Index

African, Caribbean and Pacific Group (ACP) 23
Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) 125–57
Annex C 134, 151–56
arbitrary and unjustifiable 144, 147–51
Article 1 (General Provisions) 129
Article 2.3 (Basic Rights and Obligations – National Treatment) 131–57, 141–3, 147–51
Article 5.5 (Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection – National Treatment) 133, 141–3
burden of proof 133
control, inspection and approval 134
identical or similar 147, 149–51
Preamble 129
regulatory autonomy 144
Agreement on Subsidies and Countervailing Measures (SCM Agreement) 87, 271
Agreement on Technical Barriers to Trade Tokyo Round Agreement 1979 Standards Code 128
Agreement on Technical Barriers to Trade (TBT) Uruguay Round Agreement 1994 42, 44, 230
Article 2 (National Treatment) xxi, 42, 55, 58–60, 92, 96–7, 147–3, 154–5
Recitals 59, 94
Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Uruguay Round Agreement 1994
alternative forms of protection 288
Article 1 (Nature and Scope of Obligations) 287
Article 2 (Intellectual Property Conventions) 260, 286
Article 3 (National Treatment) xxi, 252, 254, 259, 283, 290–91, 294
Article 4 (Most-Favoured-Nation Treatment) 14, 230
Article 9 (Relation to the Berne Convention) 292
Article 10 (Computer Programs and Compilations of Data) 265
Article 14 (Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations) 279
Article 19 (Trademarks – Requirement of Use) 289
Article 20 (Trademarks – Other Requirements) 289
Article 27 (Patentable Subject Matter) 246, 288, 295–6
Article 30 (Patents– Exceptions to Rights Conferred) 295
Article 31 (Other Use Without Authorization of the Right Holder) 289
Article 68 (Council for Trade-Related Aspects of Intellectual Property Rights) 291
Choice of law rule 283
databases 288–9
differential treatment 295–6

305
effective equality of opportunities 254–8
field of technology 296
footnote 3 on ‘Protection’ (to Article 3(1) TRIPS) 287
incorporation by reference 286, 294
like field of technology 295–6
Paris Convention 1883, Stockholm Act of 1967 286
Plant Breeder’s rights 288
protection (footnote 3 on ‘to Article 3(1) TRIPS’) 287
Temporary Protection at Certain International Exhibitions 288
trade names 288
TRIPS-plus provisions 230, 270
unfair competition 288
Agreement on Trade-Related Investment Measures (TRIMS) 180
America Invents Act 2011 234, 239
ASEAN 30, 170–71
ASEAN Comprehensive Investment Treaty (2009) 177, 180
Beijing Treaty on Audiovisual Performances 2012 280
Article 4 (National Treatment) 280
Berne Convention for the Protection of Literary and Artistic Works (1886)
Article 2 (Protected Works) 227, 260, 265, 282
Article 5 (National Treatment) xviii, 226–7, 252, 259–60, 269, 281–2
Article 6 (Possible Restriction of Protection) 291
Article 6bis (Moral Rights) 292
Article 7 (8. Applicable law; "comparison" of terms) 227, 265, 282
Article 14ter (Droit de suite) 276
Article 20 (Special Agreements) 269
Choice of law rule 283, 300–303
copyright
computer programs 265
databases 264, 288
Digital Rights Management (DRM) 268
Droit de suite 276
equitable remuneration 279
fixation 282
formalities 260, 281–2
literary and artistic works 260
moral rights 292
performance rights 276–80
phonograms 276–80
private copying levies 274–6, 278, 280
public lending 256, 272–3
right of distribution 268
right of making available 268–9
rule of the shorter term 249, 263–4, 282
subsidies 271, 273–4
technological measures 268

remedies of statutory damages and attorney’s fees 281, 290–91
Rule of the shorter term 249, 263–4, 282
territoriality 303
works definition/enumeration 261–6
Calvo Doctrine 167–8, 185, 189–90
Conventions for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms 1971 249
Convention on the Settlement of Investment Disputes between States and Nationals of other States 192
copyright
broadcasting 276–80
computer programs 265
databases 264, 288
Digital Rights Management (DRM) 268
Droit de suite 276
equitable remuneration 279
fixation 282
formalities 260, 281–2
literary and artistic works 260
moral rights 292
performance rights 276–80
phonograms 276–80
private copying levies 274–6, 278, 280
public lending 256, 272–3
right of distribution 268
right of making available 268–9
rule of the shorter term 249, 263–4, 282
subsidies 271, 273–4
technological measures 268

