Part II

Natural Resource Law in Practice: From Creeping National Jurisdiction Towards International Co-operation
Introductory Remarks to Part II

The principle of PSNR developed through the political organs of the United Nations, but it was given flesh and blood in the practice of international relations. Third World States invoked it in their offensives against the application of traditional international law principles such as *pacta sunt servanda*, freedom of the high seas and State responsibility. In addition, it was part and parcel of the same movement that gave rise to new principles and concepts such as: a fundamental change of circumstances (*clausula rebus sic stantibus*), participatory equality of developing countries in international economic consultation and decision-making; preferential treatment of developing countries in international trade and financial relations; entitlement of developing countries to development assistance; common heritage of mankind in the law of the sea and outer space; and common concern and ‘common but differentiated responsibilities’ in international environmental law.

PSNR initially played a pivotal role in efforts of developing countries to achieve ‘sovereign equality’ and often had—and still has—a protective function as legal shield against infringement of their sovereignty by other States and foreign enterprises. This particular background and the qualification of PSNR as ‘permanent’ and ‘inalienable’ stood for some time in the way of reshaping the principle to accommodate the realities of economic and environmental globalization. However, more recently, increased attention is being given to the interpretation and application of PSNR as a source of duties as well as rights with respect to: treatment of foreign investors; proper management of (living and non-living) natural wealth and resources; and sustainable development. The increasing significance of the duty to co-operate has a profound impact on the modern interpretation and actual application of the principle of PSNR and is reflected in treaty law, in State practice, in decisions of international courts and tribunals, and in doctrine. This evolution ‘from rights to duties’ and from a focus on exclusive national interests towards international cooperation is discussed in this Part with reference to developments in international law relevant to natural resource jurisdiction in three main areas of international relations: foreign investment regulation (Chapter 6); control over marine resources (Chapter 7); and environmental conservation (Chapter 8). The aim of this Part is: (a) to show that PSNR did not take shape in a legal vacuum but in the practice of international relations; and (b) to provide the background information to be used in Part III in the systematic identification of the hard-core content of PSNR in modern international law.
International Investment Law: From Nationalism to Pragmatism

In the period since the establishment of the United Nations the regulation of foreign investment has become a major bone of contention between industrialized and developing countries. While the former have emphasized the duty of all States to respect international law, including the fair treatment of foreign investors and the payment of prompt, adequate and effective compensation in the case of expropriation and nationalization, the latter claim free disposal of their natural resources and the right to take over foreign property when they see fit. These issues were, as we noted in Part I, at the centre of the debate on permanent sovereignty over natural resources. This chapter reviews the main developments in international investment law starting, in section 2, with a discussion of the contents and evolution of the two main opposing doctrines, the international and the national standards. Section 3 focuses on multilateral efforts to draft codes of conduct relating to foreign investment. Section 4 then reviews multilateral instruments for promotion, protection and insurance of foreign investment. One of the most striking phenomena in the field of international investment law is the increasing popularity of bilateral investment treaties which is covered in section 5. Section 6 discusses some trends in the international settlement of investment disputes.

1. ‘National Standard’ versus ‘International Minimum Standard’

1.1 Historical Background

Rules of law on foreign investment can be traced back to the early days of colonization and European domination. During the 18th and 19th centuries an extensive and increasing migration of persons and capital from Europe and North America to eastern and southern parts of the world took place. This was part of the industrialization process in the ‘North’ and part of the colonization process of the ‘South’, where important natural resources were found and exploited. The colonial administrative structures created a convenient framework for the exploitation of natural resources by foreigners. Later, foreign investment was stimulated by the authorities of capital-importing sovereign States, by several means including the conclusion of bilateral treaties and the granting of concessions to foreign inves-
tors. Through bilateral treaties, the government often conceded that foreign nationals and their property would not be subjected to the national jurisdiction of the host State where they resided or invested but would remain under the jurisdiction of their home State. In this way non-reciprocal extritorial rights and privileges were granted which degraded these host States, to a certain extent, to ‘quasi-colonies’ of Western powers, companies or even individuals. Examples include a series of treaties between China and other countries, including Great Britain (1842), the United States (1844), France (1844), Russia (1858), German States (1861), Austria-Hungary (1869) and Japan (1871). These treaties provided the framework for travel rights for foreign merchants, limitations on customs duties and tariffs, and concessions to foreign enterprises in the fields of natural resource exploitation, railways and shipping. These treaties also contained clauses for the protection of Christian missionaries and of local Christians. In addition, some treaties provided for a cession or lease of territory to foreign powers, among others, to Great Britain (Hong Kong) and Russia (Manchuria).

Through an international concession a State would transfer rights inherent in its sovereignty to a private person, a private or State-owned company or consortium. In the past, concessions often served as instruments for the exploitation of overseas territories by Western powers, companies or even individuals. The rights granted were wide-ranging and gave broadly-defined jurisdiction, as in feudal days. For example, the Dutch East Indies and West Indies Companies and the British East India Company obtained extensive trading and jurisdictional privileges through concessions from local rulers. A peculiar and interesting example is the recognition by the British Crown of sovereign powers held by the Brooke dynasty as rajahs from 1841 to 1946, enabling them to govern a vast territory for private gain. Later on, concessions were often granted by local authorities in an attempt to attract a foreign company to invest and establish an enterprise.

Generally such concessions pertained to either the public utilities sector such as postal services, the construction and operation of railways, canals, etc., or the natural resource sector, including the exploration and exploitation of mineral or timber resources. A well-known example of the first type is the concession for the construction and operation of the Suez Canal, granted in November 1854. An example of the second type is the 1933 Concession to the British-owned Anglo-Persian Oil Company, which was unilaterally abrogated by Iran in 1951 and subsequently became the object of proceedings before the International Court of Justice. Another illustrative example is the 1939 concession granted by the Sheikh of Abu Dhabi to the Petroleum Development Co. (Trucial Coast) Ltd. This concession to drill for and extract mineral oil in Abu Dhabi, later also gave rise to

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*ICJ Reports 1951*, p. 89. See also Appendix V.
a dispute which was submitted for arbitration in 1949. In his award of 1951, the Arbitrator said:

This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.  

Treaties, concessions, and arbitral awards such as those mentioned above became a major source of grievance for Third World States and inspired their efforts to change traditional international law relating to international investment.

### 1.2 International Diplomatic Protection to Enforce ‘Fair Treatment’

International investment law began to be developed during the first half of the twentieth century, in particular in response to the needs of the pioneer industrial investor. It was heavily biased in favour of the capital-exporting countries and, as Jessup put it as early as 1949, ‘an aspect of the history of imperialism’ and ‘dollar diplomacy’.  

It was intended to provide foreign investors with maximum freedom of movement, transfer of capital, and trade. At the same time, it purported to support them by means of the doctrine of diplomatic protection by the home State, should a dispute arise with the authorities of the host State.

