<table>
<thead>
<tr>
<th>Index</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>absolute sanctity of contract, 39, 50, 55</td>
<td>parties influence, 208–217</td>
</tr>
<tr>
<td>absolute theory of immunity, 557</td>
<td>previous opinions, 217–223</td>
</tr>
<tr>
<td>Abs–Shawcross Draft Convention on Investments Abroad (1959), 64, 453</td>
<td>challenges against, procedure</td>
</tr>
<tr>
<td>ACIA. See Association of South East Asian Nations (ASEAN) Comprehensive Investment Agreement (ACIA)</td>
<td>ICSID, 196–197</td>
</tr>
<tr>
<td>Act of State doctrine, 14, 563–571</td>
<td>Stockholm Chamber of Commerce (SCC), 197</td>
</tr>
<tr>
<td>benchmark American ruling, 569</td>
<td>UNCITRAL, 198</td>
</tr>
<tr>
<td>ad hoc appellate bodies, 603</td>
<td>challenges against, substance</td>
</tr>
<tr>
<td>ad hoc ICSID annulment committees, 103, 547</td>
<td>IBA, 205, 207</td>
</tr>
<tr>
<td>ad hoc investment arbitration</td>
<td>ICSID, 199–204</td>
</tr>
<tr>
<td>ICSID, comparison with, 109–113</td>
<td>Stockholm Chamber of Commerce (SCC), 205</td>
</tr>
<tr>
<td>ad hoc investment tribunal system, 82</td>
<td>UNCITRAL, 205</td>
</tr>
<tr>
<td>admissibility. See jurisdiction and admissibility</td>
<td>challenges, procedure, 189</td>
</tr>
<tr>
<td>adverse inferences, 246</td>
<td>double-hatting, 228</td>
</tr>
<tr>
<td>low incidence, 247</td>
<td>justifiable doubts standard, 203</td>
</tr>
<tr>
<td>adverse third party arbitrators, 211</td>
<td>key figures, 173</td>
</tr>
<tr>
<td>Agreement between Australia and Japan for an Economic Partnership (Australia–Japan EPA) linking FET standard to customary international law, 82</td>
<td>multiple appointments relationship of adversity, 215</td>
</tr>
<tr>
<td>agreements must be kept. See pacta sunt servanda appellate tribunals, 82</td>
<td>same counsel, 214–215</td>
</tr>
<tr>
<td>arbitral awards. See also New York Convention challenging, 109</td>
<td>same party, 213–214</td>
</tr>
<tr>
<td>arbitrations, 82</td>
<td>Argentina–Chile BIT, 393</td>
</tr>
<tr>
<td>Argentina–France BIT, 384</td>
<td>Argentina–Germany BIT, 389</td>
</tr>
<tr>
<td>Argentina–Indonesia BIT, 593</td>
<td>Argentina–Spain BIT, 389</td>
</tr>
<tr>
<td>Argentina–Spain BIT, 389</td>
<td>Argentinian gas cases, 543</td>
</tr>
<tr>
<td>ASEAN Treaty for the Promotion and Protection of Investments</td>
<td>ASEAN Treaty for the Promotion and Protection of Investments</td>
</tr>
<tr>
<td>Article IV, 68</td>
<td>Article IV, 68</td>
</tr>
<tr>
<td>Asian–African Legal Consultative Organisation, 109</td>
<td>Article 4, 283, 300</td>
</tr>
<tr>
<td>ASR</td>
<td>Article 8.10, 79</td>
</tr>
<tr>
<td>Articles 20–25, 421</td>
<td>Australia–India BIT, 587</td>
</tr>
<tr>
<td>asset attachment, 572–573</td>
<td>Australia–Japan EPA</td>
</tr>
<tr>
<td>Arbitration Rules of the Centre, 29</td>
<td>Article 14.6, 82</td>
</tr>
<tr>
<td>arbitration without privity, 88, 89–94</td>
<td>award enforcement arbitration</td>
</tr>
<tr>
<td>arbitrators appointment, 179</td>
<td></td>
</tr>
</tbody>
</table>
award enforcement (cont.)
ICSID, 542–56
non-ICSID, 538–42
asset attachment, 563, 572–73
ICSID award, 536, 538
non-ICSID award, 536, 537

