

Yearbook on International Investment
Law & Policy 2019

YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY

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LISA E. SACHS
LISE J. JOHNSON
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Foreword

The publication of the *Yearbook on International Investment Law and Policy 2019* comes amidst efforts in Africa to develop a protocol on sustainable investment as part of the legal instruments of the African Continental Free Trade Area (AfCFTA).¹ Future publications of the *Yearbook* will benefit from this upcoming work, just as much as the African Union is already benefitting from these *Yearbooks*.

Since the AfCFTA is a new undertaking, it is important to provide some details about this emerging market as well as upcoming work on the protocol on sustainable investment. The AfCFTA is, in terms of geographical size and population, the largest free trade agreement since the establishment of the World Trade Organization.² The Agreement encompasses rules and commitments on market access and provisions to reduce barriers to trade as well as investment. With a focus on trade in goods, the Agreement will also promote structural transformation in production and, in so doing, help to enhance competitiveness in addition to promoting the development of regional value chains and food security.³ The AfCFTA is also expected to serve as a new platform for Africa's competitive engagement with the rest of the world.⁴

One of the objectives of the AfCFTA, as outlined in Article 4 of the Agreement, is to cooperate on investment, intellectual property rights, and competition policy. This will be achieved through the AfCFTA Phase II negotiations, which formally began in 2019 and continued at the time of writing. As part of the process of market deepening, a new mandate was also secured by the African Union Commission to embark on facilitating negotiation of a protocol on digital trade and e-commerce.

The successful negotiation of the planned protocol on sustainable investment, together with protocols on competition policy and intellectual property rights, is expected to create a competitive and conducive business environment, facilitating increases in sustainable investments throughout the African continent. This will be achieved by creating a harmonized investment policy regime with a set of institutional arrangements promoting development objectives, thereby enabling higher levels of entrepreneurial activities, among other positive developments. In this context, the planned protocol on

¹ Agreement establishing the African Continental Free Trade Area (opened for signature 21 March 2018, entered into force 30 May 2019).

² Nick Routley, 'This is Africa's ambitious free trade plan, mapped' (*World Economic Forum*, 9 April 2019) <www.weforum.org/agenda/2019/04/visualizing-africa-s-free-trade-ambitions> accessed 19 May 2020.

³ OECD, African Tax Administration Forum and African Union Commission, *Revenue Statistics in Africa 2019: 1990–2017* (OECD Publishing 2019) 130.

⁴ Gerhard Erasmus, 'How will the AfCFTA live up to all the Expectations?' (*Trade Law Centre*, 13 April 2020) <www.tralac.org/publications/article/14505-how-will-the-afcfta-live-up-to-all-the-expectations.html> accessed 19 May 2020.

sustainable investment will play a positive role in attracting quality investments. These investments, both local and foreign, will have the added contribution of developing technological capabilities crucial to boosting innovation and competitiveness of enterprises across Africa.

Before this new initiative, African States had already drafted and concluded a variety of domestic, bilateral, and regional investment instruments, many of which are highly innovative.⁵ Through the planned protocol on sustainable investment, 'Africa is poised not only to reap the benefits of the field but also perhaps to assume a leadership role in defining the next generation of treaties.'⁶ The planned protocol will be a progression of what African States have done in modernizing their domestic investment codes to promote and protect investments with a view to balancing African countries' interests in sustainable development with those of investors, while affirming the sovereign right of states to regulate investments in the public interest.

Moving ahead, the African Union expects the planned protocol on sustainable investment to shape and foster the domestication of reformed international investment law, as shaped by and agreed upon by African Union Member States. As a consequence, the international investment regime will be shaped according to the policy and development priorities of Africans under the framework of the AfCFTA. In this context, African States are actively reclaiming the narrative of the reform and development of the international investment regime according to their policy and development priorities.⁷

The starting point for the development of the protocol on sustainable investment is the Pan-African Investment Code (PAIC).⁸ The PAIC is a continental framework that puts the long-term goal of securing sustainable development at its core. This is visible from the instrument's Preamble, which makes sustainable development the primary objective of the Code.⁹ The Preamble of the PAIC also emphasizes the importance of the United Nations Sustainable Development Goals (SDGs) for the economic, social, and environmental development of the continent.¹⁰ Furthermore, the formulations in the PAIC include provisions safeguarding the right to regulate, right to pursue development goals, exclusions of umbrella clauses, carve outs for public interest measures, as well as provisions aimed at minimizing exposure to international arbitration.¹¹

⁵ Makane Moïse Mbengue and Stefanie Schacherer, 'Evolution of International Investment Agreements in Africa: Features and Challenges of Investment Law "Africanization"' in Julien Chaisse, Leïla Choukroune, and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer forthcoming) (hereafter Mbengue and Schacherer, 'Evolution of IIAs in Africa').

