

2020 **WAW**



WASHINGTON
ARBITRATION WEEK

WAW

2020

NOVEMBER 30 - DECEMBER 4

WASHINGTON ARBITRATION WEEK

Washington D.C. is the epicenter of investment arbitration. It has the headquarters of the International Centre for Settlement of Investment Disputes (ICSID), law firms specialized in investment arbitration, public international law and international commercial arbitration, international organizations, United States federal agencies specialized in investment arbitration, embassies, vibrant law schools, NGOs and think tanks. Washington D.C. Arbitration Week (WAW) is being launched to provide an organic D.C. forum in international arbitration for its legal community and the international and foreign community connected to it. WAW will further advance the analysis and discussion of developments reflected in arbitral awards, treaties and international instruments at the forefront of international arbitration.

The first edition of WAW is being held virtually by video conference during a five-day period from November 30 to December 4, 2020. As set out in this brochure, this edition of WAW consists of 15 sessions and networking events connecting the members of Washington D.C.'s international arbitration community to the rest of the world.



WASHINGTON

ARBITRATION WEEK

These panels will follow a dynamic format and foster an open discussion about the future of international arbitration. They will shed light on new arbitration techniques, focus on developments and evolving interpretations and views, and discuss the best practices for international arbitration in the new virtual reality.

WAW 2020 will be a showcase of international arbitration in Washington, DC. On behalf of all of our supporters, panel speakers and moderators, we welcome newcomers and experienced practitioners alike to our city and arbitration community.

WAW Founders,

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EVENT PROGRAM

Monday, November 30th

- | | |
|-------------------------|---|
| 9:00am - 10:30am | Women in International Arbitration |
| 12:00pm - 1:30pm | COVID-19 and International Arbitration |
| 4:00pm - 5:30pm | Third-Party Funding: Developments, Pitfalls and Looking to the Future |

Tuesday, December 1st

- | | |
|-------------------------|---|
| 9:00am - 9:30am | Keynote Speaker Address |
| 9:30am - 11:00am | Reform of ISDS – The ICSID Rules Amendments and UNCITRAL Working Group III |
| 1:00pm - 2:30pm | Alternative Approaches to Valuing Early Stage Investments in Investor-State Arbitration |
| 4:00pm - 5:30pm | Draft Guidelines on States’ Defenses and Prevention of Investment Arbitration |

Wednesday, December 2nd

- | | |
|-------------------------|---|
| 9:00am - 10:30am | EU Investment Arbitration: Current Issues Regarding the Validity and Enforcement of Awards Even Beyond the EU |
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EVENT PROGRAM

Wednesday, December 2nd

- 12:00pm - 1:30pm** Fossil Fuel, Clean Energy and the Environment in International Arbitration
- 4:00pm - 5:30pm** International Commercial Arbitration from the Client's Perspective

Thursday, December 3rd

- 9:00am - 10:30am** Perspectives of Young Arbitration Practitioners
- 12:00pm - 1:30pm** The Rise of Technology in International Arbitration - Artificial Intelligence and Virtual Hearings
- 4:00pm - 5:30pm** Infrastructure Disputes in International Arbitration

Friday, December 4th

- 9:00am - 10:30am** States' Claims and Counterclaims in Investment Arbitration
- 12:00pm - 1:30pm** Human Rights and Investment Arbitration





EVENT PROGRAM

Monday, November 30th

Women in International Arbitration (9:00am - 10:30am)

Through hard work, flexibility, creativity and focus, in recent decades, women have made undeniable progress playing significant roles in international law and arbitration. Today, powerful women work as arbitrators, heads of international arbitration centers, and partners, counsels and associates of leading arbitration firms. However, there still room for improvement. Milestones remain to be achieved for women practitioners and arbitrators, and for the international arbitration community as a whole. The Cross-Institutional Task Force on Gender Diversity in International Arbitral Appointments and Proceedings, for example, analyzes statistic on the appointment of female arbitrators and identifies opportunities and best practices to promote gender diversity in international arbitration.

Through the stories of our panelists, attendees will learn what is like to be an arbitral woman in Washington D.C. and its greater international community, what companies and arbitral institutions are doing to promote gender diversity, and how young female practitioners can break into the world of international dispute resolution.



