

Contents

Foreword xiii

Preface xv

Acknowledgments xvi

Table of Treaties, National Legislation, Cases and Awards xvii

List of Abbreviations xlii

1. The Origins of Investment Protection and International Investment Law 1
 - Chapter Outline 1
 - Introduction 2
 - 1. Diplomatic Espousal, Mixed and Other Similar Commissions 2
 - 1.1 Diplomatic Espousal 2
 - 1.2 Diplomatic Espousal and Diplomatic Settlement 4
 - 1.3 Mixed International Commissions, National Commissions and Modern Claims Settlement 5
 - 2. Legal Uncertainty and the Conflicting Attempts to Restate the Law in the United Nations (1945–1970s) 10
 - 2.1 Legal Chaos 10
 - 2.2 Efforts at the United Nations 14
 - 3. The Creature of the ‘Internationalised’ Contract 22
 - 4. Reaching for Treaty-Based Investor–State Arbitration 24
 - 5. ICSID, International Courts and Other Modern Institutions 26
 - 6. The Nature of Investment Treaty Arbitration and the Sources of the International Law on Foreign Investment 31
 - Conclusion 34
 - Questions 35
 - Suggestions for Further Reading 36
2. Investment Contracts and Internationalisation 37
 - Chapter Outline 37
 - Introduction 37
 - 1. Key Awards on Internationalisation 39
 - 2. The Backlash against Internationalisation 50
 - 3. Types of Investment Contracts 52

3.1	Natural Resource Concessions	52
3.2	Public Service Concessions	53
3.3	Build-Operate-and-Transfer (BOT) Contracts	54
3.4	Public-Private Partnerships (PPPs)	54
	Conclusion	55
	Questions	55
	Suggestions for Further Reading	56
3.	The Metamorphosis of Investment Treaties	57
	Chapter Outline	57
	Introduction	57
1.	Creation: 1959–1990	59
1.1	The Earliest Investment Treaties	61
1.2	The ICSID Convention	63
1.3	Draft Multilateral Investment Treaties	64
2.	Accelerated Growth: 1990s–2007	66
2.1	Partial Convergence in Treaty Content	67
2.2	Claims against Host States and <i>Jurisprudence (In)constante</i>	70
3.	'Resistance and Change': 2007 and Beyond	73
3.1	Cracks in the Investment Treaty Regime	73
3.2	Changes in the Investment Treaty Regime	78
	Conclusion	83
	Questions	84
	Suggestions for Further Reading	85
4.	Investment Dispute Settlement	86
	Chapter Outline	86
	Introduction	86
1.	Investment Arbitration as a Principal Means of Settlement Today	87
1.1	An Unusual Feature in Investment Arbitration	87
1.2	'Arbitration without Privity'	88
2.	Consent to Investment Arbitration	94
2.1	Forms of Consent and Agreement to Investment Arbitration	94
2.2	The Writing Requirement	97
3.	<i>Electa una Via</i> ('Fork in the Road') Clauses, 'No U-Turn' Clauses and Other Procedural Preconditions	100
3.1	Dispute Clauses and Procedural Preconditions	100
3.2	Exhaustion of Local Remedies	100
3.3	'Fork in the Road' Clauses, 'No U-Turn' Clauses and the Problem of Parallel Proceedings	101
4.	Contractual Forum Selection Clauses	104
5.	The Call for a Return to Adjudication, and Other Investment Dispute Settlement Bodies	105
6.	ICSID versus Ad Hoc Arbitration	106
	Conclusion	110
	Questions	111
	Suggestions for Further Reading	111

5. Jurisdiction, Admissibility and Parallel Proceedings	112
Chapter Outline	112
Introduction	112
1. 'Jurisdiction' and 'Admissibility'	114
2. Consequences of the Distinction	121
2.1 No Consequence	121
2.2 Consequence for Post-Request Developments	122
2.3 Consequence for Handling Objections	123
2.4 Consequence for Stay	123
2.5 Consequence for Challenges	124
3. Procedure for Addressing Objections to Jurisdiction and Admissibility	124
3.1 Bifurcation between Preliminary Objections and Merits	124
3.2 Claims Manifestly without Legal Merit	126
4. Objections to Jurisdiction and Admissibility	128
4.1 Investor	128
4.2 State	130
4.3 Investment	130
4.4 Consent and Other Issues	131
5. Parallel Proceedings	132
5.1 Consent by Disputing Parties	133
5.2 Special Treaty Rules	133
5.3 No Issue	134
5.4 Sequential Proceedings: Collateral Estoppel/ <i>Res Judicata</i>	135
5.5 Parallel Proceedings: Abuse of Process	137
5.6 Remedies	139
Conclusion	141
Questions	143
Suggestions for Further Reading	143
 6. Applicable Laws	 144
Chapter Outline	144
Introduction	144
1. <i>Lex causae</i>	145
1.1 Sources of Laws	145
1.2 Interplay of Laws	150
1.2.1 Configuration 1 – Matching Each Head of Claim to Its Governing Law	150
1.2.2 Configuration 2 – <i>Renvoi</i> to National Law	151
1.2.3 Configuration 3 – Composite National-International Law	153
1.3 Arbitral Mandate and Choice-of-Laws	155
2. <i>Lex arbitri</i>	156
3. <i>Lex loci arbitri</i>	161
Conclusion	163
Questions	163
Suggestions for Further Reading	164

