

YEARBOOK ON
INTERNATIONAL INVESTMENT
LAW & POLICY
2014–2015

YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY

ANDREA K. BJORKLUND, EDITOR

*L. YVES FORTIER CHAIR IN INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW,
MCGILL UNIVERSITY FACULTY OF LAW, MONTREAL*

SENIOR FELLOW, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT (CCSI), NEW YORK

DANIEL LITWIN, MANAGING EDITOR

RESEARCH FELLOW, CCSI

ADVISORY BOARD

JOSÉ E. ALVAREZ
New York University School of Law, New York City

RUDOLF DOLZER
University of Bonn

EMMANUEL GAILLARD
Shearman & Sterling LLP, Paris

GABRIELLE KAUFMANN-KOHLER
University of Geneva Law School

PETROS C. MAVROIDIS
Columbia Law School, New York City

JAN PAULSSON
Three Crowns, LLP, Washington, D.C.

DANIEL M. PRICE
Rock Creek Global Advisors LLC, Washington, D.C.

MANFRED SCHEKULIN
*Austrian Federal Ministry of Economy, Family and
Youth, Vienna*

STEPHEN M. SCHWEBEL
*Independent Arbitrator and Counsel
Washington, D.C.*

FRANCISCO ORREGO VICUÑA
Heidelberg Center, Santiago

GEORGE A. BERMAN
Columbia Law School, New York City

AHMED S. EL KOSHERI
Kosheri, Rashed and Riad, Cairo

MICHAEL HWANG, SC
Barrister & Arbitrator, Singapore

CAROLYN B. LAMM
White & Case LLP, Washington, D.C.

THEODORE H. MORAN
Georgetown School of Foreign Service, Washington, D.C.

W. MICHAEL REISMAN
Yale Law School, New Haven

CHRISTOPH SCHREUER
Of Counsel at Zeiler Partners, Vienna

MUTHUCUMARASWAMY SORNARAJAH
National University Singapore Law School

LOUIS T. WELLS
Harvard Business School, Boston

KARL P. SAUVANT, FOUNDING EDITOR OF THE YEARBOOK
Columbia Center on Sustainable Investment, New York

EDITORIAL COMMITTEE

N. JANSEN CALAMITA
*Investment Treaty Forum,
British Institute of International and Comparative
Law, London*

LISE JOHNSON
CCSI, New York

LUKE NOTTAGE
Sydney Law School

FEDERICO ORTINO
King's College London School of Law

LISA E. SACHS
CCSI, New York

MARK FELDMAN
*Peking University School of Transnational Law,
Shenzhen*

PETER MUCHLINSKI
*School of Oriental and African Studies Law
School, London*

UCHEORA ONWUAMAEGBU
Arent Fox, LLP, Washington, D.C.

AUGUST REINISCH
University of Vienna

ABBY COHEN SMUTNY
White & Case LLP, Washington, D.C.

STUDENT EDITORIAL STAFF

NICCOLÒ PIETRO CASTAGNO
Columbia Law School, Senior Editor

SARAH KETTANI
McGill University Faculty of Law, Senior Editor

LUKAS VANHONNAEKER
McGill University Faculty of Law, Senior Editor

WILLY BUCKWELL
McGill University Faculty of Law, Editor

MARIAM CHAUHAN
McGill University Faculty of Law, Editor

LEE-DIA CHAPUT
McGill University Faculty of Law, Editor

EMILY HUTCHINSON
McGill University Faculty of Law, Editor

DINA PROKIC
McGill University Faculty of Law, Editor

EDWARD S. RIVERSA
Columbia Law School, Editor

TANJA TOLPPANEN
McGill University Faculty of Law, Editor

PEER REVIEWERS

The Editorial Committee of the *Investment Yearbook* thanks all those who helped in the preparation of this publication and especially the peer reviewers, who include:

James Fry	Chiara Giorgetti
Kun Fan	Kate Miles
Hugo Perezcano Díaz	Mark Feldman
Antonio Parra	Noah Rubins
Susan L. Karamanian	Ted Posner
Barnali Choudhury	Timothy Meyer
Huawei Sun	Karl Sauvant
Lou Wells	David Gantz
Christina Binder	Todd Weiler
Ted Folkman	Roberto Echandi
Eloïse Obadia	Diane Desierto
Carin Smaller	Ward Anseeuw
Won Kidane	

COLUMBIA CENTER ON SUSTAINABLE INVESTMENT

The Columbia Center on Sustainable Investment (CCSI) is a leading applied research center and forum for the study, practice, and discussion of sustainable international investment. The CCSI focuses on analyzing important topical policy-oriented issues and constructing and implementing an investment framework that promotes sustainable development and the mutual trust needed for long-term investments that can be practically adopted by governments, companies, and civil society. The Center undertakes its mission through interdisciplinary research, advisory projects, multistakeholder dialogue, educational programs, and the development of resources and tools. The Center's website is found at <http://ccsi.columbia.edu/>.

YEARBOOK ON
INTERNATIONAL
INVESTMENT
LAW & POLICY
2014–2015

EDITED BY
Andrea K. Bjorklund

OXFORD
UNIVERSITY PRESS

OXFORD

UNIVERSITY PRESS

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trademark of Oxford University Press in the UK and certain other countries.

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America.

© Oxford University Press 2016

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press, or as expressly permitted by law, by license, or under terms agreed with the appropriate reproduction rights organization. Inquiries concerning reproduction outside the scope of the above should be sent to the Rights Department, Oxford University Press, at the address above.

You must not circulate this work in any other form
and you must impose this same condition on any acquirer.

ISBN 978-0-19-061205-4

Printed by Edwards Brothers Malloy, United States of America

Note to Readers

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is based upon sources believed to be accurate and reliable and is intended to be current as of the time it was written. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. Also, to confirm that the information has not been affected or changed by recent developments, traditional legal research techniques should be used, including checking primary sources where appropriate.

*(Based on the Declaration of Principles jointly adopted by a Committee of the
American Bar Association and a Committee of Publishers and Associations.)*

If you are interested in contributing content to be considered for future editions of the *Yearbook on International Investment Law & Policy*, please contact us at laweditorial@oup.com

You may order this or any other Oxford University Press publication by visiting the Oxford University Press website at www.oup.com

If you would like to be placed on Standing Order status for the *Yearbook on International Investment Law & Policy* whereby you will automatically receive and be billed for new annual volumes as they publish, please contact a Customer Service Representative.