EVENT PROGRAM

Monday, November 30th

Women in International Arbitration (9:00am - 10:30am)

The panel will also provide insights on the impact that initiatives such as the Cross-Institutional Task Force on Gender Diversity in International Arbitral Appointments and Proceedings have in international arbitration. Finally, the panel will focus on what remains to be done to promote a more gender-diverse practice in international arbitration.

Speakers:

- Mónica Jiménez – Ecopetrol Colombia
- Melissa Stear Gorsline – Jones Day
- Ashley Riveira – Crowell & Moring LLP
- Ana Stanic - E&A Law Limited

Moderator: Margarita R. Sánchez - Quinn Emanuel Urquhart & Sullivan, LLP



EVENT PROGRAM

Monday, November 30th

COVID-19 and International Arbitration (12:00pm - 1:30pm)

As States and commercial actors embrace the new reality of a post-COVID-19 world, the consequences of safety measures and declarations of national emergencies to address the crisis are arising. The array of measures taken, and legislation enacted in almost every State to combat the pandemic is having important effects on foreign investment and international transactions. Actions that may otherwise be qualified as contractual breaches or violations of investment treaties today might be viewed under a new light given the unprecedented situation.

This Panel will discuss the challenges facing arbitral institutions and the potential arguments and tools at the disposal of parties engaged in international commercial and investment disputes in the context of the pandemic. Attention will be given to whether the traditional procedures and rules of responsibility are equipped to deal with the current situation and the consequences in the aftermath.

Speakers:

- Gonzalo Flores - ICSID Deputy Secretary-General
- Anne Marie Whitesell - Georgetown University, Faculty Director, Program on International Arbitration and Dispute Resolution
- Karl Hennessee - Airbus, Senior Vice President and Head of Litigation
- Mérida Hodgson - Jenner & Block

Moderator: Gaela K. Gehring Flores - Arnold & Porter
Kaye Scholer LLP



EVENT PROGRAM

Monday, November 30th

Third-Party Funding: Developments, Pitfalls and Looking to the Future (4:00PM - 5:30PM)

Presently, international arbitration is the preferred means of settlement of international commercial and investment disputes. As a result, third-party funding has become a multimillion-dollar industry, as it offers innovative ways to finance arbitrations and allows parties with limited funds or corporations that simply want to de-risk the investment in their own cases, to receive financing and ensure appropriate representation. Both private parties and sovereign clients, including State-owned companies, may seek funding for international commercial arbitrations and investment-contract arbitrations. In investment-treaty arbitrations, foreign investors are the primary candidates that seek third-party funding. With regard to financing the enforcement of awards, both private parties and State-owned companies have sought enforcing awards in their favor. As a result of their role in international arbitration and proceedings on enforcement of awards, private parties, sovereign States and State-owned companies may be seeking financing from third party funders.



EVENT PROGRAM

Monday, November 30th

Third-Party Funding: Developments, Pitfalls and Looking to the Future (4:00PM - 5:30PM)

This Panel will be a hands-on workshop for counsel for claimants and respondents, including counsel for private parties, States and State-owned companies, on how to navigate the waters of third-party funding. The panelists will explain the process involved in seeking financing for an international arbitration and enforcement of a favorable award. The Panel will discuss the practical steps that counsel and the client need to take concerning the information, memoranda and analysis on quantum that must be provided to the potential funder; as well as the traditional expectations of return—either a multiple of the investment made by the funder, or a percentage of the expected award—that exist in the industry. In addition, the Panel will also discuss how the process to receive funding for the enforcement of an award may differ from the funding of a full arbitration proceeding.

Speakers:

- Michael Kelley - Parker Poe Adams & Bernstein LLP
- Ty Ludbrook – Allegiance Capital
- Michael Perich – West Fleet Advisors
- William C. Marra - Validity Finance

Moderator: Timothy Feighery - Arent Fox LLP



EVENT PROGRAM

Tuesday, December 1st

Keynote Speaker Address (9:00AM - 9:30AM)

Keynote speaker: Meg Kinnear - ICSID Secretary General

Meg Kinnear is the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID).

She worked as Senior General Counsel (2006-2009) and Director General of the Trade Law Bureau of Canada (1999-2006). Prior to this, Ms. Kinnear also worked as the Executive Assistant to the Deputy Minister of Justice of Canada (1996-1999) and Counsel at the Civil Litigation Section of the Canadian Department of Justice (1984-1996).

