YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2018

Yearbook on International Investment Law & Policy

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LISA E. SACHS
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JESSE COLEMAN

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FOREWORD

As described in this year's issue of the *Yearbook on International Investment Law and Policy*, the continued development and evolution of international investment law is rife with tensions. Indeed, the backlash against the regime has taken hold even more strongly in recent years, intensified by new awards and related implications, as surveyed in this *Yearbook*. Decisions continue to be characterized by a lack of uniformity, even in cases where the underlying facts are similar. Determinations rendered in 2018 include—as in previous years—pronouncements on sovereign decisions of states involving deep policy considerations based on economic changes, made by tribunals far removed from the scene and unconcerned with the consequences of their determinations.

The chapters contained in this *Yearbook* reflect on trends in aspects of international investment law, and consider those trends in the context of specific issue areas and sectors for which the regime has distinct and noteworthy implications, including trade, taxation, and the environment. Other chapters, meanwhile, consider structural concerns with the investment law system, including asymmetries in investor-state dispute settlement (ISDS) cases and its inconsistency with the rule of law.[1] They also presage the nature of changes that could take place, specifically in response to growing demands for reform.

Some such areas of change can already be identified. The first is the trend towards so-called 'balanced treaties'. In these treaties, a balance is said to be effected between investment protection, one of the traditional objectives of investment treaties, and the need for the state to regulate in the public interest. These treaties provide for exceptions or defences for measures such as those taken to secure environmental protection, human rights, labour standards, cultural property, and rights of indigenous peoples. The 2004 United States Model Treaty[2] began the trend towards balanced treaties. *Methanex v United States* had the salutary effect on the United States of bringing about the realization that the protection of public interests, such as health, may have to override investment protection.[3] Since then, there has been an exploration of how best this can be done in other treaties; the 2015 Indian Model Treaty, for instance, is an example of a model agreement that contains broad defenses seeking to limit investment protection considerably.[4]

[1] See ch 22 by Alessandra Arcuri in this volume.

[2] Government of the United States of America 2004 Model BIT.

[3] See *Methanex Corporation v United States of America*, Final Award on the Jurisdiction and Merits—UNCITRAL Arbitration Rules (1976), 3 August 2005.

[4] Model Text for the Indian Bilateral Investment Treaty (December 2015) <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/3560> accessed 19 June 2019 (hereafter India Model BIT).

The *Yearbook* contains an excellent chapter that considers treaties that have sought this balance through inclusion of provisions mirroring Article XX of the GATT.[5] In it, the authors highlight that, perhaps contrary to treaty drafters' intents, in the few awards where arbitral tribunals have considered these exceptions, the provisions have been treated as non-existent or appendages rather than provisions afforded the same weight as other substantive provisions. It is likely that existing arbitrators will interpret these treaties in the context of their known ideological preferences, giving heed either to the revised objective to balance investment protection with the state's ability to regulate, or to the traditional objective of investment protection.

Notably, even the 'balanced treaties' fail to give the regulatory right of the state and the public interests it protects a clear precedence over investment protection objectives. A state exists to protect the public interest. No state constitution supports the idea that any matter other than the protection of the interests of the public is given priority. *Salus populi, suprema lex*. How is it, then, that states can sign investment treaties that ignore the public interest altogether, as the old treaties did, or couch the public interest as mere exclusions and defences as the 'balanced treaties' now do? The more consistent method would be, if balanced treaties are the way to go, for the circumstances of the right to regulate (beyond the category of regulatory expropriation, which is provided for in customary international law) to be first stated and indication then made when the foreign investor should be compensated in situations where the right is wrongly exercised. The criteria for wrongfulness could be stated in the treaty, giving a clear indication to decision-makers (whether arbitrators or otherwise) that priority is to be given to the right of a state to protect its people, which is the *raison d'etre* of a state, both in international and constitutional law.