In the United States, Canada, Mexico, Central and South America, contact:

Customer Service
Oxford University Press USA
2001 Evans Road
Cary, NC 27513
Email: custserv.us@oup.com
Phone (toll free in US): 1-866-445-8685
Phone (international customers): 1-919-677-0977
Fax: 1-919-677-1303

In the United Kingdom, Europe, and Rest of World, contact:

Customer Service
Oxford University Press
Saxon Way West, Corby
Northants, NN18 9ES
United Kingdom Email: bookorders.uk@oup.com
Phone: +44 1536 741017
Fax: +44 1536 454518

TABLE OF CONTENTS

Submission Policy xxi

Contributors xxiii

Foreword by Christoph Schreuer xxix

Preface by the Editorial Committee xxxiii

PART ONE

1. Trends in International Investment and the Activities of Multinational Enterprises: 2014–2015 3

Michael V. Gestrin

2. International Investment Agreements, 2014: A Review of Trends and New Approaches 15

Lise Johnson, Lisa Sachs, and Jesse Coleman

3. International Investment Law and Arbitration: 2014 in Review 65

Ian A. Laird, George D. Ruttinger, and James J. Saulino

PART TWO

BIICL

4. Labor Provisions and Dispute Settlement in International Investment Agreements: An Inquiry into the Politicization of the Settlement of 'Labor Disputes' 83

Yannick Radi

5. Can International Investment Law Be Restated?: Or Is *Jurisprudence Constante* the El Dorado of Investment Treaty Lawyers? 101

Andrea K. Bjorklund

PART THREE

General Articles

6. Group Comparison vs. Best Treatment in International Economic Law Nondiscrimination Analysis 111

Arwel Davies

7. 'Land Grabbing' and International Investment Law: Toward a Global Reconfiguration of Property? 177

Lorenzo Cotula

8. Legitimizing Expectations in Arbitration through Political Risk Analysis 215

Robert Ginsburg

9. From Anarchy to Rational Design: Direction and Perception in International Investment Law 233

Lucas Bento

10. Reforming International Investment Law: Is It Time for a New International Social Contract to Rebalance the Investor-State Regulatory Dichotomy? 269

Dessislav Dobrev

11. A New Approach to the Law of Foreign Investments: The South African Case 295

Christian Vidal-León

12. Asian Perspectives on Investment Agreements and Arbitration: An Evolving Marcottage 317

Mahdev Mohan

13. China and the Regulation of Outbound Investment: Toward a 'Responsible Investment' Policy Framework 349

Pichamon Yeophantong and Cristelle Maurin

14. Beyond ICSID Arbitration: The Center for Settlement of Investment Disputes of UNASUR 375

Rodrigo Polanco Lazo

15. The Investment Treaty Regime and Development Policy Space in Ghana: Analysis in Constitutionalism and General International Law	405
--	------------

Dominic N. Dagbanja

PART FOUR

Special Section: Winning Memorials from the 2014 Foreign Direct Investment International Moot Competition (FDI MOOT)

16. Winning Claimant Memorial: University of Ottawa	461
--	------------

17. Winning Respondent Memorial: Harvard Law School	501
--	------------

PART FIVE

Special Section: Winning Memorials from the 2015 Foreign Direct Investment International Moot Competition (FDI MOOT)

18. Winning Claimant Memorial: University of Athens	543
--	------------

19. Winning Respondent Memorial: Harvard Law School	585
--	------------



DETAILED TABLE OF CONTENTS

Submission Policy xxi

Contributors xxiii

Foreword by Christoph Schreuer xxix

Preface by the Editorial Committee xxxiii

PART ONE

1. Trends in International Investment and the Activities of Multinational Enterprises: 2014–2015 3

Introduction 3

A. Global Trends in Cross-Border Investment 3

B. Factors Shaping the Outlook 6

1. Potential FDI Bubbles in Emerging Markets 7

2. The Increasingly Important Role of Governments as Competitors in the Global Economy 9

Conclusions 12

2. International Investment Agreements, 2014: A Review of Trends and New Approaches 15

A. Overview of CETA, the Brazilian CFIAs, and India's Model BIT 18

1. EU-Canada Comprehensive Economic and Trade Agreement (CETA) 19

a. Attempts to Restrict Discretion of Investment Tribunals 20

b. Transparency and Investor-State Dispute Settlement	21
c. Additional Developments in EU Investment Policy	21
2. Brazil's Cooperation and Facilitation Investment Agreements (CFIAs)	22
a. Rationale behind Re-Engagement	23
b. Key Aspects of the CFIA Model	24
3. India's Revised Model BIT	25
a. Key Aspects of India's New Model	26
B. Diverging Trends	27
1. Investor Protections	27
a. Fair and Equitable Treatment	27
i. Brazil	28
ii. India	28
iii. CETA	29
(i) The Relevance of 'Manifest Arbitrariness'	30
(ii) The Relevance of 'Investor Expectations'	31
(iii) Narrowing the Scope of Protected Expectations?	32
(iv) Relationship between CETA and Other Canadian Treaty Practice	33
b. Expropriation	34
i. Brazil	34
ii. India	34
(i) What Constitutes an Indirect Expropriation?	35
(ii) Compensation Owed	37
iii. CETA	39
c. Nondiscrimination	40
i. Market Access	41
ii. Ability of Countries to Accord Disparate Treatment to Foreign Investors or Investments	41
iii. Importation of Provisions from Other Treaties	43
2. ISDS: Spectrum of Constraints on Investor Access to Dispute Settlement	43
a. Filter Mechanisms	44
b. Exclusions from Dispute Settlement	47
c. Alternatives to ISDS	49
3. Investor Obligations	50
a. Corruption	53
b. Corporate Social Responsibility	54
c. Human Rights	57
Conclusion	60

3. International Investment Law and Arbitration: 2014 in Review	65
A. Merits	67
B. Damages	71
1. Application of the Principle Methodologies for Determining Damages	71
a. Valuation Date	72
b. <i>Yukos</i> : Market Approach	72
c. <i>Gold Reserve</i> : Income Approach	73
2. Cost Awards	73
C. Stays of Enforcement in ICSID Ad Hoc Annulment Proceedings	74
Annex 1	77
Annex 2	78
Annex 3	78
Annex 4	79

PART TWO—BIICL

4. Labor Provisions and Dispute Settlement in International Investment Agreements: An Inquiry into the Politicization of the Settlement of ‘Labor Disputes’	83
Introduction	83
A. Mapping Treaty Practice: A Positivistic Overview of IIA Labor Provisions	86
1. Overview of the Substantive Provisions Aimed at the Protection of Labor Conditions	86
a. ‘No-Lowering of Standards’ Provisions	86
b. ‘Statement of Shared Commitment’ Provisions	89
2. Overview of the Dispute Settlement Mechanism Provisions Attached to IIA Substantive Labor Provisions	90
B. Making Sense of Treaty Practice: A Policy Analysis of IIA Provisions	92
1. Case Studies: The US Submissions against Bahrain and Guatemala	93
2. The Specificities of Labor Disputes	96
3. The Challenges Raised by the Politicization of the Settlement of Labor Disputes	98
Conclusion	100
5. Can International Investment Law Be Restated?: Or Is <i>Jurisprudence Constante</i> the El Dorado of Investment Treaty Lawyers?	101

PART THREE—GENERAL ARTICLES

6. Group Comparison vs. Best Treatment in International Economic Law Nondiscrimination Analysis 111

- A. Group Comparison or Best Treatment in the Trade Context 115
 1. *EC-Asbestos* 115
 2. The Pre-*Asbestos* Position 119
 - a. *Malt Beverages* 119
 - b. *US-Section 337* 121
 - c. *US-Taxes on Automobiles* 123
 - d. *US-Gasoline* 125
 - e. *Canada-Periodicals* 126
 3. Other GATT Article III:2 Second Sentence Cases 127
 4. GATT Article I 128
 5. Summary of the Pre-*Asbestos* Position 129
 6. The Post-*Asbestos* Position 130
 - a. *US-Clove Cigarette* 130
 - b. *US-Tuna II* 132
 - c. *US-COOL* 134
 - d. MFN under TBT Article 2.1 and GATT Article I 134
 7. Summary of the Post-*Asbestos* Position 136
 8. Conclusions on the GATT/WTO *Acquis* 138
- B. Group Comparison or Best Treatment in the Investment
Context 138
 1. NAFTA Article 1102 138
 2. *Pope & Talbot*—Assessing the Extent of the Best Treatment
Endorsement 141
 3. *ADF v. US*—Lack of Evidence of Disproportionate Impact
Leads to Failure of Claim 144
 4. *Corn Products International v. Mexico*—Evidence
of Disproportionate Impact Leads to Success of the
Claim 145
 5. *Archer Daniels Midland Company, Tate & Lyle Ingredients
Americas, Inc. v. Mexico*—Doctrinal Ambivalence and
Apparent Support for Best Treatment 146
 6. *United Parcel Service of America, Inc. v. Canada*—Indications
That Disproportionate Impact Is Relevant (Majority)/Explicit
Endorsement of Best Treatment (Dissent) 148
 7. *Methanex Corporation v. United States*—Both Endorsement of,
and Aversion toward, Best Treatment 150
 8. *Feldman v. Mexico*—The Strongest but Not Especially Strong
Best Treatment Endorsement (Majority)/Strongest Rejection of
Best Treatment (Dissent) 153
 9. Conclusions on the Investment Regime 158