Ms. Kinnear has frequently spoken on and published with respect to international investment law and procedure, including as a co-author of *Investment Disputes under NAFTA* (Kluwer Law Publications, June 2006; updated editions released January 2008 and June 2009).

Ms. Kinnear holds degrees from the University of Virginia (LL.M.) and McGill University (LL.B.). She is admitted to the Bar of the Law Society of Upper Canada (Ontario) and the District of Columbia Bar.



EVENT PROGRAM

Tuesday, December 1st

Reform of ISDS – The ICSID Rules Amendments and UNCITRAL Working Group III (9:30am– 11:00am)

For many years, the legitimacy of the investor-state dispute settlement (ISDS) system has been subject to criticisms of States, international organizations, civil society, commentators, academics and even arbitrators. In the last ten years, investor-State arbitrations have continued to grow, not only involving developing States as respondents, but also against States in North America and Eastern Europe, and significantly against Western European States. As a response to the criticisms against ISDS, a range of institutional reforms are being discussed at two different forums, ICSID and UNCITRAL's Working Group III.

ICSID's Rules of Arbitration have been reformed four times since the first set of rules were adopted in 1968. These reforms reflect a continuous effort to modernize and improve the rules applicable to ICSID proceedings. In 2017, UNCITRAL's Working Group III was also entrusted to work on reform options for the ISDS system. In both reform efforts, stakeholders have participated in discussions to identify concerns and propose reforms. The concerns include (i) the search for consistency between arbitral awards in a system comprised of circa 3,300 international investment agreements, (ii) the ethical integrity of the adjudicators, and (iii) whether a reformed system may still protect foreign investors and guarantee the States' rights to regulate and be accorded procedural and substantive justice during the course of investor-State proceedings.



EVENT PROGRAM

Tuesday, December 1st

Reform of ISDS – The ICSID Rules Amendments and UNCITRAL Working Group III (9:30am- 11:00am)

Although the Amendments to the ICSID Rules include significant modifications, there is debate as to whether the proposals stop short of a complete renovation of the ICSID system and whether they effectively solve the criticisms leveled against the ISDS system.

In light of the foregoing, this Panel will discuss the potential amendments and reforms that have been proposed at ICSID and UNCITRAL, their objectives, and the impact that they could have on the ISDS system. The panelists will consider how the discussions about the Amendments to the ICSID Rules and the UNCITRAL's Working Group III are evolving and what may be the likely outcome in a reformed system concerning (i) the options of a standing multilateral investment court, (ii) a standing appellate mechanism, (iii) an opt-in or opt-out multilateral convention, and (iv) an advisory center.

Speakers:

- Meg Kinnear – ICSID Secretary-General
- Anna Joubin-Bret - UNCITRAL
- Mallory Silberman – Arnold & Porter Kaye Scholer LLP
- Chiara Giorgetti – University of Richmond School of Law
- Maireé Uran Bridegain - Coordinator of the Investment Arbitration Defense Program, Chile

Moderator: Lee Caplan - Arent Fox LLP



EVENT PROGRAM

Tuesday, December 1st

Alternative Approaches to Valuing Early Stage Investments in Investor-State Arbitration (1:00pm - 2:30pm)

Depending on the type of claim, damages experts and tribunals may favor computing damages using the income approach, the market approach, or the cost approach. Each of these approaches entails different valuation methodologies. The industry in which the investment was made and the extent of development of the investment project may determine a particular approach and valuation methodology.

The income approach is based on the principle that the asset's capability to generate future income determines the value of an asset, which is equal to the present value of the anticipated profits or income that such asset is expected to generate in the future. This approach commonly uses the discounted cash flow (DCF) method, which consists of estimating the string of expected future cash flows that the asset can reasonably be expected to generate, and then 'discounts' those cash flows to the date of assessment of damages by using a discount rate.

The market approach assesses the value of an asset by comparing it to a similar asset that has been sold or transacted in the market. The variables used to calculate value with this approach include publicly traded companies, transaction multiples and the stock market.



