

CONTENTS

<i>Table of Cases</i>	xxxi
<i>Table of Treaties, Legislation, and Related Instruments</i>	lvii
<i>List of Abbreviations</i>	lxxvii
<i>List of Contributors</i>	lxxxi

I CONCEPT AND FOUNDATIONS

1. International Investment Law and Comparative Public Law—an Introduction	3
I. International Investment Law and Its Discontents	4
II. Institutional Reform or System-Internal Adaptation?	7
III. International Investment Law as Public Law	10
IV. Investment Treaty Arbitration and Global Governance	17
V. International Investment Law and Comparative Public Law	23
VI. Conclusion	35
2. Minimum Standards of Procedural Justice in Administrative Adjudication	39
I. Introduction	39
A. Goals and Structure of the Chapter	39
B. The Study of Common Principles as the 'Most Important Task' for Comparative Lawyers	42
C. Why the Comparative Method is Increasingly Important in the Field of Public Law	45
D. Protecting International Investments: the Question of Standards	46
II. Are There Invariable Laws? Montesquieu, Smith, and Tocqueville	49
A. Universalism and Particularities in Montesquieu	49
B. Adam Smith's Conception of General Principles of Law	51
C. Tocqueville's <i>règles invariables</i>	53
D. Hegel and the Separation between National and International Law	54
III. Procedural Due Process of Law in Administrative Adjudication	56
A. A Methodological Premise	56
B. Due Process of Law: Procedure and Substance	57
C. Administrative Adjudication within the OECD	59
D. The Right to be Heard: Beyond Notice	60
E. Transparency and Access to Files	65

F. The Duty to Give Reasons	67
IV. The Minimum Standards of Procedural Justice	69
A. New Standards for Administrative Procedures	69
B. The Concept of Minimum Standard	71
C. An ' <i>échelle des garanties</i> '	73
3. Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality	75
I. Introduction	75
II. The Development and Diffusion of Proportionality Analysis	79
III. The Structure of Proportionality Analysis	85
A. Suitability for a Legitimate Government Purpose	86
B. Necessity	86
C. Proportionality <i>stricto sensu</i>	87
IV. Applying Proportionality Analysis in Investor-State Arbitration	88
A. Proportionality Analysis and the Concept of Indirect Expropriation	89
B. Proportionality Analysis and Fair and Equitable Treatment	96
C. Proportionality Analysis and Non-Precluded Measures Clauses	98
V. Conclusion: Proportionality Analysis and Reasoning in Investment Arbitration	102

II INVESTOR RIGHTS IN COMPARATIVE PERSPECTIVE

4. The Concept of Indirect Expropriation in Comparative Public Law—Searching for Light in the Dark	107
I. Introduction	107
II. Indirect Expropriation in International Investment Law as it Stands Today	109
III. Indirect Expropriation under the ECHR	112
A. Particularities of Article 1 of the First Protocol to the ECHR	112
(1) The existence of a duty to compensate	113
(2) The importance of the right to regulate	113
(3) The jurisprudence on other interferences with property rights	114
B. <i>De facto</i> Expropriations under Article 1(1) sentence 2	114
C. The Control of Use under Article 1(2)	116
D. Other Interferences under Article 1	119
E. Summary of the Jurisprudence on Article 1	120
IV. General Principles of Law	121
A. US Constitutional Law	122
(1) The development of the current jurisprudence	122