⁶ Charles N Brower and Michael P Daly, 'A Study of Foreign Investment Law in Africa: Opportunity Awaits' in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series No 19 (Wolters Kluwer 2017) 503, 538.

⁷ Makane Moïse Mbengue, 'Africa's Voice in the Formation, Shaping and Redesign of International Investment Law' (2019) 34(2) *ICSID Review—FILJ* 455, 462 (hereafter Mbengue, 'Africa's Voice').

⁸ African Union Commission Economic Affairs Department, 'Draft Pan-African Investment Code' (December 2016) <www.au.int/en/documents/20161231/pan-african-investment-code-paic> accessed 21 June 2020.

⁹ Mbengue, 'Africa's Voice' (n 7) 471.

¹⁰ *ibid.*

¹¹ *ibid.*

Most importantly, the PAIC sets forth the right of African Union Member States to preserve their right to regulate and to open or close sectors to investment in accordance with their development strategies. This includes, for instance, that performance requirements may be imposed by African States on foreign investors to ensure that their investments also benefit African host states that are at different levels of social and economic development.

In pursuing these aforementioned objectives, the PAIC pursues all of the five areas of reform that the United Nations Conference on Trade and Development (UNCTAD) has emphasized in its Investment Policy Framework for Sustainable Development,¹² namely: (1) promoting and facilitating investment; (2) safeguarding the right to regulate, while providing protection; (3) reforming investment dispute settlement; (4) ensuring responsible investment; and (5) enhancing systemic consistency.¹³

By building upon the achievements of the PAIC, the process of negotiating the protocol on sustainable investment offers a new momentum for a new vision for international investment law. It goes without saying that the success of the planned protocol will depend on identifying the key development objectives of all African countries and on formulating provisions that will be supportive of sustainable investment promotion and facilitation within the context of the AfCFTA.

The success of the protocol on sustainable investment will be measured, at least in part, on its ability to bring coherence and consistency in the constellation of regional approaches and mechanisms that have been put forward to build a sound and predictable investment regulatory framework across the continent.¹⁴ The planned protocol on sustainable investment presents a unique opportunity for Africa to codify and harmonize these approaches, with the aim of building a large and attractive market for investment, both small and large-scale. The process of negotiating the planned protocol on sustainable investment will fully explore and capitalize on the work achieved on investment law initiatives by international and regional organizations so far, including the current discussions of the United Nations Commission on International Trade (UNCITRAL) Working Group III (Investor-State Dispute Settlement Reform), while focusing in particular on the new generation of investment agreements, the systemic challenges posed by the interactions within and between existing agreements, and their impact on policy coherence. Through the planned protocol, African policymakers will also work towards avoiding inconsistencies among national, regional, and international commitments and, in the process, help to solve problems of legal uncertainty and inconsistency.¹⁵ In

¹² UNCTAD, 'Investment Policy Framework for Sustainable Development' (2015) <<https://investmentpolicy.unctad.org/investment-policy-framework>> accessed 21 June 2020.

¹³ Rafia de Gama and Makane Moïse Mbengue, 'Break-out sessions: Regional investment policy processes and their contribution to Phases 1 and 2 of SD-oriented IIA reform: "Developing countries: Africa"' (UNCTAD High-level IIA Conference, Geneva, 13 November 2019) <<https://investmentpolicy.unctad.org/uploaded-files/document/IIA-Conference-2019-Report-back-on-Developing-countries-Africa-by%20Ms.DeGama%2CMr.Mbengue%20.pdf>> accessed 21 June 2020 (hereafter Gama and Mbengue, 'UNCTAD High-level IIA Conference').

¹⁴ Mbengue, 'Africa's Voice' (n 7) 480.

