| Abi-Saab, G., 8, 323                    | legitimacy of, 264                     |
|---|--|
| actual draft, 13, 15                    | remedies, 180                          |
| admissibility of evidence, 25, 27       | Bordin, F.L., 166                      |
| ALI/UNIDROIT principles, 29             | Born, G., 255                          |
| ambivalent arbitral practice, 126-8     | Bulgarian minorities, property of,     |
| Anti-Dumping Agreement, 214             | 175-6                                  |
| applicable rules of law, 95, 99, 103    | burden of education, 42                |
| Argentina, 39, 54, 56, 60, 61, 65,      | burden of proof, 34, 206-8, 244, 247,  |
| 66, 279                                 | 269, 276, 277                          |
| Articles on State Responsibility for    | Burkina Faso/Singapore BIT, 68         |
| Internationally Wrongful Acts           | 01                                     |
| (ARSIWA)                                | Canada, 16, 17, 19, 21, 55, 57, 58     |
| compensation for material loss, 151     | Canada-United States-Mexico            |
| content of applicable rules             | Agreement (CUSMA), 18                  |
| means of interpretation, 110–13         | the Caroline incident, 170–2           |
| textual approach, 105-10                | case-by-case approach, 117, 118        |
| formal status of, 95–100                | Cerro Negro Project, 59                |
| interpretation, patterns of, 105–10     | Charter of Economic Rights and         |
| justification, patterns of, 100–5       | Duties of States (CERDS),              |
| law on State responsibility             | 9, 237                                 |
| interpretation of, 113–16               | Charter of the United Nations, 65, 67  |
| unity of, 116–20                        | Cheng, Bin, 81                         |
| proportionality, requirement of, 135    | Chicago Convention, 145, 146           |
| standard of compensation, 180           | China/Mexico BIT, 68                   |
| Austria, 166                            | China-Australia Free Trade             |
| award, 54                               | Agreement (ChAFTA), 227                |
|   | Chorzów Factory case, 73, 81, 84, 179, |
| backward-looking methodology, 300       | 285-8                                  |
| bankruptcy, 241                         | calculating compensation, 299-302      |
| Belgium, 66, 67, 202, 217, 243          | damages                                |
| Berman, F., 138                         | after, 81–3                            |
| bilateral investment treaties (BITs), 3 | before, 77-81                          |
| actual drafting, 13                     | present, 84-6                          |
| fair and equitable treatment            | restitution, 288–92                    |
| standard in, 190                        | Churchill, W., 210                     |
| FET obligation, 11                      | Columbia Center on Sustainable         |
| foreign investors, 261                  | Investment (CCSI), 235                 |