The capital-exporting States of Europe and North America stipulated that all governments were obliged to observe a so-called International Minimum Standard of Civilization (also called the international standard of justice; hereafter IMS), no matter how they treated their own nationals. While the IMS focuses on the treatment of aliens, it applies to various fields of law, including regulation of foreign investment, protection of property rights, judicial (civil and criminal) proceedings, human rights, and protection against disorders. Its content is not entirely clear. Several attempts to clarify it have been made, among others by the League of Nations Codification Conference in 1930 and by the International Law Commission in the context of its work on State responsibility. However, the results have not (yet) attracted widespread support. Therefore, one may still seek recourse to the 1926 judgment in the *Neer claim* (USA v. Mexico), which formulated the stan-

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3 Arbitrator was Lord Asquith of Bishopstone, in *ILR* 18: 149.

4 Jessup (1949: 96).

5 On the international minimum standard, see Schwarzenberger (1955 and 1969). See also Seidl-Hohenveldern (1992), in particular Chapter XIII on ‘Property rights of aliens’.

standard in the following terms and thereby seemed to disallow investors’ claims except in cases of extreme misbehaviour of the host State authorities:

... the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.

The main implications arising from the IMS for investment regulation are:7

1. *respect for domestic law of the host State.* In principle, a foreign investor has to accept and respect the laws and customs of the country where he is residing and investing;

2. *no treatment below a minimum international standard.* The home State of the foreign investor has a right to expect that its nationals who are investing and residing abroad are not treated below the minimum international standard;

3. *expropriation standard.* While it is recognized that each State has the sovereign right to interfere with foreign property, it is only entitled to do so if certain conditions arising from *international* law are met. These conditions, probably the essence of the international minimum standard, have been claimed time and again by Western countries, in particular the US, in their reactions to ‘nationalizations’ and in multilateral negotiations. For example, in 1975 the US Government formulated this position in the following terms:

   Under international law, the United States has a right to expect:
   • that any taking of American private property will be *non-discriminatory*;
   • that it will be for a *public purpose*; and
   • that its citizens will receive *prompt, adequate, and effective compensation* from the expropriating country.8

4. *pacta sunt servanda.* It is a well-established principle that no interference should take place contrary to a specific contractual undertaking with an investor. This rule is often laid down in bilateral investment treaties;

5. *due process of law.* It is often claimed that measures affecting the property rights and business interests of foreign nationals ‘must be based upon (domestic) law and taken in accordance with procedures prescribed in the Constitution or (relevant) laws, subject to the possibility of appeal and not applied in an arbitrary manner’;9 and

7 For a more extensive review, see Verwey and Schrijver (1984: 22–27).
9 Suy (1972: 125, translated from the Dutch).
6. **local remedies rule.** A foreign investor is required to submit his disputes with the host State’s authorities to the host country’s tribunals and exhaust the available local remedies. However, it is often claimed that where these remedies do not exist or have proved to be below required standards, there should be a right of direct appeal to international adjudication.

### 1.3 The National Standard as Riposte

**Review of the Calvo doctrine**

Traditionally, Latin American countries have put much emphasis in their foreign policy on such principles as national sovereignty, territorial integrity and non-intervention as well as on the primacy of national law and domestic courts. In their relations with Europe and the United States this policy served as a political and legal shield for encroachments upon their political and economic independence and their freedom to regulate their own affairs. On the issue of foreign investment regulation, they tried to subject foreign investors exclusively to the national law and the jurisdiction of the courts of the host State.

In response to abuses in the 19th century by Western powers of the right of diplomatic protection of their citizens abroad, Latin American countries put forward the claim that investment regulation in general and the taking of foreign property in particular are matters of domestic jurisdiction. The Argentinean lawyer Carlos Calvo (1822–1906) was the first to systematize the elements of this claim at a legal level. Consequently, it came to be known as the ‘Calvo doctrine’.

The Calvo doctrine, also referred to as the ‘national standard’ (as opposed to the ‘international minimum standard’), basically stipulates that the principle of territorial sovereignty of a State entails:

1. equality before the law between nationals and foreigners;
2. the subjection of foreigners and their property to the laws and judicial jurisdiction of the State in which they invest or operate;
3. abstention from interference by other governments, notably those of the home States, in disputes over the treatment of foreigners and their property rights.

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11 See Chapter IV on Fundamental Rights and Duties of States as included in the Charter of the Organization of American States, 30 April 1948, 119 *UNTS* (1952), p. 3; see also the Convention on Rights and Duties of States, signed in Montevideo, 26 December 1933, 165 *LNTS*, p. 19.
12 Calvo (1896).
(i.e., abstention from ‘gunboat diplomacy’ and restriction of diplomatic protec-
tion); and

4. absence of an obligation for a State to pay compensation for damages suffered
   by foreigners due to civil wars or disturbances, unless its own law has created
   such an obligation.

The Calvo doctrine does not imply that all elements of the international standard,
including those relating to expropriation (the conditions of ‘public purpose’, ‘non-
discrimination’, and ‘adequate compensation’) are unacceptable. In fact, these el-
ements have frequently been incorporated in Latin American national constitu-
tions and laws. However, it does claim that they stem from national law, not
from international law, and that, in principle, disputes arising over their applica-
tion should be settled under the domestic law of the host State and by its tribu-
nals.

Over the years, various versions of the Calvo doctrine have been formulated
in national constitutions and laws, regional conventions and other instruments,
and investment contracts concluded by Latin American countries. Occasionally, it
has found its way into laws enacted by newly-independent States in Asia and Af-
rica.

**Review of the Calvo clause**

Latin American countries frequently required the insertion of a so-called ‘Calvo
clause’ in investment contracts concluded with foreigners, by which the foreign
investor committed himself to: refrain from seeking diplomatic protection from
his home State in a dispute with the host State; and seek redress through local
remedies. This way he would find himself in the same position as national inves-
tors. A well-known example is the Calvo clause in the contract between Mexico
and the North-American Dredging Company of Texas, which stipulated:

The Contractor and all persons who, as employees or in any other capacity, may
be engaged in the execution of work under this contract either directly or indi-
rectly, shall be considered as Mexicans in all matters, within the Republic of
Mexico, concerning the execution of such work and the fulfilment of this contract.
They shall not claim, nor shall they have, with regard to the interests and the
business connected with this contract, any other rights than those established in
favour of Mexicans. They are consequently deprived of any rights as aliens, and
under no conditions shall the intervention of foreign diplomatic agents be per-
mitted, in any matter related to this contract.\(^\text{14}\)

While the Calvo clause has been characterized by Latin American scholars as ‘an
outstanding Latin American contribution to the development of international

\(^{14}\) Text as quoted in Shea (1955: 200).
law”, in most other parts of the world this is seriously doubted. In particular, the claim that an investor could denounce the right of diplomatic protection is negated, since this is a right of the State, which cannot be renounced by its nationals. Consequently, in international jurisprudence and specialist literature, the Calvo clause is often considered to be of limited validity. The most authoritative award in this respect was rendered by the American-Mexican General Claims Commission presided over by Cornelis van Vollenhoven, in the North American Dredging Company of Texas Case (1926). As to the question whether an alien is legally competent to accept a commitment not to seek diplomatic protection from his home government in the case of a dispute with the host State’s government, the Commission stated:

The Commission holds that he may, but at the same time holds that he cannot deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen cannot by contract in this respect, tie the hands of his Government.

