Contents

Table of Cases	xxiii	
Table of Statutes		
Table of EC Materials		
Table of Treaties	$1_{\mathbf{x}}$	
Table of Official Publications of Governments and		
International Organizations	1xv	
Abbreviations	lxxxv	
I. THE CONCEPTUAL FRAMEWORK		
1. Getting to Know Multinational Enterprises	3	
	5	
1. Problems of Definition	9	
2. The Principal Phases of MNE Growth	10	
(a) The First Period: 1850–1914	10 12	
(b) The Second Period: 1918–1939 (c) The Third Period: 1945–1990	15	
(i) The Period of American Dominance: 1945–1960	15	
(ii) The Period of Renewed International Competition:		
1960–1990	18	
(d) The Fourth Period: 1990 onwards	21	
3. Explanations for the Growth of MNEs	25	
4. The Role of Legal Factors in the Growth of MNEs	33	
Concluding Remarks	44	
2. Business and Legal Forms of Multinational Enterprise:		
Towards a Theory of Control	45	
1. MNEs as Transnational Business Organizations	45	
2. Legal Forms of Multinational Enterprise	51	
(a) Contractual Forms	52	
(i) Distribution Agreements	53	
(ii) Production Agreements	54	
(iii) Public Private Partnerships	55	
(b) Equity Based Corporate Groups	56	
(i) The Anglo-American 'Pyramid' Group	56	
(ii) European Transnational Mergers	58	
(iii) The Japanese 'Keiretsu'	63	
(iv) Changes in Business Organization and Effects on		
Equity Based Structures	65	

(c) Joint Ventures	66
(d) Informal Alliances between MNEs	69
(e) Publicly Owned MNEs	70
(f) Supranational Forms of International Business	72
(i) Forms Adopted by the European Community	72
(ii) The Andean Multinational Enterprise	75
(iii) Public International Corporations	76
3. Business and Legal Forms and the Control of MNE Activities	es 77
Concluding Remarks	79
3. Regulating Multinationals	81
1. The Principal Actors	82
2. Developing a Regulatory Agenda	85
3. The Role of Ideology	90
(a) The Ideological 'Building Blocks': 1960–1990	90
(i) The 'Neo-Classical Market' Perspective	90
(ii) The 'Regulated Market Perspective'	91
(iii) The 'Marxist' Perspective	92
(iv) The Influence of Nationalism	94
(b) The Influence of the Debate on 'Globalization'	96
(i) Globalization and MNE Regulation	96
(ii) 'Global Consumerism'	99
(iii) 'International Corporate Social Responsibility'	100
4. Bargaining Power, Sources and Sites of MNE Regulation	104
(a) Bargaining Between States and MNEs	104
(b) Sources of Regulatory Standards	110
(c) 'Sites' of Regulation (i) Self December 2	112
(i) Self-Regulation(ii) Regulation by NGOs	113
(iii) National Regulation	114 114
(iv) Bilateral Regulation	114
(v) Regional Regulation	117
(vi) Multilateral Regulation	119
Concluding Remarks	121
II. ECONOMIC REGULATION BY HOME	7
	<u></u>
AND HOST COUNTRIES	
4. The Jurisdictional Limits of Regulation Through National or	
Regional Law	125
1. The Legal Bases for the Extraterritorial Regulation of MNEs	125
(a) Nationality	126
(b) Protective Jurisdiction	127
(c) Objective Territorial Jurisdiction	127

