INDEX

Abi-Saab, G., 8, 323
actual draft, 13, 15
admissibility of evidence, 25, 27
ALI/UNIDROIT principles, 29
ambivalent arbitral practice, 126–8
Anti-Dumping Agreement, 214
applicable rules of law, 95, 99, 103
Argentina, 39, 54, 56, 60, 61, 65, 66, 279
Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA)
compensation for material loss, 151
content of applicable rules
means of interpretation, 110–13
textual approach, 105–10
formal status of, 95–100
interpretation, patterns of, 105–10
justification, patterns of, 100–5
law on State responsibility
interpretation of, 113–16
unity of, 116–20
proportionality, requirement of, 135
standard of compensation, 180
Austria, 166
award, 54
backward-looking methodology, 300
bankruptcy, 241
Belgium, 66, 67, 202, 217, 243
Berman, F., 138
bilateral investment treaties (BITs), 3
actual drafting, 13
fair and equitable treatment standard in, 190
FET obligation, 11
foreign investors, 261
legitimacy of, 264
remedies, 180
Bordin, F.L., 166
Born, G., 255
Bulgarian minorities, property of, 175–6
burden of education, 42
burden of proof, 34, 206–8, 244, 247, 269, 276, 277
Burkina Faso/Singapore BIT, 68
Canada, 16, 17, 19, 21, 55, 57, 58
Canada–United States–Mexico Agreement (CUSMA), 18
the Caroline incident, 170–2
case-by-case approach, 117, 118
Cerro Negro Project, 59
Charter of Economic Rights and Duties of States (CERDS), 9, 237
Charter of the United Nations, 65, 67
Cheng, Bin, 81
Chicago Convention, 145, 146
China/Mexico BIT, 68
China–Australia Free Trade Agreement (ChAFTA), 227
Chorzów Factory case, 73, 81, 84, 179, 285–8
calculating compensation, 299–302
damages
after, 81–3
before, 77–81
present, 84–6
restitution, 288–92
Churchill, W., 210
Columbia Center on Sustainable Investment (CCSI), 235
INDEX

commercial arbitration, influence of, 29–32
Company General of the Orinoco, 173–5
compensation. See also duty of compensation
Chorzów Factory case, 299–302
equity. See equitable consideration
lawful expropriation, 293–6
material loss, 151
Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA), 4
FET clause, 19–20
countermeasures
ambivalent arbitral practice, 126–8
application of, 125
vs. counterclaims, 148–9
customary requirements of, 134–7
investors’ rights, 130–4
lex specialis principle, 128–30
as prior internationally wrongful act, 144–5
US-Mexico sugar war, 126–8
COVID-19 pandemic, 252, 253, 258, 259
classical practice, 253–5
current prognosis, 256–60
treaty and custom in, 234–6
Crawford, J., 243
customary international law (CIL), 336–44
constitutive elements of, 33–7
functions of, 316–23
identification, 46, 47, 54–60
interpretation of, 312–16
relevance of, 335–6
State practice in, 54–60
TWAIL approach, 323–30
custody of presumption
reasonable regulation of, 243–5
systemic integration of, 246–7
Czech Republic, 215, 217
damages
Chorzów decision

after, 81–3
before, 77–81
present, 84–6
de Vattel, E., 233
decision-making process, 40, 99
denial of justice principle, 6, 44, 318–20
Denmark, 165
delayed Compensation Flow (DCF) method, 83, 301, 302, 304
Dolzer, R., 10
domestic courts
influence of, 29–32
State practice in, 47–53
Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), 57, 277, 278
due process, 6, 20, 24
principle of, 18
procedural equity, function of, 209

duty of compensation
agnosticism, 163
assertions, 156–8
assessment, 177–8
Bulgarian minorities, property of, 175–6
the Caroline incident, 170–2
Company General of the Orinoco, 173–5
deductions, 158–62
denials, 162–3
equivocal precedents, 167–8
Gabčíkovo-Nagymaros, 176–7
lost and found, 189–95
material loss, 151–4
missing practice, 164–7
the Neptune, 168–70
Orr and Laubenheimer, 172–3
Eagleton, Clyde, 77
‘effective control’ test, 107, 117
electricity, 304
Energy Charter Treaty (ECT), 251
Environmental Impact Assessment (EIA), 272–3
environmental liability, foreign investors, 280–2
environmental protection, 139, 240, 275, 328, 341

