

## INDEX

- Abalclat v. Argentina* 20  
*ADF v. US* 119–121, 130  
*ADM v. Mexico* 16, 110, 130–131  
 Advisory Centre on WTO Law 262–263  
*AES v. Hungary* 227  
 Agreement on Subsidies and Countervailing Measures 23–24  
 Agreement on Technical Barriers to Trade *see* TBT Agreement  
 Agreement on the Application of Sanitary and Phytosanitary Measures *see* SPS Agreement  
 Agreement on Trade-Related Intellectual Property Rights *see* TRIPS Agreement  
 Agreement on Trade-Related Investment Measures *see* TRIMS Agreement  
*amicus curiae*  
   ASEAN Comprehensive Investment Agreement (ACIA) 273  
   Canada 273  
   developing states' concerns, addressing 272  
   ICSID 272–273  
   opposition to 265  
   submissions from non-state actors 271–273  
   US 273  
   variance in investment treaty practice on 272–273  
*AMINOIL* 43  
 anti-dumping 8–9  
   non-tariff barrier, anti-dumping duties as 16  
   zeroing cases 236–238  
*Argentina* 56  
   compensation claims after financial crisis 73–74, 214–218, 248  
   non-compliance with ICSID awards 77  
 ASEAN treaties  
   carve-outs for environmental and health regulation 12  
   collective investment rules 174  
   Comprehensive Investment Agreement (ACIA) 185–186  
   *amicus curiae* 273  
   MFN 250–251  
   public release of award discretionary 273–274  
   emergency safeguard measures 12  
   flexibilities/exceptions 75–76  
   special and differential treatment 12  
   umbrella clause protection omitted 25–26  
 Asian Financial Crisis (1997–98) 173–174  
 Australia 12  
   expropriation 189–192  
   flexibilities/exceptions 75–76  
   plain packaging laws 15, 69, 181–182  
   private property, protections for 189–192  
   vexatious arbitration claims, identifying 180–181  
*Australia – Salmon* 148  
*Azurix v. Argentina* 170  
 balancing test 199, 201–202  
*Barcelona Traction* 258  
 bilateral investment treaties *see* BITS  
*Bilcon v. Canada* 155, 166–167  
 BITS  
   activation, engagement and recalibration 31–32, 66–77  
   investment treaty regime, shift in operation of 71–77

- BITS (cont.)  
   early BITS 43–48  
     absence of exceptions 46  
     asymmetry in economic and power relationships 44–48  
     dispute settlement processes 46–48  
     exceptions omitted from early BITS, explanation why 172–173  
     ‘fair and equitable’ treatment of foreign investors 45  
     investor-state arbitration 46–48  
     national treatment 45–46  
   emergence of 41–48  
   exponential growth in 53–66  
     domestic restrictions on foreign investment unilaterally liberalized 54  
   explosive growth in investment treaty-making 54  
   functional evolution: BIT as commitment to liberal economic policies 55–61  
   NAFTA Chapter 11 62–64  
   OECD Multilateral Agreement on Investment 64–66  
   expropriation *see* expropriation  
   paring back expansive protections in classic BIT model 74–76  
   reasons for growth in bilateralism 41–42
- Canada  
   *amicus curiae* 273  
   appointing arbitrators/qualifications 275  
   exceptions/flexibilities 75–76  
   Model BIT 202–206  
   *Canada – Administration of the Foreign Investment Review Act* 49, 68–69  
   *Canada – Continued Suspension* 148–149, 151  
   *Canfor v. US* 13–14  
   Charter for an International Trade Organization (ITO) 34–36  
     foreign investment 34–36  
     sovereign rights 35–36  
   Charter of Economic Rights and Duties of States 42
- Charter on Human and Peoples’ Rights of the Organization of African Unity 192  
   *Chemtura v. Canada* 161–166, 197  
   *Chile – Alcohol* 103, 129, 132  
   China  
     BITS  
       domestic market reform, and 58–60  
       Model BIT 112  
   *CMS v. Argentina* 214, 215–216, 218–219, 220, 239, 268–269  
   Codex Alimentarius Commission 141  
   common exceptions and derogations 168–228  
   conceptual case for express flexibilities in international economic law 169–193  
   capital flows, restrictions on 174–175  
   exceptions elucidating parties’ vital socio-political values 169–170  
   exceptions strategy appropriate for certain policy goals 173–174  
   financial crises 173–174  
   first objection: redundancy 168, 175–183  
   foreign investment protection as single *telos*/dominant purpose 170–171  
   second objection: suitability 168–169, 183–193  
   state disenchantment with investment treaty arbitration 171  
   theoretical justification for use of treaty exceptions 171–172  
   objection to exceptions: redundancy 168, 175–183  
   adjudicators incorporating sufficient flexibility for intervention 178–179  
   flexibility already present in some investment treaties 175–176  
   fractured nature of national treatment jurisprudence 182–183

