Sovereignty over natural resources
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10 Duties: The Reverse Side of the PSNR Coin

1. The Concept of Duties

Once the principle of permanent sovereignty over natural resources (PSNR) had been formulated, its legal evolution focused initially, as we saw, on the rights arising from it. For obvious reasons States are inclined to formulate rights expanding their sovereignty rather than obligations restricting it. They tend to consider the latter as an encroachment on their sovereignty. Similarly, academic discussion on the content of PSNR has long focused on the rights emanating from it, in particular the right to take foreign property.

Less attention has been paid to the question whether duties are incumbent on States in the exercise of their PSNR and if so what they entail. This chapter intends to analyse what kind of duties the principle of PSNR may give rise to, especially for States. As in previous chapters, it takes as a starting point the set of PSNR-related UN resolutions analysed in Part I and investigates to what extent PSNR-related duties have become recognized in treaty law,\(^1\) State practice, decisions of international courts and tribunals,\(^2\) the work of professional international law bodies, and in international law literature. Only those treaties which have a bearing on the exercise of PSNR are dealt with. As regards intergovernmental and professional bodies, documents dealt with include: the ICC Guidelines on Foreign Investment (1972); the OECD Declaration on Multinational Enterprises (1976); the ILA Seoul Declaration (1986); the ALI’s Third Restatement of the Foreign Relations Law of the United States (1987); the Draft UN Code of Conduct on Transnational Corporations (1990); the World Bank Guidelines on the Legal Treatment of Foreign Investment (1992); the Proposed Legal Principles of the Group of Legal Experts of the Brundtland Commission (1987); and the draft International Covenant on Environment and Development of the World Conservation Union (IUCN, 1994).

At the outset, it should be pointed out that the concept of duties or obligations is difficult to define in precise terms, as signified by the broad range of express-

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\(^1\) See Appendix III.

\(^2\) See Appendix V.
ions used, such as: ‘requirements’; ‘undertakings’; ‘(general) obligations’; ‘obligations freely entered into’; ‘codes of conduct’; ‘commitments’; and ‘responsibilities’. Strict obligations can only be said to exist where a prescribed form of conduct is imposed on an identifiable subject, corresponding to another subject’s right to demand such conduct. Obligations stricto sensu create ‘strict’ liability. All too often, however, the nature of the obligation, the subjects concerned and their mutual relationship cannot be clearly identified. In international law such terms as duties, obligations or commitments are often used to denote the weaker form of indebtedness associated with framework treaties, codes of conduct, non-mandatory resolutions and the like. However, in the context of State responsibility in public international law the word ‘responsibility’ has a more stringent meaning. The ILC uses it in connection with wrongful acts and reserves the term ‘liability’ for injurious consequences arising out of activities not prohibited by international law.³

Thus it must be recognized that in general there is considerable confusion in the terminology used in this field. In this chapter the terms obligation and duty are used interchangeably in the sense of a prescribed form of conduct imposed on an identifiable subject. Although they often cannot be enforced through court proceedings, this does not preclude the possibility that in practice they are adhered to as a result of international political pressure or public opinion. They can still be said to be legally relevant in so far as they entail a code of conduct for the addressees and may create ‘legitimate expectations’ on the part of other parties. The link between addressees and beneficiaries is, however, not as strong as in the case of obligations proper. Yet such weaker forms of obligations and duties can serve as an illustration of the law in statu nascendi, in so far as they have the potential to evolve into fully-fledged obligations as a result of widespread and consistent State practice.

2. The Exercise of Permanent Sovereignty for National Development and the Well-Being of the People

GA Resolution 523 (VI) conditioned the right of underdeveloped countries freely to determine the use of their natural resources by the requirement ‘that they must utilize such resources in order to be in a better position to further the realization of their plans of economic development in accordance with their national interests’.⁴ Resolution 626 (VII) puts this in less stringent terms: ‘wherever deemed desirable by them [i.e., member States] for their own progress and economic de-

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⁴ Emphasis added.
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Resolution 1803 (XVII) embodies some specific guidelines for the exercise of the right to PSNR, stressing in its very first paragraph:

The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.5

Thus the General Assembly clearly linked the exercise of PSNR with the requirement to promote national development and the well-being of the inhabitants.6 It should be noted that these two injunctions are not necessarily in harmony with each other and may conflict. For example, the exploitation of a copper mine or a forest may be conducive to the development of the national economy but detrimental to the well-being of the local population. Similarly, the benefits of the exploitation of natural resources may accrue mainly to foreign investors and national elites and may not trickle down to the people. By requiring that PSNR must be exercised in the interest of national development and the well-being of the people, the 1962 Declaration seeks to ensure that the whole population should benefit from resource exploitation and the ensuing national development.

This particular phrasing of paragraph 1 of Resolution 1803 was literally reaffirmed only once, in GA Resolution 2692 (XXV).7 In all subsequent resolutions dealing with PSNR either only very general guidelines were included, such as promoting ‘national development’,8 or there were no guidelines at all.9 This could be interpreted as an illustration of the trend during the late 1960s and early 1970s

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5 Emphasis added.
6 The right-holders and beneficiaries are somewhat ambiguously identified: while PSNR is formulated as a right of ‘peoples and nations’, it has to be exercised in the interest of ‘national development’ and the well-being of the people of the ‘State concerned’. See section 4 of Chapter 1 supra on this issue. In the French version the text reads as follows: ‘Le droit de souveraineté permanent des peuples et des nations sur leurs richesses et leurs ressources naturelles doit s’exercer dans l’intérêt du bien-être de la population de l’Etat intéressé’. It seems likely that some confusion has crept into some texts as a result of the three different meanings of the English word ‘people’: corresponding with the French words ‘peuple’, ‘population’ and ‘les gens’.
8 GA Res. 2158 (XXI), oper. para. 1. While in this main PSNR paragraph no reference is made to ‘the well-being of the people’, it is notable that its paragraph 5 on enhancing the share of developing countries in the advantages and profits of foreign enterprises refers to ‘the development needs and objectives of the peoples concerned’.
9 This applies to the NIEO resolutions. Paragraph 4 (r) of the NIEO Declaration only formulates ‘[t]he need for developing countries to concentrate all their resources for the cause of development’.
to formulate the right to PSNR as being as ‘hard’ and unqualified as possible without any reference to possible restrictions of the discretionary power of the State. For example, Article 2 of the CERDS provides:

Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.10

Here a general duty is imposed on the State to exercise freely and fully its PSNR. In view of the political circumstances in which it was drafted and the nationalistic tide then prevailing, this article might be interpreted as an injunction upon States to manage their natural resources in the interest of their national development.

Decree No. 1 for the Protection of the Natural Resources of Namibia puts it more explicitly where it affirms the responsibility of the UN Council for Namibia to ensure that ‘these natural resources are not exploited to the detriment of Namibia [and] . . . its people’.11

As far as multilateral treaties are concerned, duties are mostly imposed indirectly. Article 1 of the 1966 Human Rights Covenants provides: ‘In no case may a people be deprived of its own means of subsistence.’12 The African Charter on Human and Peoples’ Rights stipulates in its PSNR Article: ‘This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it’.13 Several of the provisions of the 1968 African Convention on the Conservation of Nature and Natural Resources underscore the need in managing and utilizing the resources to take into account the social and economic needs of the peoples or States concerned.14 For example, Article VI obliges States to ‘adopt scientifically-based conservation, utilization and management plans of forests and rangeland, taking into account the social and economic needs of the States concerned.’ Likewise, the 1978 Treaty for Amazonian Co-operation includes amongst its objectives socio-economic development and identifies this as a

11 Decree No. 1 for the Protection of the Natural Resources of Namibia, enacted on 27 September 1974. Text in Chapter 5.
12 In addition, both Covenants state: ‘Nothing in the present Covenant may be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.’ Art. 25 of the Economic, Social and Cultural Rights Covenant and Art. 47 of the Civil and Political Rights Covenant.
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responsibility 'inherent in the sovereignty of each State'. This goal was reiterated in the 1989 Amazon Declaration, where the presidents of the States Parties to the Amazonian Treaty stated:

Conscious of . . . the necessity of using this potential [i.e., of the Amazon region] to promote the economic and social development of our peoples, we reiterate that our Amazon heritage must be preserved through the rational use of the resources of the region, so that present and future generations may benefit from this legacy of nature . . . We reaffirm the sovereign right of each country to freely manage its natural resources, bearing in mind the need for promoting the economic and social development of its people . . .

Lastly, a reference can be found in the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources (not in force). In its preamble the six member States recognize the importance of natural resources and the duty, among other things, ‘to develop their forestry management plans . . . with a view to maintaining potential for optimum sustainable yield and avoiding depletion of resource capital.’

In international jurisprudence and arbitral awards, no direct indication of duties at the national level with respect to the use of natural resources can be found, although the interests of the local populations and their dependence on the natural resources in what they perceived as their territories and waters were very much at stake. References occur in, for example, the ICJ’s Fisheries Jurisdiction Cases (UK and FRG v. Iceland, 1974), the Western Sahara Case (advisory opinion to GA, 1975) and the Gulf of Maine Case (USA v. Canada, 1984). So far international law literature has not addressed the question of exercising PSNR in the interest of national development and the well-being of the people to such an extent that meaningful conclusions can be drawn from it.

To sum up, Resolution 1803 says that PSNR is a right of nations and peoples and requires that it be exercised in the interests of the whole population and national development. This reflects the spirit of the linkage between self-determination and the realization of socio-economic human rights, during the human rights codification process of the 1950s and 1960s, and the subsequent linkage between the decolonization process and the pursuance of development of developing countries, as exemplified in the 1960 Decolonization Declaration and certain development-

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17 Art. VI.2 (g).
related resolutions. However, apart from this and a few other UN resolutions, only cursory evidence can be found that under international law States have a duty: to exercise their right to PSNR in the interest of national development; and to ensure that their inhabitants benefit from resource exploitation and the resulting national development.

3. Respect for the Rights and Interests of Indigenous Peoples

With respect to the duty of States to exercise their PSNR in the interest of the well-being of the people, that is all inhabitants residing in a country, one should note that in practice the inhabitants of a State are often not a homogeneous community but may be composed of various peoples and minorities, including indigenous peoples. In international law the phrases ‘We, the peoples’ of the UN Charter, ‘all peoples’ of Article 1 of the Human Rights Covenants, or ‘the people’ (in French: ‘la population’) as in Declaration 1803, are most likely to be equated with the peoples resident within a defined territory. This raises the issue of State control and development of natural resources as being possibly contrary to the well-being of, for example, indigenous peoples within its territory.

Until the late 1960s, hardly any international political attention was paid to the plight of ‘indigenous peoples’ and their need for international protection. Exceptions are a General Assembly resolution on social problems of ‘aboriginal populations and other under-developed social groups of the American continent’, adopted in 1949 at the initiative of Bolivia, and the 1957 ILO Convention No. 107

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19 The same goes for the phrases ‘self-determination of peoples’ in Articles 1 and 55 and ‘territories whose peoples have not yet attained a full measure of self-government’ in Article 73 of the UN Charter.


21 GA Res. 275 (III), entitled ‘Study of the Social Problems of the Aboriginal Populations and Other Under-Developed Social Groups of the American Continent’, adopted on 11 May 1949 by 37 votes to none, with 14 abstentions. See UNYB 1948–49, pp. 621–22. It recalls the UN Charter objectives of promoting social progress and higher standards of living throughout the world and notably states that: ‘the material and cultural development of those populations would result in a more profitable utilisation of the natural resources of America to the advantage of the world.’ The USSR and Poland used this item on indigen-
Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (see below).

Since the late 1960s, the question of indigenous peoples received renewed attention within the United Nations in the context of the development of human rights law, particularly relating to anti-discrimination and protection of minorities. Obviously, a certain overlap exists between the general case of minorities and the specific issue of indigenous peoples. On the recommendation of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, ECOSOC initiated in 1971 a study on 'The Problem of Discrimination Against Indigenous Populations'. In 1982, it established a Working Group on Indigenous Populations, with the mandate to review the human rights of indigenous peoples and to develop standards to protect these rights. Apart from serving as a significant forum for the discussion of the plight of indigenous peoples and of possible responses, both national and international, the major work on which the Working Group embarked was the drafting of a declaration on the rights of indigenous peoples to be adopted by the UN General Assembly. In 1988, a first draft was submitted and in 1993 the Working Group completed its work on a Draft Declaration on the Rights of Indigenous Peoples. In August 1994, the draft was adopted by the above-mentioned Sub-Commission and it will be con-

The inclusion of Article 27 dealing with the protection of minorities in the UN Covenant on Civil and Political Rights (1966) is of importance. It reads: ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.’


Special Rapporteur was the Mexican Ambassador Martínez Cobo. His report was published in 1983; see UN Doc. E/CN.4/Sub.2/1982/21/Add. 1. The definition of indigenous peoples proposed in the Special Rapporteur’s report of 1982 reads:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

UN Doc. E/RES/1982/34.

sidered by the UN Commission on Human Rights at its 1995 session. The rights contained therein are said to constitute ‘the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world’. One should bear in mind, however, that this still is a Draft Declaration and that it is by no means sure that it will eventually be adopted by ECOSOC and, subsequently, by the UNGA. It goes without saying that the definition of ‘indigenous peoples’ and the scope of their alleged right to political self-determination are among the most controversial issues.

Concern for the position and rights of indigenous peoples is also reflected in the final documents of the UN Conferences held in Rio (1992) and Vienna (1993). Principle 22 of the Rio Declaration on Environment and Development stresses the need to recognize and support the identity, culture and interests of indigenous people and other local communities, inter alia, in recognition of their ‘vital role in environmental management and development because of their knowledge and traditional practices’. The Vienna Declaration adopted by the 1993 World Conference on Human Rights recognizes the ‘inherent dignity’ of indigenous people and calls upon States to take, in accordance with international law, positive steps to ensure respect for all human rights and fundamental freedoms of indigenous peoples. Positive as these developments may be, it is one thing for States to adopt some general statements on the rights of indigenous peoples but another to act upon the content of these rights.

