Index

Anti-Dumping Agreement
  procedural fairness 33
  reasonableness 69, 71
arbitrary conduct, reasonableness
  definition 80
  IIA provisions 78–82
arbitrary measures, reasonableness
  IIA provisions 84–8
Argentina-US BIT 113–15

bilateral investment treaties (BITs)
  Argentina-US BIT 113–15
  fair and equitable treatment standard
    27–31
global trends 2
prudential exceptions 196
reasonableness 81–2
US Model BIT 29–30

see also international investment agreements

comparative studies, generally
  applicability of 17–18
  common norms and problems
    18–19
  separation and convergence of
    regimes 16–19
Comprehensive and Progressive Agreement for Trans-Pacific Partnership 2018 (CPTPP)
  covered persons 182
cross-border data flow restrictions
  171, 182, 189
effect of, limitations on 182
  investment, definition of 177
  necessity testing 189
  non-discrimination 182
Comprehensive Economic and Trade Agreement 2016 (CETA) 30, 199, 210–212

confidential information, third party
  access to 60–62
Cook, G. 51, 57
Corten, O. 53–4
cross-border data flows
  global trends 168–9
  international investment law
    covered investments 176–9
    exceptions clauses 178–9, 189–91
  fair and equitable treatment
    178–9
  fair and equitable treatment standard 178–9, 185
  jurisdiction thresholds 177–8
  necessity testing 189–91
  non-discrimination 182–3
  reasonableness 185
international trade law
  applicability of 170–71
  necessity testing 176, 186–8
  non-discrimination 170–71, 175–6, 179–81
  reasonableness 184

necessity testing
  CPTPP exception 189
  international investment law
    189–91
  international trade law 186–8
  national security exception
    176, 187–8, 190
  public policy justifications
    176, 186–7, 189
non-discrimination
  CPTPP 182
  international investment law 182–3
  international trade law 170–71, 175–6, 179–81
overview 168–9, 171–2

reasonableness
burdensome domestic regulation 184
international investment law 185
international trade law 176, 184
regime convergence, influences on 18–19
restrictions on burdensome domestic regulation 184
China's Great Firewall 172–3
CPTPP exception 189
data protection mechanisms 173, 184
data sovereignty, and 174–5
domestic law variations 169, 172–3
EU-US Privacy Shield 181
identification challenges 172
implications for trade 169–73
justifications for 169–76, 186–9
national security, and 174, 176, 187–8, 190
public policy objective 176, 186–7, 189
Strasbourg Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data 2005 181
customary international law
denial of justice concept 24–5
international trade and investment law, applicability to 9
legal principles in 8–9
necessity defence 93–4, 113–18, 121–3, 189–90
objective and subjective elements of 8–9
opinio juris 8
treaty interpretation rules 11–13, 136

Danneman, G. 16
denial of justice concept 24–5, 29–31
access to justice, and 37–9
substantive due process violations 46–7

swift court action, and 44
discriminatory conduct see non-discrimination
discriminatory measures see non-discrimination
Dispute Settlement Understanding
necessity testing 107–8
reasonableness 65–6, 70–71, 89
domestic law
cross-border data flow restrictions, and 184
inconsistencies and flaws, reasonableness of 62–4
due process see procedural fairness
Dworkin, R. 5–6, 20, 55
economic crisis
definition 190
prudential regulation, implications for 192, 195
fairness standards see procedural fairness
foreign investors
fair and equitable treatment of 9, 27–9
denial of justice, and 37–9
object of IIAs, as 138–9
non-discrimination
cross-border data flow restrictions, implications of 183
IIA non-discrimination clauses 138–9
protection of, prudential regulation implications for 194–6
Freeman, A.V. 37