- functional/symbolic reasons for flexibility in investment treaty obligations 179–180
- negative lists 176–178
- reasons to include general exceptions clauses in investment treaties 180–183
- timing and resource implications 177–178
- objection to exceptions: suitability 168–169, 183–193
- alternative theories of private property/redistribution of property 192–193
- exceptions strategy, rational nature of 189–192
- expropriation/ACIA annex on 185–186
- indirect expropriation/US rules on 184–185
- state's purpose critical to determine legality of actions 185
- strategy at odds with liberal conceptions of private property 186–192
- taxonomy of exceptions clauses 193–227
  - commonality, thin 209–227
  - deep integration via 'incorporation by reference' 194–202
  - degree of transplant inherent in incorporation by reference 198–202
  - modelling from WTO law 202–209
  - thin commonality 209–227
    - absence of *chapeau* 224–227
    - methodologies of conflation 212–218
    - primary – secondary applications: role of WTO law 218–224
- compulsory patent licences for public health purposes 75
- Continental v. Argentina* 18, 19–20, 218–219, 220–223, 224, 226, 269
- convergence factors 10–20
- coordination strategies 11
- cross-fertilization of jurisprudence 18–19
- economic logic and reality/interdependent trade/foreign investment 15–17
- flexibilities for state regulation 11–12
- intellectual property 10–11
- legal arbitration 15
- managing conflicts between investment treaty norms/WTO law 11
- movement of actors across the two fields 19–20
- performance requirements 10
- same measure within jurisdiction of both systems 13–15
- services sector, WTO regulation of foreign investment in 10–11
- state discrimination restricted 11
- systems sharing common/important legal terrain 10–12
- Corn Products v. Mexico* 95–96, 128, 129–130
- countervailing measures 2
- countervailing duties 8–9
- deep integration models 194–202
- derogations *see* common exceptions and derogations
- developing states
  - amicus curiae* submissions, addressing concerns over 272
  - BITs
    - domestic/political reform, and 56–57
    - economic reforms, and 71
    - motivation for entering into 55–56, 61
  - capital exporters as well as importers 71
  - costs of arbitration, assistance with 262
  - expropriation 42
  - FTAs, developmental benefits of 70
  - GATS/trade in services 48–49, 51
  - investment treaties and flows of foreign investment 74