The *Yearbook* chapter that surveys 2018 trends in investment disputes and awards shows a second trend: that the doctrine of legitimate expectations as a basis for awarding damages continues to pose problems for states, despite efforts to address these issues in more recent treaties.[6] It also points to continued challenges with inconsistency in ISDS jurisprudence; for example the Spanish solar energy awards rendered in favour of investors, based on the legitimate expectations doctrine, stand in contrast with the Czech awards where the same claims failed.[7] The subtlety of distinctions that have to be made to reconcile such outcomes confirms the subjectivity involved in the interpretation and application of the doctrine. Indeed, while 'legitimate expectations' has become the mainstay of investment arbitration, the uncertainties involved in the doctrine remain unresolved. Despite the growing literature on the subject, there does not seem to be any sound test for the application of the doctrine. That such an unexplained doctrine constitutes the most relied upon standard in investment arbitration, and the basis upon

[5] See ch 21 by Wolfgang Alschner and Kun Hui in this volume; General Agreement on Tariffs and Trade (opened for signature 10 October 1947, provisionally entered into force 1 January 1948) 55 UNTS 195, art XX.

[6] See ch 9 by Jarrod Hepburn in this volume.

[7] ibid s B.2.

which millions of dollars are awarded as damages, is in itself a sign of weakness of the system. That both developed and developing states have sought to restrict the scope of the fair and equitable treatment standard, and that this restriction has made little or no impression on arbitrators, is a further sign of weakness. The best course would be to eliminate the use of the standard altogether, as newer treaties seem to do.

A third notable topic covered in the *Yearbook* concerns the increasing number of disputes in which decisions of the highest courts of a state are alleged to be violations of an investment treaty, thereby effectively converting investment arbitration tribunals into appellate courts, despite the arbitrators' frequent lack of knowledge about the laws the local courts had to consider. This is evidenced in the Chapter on cases relating to intellectual property,[8] describing evolving interpretations of the 2017 award in *Eli Lilly v Canada*,[9] one such case in which a decision of the Supreme Court of a developed country, in this case Canada, was contested before an investment arbitration tribunal. This emerging practice goes beyond customary international law, which permitted such questioning only in situations of denial of justice involving egregious injustice being caused by a judicial decision, but otherwise counsels great deference to the decisions of national courts. Newer model agreements, like the 2015 Indian Model Treaty, seek to address this development by confining liability to circumstances of denial of justice.[10] However, most claims continue to be brought on the basis of older generation treaties. One can only hope that arbitrators do not tarnish the system further by continuing with the assumption of appellate powers over national courts.

A fourth issue likely to receive increasing attention in the coming years relates to the *dramatis personae* of investment arbitration. The Chapter on arbitral jurisdiction adverts to the increasing numbers of challenges to arbitrators and experts, conflicted by their relationships with third-party funders and identifiable ideological preferences.[11] Some academics who write on investment law and policy can be lured into arbitral practice and join camps in the hope of appointment as arbitrators. In the pursuit of clients, law firms drum up creative theories of litigation, pushing the boundaries and objectives of the law. In this context, the true aims of the law can come to be sacrificed in mercenary pursuits. If real change is to be effected, a change of personnel is required. The idea of a court put forward by the European Commission is initially attractive as it may bring about a change of personnel. However, courts may have their problems too. There are obvious judicial preferences towards certain doctrines and solutions, as the European Courts have demonstrated. These changes also have to be carefully debated.[12]

[8] See ch 11 by Susan Sell in this volume.

[9] *Eli Lilly and Company v The Government of Canada*, Final Award, ICSID Case No UNCT/14/2, 16 March 2017.

[10] India Model BIT (n 5) art 3.1(i).

[11] See ch 8 by Catharine Titi in this volume.

[12] M. Sornarajah, 'An International Investment Court: Panacea or Purgatory?' (15 August 2016) Columbia FDI Perspectives No. 180 <http://ccsi.columbia.edu/files/2013/10/No-180-Sornarajah-FINAL.pdf> accessed 19 June 2019.

Finally, the continuing significance of state-owned enterprises (SOEs) receives attention in this year's *Yearbook*.[13] China's SOEs will assume greater significance in the future in international investment law, as investments from these entities come to comprise a sizeable portion of investment in developed countries (which are fast becoming eager recipients of foreign investment from China, India, and other erstwhile emerging economies). Moreover, it appears likely that, to support its One Belt, One Road (OBOR) policy, China will push to negotiate treaties with pre-entry national treatment within the region in order to protect investments and enable greater access to the markets of the regional states. Consequently, China may become a bigger player on issues of international investment law, with Chinese SOEs potentially submitting more claims to arbitration. As the West recedes from the scene, it would be a dramatic change to see a state that made narrow treaties in the past making treaties that, historically, more powerful states had used. This potential shift is illustrative of the change in power equations in the area.

