Index

absolute impossibility 293–4, 296–7, 309–10
Ago, Roberto 310
amicus curiae participation 339–40
framework 340–41
international financial institutions 341–3
limitations 343–4
non-disputing party requirement 342–3
opportunities 344
significant interest requirement 343
Argentina
collective action clauses 141–2
expropriation, necessity defence 207–8
monetary transfer provisions restrictions 261
sovereign debt restructuring initiatives 120–21
regulatory powers 108–10
bail-ins
admissibility 201–2, 210
background 16
compliance concerns 245
Cyprus banking crisis 2013 195–6, 322–4
background 241–2
bail-in litigation 244
expropriation, whether 205–6
financial assistance package 242–3
investment institution influences on 200–202, 322–4
Laiki Bank restructuring arrangements 243
stability levies 242–3
state actions 241–2
substantive remedies 207–10
definition 194–5
depositor challenges 197–8
BIT rights guarantees, and 253
causation 249–53
compliance issues 253–4
human rights 252–3
no creditor worse off principle, and 252–3
successful claims 250–51
discrimination, and 205–6
expropriation 245
identification 204–6
substantive remedies 206–10
investment protection law
applicability 197–202
breaches of, as 245–6
no creditor worse off principle 252–3
non-arbitrariness 206
bank deposits
bail-ins, as breach of BITs 245–9
deposit guarantees 81, 284–9
Iceland crisis 2008, force majeure defence 282–9
investments, qualification as 199–200, 245–9
bank guarantees, arbitral interpretation 36
Bank Recovery and Resolution Directive 195
bank rescues
bail-ins
admissibility 201–2, 210
background 16
Cyprus banking crisis 2013 195–210, 241–4
definition 194–5
depositor challenges 197–8
discrimination, and 205–6
expropriation 204–10, 245

349
investment institution involvement 200–202, 322–4
investment protection law, applicability 197–202
non-arbitrariness 206
substantive remedies 206–10
causation, and 217–19, 226–36
burden-sharing principle 237–8
claimant investor behaviour 227–8, 230–36
damages reduction 229–31
due diligence, and 228
foreign creditor challenges 236–9
foreign creditor prejudice 249–53
imprudent conduct 232–6, 250–51
intervening factors 227–32
loss of opportunity 230–31
no creditor worse off principle 237–9, 252–3
prior insolvency 232–6
unjust enrichment principle, and 229–30
challenges, under BITs
causation, and 217–19, 226–36
certainty 215–16
economic loss, and 216–17
investment values, and 216
deliberative approach 80–82
due process, and 16, 206
economic loss requirement 216–19
expropriation, and 50, 204–10
Icelandic bank collapse 80–82
international investment law
bail-ins, applicability 197–202
conflicts, generally 80–82
international financial institutions, conflicts 322–4
national treatment guarantees, and 80–81
too big to fail measures 52
trends 16
Basel Committee on Banking Supervision (BCBS) 24–5
exclusions 62–3
bilateral investment treaties
see also investment arbitration;
monetary transfer provisions
capital flow measures 266–7
conflicts between 267–72
necessity defence 277–8
non-precluded measures, and 276–7, 279, 334
drafting, institutional influences on 333–4
economic loss claims
causation 217–19
requirement 218–19
generally 257–8
history 257–8
investment standards, applicability 334–5
investments
arbitral interpretations 30–33
definitions 27–8, 53–4, 80, 198–200, 213–14, 245–6
deposits, inclusion 245–9
exclusions 53–4, 178–9
investors, arbitral interpretation 37–88, 198–200
key principles 258
limitations 189–90
monetary transfer provisions
conflict avoidance mechanisms 272–6
IMF Articles, and treaty interpretation 272–6
IMF Articles, interference with 260–61, 269–72
sovereign debt restructuring, and fair and equitable treatment principle 185–7
generally 160–61
relevance 53–4, 178–9
bonds
bondholders, identification 136
investment status 199–200
investments, arbitral interpretation 30–32
Brady Initiative 120–21
Bretton Woods system collapse 62
capital flow measures
adoption trends 263–4
alternative imposition approaches 276–8
Index

