

# Table of Contents

## Table of Cases

xv

<b>1 Introduction</b>	1
1.1 Legitimacy and the 'Backlash' against Investment Arbitration	4
1.2 Overview of the Book	8
PART I IDENTIFYING DOMESTIC LAW ISSUES IN INVESTMENT ARBITRATION	
<b>2 Domestic Law and Fair and Equitable Treatment</b>	13
2.1 Introduction	13
2.2 Domestic Law and Direct FET Breaches	17
2.2.1 Domestic legality contributing to FET compliance	17
2.2.2 Domestic illegality contributing to FET breach	20
2.2.3 Domestic legality as a determinative factor?	21
2.3 Domestic Law and Legitimate Expectations under the FET Standard	26
2.4 Domestic Law and Arbitrariness under the FET Standard	31
2.4.1 Domestic legality as irrelevant	33
2.4.2 Domestic legality as contributory factor	34
2.4.3 Domestic legality as a proxy for (non-)arbitrary measures	36
2.5 Conclusion	39
<b>3 Domestic Law and Expropriation</b>	41
3.1 Introduction	41
3.2 Domestic Law and the 'Police Powers' Doctrine	42
3.3 Domestic Law and the International Lawfulness of Expropriation	46
3.3.1 Formulations of the 'due process' requirement in IIAs	47
3.3.2 First set—a textual link to domestic law	48
3.3.3 Second set—'due process of law'	51
3.3.4 Third set—due process as domestic judicial review	57
3.3.5 Conclusion	58
3.4 Limitations on Lawfulness: The Effect of the Compensation Requirement	58
3.5 Legality and the Public Nature of Investment Law	62
3.6 Conclusion	67
<b>4 Domestic Law and Remedies</b>	69
4.1 Uncertainty in International Law on Remedies	70

4.2	Application of Domestic Law when Determining Remedies	73
4.2.1	Local failure to act	74
4.2.2	Validity of the investment affecting compensation	78
4.2.3	Temporal extent of claimant's rights	81
4.2.4	Conclusion	82
4.3	Relevance of Domestic Law Rules on Interest Payments	82
4.3.1	Reference to municipal legal systems generally	83
4.3.2	Reference to host state law specifically	84
4.3.3	Reference to host state law on interest determinations	85
4.3.4	Conclusion	90
4.4	Compliance with Domestic Law as a Factor in Remedies Determinations	91
4.4.1	Factors allowing consideration of compliance with domestic law in remedies determinations	94
4.4.2	Domestic legality and non-monetary remedies	96
4.4.3	Conclusion	98
4.5	Conclusion	99

## PART II RESOLVING DOMESTIC LAW ISSUES IN INVESTMENT ARBITRATION

<b>5</b>	<b>Ascertaining the Contents of Domestic Law in Investment Arbitration</b>	<b>103</b>
5.1	Introduction	103
5.2	Domestic Law as Fact in International Investment Arbitration	104
5.3	Tribunals' Attitude towards Domestic Law	108
5.4	The Practicalities of Ascertaining the Contents of Domestic Law	112
5.4.1	Guidance in arbitral rules	112
5.4.2	Arbitrators' knowledge of domestic law	113
5.4.3	Guidance from international courts	114
5.4.4	Guidance from national courts	116
5.4.5	Guidance from international commercial arbitration	117
5.5	The Principle of <i>Iura Novit Curia</i> in Investment Arbitration	120
5.6	Weighting Domestic Case-law and Other Domestic Law Materials	125
5.6.1	Fear of host state manipulation of local case-law	126
5.6.2	No binding <i>res judicata</i> for local case-law	129
5.6.3	Resolving conflicts or uncertainties in domestic case-law	133
5.7	Expert Evidence on Domestic Law	134
5.8	Conclusion	137
<b>6</b>	<b>Applying the Framework—Preliminaries</b>	<b>139</b>
6.1	Introduction	139
6.2	What Counts as Domestic Law?	139
6.2.1	All host state law, or only fundamental laws?	140
6.2.2	Any laws, or only laws related to investment?	147
6.2.3	Only laws that are rule-of-law compliant?	151

*Table of Contents*

xiii

6.3	Estoppel as a Means to Avoid Consideration of Domestic Law	155
6.3.1	An alternative view: the rule of law and investment law	157
6.3.2	Limits on estoppel	160
6.4	Conclusion	161
<b>7</b>	<b>Applying the Framework—In Practice</b>	<b>163</b>
7.1	A Taxonomy of Errors	163
7.1.1	Failure to appreciate role of domestic law	163
7.1.2	Failure to investigate domestic law sources	166
7.1.3	Failure to engage with available domestic law sources	169
7.1.4	Unreasoned assertions of legality	177
7.1.5	Reliance on improper sources	181
7.2	Positive Models of Domestic Law Reasoning	182
7.2.1	Emulating domestic judges	182
7.2.2	Reliance on domestic materials	183
7.2.3	Reliance on expert witnesses	186
7.3	Conclusion	192
<b>8</b>	<b>Conclusion</b>	<b>193</b>
	<i>Bibliography</i>	199
	<i>Index</i>	209