C. How Should the Investment Law Position Evolve?	159
1. Nationality-based Discrimination in the Investment and Trade Regimes	159
2. Protectionism as the Essence of Nationality-based Discrimination or as a Type of Nationality-based Discrimination?	164
3. Should Different Political Economies Shape the Content of Rights or Merely the Burden of Proof?	167
4. Sunk Costs Entitle Investments to Greater Protection?	168
5. Intensity of Competition	169
6. Individual Decisions and Measures of General Application	170
D. <i>Bilcon v. Canada</i>	171
Conclusion	175
7. 'Land Grabbing' and International Investment Law: Toward a Global Reconfiguration of Property?	177
Introduction	177
A. 'Land Grabbing' and Pressures on Resources: A Bird's-Eye View of the Evidence	180
B. Property and the Global Resource Squeeze	185
C. National Law and the Allocation of Property	193
D. International Investment Law and the Protection of Property	201
Conclusion	211
8. Legitimizing Expectations in Arbitration through Political Risk Analysis	215
A. Context of BITs	217
1. Russia Case Study	218
B. Existing Literature and Jurisprudence	218
C. Political Risk Assessment	221
1. Macro-Level Analysis of Political Risk	222
a. Commitment to Reforms: Breaking Down Emerging Markets	222
2. Micro-Level Analysis	224
a. Industry and Type of Project	224
b. Relations between Home and Host Governments	226
c. Risk Mitigation Strategies	227
D. Shell in Russia	228
1. Legitimate Expectations: A Case Study of Russia	228
a. Macro Assessment of Russia	228
b. Micro Assessment of Russia	231
Conclusion	232

9. From Anarchy to Rational Design: Direction and Perception in International Investment Law 233

- Introduction 233
- A. Direction 236
 - 1. Bilateral Self-Help (Nineteenth Century–1945) 241
 - 2. One-Way Bilateralism (1945–1990) 243
 - 3. Global Bilateralism (1990–Present) 246
 - 4. Regional Globalism 251
 - 5. Comprehensive Multilateralism 256
- B. Perception 261
 - 1. Toward a New Narrative for IIL 261
 - 2. The Example of UNASUR's Dispute Resolution Center 263
- Conclusion 266

10. Reforming International Investment Law: Is It Time for a New International Social Contract to Rebalance the Investor-State Regulatory Dichotomy? 269

- Introduction 269
- A. The Current Regulatory Framework under International Investment Law 271
 - 1. Regulatory Framework for the Obligations of the Host Government 271
 - a. Underlying Interest: The Fundamental Right to Developmental Self-Determination 272
 - b. Governing Framework: International Law Standards 273
 - i. Investment Treaties 273
 - ii. Free Trade Agreements 274
 - iii. Customary International Law 275
 - iv. General Principles of Law 275
 - 2. Regulatory Framework for the Obligations of the Foreign Investor 276
 - a. Underlying Interest: The Right of the Investor to Extract the Economic Benefits of the Investment 276
 - b. Governing Framework: Domestic Law Standards 277
 - i. Lack of Mandatory International Standards Binding on Foreign Investors 277
 - ii. No Extraterritorial Application of the Laws of the Investor's Home Country 280
 - iii. Domestic Laws of the Host State 281
- B. A Blueprint for a More Balanced International Social Contract 282
 - 1. The Asymmetry: Balancing Public and Private Interests 282

2. The Need for a New International Social Contract	283
a. The Case for an Equitable and Sustainable Framework	283
b. The Case for the Internationalization of Minimum Social Standards	284
3. Proposals on How to Design This New Social Contract	285
a. Existing Noninvestment Obligations in the International Investment Framework	286
i. Current Framework	286
ii. Uncertainties of the Current Framework and the Need for a Bolder Reform	287
b. Incorporation of Rules Binding on Foreign Investors into International Treaties	288
i. Extract International Law Rules from Existing International Instruments Binding on Host States	288
ii. Standards Established by Development Finance Institutions	289
iii. Use as a Model Existing Voluntary International Standards	289
c. Practical Implementation of the Proposed Approach: Implications and Challenges	290
i. Challenges to Implementation in Practice	290
ii. Implications for Investor-State Arbitration	292
Conclusion	293

11. A New Approach to the Law of Foreign Investments: The South African Case 295

Introduction	295
A. The Triggering Factor: <i>Piero Foresti and others v. South Africa</i> (2006–2010)	296
B. The Bilateral Investment Treaty Policy Framework Review (2008)—The 2010 Cabinet Decision	298
C. Implementing the 2010 Cabinet Decision	300
1. Termination and Nonrenewal of IIAs	300
2. The Legislative Process	302
D. The Promotion of Investment Act No. 22 of 2015 (PIA 2015)	303
1. The Principle of Equal Treatment: Treatment to Foreign Investors and Investments No More Favorable Than That Accorded to Domestic Investors and Investments	305
2. The Right to Regulate in the Public Interest	308
3. A New Dispute Settlement Mechanism: Doing Away with Investor-State International Arbitration	311
Conclusion	315

12. Asian Perspectives on Investment Agreements and Arbitration: An Evolving Marcottage 317

Introduction	317
1. New Asian ‘Sophistication’?	318
2. Evolving Marcottage	320
A. Indonesia’s Disengagement with ISDS	322
B. India’s Selective Adjustments to Its Model BIT	325
1. India’s Approach toward BITs	325
2. A Draft Model BIT 2015	325
a. Absence of the MFN Clause and Inclusion of Exhaustion of Local Remedies Clause	327
b. The Drafting of the FET Clause and Sustainable Development-oriented Provisions	328
c. Exclusion of Tax Disputes from the Ambit of ISDS and the Putative EU-India FTA	331
3. India’s Attitudinal Change toward BITs in Proper Perspective	333
C. Australia’s ‘Anti-ISDS’ Bill—Going the Way of Argentina?	335
D. China’s Support for ‘New’ Investors and ‘Old’ Agreements	337
1. A Commitment to ‘New Generation’ BITs Shaped by Economic Pragmatism	337
2. Nostalgia for the ‘Old Generation’? A Contextual Interpretation of China’s BITs with Peru and Laos	340
3. China Shifts	343
E. Singapore’s Dispute Resolution Innovation	344
Conclusion	346