Unless the States concerned or the parties to the dispute have set aside the local remedies rule or there is déni de justice in the course of exhausting the local remedies or a special agreement to resort to arbitration at an early stage, a foreign investor is bound by international law to refrain from invoking diplomatic protection. Likewise, his home State is not entitled to interfere as long as the local remedies have not been exhausted. The Calvo clause only comes into the picture if a foreign investor invokes diplomatic protection from his home State as a means of circumventing local courts or in the case of a denial of justice.

Calvo’s inception in the United Nations
As described in Part I, in the period since the formation of the United Nations, Latin American countries have been campaigning to obtain international support

17 4 RIAA (1926), p. 29. However, notwithstanding this observation the Commission decided that in this particular case the international claim by the claimant was inadmissible:

... where a claimant has expressly agreed in writing, attested to by his signature, that in all matters pertaining to the execution, fulfilment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities and then wilfully ignores them by applying in such matters to his Government, he will be held bound by his contract and the Commission will not take jurisdiction of such a claim.

18 See Brownlie (1990: 546–47).
Chapter Six

Box 6.1

Characteristic examples of Calvo-flavoured provisions in:

a. Latin American constitutions:

Article 24 of the Constitution of Bolivia:

Foreign subjects and enterprises are subject to Bolivian laws, and in no case may they invoke exceptional positions or have recourse to diplomatic claims.

Article 27 of the Constitution of Mexico:

The State may grant the same right [to acquire ownership of lands, waters, and their appurtenances, or to obtain concessions for the exploitation of mines or of waters] to foreigners, provided they agree before the Ministry of Foreign Relations to consider themselves as nationals in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto; under penalty, in case of non-compliance with this agreement, of forfeiture of the property acquired to the Nation.

Article 136 of the Constitution of Peru:

Foreign enterprises domiciled in Peru are subject without restrictions to the laws of the Republic. In any agreement which the State signs with foreigners or with juridical persons, or in the concessions which are granted to them, the express acceptance by the former of the jurisdiction of the laws and the courts of the Republic and their renunciation to any diplomatic recourse must be made clear.

The State and juridical persons can submit disputes stemming from agreements with foreigners to judicial and arbitral courts established by virtue of international agreements in which Peru is a party.

Article 127 of the Constitution of Venezuela:

In contracts involving the public interest, when not unnecessary because of the nature thereof, there shall be considered incorporated, even if not expressly stated, a clause by which any questions and disputes which may arise concerning such contracts and which are not amicably settled by the contracting parties shall be decided by the competent courts of the Republic, in accordance with its laws, and they may not for any reason or cause give rise to foreign claims.

(Continued on next page)

for their national standard policy and to denounce the international standard. These efforts have included an initiative by Uruguay in the early 1950s which for the first time led to formulating the sovereign right of each State ‘to freely exploit natural wealth and resources’ and the Chilean proposal in 1952 to in-

19 GA Res. 626 (VII), 21 December 1952.
b. **Regional conventions**

Article 9 of the Montevideo Convention on Rights and Duties of States (1933):
Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of nationals.

Article 7 of the Pact of Bogotá (1948):
The High Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective State.

c. **Other regional instruments:**

Articles 50 and 51 of the 1970 Andean Foreign Investment Code, commonly known as ‘Decision 24’ (no longer in force):

50. Member countries shall not grant to foreign investors any treatment more favourable than that granted to national investors.

51. In no instrument relating to investment or to the transfer of technology shall there be clauses that remove possible conflicts or controversies from the national jurisdiction and competence of the recipient country or allow the subrogation by States to the rights and actions of their national investors.

clude a paragraph dealing with permanent sovereignty in the draft text of Article 1 on self-determination of the envisaged Covenants on Human Rights. This was followed by the adoption by the General Assembly of the 1962 Declaration on Permanent Sovereignty over Natural Resources, which is, however, generally interpreted as reflecting more elements of the international minimum standard than of the national standard.

In 1974, the political climate had changed and the campaign by the Latin American countries to ‘crack’ the IMS was more successful. As discussed in Chapter

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20 UN Doc. E/C.4/L.24, 16 April 1952. This text was substantially modified during the negotiations and occurs in Article 1 of both Human Rights covenants as they were finally adopted in 1966.

21 GA Res. 1803 (XVII), 14 December 1962.

22 See Chapter 2.
3. Article 2 of the Charter of Economic Rights and Duties of States (CERDS) was the centre of great controversy. In later years, during reviews of CERDS, these provisions remained a major source of controversy and failed to gain additional support.

Changing attitudes

Nearly all developing countries, including a number of Latin American countries and socialist countries such as the People’s Republic of China and Vietnam, have enacted national legislation in recent years, or are in the process of doing so, with a view to promoting the flow of foreign investment and capital into their economies. This policy is also reflected in changes in the Andean Foreign Investment Code. On 11 May 1987, the restrictive Decision 24 was substituted by a new, more liberal Common Foreign Investment and Technology Licensing Code (Decision 220). Each country may apply such regulations as it deems appropriate in its particular national circumstances, including recourse to international dispute settlement procedures.

In March 1991, the Commission of the Cartagena Agreement considered that ‘the new policies toward foreign investment in effect in the Subregion make it necessary to review and update the communitarian norms approved in Decision 220 of the Commission so as to stimulate and promote the flow of foreign capital and technology to the Andean economies’. As a result, Decision 291 of March 1991 does not require common norms on foreign investment and technology. Article 2 reflects the principle of resort to national standards: ‘Foreign investors shall have the same rights and obligations as pertain to national investors, except as otherwise provided in the legislation of each Member Country’. Thus, the treatment of foreign investors is basically left to the discretion of individual States. The Commission also agreed ‘to remove the obstacles to foreign investment’ (preamble). Consequently, the Code provides for a nearly unrestricted entry for foreign investment and explicitly allows remittance of earnings and the repatriation of capital, as opposed to the extensive restrictions contained in Decision 24.

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23 This was reflected in the separate vote on Art. 2.2 (104 votes to 16, with 6 abstentions) and the final vote on CERDS as a whole (120 to 6, with 10 abstentions). See 28 UNYB 1974, pp. 401–3. For a general discussion of CERDS see Meagher (1979).


25 See the regular reports and publications of various institutions, including ICSID, IFC, the UNCTC and UNCTAD.


The changing attitude of a number of Latin American countries towards foreign investment is also reflected in their increasing participation in multilateral investment instruments such as ICSID and MIGA as well as in the increasing number of bilateral investment treaties they have concluded in recent years.