benefits 264–5
BIT provisions 266–7
conflicts between 267–72
capital account restrictions 270–71
challenges to 230
contracting out 267–9, 279–80
current account restrictions 269–70
financial crisis, during 263–4, 319–20
general principles 263
IMF Articles of Agreement 264–5, 269, 320
international investment law
international financial institutions, conflicts 319–20
regulation 267–8
recognition 258–9
state regulation
alternative approaches 276–8
necessity defence 277–8
non-precluded measures 276–7, 279, 334
restrictions 267–8, 270–71
rights 262–3
systemic integration principle, and 272–6, 279
treaty interpretation, and 272–6
causation
bank rescues, and 226–36
burden-sharing principle 237–8
claimant investor behaviour 227–8, 230–36
damages reduction 229–31
due diligence, and 228
foreign creditor challenges 236–9
foreign creditor prejudice 249–53
imprudent conduct 230–51
intervening factors 227–32
loss of opportunity 230–31
no creditor worse off principle 237–9, 252–3
prior insolvency, and 232–6
unjust enrichment principle, and 229–30
BITs, challenges under 217–19
break in chain 225, 227, 250
burden of proof, and 222
establishment, difficulties with 224–6, 228–9
factual vs. legal considerations 222
force majeure defence 290–91, 312–13
general principles 221–6
indirect losses 224–5
internationally wrongful acts 219–26, 290
intervening acts 225, 227–32
proximity test 223, 231–2, 250
pure vs. transitive links 224–5
reasonableness and foreseeability 223–4
third party acts 225, 227, 250–51
central banks
deliberative approach 83–4
independence 61–2
investment tribunal interactions 83–4
liquidity control measures 65–7
scrutiny 83–4, 239
unorthodox monetary policy measures 83–4
Chile
capital flow measures 263
choice of law, jurisdiction clauses 43
claims, classification 148–9
claims to money, arbitral interpretation 32–3
collective action clauses
aggregated mechanisms 141–5
binding effect of majority decisions 131–2, 179–80
cram-down procedures, compared 148–9, 158
development 139–41
domestic regimes, and 132–4
European Stability Mechanism (ESM) 124–6, 143
generally 44, 47–8, 77
IMF promotion 140, 145
international recognition of restructuring measures 132–4
limitations 124–6, 131–2, 137, 143–4, 159, 165–6
market practice 145–6
minority creditor safeguards 153–4
national treatment principle 130–31
negotiations, principles for 127–9
procedural rules 129–30
reform proposals 137–8
retroactivity 133
role 124–6, 134, 138
single-limb voting mechanisms 137–8, 144–5, 148–9, 153–7
substantive decisions 130–31
traditional mechanisms 139–41
trends 145–6
two-limb voting mechanisms 141–4
unfair discrimination, prohibition 157
Colombia
capital flow measures 264
cram-down procedures 44
see also collective action clauses benefits 137–8
fair and equitable treatment, and 151–2, 159
limitations 159
minority creditor safeguards 149–52, 158
municipality bankruptcy, principles for 147–8
purpose 146, 148
single-limb voting CACs, compared 148–9, 158
unfair discrimination, prohibition of 149–50
Crawford, James 292
currency regulation rights 262
current account transactions, state restrictions 269–70
Cyprus
banking crisis bail-in 2013 195–6, 322–4
background 241–2
bail-in litigation 244
expropriation, whether 205–6
financial assistance package 242–3
force majeure defence 283
investment institution influences on 200–202
Laiki Bank restructuring arrangements 243
stability levies 242–3
state actions 241–2
substantive remedies 207–10
debt management practices 136–7
due diligence 163–4
international framework lack thereof 161–6
responsible lending principles 172–3
deliberative approach to law
bank rescue measures 80–82
central banks, unorthodox monetary policies 83–4
principles 69–71
priority rules 72
rules, interpretation 71–2
sovereign debt workout measures 76–9
systemic integration
general principles 72–5
pluralist understanding 74–5
deposit conversion into shares see bail-ins
deposit guarantees
Directive 81, 284–9
Iceland bank crisis 2008, force majeure defence 282–9
deposits see bank deposits
dispute settlement see investment arbitration; ISDS
Dodd-Frank Act 2010 55, 195
dollar standard 60
Dominican Republic
collective action clauses 141–2
due diligence 163–4, 187
causation, in bank rescue challenges 228
economic loss
causation, and 226–36
bank rescues 217–19, 226–36
burden-sharing principle 237–8
damages reduction 229–31
due diligence, and 228
general principles 221–6
imprudent conduct 231–6, 250–51
intervening factors 227–32

