

TABLE OF CONTENTS

INTRODUCTION	1
CHAPTER I	
FOREIGN DIRECT INVESTMENTS AND THE ROLE OF INTERNATIONAL INVESTMENT LAW	
1. Introduction	7
2. The Role of Multinational Enterprises and their Interests in FDI	9
3. The Host State's Position <i>vis à vis</i> FDI	15
4. The Host State's Strategy to Attract FDI	18
4.1. Incentives and Special Economic Zones	19
4.2. The Role of Domestic Laws in Attracting FDI	21
4.3. The Role of International Investment Agreements	23
5. Conclusion	28
CHAPTER II	
THE SOURCES OF INTERNATIONAL LAW GOVERNING EXPROPRIATION	
1. Introduction	31
2. Customary International Law and the Minimum Standard of Treatment	34
2.1. The International Minimum Standard of Treatment	34
2.1.1. Criticism to the International Minimum Standard of Treatment and the National Treatment Theory	40
2.2. Expropriation in Customary International Law	45
2.2.1. The Duty to Pay Compensation upon Expropriation	49
2.3. The Proliferation of International Investment Agreements and Domestic Laws on Investment and Customary Law Today	52
2.3.1. Treaties as Expression of State Practice	52
2.3.2. The Practice of States outside the Treaty Framework: Domestic Laws on Foreign Investment	56
3. International Investment Agreements	58
3.1. The Content of International Agreements	65
3.1.1. Protection against Expropriation	67

3.1.2. The Fair and Equitable Treatment Standard	70
3.1.3. The Full Protection and Security Standard	74
3.1.4. The Most Favoured Nation Treatment Standard and the National Treatment Standard	75
3.1.5. The Umbrella Clause	77
4. Investor-State Arbitration: the Role of Precedent and the Dialogue with the European Court of Human Rights	80
4.1. Reference to the Case Law of the European Convention on Human Rights	85
5. Conclusion	91

CHAPTER III

DEFINING INDIRECT EXPROPRIATION IN INTERNATIONAL INVESTMENT LAW

1. Introduction	93
2. Direct Expropriation, Indirect Expropriation and Regulation	94
3. Treaty Provisions on Indirect Expropriation	103
3.1. Definitions of Indirect Expropriation <i>vis à vis</i> Direct Expropriation	103
3.2. Supplementary Provisions to Identify Indirect Expropriation	105
3.3. The Distinction between Non-Compensable Regulation and Indirect Expropriation in International Treaties	111
3.3.1. “Rare Circumstances”	113
3.3.2. General Exceptions	115
3.3.3. Concluding Remarks on Non-Compensable Regulation and Indirect Expropriation in International Treaties	119
4. Case Law	119
4.1. The Case Law of the Iran- United States Claims Tribunal	119
4.1.1. Unreasonable Interferences Amounting to Expropriation	121
4.1.2. “Other Measures Affecting Property Rights”	126
4.1.3. Concluding Remarks on the Case Law of the Iran-United States Claims Tribunal	128
4.2. Investment Treaty-based Case Law	129
4.2.1. Exceptions to the Principle of Non-Compensable Regulation	129
4.2.2. Tribunals Focusing on the Effects of the Measure (or the so-called “Pure Effects” Approach)	132
4.2.3. The “Police Powers Doctrine”	143
4.2.4. The Application of Proportionality	150
5. Conclusion	161

CHAPTER IV

COMPENSATION, DAMAGES AND THE LEGAL CONSEQUENCES
OF INDIRECT EXPROPRIATION

1. Compensation for Lawful Expropriation	165
2. Reparation and Damages for Unlawful Expropriation	171
2.1. The Payment of Lost Profits	176
2.2. The FMV of the Lost Investment at the Relevant Date: the Time of the Undertaking v. the Time of the Award	178
2.3. Expenses Incurred as a Consequence of the Wrongful Conduct	180
2.4. Moral Damages	181
2.5. Punitive Damages	183
3. The Legal Consequences of Indirect Expropriation	183
3.1. Unlawful Indirect Expropriation	186
3.2. Uncompensated Indirect Expropriation	189
4. Conclusion	194

CHAPTER V

HOW TO DEFINE INDIRECT EXPROPRIATION
AND THE APPLICATION OF PROPORTIONALITY IN THE QUANTUM PHASE

1. Introduction	197
I) THE “PURE EFFECTS” APPROACH	
2. The Application of the “Pure Effects” Approach to Define Indirect Expropriation	199
2.1. The Content of the “Pure Effects” Approach	200
2.1.1. The State’s Measure shall Affect at least one of the Inves- tor’s Rights	201
2.1.2. The Measure shall have an Adverse Economic Impact upon the Investment	203
2.1.3. The Effect of the Measure upon the Investment shall be Irreversible	206
2.2. The “Pure Effects” Approach as the Decisive Criterion to Iden- tify Indirect Expropriation	209
2.2.1. The “Pure Effects” Approach Reflects Judicial Bodies’ Practice	209
2.2.2. The “Pure Effects” Approach <i>vis à vis</i> Other Criteria	212

II) THE LOWER LIMIT OF INDIRECT EXPROPRIATION	
3. The Lower Limit of Indirect Expropriation: the FET Standard	215
3.1. Some Examples on the Application of the FET Standard	215
3.1.1. Cases involving Argentina as Respondent State	217
3.1.2. Other Relevant Investment Law Cases	217
3.2. Concluding Remarks on the Application of the FET Standard as the Lower Limit of Indirect Expropriation	225
III) PROPORTIONALITY IN THE QUANTUM PHASE	
4. Evaluation of the Specific Circumstances of the Parties in Assessing the Indemnity	228
4.1. Specific Circumstances of the State	231
4.1.1. The State of Necessity	231
4.1.2. The Social and Economic Situation of the State	233
4.1.3. The State's Human Rights Obligations	237
4.2. Specific Circumstances of the Investment and of the Investor	240
4.2.1. The Characteristics of the Investment and the Capacity and Commitment of the Investor	240
4.2.2. The Contributory Fault of the Investor	242
5. How to Coordinate the Specific Circumstances of the Parties	245
5.1. Equity	246
5.2. Reasonableness	249
5.3. Proportionality	253
5.3.1. The Proportionality Test and the Interferences with the Right to Property	254
5.3.2. The Application of the Proportionality Test in the Assessment of the Indemnity	258
6. Can Proportionality Play a Role to Assess the Quantum in Investor-State Arbitration?	259
6.1. Criticism to the Application of Proportionality and Reply	262
7. Conclusion	265
CONCLUSION	267
<i>Table - Annex</i>	273
<i>Bibliography</i>	307