- developing states (cont.)
  - performance requirements 49
  - special and differential treatment under GATT 12
    - developmental goals, increasing tariffs for 40, 41–42
  - TRIPS 52
- diplomatic protection 46
- discrimination, hidden/embedded 225–227
- disparate impact test 103–104, 116, 118, 124–125, 129–130, 182
- dispute settlement 229–278
  - investment treaties, in *see* dispute settlement in investment treaties
  - judicial power, politics and legitimization from GATT to WTO 231–244
  - reform models *see* reform models and techniques for arbitral adjudication
  - what role for consistency and/or coherence in investor-state arbitration? 244–256
  - WTO *see* WTO dispute settlement
- dispute settlement in investment treaties 1–2, 71–77
- arbitral incoherence 6, 252–256
  - urgent need for improvements in coherence of reasoning 251–256
- arbitration as adjudicatory model 3, 47
- arbitration as currently practised
  - conferring legitimacy on system, whether 246
- arbitration centres/private systems of dispute settlement 2, 47
- arbitration, exponential growth of 8
- commercial arbitration compared 6, 245, 246–247
  - distinction between 247
- consistency in investment law
  - adjudication 247–249
  - application of similar rules to similar factual issues 248–249
  - de facto precedential value of past awards 271
  - more attenuated/sophisticated approach to consistency needed 251, 256
- constitution of tribunals 244–246
  - conflicts of interest 245–246, 275, 277–278
  - party choice 244–245
- deference, consequences of 131–132
- escalation of investment treaty claims 71–72
- factors in decisions to bring cases 92, 111, 115
- ICSID *see* ICSID
- inconsistent outcomes 6
- informational asymmetry 91, 92–94
- investor-state arbitration,
  - introduction of 46–48
- legal error in investment arbitration 18–19, 115
- NAFTA *see* NAFTA
- no general exemption provision for regulatory interventions 115
- objective treaty purpose,
  - interpretations/readings against 5, 111–112
- outcome over process preferred 5
- private practitioners, role of 2
- pro-investor reasoning of early challenges 73–74
- reform 249–250, 251–256
  - more attenuated/sophisticated approach to consistency needed 251, 256
  - reform models *see* reform models and techniques for arbitral adjudication
  - substantive rulings influencing content of newer investment treaties 249–250
  - urgent need for improvements in coherence of reasoning 251–256
- remedies, retrospective damages as 94, 230
- standing consent of states 47
- standing of foreign investors 2, 47, 91, 229

- state disenchantment with quality/
  - nature of arbitration 171
- state-to-state dispute settlement 2
- WTO law in investor-state
  - arbitration, citation of 26–27
- Doha Round of negotiations 6, 32, 70, 259
- Dominican Republic – Cigarettes* 118–119
- Ebrahimi v. Iran* 43
- EC – Asbestos* 82–83, 103, 118, 272
- EC – Biotech* 151
- EC – Hormones* 132, 141, 144, 148, 149–151, 152, 164, 165
- EC – Sardines* 141–142
- EC – Seal Products* 103–104, 179
- El Paso v. Argentina* 214, 216–217
- Enron v. Argentina* 214, 218, 220, 239, 269–270
- European Union 174–175, 207–209
  - reform of WTO dispute settlement system proposed 276
- exceptions *see* common exceptions and derogations
- expropriation 41–43, 44
  - ACIA 185–186
  - compensation 84
    - customary law, under 42–43, 44
    - direct expropriation, for 185
    - Hull standard 44, 185
    - indirect expropriation, for 44, 184–185
    - ILC Rules 213
  - decolonization, and 41, 53, 84
  - exceptions clauses 178–179
  - indirect expropriation 44, 75, 76, 178–179, 184–185
  - NAFTA 187–189
  - protecting investors from 84
  - South Africa 193
  - state taking of private/foreign property 44
  - US 75, 184–185, 189–190
- fair and equitable treatment
  - controversy over scope/operation in international investment law 136–137
  - customary protections, fair and equitable treatment as subset of 154–156
  - early BITs, 45
  - NAFTA 252–254
  - states confining in newer treaties 137–138
  - states' liability for breach, science and *see* science science-based approach to fair and equitable treatment
- FDI 10, 15–17
  - complement to cross-border trade in goods and services, as 16–17
  - 'greenfield' investments 89
  - principal market entry through M&A 88–89
  - protection lobbying, impact of immobile FDI on 90
  - regarded as positive input by domestic actors 88
  - substitute for trade, as a 15–16
- Feldman v. Mexico* 110
- Fireman's Fund v. Mexico* 102, 188–189
- flexibilities *see* common exceptions and derogations
- foreign investment *see* FDI, investment treaties, international investment law
- free trade agreements (FTAs)
  - bilateral and regional FTAs
  - bifurcating states' trade policy 70–71
  - movement of actors across fields 20
  - national treatment, and 74
  - WTO exceptions incorporated by reference 12
  - WTO obligations, and 6–7
- Free Trade Commission (FTC), NAFTA 263–264
- binding interpretations, making 75, 263