Several paragraphs of the Draft Declaration on the Rights of Indigenous Peoples deal with elements of the right of indigenous peoples to dispose of their natural resources. In the preamble, concern is expressed that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, inter alia, in ‘their colonization and dispossession of their lands, territories and resources’. The conviction is expressed that ‘control by indigenous peoples over developments affecting their lands, territories and resources will enable them . . . to promote their development in accordance with their aspirations and needs’. The 45 articles of the operative part of the Draft Declaration formulate a number of

27 Art. 42 of the Draft Declaration.
30 See Chapter 26 of Agenda 21 which elaborates on this; UN Doc. A/CONF. 151/26, 13 August 1992.
31 UN Doc. A/CONF.157/23, para. 20. See also the recommendations in paragraphs 28–32 of the Vienna Declaration, in particular to proclaim a UN Decade of Indigenous Peoples, creating a permanent UN forum for indigenous peoples and providing advisory services in the field of human rights for indigenous peoples.
rights of indigenous peoples to land and resources, from which corollary prohibitions or obligations of States can be inferred. These include:

a. no subjection of indigenous peoples to any action having the aim or effect of dispossessing them of their lands, territories or resources (Art. 7);

b. no relocation from their lands or territories without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation (Art. 10);

c. recognition and respect of indigenous peoples’ right to the protection of vital medicinal plants, animals and minerals (Art. 24);

d. recognition and respect of indigenous peoples’ right to their natural wealth and resources, particularly their right:
   • to maintain and strengthen their relationship with the lands, territories, waters and coastal seas which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard (Art. 25);
   • to own, develop, control or use their lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources (Art. 26).
   • to restitution of their lands, territories and resources which have been confiscated, occupied, used or damaged, or, where this is not possible, to seek ‘just and fair compensation’;32
   • to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international co-operation (Art. 28); and
   • to determine priorities and strategies for the development and use of their lands, territories and other resources.
   
   This requires that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

As far as treaty law is concerned, the most relevant instruments include ILO Conventions No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (1957)33 and

32 It is added that, unless otherwise agreed, compensation shall take the form of lands, territories or resources equal in quality, size and legal status.

33 Signed on 26 June 1957, entered into force on 2 June 1959. 27 States have ratified ILO Convention No. 107. Text in 328 UNTS 247. See also ILO Recommendation No. 104 on the Protection of Indigenous and Tribal Populations.
No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989). The 1957 Convention has often been criticized because of its integrationist, if not assimilationist approach. It contains rather weak protection clauses on the rights of indigenous peoples, including those with respect to their lands. Article 12.1 for example provides that:

The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.

Following UN discussions on better standard-setting for the protection of indigenous peoples, ILO decided in 1985 to convene a meeting of experts with a view to revising the 1957 Convention. Its work resulted in the adoption of Convention No. 169 on 27 June 1989. The new Convention is said to reflect contemporary thought which has abandoned ‘assimilation’ in favour of ‘preservation’. Part III of the new Convention includes various articles on the protection of lands and territories of indigenous peoples, the term ‘territories’ being used to cover ‘the total environment of the areas which the peoples concerned occupy or otherwise use’. Article 15 deals specifically with safeguarding the rights of the peoples concerned to the natural resources pertaining to their lands: ‘These rights include the right of these peoples to participate in the use, management and conservation of these resources’.

The word ‘participate’ appears considerably to diminish the value of safeguarding the indigenous people’s rights to their natural resources, even in cases where the peoples concerned enjoy ownership and possession of the lands and their natural resources. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments are said to be under an obligation to consult indigenous peoples as regards exploration and exploitation of such resources in their lands. In a non-committal way it is added that the peoples concerned shall, wherever possible, participate in the benefits of such activities. However, they must receive fair compensation for any damage which they may sustain as a result of such activities. Article 16 stipulates that the peoples concerned shall not be removed from the

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35 Text in 28 ILM (1989), p. 1382. Following two ratifications it entered into force on 5 September 1991. As of 1 January 1993 it had been ratified by only four States: Bolivia, Colombia, Mexico and Norway.
36 Brölmann et al. (1993: 215).
37 Art. 13.2 of ILO Convention No. 169.
38 Art. 15.1.
lands which they occupy, but provides some ambiguous and dubious escape clauses.\textsuperscript{39}

Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.\textsuperscript{40}

Obviously, this Article leaves the State concerned ample discretion and will be of little help to indigenous peoples should they have a dispute with their State government concerning the destruction of their land and resources as a result of, for example, the construction of infrastructural works or resource exploitation.

In ‘The Amazon Declaration’ (1989) the Council, established under the Treaty for Amazonian Co-operation of 1978, linked the exercise of PSNR to the duty to respect the rights and interests of the indigenous peoples: ‘... we reiterate our full respect for the right of indigenous populations of the Amazonian region to have adopted all measures aimed at maintaining and preserving the integrity of these human groups, their cultures and their ecological habitats, subject to the exercise of the right which is inherent in the sovereignty of each State.’\textsuperscript{41}

Reference can also be made to the 1992 Biodiversity Convention, the 1994 International Tropical Timber Agreement (ITTA), the 1994 Desertification Convention and the 1994 European Energy Charter Treaty. The Biodiversity Convention recognizes the contribution of indigenous peoples to the conservation of biological diversity and the sustainable use of its components,\textsuperscript{42} but falls short of recognizing rights of indigenous peoples, based on their knowledge and practices, to the conservation and sustainable use of biological diversity. It only calls upon governments to ‘respect, preserve and maintain’ the knowledge of indigenous communities and to promote its wider application with their approval and involvement and the equitable sharing of the benefits arising from the utilization of such knowledge.\textsuperscript{43} The ITTA encourages members to support and develop industrial tropical timber reforestation and forest management activities as well as to rehabilitate

\textsuperscript{39} Cf. Art. 12.1 of the 1957 ILO Convention quoted above, which it is meant to improve, without much success.

\textsuperscript{40} Art. 16.2. Emphasis added. See also some ‘whenever possible’ clauses in the subsequent paragraphs of Article 16.


\textsuperscript{42} In the preamble the close and traditional dependence of such communities on biological resources is acknowledged. It also addresses the desirability of those possessing local knowledge related to genetic resources to benefit appropriately from its use.

\textsuperscript{43} See Art. 8 (j) of the Biodiversity Convention.
degraded forest land, ‘with due regard for the interests of local communities dependent on forest resources’. The UN Convention to Combat Desertification calls on the Parties to ensure that decisions on the design and implementation of programmes to combat desertification and/or to mitigate the effects of drought are taken with the participation of populations and local communities. Finally, the European Energy Charter Treaty includes amongst its exceptions any preferential measure ‘designed to benefit investors who are aboriginal people . . . or their investments’. It should be noted, however, that in all these treaties the sovereign rights are vested in the State which is to exercise these rights on behalf of all its peoples and citizens.

As far as judicial decisions are concerned, the ICJ recognized in the Western Sahara Case (1975) that territories inhabited by socially and politically organized tribes and peoples were not to be regarded as terra nullius or free for occupation and acquisition. It also found that certain nomadic peoples possessed rights, including rights to the lands in the Western Sahara. The Court concluded that the Decolonization Declaration 1514 (XV) was applicable to the Western Sahara and advised that the application of the principle of self-determination be pursued, through the free and genuine expression of the will of the people of the territory. Issues at stake included not only certain political disputes among North African States, but also the disposal of the rich phosphate deposits and fishery zones of the Western Sahara. In 1976, following an agreement between Spain, Morocco and Mauritania, Spain withdrew from the territory; Morocco acquired a large part of the Western Sahara (including phosphate deposits); and Mauritania acquired the rest (including some mineral wealth). However, after strong protests from Algeria and the Saharan liberation movement Polisario, Mauritania renounced its claims and the UN launched a plan for the self-determination of the peoples within the territory, under which the peace-keeping operation MINURSO would supervise a cease-fire and conduct a referendum. So far, however, this has not materialized and in practice Morocco occupies almost the entire Western Sahara.

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44 Text in Environmental Policy and Law, 24/2/3 (1994), p. 125. See also section 4 infra.
45 See Art. 3 (a). See also the preamble and Arts 5 (d) and 19.1(a).
46 Art. 24.2 (iii) of the EECT.
48 Ibid., p. 68.
49 See also Franck (1976: 694-721).
Finally, reference should be made to a recent policy change of the World Bank Group should be made: in response to mounting criticism of the effects of its projects on indigenous peoples and their economies,\textsuperscript{51} the World Bank in March 1992 issued Guidelines on Indigenous Peoples in which it declared to aim at their \textit{informed participation}.\textsuperscript{52}

Thus, identifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists are core activities for any project that affects indigenous peoples and their rights to natural and economic resources.

The above rights of indigenous peoples to the natural resources of their lands are at first glance similar to those of States (to be) derived from the principle of PSNR, as discussed in Chapter 9. Yet, the essential difference is that indigenous peoples are still an object rather than a subject of international law.\textsuperscript{53} Relations of States with indigenous peoples within their territory have long been perceived as matters of internal jurisdiction. Due to the developments in human rights law and attempts to provide indigenous peoples with an internationally-recognized status, no State can any longer maintain that its treatment of its citizens and indigenous peoples is an internal matter. Indeed, both the ECOSOC Working Group Draft Declaration and ILO Convention No. 169 fall short of recognizing a fully-fledged right to self-determination of indigenous peoples and cautiously limit their rights to aspects of internal self-determination, in other words to rights \textit{within} their States.\textsuperscript{54} These documents indicate the gradual recognition, under present international law, of the need for special protection of the rights of indigenous peoples and of the notion that—as the preamble of the Draft Declaration puts it—‘arrangements between States and indigenous peoples are properly matters of international concern and responsibility’. This manifests itself first and foremost in obligations incumbent upon States rather than in rights of indigenous peoples themselves which can be internationally invoked. At the international level, States can be held accountable, both in the context of the ILO Convention and under UN

\textsuperscript{51} Examples are the Polonoroenk project in Brazil and the Narmada project in India.


\textsuperscript{54} As is evident from the qualification in Article 1 of ILO Convention No. 169, the use of the term ‘peoples’ has no implications as regards the rights which one may attach to the term under international law.
human rights procedures, for their obligation to respect the rights and interests of indigenous peoples regarding their natural wealth and resources, but the decisive authority as regards use and exploitation of indigenous lands and their natural resources ultimately rests with the State.

4. Duty to Co-operate for International Development

4.1 Global Development

In the very first PSNR Resolution 523 (VI), it was considered that ‘the underdeveloped countries must utilize such (natural) resources . . . to further the expansion of the world economy.’ In subsequent resolutions this phrase has never been repeated. In Resolutions 837 (IX), 1314 (XIII) and 1514 (XV) reference is made to ‘obligations arising out of international co-operation’. These words are usually understood to refer to the obligation to fulfil specific commitments made in the course of co-operation, but could also be interpreted as reflecting a duty to co-operate for international development. The Strategy for DD II points out: ‘Every country has the right and duty to develop its . . . natural resources’ and provides in its Paragraph 73: ‘. . . production policies will be carried out in a global context to achieve optimum utilization of world resources, benefiting both developed and developing countries.’ In the PSNR-related paragraphs of the CERDS (as well as in other NIEO resolutions) such requirements are not included. They contain, however, many general references to objectives such as a sustained growth of the world economy, balanced international trade and economic co-operation among States, which—according to Article 33.2—also govern Article 2. Consequently, one may argue that the right to exercise PSNR should be read and understood in the light of Article 33 of the CERDS and the general context of this Charter of Economic Rights and Duties of States.

As far as multilateral treaties are concerned, only general references to a duty to co-operate can be traced, although none of them is directly related to PSNR. The

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55 For example, the various communication and complaints procedures in the context of the UN Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Elimination of Racial Discrimination.

56 GA Res. 523 (VI), 12 January 1952. Emphasis added.


58 Arts. 6–9 and 33 of CERDS; see also VerLoren van Themaat (1981: 269–73).
first document to be mentioned is, of course, the UN Charter, especially Chapter IX on International Economic and Social Co-operation.\footnote{For the background and an interpretation of Articles 55 and 56 of the UN Charter see Pellet and Bouony in Cot and Pellet (1991: 843–63 and 887–93).}

Secondly, it may be relevant to mention the agreements underlying the post-war international economic and monetary order. Nothing more than an indirect reference to the use of natural resources for world development can be found in the constitutions of the IMF and World Bank, of which the former includes the stated intention ‘to facilitate the expansion and balanced growth of international trade, and to contribute thereby to . . . the development of the productive resources of all members as primary objectives of economic policy’.\footnote{Art. I sub (ii), IMF; similar objectives can be found in Art. I sub (i) and (iii) of the Articles of Agreement of the World Bank.} Similarly, the 1948 Havana Charter aimed ‘to increase the production, consumption and exchange of goods, and thus to contribute to a balanced and expanding world economy’. The preamble of GATT (1947) recognizes that international relations in the field of ‘trade and economic endeavour should be conducted with a view to raising standards of living, . . . developing the full use of the resources of the world and expanding the production and exchange of goods’. The constitution of the new World Trade Organization (WTO, 1994) contains a modified formulation of this objective:

... allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and to preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

Some regional co-operation agreements could also be referred to in this context. For example, the Treaty establishing the European Coal and Steel Community (1951) includes the following objectives:

- to ensure an orderly supply to the common market, taking into account the needs of third countries; . . .
- to promote a policy of using natural resources rationally and avoiding their unconsidered exhaustion.\footnote{Art. 3 (a) and (d).}

The 46 member States of the Organization of the Islamic Conference (OIC) have stated their wish to ensure that:\footnote{Preamble. Text in Moinuddin (1987: 197).}

... the economic resources of the Islamic countries could circulate between them so that optimum utilization could be made of these resources in a way that will serve their development and raise the standard of living of the peoples.
The 1994 European Energy Charter Treaty aims to promote long-term co-operation in the energy field by promoting exploration and development of energy resources on a commercial and non-discriminatory basis. The facilitating of access to these resources and security of supply of oil and natural gas served as a major motive for Western States to initiate and join this co-operation.  

Finally, the 1982 UN Convention on the Law of the Sea, includes as a general objective the setting-up of 'a legal order for the seas and oceans which will . . . promote . . . the equitable and efficient utilization of their resources . . . both within and beyond the limits of national economic jurisdiction.'

The above-mentioned multilateral instruments set out objectives or aims by which the State Parties and organizations concerned should be guided; they do not impose clear-cut obligations. This is reflected in section 4 on the Duty to Co-operate for Global Development of the Seoul Declaration:

The duty to co-operate in international economic relations implies the progressive development of this duty in proportion to the growing economic interdependence between States and should lead therefore in particular to a reinforced co-operation in the fields of international trade, international monetary and financial relations, transnational investments, the transfer of technology, the regulation of the activities of transnational corporations and of transnational restrictive business practices, the supply of food, energy and commodities, the international protection of the natural environment, the right to development and the co-ordination of the various activities with a view to a coherent implementation of a new international economic order.

Obviously, this formulates the duty to co-operate for global development in exhortatory rather than in binding language. Furthermore, the ILA advocates that such a duty should progressively be developed 'in proportion to the growing economic interdependence between States'. Consequently, it is not easy to identify whether, and if so which, specific international obligations with respect to the use of natural resources arise from this duty to co-operate for global development.

