More Information

INDEX

Abs-Shawcross Draft Convention on Investments Abroad 5 Africa 3 amicable settlement 136-8 no absolute time-bar 138 whether requirements impose a jurisdictional hurdle 136-8 see also procedure arbitration and arbitral tribunals amicable settlement provisions, meaning of 137 arbitration without privity 6 awards, enforceability of 144 BITs providing arbitration for investors and host states 5-6 Competent Tax Authorities, and 193 - 4decisions of investment arbitral tribunals, ECT interpretation and 35-7 disputes under Article 26 of the ECT see dispute settlement under Article 26 of the ECT established by states 2 exercise of diplomatic protection during proceedings prohibited by ICSID 4 fair and equitable treatment for foreign investors 112-13 see also fair and equitable treatment ICSID see ICSID Convention ICSID Additional Facility Rules see ICSID Additional Facility Rules international arbitration provided for in dispute settlement clauses 4

investment treaties 94 arguments repeated in successive arbitrations 36-7 origins see origins and characteristics of investment treaty arbitration right to international arbitration under 6–7 language issues 32 Model BITs, jurisprudence impact on 33 orders see remedies and orders powers of a tribunal constituted pursuant to Article 26 of the ECT 161-2 stabilisation clauses, interpretation of 4 Stockholm Chamber of Commerce see Stockholm Chamber of Commerce (SCC) taxation, and conclusions of Competent Tax Authority, and 193-4 staying proceedings 194 UNCITRAL Arbitration Rules see UNCITRAL Arbitration Rules Arbitration Institute of the Stockholm Chamber of Commerce see Stockholm Chamber of Commerce (SCC) Arbitration Rules of the United Nations Commission on International trade Law see **UNCITRAL Arbitration Rules** Articles on Responsibility of States for Internationally Wrongful Acts 37, 52, 126, 163

234

More Information

INDEX

235

Commentary distinguishing between primary and secondary rules 164-5 excess of jurisdiction 167-8 rules on state responsibility as secondary rules 164-5 state and privileged enterprises 168 attribution of exercise of governmental authority 168, 169-70 Commentary on rule of attribution 170 state responsibility for acts of bodies other than the executive 164-5, 166, 169-70 Asia 3, 8, 12-13, 26 assertion of claims and enforcement of rights 130-2, 147-8 challenges to enforcement 159-61 denial of justice 141 enforcement of awards 153-5 challenges to awards 155-9 Australia 9, 11-12 ECT signed but not ratified 21-2, 68,74 umbrella clause 122-3 awards challenges to 155-9 enforcement of awards see assertion of claims and enforcement of rights Azerbaijan 144 trans-Caspian Aktau-Baku transport system 25 Bamberger, C. 13 Belarus not party to ECT but provisionally bound 7, 22, 68 bilateral investment treaties (BITs) 5-7, 15, 85 arbitration provided for investors and host states 5-6 customary international law, and 5 diplomatic protection pitfalls avoided by 6 discrimination prohibited 5 see also discrimination and non-discriminatory measures

EU members, and 89-90 exhaustion of remedies 138-9 expropriation without full compensation prohibited 5 FCNs, derived from 5 interpretation 30-1, 36-7 liberalisation of global economy, and 6 Model BITs 15, 33, 55, 85, 110, 161 providing arbitration for investors and host states 5-6 usual provisions 5, 87-8 whether substantive rights conferred on covered investors 6-7 Brownlie, I. 182 burden of proof 83, 97-8 'Calvo clauses' 150 Canada ECT and European Energy Charter 9,21-2neither signatory nor party to ECT 122-3 Model BIT 110 NAFTA 6,110 umbrella clause 122-3 choice of international arbitration forum 152-61 available forums 152-3 challenges to awards 155-9 challenges to enforcement 159-61 choice among available arbitral forums 153-61 enforcement of awards 153-5 choice of law clauses 4 claims commissions established by states 2 US-Mexico 2 Cold War 9 colonialism 3 compensation BITs prohibiting expropriation without full compensation 5 expropriation of foreign-owned property 2-3 see also expropriation of foreign-owned property

