Yearbook on International Investment Law & Policy 2019

YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY

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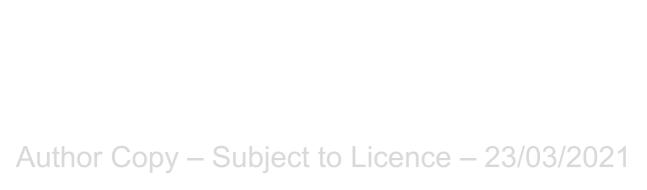
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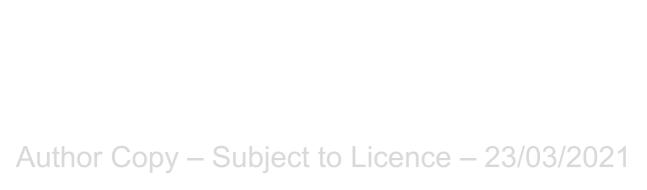


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The *Investment Yearbook* addresses legal and policy issues in the area of international investment—from national, regional, and international perspectives. The Editorial Committee invites for publication manuscripts that are of outstanding quality in terms of academic rigor, quality of the argument, originality, and contribution to the field of international investment law and policy. The *Investment Yearbook* will not consider a manuscript that has been published previously. Every manuscript that is considered for publication will be assessed through an external double-blind peer-review process. The style of the manuscripts should be in accordance with the OSCOLA guidelines, as adapted to the *Yearbook* (available from the Editorial Committee).

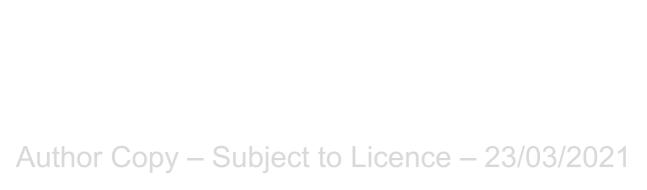
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Foreword

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). 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. 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. 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). 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. 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. 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.

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 everevolving 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. 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.

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.

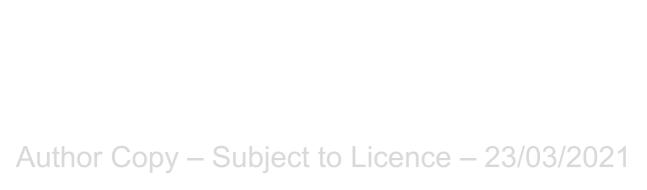
¹⁸ The Afrochampions Initiative, 'Will COVID-19 Derail AfCFTA Start of Trading? Preliminary Assessment and Recommendations by AfroChampions' (Trade Law Centre, 17 April 2020) <www.tralac.org/documents/resources/covid-19/regional/3310-covid19-afcfta-afrochampions-april-2020/file.html> accessed 19 May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



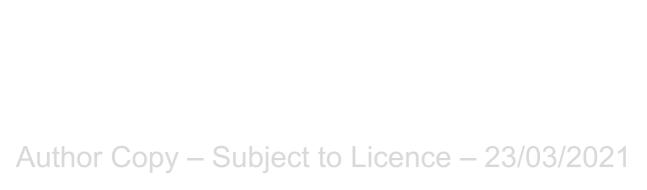
Contents—Summary

Aut	hor Biographies	xxxi
	PART I: YEAR IN REVIEW	
	A. DEVELOPMENTS IN FOREIGN INVESTMENT	
1.	2019 Trends in FDI Flows and Policy <i>Ilan Strauss</i>	5
2.	Financing for Sustainable Development in 2019: ESG Considerations 'Go Mainstream' and Its Implications Daniel D. Bradlow and Andria Naudé Fourie	27
3.	Taxation of International Investment: The Search for Consensus José Antonio Ocampo and Tommaso Faccio	42
4.	Institutional Developments in International Investment Law and Policy <i>Joel Dahlquist</i>	55
5.	Home State Measures Towards Foreign Investment Geoffrey Gertz	66
6.	Investment Facilitation Update: Initiative Among WTO Member Group Prepares for Twelfth Ministerial Conference Sofia Baliño and Nathalie Bernasconi-Osterwalder	80
7.	Political Risk Insurance in an Age of Managed Trade Wouter Schmit Jongbloed	97
8.	Investment Treaties and Models in 2019: (Mis) Aligned with the SDGs? <i>Jesse Coleman, Lise J. Johnson, Ella Merrill, and Lisa E. Sachs</i>	111
	B. DEVELOPMENTS IN INVESTOR-STATE ARBITRATION	
9.	2019 Developments in Investment Treaty Arbitration: Jurisdiction, Admissibility, Procedure, and Conduct Catharine Titi	167
10.	2019 Developments in Investment Treaty Arbitration: Decisions on the Merits Damien Charlotin	193