redress 281
related rights 291
Calvo clause 190
Charter of Economic Rights and Duties of States 162
compensation
Hull formula 168, 190–91
Conventions for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms 1971 249
Convention on the Settlement of Investment Disputes between States and Nationals of other States 192
copyright
broadcasting 276–80
computer programs 265
databases 264, 288
Digital Rights Management (DRM) 268
Droit de suite 276
equitable remuneration 279
fixation 282
formalities 260, 281–2
literary and artistic works 260
moral rights 292
performance rights 276–80
phonograms 276–80
private copying levies 274–6, 278, 280
public lending 256, 272–3
right of distribution 268
right of making available 268–9
rule of the shorter term 249, 263–4, 282
subsidies 271, 273–4
technological measures 268

The principle of national treatment in international economic law
Index

term of protection 282
translation 256
works definition/enumeration 261–6
Customs Union/Territory 15, 254

Dispute Settlement
TRIPS Disputes 250
WTO Dispute Settlement
Understanding (DSU) 32
distributive justice 20
Doha Development Agenda 33

reciprocity 259, 288–9

European Convention on Human Rights (ECHR) 243
European Patent Convention 1973 230
European Patent Office 231

expropriation
Calvo Doctrine 167–8, 185, 189–90
Ecuador–United States BIT (signed 27 August 1993) 209–11
Hull formula 168, 190–91

Foreign Direct Investment (FDI)
161–82
International Investment Agreements 161–2, 179
Free Trade Agreement
ASEAN–Australia, China, India, Japan, New Zealand, Korea Regional Comprehensive

Economic Partnership Agreement 199
ASEAN–Australia–New Zealand (2009) 198
ASEAN–India Trade in Services and Investment Agreements 198
Central America–Mexico (2011) 198
Transatlantic Trade and Investment Partnership 199
Transpacific Partnership 199
Free Trade Zone 15

GATS Scheduling Guidelines 56, 62–7, 69–73, 74, 79, 89
General Agreement on Tariffs and Trade (GATT) 1947 xix, 10, 17, 97, 122, 128, 232, 254, 271
General Agreement on Tariffs and Trade (GATT) Uruguay Round Agreement 1994
Article I (General Most-Favoured-Nation Treatment) 14, 34, 46
Article III (National Treatment) xix, 10, 12, 17, 34-5, 37-8, 40, 42, 45, 51, 54, 55–8, 65, 72, 92–3, 97, 132, 136–40, 143, 164, 214, 257, 293
Article XI (General Elimination of Quantitative Restrictions) 72, 74
Article XX (General Exceptions) 18, 25, 52, 59, 65, 94, 108–10, 116–7, 121, 131, 136–40, 139, 147, 150, 177, 197, 214, 216
Article XXIV (Territorial Application – Frontier Traffic – Customs Unions and Free-trade Areas) 15, 23, 24, 270
differential treatment 18
discrimination (de facto and de jure) 35–6, 52–3, exemptions 18, 23
GATT 1994 59, 62–7, Preamble 3
regulatory freedom 147
The principle of national treatment in international economic law

General Agreement on Trade in Services (GATS) Uruguay Round Agreement 1994

Article I (Scope and Definition) 63–4

Article II (Most-Favoured-Nation Treatment) 14, 63, 76

Article V (Economic Integration) 15, 24

Article XIV (General Exceptions) 18, 80, 174, 177

Article XV (Subsidies) 74, 271

Article XVI (Market Access) 18, 56, 62, 68–9, 71, 78–80, 79–80

Article XVII (National Treatment) xx, 18, 55–6, 62, 70, 73–8, 78–86

Article XX (Schedules of Specific Commitments) 71–2

Article XXI (Modification of Schedules) 80

commercial presence 171
discrimination (de facto and de jure) 56–7, 68, 75–6, 82–6
market access rule 78–79, 81–6
MFN 64, 77
modifies the conditions op competition test 76
Preamble 63, 84
pre-establishment national treatment 171
quantitative restrictions 68
General Systems of Preferences (GSP) 22, 24, 31, 32
Genetically modified (GM) Food 139–40
geographical indications of origin 38–9, 230
Grace Period 240–46