¹⁵ Mbengue and Schacherer, 'Evolution of IIAs in Africa' (n 5).

this respect, the African Union Commission will facilitate the development of a protocol that fully meets their needs, which will entail addressing the dynamic and ever-evolving character of the relationship between investors and states, while recognizing the rights and obligations of the investment community and all other stakeholders.¹⁶

From the foregoing, it is clear that inclusiveness in the upcoming negotiations on the protocol is crucial. This will be promoted and achieved by ensuring public participation in the negotiation process as well as providing access to information to stakeholders at both domestic and regional levels. Inclusivity will align responsible investment policies and practices with broader sustainable development goals more generally and, in the process, enable the negotiators to reach a broad-based consensus on the substance of the protocol on sustainable investment. In the spirit of inclusiveness, African governments are expected to put in place mechanisms at the national levels that will allow full involvement of stakeholders, broadly encompassing the private sector, civil society organizations, academia, women, youth, and labour (among others) during the elaboration of the Protocol.

This *Yearbook* is being published at a time when the global COVID-19 pandemic has shown that investment law should not be isolated from societal concerns. Investments should cater to developing and strengthening institutions in the areas of health, education, livelihoods, as well as the resilience of countries' institutional frameworks. With this in mind, governments are responding to the COVID-19 pandemic with wide-ranging actions, some of which have direct impacts on trade and investment. In this diversity of responses, projections from UNCTAD give an indication of a decline in investor confidence as well as other adverse financial repercussions.¹⁷ Another publication by the Afro-Champions Initiative on early surveillance of the COVID-19 pandemic shows that some of the continent's strongest companies and businesses are already in severe financial stress.¹⁸

In addition to these socio-economic concerns, countries are faced with potential threats of investor-state dispute settlement (ISDS) claims related to COVID-19 measures. The future role of international investment law therefore becomes extremely crucial to cushioning African governments and investors alike, while ensuring that the sustainable development needs and the rights of all people are realized.

As African Union Member States take critical steps to address the human and economic impacts of COVID-19, these decisions and policies will no doubt shape approaches on regional and global investment law and policy more generally. The decisions of

¹⁶ Gama and Mbengue, 'UNCTAD High-level IIA Conference' (n 13).

¹⁷ UNCTAD, 'Impact of the COVID-19 Pandemic on Global FDI and GVCs: Updated Analysis' (March 2020) Investment Trends Monitor <www.unctad.org/en/PublicationsLibrary/diaeiainf2020d3_en.pdf> accessed 21 June 2020.

¹⁸ The Afrochampions Initiative, 'Will COVID-19 Derail AfCFTA Start of Trading? Preliminary Assessment and Recommendations by AfroChampions' (Trade Law Centre, 17 April 2020) <www.tralac.org/documents/resources/covid-19/regional/3310-covid19-afcfta-afrochampions-april-2020/file.html> accessed 19 May 2020.

individual governments will have a direct bearing on trade and investment across and beyond the continent. These potential impacts bring home the more fundamental need to re-think the approach of international investment law, policy, and reforms. Now more than ever, policy space and public budgets must be reserved for provision of essential social services and restoring domestic and regional economies to health.¹⁹ Therefore, the planned protocol on sustainable investment will be an opportunity to build better bridges between the promotion and facilitation of investment in Africa and other developmental concerns, such as the realization of higher environmental, food security, and health equity concerns in the post COVID-19 era.

In welcoming the publication of this edition of the *Yearbook on International Investment Law and Policy*, I also recommend it for use by professors, students, researchers, policy makers, and other practitioners in the field.

Albert Mudenda Muchanga
Commissioner for Trade and Industry, African Union Commission
June 2020

¹⁹ Roslyn Ng'eno, 'COVID-19 and ISDS Claims: Risks and Potential Solutions—Background Note' (May 2020) AfCFTA Support Unit, DTI, African Union Commission, 2.

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Author Biographies

Juan Miguel Alvarez is a Lecturer and Researcher at the Business Law Department of the Universidad Externado de Colombia. He holds a law degree from the Universidad Externado de Colombia, an LLM degree in International Economic Law, Business and Policy from Stanford University, and an LLM degree in European and International Business Law from the University of Vienna. His work focuses on international economic law, particularly on international investment law, as well as on international contracts and international commercial arbitration. He is also a partner at Roldán Uribe & Alvarez Abogados, a Colombian law firm which specializes in dispute resolution, including litigation and arbitration, state contracts, investment law, and energy and oil law.