In the aftermath of the use of ‘the Arab oil weapon’ and the world energy crisis during the early 1970s, some critical literature claimed that the ‘free’ exercise of PSNR should be performed or controlled in such a way as to contribute to international peace, world trade and development. Although from the point of view of

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64 Preamb. para. 4 of the 1982 UN Convention. See also Pinto (1986: 131–54).

international law some of these arguments may make sense, at the time they were inspired by *ad hoc* political considerations rather than legal argument. Legally-inspired rebuttals came from, among others, Shihata\(^{66}\) and Bedjaoui\(^{67}\) who defended the legality of the use of ‘the Arab oil weapon’ and the ‘full’ and ‘permanent’ sovereignty of developing States over their natural resources, respectively.

### 4.2 Development of Countries of the ‘South’

It is notable that PSNR resolutions rarely call on States to exercise their PSNR, or to exploit and use their natural resources, in order to promote the development of (other) developing countries. This may be explained, firstly, by the fact that developing countries have themselves advocated the principle of PSNR in the international community as a means to defend their resources against industrialized countries and Western companies in order to secure the benefits from exploitation for themselves. Secondly, the thought of mutual help and solidarity among developing countries only occurred much later.\(^{68}\) Once it was realized that all States, industrialized or developing, have the right to PSNR, one may wonder whether the general duty to co-operate for development of developing countries should not imply a specific obligation for States to exploit, use or share their natural resources for the sake of promoting development of developing countries. A first indication of the emergence of such an obligation might perhaps be found in the 1982 UN Convention on the Law of the Sea. Firstly, Articles 69 and 70 provide, under specified conditions, for sharing the living resources in the EEZs of coastal States with neighbouring land-locked or otherwise geographically disadvantaged developing States. However, as we noted in Chapter 6, the implementation of this obligation depends on the way in which the coastal States concerned interpret it.\(^{69}\) Secondly, coastal States are in principle under an obligation to make payments or contributions, in respect of the exploitation of the non-living resources of their continental shelves beyond 200 miles, to the International Sea-bed Authority. The latter will distribute them to State Parties to the Convention ‘on the basis of

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\(^{67}\) See Bedjaoui (1979: 228).

\(^{68}\) See South Commission (1990).

\(^{69}\) Nonetheless, the UN Convention on the Law of the Sea has identified this participation as a ‘right’ of land-locked and geographically-disadvantaged States, which consequently implies a legal duty on the part of coastal States. Similar resource-related provisions cannot be found in other multilateral treaties such as the Lomé IV Convention, the Agreement Establishing the Common Fund for Commodities, or the Agreement on the Global System of Trade Preferences among Developing Countries (GSTP), a so-called South-South treaty which was concluded under the auspices of the Group of 77 in Belgrade in 1988.
equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them'.

In conclusion, while under modern international law States have a duty to co-operate for development, in particular of developing countries, there are no indications that this general duty has been carried to a higher level of obligation namely that of an obligation incumbent on States in the exercise of their right to PSNR.

5. Conservation and Sustainable Use of Natural Wealth and Resources

In 1962, before the preservation of the environment was perceived as an important concern, the General Assembly adopted by consensus a Resolution ‘Economic Development and the Conservation of Nature’. The Resolution shows its consciousness of the extent to which the economic development of developing countries may jeopardize their natural resources, including their fauna and flora, and formulates for the first time the objective that natural resources should not be wasted. It endorses an initiative from UNESCO to recommend action and to introduce effective domestic legislation towards, inter alia, the preservation and rational use of natural resources.

The Stockholm Declaration on the Human Environment (1972) points out that careful planning and management are required for safeguarding the natural resources of the earth for the benefit of present and future generations: ‘The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments.’

In general terms, it is stated in Principle 2: ‘The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.’ Principle 13 provides that:

In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with

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71 GA Res. 1831 (XVII), 18 December 1962.
72 Preamb. para. 2.
the need to protect and improve the human environment for the benefit of their population.

But no specific principles with respect to modalities of national management of resources can be inferred from this Declaration. Ever since the Stockholm Conference, UN resolutions have elaborated gradually standards for nature conservation and utilization of natural resources. For example, Article 30 of Chapter III of the CERDS, entitled ‘Common responsibilities towards the international community’, reads:

The protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States. All States shall endeavour to establish their own environmental and developmental policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries. All States have 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. All States should cooperate in evolving international norms and regulations in the field of the environment.

Symptomatic of this trend may be the following paragraph of Resolution 35/7 in which the General Assembly:

_Solemnly invites_ Member States, in the exercise of their permanent sovereignty over their natural resources, to conduct their activities in recognition of the supreme importance of protecting natural systems, maintaining the balance and quality of nature and conserving natural resources, in the interests of present and future generations.

This phrase was literally repeated in Resolutions 36/6 and 37/7. In the latter the General Assembly solemnly proclaimed the (revised) World Charter for Nature, 73 In this document the following conviction is expressed: ‘Man can alter nature and exhaust natural resources by his action or its consequences and, therefore, must fully recognize the urgency of maintaining the stability and quality of nature and of conserving natural resources.’

Consequently, it includes principles of conservation. It stipulates that natural resources must not be wasted, but used with restraint in accordance with the following rules: 74

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73 On 2 October 1982, GA Res. 37/7 annexing the Charter was adopted by a recorded vote of 111 to 1 (the USA), with 18 abstentions. Originally, this Charter was drafted by the International Union for the Conservation of Nature and Natural Resources (IUCN: now World Conservation Union).

74 GA Res. 37/7, 28 October 1982, para. 10.
a. Living resources shall not be utilized in excess of their natural capacity for regeneration;
b. The productivity of soils shall be maintained or enhanced through measures which safeguard their long-term fertility and the process of organic decomposition, and prevent erosion and all other forms of degradation;
c. Resources, including water, which are not consumed as they are used shall be reused or recycled;
d. Non-renewable resources which are consumed as they are used shall be exploited with restraint, taking into account their abundance, the rational possibilities of converting them for consumption, and the compatibility of their exploitation with the functioning of natural systems.

In the section on implementation, it provides that its principles ‘shall be reflected in the law and practice of each State’ and that each State, taking fully into account sovereignty over its natural resources, must give effect to provisions of the Charter through its competent organs and in co-operation with other States. From this perspective it is disappointing, as noted above (section 9 of Chapter 4), that the 1992 Rio Declaration appears to be a step back since it contains less substantive provisions on natural resources and nature conservation than the Stockholm Declaration.

Some resolutions, while re-affirming the PSNR of States, indicate that the environmental impact of an irrational and wasteful exploitation of natural resources may amount to a threat to the exercise of PSNR by other countries, especially by developing countries. The NIEO Declaration (1974) reiterated in general terms ‘the necessity for all States to put an end to the waste of natural resources, including food products’, while GA Resolution 3326 (XXIX) puts this objective in the context of PSNR by observing that ‘irrational and wasteful exploitation and consumption of natural resources represent a threat to developing countries in the exercise of their PSNR.’ This also implies a duty of States to ensure that their natural resources and environment are managed properly, for the benefit of present and future generations.

With respect to the duty to prevent significant harmful effects on the environment of other States or of areas beyond national jurisdiction, the Stockholm Declaration includes as Principle 21:

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 ac-

75 Apart from States, individuals and NGOs are also addressed to ensure that the objectives and requirements of the Charter are met (para. 24).

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.

During its next session the General Assembly included a stronger term in the first operative paragraph of the Resolution on Co-operation between States in the Field of the Environment:77 ‘in the exploration, exploitation and development of their natural resources, States must not produce significant harmful effects in zones situated outside their national jurisdiction.’ Recently, there seems to have been a trend to specify this prohibition in particular with respect to exploitation of shared natural resources.

A number of international conventions in the field of environment and development have a bearing—albeit mostly indirectly—on the exercise of States of their PSNR. Reference can be made to: regional co-operation treaties; global conservation treaties; and other resource-related multilateral treaties.

5.1 Regional Co-operation Treaties

The first regional co-operation treaty to be mentioned is the 1940 Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere—an early and visionary example of an effort to protect all species in their natural habitat in order to prevent extinction and to preserve extraordinary beauty and striking geological formations, mainly through the establishment of national parks and wilderness reserves.78 Twenty-one States in the Americas are parties to it and all but one (USA) are developing countries. It is estimated that their territories include the habitat of approximately 25 per cent of all species on earth as well as the world’s largest remaining tropical forests. This Convention, however, is primarily of a promotional nature and a framework for co-operation rather than a source of international legal obligations.

In 1968, the African Convention on the Conservation of Nature and Natural Resources was concluded under the auspices of the OAU. According to the preamble, the Convention is based on the duty ‘to harness the natural . . . resources of our continent for the total advancement of our peoples’. Its principal objective is to promote the taking of the necessary measures to ensure the conservation, utilization and development of soil, water, floral and faunal resources of the continent, in accordance with scientific principles and having due regard to the best interest of the people. In addition, Parties are required to pay particular attention to issues such as ‘controlling bush fires, forest exploitation, land clearing for

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77 This GA Res. 2995 (XXVII) was adopted by 115 votes, with none against and 10 abstentions.

Tropical rain forests and biodiversity are among the most precious forms of natural wealth on our earth and contain many natural resources. It is estimated that the tropical rain forests provide a habitat to more than half of the world’s plant and animal species. They serve as essential sources of food, fuel, shelter, medicines and many other products for people living in these areas or elsewhere. They are essential for the maintenance of biological diversity and for the protection of soil and water resources. In addition, tropical rain forests serve as important natural carbon sinks. Deforestation by burning or rotting processes not only releases carbon-dioxide but also diminishes the capacity to absorb it. Thus, tropical rain forests and biodiversity play an important role in ecosystems and are important for human life.

Tropical rain forests are at present being destroyed at an alarming rate. Every year more than 15 million hectares—an area four times as large as the Netherlands!—are lost. The basic reasons for tropical deforestation include increasing needs for agricultural and pasture land, as a result of rapid population growth, and for fuel, timber, pulp and hard currency. Recently it has been estimated that at least 100 million hectares of tree planting worldwide are necessary for ecological rehabilitation, especially in tropical regions.

Tropical rain forests are part of the natural wealth of countries and thus they are subject to the PSNR of the States where they are located. Consequently, their management is first of all the responsibility of these States. With the important exceptions of Australia (Queensland) and French Guyana, virtually all of them are developing countries. PSNR does not mean, however, that other countries have nothing to do with the present and future management of this natural wealth. Tropical timber production and forestry management reflect overall development problems for which the international community as a whole should bear responsibility. Poverty and population pressure are among the driving forces in the depletion of tropical forests since people increasingly need land, fuel, shelter, etc. For some developing countries, timber production is a source of income and foreign exchange which they badly need in view of their international debt problems. Prices paid for tropical timber are, however, unstable and relatively low. This results in ‘cut-and-run’ patterns of commercial exploitation rather than in sustainable use.

It is now recognized that the destruction of tropical forests can have a severe impact on the ecological balance of neighbouring countries, and even on the global environment. As regards the latter, it has been suggested that forest fires in Brazil and Indonesia have contributed to global warming. In short, here we have yet another example of effects of national sovereignty or inadvertent acts in a certain country on other States and their environment.

cultivation . . . ’ and ‘to limit forest grazing to seasons and intensities that will not prevent forest regeneration’. 79 States Parties have a particular responsibility for protection of animal or plant species threatened with extinction and which are

The African Convention stands out as an early example of integrating the conservation of nature and natural resources with development. However, the Convention is mainly a ‘sleeping beauty’ since the level of activity in respect of the Convention is reportedly very low.\(^\text{81}\)

In 1976, the Apia Convention on Conservation of Nature in the South Pacific was concluded.\(^\text{82}\) Its principal objective is to conserve the capacity of the South Pacific to produce renewable natural resources, including indigenous wildlife, as well as to preserve representative samples of ecosystems, ‘superlative scenery’ and ‘striking geological formations’.

As far as Latin America is concerned, the most relevant treaty to be mentioned here is the 1978 Treaty for Amazonian Co-operation. Its main objectives include the promotion of ‘the harmonious development of the Amazon region’, in such a way that it will achieve environmental preservation as well as conservation and rational utilization of the natural resources of these territories.\(^\text{83}\) In the Amazon Declaration (May 1989), the Amazonian Council links the exercise of PSNR more closely with the duty of conserving the environment and respecting the rights and interests of indigenous peoples:

2. Conscious of the importance of protecting the cultural, economic and ecological heritage of our Amazon regions and of the necessity of using this potential to promote the economic and social development of our peoples, we reiterate that our Amazon heritage must be preserved through the rational use of the resources of the region, so that present and future generations may benefit from this legacy of nature.

4. We reaffirm the sovereign right of each country to freely manage its natural resources, bearing in mind the need for promoting the economic and social development of its people and the adequate conservation of the environment . . .

In the second part of paragraph 4 the Declaration welcomes international support for the conservation of the heritage of these territories, on the condition that this does not amount to an infringement of sovereignty.

Apart from the weakness of the co-operation provided for in the treaty, the dominant position of Brazil and political difficulties in the region have hampered

\(^{80}\) Art. 8.

\(^{81}\) See Lyster (1985) and Sand (1992: 70).


\(^{83}\) The Amazon Declaration also reiterates that ‘the Amazon heritage must be preserved through the rational use of the resources of the region, so that present and future generations may benefit from this legacy of nature’, referred to in section 2 of this chapter. The text of the Amazon Declaration of 6 May 1989 is published in 28 *ILM* (1989), p. 1303–05.
the implementation and further development of the Amazonian Treaty as an effective framework for regional co-operation in natural resource management.

In 1985, the six members of ASEAN concluded the ASEAN Agreement on the Conservation of Nature and Natural Resources\(^\text{84}\) which, however, never entered into force. In the preamble the ASEAN States recognize the importance of natural resource for present and future generations and express the wish to undertake individual and joint action for the conservation and management of living resources and other natural elements on which they depend. The treaty aims at maintaining essential ecological processes and life-support systems, preserving genetic diversity and ensuring the sustainable utilization of harvested resources. It purports to establish a co-operative framework among the ASEAN member States and to serve as a framework of reference for domestic environmental legislation.

In the context of UNEP a series of Conventions on Regional Seas have been concluded. While they primarily aim to protect the marine environment from pollution, most of them also contain standards and co-operative arrangements with respect to natural resource management in the marine and coastal areas of the regions concerned, with a view to maintaining a balance between economic development and environmental protection. One example is the 1985 Noumea Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.\(^\text{85}\) This Convention recognizes the economic, social and cultural value of the natural resources of the region and the need to protect this natural heritage for future generations.