- Free Trade Commission (cont.)
  - binding interpretations, benefits of 263–264
  - infrequently invoked 264
- Friendship, Commerce and Navigation (FCN) treaties 32–34, 46
- future engagement between WTO law and international investment law 20–28
  - double helix metaphor 24–28
  - full convergence between two fields 21–24
  - normative sense of convergence 24
  - pluralist approach 20–21
  - state practice, evolving 27–28
  - umbrella clause protection 25–26
- Gabčíkovo–Nagymaros (Hungary v. Slovakia)* 152, 219
- GAMI v. Mexico* 131–132, 225–226
- General Agreement on Tariffs and Trade 1947 (GATT) 1, 36–41
  - carve-outs for environmental/health regulation 11–12, 73
  - core public/domestic values 4, 40
  - developing states 40
  - dispute settlement mechanisms/
    - panels 5, 40–41, 46, 231, 232–233, 244
    - artificial outcomes with pro-trade bias 239–240, 242, 252, 256
    - panellists, nature of 239
  - domestic regulation 137
  - ‘embedded liberalism’ 4, 11–12, 40, 46, 83, 171
  - emergency action/safeguard measures 4, 12
  - ensuring market access for foreign goods in importing states 36–37
  - exceptions/flexibilities 4, 46, 197, 203, 209–212, 224
  - food security 40
  - most-favoured-nation treatment 37–38, 39
  - national treatment 39–40, 45, 80–83
  - special and differential treatment 12
  - stability, factors ensuring 171
  - tariffs 15–16, 36–40, 171
- General Agreement on Trade in Services (GATS) 50–51, 63
  - carve-outs for environmental/health regulation 11–12
  - exceptions/flexibilities 51, 194–198, 211–212, 219–220
  - governance commitments 18
  - FDI 10, 50
  - legal structure and orientation 50–51
  - modes of service supply 10
  - scheduling by positive lists 177–178
- Glamis Gold v. US* 155
- Global Financial Crisis (2008) 23, 88
  - essential security interests 220–222
- history 31–78
  - expansion: 1980s to late 1990s 31, 48–66
  - Uruguay Round 1986–1994/
    - establishment of WTO 48–53
  - inception: 1945–1970s 31, 32–48
    - BITs, emergence of 41–48
    - FCN treaties 32–34
    - GATT 36–41
    - ITO 34–36
- ICSID/ ICSID Convention (1965) 47
  - amicus curiae* submissions 272–273
  - annulment 18–19, 218, 259–260, 266–270
    - appointing committees 275
    - de facto appellate review,
      - annulment committees
      - engaging in 270
    - evolution of understanding of purpose of 267–270
    - legitimacy of process, focus on 266
  - appeals mechanism proposed 257, 260
  - appointing arbitrators
    - party autonomy 275
    - qualifications 275
  - arbitral adjudication, creation of
    - appellate organ for 259–260
  - claims without legal merit,
    - preliminary objections to 180
  - disqualification of arbitrators 277
  - state withdrawals from ICSID 76–77

- strike-out procedures 274
- identical comparator test 100, 102, 104–105, 108, 122
- import substitution approach 53
- intellectual property 10–11
- see also* TRIPS Agreement
- International Court of Justice 236, 241
  - arbitral adjudication, use as appellate organ for 257–258
  - composition 257
  - judgments, issues with 258
  - standing 258
- international environmental law 144
- international investment law
  - bilateral and regional investment treaties, diffuse network of 2
  - developing states 12
  - dispute settlement *see* dispute settlement system in investment treaties
  - exceptions *see* common exceptions and derogations
  - fair and equitable treatment *see* fair and equitable treatment
  - FDI *see* FDI
  - history *see* history
  - international investment law as part of public international law 2–3
  - legitimate regulatory interventions by states 139–140
  - national treatment *see* national treatment
  - origins 1
  - state disenchantment with investment treaty arbitration 171
  - subsidies 23–24
  - treaty protections for 1
  - WTO law, and
    - convergence factors *see* convergence factors
    - omission of WTO in investment law texts 7–9
    - opposition to engagement with WTO law 9–10
    - pathologies of divergence 6–10
    - umbrella clause protection 25–26
  - see also* future engagement between WTO law and international investment law
- International Law Commission (ILC) 27
- Articles on Responsibility of States (Art. 25) 212–218
- customary plea of necessity 212, 214, 217–218
- International Monetary Fund 34
- international trade/WTO law 4
  - barriers to foreign trade, liberalizing 1
  - constituted multilaterally 1–2
  - dispute settlement system *see* WTO dispute settlement
- GATT *see* General Agreement on Tariffs and Trade (GATT)
- Geneva as institutional nucleus 1–2
- history *see* history
- international investment law, and convergence factors *see* convergence factors
- FTAs, and 6–7
- omission of investment law texts in WTO law 7–9
- opposition to engagement with international investment law 9–10
- pathologies of divergence 6–10
- see also* future engagement between WTO law and international investment law
- origins 1
- WTO *see* World Trade Organization (WTO)
- International Tribunal of the Law of the Sea 156
- investment treaties
  - capital flows, facilitating 96–97
  - dispute settlement *see* dispute settlement system in investment treaties
  - exceptions *see* common exceptions and derogations
  - evolution of functionality of 74–77, 84–85
  - expropriation *see* expropriation