More Information

236

Competent Tax Authorities 190-4 arbitral tribunals, and 193-4 definition of 'Competent Tax Authority' 192 failure of Competent Tax Authority to report within six months 194 failure to refer to 192 procedure for referral to 192-3 requirement to refer to 191-4 status of conclusions 193-4 expertise and utility of procedure 193 - 4whether tax is an expropriation 193 whether tax is discriminatory 193 see also taxation Contracting Parties' international responsibility for Part III ECT breaches 163-85 international organisations' responsibility see international organisations under the ECT, responsibility of state responsibility see state responsibility under the ECT see also Articles on Responsibility of States for Internationally Wrongful Acts Court of First Instance see General Court Declarations see Understandings and Declarations denial of advantages under Article 17 of the ECT see dispute settlement under Article 26 of the ECT denial of justice 141 Denmark Declaration in respect of ECT 20developing states 59 BITs attractive to 6 diplomatic protection and foreign investors 1-2, 6-7, 118 abuse of diplomatic protection 2

'Calvo clauses' 150

INDEX

diplomatic protection during arbitration prohibited by ICSID diplomatic protection pitfalls avoided by BITs 6 discrimination and non-discriminatory measures assertion of claims and enforcement of rights, and 147-8 BITs prohibiting 5 ECT provisions relating to foreign investors 10-11, 116-17 invalid grounds of discrimination not enumerated 117 investment 15-16 payments for losses caused by wars etc. 134 taxation measures 189, 190 transit 16 unreasonable measures, avoiding 116-17 validity of measures as question of reasonableness 117 European Energy Charter 10-11 OECD Model Tax Convention on Income and on Capital provisions 192-3 pre-investment stage 11-12, 16, 23 - 4dispute settlement under Article 26 of the ECT 18-19, 39-88 amicable settlement see amicable settlement burden of proof 83, 97-8 conditions for establishing jurisdiction 41, 45-66 claimant must be an investor of a contracting party 64-5 date of events concerning claim must give tribunal jurisdiction 66 dispute concerns alleged breaches of Part III by a Contracting Party 45-6 dispute must relate to an investment 46-63 investment must be in the area of the Contracting Party 64

> denial of advantages under Article 17 of the ECT 77-87 burden of proof 83 how the advantages of Part III are denied 83-7 jurisdiction or admissibility 80 - 3'substantial business activities', meaning of 78 'third state', meaning of 79-80 determined by international law 27, 50-1dispute must relate to an investment 46-63 nature of alleged investment must amount to an 'investment' 48 - 63subject matter of investment within the energy sector 46 - 8EU law, and see European Union law and the ECT investor, meaning of 65, 78-9 jurisdiction 41-66 admissibility, and 39-40, 80-3, 87-8 conditions for establishing 41, 45-66 disputed allegations of fact in preliminary hearings 42-4 procedures for resolving issues of jurisdiction 42-4 misconduct on the part of investors 87 - 8nationality of investors 38, 65 nature of alleged investment must amount to an 'investment' 48 - 63assets included in definition of 'investment' 52, 54-5 broad application of 'investment' 57,60-3 claimant's rights as matter of the law of host state 49-52 contribution to development of host state 58-63 Fedax criteria and Salini test 57

'investment', meaning of 54–63

INDEX

237

'investment', ordinary meaning of 56 - 7'owned or controlled directly or indirectly', meaning of 53-4 whether any right of a foreign claimant amounts to an 'investment' 55-6 powers of a tribunal constituted pursuant to Article 26 of the ECT 161-2 procedure see procedure provisional application 67-77 cases concerning provisional application 69-77 concept not new 68-9 entry into force 70-2 not inconsistent with constitution, laws or regulations of signatory 72-4: meaning of inconsistency 72-3; qualification only applicable where in principle inconsistent 74-7 provisions on provisional application 67-8 regime of provisional application 69-72 regional and local government or authorities, breach by 166 whether investors can contract out of proceeding under Article 26(3) 150-1 Dolzer, R. 112 Douglas, Z. 50, 64 Eilmansberger, Thomas 172–3 Energy Charter Conference 11, 14, 15, 22-6, 91 disputes on environmental obligations 18 **Economic Integration Agreements** (EIAs) 99–100 observers 22-3 process review 26 role and decision-making 23 subsidiary bodies 23-5 Transit Protocol, draft 17, 24 Energy Charter Declaration see European Energy Charter

