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# International (Investment) Law and Distribution Conflicts over Natural Resources

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**Abstract:** While distribution conflicts over natural resources were central to the debates on a New International Economic Order, during the last decades the specific distribution conflicts surrounding natural resource exploitation no longer have been at the core of international law. In this paper I trace the developments in the relationship between international law and resource distribution conflicts. I first argue that the New International Economic Order favored the political resolution of distribution conflicts over natural resources and envisaged international distribution conflicts to be addressed by the political organs of international institutions within legal procedures. Second, I show how the NIEO was surpassed by a different order that relied largely on the market as a distribution mechanism for raw materials and how international institutions and international law played a crucial role in the establishment of this order by promoting the privatization of natural resource exploitation and protecting foreign direct investment and trade. With reference to the copper industry in Zambia I thirdly illustrate how international investment law, and more broadly international economic law, is shaping (and affecting the resolution of) not only distribution conflicts between, but also within States. I conclude with a call for a renewed focus on an international law of resource conflicts to allow for their political resolution given the countermoves we can observe with respect to international investment law and the persistence of (violent) conflicts over natural resource exploitation within States.

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## **I. Distribution Conflicts over Natural Resources in International Law**

Natural resources – such as minerals or hydrocarbons – constitute the basis of our economies; they provide us with energy and the raw materials for infrastructure and industrial production. Extractive resources – which are the focus of this Chapter – are exhaustible and distributed unequally over the globe. Their territoriality, scarcity and uneven geographical distribution potentially lead to conflicts over access to natural resources. Due to the potentially large gains that can be reaped from natural resource exploitation and extensive social and environmental costs involved conflicts not only arise over access, but also with respect to the questions whether to extract or not, the modalities and the sharing of the costs and benefits of natural resource exploitation.

Many poor countries in the Global South have historically been and remain today the site of large scale projects for the extraction of raw materials frequently destined for export to countries in the Global North. Under colonialism international law was instrumental for the metropolitan powers to secure access to natural resource wealth in the colonies and dependent territories. With decolonization and the inclusion of the former colonies into the international community as sovereign States access could no longer be safeguarded through domination. Yet, international law continued to play an important role with respect to the distribution of access to natural resources between States, a role that continues to change over time.

Already during World War II the United States and the United Kingdom anticipated that the distribution of natural resources would become a central concern after World War II. In the Atlantic Charter of 1941 they stated:

Fourth, they [the US and the UK] will endeavor, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity.<sup>1</sup>

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<sup>1</sup> Declaration of Principles, signed and entered into force on 14 August 1941 204 LNTS 381, 384.

Accordingly natural resource wealth was to be equitably shared between States. Yet, with progressive decolonization the newly independent States started to promote their own views on just distribution which substantially differed from those of the industrialized States. For the new States, political independence promised that they would be able to reap the benefits of resource wealth for their own economic prosperity. Resource wealth, moreover, meant bargaining power in the endeavor to negotiate a New International Economic Order (NIEO). Just distribution with respect to natural resource exploitation for these countries implied the right to nationalize, state control over foreign investments, reparation and compensation for natural resource exploitation in the former colonies and dependent territories and market intervention to control commodity prices.<sup>2</sup> While distribution conflicts over natural resources were central to the debates on a NIEO, during the last decades the specific distribution conflicts surrounding natural resource exploitation no longer have been at the core of international law. Instead international law has played a significant role in the privatization of natural resource exploitation relegating questions of distribution to 'the market'. Yet, international law's stance on resource distribution conflicts may once more be changing and resource conflicts may soon move center stage again, given the growing demand by emerging economies for raw materials, the discontents triggered by the social and environmental costs of extraction projects mainly in poor, but increasingly also in rich countries, as well as an enhanced global awareness of planetary limitations and the destructive consequences of our ever increasing consumption of natural resources.

In this Chapter I trace the developments in the relationship between international law and resource distribution conflicts. The focus will be on the role of international economic law, and in particular international investment law, in displacing efforts to create a legal framework for the political resolution of distribution conflicts over natural resources with a market rationale of distribution which does not take account of the particularities of natural resource exploitation. I first argue that the New International Economic Order favored the political resolution of distribution conflicts over natural resources and envisaged

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<sup>2</sup> For a good overview see Nico Schrijver, *Sovereignty over Natural Resources. Balancing Rights and Duties* (CUP 1997) ch 3.

international distribution conflicts to be addressed by the political organs of international institutions within legal procedures (II.). Second, I show how the NIEO was surpassed by a different order that relied largely on the market as a distribution mechanism for raw materials and how international institutions and international law played a crucial role in the establishment of this order by promoting the privatization of natural resource exploitation and protecting foreign direct investment and trade (III.). With reference to the copper industry in Zambia I thirdly illustrate how international investment law, and more broadly international economic law, is shaping (and affecting the resolution of) not only distribution conflicts between, but also within States (IV.). I conclude with a call for a renewed focus on an international law of resource conflicts allowing for their political resolution given the countermoves we can observe with respect to international investment law and the persistence of (violent) conflicts over natural resource exploitation within States (V.).

## **II. The New International Economic Order: Political Resolution of Distribution Conflicts over Natural Resources**

The New International Economic Order – which the newly independent States, organized in the G77, sought to establish after WWII – can be interpreted to exhibit a preference for the political resolution of natural resource conflicts. With the establishment of the principle of permanent sovereignty over natural resources it clearly allocated the right to dispose over natural resource wealth to the State within whose territory natural resources are located. Sovereignty over natural resources includes the right of States to exclude other States from access to their extractive resources.<sup>3</sup> As concerns internal decisions whether or not to exploit natural resources, how to exploit natural resources and how to share the benefits and burdens of natural resource exploitation, permanent sovereignty over natural resources may be interpreted to require such decisions to be the outcome of democratic processes. The New International Economic Order not only allocated disposal rights to resource States and their peoples, it also addressed questions of international distribution conflicts which the

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<sup>3</sup> On modifications of sovereignty over natural resources in particular by international environmental law see *ibid* 231 et seq.

principle of permanent sovereignty – by its primary allocation of disposal rights over territorial resource wealth to individual States – potentially exacerbated. International Commodity Agreements were to provide legal frameworks for the political resolution of such international distribution conflicts.

### **1. Permanent Sovereignty over Natural Resources as a Political Concept**

With decolonization the conflicting positions between industrialized countries, many dependent on imports of raw materials and oil, and newly independent resource-exporting States became apparent in debates within the United Nations on permanent sovereignty over natural resources. Under colonialism the imperial/European international law had provided a justification (based on the colonies' inferior status attributed to them by international law) to the imperial powers and their corporations for the exploitation of natural resources in the colonies.<sup>4</sup> With political independence, however, the formerly dependent territories became the imperial powers' sovereign equals and concomitantly could assert a right to territorial sovereignty, including sovereignty over their natural resources. Since the early 1950s the principle of permanent sovereignty over natural resources was formulated in a number of General Assembly resolutions.<sup>5</sup> General Assembly Resolution 1803 of 1962 qualifies the principle as follows:

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.<sup>6</sup>

This formulation indicates that permanent sovereignty is to protect the collective autonomy of the resource States' population and has to be exercised through politics. This interpretation is supported by the international human rights covenants that link permanent sovereignty over natural resources to the right to

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<sup>4</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005); Bernard V A Röling, *International Law in an Expanded World* (Djambatan 1960) 26 et seq.

<sup>5</sup> UNGA Res 523 (VI) (1952); UNGA Res 626 (VII) (1952); UNGA Res 1803 (XVII) (1962).