https://doi.org/10.1017/9781009255462.021 Published online by Cambridge University Press
environmental regulation, history of, 263–5
equitable consideration
application of, 183
compensation, 185–9
extrinsic limitations to, 204–10
limitations, 195–200
Eritrea-Ethiopia Claims Commission (EECC), 199
EU-Canada CETA, 41
European Court of Human Rights (ECtHR), 251, 254
expansive approach, 145–8
expert witnesses, in investment arbitration, 23
expropriation
lawful, 293–6
unlawful, 293–6
fair and equitable treatment (FET), 3
actual drafting of, 15
CETA, 19–20
emergence of, 10–14
interpretations of, 16
tacit integration, 250–2
fair market value, 294, 296, 301
financial regulation, 241
foreign investments
expropriation of, 185
importance of, 149
legal protections, 10
regulation of, 233, 237
regulatory authority, 238
settlement of, 46
foreign investors
assets owned by, 258
environmental liability of, 280–2
investment protection for, 3
legal protection, 3, 10
minimum standard of protection to, 8
obligations of, 261–3
rights of, 149
foreign-owned property, 174, 175
formalist analysis, 33–7
forward-looking methodology, 301, 302
France, 166, 240
Free Trade Commission (‘FTC’), 16
gas, 305
Geneva Convention, 80, 86, 89
German-Venezuelan Commission, 243, 252
Germany, 165, 217, 240
gold, 305
gunboat diplomacy, 6
Hague Conference (1930), 241
Harvard Draft (1961), 241
health, 241
Heathcote, S., 175
Herz, J.H., 80
Higgins, R., 243
host States
power of, 141–4
procedural implications for, 274–5
Hudson, M.O., 80
human rights protection, 139, 239
ILC Draft Conclusions, 35
illegal expropriations, 74, 76, 84, 88
income-based methodology, 301
India, 111, 338
Indian Model BIT, 22
infra legem equity, 187, 189, 195, 200
intrinsic limitations to, 200–4
International Court of Justice (ICJ), 27, 34
expansive approach, 145–8
judges of, 42
International Finance Corporation (IFC), 267
International Institute of Sustainable Development (IISD), 267
International Investment Agreements (IIAs), 54, 71
International Law Commission (ILC), 33, 180
duty of compensation, 165
international law experts, 26
investment arbitration, 29
investment protection treaties
countermeasures, interaction of, 137–41
investors’ rights, 130–4
investment regulation, 236–7
investment treaty arbitration, 155, 234–6
exceptional character of, 237–8
investor obligations, 276–80
investors’ rights
host States, power of, 141–4
nature of, 130–4
investor-State arbitration, 21, 119, 127, 143, 276–80
investor-State dispute settlement proceedings (ISDS), 54, 212
challenge of, 60
State practice in, 54–60
Iran-U.S. Claims Tribunal (IUSCT), 82
Iran-United States Claims Tribunal, 241
*iura novit arbiter* principle, 42
Jay Treaty (1974), 169, 190
Jennings, J., 202
joint review panel (JRP), 274
Latin America, 6, 338
law on State responsibility equitable considerations in, 189–95
interpretation of, 113–16
unity of, 116–20
lawful expropriation. See expropriation
legal experts
admissibility, 32
appointment of, 27
battle of, 26
scarcity of, 28
testimonies, 35
use of, 30
witnesses, 34, 37, 43
legal experts, types of, 26
legal opinions, in investment arbitration, 25–9
*leges specialis*, 19–20
legitimacy, struggle for, 40–4
*lex specialis* principle, 128–30
countermeasures, interaction of, 137–41
licensing, 241
Lisbon Treaty, 216
Lowe, V., 248
Luxembourg, 217
market-based methodology, 301
material loss, compensation for, 151–4
Merkouris, P., 159, 201, 316
Mexico, 17, 58, 127, 131, 135, 136, 141, 144
Mexico/Singapore BIT, 68
minimum standard of treatment (MST)
concept of, 3–4
customary status of, 316–23
historical foundation of, 5–7
Newly Independent States, challenges, 8–10
return of, 14–18
Multifibre Arrangement (MFA), 214
national law experts, 26
natural resources sector, case of, 302–5
*the Neptune*, 168–70
Netherlands, 21, 165, 215, 217, 243
Neuberger, L., 207
New International Economic Order (NIEO), 264, 310, 339
Newly Independent States, 8–10
Nigeria–Morocco BIT, 266, 267, 275, 276, 281
North American Free Trade Agreement (NAFTA), 7, 15, 264
arbitration proceedings, 16
claims of breaches, 129
Commission, 221
interpretation of, 55
Parties, 16
US breaches of, 140
OECD Draft Convention (1967), 11, 240
Organisation for Economic Cooperation and Development (OECD), 5, 11, 12, 45
Orr and Laubenheimer, 172–3
Paddeu, F., 344
Pan African Investment Code (PAIC), 267
Paparinskis, M., 141, 198
party-appointed expert witnesses, 24, 25
INDEX