Finally, reference should be made to EU law. The original constitutions of the European institutions did not deal with environmental concerns, but the Single European Act (1987) and the Treaty of Maastricht (1992) inserted several environmentally-relevant provisions into EU law. One of the new objectives of the EU is ‘to promote through the Community a harmonious and balanced development of economic activities, [and] sustainable and non-inflationary growth respecting the environment’.\(^\text{86}\) This is specified in Article 130 R, which provides that action by the Community in the field of the environment has, *inter alia*, the following ob-

\(^{84}\) Text in 15 *EPL* (1985), p. 64.


\(^{86}\) Art. 2 of the Maastricht Treaty on European Union. See also Wilkinson (1992).
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objectives: to preserve, protect and improve the quality of the environment; to ensure a prudent and rational utilization of natural resources; and to promote measures at the international level to deal with regional or worldwide environmental problems.

5.2 Global Conservation Treaties

A number of multilateral treaties in the field of nature and natural resource conservation are relevant. Firstly, the 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat. Like the Washington Convention, this is first of all an intergovernmental framework for international cooperation for the conservation and ‘wise use’ of wetland habitat and species. The Bureau of the Convention keeps a register of wetlands of international importance, which currently numbers more than 500, involving some 60 States. Co-operation programmes have been set up under the Convention, involving the Netherlands, Switzerland, France and various African States. In addition, in 1990 the Wetlands Conservation Fund was established to assist developing countries in the implementation of the Convention.

Under the 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage, each State Party has a duty to identify, protect, conserve and hand on to future generations the cultural and natural heritage which lies in its territory. A major international environmental non-governmental organization, the IUCN, is entrusted with the task of monitoring and reporting on the state of the natural sites. The World Heritage List includes at least 358 sites located in some 83 States, of which less than 100 are natural sites.\(^{87}\)

Although the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) addresses the international trade of faunal and floral resources, its ultimate objective is, of course, to conserve the status of the species concerned. So far, it has been the most important international agreement using trade instruments to protect wildlife. A related treaty is the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals. This multilateral convention purports to protect and conserve migratory species such as seals, small cetaceans and white storks by restricting harvest, conserving habitat and controlling adverse factors.

The main objectives of the Convention on Biological Diversity are the conservation of biological diversity, the sustainable use of its components and the equitable sharing of benefits of utilizing genetic resources. Sustainable use is defined as ‘the use of components of biological diversity in a way and at a rate that does

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\(^{87}\) Some 84 of these are natural and an additional 14 both natural and cultural. These 98 sites are located in some 38 States. Information provided to the author by Professor A.W. Westing, 30 November 1994.
not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations’. Thus the Convention incorporates important new principles of international environmental law such as the ‘precautionary principle’ and ‘intergenerational equity’. While recognizing State sovereignty over natural resources, the Convention requires Parties to facilitate access to genetic resources for environmentally-sound uses by other Parties. The Convention provides, *inter alia*, for national monitoring of biodiversity and the development of national strategies for its conservation, including the establishment of measures for specific species and habitats. Thus the Convention obliges States to take effective national action to put a halt to the destruction of biological species, habitats and ecosystems.

The UN Framework Convention on Climate Change (FCCC) aims to stabilize atmospheric concentrations of greenhouse gases at levels that will prevent human activities from interfering dangerously with the global climate system. Such a level is to be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner. Apart from the commitment of industrialized countries ‘by the end of the present decade’ to ‘return individually or jointly to their 1990 levels of those anthropogenic emissions’ of greenhouse gases, the FCCC formulates some duties incumbent on all Parties. They include in general terms duties to protect the climate system for the benefit of present and future generations of humankind, to take precautionary measures with respect to climate change, and to promote sustainable development. More specific resource-related obligations are: to promote and co-operate in the conservation and enhancement of sinks and reservoirs of greenhouse gases, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems; and to co-operate in preparing for adaptation to the impacts of climate change and to develop integrated plans for areas and resources especially vulnerable. The implementation of these general commitments are incumbent on States in the exercise of PSNR. During the negotiations on the FCCC developing countries with significant deposits of energy resources—for example, oil, natural gas and coal—asserted their PSNR rights and claims, but also indicated that they might be willing to accept self-imposed limitations as a *quid pro quo* for international assistance to adopt more effective pollution abatement measures and to gain access to environmentally sensitive technologies. The Convention provides that industrialized States may implement certain policies and measures ‘jointly’ with each other or with other States Parties, based on criteria to be set by the Confer-

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88 Arts 7 and 9.

89 See Art. 4.1 (d) and (e).

ence of the Parties. Specifically, this would mean that one State may carry out part of its obligations in the territory of another State, for example by investing in pollution-reducing activities. The principle of PSNR requires, of course, such cooperation to take place on a voluntary basis and to respect the sovereignty of the host State, including its economic and environmental policies.91

The UN Convention to Combat Desertification, a follow-up to Agenda 21 of UNCED 1992 in Rio de Janeiro, aims at curbing the degradation of drylands worldwide, including semi-arid grasslands as well as deserts. The degradation of fragile drylands threatens the livelihoods of over 900 million people in some 100 countries. The process affects some 25 per cent of the Earth’s land area and seems to be occurring at an accelerated rate globally. Causes include overgrazing, overcropping, poor irrigation practices and deforestation, combined with climatic variations. The situation is especially serious in Africa, where 66 per cent of the continent is desert or dryland, and 73 per cent of the agricultural drylands are already degraded. The Convention acknowledges that desertification and drought are problems of global dimension and calls for joint action to prevent the long-term consequences of desertification—such as mass migration, loss of plant and animal species, climate change and the need for emergency aid to populations in crisis.92 It establishes a framework for national, sub-regional and regional programmes and formulates general obligations, obligations of affected country Parties and obligations of developed country parties to combat desertification and mitigate the effects of drought. The Convention calls on the latter to actively support the efforts of affected developing countries, to provide financial resources and to transfer anti-desertification technologies to developing countries.

5.3 Other Resource-Related Multilateral Treaties

According to Article 1 of the Constitution of the FAO, the organization’s functions include ‘the conservation of natural resources’. The 1982 UN Convention on the Law of the Sea includes innovative principles and rules on environmental protection and preservation of the marine environment in rational exploitation and conservation of the living and non-living resources of the sea. While resources in extensive sea areas may be brought under national economic jurisdiction as a result of the establishment of a 200 mile EEZ and by extension of the continental shelf, obligations have been formulated as regards the protection and preservation of the marine environment in these areas. This dual approach is reflected in Article 193:

91 On this issue see Kuik, Peters and Schrijver (1994).
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.

Part XII of the Convention formulates a number of specific responsibilities for environmental preservation. These relate in particular to the prevention, reduction and control of pollution, including pollution originating in areas under national economic jurisdiction.\(^{93}\) Article 235 provides that States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment, and that ‘they shall be liable in accordance with international law’. Articles 61 and 62 include specific responsibilities of coastal States as regards the conservation and utilization of living resources in their EEZ.\(^{94}\)

The International Tropical Timber Agreement (1983) and its 1994 successor may also serve as examples of an attempt to include international environmental regulation in a resource-related multilateral treaty. In the preamble to the 1983 Agreement the parties recognized ‘the importance of, and the need for, proper and effective conservation and development of tropical timber forests with a view to ensuring their optimum utilization while maintaining the ecological balance of the regions concerned and of the biosphere’. While bearing in mind the sovereignty of producing member States over their natural resources, Article 1(h) lists as one of the objectives of the Agreement: ‘To encourage the development of national policies aimed at sustainable utilization and conservation of tropical forests and their genetic resources, and at maintaining the ecological balance in the regions concerned.’ A slightly modified version is incorporated in the 1994 Agreement. Recognizing the sovereignty of members over their natural resources, it sets out: ‘To encourage members to develop national policies aimed at sustainable utilization

\(^{93}\) See in particular Article 194.2 of the UN Convention on the Law of the Sea which reads:

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

\(^{94}\) On 28 July 1994, the General Assembly adopted a supplementary Agreement relating to the implementation of Part XI of the UN Convention on the Law of the Sea. This Agreement substantially modifies some of the controversial parts of the envisaged deep sea-bed mining regime in an effort to accommodate objections of the industrialized countries and to seek in this way universal participation in the 1982 Convention. The Agreement does not concern natural resources which come within the exclusive economic jurisdiction and the PSNR of coastal States, with the exception of the eroded protection of developing land-based producers of minerals. The text of the 1994 Agreement is annexed to UN Doc. A/RES/48/263, 17 August 1994 and has been published in 33 ILM (1994), p. 1309. For a discussion see Li (1994: Chapter VIII).
Duties

and conservation of timber producing forests and their genetic resources and at maintaining the ecological balance in the regions concerned, in the context of tropical timber trade. 95

Firm decisions to reach sustainability in timber production by the year 2000 were still considered to be impossible and, consequently, only objectives were formulated. The International Tropical Timber Council can only stimulate and at best assess sustainable utilization and conservation of tropical forests, but it cannot prohibit unsustainable production.

Other individual commodity agreements also contain conservation paragraphs. For example, the International Tin Agreement (1977, later renewed) provides that participating countries 'shall encourage the conservation of the natural resources of tin by preventing the premature abandonment of deposits'. 96 This relates to the need to avoid wasteful production methods. The International Rubber Agreement (1979) merely invests its Council with the right to initiate, upon the request of one State Party, a consultation procedure on domestic natural rubber policies directly affecting supply or demand.

Lomé IV (1989) includes amongst its principles of co-operation ‘a sustainable balance between its economic objectives, the rational management of the environment and the enhancement of natural . . . resources.’ 97 Article 14 specifies that co-operation shall entail ‘mutual responsibility for preservation of the natural heritage’ and:

shall help to promote specific operations concerning the conservation of natural resources, renewable and non-renewable, the protection of ecosystems and the control of drought, desertification and deforestation; other operations on specific themes shall also be undertaken (notably locust control, the protection and utilization of water resources, the preservation of tropical rain forests and biological diversity).

The Environment is included as a first, but rather general, chapter on areas of ACP-EEC co-operation. 98 It includes provisions concerning the protection and enhancement of the environment, the halting of the deterioration of land and forests, the restoration of ecological balances and the preservation of natural resources and their rational exploitation. For these purposes EEC support is to be provided ‘with a view to bringing an immediate improvement in the living conditions of their populations and to safeguarding those of future generations.’ Yet, all of these objectives and duties seem to be of a promotional nature and no clear-cut

96 Art. 45 (c), sub (iii).
97 Art. 4.
98 Title I, Part Two.
obligations can be discerned. The only exceptions thereto are provisions concerning transboundary movements of hazardous and radioactive wastes.\textsuperscript{99} The EU is under an obligation to prohibit all exports of such wastes to the 70 ACP States which are, in turn, required to prohibit import of such wastes from the EU States. In addition, the ACP States are obliged to ban such waste imports from ‘any other country’.\textsuperscript{100} Finally, reference can be made to the environment provisions of NAFTA and the European Energy Charter Treaty. It is notable that the latter treaty makes reference to the concept of ‘sustainable development’ and calls on each State to minimize in an economically efficient manner harmful environmental impacts, occurring either within or outside its territory, as a result of activities in the energy sector.\textsuperscript{101}

International jurisprudence and arbitral awards have so far focused mainly on the obligation for a State to prevent significant damage to the environment of other States (see Chapter 7). There have been no specific international cases related to natural resources and the environment. There are certain relevant awards such as those in the \textit{Trail Smelter} and \textit{Lac Lanoux} cases as well as the ICJ \textit{Nuclear Test Cases (Australia/New Zealand v. France, 1974)}. In its case Australia suggested a general right of all States, a right \textit{erga omnes}, to seek to enforce important environmental obligations.\textsuperscript{102}

In conclusion, legal development has focused on State obligations with respect to the environment of other, mostly neighbouring States, as is clearly reflected in Principle 21 of the Stockholm Declaration. However, a distinct tendency can be discerned from UN resolutions and treaty law to impose duties on States with respect to the management of their natural wealth and resources so as to ensure sustainable production and consumption, in the interest of the peoples of their own and other States and of humankind including future generations. Reference has been made to obligations to make rational use of natural resources, to maintain and improve the habitat of wildlife, migratory birds, endangered flora and striking natural beauty, to protect biodiversity and to diminish the consequences of over-exploitation of soil, deforestation, overfishing and pollution. These obligations respond to environmental problems of international if not global concern, both to present and future generations. Gradually, it has become recognized under international law that natural resource management should no longer fall within the ex-

\textsuperscript{99} As defined in Annex VIII to the Lomé Convention’s Final Act.

\textsuperscript{100} See also the Convention on the Ban of the Import into Africa and the Control of Trans-boundary Movements and Management of Hazardous Wastes Within Africa, also known as ‘the Bamako Convention’. Text in 30 \textit{ILM} (1991), p. 775, not yet in force.

\textsuperscript{101} Art. 19 of the EECT.

\textsuperscript{102} See Chapter 8 above.
exclusive domestic jurisdiction of individual States. This constitutes a deflection from the extended domestic realm—that is, ‘matters which are essentially within the domestic jurisdiction of any State’—protected by Article 2.7 of the UN Charter.

6. The Equitable Sharing of Transboundary Natural Resources

Boundaries of States do not exist for water, fish, wildlife, oil, gas and atmospheric resources. For obvious reasons, consultation and co-operation are required in order to prevent disputes over concurrent national uses of internationally-shared natural resources and their environmental consequences. These issues have featured on many international agendas and induced numerous arrangements on such aspects as freedom of navigation in international rivers, management of boundary waters, ‘equitable’ apportionment of freshwater resources and other uses of international watercourses. The UN debate on the question of ‘shared resources’ got off to a late start due to serious differences of opinion, especially among developing countries. It focused on the question of which mutual obligations neighbouring States have as regards such resources, and what their relation is to the PSNR of each State. The ILA Helsinki Rules on the Uses of the Waters of International Rivers (1966) have served as a model for the further development of international norms in this field. Yet, it proved impossible to include a substantive paragraph on transboundary resources in the 1972 Stockholm Declaration.

In 1973, it was finally agreed that it was important to develop an effective system of co-operation for the conservation and exploitation of natural resources shared by two or more States. UNEP was mandated to formulate international standards for the conservation and harmonious exploitation of such resources, pertaining, among other things, to a system of information and prior consultation. Subsequently, the General Assembly included a substantive provision in CERDS on this issue: 106

103 The latter term denotes rivers, lakes or groundwater resources shared by two or more States.

104 See Chapter 4 above.

105 This initiative resulted in the adoption of GA Resolution 3129 (XXIX), entitled ‘Co-operation in the Field of the Environment Concerning Natural Resources Shared by Two or More States’.

106 Art. 3 of the CERDS, GA Res. 3281 (XXIX). Although this was already a compromise text, the separate vote on this article revealed continuing controversies: it was adopted with 8 votes against and 28 abstentions.
In the exploitation of natural resources shared by two or more countries each State must co-operate on the basis of a system of information and prior consultation in order to achieve optimum use of such resources without causing damage to the legitimate interests of others.