2. Multilateral Codes of Conduct on Foreign Investment

2.1 UN Draft Code of Conduct on Transnational Corporations

Since 1977 the UN Commission on Transnational Corporations has been involved in negotiations on a general Code of Conduct on Transnational Corporations (TNCs). The main aim of this effort is ‘to maximize the contributions of TNCs to economic development and growth and to minimize the negative effects of the activities of these corporations.’ While all UN member States subscribe to this aim, it has been far from easy to draft and agree on such a code. This is, inter alia, the result of suspicions in Western countries regarding standards of treatment of foreign investors in developing countries, of the fear that new rules will be created on the basis of which the host country can claim the cancellation of acquired rights of TNCs, and of suspicions among developing countries regarding the impact of TNCs on their domestic policies and international relations. The decisions to establish a UN Commission on TNCs and to start negotiations on a Code of Conduct were taken in the aftermath of the overthrow of the Allende government in Chile in 1973, of corruption scandals in the West (for example, the Lockheed affair in the Netherlands) and of a wave of nationalizations of foreign companies in developing countries. Furthermore, regulation and control of the activities of TNCs became part and parcel of efforts in the 1970s to establish a NIEO. Thus, it also became linked with the sorry fate of these efforts.

Even if a comprehensive Code of Conduct on TNCs may never be adopted, the discussions and the amount of information generated by the negotiations on it have had a positive impact on identifying the issues and the problems involved, and opened perspectives in which concrete negotiations in other fora could take place. As Weiss correctly observed: ‘Effective UN action need not always end in formal resolutions.’ Meanwhile, the outstanding issues in the Code negotiations have lost relevance. The question of the definition of a TNC has become

29 For a review of the negotiations, see Horn (1980) and Dell (1989).
7. Transnational corporations shall respect the national sovereignty of the countries in which they operate and the right of each State to exercise its permanent sovereignty over its natural wealth and resources;

8. An entity of a transnational corporation is subject to the laws, regulations and established administrative practices of the country in which it operates.

10. Transnational corporations should carry out their activities in conformity with the development policies, objectives and priorities set out by the Governments of the countries in which they operate and work seriously towards making a positive contribution to the achievement of such goals.

19. With respect to the exhaustion of local remedies, transnational corporations should not request Governments to act on their behalf in any manner inconsistent with paragraph 65.

47. In all matters relating to the Code, States shall fulfil, in good faith, their obligations under international law.

49. Transnational corporations shall receive fair and equitable treatment in the countries in which they operate.

50. (. . .), entities of transnational corporations should be entitled to treatment no less favourable than that accorded to domestic enterprises in similar circumstances.

55. It is acknowledged that States have the right to nationalize or expropriate the assets of a transnational corporation operating in their territories, and that adequate compensation is to be paid by the State concerned, in accordance with the applicable rules and principles.

56. An entity of a transnational corporation is subject to the jurisdiction of the country in which it operates.

57. Disputes between States and entities of transnational corporations, which are not amicably settled between the parties, shall be submitted to competent national courts or authorities. Where the parties so agree, or have agreed, such disputes may be referred to other mutually acceptable or accepted dispute settlement procedures.

64. States should not use transnational corporations as instruments to intervene in the internal or external affairs of other States and should take appropriate action within their jurisdiction to prevent transnational corporations from engaging in activities referred to in paragraphs 16 and 17 of this Code.

65. Government action on behalf of a transnational corporation operating in another country shall be subject to the principle of exhaustion of local remedies provided in such a country and, when agreed among the Governments concerned, to procedures for dealing with international legal claims. Such action should not in any event amount to the use of any type of coercive measures not consistent with the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.
less problematic as more developing countries have transnationals of their own and Eastern European countries will no longer attempt to keep State-owned companies outside the scope of the Code. Other outstanding issues are not as ‘hot’ as they used to be. Experience in other relevant fora shows that they could be solved fairly easily if there is sufficient political will. They include: (1) a reference to international law/international obligations; (2) non-interference in internal affairs; (3) respect for national sovereignty; (4) nationalization and compensation; (5) dispute settlement; and (6) national treatment.  

However, the UN Commission on TNCs has not been able to capitalize on the political momentum of the early 1990s. Upon recommendation of ECOSOC, the UNGA decided in 1994 to integrate this Commission into the institutional structure of UNCTAD.

2.2 World Bank Guidelines on the Treatment of Direct Foreign Investment

After a French initiative in April 1991, the Development Committee, a joint ministerial committee of the Boards of Governors of the International Monetary Fund and the World Bank Group, requested the World Bank to prepare a ‘legal framework’ embodying the essential legal principles necessary to promote foreign direct investment. A working group of the World Bank institutions energetically worked on this request and formulated ‘Guidelines on the Treatment of Foreign Direct Investment’ embodying positive approaches. The Development Committee decided to ‘call the attention’ of member countries to these guidelines as ‘useful parameters in the admission and treatment of private foreign investment in their territories, without prejudice to the binding rules of international law at this stage of its development’. These guidelines set out a general framework for the treatment of foreign investment by host States, they supplement the efforts of member countries to attract increased flows of private foreign investment, and they support binding instruments in the field of foreign investment.

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32 In September 1989 a symposium took place on issues in the negotiations on a draft code of conduct on TNCs in the Peace Palace at The Hague, convened by the UN Centre on Transnational Corporations and the International Law Association’s Committee on Legal Aspects of a New International Economic Order. In the Report of this symposium as well as in the 1990 report of the ILA Committee, substantive solutions for bridging the gaps have been formulated; see the CTC Reporter, United Nations, New York, issue 29, Spring 1990.


Recognizing that the promotion of private foreign investment is a common purpose of the International Bank for Reconstruction and Development, the International Finance Corporation and the Multilateral Investment Guarantee Agency;

I.1 These Guidelines may be applied by members of the World Bank Group institutions to private foreign investment in their respective territories, as a complement to applicable bilateral and multilateral treaties and other international instruments, to the extent that these Guidelines do not conflict with such treaties and binding instruments, and as a possible source on which national legislation governing the treatment of private foreign investment may draw. ...

I.2 The application of these Guidelines extends to existing and new investments established and operating at all times as bona fide private foreign investments, in full conformity with the laws and regulations of the host State.

II.1 Each State will encourage nationals of other States to invest capital, technology and managerial skill in its territory and, to that end, is expected to admit such investments in accordance with the following provisions.

II.3 Each State maintains the right to make regulations to govern the admission of private foreign investments. In the formulation and application of such regulations, States will note that experience suggests that certain performance requirements introduced as conditions of admission are often counterproductive and that open admission, possibly subject to a restricted list of investments (which are either prohibited or require screening and licensing), is a more effective approach. . . .

III.2 Each State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in these Guidelines.

III.3 . . . In all cases, full protection and security will be accorded to the investor’s rights regarding ownership control and substantial benefits over his property, including intellectual property.

III.7 Each State will permit and facilitate the reinvestment in its territories of the profits realized from existing investments and the proceeds of sale or liquidation of such investments.

IV.1 A State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation.

IV.2 Compensation for a specific investment taken by the State will . . . be deemed ‘appropriate’ if it is adequate, effective and prompt.