- investment treaties (cont.)
  - fair and equitable treatment *see* fair and equitable treatment
  - FDI *see* FDI
  - foreign investment as proxy for colonialism, as 41
  - heterogeneity in treaty form, substance and procedure 249
  - law *see* international investment law
  - shift in operation of investment treaty regime 71–77
    - compulsory licences for public health purposes shielded 75
    - developing countries, approach of 71
    - escalation of investment treaty claims 71–72
    - forms of state exit from investment treaty system 76–77
    - increasing deficit of functionality of investment treaties 74–77
    - paring back expansive protections in classic BIT model 74–76
    - pro-investor reasoning of early challenges 73–74
    - sensitive and speculative challenges 72–73
    - substantive and binding exceptions for host state conduct 75–76
- Japan 12
  - flexibilities/exceptions 75–76
  - redistribution programmes 192–193
- Japan – Alcohol* 98, 125–126, 235
- Korea – Beef* 200–201, 222, 223
- ‘less restrictive means’ (LRM) analysis 199, 200–201, 202, 205, 222–224
- Lochner v. New York* 189
- Loewen v. US* 110, 115, 255
- Lucas v. South Carolina Coastal Council* 190
- Maffezini v. Spain* 250
- Marxism 41–42, 53, 58
- Merrill Ring v. Canada* 103, 114
- Metalclad v. Mexico* 75, 136, 183
- Methanex v. US* 9, 99–108, 110, 122, 128, 131–132, 139–140, 158–161, 165, 197, 255–256
- Mobil Oil v. Canada* 155
- most-favoured-nation treatment (MFN) 11
  - dispute settlement clauses in other treaties, and 250–251
  - GATT, in 37–38, 39
- NAFTA
  - arbitrators, reverse appointment system for 275–276
  - Chapter 11 9, 50, 62–64, 111–112, 162–163
  - challenges in sensitive areas of governance 72
  - expropriation 187–189
  - flexibilities/exceptions 175–176, 187–189
  - Free Trade Commission *see* Free Trade Commission (FTC), NAFTA
  - increased claims 72
  - replication of strict BIT model in 62–64
  - speculative claims 72–73
- factors in decisions to bring cases 92
- fair and equitable treatment
  - obligation, interpretation of 252–254
- interpreting treaty in light of objectives 102
- national treatment 83–84, 101–102, 113–115, 116–117, 155, 255–256
- parties 62
- national treatment 9, 11, 18, 79–135
  - comparing legal norms, political economy justifications/systems: proposed methodology 85–94
  - contextual differences/legitimate government interventions 90–91
  - informational asymmetry 91, 92–94