As in previous years, reading of chapters of this year's *Yearbook* leads not merely to the understanding of recent developments but gives rise to the contemplation of many issues relating to international law. The *Yearbook*'s survey of awards that have been rendered in various areas and their impact on international investment law by veritable experts of the law enables a quick understanding of the developments. The analysis of the subjects that have attracted controversy enhances this understanding. Readers are left with ever more reasons for looking forward to the new publication of the *Yearbook* every year.

M. Sornarajah
June 2019

[13] See ch 24 by Mihaela Maria Barnes in this volume.

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AUTHOR BIOGRAPHIES

Olabisi D. Akinkugbe is an Assistant Professor at the Schulich School of Law, Dalhousie University, Canada. He holds a PhD in law from the Faculty of Law, University of Ottawa. Prof. Akinkugbe is a founding editor of Afronomicslaw blog, a blog on all aspects of international economic law as they relate to Africa; and the Co-Managing Editor of the *Nigerian Yearbook of International Law*. He is the current President of the African International Economic Law Network, the regional arm of the Society of International Economic Law. His research interests cut across different aspects of international economic law, with particular focus on African regional economic integration, transnational law, international law and development, and socio-legal approaches to law.

Wolfgang Alschner is an Assistant Professor at the Common Law Section of the University of Ottawa. His work focuses on international economic law, empirical legal analysis, and computational legal studies. Prior to joining the University of Ottawa, he worked for several years as an individual contractor for UNCTAD's Section on International Investment Agreements and as a research fellow at the Graduate Institute in Geneva and the World Trade Institute in Bern, Switzerland.

Alessandra Arcuri is Professor of Inclusive Global Law and Governance at the Department of International and European Union Law, Erasmus School of Law, Erasmus University Rotterdam. Her research focuses on international economic law and the relationship with human rights, environmental, and public health law, as well as on the global governance of risks and the emergence of global technocracy. She has lived and held positions at various international institutions, including the European University Institute, New York University, and Hamburg University. Professor Arcuri holds a law degree from La Sapienza University, Rome (cum laude), an LLM from Utrecht University and a PhD from the Erasmus School of Law. Professor Arcuri is Member of the Erasmus Initiative on Dynamics of Inclusive Prosperity, Member of the Erasmus Institute of Public Knowledge, and Co-Chair of the Young Erasmus Academy.

Sofia Baliño is a writer, editor, and communications professional specializing in trade, investment, and agriculture with IISD's Economic Law and Policy programme. Prior to joining IISD, Sofia spent several years as a journalist and senior editor covering trade, investment, environment and natural resources, and other aspects of sustainable development for *Bridges Weekly* at the International Centre for Trade and Sustainable Development. She previously worked for environmental non-profits in Washington, D.C., covering topics such as wetlands conservation and preservation, food and water safety, and sustainable fisheries. Sofia has a Master of Public Policy with a global policy concentration from Duke University, as well as a Master of Arts in English language and literature from the Université de Genève.

She has a Bachelor of Arts in English and Economics from the College of William and Mary in Virginia. Sofia is also a graduate of the Columbia Publishing Course at Columbia University's School of Journalism.

Mihaela Maria Barnes is a Visiting Fellow at the Lauterpacht Centre for International Law, Cambridge University. She holds a PhD in international law from the Graduate Institute of International and Development Studies, Geneva, and an LLM in international and European law (specialization: international trade and investment law) from the University of Amsterdam, as well as undergraduate degrees, legal qualifications, and practical experience in both common law and civil law. Mihaela is also a member of the Coordinating Committee of the European Society of International Law Interest Group on Business and Human Rights and has published in peer-reviewed journals on various topics of international law.

Thierry Berger is a qualified solicitor and an associate at the International Institute for Environment and Development (IIED), where his work focuses on law and sustainable development. Prior to his collaboration with IIED, Thierry worked for global law firms for ten years, specializing in international arbitration. Thierry has a DESS (LLM) in International Arbitration and Alternative Dispute Resolution from the Université Paris II Panthéon Assas, as well as an LLM in Global Environmental and Climate Change Law from the University of Edinburgh.

