons, that are undetermined'.[966] That is, the case was brought in representation of 30,000 people, whose collective characteristic was to have been affected by the environmental damage argued by the 42 named claimants in the proceedings. There has been some discussion regarding the identity of these claimants and whether this was a diffuse or collective claim or a collection of individual claims. For the purposes of this thesis, what is relevant is that the claim was made by or on behalf of persons arguably locally affected by the hydrocarbon

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[964] *Chevron Corporation and Texaco Petroleum Corporation v Ecuador*, UNCITRAL Case, PCA Case No. 2009-23, First Partial Award on Track 1 (17 September 2013); *Chevron Corporation and Texaco Petroleum Corporation v Ecuador*, UNCITRAL Case, PCA Case No. 2009-23, Decision on Track 1B (12 March 2015).

[965] The suit was originally brought as a class action suit, in representation of 30,000 inhabitants of the Oriente Region in Ecuador, before the Southern District of New York but was rejected on the basis of *forum non conveniens* and international comity, *see Aguinda v. Texaco, Inc.*, 945 F.Supp. 625 [United States]; *see also* Howard Erichson, 'The Chevron-Ecuador Dispute, Forum Non Conveniens, and the Problem of Ex Ante Inadequacy' (2013) 1 Stanford J. Complex Litigation 417.

[966] *Maria Aguinda and others. v. Chevron Texaco Corporation*, Proceeding No. 002-2003 (at first instance), Provincial Court of Sucumbíos, Sole Division (*Corte Provincial de Justicia de Sucumbíos, Sala Única de la Corte Provincial de Justicia de Sucumbíos*), Nueva Loja, Ecuador, Decision of 14 February 2011, p. 33 [Ecuador] (free translation) ('*42 ciudadanos … quienes no han pedido indemnización a título personal de ningún daño, sino que han demandado la protección de un derecho colectivo, conforme la ritualidad que dispone la LGA, la reparación del daño ambiental, que según se ha alegado en este juicio, afecta a más de 30000 personas, siendo éstas supuestamente indeterminadas*'). Note that the arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador* refers to 48 plaintiffs. *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*, UNCITRAL PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 February 2012) para 3.34.

exploration and production activities[967] and that there were representatives of local indigenous communities amongst the claimants.[968]

On the merits, as noted, before the local courts the claimants referred both to local legislation—the 1999 Environmental Management Act—and to international instruments which local law reflects. In the first place, the Environmental Management Act reflects principles enshrined in the 1992 Río Declaration on Sustainable Development to which it expressly refers.[969] The courts of Ecuador noted that provisions like those of the Environmental Management Act referred to in the decision are applied in similar ways in other countries like Chile, Argentina, Costa Rica and Panama.[970] Additionally they noted that the principle that 'he who contaminates pays' (the polluter pays principle) has its origin in international law, particularly in Principle 22 of the Stockholm Declaration and Principle 13 of the Río Declaration.[971] The courts also referred to Principle 1 of the Río Declaration and the Johannesburg Declaration on the rights to sustainable development and a healthy life in harmony with nature.[972] Further, the courts indicated that the rights of

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[967] The international arbitration tribunal refers to the local complaint (filed on 7 May 2003) describing the plaintiffs as '"domiciled in the Secoya Community of San Pablo de Aguarico, Canton of Shushufundi, Province of Sucumbíos" and "Ecuadorian nationals engaged in farming activities"' *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*, UNCITRAL PCA Case No. 2009-23, Decision on Track 1B (12 March 2015) para 159. At the time of this writing the original complaint is not publicly available.

[968] *See* Patrick Radden Keefe, 'Reversal of Fortune: The Lago Agrio Litigation' (Spring 2013) 1:2 Stanford J of Complex Litigation 199, 200.

[969] *Ley de Gestión Ambiental* [Environmental Management Act] No 37/RO/ 245, s 3 [Ecuador].

[970] *Maria Aguinda and others v Chevron Texaco Corporation*, Casación Decision of 12 November 2013, pp. 54-55.

[971] ibid, p. 55

[972] ibid, pp. 137-138.

indigenous peoples under article 15 of ILO Convention 169 were invoked by the claimants.[973]

Broad reference to several international instruments (or meetings) whose object includes preserving the environment for future generations was also made in the decision, demonstrating international concern regarding the protection of the environment: Stockholm Declaration, [974] World Charter for Nature, [975] Rio Declaration,[976] UN Framework Convention on Climate Change,[977] Kyoto Protocol,[978] Millennium Summit, Copenhagen Agreement,[979] amongst others. These references were made in the context of referring to the concept of 'collective rights' to make claims in relation to the environment, whilst indicating that on environmental conservation each country has established legal instruments to guarantee a healthy environment and that Ecuador had done this through the Environmental Management Act.[980]

In the international arbitration claim Chevron and Texaco argued that, in allowing these local proceedings to move forward, Ecuador was, through various alternative explanations that are not relevant here,[981] violating its obligations under

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[973] ibid, p. 183

[974] Declaration of the United Nations Conference on the Human Environment, A/CONF.48/14 (16 June 1972)

[975] World Charter for Nature, UN Doc No A/RES/37/7 (28 October 1982)

[976] Rio Declaration on Environment and Development, UN Doc No A/CONF.151/26 (12 August 1992).

[977] United Nations Framework Convention on Climate Change, entered into force on 21 March 1994.

[978] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted on 11 December 1997, entry into force on 16 February 2005) 37 Intl L Materials 22 (Kyoto Protocol to the United Nations Framework Convention, entered into force on 16 February 2005.

[979] Copenhagen Accord, UN Doc No FCCC/CP/2009/L.7 (18 December 2009)

[980] *Maria Aguinda and others v Chevron Texaco Corporation*, Casación Decision of 12 November 2013, pp. 178-179.

[981] Chevron and Texaco specifically argued that: 'through the Respondent's actions and inactions in breach of its several obligations under the BIT to both Claimants, the Respondent is improperly

the U.S.-Ecuador BIT.[982] They argued, amongst other allegations, that 'the Lago Agrio Plaintiffs do not have separate rights which might be affected by this arbitration, but rather that the rights which those plaintiffs seek to assert against Chevron are the same rights which (so the Claimants allege) the Respondent agreed to release in the settlement agreements'.[983] Ecuador further argued, in the international arbitration, that in 1995 'it had no power to represent the Ecuadorian people with regard to their individual rights and that individuals could bring personal claims and recover damages'[984] and that diffuse or collective environmental rights 'did not exist under Ecuadorian law until 1998/1999'.[985] This is an issue that was addressed at length by the international arbitral tribunal concluding that 'the Lago Agrio Complaint, as originally filed, does include individual claims and cannot be read … as pleading "exclusively" or "only diffuse claims"'.[986] This is useful to establish that the claims

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seeking to impose upon Chevron the public remediation obligations and liabilities that belong exclusively to the Respondent and PetroEcuador; that never belonged to Chevron; from which the Respondent and PetroEcuador expressly released TexPet, its parent company, affiliates and principals (thereby including Chevron); that rather than honouring its obligations under the 0BIT and the relevant agreements made with TexPet, the Respondent has chosen to collude unlawfully with the Lago Agrio plaintiffs in order to evade the Respondent's own legal responsibilities and to secure an illegitimate financial windfall from Chevron; that the Respondent has pursued a coordinated strategy with the Lago Agrio plaintiffs that involves the Respondent's various state organs; that the Respondent's executive branch has publicly announced its support for the Lago Agrio plaintiffs; that the Respondent has sought and obtained the sham criminal indictments of two Chevron attorneys (Messrs Viega and Pérez) in an attempt to undermine the 1995 Settlement Agreement and to interfere with Chevron's defence in the Lago Agrio litigation; that the Respondent's judicial branch has conducted the Lago Agrio litigation in total disregard of Ecuadorian law, international standards of fairness and Chevron's basic rights as to due process and natural justice, in co-ordination between the Respondent and the Lago Agrio plaintiffs.' *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*, UNCITRAL PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 February 2012) para 3.39.

[982] *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*, UNCITRAL PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 February 2012) para 3.39.

[983] ibid, para 3.127.

[984] *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*, UNCITRAL PCA Case No. 2009-23, First Partial Award on Track I (17 September 2013) para 58.

[985] ibid, para 58.

[986] *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*, UNCITRAL PCA Case No. 2009-23, Decision on Track 1B (12 March 2015) para 183.

allowed, and admitted, under Ecuadorian law included individual claims by members of the local community with regard to environmental damages and remediation.

Another, less publicised decision in Ecuador relating to the development or protection of local communities is the *Delfina* claim, in which a broad (but individual) claim was made regarding relief for damages caused by a refinery in the form of remedial works for the community.[987] In this case, the claim was brought against Petroecuador (the national oil company). Here the court granted relief to the community, which was represented as a legal entity before the court. Thus, the relevance of this decision for this thesis is limited as, though *de facto* the reparations were in the form of infrastructure for the community, *de lege* the claimant was a legal entity.

In *Perenco v Ecuador*, another international arbitration related to Ecuador's oil and gas industry and damage to local communities, Ecuador argued, in part, that 'an operator that stays within the limits prescribed by the regulations may still create an impact on the environment which can constitute an environmental harm which must be remediated'.[988] It made this argument on the basis of obligations based 'on the 2008 Constitution's recognition that Nature ("*pacha mama*") was itself the subject of rights as well as codification of the principles of sustainable development and the right of the human being to live in an environment free from

[987] *Delfina Case*, First Commercial and Mercantile Division of the Supreme Court of Justice [*Primera Sala de lo Civil y Mercantil de la Corte Suprema de Justicia*], Judges Drs. Ernesto Albán Gómez, Santiago Andrade Ubidia and Galo Galarza Paz, Case No. 31-2002, R.O. No. 43 (19 March 2003) [Ecuador].

[988] *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015) para 83.

contamination'.[989] Though the tribunal rejected that this argument could be relied on to determine any responsibility prior to the entry into force of the 2008 Constitution (where the obligation was made manifest), it did accept that as from its entry into force Perenco's responsibility for environmental damage shifted from fault-based liability regime to strict-liability regime. That is, in relation to an on-going agreement it is possible to change the liability regime in relation to the environment so long as it is done so expressly. However, that change could not be applied retroactively.

In *Kichwa v Ecuador*, a case before the Inter-American Court of Human Rights, the petition was brought by the Kichwa Indigenous People of Sarayaku, the *Centro de Derechos Económicos y Sociales* and the Center for Justice and International Law. The complaint was based on violations of requirements of prior consultation and consent of the Sarayaku peoples for a private oil company to carry out oil exploration and production activities on the Sarayaku territory.[990] Additionally, allegations were made regarding situations of risk for the population, preventing them from seeking means of subsistence, limiting their freedom of movement, as well as lack of judicial protection and failure to observe judicial guarantees.[991] Ecuador acknowledged its responsibility to the Sarayaku peoples through a general statement made by the Secretary of Legal Affairs of the Presidency, in relation to all

[989] ibid, para 209.

[990] *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Judgment (Merits and Reparations) (27 June 2012) para 2.

[991] ibid.

the allegations made and the need to provide reparations, as well as acknowledging that 'there will be no more oil exploitation without prior consultation'.[992]

Further, the decision refers to a local declaration by the ombudsman of Pastaza in 2003 holding that the issues which were underway in relation to the Sarayaku peoples were a violation of '*inter alia*, Articles 84(5) and 88 of the Ecuadorian Constitution, ILO Convention No. 169, and Principle 10 of the Río Declaration on Environment and Development'.[993] Specifically on the issue of prior consultation for exploitation of natural resources as reflected in ILO Convention no. 169, after enumerating the number of countries who incorporated this requirement in their domestic laws[994] or through domestic courts[995], the Court concluded that 'the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law'[996] and, as such, 'nowadays the obligation of States to carry out special and differentiated consultation processes when certain interests of indigenous peoples and communities are about to be affected is an obligation that has been clearly recognized'.[997]

The Court finally found that Ecuador was liable for violations of the right to consultation, to indigenous communal property, and to cultural identity; the right to life and personal integrity; the right to judicial guarantees and judicial protection,

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[992] ibid, para 23.

[993] ibid, para 103.

[994] Argentina, Bolivia, Chile, Colombia, United States, Mexico, Nicaragua, Paraguary, Perú, Venezuela.

[995] Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Peru, Venezuela, Canada, United States, New Zealand.

[996] *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Judgment (Merits and Reparations) (27 June 2012) para 164. The court did not expressly refer to a requirement of consent under international law.

[997] ibid, para 165.

reflected in articles 1(1), 2, 4(1), 5(1), 8(1), 21 and 25 of the American Convention.[998]

Following on from that decision by the Inter-American Court, the UN Economic and Social Council also expressed concern regarding the 'failure to undertake consultations as a basis for obtaining the prior, freely given and informed consent of indigenous peoples and nationalities for natural resource development projects that affect them.' [999] The Ecuadorian Constitution (reformed in 2008) foresees requirements of consultation and participation in the benefits of exploration and production of non-renewable resources on indigenous land.[1000] However, these are not requirements of consent. In fact, the Constitution states that if consent is not obtained the process will move forward in accordance with the Constitution and the law.

10. India

In India, legislation regarding protection and benefits to local communities with regard to oil and gas exploration and production is dealt with under general legislation regarding the environment (1986) [1001] and environmental impact

[998] ibid, para 341.

[999] ECOSOC, Concluding Observations on Ecuador, UN Doc. E/C.12/ECU/CO/3 (13 December 2012) para 9. The Council also noted that Executive Decree 1247 of August 2012 did not comply with these requirements or those of the Inter-American Court decision; Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 342.

[1000] Art. 57(7), Constitution [Ecuador].

[1001] Environment (Protection) Act (1986) [India]. This act was enacted to give 'effect to India's international law and treaty obligations … enacted pursuant to the United Nations Conference on the Human Environment in 1972, also known as the Stockholm Conference', Krishna Vijay Singh and Shephali Mehra Birdi, 'India' in Roger R. Martella Jr and J. Brett Grosko (eds), *International Environmental Law The Practitioner's Guide to the Laws of the Planet* 761 (ABA 2014).

assessments (2006).[1002] Under this legislation, there is an obligation to consult with communities about the environmental impact of projects including '[o]ffshore and onshore oil and gas exploration, development & production'.[1003]

The approval process determines whether or not the project has Environmental Clearance. In the case of oil and gas projects, this clearance is given at the Union level, rather than the State level.[1004] The steps leading up to this environmental clearance include carrying out an environmental impact assessment, which is then subject to 'public consultation' by 'local affected persons and others who have a plausible stake in the environmental impacts of the project or activity design as appropriate'.[1005] However, concerns have been raised about the efficacy of the public consultation process given the exceptions to this requirement, for example in projects 'concerning national defence and security or involving other strategic considerations as determined by the Central Government',[1006] as well as the quality of the information provided.[1007] Though there may be justified concerns in this area, it seems to be more an issue of implementation than legislation, which gives local communities an opportunity to participate in the decision process (although not a right to veto).

[1002] S.O. 1533 Environmental Impact Assessment Notification, Schedule (2006) [India].

[1003] Schedule 1(b), S.O. 1533 Environmental Impact Assessment Notification (2006) [India].

[1004] The Directorate General of Hydrocarbons of the Ministry of Petroleum and Natural Gas has issued a 'Procedure for environmental related clearances in oil and gas sector' available at: http://dghindia.gov.in/assets/downloads/sop_env.pdf, last accessed 10 November 2017.

[1005] §3(i), S.O. 1533 Environmental Impact Assessment Notification [India]; Lavanya Rajamani, 'Public Participation in Indian Environmental Law' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 400.

[1006] §3(i)(f), S.O. 1533 Environmental Impact Assessment Notification [India].

[1007] Lavanya Rajamani, 'Public Participation in Indian Environmental Law' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 402-405.

Concerns have also been raised regarding increasing local opposition to projects relating to oil and gas exploration and production. This is particularly the case where 'there is growing hostility to resource development projects given that adequate policy frameworks that reflect benefit sharing and compensation are not in place or not enforced, globally and in India'.[1008]

11. Indonesia

On 13 November 2012, the Indonesian Constitutional Court issued a decision disbanding BP Migas, the regulator established by the Indonesian government for the oil and gas sector.[1009] The basis for the decision was that the existence of an intermediary regulator 'is inconsistent with the constitution which requires the state control to provide benefits for the greatest prosperity of the people'.[1010]

The rationale for that requirement was in article 33 of the Constitution (of 1945). Although there are references in the decision to the principle of sovereignty over natural resources, there are no references to it as a principle of international law or to any related international law obligations.

As to local benefit sharing, Indonesia has a policy through which the majority of revenue of oil and gas production is kept by the central government, and the

[1008] Ligia Noronha, 'Resources' in David M. Malone, C. Raja Mohan and Srinath Raghavan (eds), *The Oxford Handbook of Indian Foreign Policy* (OUP 2015) 163.

[1009] Decision No. 36/PUU-X/2012, Constitutional Court [Indonesia]; Simon Butt and Fritz Edward Siregar, 'State Control over Natural Resources in Indonesia: Implications of the *Oil and Natural Gas Law* Case of 2012' (May 2013) 31(2) J of Energy and Natural Resources L 107; Madjedi Hasan, 'Indonesia's Petroleum Contract under Rising Nationalism Environment' (2013) 11(5) Oil, Gas and Energy L 1.

[1010] Decision No. 36/PUU-X/2012, p. 194, Constitutional Court [Indonesia]; Simon Butt and Fritz Edward Siregar, 'State Control over Natural Resources in Indonesia: Implications of the *Oil and Natural Gas Law* Case of 2012' (May 2013) 31(2) J of Energy and Natural Resources L 107; Mirza Karim, 'A controversial decision of the Constitutional Court on the Indonesian Oil and Gas Law' (2013) 6(3) J of World Energy, L and Business 260.

remaining parts are distributed to producing and non-producing districts, although there is a distinction between the revenue allocated to each of these.[1011]

Indonesia also has local content requirements in the oil and gas sector. However, when questioned about them at the WTO it stated that 'there was no obligation to prioritize the use of domestic over foreign goods and services in the energy sector'.[1012]

12. Iran

There is not much publicly available information about Iran's policies on local community development or participation in the oil and gas exploration and production phase. However, in 2011 the existing Oil Stabilization Fund—which was meant to create stability in oil revenues—was deemed a 'failure'[1013] and replaced by the National Development Fund. Amongst other objectives, the fund has as one of its purposes 'to save the shares of future generations and to transform a portion of oil revenues to productive investments'.[1014] This fund was apparently set up to complement the Oil Stabilization Fund, separating the savings and stabilization purposes of both.[1015]

[1011] Law 33/2004 [Indonesia]; Cut Dian Agustina, Ehtisham Ahmad, Dhanie Nugruho, and Herbert Siagian, 'Political economy of natural resource revenue sharing in Indonesia' [2012] Asia Research Centre Working Paper 55; Kai Ostwald, Yuhki Tajima and Krislert Samphantharak, 'Indonesia's Decentralization Experiment' (2016) 33(2) J of Southeast Asian Economies 139.

[1012] Minutes of the Meeting Held on 12 May 2017, WTO G/TRIMS/M/42 (13 July 2017).

[1013] National Development Fund of Iran, *Fund History*, available at: http://en.ndfi.ir/About-NDF/History, last accessed November 10, 2017.

[1014] National Development Fund of Iran, *Fund History*, available at: http://en.ndfi.ir/About-NDF/History, last accessed November 10, 2017.

[1015] Jedrzej George Frynas, 'Sovereign Wealth Funds and the Resource Curse: Resource Funds and Governance in Resource-Rich Countries' in Douglas Cumming, Geoffrey Wood, Igor Filatotchev, and Juliane Reinecke (eds.), *The Oxford Handbook of Sovereign Wealth Funds* (OUP 2017) 128.

Though the fund has been criticised for its lack of accountability and transparency,[1016] it is an interesting development in the policies of Iran to contemplate the importance of benefits to future generations of its current exploration and production efforts.

13. Iraq

There is not much publicly available information about the issue of local development in Iraq. However, with regard to the distribution of revenue from oil and gas exploration and production, Iraq establishes a principle of 'equitable distribution in proportion to the population of each region and with consideration of the requirements of regeneration of damaged and deprived regions'.[1017] The Kurdistan region was excluded from this distribution and granted a pre-established quota of 17%.[1018]

14. Mexico

The Mexican constitution was reformed in 2011 to incorporate certain human rights in its first chapter.[1019] This reform incorporated human rights obligations stemming from human rights treaties which Mexico had ratified and gave them constitutional status.[1020]

[1016] CCSI, *Islamic Republic of Iran Oil Stabilization Fund and the National Development Fund of Iran*, available at: https://resourcegovernance.org/sites/default/files/NRF_Iran_February_2014.pdf, last accessed November 10, 2017.

[1017] Art. 112, Constitution [Iraq]; Nima Mersadi Tabari, *Lex Petrolea and International Investment Law* (Routledge 2017) 213.

[1018] Nima Mersadi Tabari, *Lex Petrolea and International Investment Law* (Routledge 2017) 213.

[1019] Decree in which the title of chapter I was changed and reform of several articles of the Political Constitution of the United Mexican States, Official Gazette of the Federation, Mexico, 10 June 2011 [Mexico].

[1020] Art. 1, Constitution (2011) [Mexico]; Marisol Angeles Hernandez, 'La reforma en materia de hidrocarburos en México, como parte del proyecto neoliberal hegemónico violatorio de derechos

The Mexican energy reform of 2013-2014 also included a reform of legislation regarding the relationship between oil and gas exploration and production and local communities. In the President's explanation to the Senate of the amendments proposed in light of this reform in the Hydrocarbon Law, he specifically referred to the issue of the changes that were proposed with regard to social impact issues.[1021] These changes are reflected in articles 118 to 121 of the Hydrocarbon Law. President Peña Nieto explained that the implementing regulations will deal with the requirements in relation to indigenous communities pursuant to ILO Convention 169 and that these provisions of the Hydrocarbon Law guarantee that important infrastructure projects related to hydrocarbons are implemented in accordance with international obligations and the best practices of social management.[1022]

Though *de facto* social licenses were already undertaken in hydrocarbon projects in Mexico since 2001,[1023] requirements of free, prior and informed consultation with local communities[1024] with the objective of achieving an agreement or consent are now expressly set out in the new Hydrocarbon Law.[1025] The law also requires that projects should uphold the principle of sustainability and

humanos' in Marisol Angeles Hernandez, Ruth Roux, and Enoc Alejandro Garcia Rivera (eds), *Reforma en Materia de Hidrocarburos* (UNAM 2017) 150.