- political economy of trade policy/
  - bias towards protectionism 86–87
- political economy surrounding
  - investment restrictions 87–90
- remedy structures 94
- systemic differences across the two systems 91–94
- textual differences 85–86
- competition as necessary condition
  - of likeness 95–108
- competition flushing out
  - protectionism 95–96
- rejecting competitive interaction
  - role in national treatment inquiry 97–108
- early BITS 45–46
- exceptions/flexibilities 177–178, 182–183
- FTAs 74
- international investment law 83–85
  - minimalist approach 83–84
- interpretative questions and cases 94–134
  - is competition a necessary condition of likeness? 95–108
  - is protectionist purpose required as condition of breach? 121–134
  - what constitutes ‘less favourable treatment’? 108–121
- ‘less favourable treatment’ 108–121
  - fallacy of ‘most’ favoured domestic investor standard 110–115
  - group approach to 116–121
  - origin-neutral measures 109, 116
  - origin-specific measures 108–109
- protectionist purpose as condition of breach 121–134
  - accepting external legal norm as evidence of state’s *bona fides* 132–134
  - autonomy of host state choice 122–123
  - deference, consequences of 131–132
  - disparate impact test 124–125
  - express statements 125–128
  - openness and integrity
    - considerations 122–123
  - ‘purpose’ of host state, meaning of 125
  - structure, text and disparate impact 129–131
  - ‘subjective’ intent 125–127
- WTO law: GATT Art. III 39–40, 45, 80–83, 85
  - cornerstone provision in WTO 80
  - legal test as to whether tax/regulation protectionist 81–83
  - obligation, nature of 80–81
  - requirement of a competitive relationship 85–86
- necessity, customary defence of 212–218
- New York Convention (1958) 47
  - review of arbitral awards 266
- Nicaragua v. US* 210
- non-tariff barriers 16
- Occidental v. Ecuador* 73, 76, 97–99, 103, 124–125
- OECD: Multilateral Agreement on Investment 64–66
- Oil Platforms (Iran v. US)* 33–34
- Oscar Chinn Case* 33
- Penn Central v. City of New York* 184
- Pennsylvania Coal Co. v. Mahon* 189
- Permanent Court of Arbitration, Financial Assistance Fund 262, 263
- Plama v. Bulgaria* 250
- Pope and Talbot v. Canada* 75, 110, 113, 114, 116–118, 124, 131–132, 252–254, 255, 264
- precautionary principle 156
- proportionality review 200, 201–202
- public morals and public order 220
- Pulp Mills (Argentina v. Uruguay)* 152
- rationality review 199, 205, 206
- reform models and techniques for arbitral adjudication 256–278
  - ad hoc (horizontal) reform 270–278

- reform models (cont.)
  - amicus curiae* submissions from
    - non-state actors 271–273
  - amicus curiae*, variance in
    - investment treaty practice on 272–273
  - autonomy of party choice of arbitrators, unwillingness to disrupt 274–276
  - consolidation of claims 274
  - designed to improve first-instance adjudication 271
  - increasing overall transparency of dispute settlement 273–274
  - participation of non-disputing state parties 271–273
  - strike-out procedures 274
  - targeted probity guarantees in arbitral adjudication 277–278
- organic (hierarchical) evolution
  - 266–270
  - ICSID annulment 266–270
  - New York Convention, review under 266
- structural (hierarchical) reform
  - 257–266
  - challenges and gains from reform proposals 262–264
  - binding interpretations as alternative 263–264
  - greenfield institution in bilateral/regional negotiating forum 261
  - ICJ as appellate organ, use of 257–258
  - ICSID, creation of appeals
    - mechanism in 259–260
  - new multinational architecture for appellate review 260–261
  - specific design questions needing to be finalized 264–266
  - use or construction of standing appellate organ 257
  - WTO Appellate Body, use of 258–259
- regulation *see* science as proxy for rational regulation
- Romak v. Pakistan* 246–247
- Saipem v. Bangladesh* 237, 247–248
- Saluka v. Czech Republic* 170
- science-based approach to fair and equitable treatment 136–167
  - fair and equitable treatment in international investment law, controversy over 136–137
- science, risk regulation and international economic law:
  - WTO law best practice 139–153
- ICJ decisions compared to WTO law 151–152
- nature/purpose of legal obligation to engage with scientific evidence 143–145
- non-discriminatory regulatory interventions, defending 140
- positive regulatory interventions 139–140
- risk assessments 148–151
- risk assessments, state's SPS measures based on 149–151
- science informing evaluation of level of risk 145–146
- science informing how a state responds to a given risk 146
- SPS Agreement *see* SPS Agreement
- textual limits constraining scientific evidence examination 143
- type of measures examined in science-based approach 142–143
- WTO members retaining fully autonomy to set level of risk 146–147
- three key iterations of fair and equitable standard 153–157
  - evolutionary nature of customary international law 155–156
  - forms/textual differences resulting from state choice 153–154
- independent treaty standards/proxy for rational regulation 156–157

