Part III

Balancing Rights and Duties in an Increasingly Interdependent World
Introductory Remarks to Part III

Permanent sovereignty over natural resources, while a legal concept, is typically a product of the interaction of politics, economics and sociology of international relations. The decolonization process marked its genesis; and the efforts of newly-independent States to enhance their opportunities for development had a profound impact on its evolution. Political and academic discussion of permanent sovereignty has focused on rights rather than on obligations. This is due to the fact that the newly-independent States have looked upon permanent sovereignty as a counteracting factor, if not as an ‘antidote’ to the more traditional rights connected with resource management, such as the inviolability of contracts, a strict interpretation of *pacta sunt servanda* and of respect for acquired rights, and the right of home States to grant diplomatic protection to their nationals abroad. Developing countries challenged these rights by invoking ‘permanent sovereignty’ as the basis for claiming, among other things, the right to regain effective control over natural resources, to choose freely their own socio-economic system, the right to use freely their own natural resources and the right to expropriate or nationalize foreign property rights.

Logically, developing States were more interested in formulating rights reinforcing their sovereignty than in obligations restricting it. For a long time they tended to perceive any reference to obligations as a potential encroachment on their ‘permanent’, ‘full’ and ‘inalienable’ natural resource sovereignty. All of these traditional rights and concepts are currently subject to change and are being replaced or complemented by new, usually more flexible insights. Today, State sovereignty is becoming increasingly qualified, partly due to a significant trend towards international economic co-operation. Perceptions of the role of the State and foreign investment in economic development are changing rapidly. Self-determination of peoples, including indigenous peoples, outside a colonial context, is being highlighted, both as a human right and as a principle of international law concerning friendly relations between States in accordance with the UN Charter. This necessitates the interrelating of sovereignty and self-determination. Moreover, our earth is increasingly being seen as an interdependent entity and the ‘environmental pressure’ on it is widely recognized as a problem of global concern. Both States and peoples are identified as guardians of the environment. These challenges and trends influence the current interpretation and

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1 For an exception see de Waart (1977); see also Weiss (1990).
application of the principle of permanent sovereignty and are manifested in international law which emphasizes duties as well as rights.

The art of balancing rights and duties (ars aequi) is an inherent characteristic of nearly every legal system, including international law. States may be ‘sovereign’ and endowed with ‘sovereign rights’ and peoples may be entitled to ‘self-determination’, but this does not mean that either are above the law and inherently immune from duties. This subsequently raises the question of the scope of jurisdiction of States and peoples and which limitations or obligations arise from the rights which accrue to others, whether they are third States, peoples or humankind as such.

Exploring beyond the immediate text and interpretation of the PSNR resolutions and examining various branches of international law relevant to natural resource jurisdiction, this Part identifies and analyses, firstly, key legal rights and claims of States and people which emanate from the principle of permanent sovereignty over natural resources and assesses the extent to which they have become recognized in relevant sources of international law (Chapter 9). Secondly, and according to a similar scheme, Chapter 10 extensively considers the reverse side of the PSNR coin: duties. The hypothesis is that assertions and formulations of PSNR-inspired rights are often accompanied or followed up by the imposition of duties, thus seeking (to restore) a balance between the rights and interests of all parties involved and protecting the quality and diversity of the natural resource base, also for future generations. Thirdly, this Part provides conclusions by examining issues arising from the questions posed in Chapter 1. The final chapter will draw out the main points and conclusions based on the examination in this study of: (1) the origin, development and legal status of the principle of permanent sovereignty in current international law; (2) the impact of the various challenges to State sovereignty and of the changing perceptions of the role of the State in economic development on the current relevance and interpretation of permanent sovereignty; and (3) the new directions of permanent sovereignty in an interdependent world.

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9 Rights and Claims: Seeking Evidence of Recognition in International Law

1. The Grammar of Rights

For a long time the grammar of permanent sovereignty was a grammar of rights: the right to dispose freely of natural resources, the right to expropriate, the right to compensation for damages to natural resources caused by third States or enterprises, to mention just a few. The invocation of such rights often led to serious controversy between States, especially between Western and developing countries. Various attempts were made to formulate, in general terms, the relevant rules of international law in treaty law, for example in the 1948 Havana Charter, the 1965 ICSID Convention, the 1966 Human Rights Covenants, the 1967 OECD Draft Convention on the Protection of Foreign Property and the 1982 Law of the Sea Convention. In addition, efforts were made, in the context of both intergovernmental and professional bodies, to formulate ‘codes of conduct’, ‘declarations’ or ‘guidelines’.

Claims to and exercise of ‘sovereign’ rights have often been the subject of diplomatic protest and international litigation, occasionally before the International Court of Justice (such as the Anglo-Iranian Oil Company Case) but more often before international arbitration tribunals. Examples of the latter include the Libyan oil nationalization tribunals, ICSID tribunals and the Iran-US Claims Tribunal in The Hague. Finally, it goes without saying that heated debates and duels between...
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lawyers occurred and these have given rise to an abundant literature describing historic controversies in which the battlelines in this field have been drawn.

This chapter analyses key legal rights emanating from the set of PSNR-related UN resolutions referred to in Part I, and seeks to identify the extent to which they have become recognized in relevant sources of international law. Working from the text and meaning of the PSNR resolutions, the chapter undertakes an analytical search of evidence of recognition of these rights in:

a. relevant treaty law, particularly multilateral treaties in the fields of human rights, law of the sea, foreign investment, international trade, and the environment;

b. major trends in State practice, especially those arising from bilateral investment protection treaties;

c. decisions of international courts and tribunals as far as relevant to the interpretation and application of the principle of PSNR;

d. international instruments other than UN resolutions on foreign investment regulation, such as guidelines and codes of conduct;

e. the work of international law forums, such as the UN International Law Commission (ILC), the International Law Association (ILA) and the American Law Institute (ALI); and

f. international law literature.

Before taking up this task, it may be relevant to dwell for a moment on the notion of a ‘right’, which—according to the *Oxford Companion to Law*—is a ‘much ill-used and over-used word’. In Greek philosophy, Roman law and in the work of theologians such as Thomas Aquinas, the word ‘right’ (*jus*) primarily meant that which was ‘right’ and ‘just’, ‘fair’ or ‘that which is fair’. In modern law a distinction is often made between ‘moral’ rights, arising from principles of morality or natural justice, and ‘legal’ rights, recognized (and protected) by rules of law. Legal rights generally denote benefits conferred on its holder and the ability to enforce the correlative duties of another subject, although sometimes—especially in international law—there is a lack of correspondence between rights of one subject and duties of another. A further distinction is between ‘positive’ and ‘negative’ rights. The former are associated with claims of a holder to a cer-

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2 It should be put on record that extensive excursion through these sources of law was greatly facilitated and guided by: Bernhardt (1981, Instalment 2); Higgins (1983); Dixon and McCorquodale (1991); The World Bank Group (1992), Volume I; Chapters 5 and 6 of Makarzyk (1988); Brower (1993) and Mouri (1994).

3 See Appendix III.

tain performance (act or acquiescence) of another subject, while the latter imply
that one’s rights are respected and not infringed or violated.\(^5\) There may also be
claims which fall short of rights but which nonetheless are legally relevant.\(^6\) Examples in kind include the entitlement of developing countries to receive de-
velopment aid from industrialized countries or to receive ‘remunerative’ or ‘fair
and just’ prices for their exported raw materials, as often stated in UN and in
particular UNCTAD resolutions. The implementability of such claims basically
depends on the goodwill and fulfilment of a political commitment accepted by
another subject. In this chapter we will seek evidence of recognition in interna-
tional law of rights and claims (to be) derived from the principle of PSNR.

2. The Right to Dispose Freely of Natural Resources

One of the basic tenets of PSNR is no doubt the ‘sovereign’\(^7\) right of a State or
a (colonial) people to dispose freely of its natural resources and wealth within the
limits of national jurisdiction.\(^8\) This is clearly reflected in virtually all PSNR-
related resolutions.

As far as treaty law is concerned, it is most explicitly recognized in Article 1
of the 1966 Human Rights Covenants (‘All peoples may, for their own ends,
freely dispose of their natural wealth and resources’) and Article 21 of the 1981

\(^5\) Finnis, building on the work of the American jurist Hohfeld (Hohfeld (1919)) distinguishes
between a ‘claim-right’ and a ‘liberty’. For example, A has a claim-right that B should
perform in a certain way (A claims, B must); and B has a liberty (relative to A) to act, if,
and only if, A has no-claim-right (‘a no-right’ or inability) that B should act in a certain

\(^6\) Here one may also use the term ‘legitimate expectation’ or ‘entitlement’. Verwey, who
defines such an ‘expectation’ as ‘entitlement whose implementability is not guaranteed by
a corresponding obligation to the extent necessary to render it a subjective right’ or—as he
puts it more loosely—’the kind of legally “grey zone” commitment, which is more than an
offer without engagement but less than a legal obligation (or duty)’. See Verwey (1984:
548). See also Professor Amartya Sen’s theory of ‘entitlements’ and ‘metarights’, referred

\(^7\) This qualification is used in GA Res. 523 (VI), 626 (VII) and 3175 (XXVIII), and
UNCTAD I, General Principle 3, UNCTAD Res. 46 (III) and TDB Res. 88 (XII).

\(^8\) This right to dispose freely of natural resources is closely related to the principle that every
State has the right to adopt the social and economic system which it deems most favourable
to its development. This is recognized in many UN resolutions, including the 1970 Declara-
tion on Principles of International Law (‘Every State has an inalienable right to choose its
political, economic, social and cultural systems, without interference by another State’,
Principle III.4) and PSNR Resolution 3171 (XXVIII) which reaffirms this as an ‘inviolable
principle’ (preamb. para. 3).
African Charter on Human and Peoples’ Rights (‘All peoples shall freely dispose of their wealth and natural resources’). The 1994 European Energy Charter Treaty recognizes State sovereignty and sovereign rights over energy resources and provides that the treaty ‘shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources.’ The treaty specifies that each State continues to hold the right to decide which geographical areas within its territory are to be made available for exploration and development of energy resources. The right freely to dispose of natural resources is also recognized in decisions of arbitration tribunals. For example, in the Texaco Award (1977) dealing with Libyan oil nationalization measures it is pointed out:

Territorial sovereignty confers upon the State an exclusive competence to organize as it wishes the economic structures of its territory and to introduce therein any reforms which may seem to be desirable to it. It is an essential prerogative of sovereignty for the constitutionally authorized authorities of the State to choose and build freely an economic and social system. International law recognizes that a State has this prerogative just as it has the prerogative to determine freely its political regime and its constitutional institutions.

In the Liamco Case (1977) a similar view was expressed when the sole arbitrator Mahmassani observed that Resolution 1803 (XVII) recommended respect for States’ sovereign right to dispose of their wealth and natural resources and concluded that ‘the said Resolutions, if not a unanimous source of law, are evidence of the recent dominant trend of international opinion concerning the sovereign right of States over their natural resources’. The Aminoil Award (1982) notes that many constitutions provide that all natural resources are the property of the State.

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9 Art. 21.1. In addition, Article 21.3 of the African Charter provides: ‘States parties . . . shall individually and collectively exercise the right to free disposal of their wealth and resources’.


13 *Kuwait v. Aminoil*, reprinted in 21 ILM (1982), pp. 976–1053. The Kuwaiti Constitution provides ‘All of the natural wealth and resources are the property of the State’ (Art. 21) and ‘Any concession for the exploitation of a natural resource or of a public utility shall be granted only by law and for a determinate period.’ (Art. 152).
Arbitral procedures and academic analyses have stimulated considerable debate on the question to what extent States have the right to dispose of natural resources within their territories by entering into contracts with other subjects, and to what extent States retain a right to terminate or change contractual arrangements with foreign investors; in other words, what is the meaning and what are the implications of the adjectives ‘permanent’, 14 ‘inalienable’, 15 and ‘full’ 16 before ‘sovereignty’.

The Texaco Award clearly indicates that the right of States to dispose of their natural resources includes the right to exercise their sovereignty by undertaking international commitments vis-à-vis other States and non-State partners, intergovernmental organizations or private foreign entities:

The State by entering into an international agreement with any partner whatsoever exercises its sovereignty whenever the State is not subject to duress and where the State has freely committed itself through an untainted consent. 17

For this purpose the sole arbitrator Dupuy introduced a distinction between ‘enjoyment’ and ‘exercise’ of sovereignty: in his view the notion of permanent sovereignty can be completely reconciled with the conclusion by a State of agreements which leave to the State control of the activities of the other contracting party within its territory. 18 To decide otherwise would be to consider any contract entered into between a State and a foreign private company to be contrary to the rule of jus cogens whenever it concerns the exploitation of natural resources. Similarly, the Liamco Award calls the right to conclude contracts ‘one of the primordial civil rights acknowledged since olden times’. 19 With respect to

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14 This adjective is used in nearly all PSNR resolutions, with the exception of GA Resolutions 523 (VI) and 626 (VII).

15 Reference to PSNR as an ‘inalienable right’ of States (and occasionally of peoples) is made in GA Resolutions 2158 (XXI), 3171 (XXVIII) and 3281 (XXIX).