V.1 Disputes between private foreign investors and the host State will normally be settled through negotiations between them and failing this, through national courts or through other agreed mechanisms including conciliation and binding independent arbitration.
such as national legislation, bilateral investment treaties and multilateral treaties. The Guidelines were formulated on the basis of an extensive study of existing legal instruments at the national, bilateral and multilateral levels, as well as of international arbitral awards and relevant literature.

It is striking that the Guidelines provide a framework for bona fide foreign investments only and do not deal with sensitive issues such as disclosure of information, restrictive business practices, the avoidance of corrupt practices and non-interference in domestic affairs. Thus, they do not formulate rules of good behaviour on the part of foreign investors nor do they address the policies of their home States with respect to these and other issues. They only formulate rules of behaviour for host States and mainly from the perspective of the interests of foreign investors with a view to promote foreign investment. The report of the working group to the Development Committee argued that it was trying to avoid a duplication of the work done by the UNCTC and a repetition of principles accepted in that context. But, as reviewed above, the fate of this draft Code is highly uncertain. To have Guidelines only for fair treatment of foreign investors by host States only, without an accompanying set of rules guiding the behaviour of foreign investors and their home States seems to be rather one-sided. Yet, it is symptomatic of the present ‘business-like’ international economic climate that the drafting of such a legal framework for the treatment of foreign investment took only one year, whereas a general draft code of conduct on transnational corporations has not emerged after 15 years.

Apart from a first section on the scope of application (I), they cover four main areas, viz. admission of foreign investment (II), standards of treatment and transfer of capital and net revenues (III), expropriation and unilateral alterations or termination of contracts as well as their compensation (IV), and the settlement of disputes between governments and foreign investors (V).

It contrasts with the 1972 International Chamber of Commerce Guidelines which set out, on each subject, the duties and obligations of the three parties concerned, i.e. investor, host State and home State.
3. Multilateral Instruments for Promotion and Protection of Foreign Investment

3.1 Three World Bank Agencies

In 1955, it was decided to establish the International Finance Corporation (IFC), separate from but affiliated to the World Bank.\(^{37}\) Its purpose is to supplement the Bank by encouraging, in co-operation with foreign investors, the establishment and expansion of private enterprise of a productive character in member States and especially in developing countries,\(^{38}\) particularly by stimulating the international flow of private capital and providing risk capital for productive purposes. For these purposes the IFC can provide loans to an enterprise and—from 1961—it has been able to buy shares in a private enterprise. It is unique in the sense that it is the only intergovernmental organization operating for the sole purpose of assisting the international spread of private enterprise. To this end, it operates as an international investment bank, but with responsibilities for assisting economic development as well as making sound investments. Originally, IFC concentrated on investments in manufacturing, particularly basic industries such as iron, steel, textiles, construction materials, pulp and paper. Later it also started to invest substantial amounts of money in agricultural businesses as well as in financial institutions. Recently, the IFC has been significantly expanding its work due to the increasing interest in the role of the private sector in the development process.

*International Centre for the Settlement of Investment Disputes*

After earlier efforts in the context of the OECD and other organizations to draft a multilateral convention on the protection of foreign property had been unsuccessful,\(^{39}\) the Convention on the Establishment of an International Centre for the Settlement of Investment Disputes between States and Nationals of Other States

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\(^{37}\) In 1955, its Articles of Agreement were submitted for approval to the Board of Governors of the International Bank for Reconstruction and Development (IBRD) and subsequently approved. On 20 July 1956, the treaty entered into force.

\(^{38}\) See Art. 1 of the IFC’s Articles of Agreement. Although the IFC operates as a separate agency with its own staff and is a specialized agency of the United Nations in its own right, it has close links with the IBRD. The IFC is also headquartered in Washington, only IBRD member countries are eligible for membership of IFC, it has the same Governors and Executive Directors and a weighted voting system similar to that of the IBRD, and the President of the World Bank is *ex officio* President of the IFC as well. By June 1992, membership included 146 States.

(ICSID) was adopted in the context of the World Bank in 1965.\(^{40}\) ICSID itself does not act as conciliator or arbitrator. The Convention provides for procedures and ICSID keeps a list of qualified persons from which the parties to a dispute are able to choose conciliators or arbitrators.\(^{41}\) ICSID only administers the proceedings and provides the necessary procedural facilities. Procedures under the auspices of ICSID must conform to three main criteria:

- both parties must have consented to have recourse to ICSID (admissibility);
- one party has to be a Contracting State and the other a national of another Contracting State (ratione personae); and
- it should involve a legal dispute arising out of an investment (ratione materiae).\(^{42}\)

Although relatively few proceedings have been conducted under the auspices of ICSID, hundreds of investment contracts, bilateral investment treaties and national laws contain provisions for the submission of disputes to ICSID. References to ICSID also appear in the Investment Chapter of the 1992 North American Free Trade Agreement (NAFTA)\(^{43}\) and the 1994 European Energy Charter Treaty.\(^{44}\) Such treaty clauses are meant to generate trust and are interpreted to meet the requirement of a party’s consent to the jurisdiction of ICSID on an advance basis. The ICSID Convention has been ratified by a majority of States.\(^{45}\)

It is interesting to analyse why ICSID is gaining in popularity. For host States the following advantages may be identified:

- if a host State agrees to arbitration of a dispute with a foreign investor of a State which is also a party to the ICSID Convention, there will be less chance

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\(^{40}\) After ratification by 20 States, the ICSID Convention entered into force on 14 October 1966.

\(^{41}\) Each Contracting State can appoint four persons from this list to a so-called Panel of Conciliators and Panel of Arbitrators.

\(^{42}\) See Art. 25 of the ICSID Convention.

\(^{43}\) An interesting detail is that two of the three NAFTA partners, namely Canada and Mexico, are in fact not (yet) ICSID Contracting States. However, for disputes between parties falling outside the scope of the Convention, ICSID established the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings. This allows for the settlement of disputes where one of the parties is either a State that is not a Contracting State or a national of a State that is not a Contracting State.


\(^{45}\) As of 19 October 1994, the ICSID Convention had 115 Contracting States while a further 16 States had signed, but not yet ratified the Convention.
that the investor’s home State will exercise its right to grant diplomatic pro-
tection and thus interfere (Arts. 26 and 27);

- any Contracting State may in principle exclude certain disputes from the juris-
diction of ICSID. However, only five States (Jamaica, Papua New Guinea, 
Saudi Arabia, Turkey and China) have made such a notification under Article 
25, paragraph 4;\footnote{The notifications from Jamaica (1974) and Saudi Arabia (1980) exclude disputes relating to 
the natural resources sector. Papua New Guinea ‘will only consider submitting those dis-
putes to the Centre which are fundamental to the investment itself’ (1978), while Turkey 
(1989) will only consider submitting with respect to investments that have been approved. 
Moreover, Turkey specified that ‘the disputes, related to the property and real rights upon 
the real estates are totally under the jurisdiction of the Turkish courts and therefore shall 
not be submitted to jurisdiction of the Center’. Finally, China (1993) notified ICSID that it 
would only consider submitting to the ICSID disputes over ‘compensation resulting from 
expropriation and nationalization’ (nevertheless China has given consideration in some 
bilateral investment treaties to the possibility of ICSID arbitration for other types of invest-
ment disputes). See the section on ‘Notifications concerning Classes of Disputes Considered 
Suitable or Unsuitable for Submission to the Centre’ in Doc. ICSID/8, entitled ‘Contracting 
States and Measures Taken by them for the Purpose of the Convention’, October 1993. 
Guyana and Israel withdrew their earlier notifications.}

