Cambridge University Press 978-1-107-04241-4 - Substantive Protection under Investment Treaties: A Legal and Economic Analysis Jonathan Bonnitcha Table of Contents More information

## Contents

	Acknowledgements	page xv
	List of abbreviations	xviii
	Table of arbitral awards and cases	XX
	Cases	XX
	Investor-state arbitral awards	xxi
	Other arbitral awards	xvii
	Table of treaties	xxviii
	Table of UN documents	xxx
1	Introduction	1
	1.1 A brief history of investment treaties	2
	1.2 The scope of the inquiry	4
	1.2.1 The evaluation of levels of protection	
	derived from existing arbitral jurisprudence	5
	1.2.2 The prospective evaluation of legal rules	6
	1.2.3 Exceptions to substantive protections	7
	1.2.4 Evaluation from a general, impartial	
	perspective	8
	1.3 Outline of the argument	11
2	The structure of existing debate	16
	2.1 Introduction	16
	2.2 Assumptions and premises in social scientific	
	scholarship on investment treaties	17
	2.2.1 'Rational actor' theories explaining why	
	states sign investment treaties	17
	2.2.2 Theories explaining the content of	
	investment treaties	18

vii

3

Cambridge University Press
978-1-107-04241-4 - Substantive Protection under Investment Treaties: A Legal and Economic
Analysis
Jonathan Bonnitcha
Fable of Contents
More information

## viii contents

	2.2.3	Summary of social scientific scholarship	20
		cisms of investment treaties	21
		Historical methodology and critique	21
		Comparative methodology and critique	22
		Razian rule of law norms as a basis for	
		critique	30
	2.3.4	Sovereignty as a basis for critique	31
		Human rights norms as a basis for critique	33
		Environmental norms as a basis for critique	37
		fications for investment treaties and	
	inves	tment treaty protections	39
	2.4.1	Realisation of treaties' purpose as a basis for	
		justification	39
	2.4.2	Consent as a basis for justification	41
	2.4.3	Norms of good governance as a basis for	
		justification	42
2.5 '	The 1	ole of secondary norms in debate about	
	inves	tment treaties	45
2.6	Syntl	nesis of existing debate, as it relates to	
	inves	tment treaty protections	48
A fr	amev	work for evaluating different levels of	
		ent treaty protection	52
3.1	Intro	duction	52
3.2	Meth	odology: the relationship between theory	
	and e	evidence	53
	3.2.1	The influence of the New Haven school of	
		law and economics	54
	3.2.2	To what extent do the decisions of arbitral	
		tribunals constitute evidence?	57
3.3	Inves	tment treaty protections as liability rules	58
3.4	Effici	ency – net economic benefits (or costs)	62
	3.4.1	The concept of efficiency	62
	3.4.2	The relationship between efficiency and	
		other consequences	63
		other consequences Theory and evidence in the efficiency	63
:		-	63 65
	3.4.3	Theory and evidence in the efficiency	
	3.4.3	Theory and evidence in the efficiency analysis	

Cambridge University Press 978-1-107-04241-4 - Substantive Protection under Investment Treaties: A Legal and Economic Analysis Jonathan Bonnitcha Table of Contents <u>More information</u>

CONTENTS	1X
3.4.6 Property rights and efficiency: the Coase	
theorem	80
3.4.7 Summary of efficiency	82
3.5 Distributive consequences – the fair allocation of	
economic costs and benefits	83
3.5.1 Evidence and theory in the analysis of	
distributive consequences	84
3.5.2 The nature and extent of the distributive	
consequences of investment treaty	
protections	84
3.5.3 Evaluating the distributive consequences of	
investment treaties	87
3.5.4 A theory of 'compensatory' justice cannot	
explain why compensation should be paid	
for some losses caused by the state but not	
others	89
3.5.5 Libertarian theories of distributive justice	91
3.5.6 Egalitarian theories of distributive justice	92
3.5.7 Utilitarian theories of distributive justice	94
3.5.8 Political process theories and distributive	
justice	97
3.5.9 Summary of distributive consequences of	
investment treaties	101
3.6 Attraction of foreign direct investment	102
3.6.1 Is additional FDI normatively desirable?	102
3.6.2 Evidence and theory on the relationship	
between investment treaty protections and	
FDI	104
3.6.3 Empirical evidence on the relationship	
between BITs and FDI	105
3.6.4 Theoretical insights on investment	
protection and FDI	109
3.6.5 The interaction between investment treaty	
protections, FDI and other measures	
affecting the investment climate	112
3.6.6 Summary of FDI	113
3.7 Regulatory chill: consequences for the realisation	
of human rights and for environmental	
conservation	113

ambridge University Press
78-1-107-04241-4 - Substantive Protection under Investment Treaties: A Legal and Economic
nalysis
onathan Bonnitcha
able of Contents
Iore information