13. China and the Regulation of Outbound Investment: Toward a ‘Responsible Investment’ Policy Framework 349

Introduction	349
A. Global Trends, Policy Adoption, and the Evolution of China’s ODI Regime	353
1. Emergence of the Responsible Investment Approach	354
2. Policy Adoption	355
3. Enforcement	360
B. Chinese Resource Investment and Economic Cooperation in Africa	361
1. Taking a Closer Look at Sustainability Impacts	362
2. Evolving Responsible Investment Practices	366
C. External Game Changers and Investment Regulation for Sustainable Development	367
1. Bilateral Investment Treaties	368

2. Civil Society	369
3. International Forces	371
Concluding Remarks	372
14. Beyond ICSID Arbitration: The Center for Settlement of Investment Disputes of UNASUR	375
Introduction	375
A. Context of the Project	378
1. Origin of the Project	380
2. Evolution of the Project	382
3. Content of the Project	384
a. Organization of the Center	384
b. Jurisdiction	386
i. Ratione Materiae	386
ii. Ratione Personae	387
iii. Ratione Temporis	388
c. Facilitation	389
d. Conciliation	390
e. Arbitration	391
i. Initiation of the Procedure	391
ii. Arbitrators	391
iii. Awards and the Applicable Law	393
iv. Consolidation of Proceedings	394
v. Transparency	394
vi. Remedies and an Appeal Mechanism	395
vii. Enforcement of the Award	397
viii. Exclusion of Other Mechanisms	397
B. The Way Ahead	398
Conclusion	399
15. The Investment Treaty Regime and Development Policy Space in Ghana: Analysis in Constitutionalism and General International Law	405
Introduction	405
A. The Right to Development and Duty of the State in Ghana	410
1. The Concept of Development	410
2. The Role of State in Development: Theoretical Analysis	412
3. The Constitution and Development in Ghana	415
4. General International Law and Development in Ghana	418
B. The Development Objective of the Investment Treaty Regime of Ghana	419

C. The Investment Treaty Regime and Development Policy Space in Ghana	423
1. The Standards of Investment Protection and Targeted Economic and Social Policies in Ghana	423
a. National Treatment, Most-Favored Nation Treatment, and Targeted Economic and Social Policies	423
b. Regulatory Expropriation and Targeted Economic and Social Policies	430
2. The Standards of Investment Protection and Economic Emergency and Financial Crisis Management	434
a. National Treatment, Most-Favored Nation Treatment, and Economic Emergency	434
b. The Argentine Experience and Its Implications for Ghana	436
3. Repatriation of Investments and Returns and Foreign Exchange Regulation	443
a. The Right of Foreign Investors to Transfer Investment Funds	443
b. Capital Controls as a Development Tool	443
c. Repatriation of Investment and Foreign Capital Regulation	445
D. The Constitution, General International Law, and Development Policy Space in Ghana: Implications for Investment Treaty Conclusion and Interpretation	449
Conclusion	455

PART FOUR—SPECIAL SECTION: WINNING MEMORIALS FROM THE 2014 FOREIGN DIRECT INVESTMENT INTERNATIONAL MOOT COMPETITION (FDI MOOT)

16. Winning Claimant Memorial: University of Ottawa	461
17. Winning Respondent Memorial: Harvard Law School	501

PART FIVE—SPECIAL SECTION: WINNING MEMORIALS FROM THE 2015 FOREIGN DIRECT INVESTMENT INTERNATIONAL MOOT COMPETITION (FDI MOOT)

18. Winning Claimant Memorial: University of Athens	543
19. Winning Respondent Memorial: Harvard Law School	585

SUBMISSION POLICY

The *Investment Yearbook* is an annual publication published by Oxford University Press in association with the Columbia Center on Sustainable Investment. It draws on the guidance of a distinguished Advisory Board, ongoing engagement by an Editorial Committee consisting of leading academics in the field of investment law and policy, and skillful work by an Editorial Staff of students from Columbia Law School and McGill University Faculty of Law.

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).

The Editorial Committee welcomes the submission of manuscripts to the *Investment Yearbook*. Manuscripts should be electronically sent to the Columbia Center on Sustainable Investment, ccsi@law.columbia.edu.



CONTRIBUTORS

Lucas Bento is an associate in Quinn Emanuel Urquhart & Sullivan LLP's New York office, where he practices international arbitration and international civil litigation. He is President of the Brazilian American Lawyers Association and Secretary to the Inter-American Affairs Committee at the New York City Bar Association. His articles on international law have been cited authoritatively by US federal courts. He also teaches a course on International Arbitration and Dispute Resolution at New York University. Prior to joining Quinn Emanuel, Lucas worked for a US federal judge, for a natural resources consultancy in Brazil, and as a law tutor at Oxford University in England.

Andrea K. Bjorklund is the L. Yves Fortier Chair in International Arbitration and International Commercial Law at McGill University Faculty of Law. She is an adviser to the American Law Institute's project on restating the US law of international commercial arbitration. She is also a member of the Advisory Board of the Investment Treaty Forum of the British Institute for International and Comparative Law.

Jesse Coleman is a legal researcher for the Columbia Center on Sustainable Investment (CCSI). Her work at CCSI focuses on investment law and policy, natural resources, and the intersection between human rights and sustainable development. She received her Bachelor of Arts in Political Science and Bachelor of Laws from Trinity College Dublin, and holds a Master of Law from the University of Cambridge, where she specialized in international law. Her research while at Cambridge focused on the interplay between international human rights law and land-based investment. Further information: <http://ccsi.columbia.edu/about-us/staff/>.

Dr. Lorenzo Cotula is a principal researcher in law and sustainable development at the International Institute for Environment and Development (IIED), and a visiting research fellow at the Centre for Law, Regulation & Governance of the Global Economy (GLOBE Centre), Warwick Law School. Dr. Cotula's research interests span international human rights law, international investment law, international law of natural resources, and comparative land and resource law. At IIED, Dr. Cotula steers 'Legal Tools for Citizen Empowerment', an initiative

to strengthen local rights and voices within natural resource investments in low- and middle-income countries. Before joining IIED in 2002, Dr. Cotula worked on assignments with the Legal Office of the Food and Agriculture Organization of the United Nations. He holds academic qualifications in law, development studies, and sustainable business from the University of Rome 'La Sapienza', the London School of Economics, the University of Edinburgh, and the University of Cambridge.

Dr. Dominic N. Dagbanja is a Lecturer in Law in the University of Western Australia Faculty of Law, Perth, Australia. He has been a Research Associate at the University of Manchester School of Law in the United Kingdom, Lecturer in Law at Ghana Institute of Management and Public Administration, and Graduate Teaching Assistant in the University of Auckland Law School in New Zealand. He previously worked and practised law at Bentsil-Enchill, Letsa & Ankomah, Ministry of Justice & Attorney-General's Department and Public Procurement Authority in Ghana. He was a Legal Assistant in the law firm of Gustavo Matheus, Esq. LLC in Maryland, Research Assistant at American Bar Association Section of Public Contract Law, and Senior Intern at International Law Institute in Washington, D.C. His publications include *The Law of Public Procurement in Ghana: Law, Policy and Practice* (Lap Lambert Academic Publishing, 2011) and articles in peer-reviewed journals including *Journal of African Law*, *Manchester Journal of International Economic Law* and *Transnational Legal Theory*. Dominic holds the degrees of B.A., University of Ghana; LLB, University of Ghana; B.L., Ghana School of Law; LL.M., University of the Pacific, USA; LL.M., The George Washington University, USA; and Ph.D. in Law, the University of Auckland, New Zealand.

