

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

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T R A N S P A R E N C Y

UNCTAD Series on Issues in International Investment Agreements II



A sequel



UNITED NATIONS

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

TRANSPARENCY

**UNCTAD Series on Issues in International Investment
Agreements II**



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NOTE

As the focal point in the United Nations system for investment and technology, and building on 30 years of experience in these areas, UNCTAD, through the Division on Investment and Enterprise (DIAE), promotes understanding of key issues, particularly matters related to foreign direct investment (FDI). DIAE assists developing countries in attracting and benefiting from FDI by building their productive capacities, enhancing their international competitiveness and raising awareness about the relationship between investment and sustainable development. The emphasis is on an integrated policy approach to investment and enterprise development.

The term “country” as used in this study refers, as appropriate, to territories or areas. The designations employed and the presentation of the material do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. In addition, the designations of country groups are intended solely for statistical or analytical convenience and do not necessarily express a judgment about the stage of development reached by a particular country or area in the development process.

The following symbols have been used in the tables:

Two dots (..) indicate that data are not available or are not separately reported.

Rows in tables have been omitted in those cases where no data are available for any of the elements in the row.

A dash (–) indicates that the item is equal to zero or its value is negligible.

A blank () in a table indicates that the item is not applicable.

A slash (/) between dates representing years, e.g. 1994/1995, indicates a financial year.

Use of a dash (–) between dates representing years, e.g. 1994–1995, signifies the full period involved, including the beginning and end years.

Reference to “dollars” (\$) means United States dollars, unless otherwise indicated.

Annual rates of growth or change, unless otherwise stated, refer to annual compound rates.

Details and percentages in tables do not necessarily add to totals because of rounding.

The material contained in this study may be freely quoted with appropriate acknowledgement.

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PREFACE

This volume is part of a series of revised editions — sequels to UNCTAD’s “Series on Issues in International Investment Agreements”. The first generation of this series (also called the “Pink Series”) was published between 1999 and 2005 as part of UNCTAD’s work programme on international investment agreements (IIAs). It aimed at assisting developing countries to participate as effectively as possible in international investment rulemaking at the bilateral, regional, plurilateral and multilateral levels. The series sought to provide balanced analyses of issues that may arise in discussions about IIAs, and has since then become a standard reference tool for IIA negotiators, policymakers, the private sector, academia and other stakeholders.

Since the publication of the first generation of the Pink Series, the world of IIAs has changed tremendously. In terms of numbers, the IIAs’ universe has grown, and continues to do so — albeit to a lesser degree. Also, the impact of IIAs has evolved. Many investor-State dispute settlement (ISDS) cases have brought to light unanticipated — and partially undesired — side effects of IIAs. With its expansive — and sometimes contradictory — interpretations, the arbitral interpretation process has created a new learning environment for countries and, in particular, for IIA negotiators. Issues of transparency, predictability and policy space have come to the forefront of the debate. So has the objective of ensuring coherence between IIAs and other areas of public policy, including policies to address global challenges such as the protection of the environment (climate change) or public health and safety. Finally, the underlying dynamics of IIA rulemaking have changed. A rise in South-South FDI flows and emerging economies’ growing role as outward investors — also vis-à-vis the developed world — are beginning to alter the context and background against which IIAs are being negotiated.

It is the purpose of the *sequels* to consider how the issues described in the first-generation Pink Series have evolved, particularly focusing on treaty practice and the process of arbitral

interpretation. Each of the *sequels* will have similar key elements, including (a) an introduction explaining the issue in today's broader context; (b) a stocktaking of IIA practice and arbitral awards; and (c) a section on policy options for IIA negotiators, offering language for possible new clauses that better take into account the development needs of host countries and enhance the stability and predictability of the legal system.

The updates are conceptualized as *sequels*, i.e. they aim to complement rather than replace the first-generation Pink Series. Compared to the first generation, the *sequels* will offer a greater level of detail and move beyond a merely informative role. In line with UNCTAD's mandate, they will aim at analysing the development impact and strengthening the development dimension of IIAs. The *sequels* are complementary to UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD), providing in-depth analysis of particular topics covered in the IPFSD. The *sequels* are finalized through a rigorous process of peer reviews, which benefits from collective learning and sharing of experiences. Attention is placed on ensuring involvement of a broad set of stakeholders, aiming to capture ideas and concerns from society at large.

The *sequels* were edited by Anna Joubin-Bret, and produced by a team under the direction of Jörg Weber and the overall guidance of James Zhan. The members of the team include Wolfgang Alschner, Bekele Amare, Dolores Bentolila, Anna Lisa Brahms, Natalia Guerra, Hamed El-Kady, Jan Knörich, Ventzislav Kotetzov, Sergey Ripinsky, Faraz Rojidi, Diana Rosert, Claudia Salgado, Ileana Tejada and Elisabeth Tuerk.

This paper is based on a study prepared by Andrea Bjorklund and Kate Miles. Inputs were received from Anne van Aaken, Anna Joubin-Bret, Claudia Gross, Gus van Harten, Lise Johnson, Cree Jones, Riku Miyata, Corinne Montineri, Jai Motwane and Stephan Schill.

The paper was typeset and formatted by Teresita Ventura. Sophie Combette designed the cover.

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