(2) Ad hoc analysis	123
(3) <i>Per se</i> rules	126
(4) Summary of US constitutional law	129
B. German Constitutional Law	130
(1) Historical development	131
(2) Current jurisprudence	133
(3) Summary of German constitutional law	137
C. Law of the European Union	138
(1) The right to property in European law	138
(2) Expropriation according to Article 17(1) sentence 2	139
(3) Regulations according to Article 17(1) sentence 3	140
(4) Article 340(2) of the TFEU	143
(5) Summary of the law of the European Union	147
V. Conclusion	147
 5. Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law	 151
I. Introduction	151
II. Conceptualizing Arbitral Jurisprudence: Fair and Equitable Treatment as an Embodiment of the Rule of Law	155
A. Principles Derived from Fair and Equitable Treatment	159
(1) Stability, predictability, consistency	160
(2) Legality	162
(3) Protection of legitimate expectations	163
(4) Administrative due process and denial of justice	166
(5) Protection against arbitrariness and discrimination	167
(6) Transparency	168
(7) Reasonableness and proportionality	169
B. Contextualization of Fair and Equitable Treatment in the Separation of Powers Framework	170
(1) Fair and equitable treatment and domestic administrative law	170
(2) Fair and equitable treatment and domestic judicial proceedings	172
(3) Fair and equitable treatment and domestic legislation	173
C. Methodological Implications of the Rule of Law Approach	174
(1) Comparative analysis of domestic legal systems	175
(2) Comparative analysis of international legal regimes	176
III. A Normative Justification of the Rule of Law Approach	176
A. The Teleology of International Investment Treaties	177
B. Institutional Economics and the Role of the Rule of Law	177
IV. Conclusion	181
 6. Full Protection and Security	 183
I. Introduction	183

II.	Obligation to Provide Full Protection and Security under Customary International Law	184
A.	Relevance of Customary International Law for Investment Treaty Interpretation	184
B.	Customary Law Protection against Harm Caused by State or Private Actors	187
(1)	Complicity	187
(2)	Responsibility for failure to act	188
III.	Investment Law Jurisprudence	190
A.	Harm Caused by the State	191
B.	Harm Caused by Private Actors	192
(1)	Responsibility based on complicity	192
(2)	Responsibility based on failure to protect	192
IV.	The Interpretation of Due Diligence	199
A.	The Relevance of General Principles of Law	199
B.	The Protection Standard	200
(1)	Absolute or relative standard	200
(2)	Deference to state sovereignty	203
(3)	The standards of reasonableness, necessity, and proportionality	206
(4)	Knowledge and foreseeability	208
(5)	Causality	209
(6)	Conflicting private rights	210
V.	Conclusion	211
7.	Cain and Abel: Congruence and Conflict in the Application of the Denial of Justice Principle	213
I.	Historical Development	217
II.	Substantive Basis for Alleging Denial of Justice	220
A.	The Investment Context	220
B.	The Human Rights Context	224
III.	Similarities in Factual Underpinnings	225
A.	Failure to Provide Access and Refusal to Enforce Judgments	225
B.	Delay	227
C.	Undue Process and Inadequacies in the Administration of Justice	230
D.	Manifestly Unjust Decision or Pretence to Form	231
IV.	Distinctions and Similarities between the Approach of Investment Tribunals and Human Rights Organs	233
A.	Distinct Functions	233
B.	Varying Procedural Requirements as Evidenced in the Application of the Local Remedies Rule	234
C.	Similarities in the Overall Approach of Investment Tribunals and Human Rights Organs	239
V.	Conclusion	241

8. The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO	243
I. Introduction	243
II. National Treatment Across the WTO and International Investment Law	246
A. The Law of the WTO: GATT Article III	246
B. National Treatment in International Investment Law	249
III. Comparing Legal Norms and Systems: a Proposed Methodology	250
IV. The Interpretative Questions and Cases	255
A. Competition as a Necessary Condition of Likeness	255
B. What Constitutes 'Less Favourable Treatment'?	262
(1) A 'most' favoured domestic investor standard?	264
(2) A group approach to 'less favourable treatment'?	267
(3) Summing up	272
C. National Treatment and Protectionist Purpose	272
V. Conclusion	277
9. Discrimination on the Basis of Nationality: Determining Likeness in Human Rights and Investment Law	279
I. Introduction	279
II. Nationality-Based Discrimination Clauses	281
A. Human Rights Treaties: General Non-Discrimination Clauses	281
(1) First category: 'nationality' as part of 'national origin'	281
(2) Second category: 'nationality' as part of 'other status'	285
(3) Third category: 'nationality' as an unclassified ground	288
(4) Fourth category: 'nationality' as an explicit ground	289
(5) Conclusion: general prohibition with scope for exceptions	290
B. Investment Treaties: Most-Favoured-Nation and National Treatment Clauses	290
C. A Brief Comparative Analysis	291
III. Likeness Tests in Human Rights and Investment Law	292
A. Likeness in Human Rights Law: Individuals in Analogous Situations	292
(1) Likeness as a treaty-concept	293
(2) Structure of the discrimination assessment exercise	293
(3) Public-private interest balancing likeness test	294
(4) Result: cross-treaty uniformity	297
B. Likeness in Investment Law: Investment and Investors in Like Circumstances	297
(1) Treaty reference to 'in like circumstances'	298
(2) Structure of the discrimination assessment exercise	299
(3) Likeness criteria and legitimate objectives	299
(4) Double shift in the burden of proof	305
(5) Result: a likeness test in its infancy	307