[1021] Letter from the President of Mexico to the President of the Senate, available at: http://cdn.reformaenergetica.gob.mx/1-ley-de-hidrocarburos.pdf, last accessed 10 November 2017.

[1022] Letter from the President of Mexico to the President of the Senate, p. 37, available at: http://cdn.reformaenergetica.gob.mx/1-ley-de-hidrocarburos.pdf, last accessed 10 November 2017.

[1023] José Juan González Márquez, 'Social and Environmental Liability of Private Companies in the Energy Sector and the Mexican Energy Reform' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 249.

[1024] There is additionally a special provision for the protection of vulnerable groups, Article 119, Hydrocarbon Law [Mexico].

[1025] Article 120, Hydrocarbon Law [Mexico].

respect for human rights of the communities and peoples of the regions where they will be carried out.[1026]

As regards the sharing of benefits, there is in play a system of benefits to the Mexican national government, as well as a Mexican Oil Stabilization Fund.[1027] Some authors believe that the issue of benefits to local communities will be further developed through the required consultation process and regulation. This remains to be seen.[1028]

15. Nigeria

Another case related to protection of local communities and human rights in the area of upstream hydrocarbon activity is *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria* of the African Commission on Human and Peoples' Rights.[1029] This case,[1030] which relates to

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[1026] Article 118, Hydrocarbon Law [Mexico].

[1027] José Juan González Márquez, 'Social and Environmental Liability of Private Companies in the Energy Sector and the Mexican Energy Reform' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 252-256.

[1028] José Juan González Márquez, 'Social and Environmental Liability of Private Companies in the Energy Sector and the Mexican Energy Reform' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP, 2016) 256-257.

[1029] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, ACHPR Case No. 155/96 (13 and 27 October 2001). For further reference to this decision see, for example, Dinah Shelton 'Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria Case No. ACHPR/COMM/A044/1' (2002) 96(4) AJIL 937; Fons Coomans 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52(3) ICLQ 749; Justice C. Nwombike 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria' (2005) 1(2) African J L Studies 129.

[1030] Related cases were brought against Royal Dutch Shell before U.S. Courts on the basis of the Alien Tort Statute alleging that Shell had cooperated in the killings of members of the Ogoni People. This aspect of the case is not relevant for this chapter of the thesis. Three of these cases (*Ken Wiwa and others v Shell Petroleum N.V. formerly Royal Dutch Shell Petroleum Company*, 96 Civ 8386 (KMW)(HBP) [United States]; *Shell Transport and Trading, Ltd., formerly The "Shell" Transport and Trading Company plc; Ken Wiwa and others v Brian Anderson*, 01 Civ 1909 (KMW)(HBP) [United States]; and *Ken Wiwa and others v Shell Petroleum Development Company of Nigeria Limited*, 01 Civ

events taking place since the 1950s in the oil and gas exploration and production in Nigeria[1031], was brought before the African Commission alleging violations of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter. With regard to Nigeria's position, the decision limits its description of the Nota Verbale of the government as admitting 'the gravamen of the complaints' but going 'on to state the remedial measures being taken […] by the new civilian administration'.[1032]

The African Commission found that Nigeria had acted in violation of these articles of the Charter, amongst other things because 'the Nigerian Government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is a violation of Article 21 of the African Charter' on Human and Peoples' Rights.[1033] Further, the Commission found that the degradation of the environment was also a human rights violation: '[t]he pollution and environmental degradation to a level humanely unacceptable has it living in the Ogoni land a nightmare'.[1034] Finally, it

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2665 (KMW)(HBP) [United States]) were settled in 2009 for $15.5 million. The settlement agreement is available at: http://ccrjustice.org/sites/default/files/assets/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf, last accessed 2 November 2015. While a fourth (10-1491 *Kiobel v Royal Dutch Petroleum Co* 133 S.Ct. 1659 (2013) [United States]) was dismissed by the U.S. Supreme Court on the basis that the ATS does not apply extraterritorially.

[1031] Royal Dutch Shell began oil production in the Niger Delta region in 1958, *see* http://www.shell.com.ng/aboutshell/who-we-are/history/country/first-steps.html, last accessed 2 November 2015, and the ACHPR decision refers to the fact that '[i]t is not necessary here to recount the international attention that Ogoniland has received to argue that the Nigerian government has had ample notice and, over the past several decades, more than sufficient opportunity to give domestic remedies' (*Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, ACHPR Case No. 155/96 (13 and 27 October 2001) para 38).

[1032] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, ACHPR Case No. 155/96 (13 and 27 October 2001) para 30.

[1033] ibid, para 58.

[1034] ibid, para 67.

appealed to the government of Nigeria to ensure 'that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry'.[1035]

This case is relevant to this thesis as the African Commission relies on human rights obligations of Nigeria under the African Charter to impose obligations on how it should have and should in the future regulate its oil exploration and production. Implicit in this analysis is an understanding that those human rights obligations under the African Charter could create supervening obligations on oil and gas companies in excess of those originally provided for in the legislation and contracts applicable at the time of the investments.

In 2005, the Federal High Court of Nigeria issued a decision in the case of *Gbemre v. Shell* where it declared that certain provisions of the Associated Gas Re-Injection Regulations were inconsistent with the right to life and human dignity reflected in the Constitution and in the African Charter on Human and Peoples Rights.[1036] In that decision the protection of individuals as well as the local community was contemplated, as the position of the applicants was that the flaring of gas was harmful to the local community.

In addition to this, insecurity and instability in Nigeria in relation to oil resources is notable.[1037] The oil and mineral resources in Nigeria are vested in the

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[1035] ibid, Holding.

[1036] *Mr. Jonah Gbemre (for himself and representing Iwherekan Community in Delta State, Nigeria) v. Shell Petroleum Development Company Nigeria, Ltd., Nigerian National Petroleum Corporation, Attorney General of the Federation*, Suit No. FHC/B/CS/53/05, Federal High Court of Nigeria in the Benin Judicial Division, 14 November 2005 [Nigeria]; Jane Ezirigwe, 'Human rights and property rights in natural resources development' (2017) 35(2) J of Energy & Natural Resources 207.

[1037] Yinka Omorogbe, 'Resource Control and Benefit Sharing in Nigeria' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of*

Federal Government, [1038] albeit with increasing opposition from local communities.[1039] However, the relevance of local communities has been expressed in legislation. On the one hand, distribution of benefits towards state governments is legislated through the principle of derivation.[1040] Though this has historically diminished, prior to independence derivation was 100%, meaning that all revenues from natural resources went back to the state where they were produced. The participation then dropped to 50% and 1.5%, they then increased it to 3%, and since 1999 13% of the rents and royalties produced in a state go to the government of that state.[1041] In the 1994-1995 Constitutional Conference the rationale behind the

Energy and Resource Activity: Legal Change and Impact on Communities (OUP 2016) 259-260; Victoria E. Kalu and Ngozi F. Stewart, 'Nigeria's Niger Delta Crises and Resolution of Oil and Gas Related Disputes: Need for a Paradigm Shift' (2007) 25(3) J of Energy and Natural Resources L 244.

[1038] This is reflected in Section 44(3), Constitution (1999) [Nigeria], the Petroleum Act (1969) [Nigeria] and the Minerals and Mining Decree (1999) [Nigeria]; Yinka Omorogbe, 'The Legal Framework for Public Participation in Decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless' in Donald M. Zillman, Alastair Lucas, and George (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP 2002) 577.

[1039] For example, in The Kaiama Declaration by Ijaw Youths of the Niger Delta, 11 December 1998 [Nigeria]; the Ogoni Bill of Rights (1990) [Nigeria]; The Niger Peoples Compact (2008) [Nigeria]; Yinka Omorogbe, 'Resource Control and Benefit Sharing in Nigeria' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 268.

[1040] Arguably, this is not actually a local community benefit as the state government chooses where to use these funds and this does not necessarily mean that they are given to the local community, in the sense of the community directly affected by the extraction of oil. Ondotimi Songhi, 'Defining a path for benefit sharing arrangements for local communities in resource development in Nigeria: the foundations, trusts and funds (FTFs) model' (2015) 33(2) J of Energy & Natural Resources L 147, 153.

[1041] Section 162(2), Constitution (1999) [Nigeria]; Yinka Omorogbe, 'The Legal Framework for Public Participation in Decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless' in Donald M. Zillman, Alastair Lucas, and George (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP 2002) 559. It is worth noting that the remaining percentages are distributed in the Federation in accordance with "population, equality of States, internal revenue generation, land mass, terrain as well as population density" (section 162(2), Constitution (1999) [Nigeria]) which means that more densely populated regions, such as the Northern and Western Nigeria receive 'more allocations from oil revenue than the oil-producing States' Z. Adangor, 'The Principle of Derivation and the Search for Distributive Justice in the Niger Delta Region of Nigeria: The Journey So Far' (2015) 41 J of L, Policy and Guidelines 115, 127.

principle of derivation was described as a reward for revenue generation, as well as compensation for loss caused by natural resource generation.[1042] This has since been extended to offshore areas up to 200 metre water depths isobath.[1043] This distribution of benefits, however, has not satisfied local communities, that continue to claim that the natural resources are theirs and that they should obtain 100% derivation, with increased violence, agitations and kidnappings being a direct result of this situation.[1044]

The Environmental Impact Assessment Decree of 1992—which reflects Principle 17 of the Rio Declaration[1045]—is another legislative act which refers to public participation. The Decree mandates that an environmental impact assessment must be carried out for activities such as oil and gas fields development,[1046] and after it is carried out it should be made available to the public who are entitled to comment on it.[1047] However, this Decree has a series of loopholes which allow for projects to be pushed forward without going through the EIA process. [1048] It also only foresees that these comments shall be taken into

[1042] Federal Republic of Nigeria, 'Report of the Constitutional Conference Debates 1994-1995 Vol. III' (Abuja Nigeria, 1995), 123, paras. 2781-2782; Z. Adangor, 'The Principle of Derivation and the Search for Distributive Justice in the Niger Delta Region of Nigeria: The Journey So Far' (2015) 41 J of L, Policy and Guidelines 115, 125-126.

[1043] Revenue Allocation Act (2004) [Nigeria].

[1044] Yinka Omorogbe, 'Resource Control and Benefit Sharing in Nigeria' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 267-268.

[1045] Victoria E. Kalu, 'State Monopoly and Indigenous Participation Rights in Resource Development in Nigeria' (2008) 26(3) J of Energy and Natural Resources L 443.

[1046] Section 12(a), Schedule, Environmental Impact Assessment Decree (1992) [Nigeria].

[1047] Section 7, Environmental Impact Assessment Decree (1992) [Nigeria].

[1048] Section 15, Environmental Impact Assessment Decree (1992) [Nigeria]; Yinka Omorogbe, 'The Legal Framework for Public Participation in Decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless' in Donald M. Zillman, Alastair Lucas, and George (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP 2002) 567.

consideration,[1049] meaning they do not appear to have a binding effect. There is also much criticism of its implementation.[1050]

CERD monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by state parties. In the latest review of Nigeria,[1051] CERD noted 'adverse effects on the environment' due to exploitation of natural resources in the Delta region and criticised the country for 'failure to engage in meaningful consultation with the concerned communities'. [1052] Further, it recommended that Nigeria repeal existing legislation, replacing it with legislation based on 'the obligation to abide by strict environmental standards as well as fair and equitable revenue distribution', as well as reiterating that 'along with the right to exploit natural resources there are specific, concomitant obligations towards the local population, including effective and meaningful consultation'.[1053]

16. Norway

In Norway, a series of measures are in place to protect or assure the development of local communities. First, legislation was promoted to develop local content, which would guarantee not only participation of local communities but also the development of local goods and services which would benefit the communities

[1049] Section 17(1)(c), Environmental Impact Assessment Decree (1992) [Nigeria].

[1050] Victoria E. Kalu, 'State Monopoly and Indigenous Participation Rights in Resource Development in Nigeria' (2008) 26(3) J of Energy and Natural Resources L 443.

[1051] Note that reports have to be submitted by State parties every two years but it seems that Nigeria's report of 2008 is still pending.

[1052] CERD, Concluding Observations on Nigeria, UN Doc. CERD/C/NGA/CO.a8 (1 November 2005) para 19.

[1053] CERD, Concluding Observations on Nigeria, UN Doc. CERD/C/NGA/CO.a8 (1 November 2005) para 19; Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 342.

indirectly through oil and gas revenues.[1054] Regulations protecting the environment and with an aim to develop Norwegian society as a whole have been historically present in Norwegian oil and gas development (though the Ten Oil Commandments, embedded in the Royal Declaration of 8 December 1972).[1055] Norway also has an oil fund whose purpose is to 'safeguard and build financial wealth for future generations'.[1056]

Norway has ratified the ILO Convention 169 and it voted in favour of adopting UNDRIP.

17. Russian Federation

The Russian Federation has not ratified the ILO Convention 169, nor formally endorsed UNDRIP.[1057] However, recognised indigenous peoples are consulted with regard to environmental impact assessments for oil and gas projects, for example 'on Sakhalin Island, the requirements of the World Bank and the International Finance Corporation have been implemented better with peoples that are

[1054] Berryl Claire Asiago, 'Rules of Engagement: A Review of Regulatory Instruments Designed to Promote and Secure Local Content Requirements in the Oil and Gas Sector' (2017) 6 Resources 1; Per Heum, 'Local Content Development: Experiences from Oil and Gas Activities in Norway' SNF Working Paper 2008:2.

[1055] Royal Decree of 8 December 1972 Relating to Exploration of and Exploitation of Petroleum in the Seabed and Substrata of the Norwegian Continental Shelf [Norway]; Tina Hunter, 'The regulatory frameworks and state regulation in optimising the extraction of petroleum resources: A study of Australia and Norway' (2014) 1(1) The Extractive Industries and Society 48; Berryl Claire Asiago, 'Norwegian Local Content Model A Viable Solution?' (2017) 14 US-China L Rev 471.

[1056] Norges Bank Investment Management, information available at: https://www.nbim.no, last accessed 8 December 2017.

[1057] In the General Assembly Plenary meeting where the text was adopted, the Russian representative (in abstaining) declared that 'his delegation had supported the rights of indigenous people and the development of international standards in that regard… Unfortunately, the text being considered was not such a document. It was not a truly balanced document, in particular regarding land and natural resources or the procedures for compensation and redress', UN, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President', UN Doc. GA/10612 (13 September 2007).

recognised as indigenous.'[1058] Though there is not an explicit legislative incorporation of FPIC, 'there are provisions in national and regional law that require prior agreement with indigenous residents on the location of production facilities'; EIAs also require 'mandatory public consultation with any local community before an industrial project is approved'.[1059] The Russian Constitution,[1060] federal[1061] and regional laws purport to protect indigenous communities and require their consent and establish damages for harm caused. However, these provisions are not sufficiently clear or enforced.[1062] There is no reference to the origin of these legislative positions.

With regard to the Russian Federation, CERD has held that it is concerned regarding its failure to respect the principle of free, prior and informed consent of indigenous peoples, particularly with extractive and development projects that have 'caused irreparable damage on' their right to use and enjoy their lands and natural resources.[1063] CERD has therefore recommended that Russia ensure that all projects

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[1058] Simon Pierk and Maria Tysiachniouk, 'Structures of mobilization and resistance: Confronting the oil and industries in Russia' (2016) 3(4) The Extractive Industries and Society 997.

[1059] Emma Wilson, 'What is the social license to operate? Local perceptions of oil and gas projects in Russia's Komi Republic and Sakhalin Island' (2016) 3(1) The Extractive Industries and Society 73.

[1060] The Russian Constitution incorporated the protection of indigenous peoples in accordance with international law in 1993, Article 69, Constitution [Russia].

[1061] Federal Law On Guarantees of Rights of Small-numbered Indigenous peoples of the Russian Federation (1999) [Russia]; Federal Law on Traditional Natural Resources Territories of Small-Numbered Indigenous Peoples of North, Siberia and Far East of the Russian Federation (2001) [Russia]; Concept of Sustainable Development of Indigenous Small-Numbered Peoples of North, Siberia and Far East (2009) [Russia].

[1062] Natalia Yakovleva, 'Oil sector developments in Russia and indigenous people' (2011) 9(4) Oil, Gas and Energy L 2; Anna Varfolomeeva, 'Evolution of the concept of "indigenous people" in the Soviet Union and the Russian Federation: the case study of Vepses' (Doctoral Thesis, 2012), Central European University; Florain Stammler and Emma Wilson, 'Dialogue for Development: An Exploration of Relations between Oil and Gas Companies, Communities, and the States' (2006) 5(2) Sibirca: Interdisciplinary J of Siberian Studies 1.

[1063] CERD, Concluding Observations on the Russian Federation, UN Doc. CERD/C/RUS/CO/23-24 (20 September 2017) para 23.

and measures that could affect indigenous peoples be subject to a process of prior consultation with a view to securing their free, prior and informed consent.[1064]

18. United States

In the United States authority is retained at the federal level to regulate environmental matters of national scope, as well as over resources located on federal lands. [1065] However, the EPA—and Congress—have shied away from regulating hydraulic fracturing and its effect on drinking water, including by not requiring energy companies to disclose the components of fracking fluid. [1066] Reluctance to enter into regulations on hydraulic fracturing may be linked to issues of national security, as dependence on foreign oil is projected to decrease due to increases in both shale gas and tight oil production.[1067]

The United States rules relating to local communities are locally issued and enforced. In this sense, states have different rules regarding regulatory autonomy of local municipalities, distinguishing those that are 'home-rule' from those that follow 'Dillon's Rule'. The former have a greater degree of autonomy than the latter.[1068]

[1064] CERD, Concluding Observations on the Russian Federation, UN Doc. CERD/C/RUS/CO/23-24 (20 September 2017) para 24.

[1065] LeRoy C. Paddock and Jessica Anne Wentz, 'Emerging Regulatory Frameworks for Hydraulic Fracturing and Shale Gas Development in the United States' in Donald N. Zillman, Aileen McHarg, Adrian Bradbrook, and Lila Herrera-Hernández (eds), *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014) 154.

[1066] 42 USC §300h(d) [United States].

[1067] LeRoy C. Paddock and Jessica Anne Wentz, 'Emerging Regulatory Frameworks for Hydraulic Fracturing and Shale Gas Development in the United States' in Donald N. Zillman, Aileen McHarg, Adrian Bradbrook, and Lila Herrera-Hernández (eds), *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014) 152.

[1068] Stephen Elkind, 'Preemption and Home-Rule: The Power of Local Governments to Ban or Burden Hydraulic Fracturing' (2016) 53(2) Rocky Mountain Mineral L Foundation J 326.

This has had a direct impact upon the regulatory power of local municipalities, in particular with regard to the issue of hydraulic fracturing.[1069]

In West Virginia, for example, one city attempted to ban hydraulic fracturing due to environmental concerns, but this ban was considered preempted by state legislature regulations regarding requirements for drilling permits.[1070]

In Colorado, there is significant production of oil and gas from unconventional basins.[1071] Colorado also strongly favours granting authority to local government, regarding activities that are of local concern.[1072] However, attempts to limit fracking by local communities have been struck down by the judiciary, holding that they were preempted by the Colorado Oil and Gas Conservation Act.[1073]

In New York, however, two municipalities had banned oil and gas operations within their borders on the basis of environmental concerns. The Court of Appeals, New York's highest court, confirmed that the local bans were not preempted by state

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[1069] Hannah J. Wiseman, 'Disaggregating Preemption in Energy Law' (2017) 54(1) Rocky Mountain Mineral L Foundation J 108.

[1070] *Ne. Natural Energy, LLC v. City of Morgantown*, No. 11-C-411, W. Va. Cir. Ct. (12 August 2011) [United States].

[1071] Don C. Smith, 'Social Licence to Operate in the Unconventional Oil and Gas Development Sector' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 115-116.

[1072] Steven M. Nagy and Morgan L. Figuers, 'The Public Trust Doctrine and Environmental Rights Initiates: A Tectonic Shift in Colorado Property Rights in Natural Resources?' (2016) 53(1) Rocky Mountain Mineral L Foundation J 29.

[1073] *Colorado Oil and Gas Association v. Longmont*, Colo. Dist. Ct., Case No. 13-CV-63 (14 July 2014) [United States]; *Colorado Oil and Gas Association v. City of Lafayette*, Colo. Dist. Ct., Case No. 3CV31746, 44 ELR 20206 [United States]; *Colorado Oil and Gas Association v. City of Fort Collins*, Colo. Dist. Ct., Case No. 13CV31385 (7 August 2014) [United States]; Mark D. Christiansen, 'Legal Developments in 2014 Affecting the Oil and Gas Exploration and Production Industry' (2015) 52(1) Rocky Mountain Mineral L Foundation J 67. Exceptionally, this ban was not struck down in Boulder, but it was also not questioned in that case. In Ohio similar conclusions with regard to the exclusive authority of the state with regard to oil and gas production regulation, excluding local provisions (*State ex rel. Morrison v. Beck Energy Corp*., 989 N.E. 2d 85, 2013-Ohio-465 (Ohio App. 2013) [United States]).

law, and that that bans could stand.[1074] Statewide, after a moratorium on fracking that was started by the legislature in 2011, in 2015 the Governor banned fracking throughout the state, citing environmental and health concerns.[1075]

In Pennsylvania, the state undertook a series of measures to address citizens' concerns regarding the environmental impact of the exponential growth of hydraulic fracturing in the State. These regulations include revised treatment standards for wastewater, increase water inspections, more stringent design requirements for unconventional wells.[1076] They also foresee participation of the local community in the permitting process, though not a veto power. [1077] Additionally, the Supreme Court of Pennsylvania not only upheld local regulations with regard to oil and gas, but it also struck down an attempt by the Pennsylvania Legislature to preempt such regulation, limiting local regulations of oil and gas in so far as they could not contain stricter requirements than those applicable to other industries.[1078] The Supreme Court held, amongst other things, that to allow such

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[1074] *Wallach v. Town of Dryden*, 16 N.E.3d 1188, 1201 (N.Y. 2014) [United States]; Stephen Elkind, 'Preemption and Home-Rule: The Power of Local Governments to Ban or Burden Hydraulic Fracturing' (2016) 53(2) Rocky Mountain Mineral L Foundation J 330-331.