International investment law and the global financial architecture
Index

investor behaviour 227–8, 230–36
loss of opportunity 230–31
no creditor worse off principle
237–9, 252–3
prior insolvency 231–6
unjust enrichment principle, and
229–30
state responsibility 217–18
economics, generally
classical theory 59–60
interest group influences 61
macroeconomic steering 59–60,
59–61, 73–4
post-war policy development
59–60
England and Wales
sovereign debt restructuring,
regulatory powers 106–8
European Banking Union 317, 323
resolution decisions 328–9
European Central Bank
discretionary powers 66–7
liquidity control measures 65–6
Outright Monetary Transactions
Programme 65–7
powers 25
Securities Markets Programme 65–6
European Convention on Human Rights
private debts, protection 226, 251–2
private property, right to enjoyment
251–2
European Investment Framework
329–30
European Stability Mechanism (ESM)
25, 66
collective action clauses, and 124–6, 143
establishment 120, 122–3, 316
European Union
account obligations under 337
deposit guarantees 81
financial system reforms 25, 66
force majeure defence 296–304,
312–14
investment arbitrations, investment
institution defendants 344–6
mutual financial assistance regime
316–17
regulatory conflicts 201
US regulatory cooperation proposals
55–6
expropriation 50, 334
bank rescues
bail-ins 204–6, 245
generally 50
quantum of damages 208–9
substantive remedies 206–9
definition 203–4
economic value, and 219
police powers doctrine, and 98
public purpose requirement 335–7
sovereign debt restructuring, and
90–91, 93, 129, 178–9
fair and equitable treatment 334
cram-down procedures, and 151–2,
159
expropriation, and 50
financial crisis
activities during 50
breaches during 40–41, 52
holdout arbitration, and 78
legitimate expectations, and 49,
186–7, 335–6
necessity defence, and 78–9
rule of law, and 335–6
sovereign debt restructuring 323–4
conflicts 78–9, 126, 130, 185–7
workout procedures 78–9
standard, definition 155–6
substantive remedies 209–10
systemic integration principle, and
78–9, 337
Fair and Transparent Arbitration
Process (FTAP) 44
FDI, systemic risk 65
Federal Reserve liquidity control
measures 65–6
fiduciary duties
sovereign debt restructuring, and
175–6, 185
financial assistance
Cyprus banking crisis 2013 bail-in
package 242–3
EU mutual assistance regime 316–17
forms
private 123–4
public 122–3
IMF policy 39, 319–20
financial crisis
Asian crisis 1998 263–4
bank rescues
exceptional state measures 212–14
expropriation, and 50, 204–6
necessity defence 51, 207
too big to fail measures 52
trends 16, 48, 211–12
capital flow measures, and 263–4, 319–20
characteristics 122
conditionality 122–3
Cyprus banking crisis bail-in 2013 195–6, 205–6
emergency measures, validity 50–51
fair and equitable treatment, and 40–41, 50, 52
financial assistance
IMF policy 39, 319–20
private 123–4
public 122–3
financial system reforms, and 25, 54–5
force majeure defence
Cyprus 282
generally 282–4, 310–311
Iceland 2008 282–9, 310–311
ILC Articles and Commentary, and 308–10, 313–14
investment claims under BITs, and 305–15
functional separation theory, and 57–8, 64–7
Greek debt crisis 47–8, 91
Iceland deposit guarantees crisis 2008 282–9
investment institution influences on policies 48, 200–202
investment law and financial system interactions 5–6, 10, 20–22
microperspective focus impacts 64–5
necessity defence, and 51, 336–7
policy focus 64
private creditor challenges 38–42

recourse exclusions during 53–4
scrutiny during 21
sovereign debt restructuring powers 112–13
State behaviour during 38–41
systemic risk identification and treatment 64–7
transnational cooperation, influences on 6
financial regulation
deliberative approach, generally 69–71
financial crisis, and exclusions 53–4
influences on 57
functional separation theory 57–8, 64–7
international economic law, and conformity with 71–2
systemic integration 72–5
reform proposals 52–4
ring-fencing 52–3
sovereign debt definition 53–4
trends 57
financial stability
restoration, key concepts 122–3
Financial Stability Board 24–5, 68
Financial Stability Oversight Council (FSOC) 68
force majeure defence
absolute impossibility 293–4, 296–7, 309–10
choice, role 291–2, 294, 309–10
financial crisis, role
Cyprus 282
generally 282–4, 310–311
Iceland 2008 282–9, 310–311
ILC Articles and Commentary, and 308–10, 313–14
investment claims under BITs, and 305–15
foreseeability 290–92, 297–9, 307, 312, 331–2
fortuitous events, and 291–2