- a Contracting State may, but need not, ‘require the exhaustion of local admin-
istrative or judicial remedies as a condition of its consent to arbitration under 
this Convention’ (Art. 26); and

- the ICSID Convention requires an arbitral tribunal to decide a dispute in ac-
cordance with the rules of law agreed to by the parties (freedom of choice). 
This can very well include the law of the host State. In the absence of agree-
ment, the Tribunal must apply the law of the State party to the dispute (inclu-
ding its conflict rules) \textit{and} such rules of international law as may be applica-
able (Art. 42.1). The parties may authorize the Tribunal to decide \textit{ex aequo et 
bono}.\footnote{See Shihata (1984: 2–3).}

For a long time Latin American countries felt that participation in ICSID would 
not be in line with the Calvo doctrine and the principle of PSNR, as ICSID pro-
vides for \textit{international} procedures for settling investment disputes while the Cal-
vo doctrine primarily stipulates \textit{local} remedies. However, ICSID and the Calvo 
document cannot be said to be incompatible, because ICSID:\footnote{The notifications from Jamaica (1974) and Saudi Arabia (1980) exclude disputes relating to 
the natural resources sector. Papua New Guinea ‘will only consider submitting those dis-
putes to the Centre which are fundamental to the investment itself’ (1978), while Turkey 
(1989) will only consider submitting with respect to investments that have been approved. 
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1. is an international agreement between sovereign States;

2. fully respects the sovereignty of the host State;
3. provides that a Contracting State may require the exhaustion of local remedies as a condition of its consent to arbitration under this Convention (Art. 26). Few States have in fact made such a stipulation;

4. aims to prevent a home State from providing diplomatic protection when an investment dispute is to be submitted to ICSID arbitration (Art. 27 of ICSID);

5. requires an arbitral tribunal to decide a dispute in accordance with the rules of law agreed to by the parties.

In recent years it has increasingly became recognized that ICSID does not contradict the Calvo doctrine as the number of Latin American countries that have signed and ratified the ICSID Convention has substantially increased. By October 1994, eight Latin American countries had ratified the Convention.48

The Convention enables a home State, whose investor might otherwise wish to seek its protection, to induce the investor to rely on ICSID. In this way a home State can avoid the embarrassment of a dispute with another State at an intergovernmental level. In fact, Article 29 of the Convention explicitly forbids the investor’s home State to give diplomatic protection in respect of a dispute submitted to ICSID, unless the host State has failed to comply with the award.

**Multilateral Investment Guarantee Agency**

The establishment of an international investment insurance facility has been on the international agenda since the early 1960s. Early efforts in the context of OECD and the World Bank and later of UNCTAD and EC failed. On a regional basis, one agency was established in 1974, namely the Inter-Arab Investment Guarantee Agency Corporation which reportedly functions quite effectively.49

In 1985, following a proposal of the Board of Governors of the World Bank, a Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) was adopted. MIGA’s main purpose is to issue guarantees to investors against non-commercial risks, in particular those related to investments in developing countries, and thus to encourage the flow of investments for productive purposes to developing countries.50 MIGA is designed to operate on a self-sustaining basis. In addition to its guarantee operations, it also provides a forum for international co-operation among capital-importing and capital-exporting countries as

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well as foreign investors. On April 12, 1988, the Convention entered into force when the required number of ratifications was achieved.

The MIGA Convention as an international instrument aims to influence the investment climate at the national level, but it does not encroach on the notion of natural resources jurisdiction of the host State and thus easily comes to terms with the Calvo doctrine. Criteria for eligibility of investments for coverage by MIGA include:

- compliance by the investor with the host country’s laws and regulations (Art. 12, para. (d) sub (ii));
- consistency of the investments with the declared development objectives and priorities of the host country (Art. 12, para. (d) sub (iii));
- host country approval of the issuance of the guarantee by the Agency (Art. 15).

These conditions are intended to ensure that control over admission of foreign investment and MIGA involvement rests with the host country. In principle, the MIGA Convention does not deal with substantive aspects of the standard of treatment of a foreign investment. It merely provides that, in guaranteeing an investment, MIGA ‘shall satisfy itself as to . . . the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment’. In a case where MIGA is of the view that fair treatment and legal protection is not adequately assured under the domestic laws of the host country or under an investment treaty, it may conclude an agreement with the host country, or make other arrangements on the treatment to be extended to the investment covered.

It could be argued that certain aspects of the dispute settlement procedure, outlined in Chapter IX of the Convention, are of a clearly international character and thus against the Calvo spirit. For example, Article 56 provides that any question of interpretation or application of the Convention arising between a member and MIGA or among members shall be submitted to the Board of Directors of MIGA for its decision, with a possibility of appeal to the Council of Governors.

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51 Schedule A to the Convention provides a classification of individual countries. For voting and some other purposes, countries are classified as belonging either to Category One (industrialized) or Category Two (developing). All Third World participants belong to Category Two (together with several OECD member States: Greece, Portugal, Spain, Turkey).

52 As of 31 October 1994, MIGA had been signed by 147 States: 19 Category One and 128 Category Two States. Of these signatories, 127 States were full members upon ratifying the Convention and paying the membership fees.

53 Art. 12 (d).

54 See Art. 23 (b), sub (ii).
Disputes between MIGA and a host country arising from subrogation may be referred by either party to international arbitration according to the procedures specified in Annex II of the Convention. The parties are free to agree on alternative methods for the settlement of such disputes, such as conciliation. Under certain circumstances this could mean that a MIGA member may involuntarily become involved in international arbitration, albeit, as Shihata puts it, in ‘a conflict between two international persons, two subjects of international law, unlike the typical case of a dispute between a foreign investor and the host government to which both the traditional objection to international arbitration and the Calvo doctrine apply’.55 However, as discussed above, the Calvo doctrine has a wider scope than the Calvo clause and has frequently been invoked by Latin American countries to object to any form of international arbitration.