In 1978, work by UNEP resulted in the adoption by its Governing Council of Principles of Conduct in the Field of the Environment for the Guidance of States in the Harmonious Utilization of Natural Resources Shared by Two or More States, but the General Assembly merely took note of those draft principles and recommendations ‘without prejudice to the binding nature of those rules already recognized as such in international law’. The principles aim at the rational use of shared natural resources in a manner which would not adversely affect the environment and which would encourage the States involved to co-operate (see Chapter 4, section 6).

Quite a number of bilateral and regional treaties and action plans have been concluded. However, few embody an integrated approach to environmental, ecological and economic aspects. An interesting exception is the 1987 Action Plan for the Environmentally Sound Management of the Common Zambezi River System, which obviously draws upon the UNEP principles.

The concept of absolute sovereignty is gradually being replaced by the concept of ‘equitable utilization’. This finds support in some early judicial and arbitral decisions. Godana recalls an arbitration case in 1898 between Costa Rica and Nicaragua concerning the San Juan River, in which the US President served as arbitrator and held:

The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing, at her own expense and within her own territory, such works of improvement, provided such works of improvement do not result in the destruction or serious impairment of the navigation of the said River or any of its tributaries at any point where Costa Rica is entitled to navigate the same.

Birnie and Boyle refer to the River Oder case (PCIJ, 1929), dealing with the duty of lower riparians to award freedom of navigation for all riparian States over the whole navigable course of the river. Reference has often been made to the Lac Lamoux Award (1957), in which the arbitral tribunal found that France was under an obligation to consult with Spain concerning diversion works constructed

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107 Para. 1 of GA Res. 34/186, 18 December 1975.
108 See Westing (1989), Birnie and Boyle (1992: Chapter 6) and Westing (1993). See also Chapter 9, section 7.
111 Birnie and Boyle (1992: 220).
entirely within French territory but which considerably affected the rights of Spanish users of the watercourse. These documents and decisions do not imply that territorial sovereignty has been replaced by shared jurisdiction or common management, but suggest that States today may be under an obligation to recognize the correlative rights of other States and at least to consult with them as regards concurrent uses of transboundary resources. It would be useful if the international community could agree on a framework multilateral treaty for this purpose, but this seems unlikely in the near future. It is difficult to reconcile the principle of PSNR with the duty to co-operate for equitable sharing, let alone joint management of transboundary resources. Nonetheless, little by little, GA and UNEP resolutions and comprehensive action plans, such as the one for the Zambezi River, set a trend for the progressive development of international law regarding the conservation, joint development and ‘equitable use’ of natural resources shared by two or more States. In any case, they provide examples of cases in which the States involved move away from the concept of ‘absolute sovereignty’ which would entitle them to use freely resources within their territory regardless of any impact this may have on the use made by neighbouring States. This last concept was postulated in the so-called Harmon doctrine, named after the US Attorney-General who in 1895 asserted:

The fact that the Rio Grande lacks sufficient water to permit its use by the inhabitants of both countries does not entitle Mexico to impose restrictions on the United States which would hamper the development of the latter’s territory or deprive its inhabitants of an advantage with which nature had endowed it and which is situated entirely within its territory. To admit such a principle would be completely contrary to the principle that the United States exercises full sovereignty over its national territory. 112

7. Respect for International Law and Fair Treatment of Foreign Investors

UN resolutions on PSNR have seldom referred explicitly to the obligation to respect international law and the rights of other States. In Resolution 837 (IX), the General Assembly requested the Commission on Human Rights to complete its draft Article on the right of peoples and nations to self-determination, including recommendations concerning their PSNR, with the phrase ‘having due regard to the rights and duties of States under international law’. 113 Similarly, in Resol-


Article 1314 (XIII) the Assembly instructed the Commission on PSNR to include a reference to ‘due regard to the rights and duties of States under international law’. The 1962 Declaration, which resulted from the latter Commission’s work, employs in its operative part a somewhat different formulation which puts the emphasis on sovereign equality: ‘The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.’

Paragraph 8 of this Declaration stipulates: ‘Foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith.’ ‘Agreements entered into by States’ relates to contracts with non-State entities, normally transnational corporations; those entered into between States are treaties. The former seems to imply that non-State entities enjoy the protection of *pacta sunt servanda* directly under international law. In line herewith, paragraph 3 provides that, in cases where authorization is granted, ‘the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation, and by international law.’ It should be recalled, however, that the scope of these provisions is limited to investment agreements freely entered into by independent States, while the drafting of rules with respect to ‘property acquired before the accession to complete sovereignty of countries formerly under colonial rule’ was left to the ILC.

Resolution 2158 (XXI, 1966) includes a reference to ‘mutually acceptable contractual practices’, a phrase which was proposed as an alternative to a clear-cut reference to international law obligations. Article 2 of the CERDS contains no direct reference to international obligations, but is subject to the Fundamentals of International Economic Relations listed in Chapter I of this Charter, including ‘fulfilment in good faith of international obligations’ (sub (j)).

As far as multilateral treaties are concerned, ample evidence can be found for the proposition that States have to observe international law in exercising their PSNR and their corollary right to regulate foreign investment. The most explicit reference to general international law obligations relating to permanent sovereignty can be found in Article 1 of the 1966 Human Rights Covenants:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to *any obligations* arising out of international eco-

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114 Para. 5 of GA Res. 1803 (XVII), 14 December 1962. Emphasis added. After the adoption of the Decolonization Declaration (1960), the General Assembly had recommended in Resolution 1515 (XV) on Concerted Action for Economic Development of Economically Less Developed Countries: ‘The sovereign right of every State should be respected in conformity with the rights and duties of States under international law.’ (para. 5).

115 Para. 5. See for the drafting history Chapter 2, section 2.2 above.

116 Cf. Art. 33 of CERDS.
nomic co-operation, based upon the principle of mutual benefit, and international law.117

As observed above, the value of this assurance, however, has to be judged in the light of Articles 25 and 47: ‘Nothing in the present Covenant may be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources’.118

The African Charter on Human and Peoples’ Rights (1981) confirms: ‘The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of international economic co-operation based on mutual respect, equitable exchange and the principles of international law.’119

The 1982 UN Convention on the Law of the Sea clearly points out that the coastal State, in exercising its rights within the EEZ, ‘shall have due regard to the rights and duties of other States’.120 The rights of other States in the EEZ include three of the four traditional high seas freedoms.121 As regards the continental shelf it is provided that: ‘The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention.’122 Equally relevant is the general provision in the Convention with respect to good faith and abuse of rights.123

As regards multilateral investment-related treaties, the ICSID Convention (1965) contains one relevant reference to the applicability of international law. It provides that, in the absence of an agreement on the law applicable for the interpretation and application of a contract, the tribunal shall apply the law of the contracting host State Party to the dispute ‘and such rules of international law as may be applicable’.124

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118 Arts 25 and 47 of the Economic Rights and Civil and Political Rights Covenants, respectively.
119 Art. 21.2 (emphasis added).
120 Art. 56.2.
121 Art. 58. For obvious reasons the freedom of fishing is excluded.
122 Art. 78.2.
123 Art. 300: ‘States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right’.
124 Art. 42 (emphasis added).
Treaty, the host State merely undertakes to protect the investor and to safeguard his investments and rights (Art. 2). Similarly, the OIC Investment Treaty (1981) lays down the standard of ‘adequate protection and security’ which is to be enjoyed by the ‘invested capital’ and accordingly is designed to safeguard investments after they have been admitted. Although in this case there is no explicit reference to international law either, a further guarantee is provided to the extent that the rights and obligations arising under the Treaty are valid even in the case of withdrawal of the host State from the Treaty. Likewise, the ASEAN Investment Treaty, NAFTA, and the European Energy Charter Treaty guarantee investors of other Contracting Parties fair and equitable treatment and full protection and security.

Since the main motive behind BITs is the encouragement of foreign investment through protection of foreign investors, it is not surprising that the requirement of fulfilment of international obligations and fair treatment is a common characteristic of all these treaties.

Decisions of international courts and tribunals provide ample evidence of the recognition that international law and rights of other States should be respected. This clearly follows from, for example, the series of ICJ judgments with respect to delimitation of maritime areas, awards of arbitral tribunals regarding oil nationalizations, and decisions of the Iran-US Claims Tribunal. As regards the latter, reference may be made, for example, to the award in the AMOCO Case (1987), in which the Tribunal explicitly referred to the Treaty of Amity between Iran and the USA (as lex specialis) as well as to customary international law (as lex generalis), to fill possible lacunae and to provide proper interpretation of ambiguous provisions of the Treaty of Amity.

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126 Art. 2.2.
127 Art. 7.
128 Arts III and IV.
129 Art. 1105.1
130 Art. 10.
131 Examples include the North Sea Continental Shelf Cases (1969), the Continental Shelf Case between Tunisia and Libya (1982), the Gulf of Maine Area (Canada v. the USA, 1984), the Continental Shelf between Libya and Malta (1985) and the Maritime Delimitation Case in the Area between Greenland and Jan Mayen (Denmark v. Norway, 1993).
The ICC Guidelines unequivocally call on the Government of the host country to respect the recognized principles of international law, including fair and equitable treatment of foreign property. The 1976 OECD Declaration, in an Annex with Guidelines for multinational enterprises, refers to ‘the understanding that Member countries will fulfil their responsibilities to treat enterprises equitably and in accordance with international law . . . ’. The ALI Third Restatement of the US Foreign Relations Law is silent on this issue since it is beyond its scope to directly address it. The Draft UN Code of Conduct on Transnational Corporations embodies the following proposal: ‘In all matters relating to the code, States shall fulfil, in good faith, their international obligations, including generally recognized international legal rules and principles.’ It adds in another paragraph that ‘Transnational corporations should receive fair and equitable treatment in the countries in which they operate.’\(^{133}\) The latter paragraph relates to one of the main outstanding issues in the negotiations. Western proposals to add the phrase ‘consistent with their international obligations’ (i.e., of the host country) or ‘consistent with international law’\(^{134}\) were unacceptable for some members of the G-77. The ILA Seoul Declaration makes several references to the obligation to respect international law, for example: ‘Permanent sovereignty implies the national jurisdiction of a State over natural resources, economic activities and wealth without exempting it from the application of the relevant principles and rules of international law.’ While PSNR is called ‘inalienable’, it is also added that ‘A State may, however, accept obligations with regard to the exercise of such sovereignty, by treaty or by contract, freely entered into.’\(^{135}\) This implies that a State which freely enters into treaties or contracts affecting its PSNR, must fulfil any obligations arising therefrom in good faith.\(^{136}\) In addition, the exercise of rights in respect of foreign interests—in natural resources, economic activities and wealth—is conditioned by the obligation to comply with international law. The Declaration, however, contains no specific guidelines on fair treatment of foreign investors by States. The 1992 World Bank Guidelines imply a role for international law where they state that the Guidelines serve as a ‘complement to applicable bilateral and multilateral treaties and other international instruments’.\(^{137}\) In addition, the Guidelines stipulate that each State extend to investments, established in

\(^{133}\) See paras. 49 and 51 of the Draft UN Code of Conduct on TNCs, UN Doc. E/1990/94. Emphasis added.

\(^{134}\) See the draft text of May 1987 of the UN Code of Conduct on TNCs, UN Doc. E/1987/73.

\(^{135}\) Emphasis added. Section 5 of the Seoul Declaration.

\(^{136}\) See also the interesting section 2 of the Seoul Declaration formulating the principles of _pacta sunt servanda_ and _claussula rebus sic stantibus_.

\(^{137}\) Section I.1.
its territory by nationals of any other State, fair and equitable treatment according to the standards recommended in these Guidelines.

In conclusion, the main PSNR resolutions require States, in the exercise of their PSNR, to respect the rights of other States and to fulfil their international obligations in good faith. This duty is also recognized in many relevant treaties and decisions of international courts and tribunals. Apart from the important body of evidence included in numerous BITs and MITs, the obligation to provide fair treatment to foreign investors is seldom addressed explicitly in other instruments of international law. The reason could be that Western States have traditionally perceived this as covered by the general injunction to respect international law, whereas developing States have traditionally stipulated that this falls within their domestic jurisdiction. Recently, a consensus seems to have been reached, also as part of the evolution of human rights law, that fair treatment of aliens and their property and other rights is an obligation under international law. This consensus is reflected, among other documents, in the Draft Code of Conduct on TNCs, albeit somewhat ambiguously,\(^{138}\) and the World Bank Guidelines.\(^{139}\)

### 8. Obligations Related to the Right to Take Foreign Property

From the early 1950s up to the late 1970s the legal evolution of PSNR and the debate on its guiding principles have been seriously affected by conflicts over the right to nationalize, in particular its modalities. Obligations relating to the right to nationalize or expropriate as they arise from Resolution 1803 and subsequent resolutions are concerned with the following conditions of legality:\(^{140}\) (1) public purpose; (2) non-discrimination; (3) payment of compensation; (4) standard of compensation; (5) due process; and (6) right to appeal.\(^{141}\)

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\(^{138}\) Paragraph 47 of the Draft Code of Conduct on TNCs unequivocally states that ‘States shall fulfil, in good faith, their obligations under international law’, while paragraph 49 is somewhat more vague: ‘Transnational corporations shall receive fair and equitable treatment in the countries in which they operate.’ See UN Doc. E/1990/94, 12 June 1990.

\(^{139}\) Section III.2.

\(^{140}\) As referred to in Chapter 9, there are opposing views on whether (a) expropriation and nationalization are lawful only when certain conditions are fulfilled; or (b) certain conditions arise after expropriation has taken place. Virtually all BITs and MITs are based on view (a); UN resolutions and some arbitral awards on view (b).

\(^{141}\) This section builds on the previous work of Verwey and Schrijver (1984).
8.1 Public Purpose

It suffices here to recall our findings in the previous chapter, section 9.2, that the nationalizing State has wide margins of discretion in determining what is necessary on grounds or reasons of ‘public utility, security or the national interest’ (para. 4 of GA Res. 1803) or for the purpose of ‘safeguarding the natural resources’ (NIEO Declaration). But should the nationalizing State be able to prove, also at the international level, that its public interest is at stake?

As far as treaty law is concerned, Article 1 of the 1952 Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) clearly states that no one shall be deprived of his possessions except in ‘the public interest’. Likewise, the OECD Draft Convention on the Protection of Foreign Property (1967), the Inter-Arab Investment Agreement (1980) and the OIC Investment Agreement (1981), all state that it is permissible to expropriate the investment ‘in the public interest’. The ASEAN Investment Agreement (1987) refers in this connection to ‘public use . . . purpose, or . . . interest’, and the European Energy Charter Treaty (1994) to ‘a purpose which is in the public interest’. Reverting to the most traditional formula, however, NAFTA (1992) straightforwardly stipulates a ‘public purpose’.