backlash
globally, 2007-date, 581–589
bad faith by Host State, 338–340
balance of probabilities, 243
bilateral investment treaties (BITs). See also specific country BITs
assets and transactions, defined, 294
common violations, 495
cooling-off period, 103
investment disputes, 566
new clauses
expropriation, 596–598
fair and equitable treatment (FET), 594–596
substantive standards, 598–600
termination of, 589–593
BLEU (Belgium–Luxembourg Economic Union–Hungary) BIT, 166
Bolivarian Alliance for the Americas (ALBA), 586
Bolivia Model BIT, 74
Bolivia–Chile BIT, 264
book value, 415, 498, 502
build-operate-and-transfer (BOT) contracts, 54

Cairo Regional Centre of Arbitration, 109
Calvo Doctrine, 12, 587
Canada–China BIT, 595
Canadian Model Treaty (2004), 584
Central America Free Trade Agreement (CAFTA)
Article 10.12.2, 463, 464, 557
Article 10.16.3, 464
Article 10.16(3), 464
CETA. See EU–Canada Comprehensive Economic and Trade Agreement (CETA)
China–EU BIT, 596
fork-in-the-road clause, 105
linking FET standard to customary international law, 596
minimum standard treatment, 596
China–United States BIT, 596
Chinese Model BIT (2003), 591
choice-of-law clauses, 51
circumstances, 486–87
circumstantial evidence, 243–246
claims
unmeritorious, 133, 529, 600
Claims Settlement Declaration, 8
clausula rebus sic stantibus, 51
Colonia Protocol on Reciprocal Promotion and Protection of Investments, 68
commercial arbitration
costs follow the event (CFtE), 529
security for costs, 530
Common Market for Eastern and Southern Africa (COMESA) Treaty
Article, 159, 68
corporate group theory, 143
compensation
Chorzów Factory case, 11
expropriation, 415
rule, 416
legal principles, 20th c., 12–15
compound interest
calculation, 510
full reparation principle, 511
Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP)
Article 9.22, 188
Article 9.4, 370
Article 9.5, 382
Article 9.25, 188
substantive application, Article 9.4, 382
confiscation of property. See expropriation
conflict of interest
arbitrators, 229
IBA Guidelines, 203
notice of challenge, 611
consent, 115–116, 138–139, 478–480
by disputing parties, 140
investment arbitration
forms of, 95–97
conservative measures. See provisional measures
constructive expropriation, 412
contractual forum selection clauses, 107
Convention establishing the Multilateral Investment Guarantee Agency (MIGA)
Article 12(d), 68
Convention for the Settlement of Investment Disputes between States and Nationals of Other States. See ICSID Convention
Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See New York Convention
Convention on the Settlement of Investment Disputes between States and Nationals of Other States. See ICSID Convention
cooling off period, 103
corporate nationality
alternative test, 320
ICSID determination, 320
place of incorporation, 323
costs
allocation
Tribunal considerations, 519–522
UNCITRAL/ICSID rules, 518–519
costs after the event, 522–529
factors influencing, 514–515
security for, 529–533
types, 515
arbitration, 515–517
party, 517–518
Index