<sup>6</sup> UNGA Res 1803 (XVII) (1962) para. 1.

self-determination.<sup>7</sup> The African Banjul Charter clarifies that this right can also be brought into position against a government and provides that '[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.'<sup>8</sup>

With the firm establishment of the right to permanent sovereignty over natural resources, initiatives were defeated that sought to introduce into international law obligations of resource States to grant access to their natural resources to third States or the obligation to engage in natural resource exploitation not only to promote the national, but the global public interest. The International Co-Operative Alliance had proposed, for example, to place resources under the control of the United Nations and to negotiate an international convention that would provide for equal access and exploitation in the public interest.<sup>9</sup>

Today, international law scholars again attempt to derive from the international law principle of sovereignty international obligations of States towards other States in a range of fields.<sup>10</sup> Yet, the wording of the relevant passage of General Assembly Resolution 1803 makes quite clear that, when the resolution was adopted, permanent sovereignty over natural resources was not understood in that way. Why States that depended on resource imports still agreed to the Resolution and its attribution of exploitation rights solely to the people of the resource State becomes clearer when we look at how importing States could protect their own national interests in access to resources through another body of rules, namely those on investor protection.<sup>11</sup> What should be noted here is that permanent sovereignty over natural resources provides the basis to argue for the need of a political resolution of internal resources conflicts. On the liberal-democratic premise that autonomy can only be realized within political procedures framed by human and minority rights, important

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<sup>7</sup> Art 1:2 of the International Covenant on Civil and Political Rights and the International Covenant in Economic, Social and Cultural Rights.

<sup>8</sup> Art 21:2 of the African [Banjul] Charter on Human and Peoples' Rights, adopted on 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5 (1982) 21 ILM. 58, entered into force on 21 October 1986.

<sup>9</sup> On this and other attempts to establish an obligation to use natural resources in the global interest see Schrijver (n 2) 37 et seq.

<sup>10</sup> Eyal Benvenisti, 'Sovereigns as Trustees of Humanity' (2013) 107 AJIL 295.

<sup>11</sup> See infra III.A.

decisions on the exploitation of natural resources will always need to be linked to democratic procedures if they are to be an expression of self-determination.<sup>12</sup> As natural resource exploitation is frequently highly capital- and skill-intensive many resource-rich developing countries would not have been able to exploit their natural resources without the help of foreign direct investment (FDI). In order to attain greater economic independence they combined insistence on permanent sovereignty over natural resources with claims for substantial financial assistance by public lenders as well as transfer of technological know-how.<sup>13</sup> Support specifically for the economic exploitation of natural resources was to be provided by a Common Fund for Commodities.<sup>14</sup>

## ***2. International Legal Procedures to Address International Resource Conflicts***

While permanent sovereignty over natural resources laid the foundation for the argument that national decisions about natural resource exploitation must be an expression of collective autonomy and are to be the subject of (domestic) politics, the New International Economic Order envisaged conflict-resolution procedures also at the international level. Conflicts between resource-exporting (producer) States and resource-importing (consumer) States were to be addressed within international organizations established by International Commodity Agreements. The Agreement Establishing the Common Fund for Commodities defined International Commodity Agreements as

any intergovernmental arrangement to promote international cooperation in a commodity, the parties to which include producers and consumers covering the bulk of world trade in the commodity concerned.<sup>15</sup>

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<sup>12</sup> On the link between sovereignty, self-determination and democracy see Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 EJIL 513.

<sup>13</sup> See, eg, International Development Strategy for the Second United Nations Development Decade, UNGA Res 2626 (XXV) (1970) paras 43 and 64.

<sup>14</sup> Christoph Ohler, 'Common Fund for Commodities (CFC)' in Rüdiger Wolfrum (ed), *Encyclopedia of Public International Law* (OUP 2008) <www.mpepil.com> accessed 1 August 2014.

<sup>15</sup> Agreement Establishing the Common Fund for Commodities, TD/IPC/CF/CONF/25, art 1 para 2.

International Commodity Agreements were, as shows the distinction in the definition just mentioned, based on the premise that the interests of producer and consumer States were potentially in conflict.

Developing countries advocated the establishment of International Commodity Agreements to achieve greater equity in international commodities trade and in particular to stabilize prices of primary commodities through market intervention in order to prevent a deterioration of the terms of trade to their detriment. In the 1960s and 70s when International Commodity Agreements were high on the agenda of the United Nations, and more specifically the United Nations Conference on Trade and Development (UNCTAD), stabilization was thought to be necessary to contain a perceived long-term trend of falling prices of commodities in relation to manufactured goods. The main instruments of market intervention to be implemented by International Commodity Agreements were buffer stocks and export quotas.<sup>16</sup> Yet, long term stabilization of commodity prices was not the only objective. Benefits of international cooperation with respect to commodities were also promised to consumer countries that were (and this is a significant difference to producer associations) to be equally represented in International Commodity Agreements. Objectives that would benefit consumer countries included the stabilization of short-term price volatility<sup>17</sup> and the equitable distribution of commodities in short supply through the co-ordination of commodity production and marketing policies.<sup>18</sup> Next to a number of further objectives International Commodity Agreements also sought to increase processing of raw materials in the resources States and to ensure fair labour standards in natural resource exploitation.<sup>19</sup>

The International Commodity Agreements that entered into force established international organizations, which – like other international organizations – had a main political organ, the council, consisting of representatives of all members,<sup>20</sup> and an executive committee with limited membership and to which the council could delegate certain powers. Decisions of these organs included,

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<sup>16</sup> B S Chimni, *International Commodity Agreements. A Legal Study* (Croom Helm 1987).

<sup>17</sup> Ibid 42, 43.

<sup>18</sup> UNCTAD Resolution, 'International Commodity Arrangements and Removal of Obstacles and Expansion of Trade' in *Proceedings of the United Nations Conference on Trade and Development: Final Act and Report* vol I (1964) Annex A.II.1 26; Chimni (n 16) 52, 53.

<sup>19</sup> Chimni (n 16) 53.

<sup>20</sup> Ibid 87 et seq.



for example, the setting of reference prices for the respective commodity. Each of the two groups, consumer and producer countries, had an equal number of votes; within each group the votes were distributed proportionally to export and import shares. Decisions had to be taken by double, or distributed, majorities, meaning that a majority of votes in each group was required.<sup>21</sup>

The following observation by *Bhupinder Chimni* with respect to decision-making in International Commodity Agreements renders a good picture of the approach to the resolution of natural resource conflicts envisaged by proponents of the NIEO, which I would call a political approach:

The significance of decision making procedures to the effective operation of international organizations can hardly be overstated. Firstly, decisions are not likely to be observed if the procedures through which they are arrived at are perceived to be unsatisfactory. Secondly, their enforcement in the outside world is rendered difficult if all the major concerned interests are not represented in the decision making process.<sup>22</sup>

International Commodity Agreements never became the effective regulators that developing countries had intended them to be.<sup>23</sup> The consumer countries, and in particular the United States, were largely opposed to the market-intervention approach of International Commodity Agreements.<sup>24</sup> While a number of such agreements were concluded and some are still operative today (for coffee, cocoa, tropical timber, olive oil, sugar and wheat), they never covered the whole range of commodities that UNCTAD's Integrated Programme for Commodities foresaw to be subject to International Commodity Agreements.<sup>25</sup> The International Commodity Agreements which are still

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<sup>21</sup> Ibid 93, 94.

<sup>22</sup> Ibid 92.

<sup>23</sup> One of the most spectacular failures was the bankruptcy of the International Tin Council; see Matthias Hartwig, 'The International Tin Council (ITC)' in Wolfrum (n 14).

