

THE INTERNATIONAL LAW ON FOREIGN INVESTMENT

The international law on foreign investment has become an arena of deep contest between different interests. While investment protection remains the main interest, inflexible investment protection through compliance mechanisms like arbitration have met with considerable opposition. Such opposition was once confined to the developing nations. But with the rise of states like China and India and other smaller states with a capacity to invest overseas, developed states are seeking changes to the system they once created. New actors such as environmental and human rights lobbies also seek changes to the fragmented international law that hitherto has emphasised investment protection over other interests. Populism resents investment protection, due to the belief that it sends capital and with it jobs overseas. Climate change demands that restrictions are placed on the liberal regimes that see unrestricted flows of foreign investment. The solar energy cases against Spain and the possibility of claims following the Covid-19 pandemic have made the subject of great concern to governments and the public. A subject of low visibility is now moving to the centre stage.

The fifth edition of this book comes at a crucial time in the life of the subject. It analyses the changes that have and are taking place. This edition considers the new defences to liability, the changes in the balance between investment protection and the regulatory power of the state, the criticisms that have been made of the system and the responses to these criticisms. By offering thought-provoking analysis of the law in historical, political and economic contexts, this fully updated edition of Sornarajah's classic text captures leading trends and charts the possible course of future developments.

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Preface to the Fifth Edition

The previous editions of this work courted controversy. They stated a view that was favourable to developing countries. They illustrated the political nature of the law that was asymmetric, was concerned with investment protection on the pretence of effecting economic development and that promoted the welfare of the rich few against the interests of the very many poor of the world. The legitimacy of the law in the area was strained greatly by the expansionist interpretations of arbitrators and the exotic interpretations advanced by litigators before them. The results were never intended by the states making investment treaties. The reaction of the developed states to a law they had created, and stood by to watch its bite on developing countries, was severe when the law came to be used against them. Both developed and developing countries desired change. Changing investment patterns, with China, India and other industrialising states becoming exporters of investment into a West that was failing in power, presaged change. The change is in the process of being made. It will be slow, for powerful interests will resist change. But, once the move towards change has been initiated, it will be difficult to stop.

The shift from a unipolar world to a multipolar world will assist in the change. The diversity of the world will become more manifest in the formulation of the law. Different economic and political viewpoints will conflict. Their resolution will be manifested in the law through different packages of norms formulated by like-minded states. The Chinese drive towards the Belt and Road Initiative may well see the formulation of a new law of dominance imposed on other nations. Or, it may be that the older methods of hegemonic imposition of laws will be avoided as they do not achieve their aims. They provoke resistance in a world that has seen imperialism through military power and then imperialism through law. It could well be that another bout of imperialism through the law of a different nation will not have acceptance despite the enormous wealth and power that that nation might amass. One has to wait and see the outcome of the contest.

The end of globalisation, together with the Covid pandemic, will witness increasing nationalism within states. Authoritarian regimes may surface which may well look inwards rather than towards foreign investment-led development. But, the more interesting trend would be the dismantling of the institutions and laws created during the neo-liberal period and the return to the welfare state. These trends will take place at a time when the world

becomes more multipolar. Regionalism will emerge, ensuring that areas that formerly were mere suppliers of natural resources are able to assert the interests of their people. The clash of interests that will occur will be more than at any previous stage in the history of this law. Smaller states may become authoritarian and corrupt. They will lean towards the authoritarian state that funds repression. The subject will continue to be fascinating because of the uncertainties of the present time.

I thank my colleagues at the NUS Law Faculty. It has been an incredible journey. An Asian law school thrust upwards to be counted among the top in the world. Every year I taught outstanding students. My postgraduate students now hold university positions. While I was writing this edition, Inga Martinkute wrote her PhD thesis. She finished her thesis as I retired. Life as an emeritus professor enables me to continue to teach a short course at NUS as well as teach at other law schools. During this short time of one year, I have taught at the National Law School, Bangalore and Kyushu University, Japan. I thank the many students I have met during this time. They remain a source of inspiration.