619
costs follow the event (CFtE), 518, 524, 527, 529, 530
countermeasures, 480–483
covered sector investments, 598
creeping expropriation, 412
criminal proceedings
arbitration proceedings, and, 264, 267
interim measures, and, 261, 263
Croatia–Canada BIT
Article II, 79
custom, 34
customary international law
expropriated property, value of, 500
fair and equitable treatment, 356, 357
fair and equitable treatment (FET) treaty clauses, and, 364
full reparation principle, 495
injury to company, 328
lawful expropriation, 414
legality
breaching of obligations, 420–423
minimum standard of treatment, 359, 361, 371, 578, 581
nationality, 316
property rights, 400, 407, 429
State impact on shareholders, 320
termination of treaties, 590
Cyprus–Hungary BIT, 405, 406
Czech Republic–Denmark BIT, 593
Czech Republic–Israel BIT, 289
damages. See compensation
damnum emergens plus lucrum cessans (DELC), 506–510
defences
balance between competing interests, 458
circumstances precluding wrongfulness, 477
circumstances, 486–487
consent, 478–480
countermeasures, 480–483
necessity, 483–486
concept of
avoidance of responsibility, 461
circumstances precluding wrongfulness, 460
denial of benefits clause, 463
flexibility in articulating, 460
denial of benefits clauses, 462
in exceptions, 467
modern exceptions, 473–477
non-precluded measures clause, 467–473
in obligations, 464–466
rules reflecting interests of Host States, 459
denial of benefits clauses, 462
denunciation of treaties, 590
derivative shareholders, 30
diplomatic espousal
chief shortcoming, 5
Don Pacifico incident, 4
diplomatic protection, 316–318
nature and appeal of, 58
direct expropriation, 411
discounted cash flow (DCF), 499–505
application, 500
definition, 499
discount rate, 500
flexibility, 501
disruptive treaty shopping, 391
doctrine of non-justiciability. See Act of State doctrine
Dominican Republic–Central America Free Trade Agreement (DR–CAFTA), 136, 309
Article 10.12, 463
Don Pacifico incident, 4, 11
double counting, 507, 510
double recovery
investors not entitled, 495
double-hatting, 224–225
arbitrators, 224–225, 228
draft multilateral investment treaties, 64–66
dual nationality and permanent residents, 308–315
due diligence, 353
due process expropriation, 419
economic development agreements, 24, 49
effective nationality principle, 309
electa una via. See fork-in-the-road clauses
Emmis test, 407
Energy Charter Treaty (ECT)
Article 13(1), 239
Article 17, 319
denial of benefits clauses, 462
fair and equitable treatment, 69
investor, definition, 136
nationality determination, 304
enforcement of awards. See award enforcement
EU–Canada Comprehensive Economic and Trade Agreement (CETA)
Annex 8–A, 413, 465
Article 28.3, 474, 570
Article 28.6, 474
Article 8.1, 5, 322
Article 8.10, 356, 594
Article 8.18, 322
Article 8.22, 141
Article 8.24, 141
Article 8.27, 83
Article 8.28, 83
Article 8.29, 84
Article 8.43, 141
Article 8.7, 172, 387, 395
Chapter 8, 372
European Union–Singapore Investment Protection Agreement, 613
European Union–Vietnam Investment Protection Agreement, 613
evidence
burden of proof, 334
Halley, Yakos and Veteran Petroleum arbitrations, 238–40
onus probandi actori incumbit, 234–235
RosInvestCo arbitration, 236–238
shifting, 240–242
vanishing, 235–240
lack of hard and fast rules, 233
standard of proof, 242
Index

620

Evidence (cont.)
- balance of probabilities, 243
- circumstantial, 243–246
- no evidence, 246–248

Expropriation
- compensation, 493–495
- compensation rule, 416
- exception to compensation
- investment valued at nil, 418
- regulatory taking, 418
- existence, 410
- direct, 411
- indirect, 412
- foreign-owned property, 11
- judicial, 423–424
- legality, 414
- circumstances precluding wrongfulness and non-precluded measures, 420–423
- compensation, 415
- due process, 419
- public purpose, 414
- new BIT clauses, 596–598
- object of, 400
- contractual rights, 402–408
- property rights, 401–402
- shareholder rights, 408–410
- safeguards, 575
- three stages
  - verification of existence, 400
  - verification of lawfulness, 400
  - verification of rights, 399

Fair and equitable treatment (FET), 594–596
- heads of claim, 335
- arbitrary and discriminatory treatment, 335–336
- bad faith by Host State, 338–340
- recent developments, 340–350
- violation of due process and lack of transparency, 337–338
- national treatment, 371–372
- new BIT clauses, 594–596
- physical security, beyond, 353–355
- recent treaty examples, 355–357
- treaty clauses
  - customary international law, and, 364
  - unqualified treaty clauses, 360–364
  - fair market value (FMV)
  - compensation, 417, 508
- Final Act of the European Energy Charter Conference Declaration, 4, 381
- Final Act of the UN Conference on Trade and Employment. See Havana Charter
- First Algiers Declaration, 9
- first instance tribunals, 83, 611
- floating standard of proof, 243, 244, 246, 248
- Foreign Claims Settlement Commission, 7
- foreign control, 320–323
- scenarios, 321
- telling factors, 328
- foreign State immunity, 556–563
- foreign-owned property