16 See GA Res. 2386, 2626, 3171, 3201, 3281, 32/9, 3202–VIII/1a, 3336, 3517, 41/128 and ECOSOC Res. 1737 and 1956.


18 According to Dupuy a concessionary contract is not an alienation of such sovereignty, but only a limitation: “The State retains, within the areas which it has reserved, authority over the operation conducted by the concession holder and the continuance of the exercise of its sovereignty is manifested, for example, by the various obligations imposed on its contracting party”. Texaco v. Libya, 17 ILM (1978), p. 26, para. 77. The findings of Dupuy have been the object of extensive analyses, some highly critical; see, among others, Kooijmans (1981), Higgins (1983), Atsegbua (1993), Rigaux (1978) and Sterne (1980). See also Delaume (1991).

the Kuwaiti claim that permanent sovereignty over natural resources has become
an imperative rule of *jus cogens* prohibiting States from affording, by contract or
treaty, guarantees of any kind against the exercise of the public authority in re-
gard to all matters relating to natural riches, the *Aminoil* Tribunal straightforwardly concludes: “This contention lacks all foundation.”

According to Jiménez de Aréchaga, permanent sovereignty over natural re-
sources means that ‘the territorial State can *never* lose its legal capacity to
change the destination or the method of exploitation of those resources, *whatever*
arrangements have been made for their exploitation . . . ’. The inalienable and
permanent character may also mean that the right to dispose freely of natural
wealth and resources can always be regained, if necessary unilaterally, contrac-
tual obligations to the contrary notwithstanding. Seidl-Hohenveldern is of the
view that the word ‘permanent’ should be understood as indicating that the State
concerned ‘can avail itself of this sovereign right at any time’, but that it does
*not* entitle the State concerned ‘to disregard at its whim the earlier waiver or
transfer of such rights’. Many would agree that the purpose of expressing such
views is to emphasize that, as Abi-Saab puts it: ‘. . . sovereignty is the rule and
can be exercised at any time, that limitations are the exception and cannot be
permanent, but limited in scope and time.’

It is also widely recognized, however, that a State has considerable discretion
in the management of its natural resources and may accept obligations with re-
gard to the exercise of its PSNR by arrangements freely entered into, as long as
they do not amount to a transfer of its sovereign powers to a private party. The
question then arises where the discretion of a State reaches its limits, taking the
alleged ‘inalienable’ and ‘permanent’ nature of sovereignty into account. In view
of the fact that in a North-South context foreign investment agreements were of-
ten perceived—as Nigeria put it during the debate on GA Resolution 1803
(XVII)—as ‘agreements between a lion and a rabbit’, the stipulation that such
agreements be ‘freely entered into’ seems to be an important yardstick under-
lining the right of States to dispose freely of their natural resources.

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20 *Kuwait v. Aminoil Award*, 21 (ILM) 1982, p. 1021, para. 90 sub (2).
26 Para. 8 of the 1962 Declaration on PSNR.
During recent years attempts have been made to resolve the controversy regarding the alleged inalienability of PSNR by a more precise analysis of how it works in practice. The arbitral awards referred to above and the work of, among others, the ILA have been instrumental in this. The ILA included the following paragraph in its 1986 Seoul Declaration: ‘Permanent sovereignty . . . is inalienable. A State may, however, accept obligations with regard to the exercise of such sovereignty, by treaty or by contract, freely entered into.’\(^{27}\) It follows that, in each particular case, verification should occur as to whether the act would in fact alienate the sovereignty of a State over its natural resources. This would also include verification in the case of changed circumstances. As Chowdhury suggested:\(^{28}\)

\[\ldots\] the principle could be similarly invoked in cases where due to changed circumstances an agreement may be regarded as having become so onerous or disadvantageous to a State as to amount to a derogation of the sovereignty of that State. The State could not be expected to allow such arrangements which were manifestly against the interests of its people.

In conclusion, it may fairly be stated that it is now commonly accepted that the principle of PSNR precludes a State from derogating from the essence of the exercise of its sovereign rights over its natural resources or—as Dupuy puts it—‘alienating’ its sovereignty over them, but that a State may by agreement freely entered into accept a partial limitation of the exercise of its sovereignty in respect of certain resources in particular areas for a specified and limited period of time.\(^ {29}\)

3. The Right to Explore and Exploit Natural Resources Freely

Obviously, the right of free disposal of natural resources and wealth is the seminal source of a series of corollary rights of the State, including the right freely to determine and control the prospecting, exploration, development, exploitation, use and marketing of natural resources and to subject such activities to national laws and regulations within the limits of its exclusive economic jurisdiction under prevailing international law. All these rights (of States, nations and peoples) are specifically mentioned in UN resolutions, particularly in GA Resolutions 626, 1803, 2158 and 3171. States are said to have the right ‘freely to use and ex-

\(^{27}\) Seoul Declaration, Principle 5.2.

\(^{28}\) Chowdhury (1988: 64).

\(^{29}\) See also the findings of the Tribunal in the Aminoil Case, 21 ILM (1982), p. 1021, para. 90 sub (2), and Chapter 11, section 1.3 of this study.
Right to exploit and exercise effective control over them and their exploitation; countries and nations the right ‘freely to dispose’/‘determine the use of’, and peoples the right ‘freely to use and exploit’ their natural wealth and resources. GA Resolution 2158 (XXI) includes the right of developing countries to ‘effectively exercise their choice in deciding the manner in which the exploitation of their natural resources should be carried out’. These rights were formulated by developing countries with the aim of securing effective control over their natural resources and to maximize the benefits arising from their exploitation.

As far as treaty law is concerned, these rights are referred to most emphatically in the law of the sea treaties. The 1958 Convention on the Continental Shelf provides that the coastal State exercises over the continental shelf ‘sovereign rights for the purpose of exploring it and exploiting its natural resources’ and adds that these rights ‘are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.’ This phrase has been repeated literally in Article 77.1 of the 1982 Convention on the Law of the Sea. Article 56.1(a) on the Exclusive Economic Zone contains a more elaborate provision, declaring that in the EEZ the coastal State has:

... sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.

The Human Rights Covenants of 1966 formulate the ‘inherent right of peoples to enjoy and utilize fully and freely their natural wealth and resources’. In Article IV of the Treaty for Amazonian Co-operation (1978), the Contracting Parties declare that ‘the exclusive use and utilization of natural resources within

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30 GA Res. 626 (VII), 21 December 1952.
31 Para. 4(e) of the NIEO Declaration, GA Res. 3201 (S-VI, 1974).
32 GA Res. 523 (VI) and 1803 (XVII); UNCTAD I, General Principle 3 (1964); UNCTAD Res. 46 (III, 1972); and TDB Res. 88 (XII, 1972).
33 GA Res. 626 (VII), 3rd preamb. para.
34 Paragraph 4(e) of the NIEO Declaration articulates it as follows: ‘In order to safeguard these resources . . .’.
35 Art. 2.1 and Art. 2.3, respectively.
36 International Covenant on Civil and Political Rights, Art. 25; International Covenant on Economic, Social and Cultural Rights, Art. 47. See also Chapter 2, section 4.
their respective territories is a right inherent in the sovereignty of each State'. 37

The 1994 European Energy Charter Treaty recognizes sovereign rights of States Parties over energy resources, in particular the rights to determine in which areas of their territories exploration and development of energy resources can take place and at which rate, and to participate in such exploration and exploitation, *inter alia*, through direct participation by the government or through State enterprises. 38

In the *Fisheries Jurisdiction Cases* (1974), the ICJ recognizes that under customary international law, as it had crystallized after the 1958 and 1960 Conferences on the Law of the Sea, a coastal State has the right to establish a 12-mile exclusive fishery zone and preferential rights of fishing in adjacent waters ‘to the extent of the special dependence of its people upon the fisheries in the seas around its coasts for their livelihood and economic development’. 39

Various arbitral awards have recognized the increased role of States in the management and exploitation of natural resources. For example, the Tribunal in the *Aminoil Case*, which had been instructed to have ‘due regard to . . . the principles of law and practice prevailing in the modern world’, noted the ‘profound and general transformation in the terms of oil concessions that occurred in the Middle East, and later throughout the world’ by which ‘the State thus became, in fact if not in law, an associate whose interests had become predominant’. Consequently, it considered the Kuwaiti decision to terminate Aminoil’s concession for exploration and exploitation of petroleum and natural gas in itself lawful in order to enable Kuwait ‘to take over full ownership of its oil resources and put them under national management’. 40 In the international law literature no one is casting any doubt on this corollary right.

37 Text in 17 *ILM* (1978), p. 1045. See also the preamble and section II on Environmental Policy in the Declaration of San Francisco de Quito (1989) of the Ministers of Foreign Affairs of the parties to the Treaty of Amazonian Co-operation, and paragraph 4 of The Amazon Declaration (1989) in which the Presidents of the States Parties to the Treaty for Amazonian Co-operation ‘reaffirm the sovereign right of each country to manage freely its natural resources’, while referring to their ‘sovereign responsibilities to define the best ways of using and conserving this wealth’.

38 Art. 18.3 of the EECT.

39 *ICJ Reports* 1974, Merits, p. 34, para. 79. See also p. 23, para. 55.

40 *Kuwait v. Aminoil*, 21 *ILM* 1982, pp. 1019–27, paras 97–114. The Tribunal considered the Nationalization Decree as ‘a necessary protective measure in respect of essential national interests which it [i.e., the Kuwaiti Government] was bound to safeguard’ (p. 1027, para. 114).
In conclusion, there is general agreement about the thesis that the right freely to explore and exploit natural resources is one of the core rights derived from the principle of PSNR.

4. The Right to Regain Effective Control and to Compensation for Damage

As discussed in Chapter 5, since 1972 a series of UN resolutions have stated that PSNR is also valid for peoples and territories under alien occupation, foreign domination or apartheid. This was the *leitmotiv* for the UN Council for Namibia in drawing up Decree No. 1 for the Protection of the Natural Resources of Namibia (1974) and for the General Assembly in adopting resolutions pertaining to the rights of the Palestinian and Arab peoples in territories occupied by Israel.\(^{41}\) Likewise, paragraph 4(f) of the NIEO Declaration provides that the NIEO should be founded, among other things, on respect for the following principle:

> All States, territories and peoples under foreign occupation, alien and colonial domination or apartheid have the right to restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those States, territories and peoples.\(^{42}\)

These and other efforts attempted to vest the right to permanent sovereignty over natural wealth and resources in peoples of occupied States and Non-Self Governing Territories and to ensure that even those who could not yet or no longer exercise their right of sovereignty over these resources should still be entitled to claim ownership over them. Reference may also be made to Security Council Resolution 687 (1991), which embodies the comprehensive peace package imposed on Iraq after the Gulf War in 1990–91 and which:

> reaffirms that Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and depletion of natural resources . . . as a result of Iraq’s unlawful invasion and occupation of Kuwait.\(^{43}\)

Such a resolution could be interpreted as an effort to protect the natural resources of States and peoples in times of armed conflict, and brings it within the purview of concerns of peace and security.\(^{44}\) The most important general reflection of

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\(^{41}\) In more general terms, Resolutions 3175, 3201, 3281 and 3336 address this issue.

\(^{42}\) Article 16.1 of the CERDS and paragraph 33 of the Lima Declaration (UNIDO II, 1975) express this in similar terms.

\(^{43}\) *UN Doc.* S/RES/687, 3 April 1991, para. 16.

\(^{44}\) Schrijver (1994c).
this type of claim in treaty law may be found in the 1966 Human Rights Covenants: ‘In no case may a people be deprived of its own means of subsistence.’

With respect to permanent sovereignty over ‘national’ resources in the territories occupied by Israel, both the Security Council and the General Assembly have recognized the applicability of the law of belligerent occupation in general and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War in particular. A basic rule of the law of belligerent occupation is that rights of sovereignty do not pass to the occupier but stay in place. This and other basic rules are codified in, among other documents, the Regulations respecting the Laws and Customs of War on Land, annexed to the Hague Convention No. IV of 1907, adopted at the second Hague Peace Conference. They include rules with respect to property. Movable property, belonging to the occupied State and which may be used for military operations, may be taken. With respect to immovable property it is provided in Article 55 of The Hague Regulations that:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.

The concept of ‘usufruct’ of a property emphasizes that the occupying State may not own but only use it, subject to the requirement that the occupying State ‘must safeguard the capital of these properties’. While usufruct of renewable resources may give no rise to particular problems, its application to non-renewable resources such as minerals is controversial. For example, the applicability of this article to the question of land and other natural resources in territories occupied by Israel was the subject of intensive discussion, especially regarding

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45 Art. 1.2. See also Art. 25 and Art. 47 of the two Covenants, respectively.

46 As a general rule, private property cannot be confiscated and requisitions may only be made for the needs of the army of occupation. For example, the Supreme Court of Israel has reportedly held that the requisitioning of private land in the occupied territories for the establishment of settlements not required for security reasons was contrary to Article 52 of the Hague Regulations. See Blaine Sloan, ‘Study of the implications, under international law, of the United Nations resolutions on permanent sovereignty over natural resources on the occupied Palestinian and other Arab territories and on the obligations of Israel concerning its conduct in these territories’, reproduced in UN Doc. A/38/265, 21 June 1983, p. 13.