IV. Comparison of Likeness Tests in Human Rights and Investment Law	307
A. Structure and Scope of the Likeness Test	307
(1) Position of the likeness test in the discrimination assessment	308
(2) Link between the likeness test and the objectives of the respective fields	308
(3) Burden of proof	309
B. Likeness Criteria	309
(1) A ‘negative’ likeness test	309
(2) Adding the phrase ‘in like circumstances’	310
C. Role and Limits of the Regulatory Context	311
(1) State intent to discriminate?	311
(2) Legitimate aims in the light of subsidiarity and proportionality	313
(3) Causal link between measure and aim	314
V. Conclusion	314
 10. Umbrella Clauses as Public Law Concepts in Comparative Perspective	 317
I. Introduction	317
II. The Jurisdictional Function of Umbrella Clauses	321
A. Two Competing Approaches: Sovereign versus Commercial Conduct	321
B. The Contract Claim–Treaty Claim Distinction	323
C. The Indistinguishability of Commercial and Sovereign Conduct	325
D. Contract Claims in International Dispute Settlement	326
E. Umbrella Clauses as Autonomous Treaty Provisions	327
F. A Flood of Contract Claims?	329
G. Summary	330
III. The Substantive Effect of Umbrella Clauses	330
A. Umbrella Clauses and Applicable Law	331
B. Contingencies and Opportunistic Behaviour	332
C. Regulation and Termination of Investor-State Contracts	336
(1) The state’s power to interfere with investor-state contracts under customary international law	337
(2) The state’s power to interfere with public contracts under domestic laws	338
D. Contract Regulation, Contract Termination, and Opportunistic Behaviour	340
IV. Conclusion	342
 11. Transfer of Funds: the Interaction between the IMF Articles of Agreement and Modern Investment Treaties: a Comparative Law Perspective	 345
I. Introduction	345

II. The Evolution of Capital Transfer Liberalization and Relevance of Legal Regimes in Interpretation	348
A. Transfer of Funds under the IMF Articles of Agreement	348
B. Exchange Restrictions under GATT/GATS	351
C. Capital Transfer under the OECD Codes of Liberalisation	352
D. Capital Transfer under the Lisbon Treaty	353
III. Conflict between Capital Transfer Obligations under Investment Treaties and the Right to Impose Restrictions under the Fund Agreement	355
A. An Overview of Capital Transfers under Investment Treaties	355
B. Conflict between Investment Treaties and the Fund Agreement	359
C. <i>Lex Specialis</i> as an Aid in Resolving Norm Conflicts between Investment Treaties and the Fund Agreement	362
IV. Comparative Foreign Exchange Control Jurisprudence: 'Maintained or Imposed Consistently' with the Fund Agreement	368
V. Conclusion	374

III COMPARATIVE ADMINISTRATIVE AND COMPARATIVE CONSTITUTIONAL LAW ON SELECTED ISSUES

12. State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests	377
I. Introduction	377
II. Principles of Reparation under the International Law on State Responsibility	379
III. Brief Overview of National Systems of State Liability	382
A. France	382
B. United Kingdom	385
C. Germany	387
D. United States	391
E. Spain	394
F. Italy	395
G. Switzerland	396
H. Austria	397
IV. Principles of State Liability in the European Union	399
A. Liability of EU Institutions	399
B. Liability of States for Violations of EU Law	402
V. Liability for Human Rights Violations	405
VI. Conclusion	408