Chorzów Factory case, 11
- expropriation, 11
- historical awards, 30
- minimum standard of treatment (MST), 331
- fork-in-the-road clauses, 104–107
- formal sources of international law, 34
- forum prorogatum, 95
- forum selection clauses, 452–453
- France–Hungary BIT, 166
- France–Sudan BIT, 61
- France–Yugoslavia BIT
- Free Trade Commission (FTC), 357–360
- freezing order, 252, 258
- French Model BIT, 591
- friendship, commerce and navigation (FCN) treaties
- forerunner of investment treaties, 60
- frivolous claims. See unmeritorious claims
- full protection and security (FPS), 350–353, 354
- Neer claim, 334–335
- physical security, beyond, 353–355
- full repairation principle, 490, 491–492
- compound interest, 511
- intentionally wrongful acts, 491, 492
- fundamental change of circumstances, 590

General Agreement on Tariffs and Trade (GATT), 459
- Article XX, 470, 474
- General Agreement on Trade in Services (GATS), 108
- generalia specialibus non derogant, 42
- German BIT, 292
- German Model BIT (1998), 591
- German Model BIT (2005), 591
- Germany–Argentina BIT, 355, 393
- Germany–Pakistan BIT, 60, 455
- Great Czech cases, 139
- Greece–Mexico BIT, 455
- Green List, 206

Hague Convention on Choice of Court Agreements, 608
- Harvard Draft Convention, 64
- Havana Charter
- Article 12, 64, 65

heads of claim
- fair and equitable treatment (FET), 335
- arbitrary and discriminatory treatment, 335–336
- bad faith by Host State, 338–340
- recent developments, 340–350
- violation of due process and lack of transparency, 337–338

Hong Kong–Australia BIT
- Hong Kong International Arbitration Centre (HKIAC), 537
- Hulley, Yukos and Veteran Petroleum arbitrations, 238–240
- IBA Guidelines on Conflicts of Interest in International Arbitration, 203
- arbitrator conflict of interest, 229
- arbitrators, challenges against, substance, 205, 207
- General Standard 2, 203, 205, 206, 207
## Index

<table>
<thead>
<tr>
<th>Page</th>
<th>Entry</th>
</tr>
</thead>
<tbody>
<tr>
<td>621</td>
<td>Index</td>
</tr>
</tbody>
</table>

### General Standard 3, 206

### Green List, 206

### Orange List, 206

### Red List, 206

### usage, 207

### ICC Rules

#### Article 13(5), 157

#### ICSID

**arbitrators**
- appointment, 180–184
- arbitrators, challenges against procedure, 196–197
- substance, 199–204
- award enforcement, 536, 538
- costs, allocation, 518–519
- protected investments, meaning tests, 285–287
- provisional measures, recourse to, 255–258

#### ICSID Additional Facility Rules, 106, 603

#### ICSID annulment committees, 190, 468, 542

#### ICSID annulment proceedings, 547

#### ICSID arbitration
- admissibility, and, 117
- consent, 94
- institutional, 28
- not specific to investment treaty arbitration, 114

#### ICSID Arbitration Rules

- Article 25, 98
- Rule 4, 182, 464
- Rule 41, 464
- Rule 41(3), 132
- Rule 41(5), 133, 134
- Rule 9, 189, 193

