Substantive Protection under Investment Treaties

Substantive Protection under Investment Treaties provides the first systematic analysis of the consequences of the substantive protections that investment treaties provide to foreign investors. It proposes a new framework for identifying and evaluating the costs and benefits of differing levels of investment treaty protection and uses this framework to evaluate the levels of protection for foreign investors implied by different interpretations of the fair and equitable treatment and indirect expropriation provisions of investment treaties.

The author examines the arguments and assumptions of both supporters and critics of investment treaties, seeks to test whether they are coherent and borne out by evidence and concludes that the ‘economic’ justifications for investment treaty protections are much weaker than is generally assumed. As such, the ‘economic’ objectives of investment treaties are not necessarily in tension with other ‘non-economic’ objectives. These findings have important implications for the drafting and interpretation of investment treaties.

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Established in 1946, this series produces high quality scholarship in the fields of public and private international law and comparative law. Although these are distinct legal sub-disciplines, developments since 1946 confirm their interrelations. Comparative law is increasingly used as a tool in the making of law at national, regional and international levels. Private international law is now often affected by international conventions, and the issues faced by classical conflicts rules are frequently dealt with by substantive harmonisation of law under international auspices. Mixed international arbitrations, especially those involving state economic activity, raise mixed questions of public and private international law, while in many fields (such as the protection of human rights and democratic standards, investment guarantees and international criminal law) international and national systems interact. National constitutional arrangements relating to ‘foreign affairs’, and to the implementation of international norms, are a focus of attention.

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Substantive Protection under Investment Treaties
A Legal and Economic Analysis

Jonathan Bonnitcha
for Emily
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JONATHAN BONNITCHA
Abbreviations

ASEAN  Association of South East Asian Nations
BIT  bilateral investment treaty
CAFTA  Dominican Republic-Central America-United States of America Free Trade Agreement
COMESA  Common Market for Eastern and Southern Africa
DTT  double taxation treaty
ECHR  European Convention on Human Rights
ECT  Energy Charter Treaty
ECTHR  European Court of Human Rights
EU  European Union
FCN  Friendship, Commerce and Navigation Treaty
FDI  foreign direct investment
FET  fair and equitable treatment
FIC  Chilean Foreign Investment Commission
FTA  free trade agreement
FTC  Free Trade Commission of the North American Free Trade Agreements
ICJ  International Court of Justice
ICSID  International Center for the Settlement of Investment Disputes
IMS  customary international law minimum standard for the treatment of aliens
ITO  International Trade Organization
MFN  most favoured nation
NAFTA  North American Free Trade Agreement
OECD  Organization for Economic Cooperation and Development
PCIJ  Permanent Court of International Justice
PMRA  Canadian Pest Management Regulatory Agency
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<td>RCEP</td>
<td>Regional Comprehensive Economic Partnership</td>
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<tr>
<td>RIAA</td>
<td>Reports of International Arbitral Awards</td>
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<td>TPP</td>
<td>TransPacific Partnership</td>
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<td>TTIP</td>
<td>TransAtlantic Trade and Investment Partnership</td>
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<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<tr>
<td>UNCTAD</td>
<td>United Nations Commission on Trade and Development</td>
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<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<tr>
<td>US</td>
<td>United States of America</td>
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<tr>
<td>VAT</td>
<td>value added tax</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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