7. Evidence	165
Chapter Outline	165
Introduction	165
1. The Burden of Proof	166
1.1 Onus Probandi Actori Incumbit	166
1.2 The 'Vanishing' Burden	167
1.2.1 The <i>RosInvestCo</i> Arbitration	168
1.2.2 The <i>Hulley, Yukos</i> and <i>Veteran Petroleum</i> Arbitrations	170
1.3 The 'Shifting' Burden	172
2. The Standard of Proof	174
2.1 Balance of Probabilities	174
2.2 Circumstantial Evidence	174
2.3 No Evidence	177
Conclusion	179
Questions	180
Suggestions for Further Reading	180
8. Provisional Measures	181
Chapter Outline	181
Introduction	182
1. Interim Measures and Sovereign Respondents	183
2. Recourse to National Courts and the Power of ICSID Tribunals	186
3. Other Types of Relief	192
4. The Test Applied by Tribunals	197
Conclusion	208
Questions	208
Suggestions for Further Reading	209
9. Protected Investments	210
Chapter Outline	210
Introduction	210
1. The Subjective Meaning of Protected Investments	211
2. The Objective Meaning of Protected Investments	218
2.1 The ICSID Tests	219
2.2 The Non-ICSID Test	221
3. The Dual Meaning of Protected Investments	223
3.1 Binding Objective Criteria	224
3.2 Illustrative Objective Criteria	226
Conclusion	230
Questions	231
Suggestions for Further Reading	231
10. Protected Investors	232
Chapter Outline	232
Introduction	232
1. Nationality-Based Eligibility for Protection	234
1.1 Form – Critical Date(s) of Nationality Possession	235
1.2 Substance – Circumstances of Nationality Acquisition	236

1.2.1 'Round-Tripping'	236
1.2.2 Litigation-Oriented Nationality Acquisition	238
2. Individual Investors	239
2.1 Authentication of Nationality	239
2.2 Dual Nationality/Permanent Residents	241
3. Corporate Investors	244
3.1 Place of Incorporation	244
3.2 Foreign Control	247
4. 'Divisible' Investors	251
Conclusion	255
Questions	256
Suggestions for Further Reading	257
11. Fair and Equitable Treatment, and Full Protection and Security	258
Chapter Outline	258
Introduction	258
1. Relationship with an International Minimum Standard of Treatment	259
1.1 The 'Minimum Standard' of Treatment	259
1.2 Fair and Equitable Treatment	260
1.3 Full Protection and Security	262
2. The Heads of Claim under FET and FPS, Their Evolution and Inter-Relationship	263
2.1 Heads of Claim under FET	263
2.1.1 Arbitrary and Discriminatory Treatment	263
2.1.2 Violation of Due Process and Lack of Transparency	264
2.1.3 Is There a Requirement of 'Bad Faith' on the Part of the Host State?	266
2.1.4 Recent Developments in the Scope of the FET Rule: Protecting Investors' Legitimate Expectations, and the Stability of the Business and Legal Environment Surrounding the Investment	268
2.2 Full Protection and Security	278
2.3 Inter-Relationship of FET and FPS beyond Physical Security	281
3. 'Narrowing Down' FET: Some Recent Examples of Treaty Clauses	283
4. 'Qualified' and 'Unqualified' Treaty Clauses, and the Interaction of Treaty and Custom	284
4.1 NAFTA and the 'North American' Model of 'Qualified' Treaty Clauses	284
4.2 'Unqualified' FET Treaty Clauses and Their Relationship with International Custom	287
Conclusion	291
Questions	292
Suggestions for Further Reading	292
12. Contingent Standards: National Treatment and Most-Favoured Nation Treatment	293
Chapter Outline	293
Introduction	293
1. Nine Lives of National Treatment	295
1.1 National Treatment	295
1.2 Expropriation	297
1.3 Fair and Equitable Treatment	297
1.4 Other Examples	298
2. Interpretation and Application of National Treatment	299
2.1 Like Circumstances	300