MIGA’s responsibilities also include improving the general investment conditions in developing countries. This may entail, but formally only at the request of the government of a member State, advice on such matters as the drafting of investment codes and reviewing investment incentive programmes. In addition, MIGA is directed to promote and facilitate the conclusion of agreements, among its members, on the promotion and protection of investments.56

3.2 EU-ACP Co-operation

The various Lomé Conventions, concluded between the European Union (EU) and developing States in Africa, the Caribbean and the Pacific (ACP States),57 initiated programmes related to the promotion and protection of foreign investments. Lomé IV, the latest Convention, contains an extensive chapter on investments (Arts. 258–74), with sections on investment protection and promotion, and on investment financing and support. The latter focuses on promotion and development of small and medium-size enterprises. Article 258 provides that ‘fair and equitable treatment’ must be granted to private investors who comply with ACP-EU development co-operation objectives and priorities and with the appropriate laws and regulations of their host and home States. In Article 260 the Contracting Parties ‘affirm the need to promote and protect either party’s investments on their respective territories’. In this context they also affirm ‘the importance of concluding between States, in their mutual interest, investment and protection

55 Shihata (1988: 264). Shihata also points out that submission to international arbitration of disputes concerning financial transactions between an international financial institution and a member State is accepted, for example, in loan agreements of the World Bank and the Inter-American Development Bank.

56 Art. 23 (b), sub (iii).

agreements which could also provide the basis for insurance and guarantee schemes. In a separate Annex to the Convention (no. LIII) the Contracting Parties agree to study the main clauses of a model bilateral agreement on investment promotion and protection, with particular attention to:

i. legal guarantees to ensure fair and equitable treatment and protection of foreign investors;

ii. protection in the event of expropriation and nationalization;

iii. international arbitration in the event of disputes between investor and host State.

4. Increasing Popularity of Bilateral Investment Treaties

The bilateral treaty of Friendship, Commerce and Navigation (so-called FCN treaty) served for a long period as one of the common instruments of traditional diplomacy. In addition to their ‘friendship’ function, these treaties used to cover a broad range of topics relating to: the rights of the nationals of each party and the protection of their property abroad; trade, including such issues as national treatment and most-favoured-nation treatment; and navigation and consular jurisdiction. After 1960, as a result of the conclusion of multilateral trade instruments such as GATT and of special bilateral trade treaties, the relevance of FCN treaties rapidly decreased. In the immediate post-war period, FCN treaties were retooled and became instrumental in the promotion and protection of foreign investment. However, capital-exporting States, in particular Germany and France, soon began negotiating bilateral treaties exclusively focusing on the promotion and protection of foreign investment. The number of bilateral investment treaties (BITs) grew rapidly, and up to 1994 more than 700 had been concluded, involving nearly 150 States, including more than 100 developing countries. Most BITs are treaties between an industrialized and a developing country, or between an industrialized and a former communist country. But it is interesting to note that in recent decades a growing number of BITs between two developing countries and between a (former) communist country and a developing country have been concluded.

As of 1 July 1994, 22 OECD countries, 20 former USSR/Eastern European countries and 107 developing countries. See Peters (1994a: 833) and information provided to the author by Mr. Paul Peters. For data and an extensive analysis, Peters (1992b: 115–16) and Stevens and de Alwis (1992: 229–83).

For example, since 1982 China has concluded 59 BITs, approximately one-third of them with OECD countries and the others with Central and Eastern European countries such as Romania (1983), Poland (1988), Hungary (1991) and Slovenia (1993), and with fellow Third World countries including Thailand (1985), Malaysia (1988), Korea (1992), Viet

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The main objectives of these treaties are: the promotion of foreign investment; protection of acquired rights; minimization of loss and risk in the case of expropriation; and dispute settlement. With a few exceptions, they include rules on: the right of ‘entry’ and the establishment of a company; fair treatment; most-favoured-nation treatment and national treatment; repatriation of capital, profits and other assets; the conditions applying to expropriation and nationalization, including compensation standards, and to losses or damages due to war and revolution; due process of law; and dispute settlement through international arbitration.

It is interesting to note that model bilateral investment treaties were not only drafted by several Western countries, but that in 1981 the Asian-African Legal Consultative Committee also drew up three model treaties with different degrees of liberality. The features of one of these are basically the same as those of Western countries.

A question to be briefly discussed here relates to the legal merits of BITs, a topic which has given rise to divergent opinions. It can be inferred, from Article 38 of the Statute of the ICJ, that uniform State practice (usus) and the conviction that one ought to perform in this way (opinio iuris), give rise to the emergence of customary international law. Where customary international law is crystal clear, treaties can merely confirm its content. However, where customary international law is unclear, or even controversial in certain respects, as in the case of the regulation of foreign investment, treaties may serve to clarify (and expand) the law. The question then arises to what extent these BITs can have an impact on the genesis and content of customary international law, in particular for non-parties. The element of State practice is certainly an important asset of the BITs: a total of over 700 of them, in which 75 per cent of all States, representing all regions of the world, participate, cannot be ignored.

More problematic is the significance of this body of bilateral treaty practice for the genesis of an opinio iuris: more specifically, whether such an impressive body of State practice can be said to reflect and reinforce ‘general practice accepted as law’, either by consolidating traditional principles of customary international law or introducing new ones. Academic views are divided on this issue. In general terms, Akehurst has argued that where numerous bilateral treaties in the same subject area contain uniform or very similar clauses on a certain matter and the actions of States generally are consistent with these treaties, then

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60 For the US model, see Bergman (1983).

such treaty provisions could be accepted as evidence of a rule of customary international law.  

62 Peters quotes Verzijl who pointed out that ‘the frequency of a particular class of bilateral treaties . . . or the constant repetition therein of particular clauses may in itself create a practice corroborated by a general opinio iuris.’  

63 But Schwarzenberger observed, in 1969, that to the extent that these treaties include less than an international minimum standard, ‘even whole series of bilateral agreements . . . hardly constitutes by itself evidence of any change in the relevant rules’. He asserts that ‘such treaties are the result of complex and highly pragmatic considerations, but not of any change in the governing rule of international customary law by desuetude’.  

64 There are authors such as Sornarajah and Chowdhury who take a critical view of BITs. Sornarajah concludes that the ‘bilateral investment treaties do not create any norms of international law’.  

65 Chowdhury claims that these BITs are often the product of ‘unequal bargaining powers on a "take it or leave it" basis and admittedly in an "inhospitable investment climate"’. If these treaties create special regimes for a closer form of economic co-operation in which property protection is one of the aspects, it means—in his view—that ‘developing states reconciled themselves as a matter of commercial bargain and not in response to any legal obligation’.  

66 Also Schachter is of the opinion that, as a general rule, the repetition of common clauses in bilateral treaties does not create or support an inference that those clauses express customary law and concludes that the various BITs are ‘essentially contractual, the product of negotiation based on a variety of considerations influencing the parties’.  

67 Bring views BITs only as a lex specialis between parties, merely designed to create a mutual regime of investment protection.  