Gardner, J. 53, 55

GATS
Annex on Financial Services 194–5, 197–205, 211
market access obligation 175, 194
necessity testing
cross-border data flow
restrictions, and 186–8
general exceptions 97–108, 111, 190–91
national security exception 187–8
public policy justification 186–7, 189
non-discrimination
appropriate comparators 131, 133, 149
cross-border data flow restrictions, and 170–71, 175–6, 179–81
general exceptions 140, 163, 170–71, 176
national treatment/most-favoured nation 129, 131–3, 170–71, 175–6, 179–81, 194
standard of treatment 131–3, 136, 155–8, 163–4
procedural fairness obligations 25–6, 32–6
review mechanisms 39, 43–4, 47
prudential exceptions 197–9, 211
anti-abuse safeguards 198–9
applicability, three step test 201–5
judicial interpretation 199–205
reasonableness
cross-border data flow restrictions, and 184–5
reasonable impartial and uniform administration of measures 58–9
reasonable terms and conditions/reasonable security 69
scope of coverage 132
trade liberalisation 194–5, 197–8
GATT
necessity testing
abuse of exceptions, safeguards against 104–5
general exceptions 97–108, 111, 190–91
measure's contribution to objective 100
reasonable alternative measures, consideration of 97–8, 101–5
relevant public interests 98–9
SPS Agreement, comparison with 110–111
TBT Agreement, comparison with 105–8
trade-restrictiveness of measure 100–101
weighing and balancing stage 97–101
non-discrimination
appropriate comparators 130–31, 133, 141–2, 149
general exceptions 139–40, 163
most-favoured nation 129–33
national treatment obligation 129–33
standard of treatment 130–31, 133, 136, 151–5, 163–4
procedural fairness obligations 21, 25–6, 32–6
review mechanisms 39, 43–4, 47, 214
reasonableness
administrative practice flaws and inconsistencies 64–7
domestic law, inconsistencies with 62–4
excluded measures 59
justifiable administration 67–8, 75
reasonable expectations and non-violation complaints 73, 75
reasonable, impartial and uniform administration of measures 58–68, 75, 88–9
reasonable or rational relationship tests 74–5
reasonable terms and conditions/reasonable security 69–70, 75
third party access to confidential information 60–62
good faith, principle of 13, 190

Hart, H.L.A. 126
Hinze, Otto 16
International Court of Justice

general principles of law, recognition of 9–10

international economic law, generally

legal principles

flexibility and cohesiveness, and 20, 216–18

interpretation aid, as 11–13, 215

justification for rule creation, as 11

non-interpretative uses 13

role of principles for 11–13, 214–18

sources of principles for 7–10

tribunals, use by 13

reasonableness, and justifications, need for 55–7, 90

role in, generally 51–3, 56–7, 90

international investment agreements (IIAs)

