

Sustainable Development in World Investment Law

Sustainable Development in World Investment Law

Edited by

Marie-Claire Cordonier Segger

Markus W Gehring

Andrew Newcombe



Wolters Kluwer

Law & Business

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3166-9

© 2011 Kluwer Law International BV, The Netherlands

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, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA.
Email: permissions@kluwerlaw.com

Printed in Great Britain.

Summary of Contents

Acknowledgements	xxxi
List of Contributors	xxxiii
Table of Abbreviations	lxiii
Foreword	lxvii
Part I	
The Foundations	1
Chapter 1	
An Introduction to Sustainable Development in World Investment Law	3
<i>Markus Gehring & Andrew Newcombe</i>	
Chapter 2	
International Investment Law and Development	13
<i>Anna Joubin-Bret, Marie-Estelle Rey and Jörg Weber</i>	
Preface by James Zhan	13
Chapter 3	
International Investment Law and the Environment	33
<i>Åsa Romson</i>	
Preface by Ole Kristian Fauchald	33

Summary of Contents

Chapter 4	
International Investment Law and Human Rights	53
<i>Jorge Daniel Taillant & Jonathan Bonnitcha</i>	
Preface by Ashfaq Khalfan	53
Chapter 5	
The Theory of Norm Conflict Solutions in International Investment Law	81
<i>Jörg Kammerhofer</i>	
Preface by Martti Koskenniemi	81
Chapter 6	
An Integrated Agenda for Sustainable Development in International Investment Law	99
<i>Marie-Claire Cordonier Segger & Andrew Newcombe</i>	
Preface by Vaughan Lowe, QC	99
Part II	
Sustainable Development in International Investment Law	143
Section 1	
Procedural Innovations for Sustainable Development in International Investment Law	143
Chapter 7	
Impact Assessments of Investment Treaties	145
<i>Markus W. Gehring</i>	
Preface by Karl P. Sauvant	145
Chapter 8	
Bringing Sustainable Development Issues before Investment Treaty Tribunals	171
<i>Chester Brown</i>	
Preface by Campbell McLachlan, QC	171
Chapter 9	
Transparency and Amicus Curiae in ICSID Arbitrations	189
<i>Nathalie Bernasconi-Osterwalder</i>	
Preface by Antonio R. Parra	189

Section 2	
Emerging Elements of International Investment Law That Affect Sustainable Development	209
Chapter 10	
Development Considerations in Defining Investment	211
<i>Marek Jeżewski</i>	
Preface by Andrés Rigo Sureda	211
Chapter 11	
‘Fair and Equitable Treatment’ and Sustainable Development	237
<i>Roland Kläger</i>	
Preface by Francisco Orrego-Vicuña	237
Chapter 12	
Sustainable Development, National Treatment and Like Circumstances in Investment Law	261
<i>Kate Miles</i>	
Preface by Armand de Mestral	261
Chapter 13	
Regulatory Expropriation and Sustainable Development	295
<i>Martins Paparinskis</i>	
Preface by Jan Paulsson	295
Chapter 14	
Are Stabilization Clauses a Threat to Sustainable Development?	329
<i>Audley Sheppard & Antony Crockett</i>	
Preface by Kamal Hossain	329
Chapter 15	
General Exceptions in International Investment Agreements	351
<i>Andrew Newcombe</i>	
Preface by Peter Muchlinski	351
Chapter 16	
The Necessity of Sustainable Development?	371
<i>Andrea K. Bjorklund</i>	
Preface by Christoph Schreuer	371

Summary of Contents

Section 3	
Sustainable Development Implications of Bilateral and Regional Investment Treaties	403
Chapter 17	
Investment and Water Resources: Limits to NAFTA	405
<i>Céline Lévesque</i>	
Preface by Meg Kinnear	405
Chapter 18	
Liberalizing Investment in the CARIFORUM–EU Economic Partnership Agreement: EU Priorities, Regional Agendas and Developmental Hegemony	429
<i>Paul James Cardwell & Duncan French</i>	
Preface by Nico Schrijver	429
Chapter 19	
The Asymmetrical Legalization of Investment Regimes in Africa: Lessons from Water Privatization	453
<i>Emma Saunders-Hastings</i>	
Preface by Don McRae	453
Chapter 20	
Globalization and Inclusive Governance in China and India: Foreign Investment, Land Rights and Legal Empowerment of the Poor	481
<i>Kishan Khoday & Jonathan Bonnitcha</i>	
Preface by M. Sornarajah	481
Chapter 21	
The Energy Charter Treaty’s Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development	513
<i>Edna Sussman</i>	
Preface by Graham Coop	513
Part III	
Future Directions	533
Section 1	
New Proposals for More Sustainable Investment Law	533

Chapter 22	
Sustainable International Investment Agreements: Challenges and Solutions for Developing Countries	535
<i>Graham Mayeda</i>	
Preface by Susan Rose-Ackerman	535
Chapter 23	
The IISD Model International Agreement on Investment for Sustainable Development	561
<i>Mahnaz Malik</i>	
Preface by David Runnalls	561
Chapter 24	
Corporate Social Responsibility and Investment Treaties	585
<i>Jarrold Hepburn & Vuyelwa Kuuya</i>	
Preface by Christopher McCrudden	585
Chapter 25	
The Institutionalization of Investment Arbitration and Sustainable Development	611
<i>Jan Wouters & Nicolas Hachez</i>	
Preface by Gavan Griffith, QC	611
Section 2	
Investment Provisions in Other Sustainable Development Treaty Regimes	641
Chapter 26	
Governing Investment in Sustainable Development: Investment Mechanisms in Sustainable Development Treaties and Voluntary Instruments	643
<i>Marie-Claire Cordonier Segger & Duncan French</i>	
Preface by Christopher Greenwood, CMG, QC	643
Chapter 27	
The Kyoto Protocol in Investor–State Arbitration: Reconciling Climate Change and Investment Protection Objectives	681
<i>Freya Baetens</i>	
Preface by James Crawford	681

Summary of Contents

Chapter 28	
Investment Promotion and Protection in the UNCBD: An Emerging Access and Benefit Sharing Regime	717
<i>Olivier Rukundo & Jorge Cabrera</i>	
Preface by Charles Gbedemah	717
Chapter 29	
Two Rivers Meet: At the Confluence of Cross-Border Water Law and Foreign Investment Law	745
<i>Paul Stanton Kibel & Jon Schutz</i>	
Preface by Hans Christian Bugge	745
Part IV	
Conclusion	769
Chapter 30	
Promoting Sustainable Investment through International Law	771
<i>Marie-Claire Cordonier Segger & Avidan Kent</i>	
Table of Treaties	793
Table of Cases	799
Table of Other International Instruments	811
About the CISDL	815
Bibliography	817
Index	859

List of Contributors

Editors

Marie-Claire Cordonier Segger (International Development Law Organisation, Centre for International Sustainable Development Law)

Marie-Claire Cordonier Segger, MEM (Yale University), BCL, and LLB (McGill University), BA Hons is an international legal scholar in the field of sustainable development and currently leads the Environment and Sustainable Development Law Programme for the International Development Law Organisation. In an academic capacity, she serves as Director of the Centre for International Sustainable Development Law (CISDL), as an Associate Fellow of the Lauterpacht Centre for International Law (LCIL) at Cambridge University, Faculty of Law, and as a Visiting Professor at the University of Chile, Faculty of Law. She has also served as Senior Director of Sustainable Prosperity, a green economy policy research network, on interchange from Canada's Ministry of Natural Resources, where she served on the Advisory Board of the International Trade and Investment Centre (Conference Board of Canada), on the Management Committee of the Extractive Industries Transparency Initiative (EITI) Trust Fund, and on the Board of the United Nations International Panel on Sustainable Resource Management. Visiting Prof. Cordonier Segger also serves on the Board of the International Law Association (Canadian Branch), as an expert on the International Law Association (ILA) Committee on International Law on Sustainable Development, as a Councillor of the World Future Council, as a Fellow of the Royal Society of the Arts, and as Vice-President of the CD Gonthier Legacy Committee. In addition, she chairs a joint CISDL – ILA – IDLO Partnership on International Law for Sustainable Development from the 2002 World Summit for Sustainable Development. Selected publications include *Sustainable Development Law: Principles, Practices and Prospects* (Oxford University Press, 2004) with A. Khalfan; *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Martinus Nijhoff,

List of Contributors

2004) with former Vice-President of the International Court of Justice, Judge C. G. Weeramantry; and *Sustainable Development in World Trade Law* (Kluwer Law International, 2005) with Prof. M. Gehring; she also edits the Cambridge University Press Series *Implementing Treaties on Sustainable Development* with Prof. M. Gehring.

Markus Gehring (Cambridge University, University of Ottawa, CISDL)

Markus W. Gehring, LL.M. (Yale University), Dr. jur. (University of Hamburg), MA (University of Cambridge), is Lead Counsel for Trade, Investment and Competition Law with the Centre of International Sustainable Development Law (CISDL). He is Tutor in Law at the Faculty of Law, University of Cambridge and affiliated Lecturer in International and European Law at the Centre of International Studies, Department of Politics and International Studies (POLIS) and a Fellow in Law at Robinson College. Prof. Gehring has been a Visiting Professor at several universities around the world and is ad personam Jean Monnet Chair in Sustainable Development Law and Associate Professor in the Faculty of Law, Civil Law Section, at the University of Ottawa. He holds an MA from Cambridge University, an LL.M. from Yale University, and a DR. JUR. from the University of Hamburg. He is a member of the Frankfurt Bar and a former associate member of the Brussels Bar. He represented the CISDL at World Trade Organization Ministerial Conferences in Doha, Qatar; Cancun, Mexico; and Hong Kong, China; as well as at the World Summit on Sustainable Development in Johannesburg, South Africa and at various other international negotiations. He is a member of the International Law Association (ILA), German Branch, and serves on the ILA Committee on International Law on Sustainable Development. Prof. Gehring also serves on the Research Committee of the IUCN Academy for Environmental Law and as an instructor in international law at the International Development Law Organization. Selected publications include *Sustainable Development in World Trade Law* (Kluwer Law International, 2005) with M.-C. Cordonier Segger; *World Trade Law in Practice* (Globe, 2007) with J. Hepburn and M.-C. Cordonier Segger; and *Sustainability through Process in World Trade Law* (Duncker & Humblot, 2007); Prof. Gehring also edits the Cambridge University Press Series *Implementing Treaties on Sustainable Development* with M.-C. Cordonier Segger.

Andrew Newcombe (University of Victoria, CISDL)

Andrew Newcombe, BA(Hons) (University of King's College, Halifax), LL.B. (University of Victoria), LL.M. (University of Toronto), is Associate Professor in the Faculty of Law, University of Victoria, and a Legal Research Fellow of the Centre for International Sustainable Development Law (CISDL). Prior to joining the Faculty in 2002, he articulated as a law student and practised as an associate with Swinton & Co. (now Miller Thomson) in Vancouver. After pursuing his LL.M., he worked with the International Arbitration and Public International Law groups at Freshfields Bruckhaus Deringer in Paris. Prof. Newcombe teaches in the areas of international economic law, international arbitration and commercial law. His research currently focuses on international investment and trade law, and

international arbitration. Prof. Newcombe created and maintains Investment Treaty Arbitration (ITA) (<<http://ita.law.uvic.ca>>), a leading international research website focused on international investment treaty law, practice, and dispute resolution. His book *Law and Practice of Investment Treaties: Standards of Treatment* (co-authored with Lluís Paradell) was published in 2009 by Kluwer Law International.