47 In addition, Article 147 of the Fourth Geneva Convention provides that ‘grave breaches’ of the Convention, if committed against persons or property protected by the Convention, include ‘extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’.
Israel’s exploration for and production of oil in the Sinai and the Suez area. Some argued that the extraction of minerals was a depletion of capital, if not spoliation of natural resources. Others argued that Article 55 only prohibits wanton dissipation or destruction or abusive exploitation of public resources.

With reference to the interpretation rule of Article 31 of the Vienna Convention on the Law of Treaties (interpretation in accordance with ‘the ordinary meaning of the terms’), Sloan concludes that to ‘safeguard the capital’ any exploitation of mineral resources should be prohibited. He also takes the view that the law of belligerent occupation gives some support to the principle of PSNR, while the principle of PSNR enhances and reinforces the law of belligerent occupation with respect to natural resources in occupied territories. Yet, in practice, difficult questions can still arise. For example, the use of sand, water and building materials by the occupying powers is probably not wrongful, especially if it is used in the interests of the inhabitants of the area itself. Would this by definition be different for the use of oil and gas? If these are used for trading rather than for domestic use, this obviously would be a different matter. It can fairly be stated that under international law a breach of the obligations of an occupying State with respect to natural resources in occupied territories involves a duty to make reparation. Compensation should be paid anyhow by the occupying State to the legitimate Government, whether or not the act is regarded as wrongful in international law. The obligation to make reparation is reinforced by that element of the principle of PSNR calling for restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources of territories and peoples under foreign occupation.

The legal instruments referred to in this section and the main trend in literature emphasize the right of peoples of occupied States and Non-Self Governing Territories to regaining effective control and to restitution of natural resources and compensation for damage inflicted by third States or enterprises. The right to restitutio in integrum or equivalent compensation, financially or otherwise, is a principle applicable to both the law of belligerent occupation and to the law of permanent sovereignty where the rights of States and peoples have been violated. Both of them have as an important objective the protection of sovereign rights to


50 Ibid., p. 21, para. 52.
land and natural resources in occupied territories and to reserve the benefits from their exploitation for the legitimate holders of these rights.

5. The Right to Use Natural Resources for National Development

The rights freely to dispose of and to exploit natural resources are closely related to the right of States and peoples to use natural resources for their development plans which regularly recurs in UN resolutions. For example: GA Resolution 626 (VII) stipulates that States may exercise their right freely to use and exploit their natural wealth and resources ‘wherever deemed desirable by them for their own progress and economic development’; Resolution 1803 (XVII) refers in this connection to ‘the interest of . . . national development and of the well-being of the people of the State concerned’ and emphasizes that economic (including investment) agreements ‘shall be such as to further their [i.e. “the developing countries”] independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources’ (emphasis added); the Namibia Decree and the UNGA resolutions on permanent sovereignty over national resources in territories occupied by Israel obviously purport to reserve the use of natural resources for the benefit of the Namibian and of the Palestinian and other Arab peoples, respectively; and, finally, Article 7 of CERDS provides that ‘each State has the right and the responsibility . . . fully to mobilize and use its resources’ in order ‘to promote the economic . . . development of its people’.

Resolution 2158 (XXI) was the first to link up the right to PSNR with claims of developing countries to obtain a larger share in the processing, marketing and distribution of natural resources.51 This claim is also included in the NIEO resolutions, albeit not always in PSNR-related paragraphs but in those claiming a right to attain ‘just’ and ‘stable, equitable and remunerative’ prices52 and a right to concert pricing policies, co-ordinate production policies and to assemble in

51 The General Assembly recognizes in this resolution that ‘the natural resources of the developing countries constitute a basis of their economic development in general and of their industrial progress in particular’, that ‘it is essential that their exploitation and marketing should be aimed at securing the highest possible rate of growth of the developing countries’, and that ‘this aim can better be achieved if the developing countries are in a position to undertake themselves the exploitation and marketing of their natural resources’. Resolution 3171 (XXVIII) and ECOSOC Resolution 1737 (LIV, 1973) specify that a ‘better utilization and use of natural resources must cover all stages, from exploration to marketing’.

52 See also Schachter (1975).
producers’ associations. Lastly, it is relevant to recall that in Principle 2 of the 1992 Rio Declaration the words ‘and developmental’ were added to the well-known Stockholm Principle 21 formula. The added words express the conviction of developing countries that environmental policies cannot override their developmental policies, especially not their exploitation of natural resources.

In treaty law there is no immediate, explicit recognition of the right of States to use and exploit their natural resources for their own economic and developmental policies. The 1992 Climate Change Convention is one of the few multilateral treaties which include an explicit reference to ‘the sovereign right to exploit their own resources pursuant to their own . . . developmental policies’. One of the objectives of the 1994 European Energy Charter Treaty is to assist the Commonwealth of Independent States (CIS) and the countries of central and eastern Europe to develop their energy potential and to catalyse economic growth. In addition, the PSNR-related articles of the State succession treaties of 1978 and 1983 implicitly intend to reserve the benefits of the exploitation of natural resources for the peoples of newly-independent States. Similarly, a major leitmotiv in initiating the drafting of a new convention on the law of the sea during the early 1970s was the need to reserve natural resources in sea areas, within the limits of a substantially extended economic jurisdiction, for promoting coastal (developing) States’ development.

The developing countries’ efforts to give legal expression to their claim to have a larger share in the processing, marketing and distribution of their natural resources, as part of their effort to use their natural resources as a base of development, are evident in other areas of international economic law as well. This is exemplified by the Convention on a Code of Conduct of Liner Conferences (1974). The Convention aims to increase the share of developing countries in the transportation of world freight up to 40 per cent. The Lomé IV Convention (1989), the framework for international development co-operation between the European Community and African, Caribbean and Pacific States, includes amongst its objectives:

53 Cf. GA Res. 3171 (XXVIII), oper. para. 7 and Art. 5 CERDS.
54 See Chapter 4.
55 See Chapter 7. See also the preambular paragraph of the 1982 Convention, where the States Parties, with due regard for the sovereignty of all States, refer to the objective to ‘promote the equitable and efficient utilization of their resources’.
56 Text in 13 ILM (1974), pp. 917–47. It should be noted that exports by liner consist largely of packaged and (semi-) processed goods and raw materials in small quantities only. Most raw materials are shipped by bulk carriers which are time- or voyage-chartered.
to contribute to optimal and judicious exploration, conservation, processing, transformation and exploitation of the ACP States’ natural resources in order to enhance the efforts of ACP States to industrialize and to achieve economic diversification.\(^{58}\)

In addition, various commodity agreements are intended to stabilize and, if possible, increase commodity prices, while also raising the share of commodity-exporting countries in the processing, marketing and distribution phases.\(^{59}\)

In the 1947 GATT text only one clause was included on commodity trade regulation, in the article dealing with ‘exceptions’. Under Article XX, sub (h) measures undertaken in pursuance of obligations under any intergovernmental commodity agreement may, under exceptional circumstances, deviate from the Most-Favoured-Nation standard and other GATT requirements for trade liberalization. GATT Article XVIII, entitled ‘Governmental Assistance to Economic Development’, is a forerunner of the application of the emerging principle of preferential treatment and economic protection of developing countries.\(^{60}\) It provides ‘those contracting parties the economies of which can only support low standards of living and are in the early stages of development’ with the opportunity, under specific circumstances, to protect their infant industries and other ‘production structures’.\(^{61}\) In 1965, a new chapter was added to GATT entitled ‘Trade and Development’. Obviously inspired if not provoked by UNCTAD I (1964), it is acknowledged in Part IV that there is a need to provide ‘a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development’. Part IV expresses a strong awareness of the dependence of many developing countries on commodity exports and calls for ‘more acceptable conditions of access to world markets for these products’ and ‘measures designed to attain stable, equitable and remunerative prices’.\(^{62}\) This development-based approach to international commodity reg-

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\(^{58}\) Art. 220 (f). See also Art. 198.1.

\(^{59}\) For an analysis see Chimni (1987) and Khan (1982).


\(^{61}\) Sections A and C. Section B is intended to safeguard their development programmes by allowing measures aimed at maintaining or acquiring adequate levels of monetary reserves. With respect to tariff negotiations, this has been exemplified in Article XXVIII bis, especially paragraph 3 (b) which inter alia provides ‘adequate opportunity to take into account the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of those countries to maintain tariffs for revenue purposes’.

\(^{62}\) Art. XXXVI of the GATT, as amended in 1965. In the subsequent Articles XXXVII and XXXVIII the Contracting Parties committed themselves to take individual and joint action towards these objectives, albeit not in the form of hard-core binding obligations but in
ulation was further elaborated in the 1976 Integrated Programme for Commodities (IPC), adopted by UNCTAD IV, and in the Agreement Establishing the Common Fund for Commodities.

As far as arbitral decisions are concerned, the progressive recognition of the right of States to use their natural resources for their own development may be illustrated by comparing the 1958 *Aramco Arbitration* and the 1982 *Aminoil Arbitration*. The issue at stake in the former was the interpretation of a concession agreement of 1933, by which Aramco had acquired from Saudi Arabia ‘the exclusive right, for a period of sixty years . . . , to explore, prospect, drill for, extract, treat, manufacture, deal with, carry away and export petroleum . . .’. When, in 1954, Saudi Arabia concluded an agreement with shipowner Onassis for the transport of all oil produced in Saudi Arabia, Aramco challenged this agreement. An arbitration tribunal was set up, which found that Saudi Arabia had infringed upon Aramco’s rights under the 1933 agreement: ‘. . . the rights and obligations of the concessionary company are in the nature of acquired rights and cannot be modified without the Company’s consent’. In contrast, the *Aminoil* terms of ‘shall to the fullest extent possible’ and ‘accord high priority’. In 1994 these texts were maintained. According to Article XIV.1 of the Agreement Establishing the World Trade Organization (WTO) all previous GATT Agreements shall apply to the WTO Agreement as well as some thirty new Uruguay Round Agreements annexed to it. This is referred to as the ‘single agreement approach’ or the ‘single undertaking approach’. See also the First Report of the Committee on International Trade Law of the International Law Association, *Report of the Buenos Aires Conference* (1994).

63 UNCTAD Res. 93 (IV), 30 May 1976.

64 Text in 19 *ILM* (1980), pp. 896–937. The Common Fund, with headquarters in Amsterdam, has three main functions:
1. to contribute, through its First Account, to the financing of international buffer stocks;
2. to finance, through its Second Account, diversification of production in developing countries and to expand processing, marketing and distribution of primary products by developing countries with a view to promoting their industrialization and increasing their export earnings;
3. to promote co-ordination and consultation with regard to measures in the field of commodities.

The Agreement entered into force on 19 June 1989 after ratification by 90 States which together had subscribed to two-thirds of the obligatory contributions and contributed 50 per cent of the envisaged voluntary contributions. See for an insider’s account Megzari (1989: 205–30).

65 The Tribunal pointed out: ‘Nothing can prevent a State in the exercise of its sovereignty, from binding itself irrevocably by the provision of a concession and from granting to the concessionaire irrevocable rights’ (text in 27 *ILR* 1963: 117–233, on 168). One arbitrator, Mr Hassan from Egypt, filed a dissenting opinion. In his view, the exclusive rights granted
Award acknowledged the transformations in the oil concession regimes in many developing countries and throughout the world⁶⁶ and the tendency of States to take a major role in the management of their natural resources in order to secure more benefits:

This concession—in its origin a mining concession granted by a State whose institutions were still incomplete and directed to narrow patrimonial ends—became one of the essential instruments in the economic and social progress of a national community in full process of development. This transformation, progressively achieved, took place at first by means of successive levies going to the State, and then through the growing influence of the State in the economic and technical management of the undertaking . . . and the regulation of works and investment programmes. The contract of Concession thus changed its character and became one of those contracts in regard to which, in most legal systems, the State, while remaining bound to respect the contractual equilibrium, enjoys special advantages . . .

In summary, the emergence of the principle of PSNR is closely linked to the cause of promoting development of developing countries and protecting the right of peoples which are as yet unable to exercise their right to political self-determination. In treaty law, arbitral decisions and the literature there is recognition of the right of States and peoples to use their natural resources in order to promote their national development.

6. The Right to Manage Natural Resources Pursuant to National Environmental Policy

During the early 1970s, especially at and after the Stockholm Conference, a debate took place on how to balance PSNR with a State’s responsibility to preserve the environment. While some duties and responsibilities with respect to the latter were formulated (see Chapter Ten), it was consistently acknowledged that every State had the right to pursue its own environmental policies. This is clearly

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States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

In treaty law this is most explicitly spelled out in Article 193 of the 1982 UN Convention on the Law of the Sea:

States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

Several other multilateral conventions refer to or repeat the substance of Principle 21, including the Ozone Layer Convention (1985), the Climate Change and Biodiversity Conventions (1992), and the Desertification Convention (1994). The UNESCO World Cultural and Natural Heritage Convention (1972) contains a general reference to sovereignty of States over their natural heritage. Article 19.3 of the European Energy Charter Treaty contains slightly different terms where it provides for the right of each State ‘to regulate the resource conservation and the environmental and safety aspects’ of the exploration and development of energy resources. In view of their traditional emphasis on such principles as sovereignty and non-interference, it is no surprise that, among the (inter-)regional documents, Latin American conventions and declarations include the most explicit references to the right of States freely to manage their natural resources pursuant to their own environmental policies. Other regional conventions, such as the African Convention on the Conservation of Nature and Natural Resources (1968), the Convention on the Conservation of European Wildlife and Natural Habitats (1979) and the ASEAN Agreement on the Conservation of Nature and Natural Resources (1985), are less assertive in this respect. However, the ECE Convention on Long-Range Transboundary Air Pollution (1979) does embody a reference to Principle 21 of the Stockholm Declaration.

