Part I The Concept of Expropriation, 1 Overview

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(p. 3) 1 Overview

A. Introduction

1.01 At first glance, the concept of expropriation under international law is simple—an expropriation is a taking of property belonging to a foreigner by the State, which, if unlawful, triggers the international responsibility of that State. The expropriation can be direct, whereby ownership is transferred to the State, or indirect, whereby the property will otherwise have been destroyed or *de facto* taken by the State. This, however, is to oversimplify a concept which has a very long history and is continually evolving.

1.02 The concept of expropriation is ever more relevant today given the recent proliferation of bilateral investment treaties (BITs), as well as regional and multilateral agreements such as the OIC Agreement (1981),[1] the North America Free Trade Agreement (1992) (the NAFTA),[2] the Energy Charter Treaty (1994) (the ECT),[3] the Dominican Republic–Central America–United States Free Trade Agreement (2004) (the CAFTA–DR), and the ASEAN Comprehensive Investment Agreement (2009) which give qualifying foreign investors direct recourse against States for violation of treaty obligations with respect to their investments.

1.03 The first BIT was entered into between the Federal Republic of Germany and Pakistan in 1959. Over the next two decades, the number increased to 385 BITs. Then in the 1990s, marking a dramatic shift in global policy making, the number of treaties quintupled, rising to 1,857 at the end of the decade.[4] Today, there are more than 3,000 BITs between over (p. 4) 184 different countries bringing the total number of international investment agreements to 3,322 of which 2,638 are in force.[5] Nearly almost all investment treaties include a protection for foreign investors against uncompensated expropriation by the host State, which is significant given that foreign investments are worth many million dollars, and often billions. Obvious examples include investments in infrastructure, construction, telecommunications, mining, oil and gas, renewable energy, and hospitality projects. Together with fair and equitable treatment, expropriation is one of the main protections relied on by foreign investors in investment treaty claims.

1.04 The concept of expropriation manifests itself in international law in two different principle sources of law—treaty and customary international law. The relationship between the two, and the extent to which different aspects of the concept are considered received principles of customary international law or emerging principles, is a matter of controversy.

1.05 The task of identifying principles of customary international law is not an easy one. The International Law Association (ILA) observed in its final report on the formation of customary international law that there are inherent serious difficulties in setting out the rules on customary international law for several reasons. Firstly, customary law is by its very nature the result of an informal process of rule-creation. Secondly, some of the issues concerned touch on controversial questions of deep legal theory and ideology. Thirdly, some issues have important political implications. Finally, there have been relatively few authoritative determinations. The pronouncements on the rules of formation of customary international law by international courts and tribunals have tended not to be systematic but

very much incidental to the substantive questions which happened to be in issue. The ILA concluded that many questions have been left unanswered.[6]

1.06 The International Court of Justice (ICJ) has given some guidance. In the *Asylum Case (Columbia/Peru)*,[7] the ICJ referred to international custom as 'constant and uniform usage, accepted as law'[8] and in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, it opined that, in considering rules of customary law, it would have to direct its attention to the practice and *opinio juris* of States.[9] In the *North Sea Continental Shelf Cases*,[10] the ICJ considered that two conditions must be fulfilled for a practice to constitute *opinio juris*—the acts in question must be settled practice and there must be a belief that the practice is rendered obligatory on States. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[11]

(p. 5) **1.07** Today, the concept of expropriation in customary international law continues to develop with the proliferation of BITs and the case law of investment treaty tribunals. It is a dynamic concept but firmly rooted in its past. The extent to which expropriation, in all its different modalities, is recognized as customary international law is an important topic as it can encourage the promotion of international norms in investment treaty law and policy-making.

1.08 This is particularly significant given that some States have, in recent years, faced a tsunami of investment claims from foreign investors—in Latin America, Argentina and Venezuela, following economic and political upheaval; in Africa, Egypt, following the Arab Spring revolution; and in Europe, Spain, following regulatory reform of its renewable energy sector. Moreover, as UNCTAD reports, countries are engaging in modernization of the existing stock of old-generation treaties, and a small, but growing number, are issuing interpretations or replacing their old generation treaties. UNCTAD observes that recent treaties frequently differ from old-generation treaties in that they aim more broadly at preserving regulatory space and limiting exposure to claims by foreign investors. Ways in which this is achieved is to include certain elements in treaties that (i) limit the scope; (ii) clarify obligations—for example by including more detailed clauses on fair and equitable treatment and/or on indirect expropriation; and (iii) contain exemptions and/or carve-outs.[12]

1.09 It is a balancing act. On the one hand, States consider it important to be perceived as investment-friendly whilst, on the other, they naturally seek to limit their exposure and to protect their regulatory space. Understanding substantive treaty protections, such as expropriation, will not only inform policy-making and investment decisions but will also ensure a margin of predictability for States and foreign investors alike.