[1075] New York Department of Environmental Conservation, 'New York State Officially Prohibits High-Volume Hydraulic Fracturing' (29 June 2015), available at: http://www.dec.ny.gov/press/102337.html, last accessed 10 November 2017; *see also* New York Department of Environmental Conservation, 'Final Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program' (June 2015), available at: http://www.dec.ny.gov/docs/materials_minerals_pdf/findingstatehvhf62015.pdf, last accessed 10 November 2017.

[1076] LeRoy C. Paddock and Jessica Anne Wentz, 'Emerging Regulatory Frameworks for Hydraulic Fracturing and Shale Gas Development in the United States' in Donald N. Zillman, Aileen McHarg, Adrian Bradbrook, and Lila Herrera-Hernández (eds), *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014) 162-163.

[1077] LeRoy C. Paddock and Jessica Anne Wentz, 'Emerging Regulatory Frameworks for Hydraulic Fracturing and Shale Gas Development in the United States' in Donald N. Zillman, Aileen McHarg, Adrian Bradbrook, and Lila Herrera-Hernández (eds) *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014) 178.

[1078] *Robinson Township, Washington County v. Commonwealth*, 83 A.3d 901 (Pa. 2013) [United States].

preemption was 'incompatible' with the mandate of local municipalities to protect the environment.[1079]

In Texas, after one municipality attempted to ban fracking, the State legislature banned municipalities from prohibiting fracking. The referred to ban was repealed after the law was signed by the Governor and pending lawsuits against the prohibition were dismissed.[1080]

In Alaska, benefits to local communities and indigenous communities come in the form of payment of dividends per annum.[1081] However, it is argued that these benefits are not sufficient to compensate for damage caused to the local communities.[1082] Alaska also has an oil fund whose purpose is to benefit 'all current and future generations of Alaskans'.[1083]

As regards indigenous populations given tribal sovereignty over their designated lands (either as reservations or trusts) and the consequent delegation of authority, tribes retain decision-making power over the entry of pollutants on to their land, including designations under the Clean Air Act, excluding such decision-making power from both the state and the Environmental Protection Agency

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[1079] *Robinson Township, Washington County v. Commonwealth*, 83 A.3d 901, 979 (Pa. 2013) [United States]; Stephen Elkind, 'Preemption and Home-Rule: The Power of Local Governments to Ban or Burden Hydraulic Fracturing' (2016) 53(2) Rocky Mountain Mineral L Foundation J 333.

[1080] Howe Bill 40 [Texas, United States]; Stephen Elkind, 'Preemption and Home-Rule: The Power of Local Governments to Ban or Burden Hydraulic Fracturing' (2016) 53(2) Rocky Mountain Mineral L Foundation J 324.

[1081] Emma Barry-Pheby, 'Examining the Priorities of the Canadian Chairmanship of the Arctic Council: Current Obstacles in International Law, Policy and Governance' (2014) 25 Colorado Natural Resources, Energy and Environmental L Rev 279.

[1082] Emma Barry-Pheby, 'Examining the Priorities of the Canadian Chairmanship of the Arctic Council: Current Obstacles in International Law, Policy and Governance' (2014) 25 Colorado Natural Resources, Energy and Environmental L Rev 280-281.

[1083] Alaska Permanent Oil Fund, information available at: https://apfc.org/who-we-are/guiding-principles/, last accessed 8 December 2017.

(EPA).[1084] Though the United States was one of the four countries that initially voted against UNDRIP, in 2010 it declared it supported the document as legally non-binding. In an additional document issued on 12 January 2011 it declared, with regard to the issue of consent, that it 'recognize[d] the significance of the Declaration's provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders'.[1085] This consultation is carried out in accordance with Executive Order 13,175, which has been criticised for its vague language and has not changed despite the change in position of the United State with regard to UNDRIP.[1086]

As to compensation for damage created in oil and gas exploration and production, in the United States there are statutes that allow for government trustees (including state or tribal trustees) to pursue natural resource damage when injury is caused by certain activities.[1087] One example of such statutes is the Oil

[1084] William C. Scott, 'Tribal Management of Tribal Lands and Resources: Environmental Regulation' (2015) 52(1) Rocky Mountain Mineral L Foundation J 25.

[1085] US State Department, 'Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples' (12 January 2011), available at: https://2009-2017.state.gov/s/srgia/154553.htm, last accessed 10 November 2017.

[1086] Executive Order 13,175 (2000) [United States]; Carla F. Fredericks, 'Operationalizing Free, Prior and Informed Consent' (2016) 80 Albany L Rev 468-469.

[1087] For example, in the incident of *Deepwater Horizon* BP has agreed to affront natural resource damages in excess of USD 8 billion. US Department of Justice, 'Attorney General Loretta E. Lynch Delivers Remarks at Press Conference Announcing Settlement with BP to Resolve Civil Claims Over Deepwater Horizon Oil Spill' (5 October 2015); Nigel Bankes and Astrid Kalkbrenner, 'Liability for Oil Spills from Oil and Gas Operations in Canada's Arctic Waters' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 210.

Pollution Act.[1088] The damages awarded (or settlements reached) in such cases must be used exclusively for 'direct, on-the-ground' restoration projects.[1089]

Interestingly, in its review mechanism, CERD has noted with concern 'the adverse effects of economic activities related to the exploitation of natural resources in countries outside the United States by transnational corporations registered in the State party' and called upon it to '[t]ake appropriate measures to prevent the activities of transnational corporations registered in the State party which could have adverse effects on the enjoyment of human rights by local populations, especially indigenous peoples and minorities, in other countries'.[1090]

19. Venezuela

The issue of consultation is dealt with both at the constitutional and legislative level in Venezuela. Article 120 was incorporated in the Constitution in 1999, when it was significantly overhauled. This article establishes that when natural resources in indigenous habitats are exploited by the State, exploitation will be subject to prior information and consultation of the respective communities.[1091]

[1088] Though the Oil Pollution Act may be reflective of Principle 13 of the Río Declaration (Malgosia Fitzgerald, 'Principle 13' in Jorge E. Viñuales (ed), *The Río Declaration on Environment and Development: A Commentary* (OUP 2015) 374-377), it was originally enacted in 1990, and thus, though its application may have increased over time (for example in the *Deepwater Horizon* incident), it cannot be considered a consequence of the Río Declaration, Jorge E. Viñuales, 'The Río Declaration on Environment and Development' in Jorge E. Viñuales (ed), *The Río Declaration on Environment and Development: A Commentary* (OUP 2015) 38.

[1089] Karen Bradshaw, 'Settling for Natural Resource Damages' (2017) 54(1) Rocky Mountain Mineral L Foundation J 173.

[1090] CERD, Concluding Observations on the United States of America, UN Doc CERD/C/USA/CO/7-9 (25 September 2014) para 10; Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 342.

[1091] Article 120, Constitution [Venezuela]; Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 355.

At the legislative level, the issue is dealt with in the Organic Law of Indigenous Peoples and Communities (*Ley Orgánica de Pueblos y Comunidades Indígenas*), in giving reasons for the law reference was made to ILO Convention 169 and the Convention on Biological Diversity. This law does establish that the consent of the indigenous community is needed to carry out a project that could directly or indirectly affect an indigenous community or that in any way is intended to benefit from natural resources on their land.[1092] It also sets out that these communities will receive social and economic benefits from such activities.[1093]

D. Conclusions

The analysis carried out in this chapter has referred to how (and whether) States have established legislation or other types of regulation in relation to local development issues in light of more recent considerations of sustainable development, environmental protection, and protection of local communities in international law. As in the previous chapters of the thesis, to study this issue I have looked at States in different situations, geographically, in relation to their own environmental and local community concerns, as well as with higher or lower dependencies on oil and gas production. In this conclusion I will highlight the most relevant common features with regard to local development that are apparent from the case studies developed above. Chapters 6 and 7 will return to these common features to determine whether they are indicative of a trend in customary international law.

[1092] Article 17, Organic Law of Indigenous Peoples and Communities (2005) [Venezuela].

[1093] Article 56, Organic Law of Indigenous Peoples and Communities (2005) [Venezuela].

In some countries, the information available leads to an understanding that there is little, if any, concern regarding issues of local development. Where these cases occur in countries with large oil and gas production/dependencies, this is usually complemented by a sovereign wealth fund for 'stability' or 'saving for future generations',[1094] or through the development of 'local content requirements',[1095] or both.[1096]

As to the issue of benefits to local communities, some countries address it through royalty rates which are paid out directly to provinces or states, instead of the federal government; [1097] others consider that the federal (or national) government should receive all the funds and then distribute them to the appropriate territories, either according to the population[1098] or considering from where the natural resources were extracted.[1099] In all three of these cases a persistent problem is that the local community affected by the measure does not necessarily benefit from it in any way differently from the rest of the province or provinces, depending on the distribution criteria. Some countries resolve this through specific provisions to benefit local (or indigenous) communities, [1100] including concerns regarding future generations, sustainable development [1101] and even referring to the Rio

[1094] As in the case of Iran, Azerbaijan, Mexico.

[1095] As in the case of Angola, Canada, Indonesia (though not an obligation), Norway.

[1096] As in the case of Norway, Brazil.

[1097] For example, in Argentina, Canada, and the United States (Alaska).

[1098] As is the case in Iraq (with the exception of Kurdistan).

[1099] As is the case in Nigeria. Brazil (though recent reforms have increased benefits to non-producing states), Indonesia.

[1100] Bolivia, Brazil, Ecuador, Venezuela.

[1101] Canada (Newfoundland and Labrador, Canadian Arctic), Ecuador.

Declaration.[1102] However, from our case studies this does not appear to be a majority of cases.

As to the issue of protection of the environment, some countries address it judicially or through national legislation.[1103] Though at times they have not been sufficiently clear regarding national legislation in that light, leaving it to local authorities to deal with the specific issues that are raised.[1104] The concern here is that these local authorities are not necessarily as equipped as the federal or national government to determine the exact impact or effects of certain situations or the dangers of the presence of chemicals.[1105] Regardless of whether the legislation or judicial decisions are at a national or local level, however, there is a common consensus that there is a need for protection of the environment in cases of oil and gas exploration and production. Indeed, some human rights bodies have been critical of environmental impacts of oil and gas exploration on local communities.[1106]

As to the issue of prior consultation with local (indigenous) communities, this is also generally accepted. It has been upheld legislatively[1107] or judicially,[1108] at

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[1102] Canada, Ecuador (several other sustainable development related instruments were also mentioned by the courts).

[1103] Ecuador, Nigeria.

[1104] For example, Argentina, United States, Canada, and Nigeria.

[1105] For example, in the case of the United States this has led to conflicting legislation of different states (e.g. New York and Texas) regarding the dangers of fracking chemicals, as well as the degree of autonomy that local communities have to regulate fracking, in light of considerations of wider state or national interest.

[1106] ACHPR (Nigeria), CERD (Nigeria), IACtHR (Ecuador), CERD request for suspension for companies incorporated in Canada and the US.

[1107] Bolivia (specifically incorporating all the provisions of UNDRIP into its local legislation), Brazil, Canada, Colombia, Ecuador, India (environmental impacts), Mexico, Nigeria, Russia, United States, and Venezuela.

[1108] For example in Argentina, Australia, Canada, and Colombia.

times based on international obligations of the country, for example under ILO Convention 169,[1109] and UNDRIP.[1110] Less frequently, the requirement of consent is specifically laid out legislatively.[1111]

Change in legislation has been fuelled by internal movements, not least when grave natural disasters have taken place,[1112] and through pressure from human rights bodies. Human rights bodies have frequently spoken out about the insufficient degree of conformity of domestic legislation with certain alleged obligations of states under international law (including explicit references to free, prior, and informed consent).[1113] They have also demanded that States issue legislative measures to prevent companies domiciled in their countries from committing acts that affect the rights of indigenous rights domestically or abroad.[1114] Though these expressions of concern seem to have had a significant impact in requiring consultation with local communities, countries are much more reluctant to incorporate a requirement of consent or a veto right for the local communities.

[1109] Bolivia, Colombia, Ecuador, Mexico

[1110] Australia (though not in relation to energy matters), Canada (through a statement), and Colombia.

[1111] For example in Australia (Northern Territories, though that is not the case for the Native Title Act) and Colombia (but only where there is displacement or a threat to the group's cultural or physical existence).

[1112] For example in the cases of Nigeria and Ecuador.

[1113] CERD (Australia, Canada, Nigeria (consultation), Russia), Special Rapporteur on the Rights of the Indigenous People (Canada), ECOSOC (Colombia (the criticism was to the implementation, but not the Constitutional Court's findings), Ecuador), and IACtHR (Ecuador (refers to consultation)).

[1114] For example CERD (Australia, Canada, and the United States)

X. CHAPTER 6: CONSISTENCY IN LEGAL JUSTIFICATIONS?

This thesis refers to the interrelationship between public international law, national law and existing contracts, concessions, or other types of arrangements related to the extraction and production of hydrocarbons within their territory. In that context, this chapter will analyse and compare the different justifications that States have given in the past to justify changes to the terms of those agreements in particular circumstances. First, I will refer to the reasons given by States either upon legislating or justifying changes in the context of international disputes. Relying on the coincidences between such reasons, I will then determine how they fall under the different legal justifications introduced in Chapters 1 and 2.

The previous chapters have examined State practice in relation to changes in regulation in three areas where States act in exercise of their sovereign powers, that is government take, nationalization, and local development.[1115] In each of those chapters a short summary has been made of the reasons given in each case for the changes in the regulatory framework that States have brought about. In this first section I will determine whether they are similar or comparable and what their differences might be.

A. Reasons given by States

As noted, as regards changes in government take I have analysed these in the context of increases in hydrocarbon prices. In most cases the change in government take has its origin in the determination by the State that there has been an 'extraordinary' increase in prices.[1116] Although 'extraordinary' increases in prices are relative, as

[1115] The explanation for choosing these areas is developed in Chapter 1 of the thesis.

[1116] See Chapter 3.

explained in Chapter 3, it is possible to draw links to the explanations given by States regardless of the underlying nominal price at issue in each case.

One of the simplest sources of government explanations for changes in hydrocarbon regulation is in the text of the provisions themselves. In this sense, as developed in Chapter 2, these provisions often have whereas clauses or accompanying notes explaining the reasons for the measures.[1117] The text, thus, provides, at least, insight as to what were the reasons expressed by the country when it implemented a certain measure.[1118] These types of provisions have the advantage that they are not *ex post*, that is, they are not the result of criticism by a third party. These expressions show what States are expressing as regards the implementation of these measures and, most importantly, what they believe justifies the taking of these measures, that is what they consider themselves legally bound to abide by in adopting these changes. As an expression of what they believe they are legally bound to comply with, this can be used as an interpretation of a State's *opinio juris* about those measures.[1119] Admittedly, there may be elements of political rhetoric in these explanations. However, that does not overshadow that they are the reasons given by the State for the changes adopted.

Another source to determine whether there are common elements in States' justifications of the measures analysed here is through arguments presented by

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[1117] For example, in the case of Venezuela: Article 1, Decree 8807, Law that creates a special contribution for extraordinary and exorbitant prices in the international hydrocarbon market (20 February 2013) [Venezuela], http://www.asambleanacional.gob.ve/documentos_leyes/ley-que-crea-contribucion-especial-por-precios-extraordinarios-y-precios-exorbitantes-en-el-mercado-internacional-de-hidrocarburos.pdf, last accessed 28 December 2017.

[1118] As seen in Chapter 2, provisions in domestic legislation are frequently looked at to determine the existence of state practice and *opinio juris*.

[1119] *Jurisdictional Immunities of the State* (*Germany v Italy, Greece intervening*) (Merits) [2012] ICJ Rep 100, para 77.

them in international disputes where such measures have been questioned. This has been used less frequently in this thesis as international cases regarding these types of provisions are not widespread.[1120] Generally, the positions of States have been analysed in international investment arbitration case law[1121] to determine what justification countries give for the measures adopted. Although the justification given in these arbitrations is *ex post facto* and, thus, may be arguably self serving, in so far as they are expressions of the position of the State they may still be useful in determining what they believe the legal justification for these measures is. Further, as noted in Chapter 2 the ILC has indicated that State pleadings before courts and tribunals are useful in indicating their positions on certain issues.[1122]

1. Reasons given for changes in government take

For this comparative analysis I have grouped the reasons given for increases in government take into three categories: impact of increases in hydrocarbon prices on the economy; the need for adjustments to make the agreements regarding hydrocarbons just and equitable in light of changes in oil and gas prices; and, finally, industry practice.

[1120] Though there are some international arbitration cases that we have analysed in the thesis the number of them was not sufficient to draw general conclusions on States' positions universally. Thus, as explained in Chapter 1, this has been complemented by domestic legislation, domestic case law, and public statements.

[1121] For example the cases of *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012); *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No. ARB/08/11, Decision on remaining issues of jurisdiction and liability (12 September 2014); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012); *Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014); *Total SA v Argentina*, ICSID Case No. ARB/04/1, Decision on Liability (27 December 2010).

[1122] ILC, 'First Report on formation and evidence of customary international law by Michael Wood, Special Rapporteur', UN Doc. A/CN.4/663, para 48.

Examples of the first category can be found in Venezuela, Argentina, China and the United Kingdom.[1123] Venezuela has justified measures of increasing government take on the basis of the impact of the increase of oil prices on the economy, thus implying that they must take measures to avoid the effect in fiscal, exchange and monetary equilibrium that such increase could have.[1124] This position is similarly asserted by Argentina,[1125] China,[1126] and the United Kingdom.[1127]

As regards the equitable distribution of these extraordinary prices, others, like Ecuador, highlight that the extraordinary increases in oil prices unilaterally modified conditions of contracts in favour of oil companies and that they must adopt measures applying criteria of 'justice and equity'.[1128] Ecuador further justified these measures on the basis that the State was the owner of a non-renewable resource and thus had to be the main beneficiary of those extraordinary revenues.[1129] In Australia, increases in government take were justified as a need for an 'appropriate return' for the community from a non-renewable resource;[1130] the U.S. refers to a

[1123] These positions are fully elaborated in Chapter 3. For the purpose of this section, we will refer to our previous conclusions to avoid unnecessary repetition.

[1124] Article 1, Decree 8807, Law that creates a special contribution for extraordinary and exorbitant prices in the international hydrocarbon market (20 February 2013) [Venezuela].

[1125] *Resolución MEyP* [Ministry of Economy Resolution] 532/2004 (4 August 2004) [Argentina].

[1126] Guo Fa [2006] No. 13 [China].

[1127] HC Deb 23 March 2011, vol 525, col 965 [United Kingdom], in this case particularly as regards impacts on fuel prices.

[1128] Law 2006-42 [Ecuador] (free translation). *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012) para 155.

[1129] *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012) para 137.

[1130] Exposure Draft, Petroleum resource rent tax extension, explanatory material (2011) para 1.3.

'fair return to the public'.[1131] Similar arguments are put forth in Angola.[1132] Though the United Kingdom based its argument, in changing the supplementary charge, on the impact of the increase in prices on the British economy, it also justified the increase on the ground of the 'unexpected profits' of oil companies in the North Sea.[1133]

This second argument is similar to Kuwait's position in the *Kuwait v Aminoil* case as regards the equitable distribution of exhaustible resources.[1134] There, the position of Kuwait at the time was that increases in revenues due to increases in oil prices should be equitably distributed with the State. In line with its 'property' over those natural resources, the revenues were 'psychologically considered by the producing States as being morally their property'. The tribunal recognised that this argument was based on 'a *sufficiently general historical evolution to be recognized for what it is by the Parties*. This is how they can be said to have based themselves in advance on the assumption that a division of profits equitable today will need to be modified in order still to be regarded as equitable tomorrow'.[1135]

[1131] United States General Accountability Office, Report to the Chairman, Committee on Energy and Natural Resources, U.S. Senate, 'Oil and Gas Resources, Actions Needed for Interior to Better Ensure a Fair Return' (December 2013) pp 2-3.

[1132] As regards the historical price excess fee, we were not able to access the official records of Angola (note the difficulties in obtaining information outlined in Chapter 3), Bernard Taverne, 'Production Sharing Agreements in Principle and in Practice' in Martyn R. David (ed) *Upstream Oil and Gas Agreements* (London, Sweet & Maxwell 1996) 64. However, as regards current taxation regimes see Law 13/04 (24 December 2004), the translation is provided by Sonangol on its website: <http://www.sonangol.co.uk/wps/wcm/connect/f7d4ac804275ad53b8d0bc84497d7a5e/Law+13-04.pdf?MOD=AJPERES&CACHEID=f7d4ac804275ad53b8d0bc84497d7a5e> last accessed 11 September 2015.

[1133] HC Deb 23 March 2011, vol 525, col 965 [United Kingdom].

[1134] As referred to in Chapter 1, *Government of Kuwait v American Independent Oil Company (Aminoil)*, Award (24 March 1982), (1984) 66 Intl L Rep. 518.

[1135] ibid, 564 (emphasis added).

As to industry practice, in the cases of Ecuador and Venezuela, it has been additionally argued, respectively, that: in the former case, IOCs had an obligation to renegotiate the contracts;[1136] and, in the latter case, that IOCs have accepted increases in government take when they are granted a profit margin, so long as they do not upset the economic balance of the investment.[1137] Finally, in the case of *Total v Argentina* the arbitral tribunal concluded that increases in government take were not in breach of international law, amongst other things because 'such "windfall profits taxes" on oil are currently common and have been introduced by many oil-producing countries including in the industrialized world', noting in the footnote that certain authors (T. Wäelde and A. Kolo) 'point to "normal" state practice in tax matters as a yardstick to judge whether or not host states' conduct in tax matters in in breach of an investment treaty regime'.[1138]

2. Reasons given for nationalisation

As is self-evident from the chapter on nationalisation as well as from generally available information, nationalisation or expropriation of hydrocarbon-related assets or agreements was more popular historically than currently. However, there are still some cases of nationalisation today and I will look at the similarities between the reasons given now and the justifications at issue historically.

Historically, there are basically three reasons given by States to nationalise their oil industry: (i) security of supply or energy security, particularly after certain

[1136] *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012) para 155.

[1137] Julián Cárdenas García, 'Rebalancing Oil Contracts in Venezuela', 33(2) Houston J of Intl L 235, 262 (Spring 2011).

[1138] *Total SA v Argentina*, ICSID Case No. ARB/04/1, Decision on Liability (27 December 2010) para 435, n. 610.

events in the Middle East and World War II, necessity, economic independence and concerns regarding balance of payments when the cost of importing oil and gas is significant; (ii) a general reference to permanent sovereignty over natural resources and that the benefits of oil and gas ought to go to the people of the country; and (iii) that the measure is a response to some other violation of international law by the country of the nationality of the international oil company. In some cases more than one of these reasons is referred to by the host country. Additionally, at times there is a reference to a breach of domestic law, but these reasons, when pursued, are generally shown to be rhetorical and not followed through on.