| commercial arbitration, influence of, | after, 81–3                                |
|---------------------------------------|--|
| 29-32                                 | before, 77–81                              |
| Company General of the Orinoco, 173–5 | present, 84-6                              |
| compensation. See also duty of        | de Vattel, E., 233                         |
| compensation                          | decision-making process, 40, 99            |
| Chorzów Factory case, 299–302         | declaratory-only award, 292-3, 306         |
| equity. See equitable consideration   | denial of justice principle, 6, 44, 318–20 |
| lawful expropriation, 293–6           | Denmark, 165                               |
| material loss, 151                    | Discounted Cash Flow (DCF) method,         |
| Comprehensive Economic and Trade      | 83, 301, 302, 304                          |
| Agreement between the                 | Dolzer, R., 10                             |
| European Union and Canada             | domestic courts                            |
| (CETA), 4                             | influence of, 29–32                        |
| FET clause, 19–20                     | State practice in, 47–53                   |
| conflict of treaty norms, 213–19      | Dominican Republic-Central America         |
|                                       | Free Trade Agreement                       |
| copper, 305                           |  |
| counterclaims, 148–9                  | (CAFTA-DR), 57, 277, 278                   |
| countermeasures                       | due process, 6, 20, 24                     |
| ambivalent arbitral practice, 126–8   | principle of, 18                           |
| application of, 125                   | procedural equity, function of, 209        |
| vs. counterclaims, 148–9              | duty of compensation                       |
| customary requirements of, 134-7      | agnosticism, 163                           |
| investors' rights, 130-4              | assertions, 156–8                          |
| lex specialis principle, 128-30       | assessment, 177–8                          |
| as prior internationally wrongful     | Bulgarian minorities, property of,         |
| act, 144–5                            | 175-6                                      |
| US-Mexico sugar war, 126-8            | the Caroline incident, 170–2               |
| COVID-19 pandemic, 252, 253, 258,     | Company General of the Orinoco,            |
| 259                                   | 173–5                                      |
| classical practice, 253-5             | deductions, 158–62                         |
| current prognosis, 256-60             | denials, 162–3                             |
| treaty and custom in, 234-6           | equivocal precedents, 167–8                |
| Crawford, J., 243                     | Gabčíkovo-Nagymaros, 176–7                 |
| customary international law (CIL),    | lost and found, 189–95                     |
| 336-44                                | material loss, 151–4                       |
| constitutive elements of, 33-7        | missing practice, 164-7                    |
| functions of, 316-23                  | the Neptune, 168–70                        |
| identification, 46, 47, 54-60         | Orr and Laubenheimer, 172–3                |
| interpretation of, 312-16             |  |
| relevance of, 335–6                   | Eagleton, Clyde, 77                        |
| State practice in, 54–60              | 'effective control' test, 107, 117         |
| TWAIL approach, 323–30                | electricity, 304                           |
| customary presumption                 | Energy Charter Treaty (ECT), 251           |
| reasonable regulation of, 243–5       | Environmental Impact Assessment            |
| systemic integration of, 246–7        | (EIA), 272–3                               |
| Czech Republic, 215, 217              | environmental liability, foreign           |
| 220011 10 public, 210, 217            | investors, 280–2                           |
| damages                               | environmental protection, 139, 240,        |
| Chorzów decision                      | 275, 328, 341                              |
| 5.757.5077 400101011                  | _, _, ,                                    |

