

## International Investment Law and the Pandemic

# Nijhoff International Investment Law Series

## *Series Editors*

Prof. Eric De Brabandere (*Leiden University*)  
Prof. Tarcisio Gazzini (*University of Padua*)  
Prof. Stephan W. Schill (*University of Amsterdam*)  
Prof. Attila Tanzi (*University of Bologna*)

## *Editorial Board*

Andrea K. Bjorklund (McGill University) – Juan Pablo Bohoslavsky (UNCTAD  
and Universidad Nacional de Rio Negro [Argentina]) – Chester Brown  
(University of Sydney) – Patrick Dumberry (University of Ottawa) – Michael  
Ewing- Chow (National University of Singapore) – Susan D. Franck (American  
University) – Ursula Kriebaum (University of Vienna) – Makane Mbengue  
(University of Geneva) – Catherine A. Rogers (Penn State Law) – Christian  
Tams (University of Glasgow) – Andreas Ziegler (University of Lausanne)

VOLUME 26

The titles published in this series are listed at [brill.com/iils](http://brill.com/iils)

# International Investment Law and the Pandemic

*Edited by*

Antonino Alì, Sondra Faccio, Marco Pertile



BRILL | NIJHOFF

LEIDEN | BOSTON

Cover image: © 2024 Artists Rights Society (ARS), New York / VG Bild-Kunst, Bonn. The Montreal Museum of Fine Arts.

Library of Congress Cataloging-in-Publication Data

Names: Ali, Antonino, editor. | Faccio, Sondra, editor. | Pertile, Marco, editor.

Title: International investment law and the pandemic / edited by Antonino Ali, Sondra Faccio, and Marco Pertile.

Description: Leiden ; Boston : Brill, 2025. | Series: Nijhoff international investment law series | Includes bibliographical references and index. | Summary: "At the dawn of the most serious and challenging global health emergency of contemporary times, the investment regime, with its Investor-State Dispute Settlement (ISDS) mechanism, was already facing its own 'crisis'. In 2019, the number of treaty terminations were exceeding the number of new treaties entering into force, with the Energy Charter Treaty experiencing a veritable exodus. The ISDS was undergoing a reform, which aimed to dismantle the system based on ad hoc arbitration in favour of a multilateral court. States began to enact laws to review FDI in strategic sectors, concerned that foreign investors could undermine national security. Some commentators argued that the investment regime, and ISDS in particular, was 'shrinking', or even 'dead'.

Identifiers: LCCN 2024040266 | ISBN 9789004711198 (hardback) | ISBN 9789004711204 (ebook)

Subjects: LCSH: Investments, Foreign (International law) | Investments, Foreign--Law and legislation. | COVID-19 Pandemic, 2020-

Classification: LCC K3830.I5845 2025 | DDC 346/.092-dc23/eng/20240828  
LC record available at <https://lccn.loc.gov/2024040266>

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: [brill.com/brill-typeface](http://brill.com/brill-typeface).

ISSN 2351-9542

ISBN 978-90-04-71119-8 (hardback)

ISBN 978-90-04-71120-4 (e-book)

DOI 10.1163/9789004711204

Copyright 2025 by Koninklijke Brill BV, Leiden, The Netherlands.

Koninklijke Brill BV incorporates the imprints Brill, Brill Nijhoff, Brill Schönningh, Brill Fink, Brill mentis, Brill Wageningen Academic, Vandenhoeck & Ruprecht, Böhlau and V&R unipress.

All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publisher. Requests for re-use and/or translations must be addressed to Koninklijke Brill BV via [brill.com](http://brill.com) or [copyright.com](http://copyright.com).

This book is printed on acid-free paper and produced in a sustainable manner.

# Contents

Notes on Editors VII

Notes on Contributors VIII

Introduction 1

*Antonino Ali, Sondra Faccio, and Marco Pertile*

- 1 Public Emergencies and Investment Law before the Pandemic: Past Emergencies and Lessons Learned 8  
*Pia Acconci*
- 2 The Impact of the Pandemic on the Reform of Investment Treaty Standards 24  
*Tarcisio Gazzini and Valentina Vadi*
- 3 The Impact of the Pandemic on the ISDS Reform 51  
*Ksenia Polonskaya*
- 4 Foreign Direct Investment and Geoeconomic Risk: Sketching the Contours of an Emerging Concept 68  
*Jens Hillebrand Pohl and Mikael Wigell*
- 5 Controlling Foreign Direct Investment in the Wake of the COVID Pandemic: Enhanced and Supplementary Screening Procedures among EU Member States 87  
*Antonino Ali*
- 6 Preventing Unwanted Acquisitions before and after the COVID Crisis 107  
*Francesco Salerno and Marco Grantaliano*
- 7 Full Protection and Security and the COVID-19 Pandemic 123  
*Sebastián Mantilla Blanco*
- 8 Revisiting the FET Standard and the Right to Regulate in Times of Crisis: The Notion of Stability in an Assessment of Legitimate Expectations 139  
*Yulia Levashova*