As regards the first category, that is cases where nationalisation is a result of risks related to security of supply, examples are found in Bolivia,[1139] Mexico,[1140] Iran,[1141] Argentina,[1142] Brazil,[1143] Iraq,[1144] Venezuela,[1145] and India.[1146]

As to the second category, where States adopted nationalisation measures for reasons relating to the ownership of the natural resources, the need for the natural resources to benefit the people of the State and the principle of permanent sovereignty over natural resources, the following States are examples of that:

[1139] Telegram from the Minister in Bolivia (Caldwell) to the Secretary of State of 22 September 1937 in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 296-297.

[1140] Whereas clause, Expropriation Decree of 18 March 1938 [Mexico] (free translation: '*satisfacción de necesidades colectivas y el abastecimiento de artículos de consumo necesario de todos los centros de población, debido a la consecuente paralización de los medios de transporte y de las industrias productoras, así como para proveer la defensa, conservación, desarrollo y aprovechamiento de la riqueza que contienen los yacimientos petrolíferos*'); Articles 1(V), (VII) and (X), Expropriation Law of 23 November 1936 [Mexico]; Joseph L. Kunz, 'The Mexican Expropriations', (1940) XVII(3) New York U L Q Rev 327, 368.

[1141] Letter to Mr Churchill, Royal Institute of International Affairs, Documents on International Affairs, 341 *cited in* Amir Rafat, 'Applicability of the Public-Purpose Principle to Cases Arising under International Law from the Expropriation of Alien Private Property', (Feb 1966) 43(3) U of Detroit L J 375; Letter to Mr Truman of 11 June 1951, Other Documents Submitted to the Court (1951-1952) Iranian Communication of 29 June 1951, Annex C(1), 672, 686; Statement by the Iranian Prime Minister before the Security Council, UN Docs. No. S/PV.560 and S/PV.563 (15 and 17 October 1951). There was no decision of the ICJ regarding the legality of the expropriation under international law as the Court considered it did not have jurisdiction and that the Concession Agreement was not a Treaty. *Anglo-Iranian Oil Co. Case (UK v Iran)* (Preliminary Objection) [1952] ICJ Rep 112. *See also* Austin T. Foster 'An Unanswered Legal Problem Raised by the Suez and the Iranian Controversies' (1957) 1 Intl L and the Middle East Crisis: A Symposium 63, 66-67.

[1142] Decrees 744/1963 and 745/1963 [Argentina].

[1143] Fabio Brandao, 'The Petrobras Monopoly and the Regulation of Oil Prices in Brazil' (OIES, 1998) 19.

[1144] Law 80/1961 [Iraq], Selected Documents of the International Petroleum Industry Iraq and Kuwait, Pre-1966 (OPEC, 1974) p 103. There is some discussion as to whether this was an expropriation or a breach of contract under international law, *see* Nima Mersadi Tabari, *Lex Petrolea and International Investment Law* (Routledge 2017) 208; MEES, 'The Iraq National Oil Company' 5 October 1962.

[1145] Organic Law that Reserves to the State the Industry and Commerce of Hydrocarbons, of 29 August 1975 [Venezuela] [*Ley Orgánica que Reserva al Estado la Industria y el Comercio de los Hidrocarburos*], refers to 'reasons of national convenience'.

[1146] Bilap Dasgupta, *The Oil Industry in India* (Frank Cass & Co 1971) p 231; *see also* Saumitra Chaudhury, 'Nationalisation of Oil Companies in India', (1977) 12(10) Economic and Political Weekly 439-440.

Iran, [1147] Iraq, [1148] Indonesia, [1149] India, [1150] Kuwait, [1151] Libya, [1152] and Saudi Arabia.[1153]

As regards cases where the nationalisation was a result of an alleged breach of international law by the State of nationality of the company (or the company

[1147] Statement by the Iranian Prime Minister before the Security Council, UN Docs. No. S/PV.560 and S/PV.563 (15 and 17 October 1951). There was no decision of the ICJ about the legality of the expropriation under international law as the Court considered it did not have jurisdiction and that the Concession Agreement was not a Treaty. *Anglo-Iranian Oil Co. Case (UK v Iran)* (Preliminary Objection) [1952] ICJ Rep 112. *See also* Austin T. Foster 'An Unanswered Legal Problem Raised by the Suez and the Iranian Controversies' (1957) 1 Intl L and the Middle East Crisis: A Symposium 63, 66-67.

[1148] MEES, 'The Iraq National Oil Company' 5 October 1962; *see also* Michael E. Brown, 'The Nationalization of the Iraqi Petroleum Company' (1979) 10 Intl J Middle East Studies 107, 108; Preamble, Law 11/1964 [Iraq], Selected Documents of the International Petroleum Industry Iraq and Kuwait, Pre-1966 (OPEC, 1974) p 115.

[1149] Contract of Work between PN Pertambangan Minjak Nasional and PT Stanvac Indonesia (25 September 1963) [Indonesia], (1964) 3 Intl L Materials 248. This situation was accepted by the companies, William A. Redfern, 'Sukarno's Guided Democracy and the Takeovers of Foreign Companies in Indonesia in the 1960s' (Ph.D. (History), University of Michigan, 2010) p 203.

[1150] Act 41 of 1981 [India].

[1151] *Government of Kuwait v American Independent Oil Company (Aminoil)*, Award (24 March 1982), (1984) 66 Intl L Rep 518, 587-588.

[1152] *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic*, Award (10 October 1973), (1979) 53 Intl L Rep 297, 316; but see Christopher Greenwood, 'State Contracts in International Law – the Libyan Oil Arbitrations' (1982) 53(1) BYBIL 27, noting: '[a]ll three cases arose out of the Libyan Government's nationalization in broadly similar circumstances of foreign companies' interests under long-term oil concessions which still had many years to run'; *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic*, Award (12 April 1977) (1982) 62 Intl L Rep 140, 195.

[1153] Anonymous, 'From Concession to Participation: Restructuring the Middle East Oil Industry' (1973) 48(4) New York U L Rev. 774, 815.

itself), examples can be found in: Bolivia,[1154] Iraq,[1155] Nigeria,[1156] and Libya.[1157] Bolivia[1158] and Mexico[1159] also based their nationalisations on alleged breaches of domestic law.

As regards current nationalisations, these have been fewer. The reasons given have been considerations of sovereignty, for example in the case of Venezuela[1160] and Argentina;[1161] that the exploitation of oil and gas should be done

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[1154] Telegram from the Minister in Bolivia (Norweb) to the Secretary of State of 15 March 1937 in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 278 ('the action is based on a claim that the company illegally exported a quantity of petroleum to the Argentine Republic during 1926-1927.'); *see also* Omar Z. Ghobashy, 'The Changing Attitudes in the World Oil Community' (1974) 2(1) Syracuse J of Intl L and Commerce 287, 295; Telegram from the Minister in Bolivia (Norweb) to the Secretary of State of 8 May 1937 in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 288 (the Bolivian Foreign Minister had justified the actions by the Bolivian government as 'legally and morally justified on account of fraud and the non-cooperative stand taken by the Company during the war, but that it was especially necessary to dispel the impression current throughout the world that the weak and impoverished Bolivia had been merely an instrument of the all-powerful, imperialistic world monster, the Standard Oil Company—that the Chaco war had been fought merely to protect the Standard Oil properties.').

[1155] Samir Saul, 'Masterly Inactivity as Brinkmanship: The Iraq Petroleum Company's Route to Nationalization, 1958-1972' (Dec. 2007) 29(4) The Intl History Review 746, 790.

[1156] Olajide Aluko, 'The Nationalisation of the Assets of British Petroleum', in Olajide Aluko, *Essays on Nigerian Foreign Policy* (George Allen & Unwin 1984) pp 212-213. Though some, e.g. Ann Genova, have argued that the true reason behind this nationalisation was economic nationalism and not sanctions in relation to oil delivery to South Africa and Zimbabwe, this does not explain why a different treatment was given to BP versus other foreign concession holders; Fiona C. Beveridge, 'Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria' (1991) 40 ICLQ 302, 320.

[1157] *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic*, Award (10 October 1973), (1979) 53 Intl L Rep 297, 315-316.

[1158] Telegram from the Minister in Bolivia (Norweb) to the Secretary of State of 16 March 1937 in United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers 279 (after speaking to the Foreign Minister where the taking was justified as 'based on the findings of the Ministry of Mines and Petroleum that a fraud had been committed in illegally exporting oil to the Argentine Republic in 1925-1926; that, however, the most important [factor in?] the Bolivian Government claim is the evasion of taxes amounting to 1,400,000 bolivianos during the early period of exploitation').

[1159] Whereas clause, Expropriation Decree of 18 March 1938 [Mexico].

[1160] Arts. 1 and 2, Law Regulating Private Participation in Primary Activities where the Operating Contracts of 18 April 2006 [Venezuela]; *Venezuela Holdings B.V. and others v Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014) paras 292, 299; *ConocoPhillips Company and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits (3 September 2012) para 211.

[1161] Law of Hydrocarbon Sovereignty 26,741 [Argentina].

in a manner compatible with sustainable development, for example in the case of Venezuela;[1162] and issues related to security of supply, and that hydrocarbons are a strategic resource for example in the case of Argentina, [1163] Bolivia, [1164] and Russia.[1165]

3. Reasons given for changes in local development

For this comparative analysis, where I have found relevant legislation or justifications given in litigation regarding local communities, I have grouped the reasons given by States as regards changes in their legislation regarding local communities (and development) into three categories: whether the change is brought about in reliance on international law obligations; whether the change is brought about to benefit a local community because they are specially affected; or because they have a right to benefit from those natural resources on the basis of equity or equitable distribution (we include cases of state oil funds created for the benefit of future generations). In some cases, I have found legislation relating to development of local communities without an explicit reason being given for that legislation. I have put this as a fourth category.

Examples of the first category can be found as regards concerns for the environment as well as consultation requirements of local or indigenous

[1162] Art. 5, Organic Hydrocarbon Law [*Ley Orgánica de Hidrocarburos*] [Venezuela].

[1163] Law of Hydrocarbon Sovereignty 26,741 [Argentina].

[1164] Article 4, Law 3058 (17 May 2005) [Bolivia].

[1165] Article 6(37), Law 57-FZ (8 April 2008) [Russia]; see Sergey Seliverstov and Ivan Gudkov, 'Energy Law in Russia' in Martha M. Roggenkamp, Catherine Redgwell, Anita Rønne and Iñigo del Guayo (eds), *Energy Law in Europe* (3rd ed., OUP 2016) 1144.

communities. In Argentina,[1166] Bolivia,[1167] Colombia,[1168] Ecuador,[1169] Mexico,[1170] and Venezuela [1171] justifications for the need to consult local indigenous communities related to ILO Convention 169.[1172] Bolivia,[1173] Colombia,[1174] and the United States [1175] also alluded to UNDRIP. Colombia's Constitutional Court also referred to the Inter-American Court of Human Rights (which set out that the consultation requirement was a principle of international law)[1176] and established a veto power where the community's existence would be threatened or dangerous materials used.[1177]

[1166] *Petrolera Piedra del Aguila v. Curruhuinca Victorino and others*, Acción de Amparo, First Instance Court of Cutral Có, 17 February 2011 [Argentina].

[1167] Article 115, Law 3058 (2005) [Bolivia].

[1168] Preamble, Decree 2613/2013 [Colombia]; *see also* Presidential Directive 1/2010 [Colombia].

[1169] *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Judgment (Merits and Reparations) (27 June 2012).

[1170] Articles 118-120, Hydrocarbon Law [Mexico]; Letter from the President of Mexico to the President of the Senate, p. 37, available at: http://cdn.reformaenergetica.gob.mx/1-ley-de-hidrocarburos.pdf, last accessed 10 November 2017.

[1171] Articles 17, 56, Organic Law of Indigenous Peoples and Communities (2005) [Venezuela]. Venezuela also refers to the ILO Convention in relation to requirements to provide benefits to local communities.

[1172] Convention (No. 169) concerning indigenous and tribal people in independent countries (adopted on 27 June 1989, entry into force on 5 September 1991) 1650 UNTS 383

[1173] Law 3760 (2007) [Bolivia].

[1174] *Laura Juliana Santacoloma Méndez and Rodrigo Elías Negrete Montes*, Constitutional Claim (*Demanda de inconstitucionalidad*), Constitutional Court, Grand Chamber, Decision C-389/2016 [Colombia]; Juan C. Herrera, 'The Right of Cultural Minorities to Binding Consent: Case Study of Judicial Dialogue in the Framework of a *Ius Constitutionale Commune en América Latina*', MPIL Research Paper Series No. 2017-11.

[1175] US State Department, 'Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples' (12 January 2011), available at: https://2009-2017.state.gov/s/srgia/154553.htm, last accessed 10 November 2017.

[1176] *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Judgment (Merits and Reparations) (27 June 2012).

[1177] *Laura Juliana Santacoloma Méndez and Rodrigo Elías Negrete Montes*, Constitutional Claim (*Demanda de inconstitucionalidad*), Constitutional Court, Grand Chamber, Decision C-389/2016 [Colombia]; Juan C. Herrera, 'The Right of Cultural Minorities to Binding Consent: Case Study of Judicial Dialogue in the Framework of a *Ius Constitutionale Commune en América Latina*', MPIL Research Paper Series No. 2017-11.

Australia, [1178] Canada, [1179] Ecuador, [1180] and Nigeria, [1181] mention other international instruments, including human rights treaties and sustainable development declarations. Canada additionally responded to comments by the Special Rapporteur on the Rights of Indigenous Peoples[1182] and CERD[1183] putting

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[1178] Declaration on the Rights of Indigenous Peoples, UNGA A/RES/61/295 (2 October 2007), International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, enetered into force 4 January 1969) 660 UNTS 195, ICESR, ICCPR, Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), *Maloney v. The Queen* [2012] IICATrans 342 (11 December 2012) [Australia]; *Wuridjial v Commonwealth* (2009) 237 CLR 309 [Australia]; *Aurukun Shire Council v. CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 037 [Australia]; Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 Australian Intl L J 38-39; Preamble, Native Title Act (1993) [Australia].

[1179] Sustainable development requirements set out in NAFTA, Rio Declaration, Canada's Counter Memorial (1 December 2009) para 170 in *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No. ARB(AF)/07/4. Reference to participation of citizens as a requirement of international law, *Lone Pine Resources Inc v. Canada*, UNCITRAL Case, Counter Memorial (24 July 2015) para 110.

[1180] As to the polluter pays principles, Ecuador linked it to the Stockholm Declaration, Rio Declaration, World Summit On Sustainable Development) (UN Declaration on World Summit Outcome, UNGA A/RES/60/1) (26 August-4 September 2002), *Maria Aguinda and others. v. Chevron Texaco Corporation*, Casación Decision of 12 November 2013, pp. 54-55, 137-138 [Ecuador]. As to the protection of future generations it mentioned the Stockholm Declaration, World Charter for Nature, Rio Declaration, United Nations Framework Convention on Climate Change (adopted on 9 May 1992, entry into force on 21 March 1994) 1771 UNTS 107, Kyoto Protocol, Millennium Summit, Copenhagen Agreement, *Maria Aguinda and others. v. Chevron Texaco Corporation*, Casación Decision of 12 November 2013, pp 178-179 [Ecuador].

[1181] Nigeria refers to its obligations under the African Charter on Human and Peoples Rights in relation to the protection of the environment of local communities *Mr. Jonah Gbemre (for himself and representing Iwherekan Community in Delta State, Nigeria) v. Shell Petroleum Development Company Nigeria, Ltd., Nigerian National Petroleum Corporation, Attorney General of the Federation*, Suit No. FHC/B/CS/53/05, Federal High Court of Nigeria in the Benin Judicial Division, 14 November 2005 [Nigeria]; Jane Ezirigwe, 'Human rights and property rights in natural resources development' (2017) 35(2) J of Energy & Natural Resources L 207; *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, ACHPR Case No. 155/96 (13 and 27 October 2001) para 30. As well as referencing the Rio Declaration in relation to allowing comments of the local communities where an environmental impact assessment is required, Section 12(a), Schedule, Environmental Impact Assessment Decree (1992) [Nigeria]; Victoria E. Kalu, 'State Monopoly and Indigenous Participation Rights in Resource Development in Nigeria' (2008) 26(3) J of Energy and Natural Resources L 443.

[1182] Statement of the Permanent Mission of Canada on the Report of the Special Rapporteur on the Rights of Indigenous Peoples of 30 October 2014, available at: http://www.international.gc.ca/genev/statements-declarations/report_special_rapporteur-rapport_rapporteur_special.aspx?lang=eng, last accessed 3 November 2017.

[1183] *Delgamuukw v British Columbia* [1997] 3 SCR 1010, para 168 [Canada]; Principles respecting the Government of Canada's relationship with Indigenous Peoples (July 2017); Written Response to questions posed by the Committee on the Elimination of Racial Discrimination during the Interactive Dialogue with Canada on August 14-15, 2017 (26 September 2017); Alastair R. Lucas, 'Canadian Participatory Rights in Mining and Energy Resource Development: The Bridges to Empowerment?'

forward that it would attempt to increase participation of indigenous communities through consultation.

As to the second classification of reasons, that is, benefits to the local community because it is specially affected, I also find examples in Argentina,[1184] Ecuador,[1185] Iraq,[1186] and Russia.[1187] In India, the duty to consult locally affected communities is also because they are specially affected.[1188]

Regarding the third category, that is countries that have considered benefits necessary for equitable considerations or because of ownership over the natural resources (or territory), including references to future generations, the following States have expressed those concerns: Argentina,[1189] Azerbaijan,[1190] Bolivia,[1191]

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in Donald Zillman, Alastair Lucas, and George (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in Sustainable Development of Mining and Energy Resources* (OUP 2002) 305, 309.

[1184] Article 21, Law 27,007 [Argentina].

[1185] *Delfina Case*, First Commercial and Mercantile Division of the Supreme Court of Justice [*Primera Sala de lo Civil y Mercantil de la Corte Suprema de Justicia*], Judges Drs. Ernesto Albán Gómez, Santiago Andrade Ubidia and Galo Galarza Paz, Case No. 31-2002, R.O. No. 43 (19 March 2003); *Maria Aguinda and others v Chevron Texaco Corporation*, Casación Decision of 12 November 2013 [Ecuador].

[1186] Art. 112, Constitution [Iraq]; Nima Mersadi Tabari, *Lex Petrolea and International Investment Law* (Routledge 2017) 213.

[1187] Federal Law On Guarantees of Rights of Small-numbered Indigenous peoples of the Russian Federation (1999) [Russia]; Federal Law on Traditional Natural Resources Territories of Small-Numbered Indigenous Peoples of North, Siberia and Far East of the Russian Federation (2001) [Russia]; Concept of Sustainable Development of Indigenous Small-Numbered Peoples of North, Siberia and Far East (2009) [Russia].

[1188] S.O. 1533 Environmental Impact Assessment Notification, §3(i) [India]; Lavanya Rajamani, 'Public Participation in Indian Environmental Law' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 400.

[1189] Law 27,007 [Argentina].

[1190] SOFAZ, Mission, goals and philosophy, available at: http://www.oilfund.az/en_US/about_found/meqsed-ve-felsefe.asp, last accessed 10 November 2017; Svetlana Tsalik, *Caspian Oil Windfalls: Who will benefit?* (Caspian Revenue Watch, 2003).

[1191] Art. 353, Constitution (2009) [Bolivia].

Brazil,[1192] Canada,[1193] Indonesia,[1194] Iran,[1195] Iraq,[1196] Nigeria,[1197] Norway,[1198] and the United States[1199] (Alaska[1200]). Brazil[1201] and the United States[1202] also have requirements of consultation with indigenous communities on the basis of their having original rights over the territory.

[1192] Article 231(3), Constitution [Brazil]; Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 354.

[1193] *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) para 46.

[1194] Law 33/2004 [Indonesia]; Cut Dian Agustina, Ehtisham Ahmad, Dhanie Nugruho, and Herbert Siagian, 'Political economy of natural resource revenue sharing in Indonesia' [2012] Asia Research Centre Working Paper 55; Kai Ostwald, Yuhki Tajima and Krislert Samphantharak, 'Indonesia's Decentralization Experiment' (2016) 33(2) J of Southeast Asian Economies 139.

[1195] National Development Fund of Iran, 'Fund History', available at: http://en.ndfi.ir/About-NDF/History, last accessed 10 November 2017.

[1196] Art. 112, Constitution [Iraq]; Nima Mersadi Tabari, *Lex Petrolea and International Investment Law* (Routledge 2017) 213.

[1197] Section 162(2), Constitution (1999) [Nigeria]; Yinka Omorogbe, 'The Legal Framework for Public Participation in Decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless' in Donald M. Zillman, Alastair Lucas, and George (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP 2002) 559. The distribution in the Federation is in accordance with the 'population, equality of States, internal revenue generation, land mass, terrain as well as population density' (section 162(2), Constitution) which means that more densely populated regions, such as the Northern and Western Nigeria receive 'more allocations from oil revenue than the oil-producing States' Z. Adangor, 'The Principle of Derivation and the Search for Distributive Justice in the Niger Delta Region of Nigeria: The Journey So Far' (2015) 41 J of L, Policy and Guidelines 115, 127.

[1198] Norges Bank Investment Management, information available at: https://www.nbim.no, last accessed 8 December 2017.

[1199] William C. Scott, 'Tribal Management of Tribal Lands and Resources: Environmental Regulation' (2015) 52(1) Rocky Mountain Mineral L Foundation J 25.

[1200] Alaska Permanent Oil Fund, information available at: https://apfc.org/who-we-are/guiding-principles/, last accessed 8 December 2017; Emma Barry-Pheby, 'Examining the Priorities of the Canadian Chairmanship of the Arctic Council: Current Obstacles in International Law, Policy and Governance' (2014) 25 Colorado Natural Resources, Energy and Environmental L Rev 279.

[1201] Article 231(3), Constitution [Brazil]; Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 354.

[1202] William C. Scott, 'Tribal Management of Tribal Lands and Resources: Environmental Regulation' (2015) 52(1) Rocky Mountain Mineral L Foundation J 25.