13. Legitimate Expectations and Informal Administrative Representations	413
I. Introduction	413
II. The Geographical Expansion of the Doctrine	415
III. Legitimate Expectations in International Investment Cases	418
IV. The Forerunners of the Doctrine	421
A. Estoppel	421
B. The <i>Venire</i> Doctrine	422
C. A Comparison of these Doctrines	423
V. Informal Administrative Representations	425
VI. The Reasonableness of the Expectation	426
A. The Author of the Informal Representation	426
(1) In national systems and the European Union	426
(2) In international investment cases	427
B. The Content of the Informal Representation	428
(1) In national systems and the European Union	428
(2) In international investment cases	429
C. The Lawfulness and Correctness of the Representation	429
(1) In national systems and the European Union	429
(2) In international investment cases	430
D. The Form of the Representation	431
(1) In national systems and the European Union	431
(2) In international investment cases	434
E. The Hardship Inflicted on the Recipient of the Informal Representation	436
(1) In national systems and the European Union	436
(2) In international investment cases	437
F. The Conduct of the State	437
(1) In national systems and the European Union	437
(2) In international investment cases	438
G. The Conduct of the Private Party	441
(1) In national systems and the European Union	441
(2) In international investment cases	441
H. The Unforeseeability of the Defeat of Expectations	443
(1) In national systems and the European Union	443
(2) In international investment cases	444
I. The Balance of Interests	444
(1) In national systems and the European Union	444
(2) In international investment cases	445
VII. Remedies	446
A. In National Systems and the European Union	446
B. In International Investment Cases	447
VIII. Conclusion	449

14. Revocation and Cancellation of Concessions, Operating Licences, and Other Beneficial Administrative Acts	453
I. Introduction	453
II. National and International Case Law and Administrative Practice	455
A. Revocation or Cancellation Due to a Breach by the Private Party	456
(1) Case law and administrative practice from Europe	456
(2) Case law and administrative practice from the United States	460
(3) Summary	464
B. Revocation or Cancellation Due to Change of Circumstances	464
(1) Case law and administrative practice from Europe	464
(2) Case law and administrative practice from the United States	468
(3) Summary	470
III. Analysis and Conclusion	471
15. Public-Private Partnerships: Award, Performance, and Remedies	475
I. Introduction	475
II. Comparative Context	476
A. Usage of PPPs in the Jurisdictions	476
B. PPP Practices Relevant for International Investment Law	478
III. Principles and Practices in the PPP Context Relevant to International Investment Law	479
A. Transparency and Fair and Equitable Treatment	480
(1) European Union	480
(2) United States	481
(3) England and France	481
B. Legitimate Expectations	482
(1) England	483
(2) United States	489
(3) France	491
(4) European Union	493
C. The Principle of Due Process: Remedies	494
(1) United States	494
(2) England and France	495
(3) European Union	497
D. Proportionality	497
IV. Conclusion	498
16. Economic Emergency Powers: a Comparative Law Perspective	503
I. Introduction	503
II. The Necessity Defence under (Customary) International Law and Economic Emergency Situations	505
A. Historical Appraisal: the Necessity Defence in Older State Practice	505

B. The Necessity Defence under Customary International Law: Article 25 of the ILC Articles	506
C. The Necessity Defence in the Investment Arbitration Cases against Argentina	508
(1) Facts	508
(2) The elements of the necessity defence in the cases brought against Argentina	509
(3) Conclusion	513
III. State Powers in Economic Emergency Situations under National Law: the Examples of the United Kingdom, France, Germany, and the United States	513
A. United Kingdom	515
(1) Overview	515
(2) The Civil Contingencies Act 2004	515
(3) Appreciation	517
B. France	518
(1) Overview	518
(2) Article 16 of the 1958 Constitution	519
(3) The 1955 law	521
(4) The decisions of the Conseil d'Etat on the 2005 ' <i>état d'urgence</i> '	522
(5) Appreciation	523
C. Germany	524
(1) Overview	524
(2) The 1968 Law on Securing the Economy	525
(3) The 1990 Law on Securing Food Supply (<i>Ernährungsvorsorgegesetz</i>)	525
(4) Judicial review	526
(5) Compensation	526
(6) Article 15 of the German Basic Law (GG)	528
(7) Appreciation	528
D. United States	529
(1) Overview	529
(2) The US Emergency Regime—the NEA and the IEEPA	530
(3) Limitations of constitutional guarantees in times of (economic) emergencies: the contracts clause	533
(4) Compensation	536
(5) Appreciation	537
IV. Conclusion	538
 17. Property Protection and Protection of Cultural Heritage	541
I. Introduction	541
II. The Emergence of the Conflict between Cultural Property Protection and Investment-related Property Rights in International Practice	543