#### ICSID Convention
- accession to, 63
- Arbitrator and Conciliator panels, 29
- Article 14, 199
- Article 14(1), 199, 203, 204, 210
- Article 25, 161, 261
- Article 25(1), 138, 278, 279, 280, 281, 282, 284, 289, 290, 296, 302, 464
- Article 25(2), 137, 301, 302, 307, 315, 320, 321
- Article 26, 124, 255, 256, 258, 264
- Article 41, 117
- Article 42(1), 164
- Article 47, 254, 255, 256, 258, 259, 261, 274, 531, 532
- Article 52, 103, 131, 553
- Article 52(1), 244, 279, 512
- Article 52(4), 190
- Article 54, 572
- Article 54(1), 538, 550
- Article 57, 199, 202, 204
- Article 58, 193
- Article 61(2), 519
- Article 71, 576
- Articles 13–15, 181
- Articles 37–40, 180
- Articles 57–58, 189
denounced by Latin America, 73, 74, 75, 576, 583, 586
distinguished features, 27
establishment, 27
hearing locations, 517
investment criteria, 290, 291, 292
investment not defined, 86
investment requirement, 110
negotiations, 63
reasonable doubt test, 203
widespread support, 63

### ICSID Draft Code of Conduct, 228

### ILC Articles on State Responsibility, 137

#### Article 20, 478

#### Article 22, 480

#### Article 25, 158, 469, 476, 483

#### Article 27, 486

#### Article 3, 368

#### Article 36, 417

#### Article 49, 480

#### Chapter V, 460

### MFN clause

#### final report, 391
- study group, 384
- study group report, 392, 393, 394
- summary conclusions, 385–388, 390

### immunity

- absolute theory of, 557
- execution and attachment, 556
- from execution, 536
- restrictive theory, 7, 573
- restrictive theory of, 557
- Immunity from execution, 572
- India–Mauritius BIT, 219

#### Article 11(3), 471

### Indian Model BIT (2015), 74, 80, 105, 106

### indirect expropriation, 412
- three-part test, 597

### intentionally wrongful acts, 368

### Inter-American Development Bank, 27

### interest

- compensation and restitution, 510–511
- interim measures. See *also* provisional measures standards
- evaluation, 273
- need to be met, 268–273
- interim relief, 251, 253, 256–258
- internalisation of investment contracts, 37
- International Centre for Settlement of Investment Disputes Convention. See ICSID Convention
- *international commercial arbitration*, 89–92
- UNCTAR Model Law, 540
- *international investment agreements* (IIAs)
- *appellate mechanism*, 602, 603
- *survival clause*, 592
- *internationalisation of investment contracts*
- *automatic process*, 22–25
- *backlash against*, 50–52
- *history of*, 38–39
- *hybrid and complex nature*, 31–35
- *key awards*, 39–50
- *modern institutions*, 26–31
- *placed on treaty footing*, 25