More Information

238

Energy Charter Secretariat 11, 22, 26, 32, 100, 148 Energy Charter Treaty (ECT) aims and purposes 8, 78 breach see Contracting Parties' international responsibility for Part III ECT breaches EU law, and see European Union law and the ECT institutional aspects of the ECT and the Energy Charter process 22 - 6international institutions, responsibility of see international organisations under the ECT, responsibility of interpretation see interpretation of the ECT main provisions and related instruments 13-22 environment see environmental protection and energy efficiency investment see investments in the energy sector, promotion and protection of settlement of disputes see settlement of disputes under the ECT substantive obligations of parties see substantive law trade see trade in energy materials and products transit see transit of energy products and material Understandings and Declarations see Understanding and Declarations New York Convention, and 154 non-discrimination see discrimination and non-discriminatory measures origins and negotiating history 6, 7 - 13origins in Europe see European Energy Charter scope 8

INDEX

signatories 7, 8, 11, 12-13, 22 state responsibility 164-5 regional and local government and authorities 165-8 taxation, and see taxation whether substantive rights conferred on covered investors 6-7 enforcement of rights see assertion of claims and enforcement of right England see United Kingdom (UK) environmental protection and energy efficiency 17-18, 24 dispute settlement see settlement of disputes under the ECT Protocol on Energy Efficiency and **Related Environmental Aspects** (PEEREA) 10, 17-18, 24 Europe Central 8-9, 11 disputes over applicable substantive law 2,3 Eastern 8-9, 11 and ECT 8, 12-13 European Atomic Energy Community 7 European Commission 9 conduct attributable to the EU, and 179 EU law and the ECT 90–1, 92, 93-4, 95-7 participating in proceedings as of right 185 European Convention on Human Rights 147-8, 181, 183-4 European Court of Human Rights 95, 181, 183-4 European Court of Justice (ECJ) 96-7, 101-2, 103 conduct attributable to the EU, and 179 EU consent to arbitration, and 100-1, 149, 173-85 European Energy Charter 8 adoption 9 aims and purposes 9-10, 29 negotiations 10

More Information

INDEX

239

non-discrimination provisions 10 - 11origins 8-9, 10 European Parliament 179 European Union (EU)/European Community (EC) consent to arbitration, terms of 100-1, 149, 173-85 Declarations in respect of ECT 21-2, 91European Energy Community 8-9 EU law, ECT and see European Union law and the ECT origins of ECT 8-9, 31 party to ECT 7, 12-13, 89, 117, 171 - 2attribution of conduct to 163 protection of investments, EU Regulations and Directives and 118 REIO, as 92-3, 101, 171-2, 174 Transit Protocol 17 see also international organisations under the ECT, responsibility of European Union law and the ECT 89-103 dispute settlement under Article 26 and the EU 100-3 EC statement pursuant to Article 26 100-1, 149, 173-85 ECT as a mixed agreement 89–90 investment disputes between member states and investors of non-member states 98–100 EIAs 98-100 investment disputes within the EU and Article 26 91-8 admissibility 93-4 jurisdiction 92-3 merits 95-8 relevance of EU law to investor-state disputes under Article 26 89, 90–1 exclusive jurisdiction clauses 139-41, 150 see also waiver of rights

exhaustion of remedies see remedies and orders expropriation of foreign-owned property 2-3 BITs prohibiting expropriation without full compensation 5 ECT investment provisions prohibiting 15-16 protection of investments, and 134 - 5taxation, and 190-4 arbitral tribunals, conclusions whether tax is an expropriation and 193 arbitral tribunals, conclusions whether tax is discriminatory and 193 arbitral tribunals, staying proceedings and 194 definition of ' Competent Tax Authority' 192 determining whether tax discriminatory 192-3 failure of Competent Tax Authority to report within six months 194 failure to refer to Competent Tax Authority 192 procedure for referral to Competent Tax Authority 192-3 requirement to refer to Competent Tax Authority 191 - 4status of conclusions of Competent Tax Authority 193 - 4taxation of investment able to be an expropriation 191 utility of procedure 193-4 see also taxation fair and equitable treatment 108–15 areas where standard may operate 112 BITs guaranteeing 5 correct approach to Article 10(1) of the ECT 111-12