general principle 281, 288, 310–311, 331–2
causation 290–91, 312–13
EU law, under 296–304, 312–14
international law, and 289–95, 303–4
of law, as a 300–304, 307–8
limitations on use 303–4
thresholds 294–5
international financial institutions, and 330–32
investment arbitration
judicial interpretation 307–8
use trends 306–7
involuntary conduct 291–4, 309–10
irresistible events 290, 331–2
lex specialis vs. lex specialis 314
limitations
general principle of law, as 303–4
semi-public debt restructuring 117
material/relative impossibility 290–94, 298–9, 312–13, 332
necessity defence, and 292–5, 308–9, 311–12, 332
systemic integration principle, and 313
foreign creditors and investors
bank rescues, and causation challenges 236–9
prejudice 249–53
capital flow measures, benefits 266–7
financial crisis, force majeure defence 286–7
national treatment principle conflicts 184–5
obligations, failure to meet 168–9
foreign direct investment, systemic risk 65
Foreign Sovereign Immunities Act (New York) 43
foreseeability
causation 223–4
force majeure defence 290–92, 297–9, 307, 312, 331–2
Friedman, Milton 61
functional separation theory
adequacy 66–7
development 59–64
financial crisis influences 57–8, 64–7
foreign direct investment, and 65
generally 57–8
limitations 62–3, 67
liquidity control measures 65–7
responses and remedies 58, 67–9
Germany
sovereign debt restructuring, regulatory powers 110–111
global financial system
coordination, lack of 8–9
definition 4, 23–6
deregulation 24
development 9–10, 316–17
global financial stability, and 24–5
investment arbitration, and conflicts 23, 26–7, 45–53
interconnections 4–9, 23, 26–7, 38–45
private international creditor
access 27–30, 38–42
right to regulate, and 49–53
sovereign debt dispute settlement 42–5, 321–2
judicial forum, need for 26
liberalisation 24
limitations 8–9, 25–6
re-regulation, and 6–7, 24
Gold, Joseph 265
good faith principle
holdout arbitration, and 78–9
responsible lending principles 176
Great Depression 60
Greece
sovereign debt restructuring 47–8, 91, 320–21
collective action clauses 141–2, 157, 321
Hayek, Friedrich 61, 63–4
holdout arbitration 46–8, 77–8, 180
necessity defence, and 78–9
Iceland
financial crisis 2008, *force majeure*
defence 283–9
ICSID Convention 4
investments, definition 33–7, 199
India
Model BIT, monetary transfer
provision 280
indirect expropriation 203–4
and bail-ins 204–6
economic value, and 219
insolvency
law, purpose 129
sovereign insolvency trends 121–2
International Capital Market
Association (ICMA) 140–41, 144, 153
International Clearing Union 60
international economic law
deliberative approach
practical implications 75–84
principles 69–72
sovereign debt workout measures
76–9
systemic integration, and 72–5
rules
interpretation 72–3
priority 71–2
international financial institutions
bank rescue involvement 200–202, 322–4
criticisms 169–70
decisions, implications 317–18
establishment 24–5, 60–61, 68
financial crisis, policy influences 48, 200–202
international investment law conflicts
318–19
bank rescues 322–4
capital controls 319–20
sovereign debt restructuring
320–22
internationally wrongful acts, responsibility and liability for
317–18, 324
investment arbitration
defendants, as 344–6
investment standards, and
defence 337–8
interpretation 334–8
investment agreement drafting
333–4
proportionality 335–7
public purpose requirement 335–7
investment treaties, influences on
333–4
*lex lata* interpretation 68–9
limitations 68–9
macro-prudential role 68
piercing institutional veil 329–30
regulatory interdependence 68–9
sovereign debt restructurings, and
130–31
state rights and responsibilities, and attribution 325–30, 346–7
conditional lending 326–7
control mechanisms generally 324
EU investment framework 329–30
*force majeure* defence 330–32
resolution decisions 328–9
supra-institutional conflicts 328–9
systemic risk management role 68–9
too big to fail measures 52
transferring powers to, purpose
317–18
without prejudice clauses 20, 208
international investment agreements
debt restructuring exclusions 53–4, 178–9
drafting constraints 333–4
financial constraints qualification
under 27–30
international institutional influences
333–4
investment law interactions 9
investment protection coverage
trends 9, 54–6
investments, definition 27–30, 80, 198–200
law-making trends 21–2
limitations 21–2, 55–6
private international creditor access,
and 27–30
purpose 196–7
scrutiny exemptions 21, 82
Index