Dr. Arwel Davies is an Associate Professor at the College of Law, Swansea University. Dr. Davies' research interests are in the area of international economic law. He is particularly interested in the interactions between the trade law and investment law regimes. He also has an interest in international public procurement regulation. He is a co-author of *World Trade Law: Text, Materials and Commentary* published by Hart (2012).

Dessislav Dobrev is currently working as legal counsel at the World Bank Group, MIGA. Prior to that, he practiced law in three different jurisdictions—in New York, at the international law firm of Davis Polk & Wardwell LLP, as well as in Toronto (Canada) and Sofia (Bulgaria). Academically, Dessislav has law degrees in both civil law (from Sofia University, Bulgaria) and common law (J.D. from Osgoode Hall Law School in Toronto, where he won the bronze medal and First Prizes in Contracts and Constitutional Law). During his J.D. studies, he worked as an editor of the Osgoode Hall Law Journal. In addition, Dessislav has a LL.M. degree from the University of Toronto. In practicing law over the years, Dessislav has worked on complex international projects involving development finance institutions and multinational companies. He has also managed projects assisting the Public International Law and Policy Group, a Nobel Peace Prize nominee (e.g., drafting proposed legislation for post-2011 South Sudan citizenship). Dessislav has also represented individuals seeking asylum based on political persecution.

Michael V. Gestrin is currently a senior economist in the Investment Division of the Organisation for Economic Co-operation and Development in Paris, France. Previously he has held research and teaching positions at the University of Oxford, ESSEC Business

School, the University of Toronto, and the UN Conference on Trade and Development (UNCTAD). Dr. Gestrin's main areas of research include the impact of global value chains on the organization of multinational enterprises, the globalization of state-owned enterprises, and global trends in foreign direct investment. He has a doctorate from the University of Oxford, where he examined the profitability of the international operations of multinational enterprises.

Robert Ginsburg has advised foreign investors and governments on cross-border transactions since 1999. Currently, Robert manages RBG Global—a boutique legal and consulting practice that advises companies and host governments on strategies that maximize the rewards of cross-border transactions and minimize exposures to insidious risks. Prior to starting RBG Global, Robert managed the foreign direct investment program for the State of Illinois and worked as an international arbitration practitioner for Freshfields Bruckhaus Deringer. He also teaches international law and business courses at Chicago Kent College of Law.

Lise Johnson is the Investment Law and Policy Head at the Columbia Center on Sustainable Investment (CCSI). Her work at CCSI centers on analyzing 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 B.A. from Yale University, J.D. from University of Arizona, LL.M. from Columbia Law School, and is admitted to the bar in California.

Ian A. Laird is Co-Chair of the International Dispute Resolution Group in the Washington, D.C., office of Crowell & Moring LLP. Over the past 17 years, he has represented a range of clients in international arbitration proceedings involving disputes between corporations and foreign governments. He is Lecturer at Law at Columbia Law School and Adjunct Professor at Georgetown University Law Center. Ian is the Co-Director of the International Investment Law Center (International Law Institute), Co-Editor of the series, *Investment Treaty Arbitration and International Law* (Juris Publishing—now in its ninth edition), and Editor-in-Chief of InvestmentClaims.com (Oxford University Press).

Dr. Cristelle Maurin is a Postdoctoral Research Associate at University College, London's International Energy Policy Institute. Previously, Cristelle was an Associate to the Centre for International Law at the University of Paris Panthéon-Sorbonne, where she completed her Ph.D. in 2011. She has also held visiting research positions at the Centre for Chinese Studies at the University of Stellenbosch (South Africa) and Academia Sinica in Taiwan. Prior to academia, Cristelle worked for the United Nations' International Labour Organization in policy and management roles in East Asia and Africa.

Mahdev Mohan is an Assistant Professor of Law at the Singapore Management University School of Law. He directs SMU's Asian Business and Rule of Law initiative and is the Executive Director of the Society of International Law Singapore. He is an editor of the *Journal of East Asia and International Law*, and researches and writes on public international law, investment arbitration, and human rights in Asia. Mahdev has worked with Senior Counsel to represent

sovereigns and multinational clients on a range of disputes, and is an Associate Tenant of Temple Garden Chambers in London.

Dr. Rodrigo Polanco Lazo is an Assistant Professor at the University of Chile, where he has taught foreign investment law and international trade Law, both at the Faculty of Law and at the Institute of International Studies. He is also a lecturer and researcher on investment law at the World Trade Institute, University of Bern. Rodrigo holds a Bachelor and a Master of Laws from University of Chile, an LL.M. in International Legal Studies from New York University, and a Ph.D. from the University of Bern, specialized in international investment law.

Yannick Radi is a Professor of Public International Law at the University of Louvain in Belgium. He is also Editor-in-Chief of *International Legal Theory and Practice*. Yannick Radi previously was a Judge at the French National Court of Asylum and a consultant for the Office of the United Nations High Commissioner for Refugees. He holds a Ph.D. and an LL.M. from the European University Institute and an LL.M. from the University Paris II Panthéon-Assas. His areas of expertise include international investment law, arbitration, international dispute settlement, global economic governance and the history and theory of international law.

George D. Ruttinger is a partner in Crowell & Moring LLP's (Washington, D.C. office) Government Contracts Group and co-chair of the International Dispute Resolution Group. He has represented domestic and foreign clients in international arbitrations before tribunals of the International Chamber of Commerce, Stockholm Chamber of Commerce, Netherlands Arbitration Institute, Permanent Court of Arbitration, and the World Bank's International Centre for Settlement of Investment Disputes (ICSID). During a 12-month period in 2013–2014, he handled three trials of international investment arbitrations under ICSID and UNCITRAL rules.

Lisa Sachs is the Director of the Columbia Center on Sustainable Investment (CCSI). Since joining CCSI in 2008, she established and now oversees the three areas of focus for CCSI: investments in extractive industries, investments in land and agriculture, and investment law and policy. She specializes in extractive industries, foreign investment, corporate responsibility, and integrated economic development. She received a B.A. in Economics from Harvard University, and earned her J.D. and an M.A. 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.

James (J.J.) Saulino is an attorney practicing in international trade and international dispute resolution based in Crowell & Moring's Washington, D.C., office. In his trade practice, J.J. advises both US and international clients on compliance with international trade regulations administered by the Departments of State, Commerce, Treasury, and Homeland Security. In his dispute resolution practice, J.J. represents clients in the context of both commercial and investment treaty arbitrations. He has served as counsel in disputes involving the governments of Turkey, Egypt, Libya, El Salvador, and Lithuania, and in such industries as construction, tourism, mining, and manufacturing.

Christoph Schreuer is an expert in international investment law. He is a graduate of the Universities of Vienna (Dr. iur. 1966), Cambridge (LL.M. 1970) and Yale (J.S.D. 1979). During his academic career he was an Assistant Professor at the University of Graz and a Professor

of Law at the Universities of Salzburg, the Johns Hopkins University and the University of Vienna. Christoph Schreuer is the author of numerous articles and books, he regularly gives lectures and is a member of—inter alia—the ICSID Panel of Conciliators and Arbitrators. He has written expert opinions in many investment cases and has served as arbitrator in ICSID and UNCITRAL cases. He is currently working as an independent expert and arbitrator in investment cases and is of counsel at zeiler.partners.

