CONTENTS

page xv

Preface to the second edition

		face to the first edition xvi
		ple of cases xvii
List of abbreviations xxiv		
	1100	
1	Int	roduction 1
	1.	The definition of foreign investment 7
		1.1. The distinction between portfolio investment and foreign
		direct investment 7
		1.2. Definition of foreign investment in treaties 9
		1.3. The evolution of the meaning of the term 'investment' 9
	2.	The history of the international law on foreign
		investment 18
		2.1. The colonial period 18
		2.2. The post-colonial period 22
	3.	An outline of the book 30
2	Th	e shaping factors 34
		The historical setting 37
		1.1. State responsibility for injuries to aliens 37
		1.1.1. The natural resources sector 40
		1.1.2. The plantation sector 44
		1.1.3. The manufacturing sector 44
		1.1.4. The financial sector 46
		1.1.5. Intellectual property 46
	2.	Conflicting economic theories on foreign
		investment 50
		2.1. The classical theory on foreign investment 51
		2.2. The dependency theory 57
		2.3. The middle path 59
	3.	Actors in the field of foreign investment 65
		3.1. The multinational corporation 66

	3.2.	State corporations 69
	3.3.	International institutions 71
	3.4.	Non-governmental organisations 74
	3.5.	Other actors 75
4.	Risks	in foreign investment 75
	4.1.	Ideological hostility 77
	4.2.	Nationalism 78
	4.3.	Ethnicity as a factor 80
	4.4.	Changes in industry patterns 81
	4.5.	Contracts made by previous regimes 83
	4.6.	Onerous contracts 85
	4.7.	Regulation of the economy 85
	4.8.	Human rights and environmental concerns 86
	4.9.	The law-and-order situation 87
5.	The s	sources of the international law on foreign
	inves	tment 87
	5.1.	Treaties 87
	5.2.	Custom 89
	5.3.	General principles of law 93
	5.4.	Judicial decisions 95
	-	
Co		by the host state 97
1.		lation of entry 108
		Guarantees against expropriation 110
	1.2.	Guarantees relating to dispute settlement 114
	1.3.	Tax and non-tax incentives to foreign investors 115
		Screening of foreign investment entry 116
		Requirements of local collaboration 120
		Capitalisation requirements 122
		Requirements relating to environmental protection 124
		Requirements relating to export targets 126
		Requirements relating to local equity 128
	/	Other requirements 131
		Regulation and expropriation 131
2.		forms of foreign investment 132
		The joint venture 133
		The production-sharing agreement 134
3.	Cons	straints on control: the customary
	inter	national law 135
	3.1.	State responsibility for injuries to aliens 138
	3.2.	The conflict between the United States and Latin American
		states 142

			The content of the international minimum standard	148
			State responsibility and developing states 151	
			The 'noble synthesis' 152	
			Damage to property in the course of civil disturbances	156
		3.7.	Validity of conditions on foreign investment 159	
			3.7.1. Regulations on screening of foreign	
			investments 159	
			3.7.2. Local equity requirements 161	
	1	Conc	3.7.3. Export requirements 165 clusion 167	
	4.	Conc	Jusion 107	
1	Th	e liabi	lity of multinational corporations and home	
	sta	te mea	asures 169	
	1.	Oblig	gations of multinational corporations 171	
		1.1.	The obligation not to interfere in domestic politics	174
		1.2.	Obligations relating to human rights 175	
		1.3.	Liability for violations of environmental norms 179)
		1.4.	The obligation to promote economic development	181
	2.	Extra	iterritorial control by home states 182	
		2.1.	State responsibility of home states for failure to control	
			multinational corporations 184	
		2.2.	The existing rules on state responsibility 184	
		2.3.	The duty to control nationals abroad 194	
		2.4.	State responsibility and the duty to provide remedies	
			to victims 201	
	3.	Conc	clusion 203	
-	Ril	ateral	investment treaties 204	
,			ductory survey 204	
			ies of friendship, commerce and navigation	209
			ons for bilateral investment treaties 211	207
	<i>4</i> .		ares of bilateral investment treaties 217	
	1.		The statement of the purpose of the treaty 218	
			Definitions 220	
		1.2.	4.2.1. Investments 220	
				225
			4.2.3. Portfolio investments 227	
			4.2.4. Corporate nationality and protection of	
-			shareholders 228	
		4.3.	Standard of treatment 233	
			4.3.1. National standard of treatment 233	
			4.3.2. Fair and equitable standard 235	

			4.3.3. Most-favoured-nation treatment 236
			4.3.4. Full protection and security 237
		4.4.	Performance requirements 237
			Repatriation of profits 238
			Nationalisation and compensation 239
			4.6.1. Compensation for destruction during wars and national
			emergencies 246
		4.7.	Protection of commitments 248
		4.8.	Dispute resolution 249
			Arbitration and the exhaustion of local remedies 253
			4.9.1. Arbitration between states 255
			4.9.2. Subrogation 256
		4.10.	Safeguard provisions and exceptions 257
		4.11.	Succession of governments and bilateral investment
			treaties 258
	5.	New	concerns in bilateral investment treaties 259
		5.1.	Environmental concerns 260
		5.2.	Human rights 261
		5.3.	Economic development 262
		5.4.	International concerns 263
		5.5.	Regulatory space and bilateral treaties 265
	6.	Conc	lusion 266
6	Mı	ıltilate	ral instruments on foreign investment 269
	1.	The in	nternational norms on multinational
		corpo	orations 271
	2.	-	JNCTC Draft Code on Multinational
		Corp	orations 275
		_	Description of the UNCTC Draft Code 276
		,,	2.1.1. The preamble 276
			2.1.2. Definition 277
			2.1.3. Respect for national sovereignty 277
			2.1.4. Renegotiation of contracts 278
			2.1.5. Non-interference in domestic affairs 278
			2.1.6. Abstention from corrupt practices 280
			2.1.7. Economic and other controls 281
			2.1.8. Disclosure of information 282
			2.1.9. Treatment of transnational corporations 283
	3.	The c	outstanding issues 283
			The relevance of international law 283
			Non-interference in domestic affairs 286
			Permanent sovereignty and international obligations 287
			0 /