international investment law
  deliberative approach
    bank rescue measures 80–82
    central banks, unorthodox
      monetary policies 83–4
      generally 84–5
    practical implications 75–84
    principles 69–72
    sovereign debt workout measures 76–9
    systemic integration, and 72–5
  development 9
  financial stability, and 21
  functional separation theory 57–8
  holistic understanding 84
  international financial institutions,
    conflicts 318–19
    bank rescues 322–4
    capital controls 319–20
    sovereign debt restructuring 320–22
  internationally wrongful acts 218–19
    damages, and 219–21
    law-making trends 21–2
  national treatment principle 80–81,
    130–31
  international investment treaties
    expropriation rules 203–4
International Law Commission
  Articles on the Responsibility of
    State for Internationally
    Wrongful Acts 174, 208, 218–19
International Monetary Fund
  Articles of Agreement
    BIT interference with 260–61,
      270–71
    capital flow measures provisions
      264–5
    monetary transfer clauses,
      generally 260–61
    systemic integration principle, and
      272–6, 279
    treaty interpretation, and 272–6
    collective action clauses, promotion
      140, 145
    financial assistance policy 39,
      319–20

  Heavily Indebted Poor Countries
    Initiative 121
    multilateral surveillance 62
    purpose and functions 24–5
    sovereign debt restructuring reforms 158
International Organisation of Supreme
  Audit Institution (INTOSI) 174
International Organization of Securities
  Commissions (IOSCO) 24–5
internationally wrongful acts
  force majeure defence 281–2,
    289–91, 303–4, 308–10, 313–14
  general principle 331
  institutional responsibilities and
    liabilities 317–18, 324
  necessity defence 277–8
  state rights and responsibilities 174,
    208, 218–19, 317–18
  attribution 325–30, 346–7
  causal relationships, and 219–26,
    290
  damages, and 219–21
  EU investment framework 329–30
  resolution decisions 328–9
investment arbitration
  amicus curiae participation 339–40
    framework 340–41
  international financial institutions
    341–3
  limitations 343–4
  non-disputing party requirement 342–3
  opportunities 344
  significant interest requirement 343
  choice of jurisdiction clauses 43
  dispute settlement mechanisms
    generally 4
  ISDS sovereign debt claim
    disputes 42–5, 321–2
  parallel proceedings, and 45, 48
  force majeure defence
    judicial interpretation 307–8
    use trends 306–7
  global financial system, and
    conflicts 23, 26–7, 45–53
    interconnections 23, 26–7, 38–45
private international creditor
access 27–30, 38–42
right to regulate, and 49–53
sovereign debt dispute settlement
mechanism 42–5
IMF capital flow measures policy 320
implications 7
international investment institutions,
and 338
amicus curiae participation
339–44
defendants, as 344–6
investment treaties, framework under
advantages 177–8
consistency, need for 180–82
investment, definition exclusions
53–4, 178–9
legitimacy concerns 182–3
limitations 177–83
sovereign debt, relevance to
177–83
standards, lack 180–82
investor behaviour influences 187–8
methods, choice 196–7
practice development trends 29–30
protected investments
arbitral interpretation trends 30–33
definition 27–30
sovereign debt restructuring
collective action clause claims
154–7
generally 135–6
holdout arbitration 46–8, 77–8, 180
investment treaties, under 177–83
judicial proceedings 90–92, 94
trends 29–30
investment risks principle 49–50
investment standards
deferece 337–8
interpretation 334–8
investment agreement drafting 333–4
proportionality 335–7
public purpose requirement 335–7
systemic integration principle, and
337–8
investments
bank guarantees as 36
bonds as 30–32
claims to money as 32–3
definition
bank deposits as 245–9
BITs, under 27–33, 53–4, 80, 196, 198–200, 213–14, 245–6
double-barrelled test 33–5
ICSID Convention, under 33–7, 199
intention of contracting parties,
and 34–7
interpretation, arbitral practice
30–33
limitations 54–5
objective requirement approach
34–6
Salini test 34–5, 80
sovereign debt, exclusion from
53–4, 94, 178–9
loans as 31–3
majority shareholding as 29
promissory notes as 36
investor behaviour
bank rescues, causation 227–8,
230–36
imprudent conduct, and 231–6,
250–51
investment arbitration, relevance
187–8
investor protection
investment risks principle, and 49–50
law, development influences 63
investor-state dispute settlement see
ISDS
investors
arbitral interpretation 37–8
business interests, influences of
136–7
definition 37–8, 198–200, 245–6
right to regulate, and 49–53
investors rights, limitations 7
ISDS (investor-state dispute settlement)
amicus curiae participation 339–40
framework 340–41
international financial institutions
341–3
limitations 343–4
non-disputing party requirement
342–3
opportunities 344
significant interest requirement 343
collective action/ cram-down clauses 44, 47–8, 77, 158–9
forum shopping 43
holdout arbitration impacts 46–8
limitations and conflicts 45–6
parallel proceedings 45, 48
sovereign debt claim disputes 42–5, 321–2
Italy
bank rescues, investor protection challenges 232–3
Jenks, Wilfred 270
Keynes, John Maynard 59–60, 62, 73–4
Laiki Bank see Cyprus
law, generally
deliberative approach 69–71
general principles
force majeure defence as 300–304, 307–8
rule of law, public purpose 335–6
indeterminacy impacts on 70–71
paradoxes 69–70
legitimate expectations
fair and equitable treatment 49, 186–7, 335–6
transparency, and 186–7
lex generalis, force majeure defence 314
lex specialis, force majeure defence 314
loans, arbitral interpretation 31–3
London Club 136

macroeconomic steering 59–60, 73–4
Malaysia
capital flow measures 263–4
material impossibility 290–94, 298–9, 312–13, 332
monetary transfer provisions
see also capital flow measures
BIT provisions 266–7
conflict avoidance measures 272–6

IMF Articles, and treaty
interpretation 272–6
IMF Articles, interference with
260–61, 269–72
classification 258–9
contracting out 267–9, 279–80
exceptions and deviations 259–61
foreign investor benefits 266–7
functions 266–7
non-precluded measures 276–7, 279, 334
systemic integration principle, and
272–6, 279
Type I obligations 258–9
Type II obligations 259–61
most favoured nation treatment
sovereign debt restructuring, and
130–31