Christian Vidal-León is a Senior Research Fellow at the Mandela Institute of the University of the Witwatersrand in Johannesburg. Previously, he has served as a dispute settlement lawyer in the Appellate Body Secretariat of the World Trade Organization. Mr. Vidal-León has also served as a Legal Officer in the Directorate-General for Trade of the European Commission, and as an assistant to Professor Georges Abi-Saab in a number of ICSID tribunals. Mr. Vidal-León is a qualified lawyer in both Mexico and Spain and holds a Masters in International Law and Economics from the World Trade Institute and an LL.M. in International Legal Studies from Georgetown University.

Pichamon Yeophantong is Lecturer in International Relations and Development at the University of New South Wales, Australia. She is also a Research Associate at the Global Economic Governance Programme, University of Oxford, and an ASEAN-Canada Senior Fellow (nonresident) at the RSIS Centre for Non-Traditional Security Studies, Nanyang Technological University. Previously, she was a Global Leaders Fellow at University College, Oxford, and at the Niehaus Center for Globalization and Governance, Princeton University. She has held visiting fellowships at Peking University, China University of Political Science and Law, and National Taiwan University, among others. Her work has appeared in such publications as *Asian Survey*, *Chinese Journal of International Politics*, *Pacific Affairs*, *Yale Global*, and *The Diplomat Magazine*. She holds a Ph.D. and an M.A. (Honors) from the Australian National University.



FOREWORD

Investment arbitration is going through turbulent times. For decades, it has operated largely unnoticed by the public. More recently, investment arbitration has attracted much attention, mostly in the form of fierce criticism. Some would have it abolished altogether. Others have suggested far-reaching reforms.

Reform, almost by definition, has positive connotations. No human endeavor is perfect, and reform is a way of dealing with shortcomings. No doubt, there is room for improvement in the current system of settling disputes between states and foreign investors. Two areas that call for improvement are the phenomenon of rising costs and the lack of consistency in the practice of tribunals.

Not every change is tantamount to reform. For meaningful reform, it is necessary, first, to identify the shortcomings, second, to search for alternatives, and, third, to evaluate their capability for bringing about the desired improvement. Changes whose purpose is to placate public criticism, often based on ill-informed media reports, are not likely to lead to improvement and do not deserve the designation ‘reform’.

An often-heard complaint is the perceived lack of *transparency* in investment arbitration. Recent years have seen much progress toward transparency in investor-state proceedings, which nowadays are often more transparent than domestic court proceedings. The process toward transparency is not yet completed, and some awards, regrettably, remain unpublished. A willingness by parties to release decisions for publication will not merely improve the image of investment arbitration but will also facilitate increased coherence in the practice of tribunals.

Another complaint is *regulatory chill*, the fear that tribunals will stop or impede measures that serve the public good. For the most part, this argument is hypothetical. Few cases involve investors opposing legitimate regulation. Moreover, tribunals consistently acknowledge that they will respect legitimate regulatory action.

Where the state professes to act in the public interest, it should be prepared to accept an independent determination of whether the regulatory action is genuinely legitimate. An international tribunal is in a better position to make this determination than an organ of the state whose action is under review. In many states, domestic structures for review are weak and judicial control is ineffective.

The rejection of judicial scrutiny of state action is quite out of line with the legal tradition of systems operating under the rule of law. Judicial control of public administration and regulation is perfectly normal in many states and is part of good governance. It is unclear why judicial restraint on administrative discretion should become objectionable when exercised by an international tribunal rather than by a domestic court. The objection to international judicial control of state action is also at odds with the acceptance of international human rights courts.

The assumption that host states invariably act in the public interest is open to question. At times, state action affecting investors is arbitrary or even the result of corruption. In some arbitration proceedings, investors insist upon compliance with the local law. This insistence can contribute to combatting corruption and establishing a measure of good governance.

The introduction of an *appeals procedure* has been under discussion for some time. Curiously, there is little discussion of the objective of such a mechanism. Rather, its beneficial effect is simply taken for granted. Appeal may serve the purpose of advancing the correctness of decisions or of securing the uniformity of judicial practice. Correctness is an elusive goal that takes time and effort and may take several layers of review. In arbitration, finality, i.e., the desire to have a dispute settled expeditiously, usually takes priority over the quest for correctness.

The addition of an appeals procedure would be likely to exacerbate one of the most pressing problems of investment arbitration. Inevitably, appeal would lead to a further increase in the cost of proceedings. Once an opportunity for appeal is established, it is unlikely that a dissatisfied party will forego the possibility to contest the award. The resulting delay and additional cost will affect particularly smaller and medium-size investors by hampering their access to judicial protection.

Coherence of judicial practice is a legitimate concern, but it is doubtful whether appeals mechanisms are a suitable way to achieve consonance of decisions. Competing systems of appeal under different treaties are unlikely to advance the goal of consistency. More likely, they will lead to further fragmentation. A system of preliminary rulings is better suited to advance uniformity of practice. This would require the establishment of a central, permanent body, authorized to give rulings upon the request of tribunals. Moreover, Article 53(1) of the ICSID Convention explicitly rules out any appeal, whereas a mechanism of preliminary rulings would be compatible with ICSID arbitration.

Binding interpretations by the states parties to investment treaties are another reform proposal designed to achieve uniformity of interpretation. The Vienna Convention on the Law of Treaties (VCLT), in Article 31(3), foresees subsequent agreements between the parties regarding the interpretation of treaties but does not give them binding force: under the VCLT these interpretations of the parties 'shall be taken into account'.

Joint declarations of the states parties on the proper interpretation of an investment treaty may appear efficient and look like a convenient method to settle questions of treaty interpretation. However, if the question is relevant in pending proceedings, such an interpretation gives rise to serious concerns about the fairness of the procedure. Once a case is under way, the respondent state is motivated primarily by defensive concerns related to the pending dispute. It will promote a particular interpretation not because it believes in its intrinsic correctness but because it is helpful to its endeavor to win the case. The disputing investor's home state may be less interested in an interpretation favorable to its national in the pending dispute than in an interpretation that favors state respondents generally.

A mechanism whereby a party to a pending dispute is able to influence the outcome of judicial proceedings, by issuing an official interpretation to the detriment of the other party, is highly problematic. This is true even if that party needs the support of the other treaty

party (or parties) and even if the interpretation is presented as being declaratory of the treaty's meaning. In a situation of this kind, the respondent state becomes judge in its own cause and, if the interpretation is binding, the international tribunal loses its power to decide independently. The rule *nemo judex in sua causa* should not have to yield to opportunistic ex post facto interpretations.

Permanent courts or semi-permanent tribunals under bilateral agreements are unlikely to advance either independence or uniformity. This is particularly so if tribunals are to be composed of nationals and co-nationals of the disputing parties. Arbitrators associated with the disputing parties through a bond of nationality inevitably face a problem of independence and impartiality, whether real or perceived. International judicial practice demonstrates that judges and arbitrators have a tendency to side with their home country or compatriots. The ICSID Convention, wisely, all but excludes nationals and co-nationals of the parties from serving as arbitrators.

The appointment of arbitrators or judges on a salaried basis would add costs with no guarantee that appointees will actually serve in a dispute. Moreover, permanent bodies inevitably generate international bureaucracies, further adding to costs. A multitude of bilateral investment courts would be wasteful and inefficient.

Permanent courts may be more likely to achieve consistency of decision than tribunals composed on an ad hoc basis. However, parallel courts with differing composition operating under separate treaties are unlikely to advance uniformity of decision.