More Information

240

INDEX

fair and equitable treatment (cont.) ECT investment provisions requiring 15-16 effective means for assertion of claims and enforcement of rights, and 130-1 most successfully invoked standard in international investment disputes 108 objective standard 108 process of decision-making, and 112-13 what constitutes 'fair and equitable' treatment 112-15 context and object and purpose of ECT 113-15 whether the same as obligation to apply 'international minimum standards' 108-11 France 10 friendship, commerce and navigation treaties (FCNs) 5 GATT 5, 14-15, 119, 132-4 General Court 102, 179 Germany 5 global economy liberalisation 6 Hart, H. L. A. 50 van Harten, G. 113 Havana Charter for an International Trade Organization (1948) 5, 108 'Hull formula' 2–3 human rights 7, 76–7, 95 complaints under treaties, protection of investments and 119-20 Hungary 122-3 Iceland 11–12 ECT signed but not ratified 22, 68, 74 ICSID Additional Facility Rules 19, 27, 145, 154-5 consent 145 disputes under ECT provisions 145 enforcement of awards 154

EU, and 101-2, 185 awards contrary to EU law 103 powers of a tribunal constituted pursuant to Article 26 of the ECT 161-2 requirements for arbitration under 153 ICSID Convention 154-5 annulment 158-9, 160-1 BITs providing ICSID arbitration for investors and host states 5-6 cases by consent and, under treaty dispute settlement provisions 4 - 5challenges to awards 157-9 annulment grounds 158-9 Committee, approach of 158 remedies 159 tribunal 'manifestly exceeding powers' 158-9 challenges to enforcement 161 consent 145 decisions of predecessor tribunals persuasive not binding 36-7 diplomatic protection during arbitration prohibited 4 disputes under ECT provisions 19, 27, 145 challenges to awards 157-9 enforcement of awards 153-4 Fedax criteria 57 jurisdiction decisions reviewable under annulment procedure 40 meaning of 'investment' 49, 57 powers of a tribunal constituted pursuant to Article 26 of the ECT 161-2 power to dismiss claims without legal merit 44 procedure for resolving issues of jurisdiction 42, 44 requirement of being parties to ICSID Convention 152 Salini test 57 EU, and 101-2, 103, 185 history and purpose 4–5 ICSID established 4

> not applying to arbitration under Additional Facility Rules 153 requirements for ICSID arbitration Contracting Parties must be parties to ICSID Convention 152 'legal dispute arising directly out of an investment' 152-3 international arbitration see arbitration and arbitral tribunals International Centre for Settlement of Investment Disputes see ICSID Convention International Court of Justice 35, 42 - 4unreasonable measures 117 international law application in choice of law clauses 4 conferral of legal personality on private persons 7 customary international law Articles on State Responsibility 126 - 7see also Articles on Responsibility of States for Internationally Wrongful Acts attribution 126-7, 163, 164, 169 - 70see also Contracting Parties'

investment, meaning of 152-3

international responsibility for Part III ECT: breaches; state responsibility under the ECT international minimum standards 108–11, 114

nationality 65 standards of treatment required by BITs 5, 108–11

treaty interpretation 28

- determining disputes under Article 26 of the ECT 93–4
- denial of advantages under Article 17 27, 50–1
- developing states, and 6
- disputes as to requirements 2–3 expropriation of foreign-owned property 2–3

INDEX

241

excess of jurisdiction 167-8 international minimum standards 1, 2, 108-11, 114 judicial decisions as subsidiary source 35 nationality 65, 93 protection of investments 118 state and privileged enterprises 168 traditional approach to individual foreign investors 1-3 treaty interpretation 28, 33-5 see also interpretation of the ECT waiver of rights 150 International Law Commission (ILC) 37, 68-9, 126, 163 draft Articles on Responsibility of International Organizations 178-85 states, and see Articles on Responsibility of States for Internationally Wrongful Acts international minimum standards 'Calvo clauses', and 150 classic formulation 108-9 customary international law, part of 108-11, 114 fair and equitable treatment, whether part of 108-11 historical treatment of foreign investors 1, 2 most constant protection and security, whether part of 115-16 whether there is a generally agreed minimum standard 110–11, 114 international organisations under the ECT, responsibility of 171-85 draft ILC Articles on Responsibility of International Organizations 178-85 agency and effective control arguments and the ECT 182-3, 184-5 agent of EU, member state as 180, 182-3, 184-5 attribution of conduct 179