B. A Brief Overview of Expropriation in International Law

1.10 The concept of expropriation in international law has a very long history. The UNCTAD Report, *Taking of Property*,[13] explains how:

> In the twentieth century, the first major phase of taking of property of aliens by States which can be classified as 'nationalizations' and had an impact on shaping international law on the subject of takings, began with the Russian and Mexican revolutions. These takings were not accompanied by the payment of compensation and resulted in conflicts between the host countries and the home countries of the aliens whose property was taken. In response to the taking of United States property by Mexico, the Government of the United States did not contest Mexico's

right to nationalize but argued that it was subject to certain international standards, including the payment of 'prompt, adequate and effective compensation'.[14]

1.11 Rubins and Kinsella observe that sudden transitions and nationalizations occurred not only in Russia and Mexico, but also in, amongst other countries, Bulgaria, Czechoslovakia, Hungary, and Poland between 1945 and 1948, China in the 1950s, Bolivia in 1952, Egypt in 1956, and Cuba in 1959. Expropriations triggered by political change continued into (p. 6) the 1970s, for example in Uganda and Ethiopia where compensation was promised, but none voluntarily paid.[15] They further explain that during the 1950s, 1960s, and 1970s, nationalization programmes were also implemented by the newly independent and newly prosperous states of the Middle East, Asia, and Africa, usually involving the expropriation of petroleum rights from multinational corporations operating under the auspices of concession agreements.[16]

1.12 The takings led to debate in the General Assembly of the United Nations on the sovereignty of States over their natural wealth and resources and to a series of General Assembly Resolutions on expropriation. The General Assembly Resolutions of the 1960s made the right of sovereignty over natural resources and the right to expropriate subject to international law. In contrast, the General Assembly Resolutions of the mid-1970s rejected outright the role of international law. A split emerged between the developing and developed countries and the developing countries called for a New International Economic Order.

1.13 *The Charter of the United Nations: A Commentary* observes that most legal commentators consider that General Assembly Resolutions do not create any legal obligations. It adds that, although there is a lack of *opinion juris* at least on the part of the dissenting States, this does not however preclude individual provisions of these instruments evidencing customary international law. At the very least, these instruments, or parts thereof, may contribute to the formation of new international customary law.[17] Similarly, Oppenheim considers that the impact of General Assembly Resolutions on customary international law both as to its content, and its continued applicability in cases of dispute, is far from clear particularly given the lack of consensus on the adoption of many.[18]

1.14 The ILA considers that General Assembly Resolutions may, in some instances, constitute evidence of the existence customary international law; help to crystallize emerging customary law; or contribute to the formation of new customary law, but as a general rule, they do not *ipso facto* create new rules of customary law.[19] It reflects that 'the way in which General Assembly Resolutions can evidence or contribute to the development of customary international law is similar to the way in which treaties can do so, with one important difference: treaties do at least lay down some legal obligation, even if it is "only" a conventional one. In practice, this may facilitate the transformation from particular to general law, (p. 7) though this is by no means automatic. By contrast, General Assembly Resolutions are not usually binding as such'.[20]

1. General Assembly Resolutions of the 1960s

1.15 The General Assembly Resolutions of the 1960s recognize a State's right of permanent sovereignty over its natural resources and the lawfulness of expropriation subject to grounds of public interest and the payment of appropriate compensation. The role of international law is also recognized.

1.16 On 15 December 1960, the United Nations adopted General Assembly Resolution 1515 (XV) on *Concerted Action for Economic Development of Economically Less Developed*

Countries.[21] Its paragraph 5 provides for the sovereign right of every State to dispose of its natural resources under international law:

> *Recommends further* that the sovereign right of every State to dispose of its wealth and natural resources should be respected in conformity with the rights and duties of States under international law.