While the terms used are varied, it is obvious that the large majority of BITs stipulate some public cause of a non-political nature. The valid grounds or reasons prescribed for the taking of foreign property include: ‘public purpose’ (‘d’utilité publique’); ‘public purpose related to internal needs’; ‘public interest’; and ‘national security and public utility’.

The public purpose condition was invoked in a number of well-known nationalization cases. For example, the British Government contested the nationalization by Libya of assets of the BP Exploration Company, observing that ‘nationalization measures . . . motivated by considerations of a political nature unrelated to the

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142 The American Convention on Human Rights (Art. 21) and the African Charter of Human and Peoples’ Rights (Art. 14) contain similar clauses.

143 Art. 3.1 of the OECD Draft Convention.

144 Art. 9.2.

145 Art. 10.2.

146 Art. VI.1.

147 Art. 10.1, sub (a).

148 Art. 1110.1 (a).

internal well-being of the taking State are, by a reference to those principles (of international law), illegal and invalid’.\(^{150}\)

The public purpose requirement was recognized by: the PCIJ in the *German Interests in Polish Upper Silesia Case* (1926) and in the *Chorzów Factory Case* (1928); by Arbitrator Lagergren in the *BP Case* (1974); by the Tribunal in the *Aminoil Case* (1982); and by the Iran-US Claims Tribunal in the *American International Group, INA Corporation* and *AMOCO* cases.\(^{151}\) In the latter case the Tribunal noted that ‘a precise definition of the "public purpose" for which an expropriation may be lawfully decided had neither been agreed upon in international law nor even suggested’, but that ‘as a result of modern acceptance of the right to nationalize, this term is broadly interpreted, and that States, in practice are granted extensive discretion’.\(^{152}\)

Likewise, the American Law Institute (ALI) acknowledges:

\[\ldots\text{the concept of public purpose is broad and not subject to effective re-examination by other states. Presumably, a seizure by a dictator or oligarchy for private use could be challenged under this rule.}\]

In the accompanying Reporter’s Notes it is observed:\(^{154}\) ‘As the general understanding of 'public purpose' broadens, the likelihood of a successful challenge on that basis grows smaller.’

Higgins points out that the problem is not so much that the terms ‘public utility, security, or the national interest’ are unreasonable, but that in a decentralized legal system they are open to different interpretation and abuse.\(^{155}\) While recognizing the wide discretion of the nationalizing State, Wellens points out that the ‘public utility’ requirement can best be tested by assessing whether the nationalization measure is within the limits of abuse of justice and good faith.\(^{156}\) Likewise, Moinuddin concludes that the minimum function of the requirement would probably be the deterrence of expropriations which are manifestly in violation of

\[^{150}\text{See 13 ILM (1974), p. 769. See for other examples the next section on prohibition of discrimination.}\]

\[^{151}\text{See Verwey and Schrijver (1984: 15) and Mouri (1994: 324–27).}\]

\[^{152}\text{Amoco International Finance Corporation v. Iran, 15 Iran-US CTR, 1987, p. 189, at p. 233, para. 145.}\]

\[^{153}\text{American Law Institute (1987: 200).}\]

\[^{154}\text{American Law Institute (1987: 210).}\]

\[^{155}\text{Higgins (1983: 288).}\]

\[^{156}\text{Wellens (1977b: 53–54).}\]
the principle of public utility. From the close link between PSNR and socio-economic development, one may draw the conclusion that public utility must be of a public socio-economic nature, not of a purely or even predominantly political nature. As O’Keefe puts it, the major protective importance of this requirement occurs ‘in a case where the acknowledged object of an expropriation is to force a foreign sovereign to yield to a political demand’.

Thus we may conclude that in general terms a nationalizing State has wide margins of discretion but must be able to prove, also at the international level, that a public interest is served by the act of nationalization, thus excluding takeovers for non-public interests.

8.2 Non-Discrimination

Two types of discrimination can be at issue: discrimination between foreigners and nationals; and discrimination among foreigners. It is uncertain whether, under Resolution 1803, discrimination between nationals and foreigners should be considered as prohibited in view of the phrase that nationalization must be based on grounds ‘which are recognized as overriding purely individual or private interests, both domestic and foreign’. The drafting history shows that not only Western delegates but also various delegates from the South pointed out that their constitutions vested the same rights in nationals and foreigners, but only some of them expressly mentioned that the text of the Declaration prescribed this. It has been said that the non-discrimination requirement originated in Latin America, the continent which gave birth to principles such as those embodied in the Calvo and the Drago doctrines. Latin American States were also those that introduced the principle of PSNR into the United Nations during the early 1950s. As mentioned above, by 1974 the G-77 was no longer prepared to accept formulations which either explicitly or implicitly prohibited discrimination between nationals and foreigners. On the contrary, under sharp protest from the Western Group the right to practice such discrimination was inserted in the NIEO Declaration, where it is stated: ‘each State is entitled to . . . the right to nationalization

158 However, it would not be appropriate for a State to use its power of expropriation and nationalization for the sole purpose of increasing the State’s resources; see Dolzer (1985: 217).
160 For example, Peru and Argentina; UN Docs A/C.2/SR.845, 19 November 1962, p. 259 and A/C.2/SR. 859, 4 December 1962, p. 397.
or transfer of ownership to its nationals.' The fact that the words ‘to its nationals’ have not been repeated in Article 2.2(c) of the CERDS may, from a Western point of view, be interpreted as a positive sign; but the term ‘transfer of ownership’ without further specification could equally well be interpreted as also entitling the taking State to discriminate between foreigners of different nationalities, albeit that this has not been suggested during the negotiations on this provision.

It is not entirely clear to what extent a condition of non-discrimination can be derived from rules of international law not specifically related to the treatment of foreign property. The International Covenant on Economic, Social and Cultural Rights\textsuperscript{164} 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 (Art. 2.3).

This potential deviation under UN law from the principle of non-discrimination has had no follow-up in legal instruments relating to regulation of foreign investment. MITs and BITs invariably recognize it. The Inter-Arab Treaty explicitly guarantees full non-discriminatory treatment, while the OIC Agreement stipulates that expropriation shall be ‘without discrimination’. Similarly, the ASEAN Investment Agreement, NAFTA and the European Energy Charter Treaty refer to ‘a non-discriminatory basis’. Most BITs also provide explicitly for full non-discriminatory treatment: foreign investors shall enjoy treatment not less favourable than that accorded to nationals or companies of the host State or to investments of nationals or companies of any third State, if the latter is more favourable to the investor (Most-Favoured Nation treatment).\textsuperscript{165}

In State practice alleged discrimination has often been a major bone of contention in nationalization cases. For example, it was mainly on this legal basis that the Netherlands Government rejected the legality of the nationalization of Dutch property by Indonesia in 1958, noting that the law in question explicitly referred to its connection with the dispute over Irian Jaya (former Dutch New Guinea) and

\textsuperscript{162} Para. 4.c of GA Res. 3201 (S-VI), 1 May 1974. Emphasis added.

\textsuperscript{163} See statements by Chile and Malaysia; UN Doc. A/C.2/834, 12 November 1962, p. 231 and A/C.2/845, 19 November 1962, p. 295.

\textsuperscript{164} The protection of private property has, however, found a place in other human rights instruments; for example, in Article 1 of the First Protocol to the European Convention on Human Rights, Article 21 of the American Convention on Human Rights and Article 14 of the African Charter on Human and People’s Rights. See Schabas (1989).

\textsuperscript{165} In Peters’ sample of 145 BITs, 105 provide for national treatment and most-favoured nation treatment. All 145 provide for most-favoured nation treatment (thus allowing discrimination between nationals and the investor).
Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela, 22 October 1991

Article 6

Neither Contracting Party shall take any measures to expropriate or nationalise investments of nationals of the other Contracting Party or take measures having an effect equivalent to nationalisation or expropriation with regard to such investments, unless the following conditions are complied with:

(a) the measures are taken in the public interest and under due process of law;
(b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party taking such measures may have given;
(c) the measures are against just compensation. Such compensation shall represent the market value of the investments affected immediately before the measures were taken or the impending measures became public knowledge, whichever is the earlier; it shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.


Article 4

1. Neither Contracting State shall expropriate, nationalize or take similar measures (hereinafter referred to as ‘expropriation’) against investments of investors of the other Contracting State in its territory, unless the following conditions are met:

(a) in the public interest;
(b) under domestic legal procedure;
(c) without discrimination;
(d) against compensation.

2. The compensation mentioned in Paragraph 1, (d) of this Article shall be equivalent to the value of the expropriated investments at the times when expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay.

3. Investors of one Contracting State who suffer losses in respect of their investments in the territory of the other Contracting State owing to war, a state of national emergency, insurrection, riot or other similar events, shall be accorded by the latter Contracting State, if it takes relevant measures, treatment no less favourable than that accorded to investors of a third State.
recalling that the President of Indonesia had warned that ‘if, in the question of West Irian, the Dutch remain stubborn, if, in the question of our national claim, they remain headstrong, then all the Dutch capital, including that in mixed enterprises, will bring its story to a close on Indonesian soil’. 166 Other examples include the US Government’s rejection of the claim regarding the legality of Cuban Law No. 851 (1960), which specifically referred to the US sugar boycott, describing the nationalization measures as ‘a luminous and stimulating example for the sister nations of America and all the under-developed countries of the world to follow in their struggle to free themselves from the brutal claws of imperialism’. 167 The US administration also contested the legality of the 1971 Libyan nationalization of the Texaco oil company, referring to the Libyan statement that expropriation had been undertaken as a ‘cold slap in the insolent face’ of the investor’s government. 168

Several awards refer explicitly to the prohibition of discrimination. For example, in the BP Case Judge Lagergren found that Libya had violated ‘public international law’ as the expropriation was ‘arbitrary and discriminatory in character’. 169 In the award in the AMOCO Case, the Iran-US Claims Tribunal stated: ‘Discrimination is widely held as prohibited by customary international law in the field of expropriation.’ 170

The non-discrimination rule is also upheld in various codes and guidelines with respect to foreign investment. Thus, the ICC Guidelines call for ‘the avoidance of unreasonable and discriminatory measures’. 171 Similar terms are used by the ILA Seoul Declaration, the ALI Third Restatement of US Foreign Relations Law, 172 the Draft UN Code of Conduct on TNCs, 173 and the World Bank

166 See Preamble to Act No. 86 of 31 December 1958, text in 6 NILR (1959), p. 291. See also the Netherlands Note of 18 December 1959, text in 54 AJIL (1960), p. 487, in which the speech of the President of Indonesia is quoted.

167 As quoted by Higgins (1965: 62-3).


169 53 ILR, 297, p. 329. In the Liamco Award the arbitrator came to the conclusion that, in the given case, there was insufficient proof to declare that the act of the nationalizing State was of a purely discriminatory character. See 20 ILM (1982), p. 60.


171 Section V.3.a(ii).

172 In Section 712 it is stated: ‘A state is responsible under international law for injury resulting from . . . a taking by the State of the property of a national of another state that . . . is discriminatory’. American Law Institute (1987: 196).
Duties

Guidelines. We may therefore conclude that the prohibition of discrimination is a well-established condition of legality for nationalization. However, this is not to say that all distinctions between foreigners and nationals are necessarily prohibited. As it is worded in the Third Restatement:

Discrimination implies unreasonable distinction. Takings that invidiously single out property of persons of a particular nationality would be unreasonable; classifications, even if based on nationality, that are rationally related to the state’s security or economic policies might not be unreasonable.

This kind of reasoning was applied in the Aminoil Case, where the Tribunal found that nationalizing one company but not another did not violate international law in that particular case. Moreover, discrimination in favour of foreigners may be permitted, as the French nationalizations of parts of the banking sector in the early 1980s suggest; the French Constitutional Council found that the constitutional principle of equality is not violated where largely domestic banks are nationalized while largely foreign banks are not.

8.3 Payment of Compensation

Despite all attempts to dilute or even negate the issue, one may conclude that the main PSNR resolutions reaffirm an obligation to pay compensation in the case of nationalization and expropriation. In 1962 all Soviet and other amendments aimed at denying the existence of such a duty were defeated. Thus it was provided in the 1962 Declaration on PSNR that ‘the owner shall be paid appropriate compensation’. As shown in previous chapters, some NIEO resolutions entailed intensive efforts to erode this obligation and to render payment of compensation a discretionary, instead of an absolute prerequisite, for example by proposals to replace the term ‘appropriate’ by ‘possible’. However, these efforts failed to receive

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174 See Section IV.1.
176 See in particular UNCTAD TDB Res. 88 (XII), 19 October 1972 and GA Res. 3171 (XX-VIII), 17 December 1973.
widespread support. Subsequently, the obligation to pay compensation has been rarely denied but also rarely reaffirmed in UN resolutions. It could certainly be argued that each reference in UN resolutions to ‘obligations arising out of international law’ implies compulsory payment of compensation. The reference in paragraph 55 of the Draft UN Code of Conduct on TNCs that a State has the right to expropriate assets of a TNC under payment of adequate compensation, in accordance with the applicable rules and principles, could—but will not generally—be interpreted accordingly.

In Section 9.3 of the previous chapter we saw that treaty law amply recognizes the obligation to pay compensation. Article 1 of the First Protocol to the Council of Europe Convention does not explicitly provide for an obligation, but the phrase ‘subject to the conditions provided for by general international law’ is widely interpreted to cover it, at least in the case of non-nationals.\footnote{See Higgins (1983: 363 and 368–69).} Clear-cut obligations to compensate can be found in all MITs and in virtually all BITs.

