

**UNITED NATIONS CONFERENCE ON TRADE AND
DEVELOPMENT**

MOST-FAVoured- NATION TREATMENT

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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.

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The following symbols have been used in the tables:

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

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

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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 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* are 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 Bekele Amare, Suzanne Garner, Hamed El-Kady, Jan Knörich, Sergey Ripinsky, Diana Rosert, Claudia Salgado, Ileana Tejada, Diana Ruiz Truque and Elisabeth Tuerk.

This paper is based on a study prepared by Alejandro Faya-Rodríguez and Anna Joubin-Bret. The paper was reviewed and benefited from comments made at the Ad hoc Expert Group Meeting on Key Issues in the Evolving System of International Investment Rules, convened by UNCTAD in December 2009, which was attended by numerous experts and practitioners in this field. The paper also benefited from an online debate on UNCTAD's network of IIA experts on the issue of most-favoured nation treatment.

November 2010

Supachai Panitchpakdi
Secretary-General of UNCTAD

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