Andrés Eduardo Alvarado Garzón is a PhD Candidate at Saarland University in Germany, where he also works as a research associate at the Chair for Public Law, Public International Law and European Law of Prof. Dr. Marc Bungenberg. His research is focused primarily on the fields of international investment law and trade law. Previously, he studied law at the Universidad Externado de Colombia, where he also worked as an assistant at the Chair of Procedural Law. He holds an LLM degree in European and International Law from the Europa-Institut at Saarland University, with emphasis on Foreign Trade and Investment, and International Dispute Resolution. He is qualified to practice law in Colombia, where he has gained professional experience working for the private sector.

Sofía 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.

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 on 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.

Daniel D. Bradlow is SARCHI Professor of International Development Law and African Economic Relations, University of Pretoria and Professor Emeritus, American University Washington College of Law. He was previously Head, International Economic Relations and Policy Department, South African Reserve Bank; Director, International Legal Studies Program, American University Washington College of Law; Chair, Roster of Experts, Independent Review Mechanism, African Development Bank; member, International Law Association's Committee on Accountability of International Organizations, and consultant to numerous international organizations. He has published on topics including the international law applicable to international financial institutions, finance and human rights, global economic governance, and international development law. His most recent book is Daniel Bradlow and David Hunter (eds), *Advocating Social Change Through International Law: Exploring the Choice Between Hard and Soft International Law* (Brill 2020).

Damien Charlotin is a PhD Candidate in Law at the University of Cambridge, as well as a writer and editor for Investment Arbitration Reporter, a news and analysis service specializing in international investment law. He also teaches data science to law students at Sciences Po Paris.

Jesse Coleman is a Senior Legal Researcher at the Columbia Center on Sustainable Investment (CCSI). She joined CCSI in 2015, and focuses on the nexus of international investment and human rights law, investment law and policy, and sustainable investments in land and agriculture. Prior to joining CCSI, she worked with public health and human rights organizations. Jesse holds a Master of Law from the University of Cambridge, where she specialized in public international law. She received her Bachelor of Laws and Bachelor of Arts in Political Science from Trinity College Dublin.

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 post-graduate course on International Investment Law and Sustainable Development. 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.

Joel Dahlquist holds a doctorate in international investment law and has been teaching that subject and others since 2013. As of 2020, Joel is Managing Associate at Arbitration Chambers, where he works full-time as tribunal secretary in large arbitrations. Previously, among other things, he was Associate Counsel at the Arbitration Institute at the Stockholm Chamber of Commerce and worked as writer and editor at Investment Arbitration Reporter.

Nicholas J. Diamond is an Adjunct Professor of Law at the Georgetown University Law Center. He is also a PhD candidate in public international law at Leiden Law School, with a specific focus on investment treaty arbitration, treaty interpretation, and human rights. He holds related affiliations as an Assistant Editor of Wolters Kluwer's Kluwer Arbitration Blog and a Contributor to Oxford University Press' Investment Claims. He trained and qualified as a lawyer in the US, and holds graduate degrees in global health law and bioethics.

Rochelle Cooper Dreyfuss is the Pauline Newman Professor of Law at New York University School of Law, co-Director of NYU's Engelberg Center on Innovation Law and Policy, and the Arthur Goodhart Visiting Professor at the University of Cambridge for 2019–20. She is a member of the American Law Institute and was a co-Reporter for its Project on Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes. She was a consultant to the Federal Courts Study Committee, the Presidential Commission on Catastrophic Nuclear Accidents, and the Federal Trade Commission. She served on the Secretary of Health and Human Services' Advisory Committee on Genetics, Health, and Society and National Academies Committees on Intellectual Property in Genomic and Protein Research and Innovation, on Intellectual Property Rights in the Knowledge-Based Economy, and on Science, Technology, and Law. Her writings include *A Neofederalist Vision of TRIPS: Building a Resilient International Intellectual Property System* (Oxford University Press 2012) (with Graeme Dinwoodie); *Balancing Wealth and Health: The Battle over Intellectual Property and Access to Medicines in Latin America* (Oxford University Press 2014) (edited and partly co-written with César Rodríguez-Garavito), and several papers on the impact of investor-state dispute resolution on intellectual property rights.