economic development goals 137–8

fair and equitable treatment standard 24–8

customary minimum standard 28–9

foreign investors, protection of 9, 27–9

non-discrimination, overlap with 133–4

non-impairment clauses 82

reasonableness, overlap with 78–82, 86–8

violation, by government conduct 29–31, 40–43

foreign investors, protection of fair and equitable treatment 9, 27–9

object of agreement, as 138

global trends 2

investments

definition of 176–7

treaty protection, jurisdiction implications 177–8

reasonableness

cross-border data flow restrictions 176–9

covered investments 176–9

exceptions clauses 178–9, 189–91

fair and equitable treatment obligations, role in 78–82, 86–8

justifiable measures 84–8

non-impairment clauses 82

prudential exceptions 196, 198, 208–10

unreasonable, discriminatory or arbitrary conduct 78–82

essential security interests

justification 113–18, 190

non-impairment clauses 81–4, 87–8

object and purpose 137–9

prudential exceptions 196, 198, 208–10

reasonableness

cross-border data flow restrictions 185

fair and equitable treatment obligations, role in 78–82, 86–8

justifiable measures 84–8

non-impairment clauses 82

prudential exceptions 208–10

unreasonable, discriminatory or arbitrary conduct 78–82

international investment law

cross-border data flow restrictions 177–8

covered investments 176–9

exceptions clauses 178–9, 189–91

fair and equitable treatment obligations 178–9

fair and equitable treatment standard 178–9, 185

jurisdiction thresholds 177–8

necessity testing 189–91

non-discrimination 182–3

reasonableness 185

customary international law, and 9

fair and equitable treatment standard 24–31

comparison with WTO obligations 33–6

cross-border data transfer restrictions 178–9

customary minimum standard 28–9

denial of justice, and 29–31

foreign investors, protection of 9, 27–9

non-discrimination, overlap with 133–4

non-impairment clauses 82

reasonableness, overlap with 78–82, 86–8

violation, by government conduct 29–31, 40–43

Andrew D. Mitchell and Elizabeth Sheargold - 9781788973670
Downloaded from Elgar Online at 04/26/2022 06:48:56AM via free access
violation, judicial interpretation of 28–9, 43
international trade law, and
separation and convergence of regimes 16–19
necessity testing
cross-border data flow restrictions 178–9, 189–91
customary international law defence 93–4, 113–18, 121–3, 189–90
essential security interests justification 113–18, 190
exception clauses 121–3, 178, 189–91
IIAs, adoption in related provisions 118–20
indirect expropriation or discrimination 119–20
investor’s expectations, and 118–19
judicial interpretation trends 113–18
least-restrictive means analysis 118–21
legal certainty, and 121–2
non-precluded measures and exceptions clauses 113–18
proportionality, and 119–20
role in 121–4
use inconsistencies 112–13, 121–4
WTO approach, comparison with 114–15, 122–3
non-discrimination
aims or effects approach 158–62, 183
appropriate comparators 134–6, 146–9, 158–9
arbitrary or discriminatory measures prohibitions 133–4, 183
comparison approaches 158–9
cross-border data transfer restrictions 178–9, 182–3
exceptions clauses 139–40, 178–9, 215
fair and equitable treatment standard, overlap with 133–4
indirect expropriation or discrimination 119–20, 133
national treatment/most-favoured nation treatment 133–5, 182–3
necessity testing 119–20
non-discrimination clauses 133–6
object and purpose 137–9, 162, 165
regulatory purpose, relevance of 148–9, 158–61
required standard of treatment 134–5, 158–61
prudential regulation
anti-abuse safeguards 198–9
drafting variations 196–9
expropriation claims 205–10
fair and equitable treatment standard, and 207–8
