International Investment Law and Arbitration

History, Modern Practice, and Future Prospects

By

Borzu Sabahi
Ian A. Laird
Giovanna E. Gismondi
Contents

International Investment Law and Arbitration: History, Modern Practice, and Future Prospects 1  
Borzu Sabahi, Ian A. Laird, and Giovanna E. Gismondi

Abstract 1
Keywords 2

I. Introduction 2
II. Forces that Shape the System of Investment Protection and Promotion 3
   A. Ideologies, Political Economy, and the Historical Context 3
   B. Protagonists 4
   C. The Nature of the Modern System of Investor-State Arbitration 5


IV. Protection through Peaceful Means of Settlement of Disputes: Hague Conferences, PCIJ, ICJ 11

V. Post-World War II: Promotion and Protection of Private Capital Flows 13
   A. Security for Foreign Investment through Investment Guarantees 13
   B. Security through Arbitration: Creation of the World Bank's International Centre for Settlement of Investment Disputes 15
   C. Contractual Techniques to Protect Foreign Investment 16
   D. The New International Economic Order (NIEO) 17

VI. FCN and BIT Programs and Recognition of Foreign Investor's Right to Directly Submit Claims to International Arbitration without Espousal or Exhaustion of Local Remedies 19
   A. Overview 19
   B. Post-Cold War: Proliferation of BITS and Investment Treaty Disputes 20
   C. First Test of the Investment Treaty System: Early NAFTA and the Argentine Financial Crisis Cases 21

VII. Content of Modern BITS 23
   A. Investor's Right to Directly Initiate Arbitration and the Idea of Unilateral Consent 24
   B. Admission and Establishment 25
   C. Key Substantive Protections for Foreign Investors 27
   D. Key Aspects of the Investor-State-Arbitration Process 31
VIII. Scaling Back Protections and Backlash 44
   A. The EU Proposal of a European Investment Court System 44
   B. The US Proposal for a Revised NAFTA 49
IX. Conclusion 52

Bibliography 53