Index

Adlung, Rudolf 84, 90–1, 116–17, 130
arbitrariness 134, 139, 212–13
see also discrimination
arbitrators 12, 149, 194–5, 214, 224, 248
bad faith 133, 214
see also good faith
balance
between policy space and benefits of liberalisation 246, 256
between right to regulate and trade 81–2, 118, 199, 247–8
regarding IP rights 40–2, 50–1, 78–80, 246
Baldwin, Richard 10
barriers to trade 2, 9, 16, 18, 21, 28, 32, 39, 82, 99, 117, 200–201
see also protectionism
Bartels, Lorand 67, 117, 236
bilateral investment treaty see BIT
Binder, Christina 250
BIT
agreements see Table of Treaties
definition of xvi, 7–13
disputes see Table of Cases
historical development of 1–7, 13–26
Broude, Tomer 6, 8, 18, 48, 91–4
Capling, Ann 2, 14, 27–8, 30, 252
code of conduct see ISDS
compliance
measures necessary to secure 112, 115, 157, 159
with domestic law 227
with GATS 118, 234
with TRIPS 144
see also ISDS
Copeland, Brian 81–2
Coppens, Dominic 82
copyright see intellectual property
Cottier, Thomas 76, 229, 247
damages see remedies
Davison, Mark 59–60, 63, 66
Delimatsis, Panagiotis 229
denial of benefits 36, 191
Diebold, Nicolas F. 229
differential treatment 9, 113, 115
see also discrimination
discrimination 5, 20, 56, 85, 113, 118, 139, 205, 209–10, 256
arbitrary 90, 111, 156, 227
unjustifiable 90, 111, 156, 227
see also arbitrariness; differential treatment; non-discrimination
disguised protectionism see protectionism
dispute settlement
investment treaty arbitration 12, 80, 177, 249
investor–state see ISDS
State–State 145, 193–4
WTO 7, 61–3, 72, 115–16, 118, 141, 182–3, 200–1
see also Table of Cases; arbitrators; tobacco
domestic law see compliance
Douglas, Zachary 146
economic development 9, 11, 41
education see non-trade objectives
environmental protection see non-trade objectives
exceptions
to investment obligations 121, 152–61, 227–36
to services obligations 110–16, 152–61
direct and indirect 140–2
lawful and unlawful 140–2
fair and equitable treatment see standard of treatment
Faunce, Thomas 67
FET see standard of treatment
financial services 88–99, 96, 110, 193
see also services;
telecommunications services forum shopping 182–4
see also ISDS
general exceptions see exceptions
good faith 64, 150, 210, 213
see also bad faith
government procurement 20, 84–5, 108, 119, 154
Grosse Ruse-Khan, Henning 57, 65, 73, 76, 145
Haftel, Yoram Z 6, 48
harmonisation 20–1, 248
see also regulatory harmonisation
health see non-trade objectives
IIA
definition of xvi, 16
purpose of 10–11
see also PTA and BIT
illegitimate objective 149
see also legitimate objective
intellectual property 30, 34, 38, 40–80, 143–5, 174, 246–9, 257
see also pharmaceuticals
copyright 42–57, 79, 247
circumvention of technological protection measures 54–7
fair use 50–3, 79
parallel imports 53–4
patents 42, 66–79
data exclusivity 68–71, 74–6
compulsory licences 73, 142–4
trade marks 42, 57–66
international investment agreement see IIA
investment agreements see IIA disputes 11, 13, 203
exceptions to investment obligations 35, 121–3, 152–61, 230
see also exceptions; NCM
see also expropriation; MFN
treatment; minimum standard of treatment
investor–state dispute settlement see ISDS
ISDS
benefits of 6, 8
code of conduct 194–5
calls with 6, 8, 11–12, 30, 33, 37
council to 165–71
Joint Committee determinations 37, 190
proposed reform of 32, 181–95
rationale for 8, 66
safeguards in 34, 178, 191
see also forum shopping; ISDS
Keck, Alexander 9
Kingsbury, Benedict 148
Kotlowitz, Danny 116
Krajewski, Markus 81, 84, 248
Kulick, Andreas 184, 190
legitimate expectations 134–6, 138
legitimate objective 6, 100–1
Index

legitimate regulatory objective 160, 244

see also illegitimate objective; legitimate regulatory distinction; regulatory purpose legitimate regulatory distinction 113
Lewis, Meredith Kolsky 18–19, 21, 248

like circumstances 113, 124–6, 128–30, 206, 210, 217, 226
likeness see like circumstances

Lockhart, Nicolas J.S. 117
Low, Patrick 9

MAI 23, 25–6
market access obligations 94, 101, 108
Mattoo, Aaditya 5–6, 81–2, 87, 92–4
McGrady, Benn 63
Mercurio, Bryan 28, 57, 67, 117, 236

effect on dispute settlement procedures
in Australia’s BITs 125, 128, 165–71
in Australia’s PTAs 128, 171–95
of investments 12, 184, 191, 248
of services 115–17
Miles, Kate 65, 145, 199, 218, 248
minimum standard of treatment see standard of treatment
Mitchell, Andrew D. 12, 28, 30, 36, 41, 57–8, 60, 62–3, 66–7, 73, 76, 95, 101, 117, 122–3, 149, 161, 168, 192, 200, 207
morals see non-trade objectives
Moses, Shai 91–4
most-favoured nation treatment see MFN treatment
Multilateral Agreement on Investment see MAI
multilateralisation 122

de facto 122

Munro, James 57, 122–3, 161, 168, 192

Natens, Bregt 5, 82, 91

see also differential treatment; discrimination

in investment chapters 106, 109, 126–7, 154–5, 235–6
in services chapters 106, 127, 235–6