1.17 This was followed two years later by General Assembly Resolution 1803 (XVII) *Permanent Sovereignty Over Natural Resources* adopted on 14 December 1962[22] by eighty-seven votes to two with twelve abstentions. It also recognizes the principle of a nation's permanent sovereignty over its natural wealth and resources:

> *Noting* that the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources reinforces their economic independence,
>
> *Desiring* that there should be further consideration by the United Nations of the subject of permanent sovereignty over natural resources in the spirit of international cooperation in the field of economic development, particularly that of developing countries.
>
> *Declares* that:
>
> 1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interests of their national development and of the well-being of the people of the State concerned. […]
>
> 7. Violation of the rights of people and nations to permanent sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace.

1.18 This sovereignty was subject to two important qualifications: (a) the expropriation must be based on grounds of public utility, security, or the national interest; and (b) payment of 'appropriate' compensation in accordance with the rules of the host State and, importantly, international law:

> 4. Nationalisation, expropriation or requisitioning shall be based on grounds of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force of the State taking such measures in the exercise of its sovereignty and with international law.[23]

(p. 8) **1.19** On 16 December 1966, the General Assembly adopted the *International Covenant on Economic, Social and Cultural Rights* by Resolution 2200A (XXI).[24] As with earlier General Assembly Resolutions, it also recognized the role of international law. Its Part 1, Article 1(2), reads:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may people be deprived of their own means of subsistence.

2. General Assembly Resolutions of the 1970s

1.20 Lillich explains how, until the early 1970s, most commentators had assumed that General Assembly Resolution 1803 (XVII) represented a reasonably accurate reflection of customary international law; however, this changed with demands from developing countries for a New International Economic Order:

> [t]his assumption became tenuous when demands for a New International Economic Order began to be heard early in the decade. Whether or not the consensus seemingly reflected in Resolution 1803 ever existed, it was clear by the mid-1970s that at the very least '[the] principles so formulated cannot be relied on in a dispute between capital-importing and capital-exporting states [citing O'Keefe, 1974]'.[25]

1.21 On 17 December 1973, the General Assembly adopted Resolution 3171 (XXVIII) on Permanent *Sovereignty Over Natural Resources*—notably, with the same name as Resolution 1803 adopted a decade earlier.[26] Described by Lillich as 'obviously designed to undercut or supersede Resolution 1803'[27] it provided that each State is entitled to determine the compensation payable for nationalization and that, controversially, disputes shall be settled in accordance with the national law of that country:

> 1. *Strongly reaffirms* the inalienable rights of States to permanent sovereignty over their natural resources. […]
>
> 3. *Affirms* the application of the principle of nationalization carried out by States as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes that might arise should be settled in accordance with the national legislation of the State carrying out the measures.

1.22 Then came General Assembly Resolution 3201 (S-VI), *Declaration on the Establishment of a New International Economic Order*,[28] adopted on 1 May 1974 in the Sixth Special Session of the General Assembly, proclaiming a united determination to establish a New International Economic Order. General Assembly Resolution 3201 (S-VI) declared, in its first paragraph, that the greatest and most significant achievement during the last decades (p. 9) has been the independence from colonial and alien domination. It further declared that the present system perpetuates inequality between developed and developing countries which constitute 70 per cent of the world's population but account only for 30 per cent of the world's income. To this end:

> The present international economic order is in direct conflict with current developments in international political and economic relations. Since 1970 the world economy has experienced a series of grave crises which have had severe repercussions, especially on the developing countries because of their generally greater vulnerability to external economic impulses. The developing world has become a powerful factor that makes its influence felt in all fields of international activity. These irreversible changes in the relationship of forces in the world necessitate the active, full and equal participation of the developing countries in the formulation and application of all decisions that concern the international community.[29]

1.23 General Assembly Resolution 3201 (S-VI) proclaimed that a New International Economic Order should be founded on a number of principles including the sovereign equality of States[30] and full permanent sovereignty of every State over its natural resources and all economic activities, meaning 'each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State'.[31] However, as the sole arbitrator in *Texaco v. Libya* noted, the resolution was adopted without a vote and statements made by representatives of the main capital exporting countries objected to the alteration of the rules concerning compensation for expropriation previously embodied in General Assembly Resolution 1803 (XVII).[32]

1.24 General Assembly Resolution 3281 (XXIX) on the *Charter of Economic Rights and Duties of States* was adopted on 12 December 1974. Although it recognizes a State's right of permanent sovereignty over its natural resources and its right to nationalize, expropriate, or transfer ownership of foreign property for 'appropriate compensation'; in contrast to General Assembly Resolution 1803 (XXIX), it omits reference to the requirements that expropriation be in the public interest and in accordance with international law. Moreover, as with General Assembly Resolution 3171 (XXVIII), it provides that disputes regarding compensation are to be settled in accordance with the national law of the host State:

> Every State has the right:
>
> 2(c). To nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

(p. 10) Although 120 countries voted in favour of General Assembly Resolution 3281 (XXIX), six of the principal capital exporting countries voted against it: Belgium, Denmark, German Federal Republic, Luxembourg, the United Kingdom, and the United States, and ten other countries abstained.