Reform and improvement are a necessary part of our social fabric. But change for its own sake, unsupported by proper reflection, carries the danger of destroying the very institutions that we seek to reform.

Christoph Schreuer



PREFACE

Several themes emerge in this edition of the *Yearbook*. The first is a notable focus on country- and region-specific developments. Different articles focus on key developments in such countries as Australia, Brazil, China, Ghana, India, Indonesia, Russia, and South Africa. Others focus on regional innovations, in particular in Latin America. These local and regional initiatives are fascinating when set against the backdrop of one of the key developments of 2015, the completion of negotiations for the 12-nation Trans-Pacific Partnership, and the continuation of negotiations for the Trans-Atlantic Trade and Investment Partnership. These two ‘mega-regionals’ offer the potential for the coalescence of international investment law around one or two models and have attracted a great deal of attention, yet as the *Yearbook* illustrates, there is significant bilateral and ‘mini-regional’ activity as well.

A second area of attention is reform, and proposals for reform, in investor-state dispute settlement and in investment law generally. Novel proposals by Brazil, new model treaties released by multiple countries, and the continued questioning of, and occasional withdrawal from, the existing investment arbitration regime all point toward an area in flux. Whether the changes presage incremental amendments to the regime as it has developed over the past few decades or whether they presage wholesale reform is yet to be seen.

A related, third theme is continued concern about states’ regulatory autonomy and the importance of their retaining their ability to protect the interests of their nationals. These interests include ensuring that policies favoring sustainable development and high labor standards are accommodated by the investment law regime. Thoughtful inquiries address whether investment law hinders state preferences with respect to the preservation of small landowners’ rights and also whether it in fact encourages more responsible outward foreign investment.

A fourth inescapable theme is the continued contribution that investment arbitration makes to the development of international law, and the influence that it is starting to have on other areas of law, whether that is as a source of inspiration in the interpretation of other norms or as a source of potentially powerful persuasive authority given the ‘teeth’ that investment law has with respect to enforcement.

One of the *Yearbook*’s enduring contributions to the study of international investment law has been the rigorous analysis of yearly trends in international investment policies, in the

negotiation of international investment agreements, and in the development of international investment jurisprudence. This year is no exception.

We welcome back Michael Gestrin, of the Organisation for Economic Co-operation and Development, who undertook an empirical analysis of the trends in international investment law and the activities of multinational enterprises. Against the backdrop of the reorganization of the international business landscape in light of the global financial crisis, the author concludes that 2014 saw the deeper integration of emerging markets, on the one hand, and the decline in international investment flows in advanced economies, on the other hand. In particular, the author identifies a foreign investment bubble that has developed and that might be starting to deflate. In addition, he highlights the blurring of the traditional north-south divide as both north and south countries now act as host and home states. Finally, he tackles the new challenges created by this changing landscape, including fragmentation, economic distortions, and the new policies undertaken by states in response to the evolution of their roles.

Lise Johnson, Lisa Sachs, and Jesse Coleman have contributed a thoughtful and encompassing piece that traces developments in the negotiation of investment treaties through 2014 and in to 2015. They highlight the numerous countries that are considering the wisdom of maintaining their existing investment agreements and questioning the desirability of entering into new ones, as well as considering modifications to their model treaties. They note developments in other treaties, such as the UN Convention on Transparency in Treaty-Based Investor-State Arbitration (the 'Mauritius Convention'), which will affect investment arbitration. Their piece provides an insightful and provocative analysis of various responses to and efforts to help shape the international investment regime, with an illuminating juxtaposition of the Comprehensive Economic and Trade Agreement between Canada and the European Union, Brazil's Cooperation and Facilitation Investment Agreements, and India's revision of its Model BIT.

Finally, the review of investment jurisprudence by Ian Laird, George Ruttinger, and James Saulino notes several milestones in investment arbitration in 2014, including the rendering of the largest award in investment arbitration history—more than US\$ 50 billion in *Yukos v. Russia*, as well as the first-ever grant of interim measures in favor of the claimant in the *TSIKinvests LL.C. v. Moldova* arbitration. Their substantive analysis highlights developments in three areas of law: the continuing popularity of the fair and equitable treatment standard as a basis for claims and the continuing evolution of its content; differing approaches to quantum-related issues, with particular emphasis on the methodologies tribunals employed in arriving at their damages awards; and the practice of ICSID ad hoc annulment committees when presented with requests to stay enforcement of the judgment pending the outcome of an annulment application, including the hiccup presented by the decision to reject the requested stay in *SGS v. Paraguay* in the otherwise-consistent record of granting requested stays.

We have continued our partnership with the British Institute of International and Comparative Law to publish papers presented at investment treaty fora they so ably organize each year. This year we have two BIICL-based contributions.

The first, by Yannick Radi, presents a striking analysis of the extension of certain investment agreements to encompass the imposition of labor standards on host states, and the resolution of labor-related disputes in state-state arbitration. He suggests that this form of dispute settlement, a move away from the 'legalized' form of dispute settlement available for the resolution of typical investment disputes, in fact politicizes the resolution of disputes in ways that permit more nuanced considerations of the myriad policy interests that drive governmental regulation of labor. Yet even state-state dispute settlement is subject to claims of illegitimacy

on the grounds that foreign tribunals will be seen to be interfering with key issues of domestic governance.

Andrea Bjorklund presented a keynote speech for the investment treaty forum held in September 2014. That short manuscript, entitled ‘Can international investment law be restated? Or is *jurisprudence constante* the El Dorado of investment treaty lawyers?’, presents a skeptical view of the possibility of codifying, in the form of a restatement, the current law of investment arbitration. She highlights several challenges that would need to be overcome in order for such an enterprise to succeed, including the dispersed and sometimes divergent nature of substantive obligations themselves, difficulty in using the restatement process to include meaningful participation by people from every affected jurisdiction, and problems associated with identifying those who would be appropriate drafters.

The general section commences with an article by Arwel Davies that undertakes a comparative analysis of the nondiscrimination principles as understood and applied in international trade law under the WTO framework and in international investment law. In particular, this contribution focuses on arguably the most divergent aspect of the nondiscrimination analysis: the choice between the group comparison approach (i.e., the demonstration that a given measure affects disproportionately or asymmetrically imported goods or foreign investments relative to domestic comparators) endorsed in the WTO context and the ‘best treatment’ approach (which merely requires demonstrating that an individual imported product or foreign investment is adversely affected by a measure when a domestic comparator is not), which has received a more sympathetic hearing from investment tribunals. In his insightful enquiry supported by WTO and investment case analysis, Arwel Davies argues that the non-discrimination principle in both systems is not, in fact, fundamentally different, and provides important advice for treaty drafters.

Lorenzo Cotula continues his service to *Yearbook* readers by exploring the reconfiguration of property associated with the global resource squeeze and the links between land tenure systems, national legislation regulating property, and investment law and arbitration. In particular, his chapter analyzes the notion of ‘land grabbing’ and the consequences and implications of the recent wave of large-scale agribusiness investments in land deals in low- and middle-income countries. This thoughtful analysis of the ongoing reconfiguration of control over natural resources and of property itself argues for a more subtle understanding of international investment law and a holistic consideration of property rights that evaluates the distributive consequences of so-called ‘land grabbing’.