Hull formula 168, 185

International Investment Agreements (IIA) 161–2, 165, 184–5
Argentina-Canada BIT (signed 5 November 1991) 170
ASEAN 170
Brazil-Chile BIT 175
Brazil-Cuba BIT (signed 26 June 1997) 168
broadcasting 176
burden of proof 165
Canada BIT Model (2012) 197
Canada-China BIT (signed 9 September 2012) 197
Canada–South Africa BIT (signed 27 November 1995) 169
Chile-Canada RTA (signed 5 December 1996) 176, 178
China–Cambodia BIT (signed 19 July 1996) 173
China–Czech Republic BIT (signed 8 December 2005) 172
China-Guyana BIT (signed 27 March 2003) 176
cultural industries 176
Ecuador-United States BIT (signed 27 August 1993) 209–11
Ecuador-Netherlands IIA 170
exceptions to national treatment 174–8
health care services 175
India-Sweden BIT 173
India-Turkey BIT (signed 17 September 1998) 172
India-Switzerland BIT (signed 4 September 1997) 177
Indonesia–Romania BIT (signed 26 June 1997) 167
Indonesia–Sweden BIT (signed 17 September 1992) 173
Indonesia–Thailand BIT (signed 17 February 1998) 173
Japan–Singapore RTA (signed 13 January 2002) 169
Jordan–Singapore BIT (signed 16 May 2004) 174–5
Malaysia-Germany BIT (signed 22 December 1996) 173
national security and public order 176
performance requirements 179
Peru–Czech Republic BIT (signed 16 March 1994) 170
Philippines–Czech Republic BIT (signed 5 April 1995) 172

Anselm Kamperman Sanders - 9781783471225
Downloaded from Elgar Online at 02/08/2019 04:09:10PM
via free access
<table>
<thead>
<tr>
<th>Index</th>
<th>309</th>
</tr>
</thead>
<tbody>
<tr>
<td>Philippines–UK BIT (signed 3 December 1980) 173</td>
<td></td>
</tr>
<tr>
<td>post-establishment national treatment</td>
<td></td>
</tr>
<tr>
<td>170, 172–3, 197</td>
<td></td>
</tr>
<tr>
<td>pre-establishment national treatment</td>
<td></td>
</tr>
<tr>
<td>169–71, 197</td>
<td></td>
</tr>
<tr>
<td>Russia-Canada BIT 170</td>
<td></td>
</tr>
<tr>
<td>Russia-Cyprus BIT 175</td>
<td></td>
</tr>
<tr>
<td>Russia-Egypt BIT (signed 23 September 1997) 175</td>
<td></td>
</tr>
<tr>
<td>Russia-Thailand BIT (signed October 2003) 176</td>
<td></td>
</tr>
<tr>
<td>Russia–US BIT (signed 17 June 1992) 173, 175, 178</td>
<td></td>
</tr>
<tr>
<td>Singapore-India RTA 170</td>
<td></td>
</tr>
<tr>
<td>Singapore-Mongolia BIT (signed 24 July 1995) 173</td>
<td></td>
</tr>
<tr>
<td>Singapore-Peru BIT (signed 27 February 2003) 173</td>
<td></td>
</tr>
<tr>
<td>South Africa-Turkey BIT (signed 23 June 2000) 172</td>
<td></td>
</tr>
<tr>
<td>subsidies and grants 176</td>
<td></td>
</tr>
<tr>
<td>termination 185–7</td>
<td></td>
</tr>
<tr>
<td>Turkey-Indonesia BIT 172</td>
<td></td>
</tr>
<tr>
<td>Vietnam-Chile BIT (signed 16 September 1999) 172</td>
<td></td>
</tr>
<tr>
<td>Vietnam-Japan BIT (signed 14 November 2003) 170, 175</td>
<td></td>
</tr>
<tr>
<td>Investor-state dispute settlement (ISDS) 187–8</td>
<td></td>
</tr>
<tr>
<td>labeling 44, 46</td>
<td></td>
</tr>
<tr>
<td>like circumstances 163, 166</td>
<td></td>
</tr>
<tr>
<td>like product 58–61, 97–114, 136–7, 213</td>
<td></td>
</tr>
<tr>
<td>aim and effect approach 138</td>
<td></td>
</tr>
<tr>
<td>Four-part test 97–102</td>
<td></td>
</tr>
<tr>
<td>‘like goods’ and ‘like circumstances’ 211–13</td>
<td></td>
</tr>
<tr>
<td>like field of technology 295–6</td>
<td></td>
</tr>
<tr>
<td>Lisbon Agreement for the Protection of Appellations of Origin and their International Registration 1957 230</td>
<td></td>
</tr>
<tr>
<td>Lomé Agreements 23</td>
<td></td>
</tr>
<tr>
<td>Madrid Agreement Concerning the International Registration of Marks 1891 230</td>
<td></td>
</tr>
<tr>
<td>Madrid Arrangement 1890/Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods 1891 230</td>
<td></td>
</tr>
<tr>
<td>Madrid Protocol/Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks 1989 230</td>
<td></td>
</tr>
<tr>
<td>Market access rule 78–80</td>
<td></td>
</tr>
<tr>
<td>modifies the conditions op competition test 76</td>
<td></td>
</tr>
<tr>
<td>Most-favoured-nation treatment (MFN) 184</td>
<td></td>
</tr>
<tr>
<td>fair and equitable treatment</td>
<td></td>
</tr>
<tr>
<td>Preferential trade agreements 14 principle 6, 8–9, 14, 231–2</td>
<td></td>
</tr>
<tr>
<td>regional integration 14, 22</td>
<td></td>
</tr>
<tr>
<td>Multifibre Agreement 25</td>
<td></td>
</tr>
<tr>
<td>national treatment</td>
<td></td>
</tr>
<tr>
<td>arbitrary and unjustifiable treatment 144, 147</td>
<td></td>
</tr>
<tr>
<td>Article 18 Treaty on the Functioning of the European Union (TFEU) (Non-Discrimination and Citizenship of the Union) 10</td>
<td></td>
</tr>
<tr>
<td>Beneficiaries of and Exceptions to National Treatment under Treaties Administered by WIPO, Communication from the World Intellectual Property Organization 291, 297–9</td>
<td></td>
</tr>
<tr>
<td>best regulatory practices 143</td>
<td></td>
</tr>
<tr>
<td>breach (de facto) 80–86</td>
<td></td>
</tr>
<tr>
<td>breach (de jure) 86–90</td>
<td></td>
</tr>
<tr>
<td>Charter of Economic Rights and Duties of States 162</td>
<td></td>
</tr>
<tr>
<td>Conflict of law rule 283, 300–303 consumer preference 45</td>
<td></td>
</tr>
<tr>
<td>copyright remedies (US non-compliance with Berne Convention?) 281–2, 290–91</td>
<td></td>
</tr>
<tr>
<td>detrimental impact 52, 114–22, discriminatory intent 165</td>
<td></td>
</tr>
<tr>
<td>disproportionate advantage 204</td>
<td></td>
</tr>
</tbody>
</table>
310  *The principle of national treatment in international economic law*