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.

Andria Naudé Fourie is a Research Fellow with the Department of International and European Union Law at the Erasmus School of Law, Erasmus University Rotterdam. Her professional experience extends across countries and industries, having worked both as a business consultant with Accenture in their Retail Banking and Resources practices, and as an academic researcher and lecturer at the Erasmus School of Law. She holds PhD and LLM degrees in Public International Law from the Erasmus University Rotterdam, as well as post-graduate qualifications in business and alternative dispute resolution from the University of Pretoria. Her research and publications focus on the operationalization of accountability, sustainable development, and human rights within the broader transnational development context.

Geoffrey Gertz is a Fellow in the Global Economy and Development program at the Brookings Institution and a Research Associate at the Global Economic Governance Programme at the University of Oxford. His research focuses on the politics of trade and foreign investment, and he is currently working on a book manuscript on American commercial diplomacy. He regularly briefs American and European policymakers on international trade and investment policy. Originally from Ottawa, Canada, he received an MPhil and DPhil (PhD) in International Relations from the University of Oxford, and a BA in Economics from DePauw University.

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.

Wouter Schmit Jongbloed joined Exante Advisors as Head of Political Risk Analysis. He previously has extensive experience working in Academia and has worked with various law firms, including Shearman & Sterling LLP (Frankfurt am Main) and Freshfield Bruckhaus Deringer LLP (Amsterdam). Wouter obtained his PhD. in Law and Economics at Columbia University (JSD). His dissertation work concentrated on the interplay of trade policy and economic growth. He additionally holds three Master degrees in Law (JD-equivalent), Philosophy, and Finance; held various research positions in Switzerland, Germany, and Brazil, and is an co-author and co-editor of *Sovereign Investment: Concerns and Policy Reactions* (OUP, 2012) and was the Managing Editor of the *Investment Yearbook* (OUP, various years).

Hannes Lenk is Assistant Professor at Aarhus University, Denmark. He holds a PhD in law from Gothenburg University, Sweden and obtained an LLM in European Law from Leiden University, the Netherlands. His research revolves around the intersection between international investment law and EU external relations law. He has published widely in a range of peer-reviewed journals on issues including the EU investment court system, the EU principle of autonomy, and the EU's international responsibility. Outside of academia, Hannes spent some time at the European Commission, Directorate General for Trade.

Chin Leng Lim is the Choh-Ming Li Professor of Law at the Chinese University of Hong Kong and practises from chambers at Keating Chambers, London. He is an Honorary Senior Fellow of the British Institute of International and Comparative Law, and a Visiting Professor at King's College London. His books include Chin Leng Lim, Jean Ho, and Martins Paparinskis, *International Investment Law and Arbitration* (CUP 2018) with a Foreword by Emmanuel Gaillard; Chin Leng Lim (ed), *Alternative Visions of the International Law on Foreign Investment* (CUP 2016); and the forthcoming *Cambridge Companion to International Arbitration* with a Foreword by Lord Neuberger.

Maria Laura Marceddu is a teaching fellow in international economic law at the University of Edinburgh, research associate at the Edinburgh Centre for International and Global Law, 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.

Ella Merrill joined the Columbia Center on Sustainable Investment in 2019, supporting the Center's research and programmatic work in investment law and policy. She received her Bachelor of Arts from Barnard College where she studied environmental policy and human rights. Prior to joining CCSI, she worked as the research assistant to a leading environmental journalist, conducted her own research and policy work on the previously undetected persistence of herbicides in Florida waterways, and contributed to Barnard College's successful fossil fuel divestment campaign, in addition to serving as the program manager to a sustainability and energy management firm in New York.

H.E. Amb. Albert Mudenda Muchanga is currently African Union Commissioner for Trade and Industry. He previously worked in the Zambian Civil Service at home and abroad and as Deputy Executive Secretary of the Southern African Development Community (SADC). In his current position, he has provided strategic leadership in facilitating negotiation, conclusion and ratification of the Agreement Establishing the African Continental Free Trade Area (AfCFTA), which entered into force on 30 May 2019 and whose operation phase was launched on 7 July 2019. In addition, Ambassador Muchanga has provided similar leadership on matters of trade, industrialization, mining, and customs cooperation. He works with ease at technical, professional, management, leadership, and political levels.