As to our fourth category, that is, States which have some local development or protection of local communities legislation in place but have not given reasons for it, I found the following examples. Angola[1203] and Norway[1204] have local content requirements that are usually brought up in relation to local development issues. Indonesia's Constitutional Court eliminated the oil and gas regulator (BP Migas) because it did not 'provide benefits for the greatest prosperity of the people'.[1205] Russia requires consultation of local communities and indigenous peoples (sometimes) but does not give any reasons for that protection.[1206] In the United States some local communities are allowed to issue regulations regarding oil and gas, including fracking,[1207] whilst others are preempted from doing so by the state.[1208]

[1203] Jesse Salah Ovadía: 'The dual nature of local content in Angola's oil and gas industry: development vs. elite accumulation' (2012) 30(3) J of Contemporary African Studies 395.

[1204] Berryl Claire Asiago, 'Rules of Engagement: A Review of Regulatory Instruments Designed to Promote and Secure Local Content Requirements in the Oil and Gas Sector' (2017) 6 Resources 1; Per Heum, 'Local Content Development: Experiences from Oil and Gas Activities in Norway' SNF Working Paper 2008:2.

[1205] Decision No. 36/PUU-X/2012, p. 194, Constitutional Court [Indonesia]; Simon Butt and Fritz Edward Siregar, 'State Control over Natural Resources in Indonesia: Implications of the *Oil and Natural Gas Law* Case of 2012', (May 2013) 31(2) J of Energy and Natural Resources L 107; Mirza Karim, 'A controversial decision of the Constitutional Court on the Indonesian Oil and Gas Law' (2013) 6(3) J of World Energy, L and Business 260.

[1206] Federal Law On Guarantees of Rights of Small-numbered Indigenous peoples of the Russian Federation (1999) [Russia]; Federal Law on Traditional Natural Resources Territories of Small-Numbered Indigenous Peoples of North, Siberia and Far East of the Russian Federation (2001) [Russia]; Concept of Sustainable Development of Indigenous Small-Numbered Peoples of North, Siberia and Far East (2009) [Russia].

[1207] New York.

[1208] Colorado, Texas, West Virginia.

B. Comparison

In all of these positions regarding the justification for measures unilaterally changing existing agreements, there are common factors that should be separated and analysed further.

1. Protection of population

The first of these factors relates to protection of the population under the sovereignty of the State in question. This is reflected in the arguments made in all three areas that have been studied here. As to local development, this is found where the local community, because it is particularly affected by the extraction and production of hydrocarbons, is given some sort of compensation, as well as when it is specifically benefitted by the extraction, either through CSR policies or payments made to the local community; as to nationalisation, it is where the measure is adopted to benefit the local population and/or achieve economic independence; and as to increases in government take, it is reflected in the argument based on protection of the economy, or the wider population, from the impact of extraordinary increases in prices.

2. Energy security

The issue is particularly interesting in the case of nationalisation or expropriation, or of restrictions on exports, as in those cases the argument is based on the need to guarantee energy security of supply. The issue of energy security is also related in States' discourse to the concept of economic independence and nationalisation of a strategic sector in order to guarantee protection from foreign influence. As to government take, the issue of energy security is also relevant in the impact of increases in hydrocarbon prices on the economy. Both importing and exporting

countries (and those that go from one to the other) adopt measures to guarantee their energy supply where there are increases in oil prices that could affect them through inflation and through balance of payment effects.

3. Equity or equitable distribution

In examining how state regulation of oil and gas exploration and production has changed over time and its relation to the PSNR doctrine, it has been argued that this is a cyclical issue. That is, that States change their positions as regards oil and gas government take as a function of the prices of oil and their needs for investment.[1209] Others note that there has been a trend in changes in negotiations in these areas. There is an acceptance of increased state participation in revenues when there are extraordinary profits on the basis of equitable distribution based on ownership of the underlying resources as well as increased regulation on the basis of concerns of sustainable development.[1210]

Concern regarding equitable management of resources is addressed, for example, in the UN Deputy Secretary General's comments in a Security Council meeting of 19 June 2013. There he offered the organisation's assistance to States to guarantee that they develop adequate taxation policies: '[a]lthough Governments

[1209] See Paul Stevens, 'National oil companies and international oil companies in the Middle East' (2008) 1(1) J of World Energy L and Business 5; Thomas Waelde, 'Renegotiating acquired rights in the oil and gas industries: Industry and political cycles meet the rule of law', (2008) 1 J of World Energy L and Business 55; George Joffe and others 'Expropriation of oil and gas investments: Historical, legal and economic perspectives in a new age of resource nationalism' (2009) 2(1) J of World Energy L and Business 3; Mark Clarke and Tom Cummins, 'Resource Nationalism: A Gathering Storm?' (2012) 6 Intl Energy L Rev 220.

[1210] Rosalyn Higgins, 'Natural Resources in the Case Law of the International Court' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development* (OUP 1999) 88; Nico Schrijver, 'Natural Resources, Permanent Sovereignty over' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (June 2008); Nadine Bret-Rouzat and Jean-Pierre Favennec, *Oil and Gas Exploration and Production, Reserves, costs, contracts* (Paris, Ed. Technip 2011) 206; Stephan Hobe, 'Evolution of the Principle on Permanent Sovereignty Over Natural Resources' in Marc Bungenberg, Stephan Hobe (eds), *Permanent Sovereignty over Natural Resources* (Springer 2015).

held the primary responsibility for preventing conflict and for equitably managing resources … the United Nations supported dispute resolution and grievance mechanisms on the ground through its rule of law programmes. Together with international financial institutions, the Organization could help Governments to develop capacity on taxation policies and better regulate extractive industries'.[1211] There is thus evidence of a link between increases in government take or equitable distribution of revenues in cases of extraordinary increases in oil or gas prices and sovereign concerns made in publications by jurists, arbitral decisions, and international organisations.

Similarly, the issue of equity and equitable distribution of benefits is apparent in both nationalisation and local development measures. As regards nationalisation, the issue is raised in relation to who should be benefitting from the production of hydrocarbons on the territory of the State. Generally, States adopt measures of nationalisation where they find that the principal beneficiary of this exhaustible resource is the foreign oil company, while their own population is struggling.

As to local development issues, equity and equitable distribution is important where States adopt measures to benefit a particular community because the natural resource was found (and exploited) on their territory, as well as where States adopt measures ensuring equitable distribution amongst all the citizens of the State, even including future generations. The concept of equitable distribution is, thus, applied (by different States) to both the local community and the population of the whole State (present and future).

[1211] Security Council Meeting of 19 June 2013, U.N. Doc. SC/11037 (6982 meeting).

4. Expectations of investors in the hydrocarbon sector

Arguments based on industry practice are implicitly based on a position that holds that the industry expects changes in regulation upon the occurrence of certain changes in circumstances. This combines the issue of changes in circumstances with expectations under international law.[1212] In the case of increases in government take, these examples are clearer because the change in circumstances is manifest in increases in hydrocarbon prices.

For nationalisations, one might be able to argue that the change in circumstances is when a country suddenly finds itself importing hydrocarbons when it used to have security of supply, such as the case of Argentina and the expropriation of the shares of YPF S.A. However, that position does not seem to have been upheld by States in the evidence reviewed thus far. The change in position noted previously, where the discussion has shifted in current nationalisations from the legality of the measure to the amount of compensation, is also a reflection of investors' expectations as it implies that the investor is normally willing to concede that States have a right to nationalise, at the right price.

[1212] Whether the concept of expectations actually exists under international law is arguable. However, 'legitimate expectations' are frequently linked to obligations to provide fair and equitable treatment under bilateral investment treaties. The concept of 'legitimate expectations' has been extensively addressed in the area of international investment law, for in-depth discussion on this issue see: Martin Parparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013); Ioana Tudor *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2008); Marc Jacob and Stephan W. Schill, 'Chapter 8: Standards of Protection I. Fair and Equitable Treatment: Content, Practice, Method', in Mark Bungenberg, Jorn Griebel, Stephan Hobe, August Reinisch (eds), *International Investment Law* (C.H. Beck, Hart Publishing and Nomus 2015) 700; Christopher Campbell, 'House of Cards: Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law' (2013) 30 J Intl Arbitration 361; Stephan W. Schill, 'Fair and Equitable Treatment, the Rule of Law and Comparative Public Law', in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 151; Nicolas Angelet, 'Fair and Equitable Treatment' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (March 2011).

As to local development issues, one could argue that an investor's expectations come into play where a State adopts regulations changing the terms of an agreement on the basis of another existing obligation under international law (or one that is in the process of being developed). Some even hold that human rights and environmental obligations can be considered binding on investors as well as States.

5. Conflict with other obligations under international law

In some cases, States have argued that they have adopted a certain measure in light of an existing obligation under international law. These latter obligations are generally argued under customary international law.[1213] The clearest examples of this type of measures are regulations affecting the rights of local indigenous peoples or protection of the environment taken after an existing contract or concession has already been issued.[1214] There are, of course, several courses of action considering conflicting obligations under international law. These can be addressed through interpretation or through arguments based on hierarchy. However, in the cases related to measures protecting local development a vast majority of States has relied on other obligations of international law, either in drafting domestic legislation or in international litigation.

In the nationalisation cases I have seen, States have also relied on other obligations under international law. The international obligation invoked by States

[1213] The conflicting obligations have been mentioned in chapters 3, 4 and 5 and have also been mentioned previously in this chapter.

[1214] For example in the case of *Texaco v Ecuador*.

is the permanent sovereignty over natural resources principle that the benefits from hydrocarbon exploration ought to go to the people of the State.

XI. CHAPTER 7: CONCLUSION

In the ICJ *Jurisdictional Immunities* case, Germany requested that the Court decide whether certain decisions of the Italian courts allowing civil claims to go forward against Germany on violations of international humanitarian law during World War II, as well as taking measures against non-commercial German property, and declaring similar judgments by Greek courts enforceable, were in violation of the international law obligation to respect jurisdictional immunities.[1215] Italy argued that 'customary international law has developed to the point where a State is no longer entitled to immunity in respect of acts occasioning death, personal injury or damage to property on the territory of the forum State'.[1216]

The Court considered that it must 'determine whether … the failure of a State to perform completely a duty of reparation which it allegedly bears is capable of having an effect, in law, on the existence and scope of the State's jurisdictional immunity before foreign courts. The question is one of law on which the Court must rule to determine the customary international law applicable in respect of State immunity'. [1217] The Court then looked to determine the status of customary international law in this regard through State practice and *opinio juris.* [1218] In particular it looked to the legislation, and judgments of domestic courts, and the

[1215] *Jurisdictional Immunities Case* (*Germany v. Italy, Greece intervening*) (Merits) [2012] ICJ Rep 99, 107.

[1216] *Jurisdictional Immunities Case* (*Germany v. Italy, Greece intervening*) (Merits) [2012] ICJ Rep 99, 126.

[1217] *Jurisdictional Immunities Case* (*Germany v. Italy, Greece intervening*) (Merits) [2012] ICJ Rep 99, 120.

[1218] *Jurisdictional Immunities Case* (*Germany v. Italy, Greece intervening*) (Merits) [2012] ICJ Rep 99, 123.

number of States it reviewed was approximately ten.[1219] It therefore concluded that 'the Court considers that customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of the State in the course of conducting an armed conflict'.[1220]

Ad hoc Judge Gaja's analysis of the Court's decision is also relevant for this study as he justified the extent of the survey—ten States—relying on the passage of time and the acquiescence of other States.[1221] He additionally referred to decisions of domestic courts which describe the current status of the law as a 'trend' but that is was not yet an established principle of customary international law.[1222]

This sort of analysis is not typically undergone by international investment tribunals, though States do argue that other countries adopt similar measures[1223] and at times this is relevant to the conclusions of those tribunals.[1224] In contrast with the ICJ's approach above, the analysis is not carried out as a determination of the

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[1219] *Jurisdictional Immunities Case* (*Germany v. Italy, Greece intervening*) (Merits) [2012] ICJ Rep 99, 130-134.

[1220] *Jurisdictional Immunities Case* (*Germany v. Italy, Greece intervening*) (Merits) [2012] ICJ Rep 99, 135.

[1221] *Jurisdictional Immunities Case* (*Germany v. Italy, Greece intervening*) (Dissenting Opinion *ad hoc* Judge Gaja) [2012] ICJ Rep 309, 310-311.

[1222] *Jurisdictional Immunities Case* (*Germany v. Italy, Greece intervening*) (Dissenting Opinion *ad hoc* Judge Gaja) [2012] ICJ Rep 309, 320.

[1223] eg Canada in Canada's Counter Memorial (1 December 2009) para 124 in *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No. ARB(AF)/07/4; Argentina in *Total SA v Argentina*, ICSID Case No. ARB/04/1, Decision on Liability (27 December 2010) paras 434-435; Ecuador in *Maria Aguinda and others v Chevron Texaco Corporation*, Casación Decision of 12 November 2013, pp 54-55 [Ecuador] and *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012) para 137.

[1224] *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No. ARB/08/11, Decision on remaining issues of jurisdiction and liability (12 September 2014) para 591; *Total SA v Argentina*, ICSID Case No. ARB/04/1, Decision on Liability (27 December 2010) paras 435, 459; *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Judgment (Merits and Reparations) (27 June 2012) para 164.

existing state of customary international law. In fact, though tribunals refer to this as a relevant factor they do not explicitly link it to a rule of international law or State responsibility, i.e. they do not state that there has been a change in customary law—nor do they deny this—, or that an investor's expectations should have contemplated this general response to a certain circumstance.

Throughout this thesis I have attempted to do precisely that, that is determine whether there is a change in the concept of PSNR under customary international law, which should be (or is) considered by States and investment tribunals upon issuing regulations as regards oil and gas upstream activities or deciding on whether they breach international obligations of States.

As noted previously, I have focused the areas of study of the thesis on three key areas of regulation of the hydrocarbon upstream industry: government take, nationalisations, and local development. I have determined State practice through local legislation, local judicial decisions, arguments made in international litigation, and secondary sources. In some cases, I have not been able to determine what the State practice was due to lack of availability of sources or language issues. The thesis looked at twenty-five States which reflect a cross-section of specially relevant States, and different legal systems.

We chose to study the evolution of PSNR through hydrocarbon upstream regulation because it is an area where States are very sensitive and therefore more prone to regulate. Hydrocarbons are non-renewable, sub-soil natural resources that require large amounts of capital investments to be exploited. They are also, currently, necessary to produce energy and their prices are subject to geographical, political and technological volatility. They are also historically at the origin of the doctrine of PSNR.

The areas of study were chosen for different reasons. Government take and nationalisations were chosen because of their historical relevance to the PSNR principle, as well as their current relevance with regard to human rights discussions of equitable distribution of an exhaustible natural resource. Local development was chosen because of its current relevance in the international community, particularly with regard to benefits, compensation for damages, and participation when a local community is specially affected by a project.

As noted, this is not a thesis on customary international law; however, methodologically it was necessary to go back over the elements studied to determine whether there has been an evolution or trend that has crystallized as an evolution of custom. In this sense, this study is similar to what was done by the ICJ in the *Jurisdictional Immunities* case; I have looked at State practice and *opinio juris* and linked States' positions as regards their regulations with international law concepts.

This thesis was divided into seven chapters. Chapter 1 was a description of the overall purpose of the thesis, that is the analysis of the changes in regulation of oil and gas regimes over time through a study of contemporary state practice in regulating this sector for 'sovereign ends' and its implications for international law and the evolution (if any) of the principle of permanent sovereignty over natural resources (PSNR). This chapter also referred to the methodology of the thesis, as well as general background necessary to understand the thesis.

Chapter 2 examined the fundamental international legal concepts central to the thesis. It was divided into two sections: a first that referred to the methodology and content of primary rules, that is the development of custom, energy security, equity, conflicting obligations under international law, supervening impossibility of

performance, and fundamental change of circumstances. The second section referred to concepts related to secondary rules, that is circumstances precluding wrongfulness, *force majeure*, and state of necessity.

Chapter 3 analysed the different regimes regarding government take of revenues generated by hydrocarbons, adopting a comparative approach. In it I identified common ground in reasons given by States as regards their regulations in this area.

Chapter 4 contained a study of historic and current nationalisations within the oil and gas sector. There are few examples of this currently, but given the historical relevance of these nationalisations for the development of the PSNR doctrine it was necessary to revisit them in a comparative analysis of the nationalisations of the 1970s, looking specifically at their evolution and similarities with regard to current nationalisations. Again, in this chapter I have identified coinciding justifications.

Chapter 5 looked at instances or projects where there has been regulation of oil and gas production and exploration in light of concerns regarding local development and the environment. It was a comparative study of different specific cases of local, provincial or national legislation as well as a closer look at regulatory requirements of international financing agencies like the WB, the IMF and the IFC. Again, I have focused on the reasons given for those changes in regulation, and their common ground.

Chapter 6 is a synthesis of the justifications given and identified in chapters 3, 4 and 5. It has further provided a legal analysis of the reasons given for the measures described in the previous three chapters. In it I have overlapped the reasons given in chapters 3, 4 and 5 with the legal concepts outlined in Chapter 2, to

determine how far these reasons are a reflection of existing rules of international law.

As reflected in that chapter, these reasons significantly overlap with the areas of: (i) protection of population; (ii) energy security; (iii) equity or equitable distribution; (iv) expectations of investors in the hydrocarbon sector; and (v) conflicts with other obligations under international law.

Historically, PSNR has been linked to the concepts of equity and equitable distribution of benefits and energy security. The evolution that I have identified in the State practice studied is that these concepts continue to be relevant in the concept of PSNR, but other, newer international law concerns have also been incorporated in these areas. These newer concepts include concern for the protection of population, that is a reflection of the evolution of human rights and environmental law; expectations of investors, that is a reflection of the evolution of investment law; and conflicts with other obligations under international law.

As Chapter 6 shows, there is significant State practice and *opinio juris* of States, and it is my position that these are widespread enough to reflect an emergence of evolution of PSNR under customary international law. Much of the concept of PSNR has been maintained, in that States continue to regulate as a measure to guarantee equitable distribution of a non-renewable resource and that they continue to be concerned about issues of energy security. However, these concepts have also expanded, for example: equitable distribution now includes (in significant countries, though not all) benefits to local communities; and energy security now contemplates both the need to guarantee security of supply as well as the need to protect investments to continue to explore, advance technology and find new reserves. Additionally, new concepts have been incorporated into these

regulations, including the protection and participation of local communities, indigenous communities, and the protection of the environment.

This evolution of the concept of PSNR has implications for State regulation as well as for other actors that participate in these activities. Those other actors, that I have referred to sporadically throughout this thesis, include international financial institutions, local communities and oil companies. Following the ILC's articles on international responsibility of States and international organisations, international financial institutions could be considered internationally responsible in cases where they financed projects that do not respect these international obligations. Though these articles are not binding, or necessarily generally accepted, as I have seen in this thesis international financial institutions have adopted guidelines requiring projects that are financed by them to guarantee certain protection of the environment and participation of local communities. Their position is to acknowledge responsibility of business [and governments] to respect human rights, and therefore that through establishing these standards 'support this responsibility of the private sector'.[1225] However, they also recognise their 'responsibility to conduct environmental and social due diligence of activities proposed for' their support.[1226]

As regards oil companies, international or national, they are the investors in these projects. They are the final recipients of these regulations and also the affected parties where those regulations change the terms in which they made the

[1225] IFC Sustainability Framework, 'Policy and Performance Standards on Environmental and Social Sustainability' (January 1, 2012), p. 5.

[1226] IFC Sustainability Framework, 'Policy and Performance Standards on Environmental and Social Sustainability' (January 1, 2012), p. 3.

investments. When that happens, I have seen that they usually adopt one of two solutions, they either attempt international litigation on the basis of bilateral investment treaties or agreements or negotiate with the national government (or the local community). The latter solution is the most common, and this is indicative of a recognition of the right to regulate, though an attempt is made to find a solution that is acceptable to all parties. In the majority of cases this solution is found. The former solution is less common, but relevant because it manifests a situation where the investor considers that there is a measure being adopted which is contrary to international law. As I have seen the investors in these international arbitrations rely on concepts like the fair and equitable treatment standard, which is generally argued to be based on an idea of legitimate expectations of the investors.

As regards the implications under international law and international responsibility of the evolution of the concept of PSNR under customary international law, these would be as follows. If customary international law has evolved to include States' rights to regulate to protect communities and the environment, then it also would include obligations to protect these areas. If that were the case, then investors should expect States' to regulate to protect these areas. If investor's expectations should include these concepts, that means that a States' change in regulation to protect these elements should not be determinative of international responsibility under international investment law.

As the ICJ held in the *Nicaragua* case, '[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared by other States, tend

toward a modification of customary international law'.[1227] As outlined in Chapter 1, this thesis has looked at current State practice and *opinio juris* of twenty-five relevant States in the key areas of regulation of upstream hydrocarbon regimes from the perspective of the State acting in its sovereign capacity. That standard of review of State practice exceeds what has been used in the past to determine the existence of evolution of customary international law, particularly when including the acquiescence of other States, although international law's reluctance to set up abstract hierarchies[1228] may still allow for exceptions to the conclusions of this thesis in certain circumstances.

As also confirmed in Chapter 1, the existence of the PSNR doctrine as a principle of customary international law was not under discussion in this thesis, as the ICJ recently confirmed its continuing customary character.[1229] The object of the thesis was to determine whether despite its continuous customary character its *content* had evolved to reflect more current concerns under international law. Through the analysis carried out, the thesis confirms that the issues originally raised under the PSNR principle, i.e. to guarantee equitable distribution of a non-renewable resource, and energy security, continue to be current. In addition, however, it also confirms that there is significant State practice and *opinio juris* as well as lack of objections by other States and reinforcement through international human rights bodies, as regards hydrocarbon upstream activities. That demonstates that the principle has evolved to encompass protection, participation and benefits

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[1227] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14, para 207.

[1228] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

[1229] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*), [2005] ICJ Rep 168, 251-252.

to local communities; energy security combining States regulating to guarantee security of supply, and protection of investments; as well as protection of the environment.