‘negative list’ approach 29, 83, 85, 91–101, 105–10
in investment chapters 88, 154
in services chapters 86–9, 104, 116, 119, 127, 247

see also ‘positive list’ approach

Newcombe, Andrew 140, 160
non-conforming measure see NCM
non-discrimination 86, 92, 112, 133, 153, 200–1, 207

see also discrimination
non-economic objectives see non-trade objectives
non-trade objectives 121
education 52, 100, 104, 106–7, 119
environmental protection 29, 38, 199–244, 246, 248
safety and security 2, 5, 63, 111, 113, 149, 156, 190, 200, 214
technological development 41
public health 5, 29, 38, 72, 74–5, 104, 106–7, 110–11, 119, 121, 144, 149, 151, 155–9, 176, 178, 190, 192, 194, 200, 227–9, 234, 246
public morals 111, 156–8, 190, 200, 227
public order 111–12, 156, 158, 190

Nottage, Luke 169, 172, 177, 180–1
objective see illegitimate objective; legitimate objective
order see public order
patents see intellectual property
pharmaceuticals 2, 30, 67–9, 71, 78, 151, 194
see also intellectual property
Pincus, Jonathan 15
plain packaging 58–63, 141
policy objective see regulatory purpose
policy space 2, 6, 26, 29, 38, 83, 100, 119, 121–2, 128, 150, 161, 212, 224, 235, 244–257
see also regulatory autonomy
Pomfret, Richard 14–15, 21–2
‘positive list’ approach 86–7, 91–2, 97, 114
in investment chapters 83, 86
in services chapters 83, 95, 99, 101, 103–4, 119
see also ‘negative list’ approach
preferential trade agreement see PTA
procurement see government procurement
protectionism 20, 85
disguised protectionism 5, 217, 256
PTA agreements see Table of Treaties definition of xvii, 1–7
disputes see Table of Cases historical development of 7–13, 17–39
public health see non-trade objectives
public morals see non-trade objectives
public order see non-trade objectives
Reed, Lucy 135
regulatory autonomy
constraints on environmental protection regulation 236–9, 257
definition of 3–13
see also policy space
constraints on regulatory autonomy 3–13, 203–26
constraints on the protection of foreign investors 39, 225
constraints on the protection of intellectual property 40–3, 49–50, 78
constraints on the regulation of services 38, 61–5, 81–120
regulatory goal see regulatory purpose
regulatory purpose 207, 226
regulatory harmonisation 21, 248
see also harmonisation
Reinisch, August 184
remedies 2, 8, 57, 96, 98, 127
damages 134, 240, 242–3
right to regulate see balance
Rimmer, Matthew 42, 54, 60, 67, 73
Roessler, Frieder 160
Roy, Martin 81, 91, 247
safety see non-trade objectives
sanitary and phytosanitary measures see SPS measures
Sauvé, Pierre 81, 87, 91–4
Schill, Stephan W. 122–3, 148, 187, 250
security see non-trade objectives
sensitive areas 83, 100
services exceptions to services obligations 110–16, 152–61
see also exceptions; NCM
see also financial services; telecommunications services obligations in relation to trade in 84–110
see also ‘negative list’ approach; non-discrimination; ‘positive list’ approach
service supply 88
Sheargold, Elizabeth 36, 179, 200
Sornarajah, M. 12
SPS measures 250
standard of treatment 174, 212
minimum standard of treatment 91, 121, 130–40, 154, 157, 161–2, 204–5, 208, 212, 218–19, 221, 235
Index

fair and equitable treatment 35, 131–40, 139, 157–8, 162, 174, 179, 203–5, 209, 212–14, 217, 221–3, 225–6
Stoler, Andrew L. 39, 67
subsidies 9, 36, 84–5, 108, 119, 138–9, 151–5, 240
taxation 31, 85, 112, 114–5, 119, 125, 127, 143
technological development see non-trade objectives
telecommunications services 103, 110  see also financial services; services
tobacco 13, 80, 107, 108, 119, 136–7, 141, 149, 163, 177, 182, 197
countrol 36, 42, 57, 66, 164, 189–94
disputes 36, 43, 57–66
Townsend, Ruth 67
trade barriers see barriers to trade
trade in goods 9, 28, 82, 89, 200–1, 228–9, 231–2, 249
trade in services 19, 38, 81–120, 228, 235, 246–7  see also services
trade liberalisation 3, 9–10, 15–16, 27, 38, 81, 100, 246
trade marks see intellectual property
trade restrictiveness 4–5, 18–19, 45, 51, 54, 71–3, 90, 125–7, 130, 141, 144–5, 156, 184, 200, 227
more trade restrictive than necessary 101, 115
transparency see also transparency
mechanisms 119, 134, 185
rules 185–8, 191, 197
treaty negotiation 188–9, 245, 248, 253–5
see also treaty negotiation
treaty negotiation 23, 34, 133, 252–6
see also transparency
treaty process 34, 43, 246, 252–6
Tuthill, Lee 247
umbrella clause 136–7
van Harten, Gus 12
Viñuales, Jorge E. 57, 199, 218
Weatherall, Kimberlee 2, 30, 42, 44, 49, 51, 53, 55, 71, 80
World Trade Organization see WTO
Wouters, Jan 82
consistency of PTAs with WTO law 116–18, 201
disputes see Table of Cases; dispute settlement