WAU

FIRST EDITION

World Arbitration UPDATE 2021

OCTOBER 11 - OCTOBER 15

Brochure subject to updates

WAU

Introduction to WAU: Decentralization and Update of International Arbitration

Rigorous and remarkable counsel, arbitrators and academics are living and practicing beyond the centers of international arbitration. There are large, medium, and boutique firms, as well as solo practitioners, actively advancing international arbitration and public international law in non-traditional venues in Africa, the Americas, Asia, Europe and Oceania.

The World Arbitration Update (WAU) will update the global community on key and novel topics of investment and international commercial arbitration, and public international law in a decentralized forum.

By the end of the 1990s, and even by the end of the 2000s, it may have been possible to keep up to date individually by directly digesting the few investment arbitration awards and main publicly disclosed international commercial arbitration awards. Out of approximately 3,300 investment treaties in force, 1,138 have been invoked in investment arbitrations. As those investment cases have led to 225 awards rendered between 2011 and 2020, and as the use of international commercial arbitration has also reached new heights during the last decade, WAU will provide an international arbitration update focused on key investment and international commercial issues with global and regional impact.

The WAU panels will follow a dynamic format where a presenter will first provide an update of the issue that the panel will address, including relevant treaty and international customary norms, as well as case law. An open discussion by the panelists, including practitioners, counsel for investors, counsel for States, arbitrators, officials of international organizations and arbitration centers, and academics, will then follow. After each panel, there will be a networking space in breakout rooms for panelists and WAU attendees to meet and interact.

WAU

WAU connects different regions with the global community aiming to decentralize and further expand international arbitration and public international law. At WAU, practitioners, States, private parties, arbitrators, international organizations, academics and students have the possibility to engage with each other and nourish the conversation on investment and international commercial arbitration, while being members of a forum that integrates the world through connectivity and precise updates.

The first edition of WAU is being held virtually linking different regions by video conference during a five-day period from 11 to 15 October 2021. During these five days, there will be 15 panels and networking virtual events.

On behalf of WAU, its circles of supporting firms, organizations, experts, panel speakers and moderators, we welcome the global community, newcomers, and experienced practitioners alike to the first edition of the World Arbitration Update.

José Antonio Rivas
Xtrategy LLP
Co-Chair of WAU

Ian A. Laird
Crowell & Moring LLP
Co-Chair of WAU

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CIRCLE OF SUPPORTING ORGANIZATIONS

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EVENT PROGRAM

Monday, October 11th — Americas

9:00am - 10:30am
Washington D.C. Time

Enforcement of International Arbitration Awards and Collection of Damages in Multiple Civil and Common Law Jurisdictions: Japan, Panama, Singapore, New York and Ukraine

12:00pm - 1:30pm
Washington D.C. Time

Arbitration in the Caribbean on Renewable Energy and Climate Change

4:00pm - 5:30pm
Washington D.C. Time

North America: The End of NAFTA Chapter 11 - Transition from NAFTA to USMCA, the Final NAFTA Legacy Disputes, and the Future of US-Mexico Investment Disputes

Tuesday, October 12th — Africa

12:00pm - 1:30pm
Morocco Time (WET)
7:00am - 8:30am
Washington D.C. Time

Middle East North Africa Region: Mega Disputes, Expansion of International Arbitration Centers, and a Renewed Interest in Shariah Law as a Foundation of Applicable Law

3:00pm - 4:30pm
Morocco Time (WET)
10:00am - 11:30am
Washington D.C. Time

Influencing the Future of the Investor-State Dispute Settlement System through the Investment Chapter of the African Continental Free Trade Agreement (AfCFTA)

6:00pm - 7:30pm
Morocco Time (WET)
1:00pm - 2:30pm
Washington D.C. Time

Investment Arbitration and Mining, Challenges and Opportunities Ahead

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EVENT PROGRAM

Wednesday, October 13th	Asia & Oceania
7:00am - 8:30am Wednesday, October 13th Beijing Time (CST) **7:00pm - 8:30pm** Of Tuesday, October 12th Washington D.C. Time	Current Status of Third-Party Funding in International Arbitration, and its Development in Multiple Jurisdictions: Australia, Singapore, United Kingdom and United States
7:30am - 9:00am Wednesday, October 13th New Dehli Time (IST) **10:00pm - 11:30pm** Tuesday, October 12th Washington D.C. Time	Controversial Investment Awards Against States in South Asia: Claims of Corruption, Abusive Treaty Interpretation and Novel Damages Calculations
7:00pm - 8:30pm Wednesday, October 13th Beijing Time (CST) **7:00am - 8:30am** Wednesday, October 13th Washington D.C. Time	China's Belt and Road Initiative: Dispute Resolution Options and Risk Mitigation

Thursday, October 14th	Europe
12:00pm - 1:30pm Paris Time (CET) **6:00am - 7:30am** Washington D.C. Time	Tension between International Investment Law and European law: Are EU Institutions Contributing to or Disrupting the International Rule of Law
3:00pm - 4:30pm Paris Time (CET) **9:00am - 10:30pm** Washington D.C. Time	Crisis at the WTO - Can the Dispute Settlement Mechanism be Saved? The Proposed Multi-Party Interim Appeal Arbitration Arrangement May Be the Life Preserver
6:00pm - 7:30pm Paris Time (CET) **12:00pm - 1:30pm** Washington D.C. Time	Assessing Damages in Non-Expropriatory Breaches

EVENT PROGRAM

Friday, October 15th	Diverse Topics
7:30am - 9:00am Washington D.C. Time	Incorporating Obligations of Investors in BITs
10:30am - 12:00pm Washington D.C. Time	Dual Nationality, and Dominant and Effective Nationality in Investment Arbitration
1:30pm - 3:00pm Washington D.C. Time	Arbitration Boutiques and Solo Practitioners – Can they Compete and Provide World Class Service in International Investment and Commercial Arbitration?

ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS AND COLLECTION OF DAMAGES IN MULTIPLE CIVIL AND COMMON LAW JURISDICTIONS: JAPAN, PANAMA, SINGAPORE, NEW YORK AND UKRAINE

Monday, October 11
9:00am - 10:30am

With the increase of cross-border transactions and investment projects, the question of enforcement of foreign judgments and arbitral awards is more relevant than ever. The efficacy of arbitration as a dispute resolution mechanism depends, to a large extent, on whether the integrity of the award will be protected by the national courts in enforcement proceedings and treated as final and binding, save in limited circumstances.

Arbitral awards benefit from international treaties that provide robust and effective means of enforcement. Notably, the 1958 New York Convention ("New York Convention") enables the straightforward enforcement of arbitral awards, and national laws based on UNCITRAL's Model Law on International Commercial Arbitration facilitate such enforcement, except in discrete circumstances provided those instruments, respectively.