Thanga and I live in Jaffna, Sri Lanka, in our ancestral village. Thanga has been able to use her knowledge while working for the Human Tissue Authority in London to help set up a heart valve bank in a children's hospital in Sri Lanka. There is plenty left for us to do. Part of the year we live in Southfields, London. Ahila, an international lawyer, works for the Foreign and Commonwealth Office. Her son, Mohan, is a happy playmate. Ramanan works in Sydney for the New South Wales Department of Communities and Justice as a statistician and an economic analyst. This edition is dedicated to him, as are the previous editions. Vaishi is an NHS doctor in London, specialising in neuro-psychiatry. I thank them for much fun amidst all the work they do.

Preface to the Fourth Edition

This edition is published at a time of much controversy in the international law on foreign investment. The need for investment treaties is coming to be questioned by economists. Some of them argue that the original premises of greater flows of foreign investment resulting from such treaties or that they lead to economic development are not provable assumptions. If they are correct, the system has been built on wrong premises. The thrust of neo-liberalism that dominated events in the field and shaped the law is on the wane. The low visibility of the subject is no more, as disputes such as cigarette labelling in Australia and Uruguay, the water dispute in Bolivia or the use of nuclear power in Germany have brought high visibility and public concern with the subject. The old view that a foreign investment dispute concerns only the parties to it is now considered archaic as extraneous factors such as environmental considerations, human rights, labour rights, cultural rights, the rights of indigenous peoples and other factors are considered relevant to such disputes. Increasingly, vocal interest groups espouse these interests. The escapades of arbitral adventurism have created public anxiety. The protests against the Transatlantic Trade and Investment Partnership (TTIP) and the Trans Pacific Partnership (TPP) exclusively in developed countries indicate the extent of this public anxiety.

States have responded to these developments in many ways. Some have withdrawn from the system. Others have toyed with the idea of doing away with treaty-based investment arbitration. Most have come up with the so-called ‘balanced’ treaties based on the reconciliation of the two incompatible ideas of investment protection and regulatory space for the state. How this will be worked out is yet to be seen as there have been no cases on the exceptions to liability in the balanced treaties which essentially cater for the preservation of the regulatory space.

The fact is that investment arbitration is a regime that can mutate into new shapes. This is demonstrated by its capacity to create new rules, such as the legitimate expectations rule, when the door of expropriation closes and to create the proportionality rule when the legitimate expectations rule retreats in the face of criticism. Balanced treaties may not provide a cure to the anxieties that have been expressed. There is too much at stake for interested groups like the global law firms and the investment arbitration industry to restrict the system of investment arbitration.

The criticism of this work on the ground that it focuses too much on the North-South divide is misplaced. Developing countries bear the brunt of the system still. The concepts that continue to be used, like the international minimum standard, denial of justice, expropriation law and the rules of state responsibility for injuries to aliens, were developed in the context of an asymmetry between capital-exporting and capital-importing states. These old concepts form the bedrock of the newer treaties. The sovereignty-based defences that are formulated are often the discovery of old principles that existed in the law. They were defences used by developing countries. To sanitise the law from the asymmetries is to participate in the old positivist game of hiding the reality that private power has no role in shaping the principles of international law. This work refuses to participate in this endeavour and causes discomfort to some. But that is in the nature of academic scholarship.

I thank my students for being active participants in the debates in the area of the law and thereby provoking thought as to the soundness of the positions in this book as well as affirming them. I thank my doctoral students in the period after the previous edition – Trinh Yen, Prabhakar Singh, Aniruddha Rajput and Inga Martinakute – for their stimulating discussions.

As usual, I must report to my readers about my family. Thanga continues her work as a scientist at the Human Tissue Authority and looks forward to moving with me to our ancestral village in Jaffna in Sri Lanka. Ahila is now a diplomat, the First Secretary to the British Delegation at the United Nations, doing more good to international law than I ever did (which some wits would say is easy). Ramanan is at the Australian Bureau of Statistics enjoying the beaches around Sydney as much as working at the ABS. Vaishnavi is a medical doctor just beginning her career.

I am fortunate in having a supportive wife, loving children, caring colleagues at the Law School of the National University of Singapore, which is climbing fast in the league tables of top law schools of the world, and students who are as good as any in the world. The future is with them.