<sup>24</sup> On the US exit from the International Coffee Agreement see Matthew J Foli, 'International Coffee Agreements and the Elusive Goal of Price Stability' (1995) 4 Minnesota Journal of Global Trade 79, 94; P Brian Bartels, 'Preventing Coffee Cooperation from Grinding to a Halt: An Institutional Analysis of the International Coffee Agreements and Recommendations for Achieving Long-term Cooperation in the International Coffee Trade' (2009) 42 Creighton Law Review 279.

<sup>25</sup> Apart from agricultural commodities the following commodities were to be covered: bauxite, copper, iron ore, manganese, phosphates and tin: UNCTAD Resolution 93(IV) sec II.

operative today no longer intervene in commodity markets, but instead engage in product marketing, collect information and provide fora for consultation on the respective commodity.<sup>26</sup>

### **III. Privatized Natural Resource Exploitation, Investment Protection and Trade Liberalization: Just Distribution of Natural Resources through the Market**

For a number of reasons the resource distribution order envisaged by proponents of the NIEO never fully came into being. The reasons include the lack of agreement between developed and developing countries<sup>27</sup> as well as changing views within economics as to the best way to promote economic development.<sup>28</sup> Moreover – and most importantly with respect to this Chapter’s subject of distribution conflicts over natural resources – for industrialized countries whose industry depend on resource imports the privatization of natural resource exploitation, the promotion of a strong international investment law and the liberalization of trade proved more effective means to secure access to extractive resources than the establishment of political procedures for the resolution of international resource conflicts within the United Nations framework.

The avenue pursued by resource-importing countries to secure access to resources stands in stark contrast to *Chimni’s* statement cited above. Resource-importing States have promoted their interests not through international cooperation with exporting States that openly acknowledges distribution conflicts, but instead have opted to strengthen investor protection. In this endeavor they have been substantially supported by International Organisations, in particular the international financial institutions. The latter’s role has not been to resolve distribution conflicts with the participation of all affected States. Instead their secretariats’ economic expertise promoted the

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<sup>26</sup> Frank Schorkopf, ‘Internationale Rohstoffverwaltung zwischen Lenkung und Markt’ (2008) 46 *Archiv des Völkerrechts* 245.

<sup>27</sup> On the antagonism between developing countries and developed countries in the United Nations in the 1980s see Jagdish N Bhagwati and John Gerald Ruggie (eds), *Power, Passions, and Purpose. Prospects for North-South Negotiations* (MIT Press 1984).

<sup>28</sup> For critiques of the economics underlying the NIEO see Anne Krueger, ‘Trade Policy and Economic Development: How We Learn’ (1997) 87 *American Economic Review* 1; Jagdish N Bhagwati (ed), *The New International Economic Order* (MIT Press 1977).

exploitation of natural resources through private investors as the model most conducive to development. This model made the interest conflicts that were stressed in the NIEO disappear in a win-win scenario: The pursuit of private investors of their interests in profit-maximization would also satisfy the interests of resource exporting developing States in economic development. And coincidentally also the interests of the investors' home States: resource-dependent importing States.

The fact that resource importing States largely left the scene of international cooperation for the political resolution of resource conflicts does not mean that they did not consider supply security a national interest. Rather they could rely on supply being secured through private investment abroad and liberalized trade;<sup>29</sup> and even more so as international law came to protect, and international institutions came to promote, foreign direct investment. As resource exporting States sometimes impose restrictions on the export of raw materials (e.g. to promote the establishment of a domestic processing industry) the prohibition of such barriers to trade is a further objective pursued by importing States to secure access to natural resources.<sup>30</sup>

### ***1. Promotion of Privatized Natural Resource Exploitation and Strengthening of Investor Rights***

While in the 1960s all States represented in the United Nations could agree to a broadly phrased principle of permanent sovereignty over natural resources, what remained contentious was how this principle would affect existing and future rights of foreign investors. Some of the new States had granted exploitation concessions to foreign corporations for periods of several decades. Aiming not only at political autonomy, but also greater economic independence the new States frequently nationalized these corporations. They argued that sovereignty should not only entail a right to ownership, but also a right to nationalize foreign extraction companies. While consensus could also be reached on this position, the industrialized countries did not agree to a right to

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<sup>29</sup> Stephen D Krasner, *Defending the National Interest. Raw Materials Investments and US Foreign Policy* (Princeton University Press 1978).

<sup>30</sup> Where the establishment of a legal framework conducive to private investment and raw materials trade was not sufficient, import states continued to intervene. Yet, such intervention, as for example the United States' support for the military coup against Salvador Allende in Chile in 1973, largely occurred outside the confines of international law.

nationalize without any limitations imposed by international law.<sup>31</sup> The latter mostly shared the view that nationalizations had to pursue a public interest and that the nationalizing State had to pay prompt, adequate and effective compensation. They also stressed that permanent sovereignty could be 'contracted away' by a State through entering into international agreements.<sup>32</sup>

The G77, by contrast, strove to consolidate their own version of a right to nationalize as part of a New International Economic Order.<sup>33</sup> While Resolution 1803 of 1962 on Permanent Sovereignty over Natural Resources provided for compensation according to *international law and national law* in cases of expropriation,<sup>34</sup> the Declaration on a New International Economic Order and the Charta on the Economic Rights and Duties of States of 1974 aimed to expand the right to expropriate. These two instruments no longer demanded compensation according to international law and they also no longer required expropriation to serve a public interest.<sup>35</sup> The industrialized powers, however, resisted this move by voting against the respective parts of the resolutions dealing with expropriations and subsequently international law scholars and arbitrators, most famously René-Jean Dupuy in his *Texaco Award*, for this reason concluded that they lacked legal effect.<sup>36</sup>

While the requirements for lawful expropriations under customary international law remain contested today<sup>37</sup> the protection of private investment has progressively been strengthened through the case law of arbitral tribunals, the conclusion of bilateral investment agreements and inclusion of investment chapters into regional trade agreements. The principle of permanent sovereignty over natural resources as formulated by the General Assembly resolutions left the door open for the argument that a State could voluntarily limit

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<sup>31</sup> M Sornarajah, *The International Law of Foreign Investment* (3<sup>rd</sup> edn, CUP 2010) 406 et seq.

<sup>32</sup> Schrijver (n 2) ch 2.

<sup>33</sup> On NIEO as a project of redistributive justice see Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes Meier 1979).

<sup>34</sup> UNGA Res 1803 (XVII) (1962) para 4: 'Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign'; on this formulation which was a compromise between developing countries and industrial nations see Stephen M Schwebel, 'The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources' (1963) 49 *American Bar Association Journal* 463.

<sup>35</sup> UNGA Res 3201 (S-VI) (1974) para 4 (e); UNGA Res 3281 (XXIX) (1974) art 2.

<sup>36</sup> *Texaco Overseas Petroleum Company/California Asiatic Oil Company v The Government of the Libyan Arab Republic* (1978) 17 *International Legal Materials* 1.

<sup>37</sup> Sornarajah (n 31) 412 et seq.

its own sovereignty by concluding international agreements. Building on this argument arbitral tribunals enhanced the protection of foreign investors by interpreting concession agreements concluded with foreign investors as constituting international agreements. Investment arbitrations in the 1970s concerning the expropriation of oil companies by Libya adopted such an interpretation and held that the petroleum concession contracts in question that had been concluded between Libya and Texaco, Liamco and BP respectively constituted 'economic development agreements' that were not part of national law, but of international law.<sup>38</sup> As a consequence of the characterization as economic development agreements which form part of the international legal order, contractual provisions on the application of international law or so-called stabilization clauses that mandate the application of domestic law as it existed at the time the contract was concluded could not be overturned by subsequent national legislation. This de-localization and internationalization of contracts increased the protection afforded to foreign investors, while limiting the authority of the host State.<sup>39</sup>

Today this doctrinal construction has lost some of its relevance as many foreign direct investments fall within the scope of bilateral investment agreements which were initially concluded mainly by capital-exporting (industrialized) States with capital-importing (developing) States to secure the protection of investors from the industrialized States from government incursions, such as nationalizations, in the developing country where the investment was taking place. While at first sight these agreements appear as one-sided (and are frequently interpreted to be) they also posit (like the arbitral awards mentioned above) that in order to benefit from international protection, foreign direct investment must be beneficial to economic development. Under such an interpretation transnational corporations are becoming agents of development.<sup>40</sup> The same transnational corporations would have been more strictly controlled and limited in their power if the developing countries had had their will. The

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<sup>38</sup> Charles Leben, *The Advancement of International Law* (Hart Publishing 2010) ch 1; see also Melaku Desta in this volume.