- Ecuador-United States BIT (signed 27 August 1993) 209–11
- effective equality of opportunities 254–8
- equal treatment 4–6, 8, 19, 23, 26, 34–5, 37, 53, 92, 231–2, 237, 246, 258–9, 285
- filing fees 232
- GATS Scheduling Guidelines 69–73
- Government treatment 45
- International Investment Agreements 165
- market access rule 56
- North American Free Trade Agreement (NAFTA) 194–5, 199
- Organisation for Economic Co-operation and Development (OECD) 193–4
- post-establishment national treatment 170, 172–3, 197
- pre-establishment national treatment 169–71, 197
- preferential treatment 167
- principle 9–10, 62
- quantitative restrictions 56
- regulatory autonomy 144
- risk-focused reach 144
- SPS 131–57
- treatment (no) less favourable 144–7, 150–51, 167, 203–7, 252, 254, 258
- Unionist treatment (Berne Union) 281
- Unionist treatment (Paris Union) 228
- United Nations Conference on Trade and Development (UNCTAD) 162, 166
- non-discrimination 5, 7–8
- arbitrary and unjustifiable treatment 144
- distributive justice 20
- North American Free Trade Agreement (NAFTA) 164
- Article 102 (National Treatment) 194–5, 199, 205–9, 212
- Article 105 (Fair and Equitable Treatment) 201, 205–6, 209, 212
- Article 106 (Performance Requirements) 205–6, 208
- Article 110 (Expropriation) 201, 205, 208, 212
- reciprocity (sound recordings) 279