EVENT PROGRAM

Tuesday, December 1st

Alternative Approaches to Valuing Early Stage Investments in Investor-State Arbitration (1:00pm - 2:30pm)

Under the asset or cost approach, the value of an asset is equal to the cost of replacing its components. The valuation on a cost approach is sometimes equated to the book value of the assets, which reflects its acquisition cost net of accumulated depreciation. Certain of the aforementioned approaches and valuation methodologies may be more appropriate than others depending on the characteristics of the investment in a particular case, such as (i) whether the investment project was only a legally recognized right to develop an investment project or a start-up project, (ii) whether an investment that was made and was already operating and making limited profits, and (iii) whether an investment project was established and operating for a significant number of years.

This Panel will explain the various approaches to calculating damages with regard to the various methodologies and will assess which approach may be the most appropriate according to the industry and the extent of the development and implementation of the investment project.

Speakers:

- Borzu Sabahi - Curtis Mallet-Prevost Colt & Mosle
- Garrett Rush - Versant Partners
- Miguel Nakhle - Compass Lexecon
- Mark Kantor - Independent Arbitrator

Moderator: Christina Beharry - Foley Hoag LLP



EVENT

PROGRAM

Tuesday, December 1st

Draft Guidelines on States' Defenses and Prevention of Investment Arbitration (4:00pm - 5:30pm)

In May 2018, Singapore hosted the “Investment Arbitration and Trans-Pacific Transactions Conference” organized by the Section of International Law of the American Bar Association in cooperation with various international entities. In attendance were investment arbitration practitioners and former and current government officials who have served as counsel of respondent States in investment claims, as well as investors, arbitrators, academics, and officials of international arbitration centers and international organizations.

The conference included panels on (i) the experience of States in the prevention of investment treaty disputes and the means to improve a State’s readiness for investment arbitration; (ii) the choice of arbitration rules for the resolution of investment disputes; (iii) preliminary and jurisdictional objections; (iv) regulatory powers and defenses on the merits concerning expropriation and fair and equitable treatment; (v) issues of quantum as part of a State’s defense strategy; (vi) defense models for States in investment arbitration; (vii) State representation in international arbitration and matters of public international law; and (viii) discussions on best practices and guidelines for the prevention and defense of investment disputes.

At the Singapore Conference, an earlier version of the Draft Guidelines for the Prevention of Investment Disputes and Defense in Investment Arbitration (Draft Guidelines) was circulated for comments among the participants.



EVENT PROGRAM

Tuesday, December 1st

Draft Guidelines on States' Defenses and Prevention of Investment Arbitration (4:00pm – 5:30pm)

Former government officials who have served as counsel for States in investment arbitrations, practitioners, and damages experts have provided comments on the Draft Guidelines during the past two years. These comments have been considered in the subsequent revisions to the Draft Guidelines.

This Panel will focus on the current version of the Draft Guidelines to further facilitate the discussion to include views of former and current government officials with experience as counsel in investment arbitrations, and private practitioners who have represented States. The objective of this Panel is to continue a dialogue that would lead to a set of best practices and non-binding actions that States may take to: (1) prevent investment disputes, and (2) improve their readiness and defenses in investment arbitration.

Speakers:

- **Nicole C. Thornton** - Chief of Investment Arbitration, Office of International Claims and Investment, Disputes U.S. Department of State
- **Ricardo Ampuero** - President Special Commission Representing Peru in Investment Arbitration Disputes
- **Cindy Rayo Zapata** - General Director of International Trade and Investment, Trade Secretary, México
- **Adam Douglas** - Trade Law Bureau, Foreign Affairs and International Trade Canada
- **Chester Brown** – Sydney University

Moderator: José Antonio Rivas – Xstrategy LLP



EVENT

PROGRAM

Wednesday, December 2nd

EU Investment Arbitration: Current Issues Regarding the Validity and Enforcement of Awards Even Beyond the EU (9:00am - 10:30am)

The judgment of the Court of Justice of the European Union (CJEU) in *Slovak Republic v. Achmea* (Achmea) has been the object of much discussion in the investment arbitration world. In the Achmea judgment, the CJEU held that investment arbitration clauses in bilateral investment treaties (BITs) between Member States are incompatible with EU law. As a result, in May 2020, a majority of EU Member States signed a multilateral treaty to terminate approximately 200 intra-EU BITs. The Achmea judgment has raised concerns regarding both the validity and enforcement of awards in arbitrations brought by EU nationals against EU Member States.