68 It should be noted that the aforementioned views were expressed when the number of BITs and the number of countries involved were significantly smaller than they are now, and when the number of States rejecting them (particularly communist and Latin American countries) was considerable. However, in 1994 Sornarajah, while acknowledging that the resorting to such treaties is ‘a new phenomenon’ and that they are ‘potentially law creating’, still takes the view that it

63 Verzijl (1968: 40).
64 Schwarzenberger (1969: 8–9).
65 Sornarajah (1986: 40).
would be too far-fetched to claim that customary principles of law could emerge from them. In the author’s view, the impressive body of BITs may not in itself be able to reflect or generate customary international law including an *opinio iuris communis*, but can certainly serve to clarify and consolidate widely-accepted principles of international investment law as well as to identify new trends, such as the option of resort to international arbitration without prior exhaustion of local remedies and compensation standards. Now that the days of sharply divided doctrinaire debates on these issues in the UN seem to be over (see Part I) and hardly any nationalizations are taking place, the entire debate on the legal merits of BITs has become rather theoretical. For, the various developments concerning the international regulation of foreign investment all point in the same direction, i.e., a more business-like approach on the side of both developing States, which are eager to host more foreign investors and are willing to accept international rules, and industrialized States, which no longer demand ‘capitulation’-type clauses and acknowledge that foreign investors are in principle subject to the laws of the country in which they operate.

5. International Settlement of Investment Disputes

At the international level various mechanisms have been used to settle international investment disputes. They will be briefly mentioned in this section, while their relevance for the appraisal of the status and the interpretation and application of the principle of PSNR will be reviewed in Part III.

So far, the ICJ has dealt with only a few cases pertaining to foreign investment issues. In the *Anglo-Iranian Oil Company Case* (UK v. Iran, 1952), the Court found that it had no jurisdiction to deal with the merits of the case. In the *Barcelona Traction Case* (Belgium v. Spain, 1970) the Court addressed, *inter alia*, issues of nationality of companies and shareholders and their status in international law. Lastly, in the *ELSI Case* (USA v. Italy, 1989), a Chamber of the ICJ pronounced on the requisition of a US company in Italy and alleged violation of the bilateral FCN-treaty. It led to an interesting judgment on such issues as interpretation and status of an FCN-treaty, exhaustion of local remedies and compensation for damages.

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69 Sornarajah (1994: 25 and 276). In this connection he refers at p. 25 to ‘[t]he overzealous and excessive claims that they have created customary international law on many points must, however, be rejected.’

70 See also Appendix V.

71 For a critical comment see Mann (1991).
Up to the early 1970s, only a few arbitrations are on record: *Abu Dhabi* (1951), *Qatar, Aramco* (1958) and *Sapphire* (1963). All of them dealt with efforts by oil-producing States in the Middle East to terminate or renegotiate oil concessions. These arbitration tribunals did not yet apply newly-emerging principles such as PSNR and the *clausula rebus sic stantibus*, but instead based their decisions on ‘general principles of law’, international case law and the actual terms of the concessions concerned. Between 1971 and 1974 Libya nationalized the interests and properties of foreign oil companies. Three arbitration tribunals were established to settle the disputes arising from the acts of nationalization. For each tribunal a sole arbitrator was appointed: Arbitrator Lagergren in the *BP Case*; Arbitrator Dupuy in the *Texaco Case*; and Arbitrator Mahmassani in the *Liamco Case*. Their rulings on the lawfulness of the Libyan nationalizations and the compensation to be paid differ considerably. All of them also dealt with the impact of the UN resolutions on PSNR, particularly the extent to which they challenged customary international law in the fields of concern. Similarly, in 1982 an international tribunal rendered an interesting award in the *Kuwait v. Aminoil Case* which also addresses such issues as ‘stabilization clauses’, the ‘appropriate compensation’ formula and the status of Resolution 1803 and the NIEO resolutions.

Following the release of American hostages in Tehran, the Iran-US Claims Tribunal was established in The Hague to deal with claims over disputes then outstanding between US nationals and the government of Iran arising out of ‘expropriations or other measures affecting property rights’. The Tribunal mainly operates through three Chambers, composed of a ‘neutral’ President and an American and an Iranian arbitrator. In practice, all significant decisions have been rendered by a majority, mostly consisting of the neutral and the American arbitrator. Their awards address a large number of issues including: the applicability of the 1955 US-Iran Treaty of Amity, Economic Relations and Consular Rights; the lawfulness of nationalization and standards; and methods of valuation of compensation. Some of its most significant awards will be examined in Chapters 9 and 10 dealing with the rights and duties arising from the principle of PSNR. Yet, it is not easy to identify common trends in the awards of the often deeply-divided Chambers and to assess their impact on international investment law and expropriation law in general.

Another category is a series of arbitration awards under the institutionalized procedures of the ICSID such as those in the *Jamaican bauxite cases* (all discontinued in 1977), *Amco v. Indonesia* (1983 and 1984), *Klöckner v. Cameroon* (1983), *Liberian Eastern Timber Corporation (Letco) v. Liberia* (1987) or *Asian Agricultural Products/Sri Lanka* (1990). These awards are especially relevant from the perspective of the interpretation of applicable law clauses and will be examined in Part III.
Finally, reference can be made to the UNCITRAL Arbitration Rules\(^{72}\) and the International Chamber of Commerce Rules of Conciliation and Arbitration.\(^{73}\) Both of them provide rules on matters such as the choice of arbitrators, the applicable law, and the place and language of arbitration proceedings.\(^{74}\) As UNCITRAL as such is not an administered form of arbitration, disputes cannot be brought before the UNCITRAL Centre (other than regional centres). The ICC Court of Arbitration serves as an international centre for the settlement of commercial disputes between parties to international contracts. Parties often involve governments or State-owned organizations. These disputes are often dealt with under strict confidentiality. Hence, they have not been examined in Part III.

7. Trend Towards Pragmatism

At various levels of investment regulation an increasing trend towards pragmatism, which bridges differences rather than exposing doctrinaire viewpoints, can be discerned. This was induced by the sharp decrease in new direct foreign investment in developing countries (especially in Africa) during the 1980s, by changing ideologies with respect to the role of the private sector and the market (especially since 1989, the end of the Cold War), as well as by the activities of transnational corporations operating in developing countries. This trend is apparent at various levels of investment regulation:

- at the **national level** of developing countries where investment regulations are being drawn up to generate confidence among potential foreign investors and maximize their contribution to national development;
- at the **bilateral level** in the increasing number of bilateral investment treaties, concluded both between industrialized and developing countries, and between developing countries themselves;
- at the **regional level** in multilateral investment treaties such as the Inter-Arab Investment Protection Treaty (1981) and the ASEAN Investment Treaty (1987);
- at the **inter-regional level**, for example, in the inclusion of investment promotion provisions in the Lomé Conventions between the EU and the ACP countries or the development of Draft Model Bilateral Agreements for Promotion, Encouragement and Protection of Investments by the Asian-African Legal Consultative Committee (AALCC, 1981);


\(^{74}\) See Sacerdoti (1977).
• at the multilateral level in the expanding work of the IFC, the establishment of MIGA (1986) and the increasing number of Contracting Parties to the ICSID Convention.

Through international dispute settlement procedures it has been possible to reach satisfactory decisions in a number of cases, balancing the interests of commercial companies and the interests of host States, sometimes through institutionalized procedures such as those of the ICJ and ICSID, otherwise on an ad hoc basis such as in the Libya Oil Nationalization Cases (1973–77), the Kuwait v. Aminoil Case (1982) or in the context of the Iran-US Claims Tribunal in The Hague.