	THEMATIC	DEMELOD	MENITO I	NI INIVECTA	TENT POLICY
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11.	Developments in Investment and Environment, Climate, and Renewables in 2019 <i>Kyla Tienhaara</i>	233
12.	ISDS and Intellectual Property in 2019: The Case of the Dog that Didn't Bark Rochelle Cooper Dreyfuss	249
13.	Intersections Between Trade and Investment Law and Policy: The Common Causes Underlying the Crisis of Dispute Settlement Maria Laura Marceddu and Federico Ortino	261
14.	Developments in Investment and Human Rights in 2019 <i>Nicholas J. Diamond</i>	276
15.	Investor-State Arbitration in the Extractive Industries in 2019 <i>Zoe Phillips Williams</i>	297
16.	Land in International Investment Law and Dispute Settlement: Developments in 2019 Thierry Berger and Lorenzo Cotula	309
	D. REGION REPORTS	
17.	Developments in International Investment Law and Policy in Asia <i>Chin Leng Lim</i>	323
18.	Developments in International Investment Law and Policy in the European Union Hannes Lenk	339
19.	Developments in International Investment Law and Policy in Latin America Facundo Pérez-Aznar	366
20.	Developments in International Investment Law and Policy in North America Todd Tucker	391
	PART II: GENERAL ARTICLES	
21.	Compensation with a Chess Clock? The Interaction of Statutes of Limitation with the Calculation of Damages in Investment Arbitration Andrés Eduardo Alvarado Garzón	405
22.	The United States–Mexico–Canada Agreement (USMCA): A New Chapter in the Discussion About ISDS Between Developed Countries <i>Juan Miguel Alvarez</i>	425

	CONTENTS—SUMMARY	X1X
23.	The Promises and Pitfalls of Investor-State Mediation Esmé Shirlow	461
24.	Opinion 1/17 and the Future of Investment Dispute Settlement: Implications for the Design of a Multilateral Investment Court Cathorine Titi	514



Contents—Detailed

Author Biographies	xxxi
PART I: YEAR IN REVIEW	
A. DEVELOPMENTS IN FOREIGN INVESTMENT	
1. 2019 Trends in FDI Flows and Policy	5
Ilan Strauss	
A. Introduction: FDI and Secular Stagnation?	1.01
1. Overview	1.01
2. Secular Stagnation	1.04
B. Statistical Trends in Official FDI	1.08
1. Long-Term Factors	1.10
2. Short-Term Factors	1.16
C. Investment Policy Trends in 2019	1.21
1. National Investment Regulations Among Emerging and	
Developing Economies	1.24
2. Regionalism	1.30
3. Technological Leadership: National Security and Industrial Policy	1.36
4. China–US Bilateral FDI Trends	1.42
D. Conclusion	1.46
Appendix	26
2. Financing for Sustainable Development in 2019: ESG Considerations	
'Go Mainstream' and Its Implications	27
Daniel D. Bradlow and Andria Naudé Fourie	27
A. Introduction	2.01
B. Conceptualizing Sustainable Development	2.01
C. 2019: ESG Considerations 'Go Mainstream'	2.10
Social Impact Investing and Business Attention to ESG Matters	2.10
Funding Shortfall—Causes and Consequences	2.11
3. Efforts to Harmonize ESG Standards and Performance Reporting	2.19
4. Accountability for ESG Issues—Courts and Independent Accountability	2.17
Mechanisms	2.25
D. Challenges Arising from the ESG—Trends for the Financing Community	2.29
Forward-Looking ESG Risk Management Systems	2.30
2. Internalizing All Costs	2.35
3. Implications for Accountability to Shareholders and Stakeholders	2.38
E. Conclusion	2.39