As far as jurisprudence and arbitral awards are concerned, reference can be made first of all to the PCIJ, which recognized this obligation in its judgments in the \textit{Mavrommatis Jerusalem Concessions Case} (1925),\footnote{\textit{PCIJ}, Series A, no. 5, 1925, p. 51.} the \textit{German Interests in Polish Upper Silesia Case} (1926),\footnote{\textit{PCIJ}, Series A, no. 7, 1926, p. 32.} and the \textit{Chorzów Factory Case} (1928).\footnote{\textit{PCIJ}, Series A, no. 17, 1928, p. 42.} So did Arbitrator Huber in the \textit{Spanish Zones of Morocco Claims} (1923)\footnote{RIAA, Vol. II (1949), p. 615.} and the arbitrator in the \textit{Shufeldt Claim} (USA v. Guatemala, 1930).\footnote{Ibid., Vol. II, pp. 1079–102. The case dealt with the cancellation of a concession to extract chicle.} Although the ICJ has so far not dealt with clear-cut nationalization or compensation issues (see Chapter 9), it has acknowledged the compensation obligation in the \textit{Temple of Preah-Vihear Case} (1962).\footnote{\textit{ICJ Reports} 1962, pp. 36–37.} The arbitral awards in the \textit{BP, Texaco and Liamco v. Libya} cases as well as in the \textit{Kuwait v. Aminoil} case explicitly recognize it.\footnote{See 53 \textit{ILR}, p. 297; 53 \textit{ILR} p. 389; and 62 \textit{ILR}, p. 146. In the latter case, Arbitrator Lagergren found that the fact that no offer of compensation had been made indicated that the taking was indeed confiscatory.} The latter case places application of the relevant rules within the context of development financing in North-South relations. The Tribunal was particularly aware of the need to maintain trust and stability for foreign
investors and pointed out that the need for a continuous flow of private capital called for nationalizing States to approach compensation issues in a manner which ‘should not be such as to render foreign investment useless, economically’. 189 Awards of the Iran-US Claims Tribunal amply recognize that both under customary international law (as *lex generalis*) and under the 1955 Treaty of Amity between Iran and the USA (as *lex specialis*) compensation is due. 190 In its first award on the merits of a compensation case, *American International Group Inc. v. Iran* (1983), the Tribunal unequivocally recognized that:

> it is a principle of public international law that even in a case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken. 191

In its 1994 Award in the *Ebrahimi Case*, the Tribunal repeated that ‘international law undoubtedly sets forth an obligation to provide compensation for property taken’. 192

The ICC Guidelines, the Draft UN Code of Conduct on TNCs, the ILA Seoul Declaration, the ALI Third Restatement and the World Bank Guidelines, all require payment of compensation in the event of expropriation or nationalization. Literature abundantly confirms the obligation, either as a condition of legality or at least as a product of lawful taking and, *a fortiori*, of an unlawful taking. 193 For the adherents to the International Minimum Standard (see Chapter 6) it arises either—in the case of a lawful taking—from the prohibition of ‘unjust enrichment’, or—in the case of an unlawful taking—from the obligation to eliminate all damaging consequences of an unlawful act.

Consequently, there is no doubt that the obligation to pay compensation for expropriation or nationalization is generally recognized, whatever the impact of the principle of PSNR may be or have been. The problems at stake revolve around the question of the moment, proper amount and modes or, in sum, the standard of compensation.

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193 For example, Fatouros (1962: 314–15) writes that ‘compensation is a legal duty arising out of related measures, not as a condition precedent to the lawfulness of the measures’. Similarly, see Asante (1988), Bring (1980) and Schachter (1984 and 1985). However, virtually all BITs treat it as a condition precedent by allowing the taking only if compensation is provided for at the time of the taking or before.
8.4 Standard of Compensation

A number of Western countries, on the one hand, have consistently maintained the position that compensation should be in accordance with the ‘triple standard’, that is ‘prompt, adequate and effective’; a demand reaffirmed during the debates on the Declaration on PSNR, the NIEO Declaration, as well as the CERDS. As we noted above in Chapters 6 and 9, in its traditional form, the standard held that, where restitution (restitutio in integrum) was not possible, compensation was to be achieved by payment of a sum corresponding to damnum emergens et lucrum cessans, and that payment of such compensation had to be ‘prompt, adequate, and effective’, the so-called Hull formula.

The developing countries, on the other hand, have consistently denied the existence of a ‘generally accepted practice’ in this respect. The drive for a consensus resulted in the formula of ‘appropriate’ compensation included in the 1962 Declaration, a ‘deliberate ambiguity’, which was repeated in the CERDS, albeit in the context in a non-committal formula. While the provocative phrase ‘possible compensation’ of earlier drafts was not included, the phrase ‘appropriate compensation should be paid’ was ambiguous enough. This left developments to take their own course, since both the adherents to the triple standard and those of new doctrines pertaining to ‘capacity to pay’, ‘excess profits’ and ‘unjust enrichment’ could (ab)use the term as part of their ammunition in legal battles. The Draft Code of Conduct on TNCs is far from helpful in this respect, as it leaves all options open by providing that: ‘adequate compensation is to be paid by the State concerned, in accordance with the applicable legal rules and principles.’

In view of the continuing controversies surrounding the compensation issue, it is small wonder that, apart from MITs, few multilateral treaties address the question of the compensation standard. Significantly, as regards the moment of payment, the traditional formula ‘prompt’ or ‘without delay’ is sometimes replaced by ‘without undue delay’ as is exemplified by its insertion in the OECD Draft Convention on the Protection of Foreign Property and by ‘without unreasonable delay’ as in the ASEAN Agreement. The Inter-Arab Investment Agreement provides that compensation must be paid within a period not exceeding one year from the date on which the expropriation decision has become final, while the OIC Agreement requires ‘prompt payment’. Likewise, NAFTA uses the traditional term ‘without

\(^{194}\) UNCTAD TDB Res. 88 (XII), 19 October 1972 and GA Res. 3171 (XXVIII), 17 December 1973.

delay'. The European Energy Charter Treaty provides for expropriation to be accompanied by the payment of ‘prompt compensation’. 197

As to the amount of compensation, an early draft (1946) of the Havana Charter provided that ‘just compensation’ to a foreign national be granted in case of the ‘prescription of requirements as to the ownership of existing or future investments’. 198 This draft was, however, heavily criticized by the ICC and was eventually abandoned. 199 The 1967 OECD Draft Convention provided that measures of expropriation must be accompanied by a provision for the payment of ‘just compensation’. Such compensation had to represent the genuine value of the property affected and had to be transferable to the extent necessary to make it effective for the party entitled thereto. The 1980 Inter-Arab Investment Agreement stipulates ‘equitable compensation’, 200 while the 1981 OIC Agreement requires ‘adequate and effective compensation to the investor in accordance with the laws of the host state regulating such compensation’. 201 Moinuddin identifies this phrase as ‘blending between a classical compensation formula and the Calvo clause as embodied in Article 2.2 (c)’ of the CERDS. 202 The ASEAN Agreement embodies the concept of ‘adequate compensation’, 203 while the qualification...
tions used by NAFTA and the European Energy Charter Treaty concur with the prompt, adequate and effective standard. 204

With some exceptions 205 and many variations, it appears that the classical formula of ‘prompt, adequate and effective compensation’ is retained in BITs, albeit often—as discussed above—in more flexible wording. In a sample of 145 BITs signed in the period 1990-93, Peters found that the Hull formula occurred 91 times (63 per cent of the total). In 94 BITs the compensation is required to be paid ‘without delay’, in 46 BITs ‘without undue delay’. ‘Adequate’ is by far the most popular term, but occasionally other qualifications are used such as ‘just’ or ‘fair’ (13 times in all). The value of the investment which forms the basis for the determination of the compensation is described in such terms as ‘market value’ (44 times), ‘real’ or ‘genuine’ value (25 times), ‘full value’ (once), ‘actual value’ or ‘value’ without qualification (38 times). 206

As regards decisions of international courts and tribunals, one may first refer to the Norwegian Shipowners Claims arbitration (1922), a case dealing with the requisitioning of alien property by the USA for wartime purposes. The Tribunal determined that ‘just compensation’ should be paid, to be determined by ‘fair actual value at the time and place . . . in view of all surrounding circumstances’. 207 An early and frequently quoted source is the Chorzów Factory Case, 208 in which the PCIJ referred to ‘just compensation’ and stated that, when expropriation was prohibited by a treaty, ‘the dispossession of an industrial undertaking . . . involves the obligation to restore the undertaking and, if this is not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible’. 209 However, both cases deal with specific war-time circumstances. The ICJ so far has not addressed the standard of compensation issue.

In the three Libyan oil nationalization cases the three arbitrators differed in their legal reasoning with respect to the compensation and calculation of damages. 210 In the BP Case Lagergren referred to restitutio in integrum being avail-

204 See Art. 1110.2-6 of NAFTA and Art. 13.1 of the EECT.

205 A rare reference to ‘appropriate compensation’ or ‘appropriate value’ can be found in the BITs of China with France (1984), Thailand (1985) and Laos (1993).


208 Case Concerning the Factory at Chorzów (Merits), PCIJ, Series A, no. 17, 1928, p. 42.

209 Ibid., p. 48.

210 In practice, Libya reportedly paid more or less the full value of the expropriated interests. See Dolzer (1981a: 170) and Dixon and McCorquodale (1991: 445).
able ‘as a vehicle for establishing damages’ rather than as the remedy itself which a State acts in breach of a concession agreement. Dupuy considered the Libyan nationalization of Texaco unlawful and concluded that both under Libyan law and under public international law *restitutio in integrum* was required. Thus he ordered Libya to resume performance under the concession agreement. Finally, in the *Liamco Case* arbitrator Mahmassani awarded Liamco ‘equitable compensation’, in this particular case including a calculation of the profits lost by the claimant. The *Aminoil* Tribunal awarded the company ‘appropriate compensation’ for what it considered to be a lawful taking of its property interests in Kuwait. The determination of what appropriate compensation amounted to required an ‘inquiry into all the circumstances relevant to the particular case’, including the question what would be ‘a reasonable rate of return’ from the investment and the value of Aminoil’s investment as ‘a going concern’.

With some exceptions—notable ones are the 1987 *Sola Tiles* case and the 1987 *AMOCO* case, the latter involving a large-scale nationalization of oil industry—the Iran-US Claims Tribunal has found that full compensation representing the full equivalent of the property taken is required under customary international law and under the 1955 Treaty of Amity, both in cases involving expropriation and in those involving large-scale nationalizations. Such full compensation has to be equal to the ‘going-concern’ value of the property taken, including not only the physical and financial assets of the undertaking but also intangibles such as goodwill and likely future profits. In the *AMOCO* award, however, it was explicitly established that ‘future capitalization of the revenues which might be generated by such a concern after the transfer of property resulting from the expropriation of the company’.

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211 53 *ILR*, p. 347.
212 Finally, the case was settled out of court by an agreement of November 1974 under which Libya paid approximately 17.4 million sterling in cash to BP. See Dolzer (1992a: 506).
213 Ultimately, in 1977 the parties settled their claims by an agreement under which Libya undertook to deliver the companies a large amount of crude oil within 15 months. See Dolzer (1981: 170).
215 53 *ILR*, pp. 566–94.
216 *AMOCO Award*, pp. 611-13.
217 It should be noted, however, that the Tribunal stated that attempts to invest the terms ‘appropriate’ or ‘fair’ or ‘just’ with a concrete meaning revealed that ‘the distance between rhetoric and reality is narrower than might at first glance appear’. *Sola Tiles, Inc v. Iran*, Award 22 April 1987, reprinted in 14 *Iran-US CTR*, p. 223, para. 43, at p. 235.
218 This does not automatically imply that the whole triple standard of ‘prompt, adequate (full) and effective compensation’ is met.
ation (\textit{lucrum cessans})\textsuperscript{219} should \textit{not} be taken into account in the assessment of compensation due for a lawful taking. Yet, the award includes compensation for ‘goodwill and commercial prospects’. Judge Brower, who served as a judge in that particular case, filed a separate opinion, and noted later during his Hague Academy lectures that it is difficult to see the difference between ‘lost profits’ and ‘commercial prospects’.\textsuperscript{220} Also in the \textit{Ebrahimi Case} (1994), the Tribunal pointed out that additional compensation for \textit{lucrum cessans} is conditional on a prior characterization of the taking as unlawful.\textsuperscript{221} In some other cases such as \textit{Phillips Petroleum} (1989), the Tribunal did not differentiate and applied a single standard of compensation as provided for in the Treaty of Amity and interpreted this as to require compensation representing the ‘full equivalent of the property taken’.

A vast body of literature exists on this question, reflecting a mosaic of views; as already noted in the previous chapter, scholarly opinion is deeply divided. It is hard to draw conclusions from it. The same goes for the various foreign investment guidelines and codes of conduct. One can conclude, however, that during recent decades a certain readiness has emerged to interpret the rules of traditional doctrine as to the amount of compensation less strictly, by observing the interests and financial capacity of the taking State.

As regards the requirement of \textit{promptness}, expert literature—like State practice—no longer provides significant support for the traditional claim—as still reflected in the 1970 Hickenlooper Amendment—that the amount of compensation should be established and payment be made at the time of, or even prior to, the act of dispossession. The ILC observed as early as 1959:

\ldots the time-limit for the payment of the agreed compensation necessarily depends on the circumstances in each case and in particular on the expropriating State’s resources and actual ability to pay. Even in the case of ‘partial compensation’, very few States have in practice been in a sufficiently strong economic and

\textsuperscript{219} \textit{AMOCO Award}, para. 264.

\textsuperscript{220} See Brower (1993: 348).

\textsuperscript{221} In this particular case the claimants did seek compensation for \textit{damnum emergens} only (including compensation for tangible and intangible assets and future prospects). The Tribunal concluded that: ‘The appropriate amount to be awarded shall therefore be determined in such a manner as to include \textit{damnum emergens} but not \textit{lucrum cessans};’ \textit{Ibrahima Award}, 12 October 1994, p. 44, para. 96.
financial position to be able to pay the agreed compensation immediately and in full.222

Similarly, Schwarzenberger observes that ‘in equity, prompt compensation does not necessarily mean immediate compensation. It means compensation after a reasonable interval of discussions on all relevant aspects of the expropriation’.223

The ICC Guidelines include the ‘without delay’ formula; while the ILA Seoul Declaration and the Draft UN Code of Conduct on TNCs do not address this element. The ALI Third Restatement requires, in the absence of exceptional circumstances, payment at the time of the taking, or within a reasonable time thereafter with interest to be paid from the date of taking.224

The World Bank Guidelines continue to equate ‘prompt’ to ‘without delay’, but agree that where the taking State faces exceptional circumstances compensation may be paid ‘within a period which will be as short as possible and which will not in any case exceed five years from the time of the taking, provided that reasonable, market-related interest applies to the deferred payments in the same currency.’225

As regards the requirement of ‘adequacy’ or ‘full value’ of compensation, the strict interpretation of this requirement is no longer convincingly supported in the literature.226 It is difficult to maintain that adequate compensation is usually considered to be an amount representing the market value or ‘going concern’ value of the enterprise and that indemnity should always and exclusively be determined on the basis of damnum emergens (the going concern value) plus lucrum cessans (the value of future earning prospects). As early as 1972, the ICC Guidelines (re-)introduced the concept of ‘just compensation’. The ILA Seoul Declaration employs the phrase ‘appropriate compensation as required by international law’; while the Draft UN Code of Conduct on TNCs mentions ‘adequate compensation . . . , in accordance with the applicable legal rules and principles’. The AIL Third Restatement notably uses the term ‘just compensation’, equated—in the absence of exceptional circumstances—to an amount equivalent to the value of the property taken; and the World Bank Guidelines embody the traditional for-

222 UN Doc. A/CN.4/119 (1959), p. 59. However, in 1961 Domke maintained that the ‘ad hoc arrangements’ on instalment payments agreed to by some capital exporting countries ‘cannot alter principles as fundamental as the requirement of prompt compensation’. See Domke (1961: 604-06).