Contents	XV

	2. Jurisdiction to Prescribe	129
	(a) Nationality Links	131
	(b) The 'Effects' Doctrine	133
	(c) Links of Ownership and Control	139
	3. Personal Jurisdiction	140
	(a) Establishing a Sufficient Connection Between the Forum and	
	the Non-Resident Unit of the MNE	140
	(i) Corporate Links Between Resident and Non-Resident	
	Units of the MNE	141
	(ii) Links Based on Other Business Contacts With the Forum	
	Jurisdiction	148
	Presence of Corporate Officers	149
	Presence of Products Manufactured by a Non-Resident	
	Corporation	149
	Supply of Goods and Services Through the Internet	151
	(b) The Doctrine of Forum Non Conveniens as Applied to	1 - 0
	Non-Resident Units of MNEs	153
	4. Jurisdiction to Enforce	160
	(a) The Disclosure of Evidence in Proceedings Involving a MNE	161
	(i) Disclosure of Evidence in US Antitrust Proceedings	162
	(ii) US Disclosure Orders and Foreign Secrecy Laws	166
	(b) The Reduction of Conflicts over Demands for Disclosure of	1.00
	Evidence Located in a Foreign Jurisdiction	169
	(i) Bilateral Cooperation	169
	(ii) The Hague Convention on the Taking of Evidence	171
	Abroad in Civil or Commercial Matters 1970	171
	Concluding Remarks	174
5.	The Control of Inward Investment by Host States	177
	1. The Scope of Host State Discretion	177
	2. Techniques for Restricting Entry and Establishment	179
	(a) Total Exclusion and Sectoral Exclusion of Foreign Investors	179
	(i) Total Exclusion (i) Total Exclusion	179
	(ii) Sectoral Exclusion	180
	(b) Laws Restricting Foreign Shareholdings in National Companies	184
	(i) Indigenization Laws	185
	(ii) Restrictions on Foreign Ownership in Privatized Companies	188
	(c) Laws Regulating Equity Joint Ventures Between Foreign and	
	Local Enterprises	191
	(d) 'Screening' Laws	201
	Concluding Remarks	213
6	Measures for the Encouragement of Inward Direct Investment	215
0.		
	 The Encouragement of Inward Direct Investment by Host States (a) Host States Without Specialized Controls on Inward 	215
	Direct Investment	216

	(b) Investment Incentives	219
	(c) Export Processing Zones (EPZs) and Related 'Policy Enclaves'	
	Within the Host State	226
	(i) The Evolution of EPZs	226
	(ii) The Principal Legal and Administrative Features of EPZs	
	in Developing Host States	229
	(iii) The Performance of EPZs	232
	(iv) The Chinese 'Special Economic Zone' Policy	234
	2. Bilateral and Regional Measures for the Encouragement of	
	Direct Investment	238
	(a) The North American Free Trade Agreement (NAFTA)	239
	(b) The European Internal Market	242
	3. Multilateral Arrangements Dismantling Barriers to	
	Inward Investment	248
	(a) The OECD Codes of Liberalization	248
	(b) Direct Investment and the WTO Agreements	251
	(i) Services	252
	(ii) Trade-Related Intellectual Property Measures (TRIPs)	256
	(iii) Trade-Related Investment Measures (TRIMs)	258
	Concluding Remarks	261
7.	Taxation Problems Associated With MNEs	263
	1. International Double Taxation and MNEs	263
	2. Location of Investments and Tax Considerations	267
	3. Tax Avoidance and MNEs	269
	(a) The 'Transfer Pricing' Problem	269
	(i) Establishing Transfer Prices in MNE Networks	271
	(ii) Incentives, Disincentives and Empirical Evidence for	
	Transfer Price Manipulations	273
	(iii) The Regulation of Transfer Price Manipulations: Arm's	
	Length and Comparable Profit Methods (CPM)	277
	(iv) Problems Relating to the Administration of Transfer	
	Pricing Controls Using the Arm's Length Standard	288
	(v) Formula Apportionment	294
	(b) The Use of 'Tax Havens' by MNEs	299
	Concluding Remarks	306
8.	Group Liability and Directors' Duties	307
	1. The Regulation of MNE Group Liability Under Existing	
	Legal Principles	308
	(a) Equity Based MNE Groups	308
	(i) Direct Liability of the Parent Company	309
	(ii) Lifting the Corporate Veil	313
	(b) Liability of Transnational Network Enterprises	316