Preface to the Third Edition

Since the second edition of this book, the international law on foreign investment has witnessed such enormous activity that a new edition is justified within five years. The number of arbitration awards based on investment treaties has increased, resulting in several books written solely on the subject of investment treaty arbitration. New works have appeared on several aspects of the law on foreign investment. This work has held the area of the law together without fragmenting it any further. The carving out of an international law on foreign investment itself may have furthered fragmentation in international law. Yet, the aim was to ensure that the base remained clearly in international law principles. That aim does not appear to have been preserved in many of the later works which sought to carve out further areas as free-standing ones. The original niche of this work remains unaffected. It seeks to establish the foundations of the law clearly in the international law rules on state responsibility and dispute resolution rather than approach it with the central focus on investment treaties and arbitration which seems to have attracted the practitioner more than the scholar.

It also has a focus that is different from that of the other works in the field. It is written from the perspective of development. The claim to neutrality of the works in the field cloaks the fact that they deal with an asymmetrical system of the law created largely to ensure investment protection. The fact that it does not follow this routine does not by itself make it a partial work. As before, the criticisms of this work have been made best by my students who have come from all over the world. I have taught courses based on this book in London, at the Centre for Transnational Legal Studies, in Toronto, at Osgoode Hall Law School, at Dundee at the Centre for Petroleum and Natural Resources Law and at my own home institution, the National University of Singapore, which, through its joint programme with the New York University Law School, attracts a global body of students. All possible criticisms that could be made of its central approach are reflected in the work. No criticism can be more valuable to an academic than those made by young minds coming fresh to the subject. In many ways, the stances that were taken in the first two editions seem to be justified in light of the global economic crisis and the retreat of some of the tenets of free market liberalisation that it is alleged to have brought about.

That the subject will continue to undergo rapid changes is very clear. Even as the preface is written, new developments are taking place. As I sat to write it, the Lisbon Treaty of the

European Union came into effect giving the EU competence over investment policy and investment treaties. It is not possible in this edition to speculate what the effects of the Treaty might be. States, particularly in Latin America, are pulling out of investment treaties and the ICSID Convention. The United States and South Africa have announced major reviews of their investment treaties. Some treaties are being made without an investor-state dispute-resolution provision. There is an evident retreat from the perception that investment protection is the only purpose of the investment treaty by the recognition of defences often on the basis of the relevance of the international law generally and of the international law on human rights and the environment in particular. In any event, the newer treaties are beginning to include concerns relating to labour rights, human rights and the environment. The impact of sovereign wealth funds as foreign investors has to be assessed. These changes are captured in this edition, but the manner in which they will take hold is still unclear.

As indicated in the previous editions, this area of the law is in constant change simply because different interests clash and outcomes differ based on constantly changing power balances. As a consequence, it is not an area to be studied by looking at only the language of the treaties and the awards interpreting them (the approach taken in the conventional texts on the subject), but in light of a variety of factors, among them the movement of power balances among states, the dominance and retreat of particular economic theories at given periods and the prevailing viewpoints within the arbitral community. This edition seeks to capture these changing factors which are responsible for the rapid developments that have taken place in the law.

As in the case of the previous editions, I thank those who have travelled the same path with me in the study of this exciting branch of international law. Working with those at the Division on Investment and Enterprise at UNCTAD, particularly with James Chan and Anna Joubin-Brett, has enabled me to keep abreast of the new developments that have taken place, especially in the economic aspects of the field. My academic friends, Peter Muchlinski, Frederico Ortino, Gus van Harten, Kerry Rittich, Karl Sauvant, Wenhua Shan, David Schneiderman, Kenneth Vandevelde, Jiangyu Wang and Jean Ho, have always been good sources of information, criticism and commentary, for which I am grateful. The work was first written at the Lauterpacht Centre for International Law at Cambridge. Its Directors, Sir Eli Lauterpacht and Professor James Crawford, have remained supportive. I thank also my graduate students, Huala Adolf, George Akpan, Lu Haitian and Adefolake Oyewande Adeyeye, who worked with me in aspects of this field.

I thank Finola O'Sullivan, Sinead Moloney, Richard Woodham, Daniel Dunlavy and Martin Gleeson for the care taken over the production of my book.

The National University of Singapore has facilitated my research in every way I wished for. It has been a pleasure to be an academic at the NUS.

