

International Law and Foreign Direct Investment

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Muna B. Ndulo and Abigail N. Chase



CAROLINA ACADEMIC PRESS

Durham, North Carolina

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ISBN 978-1-5310-1523-7
eISBN 978-1-5310-1524-4
LCCN 2019949092

Carolina Academic Press
700 Kent Street
Durham, NC 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.caplax.com

Printed in the United States of America

*Dedicated to our parents
Temba and Julia Ndulo
and
Howard and Gisela Chase*

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Introduction

This book is designed to provide an overview of the law of foreign investment, incorporating a thorough exposition of the legal principles that are likely to affect a commercial investment in a foreign country. It includes a discussion of the following issues: the international legal framework for foreign investments; the regulation of foreign investment; the role of foreign capital in economic development; foreign investment and the environment and human rights issues; obstacles to flow of investment to developing countries; the role of guarantees to investors and investment codes; bilateral investment treaties; nationalization and problems of compensation; the structuring of joint ventures; transfer of technology; investment insurance; project financing and infrastructure construction; international efforts against corruption in international business transactions; international commercial arbitration and other forms of dispute settlement; and the unification of trade law. The subjects have been chosen because of their common link to international law and foreign direct investment. With the worldwide acceleration in the volume of international trade and investment activity, brought about by globalization, the need for capital in developing countries, and the emergence of new forms of structuring investments and the increase in bilateral and regional investment treaties, as well as the number of disputes referred to both treaty and institutional based arbitration tribunals, international investment law has become an important area for scholars to study. This area of the law has witnessed tremendous growth and has now become one of the fastest growing areas of international law with far reaching implications for both investment receiving and investment exporting countries.

This book analyses the fundamental principles of foreign investment law and the manner in which these principles have been interpreted and applied by international courts, domestic courts, and arbitral tribunals. Relevant cases and materials are printed in the book. Most cases have been sharply edited, and we have indicated omissions through the conventional use of dots, except for omissions of citations. Generally footnotes have been omitted from judicial decisions. The materials in the book in addition to the cases, include writings by scholars who write on the field of international investment law. The book is arranged according to the following chapters: Chapter 1, Foreign Investment and International Law; Chapter 2, Attraction of Foreign Investment, Guarantees to Investors, Investment Codes and Efforts to Regulate Foreign Investments; Chapter 3, Investment Insurance, Features, Concepts; Chapter 4, The Protection of Investment Through Bilateral Treaties; Chapter 5, Nationalization, Investment Protection and Compensation; Chapter 6,

Intellectual Property Protection and Transfer of Technology to Developing Countries; Chapter 7, The Process and Value of the Unification of Commercial Law for International Trade and Investment; Chapter 8, International Commercial Arbitration and International Settlement of Investment Disputes; Chapter 9, Legal Issues in Joint Ventures; Chapter 10, Emerging Issues in Foreign Direct Investment; Chapter 11, Project Financing; Chapter 12, International Efforts Against Corruption in International Business Transactions.

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Acknowledgments

The genesis of this book is from a search for teaching materials for my course on international law and foreign direct investment at Cornell Law School. For a number of years, I taught the course from a set of handouts. Over the years, I saw the need to turn the materials into a book for easy access for teaching as well as a contribution to this growing area of the law. This book would not have been possible without the work of several people. We thank the students in my International Law and Foreign Investment classes at Cornell Law School for being active participants in the debates in the classes and asking questions about issues covered in the book thereby contributing to the development of materials for the book. We thank the research assistants who worked on the materials all of whom provided many hours of research and assistance in various ways to this project. These include Gabrielle Di Bernardi, Leigh Blomgren, Manasa Gummi, Patrick Meson and Dae Un Hong. We thank Megan Olivares who has provided invaluable assistance in the development and production of this book.