Nathalie Bernasconi-Osterwalder LLM, is a senior international lawyer and heads the Economic Law & Policy programme of the International Institute for Sustainable Development (IISD). She works with developing country governments in relation to investment treaty negotiations, investor-state contracts, model investment treaties, and foreign investment laws. Nathalie has extensive legal, policy, and training experience in international trade, investment, sustainable development, human rights, international environmental law, and arbitration. She previously worked as an attorney at the Center for International Environmental Law in Washington and Geneva, where she managed the office. Earlier, she was a fellow at the International Institute of International Economic Law at Georgetown University Law Center and worked in Vietnam for a legal reform project of the United Nations Development Programme (UNDP) and for Australian law firm Phillips Fox. She is admitted to the Bar of Basel and has worked for the Justice Department, Berne, in the Section for International Law.

Jesse Coleman joined the Columbia Center on Sustainable Investment (CCSI) as a Legal Researcher in 2015. At CCSI, she focuses on the nexus of international investment and human rights law, sustainable investments in land and agriculture, and investment law and policy. Prior to joining CCSI as a legal researcher, Jesse worked with the END Fund, the International Center for Transitional Justice, Cambridge University's Centre of Governance and Human Rights, and the Cambridge Pro Bono Project. She also worked with CCSI as a Legal Fellow. Jesse received her Bachelor of Laws and Bachelor of Arts in Political Science from Trinity College Dublin. She holds a Master of Law from the University of Cambridge, where she specialized in public international law.

Lorenzo Cotula is a principal researcher in law and sustainable development at the International Institute for Environment and Development (IIED). He leads research and policy work on issues spanning investment law, natural resource governance, and human rights. Lorenzo conducts both legal and cross-disciplinary research, and has provided expertise to governments, civil society, United Nations bodies, the World Bank, and bilateral development agencies. He is also a Visiting Professor at the Law School of the University of Strathclyde, where he teaches the postgraduate course on International Investment Law and Sustainable Development; and a Visiting Research Fellow at Warwick Law School's Centre for Law, Regulation and Governance of the Global Economy (GLOBE). Lorenzo holds academic qualifications in law, development studies, and sustainable business from Sapienza University of Rome, the London School of Economics, the University of Edinburgh, and the University of Cambridge..

Rachel Denae Thrasher received a JD and a master's degree in international relations, both from Boston University. She works as trade and investment policy coordinator for the Global Economic Governance Initiative at the Global Development Policy (GDP) Center at Boston University. Her own research explores the impact of trade and investment agreements on domestic policy-making in areas of industrial, environmental, fiscal, and intellectual property policies, as well as economic integration between developing countries. She is the co-editor, alongside Boston University's Pardee School dean Adil Najam, of a book titled *The Future of South-South Economic Relations*. She teaches international law and international trade law (with a focus on policy space) at Northeastern University School of Law.

Diane A. Desierto is tenured Associate Professor of Human Rights Law and Global Affairs at the Keough School of Global Affairs at the University of Notre Dame (Indiana, USA), where she publishes on international law, human rights and humanitarian law, international economic law and development, ASEAN law, maritime security, and comparative constitutional law. At Notre Dame, she teaches Master's in Global Affairs students, JD and graduate law students, other graduate students, and undergraduates in her core interdisciplinary courses of International Law and Human Rights; Economic, Social, and Cultural Rights; Human Rights and the Global Economy; Introduction to Global Affairs; Human Rights, Sustainability, and the Global Commons. She is a Faculty Fellow of Notre Dame's Kellogg Institute of International Studies and Liu Institute for Asia and Asian Studies, and Faculty Advisory Member of the Notre Dame Klau Center for Civil and Human Rights; External Faculty Fellow of the Stanford WSD Handa Center for Human Rights and International Justice; and Professor of International Law at the Philippine Judicial Academy of the Supreme Court of the Philippines. Among her global commitments, Professor Desierto serves as SAB Member at the *European Journal of International Law* and *EJIL:Talk!* Editor, Member of the UNCITRAL Academic Forum on ISDS Reform, and Expert for the UN Intergovernmental Working Group on the Right to Development.