III. Relevant International Treaties Concerning the Safeguarding of Cultural Heritage and Their Potential to Affect Principles of International Investment Law	549
IV. Comparative Analysis and Influence of International Law on Domestic Rules	555
V. General Principles of Law Regulating the Interaction between the Safeguarding of Cultural Heritage and Investment-related Private Rights	562
VI. Conclusion	567
 18. Taxation and Investment: Constitutional Law Limitations on Tax Legislation in Context	 569
I. Introduction	569
II. Scope of Application of Investment Treaties to Matters of Taxation	571
A. General Treatment of Tax Matters in Investment Treaties	571
B. Substantive Treatment Standards and Their Tax Relevance	573
III. Limitations of the Tax Legislator with Regard to Investor Rights—Comparative Public Law Analysis and Relevant Case Law	574
A. Selection Criteria	574
B. Differential Tax Treatment	575
C. Changes in Tax Legislation	580
(1) Retroactive and future changes from a constitutional law point of view	580
(2) The significance of planning stability for the legitimate expectations of the foreign investor	585
(3) The concept of tax stabilization clauses	586
(4) Summary	588
D. The Protection of Property against Excessive Taxation	589
(1) Challenges to the absolute amount of taxes levied in selected national jurisdictions	589
(2) Property protection against indirect expropriation through tax measures in international investment law	592
E. Restraints on Domestic Tax Legislation by EU Law	594
IV. Conclusion	596
 19. Comparative Taxation Procedure and Tax Enforcement	 599
I. Introduction	599
II. Relevant Principles of Investment Law	600
A. Fair and Equitable Treatment	600
B. Expropriation	603
C. Umbrella Clauses and Stabilization Agreements	606
III. Tax Procedure in Comparative Perspective	607

A. Substance and Procedure	608
B. Reporting Requirements and Withholding	609
C. Ability to Rely on Tax Administration Guidance	611
D. Auditing and Taxpayer Rights	613
E. Administrative Review	615
F. Judicial Review	616
G. Collection and Asset Freezes	619
H. Asset Sales	621
IV. Conclusion	624

IV DISPUTE SETTLEMENT, ARBITRAL PROCEDURE, AND REMEDIES

20. Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law	627
I. Introduction	627
II. Context	630
A. The Uniqueness of Investment Treaty Arbitration	630
B. A Caution on Domestic Analogies	632
III. The Issue of the Rule of Law	634
A. The Emphasis on Procedural Fairness	634
B. The Role of Judicial Independence	639
IV. Concerns about Independence in Investment Treaty Arbitration	643
A. The Inappropriate Influence of Appointing Authorities	643
B. The Inappropriate Influence of Private Parties	648
C. Actual versus Perceived Bias	651
D. Empirical Study of Actual Bias	653
E. Existing Protections within the System	654
V. Conclusion	656
21. Procedure in Investment Treaty Arbitration and the Relevance of Comparative Public Law	659
I. Introduction	659
II. Procedure in International Adjudication	662
A. Sources of Procedure	662
(1) Statutes and rules of procedure	662
(2) Customary international law and international judicial and arbitral practice	664
(3) General principles of law	665
(4) Inherent powers	666
B. Procedure in Investment Treaty Arbitration	669
III. Aspects of Procedure in the Review of Sovereign Action at the National Level	672