For purposes of enforcement, it is essential to understand the judicial practice in each jurisdiction, particularly the way that domestic courts understand and apply the provisions of the New York Convention. The procedural and substantive requirements necessary in the domestic jurisdiction where enforcement is sought, as well as other practicalities characterizing the enforcement process are also crucial to enforce international arbitration awards.

But recognition and enforcement of international awards in local jurisdictions are hardly enough to ensure satisfaction of what matters to the winning party in an international arbitration: Payment of the awarded damages.
The growth in requests for enforcement of international arbitration awards by national courts raises a number of legal issues (such as the identification and attachment of assets, the efforts by the respondent to delay enforcement pending annulment proceedings, and the different ways in which national courts apply the New York Convention) and allows to make a comparison between jurisdictions, and their advantages and disadvantages as seat of arbitration.

EVENT PROGRAM

Monday, October 11
9:00am - 10:30am

This panel will feature a dialogue among international arbitration attorneys of civil and common law jurisdictions, including New York, Panama, Singapore, Ukraine South Africa and Colombia, as well as asset tracers, that will provide an overview of the practical steps and requirements in order to enforce and collect in their respective jurisdictions. The panel will also discuss strategic approaches to the tracing of assets and their collection in multiple jurisdictions

MODERATOR

- **Gene M. Burd** - FisherBroyles

PRESENTER

- **Charlene C. Sun** - DLA Piper

PANELISTS

- **Yoko Maeda** - City-Yuwa Partners
- **Soh Lip San** - Rajah & Tann Singapore LLP
- **Tatyana Slipachuk** - Sayenko Kharenko NewLaw Firm
- **David M. Mizrachi** - MDU Legal

ARBITRATION IN THE CARIBBEAN ON RENEWABLE ENERGY AND CLIMATE CHANGE.

Monday, October 11
12:00pm - 1:30pm

Investments in renewable energy within the Caribbean are on the rise as is the potential threat of States in the region to international disputes. This shifting policy aligns with global efforts to combat climate change, greenhouse gas emissions caused by fossil fuel consumption and sea level rise. Concomitantly, major arbitral institutions worldwide have witnessed a steady increase in disputes involving climate-related issues due to reforms by States in the renewables sectors. These cases highlight practical difficulties of governmental efforts to transition away from traditional energy sources, increase private investments in renewable energy and modernize power grids. Considering the rise of those cases, legitimate concerns arise as to whether those claims may discourage States from taking climate policy action and developing renewable energy.

Many States encourage investments to accelerate the growth of renewable energy. However, a few States, among others Spain, Italy, and the Czech Republic, have changed their renewable energy schemes, withdrawing incentives or subsidies initially offered in support of alternative energy. Those changes have contributed to an upsurge in investor-State arbitrations bringing more than 60 cases concerning renewable energy, such as wind, photovoltaic (PV) and geothermal energy.

International arbitration related to renewable energy may continue growing wherever a foreign investor believes that it was subject to discrimination, or that its legitimate and reasonable expectations from the investment that it made were thwarted by governmental actions. This discussion may be central to the Caribbean, where several island nations focused on reforms within the energy sector. For example, in Grenada Private Power Limited and WRB Enterprises, Inc. v. Grenada (ICSID Case No. ARB/17/13), investors filed an arbitration claim due to the decision of the Grenadian Government to restructure the electricity sector through sweeping changes to its regulation.

EVENT PROGRAM

Monday, October 11
12:00pm - 1:30pm

This panel will explore how the efforts to transition into a clean energy environment in the Caribbean, and efforts to address sea level rise may affect and may be influenced by investment and international commercial arbitrations in the region. The panelists will also discuss if international arbitration awards on renewable energy may encourage or negatively impact State efforts to tackle climate change and actions to address sea level rise.

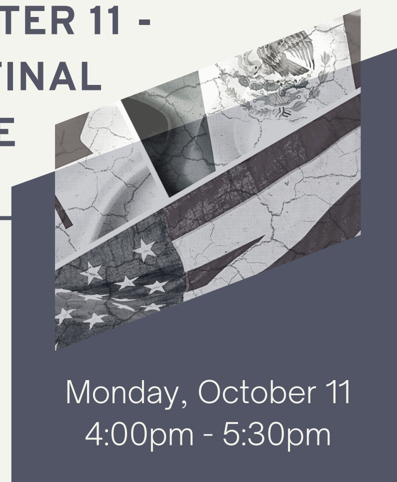
MODERATOR

- **Christina L. Beharry** - Foley Hoag

PANELISTS

- **Seabron Adamson** - Charles River Associates
- **Sherene Golding Campbell** - Senator, Jamaica
- **Dia C. Forrester** - Attonery General of Grenada
- **Daniel Flores** - Quadrant Economics

NORTH AMERICA: THE END OF NAFTA CHAPTER 11 - TRANSITION FROM NAFTA TO USMCA, THE FINAL NAFTA LEGACY DISPUTES, AND THE FUTURE OF US-MEXICO INVESTMENT DISPUTES



Monday, October 11
4:00pm - 5:30pm

In 1992, the NAFTA Chapter 11 investment chapter was created to be a central feature of the new integrated regional market ready to challenge the European Union and the world. Trade amongst the three members ballooned from around US$ 290 million in 1992 to US$ 1.1 trillion in 2016. The groundbreaking accord that helped launch what was once the world's largest free trade agreement, representing approximately 33% of the world's total gross domestic product and the second largest in total trade volume.

Winds of protectionism in the U.S. and the globe, and internal criticisms that NAFTA was "the worst deal ever", led to the renegotiation of NAFTA focusing on the protection of certain industries in the U.S.—notably, the automobile industry, among others. The new United States-Mexico-Canada Agreement (USMCA), investment chapter provides for legacy investor-State arbitration disputes for a period of three years from the entry into force on July 1, 2020. The clock is now ticking for Canadian, Mexican or U.S. investors who wish to submit a legacy claim against another NAFTA Party.

After June 30, 2023, there will be no further investment claims by Canadian investors permitted under the USMCA. This may be the last chance, for the foreseeable future, that U.S. investors may have to submit investment treaty claims against Canada, and vice versa. Thereafter, only a limited class of disputes submitted by U.S. and Mexican investors against Mexico and the U.S., respectively, will be permitted. These investors that are not party to a covered government contract or that are not engaged in activities in the five covered sectors (Oil & Gas, power generation, telecommunications, transportation and infrastructure) may only submit investor-State arbitration claims limited to certain subject matters, such as direct expropriation, national treatment and MFN.