More Information

242

INDEX

principle of systemic integration

provisional application of treaties

states unable to plead national law as defence 37, 72, 96

travaux préparatoires 29, 32, 33

meaning of 49, 54-7, 63, 152-3

ECT, in 37–8, 48–63 ordinary meaning 56–7

promotion see promotion of

protection see protection of

see also bilateral investment

transfers related to investments,

taxation and 194

investments in the energy sector,

dispute settlement see under

treaties (BITs); Energy Charter

promotion and protection of

settlement of disputes under

nature and meaning of 'investment'

non-discrimination provisions see

non-discriminatory measures

in ECT 37-8, 48-63

discrimination and

investments

investments

Treaty (ECT)

see also taxation

15-16, 23-4

the ECT

investment treaties 6

28, 33-4, 96

68

investments

international organisations (cont.) authorisations, decisions and recommendations, acting on 183 concurrent liability of EU and member state 184-5 effective control, coming under 180-1, 182-3, 184-5 examples of conduct attributable to EU 179 transferring competences, obligations not avoided by 183 - 4EU as a REIO 92-3, 101, 171-2, 174 see also Regional Economic Integration Organizations (REIOs) suggested typology of acts where competence transferred 172-3 whether EU or member state responsible 173-85 claimant's options 185 draft ILC Articles on Responsibility of International Organizations 178-85 EU statement addressing issue of responsibility 174-5 international legal personality, and 177 - 8whether REIO but not member state responsible 176-7 interpretation of the ECT 27-37 decisions of other investment arbitration tribunals 35-7 language and authentic texts 32 other treaties and general international law 33-5 ECT's relationship with other treaties 34-5 Vienna Convention on the Law of Treaties 28-32 Article 31 and general rule of interpretation 28-31, 33-4, 95-6, 98, 129 Article 32 and supplementary means of interpretation 28,

ent aims 1 35–7 arbitration *see* arbitration and ts 32 arbitral tribunals international law, and 5, 108–11 -5 whether investors can waive rights other under investment protection treaties 150 Law of whether substantive rights conferred on covered investors 6–7

- on covered investors 6–7 investors diplomatic protection *see* diplomatic protection and foreign investors
 - disputes *see* dispute settlement under Article 26 of the ECT

29, 31-2

More Information

INDEX

243

historical treatment 1, 2 legal techniques of foreign investors 3-4 meaning of 'investor' 65. 78 - 9misconduct on the part of 87-8 nationality of 38, 65, 93 discrimination, and 117 ICSID Convention, and 152 waiver of rights under investment protection treaties 150 Italy 148-9 Jacobs, Advocate General 175 Japan 9 Kazakhstan Declaration on trade in nuclear materials 21-2, 91 trans-Caspian Aktau-Baku transport system 25 key personnel 134 Kyrgyzstan Declaration on trade in nuclear materials 21-2, 91 Latin America 3, 26 'Calvo clauses' 150 Lisbon Treaty 89, 90–1, 177 Lubbers, Ruud 8 McLachlan, C. 112-13, 115 Maduro, Advocate General 97-8 Mernier, André 26 Mexico NAFTA 6,110 US-Mexico Claims Commission 2 Middle East 9, 26 Milanoviç, M. 182–3 most constant protection and security 115 - 16legal protection for investor 116 whether limited to physical security of an investor's assets 116 whether the same as obligation to apply 'international minimum standards' 115-16

most-favoured nation (MFN) treatment BITs guaranteeing 5 circumventing restrictions on bringing claims by MFN clauses 128 ECT, and 10-11, 105-6, 119-20, 127-30 bound to be accorded to nationals of other Contracting Parties 15 - 16circumventing restrictions on bringing claims by MFN clauses 128-30 EU law 98-100 intellectual property rights 130 pre-investment stage 11-12, 16 taxation, and 188-90 Multilateral Agreement on Investments (MAI), draft 85, 86 NAFTA 6, 54–5, 85, 86 Free Trade Commission 109 minimum standard of treatment 109-11 national law definition and meaning of 'investment' 37-8, 49-52 investments made contrary to 87-8 nationality 93 only jurisdiction decisions of tribunals reviewable 40 provisional application of ECT, and 72 - 4role of 37-8 cannot be pleaded as a defence 37, 72, 96 taxation provisions 187 national treatment BITs guaranteeing 5 ECT, and 10-11, 105-6, 127-30 bound to be accorded to nationals of other Contracting Parties 15 - 16EU law 100 intellectual property rights 130 pre-investment stage 11-12, 16 taxation, and 188-90