foreign investment protection, relationship with 194–6
IIA provisions 198
investor-state tribunal interpretation 205–12
non-cooperative jurisdictions, and 199–205
proportionality 208–10
prudential exceptions 198, 205–12
reasonableness 202–5, 207–10, 207–11
three-step test 201–5
use, reasons for 196
reasonableness 76
cross-border data transfer restrictions 178–9, 185
fair and equitable treatment obligations, role in 78–82, 86–8
host state conduct, reasonableness requirements 77–82
investor-state tribunals
interpretations 82–8
investor's expectations 78–9, 83–4, 87–9
justifiable measures 84–8
non-impairment clauses 82
unreasonable, discriminatory or arbitrary conduct 78–82
unreasonable or arbitrary measures 84–8
WTO approach, comparison with 78, 88–9
treaty protection
cross-border data flows, applicability to 177–8
scope of 177
international trade law
cross-border data flow restrictions
applicability of 170–71
necessity testing 176, 186–8
non-discrimination 170–71, 175–6, 179–81
reasonableness 184
customary international law, and international investment law, and separation and convergence of regimes 16–19
necessity testing
abuse of exceptions, safeguards against 104–5
GATT/GATS general exceptions 97–108
IIAs approach, comparison with 114–15, 122–3
least-restrictive means analysis 102–4, 109–12, 116
measure's contribution to objective 100
non-fulfilment risks, relevance of 107–8
reasonable alternative measures, consideration of 97–8, 101–5
relevant public interests 98–9
SPS Agreement 108–12
standards, coherence of 111–12
TBT Agreement 105–8, 111–12
trade-restrictiveness of measure 100–101, 105–11
uses, generally 96, 123
weighing and balancing stage 97–101, 106, 109–12, 116
non-discrimination
aims or effects approach 152–8
appropriate comparators 130–31, 133, 141–6, 149–50
exceptions 154–6, 163
internal taxes and regulations 129–30, 133
judicial interpretation 142–6, 151–8, 164–5
national treatment/
most-favoured nation treatment 129–33, 179–81
object and purpose 136–7, 162, 165
regulatory purpose, relevance of 144–6, 151–3
required standard of treatment 130–33, 151–8, 164–5
procedural fairness requirements 25–6, 32–6
comparison with fair and equitable treatment standard 33–6
prompt and independent review 32–3, 39, 43–4, 47, 214
prudential regulation
anti-abuse safeguards 198–9
conflicts and inconsistencies with 195–6, 199–205
drafting variations 196–9
GATS Annex on financial services 195, 197–205, 211
judicial interpretation 199–205
national treatment/
most-favoured nation obligations 194–6
non-cooperative jurisdictions, and 199–205
reasonableness 202–5
three-step test 201–5
trade liberalisation, and 193–6
use, reasons for 196
reasonableness
administrative practice flaws and inconsistencies 64–7
common themes 57, 75–6
definitions 59–60
domestic law, inconsistencies with 62–4
excluded measures 59
flexibility 75–6
IIAs approach, comparison with 78, 88–9
justifiable administration 67–8, 75
reasonable expectations and non-violation complaints 73, 75, 89, 215
reasonable impartial and uniform administration of measures 58–68, 75, 88–9
reasonable or rational relationship tests 73–5
reasonable periods of time 70–72, 76
reasonable terms and conditions/reasonable security 69–70, 75
standards of reasonableness, judicial adoption of 72–5
third party access to confidential information 60–62
investor-state tribunals
global trends 2
non-discrimination 164–5
aims or effects approach 158–62
individual investor approach 158–9, 165
proportionality tests 161
regulatory purpose 159–61
procedural fairness 37–9
prudential exceptions 207–12
reasonableness 82–8
investor's expectations
reasonableness 78–9, 83–4, 87–9