EVENT PROGRAM

Monday, October 11
4:00pm - 5:30pm

Currently, there are seven disputes under the USMCA legacy investment clause. There are five cases against Mexico – three initiated by U.S. investors and two others by Canadian investors, regarding investments involving mortgages, parking, mining, oil & gas and taxi meters. The sixth USMCA legacy case, which was initiated by a U.S. investor against Canada, concerns an emissions trading program organized – and then cancelled – by the Province of Ontario. The seventh notice for a dispute under the USMCA legacy clause is against the U.S. and concerns the revocation of the permit for TransCanada pipeline project, the Keystone XL oil pipeline.

The ever-changing Oil & Gas regulatory environment in Mexico is a chapter of its own, which could lead to international commercial or investment contract or treaty arbitrations. For now, many of the regulatory changes by the Mexican Government have been challenged administratively or before Mexican courts. In addition to the opportunity that U.S. investors have to submit claims against Mexico for any violations of the investment treaty obligations under the NAFTA before the legacy clause expires, the more focused USMCA claims in Oil & Gas might preface a sector-oriented relationship on investment and trade between Mexico and the U.S.

This panel will thus seek to address the foreseeable short-term use of the remnants of the NAFTA investor-State arbitration system until July 1, 2023; what is left under the USMCA; and the prospects of sectoral claims under the USMCA between U.S. investors and Mexico on the one hand, and Mexican investors and the U.S. on the other hand.

MODERATOR

- **Ian A. Laird** - Crowell & Moring

PRESENTER

- **Dr. Todd Weiler** - Independent International Arbitrator

PANELISTS

- **Adrian Magallanes** - Von Wobeser & Sierra
- **Marinn Carlson** - Sidley Austin LLP
- **Lauren Mandell** - WilmerHale

MIDDLE EAST NORTH AFRICA REGION: MEGA DISPUTES, EXPANSION OF INTERNATIONAL ARBITRATION CENTERS, AND A RENEWED INTEREST IN SHARIAH LAW AS A FOUNDATION OF APPLICABLE LAW

Tuesday, October 12
12:00pm - 1:30pm WET

Dispute resolution has been on the rise in Middle East North Africa (MENA) for the last decade, as the region accounts for capital intensive, complex construction mega projects involving regional and international players.

International disputes in MENA are not new: the region has been a historic catalyst of the first oil and gas arbitrations, such as Petroleum Development v. Sheikh of Abu Dhabi (1951) Saudi Arabia v. Aramco (1958), Aminoil v. Kuwait (1982), and Texaco v. Libya (1977). As the market becomes more mature, however, an ever-increasing number of disputes are resolved by international arbitration and mediation. Moreover, as mega projects have evolved into mega disputes, in 2021 the region has seen a multitude of international disputes arise: From the construction of a tourism resort in Libya involving enforcement intricacies in Paris for a US$1 billion award, to a new dispute involving the Algerian National Oil Company. Spanning beyond MENA, Jordan has launched an ICC arbitration over a US$2.1 billion contract to build a power station and mine as part of China's Belt and Road initiative, whilst Egypt and Sudan appealed to the U.N. Security Council in July to intervene in their dispute with Ethiopia over the operation of a mega dam on the Nile River. The growth of international mediation and arbitration in MENA is being accompanied by the growth of leading arbitral centers in the region, including the opening of a case management office for the ICC Court Secretariat in Abu Dhabi, United Arab Emirates (UAE) in 2020.

This panel will provide an update on the following issues related to current topics in arbitrating international disputes involving MENA parties:

- Dispelling misconceptions and the status of the quest of the Arab world to become a cosmopolitan system of law influenced by the foundations of shariah and civil law, and other factors;
- The invocation of Arab Spring events in recent arbitration claims and defenses
- Interim and conservatory remedies in arbitral proceedings in MENA jurisdictions
- Enforcement of investment and commercial awards in the MENA region;
- The latest institutional developments in the region, inter alia the MoU between the ICC and the UAB, the ICC's expansion in Abu Dhabi, and the Workstream on Arbitration of Islamic Finance Disputes.

EVENT PROGRAM

Considering these issues, the discussion will showcase a unique perspective on substantive and procedural characteristics as well as new developments of international disputes in the MENA region.

Tuesday, October 12
12:00pm - 1:30pm WET

MODERATOR

- **Meagan T. Bachman** - Crowell & Moring

PRESENTER

- **Munia El Harti Alonso** - Von Wobeser & Sierra

PANELISTS

- **Mohamed S. Abdel Wahab** - Zulficar & Partners
- **Cherine Foty** - Covington & Burling
- **Sara Koleilat-Aranjo** - Al Tamimi & Co

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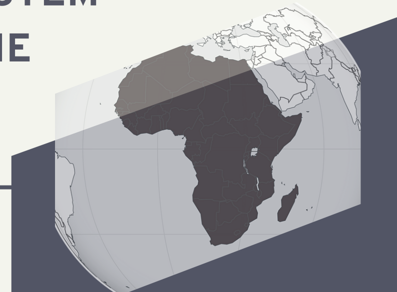
INFLUENCING THE FUTURE OF THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM THROUGH THE INVESTMENT CHAPTER OF THE AFRICAN CONTINENTAL FREE TRADE AGREEMENT (AFCFTA)



Tuesday, October 12
3:00pm - 4:30pm WET

In 2012, African States set out with the ambition to establish an unprecedented "Continental Free Trade Area", with the primary objective of boosting intra-African trade and investment. In March 2018, 44 African States signed the agreement establishing the African Continental Free Trade Area ("AfCFTA"), entering into force in May 2019. Trading under the AfCFTA was officially launched on January 1, 2021. There are currently 54 signatories, 36 of which have already met the domestic requirements to ratify the AfCFTA.

The investment protocol of the AfCFTA is currently being negotiated. The protocol may be modelled on the Pan African Investment Code ("PAIC"), a non-binding instrument adopted in October 2017 by the African Union Commission, which provides insights about the African approach to international investment protection. However, the shape and content of Investor-State Dispute Settlement ("ISDS") in the protocol may be unclear as on December 5, 2020, the African Union Ministers of Trade (AMOT) adopted a Draft Declaration on the Risk of Investor-State Dispute Settlement, whereby the member States agreed, among others, to:

- Commit to work towards the adoption of a set of guidelines for African governments to minimize the challenges of ISDS and to address and reform existing investment treaties.
- Request Member States to consider renegotiating their investment treaties by integrating provisions better suited to exceptional situations in accordance with new trends at the regional and international levels.
- Invite Member States to explore all possibilities for mitigating the risks of ISDS, including a mutual temporary suspension of ISDS provisions in investment treaties in relation to COVID-19 Pandemic government measures. . .
- Requests the African Union Commission to provide support to Member States in the on-going negotiations within different organisations that are working towards the development of legal instruments to address . . . global health threats in accordance with international law".