EVENT PROGRAM

Wednesday, December 2nd

EU Investment Arbitration: Current Issues Regarding the Validity and Enforcement of Awards Even Beyond the EU (9:00am – 10:30am)

This panel will focus on: (i) the potential impact of EU law on EU Member States' compliance with investment treaty awards; (ii) the potential impact of EU law on the validity of awards rendered in future and pending arbitrations in intra-EU cases; and (iii) the award-enforcement options available to award creditors and the enforcement risks that EU investors could face in intra-EU investment arbitrations. The panel will also touch upon the concerns that have been raised in relation to the legitimacy of investment treaty arbitration, in respect of which the Achmea judgment and the EU Commission's approach to arbitration has been seen to reflect, and the impact of this trend on investment arbitration law beyond the sphere of the European Union.

Speakers:

- Patrick Pearsall – Allen & Overy LLP
- Alex Wilbraham – Freshfields Bruckhaus Deringer LLP
- Dev Krishan - Monarc Group
- Maria Eugenia Salazar – Baker Mackenzie

Moderator: Ignacio Madalena – White & Case LLP

**EVENT****PROGRAM****Wednesday, December 2nd****Fossil Fuel, Clean Energy and the Environment in International Arbitration(12:00pm - 1:30pm)**

The political and economic volatility in the energy sector—which generally entails a public interest or ownership by States or State-owned companies—have created a fertile ground for investment and commercial disputes. Energy disputes, which represent 41 percent of investment disputes registered at ICSID, stand out from disputes in other sectors due to their large volume of documentation, complexity, disputed facts and significant amount of resources involved.

In addition, some of the investment arbitrations concerning the energy sector involve, on the part of the host State, environmental concerns and regulations. Though the applicable law varies from case-to-case depending on the applicable investment treaty, the majority of investment treaties fail to include provisions on the protection of the environment, other than those provisions stipulating that the State may implement environmental regulations and act to protect the environment as long as such State actions are consistent with the remainder of the treaty. A few other treaties, however, recognize the State's right to regulate and confirm the right to protect the environment as part of the State's public policy, which sometimes counts as an exception to indirect expropriation. The language of the treaty and the facts of the case determine whether the application of environmental regulations and environmental considerations justifies allegedly international unlawful State action.



EVENT

PROGRAM

Wednesday, December 2nd

Fossil Fuel, Clean Energy and the Environment in International Arbitration(12:00pm - 1:30pm)

This Panel will discuss the peculiarities of investment arbitration in the energy sector and the role of environmental considerations. The panelists will also discuss the effect that clean energy, environmental regulations and subsequent alleged State actions and omissions are having in the rise of investment disputes. Lastly, the Panel will address whether new environmental provisions expand the scope of State action to protect the environment with respect to foreign investments.

Speakers:

- Ucheora Onwuamaegbu - Arent Fox LLP
- Tom Sikora - Senior Counsel of International Disputes Group, Exxon Mobil Corporation and Senior Vice Chair of the Institute for Transnational Arbitration
- Ian Laird - Crowell & Moring LLP

Moderator: Jennifer Haworth McCandless - Sidley Austin LLP



EVENT PROGRAM

Wednesday, December 2nd

International Commercial Arbitration from the Client's Perspective (4:00pm - 5:30pm)

The main international commercial arbitration institutions in the U.S. include the International Centre for Dispute Resolution/American Arbitration Association (ICDR/AAA), the International Chamber of Commerce (ICC), and the International Institute for Conflict Prevention & Resolution (CPR), among others. The proceedings involve a series of steps—under regular or emergency procedures—that companies and in-house counsel need to consider, such as the filing of the notice of arbitration, the appointment of the tribunal members and the remaining procedural milestones throughout the arbitration.

In preparation for, and during the course of an international commercial arbitration, various other aspects require attention, such as the arbitration clause, the administration of the arbitration, and foreseeing and controlling the costs of the arbitration, among others.

EVENT PROGRAM

Wednesday, December 2nd

International Commercial Arbitration from the Client's Perspective (4:00pm - 5:30pm)

In addition to explaining the relevant steps involved in an international commercial arbitration both under regular and emergency or expedited procedures, this Panel will discuss the aspects that clients need to be mindful of and the good practices that they can implement in favor of an orderly and cost-effective arbitral process.