XII. APPENDIX A – COUNTRY INFORMATION

Country	Oil Reserves		Oil Production			Gas Reserves		Gas Production		
	EIA Res. '12	BP Res.	Oil Prod '12	BP Prod	IEA Prod. '12	EIA Res. '12	BP Res	EIA Prod '11	BP Prod	IEA Prod. '11
Angola	18	16	16	16	16	38		68		
Argentina	31	31	26	27	27	36	35	23	23	22
Australia	37	26	29	30	30	28	11	16	18	17
Azerbaijan	20	21	23	25	23	26	26	30	31	32
Bolivia					54	41	36	31	28	33
Brazil	15	15	11	13	13	33	31	32	30	31
Canada	3	3	5	5	5	20	17	4	5	3
China	14	14	4	4	4	13	13	6	7	6
Colombia	34	33	22	21	21	50	44	40	38	37
Ecuador	19	19	30	29	29	101		74		
Egypt	25	25	27	26	26	16	16	15	14	14
India	21	22	20	24	25	23	20	19	22	20
Indonesia	28	27	21	23	24	11	14	11	10	9
Iran	4	4	6	6	6	2	1	3	3	5
Iraq	5	5	8	9	10	12	12	65	47	48
Kuwait	6	6	10	8	9	19	18	33	32	35
Mexico	17	18	9	10	11	31	34	18	15	18
Nigeria	10	10	12	12	12	9	9	25	19	24
Norway	23	20	14	15	15	17	15	7	6	7
Qatar	13	13	18	14	14	3	3	5	4	4
Russia	8	8	3	2	2	1	2	2	2	1
Saudi Arabia	1	2	1	1	1	5	6	8	8	8
United Kingdom (offshore)	30	29	25	20	20	43	40	20	21	19
United States	12	11	2	3	3	4	5	1	1	2
Venezuela	2	1	13	11	8	8	8	27	24	28

Country	NOC	HDI '12	Ind.	Reg	ECT	Nationalized	1st oil field	OPEC	Net Oil importer	Net Gas Importer
Russia	Yes	0.788	NA	Asia	Sign	1918			No	Not
Iran	Yes	0.742	NA	M East	Obs	1951		1960		
Qatar	Yes	0.834	1971	M East	Obs	1977	1939	1961	No	No
United States		0.937	1776	N Ameri	Obs		1859		Yes	Yes
Saudi Arabia	Yes	0.782	NA	M East	Obs	1980	1938	1960	No	No
Venezuela	Yes	0.748	1811	S Americ	Obs	1976		1960	No	Yes
Iraq	Yes	0.59	1932	M East		1961		1960	No	No
China	Yes	0.699	NA	Asia	Obs		1959		Yes	Yes
Canada		0.911	NA	N Ameri	Obs				No	No
Nigeria	Yes	0.471	1960	Africa	Obs	1971	1956	1971	No	No
Norway	Yes	0.955	NA	Europe	Sign				No	No
Kuwait	Yes	0.79	1961	M East	Obs	1975		1960	No	Yes
India	Yes	0.554	1947	S Asia		1970			Yes	Yes
Azerbaijan	Yes	0.734	1991	C Asia	Mem	1920	1846		No	No
Australia		0.938	NA	Oceania	Sign				Yes	No
Mexico	Yes	0.775	1810	N Ameri		1938			No	Yes
Argentina	Yes	0.811	1816	S Americ		1963			No	Yes
Colombia	Yes	0.719	1810	S Americ					No	No
Ecuador	Yes	0.724	1822	S Americ				1973	No	No
Indonesia	Yes	0.629	1945	SE Asia	Obs	1963	1885	1962	Yes	No
Egypt	Yes	0.662	NA	Africa	Obs	1962			Yes	No
Brazil	Yes	0.73	1822	S Americ		1953			Yes	Yes
Angola	Yes	0.508	1975	Africa		1978	1955	2007	No	No
United Kingdom		0.875	NA	Europe	Mem	1920			Yes	Yes
Bolivia	Yes	0.675	1825	S. Americ	Mem	1937	1920		Yes	No

XIII. BIBLIOGRAPHY

— '62nd meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (9 May 1968) UN Doc A/CONF.39/C.1/SR.62

— '63rd meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (10 May 1968) UN Doc A/CONF.39/C.1/SR.63

— '64th meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (11 May 1968) UN Doc A/CONF.39/C.1/SR.64

— '65th meeting of the Committee of the Whole' United Nations Conference on the Law of Treaties (Vienna 26 March-24 May 1968) (11 May 1968) UN Doc A/CONF.39/C.1/SR.65

— 'From Concession to Participation: Restructuring the Middle East Oil Industry' (1973) 48(4) New York U L Rev 774

— 'Joint Report of Morris J. Cooke and Manuel Zevada to President Roosevelt and President Camacho' in Bevans, C. (comp.) 9 United States Treaties and International Agreements

— 2011 Economic Report, Oil & Gas UK

— Agreement for Sale of Assets of PT Shell Indonesia to Indonesian Government (30 December 1965), (November 1966) 5(6) Intl L Materials 1136

— Alaska Permanent Oil Fund

— BP Report on oil and gas reserves and production

— Contract of Work between PN Pertambangan Minjak Nasional and PT Stanvac Indonesia (25 September 1963) [Indonesia] (1964) 3 Intl L Materials 248

— *Derechos de los Pueblos Indígenas en la Argentina* (September 2015)

— Government Meeting of 30 May 2013, Moscow

— História do Petróleo no Brasil

— History of ONGC

— Iraq Petroleum Company's Concession Agreement, *Selected Documents of the International Petroleum Industry Iraq and Kuwait, Pre-1966* (OPEC, 1974)

— Letter to Mr Truman of 11 June 1951, Other Documents Submitted to the Court (1951-1952) Iranian Communication of 29 June 1951, Annex C(1), 672

— Minutes of the Meeting Held on 12 May 2017, WTO G/TRIMS/M/42 (13 July 2017)

— Model E&P Contract and Annexes [Colombia]

— Model Production Sharing Contract of the Ministry of Petroleum and Natural Gas of the Government of India, 2009 [India].

— Norges Bank Investment Management

— Principles respecting the Government of Canada's relationship with Indigenous Peoples (July 2017)

— Report of the World Commission on Environment and Development: Our Common Future

— Research: The Fundamental Relationship Between Natural Gas and Crude Oil Prices in North America, Baker Institute for Public Policy, available at: http://bakerinstitute.org/center-for-energy-studies/research-fundamental-relationship-between-natural-gas-and-crude-oil-price/, last accessed 8 September 2015

— Symposium on Private Investors Abroad-Rights and Duties (Southwestern Legal Foundation 1965)

— Written Response to questions posed by the Committee on the Elimination of Racial Discrimination during the Interactive Dialogue with Canada on August 14-15, 2017 (26 September 2017)

Adangor, Z., 'The Principle of Derivation and the Search for Distributive Justice in the Niger Delta Region of Nigeria: The Journey So Far' (2015) 41 J of L, Policy and Guidelines 115

Adeniji, K., 'State Participation in the Nigerian Petroleum Industry' (1977) 11(2) J of World Trade 156

Agalliu, I., 'Comparative Assessment of the Federal Oil and Gas Fiscal System', U.S. Department of the Interior, Bureau of Ocean Energy Management (2011).

Aguilar, R. and Goldstein, A., 'The Chinisation of Africa: The Case of Angola' in Greenaway, D. (ed), *The World Economy, Global Trade Policy 2009* (Wiley Blackwell 2010)

Alberta Energy Resources Conservation Board, 'A Discussion Paper: Regulating Unconventional Oil and Gas in Alberta' (December 2012)

Alberti, M., 'Oil and gas companies still enjoying 1920s royalty rates', *Map and Data Resources* (20 November 2013)

Allen, S. and Xanthaki, A. (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011)

Aluko, O., 'The Nationalisation of the Assets of British Petroleum', in Aluko, O., *Essays on Nigerian Foreign Policy* (George Allen & Unwin 1984)

— — *Essays on Nigerian Foreign Policy* (George Allen & Unwin 1984)

Alves, F. G. and de Alencar Xavier, Y. M., 'The Evolution of Brazilian Oil, Gas and Biofuel Industry Regulations' in de Alencar Xavier, Y. M. (ed), *Energy Law in Brazil* (Springer 2015)

Alvik, I., 'Norway' in Pereira, E. G. and Talus, K. (eds), *Upstream Law and Regulation* (Globe Law and Business 2013)

Amerasinghe, C. F., *Diplomatic Protection* (OUP 2008)

American Law Institute, *Restatement of the Law, Third, the Foreign Relations of the United States* (St Paul, Minn.: American Law Institute Publishers 1987)

Angelet, N., 'Fair and Equitable Treatment' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (March 2011)

Anglo-Iranian Oil Co. Case (*UK v Iran*) ICJ Pleadings 100

ANH, Model Hydrocarbon Exploration and Production Contract [Colombia]

Annuaire de l'Institut de Droit International (1952) 44(II)

ANP Circular No. 03 of 31 January 2014, For: E&P and TEA Contractors From: Javier Betancourt Valle (President of ANP) [Colombia]

Arato, J., 'Accounting for Difference in Treaty Interpretation Over Time' in Bianchi, A., Peat, D. and Windsor, M. (eds), *Interpretation in International Law* (OUP 2015)

Arias, D., 'Qatar' in Pereira, E. G. and Talus, K. (eds), *Upstream Law and Regulation* (Globe Law and Business 2013)

Aron, L., 'The political economy of Russian oil and gas' *American Enterprise Institute* (29 May 2013)

Asiago, B. C., 'Norwegian Local Content Model A Viable Solution?' (2017) 14 US-China L Rev 471

— — 'Rules of Engagement: A Review of Regulatory Instruments Designed to Promote and Secure Local Content Requirements in the Oil and Gas Sector' (2017) 6 Resources 1

Baker, R., 'Customary International Law in the 21st Century: Old Challenges and New Debates' (2010) 21.1 Eur J Intl L 173

Bankes, N. and Kalkbrenner, A., 'Liability for Oil Spills from Oil and Gas Operations in Canada's Arctic Waters' in Barrera-Hernández, L., Barton, B., Godden, L., Lucas, A. and Rønne A. (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016)

Barelli, M., 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 ICLQ 957

Barral, V., 'Sustainable Development in International Law: Nature and Operation of an Evolutive Norm' (2012) 23(2) Eur J Intl L 377

Barrera-Hernández, L., 'Sovereignty over Natural Resources under Examination: The Inter-American System for Human Rights and Natural Resource Allocation' (2006) 12 Annual Survey of Intl & Comparative L 43

— — 'Sleeping with the Enemy: The Legal Landscape of Unconventional Gas Development in Argentina' in Zillman, D. N., McHarg, A., Bradbrook, A., and Barrera-Hernández, L. (eds), *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014)

— — 'Indigenous Peoples and Free, Prior, and Informed Consent in Latin America' in Barrera-Hernández, L., Barton, B., Godden, L., Lucas, A., and Rønne, A. (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016)

Barrera-Hernández, L., Barton, B., Godden, L., Lucas, A., and Rønne, A. (eds.), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* 42 (OUP 2016)

Barrows, G., 'A survey of incentives in recent petroleum contracts' in Beredjick, N. and Waelde, T. (eds), *Petroleum Investment Policies in Developing Countries* (Kluwer 1988)

Barry-Pheby, E., 'Examining the Priorities of the Canadian Chairmanship of the Arctic Council: Current Obstacles in International Law, Policy and Governance' (2014) 25 Colorado Natural Resources, Energy and Environmental L Rev 287

Barton, B. and Goldsmith, M., 'Community and Sharing' in Barrera-Hernández, L., Barton, B., Godden, L., Lucas, A., and Rønne, A. (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016)

Barton, B., Lucas, A., Barrera-Hernández, L., and Rønne, A. (eds), *Regulating Energy and Natural Resources* (OUP 2006)

Barton, B., Redgwell, C., Rønne, A., Zillman, D. N. (eds), *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment* (OUP 2004)

Barton, B., Redgwell, C., Rønne, A., Zillman, D. N., 'Energy Security in the Twenty-First Century' in Barton, B., Redgwell, C., Rønne, A., Zillman D. N. (eds), *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment* (OUP 2004)

Bekhechi, M. A., 'The Chad-Cameroon Pipeline Project: Some Thoughts about the Legal Challenges and Lessons Learned from a World Bank-financed Large Infrastructure Project' in Roggenkamp, M., Barrera-Hernandez, L., Zillman, D. N., and del Guayo, I. (eds), *Energy Networks and the Law: Innovative Solutions in Changing Markets* (OUP 2012)

Beltrao, J. F., Monteiro de Brito Filho, J. C., Gomez, I., Pajares, E., Paredes, F., Zuniga, Y. (eds), *Derechos Humanos de los Grupos Vulnerables* (DHES, 2014)

Beredjick, N. and Waelde, T. (eds), *Petroleum Investment Policies in Developing Countries* (Kluwer 1988)

Bernal, F., *Petróleo, Estado y Soberanía* (Ed. Biblos 2005)

Besson, S., 'Sovereignty' in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (April 2011)

Besson, S. and Tasioulas, J. (eds), *The Philosophy of International Law* (OUP 2010)

Bevans, C. (comp.) 9 United States Treaties and International Agreements

Beveridge, F. C., 'Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria', (1991) 40 ICLQ 302

Beyerlin, U., 'Different Types of Norms in International Environmental Law Policies, Principles, and Rules' in Bodansky, D., Brunée, J., Hey, E. (eds), *Oxford Handbook of International Environmental Law* (OUP 2008)

— — 'Sustainable Development' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (October 2013).

Bianchi, A., Peat, D. and Windsor, M. (eds), *Interpretation in International Law* (OUP 2015)

Bindemann, K., *Production-Sharing Agreements: An Economic Analysis* (Oxford Institute for Energy Studies, October 1999)

Birnie, P., Boyle, A. and Redgwell, C., *International Law and the Environment* (OUP 2009)

Bjørge, E., *The Evolutionary Interpretation of Treaties* (OUP, 2014)

Bjørge, E. and Miles, C. (eds) *Landmark Cases in Public International Law* (Bloomsbury 2017)

Bishop, Jr., W. W., *International Law* (Boston 1971)

Blair, J. M., *The Control of Oil* (Pantheon Books 1976)

Bodansky, D., Brunée, J., Hey, E. (eds), *Oxford Handbook of International Environmental Law* (OUP 2008)

Bodeau-Livanec, P. and Morgan-Foster, J., '1969 Vienna Convention Article 61 Supervening Impossibility of Performance' in Corten, O. and Klein, P. (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011)

Bottini, G., 'The Admissibility of Shareholder Claims: Standing, Causes of Action, and Damages' (PhD Thesis, University of Cambridge 2017)

Boyle A. and Freestone D. (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999)

Boyle, A. and Freestone, D., 'Introduction' in Boyle, A. and Freestone, D. (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999)

Bradbrook, A., 'Energy Law as an Academic Disciple' (1996) 14 J Energy and Nat Resources L 193

Bradshaw, K., 'Settling for Natural Resource Damages' (2017) 54(1) Rocky Mountain Mineral L Foundation J 173

Brandao, F., 'The Petrobras Monopoly and the Regulation of Oil Prices in Brazil' (OIES, 1998)

Bremen, J. and Roberts, P., 'United Kingdom' in Pereira, E. G. and Talus, K. (eds), *Upstream Law and Regulation* (Globe Law and Business 2013)

Bret-Rouzat, N. and Favennec, J.-P., *Oil and Gas Exploration and Production, Reserves, costs, contracts* (Paris, Editions Technip 2011)

Brewer-Carias, A. R., 'The "statization" of the pre 2001 primary hydrocarbons joint venture exploitations: Their unilateral termination and the assets' confiscation of some of the former private parties' (Apr 2008) 2 Transnational Dispute Management

Brown Weiss, E., 'Intergenerational Equity', in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (February 2013)

Brown, M. E., 'The Nationalization of the Iraqi Petroleum Company' (1979) 10 Intl J Middle East Studies 107

Brownlie, I., 'Legal Status of natural resources in international law (some aspects)' (1979) 162 Recueil des Cours 249

Bungenberg, M., 'Evolution of Investment Law Protection as Part of a General System of National Resource Sovereignty (and Management)' in Bungenberg, M., Hobe S. (eds), *Permanent Sovereignty over Natural Resources* (Springer 2015)

Bungenberg, M. and Hobe, S. (eds), *Permanent Sovereignty over Natural Resources* (Springer 2015)

Bungenberg, M. and others (eds.) *International Investment Law* (C.H. Beck, Hart, Nomus 2015)

Butt, S. and Siregar, F. E., 'State Control over Natural Resources in Indonesia: Implications of the *Oil and Natural Gas Law* Case of 2012' (May 2013) 31(2) J of Energy and Natural Resources L 107

Cameron, P. D., 'Stability of Contract in the International Energy Industry' (2009) 27(3) J of Energy & Natural Resources 305

— — *International Energy Investment Law* (OUP 2010)

Canada's Counter Memorial (24 July 2015) in *Lone Pine Resources Inc v. Canada*, UNCITRAL Case

Canada's Counter Memorial (1 December 2009) para 1 in *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No. ARB(AF)/07/4.

Canada's Rejoinder (9 June 2010) paras 145-146 in *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No. ARB(AF)/07/4.

Cannizzaro, E. *The Law of Treaties Beyond the Vienna Convention* (OUP 2011)

Cárdenas García, J., 'Rebalancing Oil Contracts in Venezuela' (Spring 2011) 33(2) Houston J Intl L 235

— — 'Venezuela' in Pereira, E. G. and Talus, K. (eds), *Upstream Law and Regulation* (Globe Law and Business 2013)

Carlston, K. S., 'Concession Agreements and Nationalization' (1958) 52 AJIL 260

CCSI, *Islamic Republic of Iran Oil Stabilization Fund and the National Development Fund of Iran*

CERD, Concluding Observations on Australia, UN Doc CERD/C/AUS/CO/15-17, 13 September 2010

CERD, Concluding Observations on Canada, UN Doc CERD/C/CAN/CO/21-23 (13 September 2017)

CERD, Concluding Observations on Nigeria, UN Doc. CERD/C/NGA/CO.a8 (1 November 2005)

CERD, Concluding Observations on the Russian Federation, UN Doc. CERD/C/RUS/CO/23-24 (20 September 2017)

CERD, Concluding Observations on the United States of America, UN Doc CERD/C/USA/CO/7-9 (25 September 2014)

Chacon de Albuquerque, R., 'The Disappropriation of Foreign Companies Involved in the Exploration, Exploitation and Commercialization of Hydrocarbons in Bolivia' (2008) 14(1) L and Business Rev of the Americas 21

Chaudhury, S., 'Nationalisation of Oil Companies in India', (1977) 12(10) Economic and Political Weekly 439

Chayes, A., Ehrlich, T., and Lowenfeld, A. F., *International Legal Process* (Boston 1969)

Chesterton, B. M. (ed.) *The Chaco War: Environment, Ethnicity and Nationalism* (Bloomsbury 2016)

Chi, M., 'From Ownership-Orientation to Governance-Orientation' in Marc Bungenberg and Stephan Hobe (eds), *Permanent Sovereignty over Natural Resources* (Springer 2015)

Chirinos, R., 'Survey of Recent Governmental Measures in Key Latin American Countries and Comparison with the Venezuelan Case' (Apr 2008) 2 Transnational Dispute Management 4.

Christiansen, M. D., 'Legal Developments in 2014 Affecting the Oil and Gas Exploration and Production Industry' (2015) 52(1) Rocky Mountain Mineral L Foundation J 67

Christie, G. C., 'What Constitutes a Taking of Property under International Law?' (1962) 38 BYBIL 305

Clarke, M. and Cummins, T., 'Resource Nationalism: A Gathering Storm?' (2012) 6 Intl Energy L Review 220

Conan, L. and Kaptan, G., 'Egypt' in Pereira, E. G. and Talus, K. (eds), *Upstream Law and Regulation* (Globe Law and Business 2013)

Coomans, F., 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52(3) ICLQ 749

Corten O. and Klein P. (eds), *The Vienna Conventions on the Law of Treaties A Commentary* (OUP 2011)

Cote, S., 'Bolivian Oil Nationalism and the Chaco War' in Chesterton, B. M. (ed.) *The Chaco War: Environment, Ethnicity and Nationalism* (Bloomsbury 2016)

Crawford, J., *Brownlie's Principles of Public International Law* (OUP 2012)

Crawford, J., Pellet, A., and Olleson, S. (eds), *The Law of International Responsibility* (CUP 2010)

Crommelin, M. 'Australian Responses to Subsurface Conflicts: Greenhouse Gas Storage v. Petroleum' in Zillman, D. N., McHarg, A., Bradbook, A., and Barrera-Hernández, L. (eds), *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014)

Cumming D., Wood, G., Filatotchev, I., and Reinecke, J. (eds.), *The Oxford Handbook of Sovereign Wealth Funds* (OUP 2017)

D'Amato, A., *The Concept of Custom in International Law* (Cornell University Press 1971)

Dachevsky, F. G., 'Nacionalismo petrolero y peronismo' (2014) 23 Trabajo y Sociedad 267

Dadwal, S. R., *The Current Oil 'Crisis': Implications for India*

Dailier, P., Forteau, M., Pellet, A., *Droit International Public* (2009)

Dasgupta, B., *The Oil Industry in India* (Frank Cass & Co 1971)

David, M. R. (ed), *Upstream Oil and Gas Agreements* (London, Sweet & Maxwell 1996)

Davis, M., 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 Australian Intl L J 38

de Alencar Xavier, Y. M. (ed), *Energy Law in Brazil* (Springer 2015)

de Alencar Xavier, Y. M. and da Silva Lanzillo, A. S., 'The Regulation of Oil and Gas Industry Concerning Exploration and Production in Presalt Layer' in de Alencar Xavier, Y. M. (ed), *Energy Law in Brazil* (Springer 2015)

de Alencar Xavier, Y. M. and da Silva Lanzillo, A. S., 'Oil and Natural Gas Royalties and Social Development in Brazil' in Barrera-Hernández, L., Barton, B., Godden, L., Lucas, A., and Rønne, A. (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016)

de Jong, S. and Wouters, J., 'Institutional actors in international energy law' in Kim Talus (ed.) *Research Handbook on International Energy Law* (Edward Elgar 2014)

De Luca Drago, B., 'Brazil: Pre-Salt: A New Legal Framework for the Oil Industry in Brazil' 17 January 2011

de Vattel, E., *Le droit des gens ou principes de la loi naturelle* (London, 1758)

del Castillo-Laborde, L., 'Equitable Utilization of Shared Resources' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (January 2010)

del Guayo, I., 'Regional and Local Energy Communities—A European Union Perspective on Community Benefits' in Barrera-Hernández, L., Barton, B., Godden, L., Lucas, A., and Rønne, A. (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016)

Delupis, I., *Finance and Protection of Investments in Developing Countries* (New York 1973)

Department of the Interior, Bureau of Ocean Energy Management, 'Annual Threshold Determinations'

Derman, A. B. and Villarreal, D. J., 'United States' in Pereira, E. G. and Talus, K. (eds), *Upstream Law and Regulation* (Globe Law and Business 2013)

Dian Agustina, C., Ahmad, E., Nugruho, D, and Siagian, H., 'Political economy of natural resource revenue sharing in Indonesia' [2012] Asia Research Centre Working Paper 55

Dias, A., 'Oil and Human Rights' (2003) 1(2) Oil, Gas and Energy L 1

Directorate General of Hydrocarbons of the Ministry of Petroleum and Natural Gas, 'Procedure for environmental related clearances in oil and gas sector' [India]

Doan, L., 'BP to Conoco Seek Alaskan Oil Comeback as Palin Tax Dies: Energy', *Bloomberg* (8 January 2014)

Dolzer, R., 'International Co-operation in Energy Affairs' (2015) 372 Recueil des Cours 397

Domke, M., 'Foreign Nationalizations' (Jul 1961) 55(3) AJIL 585

Dörr, O., 'Codifying and Developing Meta-Rules: The ILC and the Law of Treaties' (2009) 49 Georgetown YB Intl L 129

Dörr, O. and Schmalenbach, K. (eds), *Vienna Convention on the Law of Treaties A Commentary* (Springer 2012)

Douglas, Z., 'International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed' (2014) 63(4) ICLQ 867

Due Process of Law Foundation, *Derecho a la consulta y al consentimiento libre, previo e informado en América Latina: avances y desafíos para su implementación en Bolivia, Brasil, Chile, Colombia, Guatemala y Perú* (2015)

Dugan, C., Wallace, D., Rubins, N., Sabahi, B., *Investor State Arbitration* (OUP, 2008).