## X CONTENTS

3.7.1 The relationship of regulatory chill to other	
consequences	114
3.7.2 Evidence and theory in the regulatory chill	
inquiry	115
3.7.3 Theoretical debate about regulatory chill in	
the existing literature	116
3.7.4 Assessing empirical evidence of regulatory	
chill	118
3.7.5 The possibility of more complex effects on	
government decision-making	127
3.7.6 The consequence of regulatory chill for	
human rights and environmental	
conservation	129
3.7.7 Summary of regulatory chill	132
3.8 Respect for the rule of law	133
3.8.1 Theory and evidence on investment treaty	
protections and the rule of law	134
3.8.2 Empirical evidence of the impact of	
investment treaties on the rule of law in	
host states	136
3.8.3 Theories on the relationship between	
investment treaties and respect for the rule	
of law	136
3.8.4 Formulating hypotheses about the	
relationship between levels of investment	
treaty protection and the rule of law	137
3.8.5 Summary of the rule of law	139
3.9 The boundaries of the framework	139
3.9.1 The impact of investment treaty protections	
on host and on home states	140
3.9.2 Rationales for investment treaties that are	
unrelated to the consequences of	
investment treaty protections	141
3.10 Conclusion	141
Eair and aquitable treatment	143
Fair and equitable treatment 4.1 Introduction	
4.1 Introduction 4.2 Foundational doctrinal issues in the	143
	140
interpretation of the FET standard	146
4.2.1 The drafting of FET clauses	146

4

Cambridge University Press 978-1-107-04241-4 - Substantive Protection under Investment Treaties: A Legal and Economic Analysis Jonathan Bonnitcha Table of Contents <u>More information</u>

CONTENTS	xi
4.2.2 FET: customary international law minimum	
standard or autonomous treaty standard?	148
4.2.3 Is it legitimate to abstract from textual	
variation in FET provisions in an analysis of	
FET decisions?	153
4.2.4 Other standards equivalent to the FET	
standard	156
4.3 Parameters: the scope of the FET standard and the	
limitations of this chapter	156
4.3.1 Conduct of a state's judicial institutions that	
breaches the FET standard	157
4.3.2 Conduct that breaches the FET standard	
because it is discriminatory	158
4.3.3 Conduct that breaches the standard because	
it is in bad faith	160
4.4 The elements of FET	161
4.4.1 The taxonomy of the elements of FET used in	
this chapter	161
4.4.2 A unified jurisprudential theory of FET?	164
4.4.3 Fact-specific reasoning and the FET standard	166
4.5 Legitimate expectations	167
4.5.1 The legal rights approach	170
4.5.2 The representations approach	175
4.5.3 The stability approach	184
4.5.4 The business plan approach	190
4.5.5 Summary: the four interpretations of the	
legitimate expectations element of FET	194
4.6 Procedural review of government conduct under	
the FET standard	194
4.6.1 Genin: a narrow approach	197
4.6.2 Chemtura: an intermediate approach	199
4.6.3 <i>Tecmed</i> : an exacting approach	206
4.6.4 Summary: the three interpretations of the	
procedural element of FET	210
4.7 Substantive review of government conduct under	
the FET standard	210
4.7.1 The 'no substantive review' approach	212
4.7.2 Reasonableness review in general	215
4.7.3 Reasonableness review: the margin of	
appreciation approach	216