<sup>39</sup> For a critical view see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 229 et seq.

<sup>40</sup> For a defense of such a conception of international investment protection see Stephan W Schill, 'Investitionen und Entwicklung' in Philipp Dann, Stefan Kadelbach and Markus Kaltenborn (eds), *Entwicklung und Recht. Eine systematische Einführung* (Nomos 2014) 341.

Declaration on a New International Economic Order had called for an obligation of home States to cooperate with developing countries in the effective control of transnational corporations.<sup>41</sup> Yet, the UN General Assembly never adopted the Code of Conduct on Transnational Corporations drafted by the Commission on Transnational Corporations.<sup>42</sup> An international competition law which might achieve some of the same objectives to date remains a mainly scholarly endeavor.<sup>43</sup>

The demands of developing countries for technical and increased financial assistance, too, have remained largely unfulfilled (the Common Fund for Commodities, for example, only entered into force 1989, 9 years after the agreement on its establishment was concluded) and with them the realization of independence from private foreign capital. The official development assistance that was granted, in particular by the World Bank, was soon to be linked to conditions, so-called structural adjustment conditionality, that often made the receipt of financial assistance dependent on the privatization of resource extraction enterprises.<sup>44</sup>

## **2. Prohibition of Export Restrictions**

The prohibition of export restrictions complements foreign direct investment as an instrument to secure access to natural resources. Recently export restrictions have received renewed attention as the US, the EU and Japan have seen their industry's access to raw materials threatened by the imposition of export quotas and tariffs on certain rare earths and other raw materials by China. The EU Commission is very explicit in its communication 'Tackling the Challenges in Commodity Markets and on Raw Materials'<sup>45</sup> as to its stance on export restrictions. Two main pillars of its raw materials initiative (set out in this communication) are: first, the negotiation of prohibitions of export restrictions, to

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<sup>41</sup> UNGA Res 3201 (S-VI) (1974) para 4(g).

<sup>42</sup> Commission on Transnational Corporations, 'Report on the Special Session (7-18 March and 9-21 May 1983)' Official Records of the Economic and Social Council, 1983, Supplement No 7 (E/1983/17/Rev. 1) Annex II.A.

<sup>43</sup> Wolfgang Fikentscher, *Culture, Law and Economics: Three Berkeley Lectures* (Stämpfli und Carolina Academic Press 2004).

<sup>44</sup> See the case of Zambia, Section IV. below.

<sup>45</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Tackling the Challenges in Commodity Markets and on Raw Materials', COM(2011) 25 final.

be included in bilateral free trade agreements, regional free trade agreements and WTO accession protocols and, second, the enforcement of such rules through diplomatic means and dispute settlement.<sup>46</sup>

In the WTO disputes with China the EU has obtained important victories in using dispute settlement to secure access to Chinese raw materials, and in particular rare earths of which China is the main exporting State. In the first case concerning restrictions on exports of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc as well as in the second case concerning restrictions on exports of rare earths, tungsten and molybdenum the WTO Appellate Body confirmed the panels' findings that Chinese export duties and export quotas violated WTO law.<sup>47</sup> Export quotas are prohibited by Art. XI of the General Agreement on Tariffs and Trade (GATT) – the general prohibition on quantitative restrictions (unless an exception applies). Export duties, by contrast, are not prohibited by the GATT. A prohibition of export duties had, however, been negotiated in the course of China's accession to the WTO and included in the accession protocol which made it a binding obligation for China.<sup>48</sup> Similar obligations are included in a number of other accession protocols, including the WTO accession protocols of Mongolia and Tajikistan.

The EU's strategic use of international law to secure access to raw materials demonstrates its acknowledgment that international conflicts over access to resources exist. This acknowledgment is illustrated by the following comment of EU trade commissioner *Karel de Gucht* on the WTO panel report in the rare earths dispute:

Today's ruling by the WTO on rare earths shows that no one country can hoard its raw materials from the global marketplace at the expense of its other WTO partners.<sup>49</sup>

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<sup>46</sup> For the implementation of these pillars see Results on Raw Materials, posted by the EU Commission on <[http://ec.europa.eu/trade/policy/accessing-markets/goods-and-services/raw-materials/index\\_en.htm](http://ec.europa.eu/trade/policy/accessing-markets/goods-and-services/raw-materials/index_en.htm)> accessed 11 August 2014.

<sup>47</sup> Appellate Body Report, 'China – Raw Materials' WT/DS395/AB/R; Appellate Body Report, 'China – Rare Earths' WT/DS432/AB/R

<sup>48</sup> WTO, 'Accession of the People's Republic of China' Decision of 10 November 2001, WT/L/432.

<sup>49</sup> Cited in Shawn Donnan and James Politi, 'WTO rules against China on 'rare earths' export restrictions' *Financial Times* (26 March 2014).

The way in which the EU uses international law to address these conflicts also shows, however, that it does not intend to revisit the idea inherent in the proposals of the NIEO to establish political procedures for the resolution of resource conflicts. Instead of promoting international procedures for an equitable resolution of resource conflicts it is 'committed to ensure that the international raw materials markets operate in a free and transparent way.'<sup>50</sup> This can be interpreted to mean that distribution conflicts are to be solved by the market or rather that distribution conflicts that would require political resolution will not arise if only the market is left to operate freely and transparently within a framework of binding international law rules.

#### **IV. How International (Investment) Law Shapes Distribution Conflicts over Natural Resources: The Case of Zambia**

The example of Zambia illustrates the shift towards privatized natural resource exploitation and how it was promoted by the international financial institutions. It also reveals that the win-win scenario which provides the legitimation for the promotion and protection of foreign direct investment in Zambia, like in many other resource-rich developing countries, has remained unfulfilled. Finally, it indicates how the privatization of natural resource exploitation has released the importing States from responsibility while at the same time serving their interest in resource security and how international law has come to restrict the policy space available to resource States to address internal distribution conflicts.

##### ***1. Privatization of Natural Resource Exploitation in Zambia***

The Republic of Zambia is a resource-rich country. On its territory exist large deposits of copper, moreover there are known deposits of emerald, gold, zinc and diamonds. Many of the mineral deposits are concentrated in the Copperbelt region on the border of Zambia and The Democratic Republic of Congo. In 2011 Zambia was the world's seventh largest producer of copper, the second largest producer of cobalt (a by-product of copper production) and provided one fifth of

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<sup>50</sup> <[http://ec.europa.eu/trade/policy/accessing-markets/goods-and-services/rawmaterials/index\\_en.htm](http://ec.europa.eu/trade/policy/accessing-markets/goods-and-services/rawmaterials/index_en.htm)> accessed 11 August 2014.



the global supply of emeralds.<sup>51</sup> The first copper mine started business in 1928 in Zambia, which was then called Northern Rhodesia and a British colony. Under colonial rule copper exploitation was controlled by the Roan Selection Trust and the Anglo-American Corporation.<sup>52</sup>