Contributors

Contributors of Prefaces

Prof. Hans Christian Bugge (University of Oslo, Faculty of Law)

Hans Christian Bugge is Professor of Environmental Law at the Department of Public and International Law, University of Oslo. He holds a doctorate in regional planning from the University of Paris II (*Doctorat de spécialité*) (1972) and a Dr Jur from Oslo University. Before he became an academic lawyer in 1991, Prof. Bugge held various senior positions as a civil servant in Norway's Ministry of the Environment from 1972 to 1982. He served as Deputy Director in the Department for Pollution Control, Director General of Norway's Pollution Control Authority, Director General of the Department for Urban and Regional Planning, and Deputy Director of the Planning Department in the Ministry of Finance. He has also worked extensively on development issues.

Mr Graham Coop (Energy Charter Secretariat)

Graham Coop is General Counsel to the Energy Charter Secretariat. Prior to this appointment, he was Head of the Energy and Natural Resources Group at Freshfields Bruckhaus Deringer, Paris, where he was based from 1992 until 2002, followed by two years as a partner with Denton Wilde Sapte's Energy and Infrastructure Department in London. He was a member of the legal team representing Bahrain in its territorial sovereignty and maritime delimitation dispute with Qatar in the International Court of Justice and received the Order of Bahrain as a result of his work on that dispute. In 1998 and 1999, he was seconded to lead the five-lawyer International Transport and Supply Contracts Division of the Legal Service of Gaz de France, the French gas utility. He has advised governments and international corporations on disputed sovereignty and maritime delimitation issues throughout the Middle East.

Prof. James Crawford (Lauterpacht Centre for International Law, University of Cambridge, Faculty of Law)

James Crawford SC, FBA, is Director of the Lauterpacht Centre for International Law at the University of Cambridge, Whewell Professor of International Law, and a Fellow of Jesus College. He was a Member of the United Nations International Law Commission from 1992 to 2001 and Special Rapporteur on State Responsibility (1997–2001). In addition to scholarly work on statehood, self-determination, collective rights, and international responsibility, he has appeared frequently before the International Court of Justice, including in the matter of the Advisory Opinions on Nuclear Weapons (1996) and the Israeli Wall/Barrier (2004). He has also appeared before other international tribunals and is actively engaged as an international arbitrator.

Prof. Ole Fauchald (Oslo University, Faculty of Law)

Ole Kristian Fauchald graduated as cand. jur. at the Law Faculty, University of Oslo, in 1991. He was awarded the degree of Dr jur by the Faculty for his thesis, 'Environmental Taxes and Trade Discrimination', published by Kluwer International in 1998. Thereafter, he worked as an adviser to the Norwegian Ministry of Environment for two years before returning to the Faculty. Since September of 2007, he has been employed full-time as professor at the Department for Public and International Law, University of Oslo. Currently, he also holds the position of Senior Research Fellow at the Fridtjof Nansen Institute.

Dr Charles Gbedemah (United Nations Convention on Biological Diversity Secretariat)

Charles Gbedemah is the Senior Environmental Affairs Officer for the Secretariat of the United Nations Convention on Biological Diversity. Dr Gbedemah holds a Master's degree in Mycology from the University of Ghana. He was involved in biotechnology research at the national level for over twenty years. He was the sole negotiator for his country during the Protocol negotiations while leading the development of the Ghana National Biosafety Framework (NBF). Before joining the Secretariat of the United Nations Convention on Biological Diversity, Dr Gbedemah had been the Regional Coordinator for the United Nations Environment Programme and the Global Environment Facility (UNEP/GEF) capacity building project since 2001 and assisted forty African countries to prepare their National Biosafety Frameworks.

Sir Chris Greenwood (International Court of Justice, The Hague)

Sir Christopher Greenwood, CMG, QC was elected to the International Court of Justice in 2008. He received the Companion of the Order of Saint Michael and Saint George in 2002. Educated at Raeburn Park School, Singapore, and Wellington School, United Kingdom, Prof. Greenwood studied law at Magdalene College, Cambridge, receiving a BA (1976), LLB (1977), and MA (1980). He then was a Fellow of Magdalene College, Cambridge (1978–1996), Fellow Commoner (1996–2009), and Honorary Fellow (2009). Prof. Greenwood served as Assistant Lecturer in Law (1981–1984) and Lecturer in Law (1984–1996), University of Cambridge; Professor of International Law, London School of Economics (1996–2009); Barrister, Middle Temple (1978); Queen's Counsel (1999); and Bencher, Middle Temple (2003). Sir Christopher Greenwood is a Member of the Panels of Arbitrators for the Law of the Sea Treaty and the International Centre for Settlement of Investment Disputes.

Dr Gavan Griffith (Essex Court Chambers)

Gavan Griffith, QC has practised as a barrister in all Australian jurisdictions and the English Bar and elsewhere since 1963, including extensive appearances and matters in the fields of public and private international law. He was Solicitor-General of Australia for fourteen years between 1984 and 1997. Since returning to private practice in 1998, he has practised as counsel and as an international

List of Contributors

arbitrator, based in both Australia and London. In particular, he keeps rooms at Essex Court Chambers and practises as a London-based arbitrator for English- and European-seated disputes.

Dr Kamal Hossain (International Law Association)

Kamal Hossain is a practicing barrister, and much of his work involves international law, constitutional law, and human rights. He served the Government of Bangladesh as Minister of Law (1972–1973), Foreign Affairs (1973–1975), and Petroleum and Minerals (1974–1975). More recently, he has been the UN Special Rapporteur on Afghanistan (1998–2003) and is currently a Member of the UN Compensation Commission. At present, he is Chairman, of the Advisory Council, Transparency International; Vice-Chairman of the International Law Association; and Chairman of the Bangladesh Institute of Law and International Affairs and the Bangladesh Legal Aid and Services Trust.

Ms Meg Kinnear (International Centre for Settlement of Investment Disputes)

Meg Kinnear was named as Secretary General of the International Centre for Settlement of Investment Disputes (ICSID) in 2009. Prior to her election to this position, Ms Kinnear was General Counsel (Senior General Counsel from 2006) and Director General of the Trade Law Bureau of Canada. In November 2002, Ms Kinnear was also named Chair of the Negotiating Group on Dispute Settlement for the Free Trade of the Americas Agreement. Ms Kinnear was called to the Bar of Ontario in 1984 and the Bar of the District of Columbia in 1982. She received a BA from Queen's University in 1978, an LLB from McGill University in 1981, and an LLM from the University of Virginia in 1982.

Mr Ashfaq Khalfan (CISDL; Oxford University, Faculty of Law; Amnesty International)

Ashfaq Khalfan is Acting Chair of the Centre for International Sustainable Development Law. He has co-authored several publications, including *Sustainable Development Law: Principles, Practices and Prospects* (OUP, 2004), with Marie-Claire Cordonier Segger. He has previously served as Coordinator of the Right to Water Programme at the Centre on Housing Rights and Evictions. Mr Khalfan has consulted for the Office of the UN High Commissioner for Human Rights (OHCHR) and the German Technical Cooperation Agency (GTZ) on human rights and development related issues, and worked for the Canadian Federal Department of Justice, the Canadian Human Rights Commission, Law & Society Trust (Sri Lanka), and Kituo Cha Sheria (Legal Advice Centre, Kenya). He received degrees in political science and international development and in common and civil law from McGill University.

Prof. Martti Koskenniemi (University of Helsinki: Lauterpacht Centre for International Law, University of Cambridge, Faculty of Law)

Martti Koskenniemi is Academy Professor with the University of Helsinki. He is also Hauser Global Professor of Law at New York University School of Law. In 2008 and 2009, he was Arthur Goodhart Professor of Legal Science, University of Cambridge. Koskenniemi has been a member of the UN International Law Commission (2002–2006) and Judge at the Administrative Tribunal of the Asian Development Bank (1997–2002). In 1978 and 1994, he was a member of the Finnish Ministry for Foreign Affairs. He is a member of the *Institut de droit international*, and his research interests focus on the theory and history of international law.

Prof. Sir Eli Lauterpacht (Lauterpacht Centre for International Law, University of Cambridge, Faculty of Law)

Elihu Lauterpacht has had a distinguished career in international law, combining teaching and practice on an extensive scale. Called to the Bar in 1950, he became a QC in 1970 and has practised extensively before the International Court of Justice and other international jurisdictions, as well as before the English courts. He was an ad hoc judge in the Bosnia case before the International Court of Justice (ICJ), has been an arbitrator in NAFTA, ICSID, and other arbitrations, President of the East African Common Market Tribunal, and a member of the panel of commissioners of the UN Compensation Commission. He has presided over the World Bank and Asian Development Bank Administrative Tribunals, and the Eritrea-Ethiopia Boundary Commission. He is an Honorary Professor of International Law of Cambridge University and was, from 1984 to 1995, the first Director of the Lauterpacht Centre for International Law in Cambridge. He has written an extended biography of his father, Sir Hirsch Lauterpacht, to be published by the Cambridge University Press in October 2010. He has also been Editor of the *International Law Reports* since 1960, more recently in conjunction with Sir Christopher Greenwood.

Prof. Vaughan Lowe (University of Oxford, Faculty of Law)

Vaughan Lowe QC is the Chichele Professor of Public International Law and a Fellow of All Souls College at the University of Oxford. He practises as a barrister from Essex Court Chambers, London.

Prof. Christopher McCrudden (University of Oxford, Faculty of Law)

Christopher McCrudden is Professor of Human Rights Law at the University of Oxford; a Fellow and tutor in law at Lincoln College, Oxford; a practising barrister-at-law (Gray's Inn), and a William W. Cook Global Law Professor at University of Michigan Law School. Specializing in human rights, he concentrates on issues of equality and discrimination as well as the relationship between international economic law and human rights. At the University of Michigan Law School, Professor McCrudden teaches in the areas of international, European, and comparative human rights. He serves on the European Commission's Expert Network on the Application of the Gender Equality

List of Contributors

Directives and is a scientific director of the European Commission's network of experts on nondiscrimination. Professor McCrudden holds an LLB from Queen's University, Belfast; an LLM from Yale; and a DPhil. from Oxford University. In addition, Queen's University, Belfast, awarded him an honorary LL.D. in 2006. He was elected a Fellow of the British Academy in 2008.

Prof. Campbell McLachlan (Victoria University of Wellington, Faculty of Law)

Campbell McLachlan QC is Professor of Law, specializing in international law and dispute resolution. After earning his LLB at Victoria University, Prof. Campbell studied in Europe and then practised law as a partner in the firm of Herbert Smith, and as Head of its International Law Practice Group, until his return to New Zealand in 2003. Prof. McLachlan is President of the Australian and New Zealand Society of International Law, an Arbitrator for the International Centre for Settlement of Investment Disputes, and a Member of the International Chamber of Commerce Court of Arbitration. He is a Specialist Editor for the fourteenth edition of Dicey, Morris and Collins on the *Conflict of Laws* (2006), the leading text on Private International Law in the common law world, and is responsible in particular for the chapter on Arbitration.

Prof. Donald McRae (University of Ottawa, Faculty of Law)

Donald McRae holds the Hyman Soloway Chair in Business and Trade Law at the University of Ottawa and is a former Dean of the Common Law Section. He was formerly Professor and Associate Dean at the Faculty of Law at the University of British Columbia. He specializes in the field of international law and has been an Advisor to the Department of External Affairs of the Government of Canada and Counsel for Canada in several international fisheries and boundary arbitrations. Prof. McRae has been chair and member of dispute settlement panels under the Canada – US Free Trade Agreement, the North American Free Trade Agreement (NAFTA), the US – Israel Free Trade Agreement, and the World Trade Organization (WTO). Prof. McRae has also chaired and been a member of investment dispute settlement tribunals. He is a member of the United Nations International Law Commission.