1.25 This provision is described by Lillich as a 'graphic illustration of how far the pendulum has swung in this area of the treatment of alien law'.[33] He notes that the role of international law, in particular with respect to compensation for expropriation, recognized by the General Assembly Resolutions of the 1960s, had been, at least so far as the developing countries were concerned, relegated.[34]

1.26 However, the General Assembly Resolutions of the 1960s and 1970s were adopted over four decades ago and much has changed since then in terms of the global economy and State practice—most significantly, they were adopted *before* the relatively recent explosion of bilateral treaties. Investment treaty practice endorses certain of the individual principles embodied in the General Assembly Resolutions. It can be argued that these principles have not only stood the test of time but that they are now generally considered by States to reflect international norms. These principles are threefold. Firstly, it is a sovereign right of States to dispose freely of their natural wealth and resources.[35] Secondly, this right of sovereignty is not unfettered—expropriation must be based on grounds of public utility, security, or national interest.[36] Thirdly, there is an obligation on the part of the

expropriating State to pay compensation, albeit, the standard of compensation remains a matter of debate.[37]

(p. 11) 3. International investment treaties—a turning point

1.27 Writing on the influence of BITs on customary international law, Schwebel observes that, not long after 1974, the tide turned with the search for multilateral agreement but this remained unachievable, giving way to the conclusion of bilateral investment treaties.[38] In *A BIT About ICSID*, Schwebel explains that two initiatives sidestepped what was a sterile confrontation between developed and developing countries and changed the outlook to a presence far more beneficent: the first, the creation of the International Centre for the Settlement of Investment Disputes (ICSID). Schwebel describes the contribution of the legal counsel of the World Bank, Aron Broches, as 'ingenious'. It was to 'sidestep what seemed to be a sterile substantive confrontation with procedural creativity' by not taking sides between the developed and developing worlds; instead, the World Bank created the ICSID, a forum for the impartial arbitral settlement of inevitable international investment disputes. The second initiative, bilateral investment treaties, 'was built on the first and successfully surmounted the divide not only over process but principle as well'.[39]

1.28 Schwebel argues that 'customary international law governing the treatment of foreign investors has been reshaped to embody the principles found in more than two thousand concordant bilateral treaties' and that, with the 'conclusion of a cascade of parallel treaties', the international community has 'fashioned an essentially unified law of foreign investment'.[40] Schill similarly submits that 'despite the endorsement of provisions on direct and indirect expropriation in bilateral treaties, States generally view these provisions as a uniform concept not only of treaty law, but equally of customary international law'. Schill concludes that, for this reason, it is safe to say that provisions on expropriation in investment treaties reference a uniform concept of customary international law and, accordingly, tribunals interpret expropriation provisions in investment treaties as a uniform concept.[41]

1.29 Others argue that treaties may play a role in the formation of customary international law. Brownlie submits that bilateral treaties may provide evidence of customary rules and, if they are habitually framed in the same way, a court may regard the standard form as law even in the absence of a treaty obligation in a case, but urges caution in evaluating treaties for this purpose.[42] McLachlan describes the relationship between custom and treaty as 'symbiotic'—custom informing the content of the treaty right, and State practice under the investment treaties contributing to the development of general international law.[43] On the other hand, Dolzer argues that much speaks in favour of recognizing, not specific elements in specific treaties, but the general trend emerging from what seems to be common to such agreements. This is because international treaties are bargained-for-arrangements, often involving a variety of mutual concessions and, for that reason, they cannot be considered (p. 12) as evidence of customary law.[44] The Commentary to the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts contemplates the possibility that treaties can *contribute* to the formation of general international law.[45]

1.30 Arbitral tribunals have also considered the influence of BITs in shaping customary international law. For example, in *Mondev v. United States*,[46] the tribunal, whilst observing that it is often difficult in international practice to establish at what point obligations accepted in treaties, multilateral or bilateral, come to condition the content of a rule of customary international law binding on States not party to those treaties,[47] considered that the vast number of bilateral and regional treaties (then more than 2,000) running between North and South and East and West represented a body of concordant practice which will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law.[48] In another case, *Eureko BV v. Poland*, the tribunal

remarked on ‘the reshaping of contemporary customary international law by the conclusion of more than 2000 essentially concordant bilateral investment treaties’.[49]