After Zambia had gained independence from Great Britain in 1964 the Copper Mining industry was nationalized between 1968 and 1972 under President Kaunda, who pursued a politics of 'socialist humanism'. The State asserted its sovereign right to ownership of mineral deposits, became majority shareholder in all mining companies and established the State mining enterprise Zambia Consolidated Copper Mines (ZCCM).<sup>53</sup> At that time the copper industry was doing well; in 1969 Zambia had attained middle-income status. Zambia's economy was based almost exclusively on the copper industry and almost all foreign exchange income derived from copper exports.<sup>54</sup> In the following decades copper production started to decline; whilst production in 1972 had amounted to 700,000 metric tons, it decreased to 226,192 tons in 2000.<sup>55</sup> This decline in part was due to a lack of investments in the copper industry and in part due to low productivity.<sup>56</sup> In addition to these factors falling copper prices, which accompanied the oil crises, led to significantly decreased export earnings. As a consequence of the flailing copper industry income per capita between 1974 and 1994 declined by 50% and Zambia became the 25<sup>th</sup> poorest country in the world.<sup>57</sup>

In the 1980s Zambia was one of the most indebted countries in Africa having received bilateral loans as well as financial assistance from the International Monetary Fund and the World Bank. By the end of the 1980s donors increased their pressure for structural adjustments in which privatization occupied a

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<sup>51</sup> UNCTAD/ICC, *An Investment Guide to Zambia. Opportunities and Conditions* (2011).

<sup>52</sup> On the history of copper exploitation in Zambia see Larry J Butler, *Copper Empire. Mining and the Colonial State in Northern Rhodesia, c. 1930-1964* (Palgrave Macmillan 2007).

<sup>53</sup> John Lungu, 'Copper Mining Agreements in Zambia. Renegotiation or Law Reform' (2008) 35 *Review of African Political Economy* (2008) 403, 404.

<sup>54</sup> *Ibid.*

<sup>55</sup> UNCTAD/ICC (n 51) 9.

<sup>56</sup> John Craig, 'Putting Privatization into Practice: The Case of Zambia Consolidated Copper Mines Limited' (2001) 39 *Journal of Modern African Studies* 389, 392.

<sup>57</sup> Lungu (n 53) 405.

central place.<sup>58</sup> The fact that Zambia in the 1990s started to effectuate the demanded adjustments was on the one hand due to donor pressure and the desire of Zambia to profit from the World Bank's Highly Indebted Poor Countries initiative; on the other hand it is explained by the defeat of President Kaunda's United National Independence Party in the first multi-party elections held in Zambia in 1991 by the Movement for Multi-Party Democracy that was committed to economic liberalization and privatization.<sup>59</sup> The privatization programme subsequently implemented was praised by international institutions as one of the most successful privatizations in Africa for the swiftness of the process, its transparency and accountability.<sup>60</sup> According to a 2011 investment report by UNCTAD and the International Chamber of Commerce only 10-15% of economic activity in Zambia is controlled by the State as opposed to 80% prior to privatization.<sup>61</sup>

## **2. The Unfulfilled Promise of Privatized Natural Resource Exploitation -- The Case of Zambia Continued**

Since the economic reforms demanded by the International Financial Institutions and including privatization, trade liberalization and facilitation of administrative procedures, Zambia is internationally praised for its investor-friendliness.<sup>62</sup> The current prosperity of the Zambian copper industry is generally attributed to privatization and foreign direct investment. According to the IMF the mining sector due to private investment and positive prospects for copper prices will continue to play a key role in the countries' economic development.<sup>63</sup> In 2007 there were nine copper mines with majority ownership of seven transnational mining companies. The government in almost all mines

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<sup>58</sup> On the International Financial Institution's concessional loans and their conditionality see Lishala C Situmbeko and Jack Jones Zulu, *Zambia: Condemned to Debt. How the IMF and the World Bank Have Undermined Development* (World Development Movement 2004).

<sup>59</sup> Craig (n 56) 391; Lungu (n 53) 405; Alastair Fraser and John Lungu, *For Whom the Windfalls? Winners & Losers in the Privatization of Zambia's Copper Mines* (CSTNZ/CCJDP 2007) 9.

<sup>60</sup> Oliver Campbell White and Anita Bhatia, *Privatization in Africa* (World Bank 1998) 111 et seq.

<sup>61</sup> UNCTAD/ICC (n 51) 9.

<sup>62</sup> *Ibid*; Zambia is a party to two bilateral investment treaties with Germany and Switzerland which entered into force in 1972 and 1995 respectively <[http://unctad.org/Sections/dite\\_pcbb/docs/bits\\_zambia.pdf](http://unctad.org/Sections/dite_pcbb/docs/bits_zambia.pdf)> accessed 11 August 2014.

<sup>63</sup> IMF, Zambia 2012 Article IV Consultation.

holds a minority stake.<sup>64</sup> While there was a sharp drop in copper prices in 2008 and 2009, prices have since risen to record highs (mainly due to rising demand in emerging economies, mostly China).<sup>65</sup>

The prosperity of the copper industry stands in stark contrast to the prosperity of the rest of the country. According to UNDP's Human Development Index 2013 Zambia is one of the poorest and least-developed countries of the world, ranked 163<sup>rd</sup> (out of 187).<sup>66</sup> It is commonly acknowledged that government revenues from copper exploitation have been extremely limited. Even though mining revenues constitute a relatively high share in GDP, government revenues are very low compared to other mineral producing countries. Government revenues from copper production between 2000 and 2007 have been below 0.5% of GDP even though the share of copper exports was above 20% of GDP.<sup>67</sup> A Swiss NGO, 'The Berne Declaration', States that only 5% of mining revenues flow into the national budget, compared with 70% of revenues from oil extraction in Norway.<sup>68</sup>

This situation is mainly due to the privileged position that was negotiated with the private investors during the privatization process as concerns royalty payments, taxation and regulatory conditions. Another important reason for the limited share of the government in mining profits is tax evasion. The exploitation rights and financial obligations that the government negotiated with foreign investors were established by so-called Development Agreements. The term Development Agreement already signifies the investors' privileged status as it refers to the doctrinal figure of 'Economic Development Agreement' that was developed by international arbitration tribunals in order to internationalize certain contracts between foreign investors and host States. The Development Agreements included clauses according to which their terms were to supersede present and future national legislation, were intended to have a duration

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<sup>64</sup> The Government stake is held through ownership of 87% of the shares in ZCCM's successor company: ZCCM Investment Holdings.

<sup>65</sup> IMF (n 63) 5.

<sup>66</sup> UNDP, 'Human Development Report 2013' <<http://hdr.undp.org/en/2013-report>> accessed 11 August 2014. The characterization of poor or least developed of course depends on the measurement criteria. While Zambia occupies one of the last ranks in the Human Development Index, the World Bank – based mainly on Gross National Income – classifies Zambia as a lower middle income country: <http://data.worldbank.org/country/zambia>.

<sup>67</sup> IMF (n 63) 15.