Tommaso Faccio is the Head of Secretariat of the Independent Commission for the Reform of International Corporate Taxation (ICRICT) and a Lecturer in Accounting and Taxation at Nottingham University Business School. He is a chartered accountant (ICAS) and his

research interests include international tax, transfer pricing, tax treaties, and tax avoidance. Until July 2014, he was a Transfer Pricing Senior Manager in the Deloitte LLP International Tax team and has significant experience advising multinationals on complex international tax issues, particularly in the area of transfer pricing and permanent establishment, first at Ernst and Young LLP and then at Deloitte LLP.

Jarrod Hepburn is a Senior Lecturer at Melbourne Law School, Australia. Jarrod is the author of *Domestic Law in International Investment Arbitration* (Oxford University Press 2017). His other work, largely in the areas of international economic law and general international law, has been published in journals including the *International and Comparative Law Quarterly*, the *Journal of International Dispute Settlement*, the *Journal of World Investment and Trade*, and the *Melbourne Journal of International Law*. Jarrod holds the degrees of DPhil, MPhil and BCL from Balliol College, University of Oxford, as well as first-class honours undergraduate degrees in both law and software engineering from the University of Melbourne. He has been a visiting researcher at the Max Planck Institute for Comparative and International Private Law in Hamburg. Jarrod is admitted to practise law in Australian federal and state jurisdictions, and has experience in the Competition group of a major Australian commercial law firm. He is also a regular contributor to a specialized news service, *Investment Arbitration Reporter*, providing coverage and analysis of foreign investment disputes.

Kun Hui is a PhD Candidate at the Faculty of Law, University of Ottawa. His research focuses on China's and Chinese state-owned enterprises' sovereign immunity claims under international and national laws. His current work at Tereposky & DeRose LLP in Ottawa touches upon NAFTA and non-NAFTA investment arbitration. Prior to arriving in Canada, he practised commercial law in China.

Lise J. Johnson is the Investment Law and Policy Head at the Columbia Center on Sustainable Investment (CCSI). Her work at CCSI centres on analysing investment treaties and treaty-based investor-state arbitrations, and examining the implications those instruments and cases have for host countries' domestic policies and sustainable development strategies. In addition, she concentrates on key institutional and procedural aspects of the investment law framework, including efforts to increase transparency in and legitimacy of investor-state dispute settlement. She has a BA from Yale University, a JD from University of Arizona, an LLM from Columbia Law School, and is admitted to the bar in California.

Mouhamadou Madana Kane is the founder of the African Center of International Law Practice (ACILP), which is an international law think-tank whose mandate is to bridge the gap between international law and public policy in Africa. Dr Kane also serves as lead legal counsel with the Islamic Development Bank, where he leads and manages the project of establishing a permanent mechanism for the settlement of investment disputes under the Agreement for the Promotion, Protection and Guarantee of Investment of Organization of Islamic Cooperation (OIC Investment Treaty). He is one of the contributors to the publication entitled *Rethinking International Investment Governance Principles for the 21st Century*.

Jane Kelsey specializes in international economic law at the University of Auckland, New Zealand, where she has taught since 1979. She has law degrees from Victoria University of Wellington, Oxford University, Cambridge University, and a PhD from the University of Auckland. Since 2012, Jane has critically monitored many negotiations, in particular the Trans-Pacific Partnership, the Regional Comprehensive Economic Partnership, the Trade in Services Agreement, and the World Trade Organization, with a specialization on services, investment, and regulatory issues. She has written many books, academic articles, and technical reports, addressed international conferences, briefed governments and affected sectors, and run training workshops on related matters for government officials, legislators, trade unions, and civil society. In 2019, Jane will complete a three-year research project funded by the Royal Society of New Zealand on options and strategies to address the legitimacy crisis confronting international economic agreements, including international investment agreements.

Nathan Lobel is a JD candidate at Harvard Law School, where he studies climate policy and political economy. Before starting law school, he was the Special Assistant to the Director at the Columbia Center on Sustainable Investment, where his scholarship focused on international governance and the clean energy transition. He received his B.A. in political science from Yale University with high honors, where he also worked with the Yale Program on Climate Change Communication and as a fossil fuel divestment organizer at Yale University.

Adebayo Majekolagbe is a doctoral student at the Schulich School of Law, a fellow of the MacEachen Institute of Public Policy and Governance and Barrister and Solicitor of the Supreme Court of Nigeria. He researches and writes on climate change law, sustainability transition, impact assessment, and the dissemination of environmentally sound technologies. He recently co-authored a work on the implications of the decision of the African Court on Human and Peoples' Rights in the *Ogiek* case, exploring the implications for human rights and the extractive industry in Africa.