Contents

		Contents	XVII
	2.	New Approaches to MNE Group Liability	317
		(a) The 'Enterprise Entity' Theory and its Limitations	317
		(b) Towards a New Law of MNE Group Liability?	321
	3.	The Protection of Minority Shareholders in the Subsidiary	
		of a MNE	326
	4	Protection of Creditors Upon the Insolvency of the	
		Subsidiary of a MNE	331
		oncluding Remarks	335
		including recinaries	
9.	Co	orporate Governance and Disclosure	337
	1.	Principal Motives and Interests Behind Enhanced	
		MNE Accountability and Disclosure	337
	2.	Reforming the Internal Governance Structures of MNEs	340
	,	(a) The Use of Outside or Non-Executive Directors	342
		(b) Enhanced External Regulation of the Auditing Function	349
		(c) European Initiatives for Employee Consultation and	
		Information	354
	3.	Disclosure by MNEs in Annual Accounts and Other Statements	359
		(a) Consolidated Financial Statements	361
		(b) Segmental Disclosure	370
		(c) Social Disclosure	375
		(i) Employee Disclosure	377
		(ii) Value-Added Statements	377
	v	(iii) Environmental Disclosure	378
		(d) Foreign Currency Translation	382
	Co	oncluding Remarks	383
0.	Re	egulation Through Competition Law	385
	1.	The Nature and Aims of Competition Regulation	385
		The Incidence of Anti-Competitive Conduct on the	
		Part of MNEs and Regulatory Responses	388
		(a) Anti-Competitive Agreements and Concerted Practices	390
		(i) International Cartels	390
		(ii) Vertical International Distribution Systems	392
		(iii) Joint Ventures	394
		(b) 'Abuse of a Dominant Position' or 'Monopolization'	398
		(c) Mergers and Acquisitions	402
	3.	International Developments in the Regulation of Restrictive	
		Business Practices	417
	Co	oncluding Remarks	427
1.	Te	echnology Transfer	429
	1.	'Technology' and 'Technology Transfer'	429
		The Generation and Use of Technology: International	
	۷.	Technology Markets	432
		recimology iviaines	IJL

-

3. Technology Transfer by MNEs and its Legal Effects	43
4. The Two Principal Models of Technology Transfer Regulation	44
(a) The Regulatory Control Model	44
(i) Reserved Approach to the Protection of Intellectual	
Property Rights	44
	44
	1.5
	45 45
	45 45
	45
	46
(iv) Mandatory IPR Regulation	46
Concluding Remarks	47
III. THE SOCIAL DIMENSION	
Labour Relations	47.
1. The Evolution of the ILO and OECD Codes	47
2. General Policies of the Codes and Their Relationship to	
National Laws	47
3. Employment Issues	47
(a) Employment Promotion	47
(b) Equality of Opportunity and Treatment	48
(c) Security of Employment	48
4. Training of Workers	480
5. Conditions of Work and Life	48
(a) Wages, Benefits, and Conditions of Work	48
	48
	49
	492
	492
	50
	50°5
Concluding remarks)00
Human Rights and Multinational Enterprises	507
1. Human Rights and the Protection of MNEs	509
2. The Basis of Human Rights Obligations for MNEs	514
3. The Major Substantive Human Rights Obligations of MNEs	518
	525
(a) The National Level	526
(b) The Inter-governmental Level	531
Concluding Remarks	536
	4. The Two Principal Models of Technology Transfer Regulation (a) The Regulatory Control Model (i) Reserved Approach to the Protection of Intellectual Property Rights (ii) Specialized Technology Transfer Laws (iii) The Draft UNCTAD Code on the Transfer of Technology (b) The Market Based Development Model (i) IPR Protection and Technology Transfer (ii) The Role of Competition Regulation (iii) 'Permissive' Regulation (iv) Mandatory IPR Regulation Concluding Remarks III. THE SOCIAL DIMENSION Labour Relations 1. The Evolution of the ILO and OECD Codes 2. General Policies of the Codes and Their Relationship to National Laws 3. Employment Issues (a) Employment Promotion (b) Equality of Opportunity and Treatment (c) Security of Employment 4. Training of Workers 5. Conditions of Work and Life (a) Wages, Benefits, and Conditions of Work (b) Minimum Age (c) Safety and Health 6. Industrial Relations (a) Freedom of Association and the Right to Organize (b) Collective Bargaining and Consultation (c) Examination of Grievances and Settlement of Industrial Disputes Concluding Remarks Human Rights and Multinational Enterprises 1. Human Rights and the Protection of MNEs 3. The Basis of Human Rights Obligations for MNEs 4. Monitoring and Enforcement (a) The National Level (b) The Inter-governmental Level