legal certainty
necessity testing, and 121–2
reasonableness principle, conflicts with 53–4, 212–13
legal principles
comparative studies
purpose of 14–15
similarities and differences, importance of identification of 15–16
customary international law, of 8–9
definition 4–6
descriptive approach 6–8
flexibility and cohesiveness, and 20, 216–18
general principles, recognition and identification 9–10
international economic law, and interpretation aid, as 11–13, 215
justification for rule creation, as 11
non-interpretative uses 13
role of principles for 11–13, 214–18
sources of principles for 7–10
tribunals, use by 13
international investment law, of 8–9, 13
international trade law, of 8–9, 13
normative approach 6–8
proportionality, and 20–21
rules, relationship between 5–7
theories of 6–8
weight concept 5–6, 20
most-favoured nation treatment see non-discrimination
national security exception
cross-border data flow restrictions, and 174, 176, 187–8, 190
international investment law 113–18, 190
national treatment see non-discrimination
necessity testing
cross-border data flow restrictions
CPTPP exception 189
international investment law 189–91
Index

international trade law 186–8
national security exception 176, 187–8, 190
public policy justifications 176, 186–7, 189
definition 94–5
generally 20–21, 92
application variations 94–5, 123–4
value of 123–4
international investment law
customary international law
defence 93–4, 113–18, 121–3, 189–90
essential security interests
justification 113–18
exception clauses 121–3, 190–91
IIAs, adoption in related provisions 118–20
indirect expropriation or discrimination 119–20
investor's expectations, and 118–19
judicial interpretation trends 113–18
least-restrictive means analysis 118–21
legal certainty, and 121–2
non-discrimination 119–20, 133–4
non-precluded measures and exceptions clauses 113–18
proportionality, and 119–20
role in 121–4
use inconsistencies 112–13, 121–4
WTO approach, comparison with 114–15, 122–3
least-restrictive means analysis 102–4, 109–12, 116
measure's contribution to objective 100
national security exception 176, 187–8
non-fulfilment risks, relevance of 107–8
public policy justifications 176, 186–7
reasonable alternative measures, consideration of 97–8, 101–5
relevant public interests 98–9
SPS Agreement 108–12
standards, coherence of 111–12
TBT Agreement 105–8, 111–12
trade-restrictiveness of measure 100–101, 105–11
uses, generally 96, 123
weighing and balancing stage 97–101, 106, 109–12, 116
least restrictive means analysis 94–5
proportionality, and 94–5
reasonableness, and 56, 86–7, 90, 94, 210
non-discrimination
appropriate comparators
identification approaches, generally 140
international investment law 134–6, 146–9, 158
international trade law 130–31, 133, 141–6, 149–50
regulatory purpose, relevance of 144–6, 148–50
cross-border data flow restrictions
CPTPP 182
international investment law 182–3
international trade law 170–71, 175–6, 179–81
definition and interpretation
appropriate comparators 130–33
common themes 134–6, 164–5
context, role of 136–9
difficulties 138–9
less favourable treatment 130–31, 133, 154–6, 158, 162–3
overview 126–7, 164
required standard of treatment 130–33
scope of obligation 126–7
discriminatory conduct, reasonableness 80
discriminatory measures, reasonableness 84–8
exceptions clauses 139–40
interdisciplinary rule borrowing 17–18
international investment law
aims or effects approach 158–62, 183
appropriate comparators 134–6, 146–9, 158–9
arbitrary or discriminatory measures prohibitions 133–4, 183
comparison approaches 158–9
exceptions clauses 139–40
fair and equitable treatment standard, overlap with 133–4
indirect expropriation or discrimination 119–20, 133
national treatment/most-favoured nation treatment 133–5
necessity testing 119–20
non-discrimination clauses 133–6
object and purpose 137–9, 162, 165
regulatory purpose, relevance of 148–9, 158–61
required standard of treatment 134–5, 158–61
international law, general role in 126
international trade law
aims or effects approach 152–8
appropriate comparators 130–31, 133, 141–6, 149–50
cross-border data flow restrictions, applicability to 170–71, 175–6, 179–81
exceptions 154–6, 163, 170–71
internal taxes and regulations 129–30, 133
judicial interpretation 142–6, 151–8, 164–5
national treatment/most-favoured nation treatment 129–33, 179–81
object and purpose 136–7, 162, 165
regulatory purpose, relevance of 144–6, 151–3
required standard of treatment 130–33, 151–8, 164–5, 175–6
investor-state tribunals, interpretation by 164–5
aims or effects approach 158–62
individual investor approach 158–9, 165
proportionality tests 161
regulatory purpose 159–61
national treatment/most-favoured nation treatment
common themes 134–6
cross-border data flow restrictions, and 179–83
international investment law 133–5
international trade law 129–33, 179–81
object and purpose
non-discrimination provisions 136–9
reasonableness, and discriminatory conduct, of 80
discriminatory measures, of 84–8
required standard of treatment 151
exceptions 154–6
international investment law 134–5, 158–61
international trade law 130–33, 151–8
Index

optimal approach 161–4
regulatory purpose, relevance of 144–8, 152–64
non-impairment clauses 81–4, 87–8
North American Free Trade Agreement 1994 (NAFTA)
anti-abuse safeguards 199
financial services provisions 194–5
national treatment obligations 120
non-discrimination 18
procedural fairness 31, 86
prudential exceptions 205–10