- post NAFTA Chapter 11 model/
  - custom as applicable standard 154–156
- US Model BIT 156
- treatment of international standards
  - and/or scientific evidence 157–167
- Bilcon v. Canada* 166–167
- Chemtura v. Canada* 161–166
- Methanex v. US* 158–161
- S. D. Myers v. Canada* 95, 123–124, 125, 127–128, 197
- Sempra v. Argentina* 214–215, 218, 220, 239, 269
- SGS v. Philippines* 73, 249
- Shrimp – Turtle* 224–225
- Siemens v. Argentina* 182
- South Africa
  - BITs 57
  - expropriation and public interest 193
- SPS Agreement 52, 152
  - assessments, nature of 153
  - budgetary and capacity constraints on states, addressing 144
  - domestic regulation based on international standards, requirement for 140–143
  - international standards, use of/ conforming to 140–142, 143, 163, 164
  - non-discriminatory measures, challenging 137–138
  - panels questioning SPS-consistency of measures achieving level of risk 147–148
  - precautionary measures 142, 156
  - risk assessments 142, 143, 148–151
  - risk assessments, state's measures based on 149–151
  - scientific justification for certain measures, requirement of 137–138
  - scope of 140
  - state choice on optimal level of risk 146–147
  - types of measures coming within scope 142–143
- subsidies 23–24, 139
- tariffs 15–16, 171
  - economic consequences of tariff discrimination 37–39
- GATT 15–16, 36–40
- MFN treatment towards tariffs on trade in goods 37–38
- TBT Agreement 52, 141–142
- Tecmed v. Mexico* 136–137
- Thai – Cigarettes* 144, 239–240
- TOPCO v. Libya* 43
- Total v. Argentina* 18
- TRIMS Agreement
  - performance requirements 10, 17, 49–50
  - WTO cases 68–69
- technology transfer
  - requirements 50
- TRIPS Agreement 26, 51–52
  - compulsory licences over patent rights 11
  - patent protection and public health (HIV/AIDS) 69–70
  - protection of intellectual property as investment 10–11
- Tuna – Dolphin I* 240, 243
- umbrella clause protection 25–26
- UNCITRAL Arbitration Rules (1976) 47
  - transparency 274
- Unglaube v. Costa Rica* 130
- United Kingdom
  - MFN 250–251
  - Model BIT 112, 113, 250–251
  - tariffs 38
- United Nations
  - Charter 211, 220
  - expropriation, resolutions on 42–43
- United States (US)
  - amicus curiae* 273
  - BITs 44, 45, 273
    - expropriation 75, 184–185
  - investment treaty goals 60–61
  - investment treaty practice, openness of 273
  - 1994 Model BIT 156
  - 2004 Model BIT 25–26, 154, 184–185