Paulsson, J., 43
Permanent Sovereignty over Natural Resources (PSNR), 237, 264
Poland, 166, 217
police powers doctrine, 233, 236, 237, 249, 250, 253, 259, 260
development of, 240–3
post-award proceedings, 46, 47, 54
State practice in, 60–9	power plants, 304
pre-award interest, 300
precautionary principle, 268–72
principle of proportionality, 192, 198
prior internationally wrongful act, 144–5
public health emergency of international concern (PHEIC), 256
quantum/industry experts, 26
rational discrimination, 34
Ramsar and Biodiversity Conventions, 277
reasonable regulation, presumption of, 243–5
renewable energy power plants, 306
renewable energy sector, 305
restitution, 288–92
Return of the State, 21
rights of foreigners, 6
rights of investors. See investors’ rights
Rio Declaration, 268
Roberts, A., 226
Root, Elihu, 7
Russia, 165, 210

SADC Model Treaty, 276
satisfaction, 289, 292
Schreuer, C., 10
Second World War, 7, 9
Singapore/Colombia BIT, 68
Slovak Republics, 217
South African Development Community (SADC) Model BIT, 267
Spanish Treaty Claims Commission of 1901, 78
standard of compensation, 84
State practice

CIL identification, 54–60
ISDS, 54–60
nature of, 47–53
in post-award proceedings, 60–9
significance of, 47–53
subsequent agreements, 219–27
sunk costs, 301
systemic integration, principle of, 246–7
Talmon, S., 156
territorial sovereignty, 233, 237, 243
regulatory dimension of, 238–40
textual approach, 105–10
Third World Approaches to International Law (TWAIL), 309–12
customary international investment law, 323–30
Titi, C., 236
Transpacific Partnership agreement, 18
treaty drafting practices, 266–8
Treves, T., 271
Trojan horse of legal expertise, 37–40
two-element approach, 46, 54, 55, 57, 62, 67–9, 167, 336. See also customary international law (CIL)

UK, 165, 171, 338
UK–Argentina BIT, 153
UNCITRAL Arbitration Rules (2013), 28
UN General Assembly (UNGA), 64, 72, 93, 343
United Nations Conference on Trade and Development (UNCTAD), 6
United Nations General Assembly, 8
United States, 16–18, 30, 32, 49, 60, 338
Universal Declaration on Human Rights, 279
unlawful expropriation. See expropriation
US–Mexico sugar war, 126–8
US Model BIT, 16, 18

Vienna Convention on the Law of Treaties (VCLT), 211, 212, 246, 343
Viñuales, J., 242

https://doi.org/10.1017/9781009255462.021 Published online by Cambridge University Press
<table>
<thead>
<tr>
<th>Term</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Washington Convention</td>
<td>183</td>
</tr>
<tr>
<td>Webster formula</td>
<td>170</td>
</tr>
<tr>
<td>Weiler, T.</td>
<td>12</td>
</tr>
<tr>
<td>Wood, M.</td>
<td>52, 53</td>
</tr>
<tr>
<td>Woolsey, L.H.</td>
<td>81</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Term</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>World Bank</td>
<td>208</td>
</tr>
<tr>
<td>World Trade Organization (WTO)</td>
<td>28, 144–5, 257</td>
</tr>
<tr>
<td>dispute settlement system</td>
<td>126</td>
</tr>
</tbody>
</table>