1.31 This book will examine the concept of expropriation in investment treaty arbitration and, in doing so, will identify principles that are settled in the case law as well as tensions that exist, and consider the extent to which customary international law on expropriation is evolving and being shaped by treaty practice. The aim of the book is to contribute to the debate, not to advocate a position or decide either way on any of the issues—that remains the challenge for future tribunals, especially given developing arguments and the importance of case-by-case, fact-specific determinations.

Footnotes:

1 The Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference, signed in Baghdad on 5 June 1981 (entered into force in February 1988).

2 The North America Free Trade Agreement was concluded between the governments of the United States, Canada, and Mexico on 17 December 1992 and entered into force on 1 January 1994. On 30 November 2018, the three governments signed a revised agreement, the United States–Mexico–Canada Agreement, as a replacement to the NAFTA.

3 The Energy Charter Treaty was signed on 17 December 1994 and entered into force on 16 April 1998. Currently there are fifty-three Signatories and Contracting Parties to the Treaty. This includes both the European Union and Euratom.

4 UNCTAD Report, *Quantitative Data on Bilateral Investment Treaties and Double Taxation Treaties*, available at http://www.unctad.org.

5 UNCTAD Report, *Recent Developments in the International Investment Regime*, May 2018, available at http:/www.unctad.org.

6 International Law Association, Final Report of the Committee, *Statement of Principles Applicable to the Formation of General Customary International Law*, 2000, pp. 2 and 3.

7 *Colombian-Peruvian Asylum Case*, Judgment of 20 November 1950, ICJ Reports 1950, p. 266.

8 Ibid, para. 276.

9 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits*, Judgment of 27 June 1986, ICJ Reports 1986, p. 14, para. 183.

10 *North Sea Continental Shelf Judgment*, Judgment of 20 February 1969, ICJ Reports 1969, p. 3.

11 Ibid, para. 77.

12 UNCTAD Report at n. 5.

13 UNCTAD Report, *Taking of Property*, 2000, UNCTAD/ITE/IIT/15, available at http://www.unctad.org.

14 Ibid, p. 5.

15 Rubins and Kinsella, *International Investment, Political Risk and Dispute Resolution: A Practitioner’s Guide*, Oceana Publications, 2005, p. 160.

16 Ibid, pp. 161–2.

[17] *The Charter of the United Nations: A Commentary*, edited by Bruno Simma, Oxford University Press, 1995, p. 767. *See* also Wolfke, *Custom in Present International Law*, Springer, 1993, p. 84 ('Broadly speaking, the opinions range from attributing to General Assembly resolutions an independent and important custom-making capacity to much more sober opinions limiting the role of such resolutions to an indirect but by no means negligible factor in the custom-forming process. The present author shares the latter opinion.'); Higgins, *The Taking of Property by the State: Recent Developments International Law*, 176 Recueil des Cours, 1983, Vol. III, 259, 268, argues that Resolutions which are at times non-binding can, if they affirm principles of international law which overwhelming numbers of States adhere to o*pinio juris*, evidence developing customary international law (p. 293).

[18] *Oppenheim's International Law*, Section 407, *Property of Aliens: Expropriation*, Vol. 1, edited by Jennings and Watts, 9th Edition, Oxford University Press, 1992, p. 924.

[19] International Law Association, Final Report, Rule 28, p. 55 at n. 6.

[20] Ibid, p. 56.

[21] General Assembly Resolution 1515 (XV) on *Concerted Action for Economic Development of Economically Less Developed Countries*, available at http://www.un.org.

[22] General Assembly Resolution 1803 (XVII) *Permanent Sovereignty Over Natural Resources* adopted 14 December 1962, available at http://www.un.org.

[23] Ibid, para. 4.

[24] General Assembly Resolution 2200A (XXI) *International Covenant on Economic, Social and Cultural Rights*, available at http://www.un.org.

[25] Lillich, Chapter 1, The Current Status of the Law, *International Law of State Responsibility for Injuries to Aliens*, University of Virginia Press, 1983, p. 14.

[26] General Assembly Resolution 3171 (XXVIII) '*Permanent Sovereignty Over Natural Resources*' adopted 17 December 1973, available at http://www.un.org.