Dunoff, J. L., Ratner, S. R., Wippman, D., *International Law, Norms, Actors, Process* (Aspen 2006)

ECOSOC, Concluding observations on Colombia, UN Doc. E/C.12/COL/CO/6 (19 October 2017)

ECOSOC, Concluding Observations on Ecuador, UN Doc. E/C.12/ECU/CO/3 (13 December 2012)

Elian, G., 'Le principe de la souveraineté sur les resources nationales et ses incidences juridiques sur le commerce international' (1976) 149 Recueil des Cours 1

Elkind, S., 'Preemption and Home-Rule: The Power of Local Governments to Ban or Burden Hydraulic Fracturing' (2016) 53(2) Rocky Mountain Mineral L Foundation J 326.

Elliot, Memorandum from the Executive Secretary of the Department of State (Elliot) to the President's Assistant for National Security Affairs (Kissinger), (1969-1976) XXVII Foreign Relations of the United States, Iran; Iraq 1973-1976, Doc. 205 (3 March 1973)

Endicott, T., 'The Logic of Freedom and Power' in Besson, S. and Tasioulas, J. (eds), *The Philosophy of International Law* (OUP 2010)

Erichson, H., 'The Chevron-Ecuador Dispute, Forum non Conveniens, and the Problem of ex Ante Inadequacy' (2013) 1 Stanford J Complex Litigation 417

Erkan, M., *International Energy Investment Law, Stability through Contractual Clauses* (Wolters Kluwer 2011)

Errico, S., 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Allen, S. and Xanthaki, A. (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011)

Esposito, P. and Rosário, P., 'Angola' in Pereira, E. G. and Talus, K. (eds), *Upstream Law and Regulation* (Globe Law and Business 2013)

Exposure Draft, Petroleum resource rent tax extension, explanatory material (2011) [Australia]

EY Global Oil and Tax Guide 2013

Ezirigwe, J., 'Human rights and property rights in natural resources development' (2017) 35(2) J of Energy & Natural Resources 207

Fabrikant, R., *Oil Discovery and Technical Change in Southeast Asia: The Petroleum Industry, Miscellaneous Source Materials* (Singapore, Institute of Southeast Asian Studies 1973)

Federal Ministry of Information, 'Second Development Plan' (1970-1974) 133-134 [Nigeria]

Federal Republic of Nigeria, 'Report of the Constitutional Conference Debates 1994-1995 Vol. III' (Abuja Nigeria, 1995)

Feller, A. H., 'Some Observations on the Calvo Clause' (Jul. 1993) 27(3) AJIL 261

Ferrari Bravo, L., 'Méthodes de Reserches de la Coutume Internationale dans la Pratique des États' (1987) 192 Recueil des Cours 237

Financial Statements of Sonangol, E.P. as of 31 December 2012

Fitzgerald, M., 'Principle 13' in Viñuales, J. E. (ed), *The Río Declaration on Environment and Development: A Commentary* (OUP 2015)

Foster, A. T., 'An Unanswered Legal Problem Raised by the Suez and the Iranian Controversies' (1957) 1 Intl L and the Middle East Crisis: A Symposium 63

Francioni, F., 'Compensation for Nationalization of Foreign Property: The Borderline between Law and Equity' (1975) 24 ICLQ 255

— — 'Equity in International Law' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (June 2013)

Franck, T. M. and Sughrue, D. M., 'The International Role of Equity as Fairness' (1992-1993) 81 Georgetown L J 563

Franklin Corkey, L. and Viveiros de Moura, M., 'Brazil' in Pereira, E. G. and Talus, K. (eds), *Upstream Law and Regulation* (Globe Law and Business 2013)

Franks, D. M., Davis, R., Bebbington, A. J., Ali, S. H., Kemp, D., and Scurrah, M., 'Conflict translates environmental and social risk into business costs' (2014) 111(21) Proceedings of the National Academy of Sciences 7576

Fredericks, C. F., 'Operationalizing Free, Prior and Informed Consent' (2016) 80 Albany L Rev 468

Friedman, S., *Expropriation in International Law* (1953)

Frynas, J. G., 'Sovereign Wealth Funds and the Resource Curse: Resource Funds and Governance in Resource-Rich Countries' in Cumming D., Wood, G., Filatotchev, I., and Reinecke, J. (eds.), *The Oxford Handbook of Sovereign Wealth Funds* (OUP 2017)

Gadano, N., *Historia del Petróleo en la Argentina* (Ed. Edhasa 2006)

Ganesan, A., 'Current Human Rights Issues in Extractive Industries' (2004) 2(4) Oil, Gas and Energy L 1

GECF, 'GECF Objectives', available at: https://www.gecf.org/about/mission-objectives.aspx, last accessed 15 December 2017

Genova, A., 'Nigeria's Nationalization of British Petroleum' (2010) 43(1) Intl J of African Historical Studies 115

Gentili, A., *De Jure Belli Libri Tres* (John C Rolfe tr, OUP 1933)

Gess, K., 'Permanent Sovereignty over Natural Resources. An Anatomical Review of the United Nations Declaration and its Genesis' (1964) 13 ICLQ 398

Ghobashy, O. L., 'The Changing Attitudes in the World Oil Community' (Fall 1974) 2(2) Syracuse J Intl L and Commerce 287

Giegerich, T., 'Article 62' in Dörr, O. and Schmalenbach, K. (eds), *Vienna Convention on the Law of Treaties A Commentary* (Springer 2012)

Gilbert, J. and Doyle, C., 'A New Dawn over the Land: Shedding Light on Collective Ownership and Consent' in Allen, S. and Xanthaki, A. (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011)

Giorgetti, C., 'Mass Tort Claims in International Investment Proceedings: What are the Lessons from the Ecuador-Chevron Dispute?' (2013) 34 U of Pennsylvania J of Intl L 787

Global Watch, *Rigged? The Scramble for Africa's Oil, Gas and Minerals* (January 2012)

Godden, L. and O'Neill, L., 'Agreements with Indigenous Communities' in Barrera-Hernández, L., Barton, B., Godden, L., Lucas, A., and Rønne, A. (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016)

Gonzalez Márquez, J. J., 'Social and Environmental Liability of Private Companies in the Energy Sector and the Mexican Energy Reform' in Barrera-Hernández, L., Barton, B., Godden, L., Lucas, A., and Rønne, A. (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP, 2016)

Government of Alberta, 'Executive Summary', *The New Royalty Framework* (25 October 2007)

Greenaway, D. (ed), *The World Economy, Global Trade Policy 2009* (Wiley Blackwell 2010)

Greenwood, C., 'State Contracts in International Law – the Libyan Oil Arbitrations' (1982) 53(1) BYBIL 27

Grotius, H., *De jure belli ac pacis* (Francis W. Kelsey tr (1925), Lonang Institute 2005)

— — *The Rights of War and Peace,* edited and with an Introduction by Richard Tuck, from the Edition by Jean Barbeyrac (Indianapolis: Liberty Fund 2005)

Grunstein, M., 'Mexico' in Pereira, E. G. and Talus, K. (eds), *Upstream Law and Regulation* (Globe Law and Business 2013)

Guriev, S., Kolotilin, A., Sonin, K., 'Determinants of Nationalization in the Oil Sector: A Theory and Evidence from Panel Data' (2011) 27(2) J of L, Economics & Organization 301

Hackett, D., Noda, L., Grissom, S., Moore, M. C., Winter, J., 'Pacific Basin Heavy Oil Refining Capacity', (Feb. 2013) 6(8) *The School of Public Policy, SPP Research Papers*.

Hart, H. L. A., *The Concept of Law* (OUP 1962)

Hasan, M., 'Indonesia's Petroleum Contract under Rising Nationalism Environment' (2013) 11(5) Oil, Gas and Energy L 1.

HC Deb 18 March 2015, vol 594, col 775 [United Kingdom]

HC Deb 23 March 2011, vol 525, col 965 [United Kingdom]

HC Deb 23 March 2011, vol 525, col 965 [United Kingdom].

HC Deb 3 December 2014, vol 589, col 312 [United Kingdom]

Heffron, R., Rønne, A., Tomain, J. P., Bradbrook, A. and Talus, K., 'A Treatise for Energy Law' [2018] J of World Energy L and Business 1, 6-8.

Heintschel von Heinegg, W., 'Treaties, Fundamental Change of Circumstances' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (August 2006)

Hernandez, M. A., 'La reforma en materia de hidrocarburos en México, como parte del proyecto neoliberal hegemónico violatorio de derechos humanos' in Hernandez, M. A., Roux, R., and Garcia Rivera, E. A. (eds), *Reforma en Materia de Hidrocarburos* (UNAM 2017)

Hernandez, M. A., Roux, R., and Garcia Rivera, E. A. (eds), *Reforma en Materia de Hidrocarburos* (UNAM 2017)

Herrera, J. C., 'The Right of Cultural Minorities to Binding Consent: Case Study of Judicial Dialogue in the Framework of a *Ius Constitutionale Commune en América Latina*', MPIL Research Paper Series No. 2017-11

Hertzmark, D. I., 'Pertamina, Indonesia's State-Owned Oil Company', The James A. Baker III Institute for Public Policy, Rice University (March 2007)

Heum, P., 'Local Content Development: Experiences from Oil and Gas Activities in Norway' SNF Working Paper 2008:2

Higgins, R., 'The Taking of Property by the State: Recent Developments in International Law' (1982) 176 Recueil des Cours 259

— — 'Natural Resources in the Case Law of the International Court' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999)

— — *Problems and Process, International Law and How We Use It* (OUP 1995)

HL Deb 23 May 1938, vol 109, cols 328 [U.K.].

Hober, K., 'Law and Policy in the Russian Oil and Gas Sector' (2009) 27 J Energy & Natural Resources L 420

Hossain, K., Chowdhury, S., *Permanent Sovereignty over Natural Resources* (St. Martin's Press 1984)

Human Rights Watch, *Some Transparency, No Accountability, The Use of Oil Revenue in Angola and Its Impact on Human Rights* (January 2004).

Hunter, T., 'The regulatory frameworks and state regulation in optimising the extraction of petroleum resources: A study of Australia and Norway' (2014) 1(1) The Extractive Industries and Society 48

IEA, 'energy security', available at: http://www.iea.org/topics/energysecurity/, last accessed 2 December 2015

IFC Sustainability Framework, 'Policy and Performance Standards on Environmental and Social Sustainability' (January 1, 2012)

IEA, 'Our Mission', available at: https://www.iea.org/about/, last accessed 15 December 2017

IEF, 'IEF Overview', available at: https://www.ief.org/about-ief/ief-overview.aspx, last accessed 15 December 2017

IFC, Chad-Cameroon Pipeline Project

IFC, Discussion Paper 'The Art and Science of Benefit Sharing in the Natural Resources Sector' (Feb 2015)

IFC, Overview, IFC Oil, Gas & Mining

IHS Presentation, 'Going Global: Tight Oil Production' (July 2014)

ILC 'Shared natural resources Comments and observations received from governments' (4 May-5 June and 6 July-7 August 2009) UN Doc A/CN.4/607

ILC 'Shared natural resources Comments and observations received from governments' (3 May-4 June and 5 July-6 August 2010) UN Doc A/CN.4/633

ILC, 'Fifth Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur', U.N. Doc. A/CN.4/183, 37

ILC, 'First Report on formation and evidence of customary international law by Michael Wood, Special Rapporteur', UN Doc. A/CN.4/663

ILC, 'Fragmentation of International Law', Report of the Study Group of the ILC, UN Doc. A/CN.4/L.682

ILC, 'Report of the International Law Commission on the work of its 53rd session', UN GAOR, 56th Sess., Supp. No. 10, Chapter IV, Commentary to Chapter V, U.N. Doc. A/56/10 (2001)

ILC, 'Report of the International Law Commission on the Work of its 18th Session', U.N. GAOR 21st Sess., Supp. No. 9, Part II, Ch. II, Draft Articles on the Law of Treaties and Commentaries, commentaries, U.N. Doc A/6309/Rev.1 (1966)

ILC, 'Report of the International Law Commission on the Work of its 9th Session', U.N. GAOR 12th Sess., Supp. No. 9, Part II, Ch. II, Second Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur, 60, para 151, U.N. Doc A/3623 (1957)

ILC, 'Second Report on State Responsibility, Special Rapporteur James Crawford', U.N. G.A., ILC, 51st Session, Geneva, 23 July 1999, U.N. Doc. A/CN.4/498/Add 2

ILC, 'Third report on the law of treaties, by Mr. G. G. Fitzmaurice, Special Rapporteur' [1958] II Yearbook of the International Law Commission, U.N. Doc. No. A/CN.4/115

ILC, 'Yearbook of the International Law Commission', 1950, UN Doc. A/Cn.4/Ser.A/1950, Vol. II

ILC, "Force Majeure" and "Fortuitous event" as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine – study prepared by the Secretariat' U.N. Doc. A/CN.4/315 (1978) p. 72, para 25.

ILO Governing Body, 282nd session, November 2001, representation under Article 24 of the ILO Constitution, Colombia, GB.282/14/3

Institut de Droit International, 'Problems Arising from a Succession of Codification Conventions on a Particular Subject' [1995] Resolutions

Inter-American Development Bank, 'Operational Policy on Indigenous Peoples', 22 February 2006, OP-765

Jacob, M. and Schill, S., 'Chapter 8: Standards of Protection I. Fair and Equitable Treatment' in Bungenberg, M. and others (eds.) *International Investment Law* (C.H. Beck, Hart, Nomus 2015)

Jennings, R., 'State Contracts in International Law' (1961) 37 BYBIL 156

— — 'Equity and Equitable Principles' (1986) XLII Annuaire Suisse de Droit International 27

Jennings, R. and Watts, A. (eds.), *Oppenheim's International Law* (OUP 2008)

Jimenez de Arechaga, E., 'International law in the past third of a century' (1978) 159 Recueil des Cours 1

John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898)

Joint UNDP/World Bank Energy Sector Assessment Program, 'Angola: Issues and Options in the Energy Sector', Report No. 7408-ANG (May 1989)

Jose E. Álvarez and Kathryn Khamsi, 'The Argentine Crisis and Foreign Investors', *in* [2008/2009] The Yearbook on International Law and Policy 379

Julliard, P., 'Calvo Clause' in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (January 2007)

Kalu, V. E. and Stewart, N. F., 'Nigeria's Niger Delta Crises and Resolution of Oil and Gas Related Disputes: Need for a Paradigm Shift' (2007) 25(3) J of Energy and Natural Resources L 244.

Kalu, V. E., 'State Monopoly and Indigenous Participation Rights in Resource Development in Nigeria' (2008) 26(3) J of Energy and Natural Resources L 443.

Karim, M., 'A controversial decision of the Constitutional Court on the Indonesian Oil and Gas Law' (2013) 6(3) J of World Energy, L and Business 260

Katzarov, K., *The Theory of Nationalization* (The Hague 1964)

Kimmerling, J., 'Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and *Aguinda v Texaco*' (2006) 38 J Intl L and Politics 413

Kjos, H. E., *Applicable Law in Investor-State Arbitration* (OUP 2013)

Kohen, M. K., '21. Desuetude and Obsolescence of Treaties' in Cannizzaro, E. *The Law of Treaties Beyond the Vienna Convention* (OUP 2011)

Konder Comparato, F., 'The Economic Order in the Brazilian Constitution of 1988' (1990) 88 American J of Comparative L 760

Koskenniemi, M., 'Hierarchy in International Law: A Sketch' (1997) 8 Eur J Intl L 566

Kunz, J. L., 'The Mexican Expropriations', (1940) XVII(3) New York U L Q Rev 327

Kust, M. J., 'Treatment of Foreign Enterprise in India' (Winter 1963) 17(2) Rutgers L Rev 351

Lalive, J.-F., 'Contracts between a State or a State Agency and a Foreign Company' (1964) 13 ICLQ 987

le Billion, P., 'Angola's Political Economy of War: The Role of Oil and Diamonds, 1975-2000' (2001) 100 African Affairs 55

Letter from the President of Mexico to the President of the Senate (28 April 2014)

Letter from the United States Department of the Interior to Reporter of 6 November 2009

Lightfoot, S. R., 'Selective Endorsement without intent to implement: indigenous rights and the Anglosphere' (2012) 16(1) The Intl J of Human Rights 107

Linderfalk, U., *On the Interpretation of Treaties* (Springer 2010)

Lindsay, R., McCorquodale, R., Blecher, L., Bonnitcha, J., Crockett, A., and Sheppard, A., 'Human rights responsibilities in the oil and gas sector: applying the UN Guiding Principles' (2013) 6(1) J World Energy L and Business 2

Lone Pine Resources Inc v. Canada, UNCITRAL Case, Notice of Arbitration (6 September 2013).

Loutit, J., Mandelbaum, J., Szoke-Burke, S., 'Emerging Practice in Community Development Agreements' 2016, Colombia Center on Sustainable Development

Lovells, Lee & Lee, Recent Developments in the Oil and Gas Industry in Indonesia (April 2009)

Lowe, V., 'The Role of Equity in International Law' (1988-1989) 12 Australian YB Intl L 54

— — 'Sustainable Development and Unsustainable Arguments' in Boyle, A. and Freestone, D. (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999)

Lowe, V. and Fitzmaurice, M. (eds), *Fifty Years of the International Court of Justice* (CUP 1996)

Lowenfeld, A. F., *International Economic Law* (OUP 2008)

Lowenfeld, A. F., Memorandum of Andreas Lowenfeld for the Undersecretary of State of 24 October 1964, Multinational Corporations and the United States Foreign Policy Hearings before the Subcommittee on Multinational Corporations of the Committee on Foreign Relations United States Senate (93rd Congress)

Lucas, A. R., 'Canadian Participatory Rights in Mining and Energy Resource Development: The Bridges to Empowerment?' in Zillman, D., Lucas, A., and Pring, G. (eds), *Human Rights in Natural Resource Development: Public Participation in Sustainable Development of Mining and Energy Resources* (OUP 2002)

Lucas, A. and Potes, V., 'Voluntary Approaches and Formal Regulation: Climate Change and Canada's Energy Sector' in Barton, B., Lucas, A., Barrera-Hernández, L., and Rønne, A. (eds), *Regulating Energy and Natural Resources* (OUP 2006)

Lucas, A. R., Watson, T. and Kimmel, E., 'Regulating Multistage Hydraulic Fracturing: Challenges in a Mature Oil and Gas Jurisdiction' in Zillman, D. N., McHarg, A., Bradbook, A., and Barrera-Hernández, L. (eds), *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014)

Macklin, J., 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (speech, Australian Parliament, Canberra, Australia, 3 April 2009).

Madan, T., *India's ONGC: Balancing Different Roles, Different Goals*, The James A. Baker III Institute for Public Policy, Rice University (March 2007)

Malanczuk, P., *Akehurst's Modern Introduction to International Law* (Routledge 1997)

Malone, D. M., Mohan, C. R. and Raghavan, S. (eds), *The Oxford Handbook of Indian Foreign Policy* (OUP 2015)

Mann, F. A., 'The Law Governing State Contracts' (1944) 21 BYBIL 11;

Martella Jr, R. R. and Grosko, J. B. (eds), *International Environmental Law The Practitioner's Guide to the Laws of the Planet* 761 (ABA 2014)

Martyn R. David (ed), *Upstream Oil and Gas Agreements* (London, Sweet & Maxwell 1996)

McHarg, A., Barton, B., Bradbrook, A., Godden, L. (eds), *Property and the Law in Energy and Natural Resources* (OUP 2010)

McLachlan, C., 'The Principles of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54(2) ICLQ 279

McNair, *The Law of Treaties* (OUP 1961)

MEES, 'Participation vs. Nationalization' 13 June 1969.

MEES, 'The Iraq National Oil Company' 5 October 1962.

MEES, 'The Vienna Resolution on Petroleum Policy' 26 July 1968.

Mendelson, M. H., 'The Formation of Customary International Law' (1998) 272 Recueil des Cours 155

Meyer Cosío, L., 'El conflicto petrolero entre México y los Estados Unidos (1938-1942)' (1966) 7(1) Foro Internacional 99

Milanovic, M., 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke J Comparative & Intl L. 69

— — *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011)

Mobil's Reply Memorial (8 April 2010) para 135 in *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No. ARB(AF)/07/4.

Moller, L., 'The governance of oil and gas operations in hostile but attractive regions: West Africa' (2013) 11(2) Oil, Gas and Energy L 1

Montoya, M., 'Regulation of Unconventional Reservoirs in Colombia' in Zillman, D. N., McHarg, A., Bradbrook, A., and Barrera-Hernández, L. (eds), *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014)

— — 'Participation of Territorial Authorities in Mining Activities in Colombia' in Barrera-Hernández, L., Barton, B., Godden, L., Lucas, A., and Rønne, A. (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016)

Morgera, E., 'Significant Trends in Corporate Environmental Accountability Standards: The New Performance Standards of the International Finance Corporation' (2007) 18(1) Colorado J of Environmental L and Policy 166.

