

Contents

<i>Preface to the third edition</i>	<i>page</i> xv
<i>Preface to the second edition</i>	xvii
<i>Preface to the first edition</i>	xviii
<i>Table of cases</i>	xix
<i>List of abbreviations</i>	xxx
1 Introduction	1
1. The definition of foreign investment	8
1.1 The distinction between portfolio investment and foreign direct investment	8
1.2 Definition of foreign investment in investment treaties	10
1.3 The evolution of the meaning of the term 'investment'	11
2. The history of the international law on foreign investment	19
2.1 The colonial period	19
2.2 The post-colonial period	21
3. An outline of the book	29
2 The shaping factors	33
1. The historical setting	36
1.1 State responsibility for injuries to aliens	36
1.1.1 The natural resources sector	38
1.1.2 The plantation sector	41
1.1.3 The manufacturing sector	42
1.1.4 The financial sector	44
1.1.5 Intellectual property	44
2. Conflicting economic theories on foreign investment	47
2.1 The classical theory on foreign investment	48
2.2 The dependency theory	53
2.3 The middle path	55
3. Actors in the field of foreign investment	60
3.1 The multinational corporation	61
3.2 State corporations	63

3.3	International institutions	65
3.4	Non-governmental organisations	67
3.5	Other actors	68
3.6	Sovereign wealth funds	68
4.	Risks in foreign investment	69
4.1	Ideological hostility	71
4.2	Nationalism	71
4.3	Ethnicity as a factor	73
4.4	Changes in industry patterns	74
4.5	Contracts made by previous regimes	75
4.6	Onerous contracts	76
4.7	Regulation of the economy	77
4.8	Human rights and environmental concerns	77
4.9	The law-and-order situation	79
5.	Sources of the international law on foreign investment	79
5.1	Treaties	79
5.2	Custom	82
5.3	General principles of law	85
5.4	Judicial decisions	87
3	Controls by the host state	88
1.	Regulation of entry	97
1.1	Guarantees against expropriation	99
1.2	Guarantees relating to dispute settlement	102
1.3	Tax and non-tax incentives to foreign investors	103
1.4	Screening of foreign investment entry	104
1.5	Requirements of local collaboration	106
1.6	Capitalisation requirements	108
1.7	Requirements relating to environmental protection	109
1.8	Requirements relating to export targets	111
1.9	Requirements relating to local equity	112
1.10	Other requirements	115
1.11	Regulation and expropriation	115
2.	New forms of foreign investment	116
2.1	The joint venture	116
2.2	The production-sharing agreement	118
3.	Constraints on control: customary international law	119
3.1	State responsibility for injuries to aliens	120
3.2	The conflict between the United States and Latin American states	124
3.3	The content of the international minimum standard	128
3.4	State responsibility and developing states	130
3.5	The 'noble synthesis'	131

3.6	Damage to property in the course of civil disturbances	134
3.7	Validity of conditions on foreign investment	136
3.7.1	Regulations on screening of foreign investments	137
3.7.2	Local equity requirements	138
3.7.3	Export requirements	141
4.	Conclusion	142
4	The liability of multinational corporations and home state measures	144
1.	Obligations of multinational corporations	145
1.1	The obligation not to interfere in domestic politics	148
1.2	Obligations relating to human rights	149
1.3	Liability for violations of environmental norms	152
1.4	The obligation to promote economic development	154
2.	Extraterritorial control by home states	155
2.1	State responsibility of home states for failure to control multinational corporations	157
2.2	The existing rules on state responsibility	157
2.3	The duty to control nationals abroad	164
2.4	State responsibility and the duty to provide remedies to victims	169
3.	Conclusion	170
5	Bilateral investment treaties	172
1.	Introductory survey	175
2.	Treaties of friendship, commerce and navigation	180
3.	Reasons for making bilateral investment treaties	183
4.	Features of bilateral investment treaties	187
4.1	The statement of the purpose of the treaty	188
4.2	Definitions	190
4.2.1	Investments	190
4.2.2	Limitation on the definition of investment	194
4.2.3	Portfolio investments	196
4.2.4	Corporate nationality and the protection of shareholders	197
4.3	Standard of treatment	201
4.3.1	National standard of treatment	201
4.3.2	Fair and equitable standard	204
4.3.3	Most-favoured-nation treatment	204
4.3.4	Full protection and security	205
4.4	Performance requirements	205
4.5	Repatriation of profits	206
4.6	Nationalisation and compensation	207
4.6.1	Compensation for destruction during wars and national emergencies	213

