Contents

Fo	rewo	page	xiii		
Acknowledgements					xv
Table of cases					xvi
	ble o	-		S S	xiv
		-			xvi
	, og t				
1	Int	rod	lucti	ion	1
Pa	nrt I	т	'he (construction of fair and equitable	
				tment	7
2	Fu	nda	mei	ntals for the construction of fair and	
	eqı	lita	ble	treatment	9
	А	Сс	nve	ntional basis of fair and equitable treatment	9
		1	No	reference to fair and equitable treatment	9
		2	Hoi	tatory references to fair and equitable treatment	11
		3	Leg	ally binding references to fair and equitable	
			trea	atment	13
			(a)	Conventional variations of fair and equitable	
				treatment	14
			(b)	Fair and equitable treatment in combination with	
				other standards	15
			(C)	Fair and equitable treatment combined with a	
				reference to general international law	17
			(d)	Fair and equitable treatment combined with a	
				reference to customary international law	18
			(e)	Fair and equitable treatment contingent on	
				domestic law	20

viii contents

			(f)	Conclusion: increasing variety of treaty language	21	
	В	Institutional, economic and functional basis of fair				
		uitable treatment	22			
	1 International investment process				23	
		(a) Underlying ideologies				
		(b) The proliferation of international investment				
		agreements				
				The dynamics of investment treaty arbitration	26	
		2 The effectiveness of international investment				
		agreements			28	
	3 Functionality of investment arbitration				32	
	(a) Methodological approaches to fair and equit				22	
				treatment	32	
	C	Ea	· /	The function of arbitrators	35	
	С			d equitable treatment in light of the general		
				finterpretation	38	
		1		pitulating the general rules of interpretation	38	
		2		lying the general rules of interpretation Literal meaning of fair and equitable treatment	40 41	
				Adjacent context	41	
				Object and purpose	42 43	
		3		erdetermination of the general rules of	15	
		0		rpretation	45	
-				-		
3					40	
		minimum standard			48	
	А			nergence of a controversy	48	
		1		international minimum standard	48	
		2		equating approach	55 59	
	 3 The plain meaning approach B Discussion concerning Article 1105 of the NAFT 1 Jurisprudence up to the FTC note of interpretation 			59 61		
			prudence up to the FTC note of interpretation	62		
		1		The Metalclad and S.D. Myers approach	62	
				The Pope & Talbot final merits award	67	
		2	. ,	note of interpretation on Article 1105(1) of the	07	
		-	NAF		70	
		3		ate after the FTC note of interpretation	72	
				Legitimacy of the FTC note of interpretation	72	
			. ,	Evolutionary character of the customary		
	minimum standard				74	
	С	C External reception of the NAFTA discussion				
		1		controversy in non-NAFTA jurisprudence	77	

		CONTENTS	ix		
		(a) Occidental Exploration & Production Co. (OEPC) v.			
		Ecuador	77		
		(b) CMS Gas Transmission Co. v. Argentina	79		
		(c) Saluka Investments BV v. Czech Republic	81		
		(d) Azurix Corp. and others v. Argentina	83		
		2 The disappearance of a controversy?	85		
4	Th	e role of international law in the construction of			
	fai	r and equitable treatment	89		
	А	Fragmentation and international investment law	89		
	В	Impulses from international law for the			
		construction of fair and equitable treatment	93		
		1 General clauses as gateways	93		
		2 The gateway character of fair and equitable treatment	94		
		3 Gateway examples	97		
		(a) Case concerning Oil Platforms	97		
		(b) Mox Plant dispute	98		
		(c) European Court of Human Rights	99		
		(d) Article XX of the GATT	100		
	С	Systemic integration of international law			
		arguments	101		
		1 Relevant rules of international law	102		
		(a) Lex specialis rules	102		
		(b) The matter of limited jurisdiction	103		
		2 Applicability between the parties	107		
		3 Inter-temporality			
	D Conclusion: the integrative construction of fair				
		and equitable treatment	110		
Pa	rt I	I The concept of fair and equitable treatment	113		
5	Conceptual challenges				
	А	Conceptual problems in arbitral jurisprudence	115		
		1 Topoi in arbitral jurisprudence	116		
		2 Quality of the concept	119		
	В	Conceptual suggestions from legal scholarship	121		
		1 Fair and equitable treatment as a 'standard'	122		
		2 Fair and equitable treatment as an embodiment			
		of the rule of law	125		
6	Fai	r and equitable treatment and justice	129		
A Fair and equitable treatment as an embodiment					
	of justice				