A. Judicial Review and Merits Review	672
B. Judicial Review in Comparative Public Law	673
(1) United Kingdom	673
(2) Australia	675
(3) United States	677
(4) Germany	679
(5) France	680
IV. The Application of Domestic Solutions in Investment Treaty Arbitration	681
A. Powers Related to the Gathering of Evidence	682
B. Application of an Inquisitorial Procedure	684
C. Access to the Court for Non-Disputing Parties	684
D. Availability of Different Remedies	686
V. Conclusion	688
 22. The Need for Public Law Standards of Review in Investor-State Arbitrations	 689
I. Introduction	689
II. Investment Arbitration as Public Law	691
III. The ICSID Approach, a Growing Legitimacy Gap, and the Need for New Standards of Review in Investment Arbitration	695
IV. A Comparative Analysis of Standards of Review in International Public Law Adjudication	699
A. The WTO's Least Restrictive Alternative Test	699
B. The Margin of Appreciation	701
(1) General justifications	701
(2) The margin of appreciation in the ECtHR's jurisprudence on the protection of property under Article 1 of Protocol 1	703
(3) Use of the margin of appreciation by other judicial bodies	705
C. Good Faith Review	705
V. Towards a Consistent and Theoretically Grounded International Approach to Standards of Review in Public Law Adjudication	707
A. Melding (or Confusing?) the Standards: Recent ICSID Jurisprudence	707
B. Standards of Review and the Institutional Context of Judicial Decision-Making	711
C. Paths Forward: the Margin of Appreciation and Proportionality Analysis	715
VI. Conclusion	719
 23. Primary and Secondary Remedies in International Investment Law and National State Liability: a Functional and Comparative View	 721
I. Introduction	721

II. Terminology	723
III. Primary and Secondary Remedies in Municipal State Liability Law	725
IV. Remedies in International Law and Investment Law	730
A. Remedies in Public International Law	731
B. Remedies in International Investment Law	733
(1) Remedies used in investment law	734
(2) Exhaustion of local remedies and denial of justice	735
(3) Waiting periods, 'local-courts-first' requirements, and fork-in-the-road provisions	739
V. Theoretical Framework for a Functional Comparison of Primary and Secondary Remedies	744
VI. Functional Comparison of Remedies in National Law and Investment Law	746
A. Arguments For and Against Primary Remedies in Investment Arbitration	746
B. How to Reintroduce Primary Remedies in Investment Law	749
VII. Conclusion and Outlook	752
 24. Comparative Compensation for Expropriation	 755
I. Introduction	755
II. Compensation for Expropriation in International Law	757
A. Reparation	757
B. Compensation for Expropriation in International Investment Law	759
(1) Customary international law	759
(2) Investment treaties	762
(3) Valuation methods and key drivers of value for determining the amount of compensation	763
(4) Case studies	766
C. Moral Damages for Expropriation	771
III. Compensation for Expropriation in International Human Rights Law	773
A. Applicability of Human Rights Jurisprudence in International Investment Law	773
B. European Court of Human Rights	774
C. Inter-American Court of Human Rights	776
IV. Compensation for Expropriation in Selected Domestic Legal Systems	778
A. Comparative Domestic Law as a Source of Law	778
B. Selected Domestic Legal Systems	779
(1) United States takings doctrine and compensation	779
(2) Germany	780
(3) France	782
V. Conclusion	784

25. Transparency and Representation of the Public Interest in Investment Treaty Arbitration	787
I. Introduction	787
II. Heading for a 'Pitched Battle'? The Debate about Transparency and Inclusiveness in Investment Arbitration	789
A. The Orthodox Approach	789
B. Moderate Orthodoxy: ICSID	790
C. Challenges to the Orthodox View	791
D. Meeting the Challenge	792
(1) ICSID and NAFTA	792
(2) Other frameworks	794
III. Transparency and Public Interest Representation in Selected Domestic Legal Systems	795
A. General Considerations	795
B. The United States	797
(1) Procedural transparency	798
(2) Representation of public interests	798
C. The United Kingdom	801
(1) Procedural transparency	801
(2) Representation of public interests	802
D. Germany	803
(1) Procedural transparency	804
(2) Representation of public interests	805
E. France	807
(1) Procedural transparency	807
(2) Representation of public interests	808
F. Greece	810
(1) Procedural transparency	810
(2) Representation of public interests	811
IV. The Potential Impact of a Domestic Analogy on International Investment Law	813
A. Assessing Domestic Legal Systems	813
B. Implications for International Investment Law	814
V. Concluding Observations	816
<i>Index</i>	817