More Information

244

national treatment (cont.) historical treatment of foreign investors 1, 2 nationality, and 117 nationality of investors see investors Nazarov, A. 12 Netherlands 8 'New International Economic Order' 3 New York Convention on the **Recognition and Enforcement** of Foreign Arbitral Awards 154 - 5challenges to enforcement 159-61 commercial transactions 19 enforcement of awards 154 limiting obligations applying Convention only to commercial disputes 154 'reciprocity reservations' 154 public policy 103 New Zealand 9 North American Free Trade Agreement (1994) see NAFTA Norway 10, 11-12, 21-2, 31 ECT signed but not ratified 22, 68, 74umbrella clause 122-3 OECD Draft Convention on the Protection of Foreign Property (1967) 5, 109 ECT, and 11-12 Model Tax Convention on Income and on Capital income and capital definition 189 non-discrimination principles

192–3 penalties and interest for late payment of taxes constituting taxes 188

Multilateral Investment Agreement, efforts to agree 6

non-European members and European Energy Community 9

INDEX

origins and characteristics of investment treaty arbitration 1 - 7Declaration on the Establishment of a New International Economic Order and Charter of Economic Rights and Duties of States 3 diplomatic protection see diplomatic protection and foreign investors disputes as to requirements of international law 2-3 settlement of investor-state disputes bilateral investment treaties see bilateral investment treaties (BITs) ICSID Convention see ICSID Convention legal techniques of foreign investors 3-4 traditional approach in international law 1-3 Pakistan 5 Papiç, T. 182-3 Paulsson, J. 39 payments for losses caused by wars, national emergencies etc. 134 PEEREA 10, 17-18, 24 Permanent Court of International Justice 1 procedure 136-62 acts of local courts as violations of Part III ECT /denial of justice 141 amicable settlement 136-8 no absolute time-bar 138 whether requirements impose a jurisdictional hurdle 136 - 8claimant's choice between options under Article 26(2) 142–5, 151 international arbitration under the ECT 144-5 previously agreed dispute resolution procedure 144

More Information

qualifications to general rule 142 resolution in host state's courts 142 - 4exceptions to host states' consent 146-51 Article 26(3)(b): 'fork-in-the-road' clause 146 - 9Article 26(3)(c): substantive limitation on umbrella clause 149 - 50statement of state's policies and practices 148-9 whether investors can contract out of proceeding under Article 26(3) 150-1: see also waiver of rights whether substance of factual complaint and of right is the same 148 exclusive jurisdiction clauses 139-41 see also exclusive jurisdiction clauses factors determining claimant's choice of international arbitration forum 152-61 see also choice of international arbitration forum no requirement of exhaustion of remedies 138-41 exceptions to right to move directly to proceedings 139 - 41powers of a tribunal constituted pursuant to Article 26 of the ECT 161-2 promotion of investments 105-7 national and most-favoured nation treatment 105-6 positive commitment 114 provision as soft law 104-5, 107 protection of investments 107–35 effective means for assertion of claims and enforcement of rights 130-2 see also assertion of claims and enforcement of rights

INDEX

245

international law, including treaty obligations 118-20 breach of customary law 118 breach of obligations in other treaties 118 breach of treaty obligations not creating an investor's cause of action 119 national and most-favoured nation treatment 127-30 see also most-favoured nation (MFN) treatment; national treatment obligations on contracting parties under Article 10(1) of the ECT 107 - 27fair treatment see fair and equitable treatment for foreign investors under arbitration and arbitral tribunals international law, including treaty obligations 118-20 most constant protection see most constant protection and security observance of obligations - the umbrella clause see umbrella clause unreasonable or discriminatory measures 116-17 see also discrimination and non-discriminatory measures obligations on Contracting Parties under Article 10(7) of the ECT 127 - 30obligations on Contracting Parties under Article 10(12) of the ECT 130-2 other obligations 132-5 expropriation 134-5 key personnel 134 non-discrimination in payments for losses caused by wars etc. 134 trade-related investment measures 132 - 4transfer of funds 135 provisions as hard law 105

More Information

246

protection of investments (cont.)