Speakers:

- Theresa Coetzee – Marriott International Inc.
- Rafael Boza – Sarens USA Inc.
- Ariel Wade Trajtenberg - Bechtel Corporation
- Alberto Ravell - ConocoPhillips

Moderator: Charles (Chip) Rosenberg - King & Spalding



EVENT

PROGRAM

Thursday, December 3rd

Perspectives of Young Arbitration Practitioners (9:00am-10:30am)

International Arbitration is constantly evolving and expanding the number of practitioners that enter the field, including a growing community of new and young practitioners learning, shaping and influencing our field of practice.

This panel will be composed of a dynamic group of young arbitration practitioners – the future of the international arbitration community! – who will offer their fresh perspectives on the field of international arbitration. This panel will explore: How to break and succeed into the field of international arbitration, how to successfully second-chair an oral argument and a cross examination, how to properly clerk for an arbitrator during the course of arbitration proceedings, and the trends that young arbitration practitioners believe will develop in the future and need to learn in order to keep succeeding in the market.

Speakers:

- Claire-Naïla Damamme - White & Case LLP
- Daniela Paez - Herbert Smith Freehills
- María Lucía Casas - Xstrategy LLP
- Enrique Molina - King & Spalding

Moderator: Pablo Mori Bregante - GST LLP

EVENT PROGRAM

Thursday, December 3rd

The Rise of Technology in International Arbitration – Artificial Intelligence and Virtual Hearings (12:00pm – 1:30pm)

In recent years, artificial intelligence (AI) has entered the sphere of investor-State arbitration. Programs and algorithms have been developed to predict within certain acceptable margins of error potential outcomes depending on the names of the arbitrators and the types of issues being addressed by tribunals. Nonetheless, there still is reluctance to embrace these new technologies by counsel of claimants and respondents in the ISDS system.

While AI may provide certain advantages, skeptics question the challenges that machine-learning may face given the current limited universe of 546 investment arbitration awards versus the analytical skills of the human brain. How does AI work? Can parties to a dispute rely on artificial intelligence to make strategic decisions during the course of arbitration? How can AI developers adapt to and conquer the challenges posed by the characteristics of investment arbitration? What are the risks and are they higher than the risks of not relying on AI?

EVENT PROGRAM

Thursday, December 3rd

The Rise of Technology in International Arbitration – Artificial Intelligence and Virtual Hearings (12:00pm – 1:30pm)

In addition to the influence of AI in international arbitration, since March 2020, as a response to the pandemic new professional practices on how to conduct arbitral proceedings have been adopted. Virtual hearings have become the new normal. This panel will also discuss the mechanics, impact, benefits and limitations of virtual hearings in international arbitration.

Speakers:

- Jara Minguez - ICSID Counsel
- Jonathan Hamilton - White & Case LLP
- Isabel Yang - Arbilex
- Claire Morel - Bryan Cabe Leighton Paisner LLP

Moderator: Nigel Blackaby, QC - Freshfields Bruckhaus Deringer LLP



EVENT PROGRAM

Thursday, December 3rd

Infrastructure Disputes in International Arbitration (4:00pm - 5:30pm)

Infrastructure projects—whether they be ports, highways, railroads, airports or others—benefit from and are often made possible by foreign investment. Notwithstanding detailed structural planning, those projects entail risks, including, finance, design, construction, completion, operation, environmental and social risks. These risks may compromise the development and completion of the project and result in disputes that can be submitted to international commercial or investment arbitration. These disputes are handled depending on whether the parties are private persons, State-owned companies or sovereign States, and whether the dispute is contract or treaty-based, or sometimes both.

Infrastructure disputes may be significantly complex due to the types of risks that they involve, their fact-intensive nature, the number of parties involved with the project, and the financing involved.



EVENT PROGRAM

Thursday, December 3rd

Infrastructure Disputes and Claims of Corruption in International Arbitration (4:00pm - 5:30pm)

One factor that will further increase that level of complexity and reverberate for many years is the consequences of COVID-19. The pandemic is affecting the continuity and pace of the execution of infrastructure projects, disrupting supply chains, human capital, and contractors.

This Panel will discuss the aforementioned aspects of infrastructure disputes under contracts and treaties. Panelists will also consider the parties involved in the dispute, and in the context of treaty arbitration, they will address issues of attribution to the State of acts of State-owned enterprises and private parties.