procedural fairness
comparability of fairness obligations 33–6, 47–8
colors in 24
definitions 23–4, 30–31, 35
denial of justice concept, and 24–5, 29–31
access to justice, and 37–9
substantive due process violations 46–7
swift court action 44
fair and equitable treatment standard, international investment law 24–31
comparison with WTO obligations 33–6
cross-border data flow restrictions 178–9, 185
customary minimum standard 28–9
denial of justice, and 29–31
foreign investors, protection of 9, 27–9
non-discrimination, overlap with 133–4
non-impairment clauses 82
prudential exceptions 207–8
reasonableness, overlap with 78–82, 86–8
violation, by government conduct 29–31, 40–43
violation, judicial interpretation of 28–9, 43
fairness in practice
access to review 25, 31, 37–9, 48, 214
ex parte proceedings 41–3
interested party's right to be heard 40–41
procedural due process 25, 31, 39–44
promptness of review 43–4
reasonable opportunity to understand claims 43
reasonableness principle, overlap with 45
substantive due process 25, 31, 44–7
violations by conduct 40–43
fairness requirements, international trade law 25–6, 32–3
comparison with FET standard 33–6
prompt and independent review 32–3, 39, 43–4, 47, 214
overview 23–4
proportionality
necessity testing, and 94–5, 102–4, 119–20
non-discrimination, investor-state tribunal interpretation 161
principle, role as 20–21
prudential exceptions, of 208–10
prudential regulation, and 212
reasonableness, and 56, 85–8, 210
stricto sensu 95
unreasonable or arbitrary measures 85–6
prudential regulation exceptions
anti-abuse safeguards 198–9
applicability, three-step test 201–5
drafting variations 196–9
GATS Annex, and 197–205
IIs, in 198
investor-state tribunal interpretation 205–11
non-cooperative jurisdictions, and 199–205
proportionality 208–10
reasonableness 202–5, 207–10
use, reasons for 196
WTO judicial interpretation 199–205
global financial crisis implications for 192, 195
international investment law
expropriation claims 205–10
fair and equitable treatment standard, and 207–8
foreign investment protection, relationship with 194–6
investor-state tribunal interpretation 205–11
proportionality 208–10
prudential exceptions 198, 205–10
reasonableness 207–11
international trade law
conflicts and inconsistencies with 195–6, 199–205
GATS Annex on financial services 195, 197–205, 211
judicial interpretation 199–205
national treatment most-favoured nation obligations 194–6
reasonableness 202–5
trade liberalisation, and 193–6
proportionality, and 212
purpose of 192–3
reasonableness
CETA provisions 199, 210–212
judicial interpretation 202–5, 207–12
limitations of 210–213
regulatory overview 192–3
trade liberalisation, relationship with 193–6
relevant public interests 98–9
reasonableness
cross-border data flow restrictions burdensome domestic regulation 184
international investment law 185
international trade law 176, 184
definitions 55, 59–60, 87
common themes 57, 75–6
functions in legal regimes 53–4
adaptability of legal rules, and 53–5
legitimacy of legal systems, and 54
importance of 50–51, 89–90
international economic law
justifications, need for 55–7, 90
role in, generally 51–3, 56–7, 90
international investment law 76
fair and equitable treatment obligations, role in 78–82, 86–8
host state conduct, reasonableness requirements 77–82
investor-state tribunals interpretations 82–8
investor's expectations 78–9, 83–4, 87–9
justifiable measures 84–8
non-impairment clauses 82
unreasonable, discriminatory or arbitrary conduct 78–82
unreasonable or arbitrary measures 84–8
WTO approach, comparison with 78, 88–9
international trade law
administrative practice flaws and inconsistencies 64–7
cross-border data flow restrictions 176, 184
definitions 59–60
domestic law, inconsistencies with 62–4
excluded measures 59
flexibility 75–6
IIAs approach, comparison with 78, 88–9
justifiable administration 67–8, 75
reasonable expectations and non-violation complaints 73, 75, 89, 215
reasonable impartial and uniform administration of measures 58–68, 75, 88–9
reasonable or rational relationship tests 73–5
reasonable periods of time 70–72, 76
reasonable terms and conditions/reasonable security 69–70, 75
standards of reasonableness, judicial adoption of 72–5
third party access to confidential information 60–62
legal certainty, conflicts with 53–4, 212–13
necessity and proportionality, roles of 56, 85–8, 90, 210
necessity testing, comparison with 94, 210
procedural fairness principle, overlap with 45, 78–82, 86–8
prudential regulation exceptions, judicial interpretation 202–5, 207–11
limitations of 210–213
public international law, role in 51, 56–7
Wednesbury unreasonableness 55–6
rules
interpretation of 11–13, 55
legal principles, relationship between 5–7