I commend to the readers of this work the excellent website run by Professor Andrew Newcombe of the University of Victoria, Canada, at <http://ita.law.uvic.ca>, which provides

the texts of and other documents concerning investment treaty awards, and the equally excellent website run by Luke Peterson, www.iareporter.com, which reports on developments in the field. Both are free services of immense help to students of this field. Most of the arbitral awards cited in this work are to be found on these websites.

Thanga was there, as always. Ahila has now studied this area of the law. Ramanan and Vaishnavi have careers of their own. The book has grown up with them.

Preface to the Second Edition

The international law on foreign investment has witnessed an explosive growth since the last edition. The decade had witnessed a proliferation of bilateral and regional investment treaties, and a dramatic rise in litigation under such treaties. The attempt to fashion a multilateral instrument on investment within the World Trade Organization has given the debate on issues in the area a wider focus. This edition seeks to capture such developments.

In the course of the decade, I have had the good fortune of being involved actively in many facets of the operation of this area of the law. During such activity, I have acquired many friends who work in the area. My association with UNCTAD has brought me in contact with Karl Sauvant, Anna Joubin-Brett, Victoria Aranda and James Chan. It has also given me the opportunity to work with Arghyrios Fatouros, Peter Muchlinksi and Kenneth Vandevelde, the academic leaders of this field. They have added much to my understanding of the law. The many hours of arguments with them, in various parts of the world, have added to the pleasure of studying this area of the law.

The first edition was written while I was a visiting fellow at the Lauterpacht Centre for International Law, University of Cambridge. The successive Directors of the Centre, Professor Sir Eli Lauterpacht and Professor James Crawford, have continued to encourage my efforts in this and other areas of international law.

My many students in Singapore and Dundee have always challenged me so that I was taught by them to know and remember that there are other ways in which the law could be looked at. To my critics, my answer would be that I am constantly made aware of their criticisms in the classroom. I have accommodated those criticisms in the text.

I thank Finola O'Sullivan, Alison Powell and Martin Gleeson for the care taken over the production of my book.

My research student, Lu Haitian, prepared the bibliography.

Thanga was there, as always. Ahila, Ramanan and Vaishnavi happily are now old enough to let their father alone.

Preface to the First Edition

This book was written while I was on sabbatical leave from the National University of Singapore. I thank the Vice-Chancellor, the Council and Dean of the Faculty of Law for the generous terms on which I was granted the leave.

I spent the sabbatical year as a Visiting Fellow at the Research Centre for International Law of the University of Cambridge. I thank Eli Lauterpacht, the Director of the Centre, for many acts of kindness in making this year a happy and productive one.

I am grateful to Professor James Crawford, Whewell Professor of International Law at Cambridge, who read and commented on an early draft of this work, to Professor Detlev Vagts, Bemis Professor of International Law at Harvard, who enabled me to spend a month of research at the Harvard Law School and to Robin Pirrie, Fellow of Hughes Hall, Cambridge, who was helpful with his advice. I remain responsible for any errors and omissions.

As always, Thanga has been an unfailing source of strength. Ahila, Ramanan and Vaishnavi have given up time that should have been theirs.

Abbreviations

AC	Appeal Cases
AD	Annual Digest of Public International Law Cases
AJIL	American Journal of International Law
All ER	All England Reports
ALR	Australian Law Reports
ASIL Proceedings	American Society of International Law Proceedings
BYIL	British Yearbook of International Law
CLR	Commonwealth Law Reports
CMLR	Common Market Law Review
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
F Supp	Federal Supplement
Hague Recueil	Hague Recueil des Cours
ICLQ	International and Comparative Law Quarterly
ICSID Rev	ICSID Review – Foreign Investment Law Journal
ILJ	International Law Journal
ILM	International Legal Materials
Iran-US CTR	Iran-United States Claims Tribunal Reports
JIA	Journal of International Arbitration
JIL	Journal of International Law
JWTL	Journal of World Trade Law
KB	King’s Bench Reports
LJ	Law Journal
LQR	Law Quarterly Review
LR	Law Review
MLR	Modern Law Review
PCIJ	Permanent Court of International Justice
SJ	Solicitors Journal
UNRIAA	United Nations Reports of International Arbitral Awards
WLR	Weekly Law Reports
YCA	Yearbook of Commercial Arbitration

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