national treatment guarantees 80–81
national treatment principle
collective action clauses 130–31
international investment law, and
80–81, 130–31
sovereign debt, conflicts 184–5, 189
necessary third party concept 344
necessity defence
capital flow measures 277–8
expropriation, in bank rescues 51, 207
financial crisis 51, 336–7
force majeure defence, and 292–5, 308–9, 311–12, 332
holdout arbitration, and 78–9
internationally wrongful acts, and
277–8
investment standards, and 334
purpose 207
right to regulate, and 112
sovereign debt restructuring 112, 128
systemic integration principle, and
75, 337
no creditor worse off principle 237–9, 252–3
non-precluded measures 276–7, 279, 282, 289, 334
obligation, arbitral interpretation 30
odious debt theory 127–8
Outright Monetary Transactions Programme 65–7
Paris Club 135–6, 165
Paulwelyn, Joost 270
pecuniary loss see economic loss
Peru
bank rescues, investor protection challenges 233–6
police powers doctrine see under sovereign debt restructuring
Ponzi schemes 41–2
Principles on Responsible Sovereign Lending and Borrowing (PRSLBs)
binding nature and enforcement 176–7
doctrine and enforcement 176–7
crises, state behaviour challenges 38–42
ISDS, validity as dispute settlement mechanism 42–5
private debt restructuring, state powers 114–16
private financial assistance, forms 123–4
promissory notes, arbitral interpretation 36
property rights restriction measures, validity 251–2
right to enjoyment of personal property 251–2
proportionality
investment standards, and 335–7
personal property rights restrictions 252
protected investments
definition 27–30, 245–6
interpretation, arbitral practice 30–33
proximity test, causation 223, 231–2, 250
public financial assistance, forms 122–3
public good defence 107
public interest, personal property rights restrictions 251–2
public purpose requirement, investment standards 335–7
quasi-sovereign debt restructuring 116–18
re-regulation 6–7, 24
reasonableness, causation 223–4
relative impossibility 290–94, 298–9, 312–13, 332
right to regulate see state rights and responsibilities
ring-fencing 52–3
Romania
force majeure defence 307
rule of law 335–6
Russian Federation
force majeure defence 308
sovereign debt restructuring, regulatory powers 105–6
Sax, Joseph 97–8
scrutiny
central banks 83–4, 239
financial crisis, during 21
international investment agreement exemptions 21, 82
Securities Markets Programme 65–6
security entitlements, arbitral interpretation 30–31
semi-public debt restructuring, state powers 116–18
shareholder interests, as form of investment 29
Single Resolution Board (SRB) 317, 323, 337
sovereign debt, generally
bonds, role 136
debt management practices 136–7
international framework, lack 161–6
responsible lending principles 172–3
default, international law
implications 92–3
dispute settlement
collective action/ cram-down clauses 44, 47–8, 77, 158–9
difficulties 136–7
forum shopping 43
holdout arbitration 46–8, 77–8, 180
ISDS mechanisms 42–5, 321–2
negative impacts 45–52
parallel proceedings 45, 48
pari passu clauses 43
positive impacts 42–5
reform proposals 44–5
foreign investors, failure to meet obligations 168–9
international framework
cohesion, need for 161–6
limitations 161–2
investment, exclusion from definition 53–4, 94, 178–9
police powers doctrine 49–53, 91–4
Argentina, in 108–10
background 90–91
England and Wales, in 106–8
financial crisis, and 112–13
Germany, in 110–111
international law, and 96–9, 112–13
judicial rulings 90–92, 94, 99–114
justification for 98–9
modification, influences on 111–14
necessity defence 112
principle 96–9
private debt restructuring 114–16
Russian Federation, in 105–6
semi-public/ quasi-sovereign debt restructuring 116–18
standards, national interpretations 99–114
US, in 101–5
political influences 136
renegotiation procedures 135–6
responsible lending and borrowing principles (PRSLBs)
binding nature and enforcement 176–7
co-responsibility principles 174–5, 187–8
debt management practices 172–3
development 161, 170
fiduciary duties, and 175–6, 185
fragmentation, influences on 171–3, 189–90
good faith principle, and 176
investor behaviour, and 187–8
legitimacy, influences on 173–7, 189–90
limitations 188–90
purpose 170–71, 189–90
trends 76–7
Sovereign Debt Resolution Mechanism (SDRM) 76
sovereign debt restructuring
see also Principles on Responsible Sovereign Lending
adverse consequences 89–90
applicable laws 136–7
collective action clauses
aggregated mechanisms 141–5
binding effect of majority decisions 131–2, 179–80
cram-down procedures, compared 148–9, 158
development 139–41
domestic regimes, and 132–4
European Stability Mechanism (ESM) 124–6, 143
generally 44, 47–8, 77
IMF promotion 140, 145
international recognition of restructuring measures 132–4
limitations 124–6, 131–2, 137, 143–4, 159, 165–6

Index

Christian J. Tams, Stephan W. Schill and Rainer Hofmann - 9781785368882
Downloaded from Elgar Online at 08/19/2019 12:29:51AM
via free access
market practice 145–6
minority creditor safeguards 153–4
national treatment principle 130–31
negotiations principles 127–9
procedural rules 129–30
reform proposals 137–8
retroactivity 133
role 124–6, 134, 138
single-limb voting mechanisms 137–8, 148–9, 153–7
substantive decisions 130–31
traditional mechanisms 139–41
trends 145–6
two-limb voting mechanisms 141–4
unfair discrimination, prohibition 157
conflicting state roles 169–70
contractual restrictions 127–8
debt exchanges 130
developer-creditor negotiations opening, principles 127–9
role 123–4
deliberative approach 76–9
domestic regimes, under 132–4
expropriation, and 90–91, 93, 98, 129, 178–9
factors influencing 89–90
fair and equitable treatment, and 78–9, 126, 130, 185–7, 232–4
fiduciary duties, and 175–6, 185
good faith principle, and 79
Greek debt crisis 47–8, 91, 320–21
collective action clauses 141–2, 157, 321
holdout arbitration 46–8, 77–8, 180
international financial institutions international investment law conflicts 320–22
role 130–31
international framework coordination, lack 161–6
standards and practice 126–7
international law conflicts 126–7
investment arbitration collective action clause claims 154–7
generally 135–6
holdout arbitration 46–8, 77–8, 180
judicial proceedings 90–92, 94
legitimacy issues 167–70, 173–7
legitimate expectations, and 186–7
London and Paris Clubs 135–6
negotiations format 135–6
odious debt theory, and 127–8
principles 135
public interest role 167
purpose 89
repudiation, passive vs. positive 92–3
right to regulate (police powers doctrine)
Argentina, in 108–10
background 90–91
England and Wales, in 106–8
financial crisis, and 112–13
Germany, in 110–11
international law, and 96–9, 112–13
judicial rulings 90–92, 94, 99–114
justification for 98–9
modification, influences on 111–14
necessity defence 112
private debt restructuring 114–16
Russian Federation, in 105–6
semi-public/quasi-sovereign debt restructuring 116–18
standards, national interpretations 99–114
US, in 101–5
state rights 91–4
UNCTAD principles background 15, 90–91, 161
purpose 15, 127, 157
workout measures 76–9
Sovereign Debt Tribunal 44
sovereign immunity, limitations 43
sovereign insolvency trends 121–2
state rights and responsibilities
currency regulation 262–3
fiduciary relationships, and 175–6, 185
Index