<sup>68</sup> Erklärung von Bern (ed), *Rohstoff: Das gefährlichste Geschäft der Schweiz* (Salis Verlag AG 2011) 115.

between 10 and 20 years and were to be modifiable only by mutual consent of the parties to the agreement. They also provided that conflicts concerning the Development Agreements could be referred to international arbitration.<sup>69</sup>

As concerns the substantive provisions on taxation the Development Agreements diverged from The Mines and Minerals Act of 1995 in favor of the foreign investors. Whereas the Act provided for mining royalties of 3%, most Development Agreements reduced this rate to 0.6%. As concerns corporate tax the agreements provided that losses could be carried forward for periods between 15 and 20 years and deducted from taxable profits. This had the effect that until 2012 practically no corporate tax had been paid by mining companies.<sup>70</sup> Capital investments were also 100% tax deductible under the agreements and companies were exempt from duties or import taxes on machinery and equipment. For the government to share into so-called windfall profits the agreements provided for government participation in profits from sales when copper prices exceeded a benchmark of US\$ 2.700 per metric ton (which they did beginning 2004). Again, however, payments to the government on the basis of this participation clause were to be tax deductible.<sup>71</sup>

As copper prices rose to unprecedented heights beginning in 2004<sup>72</sup> and copper production contrary to World Bank forecasts<sup>73</sup> significantly increased, discontent mounted within the population whose living conditions did not improve, but who by contrast suffered from precarious employment and the fact that schooling and medical services in the early 1990s had been privatized and were no longer provided for free.<sup>74</sup> NGOs, churches, trade unions and scholars pressured the government to increase the State's share in the exploitation profits. In 2006 the population of the Copperbelt region expressed their discontent with the government's policies as a majority voted members of the Patriotic Front into urban seats, a party that had promised to combat exploitation of the workforce in mines, to increase corporate taxes and limit

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<sup>69</sup> The content of the Development Agreements leaked in 2007 and a number of them were published on <[www.minewatchzambia.com](http://www.minewatchzambia.com)> which is now defunct. For detailed information on the contents see Fraser and Lungu (n 59).

<sup>70</sup> IMF (n 63).

<sup>71</sup> Fraser and Lungu (n 59) 15.

<sup>72</sup> In 2011 prices reached record highs of over US\$ 10,000 per metric ton.

<sup>73</sup> Erklärung von Bern (n 68) 113.

<sup>74</sup> UNCTAD/ICC (n 51); Fraser and Lungu (n 59) 21 et seq; Erklärung von Bern (n 68) 106.

foreign ownership of mines.<sup>75</sup> When the content of development agreements were leaked in 2007 this put further pressure on the government that announced to renegotiate the agreements with the mining companies. Plans for negotiations were abandoned in 2008 when the Zambian parliament replaced The Mines and Minerals Act of 1995 with a new Mines and Minerals Development Act that provided that ‘the development agreements shall cease to be binding on the Republic.’<sup>76</sup> Under the 2008 Mines and Minerals Development Act the corporate tax for copper exporters was set at 35% of taxable income; losses could be carried forward for a maximum of 10 years; allowances on income tax for capital expenditures have been reduced and the royalty for minerals was set at 3% of market value.<sup>77</sup> Originally the 2008 Mining and Minerals Development Act had also provided for a windfall tax of 25% on profits in times of high copper prices. When during the 2009 recession revenue fell to US\$ 77.7 million compared with US\$ 128.4 million the previous year despite increases in production and exports and when as a consequence some international investors withdrew from the Zambian copper mining industry and others refused to pay taxes the government dismantled the windfall tax.<sup>78</sup> After the 2011 elections newly elected President Sata of the Patriotic Front increased mining royalties further from 3 to 6%.<sup>79</sup> He also introduced a 10% export duty on unprocessed metals.<sup>80</sup>

While the reformed tax regime is intended to increase government revenues from resource exploitation, the realization of such increases depends on administrative implementation and the effectiveness of tax collection. To minimize their tax burden or to evade taxation companies on a large scale engage in legal and sometimes illegal maneuvers including the allocation of losses and profits to different parts of their organization. Maneuvers that are

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<sup>75</sup> Fraser and Lungu (n 59) 1.

<sup>76</sup> UNCTAD/ICC (n 51) 29; the Mines and Minerals Development Act of 2008 is available at <<http://www.zambialii.org/files/zm/legislation/act/2008/7/mamda2008295.pdf>> accessed 11 August 2014.

<sup>77</sup> For an overview over the current mining tax regime see Zambia EITI, ‘Understanding Mining Taxes’ (Brochure, 2011).

<sup>78</sup> UNCTAD/ICC (n 51) 29.

<sup>79</sup> *The Guardian* Global Development Blog (2 July 2012) <<http://www.theguardian.com/global-development/poverty-matters/2012/jul/02/haiti-mining-revenue-benefit-people>> accessed 11 August 2014.

<sup>80</sup> Matthew Hill, ‘Zambia’s Sata Orders Export Tax on Unprocessed Metals Reinstated’ *Bloomberg News* (28 October 2013) <<http://www.bloomberg.com/news/2013-10-28/zambia-s-sata-orders-export-tax-on-unprocessed-metals-reinstated.html>> accessed 11 August 2014.

facilitated by high degrees of vertical integration and that are hard to impossible to track by tax administrations especially if they have limited staff, expertise and funding as is frequently the case in low-income countries. A few years ago, this in fact became the focus of media attention, when the Swiss company Glencore International AG and the Canadian First Quantum Mining Ltd, whose subsidiary Mopani Copper Mines is the largest mining corporation in Zambia, were charged with illegal tax evasion.<sup>81</sup>

### ***3. The Responsibility Gap of Privatized Natural Resource Exploitation and its Impact on Internal Conflict Resolution***

As was already indicated above, the promotion of foreign direct investment through the international financial institutions and its protection by bilateral investment agreements is justified in terms of its furtherance of economic development. The conceptualization of foreign investors as agents of economic development presents them as actors who not only aim to maximize their own profits, but at the same time contribute to economic growth and consequently economic development of the host State. Accordingly, the World Bank can argue that making assistance conditional upon the privatization of natural resource exploitation is in line with its development mandate.<sup>82</sup> Likewise bilateral investment treaties emphasize their positive impact on development.<sup>83</sup> By defining the protected investments as investments promoting economic development, investment treaties can be presented as mutually beneficial bargains even though, if a bilateral investment treaty is concluded between a developing capital-importing country and a capital-exporting country, it is mostly only the latter's investors that will enjoy the treaty's protection.

For natural resource exploitation the link between foreign investment and development can be concretized as follows: Foreign investment provides the necessary capital, technology and know-how in order to turn raw materials into tradable commodities. Trade in commodities and their processing will lead to

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<sup>81</sup> Mining Watch Canada, 'Tax Evasion in Zambia: NGOs File Complaint Against Glencore, First Quantum for Violation of OECD Guidelines' (12 April 2011) <<http://www.miningwatch.ca/news/tax-evasion-zambia-ngos-file-complaint-against-glencore-first-quantum-violation-oecd-guidelines>> accessed 11 August 2014; Erklärung von Bern (n 68).

<sup>82</sup> Art I:1 Articles of Agreement of the International Bank for Reconstruction and Development.

<sup>83</sup> See, eg, the following formulation in the preamble of the 2004 US Model BIT: 'Recognizing that agreement on the treatment to be accorded [foreign] investment will stimulate the flow of private capital and the economic development of the Parties.'

economic growth and economic growth in turn will benefit the population through the creation of further jobs and business opportunities. The international financial institutions are not oblivious to the fact that economic growth does not automatically 'trickle' down. In order to ensure that assistance and investments ultimately leads to poverty reduction and well-being of the population they, inter alia, advocate for 'good governance' in developing countries.<sup>84</sup>

The reliance by importing States on FDI to ensure access to raw materials has two important side-effects. First, the importing State that relies on FDI for access to natural resources no longer engages in international cooperation to specifically address distribution conflicts. As a consequence, and that is the second side-effect of the privatization of natural resource exploitation, importing States have largely eschewed responsibility in cases where resource extraction projects go hand in hand with government corruption, large-scale human rights violations or environmental degradation.<sup>85</sup> Even if permanent sovereignty over natural resources is interpreted to imply that natural resource exploitation has to meet certain requirements to be in accordance with international law (e.g. that government proceeds from natural resource exploitation need to benefit the population and not disappear on the bank accounts of government officials),<sup>86</sup> the fact that the importing State takes no part in the actual resource transactions means that under international law it is generally not responsible for any violation of a peoples' right of permanent sovereignty over natural resources. Yet, the corporation that concludes a concession contract with the government and that trades the primary commodities cannot be held responsible under international law either as it is not directly bound by the right to permanent sovereignty over natural resources (or human rights<sup>87</sup> or international environmental obligations). Thus the main responsibility for any

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<sup>84</sup> On changes in World Bank policies to take account of changes in development economics see Philipp Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (CUP 2013) part I.