Maria Laura Marceddu is teaching fellow in international economic law at the University of Edinburgh, and visiting lecturer in international investment law at King's College London. She is the executive treasurer of the Society of International Economic Law (2018), where she also serves as the coordinator of the investment law network.

Julie Martin is Managing Director in the Marsh's JLT Credit Specialties Practice, whose main function is to represent clients seeking to transfer risk via political risk insurance or non-payment insurance. She joined Marsh in 2001 after twenty years of experience in the political risk business at the Overseas Private Investment Corporation, the US government agency charged with promoting US investment in emerging markets.

José Antonio Ocampo is Co-Director of Banco de la Republica of Colombia, Colombia's central bank, and Professor (on leave for public service) at Columbia University. He is also Chair of the Independent Commission for the Reform of International Corporate Taxation (ICRICT), and Chair of the Committee for Development Policy of the United Nations Economic and Social Council (ECOSOC). He has occupied numerous positions at the United Nations and his native Colombia, including UN Under-Secretary-General

for Economic and Social Affairs, Executive Secretary of the UN Economic Commission for Latin America and the Caribbean (ECLAC), and Minister of Finance, Minister of Agriculture, and Director of the National Planning Office of Colombia. He has received numerous academic distinctions, including the 2012 Jaume Vicens Vives award of the Spanish Association of Economic History for the best book on Spanish or Latin American economic history, the 2008 Leontief Prize for Advancing the Frontiers of Economic Thought and the 1988 Alejandro Angel Escobar National Science Award of Colombia. He has published extensively on macroeconomic theory and policy, international financial issues, economic and social development, international trade, and Colombian and Latin American economic history.

Federico Ortino is a Reader in International Economic Law at King's College London, specializing in international trade and investment law.

Facundo Pérez-Aznar is Senior Researcher at the Geneva Center for International Dispute Settlement and Associate Professor of International Economic Law at the University of Buenos Aires. He worked for several years as legal counsel in the Department of International Affairs at the General Attorney's Office of Argentina, which is in charge of handling the interest of Argentina in international disputes (mostly ICSID and UNCITRAL arbitrations) and previously as legal officer in the Directorate of Latin American Economic Integration at the Ministry of Foreign Affairs of Argentina. He holds a law degree from the National University of La Plata, Argentina, and a Master degree and a PhD in international law from the Graduate Institute of International and Development Studies, Geneva.

Manuel Pérez-Rocha is an Associate Fellow of the Institute for Policy Studies in Washington and an Associate of the Transnational Institute (TNI) in Amsterdam. He is a Mexican national who has led efforts to promote just and sustainable alternative approaches to trade and investment agreements for two decades. Prior to working for IPS' Global Economy Program, he worked with the Mexican Action Network on Free Trade (RMALC) and continues to be a member of that coalition's executive committee. He also worked for the Make Trade Fair campaign of Oxfam International. Manuel studied international relations at the National Autonomous University of Mexico (UNAM), has a diploma on European studies from the Autonomous Technological Institute of Mexico (ITAM), and holds a M.A. on development studies from the Institute of Social Studies (ISS) in The Hague, Netherlands. Some of his last publications include op-eds in *The Nation* and *The New York Times*.

Lisa E. Sachs is the Director of the Columbia Center on Sustainable Investment (CCSI), where she oversees the three areas of focus for CCSI: investments in extractive industries, investments in land and agriculture, and investment law and policy. She also lectures at Columbia Law School and the School on International and Public Affairs at Columbia University. She received a BA in Economics from Harvard University, and earned her JD and an MA in International Affairs from Columbia University, where she was a James Kent Scholar and recipient of the Parker School Certificate in International and Comparative Law.

Sara L. Seck, PhD., is an Associate Professor and Associate Dean, Research at the Schulich School of Law and Marine & Environmental Law Institute at Dalhousie University, Canada.