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67 See Chapter 4 for a discussion and comparison of the Stockholm and Rio Declarations.
68 Art. 6.1. It is notable that such a phrase is not included in the Wetlands Convention (1971) and CITES (1973).
69 Examples include the Treaty for Amazonian Co-operation (1978), the Declaration of San Francisco de Quito (1989) and the Amazon Declaration (1989). Text in Hohmann (1992a: 1564 et seq.).
70 See preamb. para. 5.
The 1992 summit meeting of the Non-Aligned Movement reaffirmed the sovereign right of all States to use their natural resources pursuant to their own environmental policies. It was added that, therefore, industrialized countries and international institutions 'should not use environmental considerations as an excuse for interference in the internal affairs of the developing countries or to impose conditionalities in aid, trade or development or development financing.'

The right of States to conserve and manage natural resources pursuant to their own environmental policies undoubtedly is an important element of PSNR. Modern international (environmental) law also imposes, however, corollary duties and responsibilities on States which qualify this right. These will be discussed in Chapter 10.

7. The Right to an Equitable Share in Benefits of Transboundary Natural Resources

The sharing of transboundary natural resources constitutes a major bone of contention among many States. Only a few UN resolutions address the concept of shared natural resources, among them CERDS which provides in Article 3:

In the exploitation of natural resources shared by two or more countries, each State must cooperate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.

It can be inferred from this that a State has a right to be informed and consulted by neighbouring States, should the latter consider projects involving the use of natural resources of a transboundary character. In addition, some texts provide for equitable utilization of transboundary resources. For example, the Action Plan adopted by the UN Water Conference in Mar del Plata (Argentina, 1977) included the following recommendation:

In relation to the use, management and development of shared water resources, national policies should take into consideration the right of each State . . . to equitably utilize such resources.

These rights are also emphasized in the UNEP 'Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and

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72 See Chapter 4, section 6.

Harmonious Utilization of Natural Resources Shared by Two or More States’, 74 which the General Assembly requested States to use as ‘principles and guidelines in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States’. 75

The new law of the sea, in particular international fisheries law, provides for a series of arrangements on equitable utilization and shared responsibilities for the proper management of transboundary fish stocks with a view to achieving a maximum sustainable yield and equitable utilization. 76 Article 83.3 of the 1982 Law of the Sea Convention provides that, pending agreement on delimitation of the EEZ and the continental shelf, the States concerned must make every effort to enter into provisional arrangements of a practical nature and not to jeopardize or hamper the reaching of the final delimitation. International joint development, that is the common exercise of sovereign rights by two or more States for the purpose of exploration and exploitation of the natural resources in an agreed area, is one such provisional arrangement.77 Sharing of resources can also relate to resource deposits which lie across limits of national jurisdiction and thus are partly subject to the principle of the common heritage of humankind and partly to the natural resource sovereignty of the coastal State concerned. Article 142 of the Law of the Sea Convention provides that activities in the Area shall be conducted with due regard to the rights and legitimate interests of such coastal States. Similarly, international nature conservation agreements include provisions relating to management of shared resources. Examples in kind include the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals and the 1985 ASEAN Nature Agreement, which stipulates that resource-sharing Parties co-operate concerning their conservation and ‘harmonious utilization’.78

Lastly, reference may be made to the 1994 UN Convention on Desertification which provides for ‘agreed joint programmes for the sustainable management of transboundary natural resources’ as one of the forms of co-operation to combat desertification and mitigate the effects of drought. 79

There is an extensive body of case law of the ICJ and arbitration tribunals, especially but not exclusively in the field of the law of the sea, with respect to the

74 UNEP GC Dec. No. 14 (VI), 19 May 1978, adopted by consensus. For a brief discussion and appraisal, see Chapter 4, section 6.3.
75 UN Doc. A/RES/34/186, 18 December 1979.
76 See Hey (1989).
concept of ‘equitable utilization’ of shared resources and equitable principles applicable to maritime boundary delimitation.**80** Whereas in the *Norwegian Fisheries Case* (1951) the resolution of the resource dispute was effected merely by drawing boundaries, the Court emphasized over twenty years later in the *Icelandic Fisheries Jurisdiction Cases* (1974) that the concept of shared resources and common property fell outside the exclusive control of one State.**81**

The ILA Helsinki Rules (1966) refer to the right of States to ‘a reasonable and equitable share in the beneficial uses of the waters’.**82** Likewise, the Brundtland Group of Legal Experts holds that equitable utilization may be considered as a well-established principle of international law and included in its Draft Convention on Environmental Protection and Sustainable Development the following Article: ‘States shall use transboundary resources in a reasonable and equitable manner.’**83**

In recent years an increasing but still relatively small number of joint development schemes have been agreed to, either with respect to transboundary fishery resources or oil and gas fields.**84** An early example was the Rumaila oil field between Iraq and Kuwait, the unequal exploitation of which was invoked by Iraq as a *casus belli* in 1990. Gradually, States appear to be more prepared to enter into joint development and management arrangements of transboundary resources, often in the context of bilateral boundary agreements.**85** This is certainly a promising avenue of co-operation, avoiding delimitation conflicts and leading to an early exploitation of transboundary resources with shared benefits.

8. The Right to Regulate Foreign Investment

This section discusses some key rights, emerging from PSNR resolutions, with respect to foreign investment regulation. They include: the right to regulate for-
eign investment in general; the right to regulate admission of foreign investment; and the right to exercise authority over foreign investment.86

8.1 The Right to Regulate Foreign Investment in General

The principle of PSNR epitomizes the sovereign right of a host State to regulate and control the activities of foreign investors. This includes prescriptive jurisdiction of the legislature, the executive and the judiciary. It has as its corollaries the obligation of the foreign investor to comply with such rules and regulations and to conform with the economic and social policies of the host State; and the obligation of the home State of the foreign investor to refrain from measures and policies which infringe on the PSNR of the host State or otherwise cause substantial injury to it. These topics were at the heart of the ICC Guidelines for International Investments (1972), the OECD Declaration and Guidelines for Multinational Enterprises (1976), and the Draft UN Code of Conduct on TNCs (1990). As a matter of course, such rights and obligations are subject to the requirements of other principles and rules of international law, including the principles of good faith, *pacta sunt servanda* and non-interference in the internal affairs of other States.87

GA Resolutions 1803 (XVII), 2158 (XXI) and 3281 (XXIX) are the most pertinent ones as far as regulation of foreign investment is concerned. They all affirm the right of States to regulate foreign investment according to their own objectives and development plans. Resolution 1803 declares that the use of natural resources as well as the import of foreign capital required for these purposes, ‘should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.’ However, it specifies that once a State authorizes the admission of foreign capital, the investment will be governed by the terms of the authorization, national legislation and international law, and that agreements freely entered into should be observed in good faith. In contrast, Resolution 2158 declares, in mandatory terms, that the exploitation of natural resources in each country ‘shall always be conducted in accordance with its national law and regulations’.88 Article 2 of CERDS emphasizes that ‘no State shall be compelled to grant preferential treatment to foreign investment’.89 The NIEO

86 Fox et al. (1989); Kwiatkowska (1993); Orrego Vicuña (1991).
87 These will be analysed in Chapter 10.
88 Para. 4 of GA Res. 2158 (XXI), 25 November 1966.
89 This clause was inserted at the instigation of Mexico (*UN Doc. A/C.2/L.1386 Corr.6, 5 December 1974*). Earlier Castañeda in his capacity as chairman of the CERDS Working Group had observed: ‘Some jurists and countries maintained, of course, that the “minimum-
Declaration provides that States, on the basis of their full sovereignty, should take measures in the interest of their national economies to regulate and supervise the activities of TNCs operating within their territory.90

As regards treaty law, the 1948 Havana Charter included an interesting article on the regulation of foreign investment.91 Among other things, it recognized that a State, in so far as other agreements would permit, had the right to take any appropriate safeguards necessary to: ensure that foreign investment was not used as a basis for interference in its internal affairs or national policies; determine whether and to what extent and upon what terms it would allow future foreign investment; and prescribe and on just terms give effect to requirements as to the ownership of existing and future investments and to other reasonable requirements with respect to such investments.

Although cast in general terms, the International Covenant on Economic, Social and Cultural Rights (1966) could be interpreted to imply that, under certain conditions, developing countries have a right to treat foreign investors differently than their own nationals where it provides that:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.92

The Lomé IV Convention refers to compliance with ‘the appropriate laws and regulations of their respective States’ and ‘the development programme’ of the ACP State concerned, and stipulates that investment protection arrangements do not ‘infringe the sovereignty of any Contracting State party to the Convention’.93 The 1987 ASEAN Investment Agreement provides for the right of host States to govern foreign investment.94 Similarly, the 1994 European Energy standard” concept existed in international law and that an alien could receive more favourable treatment than the nationals of a country. Naturally that was rejected by the developing countries, which invoked the principle of sovereign equality embodied in the Charter of the UN as being incompatible with preferential treatment of aliens.’ UN Doc. A/C.2/ SR.1638, 25 November 1974, p. 384.

90 Para. 4(g) of GA Res. 3201 (S-VII), 1 May 1974.
92 Art. 2.3. This may be relevant from the point of view of the modalities and practicalities of the right to expropriate and nationalize; see the next section.
93 Arts. 258.1(a), 259 (f) sub ii, and 261.4, respectively.
Charter Treaty provides for the right to regulate foreign investment, subject to the undertakings in this treaty and to other rules of international law.95

Especially relevant is the large body of bilateral investment protection and promotion treaties (BITs), as mentioned in Chapter 5. These treaties purport to encourage and protect foreign investment by laying down rules, *inter alia*, on fair treatment, most-favoured nation and national treatment, expropriation and compensation, the right of investors to repatriate capital and revenues, and dispute settlement. A large majority of both industrialized and developing countries are party to such BITs, of which there are now more than 700.96

Regarding non-binding multilateral instruments other than UN resolutions, it is relevant to refer to the 1976 OECD Guidelines which provide that every State has the right to prescribe the conditions under which transnational enterprises operate within its national jurisdiction, subject to international law and to the international agreements to which it subscribes. This is also reflected in the 1986 Seoul Declaration of the ILA and the 1992 World Bank Guidelines, although the latter focus on promoting foreign investment rather than on host States regulating it.

All instruments referred to above presume, in one way or another, that host States have a general right to regulate foreign investment and to subject those operating within their territories to local law. This right is, however, qualified by overriding provisions of international law incorporated in BITs and MITs and/or obligations arising from general international (human rights) law with respect to the treatment of aliens. These issues will be addressed further in Chapter 10.

### 8.2 The Right to Regulate Admission of Foreign Investment

Resolution 1803 declares that the import of capital required for the development of natural resources should conform with the rules that States deem necessary regarding authorization, restriction or prohibition of such activities.

Only a few multilateral treaties contain provisions pertaining to admission of investments. The 1948 Havana Charter recognized the right of each State ‘to determine whether and to what extent and upon what terms it will allow future foreign investment’.97 Such a provision was not included in GATT, neither in its 1947 nor in its 1994 version, since these agreements do not cover investments. Only the 1994 General Agreement on Trade in Services recognizes, in its preamble, the right of States to regulate the supply of services within their territories in

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95 See Arts. 10 and 18 of the EECT.


