# Table of Contents

List of Figures and Table page viii  
Foreword ix  
Acknowledgements xi  
Table of Cases xiii  
List of Selected Abbreviations xxi  

Introduction 1  

1 The Legal Landscape 6  
Host State National Courts 7  
Home State National Courts 8  
International Arbitration 10  

2 The Four Models 19  
The Direct Claims Model 19  
Direct Claims (I) Model 19  
Direct Claims (II) Model 23  
Direct Claims (III) Model 24  
A Role for the Host State 25  
The Long Shadow of Diplomatic Protection 25  
The Boundaries of State Behaviour 30  
Attribution versus Jurisdiction 32  
The ICSID Convention 34  
Arbitration Rules 38  

The Espousal Model 42  
The Host State as Espouser 42  
Two ICSID Cases 50  
Conclusion 54  

v
# Table of Contents

1. The Qui Tam Model 55
2. The Hybrid Model 66
3. Summary of the Four Models 68
4. Consolidation of Models 70
5. The Four Models and the International Centre for Settlement of Investment Disputes 71

- ‘investment’ 72
- ‘arising directly’ 73
- ‘legal dispute’ 76
- ‘between a Contracting State . . . and a national of another Contracting State’ 76
- ‘which the parties to the dispute consent in writing to submit to the Centre’ 77

6. Two Rules of Diplomatic Protection 77
7. Nationality of Claims 77
8. Exhaustion of Local Remedies 79

3. Jurisdiction *Ratione Personae*: The Foreign Investor 82

- Host State Investment Law 82
- Contract Models 85
- Treaty Models 87
  - The Host State’s Contingent Consent 87
  - Jurisdiction without Privity 90
- A Harmonisation Mechanism 93

4. Mass Proceedings and Settlement Agreements 98

5. Jurisdiction *Ratione Materiae*: The Substantive Rights 108

- Choice of Law as the Starting Point 109
- General Considerations Favouring a Broad Substantive Scope 113
- The Uncertain Status of Host State Counterclaims 116
# Table of Contents

Promoting Access to Recourse 118  
Duplication, Fragmentation, or Excessive Burden 120  
Thresholds and Due Diligence Obligations 123  
Defining the Right-Holder 125  
Areas of Law for Possible Incorporation 127  
  - Human Rights 127  
  - Labour Rights 131  
  - Environmental Rights 139  
  - Indigenous Peoples' Rights 144  
  - Anti-corruption 147  

6 Enforcement 152  
  - The ICSID Convention 152  
  - The New York Convention 154  
    - The Role of the *Lex Arbitri* 155  
    - The Requirement of an ‘Agreement in Writing’ 157  
    - The 'Commercial' Reservation 161  

Conclusion 168  

Conclusion 169  

*Annex: The Model Texts* 172  
*Index* 191