She has published over 40 articles and book chapters on business and human rights, public and private international law, and environmental and climate justice, often with a focus on extractive industries. Seck is co-editor of the 2017 book *Global Environmental Change and Innovation in International Law* (Cambridge University Press), and co-editor of a 2019 special issue of the Canadian *Journal of Women and the Law* on resource extraction and the human rights of women and girls. She is a founding member of the editorial board of the *Business and Human Rights Journal*, a member of the International Law Association's Study Group on Business and Human Rights, and a director of the Global Network on the Study of Human Rights and the Environment.

Susan K. Sell is a Professor in the School of Regulation and Global Governance at the Australian National University, and Professor Emeritus of Political Science and International Affairs at George Washington University. She has published widely on the politics of intellectual property and global governance, including her 2003 book *Private Power, Public Law: the Globalization of Intellectual Property Rights*, and her 2010 co-edited volume (with Deborah Avant and Martha Finnemore) *Who Governs the Globe?* She also was a contributor to the 2018 book *Rethinking International Investment Governance: Principles for the 21st Century*.

Muthucumaraswamy Sornarajah is CJ Koh Professor of Law at the National University of Singapore.

Kyla Tienhaara is a Canada Research Chair in Economy and Environment and Assistant Professor in the School of Environmental Studies and Department of Global Development Studies at Queen's University. She has previously held positions as Head of Research for Greenpeace Australia Pacific and as a Research Fellow at the Australian National University. Her research examines the intersection between environmental governance and the global economic system. Her work on investment arbitration has focused primarily on the subject of 'regulatory chill' and has been published in a number of academic journals and in *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press 2009). Her most recent book, *Green Keynesianism and the Global Financial Crisis* (Routledge 2018), explores the experience of several countries with green stimulus programmes following the global financial crisis.

Catharine Titi is a Research Associate Professor (tenured) at the French National Centre for Scientific Research (CNRS)–CERSA, University Paris II Panthéon-Assas, France. She is Co-Chair of the ESIL Interest Group on International Economic Law, Member of the Steering Committee of the Academic Forum on ISDS, Member of the International Law Association (ILA) Committee on Rule of Law and International Investment Law, Fellow of the Chartered Institute of Arbitrators (FCIArb), and she serves on the Editorial Board of the *Yearbook on International Investment Law & Policy* (Columbia/OUP). Catharine holds a PhD from the University of Siegen in Germany (Summa cum laude) and has previously been a consultant at the United Nations Conference on Trade and Development (UNCTAD). In 2016, Catharine became the first woman to be awarded the prestigious

Smit-Lowenfeld Prize of the International Arbitration Club of New York for the best article published in the field of international arbitration.

Iina Tornberg conducts her doctoral research at the Faculty of Law, University of Helsinki, Finland. Her doctoral research deals with EU competition law rules and their application in CIETAC (Chinese International Economic and Trade Arbitration Center) arbitration. Tornberg has lectured on private international law and international commercial arbitration at the University of Helsinki. She has also been a visiting researcher at the Max Planck Institute for Comparative and International Private Law in Hamburg and the Centre for Chinese Law, University of Hong Kong. Tornberg is a Secretary of the Finnish Branch of the International Law Association and a Board Member of the Finnish Committee of the International Academy of Comparative Law (IACL) and the International Association of Legal Science. She also holds other memberships, including with the European China Law Studies Association.

Zoe Phillips Williams is a Fellow in International Political Economy at the London School of Economics and Political Science. She holds a PhD in international relations from the Hertie School of Governance in Berlin. Her current work focuses on the impact of democratic politics and policy-making on investor-state disputes and has appeared in *Global Environmental Politics*.

James X. Zhan is senior director at UNCTAD. He leads the UN World Investment Report and is editor-in-chief of the Transnational Corporations Journal. He chairs the Governing Board of the United Nations Sustainable Stock Exchanges Initiative (with all major stock exchanges worldwide as members). He has directed extensive research on key issues and facilitated the formulation of outcomes at various international summits (eg G20 and BRICS). He has also provided policy advice to governments (including heads of states) and parliaments in over 100 countries. He led the formulation of global guidelines for a new generation of investment policies and establishment of the UNCTAD World Investment Forum. He is chief strategist for the World Association of Investment Promotion Agencies. Dr Zhan has held several advisory positions with academic institutions (eg Cambridge University, Columbia University, Oxford University, and the University of Geneva). He was research fellow at Oxford University, and Trade and Investment Council member of the World Economic Forum. He has published extensively on trade and investment-related economic and legal issues.