97 Art. 12.1(c), sub (ii).
order to meet national policy objectives, and the particular need of developing countries to exercise this right.\footnote{This is in view of ‘asymmetries existing with respect to the degree of development of services regulations’ between developed and developing countries. However, the Agreement stipulates that all domestic regulation affecting trade in services should be administered in a ‘reasonable, objective and impartial manner’. Art. VI.1. Text in 33 ILM (1994), pp. 44–80.}

As far as (inter-) regional instruments are concerned, it is striking that in the notes of and comments to the 1967 OECD Draft Convention on the Protection of Foreign Property it was provided that ‘no State is bound—unless it agreed otherwise—to admit aliens into, or permit the acquisition of property by aliens in, its territory’.\footnote{Para. 9 of Notes and Comments to Art. 1 (b) of the 1967 OECD Draft Convention on the Protection of Foreign Property. Text in 7 ILM (1968), pp. 117–43, at p. 122.} The 1973 Agreement on Arab Investment recognizes that it is part of the sovereignty of States to determine the procedure, terms and limits which control Arab investment and to designate the sectors in which such investment can be made. The right to regulate the admission of foreign investment can of course be voluntarily restricted, for example in the context of economic integration between States. Thus, the Agreement on Arab Investment and the EC Treaty limit the right of their member States to restrict the freedom of establishment of each other’s enterprises. The member States of the European Union recognize the freedom of establishment of each other’s nationals and have relinquished the right to regulate the establishment of foreign companies or firms originating from another EU State.\footnote{Art. 52 of the EEC Treaty, 1957 (now part of the 1992 Maastricht Treaty on European Union).}

NAFTA (1992), however, still provides that each of the three parties has the right to perform exclusively certain economic activities and to refuse to permit the establishment of foreign investment in such activities.\footnote{Art. 1101.2 and Annex III of NAFTA.} The European Energy Charter Treaty (1994) declares the right of each State freely to determine which geographical areas within its territory are to be made available for exploration and development of energy resources, and its right to participate in such exploration and exploitation, for example through State enterprises.\footnote{Art. 18.3 of the EECT.}

Most BITs contain an explicit provision that foreign investment must be admitted in conformity, and should be consistent, with domestic legislation or that the obligation (‘shall’) to admit a foreign investment is subject to the Contracting Parties’ right to exercise discretionary powers conferred on them by their own
legislation. Some BITs merely require the Parties ‘to endeavour’ to admit such investments subject to their laws and regulations.\textsuperscript{103}

In international jurisprudence and arbitral awards, the admission of foreign investment has not been dealt with expressis verbis. It has only been acknowledged, especially in the oil nationalization cases, that States are free to suspend the admission of foreign investors, subject of course to treaty and contractual obligations.\textsuperscript{104}

The ICC Guidelines refer to the right of host countries to reserve certain sectors for domestic ownership only, while the OECD Declaration explicitly states that it does not deal with the right of Member countries to regulate entry of foreign investment or the conditions of establishment of foreign enterprises. The Draft UN Code of Conduct on TNCs includes the right of States to regulate the entry and establishment of TNCs and to prohibit or limit the extent of their presence in specific sectors.\textsuperscript{105} Also the World Bank Guidelines point out that each State maintains the right to regulate the admission of foreign investment, but recommends a general approach of free admission, with certain exceptions such as inconsistency with national security interests.

There is thus ample evidence that States have a general right to regulate the admission of foreign investment.

\textbf{8.3 The Right to Exercise Authority over Foreign Investment}

Various UN resolutions confirm the right of a host State to regulate and exercise authority over imported capital and the activities of foreign investors within its territory, including the taking of legislative and administrative measures and the exercise of judicial authority.\textsuperscript{106} Article 2 of CERDS states, among other things, the right of each State to: ‘regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities’; and ‘supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies’.\textsuperscript{107}

\textsuperscript{104} See especially the Liamco and Aminoil cases.
\textsuperscript{106} Examples include GA Res. 1803 (para. 3), the NIEO Declaration (para. 4(g)) and Action Programme (section Vb), and CERDS’ Article 2.
\textsuperscript{107} See also GA Res. 3201 (S-VI, para. 4g) and 3202 (S-VI, section Vb) as well as ECOSOC Res. 1956, para. 4.
Treaty law provides for an extensive follow-up on these issues. The 1948 Havana Charter recognized that a State, in so far as other agreements permit, has the right to formulate appropriate safeguards which it considers necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies. A number of World Bank instruments are also relevant to this issue. The 1965 ICSID Convention underlines that the primary competence for legislating in respect of foreign investors and for settling investment disputes between host States and foreign investors lies with the authorities of the host State. In the case of arbitration, the applicable law will be the law of the contracting State party to the dispute (including its rules on the conflict of laws), albeit in combination with such rules of international law as may be applicable, unless otherwise agreed by the parties. The 1985 MIGA Convention respects the right of a State to exercise control over foreign investment, stipulating that, in guaranteeing an investment, the Agency ‘shall satisfy itself as to ... compliance of the investment with the host country’s laws and regulations’ and ‘consistency of the investment with the declared development objectives and priorities of the host country’. In addition, Article 15 of the Convention stipulates as a condition that the Agency does not conclude any contract or guarantee before the host government has approved the issuance of the guarantee by the Agency against the risks designated for cover. It is, therefore, in last resort left to the discretion of the State concerned to decide on the extent and nature of any involvement of foreign investors in the exploitation of natural resources. The 1994 European Energy Charter Treaty includes the right of each State to tax and to levy royalties on exploration and exploitation of energy resources.

Only a few judgments and arbitral awards have addressed, in general terms, issues related to a State’s right to regulate foreign investment in a non-expropriation context. In the Klöckner Award (1983), an arbitration under ICSID auspices, the Tribunal found that the host State had the right to obtain all information concerning the investment as far as relevant to the State and that the company was under an obligation to disclose it. In various ICSID awards, interpreting the applicable law clause of Article 42.1 of the Convention, it is indicated that tribu-

108 Art. 12.1(c), sub (1) of the Havana Charter.

109 ICSID provides only for conciliation and arbitration procedures after local remedies have been exhausted if the host country has so stipulated (but few have done so); see Art. 26 of the ICSID Convention and Chapter 6, section 3.1.

110 Cf. Art. 42.1 of the ICSID Convention.

111 Art. 12(d), sub ii and iii.

112 Art. 18.3 of the EECT.
nals must first scrutinize the host State law for applicable law or principles. Only where there are no applicable rules or principles in the host State’s law, or if they conflict with an international law rule or principle, is the Tribunal to apply international law. This was stated in the *Letco Case* (award in 1986) as follows: ‘The law of the contracting State is recognized as paramount within its own territory.’ However, this thesis is qualified by the important addition that it ‘is nevertheless subjected to control by international law.’ From the judgment of the ICJ Chamber in the *ELSI Case* (1989) it can also be inferred that a host State has the right to regulate, legislate and exercise authority over foreign investment.

The ICC Guidelines call on the government of the host country to make known to prospective investors its economic priorities and the general conditions that it wishes to apply to incoming direct private investment. Similarly, the OECD Guidelines recognize that the entities of a transnational enterprise located in various countries are subject to the laws of these countries. The Draft UN Code of Conduct provides that States have the right to determine the role that transnational corporations may play in their economic and social development and declares that an entity of a transnational corporation is subject to the jurisdiction of the country in which it operates. Finally, the ILA Seoul Declaration is somewhat more specific where it provides:

States have the right to regulate, exercise authority, legislate and impose taxes in respect of natural resources enjoyed and economic activities exercised and wealth held in their own territories by foreign interests subject only to any applicable requirements of international law. Except as otherwise agreed by treaty or contract, no State is required to give preferential treatment to any foreign investment. This appears to be a good summary of the relevant law as to the right of States to regulate foreign investment.

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113 See the *Amco Annulment Decision*, the *Second Amco Award*, the *Klöckner Annulment Decision* (1985) and the *Letco Award* (1986). For a review, see Westberg (1993: 6–9).


116 Para. 7 of the OECD Guidelines.


118 Seoul Declaration, section 5.5.
9. The Right to Expropriate or Nationalize Foreign Investment

The right to expropriate or nationalize foreign investment, subject to certain conditions, is inherent in the sovereignty of each State and was generally recognized long before the PSNR resolutions were adopted. Nonetheless, its formulation in the context of PSNR and the conditions applying to it have given rise to considerable debate and controversy in the United Nations, as we saw in Part I. The terms expropriation, nationalization and taking of property have often been used interchangeably. Expropriation is commonly understood to refer to unilateral interference by the State with the property or comparable rights of an owner in general terms, while nationalization denotes the transfer of an economic activity to the public sector as part of a general programme of social and economic reform. Taking of property is the most generic term.119

This section discusses, firstly, the right to take foreign property in general. Next, it reviews the claims of a majority of developing countries, in some rather controversial provisions of UN resolutions, that this right also includes: the right to determine freely the objective of a nationalization; the right to refrain from paying compensation or to determine freely its amount; the right to settle nationalization and compensation disputes on the basis of national law; and the right of free choice of means for settlement of disputes.

9.1 The Right to Take Foreign Property in General

The right to nationalize is explicitly included in only four of the set of GA resolutions under review.120 It was deleted from the text of what became Resolution

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119 See for a discussion of terminology, including terms with respect to ‘creeping expropriation’ or ‘indirect takings’, with references to literature and case law Verwey and Schrijver (1984: 4–6); Christie (1962); Higgins (1983: Chapters II and IV); Mouri (1994: Chapter II) and Weston (1975: 103); see also the Starrett, Sedco, Amoco, Mobil Oil, Phillips Petroleum and Ebrahimi Cases, Iran-US Claims Tribunal, 1987–94 and the ELSI Case, ICJ Reports 1989. In the latter case a Chamber of the Court recognized that preventing a company to manage and control its business could amount to ‘disguised expropriation’. According to the Chamber this had not occurred in that particular case.

120 These are GA Resolutions 1803, 3171, 3201 and 3281. In addition, it is also referred to in paragraph 2 of UNCTAD TDB Resolution 88 (XII), paragraph 2 of ECOSOC Resolution 1956, and paragraph 32 of UNIDO II’s Lima Declaration. It should be noted that the exact meaning of the term ‘nationalization’ has never been clarified during the debates, let alone in the resolutions themselves. Moreover, next to nationalization, the terms ‘expropriation’ and ‘requisition’ were used (cf. para. 4 of GA Res. 1803), as were the phrases ‘nationalize or transfer of ownership to its nationals’ (NIEO Declaration, sub (e)) and ‘nationalize, expropriate or transfer of foreign property’ (Art. 2.2 of the CERDS); the latter phrases may
After careful preparation by the Commission on PSNR (1958–61), a compromise formula was incorporated in the well-known operative paragraph 4 of the 1962 Declaration, recognizing the right of a State to nationalize, expropriate or requisition property, both domestic and foreign. In the context of the NIEO resolutions adopted during the early 1970s an attempt was made by the Group of 77 to broaden and ‘unconditionalize’ the right to nationalize by claiming, among other things, that a State has the right to take foreign property and to transfer ownership to its nationals. Such attempts by the G-77 to provide States with broad discretionary powers were underlined by stipulations that the right of nationalization or transfer of ownership is ‘the expression of a sovereign power’ (TDB Res. 88 (XII)), ‘inviolable’ (GA Res. 3171) and ‘an expression of the full permanent sovereignty of the State’ (GA Res. 3201). However, these attempts never received widespread support, capital-exporting countries being particularly reserved, and efforts to ‘unconditionalize’ the right to nationalization faded away during the late 1970s.

Among the more general multilateral treaties, only the Havana Charter attempted to acknowledge the right to nationalize. However, it merely provided that Members had ‘the right to prescribe and give effect on just terms to requirements as to the ownership of existing and future investments’, a provision which has been interpreted to embrace the right to expropriate. More explicit was the 1967 Draft OECD Convention on the Protection of Foreign Property, albeit that its Article 3 on ‘Taking of Property’ was cast in negative terms: ‘No Party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless the following conditions are complied with . . . ’ The (inter-)regional and bilateral investment protection treaties and the investment-related chapters of multilateral treaties such as NAFTA and the European Energy Charter Treaty all recognize the right of a host State to expropriate foreign property, subject to international law requirements which we will consider in Chapter 10.

International jurisprudence does not really provide a hold in this respect. The Chorzów Factory Case (PCIJ, 1928) is sometimes quoted as one of the first cases to allow transfer of ownership to private persons and thus allow discrimination between nationals and foreigners and, in the case of Article 2 of CERDS, also between foreigners of different nationalities. It goes without saying that Western countries considered this a painful aspect of the NIEO package.

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626 (which nonetheless was branded as the ‘nationalization’ resolution). After careful preparation by the Commission on PSNR (1958–61), a compromise formula was incorporated in the well-known operative paragraph 4 of the 1962 Declaration, recognizing the right of a State to nationalize, expropriate or requisition property, both domestic and foreign. In the context of the NIEO resolutions adopted during the early 1970s an attempt was made by the Group of 77 to broaden and ‘unconditionalize’ the right to nationalize by claiming, among other things, that a State has the right to take foreign property and to transfer ownership to its nationals. Such attempts by the G-77 to provide States with broad discretionary powers were underlined by stipulations that the right of nationalization or transfer of ownership is ‘the expression of a sovereign power’ (TDB Res. 88 (XII)), ‘inviolable’ (GA Res. 3171) and ‘an expression of the full permanent sovereignty of the State’ (GA Res. 3201). However, these attempts never received widespread support, capital-exporting countries being particularly reserved, and efforts to ‘unconditionalize’ the right to nationalization faded away during the late 1970s.

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See Chapter 2 supra, section 3.2.

The right of a host State to nationalize or expropriate alien property is, according to relevant UN resolutions, subject to a number of conditions. These conditions will be analysed in the next chapter.