4.7	Protection of commitments	215
4.8	Dispute resolution	216
4.9	Arbitration and the exhaustion of local remedies	219
4.9.1	Arbitration between states	221
4.9.2	Subrogation	222
4.10	Safeguard provisions and exceptions	222
4.11	Succession of governments and bilateral investment treaties	224
5.	New concerns in bilateral investment treaties	224
5.1	Environmental concerns	225
5.2	Human rights	227
5.3	Economic development	229
5.4	International concerns	230
5.5	Regulatory space and bilateral treaties	231
5.6	Bilateral investment treaties and customary international law	232
6.	Conclusion	234
6	Multilateral instruments on foreign investment	236
1.	The international norms on multinational corporations	238
2.	The Draft Codes on Multinational Corporations	242
2.1	Description of the UNCTC Draft Code	242
2.1.1	The preamble	243
2.1.2	Definition	243
2.1.3	Respect for national sovereignty	243
2.1.4	Renegotiation of contracts	244
2.1.5	Non-interference in domestic affairs	244
2.1.6	Abstention from corrupt practices	246
2.1.7	Economic and other controls	247
2.1.8	Disclosure of information	248
2.1.9	Treatment of transnational corporations	248
3.	The outstanding issues	249
3.1	The relevance of international law	249
3.2	Non-interference in domestic affairs	250
3.3	Permanent sovereignty and international obligations	252
4.	The regional agreements	253
4.1	NAFTA	253
4.2	The ASEAN agreements	254
5.	The Multilateral Agreement on Investment	257
6.	The WTO and foreign investment	262
6.1	Investment in the Uruguay Round	263
6.2	GATS	263
6.3	TRIPS	265
6.4	TRIMS	266

7.	An investment regime under the WTO	267
7.1	The definition of investment	267
7.2	Definition and preservation of regulatory control	268
7.3	Definition of investor	269
7.4	Treatment standards	269
7.4.1	Most-favoured-nation treatment	270
7.5	Performance requirements	271
7.6	Expropriation	271
7.7	Balance-of-payment safeguards	272
7.8	Dispute resolution	272
8.	The right to regulate foreign investment	273
9.	Conclusion	275
7	Settlement of investment disputes: contract-based arbitration	276
1.	Contractual devices for foreign investment protection	279
1.1	The essential clauses	281
1.1.1	The stabilisation clause	281
1.1.2	Choice-of-law clause	284
1.1.3	Arbitration clause	286
2.	The internationalisation of state contracts	289
2.1	The origin of the theory of internationalisation	289
2.2	The ICSID Convention and international law	299
2.3	The continued relevance of contract-based arbitration	300
2.4	Lex mercatoria and state contracts	302
2.5	Umbrella clauses and internationalisation	304
2.6	Arbitration based on investment legislation	304
3.	Conclusion	305
8	Treaty-based investment arbitration: jurisdictional issues	306
1.	Jurisdiction <i>ratione materiae</i>	308
1.1	The definition of investment	308
1.2	Economic development as a characteristic of investment	313
1.3	Does portfolio investment qualify as investment?	314
1.4	Pre-contractual expenses as investment	316
1.5	The qualification of investment as subject to local laws and regulations	317
1.6	Good faith limitations	318
1.7	Investments ‘approved in writing’	319
1.8	The time factor	319
1.9	Negotiations	320
1.10	The ‘fork in the road’ and waiver	320
1.11	Most-favoured-nation clause	322
1.12	Exhaustion of local remedies	322

