## Contents

Tab	ele of Co	tses .	XVII
Tak	le of Tr	reaties, Conventions, Resolutions, and Rules	xxix
		reviations	xli
	TA T	E Intion and Contour of Intounational Investment I are	1
1.		re, Evolution, and Context of International Investment Law	1
		ternational Investment Law as a Field of Study	1
		e Business Nature of a Foreign Investment:	
	A)	Long-Term Risk	3
	3. Ho	ost State Sovereignty and the Rules of Foreign Investment	7
	4. Cu	istomary International Law: The Emergence	
	of	a Minimum Standard	11
	5. Tr	eaty Law: Evolution and Purpose	17
		irrent Trends in Treaty Practice	24
		gional Agreements: Energy Charter, NAFTA	27
	, , , , , ,	0	
II.	Interp	retation and Application of Investment Treaties	31
		erpreting Investment Treaties	31
		Methods of Treaty Interpretation	31
		Travaux Préparatoires	33
		Interpretative Statements	34
	25. 27.	The Authority of 'Precedents'	35
50		Towards a Greater Uniformity of Interpretation	37
		plication of Investment Treaties in Time	38
	_	Inter-Temporal Application of Treaties in General	38
TOI		Different Inter-Temporal Rules for Jurisdiction and Substance	39
		The Date Relevant to Determine Jurisdiction	41
		Relevant Dates under the ICSID Convention	41
		Inter-Temporal Rules in Other Treaties	43
III.	Invest	tors and Investments	46
	1. Inv	vestors: Individuals, Companies, Nationality,	
		d Shareholders	46
		Private Foreign Investors	46
		Nationality of Individuals	47
		Nationality of Corporations	49
	, ,		

	(d) Article 25(2)(b) of the ICSID Convention: Agreement to Treat a Local Company as a Foreign National because of Foreign Control	52
	(e) Nationality Planning and Denial of Benefits	54
	(f) Shareholders as Investors	56
	2. Investment	60
	(a) The Concept of an Investment	60
	(b) Definitions in Investment Protection Treaties	62
	(c) Case Law	65
IV.	Investment Contracts	72
	1. Types of Investment Contracts	72
	2. Applicable Law	73
	3. Stabilization Clauses	75
	4. Renegotiation/Adaptation	77
V.	Admission and Establishment	79
	1. The Move towards Economic Liberalism	79
	2. Treaty Models of Admission	80
	3. Performance Requirements	82
	4. Non-Compliance by Investor with Host State Law	
	and International Public Policy	84
VI.	Expropriation	89
	1. The Right to Expropriate	89
	2. The Three Branches of the Law	90
	3. The Legality of the Expropriation	90
	4. Direct and Indirect Expropriation	92
	(a) Broad Formulae: Their Substance and Evolution	92
	(b) Judicial and Arbitral Practice: Some Illustrative Cases	96
	(c) Effect or Intention?	101
	(d) Legitimate Expectations	104
	(e) The Issue of Control: Partial Expropriation?	106
	(f) General Regulatory Measures	109
	(g) Duration of a Measure  (b) Creaning Europainties	112
	(h) Creeping Expropriation  5. Expression of Contractual Diabeta	114
	5. Expropriation of Contractual Rights	115
VII.	Standards of Protection	119
	1. Fair and Equitable Treatment	119
	(a) History of the Concept	119
	(b) Heterogeneity of Treaty Language	121

	Contents	xiii
	(c) Nature and Function	122
	(d) Fair and Equitable Treatment and Customary International Law	124
	(e) The Evolution of the Fair and Equitable Treatment Standard	128
	(f) Attempts at Defining Fair and Equitable Treatment	130
	(g) Methodological Issues	133
	(h) Specific Applications of the Fair and Equitable Treatment Standard	133
	aa. Transparency, Stability, and the Protection of the Investor's	
	Legitimate Expectations	133
	bb. Compliance with Contractual Obligations	140
	cc. Procedural Propriety and Due Process	142
	dd. Good Faith	144 147
	ee. Freedom from Coercion and Harassment  (i) Conclusion	14/ 148
2		149
2.	Full Protection and Security	
	(a) Concept  (b) Protection against Physical Violence and Harasament	149 150
	(b) Protection against Physical Violence and Harassment	150
	(c) Legal Protection  (d) Relationship to Customary International Law.	151
2	(d) Relationship to Customary International Law	
	The Umbrella Clause	153
	Access to Justice, Fair Procedure, and Denial of Justice	162
5.	Emergency, Necessity, Armed Conflicts, and Force Majeure	166
	(a) Customary International Law	166
	(b) Treaty Law	167
	(c) The ILC Articles on State Responsibility	168
	aa. Necessity	168
_	bb. Force Majeure	171
	Preservation of Rights	172
7.	Arbitrary or Discriminatory Measures	173
	(a) The Meaning of Arbitrary Measures	173
	(b) Relationship to Fair and Equitable Treatment and to	
	Customary International Law	175
	(c) The Meaning of Discriminatory Measures	176