225 Section IV.8 of the 1992 World Bank Guidelines.

226 See Schachter (1984: 122–24); but compare the comments by Mendelson (1985) and Schachter’s reaction to this in Schachter (1985).
mula of ‘adequate’ in the sense of fair market value. The Guidelines contain de-
tailed provisions on how to arrive at a reasonable determination of the market
value of the investment. 227

As regards the requirement of effectiveness of compensation, this usually refers
to compensation ‘in convertible foreign exchange’. Payment of compensation in
the form of bonds of which the income cannot be transferred, has been rejected as
‘ineffective’. As Wellens puts it, this requirement should be interpreted today in a
liberal manner.228 What counts is that the compensation is made ‘in a beneficial
form which is of real economic value to the owner’.229 Indeed, State practice
provides numerous examples of compensation in a non-monetary form, for ex-
ample in the form of commodities.230 On various occasions the US Government
has agreed with taking governments on a compensatory package deal. Interesting
examples include the settlement of the taking by Venezuela of American oil inter-
ests in 1974231 and the taking by Peru of the Marcona ore company in
1975.232 In both cases, agreement was reached on a combination of moderate
amounts of cash and a substantial long-term business relationship involving ser-
vice, marketing, transport, production, sales and other contracts.233 As already
referred to above, huge deliveries of crude oil were made by Libya to its claim-
ants. The ICC Guidelines merely include the word ‘effective’ in the compensation
clause; the ALI Third Restatement refers to ‘a form economically usable by the
foreign national’; and the World Bank Guidelines equate effective compensation
to payment in ‘the currency brought in by the investor where it remains converti-
ble, in another currency designated as freely usable by the International Monetary
Fund or in any other currency accepted by the investor.’234

227 Section IV.5 and 6 of the World Bank Guidelines. There is a notable exception clause in
paragraph 10: ‘In case of comprehensive non-discriminatory nationalizations effected in the
process of large scale social reforms under exceptional circumstances of revolution, war
and similar exigencies, the compensation may be determined through negotiations between
the host State and the investor’s home State and failing this, through international arbitra-
tion.’

228 Wellens (1977b: 75)

229 See Notes and Comments to Art. III of the 1967 OECD Draft Convention, 7 ILM (1968),
p. 128.

230 For some early examples, see Kronfol (1972: 116–17).

231 Rogers (1978: 7).


233 See also Asante (1979: 335 and 360), who discusses various possibilities of entering into
service and other co-operation contracts.

234 Section IV.7 of the World Bank Guidelines.
In conclusion, widespread support exists for the rule that compensation must be paid for the taking of foreign property and interests with the exception of property acquired under colonial rule. A difference of opinion continues to exist with respect to the standard and mode of payment, but over the years the rules arising from the triple standard have been relaxed, or at least their interpretation has been given a substantial degree of flexibility. Admittedly, it could be argued forcefully that the triple standard enjoys an increasing popularity through BITs and is also included in NAFTA, but these treaties do not necessarily incorporate the alpha et omega of international investment law. It is therefore somewhat surprising that the World Bank Guidelines provide that, as a general principle, the term ‘appropriate’ nowadays should be equated to ‘adequate, effective and prompt’, albeit with detailed qualifications as to valuation methodologies, and so on. On the other hand, it is simplistic to equate the Hull formula to ‘full compensation’ (thus disregarding the qualifications ‘prompt’ and ‘effective’) and to conclude, mainly on the basis of the decisions of tribunals in the cases concerning nationalizations by Libya, Kuwait and Iran, that the customary international law compensation standards of the 1950s and 1960s have been resurrected.

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The formula of ‘appropriate compensation’, as in the 1962 Declaration and the ILA Seoul Declaration or the formula of ‘just’ or ‘equitable’ compensation which the present author would prefer, may be the best to ensure that in determining compensation for a lawful taking of foreign property the interests of both host and home States, and those of the party whose property is taken, are accounted for.

8.5 Due Process

Although it is often stated that, as Higgins puts it, ‘the manner of an expropriation may not be . . . lacking in just procedures’, it is notable that not a single PSNR resolution spells out such procedural requirements, at least not in unequivocal terms. Arguably one could read a procedural requirement into Article 2.2(c) of the CERDS, where it provides that any controversy over the question of compensation ‘shall be settled under the domestic law of the nationalizing State and by its tribunals’. In contrast, due process of law or specific elements thereof are mentioned in all MITs and in many BITs. The 1967 OECD Draft Convention

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235 See Section IV.2 of the Guidelines. See also Shihata (1993b: 4-6).


238 OECD Draft Convention, Art. III.1; Inter-Arab Investment Treaty, Art. 9.2(a); OIC Agreement, Art. 10.2(a); ASEAN Investment Treaty, Art. VI.1; NAFTA Art. 1110.1(c); and Art. 13.1(c) of the European Energy Charter.
deals at some length with ‘the notion of due process of law’, which is said to be
akin to the requirements of the ‘rule of law’. In Peters’ sample a reference to
due process (of law) as a condition precedent occurs in 98 out of 145 BITs; some-
times other words are used, such as ‘based on law’ or ‘lawful’, which can be
considered equivalent to the requirement of due process of law.

The requirement of a due process of law has played a role in the refusal by
Western courts and governments to recognize the legality of a number of ‘nation-
alizations’, for example the Chilean copper cases. Whereas the Chilean cop-
per nationalization law accepted the principle of compensation, it provided that
this should be reduced by the amount of excess profits the copper mining compa-
ies had obtained in the past. This amount was to be fixed in a discretionary man-
ner by the Head of State, at that time President Allende, without any possibility of
appeal. In certain cases this not only led to a refusal of compensation, but
also to a finding that the nationalized company owed the Chilean State a con-
siderable sum of money (‘negative indemnification’). This absence of an impartial
element in the assessment of excess profits to be deducted from the amount of com-
ensation led to protests in Western circles. For example, the US Government
rejected the retroactive excess profit concept ‘which was not obligatory under the
expropriation legislation adopted by the Chilean Congress’.

The due process requirement is not always recognized in the literature as con-
stituting an essential part of the ‘international standard’ and a necessary condition
for a lawful taking. For example, Schwarzenberger—the prominent advocate of
the ‘international standard’— writes: ‘so long as an expropriation takes place for
public purposes and is accompanied by full or adequate, prompt and effective
compensation, it is legal’. Due process is not mentioned as one of the elem-
ents in US international law pronouncements in case of expropriation or national-
ization of US interests, nor is it cited in the ALI Third Restatement. The ICC
Guidelines call on the avoidance of ‘unreasonable measures’. The World Bank

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240 According the OECD Draft Convention the notion of due process of law is not exhausted
by a reference to the national law of the Parties concerned. The due process of law of each of
them must correspond to the principles of international law. See Art. III.1.


243 Cf. the Special Copper Tribunal Decision on the Question of Excess Profits of Nationalized
Copper Companies in Chile, in 11 ILM (1972), p. 1054.


Guidelines vaguely refer to ‘applicable legal procedures’, while the ILA Seoul Declaration and the Draft UN Code of Conduct on TNCs have no reference to due process.

In conclusion, procedural requirements relating to the right to take foreign property are referred to in some treaty law, judicial decisions and international law literature as constituting an additional requirement. But what ‘due process’ entails is by no means clear; it may be interpreted as encompassing a right of access to the courts.

8.6 Right to Appeal?

It is uncertain to what extent a host State is obliged to grant interested parties a right to appeal against a decision of first instance, in particular whether there should be an option of supra-national dispute settlement, subject to the observance of the ‘local remedies rule’. The latter rule precludes, in principle, diplomatic protection as well as international adjudication or arbitration, as long as the plaintiff has not exhausted the domestic administrative and judicial system in the State concerned, unless that State obviously denies or obstructs the alien’s access to the domestic courts (déni de justice), or unless the State has clearly indicated that it is willing to forgo the local remedies rule.

In analysing this issue, one should take into account that, until recently, natural and legal persons had not acquired a locus standi before any international tribunal or arbitral institution, and the possibility of their being a party to investment disputes before an international forum hardly existed before ICSID was established in 1966. An exception are the ‘Rules of Arbitration and Conciliation for Settlement of International Disputes between two Parties of which only one is a State’, drafted in the context of the Permanent Court of Arbitration. At the level of governments, the lack of reference to compulsory international judicial settlement in many relevant documents and writings may be explained by the fact that—rightly or wrongly—it was considered reprehensible or superfluous. On the

248 See Brownlie (1990: 546-47).
249 See the ICSID Convention, Arts. 25-27.
one hand, Latin American countries and some other developing countries consistently opposed intergovernmental interference with investment disputes between a foreign investor and the host State (see Chapter 6). On the other hand, according to Western countries in cases in which the host States’ tribunals would not settle investment disputes with foreigners in accordance with the rules of (international) law, the right of diplomatic protection would provide sufficient guarantees to ensure either an inter-governmentally negotiated settlement or an agreement to submit the dispute to international conciliation, arbitration or adjudication. However, a close link between transnational corporations and their home States, and a correspondence of interests between them, can no longer be assumed.

The Inter-Arab Investment Agreement lists as a condition of legality that ‘the investor shall have the right to contest the measure of expropriation in the competent court of the host state’ (Art. 10.2(a)). However, this local remedies rule seems to be interchangeable with the ‘choice of court’ clause of Article 16, by virtue of which the investor may raise any complaint either in the national courts of the host State or before an arbitral tribunal. The ASEAN Agreement points out that the national or company affected by expropriation has the right, under the law of the Contracting Party, to prompt review by a judicial body or another body independent of that Contracting Party. Article X of this Agreement indicates that such a dispute may be brought before the ICSID, UNCITRAL or regional arbitration centres. If parties cannot agree within three months on a suitable body for arbitration, a three-member arbitral tribunal must be formed. NAFTA and the European Energy Charter Treaty also contain elaborate provisions on a right to review and international dispute settlement, particularly arbitration. Both of them make reference to the ICSID Convention and procedures. 251

Many BITs reportedly contain a clause in the expropriation article, giving the investor access to the courts of the host State, sometimes to test the legality of the taking as well as the valuation of his investment or the amount of compensation paid or offered, sometimes only to test the valuation of the amount. 252 Virtually all BITs have a general arbitration clause. Upon the basis of his research on BITs, Peters noted that during the 1980s the resistance to international arbitration of disputes between the host country and the foreign investor was significantly reduced. He notes as a remarkable trend ‘the virtual abandonment—even in most Latin American countries, notwithstanding the Calvo doctrine—of the principle that local remedies must be exhausted before international arbitration is permissible’, either by a renunciation of this rule or—as is more often the case—by limiting the time available for recourse to local remedies to a short period, for

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251 See NAFTA, Chapter Eleven - Section B (Arts 115-38) and EECT, Part V (Arts 26-28) and Annex I. See also Chapter 9, section 9.5 of this study.

252 Peters (1994b: 3).
example, three or six months. In Peters’ view the trend of giving way to practical considerations is a positive trend: the investor perceives recourse to the local courts—before going to international arbitration—often as a waste of time, while for the host State the acrimony caused by public proceedings in its courts may harm the investment climate and could be embarrassing if the verdict of its highest court would subsequently be ‘quashed by ’foreign’ arbitrators.’

In the Chilean case, the absence of an impartial element in the assessment of excess profits to be deducted from the amount of compensation to be paid was a faux pas of the Allende Government. In 1973, the Supreme Court of Hamburg—which was called upon to deal with a request for seizure and forfeiture of Chilean copper—objected to the fact that ‘legal channels have been closed to the parties concerned’. The US Government likewise protested against the fact that Chile’s nationalization law ‘bypasses established Chilean judicial appeals procedures, including access to the Supreme Court’.

The ICC Guidelines provide that the host State should ‘in suitable circumstances’ enter into arrangements for the settlement of disputes with the investor by international conciliation or arbitration. Similarly, the OECD Guidelines encourage the use of ‘international dispute settlement mechanisms, including arbitration, as a means of facilitating the resolution of problems arising between enterprises and member countries. The Draft UN Code of Conduct on TNCs emphasizes national dispute settlement procedures, but offers the possibility of recourse to ‘other mutually acceptable or accepted dispute settlement procedures’. The ALI Comment on the Third Restatement calls for an effective administrative or judicial remedy for reviewing the legality under international law of an action causing economic injury to an alien and adds that, in the case of a taking of property, this may be done by an ‘independent domestic tribunal, an ad hoc or previously agreed arbitration, or an international tribunal’.

According to the World Bank Guidelines: ‘Disputes between private foreign investors and the host State will normally be settled through negotiations between

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254 Ibid., p. 134.
256 See 11 ILM (1972), pp. 91-92.
257 American Law Institute (1987: 202). See also Section 713 (with Comments and Reporters’ Notes) on Remedies for Injury to Nationals of Other States, pp. 217-29.
them and failing this, through national courts or through other agreed mechanisms including conciliation and binding independent arbitration.\textsuperscript{258}

It is notable that in the ILA Seoul Declaration, settlement of nationalization disputes is subject to its general section on peaceful settlement of disputes which reads:

Disputes on questions related to international economic relations have to be settled by peaceful means chosen by the parties concerned, in particular by recourse to international adjudication, international or transnational arbitration, or other international procedures for the settlement of disputes. The principle of local remedies shall be observed, where applicable;

Existing institutionalized dispute settlement arrangements, in particular on questions of international trade and investments, should be further developed and reinforced and new arrangements of a similar kind should be envisaged in other important areas, where international disputes are of growing importance, e.g., the fields of international monetary, financial and tax relations, transnational corporations and the natural environment.

In comparing the two, one could argue that the World Bank Guidelines emphasize local dispute settlement (negotiations between investor and host state, national courts, and independent arbitration—which can be either national or international), while the ILA Seoul Declaration stresses international dispute settlement.

In conclusion, the PSNR resolutions stipulate that a foreign investor has a right to seek review from a decision in the first instance regarding expropriation or nationalization of his investment. However, a local review does often not suffice and in practice there is clearly a need for independent arbitration or adjudication, following or instead of a review by the local courts of the host country. In State practice, as evidenced by MITs and a long line of BITs, there is an important tendency towards resorting to international arbitration, often without full exhaustion of local remedies. Together with the increasing applicability of human rights law to the treatment of aliens, this shows how much foreign investment disputes have become internationalized.

\textsuperscript{258} Section V.1 of the World Bank Guidelines, emphasis added. Paragraphs 2 and 3 of this section emphasize the merits of independent arbitration and recommend the ICSID procedures.