Prof. Armand de Mestral (McGill University, Faculty of Law)

Armand de Mestral CM teaches international law, international trade law, and the law of the European Union at McGill University, Faculty of Law. His current research interest is international trade and investment agreements. Prof. de Mestral has prepared books, articles, and studies in English and French on international trade law and on Canadian comparative and constitutional law and international law. He has served on WTO and NAFTA dispute settlement and arbitration tribunals. He served as president of the Canadian Red Cross Society from 1999 to 2001. He was made member of the Order of Canada in December 2007.

Prof. Peter Muchlinski (University of London, School of Oriental and African Studies, Faculty of Law and Social Sciences)

Peter Muchlinski is Professor of International Commercial Law at the School of Oriental and African Studies (SOAS), University of London. Prior to joining SOAS, he was Professor of Law and International Business at Kent Law School, University of Kent (2001–2005). Prof. Muchlinski specializes in international and European business law, competition law, law and development and commercial regulation, in which fields he has authored numerous papers and articles. He acts as a principal adviser to the United Nations Conference on Trade and Development (UNCTAD) on investment issues. During the period of June to October 2003 he was on leave of absence from Kent Law School and worked at UNCTAD in Geneva as a Senior Legal Expert in the Division on Investment Technology and Enterprise Development.

Prof. Francisco Orrego-Vicuña (University of Chile, Faculty of Law)

Francisco Orrego-Vicuña is Professor of Law at the University of Chile and has been the co-director of the Joint LL.M. Program with the University of Heidelberg, which specializes in international law, international trade, investment, and arbitration. He has been a member of the Court of the LCIA and its Vice President. He is an arbitrator at 20 Essex Street Chambers in London. Prof. Orrego-Vicuña has been the President of numerous arbitration tribunals under the International Center for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), and the United Nations Commission on International Trade Law (UNCITRAL) rules, as well as a judge and former President of the World Bank Administrative Tribunal. He has also been a member of a dispute settlement panel in the World Trade Organization. Prof. Orrego-Vicuña has extensively published in international dispute settlement and other central questions of international law.

Mr Jan Paulsson (Freshfields Bruckhaus Deringer)

Jan Paulsson is co-head of the international arbitration and public international law practices of Freshfields Bruckhaus Deringer. He has acted as counsel or arbitrator in hundreds of international arbitrations. He has conducted cases under the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL), the International Center for Settlement of Investment Disputes (ICSID), the London Court of International Arbitration (LCIA), and the American Arbitration Association (AAA) Rules, as well as before the International Court of Justice. He is currently President of the London Court of International Arbitration, the World Bank Administrative Tribunal. He holds the Michael Klein Distinguished Scholar Chair at the University of Miami and is Centennial Professor at the London School of Economics. Among numerous publications, he is author of *Denial of Justice in International Law* (2005) and co-author of the leading commentary *International Chamber of Commerce Arbitration* (3rd edition, 2000).

List of Contributors

Mr Antonio Parra (International Council for Commercial Arbitration (Honorary Secretary General))

Mr Antonio Parra was previously with the International Centre for Settlement of Investment Disputes for over fifteen years, serving successively as Senior Counsel, Legal Adviser and Deputy Secretary-General. Mr Parra's earlier positions include Senior Counsel and Counsel, World Bank; and Assistant Legal Counsel, Organization of the Petroleum Exporting Countries (OPEC) Fund for International Development.

Dr Karl P. Sauvant (Vale Columbia Center on Sustainable International Investment)

Dr Karl P. Sauvant is the Founding Executive Director of the Vale Columbia Center on Sustainable International Investment. He is a Senior Research Scholar and Lecturer in Law at Columbia Law School, Co-director of the Millennium Cities Initiative, and Guest Professor at Nankai University, China. Until July 2005, he was Director of the United Nations Conference on Trade and Development's (UNCTAD's) Division on Investment, Technology and Enterprise Development. In 1991, while at the UN, he created the prestigious annual *World Investment Report*, of which he was the lead author until 2004. Apart from his work for the UN, he has published widely on issues related to economic development, foreign direct investment (FDI) and services. His name is associated with a great number of United Nations publications on FDI over the three decades of service in the UN.

Prof. Christoph Schreuer (Of Counsel, Wolf Theiss)

Christoph Schreuer is Of Counsel at Wolf Theiss in Vienna. He is a graduate of the Universities of Vienna, Cambridge, and Yale. Over an academic career spanning more than forty years, he has published numerous articles and several books in the field of international law. He has covered such diverse areas as human rights, adjudication by national and international courts and tribunals, sovereign immunity, the law of international organizations, the sources of international law, and the future of sovereignty. Prof. Schreuer has spent most of his academic career at the Department of International Law of the University of Salzburg, Austria. From 1992 to 2000 he was the Edward B. Burling Professor of International Law and Organization at the Paul H. Nitze School of Advanced International Studies (SAIS) of the Johns Hopkins University in Washington, DC. From October 2000 to September 2009 he was Professor of International Law at the University of Vienna, Austria.

Prof. Nico Schrijver (Leiden University, Faculty of Law)

Nico Schrijver is Chair of Public International Law at Leiden University and Academic Director at the Grotius Centre for International Legal Studies, Leiden University/Campus, The Hague. He is also Visiting Professor on Europe and North-South Relations at the *Université libre de Bruxelles*; President of the Netherlands Society of International Law; Member of the Royal Netherlands Academy of Arts and Sciences (since 2008); Member of the Permanent Court

of Arbitration, The Hague; Member (*member associé*) of the *Institut de droit international* (elected in 2007); and Member of the UN Committee on Economic, Social and Cultural Rights.

Prof. Schrijver appeared before the International Court of Justice and the International Tribunal for the Law of the Sea, as legal counsel in law of the sea cases before special ad hoc tribunals, as an expert in proceedings before the International Centre for Settlement of Investment Disputes (ICSID), and before the Inter-American Court for Human Rights.

Prof. M. Sornarajah (National University of Singapore, Faculty of Law)

M Sornarajah is CJ Koh Professor at the Faculty of Law of the National University of Singapore and the Tunku Abdul Rahman Professor of International Law at the University of Malaya at Kuala Lumpur. He was previously Head of the Law School of the University of Tasmania, Australia. Prof. Sornarajah studied law at the University of Ceylon; the London School of Economics, King's College, London; and the Yale University Law School. He was Sterling Fellow at the Yale Law School, Research Fellow at the Centre for International Law, Cambridge, and at the Max Planck *Institut für Öffentliches Ausländisches Recht* at Heidelberg, Germany. Prof. Sornarajah was International Law Fellow and Visiting Professor at American University in Washington DC. He was Professorial Fellow at the Centre for Petroleum and Natural Resources Law at the University of Dundee, Scotland. He was a Visiting Professor at the World Trade Institute of the Universities of Berne and Neuchâtel, Switzerland; at Kyushu University, Japan; and at the Georgetown Centre for Transnational Legal Studies, London.

Dr Andrés Rigo Sureda (World Bank (former Deputy General Counsel); International Arbitrator)

Andrés Rigo Sureda, a Spanish national, was appointed earlier this year as a Judge on the Administrative Tribunal of the International Monetary Fund (IMF). Prior to his appointment, he served with the World Bank in several capacities (1973–2000), including Assistant General Counsel and Deputy General Counsel (1992–2000). Before joining the World Bank, he was legal advisor to the government of Venezuela and Assistant Professor of Public International Law at the Universidad Autónoma in Madrid. Dr Rigo holds a law degree from the Universidad Complutense in Madrid (1966), a diploma in International Relations from the School of Advanced International Studies (Bologna Centre) of The Johns Hopkins University (1968), and a PhD in International Law from Cambridge University (1971). Since leaving the World Bank he has developed an arbitration and mediation practice and often chairs arbitral tribunals in cases involving investment disputes between investors and States.

Prof. Susan Rose-Ackerman (Yale University, Faculty of Law)

Susan Rose-Ackerman is the Henry R. Luce Professor of Jurisprudence (Law and Political Science) with joint appointments between Yale University's Law School

List of Contributors

and Department of Political Science. She has taught and written widely on corruption, law and development, administrative law, law and regulatory policy, the nonprofit sector, and federalism. Prof. Rose-Ackerman has been visiting Research Scholar at the World Bank, a fellow at the Centre for Advanced Study in the Behavioural Sciences and at Collegium Budapest, where she co-directed a project on Honesty and Trust in Post-Socialist Societies. She currently directs the programme in Comparative Administrative Law at Yale Law School. Prof. Rose-Ackerman holds a PhD in Economics from Yale University and has held Guggenheim and Fulbright Fellowships.

Mr David Runnalls (International Institute for Sustainable Development)

David Runnalls is President of the International Institute for Sustainable Development. He is a member of the Board of the Institute of Advanced Studies of the United Nations University. He is a member of the Advisory Council for Export Development Canada; a Member of the Council for Sustainable Development Technology Canada; and a Member of the Ivey Business School Leadership Council. Mr Runnalls also serves on the Inquiry Team for Tomorrow's Global Company, the Sustainable Asset Management and Sustainable Performance Group (SAM/SPG) Leadership award, the International Sustainability Innovation Council of Switzerland (ISIS), and the Shell Report External Review Committee. He has served as Co-Chair of the China Council Task Force on WTO and Environment. He served as Chair of the Adjudication Panel for the ALCAN Prize for Sustainability. Mr Runnalls has served as Senior Advisor to the President of the International Development Research Centre (IDRC) in Ottawa, Canada, and to the Administrator of the United Nations Development Programme.

Dr James X. Zhan (United Nations Conference on Trade and Development)

James X. Zhan is Director of the Division on Investment and Enterprise at the United Nations Conference on Trade and Development (UNCTAD) and is team leader of the UN World Investment Report. His previous experiences include Chief of International Arrangements Programme, dealing with issues related to investment agreements, technology transfer, intellectual property rights, and corporate responsibilities; Chief, Office of the Director, Division on Investment, Technology and Enterprise Development; Executive Secretary of UNCTAD Commission on Investment, Technology and Related Financial Issues; and Economist at the Executive Direction and Management, dealing with policy coordination, strategic planning, and programme evaluation. Before joining UNCTAD, Dr Zhan was a diplomat and government official dealing with investment and trade issues. He has a PhD in international economics, and was Research Fellow at Oxford University.

Contributors of Chapters

Prof. Freya Baetens (Leiden University)

Freya Baetens is Assistant Professor in Public International Law at Leiden University. She wrote her doctoral thesis at the University of Cambridge (Gonville and Caius College) as W.M. Tapp Scholar, Honourary European Trust Fellow and Cambridge European Society Fellow, under the supervision of Prof. J. Crawford, on the topic of ‘Nationality-Based Discrimination in Public International Law, with a Specific Focus on Human Rights, Trade and Investment Law’. Previously, she obtained her Cand. jur./Lic. jur. degree (BA/MA equivalent) at the University of Ghent and her LLM degree (Harlan Fiske Stone Scholar) at the University of Columbia (BAEF and Fulbright Fellow). Since 2008, Prof. Baetens has been a Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. She assists Prof. Donald McRae in his work as Chairman of the ILC Working Group on Most-Favoured-Nation Clauses and is a member of the ILA Committees on Islam and International Law, State Insolvency, and Biotechnology. Prof. Baetens is also an editor of the *Max Planck Encyclopaedia of Public International Law*. She is working as tribunal assistant for several Investor–State arbitration panels and cooperates in the drafting of memorials and expert opinions in international dispute settlement.