See World Bank (1992: 84); see also Wilcox (1949: 146–47).
judgments which recognized a State’s right to take foreign property, albeit under exceptional circumstances only. In the Anglo-Iranian Oil Company Case (1951–52), the first and so far last major ICJ case stemming from an act of nationalization, the Court found that it had no jurisdiction to deal with its merits. It should be noted, however, that the claimant party (UK) did not at any time during the proceedings question in abstracto the right of a State to nationalize. Since the Anglo-Iranian Oil Company Case, the general right of States to nationalize foreign property has gradually become commonly recognized. For example, in the arbitral awards dealing with the nationalizations of oil companies by Libya the right to nationalize was confirmed and frequent references to the relevant UN resolutions were made. In the Texaco Case, Dupuy pointed out that the right to nationalize should be regarded as the expression of a State’s territorial sovereignty. Similarly, in the Liamco Case Mahmassani stated that the right of a State to nationalize its wealth and natural resources is a sovereign right. In the Aminoil Case the right to nationalize was also squarely recognized. The Tribunal recalled that the oil company itself had proposed a take-over by Kuwait as one of the options (the concession to be replaced by a

124 The case itself dealt with liquidation and transfer of assets of enemy property pursuant to peace treaties, something which the Court found to be valid under international law and not to be contrary to bonos mores. The Court recognized that there might be certain exceptions, albeit limited ones, to the principle of respect for ‘vested rights’. According to the PCIJ such exceptions included ‘expropriation for reasons of public utility, judicial liquidation and similar measures’. See Merits 1926 PCIJ, Series A, no. 7, p. 22. See also Seidl-Hohenveldern (1981: 111–14).


126 The 1989 judgment in the ELSI Case dealt with requisition and, moreover, only with the particular facts of this case and not with general conditions relating to the right to take property.

127 Makarczyk (1988: 287) observes that ‘the quite possibly justified diligence with regard to its jurisdiction deprived not only one of the sides, but the whole of the international community, of a chance to realize its legitimate expectations concerning the solving of a problem which, as the years passed, grew more and more contentious and whose non-settling at the beginning of the nineteen-fifties was painfully felt over twenty years later.’

128 The British Government claimed that the right to nationalize was subject to requirements of international law which in its view were not met in that present case. See ICJ Pleadings (1952), Anglo-Iranian Oil Co. Case. See also Schwarzenberger (1969: 66–83).


130 Liamco v. Libya, 20 ILM (1981), p. 120. He added: ‘… subject to the obligation of indemnification for premature termination of concession agreements’.
service contract) and the Tribunal had no difficulty in recognizing that a nationalization of Aminoil was in itself lawful and did not constitute a violation by Kuwait of its obligations towards Aminoil.

In its *Amoco Award* (1987) the Chamber of the Iran-US Claims Tribunal recognized nationalization as a ‘right fundamentally attributed to State sovereignty’ and ‘commonly used as an important tool of economic policy by many countries, both developed and developing’, and as a right which ‘cannot easily be considered as surrendered’.

The recognition of the right to nationalize in general is also reflected in: the ICC Guidelines; the Draft UN Code of Conduct on TNCs which acknowledges that ‘States have the right to nationalize or expropriate the assets of a transnational corporation operating in their territories’; the ILA Seoul Declaration, where it declares that: ‘A State may nationalize, expropriate, exercise eminent domain over or otherwise transfer property, or rights in property, within its territory and jurisdiction . . . ’; and the World Bank Guidelines on the Treatment of Foreign Investment, albeit that these are cast in negative terms:

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.

Literature on the right to nationalize is abundant. Academic opinion is deeply divided on the modalities of the exercise of the right to nationalize, particularly with respect to the effect of stabilization clauses, standards of compensation and dispute settlement. But the right of a State to nationalize as—in the words of Kronfol—‘an attribute of its sovereignty in the sense of supreme power which it possesses in relation to all persons and things within its territorial jurisdiction’ has long ceased to be a subject of debate. One may therefore con-

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132 Ibid., p. 1025.
133 The Tribunal recognized that: ‘It is incontrovertible that, though without haste, Kuwait had consistently pursued a general programme aimed at placing the state in control over the totality of the petroleum industry’. See *Aminoil Award*, p. 1025.
135 Section V.3.iv.
137 Para. 5.5 of the Seoul Declaration.
139 Kronfol (1972: 22).
cur with the Iran-US Claims Tribunal Chamber which stated in the above-men-
tioned Amoco Award (1987) that the right to nationalize foreign property ‘is
today unanimously recognized, even by States which reject the principle of per-
manent sovereignty over natural resources, considered by a majority of States as
the legal foundation of such a right’. 141

9.2 The Right to Determine Freely the Conditions of a Nationalization

Resolution 1803 (XVII) specifies that ‘nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign’. 142 As discussed in Chapter 2, a debate took place in 1962 on the term ‘public utility’ (derived from the Spanish word utilidad) in the Chilean draft, and the question whether it should be phrased as ‘public purpose’, the common term in traditional legal doctrine. 143 This discussion was ‘thwarted’ by the ‘emotional climate generated by the topic of permanent sovereignty over natural resources’. 144 The dispute over this phrase was perhaps rather irrelevant, since the addition of ‘security or the national interest’ as alternative grounds would have rendered the replacement of ‘utility’ by the narrower term ‘purpose’ meaningless anyway. Subsequently, during the early 1970s, Western efforts to include a reference to ‘public purpose’ in the NIEO Resolutions failed.

NIEO Resolutions 3171 and 3201 introduced the purpose of ‘safeguarding . . . natural resources’ as a reason for nationalization or transfer of ownership.

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140 Aréchaga goes somewhat further when he states: ‘Contemporary international law recognizes the right of every State to nationalize foreign-owned property, even if a predecessor state or a previous government engaged itself by treaty or contract, not to do so. This is a corollary of the principle of permanent sovereignty of a State over all its wealth, natural resources and economic activities and proclaimed in successive General Assembly resolutions.’ Aréchaga (1978: 179); see Wellens (1977b: 40); Amerasinghe (1967: 132); Higgins (1983: 276); Dolzer (1985: 214–21); Carreau et al. (1980: 554).

141 Amoco Award, p. 222, para. 113.

142 Para. 4 of GA Res. 1803 (XVII), 14 December 1962, emphasis added.

143 In view of this particular background of the word Rosalyn Higgins seems to interpret it too literally when she observes: ‘A public purpose may indeed be for reasons of public utility, but it may readily be appreciated that not all public purposes necessarily entail the transfer of property to a public utility. Reference to the national interest is obviously much wider than public purpose, but perhaps it covers those public purpose reasons that do not lead to public utility.’ (Higgins 1983: 288). The French equivalent of both ‘public purpose’ and ‘public utility’ is ‘utilité publique’.

whereas Article 2 of CERDS does not mention any ground or reason after OECD countries failed in their attempt to secure a reference to a ‘public purpose’ (see Chapter 3). 145

Conditions like those referred to in GA Resolutions 1803 (XVII) or 3171 (XXVIII) may be multifarious. For reasons of national security a State may decide to place all companies operating in specific sectors of its economy under State control, for example, in the fields of telecommunications, the defence industry, the media or even the oil industry. President Allende of Chile called nationalization ‘a development instrument’. 146 As a matter of policy, a State may also decide to ‘indigenize’ certain foreign firms, 147 which could come close to (but would not necessarily amount to) ‘creeping expropriation’.

Few multilateral treaties explicitly address this issue. Those which do mostly include the requirement of a ‘public interest’ as will be discussed in Chapter 10. The same is true for the BITs. Thus no support can be found in treaty law for the alleged claim that expropriating States are free to determine the conditions for expropriation or nationalization, nor can such evidence be found in decisions of international courts and tribunals. As far as jurisprudence is concerned, one can only refer to a few decisions of the European Court of Human Rights with respect to the property protection clause of the 1952 Protocol. For example, in the James Case (1986) the Court mentioned that legitimate objectives of public interest ‘such as pursued in measures of economic reform or measures designed to achieve greater social justice’ could justify interference with property, thus indicating a wide margin of discretion for the taking (European) State. 148 In most relevant arbitral decisions, 149 the view has been taken that a lawful nationalization or expropriation must serve a public purpose (see Chapter 10), but sometimes with qualifications. For example, in the Liamco Case it was held:

As to the contention that the said measures were politically motivated and not in pursuance of a legitimate public purpose, it is the general opinion in international

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145 The Draft Code of Conduct on TNCs does also not mention the requirement of a public purpose for nationalization or expropriation.


147 This policy has been practised by India and a number of Latin American and African countries. For the Nigerian case see Biersteker (1987).

148 Quoted by Brownlie (1990: 537).

149 See the table in Appendix V.
theory [sic] that the public utility is not a necessary requirement for the legality of a nationalisation.\textsuperscript{150}

The \textit{Texaco Award} recognizes the existence of a ‘public purpose’ requirement, but acknowledges the difficulty in assessing it. Also the \textit{Amoco Award} points out that such a requirement is easily satisfied by virtue of the ‘wide margin of appreciation’ doctrine.\textsuperscript{151} This is also the main line of reasoning in relevant literature. While many conclude that the demand of a ‘public interest’ or ‘public purpose’ should be maintained, there is recognition of the fact that ultimately it is the taking government which determines the public purpose or utility of a particular expropriation, and that in many cases ‘it can be taken as impossible that an international court or organization can form a reasonable judgment on the accuracy of a claim by a State that an action served a public purpose’.\textsuperscript{152}

In summary, a State is not completely free to determine the justification and conditions for a nationalization but is bound by certain international law requirements. In practice, however, it has wide margins of discretion.

\subsection*{9.3 The Right Not to Pay or to Determine Compensation Freely}

As regards the right of a nationalizing State to determine the amount of compensation, it should first be recalled that GA Resolution 626 (VII) marks the beginning of the Third World efforts to render payment of compensation a conditional, instead of an absolute, prerequisite. Although at that time many Third World countries still recognized the obligation to pay compensation for nationalization or expropriation, an American amendment reaffirming this principle was rejected.\textsuperscript{153} In 1962, while there was no majority support for the proposal submitted

\begin{itemize}
\item \textsuperscript{150} Mahmassani was of the view that natural resources, in general, do not belong any more to the owner of the land, but to the community represented by the State as a privilege of its sovereignty. \textit{Liamco Award}, 1977, p. 93. In addition, the arbitrator observed: ‘Nationalization began to be practised on a larger scale and has taken, in general, the feature of a collective legislative measure motivated by the public social policy of the State. It became characterised as a sovereign act, immune from judicial control and subject to international law whenever foreign elements were at issue. After WW-II, motivated by a nationalistic spirit to stress their prestige and to control their national economy, many of the "new" States and some other old ones had recourse to general measures of nationalization covering chiefly oil concessions and other natural resources and public utilities.’ Liamco Award 1977: 96.
\item \textsuperscript{151} Text in Harris (1991: 540).
\item \textsuperscript{153} By 17 votes in favour and 25 against, with 5 abstentions; 11 December 1952, see \textit{UN Doc. A/C.2/SR.} 237, p. 281.
\end{itemize}
by the UAR and Afghanistan to add ‘when and where appropriate’ to the clause on compensation after nationalization, the notion of ‘appropriate compensation’ was resorted to, albeit that payment of such compensation was said to be compulsory (‘shall’).

Ten years later, however, the majority of the developing countries, notwithstanding fervent Western opposition, inserted provisional phrases into UNCTAD TDB Resolution 88 (XII) asserting that:

such measures as States may adopt in order to recover their natural resources are the expression of a sovereign power in virtue of which it is for each State to fix the amount of compensation and the procedure for these measures. ¹⁵⁴

Similarly, in Resolution 3171 (XXVIII) the General Assembly:

Affirms that the application of the principle of nationalization carried out by States, as an expression of their sovereignty . . . implies that each State is entitled to determine the amount of possible compensation and the mode of payment.

(latter emphasis added)

An identical provision was submitted for inclusion in the 1974 NIEO Declaration, but this proposal was withdrawn by the G-77 to facilitate consensus with Western countries. The result is that this Declaration does not address the question of compensation at all. The CERDS negotiations resulted in a repetition of moves; the G-77 proposed a phrase, according to which ‘appropriate compensation should be paid by the State, provided that all relevant circumstances call for it’. ¹⁵⁵ ‘The Western Group submitted an amendment reading that ‘just compensation in the light of all relevant circumstances shall be paid’. ¹⁵⁶ Eventually, despite Western readiness to accept compromise proposals, the G-77 decided to opt for a Mexican amendment which was even more radical and therefore totally unacceptable to the Western side, viz: ‘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’. ¹⁵⁷

One particular aspect deserves attention in this discussion of compensation clauses in PSNR resolutions. During the debate on the draft Declaration on PSNR in 1962, Algeria proposed that a State, which during the colonial period had been dispossessed of its property and had seen enterprises set up in its territory, could not be obliged to pay compensation: a statement which reminds us of the very concept of permanent sovereignty of peoples. At its initiative a new pre-

¹⁵⁴ UNCTAD TDB Res. 88 (XII), 19 October 1972; endorsed by para. 16 of GA Res. 3041 (XXVII), 19 December 1972.


¹⁵⁶ UN Doc. A/C.2/L.1404, 3 December 1974, emphasis added.

ambular paragraph 5 was inserted into the 1962 Declaration, which indicates that whatever is said in the Declaration on the obligation to pay compensation will not apply with respect to the taking of ‘colonial property’:

_Considering_ that nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule;

In treaty law, no evidence can be found for the thesis that a nationalizing State has a right to withhold compensation or is free to determine the amount of compensation. On the contrary, it invariably stipulates an obligation to pay compensation and includes qualifications as to the amount of compensation to be paid, as we will see in the next chapter. Nor can evidence be found in the decisions of international courts and tribunals to the effect that a nationalizing State is free unilaterally to determine the amount of compensation. One can only report here, after a review of relevant arbitral awards and State practice, that it is accepted in most cases involving lawful large-scale nationalizations of the natural resource sector that only ‘partial’ compensation has to be paid. This is, because the impact which ‘full’ compensation would have on the financial resources and the development plans of the nationalizing country would nullify in practice the effect of the nationalization.