© in this web service Cambridge University Press

www.cambridge.org
investment arbitration
absence of submission to, 88
arbitration without privity, 89–94
backlash against. See backlash
call for return to adjudication, 108–109
Calvo Doctrine, 12
common asymmetry of rights and obligations, 88
consent
forms of, 95–97
writing requirement, 97–100
contractual forum selection clauses, 107
ICSID versus ad hoc, 109–113
preconditions, 100, 101
exhaustion of local remedies, 101–104
fork-in-the-road clause, 104–107
no U-turn clause, 104–107
transparency innovations, 600
UN Assembly process, 10–11
UN General Assembly process, 15–22
investment contract arbitration, 89
investment contracts
types
build-operate-and-transfer (BOT) contracts, 54
natural resource concessions, 52
public service concessions, 53
public-private partnership (PPP), 54
Investment Court Systems (ICS), 605, 606
investment treaties
accelerated growth, 66
claims against Host States and jurisprudence (in) constante, 70–73
partial convergence, 67–70
creation, 59–60
earliest, 61–62
draft multilateral, 64–66
ICSID Convention
accession to, 63
negotiations, 63
widespread support, 63
purpose of, 58
recent phenomenon, 57
resistance and change, 73
cracks in regime, 73–78
key changes, 78–85
investment treaty arbitration
commercial arbitration, difference between, 224
ICSID arbitration not specific to, 114
national law source of applicable substantive laws, 155
investor–State dispute settlement (ISDS), 2, 599, 603, 604–606
Iran–United States Claims Tribunal (IUSCT)
establishment, 246
structure, 9
treaty termination, 590
irreparable prejudice, 271
Italy–Egypt BIT, 308
Italy–Jordan BIT, 389, 445, 453, 454
Jay Treaty commissions, 6, 7
judicial expropriation, 423–424
jurisdiction and admissibility
distinguishing, 119–127
challenges, 110–131
handling objections, 128–130
no consequence, 127
post-request developments, 127–128
stay of proceedings, 130
objections
bifurcation between preliminary objections and merits, 132–133
claims manifestly without legal merit, 133–135
consent and other issues, 138–139
investment, definition, 137
investor, definition, 138–139
State, definition, 137
jurisprudence constante
fair and equitable treatment, 71
likeness, 376
justifiable doubts standard, 203
Kuala Lumpur Regional Centre of Arbitration, 109
legal costs, 513
legitimate investor expectations, 340, 342, 355, 585
lex arbitri
choice of, 166
ease of enforceability, 168
examples, 167
interim relief, obtaining, 168
justification not required, 167
location, 165
variations, 165
lex causae, 154
arbitral mandate, 164–165
interplay of laws, 158–159
composite international–national law, 161–163
matching each head of claim to governing law, 159–160
national law, 160–161
sources of laws, 154–158
lex loci arbitri, 169–171
liquidation value, 415, 498, 502
Lisbon Treaty (2009), 605
local remedies doctrine, 101–104
loi de l’arbitrage, 28
Lomé IV Convention, 68
London Court of International Arbitration (LCIA), 165, 537
Rules, Article 259, 531, 587
loser pays principle. See costs follow the event (CFtE)
lost profits. See damnum emergens plus lucrum cessans
lump sum settlements, 7, 8
malicious intention, 339
manifest injustice, 339
material sources of international law, 34
Mauritius Convention on Transparency, 600
Mauritius–Egypt BIT
Article 1(1), 155
minimum standard of treatment (MST), 331
historical background, 331
NAFTA qualified treaty clauses, 357–360
<table>
<thead>
<tr>
<th>Index</th>
</tr>
</thead>
<tbody>
<tr>
<td>three elements, 331</td>
</tr>
<tr>
<td>US Model BIT (2004), 579</td>
</tr>
<tr>
<td>mixed claims commissions, 5</td>
</tr>
<tr>
<td>modern successors, 8</td>
</tr>
<tr>
<td>success of, 7</td>
</tr>
<tr>
<td>time frame, 6</td>
</tr>
<tr>
<td>moral and punitive damages, 497–98</td>
</tr>
<tr>
<td>applicable to admissibility, but not jurisdiction, 393</td>
</tr>
<tr>
<td>application, public policy exceptions, 390–392</td>
</tr>
<tr>
<td>inapplicable, unless explicitly provided for, 392</td>
</tr>
<tr>
<td>objectively unfavourable treatment, 393–394</td>
</tr>
<tr>
<td>primary obligations, 384–388</td>
</tr>
<tr>
<td>recent developments, 394–396</td>
</tr>
<tr>
<td>Multilateral Investment Court, 604–615</td>
</tr>
</tbody>
</table>

NAFTA. See North American Free Trade Agreement (NAFTA)

national commissions, 6–8, 35
United States, 7
national treatment, 369
expropriation, 370
fair and equitable treatment (FET), 371–372
interpretation and application, 373–374
distinctions in treatment, 379–381
justification, 381–384
like circumstances, 374–379
obligation, 369–370
other examples, 372–373
natural resource concessions, 52
necessity, 483–486
Neer claim, 334–335
net present value (NPV) compensation, 508, 509
Netherlands–Hungary BIT, 404
Article I(a), 403
Netherlands–Indonesia BIT, 576
Netherlands–Poland BIT, 408
New International Economic Order (NIEO), 17
New York Convention
Article II, 99, 425
Article III, 537, 538
Article V(1), 542
Article VII, 568
Articles VI and VII, 170
non-covered sector investments, 599
Non-Waivable Red List, 206
North American Free Trade Agreement (NAFTA)
Article 102, 314
Article 102(1), 338
Article 102(2), 369
Article 1105, 337, 343, 465
Article 1105(1), 69, 314, 357, 358, 580, 581
Article 1110, 370
Article 1117(1), 314
Article 1120(2), 194
Article 1124(1), 194
Article 1128, 211
Article 1135, 525
Article 1139, 314
Article 201, 313, 314, 315