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List of Common Abbreviations

AAPL	Asian Agriculture Products Ltd
ADB	Asian Development Bank
AIA	Leahy-Smith America Invents Act (U.S.)
AIFI	All India Financial Institutions
AOC	Arabian Oil Company
AoS	Act of State Doctrine
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
ATS	Alien Tort Statute (U.S.)
BEPS	Base Erosion and Profit Shifting
BIT	Bilateral Investment Treaty
BJP	Bharatiya Janata Party
BOA	Build Operate Agreement
BOT	Build Operate Transfer
BTLP	Barcelona Traction, Light and Power Company Limited
CAA	Compania De Aguas Del Aconquija S.A.
CETA	Comprehensive Economic and Trade Agreement (EU-Canada)
CGE	Compagnie Générale des Eaux
CHIPS	Clearing House Interbank Payments System
CIETAC	China International Economic and Trade Arbitration Commission
CISG	The United Nations Convention on Contracts for the International Sale of Goods
CL	Compulsory License
CLOUT	Case Law on UNCITRAL Texts
CMEA	Council for Mutual Economic Assistance
COFACE	Compagnie Française d'Assurance pour le Commerce Extérieur
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership

CSIR	The Council for Scientific and Industrial Research
DAC	Development Assistance Committee (OECD)
DCF	Discounted Cash Flow
DSB	Dispute Settlement Body of the World Trade Organization
EBRD	European Bank for Reconstruction and Development
ECGD	Export Credits Guarantee Department (U.K.)
ECT	Energy Charter Treaty
ELN	National Liberation Army (Colombia)
EU	European Union
FAA	Federal Arbitration Act
FARC	Revolutionary Armed Forces of Colombia
FCN	Friendship, Commerce and Navigation Treaties
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FGS	Federal Government of Somalia
FPS	Full Protection and Security
FSIA	Foreign Sovereign Immunities Act of 1976 (U.S.)
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GOA	Government of Argentina
GOC	Government of Chile
GOI	Government of India
GOM	Government of Maharashtra
GRIP	Guaranteed Recovery of Investment Principal
ICAC	Independent Commission Against Corruption (Hong Kong)
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IEPS	Impuesto Especial Sobre Producción y Servicios
IFC	International Finance Corporation
IIA	International Investment Agreement

ILO	International Labour Organization (UN)
IMF	International Monetary Fund
IOIA	International Organizations Immunities Act (U.S.)
ISDS	Investor to State Dispute Settlement
ITT	International Technology Transfer
JASTA	Justice Against Sponsors of Terrorism Act (U.S.)
JV	Joint Venture
LCIA	London Court of International Arbitration
LDC	Least Developed Country
MERC	Maharashtra Electricity Regulatory Commission
MFN	Most Favoured Nation
MIA	Maximum Insured Amount
MIGA	Multilateral Investment Guarantee Agency
MNE	Multinational Enterprise
MSEB	Maharashtra State Electricity Board
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
OPIC	Overseas Private Investment Corporation
PCA	Permanent Court of Arbitration
PCT	Patent Cooperation Treaty
PRI	Political Risk Insurance
RCEP	Regional Comprehensive Economic Partnership
SCC	The Arbitration Institute of the Stockholm Chamber of Commerce
SCIA	Shenzhen Court of International Arbitration
SHIAC	Shanghai International Economic and Trade Arbitration Commission
SIAC	Singapore International Arbitration Centre
SOE	State-Owned Enterprise
TGS	Transportadora de Gas del Sur (Argentina)
TI	Transparency International
TPP	Trans-Pacific Partnership
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights

TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
UNHRC	United Nations Human Rights Council
UNGP	United Nations Guiding Principles on Business and Human Rights
USAID	United States Agency for International Development
USIDFC	United States International Development Finance Corporation
USMCA	United States-Mexico-Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
WBI	World Bank Institute
WFOE	Wholly Foreign Owned Enterprise
WIPO	World Intellectual Property Organization
WTO	World Trade Organization