- 9 Indirect Expropriation in the Context of the Pandemic: Confronting Investment Treaty Provisions with COVID-Related Regulatory Measures 159  
*Niccolò Zugliani*
- 10 Responses to the COVID-19 Pandemic and Customary Law Defences: Force Majeure and the State of Necessity 175  
*David Collins*
- 11 State Defences under International Investment Agreements 193  
*Silvina González Napolitano*
- 12 Scientific Knowledge and Domestic Regulatory Measures: Perspectives from the COVID Pandemic 214  
*Sondra Faccio*
- 13 Questions of Public Health before Investment Tribunals: Can Amici Curiae Play a Useful Role? 228  
*Avidan Kent and Jamie Trinidad*
- 14 Remarks on Procedural Issues concerning Scientific and Technical Evidence in Investment Arbitration 244  
*Gian Maria Farnelli*
- Selected Bibliography 259
- Index 269

## Notes on Editors

### *Antonino Ali*

is Associate Professor of International Law at the Faculty of Law and at the School of International Studies of the University of Trento (Italy). He previously held positions as an Assistant Professor of International Law at the University of Milan (2002–2005) and the University of Geneva (1999). His most recent research activity focuses on the relationship between national security and both International and European law. As of February 2024, he serves as a member of the ‘Core Group for Assessment and Strategic Analysis on the Exercise of Special Powers’ within the Department for Administrative Coordination at the Presidency of the Council of Ministers of Italy.

### *Sondra Faccio*

is Associate Professor of International Law at the School of International Studies and the School of Law of the University of Trento (Italy). She is an attorney at law, admitted to the Bar of Verona (Italy). She has been a visiting scholar at the University of Cincinnati College of Law (2023), Ernst Mach Scholar at Vienna University-Faculty of Law (2012–2013), and visiting PhD student at Columbia Law School (2010–2011). Her fields of expertise are International investment law and arbitration, conflict of laws.

### *Marco Pertile*

is Professor of International Law at the School of Law and the School of International Studies of the University of Trento (Italy). Since 2018, he has been teaching a course on Human Rights and Natural Resources at PSIA – Sciences Po in Paris. Previously, he was Visiting Professor (2012–2017) and Marie Curie Fellow (2010–2012) at the Graduate Institute of International and Development Studies in Geneva, Lecturer at the Geneva Academy of International Humanitarian Law and Human Rights (2011), Visiting Professional at the International Criminal Court (2006) and Visiting Researcher at the Max Planck Institute in Heidelberg (2003). He’s co-Director of the Journal QIL – Questions of International Law.

## Notes on Contributors

### *Pia Acconci*

is a Professor of International Law at the University of Teramo. She holds a PhD in International Economic Law. She has an extensive teaching and lecturing portfolio, covering topics on investment and health protection at various universities and international conferences. Acconci's extensive publications focus on the intersection of international and EU law. She actively participates in and leads research and study groups, notably as co-coordinator of the SIDI Interest Group on 'International and EU Health Law' since June 2016 and as a member of the ILA Committee on 'Global Health Law' since 2015. In addition, she was the academic coordinator of the Jean Monnet module on EU investment law from September 2018 to February 2023.

### *David Collins*

is a Professor of International Economic Law at City, University of London specializing in law of the WTO and international investment law with a particular focus on digital trade and services. He is Co-Editor in Chief of the journal *International Trade Law & Regulation* and Series Editor for Routledge's *Insights on International Economic Law*. He is admitted as a Solicitor in England & Wales and Called to the Bars of Ontario and New York.

### *Tarcisio Gazzini*

is Professor of International Law at the University of Padova. He has also taught at the Universities of Glasgow and VU Amsterdam. Between 2014 and 2017 he co-directed a research project financed by the Swiss National Science Foundation on *Foreign Investment in Africa: Gaining Development Momentum*. He's the author of *Interpretation of Investment International Treaties* (Hart, 2016) and a founding member of the book series *International Investment Law* (Brill).

### *Marco Grantaliano*

is an associate at the Brussels office of Gianni & Origoni. He graduated from the University of Rome – La Sapienza and the College of Europe (Bruges), with an LLM in European Law and Economic Analysis. He was legal and economic consultant at the Italian Ministry of Economic Development. He joined Gianni & Origoni's Antitrust and Regulatory team in 2021. He specializes in EU and Italian competition law, with a focus on State aid control and foreign direct

investment control, and routinely collaborates with universities in Italy and abroad to assist, teach, and research on EU law and competition law matters.