With few exceptions,158 there have been no decisions of international courts and tribunals which have straightforwardly adopted and applied the ‘prompt, adequate and effective’ compensation rule.159 The Texaco Award, the Aminoil Award and the Ebrahimi Award160 are notable examples of references to the ‘appropriate compensation’ formula in Resolution 1803. In the INA Corporation v. Iran Award (1985), the Chairperson of the Iran-US Claims Tribunal Chamber, Judge Lagergren, observed that ‘in the event of large-scale nationalizations of a lawful character, international law has undergone a gradual appraisal, the effect of which may be to undermine the doctrinal value of any “full” or “adequate”’

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159 It should be noted, however, that the triple standard is increasingly popular in BITs. See Chapter 10, section 8.4.

Rights

(when used as identical to full) compensation standard as proposed in this case.\(^{161}\) He noted that 'the flexible contemporary rule of international law on compensation found its most concrete and widely-accepted expression in Resolution 1803 (XVII) of the UNGA of 1962' and concluded:\(^{162}\)

I am inclined to the view that ‘appropriate’, ‘fair’, and ‘just’ are virtually interchangeable notions so far as standards of compensation are concerned. [. . .] there is a wide choice of well-established methods of valuation applicable and appropriate under different circumstances. Even the notions ‘full’ and ‘adequate’ compensation contain, inevitably and with the best of intentions, a margin of uncertainty and discretion.

In the *Ebrahimi Case v. Iran* (award in 1994) the Claims Tribunal stated, so far most explicitly, that 'while international law undoubtedly sets forth an obligation to provide compensation for property taken, international law theory and practice do not support the conclusion that the "prompt, adequate and effective" standard represents the prevailing standard of compensation':

Rather, customary international law favors an ‘appropriate’ compensation standard. [. . .] The gradual emergence of this rule aims at ensuring that the amount of compensation is determined in a flexible manner, that is, taking into account the specific circumstances of each case. The prevalence of the ‘appropriate’ compensation standard does not imply, however, that the compensation *quantum* should be always ‘less than full’ or always ‘partial’. [. . .] Considering the scholarly opinions, arbitral practice and Tribunal precedents noted above, the Tribunal finds that once the full value of the property has been properly evaluated, the compensation must be appropriate to reflect the pertinent facts and circumstances of each case.\(^{163}\)

The *ad hoc* Tribunal in the *Aminoil Case* also took into account the ‘legitimate expectations’ an investor could have, including an assessment of ‘excessive profits’ in the past which were above a ‘reasonable rate of return’ and which should be deducted from the amount of compensation to be paid.\(^{164}\) The retroactive excess profits concept had been applied earlier—for example, by the Chilean

\(^{161}\) The Chamber of the Tribunal proved to be deeply divided in this case (as it was in most other cases). Two separate opinions and one dissenting opinion were filed with it. The quoted observation of the Chairman was the object of a rebuttal by Judge Holtzmann, the US member of the Chamber. See also Lagergren (1988: 8).


\(^{164}\) *Aminoil Award*, 21 *ILM* (1982), pp. 1031–33, paras. 143–44.
Government in the nationalization of copper mining enterprises and the Andean Mining Company, and by the Libyan Government with respect to Bunker Hunt—but was fervently opposed by the USA and other Western Governments. The rationale for their opposition is that an oil company strikes its profits out of its business on an average. If the excess profits in a very profitable venture would be automatically creamed off, the company cannot afford exploration and development in other ventures.

Considering another aspect—that of *lucrum cessans* or profit foregone, in the *Amoco Case* (1987) the Tribunal held that this was not to be included in the assessment of compensation for lawful takings; it was only required in unlawful takings. This was also the finding of the ICSID Tribunal in the *AAPL v. Sri Lanka Case* (1990).

As to actual State practice, Asante reports that a study commissioned by the UN Centre on Transnational Corporations—on compensation settlements arising out of 154 cases in Asia, Africa and Latin America during the 1970s—found that the formula of ‘prompt, adequate and effective’ compensation from the investor’s perspective or ‘appropriate’ compensation from the host government’s perspective appeared to have played no role in the final settlements, although they were sometimes vigorously asserted in the negotiations. The final settlements were sometimes packages of trade-offs encompassing compensation amounts and ancillary benefits such as credit facilities, service contracts, management fees and tax concessions. Similarly, Lillich et al. conducted an impressive research project on expropriation practice and postwar lump sum agreements under which the respondent State paid a fixed sum (‘*en bloc*’) to the claimant State, which the latter, generally through a national claims commission, distributed among claimants after assessment and adjudication of these separate claims. The legal status and juridical impact of such agreements is a source of controversy, both in juris-

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167 See Muller (1981: 35 et seq).

168 See for a discussion of the compensation standard in this and some other cases, Mouri (1994: 363–65).


prudence\textsuperscript{171} and academic research\textsuperscript{172} as well as in the work of professional bodies.\textsuperscript{173} These empirical surveys show, on the one hand, that lump sum agreements underpin the customary compensation principle as such, but on the other hand reveal a clear trend towards adopting ‘partial’ and ‘negotiated’ compensation arrangements, depending upon the circumstances of each case. As in the case of BITs, such a large mass of State practice and the general trend emerging from it cannot be ignored.

As far as the literature of international law is concerned, it is not surprising that opinions on this issue have been deeply divided. For example, Schwarzenberger and Brown find it difficult to see why ‘the mere scale of nationalization measures, as compared with individual acts of expropriation, or the rise of new ideologies should by themselves exempt such policies of nationalization from the operation of the governing rules of international customary law’.\textsuperscript{174} An increasing number of Western scholars and almost all Third World scholars, however, hold that in the assessment of compensation to be rendered, factors should be considered like: the expediency and socio-economic necessity of the taking; the paying capacity of the taking State; and ‘reasonableness’ and other specific circumstances.\textsuperscript{175} Frustrating the process of socio-economic transformation by demanding unbearable nationalization conditions would be incompatible with the principle of State sovereignty over economic affairs.\textsuperscript{176} This may especially be so in cases of large-scale nationalizations involving a State’s natural resources. As Brownlie acknowledges: ‘The principle of nationalization unsubordinated to a

\textsuperscript{171} As far as the Iran-US Claims Tribunal is concerned, Mouri reports that ‘none of the practices [i.e., ‘settlements practice’ and ‘bilateral treaties practice’] had any substantial influence on the Tribunal’s choice of the standard of compensation’. Mouri (1994: 353). See also the case note on the SEDCO case in 80 \textit{AJIL} (1986: 970).

\textsuperscript{172} See Lillich and Weston (1988).

\textsuperscript{173} For example, the American Law Institute observes in its Comment to Section 7.12 of the Restatement of International Law that ‘those practices which represent partial or less than ‘full compensation’ do not provide persuasive evidence as to what the parties to the settlement believed the relevant law to be’.

\textsuperscript{174} Schwarzenberger and Brown (1976: 8).


\textsuperscript{176} See Wellens (1977b: 101).
full compensation rule may be supported by reference to principles of self-deter-
nomination, independence, sovereignty and equality’. 177

In conclusion, there is no support for the alleged right to refrain from paying
compensation after expropriation or nationalization. Nor is there support for the
right of a taking State to determine freely and unilaterally the amount of compen-
sation and its mode of payment. At the doctrinal level, most Western States still
adhere to classical international law standards with respect to compensation. In
practice a readiness has emerged to take into account, apart from the interests of
the dispossessed foreign investor, the interests and needs of the host country, in
particular when it is a low-income developing country in the process of socio-
economic transformation. In my view this is after all perhaps best reflected in the
‘appropriate compensation’ or, preferably, ‘just compensation’ formula which is
sufficiently flexible to accommodate various interests in each particular case.
This formula has also been adopted in the ILA Seoul Declaration, where it refers
to ‘appropriate compensation as required by international law’. 178 This may be
deliberately ambiguous, since both practice and doctrine clearly demonstrate that
neither the Hull rule nor the Calvo doctrine provide the final word on this issue.

9.4 The Right to Settle Disputes on the Basis of National Law

Although both the 1962 Declaration (GA Res. 1803-XVII) and Article 2 of the
CERDS (GA Res. 3281-XXIX) stipulate that compensation should be ‘appropri-
ate’, they differ considerably as regards the law applicable in determining it. The
former refers primarily, the latter exclusively to the national law of the national-
izing State. The Declaration also refers to ‘international law’, 179 while the
CERDS merely adds after ‘its relevant laws and regulations’ the phrase ‘and all

177 Brownlie (1990: 536-37).

178 It is interesting to note that in the fourth draft of the ILA NIEO Committee, which was
charged with preparing this Declaration, an interesting but cumbersome elaboration of
‘appropriate compensation’ was included, reading:

Appropriate compensation to be paid in all cases of nationalization and expropriation shall be
just, fair and reasonable and objectively determined giving due consideration to the legit-
imate expectations of the host State and the foreign investor, and taking into account all
pertinent circumstances, relevant criteria of valuation and equitable principles, including the
principle of unjust enrichment.

During the Seoul Conference (1986), it was decided to delete this.

179 In 1962, a USSR proposal proposed to leave the question of compensation to be decided
‘in accordance with the national law of the country taking such measures in the exercise of
its sovereignty’ (UN Doc. A/C.2/L.670). This amendment was defeated by 28 votes in
favour, 39 against, with 21 abstentions: UN Doc. A/C.2/SR.858, 3 December 1962, para. 41.
circumstances that the State considers pertinent.' It is obvious that wide discretionary State powers may emanate from such wording. Yet, according to this CERDS provision the nationalizing State remains bound by its 'national law', pursuant to the Calvo doctrine. Apparently, this is not the case according to Resolution 3171 (XXVIII), ECOSOC Resolution 1956 (LV) and UNCTAD TDB Resolution 88 (XII) which give no indication of the law to be applied. The 1976 UNCITRAL Arbitration Rules provide in Article 33 that arbitration tribunals have to apply the law designated by the parties as applicable to the substance of the dispute. If this is not done, the tribunal has to apply the law determined by the rules on conflict of law which it considers applicable, and in all cases the tribunal must decide in accordance with the terms of the contract, taking into account the usages of the trade applicable to the transaction.

As regards multilateral treaties, it is relevant to recall that Article 42 of the 1965 ICSID Convention instructs arbitral tribunals to decide a dispute in accordance with such rules of law as may be agreed by the parties to the dispute. In the absence of such an agreement the tribunal shall apply the law of the host country (including its rules on the conflict of laws) and such rules of international law as may be applicable. None of the other investment-related multilateral treaties includes a provision on applicable law in their dispute settlement arrangements; with the exception of (a) the 1980 Agreement on Investment of Arab Capital, which provides that compensation shall be paid for expropriation in accordance with generally applicable legal norms regulating the expropriation, although this is ambiguous when the law to be applied is not defined; and (b) the 1994 European Energy Charter Treaty which provides that arbitration tribunals shall decide issues in dispute in accordance with this treaty and applicable rules and principles of international law.

Most bilateral investment protection treaties reportedly do not make reference to the specific law to be applied in either intergovernmental arbitration or in arbitration between the host State and the investor. However, some BITs do contain an applicable law clause. On the basis of a detailed analysis of BITs, Peters identified the ‘Sri Lanka’ clause, which stipulates that the law of the host

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181 See Appendix 3, section V.
182 Art. 26.6 of the EECT.
country will apply.\textsuperscript{184} Some other BITs specify the law applicable in their article on intergovernmental arbitration and/or to arbitration between host country and investor.\textsuperscript{185}

The issue of choice-of-law has been addressed in a number of arbitral awards. Most of them acknowledge the freedom of the parties to choose the law or system of law which governs the contract and the law of procedure applicable to the arbitration. According to Arbitrator Dupuy in the \textit{Texaco Case}, this also includes the right to change: ‘one does not see why they could not, by mutual consent, agree to change this choice’.\textsuperscript{186} In the three Libyan petroleum concessions at stake an applicable law clause was included, reading:

This concession shall be governed by and interpreted in accordance with the principles of the law of Libya common to the principles of international law and, in the absence of such common principles, then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals. (clause 28)

It is notable that the arbitrators in the three cases reached different conclusions. Arbitrator Lagergren, in the \textit{BP Case}, concluded that he failed to identify any principles common to Libyan and international law and that he therefore had to apply ‘general principles of law’ and the case law of international tribunals.\textsuperscript{187} Arbitrator Dupuy, in the \textit{Texaco Case},\textsuperscript{188} however, determined that the arbitration was governed by both international law and Libyan law and Arbitrator Mahmassani, in the \textit{Liamco Case},\textsuperscript{189} identified principles common to Libyan and international law.\textsuperscript{190} In the \textit{Aminoil Case} the arbitration agreement instructed the Tribunal to determine the applicable law ‘having regard to the quality of the

\textsuperscript{184} Peters found this clause in 14 out of 168 BITs concluded in the period between 1980 and mid-1991, eleven of which were concluded by Sri Lanka. See Peters (1992a: 231-55, section 2.6).