Mousa Jiyad, A., 'Iraq' in Pereira, E. G. and Talus, K. (eds), *Upstream Law and Regulation* (Globe Law and Business 2013)

Mustafayev, N., 'The Legal Framework for Foreign Investments in Upstream Petroleum Industry of Azerbaijan' (2013) 11(5) Oil, Gas and Energy L 1

Musto, C. and Redgwell, C., 'US-Import Prohibition of Certain Shrimp and Shrimp Products (1998)' in Bjørge, E. and Miles, C. (eds) *Landmark Cases in Public International Law* (Bloomsbury 2017)

NAFTA, 'Notes of Interpretation of Certain Chapter 11 Provisions' [31 July 2001]

Nagy, S. M. and Figuers, M. L., 'The Public Trust Doctrine and Environmental Rights Initiates: A Tectonic Shift in Colorado Property Rights in Natural Resources?' (2016) 53(1) Rocky Mountain Mineral L Foundation J 29

Naseem, M. and Naseem, S., 'World petroleum regimes' in Kim Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014)

National Development Fund of Iran, *Fund History*

National Energy Board (Canada), 'The Past is always Present – Review of Offshore Drilling in the Canadian Arctic – Preparing for the Future' (December 2011)

Ness, W. L., 'Brazil: Local Equity Participation in Multilateral Enterprises' (1974) 6(4) L and Policy in Intl Business 1017

New York Department of Environmental Conservation, 'Final Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program' (June 2015)

New York Department of Environmental Conservation, 'New York State Officially Prohibits High-Volume Hydraulic Fracturing' (29 June 2015)

Noronha, L., 'Resources' in Malone, D. M., Mohan, C. R. and Raghavan, S. (eds), *The Oxford Handbook of Indian Foreign Policy* (OUP 2015)

Nwaobi, G. C., *Oil policy in Nigeria: A Critical Assessment (1958-1992)*

Nwombike, C., 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria' (2005) 1(2) African J L Studies 129.

O'Connell, D. P., *International Law* (London 1965)

Omorogbe, Y. and Oniemola, P., 'Property Rights in Oil and Gas under Domanial Regimes' in McHarg, A., Barton, B., Bradbrook, A., and Godden, L. (eds), *Property and the Law in Energy and Natural Resources* (OUP 2010)

Omorogobe, Y., 'The Legal Framework for the Production of Petroleum in Nigeria' (1987) 5(4) J of Energy and Natural Resources L 273

— — 'The Legal Framework for Public Participation in Decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless' in Zillman, D. N., Lucas, A., and Pring, G. (eds), *Human Rights in Natural Resource Development: Public*

Participation in the Sustainable Development of Mining and Energy Resources (OUP 2002)

— — 'Property Rights in Oil and Gas under Domanial Regimes' in McHarg, A., Barton, B., Bradbrook, A., Godden, L. (eds), *Property and the Law in Energy and Natural Resources* (OUP 2010)

— — 'Resource Control and Benefit Sharing in Nigeria' in Barrera-Hernández, L., Barton, B., Godden, L., Lucas, A., and Rønne, A. (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016)

OPEC, 'Our Mission' available at: http://www.opec.org/opec_web/en/about_us/23.htm, last accessed 15 December 2017.

Orakhelashvili A., 'Article 30 Convention of 1969' in Corten O. and Klein P. (eds), *The Vienna Conventions on the Law of Treaties A Commentary* (OUP 2011)

Orrego Vicuna, F., 'Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society', (2003) 5(3) Intl L Forum 188

Orwin, C., *The Humanity of Thucydides* (1997)

OSISA Angola, Global Witness, 'Oil Revenues in Angola, much more information but not enough transparency' (February 2011)

Ostwald, K., Tajima, Y. and Samphantharak, K., 'Indonesia's Decentralization Experiment' (2016) 33(2) J of Southeast Asian Economies 139

Otman, W. A., 'The Iranian Petroleum Contracts: Past, Present and Future Perspectives' (2007) 5(2) Oil, Gas and Energy L 2

Ovcharova, A., 'Russia' in Pereira, E. G. and Talus, K. (eds), *Upstream Law and Regulation* (Globe Law and Business 2013)

Oxfam briefing paper, 'Community Consent Index 2015' (2015)

Paddock, L. C. and Wentz, J. A., 'Emerging Regulatory Frameworks for Hydraulic Fracturing and Shale Gas Development in the United States' in Zillman, D. N., McHarg, A., Bradbrook, A., and Barrera-Hernández, L. (eds), *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014)

Palazzo Almada, L. and Parente, V., 'Oil & Gas Industry in Brazil: A Brief History and Legal Framework' (2013) 1(1) Panorama of Brazilian L 223

Paparinskis, M., *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013)

Parajon Skinner, C., 'RICO and International Legal Ethics' (2014) Yale J Intl L Online 20

Pawelyn, J., 'The Role of Public International Law in the WTO: How far can we go?' (2001) 95 AJIL 535

— — *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003)

PdVSA, '*Empresas Mixtas al servicio del pueblo*'

Peng, L., 'China' in Pereira, E. G. and Talus, K. (eds), *Upstream Law and Regulation* (Globe Law and Business 2013)

Pereira, E. G. and Talus, K. (eds), *Upstream Law and Regulation* (Globe Law and Business 2013)

Perry, J. and Carey, C. 'Iran and Control of its Oil Business' (1974) 89(1) Political Science Q 147

Petroecuador, *El Petróleo en el Ecuador, La nueva era petrolera* (2013)

Pierk, S. and Tysiachniouk, M., 'Structures of mobilization and resistance: Confronting the oil and industries in Russia' (2016) 3(4) The Extractive Industries and Society 997

Potestà, M., 'Legitimate Expectations in Investments Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28(1) ICSID Rev 88

Prata, H., Cerqueira Serra, S. and Honorato, J. P., 'Recent trends in the Angolan oil and gas sector' in *Energy and Infrastructure: Sub-Saharan Africa 2013* (Euromoney Trading Limited, 2013)

Press release: Governor Palin Signs House Bill 2001

PWC, Oil and Gas in Indonesia-Investment and Taxation Guide 2012

Rachadell de Delgado, G. and Vojvodic, N., 'Nationalization Trends in the Venezuelan Oil Industry' [Apr 2008] 2 Transnational Dispute Management 9

Radden Keefe, P., 'Reversal of Fortune: The Lago Agrio Litigation' (Spring 2013) 1:2 Stanford J of Complex Litigation 199

Rafat, A., 'Applicability of the Public-Purpose Principle to Cases Arising under International Law from the Expropriation of Alien Private Property' (Feb 1966) 43(3) U of Detroit L J 375

Rajamani, L., 'Public Participation in Indian Environmental Law' in Barrera-Hernández, L., Barton, B., Godden, L., Lucas, A., and Rønne, A. (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016)

Ramírez Carreño, R., Venezuelan Minister of Energy and Petroleum, 'Full Sovereignty Over Oil', Speech at the Third OPEC International Seminar (Sept. 2006)

Ramlogan, R., *Sustainable Development. Towards a Judicial Interpretation* (Nijhoff Leiden, 2011)

Ramos, M. L., *Angola's Oil Industry Operations* (OSISA)

Reddy, S., 'Fiscal Reforms in the Oil Sector Since the 90's Highlighting Introduction of Progressive Fiscal Elements' (Vale Columbia Center, January 2013)

Redfern, W. A., 'Sukarno's Guided Democracy and the Takeovers of Foreign Companies in Indonesia in the 1960s' (Ph.D. (History), University of Michigan, 2010)

Redgwell, C., Intergenerational Trusts and Environmental Protection (Juris 1999)

— — 'International Energy Security' in Barton, B., Redgwell, C., Rønne, A., Zillman, D. N. (eds), *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment* (OUP 2004)

— — 'International Regulation of Energy Activities' in Martha M Roggenkamp, Catherine Redgwell, Anita Rønne, Iñigo del Guayo (eds.) *Energy Law in Europe* (OUP 2016)

— — 'Shared International Responsibility for Transboundary Harm Arising from Energy Activities' in Barrera-Hernández, L., Barton, B., Godden, L., Lucas, A., and Rønne A. (eds.), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016)

Redgwell, C. and Rajamani, L., 'Energy Underground: What's International Law Got to Do With it?' in Zillman D. N., McHarg, A., Bradbrook A., and Barrera-Hernandez, L. *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014)

Report of the Economic and Social Council, Permanent Sovereignty over Natural Resources, Report of the Secretary General, Table 11, UN Doc. No. A/9716 (20 Sept 1974)

Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, 'The situation of indigenous peoples in Canada', Addendum, UN Doc. A/HRC/27/52/Add.2 (4 July 2014)

Revenue Watch Open Society Institute, *Covering Oil, A Reporter's Guide to Energy and Development* (Open Society Institute 2005)

Roba, G., 'Will Angola's efforts be adequate in avoiding the resource curse' (2006) 4(3) Oil, Gas and Energy L 1.

Roberts, A., 'Traditional and Modern Approaches to Customary International Law' (2001) 95 AJIL 757

Rodríguez, G. A., *De la Consulta Previa al Consentimiento Libre, Previo e Informado a Pueblos Indígenas en Colombia* (U. del Rosario, 2014)

Roggenkamp, M., Redgwell, C., Rønne, A., del Guayo I. (eds.) *Energy Law in Europe* (OUP 2016)

Rolland, S.E., 'China-Raw Materials: WTO Rules on Chinese Natural Resources Export Dispute' (2012) 16(21) ASIL insights.

Rønne, A., 'Public and Private Rights to Natural Resources and Differences in their Protection?' in McHarg, A., Barton, B., Bradbrook, A., Godden, L. (eds), *Property and the Law in Energy and Natural Resources* (OUP 2010)

Rood, L. L., 'Nationalisation and Indigenisation in Africa' (1976) 14(3) J of Modern African Studies 427

Rosenn, K. S., 'Expropriation in Argentina and Brazil: Theory and Practice' (Winter 1975) 15(2) Virginia J Intl L 277

Rosenne, S., 'The perplexities of modern international law: general course on public international law' (2001) 291 Recueil des Cours 9

Rumler, M., 'Free, prior, and informed consent: A review of free, prior, and informed consent in Australia', 2011

Ruzza, A., 'Expropriation and Nationalization' in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (March 2013)

Sachs, L. E., Toledano, P., Mandelbaum, J., with Otto, J., 'Impact of Fiscal Reforms on Country Attractiveness: Learning from the Facts', Sauvant, K. E. (ed), [2011-2012] Yearbook on International Investment Law and Policy

Salah Ovadía, J., 'The dual nature of local content in Angola's oil and gas industry: development vs. elite accumulation' (2012) 30(3) J of Contemporary African Studies 395

— — 'Local content and natural resource governance: The cases of Angola and Nigeria' (2014) 1(2) The Extractive Industries and Society 137.

Sampaio Contreras de Almeida, S., *Recent Changes in the Brazilian Constitution: From Reform to Growth* (GWU April 2000)

Sánchez, R. A., 'El desarrollo de la industria petrolera en América Latina' (Jul-Sept 1998) 60(3) Revista Mexicana de Sociologia 157

Sands, P., 'International Law in the Field of Sustainable Development', (1995) 81 BYBIL 303

— — 'Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law' in Boyle, A. and Freestone, D. (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999)

— — *Principles of International Environmental Law* (CUP 2003)

Sands, P., Peel, J., *Principles of International Environmental Law* (CUP 2012)

Saul, S., 'Masterly Inactivity as Brinkmanship: The Iraq Petroleum Company's Route to Nationalization, 1958-1972' (Dec. 2007) 29(4) The Intl History Rev 746

Schill, S. (ed), *International Investment Law and Comparative Public Law* (OUP 2010)

Schill, S., 'Fair and Equitable Treatment, the Rule of Law, and Comparative Law' in Schill, S. (ed), *International Investment Law and Comparative Public Law* (OUP 2010)

Schonberg, S., *Legitimate Expectations in Administrative Law* (OUP 2000)

Schrijver, N., *Sovereignty over Natural Resources : Balancing Rights and Duties* (CUP 1997)

— — 'The Evolution of Sustainable Development in International Law: Inception, Meaning and Status' (2008) 329 Recueil des Cours 217

Schwebel, S. M., 'The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources' (1963) 49 American Bar Association J

Scott, W. C., 'Tribal Management of Tribal Lands and Resources: Environmental Regulation' (2015) 52(1) Rocky Mountain Mineral L Foundation J 25.

Secretariat of the ILC, '"Force majeure" and "fortuitous event" as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine', U.N. Doc. A/CN.4/315 (1978).

Secretary General of the United Nations, 'Ways and Means of Making the Evidence of Customary International Law more Readily Available: Preparatory work within the purview of article 24 of the Statute of the International Law Commission - Memorandum submitted by the Secretary-General', UN Doc A/CN.4/6 and Corr.1

Shaw, M. N., and Fournet, C., '1969 Vienna Convention Article 62 Fundamental change of circumstances' in Corten, O. and Klein, P. (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011)

Shelton, D., 'Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria Case No. ACHPR/COMM/A044/1' (2002) 96(4) AJIL 937

Singh, K, V. and Mehra Birdi, S., 'India' in Martella Jr, R. R. and Grosko, J. B. (eds), *International Environmental Law The Practitioner's Guide to the Laws of the Planet* 761 (ABA 2014)

Sinopec Presentation of Price Sensitive Information to the Hong Kong Exchange on 5 January 2012.

Smith, D. C., 'Social Licence to Operate in the Unconventional Oil and Gas Development Sector' in Barrera-Hernández, L., Barton, B., Godden, L., Lucas, A., and Rønne, A. (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016)

Soares de Oliveira, R., 'Business Success, Angola-style: postcolonial politics and the rise and rise of Sonangol' (2007) 45(4) J of Modern African Studies 595

SOFAZ, Mission, goals and philosophy

Sonangol, Model PSA Agreement [Angola]

Songhi, O., 'Defining a path for benefit sharing arrangements for local communities in resource development in Nigeria: the foundations, trusts and funds (FTFs) model' (2015) 33(2) J of Energy & Natural Resources L 147

Sorel, J.-M. and Bore Eveno, V. 'Article 31 Convention of 1969' in Corten, O. and Klein, P. (eds), *The Vienna Conventions on the Law of Treaties A Commentary* (OUP 2011)

Sorensen, M., *Manual of Public International Law* (New York 1968)

Sprankling, J. G., *The International Law of Property* (OUP 2014) 320-321.

Stammler, F. and Wilson, E., 'Dialogue for Development: An Exploration of Relations between Oil and Gas Companies, Communities, and the States' (2006) 5(2) Sibirca: Interdisciplinary J of Siberian Studies 1.

Standard Oil Company *Confiscation: A History of the Oil Industry in Bolivia* (New York 1939)

Statement by Mr. McNee (Canada), UN Doc. A/61/PV.107 (13 September 2007) 12-13.

Statement by the Iranian Prime Minister before the Security Council, UN Docs. No. S/PV.560 and S/PV.563 (15 and 17 October 1951).

Statement of C. Stephen Allred, Assistant Secretary, Land and Minerals Management, United States Department of the Interior before the Committee on Energy and Natural Resources United States Senate (18 January 2007).

Statement of the Permanent Mission of Canada on the Report of the Special Rapporteur on the Rights of Indigenous Peoples of 30 October 2014

Steiner, H. J., Alston, P., Goodman, R., *International Human Rights in Context* (OUP 2007)

Steiner, H. J. and Vagts, D., *Transnational Legal Problems* (Mineola 1976)

Stevens, P., 'National oil companies and international oil companies in the Middle East: Under the shadow of government and the resource nationalism cycle' (2008) 1(1) J of World Energy L & Business 23

Stewart, J., Lucas, A. and Bruno, G., 'A transboundary comparative analysis of opportunities for public participation in the regulation of hydraulic fracturing in the Bakken Shale Formation' [2017] J Energy and Natural Resources L 51

Stocking, G. W., 'The Mexican Oil Problem' (1938-1939) 19 Intl Conciliation 491

Strauss, L., *Natural Right and History* (1965).

Strauss, L., *The City and Man* 185 (1978)

Tabari, N. M., *Lex Petrolea and International Investment Law* (Routledge 2017)

Talmon, S., 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) Eur J Intl L 417

Talus, K. (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014)

Taverne, B., 'Production Sharing Agreements in Principle and in Practice' in David, M. R. (ed), *Upstream Oil and Gas Agreements* (London, Sweet & Maxwell 1996)

Thucydides, *The History of the Peloponnesian War* (trans. Thomas Hobbes)

Tordo, S. and Anouti, Y., *Local Content in the Oil and Gas Sector: Case Studies* (World Bank Publication 2013)

Tsalik, S., *Caspian Oil Windfalls: Who will benefit?* (Caspian Revenue Watch, 2003)

Tudor, I., *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2008)

Tzanakopolous, A., 'The Influence of English Courts on the Development of International Law' in McCorquodale, R. and Gauci, J.-P. (eds), *British Influences on International Law, 1915-2015* (Brill 2016)

U.S. Department of Commerce, Bureau of Export Administration *The Effect on the National Security of Imports of Crude Oil and Refined Petroleum Products* (November 1999)

U.S. Energy Information Administration, *Russia* (26 November 2013)

Uche, C., 'British Petroleum vs. The Nigerian Government: The Capital Gains Tax Dispute, 1972-9' (2010) 51(2) The J of African History 167

UN Doc. A/61/251 (13 September 2007)

UN Doc. A/61/251 (13 September 2007).

UN Global Compact

UN Guiding Principles on Business and Human Rights

UN Human Rights Committee, 'Concluding Observation on Australia 2000' (A/55/40, 24 July 2000)

UN, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President', UN Doc. GA/10612 (13 September 2007)

UNCTAD, *Fair and Equitable Treatment* (United Nations 1999)

UNCTAD, *Fair and Equitable Treatment: A Sequel* (United Nations 2012)

United States Department of State [1937] Foreign Relations of the United States Diplomatic Papers

United States Department of State [1942] Foreign Relations of the United States Diplomatic Papers

United States General Accountability Office, Report to the Chairman, Committee on Energy and Natural Resources, U.S. Senate, 'Oil and Gas Resources, Actions Needed for Interior to Better Ensure a Fair Return' (December 2013)

US Department of Justice, 'Attorney General Loretta E. Lynch Delivers Remarks at Press Conference Announcing Settlement with BP to Resolve Civil Claims Over Deepwater Horizon Oil Spill' (5 October 2015)

US State Department, 'Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples' (12 January 2011)

Vakhshouri, S., 'Iran offers new terms for oil contracts' (26 February 2014)

Varfolomeeva, A., 'Evolution of the concept of "indigenous people" in the Soviet Union and the Russian Federation: the case study of Vepses' (Doctoral Thesis, 2012), Central European University

Vargas Gamboa, N. V. and Gamboa Alba, S., 'El derecho de los "pueblos y naciones indígena originario campesinos" en la Constitución Política del Estado Plurinacional de Bolivia" in Beltrao, J. F., Monteiro de Brito Filho, J. C., Gomez, I., Pajares, E., Paredes, F., Zuniga, Y. (eds), *Derechos Humanos de los Grupos Vulnerables* (DHES, 2014)

Vasciannie, S., 'The Fair and equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYBIL 99

Vielleville, D. E., Simal Vasani, B., 'Sovereignty over Natural Resources versus rights under Investment Contracts: Which one Prevails?' [Apr 2008] 2 Transnational Dispute Management

Villiger, M. E., *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009)

Viñuales, J. E. (ed), *The Río Declaration on Environment and Development: A Commentary* (OUP 2015)

— — 'The Río Declaration on Environment and Development' in Viñuales, J. E. (ed), *The Río Declaration on Environment and Development: A Commentary* (OUP 2015)

Vinuesa, R. E., 'The new role of equity as a source of international law', (1992) XIX Thesaurus Acroasium (Institute of Public International Law and International Relations of Thessaloniki)

Waelde, T., *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International 1966)

— — 'Renegotiating acquired rights in the oil and gas industries: Industry and political cycles meet the rule of law' (2008) 1 J of World Energy L and Business 55

Waelde, T. and Kolo, A., 'Environmental Regulation, Investment Protection and Regulatory Taking in International Law' (2001) 50 ICLQ 811

Waelde, T. and Kolo, A., 'Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty', (2007) 35(8/9) Intertax 424

Walzer, M., *Just and Unjust Wars* (1977)

Waskow, D. and Welch, C., 'The Environmental, Social, and Human Rights Impacts of Oil Development' in Revenue Watch Open Society Institute, *Covering Oil, A Reporter's Guide to Energy and Development* (Open Society Institute 2005)

Weil, P., 'L'équité dans la jurisprudence de la Cour Internationale de Justice', in Lowe, V. and Fitzmaurice, M. (eds), *Fifty Years of the International Court of Justice* (CUP 1996)

White, G., *Nationalization of Foreign Property* (New York 1961)

Whiteman, M. M., *Digest of International Law* (Washington 1967)

Wilson, E., 'What is the social license to operate? Local perceptions of oil and gas projects in Russia's Komi Republic and Sakhalin Island' (2016) 3(1) The Extractive Industries and Society 73

Wiseman, H. J., 'Disaggregating Preemption in Energy Law' (2017) 54(1) Rocky Mountain Mineral L Foundation J 108.

Wolfe-Hunnicutt, B., *The end of the Concessionary Regime: Oil and American Power in Iraq, 1958-1972* (PhD Dissertation (Stanford), March 2011)

World Bank, 'Angola, Oil, Broad-based Growth, and Equity, A World Bank Country Study' (2007)

World Bank, Comparative Review of Multilateral Development Bank Safeguard Systems, Main Report and Annexes (May 2015)

World Commission on Environment and Development, *Our Common Future* (OUP 1987).

Wortley, B. A., 'The Mexican Oil Dispute 1938-1946' (1957) 43 Transactions of the Grotius Society 15

— — *Expropriation in Public International Law* (Cambridge 1959)

WTO, 'Differential Provisions', available at: https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm, last accessed 21 October 2015

Yakovleva, N., 'Oil sector developments in Russia and indigenous people' (2011) 9(4) Oil, Gas and Energy L 2

Zillman, D., Lucas, A., and Pring, G. (eds), *Human Rights in Natural Resource Development: Public Participation in Sustainable Development of Mining and Energy Resources* (OUP 2002)

Zillman D., McHarg, A., Bradbrook A., and Barrera-Hernandez, L. *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014)