SCM Agreement
procedural fairness obligations 33
reasonableness 71

SPS Agreement
necessity testing 105, 108–12
non-discrimination 129
reasonableness 71–2, 74

TBT Agreement
necessity testing 105–8, 111–12
non-discrimination 132–3, 140, 146, 152, 156–8, 163–4
reasonableness 72
time, reasonable period of 70–72, 76, 89
trade liberalisation development trends 194–5
prudential regulation, relationship with 193–6
treaty interpretation customary international law, and 9, 136
principles role in 11–13
TRIPS Agreement
procedural fairness obligations 25–6, 32–3, 35–6
review mechanisms 39, 44
reasonableness 69
unreasonable conduct see reasonableness
unreasonable measures see reasonableness
US Model BIT 29–30


WTO regime
background 16–17
necessity testing
abuse of exceptions, safeguards against 104–5
cross-border data flow restrictions 176, 186–8
GATT/GATS general exceptions 97–108, 186–8, 190–91
IIAs approach, comparison with 114–15, 122–3
least-restrictive means analysis 102–4, 109–12, 116
measure's contribution to objective 100
national security exception 176, 187–8
non-fulfilment risks, relevance of 107–8
public policy justifications 176, 186–7
reasonable alternative measures, consideration of 97–8, 101–5
relevant public interests 98–9
SPS Agreement 108–12
standards, coherence of 111–12
TBT Agreement 105–8, 111–12
trade-restrictiveness of measure 100–101, 105–11
uses, generally 96, 123
non-discrimination
aims or effects approach 152–8
Appellate Body interpretation 142–6, 151–8, 164–5
approach, generally 128–9, 157–8
appropriate comparators 130–31, 133, 141–6, 149–50
cross-border data flow restrictions, applicability to 170–71, 175–6, 179–81
exception clauses 139–40, 163
GATT/GATS 129–33, 136, 139–42, 151–8, 163–4, 170–71, 175–6, 179–81, 194
market access obligation, and 175
most-favoured nation 129–31, 137, 170–71, 175–6, 179–81, 194
national treatment obligation 129–31, 137, 170–71, 175–6, 179–81
object and purpose 136–7, 139, 162, 165
regulatory purpose, relevance of 144–6, 151–3
required standard of treatment 130–33, 151–8, 164–5, 175–6
SPS Agreement 129
TBT Agreement 132–3, 140, 146, 152, 156–8, 163–4
procedural fairness 25–6, 32–6
fair and equitable treatment standard, comparison with 33–6
prompt and independent review 32–3, 39, 43–4, 47, 214
reasonableness
administrative practice flaws and inconsistencies 64–7
cross-border data flow restrictions 176, 184–5
definitions 59–60
domestic law, inconsistencies with 62–4
excluded measures 59
flexibility 75–6
GATS 184–5
IIAs approach, comparison with 78, 88–9
justifiable administration 67–8, 75
reasonable expectations and non-violation complaints 73, 75, 89, 215
reasonable impartial and uniform administration of measures 58–68, 75, 88–9
reasonable or rational relationship tests 73–5
reasonable periods of time 70–72, 76, 89
reasonable terms and conditions/reasonable security 69–70, 75
standards of reasonableness, judicial adoption of 72–5
third party access to confidential information 60–62
regime scope 137
role of 2
trade liberalisation developments 194–5
treaty interpretation rules 12