178

178

179

180

181

181

183

184

186

186

187

8. National Treatment

(b) Application

(a) Introduction

(a) General Meaning

aa. The Basis of Comparison

(c) The Relevance of WTO Case Law

9. Most-Favoured-Nation Treatment

(b) Variations of MFN Clauses

bb. The Existence of a Differentiation

cc. Is there a Justification for the Differentiation?

dd. The Relevance of Discriminatory Intent

xiv

(c) Method of Interpretation	188
(d) Invoking Substantive Rights	188
(e) Current State of the Law	190
10. Transfer of Funds	191
VIII. State Responsibility and Attribution	195
1. Organs, Provinces, and Municipalities	195
(a) State Organs	196
(b) Provinces and Municipalities	197
2. State Entities	198
(a) The Role of State Entities	198
(b) Structure, Function, and Control	200
(c) Judicial Practice on Attribution	201
(d) State Responsibility for Failure to Protect	204
3. Party Status for Constituent Subdivisions or Agencies	201
under the ICSID Convention	205
ander the roots convention	20)
IX. Political Risk Insurance	207
X. Settling Investment Disputes	211
1. State v State Disputes	211
(a) Diplomatic Protection	211
(b) Direct Disputes between States	213
2. Investor v State Disputes	214
(a) The Role of Domestic Courts	214
aa. The Limited Usefulness of Domestic Courts	214
bb. The Requirement to Resort to Domestic Courts	215
cc. The Fork in the Road	216
dd. Selection of Domestic Courts in Contracts	217
(b) Arbitration and Conciliation	220
(c) Arbitration Institutions and Regimes	222
aa. ICSID	222
bb. ICSID Additional Facility	224
cc. Non-ICSID Investment Arbitration	225
i. The International Chamber of Commerce ii. The London Court of International Arbitration	227 227
iii. UNCITRAL Rules	227
iv. The Iran–United States Claims Tribunal	228
v. The Permanent Court of Arbitration	229
(d) The Subject Matter of the Dispute (Jurisdiction Ratione Materiae)	230
aa. The Dispute	230
bb. The Legal Nature of the Dispute	230
cc. The Directness of the Dispute in Relation to the Investment	231

Contents	XV
CONTRACTOR	22 V

dd. The Investment	233	
(e) The Parties to the Dispute (Jurisdiction Ratione Personae)	233	
aa. The Host State	234	
bb. The Investor	235	
cc. The Investor's Nationality	236	
dd. The Significance of the Additional Facility	238	
(f) Consent to Arbitration	238	
aa. Consent by Direct Agreement	239	
bb. Consent through Host State Legislation	240	
cc. Consent through Bilateral Investment Treaties	242	
dd. Consent through Multilateral Treaties	243	
ee. The Scope of Consent	244	
ff. Procedural Conditions to Consent	247	
gg. The Interpretation of Consent	251	
(g) The Applicability of MFN Clauses to Dispute Settlement	253	
(h) Procedure	257	
(i) Provisional Measures	262	
(j) Applicable Law	265	
(k) Damages and Compensation	271	
(1) Costs	276	
(m) Challenge and Review of Decisions	277	
aa. Review in non-ICSID Arbitration	278	
bb. Annulment under the ICSID Convention	279	
i. Excess of Powers	281	
ii. Serious Departure from a Fundamental Rule		
of Procedure	283	
iii. Failure to State Reasons	284	
iv. Resubmission to a New Tribunal	285	
cc. Supplementation and Rectification under		
the ICSID Convention	286	
dd. Interpretation under the ICSID Convention	286	
ee. Revision under the ICSID Convention	287	
(n) Enforcement of Awards	287	
	201	
	271	
Convention on the Settlement of Investment Disputes		
between States and Nationals of Other States		
(ICSID Convention) (March 1965)	291	
Energy Charter Treaty (Parts I, III, V) (December 1994)		
North American Free Trade Agreement (NAFTA),		
Chapter XI (December 1992)	330	
Agreement between the People's Republic of China and		
the Government of [] on the Promotion and Protection	n	
of Investments (Chinese Model BIT) (2003)	352	

4

Annexes

## Contents

	5.	Accord entre le Gouvernement de la République Française et	
		le Gouvernement de [] sur l'Encouragement et la Protection	
		Réciproques des Investissements (French Model BIT) (2006)	360
	6.	Treaty between the Federal Republic of Germany and []	
		Concerning the Encouragement and Reciprocal Protection	
		of Investments (German Model BIT) (2005)	368
	7.	Draft Agreement between the Government of the	
		United Kingdom of Great Britain and Northern Ireland	
		and the Government of [] for the Promotion	
		and Protection of Investments (UK Model BIT) (2005)	376
	8.	Treaty between the Government of the United States	
		of America and the Government of [] concerning	
		the Encouragement and Reciprocal Protection	
		of Investment (US Model BIT) (2004)	385
Index			421