INDEX

substantive obligations of parties to ECT see substantive law Putin, President Vladimir 12 Rakhmanin, Vladimir 26 regional and local government or authorities 165-8 awards for breaches limited to damages 166-7 Regional Economic Integration Organizations (REIOs) ECT, under 171-2 EU as 92-3, 101, 171-2, 174 meaning 171-2, 177 no ECT obligation to specify matters where competence transferred 172 joint liability in absence of express allocation of responsibility 175 suggested typology of acts 172 - 3taxation, and 188, 189 remedies and orders arbitral tribunals, powers of 166-7 challenges to awards 159 exhaustion of remedies 138-9 no requirement for 138-41 taxation, and 193-4 regional and local government or authorities, awards for breaches by 166-7 substantive law 161-2 Rubins, N. 12 Russia Declaration on trade in nuclear materials 21-2, 91 ECT 7, 10-11, 12, 31 Declarations 20, 21-2, 91 not party to ECT but provisionally bound 7, 12, 22, 68, 74-7 transit 16, 17 Russian Revolution 3

Schreuer, C. 58, 112, 147 settlement of disputes under the ECT 18–19

applicable law 27 ECT's relationship with other treaties 34-5 diplomatic means of settlement and ad hoc arbitration 18 environmental protection and energy efficiency 18 investment provisions see dispute settlement under Article 26 of the ECT trade 18 transit 18 disruption of supplies during disputes prohibited 16 see also origins and characteristics of investment treaty arbitration; states Shore, L. 112-13, 115 sovereignty see under states Soviet Union and former Soviet Union 3 breakup of Soviet Union 8 ECT and European Energy Community 8-9, 10, 11 Declarations 21-2, 91 Spain 148 stabilisation clauses 4 state responsibility under the ECT 163 - 71ILC Articles see Articles on Responsibility of States for Internationally Wrongful Acts observance by sub-national authorities 165-8 primary rules of obligation unenforceable under Article 26 of the ECT 171 regional and local government or authorities 165-8 awards for breaches limited to damages 166-7 excess of jurisdiction 167 - 8failure reasonably to prevent non-observance by 167 state and privileged enterprises 168 - 71

More Information

INDEX

obligation to ensure extending to sale or provision of goods and services 170-1 whether obligation contractual or arising under a treaty 164 states arbitral tribunals and claims commissions, establishing 2 'Calvo clauses' not binding 150 capital-exporting 2-3, 110 capital-importing 2-3, 110 Charter of Economic Rights and Duties 3 contribution of investments to development of host state 58 - 63developing see developing states fiscal prerogatives 186 foreign investors and dispute settlement bilateral investment treaties 5-6 Charter of Economic Rights and Duties 3 diplomatic protection see diplomatic protection and foreign investors ECT, and see dispute settlement under Article 26 of the ECT gunboat diplomacy 2 ICSID Convention see ICSID Convention international minimum standards see international minimum standards legal techniques to protect foreign investors 3-4 national treatment see national treatment national law see national law protection of investments, and see protection of investments responsibility 163 ECT, under see state responsibility under the ECT see also Articles on Responsibility of States for Internationally Wrongful Acts sovereignty 29, 30, 64

247

limiting 96-7 substantive obligations as party to ECT see substantive law umbrella clause and actions by state in its sovereign capacity 124 - 5waiver of rights 150, 151 Stockholm Chamber of Commerce (SCC) 19, 27, 102, 145, 154-5, 185 arbitration available in respect of any claim 152 awards contrary to EU law 103 challenges to awards 153, 155-6 enforcement of awards 154 powers of a tribunal constituted pursuant to Article 26 of the ECT 161-2 'substantial business activities', meaning of 78 substantive law 104-35 promotion of investments see promotion of investments protection of investments see protection of investments remedies 161-2 scope of Part III ECT: investment promotion and protection 104 - 5Sweden Arbitration Act (1999) 155 Tajikistan Declaration on trade in nuclear materials 21-2, 91 taxation 186-94 'carve outs' for taxation, reasons for 186 customs duties excluded 187 double taxation agreements 189-90 'Competent Tax Authorities', and 192 ECT taxation provisions defining extent of Part III obligations 186 - 7most-favoured nation and national treatment, and 188-90