4.	The regional agreements 288
	4.1 NAFTA 288
	4.2 The ASEAN Agreements 290
5.	The Multilateral Agreement on Investment 291
6.	The WTO and foreign investment 297
	6.1. Investment in the Uruguay Round 299
	6.2. GATS 299
	6.3. TRIPS 301
	6.4. TRIMS 303
7.	An investment regime under the WTO 303
	7.1. The definition of investment 304
	7.2. Definition and the preservation of regulatory control 305
	7.3. Definition of investor 306
	7.4. Treatment standards 306
	7.4.1. Most-favoured-nation treatment 308
	7.5. Performance requirements 309
	7.6. Expropriation 309
	7.7. Balance-of-payment safeguards 310
	7.8. Dispute resolution 310
8.	The right to regulate foreign investment 311
9.	Conclusion 313
Car	uses of action: breaches of treatment standards 315
1.	The customary international law standards 318
2.	The violation of national treatment standards 319
	2.1. Performance requirements and national treatment 325
	2.2. National treatment and infant industries 326
	2.3. Subsidies, grants and national treatment 327
	2.4. Ethnicity and national treatment 327
	2.5. Conclusion 327
3.	International minimum standard treatment 328
4.	Fair and equitable standard of treatment 332
	4.1. Denial of justice 340
	4.2. Due process and administrative irregularity 340
5.	Full protection and security 342
	Conclusion 342
	e taking of foreign property 344
In	
	What constitutes taking? 345

		1.2.1. Forced sales of property 359
		1.2.2. Forced sales of shares 361
		1.3. Privatisation and forced sales 364
		1.3.1. Indigenisation measures 364
		1.3.2. Interference with property rights 367
		1.4. Changing US and European notions of property 368
		1.5. The impact on international law 371
		1.5.1. Survey of authorities 375
	2.	The exercise of management control over the
		investment 387
		2.1. Cancellation of permits and licences 389
		2.2. Takings by agents and mobs 391
		2.3. Excessive taxation 393
		2.4. Expulsion of the foreign investor 394
		2.5. Freezing of bank accounts 394
		2.6. Exchange controls 394
	3.	Illegal takings 395
		3.1. The taking must be for a public purpose 395
		3.2. Discriminatory taking 398
		3.3. Takings in violations of treaties 399
	4.	Conclusion 400
9)	Tal	cings in violation of foreign investment
		eements 402
	_	Contractual devices for foreign investment
	1.	
		•
		1.1. The essential clauses 4061.1.1. The stabilisation clause 407
		1.1.1. The stabilisation clause 407 1.1.2. Choice-of-law clause 410
		1.1.2. Choice-of-law clause 410
	2.	
	۷.	
		 2.1. The origin of the theory of internationalisation 417 2.2. The ICSID Convention and international law 429
		2.2. Lex mercatoria and state contracts 431
		2.4. Umbrella clauses and internationalisation 433
	3	Conclusion 433
	٥.	
0	Co	mpensation for nationalisation of foreign
	inv	restments 435
	1	The competing norms: the views of the capital-export

1.1. The claim that 'prompt, adequate and effective' compensation

437

states

437

must be paid

CONTENTS

		1.1.1.	Treaties 439
		1.1.2.	Customary practice 441
		1.1.3.	General principles of law 443
		1.1.4.	Unjust enrichment 444
		1.1.5.	Acquired rights 445
		1.1.6.	Right to property 446
		1.1.7.	Foreign investment codes 451
		1.1.8.	Decisions of courts and tribunals 452
		1.1.9.	International courts 453
		1.1.10.	Awards of arbitral tribunals 457
		1.1.11.	National courts 472
		1.1.12.	Writings of publicists 474
2.	The	competi	ing norms 477
		-	im that it is permissible to deduct past excess profits
			mpensation 477
	2.2.	The clai	im that the taking is a 'revindication' for which no
			sation is necessary 478
	2.3.	The clai	im that appropriate compensation should be
		paid	479
		2.3.1.	Categories of takings for which damages rather than
			compensation must be paid 482
		2.3.2.	Categories of lawful takings for which full
			compensation must be paid 483
		2.3.3.	Full compensation must be paid where there is a
			one-off taking of a small business 483
		2.3.4.	Full compensation need not be paid as part of a
			full-scale nationalisation of a whole industry 484
		2.3.5.	Partial compensation 485
3.	Valua	ation of	nationalised property 485
4.	Conc	clusion	487
Dih	liogra	nla.	100
	-	phy	409
ma	ex	506	