<table>
<thead>
<tr>
<th>Financial Crisis, International Law</th>
<th>363</th>
</tr>
</thead>
<tbody>
<tr>
<td>breaches during 40–41</td>
<td></td>
</tr>
<tr>
<td>Foreign interests, injury to 217–18</td>
<td></td>
</tr>
<tr>
<td>International Institutions, Conflicts</td>
<td></td>
</tr>
<tr>
<td>attribution 325–30, 346–7</td>
<td></td>
</tr>
<tr>
<td>Conditional Lending 326–7</td>
<td></td>
</tr>
<tr>
<td>EU Investment Framework 329–30</td>
<td></td>
</tr>
<tr>
<td>Force Majeure Defence 330–32</td>
<td></td>
</tr>
<tr>
<td>Internationally Wrongful Acts 174,</td>
<td></td>
</tr>
<tr>
<td>208, 218–19, 317–18</td>
<td></td>
</tr>
<tr>
<td>Causal Relationships, and 219–26, 290</td>
<td></td>
</tr>
<tr>
<td>Damages, and 219–21</td>
<td></td>
</tr>
<tr>
<td>Force Majeure Defence 281–2,</td>
<td></td>
</tr>
<tr>
<td>289–91, 303–4, 308–10, 313–14</td>
<td></td>
</tr>
<tr>
<td>Necessity Defence 277–8</td>
<td></td>
</tr>
<tr>
<td>Resolution Decisions 328–9</td>
<td></td>
</tr>
<tr>
<td>pecuniary loss 217–18</td>
<td></td>
</tr>
<tr>
<td>Private Creditor Challenges 38–42</td>
<td></td>
</tr>
<tr>
<td>Public Good Defence 107–8</td>
<td></td>
</tr>
<tr>
<td>Right to Regulate 49–53, 91–4</td>
<td></td>
</tr>
<tr>
<td>Arbitral vs. Enterprise Capacity of</td>
<td></td>
</tr>
<tr>
<td>State 97–8</td>
<td></td>
</tr>
<tr>
<td>Argentina, in 108–10</td>
<td></td>
</tr>
<tr>
<td>Background 90–91</td>
<td></td>
</tr>
<tr>
<td>England and Wales, in 106–8</td>
<td></td>
</tr>
<tr>
<td>Financial Crisis, and 112–13</td>
<td></td>
</tr>
<tr>
<td>Germany, in 110–111</td>
<td></td>
</tr>
<tr>
<td>International Law 96–9, 112–13</td>
<td></td>
</tr>
<tr>
<td>Judicial Rulings 90–92, 94, 99–114</td>
<td></td>
</tr>
<tr>
<td>Justification for 97–9</td>
<td></td>
</tr>
<tr>
<td>Modification, Influences on</td>
<td></td>
</tr>
<tr>
<td>111–14</td>
<td></td>
</tr>
<tr>
<td>Necessity Defence 112</td>
<td></td>
</tr>
<tr>
<td>Principle 96–9</td>
<td></td>
</tr>
<tr>
<td>Private Debt Restructuring 114–16</td>
<td></td>
</tr>
<tr>
<td>Russian Federation, in 105–6</td>
<td></td>
</tr>
<tr>
<td>Semi-Public/Quasi-Sovereign Debt</td>
<td></td>
</tr>
<tr>
<td>Restructuring 116–18</td>
<td></td>
</tr>
<tr>
<td>Sovereign Debt Restructuring 91–4,</td>
<td></td>
</tr>
<tr>
<td>99–114</td>
<td></td>
</tr>
<tr>
<td>Standards, National Interpretations</td>
<td></td>
</tr>
<tr>
<td>99–114</td>
<td></td>
</tr>
<tr>
<td>US, in 101–5</td>
<td></td>
</tr>
<tr>
<td>Sovereign Debt Restructuring</td>
<td></td>
</tr>
<tr>
<td>Conflicting State Roles 169–70</td>
<td></td>
</tr>
<tr>
<td>Legitimacy Issues 167–70</td>
<td></td>
</tr>
<tr>
<td>Right to Regulate 91–4, 99–114</td>
<td></td>
</tr>
<tr>
<td>Systemic Integration Principle</td>
<td></td>
</tr>
<tr>
<td>Definition 73</td>
<td></td>
</tr>
<tr>
<td>fair and equitable treatment, and</td>
<td></td>
</tr>
<tr>
<td>78–9, 337</td>
<td></td>
</tr>
<tr>
<td>Force Majeure Defence, and 313</td>
<td></td>
</tr>
<tr>
<td>International Economic Law, and 72–5</td>
<td></td>
</tr>
<tr>
<td>Investment Standards Interpretation</td>