248

INDEX

taxation (cont.) prohibition of expropriation, and 190 - 4see also expropriation of foreign-owned property taxation measures discriminatory 189 double taxation agreements 189-90 effective collection of taxes, for 189, 190 income and capital measures excluded 189 indirect taxation provisions 189 meaning of 187-8 reference back to national law and other relevant treaties 187 transfers related to investments 194 trade in energy materials and products 11, 14-15, 24 amendment applying WTO agreement 15, 132 dispute settlement see settlement of disputes under the ECT GATT, and 14-15 trade-related investment measures (TRIMS), and 14-15, 132-4 transfer of funds 135 transit of energy products and material 16-17, 24, 25 dispute settlement see settlement of disputes under the ECT meaning of transit 16 Transit Protocol, draft 17, 24 travaux préparatoires 29, 32, 33 treaty obligations duty of good faith 175 protection of investments 118, 119 Treaty on European Union (TEU) 94, 96 Treaty on the Functioning of the European Union (TFEU) 94, 96, 173, 176 Ukraine 16 Declaration on trade in nuclear

umbrella clause 120-7 actions by state in its sovereign capacity and commercial claims 124 - 5breach of contract claims heard in forum provided for 122 parties remaining free to chose forum 123-4 breach of contract often not a breach of treaty 121-2 consent to arbitration 149-50 criteria for assessing breach 125 facts amounting to a breach of treaty not necessarily a breach of contract 120-1 jurisdiction-conferring provision 123 legal effect 123 meaning 122-3 obligations, nature of 126 scope 124-5 UNCITRAL Arbitration Rules 19, 27, 42, 102, 145, 154-5, 185 arbitration available in respect of any claim 152 awards contrary to EU law 103 challenges to awards 153, 156-7 challenges to enforcement 160 consent 145 enforcement of awards 154 powers of a tribunal constituted pursuant to Article 26 of the ECT 161-2 UNCITRAL Model Law 156-7, 160 UNCTAD 5 Understandings and Declarations 19-22, 29-30 Declaration on trade in nuclear materials 21-2, 91 Denmark 20 Economic Activity in the Energy Sector 64 ECT and domestic law, and 143 Energy Charter Declaration see European Energy Charter EU, and 21-2, 91

materials 21-2, 91

More Information

INDEX

249

'owned or controlled directly or indirectly' provision 53-4, 57 Russia 20, 21–2, 91 Soviet Union 21-2, 91 treaty obligations 118 UN 3 United Kingdom (UK) 144 challenges to enforcement 160 - 1Human Rights Act (1998) 76–7 Model BIT 15 United Nations (UN) arguments for new international economic order 3 Declaration on the Establishment of a New International Economic Order and Charter of Economic Rights and Duties of States 3 General Assembly 3 United States of America (US) disputes over applicable substantive law 2,3 ECT 10-11 European Energy Community and Charter 9, 31 non-participation 10-11, 12, 21 - 2Model BITs 55, 85, 110, 161 NAFTA 6,110 US-Mexico Claims Commission 2

USSR *see* Soviet Union and former Soviet Union Uzbekistan Declaration on trade in nuclear materials 21–2, 91

- Vienna Convention on the Law of Treaties (1969) (VCLT) *see* interpretation of ECT
- waiver of rights 150–1 exclusive jurisdiction clauses *see* exclusive jurisdiction clauses whether contracting out possible
 - under ECT 151 whether contracting out possible under international investment protection law 150
- Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States
 - (1965) see ICSID Convention
- Weiniger, M. 112–13, 115
- World Bank 4
- World Trade Organization (WTO) 11, 14–15, 132–4
- dispute settlement 18, 119, 132 see also GATT
- World Wars I and II 3
- Yeltsin, President Boris 10, 12