2.	The investor as claimant	323
2.1	Natural persons	323
2.2	Juridical person: corporate nationality	323
2.3	Locally incorporated company	324
2.4	The wholly owned company	325
2.5	The migration of companies	325
2.6	Shopping for jurisdiction	327
2.7	Round-tripping and corporate nationality	328
2.8	Denial of benefits	329
2.9	Protection of minority shareholders	329
3.	Conclusion	330
9	Causes of action: breaches of treatment standards	332
1.	The customary international law standards	334
2.	The violation of national treatment standards	335
2.1	Performance requirements and national treatment	342
2.2	National treatment and infant industries	343
2.3	Subsidies, grants and national treatment	344
2.4	Ethnicity and national treatment	344
2.5	Conclusion	344
3.	International minimum standard treatment	345
4.	Fair and equitable standard of treatment	349
4.1	Violation of legitimate expectations	354
4.2	Denial of justice	357
4.3	Due process and administrative irregularity	358
5.	Full protection and security	359
6.	Conclusion	360
10	The taking of foreign property	363
1.	What constitutes taking?	364
1.1	New forms of taking	367
1.2	The ideas of property	369
1.2.1	Forced sales of property	376
1.2.2	Forced sales of shares	377
1.3	Privatisation and forced sales	380
1.3.1	Indigenisation measures	380
1.3.2	Interference with property rights	382
1.4	Evolving US and European notions of property	383
1.5	The impact on international law	386
1.6	Survey of authorities	389
2.	The exercise of management control over the investment	400
2.1	Cancellation of permits and licences	402
2.2	Takings by agents and mobs	404
2.3	Excessive taxation	405

2.4	Expulsion of the foreign investor	405
2.5	Freezing of bank accounts	406
2.6	Exchange controls	406
3.	Illegal takings	406
3.1	The taking must be for a public purpose	407
3.2	Discriminatory taking	409
3.3	Takings in violation of treaties	410
4.	Conclusion	410
11	Compensation for nationalisation of foreign investments	412
1.	The competing norms: the views of the capital-exporting states	413
1.1	The claim that ‘prompt, adequate and effective’ compensation must be paid	414
1.1.1	Treaties	415
1.1.2	Customary practice	417
1.1.3	General principles of law	418
1.1.4	Unjust enrichment	418
1.1.5	Acquired rights	419
1.1.6	Right to property	420
1.1.7	Foreign investment codes	424
1.1.8	Decisions of courts and tribunals	425
1.1.9	International courts	425
1.1.10	Awards of arbitral tribunals	429
1.1.11	National courts	440
1.1.12	Writings of publicists	441
2.	The competing norms	443
2.1	The claim that it is permissible to deduct past excess profits from compensation	443
2.2	The claim that the taking is a ‘revindication’ for which no compensation is necessary	444
2.3	The claim that appropriate compensation should be paid	445
2.3.1	Categories of takings for which damages rather than compensation must be paid	447
2.3.2	Categories of lawful takings for which full compensation must be paid	447
2.3.3	Full compensation must be paid where there is a one-off taking of a small business	448
2.3.4	Full compensation need not be paid as part of a full-scale nationalisation of a whole industry	448
2.3.5	Partial compensation	449
3.	Valuation of nationalised property	450
4.	Conclusion	451

12	Defences to responsibility	453
1.	Treaty-based defences	455
1.1	National security	457
1.2	Economic crises and national security	458
1.3	Necessity	461
1.4	Force majeure	465
2.	Violation of the fair and equitable standard by the foreign investor	466
3.	Ius cogens, competing obligations and liability	469
3.1	Transactions with undemocratic governments	470
3.2	Investments in areas of secessionist claims	471
3.3	Cultural property and foreign investment	471
3.4	Environmental obligations	472
3.5	Human rights considerations	472
4.	Conclusion	473
	<i>Bibliography</i>	474
	<i>Index</i>	494