*Silvina González Napolitano*

is Professor of Public International Law at the University of Buenos Aires and University Torcuato Di Tella. As an expert in the Ministry of Foreign Affairs of Argentina she has participated in the negotiation of several investment treaties. She also acts as arbitrator in investment arbitration. In the past, she worked in the Argentine Treasury Attorney General's Office, first as counsel and then as Director of the National Directorate of International Affairs and Controversies, where she represented Argentina in about 50 investment arbitrations.

*Gian Maria Farnelli*

is Associate Professor of International Law at the Department of Legal Studies, University of Bologna. He has been counsel and research assistant for Italy in inter-state disputes and research assistant to arbitrators in investor-state disputes. He has been a member of the Italian delegation during the Intergovernmental Conference on the negotiation of the Agreement on biological diversity of areas beyond national jurisdiction. His publications, in Italian and English, address issues of law of the sea, environmental law, State immunity, investment law and the law of international adjudication.

*Jens Hillebrand Pohl*

is an Adjunct Professor at Maastricht University and the United Nations University. An experienced attorney, having practiced before U.S. federal and state courts in New York and for EU institutions, Jens holds an LL.M. from Harvard Law School and a MSc in Economics and Business from Stockholm School of Economics, and is pursuing two PhDs in law and political science at Maastricht University and Tampere University, respectively. He is the founding series editor of Springer Studies in Law & Geoeconomics and a former article editor of the Harvard International Law Journal.

*Avidan Kent*

PhD (Cantab) is an Associate Professor in Law, the Law School's Director of Research, and the Founder and Convenor of UEA's International Law Research Group. He has written/edited books, reports, journal articles and chapters on a varied list of topics, including Environmental Law, International Economic Law, International Tribunals, Public Participation and Climate-Induced

Migration. He has written reports/papers for IGOs, governments, think tanks and one museum.

*Yulia Levashova*

is an Associate Professor at Nyenrode Business University in the Netherlands and a director of the dispute prevention program at the Asia Pacific FDI Network. Her specialization is international investment arbitration, commercial arbitration, Corporate Social Responsibility (CSR) and due diligence. Levashova is also an independent practitioner who serves as an arbitrator and provides legal consultancy to the Dutch government and international organizations, e.g., UNECE and UNCTAD.

*Sebastián Mantilla Blanco*

is an Assistant Professor of International Economic Law at The Fletcher School of Law & Diplomacy (Tufts University). Previously, he was a Post-Doctoral Researcher at the University of Bonn in Germany, a Post-Doctoral Global Fellow at New York University (Spring 2023), and an Independent Counsel at Zuleta Abogados (Colombia). He was also a Visiting Professor at the School of Law and Political Sciences of the Universidad de la Sabana in Colombia. He holds a Doctorate in Law (Dr. Iur.) as well as an LL.M. from the University of Bonn, and a law degree from the Pontificia Universidad Javeriana in Bogotá (Colombia).

*Ksenia Polonskaya*

is a faculty member at Carleton University. Her research focuses on international law, legal theory, and international investment arbitration. She is a convener of the Interest Group on Feminism and International Law with the European Society of International Law (ESIL).

*Francesco Salerno*

is a practicing competition lawyer with a PhD from the London School of Economics. Francesco Maria has several years of experience advising clients on foreign direct investment matters before the European Commission and the Courts in Luxembourg. He has published several articles on independent regulatory authorities, competition law and regulation in network industries and he has published with Lexology the chapter on FDI in Italy.

*Jamie Trinidad KC*

is a Fellow and Director of Studies in Law at Wolfson College, Cambridge, and a Fellow of the Lauterpacht Centre for International Law. He is also a practising barrister.

*Valentina Vadi*

is an Adjunct Professor in International Law at the School of Political Sciences of the University of Florence and a Research Fellow at the Department of Political Science, Law, and International Studies of the University of Padua. She was formerly a Professor in International Economic Law at Lancaster University (2015–2021). She is the author of several monographs and more than a hundred articles in peer-reviewed journals in the field of international economic law.

*Mikael Wigell*

is Research Director at the Finnish Institute of International Affairs. He is also Adjunct Professor at Tampere University and Expert Member of the World Economic Forum. He earned his PhD at the London School of Economics and he has been a Visiting Fellow at the Changing Character of War Centre, Oxford University. His latest book is as editor of *Geo-economics and Power Politics in the 21st Century: The Revival of Economic Statecraft* (Routledge, 2018; 2020).

*Niccolò Zugliani*

is a postdoctoral Research Fellow at Bocconi University and an Adjunct Professor at the University of Milan. He holds a PhD from the University of Verona and an LLM from the University of Vienna. He has been visiting PhD candidate at the Grotius Centre for International Legal Studies, at the University of Ottawa, and at the Amsterdam Center for International Law. He has published on issues of public international law, international economic law and jurisdiction of domestic courts.