backlash against, 2001–2004, 577
Free Trade Commission (FTC), 357–360
replacement by United States–Mexico–Canada Agreement (USMCA), 598
transparency, criticisms of, 582
North–North investment treaty model, 61
North–South investment treaty model, 61

observed of undertakings. See umbrella clause
OECD

Code of Good Behaviour, 27
Draft Multilateral Agreement on Investment (1998), 69
Freedom of Investment Roundtables, 230
Oman–Yemen BIT, 498
osity burdens acti . . . incumbit, 234–235
ordre public, 550

pacta sunt servanda, 51
parallel proceedings, 139–140
abuse of process, 144–148
consent by disputing parties, 140
no issue, 142–143
remedies, 148–150
special treaty rules, 141–142
party costs, 517–518. See legal costs
pay your own way principle, 518
Permanent Court of Arbitration (PCA), 108, 109, 146, 165, 195

arbitrators, appointment, 186
Peru–Australia Free Trade Agreement Philippines–Switzerland BIT, 292, 435, 439
piggy-backing, 14
power purchase agreements (PPAs), 165
privity, arbitration without. See arbitration without privity
procedural innovations, 600–604
property rights, 401–402
protected investments, 276

defining
applicable investment treaty, 276
dual test, 277
traits of large-scale investments, 277
dual meaning, 290
binding objective criteria, 290–293
illustrative objective criteria, 293–296
investment, definition, 280–284
objective meaning, 284
ICSID tests, 285–287
non-ICSID test, 288–290
outer limits, 282, 296
subjective meaning, 277–284
protected investors, 299, 301
absence of limit of claims, 301
causal, 315
foreign control, 320–323
place of incorporation, 316–319
individual