José Antonio Ocampo is Professor at the School of International and Public Affairs and Member of the Committee on Global Thought at Columbia University, Chair of the Committee for Development Policy of the United Nations Economic and Social Council (ECOSOC), and Chair of the Independent Commission for the Reform of International Corporate Taxation (ICRICT). He also teaches regularly at Universidad de los Andes and other Colombian universities. 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, Director of the National Planning Office of Colombia, and Member of the Board of Directors of Banco de la República (Colombia's central bank). 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 Professor in International Economic Law at King's College London specializing in international trade and investment law.

Facundo Pérez-Aznar is a 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.

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.

Dr Esmé Shirlow is an Associate Professor at the Australian National University (ANU), where she teaches and researches in the fields of public international law, international dispute

settlement, and international investment law and arbitration. Dr Shirlow serves as an Academic Editor of the Australian Yearbook of International Law, an Associate Editor of the ICSID Review—Foreign Investment Law Journal, and Associate Editor (Investment Arbitration) of Kluwer Arbitration Blog. Prior to joining the ANU, she worked in the Australian Government's Office of International Law. She is admitted as a solicitor in the Australian Capital Territory, and serves as an assistant to investment tribunals and also advises parties to investment treaty claims and in proceedings before the International Court of Justice. Dr Shirlow completed her PhD as a Dickson Poon Scholar at King's College London, for which she was awarded the King's Elsevier Outstanding PhD Thesis Prize. She completed her LLM at the University of Cambridge, where she was awarded—among other prizes—the BRD Clarke Prize for Best Overall Performance in the LLM, the Clive Parry Prize for Best Result in International Law, and the Whewell Scholarship in International Law. Esmé completed her LLB (Hons) and a BA at the Australian National University.

Ilan Strauss holds a PhD in economics from the New School for Social Research in New York (May 2020) and an MSc in development economics from SOAS (University of London). He worked on the World Investment Report for UNCTAD from 2014 to 2018 as an external consultant. Prior to that he was a research economist at the African Development Bank (AfDB) in Tunisia. He teaches macroeconomics on Rice University's online MBA program and at New York University (Division of Applied Undergraduate Studies). His recent PhD work on corporate secular stagnation has been published with Oxford University's Oxford Martin School and the Institute for New Economic Thinking (INET) Oxford. His personal website is: <<https://www.ilan-strauss.org/>>.

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. Her research examines the intersection between environmental governance and the global economic system. Her work on investment arbitration 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, Dr iur., FCI Arb is a tenured Research Associate Professor at the French National Centre for Scientific Research (CNRS)–CERSA, University Paris II Panthéon-Assas, France. She is a 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, and she serves on the Editorial Committee of the *Yearbook on International Investment Law & Policy* (OUP). In addition to sitting on the Board of the European Society of International Law (ESIL), she is a member of the Academic Council of the Institute for Transnational Arbitration (ITA) of the Center for American and International Law. Catharine is a Fellow of the Chartered Institute of Arbitrators (FCI Arb), she sits on the panel of arbitrators for the Court of Arbitration for Art (CAfA), and she is appointed to the roster of the United States–Mexico–Canada Agreement's (USMCA) Annex 31-B panelists. Catharine holds a PhD from the University of Siegen in Germany (Summa cum laude, Rolf H. Brunswick PhD Prize), and has previously been a consultant at the United Nations Conference on Trade and Development (UNCTAD). In 2016, Catharine was 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.

Todd Tucker is a political scientist and Director of Governance Studies at the Roosevelt Institute, where he helps lead research on global governance, democracy, and the administrative state. He is author of *Judge Knot: Politics and Development in International Investment Law* (Anthem Press 2018), and *Industrial Policy and Planning: What It Is and How to Do It Better* and other reports for Roosevelt. Dr Tucker has testified before legislatures and expert committees around the world and his writing has been featured in *Politico*, *Time Magazine*, *Democracy Journal*, the *Financial Times*, and the *Washington Post*.

Zoe Phillips Williams is the managing editor of Investment Treaty News and an Associate at the International Institute for Sustainable Development. 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*.