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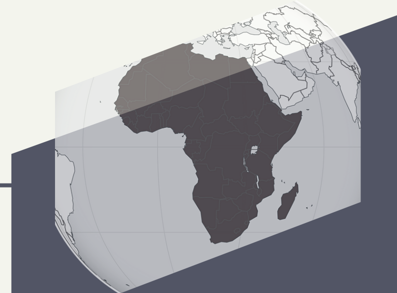


Tuesday, October 12
3:00pm - 4:30pm WET

Disputes involving African parties contribute to a significant number of cases at ICSID. At least one of the parties in 150 investor-State cases has been an African investor or State, which translates into 13.58% of the total number of ISDS cases. During the past decade African countries at national and regional levels have made efforts to reform their investment treaties by opting out of ISDS, terminating investment treaties (e.g., South Africa) and negotiating new treaties (e.g., the Canada–Nigeria BIT (2014) and the Morocco–Nigeria BIT (2016)), which reflect greater awareness from those States about the importance of corporate social responsibility standards, even though such standards remain soft law in those treaties).

This panel will address several issues related to the experience of African States in investment arbitration, some of the newest investment treaties negotiated by African States, the development of the Investment Protocol of the AfCFTA and its investment protocol, and the shape that investment treaties of African countries Africa and the use and impact that they may have in dispute resolution and on foreign investment in the continent. In particular, the panel will explore how effective may be some of the attempts to achieve reform of ISDS across the African continent? Whether the Investment Protocol will introduce changes into the African investment landscape and how those changes may impact existing ISDS? And whether the latest treaties negotiated by African States include innovative features balancing protection of foreign investment and the State's rights to regulate and demand respect of international labour, environmental and social corporate responsibility standards.

MODERATOR

- **Rose Rameau**- Rameau International Law

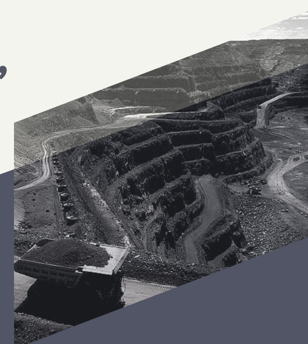
PRESENTER

- **John Nyanje** - Africa Nazarene University

PANELISTS

- **Jackwell Feris** - Cliffe Dekker Hofmeyr
- **Leyou Tameru** - I-Arb Africa
- **Chrispas Nyombi** - University of Derby

INVESTMENT ARBITRATION AND MINING, CHALLENGES AND OPPORTUNITIES AHEAD



Tuesday, October 12
6:00pm - 7:30pm WET

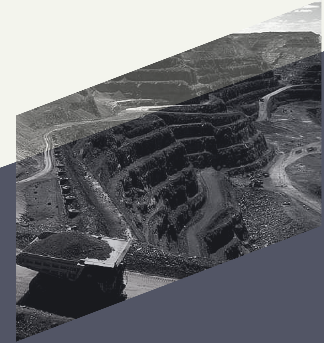
Never has mining been more relevant and polarised than today. The exponentially increasing digitisation of the world economy and the push for greener modes of transport is leading to an unprecedented and insatiable demand for strategic minerals, including gold and lithium.
Yet, these resources are often most abundant in politically volatile restrictions and their extraction often has irreversible consequences for the environment. The last few years have seen a dramatic increase in investment treaty arbitrations arising out of mining projects, with some claimants seeking double-digit billion-dollar compensation from host States.

The trend towards “resource nationalism” has the potential for creating new arbitration disputes. Emerging economies are now moving towards a greater protection for the environment, communities, and an increasing governmental control over the development of natural resources, sometimes even disregarding rights of existing concession holders. The most recent reforms include reduction to the scope of stabilisations provisions, national participation requirements, and changes to environmental regulations and taxation laws, among others. Several countries have already included changes to the mining and tax codes, such as the Democratic Republic of Congo, Tanzania, and Zambia, while others, like Mexico and Peru, are considering similar amendments. This is changing the picture of an industry filled with long-term projects and investors that may contend that that they expected few political and regulatory changes.

COVID-19 has not helped. The pandemic has led to extreme volatility in prices of commodities, and governmental measures necessary to contain the spread of the virus have contributed to interrupting mining production.

Quantum analyses pose several challenges both concerning mining projects where production has begun, and pre-production mineral projects where production is yet to start, even though exploration, pre-development and development activities over the investment may be taking place.

EVENT PROGRAM



Tuesday, October 12
6:00pm - 7:30pm WET

Pre-production projects usually lack the record of operations and profits that is sometimes required to support the use of certain approaches. Tribunals often use cost-based approaches, but in recent years tribunals have considered other quantum methodologies to calculate damages concerning projects in advanced stages. In Gold Reserve v. Venezuela and in Crystallex v. Venezuela, the tribunals applied a DFC valuation and a market-based approach, respectively, on the grounds that there was sufficient data and certainty about the future of the project.

This panel will address the most relevant issues in mining arbitration disputes, exploring its now changing environment towards a more present governmental control, the challenges left by the pandemic, and the future of quantum analysis for pre-production projects, including under what circumstances would the cost-based analysis may be substituted by other methodologies to determine damages.

MODERATOR

- **Ucheora Onwuamaegbu** – Arent Fox

PRESENTER

- **Lorraine de Germiny** - Lalive

PANELISTS

- **Tiago Duarte-Silva** - Charles River Associates
- **Bernhard Maier** - Signature Litigation
- **Lisa E. Sachs** - Columbia Center on Sustainable Investment

CURRENT STATUS OF THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION, AND ITS DEVELOPMENT IN MULTIPLE JURISDICTIONS: AUSTRALIA, SINGAPORE, UNITED KINGDOM AND UNITED STATES

Wednesday, October 13
7:00am - 8:30am CST

Third-party funding (TPF) has become a multimillion-dollar industry over the past two decades, offering financing for arbitrations and litigations, and allowing impecunious parties, as well as parties who would rather invest their funds in alternative business projects than in their own legal proceeding, to submit their claims and secure appropriate representation.

Use of TPF is becoming increasingly common in a number of jurisdictions around the world, as their courts are particularly open to funding as a means of improving access to justice. Until recently, use of TPF was mainly limited to the United Kingdom, Australia and the United States. However, within the last few years there has been a rapid expansion of TPF, now encompassing international disputes, and litigations in Asia, the Middle East and Latin America.