Ms Nathalie Bernasconi-Osterwalder (IISD)

Nathalie Bernasconi-Osterwalder (Lic. jur. (*Université de Neuchâtel*, Switzerland), LLM (Georgetown University), is a senior international lawyer and heads the Investment Program of the International Institute on Sustainable Development (IISD). She previously was the managing attorney of the Centre for International Environmental Law’s Geneva office. For several years Ms Bernasconi worked in Hanoi, Vietnam, for a legal reform project of the United Nations Development Programme (UNDP) as well as for the Australian law firm Phillips Fox. In Switzerland, Ms Bernasconi worked for the Justice Department, Berne, in the Section for International Law. She is a member of the Bar of Basel, Switzerland. Her recent book publications include *Reconciling Environment and Trade* (with John H. Jackson and Edith Brown Weiss) (Nijhoff Publishers, 2008); *Environment and Trade: A Guide to WTO Jurisprudence* (lead author) (Earthscan, 2006); and *Freshwater and International Economic Law* (with Edith Brown Weiss and Laurence Boisson de Chazournes) (Oxford University Press, 2005).

Prof. Andrea Bjorklund (University of California, Davis)

Andrea Bjorklund, JD (Yale University), MA (NYU), BA (University of Nebraska), is Professor of Law at the University of California, Davis School of Law. She teaches courses in international arbitration and litigation, international trade, international investment, public international law, international business transactions, conflict of laws, and contracts. She is Co-Rapporteur of the International Law Association’s Study Group on the Role of Soft-Law Instruments in International Investment Law. Prof. Bjorklund has written extensively on

List of Contributors

investor-state arbitration issues and has published chapters in many books, as well as pieces in several journals, including the *American Journal of International Law*, the *Hastings Law Journal*, the *American Review of International Arbitration*, and the *Virginia Journal of International Law*. She is also co-author (with Meg Kinnear and John Hannaford) of *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*. Prof. Bjorklund worked on the NAFTA arbitration team in the US Department of State's Office of the Legal Adviser, and she also worked for Commissioner Thelma J. Askey on the US International Trade Commission and in private practice at Miller & Chevalier in Washington, DC. She clerked for Judge Sam J. Ervin, III, on the US Court of Appeals for the Fourth Circuit.

Dr Chester Brown (University of Sydney)

Chester Brown, BA(HONS) (University of Melbourne), LLB(HONS) (University of Melbourne), BCL(DIST) (University of Oxford), PhD (University of Cambridge), is Associate Professor in the Faculty of Law at the University of Sydney, Australia, and a Door Tenant at Essex Court Chambers, London. His areas of practice and research are public international law, international commercial arbitration, investment treaty arbitration, and private international law. Prior to taking up his appointment at the University of Sydney, Dr Brown served as Assistant Legal Adviser at the British Foreign and Commonwealth Office, where he advised on a broad range of public international law and domestic law issues, including international investment, international arbitration, and the work of the International Law Commission. Previously, he was a Senior Associate in the International Law and International Arbitration Group of Clifford Chance LLP, London. Dr Brown is the author of *A Common Law of International Adjudication* (Oxford University Press, 2007), a major study on the applicable procedure and remedies before international courts and tribunals. He is an Associate Member of the Chartered Institute of Arbitrators, a Fellow of the Australian Centre for International Commercial Arbitration, and a Member of the International Chamber of Commerce of Australia.

Mr Jonathan Bonnitcha (University of Oxford)

Jonathan Bonnitcha, BEc(SocSc)(HONS), LLB (HONS) (University of Sydney), BCL, MPhil (University of Oxford), is a DPhil candidate at the University of Oxford, where his research is focused on the political economy of international investment law. His wider academic interest is in how systems of international economic governance deal with questions of human rights and social justice. He obtained undergraduate degrees in both economics and law from the University of Sydney and the University Medal in political economy before winning a Rhodes Scholarship. At Oxford he graduated with a BCL in 2007, with distinction and the prize for International Economic Law, and the MPhil with distinction in 2008 for a thesis comparing the regulatory expropriation jurisprudence of different jurisdictions. He has worked in the Arbitration Group of an international law firm and has also worked as a freelance travel writer and tourism critic.

Prof. Jorge Cabrera (University of Costa Rica/CISDL)

Jorge Cabrera, BCL (University of Costa Rica), LLM (University of Costa Rica), MBA (National University of Costa Rica), is a lawyer and Professor of Environmental Law in the postgraduate degree programme on Environmental and Agricultural Law and of Biodiversity Law in the Master's degree on Environmental Law programme at the University of Costa Rica. He was a tutor of the distance courses on intellectual property of the World Intellectual Property Organization (WIPO). He is currently legal adviser of the National Biodiversity Institute (INBio) and international consultant in the area of intellectual property and biodiversity, biotechnology and biosafety, access to genetic resources, and benefit sharing. He is the Lead Counsel of International Sustainable Biodiversity Law of the Centre for International Sustainable Development Law based in Canada. Prof. Cabrera was Co-chairman of the Expert Panel on Access and Benefit Sharing of the Convention on Biological Diversity (CBD) (1999–2001) and Chairman of the Sub-working Group on intellectual property rights IPR and Capacity Building during the second meeting of the Working Group on Access and Benefit Sharing (Bonn). He is a member of the Technical Expert Group on Certificates of Origin-Legal Provenance-Source established by the CBD in the context of the International Regimen Negotiations and of the Technical Expert Group (TEG) on terms, working definitions, and sectoral approaches. He is also a Member of the Delegation at the WIPO Committee on Genetic Resources and Traditional Knowledge and at the Megadiverse Like-minded Countries. Prof. Cabrera is a consultant on intellectual property rights (IPR), biotechnology, biosafety, and Access and Benefit Sharing (ABS) for national and international institutions. He has participated in the drafting of several biodiversity and Access and Benefit Sharing (ABS) laws, negotiations of ABS contracts and development of environmental legislation in Costa Rica, Nicaragua, Panama, El Salvador, Chile, Dominica, Bhutan, Seychelles, Honduras, Paraguay, and elsewhere. Prof. Cabrera has been a trainer on ABS for several African countries, including Benin, Kenya, Tanzania, Botswana, and Nigeria. He has published books and articles in the field of IPR, ABS, biosafety, trade and the environment.

Dr Paul James Cardwell (University of Sheffield)

Paul James Cardwell, LLB (University of Warwick), DEA (*Sciences Po Bordeaux*), LLM (University of Warwick), PhD (Edinburgh University School of Law), is a Lecturer in Law at the University of Sheffield. He teaches constitutional law, administrative law, and European Union law and previously taught at the *Université Montesquieu Bordeaux IV*. His main research areas are in European Union law and governance, with particular focus on foreign policy, external relations, and institutionalization. He is the author of *EU External Relations and Systems of Governance: the CFSP, Euro-Mediterranean Partnership and Migration* (Routledge, 2009). Dr Cardwell speaks fluent French.

Mr Antony Crockett (Clifford Chance)

Antony Crockett, LLM (LSE), LLB (University of Melbourne) BSc (University of Melbourne), is an associate with Clifford Chance LLP and is a member of the

List of Contributors

firm's international arbitration and public international law groups. Prior to joining Clifford Chance, Mr Crockett worked with the United Nations Office of Legal Affairs (United Nations Commission on International Trade Law (UNCITRAL) Secretariat) in Vienna. He is a member of the Association of International Petroleum Negotiators, the International Bar Association, the International Law Association, and the Chartered Institute of Arbitrators (MCIArb). In 2009 he was a coordinator of the Trade and Investment Working Group of Advocates for International Development (A4ID), a legal charity that facilitates pro bono legal assistance to civil societies, developing country governments, social enterprises, and bar associations to help achieve the UN Millennium Development Goals (MDG).

Prof. Duncan French (University of Sheffield)

Duncan French, LLB (University of East Anglia), LLM (University of Nottingham) PhD (University of Wales), is Professor of International Law at the University of Sheffield. His principal research interests are the international legal implications of sustainable development, international environmental law, and general international law. He is the author of *International Law and Policy of Sustainable Development* (Manchester, 2005). He is a Senior Research Fellow of the Centre for International Sustainable Development Law (CISDL) and, together with Professor Ximena Fuentes, *Universidad Adolfo Uban'ez*, Chile, he is Co-rapporteur for the International Law Association (ILA) International Committee on International Law and Sustainable Development.

Mr Nicolas Hachez (University of Leuven)

Nicolas Hachez, LLM (New York University), JD (Université Catholique de Louvain), is Research Fellow at the Institute for International Law and at the Leuven Centre for Global Governance Studies, University of Leuven. He is drafting his PhD dissertation on the possible emergence of an international rule of law in a global governance context. His research interests mainly include international legal theory, international human rights law, and International investment Law. He has published articles on various issues connected to those disciplines, such as the corporate social responsibility movement, the role of non-State actors, and private regulation in global governance, or the relations between international investment law and other branches of international law. Formerly, he worked as an attorney in the Brussels office of an international law firm, where he focused his practice on international investment law and European Community law. Mr Hachez speaks English, French, Dutch, and Spanish.

Mr Jarrod Hepburn (University of Oxford/CISDL)

Jarrod Hepburn, LLB, BE (University of Melbourne) BCL (University of Oxford) is a Legal Research Fellow with the Centre for International Sustainable Development Law (CISDL) in the Trade, Investment and Financial Law Programme. Mr Hepburn's research interests lie in the relations between trade and development, balancing wealth creation through trade and traditional ways of life, and

sustainable development law's role in poverty eradication. He is currently a candidate for the MPhil at Oxford University, where he is examining issues of discrimination in international economic relations. He has been admitted to practice in Australian federal and state jurisdictions, and has experience in the Competition Group of the Australian corporate law firm Mallesons Stephen Jaques. He speaks English, French, and basic German.

Mr Marek Jeżewski (University of the Cardinal Stefan Wyszyński)

Marek Jeżewski is a Lecturer at the Faculty of Law of the University of the Cardinal Stefan Wyszyński in Warsaw, where he teaches international public law and international investment law. He acts as an expert on behalf of the Ministry of Foreign Affairs of the Republic of Poland in the Interdepartmental Committee on the Bilateral Investment Treaties, where he works on the model Polish Bilateral Investment Treaty (BIT). He has participated in the Organisation for Economic Co-operation and Development (OECD) Investment Committee and the Working Group of the Investment Committee as a member of the Polish delegation. He conducted his research in the field of international responsibility in (World Trade Organization (WTO) law in the Lauterpacht Centre for International Law (University of Cambridge, 2004), in the Max Planck Institute for Comparative Public Law and International Law (Heidelberg, 2005), as well as at the University of Geneva (2005).

Ms Anna Joubin-Bret (UNCTAD)

Anna Joubin-Bret is Senior Legal Adviser with the Division on Investment and Enterprise of the United Nations Conference on Trade and Development (UNCTAD) in Geneva. She is an expert on national and international investment legal frameworks. She is providing expertise to developing countries through the delivery of technical assistance and capacity-building activities (training courses and advisory services) and participation in national, regional, and international conferences and seminars. She also contributes to and oversees the publications of the Division, in particular, the *Issues in International Investment Agreements Series*, the *International Investment Policies for Development Series*, the *Seminal Studies on International Investment Rule-Making*, and the *Investment Policy Reviews*. Ms Joubin-Bret holds a post-graduate degree in Private International Law from the University of Paris I, Panthéon-Sorbonne. She graduated in International Economic Law and in Political Science. She has been Legal Counsel in the Legal Department of the Schneider Group; General Counsel of the KIS Group, Director-Export of Pomagalski S.A., and a judge at the Commercial Court in Grenoble, France.