X CONTENTS

		1 Connections between fair and equitable treatment	
		and justice	129
		2 The rise of justice in international legal relations	132
		3 Theories of international justice	135
		(a) Cosmopolitanism	135
		(b) Communitarism	137
		(c) Rawls' Law of Peoples	138
	В	Franck's theory on fairness in international law	140
		1 Legitimacy	141
		2 Equity	142
		3 Fairness discourse	144
	С	Fairness discourse on fair and equitable treatment	146
		1 Stages of a legal discourse	146
		2 Aspects of stability and change	148
		3 The imperative of balancing	151
7	Pri	inciples of fair and equitable treatment	154
,	A		154
	11	1 Sovereignty	154
		(a) Meaning of sovereignty in the context of	134
		international investment law	155
		(b) Sovereignty in arbitral jurisprudence	155
		(c) The relative weight of sovereignty	163
		2 Legitimate expectations	165
		(a) The relevance of expectations in general	165
		(b) Investors' expectations in arbitral jurisprudence	169
		(i) Stability of the overall legal framework	169
		(ii) Stability in the administrative conduct	175
		(iii) Stability in the contractual relationship	180
		(c) The relative weight of investors' expectations	186
		3 Non-discrimination	187
		(a) General meaning of non-discrimination	188
		(b) Non-discrimination in arbitral jurisprudence	189
		(c) The relative weight of non-discrimination	195
		4 Sustainable development	197
		(a) Emergence and meaning of sustainable	197
		development	197
		(b) Fair and equitable treatment and sustainable	197
		development	203
		(c) Sustainable development in arbitral	_00
		jurisprudence	206
		(d) The relative weight of sustainable development	211
	В		213
	2		_10

contents xi

		1	Fair procedure	213		
			(a) General concepts of procedural fairness	214		
			(b) Procedural fairness in arbitral jurisprudence	217		
			(i) Denial of justice	217		
			(ii) Administrative due process	225		
			(c) The relative weight of procedural fairness	227		
		2	Transparency	227		
			(a) General meaning of transparency	228		
			(b) Transparency in arbitral jurisprudence	230		
			(c) The relative weight of transparency	234		
	С	Tł	ne structure, intensity and rationality of review	235		
		1	Proportionality as structural element	236		
			(a) General meaning and function of proportionality	236		
			(b) Proportionality in arbitral jurisprudence	240		
		2	Intensity of review	246		
			(a) Variability of the intensity of review	246		
		_	(b) Intensity of review in times of economic crisis	248		
		3	Rationality deficits	250		
			(a) Structural bias in investment treaty arbitration	251		
	Б	~	(b) Rationality of balancing and legal politics	253		
	D	C	onclusion: principled fairness	256		
De		TT	The monition of fair and a maitable transfer and			
Part III The position of fair and equitable treatment						
			in the international legal system	259		
8	Fai	r a	nd equitable treatment in the system of			
			national law sources	261		
	А	Tŀ	ne categorisation of fair and equitable treatment	261		
		1	Fair and equitable treatment as a purely	-01		
			conventional norm?	262		
		2	Fair and equitable treatment as a norm of			
			customary law?	265		
		3	Fair and equitable treatment as a general principle			
			of law?	271		
	В	Th	ne principles of fair and equitable treatment			
			nd the sources of international law			
		1	The general characteristics of principles	273		
		2	The normative status of the principles of fair and			
			equitable treatment	277		
9	Fai	r a	nd equitable treatment in the system of			
)			national investment law	281		
	- 1111	<u>, , , , , , , , , , , , , , , , , , , </u>		401		

	А	Interplay with other standards of investment					
		protection					
		1	National treatment				
			(a)	Meaning of national treatment	281		
			(b)	Intersections with fair and equitable treatment	285		
		2	Most	t-favoured-nation treatment	286		
			(a)	Meaning of most-favoured-nation treatment	286		
			(b)	Intersections with fair and equitable treatment	287		
		3	Arbi	trary or discriminatory measures	288		
			(a)	Meaning of arbitrary or discriminatory measures	288		
			(b)	Intersections with fair and equitable treatment	290		
		4	Full	protection and security	291		
			(a)	Meaning of full protection and security	291		
			(b)	Intersections with fair and equitable treatment	293		
		5	Expr	opriation	295		
			(a)	Meaning of expropriation	295		
			(b)	Intersections with fair and equitable treatment	296		
		6		orella clause	299		
			(a)	Meaning of the clause	299		
			(b)	Intersections with fair and equitable treatment	302		
	В	Fai	ir and	d equitable treatment between dispensability			
		an	d ma	ster norm	303		
		1	Faira	and equitable treatment as an absolute obligation?	304		
		2	Fair a	and equitable treatment as a gap-filling			
			oblig	gation?	306		
		3	Fair a	and equitable treatment as an overriding			
			oblig	gation?	308		
	С	Со	nclu	sion: fair and equitable treatment and the			
		ide	ea of	constitutionalism	310		
10	Conclusion			317			
Bib	Bibliography 3			321			
	Index 3			353			