Each country may have its own regulations on TPF, as influenced by the prevailing system of law, e.g., civil or common law. Given the multiplicity of regulatory responses to TPF in jurisdictions around the world, this panel will address the approaches to TPF in various jurisdictions. For instance, Singapore opened its doors to third party funding in early 2017, initially only for international arbitration, reinforcing its position as a leading Asia Pacific international dispute resolution hub. In June 2021 onwards, Singapore extended its TPF framework to domestic arbitration proceedings, certain proceedings in the Singapore International Commercial Court and mediation. In Australia, TPF has been in place for more than two decades, playing a significant role in large class actions, including in securities cases, civil and commercial litigation, and arbitration. Following a boom in class actions backed by litigation funders, in 2020, the Australia introduced regulations designed to improve transparency and accountability around litigation funding.

In the UK, TPF is well established and has financed arbitrations and litigations in wide range of disputes. There, the Association of Litigation Funders provides a form of self-regulation. Currently, the US legal and regulatory framework relevant to TPF exists at the individual state level. Additionally, in September 2020, some leading global litigation finance firms set up the International Legal Finance Association (ILFA), to represent litigation funders in their dealings with governments and regulators, and intends to provide a research center for the industry.

EVENT PROGRAM

Wednesday, October 13
7:00am - 8:30am CST

Arbitral institutions play a critical role in the regulation of TPF. Several regional arbitration centers, including, among others, the Hong Kong International Arbitration Centre, and the Singapore International Arbitration Centre have regulated TPF. Other global institutions, including the UNCITRAL Working Group III as well as ICSID, are in the process of proposing reforms, including with respect to the definition of TPF, whether there should be disclosure or not of the funder and the funding agreement, and what should be the implications of there being TPF for security for costs. These draft reform provisions, once finalized, could be implemented in treaties, adopted in arbitration rules, or incorporated in a multilateral convention.

This panel will provide an update on TPF in Australia, the US, the UK and Asia, and provide an insight concerning the use and appetite for TPF in international commercial arbitration, the type of cases that are being funded globally. It will also address the challenges that TPF is confronting in investment arbitration and whether it could still be a viable business model considering the adversarial atmospherics against TPF coming from some States and commentators contending that the increase of investment arbitrations is partly motivated by the presence of TPF. Those criticisms will also be considered by the panel. In addition, our panelists will offer a practical step by step perspective on the information, memoranda and analysis on quantum that must be provided to the potential funder. Finally, the panelists will discuss how the regulation of TPF in international arbitration might look like following the work of UNCITRAL Working Group III and the ICSID amendments.

MODERATOR

- **Myriam Seers** - Savoie Laporte

PANELISTS

- **Matthew Blumenstein** - Statera Capital
- **Tom Glasgow** - Omni Bridgeway
- **William C. Marra** - Validity Finance LLC
- **Roger Milburn** - LCM Finance
- **Kirstin Dodge** - Nivalion

CONTROVERSIAL INVESTMENT AWARDS AGAINST STATES IN SOUTH ASIA: CLAIMS OF CORRUPTION, ABUSIVE TREATY INTERPRETATION AND NOVEL DAMAGES CALCULATIONS

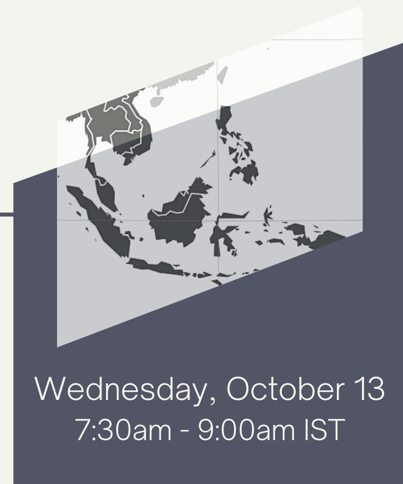
Wednesday, October 13
7:30am - 9:00am IST

South Asian countries have engaged in many high-stake investment arbitrations in the past two decades, which have often resulted in controversial adverse awards against them. In 2019, in Tethyan Copper v Pakistan an ICSID tribunal ordered that Pakistan pay $6 billion in compensation to a foreign mining company, a sum equal to the total amount that the country had received in an IMF bailout that same year. Criticism against the method used by the tribunal to calculate damages, and claims of corruption by the investor, Tethyan, during the making of the investment, were submitted during the course of the arbitration and in the request for annulment.

Recently, in Karkey v Pakistan, the ICSID tribunal awarded a USD 1 billion award to a Turkish power ship company whose ships were sequestered by Pakistan when they were providing electricity to Pakistan. Turkey and Pakistan negotiated a settlement agreement by which the ships were returned to Karkey and the favorable damages awarded by the tribunal were foregone by the company. This settlement took place before the tribunal could decide a request for revision of the award based on allegations that the investment was tainted by corruption.

In White Industries v India, the tribunal concluded that the failure of Indian judiciary to deal with the claim of White of Industries, an Australian investor, in over nine years constituted a breach of India’s obligation to provide the investor 'effective means' for assessing claims and enforcing rights. While this obligation was not expressly stated in the India-Australia BIT, the tribunal allowed White Industries to establish its claim by importing the effective means provision from the India-Kuwait BIT under the MFN clause. Critics of the award stated such automatic importation posed the risk of BITs intruding into the Indian judicial system and impinging on the sovereignty of the State.

EVENT PROGRAM



Wednesday, October 13
7:30am - 9:00am IST

These cases reflect issues that have been common in investment arbitrations involving South Asian States, including claims of corruption, conflicts of interest and ungrounded novel damages calculations. In response to these decisions and criticism, South Asian States have considere various measures to internally reform the existing ISDS framework. India, for example, drafted and adopted a new model BIT in 2015 while Pakistan, Bangladesh and Sri Lanka have actively participated in UNCTRAL Working Group III negotiations.

This Panel will examine some controversial awards issued against countries in South Asia, criticisms of these awards, and the growing movement to reform of the ISDS system as a response to the criticisms raised above.

MODERATOR

- **Dr. Kabir Duggal** - Columbia Law School

PRESENTER

- **Fatima Aslam** - Schiffer Hicks Johnson PLLC

PANELISTS

- **Rekha Rangachari** - New York International Arbitration Center
- **Rishab Gupta** - Shardul Amarchand Mangaldas & Co
- **Dr. Rumana Islam** - University of Dhaka

CHINA'S BELT AND ROAD INITIATIVE: DISPUTE RESOLUTION OPTIONS AND RISK MITIGATION

Wednesday, October 13
7:00pm - 8:30pm CST

China's Belt and Road Initiative (BRI) is China's central foreign policy initiative and global infrastructure development project launched in 2013. China Development Bank, ChinaEXIM, Chinese banks, and companies have financed, invested in, and deployed projects across many sectors – from power plants, railways, and ports to fiber optic cables and telecommunication infrastructure. As of 2021, about 139 countries have joined the BRI, including a heterogenous mix of developed and developing countries spanning across most regions of the world.