- United States (US) (cont.)
  - disputes, avoiding frivolous claims in 180
  - exceptions/carve-outs 75–76
  - expropriation 75, 185, 189–190
  - indirect expropriation 184–185
  - GATT 48–49
  - Great Depression 38
  - ITO 35, 36
  - NAFTA *see* NAFTA
  - party autonomy/appointing arbitrators 275
  - private property, protections for 189–190
  - regulatory takings 190
  - tariffs 38
- UPS v. Canada* 95, 110, 133–134, 206
- Uruguay Round 22–23, 26, 31, 36, 48–53
  - GATS/trade in services 48–49, 63
  - ideological constraints 69
  - WTO members side-lined by final stages 70
- US – Continued Suspension* 151
- US – Gasoline* 68, 205, 224, 241, 242
- US – Internet Gambling* 177–178, 220
- US – Lead and Bismuth* 272
- US – Section 301* 227, 229
- US – Section 337* 200, 201, 223
- US – Shrimp* 68, 203–204, 205, 243–244, 272
- US – Stainless Steel from Mexico* 237–238
- US – Zeroing (Japan)* 237
- Vienna Convention on the Law of
  - Treaties 1969 (VCLT) 5, 19
  - treaty interpretation/adjudication 26–27, 67, 111–112, 204, 239, 240–242
- Whaling (Australia v. Japan: New Zealand Intervening)* 9, 258
- World Bank 34
- World Trade Organization (WTO) 1–2
  - anti-dumping duties *see* anti-dumping
- Appellate Body *see* WTO dispute settlement
  - challenges, systemic 6–7
  - countervailing duties 8–9
  - see also* Agreement on Subsidies and Countervailing Measures
  - developing states 12
  - dispute settlement system *see* WTO dispute settlement
  - ‘embedded liberalism’ 11–12, 171
  - establishment/formation 1–2, 22–23, 48–53
  - fair and equitable treatment *see* science-based approach to fair and equitable treatment
  - flexibilities 28, 91, 118–119
  - foreign investment as full negotiating item, opposition to 22
  - GATS *see* General Agreement on Trade in Services (GATS)
  - GATT *see* General Agreement on Tariffs and Trade (GATT)
  - globalization of production across supply chains 17
  - legislation 234–235, 248
    - scarce output of 69–71
  - national treatment *see* national treatment
  - obligations applying equally to all member states as single undertaking 248
  - science and risk regulation *see under* science-based approach to fair and equitable treatment
  - stability, factors ensuring 171
  - subsidies 23–24, 139
  - tariffs 15–16, 171
  - TRIMS *see* Agreement on Trade-Related Investment Measures (TRIMS)
  - TRIPS *see* Agreement on Trade-Related Intellectual Property Rights (TRIPS)
  - see also* international trade/WTO law
  - WTO dispute settlement 1–2
    - Appellate Body 53, 232–244

## INDEX

311

- arbitral adjudication, use as
  - appellate organ for 258–259
  - ‘completing the analysis’ 265–266
- composition/members 232–233, 258–259
- deference, rejecting 132
- disclosure obligations in advance
  - of appointment 277–278
- expansive judicial power 66–68
- interpretation/VCLT rules 4–5, 67–68, 73, 238–244
- judicial activism, guarding
  - against 234
- judicial project 6
- legal review 18–19, 53
- legitimate regulatory
  - interventions by states 139
- mandate 233–234, 265–266
- original concept of 232
- panel decisions, and 236–244, 247–248, 265–266
- precautionary principle 156
- precedence, de facto adherence to 28, 235–238
- primary guarantor of security and predictability, as 235–238, 248
- probity/avoiding conflicts of interest 233, 277–278
- reports 231
- role and approach 66–68, 232, 259
- Rules of Conduct, disqualification
  - for breach of 277
- standing institution 232–233, 248
- systemic role of 8
- timelines for appellate review 258–259
- workload 232, 259
- Dispute Settlement Understanding (DSU) 52–53, 66–68, 231–232
  - amicus curiae* submissions, addressing concerns over 272
  - amicus curiae* submissions, opposition to 265
  - binding interpretations of Ministerial Conference/General Council 234–235
  - binding outcomes 53
  - cases, statistics on 66
  - compulsory adjudication 53
  - confidentiality of written
    - submissions and hearings 273
  - Dispute Settlement Body (DSB) 231
  - GATT panel reports as source of legitimate expectations 235
  - growing entanglement of trade and investment issues 68–69
  - interpretation, text of treaty
    - obligation as starting point for 242–244
  - interpretive process 4–5, 67–68, 73, 238–244
  - mediating between trade and other public values 68
  - panel appointments, disclosure obligations in advance of 277–278
  - panel appointments, Secretariat’s indicative list for 276
  - panels 232–233, 234, 244
  - panels and Appellate Body, disagreements between 236–238, 247–248
  - panels, interpretations of WTO text by 238–244
  - purposes of WTO dispute settlement 233–234, 248
  - reform of dispute settlement, calls for 276
  - reverse consensus rule 52–53
  - Rules of Conduct for panellists 277
  - standing of states parties 4, 91, 229–230
  - third-party submissions from WTO members 271
  - zeroing cases 236–238
- factors in decisions to bring cases 91–92
- flaws in original construction of WTO dispute settlement 265–266
- FTAs, and 6–7
- informational equality 92–93
- private legal counsel, limited role of 2
- remedies, prospective 94, 230
- state-to-state dispute settlement 2