5

Cambridge University Press
78-1-107-04241-4 - Substantive Protection under Investment Treaties: A Legal and Economic
Analysis
Ionathan Bonnitcha
Fable of Contents
More information

xii contents

4.7.4	Reasonableness review: the	
	politics-as-irrationality approach	220
4.7.5	The proportionality approach to substantive	
	review	224
4.7.6	Summary: the four interpretations of the	
	substantive element of FET	227
4.8 Con	clusion	227
Indirect	expropriation	229
	oduction	229
5.2 Expi	copriation provisions of investment treaties	231
5.2.1	Indirect expropriation and variation in	
	treaty text	232
5.2.2	2 Indirect expropriation in customary	
	international law	235
5.2.3	What is an investment, and why does it	
	matter?	235
5.2.4	The requirements for an expropriation to be	
	legal, including compensation	240
5.3 The	taxonomy	241
5.3.1	The taxonomy used in this chapter	242
5.3.2	2 Can arbitral decisions be explained by a	
	unified jurisprudential theory of indirect	
	expropriation?	243
5.3.3	Fact-specific reasoning and indirect	
	expropriation	245
5.3.4	Are decisions dealing with the expropriation	
	of contracts distinct?	245
5.4 The	effects structure of inquiry	247
5.4.1	The Metalclad approach: effect on economic	
	value	248
5.4.2	2 The Pope & Talbot approach: substantial	
	deprivation of property interests	251
5.4.3	The effect of <i>appropriation</i> : an alternative	
	approach?	255
5.4.4	Summary: the effects structure of inquiry	255
	exception structure of inquiry	256
	The Methanex approach: a police powers	0
	carve-out	256
5.6 The	balancing structure of inquiry	260

Cambridge University Press
78-1-107-04241-4 - Substantive Protection under Investment Treaties: A Legal and Economic
Analysis
onathan Bonnitcha
Table of Contents
Aore information

	CONTENTS	xiii
	5.6.1 The Tecmed approach: proportionality	
	balancing	261
	5.6.2 The US annex approach: characterisation as	
	a technique for balancing	263
	5.7 Conclusion	271
6	Application of the framework and conclusions	273
	6.1 Introduction	273
	6.2 The framework: a brief recapitulation	274
	6.3 To what extent should the FET standard protect	
	investors' legitimate expectations?	275
	6.3.1 The business plan approach versus the	
	stability approach	276
	6.3.2 The stability approach versus the	
	representations approach	279
	6.3.3 The representations approach versus the	
	legal rights approach	283
	6.3.4 Conclusion: the most desirable level of	
	protection of legitimate expectations	288
	6.4 To what extent should the FET standard provide	
	for procedural review of government conduct?	288
	6.4.1 The narrow approach versus the	
	intermediate approach	289
	6.4.2 The intermediate approach versus the	
	exacting approach	293
	6.4.3 Conclusion: the most desirable level of	
	protection from procedural unfairness	297
	6.5 To what extent should the FET standard provide	
	for substantive review of government conduct?	298
	6.5.1 The margin of appreciation approach versus	
	the politics-as-irrationality approach	298
	6.5.2 The margin of appreciation approach versus	
	the proportionality approach	304
	6.5.3 The margin of appreciation approach versus	
	the 'no substantive review' approach	309
	6.5.4 Conclusion: the most desirable level of	
	protection from substantive irrationality	313
	6.6 Which of the five levels of protection against	
	indirect expropriation is the most desirable?	315

7

8

Cambridge University Press
78-1-107-04241-4 - Substantive Protection under Investment Treaties: A Legal and Economic
Analysis
Ionathan Bonnitcha
Fable of Contents
More information

xiv contents

6.6.1 The Metalclad approach versus the Pope $\mathcal{E}$	
Talbot approach	316
6.6.2 The US annex approach versus the Tecmed	
approach	320
6.6.3 The <i>Methanex</i> approach versus the US annex	
approach versus the Pope & Talbot approach	324
6.6.4 Conclusion: the most desirable level of	
protection from indirect expropriation	330
6.7 Overall conclusions	330
6.8 Summary	335
Implications of the conclusions	336
7.1 Introduction	336
7.2 The implications for states: drafting, amendment	
and clarification of investment treaties	337
7.2.1 The case for reconsidering existing treaty	
practice	337
7.2.2 The range of options available to states	338
7.2.3 The perspective of a single state	339
7.2.4 Drafting the substantive protections of new	
investment treaties	341
7.2.5 Amendment of existing treaties	344
7.2.6 Interpretative statements clarifying the	
meaning of existing investment treaties	348
7.3 The implications for arbitrators and practitioners:	
the interpretation of existing treaties	350
7.3.1 The characterisation and significance of a	
treaty's 'object and purpose'	351
7.3.2 The influence of 'extra-legal' factors on	
interpretation in practice	357
7.4 Conclusion	362
The future of debate about investment treaties	363
Bibliography	365
Index	393