dual nationality and permanent residents, 308–315
nationality, authentication, 307–308
individuals, 306
protected investors (cont.)
nationality, 300, 301
circumstances of acquisition, 303–306
critical date(s) of possession, 302–303
natural or juridical person, 301
provisional measures, 250
interim relief, 251
other types of relief, 258–263
preserving parties positions, 251
pursuit of criminal charges, 260–263
recourse to national courts and ICSID tribunals, 255–258
sovereign respondents, 252–255
urgency and necessity, 264–267
public purpose
expropriation, 414
public service concessions, 53, 54
public–private partnership (PPP), 54
reasonable doubt test
arbitrators, 202, 203
reasonable tribunals
denial of benefits clauses, 462
Red List, 206
Regional Arbitration Centre of Cairo, 101
Regional Arbitration Centre of Kuala Lumpur, 101
remedies
character of loss suffered, 490
compensation and restitution, 492
interest, 510–511
moral and punitive damages, 497–498
violations of other treaty standards, 495–496
full reparation principle, 490, 491–492
interest calculation on awarded payout, 491
methods of valuation, 498–499
damnum emergens plus lucrum cessans (DELC), 506–510
discounted cash flow (DCF), 499–505
parallel proceedings, 148–150
quantification, 491
renegotiation of treaties, 79, 592
renvoi, 160–161, 452
restitution in kind, 11, 492, 533
restrictive theory of immunity, 7, 557, 573
Romania–Sudan BIT, 61
Rome Convention
Article 7, 170
RosInvestCo arbitration, 236–238
round-tripping, 303–304
Salini test, 112, 277, 286, 289, 290, 291
Second Algiers Declaration, 8
security for costs, 529–533
sequential proceedings, 143–144
siège social, 320
simple interest
calculation, 510
Singapore International Arbitration Centre (SIAC), 165, 537
single economic entity, 143
social network analysis
arbitrators, 176
sole effects doctrine
indirect expropriation, 412, 424
South–South investment treaty model, 61
stabilisation clauses, 51, 52
stay of proceedings, 130
Stockholm Chamber of Commerce (SCC), 165, 537
Arbitration Rules, 236
Article 19, 197, 205
arbitrators, challenges
procedure, 197
substance, 205
strict liability, 350, 352, 353
sunk costs. See damnum emergens
supervening impossibility of performance, 590
survival clause, 592, 593
Switzerland–Hungary BIT, 403, 404
Article 1(2), 405
Switzerland–Pakistan BIT, 435
systemic bias
investors from developed States, 75
termination clauses, 592
third-party funding of disputes, 514
threshold of substantial deprivation, 413, 420, 430
Trade-Related Investment Measures Agreement (TRIMS), 108
Transatlantic Trade and Investment Partnership (TTIP)
Chapter II, 609
transnational corporations
fair and equitable treatment, 68
Trans-Pacific Partnership (TPP) Agreement
Annex 9–L(A), 356, 455
transparency
investment arbitration, 600
UNCITRAL Arbitration Rules, 601–602
tribunal versus claim test, 126
UK–Argentina BIT, 453
UK–Egypt BIT, 401
Article 8, 62
UK–Malaysia BIT, 278, 279
UK Model BIT (2005), 591
UK–Soviet BIT, 236
umbrella clause
attrition, 433–435
composite international–national law, 161–163
definition, 432
distinguishing treaty law from contract law, 449–452
derendition, 439–440
examples, 453–456
forum selection clauses, 452–453
matching each head of claim to governing law, 159–160
reconciling conflicting cases, 440–446
renvoi to national law, 160–161
resistance to, 435–439
salience of SAS cases, 446–449
UN Compensation Commission (UNCC), 9
administering Gulf War reparations, 31
claims processing facility, as, 8
UN General Assembly
Charter of Economic Rights and Duties of States, 19, 20, 21
Resolution, 1803, 15, 16, 22
Resolution, 1281, 16, 17
Resolution on a Charter of Economic Rights and Duties of States, 64
Resolution on Permanent Sovereignty Over Natural Resources, 64
UNCITRAL
arbitrators, challenges procedure, 198
arbitrators, challenges against, substance, 205
costs, allocation, 518–519
UNCITRAL Arbitration Rules, 601–602
Article 10.1, 6, 202
Article 10(1), 194
Article 12, 203
Article 12(1), 194, 205
Article 23(1), 132
Article 26, 168, 169, 253, 271, 272, 273
Article 32(5), 601
Article 34(5), 601
Article 38, 523, 524
Article 39, 523
Article 40, 523, 524
Article 40(1), 519
Article 42, 519
Article 42(1), 519
Articles 12 and 13, 198
Articles 8–10, 185
award enforcement, and, 168
hearing venues, 517
interim relief, and, 168
recovery fees and expenses, 516
structure, 602
UNCITRAL Draft Code of Conduct, 228
UNCITRAL Model Law on International Commercial Arbitration
Article 7, 99
UNCITRAL Working Group III, 230
United States Model BIT
(1994), 578
(2004), 577, 578, 579, 580, 588, 591, 596
(2012), 106, 454, 455, 588, 597
(2015), 300
Sabbatino Amendment, 14
Second Hickenlooper Amendment, 14
United States–Argentina BIT, 319, 422, 453, 467, 488
United States–Chile FTA, 70
United States–Estonia BIT, 339
United States–European Union Trans-Atlantic Trade and Investment Partnership (TTIP), 577, 605, 606
Multilateral Investment Court proposal, 608
United States–Italy FCN treaty, 30
United States–Mexico–Canada Agreement (USMCA)
investment treaty arbitration restricted, 598
investment treaty protection preserved, 599
local remedies, 101, 599
United States–Romania BIT, 440
Article II(2), 445
unmeritorious claims, 133, 529
sanctions for, 529
treaty clauses, 600
US Model Treaty (2004), 584
U-turn clause, 104–107
Vattel’s dictum, 3
Vienna Convention on the Law of Treaties
Article 31, 162, 277, 348, 361, 387, 442, 444, 467
Article 32, 162, 277
Article 41, 608
Article 56, 590
Article 60, 592
Article 61, 590
Article 62, 590
codification of customary international law, 590
principle of interpretation, 364
Vigotop test, 407
World Bank
arbitrator challenges, 192
discounted cash flow (DCF), definition, 499
Guidelines on Treatment of Foreign Direct Investment, 68
ICSID Convention
hearing locations, 517
negotiations, 63
invest, 415
WTO Appellate Body, 108
Yukos saga, 235