

# FAIR AND EQUITABLE TREATMENT

UNCTAD Series on Issues in International Investment Agreements II



A sequel



UNITED NATIONS

**UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT**

# **FAIR AND EQUITABLE TREATMENT**

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



**UNITED NATIONS**  
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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 also 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 United Nations Secretariat 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 the UNCTAD 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 in participating as effectively as possible in international investment rule making 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 rule making have changed. A rise in South–South FDI flows and emerging economies’ growing role as outward investors – also with respect to 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, that is to say, they aim to complement rather than replace the first-generation Pink Series. Compared with the first generation, the sequels will offer a greater level of detail and move beyond a merely informative role. In line with the mandate entrusted to UNCTAD, they will aim to analyse the development impact and strengthen the development dimension of IIAs. The sequels are finalized through a rigorous process of peer reviews, which benefit from collective learning and sharing of experiences. Attention is placed on ensuring the 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, Hamed El-Kady, Jan Knörich, Sergey Ripinsky, Diana Rosert, Claudia Salgado, Ileana Tejada and Elisabeth Tuerk.

This paper is based on a study prepared by Peter Muchlinski and Sergey Ripinsky. Claudia Salgado, Elisabeth Tuerk and Hamed El-Kady provided inputs. The UNCTAD secretariat gratefully acknowledges the comments on the draft version of this paper, received from Stanimir Alexandrov, Andrea Bjorklund, James Crawford, Roberto Echandi, Joern Griebel, Chen Huiping, Andrea Saldarriaga, Stephan Schill, Brigitte Stern and Christopher Thomas.

The paper does not represent the views of any of the aforementioned peer reviewers. The research was facilitated by the access to the beta version of the Investor-State Law Guide, or ISLG, database. The paper also benefited from an online discussion on UNCTAD's network of IIA experts on the issue of fair and equitable treatment.



February 2012

Supachai Panitchpakdi  
Secretary-General of UNCTAD

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