<td></td>
</tr>
<tr>
<td>337–8</td>
<td></td>
</tr>
<tr>
<td>Macroeconomic Steering, and 73–4</td>
<td></td>
</tr>
<tr>
<td>Monetary Transfer Provisions 272–6,</td>
<td></td>
</tr>
<tr>
<td>279</td>
<td></td>
</tr>
<tr>
<td>Necessity Defence, and 75, 337</td>
<td></td>
</tr>
<tr>
<td>Parties, Interpretation 273</td>
<td></td>
</tr>
<tr>
<td>Pluralist Understanding 74–5</td>
<td></td>
</tr>
<tr>
<td>Principle 272–4</td>
<td></td>
</tr>
<tr>
<td>Risks 73–5</td>
<td></td>
</tr>
<tr>
<td>Systemic Risk</td>
<td></td>
</tr>
<tr>
<td>Concept Development 64</td>
<td></td>
</tr>
<tr>
<td>Foreign Direct Investment 65</td>
<td></td>
</tr>
<tr>
<td>Systemically Important Financial</td>
<td></td>
</tr>
<tr>
<td>Institutions (SIFIs) 212–13</td>
<td></td>
</tr>
<tr>
<td>Third Parties</td>
<td></td>
</tr>
<tr>
<td>Acts of, Causation 225, 227, 250–51</td>
<td></td>
</tr>
<tr>
<td>Necessary Third Party Concept 344</td>
<td></td>
</tr>
<tr>
<td>Tinbergen, Jan 61–2</td>
<td></td>
</tr>
<tr>
<td>Title, Arbitral Interpretation 30</td>
<td></td>
</tr>
<tr>
<td>Too Big to Fail Measures 52</td>
<td></td>
</tr>
<tr>
<td>Trans-Pacific Partnership (TPP) 54–5</td>
<td></td>
</tr>
<tr>
<td>Transatlantic Trade and Investment Partnership (TTIP) 55</td>
<td></td>
</tr>
<tr>
<td>Treaty Interpretation</td>
<td></td>
</tr>
<tr>
<td>Conflict of Norms, Definition 270–72</td>
<td></td>
</tr>
<tr>
<td>Contracting Out Presumption 268–9,</td>
<td></td>
</tr>
<tr>
<td>279–80</td>
<td></td>
</tr>
<tr>
<td>IMF Articles of Agreement,</td>
<td></td>
</tr>
<tr>
<td>Incorporation 272–6</td>
<td></td>
</tr>
<tr>
<td>Impossibility 293–4</td>
<td></td>
</tr>
<tr>
<td>Investment Institution Influences</td>
<td></td>
</tr>
<tr>
<td>334–8</td>
<td></td>
</tr>
<tr>
<td>Investment Standards</td>
<td></td>
</tr>
<tr>
<td>Deference 337–8</td>
<td></td>
</tr>
<tr>
<td>Drafting 333–4</td>
<td></td>
</tr>
<tr>
<td>Interpretation 334–8</td>
<td></td>
</tr>
<tr>
<td>Proportionality 335–7</td>
<td></td>
</tr>
<tr>
<td>Public Purpose Requirement 335–7</td>
<td></td>
</tr>
</tbody>
</table>
rules 71–2
systemic integration principle 72–5, 272–6
monetary transfer provisions, and 272–6, 279
UNCTAD sovereign lending principles, and 15, 90, 127, 157

UNCITRAL
Legislative Guide on Insolvency Law 148–9, 157
Rules on Transparency 340
UNCTAD principles on responsible sovereign lending and borrowing background 15, 90, 161
purpose 15, 127, 157
unfair discrimination, prohibition collective action clauses 157
cram-down procedures 149–50
generally 156
United Kingdom regulatory powers private debt restructuring 115–16

semi-public debt restructuring 116–17
sovereign debt restructuring 106–8
United States regulatory powers private debt restructuring 101–5
semi-public debt restructuring 116–17
sovereign debt restructuring 101–5
Uruguay collective action clauses 141–3, 145
Venezuela
carre majeure defence 307–8
vulture funds 43

Waibel, Michael 45
White, Harry 60
WTO
financial market liberalisation 24
investment treaty limitations 8–9
cap development 63
priority rules 72