Although the BRI lacks a centralized legal framework, law (and the work of lawyers) permeates throughout the BRI in all its guises. From the new commercial courts in Xi'an and Shenzhen to the legal agreements underpinning cross-border investments and lending, lawyers and the law play a distinctive role in shaping the BRI. China has one of biggest networks of international investment agreements (IIAs) in force, with 107 bilateral investment treaties (BITs) and 19 trade agreements with investment chapters, so there is potential for investment treaty arbitration to also play a significant role in BRI disputes. However, many of these first- and second-generation Chinese treaties tend to include only low levels of investment protection and provide limited access to investment arbitration for dispute settlement. This raises questions about the relevance and prevalence of investment treaty arbitration in BRI disputes (at least, in the near-term).

How will the BRI impact the investment arbitration and international investment regime? Will BRI awards be enforceable? Are the disputes that may arise out of BRI investment projects circumscribed to the domestic jurisdiction of the State where the projects are being developed? Or, are those disputes circumscribed to special courts or adjudication systems in China?

EVENT PROGRAM

Wednesday, October 13
7:00pm - 8:30pm CST

Could those disputes still be submitted to investor-State arbitration? Will the BRI reshape international legal norms and standards? What exactly do law and lawyers all do for the BRI – and to what effect? How has their work and the field of law changed as the BRI has evolved over the past eight years? This panel will explore these questions, as well as other issues around managing the BRI's legal, regulatory, and political risks.

MODERATOR

- **Dr. Julien Chaisse** - City University of Hong Kong

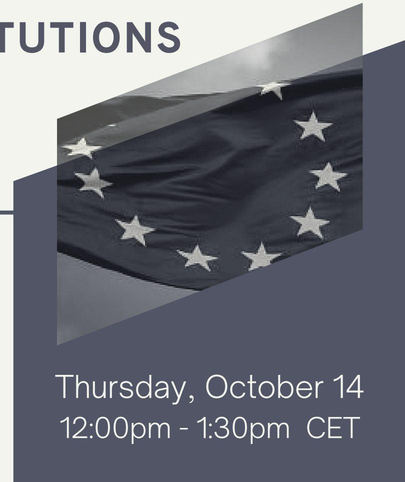
PRESENTER

- **Matteo Vaccaro-Incisa** - Carnelutti Law Firm

PANELISTS

- **Daniel Alef** - Claviger Law Group
- **Dr. Mariel Dimsey** - CMS Hong Kong
- **Jeanne Huang** - University of Sydney
- **Helena H.C. Chen** - Pinsent Masons Beijing

TENSION BETWEEN INTERNATIONAL INVESTMENT LAW AND EUROPEAN LAW: ARE EU INSTITUTIONS CONTRIBUTING TO OR DISRUPTING THE INTERNATIONAL RULE OF LAW



Thursday, October 14
12:00pm - 1:30pm CET

The relationship between European Union (EU) law and international arbitration was drastically altered by the decision of the Court of Justice of the European Union (CJEU) in Slovak Republic v Achmea B, and is being furthered affected by the recent preliminary ruling of the CJEU Moldova v. Komstroy LLC In Achmea, the Slovak Republic sought to set aside an investment treaty arbitration award rendered under the Slovak-Netherlands BIT that was favourable to the foreign investor. In the landmark decision, the CJEU ruled that the arbitration clause contained in the intra-EU BIT—which stipulated proceedings under the UNCITRAL Rules of Arbitration— was incompatible with EU law (a vision the CJEU shares with the European Commission). The decision has snowballed a movement led by various EU Member States to terminate intra-EU BITs.

In Achmea, the CJEU reasoned that ISDS clauses are incompatible with the principle of the autonomy of EU law.1 On 2 September 2021 the CJEU reenergized the debate with its ruling in Komstroy by deciding that the ECT's investor-state arbitration clause does not cover intra-EU investment disputes.

There is no clear-cut answer to the effects of Achmea over multilateral treaties. In Masdar v Spain, an ICSID case where the claimant invoked the ECT, considering that Achmea dealt with a BIT, the tribunal dismissed the relevance of such case for intra-EU ECT arbitration. In Antin v Spain, the tribunal rejected Spain's intra-EU jurisdictional objection on the basis that developments in EU law cannot undermine prior consent to arbitration offered through investment treaties. The Antin award was upheld by the ICSID ad hoc annulment committee which ruled that (i) there was no manifest excess of powers by the tribunal as a large number of previous arbitration cases had reached a similar conclusion, and (ii) certain post-award developments relied upon by Spain to seek annulment, such as Achmea, could not be considered. The saga of the tension between international investment law and the European Union continued when European Commission announced that it was launching an investigation to assess whether payment by Spain of the Antin award would amount to unlawful state aid under EU law.

EVENT PROGRAM

Thursday, October 14
12:00pm - 1:30pm CET

In Landesbank Baden-Württemberg v Spain, another case under the ECT, the tribunal found that even if EU law were to prohibit Spain from making an offer of arbitration under Article 26 of the ECT, the tribunal must still give priority to the ECT as it does not operate under EU law but under international law and the ECT. Similarly, in Vattenfall v. Germany, rejecting a broad interpretation of Achmea, the tribunal concluded that it had jurisdiction as the arbitration clause "includes EU Member States and non-EU Member States without distinction"2 as there is no provision in the ECT that carves out intra-EU application of the treaty.

On the one hand, international arbitration awards under the auspices of ICSID and the ECT involving intra-EU parties have relied on public international law, the treaty commitments made by disputing States, and the VCLT to interpret those treaties. On the other hand, the European Commission and EU institutions, including some of the 14 advocate generals of the CJEU, have contended that intra-EU investment treaties (including the ECT) are incompatible with EU law, evoking a supra-international flair when EU law is involved.

The atmospheric perception hints at a continuation of this tension between international investment law and EU law, unless current treaties in force are interpreted in good faith and observed.

This panel will address the tension between international investment law and EU law, and will consider several issues, including: Whether, consistent with international law, European States may rely on EU law not to comply with investment arbitration awards? Whether European institutions are constructively disrupting international investment law or simply putting in jeopardy the international rule of law? Whether foreign intra-EU investors have alternative means, such as choosing a seat of arbitration outside of the EU or other means, to ensure compliance with favourable awards to investors? And whether other States and regions in the world may be inclined to sustain that their domestic or regional law has a similar supra-international flair?