Mr Jörg Kammerhofer (Erlangen/Hans-Kelsen-Forschungsstelle)

Jörg Kammerhofer, Mag. jur., Dr jur., Vienna; LLM, University of Cambridge, is currently a Research Fellow at the Hans Kelsen Research Group at the University of Erlangen-Nuremberg, Germany, which is publishing a collected works edition of all of Hans Kelsen's writings. Dr Kammerhofer has written, inter alia, on

List of Contributors

customary international law, the law of the use of force under the Charter, the procedure of the International Court of Justice, and Kelsen's conception of international law. His forthcoming book deals with the intersection between theory and practice: *Uncertainty in International Law. A Kelsenian perspective*. He has given speeches on the problem of the conflicts of norms in connection with the fragmentation of international law and on the mythological use of the term 'constitutionalization' in international legal scholarship. His main academic interests are the general, theoretical, and procedural aspects of public international law, international investment law, and the theory and philosophy of law, in particular Kelsen's Pure Theory of Law. Since 2006, he has been a member of the Coordinating Committee of the European Society of International Law (ESIL) Interest Group on International Legal Theory. He is currently working on his second book, focusing on the concept of expropriation in international investment law.

Mr Avidan Kent (University of Cambridge)

Avidan Kent, LLB (Haifa University), LLM (McGill University), PhD candidate (Cambridge University), is currently working with the Centre of International Sustainable Development Law (CISDL) as its Publication Officer. Before joining the CISDL, he worked for an Israeli non-profit organization, leading educational projects in the field of environment, nature, and law. He has articulated as a law clerk for the Israeli law firm M. Seligman & Co, and he is a member of the Israeli Bar. Mr Kent's research interests include international trade and investment law and its intersection with other legal disciplines, such as competition law and sustainable development law.

Mr Kishan Khoday (UNDP)

Kishan Khoday, JD (Vermont Law School), MSc (Antioch New England Graduate School), BSc (McGill University), is a senior diplomat with the United Nations Development Programme (UNDP) since 1997, as Sustainable Development Advisor and Deputy Coordinator for Environment UNDP Indonesia (1997–2005); Assistant Resident Representative and Team Leader for Energy and Environment, UNDP China (2005–2009), and currently, as Deputy Resident Representative UNDP Saudi Arabia. Since 2005 Kishan has also served as a Research Fellow at the Centre for International Sustainable Development Law (CISDL) in Canada, where he supports research into sustainability of international trade and investment regimes. He has published widely on various aspects of sustainable development, including issues of climate change, energy security, governance reform, conflict prevention, human rights, world trade, and foreign investment.

Dr Roland Kläger (University of Tübingen)

Roland Kläger, First Legal State Exam, (Albert-Ludwigs-University of Freiburg), Dr iur. (Eberhard Karls University of Tübingen) is currently a Law Clerk at the Higher Regional Court of Frankfurt. He was previously a Research Fellow at the Institute for Public Law (Section 1: European and Public International Law) of the University of Freiburg, Faculty of Law and a Visiting Fellow at the Lauterpacht Center for International Law of the University of Cambridge. Additionally, he has

interned at the German Mission to the United Nations in Geneva and at the Department of the German Federal Ministry of Economics competent for the negotiation of investment agreements. His main areas of legal research include European public and economic law, international economic law, comparative law, and international legal theory. Mr Kläger speaks fluent German, English, and Spanish and has working knowledge of French.

Prof. Paul Stanton Kibel (Golden Gate University)

Paul Stanton Kibel, LL.M. (University of California at Berkeley, Boalt Hall School of Law), JD (Willamette University College of Law), BA (Colgate University), is Associate Professor and Co-Director of the Center on Urban Environmental Law (CUEL) at Golden Gate University (GGU) School of Law, where he also serves as Faculty Editor for the GGU *Environmental Law Journal*. His teaching at GGU includes Water Law, Trade and the Environment, Environmental Law and Policy, and California Environmental and Natural Resources Law. Mr Kibel has also taught water policy in the West at Berkeley's Goldman Graduate School of Public Policy. Prior to his position with GGU, he was a partner with the Environmental and Water Practice Group at Fitzgerald Abbott & Beardsley LLP, and he worked as Legal Counsel for the California State Coastal Conservancy (a public agency) and with the environmental nonprofit organizations Pacific Environment and Sierra Club Legal Defense Fund (now Earthjustice). Kibel's publications include the books *The Earth on Trial: Environmental Law on the International Stage* (Routledge, 1999) and *Rivertown: Rethinking Urban Rivers* (MIT Press, 2007).

Ms Vuyelwa Kuuya (University of Cambridge)

Vuyelwa Kuuya, LL.B. (University of Cape Town), LL.M. (University College London), is a Research Fellow of the Lauterpacht Centre for International Law at Cambridge University and a Research Associate of one of Africa's leading investment advisory firms. She is the lead-researcher on a Cambridge University research project investigating the concept of corporate complicity in human rights violations related to their investment in resource-rich, weakly governed, and politically unstable environments in the developing world. Ms Kuuya is also a Legal Research Fellow of the Centre for International Sustainable Development Law. She is a South African citizen who grew up in Zimbabwe, and her research interests include the legal and moral obligations of corporations vis-à-vis human rights and the environment.

Prof. Céline Lévesque (University of Ottawa)

Céline Lévesque, LL.M. (University of Ottawa), LL.B. (Dalhousie University), LL.M. (College of Europe), MA (George Washington University), is Associate Professor in the Faculty of Law, Civil Law Section, at the University of Ottawa. Her main research area is international investment law. She has published a number of articles in this area and is the author of the *chronique* on investment for the *Canadian Yearbook of International Law* (1999–2003, 2006–). In 2008 and 2009, she was Scholar-in-Residence at the Trade Law Bureau of the Canadian

List of Contributors

Department of Foreign Affairs and International Trade, where she was involved in North America Free Trade Agreement (NAFTA) Chapter 11 litigation and bilateral investment treaty negotiations. Before joining the Faculty of Law, she worked at the World Bank (1995–1998).

Ms Mahnaz Malik (IISD)

Mahnaz Malik is an Associate and International Law Advisor, International Institute for Sustainable Development (IISD). She has been actively involved at the IISD in building the capacity of over ten developing States and four regional groupings of African and Caribbean States on international investment agreements (IIAs), including bilateral and regional negotiations, model treaties, and foreign investment policies. She previously worked in the dispute resolution department of international law firm Simmons & Simmons in London, where she advised on international arbitrations conducted under the auspices of the International Center for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), as well as on an ad hoc basis. Ms Malik has been admitted as an Attorney at Law (New York), a Solicitor (England and Wales) and an Advocate (Pakistan). She received the prestigious Financial Times Legal Innovator of the Year Award in 2007. Ms Malik holds a BA(HONS) and MA degree in law from Cambridge University (UK). She is a member of the ICC Commission on Arbitration and Anti-Corruption. Ms Malik regularly speaks and publishes on international investment and sustainable development issues. More information on IISD's work on investment for sustainable development can be obtained from <www.iisd.org/investment>.

Prof. Graham Mayeda (University of Ottawa)

Graham Mayeda, MA (University of Toronto), PhD (Philosophy, University of Toronto), JD (University of Toronto) is an Associate Professor at the Faculty of Law, Common Law Section, of the University of Ottawa, Canada. His research focuses on the effects of international trade and investment agreements on developing countries. He also writes in the area of legal philosophy, with two main areas of concentration: (1) theories of judgment and the application of Japanese and contemporary European phenomenology to understanding judgment, and (2) cosmopolitan theories of global justice and their implications for the structure and application of international law. He is also interested in the impact of cultural, socio-economic, racial, and gender differences in criminal law and the law of evidence, and he has written on transgender identity and the law.

Prof. Kate Miles (University of Sydney)

Kate Miles is a Lecturer in International Law at the Faculty of Law, University of Sydney. She has published work on international investment law, sustainable finance, and the regulation of corporate conduct under international law. She is a Legal Research Fellow of the Centre for International Sustainable Development Law, Montreal, Canada, and, in 2009, she was appointed to the International Law Association's New Study Group on the Role of Soft Law Instruments in

International Investment Law. She is a member of the Society of International Economic Law, the International Law Association, Australian Branch, and the Australia and New Zealand Society for International Law. She is also the Assistant Editor of the *Asia Pacific Journal of Environmental Law*. Ms Miles has an LL.M. in Environmental Law (HONS I) from the University of Auckland and an LL.M. in International Legal Studies from the New York University School of Law. She was the recipient of the Geoffrey Powell Prize and the Gary Davies Medal as an undergraduate at the University of Auckland. She has taught at King's College, University of London, and studied at University College London. She was awarded an Australian Postgraduate Award to pursue her doctorate at the University of Sydney on the interrelationship between international investment law and principles of environmental protection. She has also practised in leading commercial law firms in Auckland and Sydney, including Allens Arthur Robinson (Sydney).

Mr Martins Paparinskis (University of Oxford/New York University)

Martins Paparinskis, LL.B. (University of Latvia), M.Jur.(DIST) (Clifford Chance Prize) (University of Oxford), M.Phil.(DIST) (University of Oxford), is a D.Phil. candidate at Queen's College, University of Oxford, and a Hauser Research Scholar at New York University. He is also a Junior Research Fellow at Merton College of the University of Oxford. He has been a Graduate Teaching Assistant in Public International Law and International Economic Law at the University of Oxford. His research concentrates on investment protection law, particularly in the broader context of sources of law, treaty interpretation, State responsibility, and international dispute settlement. As a Hauser Scholar, Mr Paparinskis addresses the operation of systemic integration of treaty and custom in investment treaty law. He has published and spoken in conferences about investment protection law, most recently about the role of countermeasures in investment protection law and the normative implications of the reliance on *pari materia* case law. Mr Paparinskis speaks fluent Latvian, English, and Russian, and he has a working knowledge of French.

Dr Marie-Estelle Rey (OECD)

Marie-Estelle Rey is a Policy Analyst and Project Coordinator in the Organization for Economic Co-operation and Development (OECD) in Paris. She works for the Investment Programme of the MENA (Middle East and North Africa) region. She coordinates research and policy dialogue related to investment policies and promotion in the region. Previously, she was a Legal Expert in the Division on Investment and Enterprise Development in the United Nations Conference on Trade and Development (UNCTAD) in Geneva. She was coordinating technical assistance and training activities of the work programme on international investment agreements. She also contributed to the research and analysis work and the intergovernmental activities of the programme. Before that, she was Project Officer in the UNCTAD programme on small and medium-sized enterprises (Empretec). She holds a PhD in Public Law from the *Université René Descartes Paris V* in France. She graduated in international relations and development law.

List of Contributors

Ms Åsa Romson (Stockholm University)

Åsa Romson, LL.M. (Stockholm University), is a doctoral student in Environmental Law at Stockholm University. She writes about international investment agreements (IIAs) and their impact on the function and development of environmental law. Her research also focuses on developing States' capacities to develop environmental law while complying with IIAs and has included field work in Central America. She is affiliated with the Stockholm Resilience Centre and teaches several undergraduate courses at the Centre and the University. She previously worked with international policy issues at the Swedish NGO Centre for Development Cooperation, Forum Syd, and participated as NGO Representative in various United Nations and World Bank forums. Ms Romson speaks fluent Swedish, English, and Spanish and has a working knowledge of French.

Mr Olivier Rukundo (CISDL/McGill University)

Olivier Rukundo, BA (University of North Iowa), Grad. Economics (Concordia University), is an Associate Fellow with the Centre for International Sustainable Development Law (CISDL). He has worked with the CISDL for the past three years as a legal scholar and researcher with the Biodiversity programme. With the CISDL's research on legal aspects of access and benefit sharing (ABS) of genetic resources, he hosted the CISDL Junior Legal Researchers' Workshop on New Research Priorities for the International Regime on Access and Benefit Sharing, and has conducted legal research as part of the CISDL international partnership on ABS issues with Peru, Kenya, Costa Rica, and India, supported by the International Development Research Centre. With the CISDL's research on legal aspects of Biosafety, he has served as an author and researcher in the design and development of a new manual, *Biosafety for Decision-Makers*, which was presented at the United Nations Secretariat of the Convention on Biological Diversity (CBD), first meeting of the Parties to the Cartagena Protocol on Biosafety; in the preparation of a new book, *When Biosafety Becomes Binding: Legal Aspects of Implementation of the Cartagena Protocol*, for Cambridge University Press; and in a scoping study of the implementation of the Cartagena Protocol in developing countries for Environment Canada. Mr Olivier is fluent in English and French, and he is a candidate for the BCL and LLB degrees in Civil and Common Law at the McGill University Faculty of Law. His previous work experience is with the CBD, where he focused on compliance issues in the Cartagena Protocol on Biosafety and in the international regime on access and benefit sharing under the CBD. His broader legal research interests include international trade law, international environmental law, and intellectual property law.