	Contents	xix
14.	Environmental Issues	537
	1. Core Concepts	537
	(a) Sustainable Development	537
	(b) Environmental Protection	539
	(i) The 'Precautionary' Principle	540
	(ii) The 'Preventive' Principle	540
	(iii) The 'Polluter Pays' Principle	541
	2. Environmental Regulation of MNEs	541
	(a) Main Themes and Issues	542
	(b) Informal Regulation	546
	(i) Corporate Self-Regulation	546
	(ii) 'Civil' Regulation	550
	(c) Formal Regulation	556
	(i) National and Regional Regulation	556
	(ii) International Regulation	566
	Concluding Remarks	574
	IV. INTERNATIONAL REGULATION	
15.	Control of Investment Risks I: Contractual Stability,	
	Renegotiation, Taking of Property, and Investment	
	Guarantees	577
	1. The Restriction of State Sovereignty in the Field of	
	Contractual Relations with Foreign Investors	578
	(a) The 'Internationalization' of International Investment Agreements	579
	(b) Sanctity of Contract and Stabilization Clauses	582
	2. Renegotiation of International Investment Agreements	583
	3. The Taking of Foreign Corporate Assets	587
	(a) What Constitutes a Taking	587
	(b) The Legality of Takings Under the Law of the Host State	596
	(c) The Legality of Takings at International Law	597
	(d) The Issue of Compensation	601
	(i) The Valuation of Expropriated Property	602
	(ii) The Measure of Compensation	610
	(iii) Settlement of Claims Through Lump Sum Agreements	613
	4. Investment Guarantee Schemes	614
	Concluding Remarks	620
1/		
10.	Control of Investment Risks II: Non-Discrimination,	
	Fair and Equitable Treatment, and Full Protection	
	and Security	621
	1. National Treatment	621
	2. Most Favoured Nation Treatment	628
	3. Fair and Equitable Treatment	635

Contents

	4.	Full Protection and Security	648
	5.	Compensation in Cases Other Than Expropriation	650
		acluding Remarks	651
17	771	Codification of International Standards For the	
1/0		tment of Foreign Investors	653
	1.	The Development of International Standards	654
		a) The Andean Common Market (ANCOM)	656
		b) The OECD Guidelines on Multinational Enterprises	658
		c) The Draft UN Code of Conduct on Transnational Corporations d) The Contribution of the World Bank: The 1992 Guidelines on the	660
		Treatment of Foreign Direct Investment and Standard Setting	
		by MIGA	662
		e) The Failure of Recent Initiatives to Adopt Multilateral	002
		Investment Rules	666
	2.	The Content of International Investment Agreements	674
		a) Preamble	675
		b) Provisions Defining the Scope of Application of the Treaty	675
		(i) Subject-Matter Covered	676
		Definition of 'Investments' to Which the IIA Applies	676
		The Admission of Investments	676
		Applicability to Investments Made Prior to the Conclusion	
		of the Treaty	678
		(ii) Covered Persons and Entities	678
		(iii) Territorial Application (iv) Temporal Application	681
		(iv) Temporal Application c) Standards of Treatment	681 682
		(i) General Standards of Treatment	682
		Fair and Equitable Treatment	682
		National Treatment	683
		Most Favoured Nation (MFN) Standard	685
		The Observance of Obligations	685
		(ii) Specific Standards of Treatment	689
		Free Transfer of Payments	690
		Compensation for Losses Due to Armed Conflict or	
		Internal Disorder	691
		Compensation for Expropriation	691
		Other Specific Standards	693
		d) Dispute Settlement Clauses	694
		(i) Disputes Between the Contracting Parties (ii) Disputes Between the Host State and the Foreign Investor	694
	2	(ii) Disputes Between the Host State and the Foreign Investor The Effect of IIAs in the National Legal Systems of	695
	J.		600
		he Parties	698
	Co	cluding Remarks	/01

		Contents	xxi
8.	Tŀ	ne Settlement of International Investment Disputes	703
	1.	The Limitations of Traditional International Dispute Settlement Mechanisms in MNE/Host State Relations	704
	2.	Alternatives to Diplomatic Protection: International	
		Dispute Settlement Mechanisms Involving the	
		MNE and Host State	707
		(a) Ad Hoc Arbitration and Conciliation	709
		(b) Institutional Systems for International Dispute Settlement	710
		(i) The ICC Court of Arbitration	711
		(ii) NAFTA	712
		(iii) Energy Charter Treaty	713
		(iv) MERCOSUR	714
		(v) ASEAN	715
	3.	The International Centre for Settlement of Investment Disputes	716
		(a) The Aims of ICSID	716
		(b) The ICSID Convention and Its Effect on State Regulation	
		of Investment Disputes	719
		(i) The Contracting State's Ability to Control Jurisdiction	719
		(ii) Subject-Matter Jurisdiction	731
		(iii) The Delocalized Character of ICSID Arbitration	734
		(iv) Annulment of Tribunal Awards	740
		(v) Enforcement of ICSID Awards	743
		(vi) Procedure and Costs	743
	Co	oncluding Remarks	745
	V		
nd	ex		747