<sup>85</sup> For the proposition that home states are obliged to ensure that multinational corporations do not act to the detriment of host states see Sornarajah (n 31) 157 et seq.

<sup>86</sup> For such an argument see Leif Wenar, 'Property Rights and the Resource Curse' (2008) 36 *Philosophy & Public Affairs* 2.

<sup>87</sup> For the duties of corporations that today are acknowledged to flow from international human rights see United Nations 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011).

detrimental impact of natural resource exploitation within its territory falls on the exporting State. This finally means that the internationalization of natural resource exploitation is only partial. Natural resource exploitation is internationalized to the extent that FDI falls under the protection of international law, the interests of the population and environment of the resource State by contrast remain largely territorialized as their effective protection remains dependent on national legislation and law-enforcement.

The policy space of the resource State to address domestic distribution conflicts is, however, severely limited by international economic law.<sup>88</sup> A clear example of such limitation is the prohibition of export restrictions currently promoted by the EU under its raw materials initiative.<sup>89</sup> Given the difficulties of governments and populations, not only of developing countries, to secure a share in the profits from natural resource exploitation by way of taxation, the imposition of export tariffs on raw materials provides an important alternative for the State to gain revenues. If, however, the imposition of export tariffs is prohibited by international law States may incur costly trade sanctions in case they continue to impose them. International investment law also potentially restricts the choice of State measures to adjust the burden of costs and benefits of natural resource exploitation – be it because economic development agreements immunize investor privileges from national legislation or because State measures may become the subject of investor claims on the basis of international investment law.<sup>90</sup>

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<sup>88</sup> Cf Dani Rodrik, *The Globalization Pradox: Democracy and the Future of the World Economy* (W W Norton 2011).

<sup>89</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Tackling the Challenges in Commodity Markets and on Raw Materials', COM(2011) 25 final; see supra, III.B.

<sup>90</sup> See, eg, the initiation of arbitral proceedings by Lone Pine Resources Inc. against the Government of Canada alleging that Canada's revocation of a fracking permit violated obligations under NAFTA's investment chapter; the notice of arbitration can be accessed under <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/lone-02.pdf>> accessed 11 August 2014.



## **V. Towards an International Conflicts Law of Natural Resources Exploitation**

In recent years distribution conflicts seem to be moving again to the center of attention of international law and politics. This development can be explained by two reasons in particular. First, resource States are increasingly dissatisfied with the current international legal framework and attempt to regain control over the exploitation of natural resources on their territory. Second, the governments of the emerging economies, in particular China, call into question the viability of continued reliance by Western industrialized countries on the market to secure their access to natural resources. In light of these developments we should refocus attention on political conflict resolution procedures.

### **1. The Return of Distribution Conflicts over Natural Resource Exploitation to International Law**

The promise of win-win through privatized natural resource exploitation frequently has remained unfulfilled and has led to discontent with FDI resulting in what is often being termed 'resource nationalism'.<sup>91</sup> Not only are many resource-rich poor States afflicted by the so-called resource curse, implying a connection between natural resource exploitation on the one hand and economic and government failures up to violent conflict on the other.<sup>92</sup> Even where the situation is less dramatic, private capital-led natural resource exploitation often does not lead to a significant increase in a population's well-being. Disappointment with foreign investment and the intention to reap greater benefits from exploitation have led a number of governments, in particular in Latin America, Asia and Africa<sup>93</sup>, but also elsewhere, to attempt to regain control over natural resources exploitation. The measures taken by resource

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<sup>91</sup> Robert Mabro, 'Oil Nationalism, the Oil Industry and Energy Security Concerns', ARI 114/2007 (25 October 2007), <[www.realinstitutoelcano.org/wps/portal/rielcano\\_in/Content?WCM\\_GLOBAL\\_CONTEXT=/elcano/Elcano\\_in/Zonas\\_in/ARI114-2007](http://www.realinstitutoelcano.org/wps/portal/rielcano_in/Content?WCM_GLOBAL_CONTEXT=/elcano/Elcano_in/Zonas_in/ARI114-2007)> accessed 11 August 2014; The Economist 'Resource Nationalism in Africa. Wish You Were Mine' *The Economist* (11 February 2012).

<sup>92</sup> Macartan Humphreys, Jeffrey D Sachs and Joseph E Stiglitz (eds), *Escaping the Resource Curse* (Columbia University Press 2007); Paul Collier, 'The Political Economy of Natural Resources' (2010) 77 *Social Research* 1105.

<sup>93</sup> For Africa see the Africa Mining Vision adopted by Heads of State at the 2009 summit of the African Union <<http://www.africaminingvision.org/reports.html>> accessed 11 August 2014.

States range from changes in the tax system to export restrictions and outright nationalizations, such as in the cases of *Yukos* (by Russia<sup>94</sup>) and *Repsol* (by Argentina<sup>95</sup>). In Bolivia the intention to establish authority over national resource exploitation has been expressed in the constitution of 2009, Art. 349:1 of which reads:

The natural resources are the property and direct domain, indivisible and without limitation, of the Bolivian people, and the State is mandated with their administration in the collective interest.<sup>96</sup>

Sometimes the strengthening of State control is being justified with the aim to promote particular social groups. Thus, Zimbabwe's politics of indigenisation or South Africa's *Black Empowerment Programme* have been supported with the argument that they were improving ownership of the black population in the resource sector.<sup>97</sup> An increasing number of States are turning their back to international investment law and have terminated their membership in the International Center for the Settlement of Investment Disputes.<sup>98</sup> South Africa in 2012 and 2013 terminated its bilateral investment treaties with Germany, the Netherlands and Switzerland,<sup>99</sup> and Indonesia recently announced to terminate all of its 67 bilateral investment treaties.<sup>100</sup>

Greater control of the State over natural resource exploitation meets with support by economists who argue that given the frequent information

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<sup>94</sup> Jason M Waltrip, 'The Russian Oil and Gas Industry after Yukos. Outlook for Foreign Investment' (2008) 17 *Transnational Law & Contemporary Problems* 575.

<sup>95</sup> Jude Webber and Miles Johnson, 'Argentina to Renationalise Oil Group YPF' *Financial Times* (17 April 2012).

<sup>96</sup> Constitution of Bolivia Art. 349: 1: 'Los recursos naturales son de propiedad y dominio directo, indivisible e imprescriptible del pueblo boliviano, y corresponderá al Estado su administración en función del interés colectivo.' Art 348:1 clarifies that minerals and hydrocarbons are considered mineral resources.

<sup>97</sup> *The Economist* (n 91); on related ICSID proceedings see Damon Vis-Dunbar, 'European Miners and South Africa Suspend Proceedings' (Investment Treaty Newsletter, 2 April 2009) <[www.iisd.org/itn/2009/04/02/european-miners-and-south-africa-suspend-proceedings/](http://www.iisd.org/itn/2009/04/02/european-miners-and-south-africa-suspend-proceedings/)> accessed 11 August 2014.

<sup>98</sup> Venezuela terminated its BIT with the Netherlands in 2008; in 2009 Russia terminated the preliminary application of the Energy Charter Treaty and Bolivia, Ecuador and Venezuela terminated ICSID membership in 2007, 2009 and 2012 respectively.

<sup>99</sup> See <<http://www.rh-arbitration.com/south-africa-terminates-bilateral-investment-treaties-with-germany-netherlands-and-switzerland/>> accessed 11 August 2014.