Ms Emma Saunders-Hastings (Harvard University)

Emma Saunders-Hastings, MPhil (University of Cambridge), BA (Queens University, Canada) is a PhD Candidate in the Department of Government at Harvard University. She holds an MPhil in International Relations from the University of Cambridge, where her dissertation research focused on Tanzania's experience of

aid conditionality, water utilities privatization, and investor–state arbitration. At Harvard, Ms Saunders-Hastings is concentrating in political theory. Her research focuses on international philanthropy and private governance in the global economy.

Mr Jon Schutz

Jon Schutz, JD (University of California, Davis), BA (Brigham Young University), is a water and environmental law attorney in Salt Lake City, Utah. Prior to relocating to Utah, he practiced water and environmental law for six years in Sacramento, California. He specializes in water, natural resources, environmental, and administrative law, including water rights, water quality, recycled water use and permitting, wetlands, endangered species, the California Environmental Quality Act (CEQA), and the National Environmental Policy Act (NEPA). He has extensive transactional and litigation experience in each of these areas. He has published articles on Section 404 of the US Clean Water Act and on water-rights issues under the North American Free Trade Agreement (NAFTA). He has given presentations on recycled-water permitting in California, expropriations under NAFTA, and California water law. He is a member of the State Bar of California.

Prof. Audley Sheppard (Clifford Chance)

Audley Sheppard, LLB (HONS), BCA (Victoria University of New Zealand), LLM (University of Cambridge) is a Partner and Global Head of the International Arbitration Group at Clifford Chance LLP in London. He is a Visiting Professor at the School of International Arbitration, Queen Mary, University of London. He is a member of the International Court of Arbitration (ICC). He has been Co-chair of the International Bar Association (IBA) Arbitration Committee (2006–2007) and Rapporteur of the International Law Association (ILA) Arbitration Committee (1996–2006). He is on the Editorial Board of the *International Arbitration Law Review*, the *Journal of International Arbitration*, and *Business Law International*. He is a Fellow of the Chartered Institute of Arbitrators. Mr Sheppard has over twenty years experience in the resolution of disputes arising out of complex infrastructure projects and other international contracts. He specializes in investment protection disputes, acting for both corporate clients and States. He also sits as an arbitrator.

Ms Edna Sussman (Sussman ADR)

Edna Sussman is a full-time arbitrator and mediator, the principal of Sussman ADR LLC, and the Distinguished ADR Practitioner in Residence at the Fordham University School of Law. She was formerly counsel at Hoguet Newman Regal & Kenney LLP and a partner at the law firm White & Case LLP. Ms Sussman serves frequently as an arbitrator and mediator on commercial, energy, and environmental matters, both domestic and international, for several of the leading dispute resolution institutions, including the International Centre for Dispute Resolution (ICDR), the American Arbitration Association (AAA), the Conflict Prevention and Resolution (CPR), the Chinese European Arbitration Centre (CEAC), the

List of Contributors

World Intellectual Property Organization (WIPO), and the Financial Industry Regulatory Authority Arbitration and Mediation panels (FINRA). As a court-certified mediator, Ms Sussman serves on the mediation panels of the federal, state, and bankruptcy courts in New York. She is certified as a mediator by the International Mediation Institute. Ms Sussman is Chair-Elect of the Dispute Resolution Section of the New York State Bar Association and the Chair of the Arbitration Committee of the Dispute Resolution Section of the American Bar Association. Ms Sussman has been selected as a Best Lawyer for Alternative Dispute Resolution for 2009 and named as an Outstanding Woman in Energy Law by *Energy Law 360*. Ms Sussman has lectured and published widely on mediation, arbitration, energy, and environmental issues. Her work can be found at <www.sussmanadr.com>.

Mr Daniel Taillant (CEDHA)

Jorge Daniel Taillant, MA (Latin American Studies and Economics, Georgetown University, BA, University of California, Berkeley), has focused his career on human rights and environmental protection, development finance, and corporate accountability. He has worked for numerous intergovernmental organizations, and he founded the Centre for Human Rights and Environment (CEDHA) in Argentina in 1999 with his lifetime partner and Sophie Prize winner of 2007, Romina Piccolotti. Mr Taillant led CEDHA to become one of the most prominent international non-profit groups geared toward improving access to justice and more effective public policy and legal frameworks for victims of environmental degradation. CEDHA obtained the Sierra Club's most distinguished international advocacy award in 2007 (the Earth Care Award) for Mr Taillant's work promoting sustainable development in the corporate sphere. He served as Chief Advisor to the Environment Secretary of Argentina from 2006 to 2008 and has more recently founded *Soluciones Sustentables*, a private advisory institution for States, corporations, and third-party actors. He has published widely and lectures regularly at diverse academic institutions. He has two children and spends his free time sailing at his lakeside home in Córdoba, Argentina.

Dr Jörg Weber (UNCTAD)

Jörg Weber is currently Chief of the International Arrangements Section in UNCTAD, responsible for implementing the work of the organization on international investment agreements. He has been with this programme since its inception in 1998. Previously, Dr Weber was a team member of the prestigious annual United Nations publication, the *World Investment Report*, since it was first published in 1991. Dr Weber joined the United Nations in 1990, working on foreign direct investment and transnational corporations issues. Since 1998, he has focused on matters related to international investment agreements. Dr Weber received his PhD from the Free University of Berlin.

Prof. Jan Wouters (University of Leuven)

Jan Wouters is Professor of International Law and International Organizations, Jean Monnet Chair *Ad Personam* on *The European Union and Global*

Governance, and Director of the Leuven Centre for Global Governance Studies and Institute for International Law of the University of Leuven. He is also Visiting Professor at the College of Europe, President of the Flemish Foreign Affairs Council, and practises law as Counsel at Linklaters in Brussels. He studied law and philosophy in Antwerp and Yale University (LLM, 1990), worked as a Visiting Researcher at Harvard University Law School, and defended his PhD at *Katholieke Universiteit Leuven* in 1996. He has held teaching positions at the Universities of Antwerp and Maastricht, was a Visiting Professor at Liège University and Kyushu University, and worked as *référéndaire* at the European Court of Justice (1991–1994). Prof. Wouters is the Editor of the *International Encyclopedia of Intergovernmental Organizations* and is Vice-Director of the *Revue belge de droit international*. He has published widely on international, European, company, and financial law (more than 360 publications, including thirty books and approximately seventy international journal articles), including a recent comprehensive handbook on public international law, a book on the WTO (*The World Trade Organization: A Legal and Institutional Analysis* (Intersentia, 2007, with B. De Meester), as well as a number of edited books, including *Conflict Prevention: Policy and Legal Aspects* (T.M.C. Asser Press, 2004), *Legal Instruments in the Fight Against International Terrorism* (Martinus Nijhoff, 2004), *The United Nations and the European Union: An Ever Stronger Partnership* (T.M.C. Asser Press, 2006), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes* (Martinus Nijhoff, 2008), and *The Europeanisation of International Law The Status of International Law in the EU and Member States* (T.M.C. Asser Press, 2008). He often provides training to international and national officials, has advised a great number of international organizations, and is frequently asked to comment in the media on international events.

Centre for International Sustainable Development Law Legal Researchers

Mr Gareth Price (WeirFoulds LLP)

Gareth Price, LLB (HONS) (University of East Anglia and University of Leuven), LLM (McGill University), is a barrister, called to the Bar of England and Wales by the Middle Temple. A Middle Temple, Harold G. Fox Scholar, Mr Price is with the Toronto law firm WeirFoulds LLP until 2010, when he returns to the UK to practise in the field of employment law. Mr Price is an Associate Fellow of the Centre for International Sustainable Development Law and an Assistant Editor of the McGill *Annals of Air and Space Law*. His academic interests remain public law, government regulation, and sustainable development of international investments.

Ms Alexandra Harrington (McGill University)

Alexandra Harrington, DCL candidate (McGill University), JD (Albany Law School of Union University), BA (New York University), was admitted to the New York State Bar in 2006. During her studies at Albany Law School, she served

List of Contributors

as Editor-in-Chief of the *Albany Law Journal of Science and Technology*. In 2007 she graduated summa cum laude from Albany Law School with a LL.M. in International Law. She is currently a DCL student at McGill University's Faculty of Law and is affiliated with the International and Comparative Law Institute. Ms JHarrington serves as the Senior Manager of and an Associate Fellow at the Centre for International Sustainable Development Law. She has published over twenty law journal articles and book chapters on a variety of legal topics.

Ms Adela Maciejewski Scheer (McGill University)

Adela Maciejewski Scheer, BCL/LLB candidate (McGill University), BSc (HONS) (McGill University), MSc (University of Oxford), Member of the Centre for International Sustainable Development Law (CISDL) Legal Research Group, has a broad background in environmental science and policy. After earning her BA in environmental science, Ms Maciejewski Scheer completed her MSc in Environmental Change and Management. Her Master's dissertation explored the role of public participation in climate change policy in the United Kingdom through an examination of the public consultation to the Climate Change Act of 2008. Most recently, she worked as a Research Assistant to lawyers at ClientEarth, a pan-European public-interest environmental law organization. Ms Maciejewski Scheer is engaged in the CISDL's climate change related work.

Mr Geraint Edwards (College of Europe)

Geraint Edwards, LLB (HONS) (University of East Anglia), *Maitrise* (Tours), LL.M. (College of Europe), is a member of the Centre for International Sustainable Development Law Research Group. Mr Edwards is currently a policy analyst working for a public affairs consultancy in Brussels, specializing in environmental and food safety regulation. Previously he was *Maitre de Langues* at the Law Faculty of the University of Angers in France, teaching English and European law. His interests in sustainable development law follow from past post-graduate work on regional governance and international public law. He is fluent in French and has a working knowledge of German, Dutch, and Spanish.

Mr Lefteris Coroyannakis (College of Europe)

Lefteris Coroyannakis, LLB (King's College London), MA (College of Europe), is a member of the Centre for International Sustainable Development Law Research Group. During his undergraduate studies, Mr Coroyannakis was awarded a scholarship to attend a summer school at *Università di Bologna* on 'The Protection of Fundamental Rights in Europe'. He was also able to gain experience in the field of journalism and in private practice, interning for the Associated Press in Athens and Jones Day LLP in Brussels. During his graduate studies, Mr Lefteris specialized in European interest representation. He has since completed a traineeship at the Directorate General for Trade of the European Commission, working on bilateral trade relations with the Americas, and is currently working for Mayer Brown International LLP in Brussels. He is fluent in English, French, Greek, Spanish, and Italian.

Mr Matthew Nied (University of Victoria)

Matthew Nied, LLB candidate (University of Victoria), BComm (University of Alberta). Mr Nied completed his commerce degree with a specialization in international economics. After completing law school, he will clerk for the British Columbia Supreme Court and article at a national law firm in Vancouver. Prior to attending law school, he was involved in the development of an international social entrepreneurship organization. He is interested in the connection between sustainable development and international legal frameworks that promote corporate social responsibility. He enjoys hiking and travel.