XXII CONTENTS—DETAILED

3.	Taxation of International Investment: The Search for Consensus José Antonio Ocampo and Tommaso Faccio	42
	A. The Unified Approach and the Global Anti-Base Erosion Proposal	3.01
	B. Nexus and Profit Allocation Rules	3.05
	C. Global Minimum Tax Rules	3.15
	D. Going Solo	3.23
	E. The Economics of the Proposals	3.34
	F. Impact on Investment	3.37
	G. Conclusions	3.42
4.	Institutional Developments in International Investment Law and Policy <i>Joel Dahlquist</i>	55
	A. Introduction	4.01
	B. UNCITRAL Working Group III—Reform Momentum Building	4.06
	C. Meanwhile at ICSID—Rule Reforms Working in ParallelD. Arbitration Institutions Providing Practical Input to the WG III, While Still	4.17
	Administering Treaty-based Arbitrations	4.22
	1. The PCA	4.26
	2. Commercial Arbitration Institutions	4.31
	E. OECD and UNCTAD Gather States and Remain Reliable Fora for Policy-	
	Driven Research	4.37
	F. Summary	4.47
5.	Home State Measures Towards Foreign Investment Geoffrey Gertz	66
	A. Introduction	5.01
	B. Home State Interests and Outward Investment	5.03
	C. 2019 Trends in Home State FDI Policy	5.09
	China Recalibrates the Belt and Road Initiative	5.09
	Retooling State-Backed Finance to Support Outward FDI	5.14
	3. The Return of Home States in Investment Protection?	5.18
	4. Advances and Setbacks in Operationalizing New Policies on Responsible	
	Investment	5.22
	D. Conclusion: Home State FDI Policies in a Shifting Global Order	5.27
6.	Investment Facilitation Update: Initiative Among WTO Member	
	Group Prepares for Twelfth Ministerial Conference	80
	Sofia Baliño and Nathalie Bernasconi-Osterwalder	
	A. Introduction	6.01
	B. From a Checklist of Measures to an Examination of IF in Practice	6.06
	C. July 2019: Release of the 'Working Document'	6.15
	D. September–December 2019: Streamlining the Working Document,	
	Evaluating Progress and Concerns	6.20
	E. Questions on the Framework's Potential Impact, Integration into	
	WTO Rules Remain	6.38
	F. The Wider WTO Context: Appellate Body Paralysis and the Future of the	
	Multilateral Trade System	6.43
	G. Conclusion: International Investment Governance and Systemic	
	Considerations	6.49

	CONTENTS—DETAILED	XX111
7.	Political Risk Insurance in an Age of Managed Trade Wouter Schmit Jongbloed	97
	 A. The Year 2019 in Review: Persisting and Re-Emerging Trends in Political Risk B. An Evolving Marketplace: Public and Private Political Risk Insurance C. Developments in 2019: Managed Trade and Heightened Uncertainty 1. USMCA (2018–2019): Bringing Back the Country Risk Premium 2. US-China Phase One Deal (2019–2020) D. Outlook: A New Paradigm for (Private) Political Risk Insurance 	7.01 7.13 7.24 7.28 7.39 7.50
8.	Investment Treaties and Models in 2019: (Mis) Aligned with the SDGs?	111
	 Jesse Coleman, Lise J. Johnson, Ella Merrill, and Lisa E. Sachs A. Introduction B. A New Approach to International Investment Governance C. Pillar One: SDG-Advancing Investment 1. Provisions That Work to Actively Mobilize SDG-Aligned Investment 2. Provisions That Work to Avoid Subsidizing Harmful Investments D. Pillar Two: SDG-Advancing Governance 1. Provisions That Advance or Distort Domestic Governance and Rights 2. Provisions That Support or Distort the Ability of States to Regulate E. Pillar Three: SDG-Advancing International Cooperation 1. Combatting Races to the Bottom 2. Closing Transnational Governance Gaps 3. Anticipating, Understanding, and Addressing Treaty Effects in State Parties F. Conclusion 	8.01 8.09 8.12 8.13 8.22 8.30 8.32 8.72 8.85 8.86 8.116 8.121 8.124
	B. DEVELOPMENTS IN INVESTOR-STATE ARBITRATION	N
9.	2019 Developments in Investment Treaty Arbitration: Jurisdiction, Admissibility, Procedure, and Conduct Catharine Titi A. Introduction	9.01
	B. Jurisdiction and Admissibility 1. Covered Investment and Covered Investors	9.02 9.02
	 Relevance of Achmea to the Energy Charter Treaty and Some Other Intra-EU Objections Most-Favoured-Nation (MFN) Clause Waiting Periods Corruption Dual Nationals Procedure and Conduct Arbitrator and Expert Challenges Bifurcation and Trifurcation Provisional Measures Amicus Curiae Submissions Third-Party Funding and Security for Costs 	9.12 9.20 9.22 9.23 9.24 9.28 9.35 9.39 9.45 9.49
	6. Burden of Proof D. Conclusions	9.50 9.51