| environmental regulation, history of, | gas, 305                                      |
|---------------------------------------|---|
| 263-5                                 | Geneva Convention, 80, 86, 89                 |
| equitable consideration               | German-Venezuelan Commission,                 |
| application of, 183                   | 243, 252                                      |
| compensation, 185-9                   | Germany, 165, 217, 240                        |
| extrinsic limitations to, 204–10      | gold, 305                                     |
| limitations, 195–200                  | gunboat diplomacy, 6                          |
| Eritrea-Ethiopia Claims Commission    |   |
| (EECC), 199                           | Hague Conference (1930), 241                  |
| EU-Canada CETA, 41                    | Harvard Draft (1961), 241                     |
| European Court of Human Rights        | health, 241                                   |
| (ECtHR), 251, 254                     | Heathcote, S., 175                            |
| expansive approach, 145–8             | Herz, J.H., 80                                |
| expert witnesses, in investment       | Higgins, R., 243                              |
| arbitration, 23                       | host States                                   |
| expropriation                         | power of, 141-4                               |
| lawful, 293-6                         | procedural implications for,                  |
| unlawful, 293–6                       | 274-5   |
|                                       | Hudson, M.O., 80                              |
| fair and equitable treatment (FET), 3 | human rights protection, 139, 239             |
| actual drafting of, 15                | -   |
| CETA, 19–20                           | ILC Draft Conclusions, 35                     |
| emergence of, 10–14                   | illegal expropriations, 74, 76, 84,           |
| interpretations of, 16                | 88  |
| tacit integration, 250-2              | income-based methodology, 301                 |
| fair market value, 294, 296, 301      | India, 111, 338                               |
| financial regulation, 241             | Indian Model BIT, 22                          |
| foreign investments                   | <i>infra legem</i> equity, 187, 189, 195, 200 |
| expropriation of, 185                 | intrinsic limitations to, 200-4               |
| importance of, 149                    | International Court of Justice (ICJ),         |
| legal protections, 10                 | 27, 34  |
| regulation of, 233, 237               | expansive approach, 145-8                     |
| regulatory authority, 238             | judges of, 42                                 |
| settlement of, 46                     | International Finance Corporation             |
| foreign investors                     | (IFC), 267                                    |
| assets owned by, 258                  | International Institute of Sustainable        |
| environmental liability of, 280–2     | Development (IISD), 267                       |
| investment protection for, 3          | International Investment Agreements           |
| legal protection, 3, 10               | (IIAs), 54, 71                                |
| minimum standard of protection to, 8  | International Law Commission (ILC),           |
| obligations of, 261–3                 | 33, 180                                       |
| rights of, 149                        | duty of compensation, 165                     |
| foreign-owned property, 174, 175      | international law experts, 26                 |
| formalist analysis, 33–7              | investment arbitration, 29                    |
| forward-looking methodology, 301,     | investment protection treaties                |
| 302                                   | countermeasures, interaction of,              |
| France, 166, 240                      | 137–41  |
| Free Trade Commission ('FTC'), 16     | 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 | 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 |
|---|--|
| Iran-U.S. Claims Tribunal (IUSCT), 82   | return of, 14–18   |
| Iran-United States Claims Tribunal,<br>241  | Multifibre Arrangement (MFA), 214  |
| iura novit arbiter principle, 42  | national law experts, 26   |
| Law Treaty (1074), 160, 100   | natural resources sector, case of, 302–5   |
| Jay Treaty (1974), 169, 190<br>Jennings, J., 202  | <i>the Neptune</i> , 168–70<br>Netherlands, 21, 165, 215, 217, 243   |
| joint review panel (JRP), 274   | Neuberger, L., 207   |
| ,   | New International Economic Order   |
| Latin America, 6, 338   | (NIEO), 264, 310, 339  |
| law on State responsibility   | Newly Independent States, 8–10   |
| equitable considerations in, 189–95   | Nigeria–Morocco BIT, 266, 267, 275,  |
| interpretation of, 113–16<br>unity of, 116–20   | 276, 281<br>North American Free Trade  |
| lawful expropriation. <i>See</i> expropriation  | Agreement (NAFTA), 7,  |
| legal experts   | 15, 264  |
| admissibility, 32   | arbitration proceedings, 16  |
| appointment of, 27  | claims of breaches, 129  |
| battle of, 26   | Commission, 221  |
| scarcity of, 28   | interpretation of, 55  |
| testimonies, 35   | Parties, 16  |
| use of, 30<br>witnesses, 34, 37, 43   | US breaches of, 140  |
| legal experts, types of, 26   | OECD Draft Convention (1967),  |
| legal opinions, in investment   | 11, 240  |
| arbitration, 25–9   | Organisation for Economic  |
| leges specialis, 19–20  | Cooperation and Development  |
| legitimacy, struggle for, 40-4  | (OECD), 5, 11, 12, 45  |
| lex specialis principle, 128–30   | Orr and Laubenheimer, 172–3  |
| countermeasures, interaction of, 137–41   | Paddeu, F., 344  |
| licensing, 241  | Pan African Investment Code  |
| Lisbon Treaty, 216  | (PAIC), 267  |
| Lowe, V., 248   | Paparinskis, M., 141, 198  |
| Luxembourg, 217   | party-appointed expert witnesses, 24, 25   |
|   |  |

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

racial discrimination, 34 Ramsar and Biodiversity Conventions, 277 reasonable regulation, presumption of, 243 - 5renewable 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 - 12customary 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

Washington Convention, 183 Webster formula, 170 Weiler, T., 12 Wood, M., 52, 53 Woolsey, L.H., 81 World Bank, 208 World Trade Organization (WTO), 28, 144–5, 257 dispute settlement system, 126