Robert Ginsburg’s chapter analyzes the need for more systematic reviews of host government investment climates through political risk assessment. In particular, he demonstrates how thorough and dynamic (as opposed to static and stereotypical) political risk assessment can help both investors and tribunals to determine whether expectations are reasonable. Mr. Ginsburg explains the micro and macro assessments that must be undertaken and applies his theoretical framework of political risk assessment to concrete examples with a specific emphasis on the case of Russia by demonstrating how political risk assessment would have identified Shell’s significant exposure to risk with respect to the latter’s investment in Russia. He concludes by arguing that a dynamic, thorough, and host-state-specific political risk assessment can provide a good overview of what can be legitimately expected in a given investment climate and from a given investment.

Lucas Bento’s contribution takes place against the background of the ‘crisis’ international investment law is facing, as illustrated by the withdrawal of several countries from the ICSID Convention; the denunciation by a number of states of their investment treaties; the opposition of many states to investor-state dispute settlement clauses in investment agreements; and

difficulties associated with the enforcement of investment awards over the past few years. This series of events has been seen by some as the sign that international investment law is coming to an end; however, Lucas Bento argues in his contribution that these ‘Negation Events’, as he calls them, are in fact evidence that the international investment law regime is evolving into its next developmental phase, which will be characterized by regionalism, symmetry, and rational design as it moves to become a fully fledged multilateral system of governance. In fact, the author argues that these Negation Events are a ‘blessing in disguise, and a gentle reminder that the potential of IIL [international investment law] is yet to be fulfilled’.

Dessislav Dobrev’s contribution explores the imbalances that are intrinsic in international investment law, with a particular focus on the dichotomy between obligations assumed by the foreign investor and the host government and the potential that investment law has to diminish the scope of state sovereignty. On the basis of this premise the author analyzes the feasibility of a general rethinking of the current framework for foreign direct investment in order to recalibrate the system and to rebalance the various interests at issue through a new international social contract. The author argues for the inclusion of an extensive range of obligations for investors under this new contract, including the governance of social issues such as environmental protection, human rights, anti-corruption measures, and labor standards.

Christian Vidal-León’s article analyzes South Africa’s decision to terminate its investment treaties and the underlying objectives of South Africa’s new investment regime, namely: (1) reinforcing the ‘sovereign right to regulate in the public interest’; (2) doing away with international investment arbitration; and (3) placing foreign and domestic investments on an equal footing. Along similar lines, the article examines the standards of investment protection *not* explicitly laid down in the Promotion and Protection of Investment Bill 2013 and inquires whether these standards are otherwise protected by the constitution or other laws. The article concludes that whilst South Africa’s policy decision on its investment protection regime is open to debate, the government has followed a comprehensive, transparent, and inclusive process, in which relevant stakeholders have been heard and with which they have engaged.

The next contribution moves to Asia, and Mahdev Mohan’s analysis of Asian perspectives on investment agreements and arbitration by focusing in particular on four different countries: Indonesia, India, Australia, and China. He clearly demonstrates how such countries, even if in a more discrete manner, are changing their attitude toward international investment law. In particular, he shows how Indonesia, which is seemingly in the process of withdrawing from its BITs, is in fact likely seeking to merely revise its existing commitments. Similarly, the position of India toward international investment law is undergoing some changes, as illustrated by the redrafting of its Model BIT to enhance the preservation of the country’s regulatory authority. Australia, for its part, does not seem to have a consistent position about investor-state dispute settlement, while China currently maintains a balance between older and newer BITs. This chapter provides a thoughtful backdrop against which the negotiation and enforcement of new agreements involving Asian countries, such as the Trans-Pacific Partnership and the US-China BIT, are taking place.

Cristelle Maurin and Pichamon Yeophantong address the regulation of outbound investment in light of the need to reach a ‘responsible investment’ policy framework. In particular, this chapter focuses on Chinese outbound direct investments to the developing world in a global international economic context characterized by a rise in foreign direct investment both to and from emerging markets and also by the ever-more preeminent role of corporate responsibility and sustainable development in the international policy environment for cross-border investment. Through an analysis supported by numerous examples, they demonstrate how the Chinese government and its state-owned enterprises, traditionally criticized for

demonstrating little or no concern for standards of compliance, are revisiting their approach with respect to outbound direct investment in the developing world, and especially in Africa, to take into account international standards of responsible business conduct and ultimately engage in ‘responsible investment’.

In the next chapter, Rodrigo Polanco Lazo offers a very good account of an alternative approach chosen by Latin American countries to resolving investor-state disputes. The contribution analyzes the approach chosen by countries such as the Plurinational State of Bolivia, the Republic of Ecuador, and the Bolivarian Republic of Venezuela, which have all taken a strong stance against the traditional investment arbitration system by denouncing the ICSID Convention and terminating several investment treaties. The approach involves emphasizing contract-based investment arbitration and promoting a regional mechanism for the settlement of investment disputes that is currently under study at UNASUR. In his analysis of the UNASUR proposal, Mr. Polanco addresses questions such as how it will operate in practice in Latin America, home of some of the countries that have been the most heavily involved in investor-state dispute settlement, and how it is both similar to and different from the existing framework of investor-state dispute resolution provided under the ICSID Convention.

In this edition of the *Yearbook* we welcome Dominic N. Dagbanja, who analyzes the interaction between the international investment treaty regime and the development policy of Ghana. In particular, based on the premise that there is a link between investment and development and that the international investment law regime limits the regulatory autonomy of host countries, he argues that other means of encouraging development exist and, accordingly, states should preserve a certain degree of regulatory autonomy to enact domestic policies that go beyond mere liberalization of the legal and regulatory environment for investment. Rather than analyzing the limits imposed by international investment treaties on the regulatory autonomy of a host state, the author assesses how the implementation of other development policies should influence and limit the types of investment treaty obligations assumed by states and how such obligations should be interpreted, with a specific reference to Ghana.

Finally, we have the privilege of including the winning memorials of the FDI Moot for both 2014 and 2105. In 2014 a team from the University of Ottawa submitted the winning claimant’s memorial, while students from Harvard Law School submitted the winning respondent’s memorial. In 2015 Harvard repeated its stellar performance, again winning best respondent’s memorial. The winning claimant’s memorial in 2015 was submitted by students from the National and Kapodistrian University of Athens. These excellent memorials reveal once again the growing interest of students in international investment law and demonstrate a striving for excellence and an enthusiasm for grappling with intellectually challenging issues.

Andrea K. Bjorklund

*L. Yves Forter Chair in International Arbitration and International Commercial Law
McGill University Faculty of Law*

Jansen Calamita

*Director, Investment Treaty Forum
British Institute of International and Comparative Law*

Mark Feldman

*Associate Professor of Law
Peking University School of
Transnational Law, Shenzhen*

Lise Johnson
Head: Investment Law and Policy
Columbia Center on Sustainable Investment

Peter Muchlinski
Professor of International Commercial Law
The School of Law
The School of Oriental and African Studies, University of London

Luke Nottage
Professor of Comparative and Transnational Business Law
Sydney Law School

Ucheora Onwuamaegbu
International Attorney, Arent Fox LL.P., Washington, D.C.

Federico Ortino
Reader in International Economic Law
Dickson Poon School of Law
King's College London

August Reinisch
Vice Dean of the Law Faculty
University of Vienna

Lisa Sachs
Director
Columbia Center on Sustainable Investment

Abby Cohen Smutny
Partner
White & Case LL.P., Washington, D.C.