<sup>100</sup> See <<http://investvine.com/indonesia-to-end-60-bilateral-investment-treaties/>> accessed 11 August 2014.

asymmetries between resource States and investors as concerns the extent of resource deposits or the amount of profits generated by the extractive industry, States should not easily part with exploitation rights. In some situations it might be better for States to secure an equitable share in profits by engaging in exploitation through State enterprises or joint ventures than to rely on royalty payments or taxation for revenue generation.<sup>101</sup>

A parallel development to the strengthening of control over natural resource exploitation by resource States are the interventions of the BRIC countries' governments in order to secure their access to resources abroad. Figures published in the most recent Human Development Report illustrate this development. According to the report development finance extended to Zambia by these countries in the period from 2006-2009 amounted to merely 3% of the US\$ 3 billion development finance that Zambia received in this period. In November 2009 Zambia and China announced that China would extend a concessional loan of US\$ 1 billion to Zambia, a sum that amounted to 40% of Zambia's total public external debt.<sup>102</sup> In return for such assistance which is frequently linked to particular development projects, China is given access to natural resource exploitation in the recipient country.<sup>103</sup>

As a reaction to proactive resource politics of the BRICs, governments, which like the German government long ceased to be actively involved in trade in natural resources, and the European Union attempt to secure access to natural resources by means of international law. While Germany is concluding so-called bilateral resource partnerships<sup>104</sup> the EU concentrates on the prohibition of export restrictions.<sup>105</sup>

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<sup>101</sup> Joseph E Stiglitz, 'What is the Role of the State?' in Humphreys, Sachs and Stiglitz (n 92) 23.

<sup>102</sup> UNDP (n 66) 57.

<sup>103</sup> Paul Collier, *The Plundered Planet: Why We Must – and How We Can – Manage Nature for Global Prosperity* (OUP 2010) 91, 92.

<sup>104</sup> Bundesministerium für Wirtschaft und Technologie, 'Rohstoffstrategie der Bundesregierung. Sicherung einer nachhaltigen Rohstoffversorgung Deutschlands mit nicht-energetischen mineralischen Rohstoffen' (2010) <[www.bmwi.de/Dateien/BMWi/PDF/rohstoffstrategie-der-bundesregierung,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf](http://www.bmwi.de/Dateien/BMWi/PDF/rohstoffstrategie-der-bundesregierung,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf)> accessed 11 August 2014. So far resource partnerships have been concluded with Mongolia, Kazakhstan and Chile.

<sup>105</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Tackling the Challenges in Commodity Markets and on Raw Materials', COM(2011) 25 final; see supra, III.B.

## **2. Re-Politicizing Resource Conflicts in International Law**

The developments described in the previous section indicate that distribution conflicts will not go away, but likely will become more severe. Their equitable resolution will require the diverging interests that give rise to these conflicts to be openly acknowledged and represented in conflict resolution procedures. Such procedures must aim to re-politicize resource conflicts. For guidance on such a re-politicization we might revisit the principle of permanent sovereignty over natural resources and the NIEO's International Commodity Agreements.

### **a) Operationalizing Permanent Sovereignty over Natural Resources**

Permanent sovereignty over natural resources requires natural resource exploitation to benefit the people. To ensure that it does, important decisions on natural resource exploitation should primarily be taken in democratic procedures while ensuring the rights of minorities and indigenous peoples, especially those who have a particular interest in the natural resource or territory in question. When designing such procedures, account must be taken of the particular political economy of natural resource exploitation that may lead to certain democratic failures, such as the inducement of particular election results by promises to distribute revenues from natural resource exploitation to the electorate.<sup>106</sup>

Responsibility to install such procedures mainly falls on States and sub-State political communities; there will be not blueprint for the 'right' procedure and therefore international institutions such as the international financial institutions should refrain from advising on a silver bullet. What they can do is to assemble best practices of procedures that have worked well for countries and allowed them to turn resource wealth into prosperity. What they must do, arguably, is to refrain from linking financial assistance to specific modalities of natural resource exploitation. When it is recognized that important decisions on natural resource exploitation, such as the decision to grant exploitation licenses to private investors for a particular area and resource, are intrinsically political matters – as exercises of the right to self-determination – then the international financial institutions by their own Articles of Agreement are bound to refrain from such

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<sup>106</sup> Paul Collier, 'The Political Economy of Natural Resources' (2010) 77 Social Research 1105.

conditionality as they may not interfere with the political systems of their members.<sup>107</sup> If a State decides, on the basis of a democratic process, to (legally) nationalize the extractive sector then it should receive adequate technical and financial assistance so it can implement this decision and thus realize its right to permanent sovereignty over natural resources. That such assistance may pay out in terms of economic development is supported by the fact that payments of the G8 for resource imports from developing countries by far exceed official development assistance.<sup>108</sup>

Since it has become abundantly clear that economic globalization, commercial power and vertical integration pose obstacles to the effective regulation and taxation of corporations there is today renewed support for an obligation of home States to cooperate with host States in order to effectively control and tax transnational corporations.<sup>109</sup> A particular impediment to democratic decision-making on the distribution of benefits from resource extraction is the intransparency of revenue flows. The Extractive Industry Transparency Initiative (EITI) aims to increase transparency in order to allow the populations of resource States to actively take part in resource politics. Participation in this multi-stakeholder initiative is voluntary. If a State participates, however, and if it wants to reach the status of a 'compliant' EITI participant it has to legally oblige companies in the extractive sector to lay open all payments to the government.<sup>110</sup> This obligation becomes more effective if, as the United States and the EU have recently done,<sup>111</sup> also the home States of investors establish such accounting obligations.

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<sup>107</sup> Art IV, sec 10 IBRD Articles of Agreement; Art V, sec 6 IDA Articles of Agreement; Art IV, sec 3 b) IMF Articles of Agreement.

<sup>108</sup> Paul Collier, *The Bottom Billion. Why the Poorest Countries are Failing and What Can be Done About It* (OUP 2008) 39.

<sup>109</sup> On the forms international tax cooperation could take see Reuven S Avi-Yonah, 'The OECD Harmful Tax Competition Report' Public Law and Legal Theory Working Paper Series, Paper No 115 (Ann Arbor: University of Michigan Law School, August 2008).

<sup>110</sup> For information on the Extractive Industries Initiative see its website under <[www.eiti.org](http://www.eiti.org)> accessed 11 August 2014.

<sup>111</sup> See Securities Exchange Act of 1934, 17 CFR Parts 240 and 249; Accounting Directive 2013/34/EU.

***b) International Institutions and Procedures to Address International Distribution Conflicts***

Due to the territoriality of natural resources located within national jurisdictions delocalization can never be complete and probably for a long time to come the democratic procedures necessary to realize the right to permanent sovereignty over natural resources will have better chances to be implemented on the State or the sub-State level than transnationally. As a consequence conflicts between States over access will persist. To 'perfect the market' for natural resources does not appear a feasible option to overcome such conflicts, given that many populations opt for stricter governmental control over natural resources exploitation. In this situation international cooperation that takes into account diverging interests of exporting and importing States will be the only feasible and legitimate way to protect importing States' interests in supply security. The International Commodity Agreements provide examples of international procedures that take account of both the sovereign equality of States and the diverging interests of resource-importing and resource-exporting States. A Commodity Organization could establish a framework for mutually beneficial cooperation that on the one hand provides assistance to exporting States to realize their permanent sovereignty over natural resources and that on the other hand promotes supply security of importing States, e.g. through the conclusion of long-term resource trade agreements. Finally, such an organization could provide a forum for a re-politicized debate on the international protection of investments and the balancing of development and investment concerns in the resources sector.