MODERATOR

- **Gaela Gehring Flores** - Allen & Overy LLP

PRESENTER

- **Dr. Angelos Dimopoulos** - Queen Mary University

PANELISTS

- **Ignacio Madalena** - White & Case
- **James E. Berger** - DLA Piper
- **Christopher Weil** - Mintz Group
- **Sarah Vasani** - CMS

CRISIS AT THE WTO - CAN THE DISPUTE SETTLEMENT MECHANISM BE SAVED? THE PROPOSED MULTI-PARTY INTERIM APPEAL ARBITRATION ARRANGEMENT MAY BE THE LIFE PRESERVER

Thursday, October 14
3:00pm - 4:30pm CET

Since the inception of its dispute settlement mechanism, the jewel of the crown of the World Trade Organization ("WTO") has been celebrated as a role model for the peaceful resolution of disputes in all areas of international political and economic relations. This mechanism allows Members to solve all disputes concerning WTO covered agreements via consultation and ad hoc panel adjudication. As conceived, panel reports can be reviewed, on appeal, by the WTO Appellate Body ("AB"), a standing institution composed of seven qualified experts.

The AB is undergoing an unparalleled crisis, exacerbating the tendency of adopting unilateral actions which could, potentially, set off world-wide trade wars. For years, some WTO Members, including the United States, have voiced systemic concerns regarding, among others, the AB's functioning. Amid escalating tensions, mainly triggered by China's accession conditions to the WTO, the position of the US has become radicalized. From 2016 onwards, the US has blocked the appointment of AB's members, leading to the complete stoppage of the dispute resolution in 2019.

WTO panel reports cannot be adopted by the Dispute Settlement Body if appealed. Thus, in practice, a defeated Member may forestall the adoption of—and thus compliance with—any panel report by appealing and thus thrusting it into the procedural void. WTO Members may decide to waive their right to appeal, thereby securing the adoption of the panel report to be rendered. This alternative might not be broadly embraced by the Membership, particularly by Members who attach a significant importance to the right to appeal.

Without a permanent solution in sight, arbitration might be the dispute settlement mechanism's savior. Article 25 of the Understanding on rules and procedures governing the settlement of disputes ("DSU") permits WTO arbitration as an alternative means of dispute settlement. On 30 April 2020, and under the purview of Article 25, 16 WTO Members notified their intention to resort to arbitration as an interim appeal procedure—as long as the AB remains inoperative—for all future disputes between the parties thereto, creating the multi-party interim appeal arbitration arrangement ("MPIA"). The MPIA will essentially follow both the substantive and procedural rules governing the AB and all rendered MPIA arbitration awards will be subject to the relevant DSU rules.

EVENT PROGRAM

Thursday, October 14
3:00pm - 4:30pm CET

This panel will discuss whether the newly established MPIA will inherit the critiques formulated by the Membership against the AB or whether, to the contrary, the MPIA will start operating with a clean slate. The panelists will also discuss how the MPIA could better address the longstanding critiques against the AB, such as the delays in appeal proceedings and the use of precedent as binding, absent cogent reasons, and what if anything, is there to adopt or learn by the MPIA from international arbitration. All of this, bearing in mind the convoluted political context underlying the creation of the MPIA.

MODERATOR

- **Niall Meagher** - Advisory Center on WTO Law

PRESENTER

- **Sara Lucia Dangon** - Ministry of Trade, Colombia

PANELISTS

- **Dr. Arthur E. Appleton** - Appleton Luff
- **Iain Sandford** - Sidley Austin
- **Dr. Mohammad Saeed** - International Trade Centre
- **Olga Starshinova** - National Research University Higher School of Economics

ASSESSING DAMAGES IN NON-EXPROPRIATORY BREACHES

Thursday, October 14
6:00pm - 7:30pm CET

While most bilateral investment treaties (BITs) include an explicit provision on how compensation for expropriation should be computed, they are silent on how to assess damages to an investor caused by other treaty breaches, such as breaches of Fair and Equitable Treatment (FET), Full Protection and Security (FPS), National Treatment (NT), and Most Favored-Nation Treatment (MFN). The methods and principles generally applied to measure compensation for expropriation—i.e., methods to assess the fair market value of an expropriated investment immediately before the date when the expropriation took place or was known—may or may not be applicable to the other treaty violations.

This problem is exacerbated when the investor makes a claim of indirect expropriation (substantial deprivation of value)—instead of claiming an outright and direct expropriation—as well as other treaty breaches (for instance related to FET, FPS, NT or MFN). In those cases, relying on damages expert opinions that assess the damages of those non-expropriatory breaches, arbitral tribunals will, in usual fashion, vet the methods used and applied to the particular case.

This panel will address the assessment of damages for non-expropriatory breaches. In those cases, tribunals widely accept that the “full reparation” standard as indicated by the PCIJ in Chorzow (i.e., that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed) is the applicable standard to assess damages. Conceptually, the principle is simple, powerful and makes economic sense. From a practical standpoint, however, query as to whether it is really straightforward.

Similar to “lost profits” claims in breach of contract cases, damages for non-expropriatory breaches are often computed by comparing the financial situation in which the investor would have been absent the State measures (the “but for” scenario) and the financial situation of the investor under the State measures (the “actual scenario”). Given that these types of claims result from past measures (often many years prior to the arbitration), damages experts typically compute the so called “historical damages” (from the date of each measure to the date of the assessment) and ”forward looking damages” (from the current date onwards).

EVENT PROGRAM

Thursday, October 14
6:00pm - 7:30pm CET

Considering the latest cases involving claims for damages for non-expropriatory treaty violations, this panel will discuss the following issues:

- Establishing a reliable “but for” scenario: causation and foreseeability. Does the but for scenario properly remove the impact of the measures?
- Is the observed historical performance enough to establish the actual scenario? And what is the relevance of the principle of mitigation?
- What is the required degree of certainty for historical damages? How certain can past damages be? Is there a need to discount historical damages to the beginning of the measures, or to otherwise reduce them?
- How to calculate the time value of money and pre-Award interest when losses are assessed as of the date of the Award?
- Forward-looking damages: Are these legally permissible for non-expropriatory breaches? How to assess the reduction in the fair market value as a measure of future damages? And whether certain contingent payments and other ad-hoc compensation schemes could be used to make those assessments?

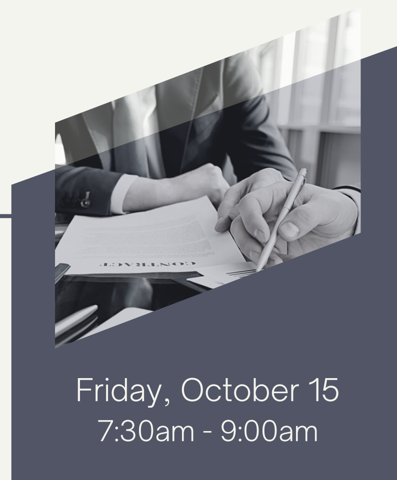
MODERATOR

- **Miguel A. Nakhle** - Compass Lexecon

PANELISTS

- **Julie M. Carey** - NERA Economic Consultig
- **Craig S. Miles** - King & Spalding
- **Cristina Ferraro** - Miranda & Amado
- **Isabel Kunsman** - AlixPartners

INCORPORATING OBLIGATIONS OF INVESTORS IN BITS



Friday, October 15
7:30am - 9:00am

With a limited number of exceptions, generally and by design, investment treaties do not contain obligations for investors. Achieving a balanced international investment order, however, may require more than the obligations of host States to respect international investment standards of protection such as fair and equitable treatment, full protection and security, national treatment, most-favored-nation treatment, and compensation in case of expropriation. It may require that investors observe certain general principles of law including good faith when they make their investments, as well as social corporate responsibility standards, which may include respecting minimum international labor and environmental obligations, and fundamental human rights in the host State.