10.	20	19 Developments in Investment Treaty Arbitration: Decisions	
	on	the Merits	193
	Da	mien Charlotin	
	A.	Introduction	10.01
	В.	Provisional Measures	10.02
		1. Relations Between Party and Counsel	10.04
		2. Criminal Proceedings	10.06
	C.	Merits and Standards of Treatment	10.11
		1. Adverse Inferences	10.12
		2. Attribution	10.14
		3. Defences	10.16
		4. Contract Claims	10.20
		5. Expropriation	10.23
		6. Non-impairment	10.28
		7. War Losses Clauses	10.33
		8. Umbrella Clauses	10.35
		9. FET	10.39
		10. Denials of Justice	10.56
		11. FPS	10.59
	D.	Renewable Energy Disputes	10.61
		1. Spain	10.62
		2. Czech Republic and Italy	10.73
	E.	Quantum	10.79
		1. Proof and Evidence	10.81
		2. General Approaches	10.86
		3. DCF	10.90
		4. Moral Damages	10.96
		5. Contributory Fault and Mitigation	10.98
	F.	Other Remedies	10.99
		1. Restitution and Declaration	10.100
		2. Reconsideration	10.103
		3. Rectification	10.105
		4. Supplementary Decisions	10.106
		Settlements	10.107
	Н.	Annulments and Set Asides	10.110
		1. ICSID Annulment	10.110
		2. Set Aside Proceedings	10.124
	I.	Conclusion	10.127
	C.	THEMATIC DEVELOPMENTS IN INVESTMENT P	OLICY
11	De	evelopments in Investment and Environment, Climate, and	
11.		newables in 2019	233
			233
	-	la Tienhaara	
		Introduction	11.01
		Climate Change	11.06
	C.	Renewable Energy	11.10
		Developments in Cases Against Spain Developments in Cases Against Spain	11.11
		2. Developments in Other ECT Cases 3. Developments in Non-ECT Cases	11.20
		3 Lievelonments in Non-HULL ases	11 25

		CONTENTS—DETAILED	xxv
	D.	Project Approval: Environmental Impact Assessments and Permits	11.27
		Counterclaims and Liability for Environmental Harm	11.32
		Reform Discussions	11.35
		1. Modernization of the ECT	11.36
		2. UNCITRAL Working Group III	11.39
12.		OS and Intellectual Property in 2019: The Case of the Dog that	2.40
		dn't Bark	249
		chelle Cooper Dreyfuss	
		Introduction	12.01
		The Mission was Accomplished	12.03
		ISDS is Maturing	12.10
	D.	Conclusion	12.21
13.	Int	ersections Between Trade and Investment Law and Policy: The	
	Co	mmon Causes Underlying the Crisis of Dispute Settlement	261
	Ma	iria Laura Marceddu and Federico Ortino	
	A.	Introduction	13.01
	В.	Lack of Clarity	13.07
		Constraining Contracting Parties' Policy Space	13.10
		1. The National Security Exception and the <i>Russia: Traffic</i> in <i>Transit</i> Dispute	13.12
		2. Fair and Equitable Treatment and the Renewable Energy Disputes	13.15
	D.	Policy Options Going Forward	13.19
	E.	Conclusion	13.31
14.	De	velopments in Investment and Human Rights in 2019	276
		cholas J. Diamond	
		Introduction	14.01
		International Investment Agreements	14.02
		1. Preambular Text	14.04
		2. Investor Responsibilities	14.06
		3. General Exceptions	14.09
		4. Regulatory Autonomy	14.11
		5. Non-Lowering of Standards	14.13
	C.	Model Agreements	14.14
		1. Slovakia Model BIT, Morocco Model BIT, and Belgium–Luxembourg	
		Economic Union Model BIT	14.14
		2. 2019 Netherlands Model BIT	14.17
	D.	Binding Treaty on Business and Human Rights	14.22
		1. History	14.22
		2. Updates	14.23
		3. Future Considerations	14.27
	E.	Hague Rules on Business and Human Rights Arbitration	14.32
		1. History	14.32
		2. Content	14.35
	г	3. Future Considerations	14.39
	r.	Investment Disputes	14.43
		1. Cases 2. Fixture Considerations	14.44
		2. Future Considerations Looking Ahead	14.46 14.48
	١T	LOUNTLY ALICAU	1440