2.2	Distinctions in Treatment	304
2.3	Justification	306
3.	Most-Favoured Nation Treatment and Primary Obligations	309
4.	Most-Favoured Nation Treatment and International Dispute Settlement	314
4.1	Applicable, with Public Policy Exceptions	316
4.2	Inapplicable, Unless Explicitly Provided for	317
4.3	Applicable to Admissibility, But Not Jurisdiction	318
4.4	Applicable to Objectively Unfavourable Treatment	319
4.5	Recent Developments	320
	Conclusion	321
	Questions	322
	Suggestions for Further Reading	322
13.	Expropriation	323
	Chapter Outline	323
	Introduction	323
1.	The Object of Expropriation	324
1.1	Property Rights	325
1.2	Contractual Rights	326
1.2.1	Contract as Property	327
1.2.2	Sovereign Contractual Interference	329
1.3	Shareholder Rights	332
2.	The Existence of Expropriation	334
2.1	Direct Expropriation	334
2.2	Indirect Expropriation	335
3.	The Legality of Expropriation	338
3.1	Public Purpose	338
3.2	Compensation	339
3.2.1	The Rule of Compensation for Expropriation	339
3.2.2	The First Exception to the Rule of Compensation for Expropriation: Investment Valued at Nil	341
3.2.3	The Second Exception to the Rule of Compensation for Expropriation: Regulatory Taking	342
3.3	Due Process	342
3.4	Circumstances Precluding Wrongfulness and Non-Precluded Measures	344
	Conclusion	346
	Questions	347
	Suggestions for Further Reading	348
14.	Umbrella Clauses	349
	Chapter Outline	349
	Introduction	349
1.	The Umbrella Clause	350
2.	The Awards	352
2.1	<i>SGS v. Pakistan</i>	352
2.2	<i>SGS v. Philippines</i>	355
2.3	A Matter of Treaty Construction?	357
2.4	The Spectre of 'the Two "SGS" Arbitrations' Lurks	363

2.5 Distinguishing Treaty Law from Contract Law	366
2.6 Forum Selection Clauses	368
3. Examples of Umbrella Clauses	369
Conclusion	372
Questions	373
Suggestions for Further Reading	373
15. Defences	374
Chapter Outline	374
Introduction	374
1. Concept of Defences	376
2. Defences in Obligations	381
3. Defences in Exceptions	383
3.1 Non-Precluded-Measures Clause	383
3.2 Modern Exceptions	387
4. Defences in Circumstances Precluding Wrongfulness	389
4.1 Consent	390
4.2 Countermeasures	392
4.3 Necessity	395
4.4 Consequences	397
Conclusion	399
Questions	400
Suggestions for Further Reading	400
16. Remedies	401
Chapter Outline	401
Introduction	401
1. The Principle of Full Reparation for Internationally Wrongful Acts	402
2. Compensation and Restitution	403
2.1 Compensation for Expropriation	404
2.2 Compensation for Violations of Other Treaty Standards	406
2.3 Moral and Punitive Damages	408
3. Methods of Valuation	410
3.1 Discounted Cash Flow (DCF)	411
3.2 <i>Damnum Emergens Plus Lucrum Cessans</i> (DELC)	417
4. Interest	422
Conclusion	423
Questions	424
Suggestions for Further Reading	424
17. Costs and Legal Fees	425
Chapter Outline	425
Introduction	425
1. The Question of Costs in the Context of Investment Arbitration	426
2. Types of Costs	427
2.1 'Arbitration Costs' or 'Costs of the Proceedings'	427
2.2 'Legal' or 'Party' Costs	429
3. Cost Allocation by the Tribunal	430

3.1	UNCITRAL and ICSID Rules	430
3.2	Tribunal Considerations	431
4.	The 'Loser-Pays' Principle, or 'Costs after the Event'	434
5.	Security for Costs	440
	Conclusion	444
	Questions	446
	Suggestions for Further Reading	446
18.	Challenging and Enforcing Awards, and the Question of Foreign State Immunities	447
	Chapter Outline	447
	Introduction	447
1.	ICSID and 'Non-ICSID' Awards	448
2.	'Non-ICSID' Arbitration	449
3.	ICSID Arbitration	452
4.	Foreign State Immunity, Act of State and Non-Justiciability	460
4.1	Foreign State immunity	460
4.2	Pleas of Act of State and Non-Justiciability	466
5.	Attachment of Assets: The 'Final Refuge'	474
	Conclusion	476
	Questions	476
	Suggestions for Further Reading	476
19.	New Directions in International Investment Law and Arbitration	477
	Chapter Outline	477
	Introduction	477
1.	The Backlash	479
1.1	The Backlash to NAFTA and in the United States, 2001–2004	479
1.2	The Global Backlash Begins in Earnest, 2007–Date	483
1.3	The Treaty Terminations Begin	491
2.	The New Treaty Clauses	495
2.1	Reforming Treaty Substantive Rules in Recent Treaties	496
2.1.1	Reforming the FET Rule	496
2.1.2	Reforming the Expropriation Rule	498
2.1.3	Other Innovations in Substantive Standards of Treaty Protection	499
2.2	Procedural Innovations	500
3.	The European Proposal for a Multilateral Investment Court	504
	Conclusion	513
	Questions	513
	Suggestions for Further Reading	513
	<i>Index</i>	515