Ms Anna Johnston (University of Victoria)

Anna Johnston, BA, LLB cand. (University of Victoria), is a member of the Centre for International Sustainable Development Law Research Group and an Executive Member of the University of Victoria Environmental Law Club. Her previous international and environmental law experience includes Facilitator for the Victoria International Development Education Association, Coordinator of Pro Bono Students Canada, University of Victoria Chapter, and Legal Researcher at Ecojustice Canada. Her work has included spearheading student-run pro bono projects for community groups and organizing speaker events on international law, including a speech by former Supreme Court Justice and United Nations High Commissioner for Human Rights Louise Arbour. Her previous publications include research papers with the Polis Project on Ecological Governance. In May 2010, Ms Johnston will begin an internship at the Institute for Law and Environmental Governance in Nairobi, Kenya.

Ms Ashley Elliott (University of Victoria)

Ashley Elliott, BA (University of British Columbia), LLB cand. (University of Victoria), has served in the Centre for International Sustainable Development Law Legal Research Group to assist with this book, under the direction of Professor Andrew Newcombe of the University of Victoria. She developed an interest in sustainable development as a result of her involvement with Youth Challenge International, where she participated in various projects in Yurong Paru, Guyana. Currently, Ms Elliott is taking a year off the study of law to explore the world of contemporary dance. She is looking forward to the day when she can combine her knowledge of the law, her interest in sustainable development, and her love of dance.

Mr Robert Sutherland (University of Ottawa)

Robert Sutherland, BComm (McGill University), LLL (University of Ottawa), LLB cand. (University of Ottawa), is a member of the Centre for International Sustainable Development Law (CISDL) Research Group, having worked for Prof. Markus Gehring at several steps of the editing process for this book. He has also researched the notion of lesion/unconscionability in international commercial transactions before his affiliation with CISDL. This interest in international law

List of Contributors

stems from his undergraduate studies, during which he also developed a keen desire to see businesses become accountable not only for their financial bottom line, but also, to take greater account of their social and environmental ‘bottom lines’. He is currently finishing his law studies while volunteering and playing for his school’s water polo team in his downtime.

Ms Erin Callery (University of Ottawa)

Erin Callery, LLB (University of Ottawa), is currently finishing her LLL at the University of Ottawa. Ms Callery completed her BA/BS(Hon) with a minor in Biology at McMaster University, where her thesis work focused on the ethical implications of biopatenting. Her past work experience has ranged from program coordination with a grassroots environmental organization and employment with in-house counsel at a not-for profit agency, to legal research for the federal government and a private, full-service law firm. The focus of her studies and interest has been on environmental and natural resources law. Her other interests include yoga, movies, and watching her hometown Toronto Maple Leafs Hockey Team.

Mr Simon Grant (University of Ottawa)

Simon Grant, LLL cand. (University of Ottawa), is member of the Centre for International Sustainable Development Law Legal Research Group for this project, as well as a former student at the University of Ottawa School of Business and 2007 recipient of the Wesly Nicol Business Plan Award. He has a special interest in international business and investment law. He previously worked as a Financial Officer for Health Canada, is fluent in French and English, and enjoys sports, dancing, and music.

Mr Qumers Wejdan (University of Ottawa)

Qumers Wejdan, LLB, LLL cand., is a graduate of the Common Law programme at the University of Ottawa, Canada. Mr Wejdan completed his summer and articling term with a national law firm in Ottawa, where he worked on a variety of litigation and international trade cases. He worked closely with key partners of the International Trade section of the law firm on two major antidumping and countervailing duty case (AD/CVD) investigations by the Canada Border Services Agency and on various legal opinions dealing with the investment provisions of the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO). After completing his articling term, he was called to the Bar of Ontario in 2009. He is currently enrolled in the National Program at the University of Ottawa to complete a Civil Law degree. His interest in the current research project stems from his passion for international trade and WTO law.

Ms Ania Zbyszewska (University of Victoria)

Ania Zbyszewska, LLB (University of Windsor), BA (Hons) (University of Toronto), PhD cand. (University of Victoria), is a student member of the Inter-University Research Centre on Globalization and Work. Prior to returning to graduate studies, Ms Zbyszewska practised labour and employment law at a

union-side boutique firm in Toronto and clerked at the Superior Court of Justice. Her current research and prospective dissertation focuses on the European Union's regulatory measures in the area of working time, primarily the Directive on Working Time. Specifically, she is investigating the extent to which the Directive represents a particular understanding of gender equality and its impact on working-time regimes in Poland.

Ms Claire Farmer (University of Victoria)

Claire Farmer, BA (Hons), LLB cand. (University of Victoria), is a member of the Centre for International Sustainable Development Law Research Group. Ms Farmer received her undergraduate degree from the University of Toronto with a major in International Relations. Prior to attending law school, she worked in South Africa in the human rights field. While at the University of Victoria, Faculty of Law, she has served on the executive committees of several student clubs, including the International and Human Rights Law Association and the Anti-Discrimination Committee. She was also the Co-chair of the 2009 University of Victoria Law Community Conference.

Ms Mariella Montplaisir (University of Ottawa)

Mariella Montplaisir, LL.L. (Cum laude), is a J.D. Cand. at the University of Ottawa. Prior to her collaboration with the Centre for International Sustainable Development Law (CISDL), she clerked at the Superior Court of Justice in Montreal and was a research assistant in contract law, private international law and international trade law at the University of Ottawa's Faculty of Law. She was part of the team who represented the University at the Grand final of the 2010 WTO-Elsa International Moot Competition in Santo Domingo, Dominican Republic.

Mr Cody Olson (University of Victoria)

Cody Olson, JD Candidate (University of Victoria), BComm (University of Calgary). Mr Olson completed his Bachelor of Commerce degree with a major in Accounting and a minor in Russian. Prior to attending law school he worked as an auditor with a Big Four accountancy firm. He is currently serving on the 2010-2011 Editorial Board of the University of Victoria's law journal, Appeal. Mr Olson has lived in, and travelled extensively throughout, the former Soviet Union, and speaks fluent Russian.

Chapter 1

An Introduction to Sustainable Development in World Investment Law

*Markus Gehring & Andrew Newcombe**

1. SUSTAINABLE DEVELOPMENT AS A GLOBAL OBJECTIVE

Sustainable development is a widely accepted objective of the global community. Ideas underlying sustainable development have governed the practices of many cultures for thousands of years.¹ As expressed in the 1987 Brundtland Report, it can be defined as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.² Significantly, from inception, the concept did not focus on limiting economic activity but rather on re-directing development in order to ensure the potential for long-term,

* The authors wish to thank Simon Grant from the University of Ottawa for his excellent research assistance.

1. See Separate Opinion by H.E. Judge C.G. Weeramantry, *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. 7, 140.
2. Gro H. Brundtland et al., *Our Common Future: The Report of the World Commission on Environment and Development* (Oxford: Oxford University Press, 1987) [*Brundtland Report*], at ix.

sustained yields.³ In this way, sustainable development is closely related to, and could be viewed as a core objective of, national and international investment law and policy.

Agenda 21, the world's plan of action from the United Nations Conference on Environment and Development, highlighted some of the sustainable development challenges with regard to investment:

Investment is critical to the ability of developing countries to achieve needed economic growth to improve the welfare of their populations and to meet their basic needs in a sustainable manner, all without deteriorating or depleting the resource base that underpins development. Sustainable development requires increased investment, for which domestic and external financial resources are needed. Foreign private investment and the return of flight capital, which depend on a healthy investment climate, are an important source of financial resources.⁴

Ten years later, the 2002 World Summit on Sustainable Development in Johannesburg emphasized the need for more environmentally sound and equitable development. The summit's Johannesburg Plan of Implementation (JPOI) identified 'an enabling environment for investment'⁵ as one of the foundations for sustainable development. The JPOI is replete with references to the need to increase and promote investment.⁶

The G8 Heads of State, in their declaration Responsible Leadership for a Sustainable Future⁷ in 2009 highlighted the role investment plays in ensuring sustainable growth:

-
3. Markus W. Gehring & Marie-Claire Cordonier Segger (eds), *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International, 2005) [*Sustainable Development in World Trade Law*].
 4. Agenda 21: Programme of Action for Sustainable Development, Report of the UNCED, vol. U.N. GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/6/Rev.1 (1992), 31 I.L.M. 874, at para. 2.23.
 5. UN World Summit for Sustainable Development: Plan of Implementation, *World Summit for Sustainable Development*, vol. UN Doc. A/CONF.199/L.1 (Johannesburg, South Africa 2002). Plan of Implementation of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002), para. 4 [Johannesburg Plan of Implementation], available online: <www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm>.
 6. Johannesburg Plan of Implementation, *ibid.*, paras 16, 19, 21, 40, 42, 43, 62, 66–67, 69, 83–84, 106 and 141. Para. 84 addresses foreign direct investment and highlights the need to 'facilitate greater flows of foreign direct investment so as to support sustainable development activities, including the development of infrastructure, of developing countries, and enhance the benefits that developing countries can draw from foreign direct investment, with particular actions to: (a) Create the necessary domestic and international conditions to facilitate significant increases in the flow of foreign direct investment to developing countries, in particular the least developed countries, which is critical to sustainable development, particularly foreign direct investment flows for infrastructure development and other priority areas in developing countries to supplement the domestic resources mobilized by them'.
 7. 'G8 Declaration', available online: <www.g8italia2009.it/static/G8_Allegato/G8_Declaration_08_07_09_final,0.pdf>.

The current crisis has affected capital flows, including foreign direct investments (FDIs), which represent an important source of financing and a driver of economic growth and integration. We stress the positive role of long term investments. We will work to reverse the recent decline in FDI, by fostering an open, receptive climate for foreign investment, especially in emerging and in developing countries. [...] Conscious of the complementary role played by governments and the private sector in reaching a sustainable growth, we call for enhanced efforts to avoid wider consequences of the financial crisis and to promote responsible business practices.⁸

This recognition was echoed and magnified in the Core Values for Sustainable Economic Activity, agreed upon in Pittsburg in 2009, where the G20 Heads of State noted:

We share the overarching goal to promote a broader prosperity for our people through balanced growth within and across nations; through coherent economic, social, and environmental strategies; and through robust financial systems and effective international collaboration. . . . We have a responsibility to recognize that all economies, rich and poor, are partners in building a sustainable and balanced global economy in which the benefits of economic growth are broadly and equitably shared. We also have a responsibility to achieve the internationally agreed development goals. . . . We have a responsibility to ensure an international economic and financial architecture that reflects changes in the world economy and the new challenges of globalization.⁹

Furthermore, the G20 Heads of State in their 2009 Pittsburg Leaders Statement, commit to a sustainable growth model:

We will work together to ensure that our fiscal, monetary, trade, and structural policies are collectively consistent with more sustainable and balanced trajectories of growth. We will undertake macro prudential and regulatory policies to help prevent credit and asset price cycles from becoming forces of destabilization. As we commit to implement a new, sustainable growth model, we should encourage work on measurement methods so as to better take into account the social and environmental dimensions of economic development.¹⁰

Sustainable development has, in one formulation or another, been enshrined as an explicit objective in more than fifty binding international treaties.¹¹ It is central to

8. *Ibid.*, at paras 49–53.

9. ‘G20 Leaders’ Statement, Pittsburgh Summit September 24–25’, Annex, Core Values for Sustainable Economic Activity, paras 3, 5, available online: <www.g20.org/pub_communiques.aspx>.

10. ‘G20 Leaders’ Statement, Pittsburgh Summit September 24–25’, para. 5, available online: <www.g20.org/pub_communiques.aspx>.

11. Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices & Prospects* (Oxford: Oxford University Press, 2004), at 32–36.

the mandate of many international organizations, and it is the subject of numerous ‘soft law’ declarations and standards.¹² Sustainable development and its principles guide domestic and international law in many areas of economic, social and environmental policy, particularly where these fields intersect. However, in international investment law, sustainable development remains challenging to implement. The challenge is to ensure that new international and domestic rules that are being developed to encourage investment by providing additional protection for investors from capital exporting States also provide sufficient policy flexibility and incentives to encourage sustainability.

2. THE CONCEPT OF SUSTAINABLE DEVELOPMENT AND ITS MEANING IN INTERNATIONAL LAW

While the introduction of the concept of sustainable development can be traced back to eighteenth-century forestry laws in Central Europe,¹³ its ongoing evolution in the field of international law is a much more recent phenomenon to the point that it is now included and, to lesser and greater degrees, implemented in many international agreements. To date, the most frequently cited definition of sustainable development is ‘development which meets the needs of the present without compromising the ability of future generations to meet their own needs’.¹⁴ There is also a general understanding that the development mentioned above must take into account three intersecting factors – economic development and social (human rights) development, as well as environmental protection.¹⁵ The exact delimitation of these factors and their applicability in practice has been at the centre of many discussions over the last few decades across many academic and international institutional fora.

The concept in its current form, primarily its ‘underlying environmental principles’,¹⁶ can be traced back to the Conference on the Human Environment, hosted by the United Nations in 1972 in Stockholm. The 1972 UN Stockholm Declaration on the Human Environment that stemmed from this conference spurred significant efforts at the international level to protect the environment, notably the creation of the United Nations Environment Programme (UNEP) in 1973. While not tackling the issue of sustainable development specifically, there were some minimal references to the concept, most notably in the second paragraph of the Declaration, where governments agreed that: ‘The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world’.¹⁷ As for sustainable development as its own

12. *Ibid.*

13. *Sustainable Development in World Trade Law*, *supra* n. 3, at 5.

14. *Brundtland Report*, *supra* n. 2.

15. Cordonier Segger & Ashfaq Khalfan, *supra* n. 11, at 1.

16. *Ibid.*, at 16.

17. ‘Declaration of the United Nations Conference on the Human Environment’ (Stockholm, 16 Jun. 1972).

socio-political concept, its first express manifestations were in the early 1980s in the report from the International Union for Conservation of Nature, World Conservation Strategy, as well as in the book *Building Sustainable Strategies*.¹⁸

It was not until 1987 that the concept truly took hold with the release of the World Commission of Environment and Development report entitled *Our Common Future*, commonly referred to as the Brundtland Report.¹⁹ It was also manifest in 1992 in the work that arose out of the United Nations Conference on Environment and Development held in Rio de Janeiro. Investment is a key element of both the Rio Declaration and Agenda 21.²⁰

International economic institutions, such as the World Trade Organization (WTO), have come to embrace the concept of sustainable development. In fact, the concept went from being mentioned in the Preamble of the WTO Agreement in 1995 ('while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'²¹) to being highlighted in later declarations. This was made clear in several Ministerial Declarations in the years following the conclusion of the WTO Agreement, including in the 1998 Geneva Ministerial Conference Declaration, where the ministers state that: 'We shall also continue to improve our efforts towards the objectives of sustained economic growth and sustainable development'.²²

Despite many references to the concept of sustainable development and widespread recognition by States of the need to pursue it, there was little, if any, consensus on its precise meaning. The 2002 World Summit on Sustainable Development aimed to 'reinvigorate global commitment to sustainable development'.²³ From this conference came the JPOI, which shifted the focus of sustainable development from 'primarily "environmental protection" to an integrated environmental, social and development agenda, with attention to poverty eradication, sanitation, and health'.²⁴ Once again though, a consensus was not reached on the principles that govern sustainable development.

In 2002, after a decade's worth of research, the International Law Association (ILA) Committee on the Legal Aspects of Sustainable Development drafted the New Delhi Declaration on the Principles of International Law Related to Sustainable Development (ILA Declaration).²⁵ The ILA Declaration identifies seven different principles in the field of sustainable development. There is the duty of

18. Cordonier Segger & Khalfan, *supra* n. 11, at 17.

19. *Brundtland Report*, *supra* n. 2.

20. See Ch. 6 in this volume.

21. Preamble of the WTO Agreement.

22. Geneva Ministerial Declaration, WTO Document WT/MIN(98)/DEC/1, 25 May 1998 at para. 4.

23. Cordonier Segger & Khalfan, *supra* n. 11, at 25.

24. *Ibid.*, at 26–28.

25. International Law Association 2002, *New Delhi Declaration on the Principles of International Law Related to Sustainable Development* (London: ILA, 2002).

States to ensure sustainable use of natural resources, first reflected in Principle 21 of the Stockholm Declaration, as well as in Principle 2 of the Rio Declaration.²⁶ This principle calls upon States to use the natural resources within their jurisdictions in such a way as to not damage the environment or natural resources of other States. The second principle (equity and poverty eradication) refers ‘to both *inter-generational equity* (the rights of future generations to enjoy a fair level of the common patrimony) and *intra-generational equity* (the rights of all the peoples within the current generation of fair access to the current generation’s entitlement to the Earth’s natural resources)’²⁷ and highlights the importance of the eradication of poverty to achieving sustainable development (as did Principle 5 of the Rio Declaration).²⁸ Next there is the principle of common but differentiated responsibilities, which draws on, among other concepts, ‘the polluter pays’ principle. Principle 4 highlights the need to use the precautionary approach to human health, natural resources’ and ecosystems, which was first enshrined by Principle 15 of the Rio Declaration, which states that: ‘Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’.²⁹ In Principle 5, the ILA Declaration emphasizes public participation and access to information and justice as a necessary element of sustainable development in that ‘it is a condition of responsive, transparent and accountable governments’.³⁰ In close correlation to that, in Principle 6, the ILA Declaration expresses that good governance is a key principle to ensure sustainable development, both at the domestic and international levels. In this respect, the JPOI states that:

Good governance within each country and at the international level is essential for sustainable development. At the domestic level, sound environmental, social and economic policies, democratic institutions responsive to the needs of the people, the rule of law, anti-corruption measures, gender equality and an enabling environment for investment are the basis for sustainable development.³¹

Lastly in Principle 7, the ILA Declaration suggests that there is a principle of integration and interrelationship, in particular in relation to human rights and social, economic, and environmental objectives. This last principle permeates many different soft law instruments, including Principle 4 of the Rio Declaration,

26. Cordonier Segger & Khalfan, *supra* n. 11, at 110.

27. *New Delhi Declaration on the Principles of International Law Related to Sustainable Development*, *supra* n. 25.

28. 1992 Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/6/Rev.1, (1992) 31 ILM 874 [Rio Declaration].

29. Rio Declaration, *ibid.*

30. *New Delhi Declaration on the Principles of International Law Related to Sustainable Development*, *supra* n. 25.

31. Johannesburg Plan of Implementation, *supra* n. 5, at para. 4.

which states that ‘In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it’,³² and Chapter 39 of Agenda 21, where States agree to ‘focus on the further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns’.³³

3. INTERNATIONAL INVESTMENT LAW AS AN INSTRUMENT FOR SUSTAINABLE DEVELOPMENT

There is a global consensus that there is a need for sustainable development and that foreign direct investment (FDI) is a key component of any development agenda.³⁴ Indeed, many soft law instruments have stressed the importance of investment with regard to sustainable development. This relationship is reflected in Agenda 21 and is stated very expressly in the final report of the International Conference on Financing for Development (Monterrey Consensus): ‘Private international capital flows, particularly foreign direct investment, along with international financial stability, are vital complements to national and international development efforts. Foreign direct investment contributes toward financing sustained economic growth over the long term’.³⁵

In light of this policy consensus, there needs to be an appropriate international and national regulatory framework to facilitate FDI. According to the Monterrey Consensus, key aspects of this framework are a ‘transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic and international, to operate efficiently and profitably and with maximum development impact’.³⁶

Although there is general consensus on the importance of foreign direct investment for sustainable development, there is still much to be done to ensure that the current regulatory framework for international investment law promotes sustainability. Given the proliferation of international investment agreements (IIAs) across the globe,³⁷ these agreements offer great potential to integrate

32. Rio Declaration, *supra* n. 28.

33. Agenda 21, *supra* n. 4, at para. 39.1, Ch. 39.1.

34. Andrew Newcombe, ‘Sustainable Development and Investment Treaty Law’, *J. World Investment & Trade* 8 (2007): 357 at 357.

35. Paragraph 1, *Monterrey Consensus of the International Conference on Financing for Development, Report of the International Conference on Financing for Development*, 22 Mar. 2002, UN Doc. A/CONF.198/11, Ch. 1, resolution 1, annex (2002), available online: UN <www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf> [*Monterrey Consensus*].

36. *Monterrey Consensus*, *ibid.*, at para. 21.

37. See Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Hague: Kluwer Law International, 2009), Ch. 1, for a description of the development of investment treaty law.

sustainable development principles while at the same time fulfilling their classic role of promoting and protecting international investments. As international investment law has matured, there have been attempts to integrate sustainable development principles into the negotiation, structure, content and implementation of IIAs.³⁸ Thus, there are lessons to be learned from the successful implementation of sustainable development principles into international investment law, but there also remains room for improving the legal framework for foreign investment to ensure that it actively promotes sustainable development.

This volume builds upon previous research on sustainable development in international trade law and policy, published in *Sustainable Development in World Trade Law*.³⁹ The volume's goal is to analyse the state of international investment law through the lens of sustainable development and to clarify how international investment law can contribute to sustainable development. The various chapters in the volume identify, characterize, and analyse existing rules, innovations, and best practices in international investment agreements, including the investment measures used by other sustainable development treaties and instruments. The volume proceeds in four parts.

Part I establishes the foundations. Chapters by leading experts examine links between investment law and development, investment law and the environment, and investment law and human rights. A further chapter explains why traditional rules on norm conflict do not present the most effective way to address the problematic aspects of these relationships. The last chapter in this part proposes a new agenda for a more integrated approach, taking into account principles of sustainable development law.

Part II of the volume addresses the procedural and substantive dimension of sustainable development in international investment law. The first section of Part II covers procedural mechanisms for addressing sustainable development concerns: impact assessments of investment treaties and innovations in the dispute settlement process. The second section of Part II analyses substantive elements of investment treaties: the definition of investment, fair and equitable treatment, national treatment, regulatory expropriation, stabilization clauses, exceptions, and necessity. The third section of Part II focuses on innovations in bilateral and regional investment law, providing an analysis of the North American Free Trade Agreement (NAFTA) and water resources, investment innovations in the European Union – African, Caribbean and Pacific Group of States (ACP) agreements, experiences with investment arbitration in the case of water privatization in Africa, recent developments in investment treaty law in the Asia-Pacific region, and an examination of investment mechanisms found in the Energy Charter Treaty and their potential role in addressing climate change.

Part III is divided into two sections. The first section examines emerging issues and proposals: improvements to IIAs for developing countries, a chapter on the International Institute for Sustainable Development's Model Investment

38. Newcombe, *supra* n. 34.

39. *Sustainable Development in World Trade Law*, *supra* n. 3, at 4.

Agreement, a chapter on one of the core issues identified in the G8 Declaration – corporate social responsibility, and a final chapter of the institutionalization of sustainable development in investment arbitration. The second section of Part III examines how investment can be promoted through sustainable development treaties in general, followed by chapters on climate change, and biodiversity treaties, as well as treaties concerning water use and shared river regimes.

Part IV provides the conclusions, which draw out the themes from this volume and provide a research agenda for the future in this emerging and important area.

With rich contributions from leading investment law practitioners, arbitrators, and academics, the volume offers a constructive, timely, and accessible expert analysis of recent ‘sustainable developments’ within the realm of international investment law, providing an integrated and essential guide to some of the most important debates in international economic law today.