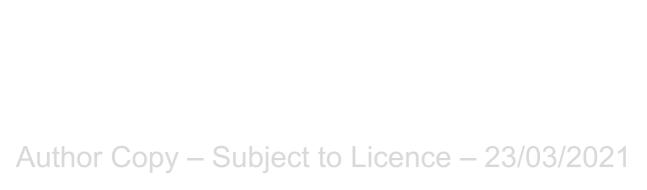
15.	Investor-State Arbitration in the Extractive Industries in 2019 Zoe Phillips Williams	297
	A. Introduction	15.01
	B. Claims in Response to Industry Activity Phase Outs	15.04
	C. Claims in Response to Community-Company Conflicts	15.09
	D. Concluded Cases	15.23
	E. Conclusion	15.34
16.	Land in International Investment Law and Dispute	200
	Settlement: Developments in 2019	309
	Thierry Berger and Lorenzo Cotula	
	A. Introduction	16.01
	B. Policy Developments	16.03
	C. Developments in Investment Disputes	16.13
	D. Future Outlook	16.24
	D. REGION REPORTS	
17.	Developments in International Investment Law and Policy in Asia Chin Leng Lim	323
	A. Introduction	17.01
	B. Asian Megaregional Responses to the Backlash, and the EU's Arrival	
	in Asia	17.04
	C. Asian Countries' Treaty Policies at UNCITRAL WG III	17.09
	D. Investment Arbitration during 2019—Pending Claims, Decisions,	
	Awards, Annulments	17.15
	E. Investment Arbitration during 2019—Institutional Rules	17.21
	F. Treaty Developments	17.22
	G. Conclusions	17.28
18.	Developments in International Investment Law and Policy in the	
	European Union	339
	Hannes Lenk	
	A. Introduction	18.01
	B. Green Light for the EU Investment Court System	18.02
	C. Other Developments in the Case Law	18.19
	D. EU Investment Agreements: The State-Of-Play	18.24
	E. Multilateral Reform of ISDS	18.29
	F. Investment Screening G. Investment Protection and the EU Internal Market	18.31 18.33
	H. A Look at the (Past) Year Ahead	18.48
19.	Developments in International Investment Law and Policy in Latin	
	America	366
	Facundo Pérez-Aznar	100
	A. Introduction	19.01
	B. Developments in Investment Disputes Involving Latin America	19.06
	Argentina and Uruguay Chile Peru and Colombia	19.08