[27] Lillich, 1983, p. 15 at n. 25.

[28] General Assembly Resolution 3201 (S-VI) *Declaration on the Establishment of a New International Economic Order* adopted 1 May 1974 A/RES/S-6/3201, available at http://www.un.org.

[29] Ibid, para. 2.

[30] Ibid, para. 4(a).

[31] Ibid, para. 4(e).

[32] International Law Association, Final Report, p. 58 at n. 6.

[33] Lillich, 1983, pp. 15–16 at n. 25; Weston, The New International Economic Order and the Deprivation of Foreign Proprietary Wealth: Reflections upon the Contemporary International Law Debate in Lillich, 1983, p. 93 at n. 25, 'A break from the past seems clear. The so-called public purpose (or public utility) doctrine is disregarded. The doctrine of alien non-discrimination is ignored. And the much-heralded international law principle of compensation appears to be nationalised or domesticated, i.e. rejected as an international regulatory norm. Provoking not a little consternation and complaint among capital exporting constituencies, the provision is a vivid demonstration of the central NIEO demand for restructured perspectives and patterns of international economic order.'

[34] The significance of the General Assembly Resolutions on customary international law was considered by the tribunals in *Texaco Overseas Petroleum Company v. The Government of The Libyan Arab Republic and Others*, Ad Hoc Award of 19 January 1977, YCA 1979, at p. 177 et seq.; *Libyan American Oil Company v. Government of the Libyan Arab Republic*, Ad Hoc Award 12 April 1977, YCA 1981, at p. 89 et seq.; and *The American Independent Oil*

Company (AMINOIL) v. The State of Kuwait, Ad Hoc Award of 24 May 1982, YCA 1984, at p. 71 et seq.

35 General Assembly Resolutions 6662 (VII) of 21 December 1952, 1515 (XV) of 15 December 1960, 1803 (XVII) of 14 December 1962, 2200A (XXI) of 16 December 1966, 3171 (XXVIII) of 17 December 1973, 3201 (SV-1) of 1 May 1974, 3281 (XXIX) of 12 December 1974, available at http://www.un.org. In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, ICJ Reports 2005, p. 168, para. 244, the ICJ recalled that the principle of permanent sovereignty over natural resources is expressed in the General Assembly Resolutions and recognized that the principle of permanent sovereignty is a principle of customary international law.

36 General Assembly Resolution 1803 (XVII) of 14 December 1962, para. 4.

37 General Assembly Resolution 1803 (XVII) provides that expropriation must be exercised in accordance with international and municipal law and 'appropriate compensation' must be paid; General Assembly Resolution 3171 (XXVIII) of 17 December 1973 provides the State should determine the amount and mode of compensation payable in accordance with its applicable law; General Assembly Resolution 3281 (XXIX) provides that 'appropriate compensation' must be paid taking into account the relevant laws and regulations of the State and all circumstances that the State considers relevant.

38 Schwebel, The Influence of Bilateral Investment Treaties on Customary International Law, *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 98 (31 March—3 April 2004), p. 27.

39 Schwebel, *A BIT About ICSID*, 23(1) ICSID Review—Foreign Investment Journal, Spring 2008, p. 3.

40 Schwebel at n. 38. Schwebel concludes that 'when BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.'

41 Schill, *The Multilateralisation of International Investment Law*, Cambridge University Press, 2009, p. 84.

42 James Crawford, *Brownlie's Principles of International Law*, 8th Edition, Oxford University Press, p. 31.

43 McLachlan QC, *Investment Treaties and General International Law*, 57(2) International and Comparative Law Quarterly, 2008, p. 361.

44 Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 American Journal of International Law, 1981, p. 553, p. 560

45 Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001, p. 55, Commentary to Article 12 at para. (4).

46 *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002.

47 Ibid, para. 111.

48 Ibid, para. 117.

49 *Eureko BV v. Republic of Poland*, Ad Hoc Tribunal (UNCITRAL), Partial Award and Dissenting Opinion, IIC 98, 19 August 2005, para. 258. This statement was made in the context of the tribunal's observation that reliance by the tribunal in *SGS v. Pakistan* on the maxim *in dubio mitius* so as effectively to presume that sovereign rights override the rights of a foreign investor could be seen as a reversion to a doctrine that has been displaced by

contemporary customary international law, particularly as that law has been reshaped by the conclusion of more than 2,000 essentially concordant bilateral investment treaties.