\textsuperscript{185} Peters considers such clauses superfluous, if not confusing, in the case of diverging or even contradictory instructions; for it is not necessary for a bilateral treaty between States to specify that the dispute will be governed, as to the merits, by public international law, while a dispute between a host State and an investor will be handled on the basis of the arbitration rules designated in the BIT, or agreed between the parties to the dispute, for example the ICSID Rules or the UNCITRAL Rules. Peters (1991: 113–14 and 1992a: 240–41).

\textsuperscript{186} \textit{Texaco Award}, 17 \textit{ILM} 1978, p. 12.


\textsuperscript{188} \textit{Texaco Case}, 17 \textit{ILM} (1978), paras. 23, 96 and 109.

\textsuperscript{189} \textit{Liamco Case}, 20 \textit{ILM} (1981), p. 66.

parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world’. The Tribunal interpreted this as meaning that it had to ‘. . . decide according to law, signifying here principally international law which is also an integral part of the Law of Kuwait’. Therefore, it held that the law governing the substantive issues could in principle be Kuwaiti law. In contrast to earlier cases (for example, in the Abu Dhabi and Aramco arbitration cases), this Tribunal found that:

Kuwaiti law is a highly evolved system as to which the Government has been at pains to stress that established public international law is necessarily a part of the law of Kuwait, including general principles of law.

In the AGIP Case (Award in 1979), the Tribunal applied Congolese law in the first instance, but supplemented it with international law. In a successful procedure aimed to annul in 1985 the ICSID award in Klöckner v. Cameroon (1983), it was ruled that the law of the host State should be applied, as stipulated by Article 42.1 of the ICSID Convention. However, in two other more recent ICSID cases, Letco v. Liberia (1986) and AAPL v. Sri Lanka (1990), this was less clearly required. In the latter case Arbitrator Asante filed a dissenting opinion on the particular issue of applicable law, claiming that the Tribunal—in view of Article 42.1 of the ICSID Convention—should have more straightforwardly applied Sri Lankan law as the main source of law, together with such rules of international law as might be applicable.

It has been reported that the Iran-US Claims Tribunal has had no difficulty in establishing that international law is generally applicable in resolving the issues related to the standard of compensation and has never indicated in any of its awards that it considered the municipal law of either of the two States involved as being the law on which the findings on the standard of compensation should be based.

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192 The procedural law of arbitration was lex forum, that is French law.
193 Aminoil Award, p. 1000.
194 The ad hoc Committee pointed out that: ‘. . . the arbitrators can have recourse to the principles of international law only after having researched and established the contents of the law of the State party to the dispute’. See de Waart (1987: 133–34).
196 See Brower (1993) and Mouri (1994: 297). See also Crook (1989) and Art. V of the 1981 Claims Settlement Declaration: ‘The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the
As regards non-binding instruments other than UN resolutions, the ICC Guidelines require in their treatment of foreign property respect for the recognized principles of international law. The Draft Code of Conduct on TNCs provides, rather vaguely, that ‘adequate compensation is to be paid ... in accordance with the applicable rules and principles’, thus evading the issue whether national or international law should have precedence. The same goes for the World Bank Guidelines which, in the expropriation section, merely refer to ‘applicable legal procedures’. In contrast, the ILA Seoul Declaration (1986) stipulates that appropriate compensation must be paid ‘as required by international law’.

In conclusion, there is far from general recognition that States have the right to settle nationalization and compensation disputes solely on the basis of national law. Yet, as is only logical and rational, there is recognition—unless otherwise agreed—that national law (normally) must be considered in the first place in a dispute between the host State and a foreign investor. If the dispute cannot be solved on the basis of national law, it is now recognized by most countries that international law must be invoked as well (see Chapter 10).

9.5 The Right of Free Choice of Means for Settlement of Nationalization Disputes

This last paragraph addresses the question of the extent to which a State, under the principle of PSNR, is free to choose the means for the settlement of disputes concerning nationalization and compensation. Two types of potential disputes are of particular concern: those between States and those between a host State and a foreign investor. Reaching agreement on arrangements for the settlement of disputes of the latter type has always been more problematic. As discussed in Chapter 6, Latin American countries took a particularly strong stand on this by stipulating, in their constitutions and through ‘Calvo clauses’ in contracts that foreigners should be subject to the law of the host State and should submit investment disputes to the local judiciary only. Western countries emphasized the right of home States to grant diplomatic protection and the right of foreign investors to international adjudication in cases where local courts allegedly were not in a position to provide justice. What do the PSNR resolutions say on this issue and what is the trend arising from recent treaties, judgments and arbitral awards?

GA Resolutions 1803 and 3171 and Article 2 of the CERDS are relevant here. It is quite remarkable that their dispute settlement clauses address disputes over

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197 Yet, in the section on the scope of Application it is clearly pointed out that these Guidelines are meant to complement ‘applicable bilateral and multilateral treaties and other instruments, to the extent that these Guidelines do not conflict with such treaties and binding instruments’. World Bank Group (1992: section I).
compensation only, leaving settlement of disputes over other aspects of the taking of foreign property—for example, its grounds—undetermined. Resolution 1803 contains the exhaustion of local remedies rule (‘shall’) before the claimant can resort to (international) arbitration or international adjudication, unless it has been otherwise agreed. Article 2 of the CERDS is highly Calvo-flavoured and thus exclusively emphasizes dispute settlement by domestic tribunals, unless other peaceful means have been chosen freely.

The rule that local remedies must be exhausted is firmly established in international law, as reflected in treaty law, international jurisprudence and in doctrine. Basically, this rule is founded on the principle of State sovereignty and expresses respect for the territorial jurisdiction of States, whereby aliens are subject to the laws of the State in which they are residing. The local remedies rule implies that the State against which an international action is brought for injuries inflicted upon a non-State party has the right to resist such action if the latter has not exhausted all the judicial remedies available under the law of that State. The rationale is that the State responsible for an international wrong must be given the opportunity to redress the wrong in accordance with a ruling of its own judiciary or administrative law courts.

Most investment-related multilateral treaties reaffirm the local remedies rule but also provide, in one way or another, for international dispute settlement procedures. Under the ICSID Convention a Contracting State may require exhaustion of local administrative or judicial remedies before it consents to international arbitration, an option which few States Parties have used. The Convention also stipulates that no Contracting State grant diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and another Contracting State have agreed to submit to ICSID arbitration procedures. The 1967 OECD Draft Convention on the Protection of Foreign Property emphasized international arbitration in disputes between State Parties. In addition, investors of the Parties could institute proceedings before an arbitral tribunal established

198 See, for example, Art. 41.1(c) of the UN Covenant on Civil and Political Rights and Art. 26 of the ICSID Convention.

199 Reference can be made to the Ambatielos Arbitration Case (Greece v. UK, reprinted in 12 RIAA (1956), p. 83 and pp. 118–19), the Interhandel Case (ICJ Reports 1959, p. 6) and the Elsi Case (ICJ Reports 1989, para. 50). The international human rights courts have also widely upheld the principle of the exhaustion of local remedies. See Dixon and McCorquodale (1991: Chapter 6).


201 Art. 26 of the 1965 ICSID Convention. See Chapter 6, section 3.1 of this study.

202 Arts. 26–27 of the ICSID Convention.
by the Convention, subject to exhaustion of local or other (national or interna-
tional) compulsory remedies; acceptance of the jurisdiction of the arbitration
tribunal by the host State concerned; and renouncement by the home State of its
right of espousal, that is to present a claim directly to the respondent State or to
bring it before an international tribunal.\footnote{203} The 1980 Arab Investment Agree-
ment provides for an Arab Investment Court which has jurisdiction to settle any
dispute between States Parties or between Arab investors and host States. Article
31 provides that the Arab investor shall first have recourse to the judiciary of the
State where the investment was made. In conflicts of jurisdiction between the
Arab Investment Court and national courts, the international jurisdiction of the
Court prevails (Art. 32).\footnote{204} The dispute settlement provisions of the 1981
Investment Agreement of the Organization of the Islamic Conference (46 mem-
ber States) offer the opportunity of resorting to national or international arbitra-
tion without exhausting local remedies.\footnote{205} The same goes for the interna-
tional arbitration procedure of the ASEAN Investment Agreement.\footnote{206} The 1991
NAFTA Agreement includes a detailed and complicated arbitration procedure for
dispute settlement between a State Party and an investor of another Party.\footnote{207} There is no reference to the local remedies rule, which is remarkable in view of
Mexico’s traditional adherence to the Calvo doctrine. Also the various references
to the ICSID Convention and procedures are notable, since both Canada and
Mexico are not (yet) parties to it.\footnote{208} Also the 1994 European Energy Charter
Treaty elaborates on the dispute settlement mechanisms, differentiating between
settlement of disputes between an investor and between contracting parties. In the
first case resort to the courts and administrative tribunals is mentioned as an
option, not as an obligation. In both cases international arbitration features
prominently as dispute settlement procedure.\footnote{209}

Most BITs provide for resort to international arbitration in the event of invest-
ment disputes or disputes over the interpretation and application of the BIT con-

\footnote{203} Art. 7 of the OECD Draft Convention on the Protection of Foreign Property. Text with
\footnote{204} It is uncertain whether this Court has been set up.
\footnote{206} Art. X on Arbitration of the ASEAN Agreement for the Promotion and Protection of
\footnote{207} See North American Free Trade Agreement (Canada, Mexico, US; 1991), Chapter Eleven–
\footnote{208} However, under ICSID’s Additional Facility Rules ICSID procedures can be extended to
nationals of non-Contracting Parties in the case of a dispute with a Contracting State Party.
\footnote{209} See Art. 26 and Annex I of the EECT. See also section 8.6 of Chapter 10.
cerned. In principle, however, the scope of these international arbitration clauses is limited by the local remedies rule. It is surprising that there is a trend to require ‘exhaustion’ of local remedies within a certain time limit (varying from 3 to 24 months), after which international arbitration is permitted irrespective of whether the judicial or administrative proceedings have been completed. The local remedies rule may even be renounced altogether.\textsuperscript{210} Obviously, this practice operates on a voluntary basis. It is hard, therefore, to distil a new rule of customary international law from it. Yet, as Peters points out, a long line of BITs indicates that—in the field of international investment law—doctrinal views are making way for practical considerations.

In the \textit{Elsi Case} (USA \textit{v.} Italy, 1989), the ICJ Chamber in interpreting the dispute settlement clause of the 1955 US/Italian Treaty of Friendship, Commerce and Navigation—which made no explicit reference to the local remedies rule—found itself ‘unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.’\textsuperscript{211} In other words, unless they unequivocally renounce the local remedies rule by way of a treaty or otherwise,\textsuperscript{212} States retain the right to settle disputes through their local judiciary before an appeal can be made to international dispute settlement procedures, should either party remain unsatisfied with the result achieved in the ‘final instance’ in the host State.\textsuperscript{213} The \textit{Elsi} judgment is particularly notable since it was rendered at a time when the rationale for the local remedies rule was no longer as obvious as it had been in the past.

In the literature of international law, considerable debate has taken place with respect to the interpretation of the dispute settlement mechanism, especially that of Article 2.2(c) of the CERDS in comparison with paragraph 4 of Resolution 1803. According to García-Amador the CERDS provision ‘seems, by implication, to reject settlement by recourse to arbitration or international adjudication’;\textsuperscript{214} but, according to Abi-Saab and Chowdhury, in practice differences may be more apparent than real since CERDS does not exclude recourse to international judi-

\textsuperscript{210} See Peters (1991: 134).

\textsuperscript{211} \textit{ICJ Reports} 1989, p. 15, para. 50.

\textsuperscript{212} For example, as was done by Iran and the USA when establishing the Iran-US Claims Tribunal in 1981 pursuant to the Declaration of Algiers (text in 20 \textit{ILM} (1981), p. 2231).

\textsuperscript{213} It is unlikely that the host State will take the dispute to international arbitration when it is unsatisfied with the verdict of its own courts, but it is entitled to do so under many BITs which allow either party to the dispute (not only the foreign investor) to institute arbitral proceedings.

\textsuperscript{214} García-Amador (1980: 51).
cial settlement if all parties concerned want it. However, it is difficult to see how this could satisfy the objections of those who prefer that the investor should have the option of an international procedure. The fact that an international judicial (or arbitral?) procedure is allowed by the CERDS does not detract from the fact that it is up to the discretion of the host State to require exclusively domestic procedures.

Despite all the controversies and uncertainties involved, nearly all sources referred to above emphasize, in fact, the right of States to a free choice of means for the settlement of nationalization and compensation disputes. This freedom includes the right to insist on exhaustion of local remedies in a dispute between a host State and a foreign investor as well as the freedom to resort to other peaceful means which have been freely agreed upon by the parties concerned. This is also reflected in the ILA Seoul Declaration where it provides that ‘disputes . . . have to be settled by peaceful means chosen by the parties concerned. . . . The principle of local remedies shall be observed, where applicable’. Unlike Article 2.2(c) of the CERDS, the Declaration includes, by using the words ‘by the parties concerned’, international arrangements between States and foreign investors. We are thus left with the question: in the absence of agreement, should an option of international dispute settlement be open? This question will be addressed in the last section of the next chapter which attempts to identify duties emanating from the principle of PSNR, which represent the reverse side of the same coin.

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