	CONTENTS—DETAILED	xxvii
	3. Bolivia, Ecuador, and Venezuela	19.20
	4. Central America, Mexico, and the Caribbean	19.27
	5. Identifying Regional Trends in Investment Disputes	19.31
	C. Developments in International Investment Agreements	19.32
	D. Developments at the Internal Level	19.43
	E. Positions in the Region on Attempts to Modernize the International	17,10
	Investment Regime	19.48
	F. Conclusion	19.54
20.	Developments in International Investment Law and Policy in North	
	America	391
	Todd Tucker	
	A. Introduction	20.01
	B. Reception to Investment Treaty Changes	20.03
	C. Arbitral Developments (and Other Potential Developments)	20.14
	1. Canada	20.15
	2. Mexico	20.20
	PART II: GENERAL ARTICLES	
21	Compensation with a Chess Clock? The Interaction of Statutes of	
21.	Limitation with the Calculation of Damages in Investment Arbitration	405
	Andrés Eduardo Alvarado Garzón	403
		21.01
	A. Introduction	21.01
	B. Nature and Application of Statutes of Limitation in Investment	21.04
	Arbitration	21.04
	1. Why Do Statutes of Limitation Exist?	21.05
	2. Sources of Statutes of Limitation in Investment Arbitration	21.08
	3. Applying Statutes of Limitation in Investment Arbitration	21.14
	C. Time Considerations in Calculation of Damages	21.19
	1. Date of Valuation: Finding the Right Moment	21.21
	2. Timing and Methods of Calculation: Modern Economy and its	21.20
	Influence on the Valuation of Assets	21.28
	D. Interaction of Statutes of Limitation and Calculation of Damages:	21.20
	Comparing Apples and Oranges?	21.30
	Background Facts Outside the Limitation Period	21.31
	2. Possible Cases of Valuation Dates Going Beyond the Limitation Period	21.34
	3. Valuation Methods Require the Analysis of Available Information	21.38
	4. Theory Into Practice: Considering Events Before the Cut-Off Date for the	21.42
	Purpose of Valuation is not a Breach of Statutes of Limitation	21.43
	E. Conclusion	21.47
22.	The United States-Mexico-Canada Agreement (USMCA): A New	
	Chapter in the Discussion About ISDS Between Developed Countries	425
	Juan Miguel Alvarez	
	A. Introduction	22.01
	B. A Preliminary Question: Developed Countries Defined	22.01
	C. Judging the USMCA: Reasons to Include ISDS in IIAs Between	22.0 1
	Developed Countries	22.09

XXVIII CONTENTS—DETAILED

	1. ISDS is Necessary to Depoliticize the Settlement of Investment Disputes	
	·	22.11
	2. ISDS is Necessary Because Legal Systems and Courts of Developed	
	· · · · · · · · · · · · · · · · · · ·	22.21
	3. ISDS is Necessary Because International Obligations Require	
	· · · · · · · · · · · · · · · · · · ·	22.27
	4. ISDS is Necessary Because Domestic Courts May Be Precluded from	
		22.31
	5. IIAs and ISDS Provide Investors with Greater Rights than Those	
	· · · · · · · · · · · · · · · · · · ·	22.40
	6. ISDS is Necessary Because Domestic Courts May Lack the Expertise to	22.10
	· · · · · · · · · · · · · · · · · · ·	22.53
	7. ISDS is Required Because of the Culturally Specific Nature of Litigation in	22.55
	The state of the s	22.55
	8. Excluding ISDS from IIAs Between Developed Countries May Endanger	22.33
		22.56
	9. Excluding ISDS from IIAs Between Developed Countries May	22.30
	· · · · · · · · · · · · · · · · · · ·	22.59
	· · · · · · · · · · · · · · · · · · ·	22.39
	10. In a Multilateral Setting, ISDS is an Unavoidable Consequence of Seeking	
	Greater Protection for Investors in Developing Countries Party to the	22.61
	6	22.61
	D. Conclusion	22.66
23.	The Promises and Pitfalls of Investor-State Mediation	461
	Esmé Shirlow	
		23.01
		23.03
		23.03
	<u> -</u>	23.11
		23.11
	-	23.16
	6 6	23.10
		23.28
		23.31
	1 , 1	23.32
	•	23.43
		23.50
	e	23.60
	Minimizing Mediation's Weaknesses	23.61
	8	23.82
	F. Conclusions	23.87
24	Opinion 1/17 and the Future of Investment Dispute Settlement:	
_ 1.	Implications for the Design of a Multilateral Investment Court	514
	Catharine Titi	511
		24.01
		24.01
	B. The Context of Opinion 1/17 and the Proposal for an Investment Court	24.05
	•	24.05
	C. The EU's Constitutional Framework	24 14

	CONTENTS—DETAILED	XX1X
Э.	The Autonomy of the EU Legal Order	24.20
	1. The Applicable Law	24.21
	2. Protection of the Level of the Public Interest, or the Right to Regulate	24.30
Ε.	The General Principle of Equal Treatment and the Right of Access to an	
	Independent Tribunal	24.43
F.	Conclusion	24.56



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