- Organisation for Economic Co-operation and Development (OECD) 208
- Declaration on International Investment and Multinational Enterprises 194
- National Treatment Instrument 193–4
- Paris Convention for the Protection of Industrial Property (1883)
- Article 1 (Scope of Industrial Property) 227
- Article 2 (National Treatment) xvii, 226
- Article 3 (Same Treatment for Certain Categories of Persons as for Nationals of Countries of the Union) 226
- Article 4 (Right of Priority) 228, 233–8
- Article 4bis (Independence of Patents) 228, 237, 242
- Article 5 (A. Patents: Importation of Articles; Failure to Work or Insufficient Working; Compulsory Licenses – B. Industrial Designs: Failure to Work; Importation of Articles – C. Marks: Failure to Use; Different Forms; Use by Co-proprietors – D. Patents, Utility Models, Marks, Industrial Designs: Marking) 246
- Article 5quater (Patents: Importation of Products Manufactured by a Process Patented in the Importing Country) 228
- Article 6 (Marks: Conditions of Registration; Independence of
Index

Protection of Same Mark in Different Countries) 228
Article6quinquies (Marks: Telle Quelle) 228
Article6sexies (Marks: Service marks) 228
Article 8 (Trade Names) 228
Article 9 (Marks, Trade Names: Seizure, on Importation, etc., of Goods Unlawfully Bearing a Mark or Trade Name) 226
Article 10 (False Indications: Seizure, on Importation, etc., of Goods Bearing False Indications as to their Source or the Identity of the Producer) 226
Article 10bis (Unfair Competition) 228, 231, 288
Article 11 (Temporary Protection at Certain International Exhibitions) 241, 245–6, 288
Article 19 (Special Agreements) 229–31
Conflict of law rule 300–303
Hague Revision Conference 1925 227
Lex loci protectionis 300
Lisbon Revision Conference 1963 241
London Revision Conference 1935 240
Madrid Revision Conference 1890 230
Stockholm Act of 1967 286
territoriality 223–4, 303
Unionist treatment 228
Patent Law Treaty 1990 241
patents
best mode disclosure 233
differential treatment 295–6
domestic use requirement 246
field of technology 295–6
grace period 240–46
Hilmer Doctrine 238
importation of patented articles 225

like field of technology 295–6
priority 225
territoriality 225
performance requirements 179
Preferential trade agreements (PTAs) 9, 14–15, 23
Punta Del Este Declaration 127
reciprocity 224–5, 270, 276–8, 281–2
Droit de suite 276
Paris Convention Hague Revision Conference 1925 227
Rome Convention 278
Rule of the shorter term 249, 263–4, 282
sound recordings 279
Article 2 (National Treatment) 252–4, 276, 283
Article 7 (Minimum Protection for Performers) 277
Article 12 (Secondary Uses of Phonograms) 277
Article 16 (Reservations) 277–8
WIPO Guide to the Rome Convention 276
Russian revolution 1917 189
Sovereign equality of States 4–5, 21
Special and Differential treatment (S&D) 26–7
technology transfer 23, 179
territoriality 223–4
patents 225
Trade Marks
Bilateral agreements 224
The principle of national treatment in international economic law

- requirement of use 289
- use restrictions 289
- use without authorization of the right holder 289
- trade names 227
- Trans-Pacific Partnership (TPP) 15
- Transatlantic Trade and Investment Partnership 15
- Treaty on the Functioning of the European Union (TFEU)
  - Article 18 (Non-Discrimination and Citizenship of the Union) 10
  - Article 28:2 (Free Movement of Goods) 10
- unfair competition 227
- United Nations
  - Conference on Trade and Development (UNCTAD) 162, 166
  - Declaration on the Establishment of a New International Economic Order (1974) 191
  - Proclamation of a right to development (1986) 191
  - Resolution 1803 on Permanent Sovereignty over Natural Resources 191
- United States Copyright Term Extension Act 282
- Universal Copyright Convention 1952 249
- Universal Declaration of Human Rights 20, 28
- Uruguay Round of Multilateral Trade Negotiations 127
- Agreement on Agriculture 127
- utility models 227
- WIPO Copyright Treaty (WCT) 1996 248, 268–70
  - Article 3 (National Treatment) 252
  - Article 4 (Computer Programs) 265
  - WIPO Performances and Phonograms Treaty (WPPT) 1996 248
    - Article 2 (Definitions) 267
    - Article 4 (National Treatment) 252, 266–8, 279–80, 284
    - Article 11 (Right of Reproduction) 279, 284
    - Article 15 (Right to Remuneration for Broadcasting and Communication to the Public) 280
  - Article 20 (Formalities) 284
- Working Party on Border Tax Adjustments 97–102
- WHO Framework Convention on Tobacco Control 112
- World Trade Organization
  - WTO Agreement 8, 188