Advocates against incorporation of obligations of investors in treaties sustain that those types of obligations already exist under domestic law of the host State and therefore, there is no need to include them in investment treaties. However, can a balanced international investment order exist if only one part of the equation, the investor, can identify international obligations owed by the other party, and only one party can submit treaty claims before international tribunals? If investment treaties were to incorporate treaty obligations for investors, the content of the international standards on social corporate responsibility, labor and the environment becomes central.

In addition to the foregoing, there is a central question of form and substance: How to create an architecture within an investment treaty—notably only entered between sovereign States or primary subjects of international law—that would still obligate the foreign investor under international law?

Friday, October 15
7:30am - 9:00am

This Panel will discuss the pros and cons of supplementing the ISDS system with treaties that in addition to the obligations of States to respect international standards of protection of foreign investors and their investments, will include social corporate responsibility obligations on foreign investors related to minimum international labor and environmental standards. It will discuss the content of those standards, and address whether rethinking investment treaties may contribute to greater observance and enforcement of those obligations. The panel will also discuss how to build a treaty architecture that could result in international obligations for foreign investors even though they are technically parties to investment treaties.

MODERATOR

- **Prof. Chester Brown** - University of Sydney

PANELISTS

- **Klara Polackova Van der Ploeg** - University of Nottingham
- **Robert Houston** - K&L Gates Straits Law LLC
- **Andrea Shemberg** - Global Business Initiative on Human Rights & Sila Advisory
- **Jose Antonio Rivas** - Xtrategy LLP

DUAL NATIONALITY, AND DOMINANT EFFECTIVE NATIONALITY IN INVESTMENT ARBITRATION

Friday, October 15
10:30am - 12:00pm

Given that a dispute between parties of the same nationality is not “international,” one of the cardinal rules in investment arbitration is that a domestic investor cannot sue her own home State. In many cases, this rule is easy to apply, as most natural persons only have one nationality — and therefore are either “foreign” or “not foreign.” However, the analysis can be trickier in the context of a dual national.

In recent years, there have been several seminal investment arbitrations involving dual nationals. This panel will discuss how the issue has been treated in ICSID and UNCITRAL arbitrations; the origin, meaning, and relevance of the “dominant and effective nationality” standard; and the various practical considerations that may come into play when an investment tribunal evaluates a claim by a dual national.

MODERATOR

- **Mallory B. Silberman** - Arnold & Porter

PRESENTER

- **Maria Lucia Casas** - Xtrategy LLP

PANELISTS

- **Maria I. Pradilla Picas** - Jones Day
- **Baiju Vasani** - Ivanyan & Partners
- **Maria Eugenia Salazar** - Baker McKenzie

ARBITRATION BOUTIQUES AND SOLO PRACTITIONERS – CAN THEY COMPETE AND PROVIDE WORLD CLASS SERVICE IN INTERNATIONAL INVESTMENT AND COMMERCIAL ARBITRATION?

Friday, October 15
1:30pm - 3:00pm

Creating an international law and arbitration boutique from scratch or deciding to launch a solo practice is a vital professional decision. Even when it is backed up by several years of experience in big law or robust legal departments of State agencies or international organizations, a successful personal track record representing sovereign or private clients in international investment or commercial disputes, and a trustworthy network of contacts, that intimate entrepreneurial decision entails risks for the startup and its founders. Initially, there are questions on the ability to launch a specialized practice and survive, followed by whether the boutique will be able to create a sustainable business model consistent with the ethos of the practice and the objectives that were initially set out.

The inaccurate perception that only sophisticated big law is capable to serve as counsel in investment and international commercial arbitrations is often passed to the public in general, and associates, students, and clients in the field of international arbitration. By the turn of this century there may have been, at best, a handful of law schools teaching international arbitration, and perhaps even less teaching investment treaty arbitration. At the time, the news headlines were related to WTO cases and anti-globalization opposition, and the main courses in law schools related to dispute settlement in international economic law were on WTO and international trade law. The last 20 years have seen an explosion of investor-State arbitration, a significant growth of international commercial arbitration involving parties from all the continents in the world, and an increased appetite from practitioners and students to learn and practice international arbitration. The current awareness about international arbitration—which goes beyond the main arbitration centers of Western Europe and North America—has led to greater competition, assessing the means in which law practitioners could create cost-effective practices that would be equally or better positioned than traditional big law firms.

EVENT PROGRAM

Friday, October 15
1:30pm - 3:00pm

Our WAU panel on arbitration boutiques and solo practitioners will explore how some of those practices started, the difficulties that they experience and the competitive advantages that they offer. Name recognition,track record as a new practice, 360-degree inhouse support may be a few of the challenges to overcome. On the other hand, provided that a winning strategy and world class services are provided as counsel, the lack of overheads and chances of conflicts, the freedom to create in a less bureaucratic environment, and the ability to provide direct customized services to the client with cost-effective arrangements may be highly attractive pluses of arbitration boutiques.

But how can solo practitioners and boutique law firms in an environment where magic circle Big Law have an intra-world of multi-jurisdictional legal experts and practitioners, in some cases attorneys with expertise on enforcement in some cases, lobbyists, and outside damages experts with whom they work regularly? Is it possible for arbitration boutiques and solo practitioners to compete? Can the arbitration boutique's or solo practitioner's network of collaborations with specialized service providers—including lawyers in different jurisdictions from Big Law or other firms, as well as damages experts, asset tracers, and strategic communication specialists—be superior in quality and cost than all-services law firms?

In addition to the foregoing, the panelists will provide their perspective on development and growth of the law practice in an evolving environment both in international commercial arbitration and investment arbitration given the context of reform in Group III of UNCITRAL and the amendments to the ICSID Rules of Arbitration.

MODERATOR

- **José Antonio Rivas** - Founder, Xtrategy LLP

PANELISTS

- **Eduardo Zuleta** - Zuleta Abogados
- **David A. Pawlak** - David A. Pawlak LLC
- **Ana Stanic** - E&A Law
- **Diogo Pereira** - De Almeida Pereira Lawyers