Speakers:

- Meagan Bachman - Crowell & Moring LLP
- Don Harvey - Secretariat
- Michael Nolan - Milbank LLP

Moderator: Ian Laird - Crowell & Moring LLP

EVENT PROGRAM

Friday, December 4th

States' Claims and Counterclaims in Investment Arbitration (9:00am - 10:30am)

The current ISDS system is considered to be a “one-way” street where, normally, respondent States do not enjoy the same right as investors who file claims against them. In the vast majority of investment treaty arbitrations, by design of those treaties, States adopt the role of respondents to claims submitted by foreign investors. Nonetheless, recent developments in treaty drafting have been changing this “one-way” street.

Newer generations of investment treaties—including free trade agreements (FTAs) and BITs—including, for example, the Comesa Agreement and the Southern African Development Community (SADC), provide for the possibility for States to file claims and/or counterclaims against foreign investors. Whether or not States may file claims and/or counterclaims depends on the relevant investment treaty, the rules of arbitration, e.g. ICSID or UNCITRAL, and the facts of the case.

EVENT PROGRAM

Friday, December 4th

States' Claims and Counterclaims in Investment Arbitration (9:00am - 10:30am)

This Panel will discuss the jurisdictional requirements and the substantive obligations that treaties may include to enable the submission of treaty claims and counterclaims by States. It will also discuss the pros and cons of supplementing the ISDS system with treaties that may impose obligations on States to respect international standards of protection of foreign investors and their investments, but also social corporate responsibility obligations on foreign investors related to minimum labor and environmental standards.

Speakers:

- Ana María Ordoñez - Director, International Legal Defense Office, National Agency for Legal Defense of the State, Colombia
- Ricardo Ampuero - President Special Commission
- Representing Peru in Investment Arbitration
- Disputes.
- José Antonio Rivas - Xstrategy LLP

Moderator: Marinn Carlson - Sidley Austin LLP



EVENT

PROGRAM

Friday, December 4th

Human Rights and Investment Arbitration (12:00pm - 1:30pm)

The notion that investment arbitration and human rights should be treated separately as two different, self-contained systems is being challenged constantly by international instruments and international awards in various forums. While it is theoretically possible to dissociate international investment standards of treatment that States have to comply with from social corporate responsibility standards that enterprises should respect, multilateral instruments such as the OECD Guidelines for Multinational Enterprises and the 2020 Second UN Draft on Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises further emphasize that foreign investors should comply with human rights in host States, including with international minimum labor and environmental standards. In parallel, investment arbitration tribunals have recognized the role of human rights in investment disputes. In *Urbaser v Argentina*, the tribunal upheld its own jurisdiction to consider whether a foreign investor had breached the human right to water. The *David Aven v Costa Rica* tribunal, citing the ICJ in *Barcelona Traction*, sustained that obligations related to the protection of the environment are *erga omnes*, and then explained that “there are no substantive reasons to exempt foreign investors of the scope of claims for breaching obligations . . . in the field of environmental law.”



EVENT PROGRAM

Friday, December 4th

Human Rights and Investment Arbitration (12:00pm - 1:30pm)

Similarly, the Partial Dissenting Opinion in *Bear Creek v Peru* concluded that the tribunal was entitled to take into account the ILO Convention 169 in determining whether the foreign investor had carried out its obligation of consulting with the local communities that would be affected by the investment project. While investment treaty tribunals are recognizing that the applicable international law may include human rights, investment treaties may also be evolving in this direction.

A number of modern investment treaties, such as the Canada-Colombia FTA and the India-Belorusse BIT encourage, as a matter of soft law, incorporation of corporate social responsibility standards within the policies of the multinational enterprises. Other treaties, such as the Morocco-Nigeria BIT, go a step further by providing that “investors and investments shall uphold human rights in the host state.”



EVENT PROGRAM

Friday, December 4th

Human Rights and Investment Arbitration (12:00pm - 1:30pm)

In addition to these and other developments on the ground gained by human rights in investment arbitration, this Panel will discuss how human rights as applied to investment arbitration may develop in the coming years, what may be the jurisdictional and substantive limitations to consider human rights violations in an investment arbitration, and the convenience of such application for a balanced ISDS system.

Speakers:

- Naomi Briercliffe – Allen & Overy LLP
- Douglas Cassel - King & Spalding
- Christian Leathley - Herbert Smith Freehills
- Maria Angélica Burgos - Baker Mckenzie
- Mariana Reyes - Xtrategy LLP

Moderator: Clovis Trevino – Covington & Burling LLP