Brochure Subject to Updates

2021 WAW

WASHINGTON ARBITRATION WEEK

WAW 2021

NOVEMBER 29 - DECEMBER 3

2ND EDITION

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 second edition of WAW is being held in a hybrid format, with in-person and virtual sessions alternating during a five-day period from November 29th to December 3rd, 2021. As set out in its brochure, this edition of WAW consists of 16 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 2021 will be a showcase of international arbitration in Washington, D.C. 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,

José Antonio Rivas
Xtrategy LLP
Co-Chair of WAW

Ian A. Laird
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EVENT PROGRAM

Monday, November 29

9:00am - 9:30am	Conference Opening Speech
9:30am - 11:00am	Washington, DC As A Place Of Arbitration
12:00pm - 1:30pm	How To Run A Seamless, Efficient And Innovative International Arbitration: The Essential Role Of Paralegals In International Arbitration
4:00pm - 5:30pm	Evidence in International Arbitration: The Latest Developments.

Tuesday, November 30

9:00am - 10:30am	COVID Impact on Infrastructure Projects and International Disputes: Update
12:00pm - 1:30pm	Concrete ISDS Reform Options: Investor-State Adjudication: A Court or an Appeals Mechanism?
3:00pm - 4:30pm	Pairs of Mentor-Mentee - Affecting the Pipeline and Paving the Way

Wednesday, December 1

9:30am - 11:00am	Investment Treaty Arbitration in the Digital Era: Using BITs to protect Cryptocurrency Investments?

EVENT PROGRAM

Wednesday, December 1

12:00pm - 1:30pm	Ethics and International Arbitration: Is it Time for an International Code of Ethics?
4:00pm - 5:30pm	Role of the 1982 World Bank Guidelines on the Treatment of Foreign Direct Investment in the Valuation of Going Concerns and Non-Going Concerns

Thursday, December 2

8:30am - 10:00am	Is the EU a Recalcitrant Entity? The Case of Domestic and Regional Judicial Decisions Non-Compliant with Investment Awards
11:30am - 1:00pm	What Can Corporate Social Responsibility and Human Rights Assessments Teach to International Arbitration?
1:30pm - 3:00pm	Land and Seabed Mining in International Commercial and Investment Arbitration
4:00pm - 5:00pm	Match Making: How to Find Your Third-Party Funder in International Commercial Arbitration? – TPF Across Industries, Types of Funders, Big and Small Claims, and Means to Fund Them

EVENT PROGRAM

Friday, December 3

9:00am - 10:30am	Foreign Investment Laws – A Renewed Basis for Consent to International Investment Arbitration? A Look at Recent Developments
12:00pm - 1:30pm	Washington, DC as a Leader in Educating Our Next Generation of Arbitration Practitioners
3:00pm - 4:30pm	High Political Risk in Investment Arbitration: The Case Study of Venezuela

EVENT PROGRAM
DAY 1

9:00am - 9:30am
Monday, November 29

Conference Opening Speech

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
DAY 1

9:30am - 11:00am
Monday, November 29

Washington, DC as a Place of Arbitration

Our panel will address the fundamental question – Why have my international arbitration in Washington, DC and not someplace else? Or more pointedly, our panel will address the question – does a physical seat still matter in the world of virtual arbitrations? Have we passed the line where virtual arbitration will become the norm?

These questions involve two different concepts: One is the seat of arbitration, crucially, as the place whose courts will naturally hear a claim for non-recognition or annulment of an international arbitration award under the New York Convention. The other concept is the physical place where hearings take place, which may but need not be at the seat of arbitration. The tribunal and the disputing parties may agree to hold hearings in any convenient physical or virtual space.

Washington D.C., home of the World Bank, Embassies, and a host of international organizations, Washington, DC has the ideal characteristics for organizing and holding international arbitrations. The highest quality arbitrators and counsel are located here, the facilities are second to none, and DC has easy transportation access to every region of the world. DC is both practical and convenient.

EVENT PROGRAM
DAY 1

9:30am - 11:00am
Monday, November 29

Washington, DC as a Place of Arbitration

But the place of arbitration consideration does not stop there. Our panel will also address the question of enforcement of arbitral awards in DC – how does the jurisprudence for recognition and enforcement differ, from say New York, or even London and Paris? Are there any advantages or disadvantages provided by the DC courts?

Moderator:

- **Chip Rosenberg** - King & Spalding LLP

Panelists:

- **Alex Kaplan** - International Centre for Settlement of Investment Disputes
- **Julia Sullivan - Independent Arbitrator**
- **Nicolle Kownacki** - White & Case
- **Jen Cherner** - Mintz Group

EVENT PROGRAM
DAY 1

12:00pm - 1:30pm
Monday, November 29

How to Run a Seamless, Efficient and Innovative International Arbitration: The Essential Role of Arbitration Specialists, Paralegals and Legal Assistants in International Arbitration (Hybrid Event)

International Arbitration Paralegals and Legal Assistants—as well as International Arbitration Specialists and Arbitration Case Managers—are the lynchpin to running a seamless arbitration from inception to conclusion. As a written production or hearing mise-en-scène, they make sure that every single detail is in place at all stages of the procedure from binders to footnotes, from annexes and exhibits to graphics and maps, from slides to the “hot seat”, in coordination with counsel.

As the COVID-19 pandemic noticeably halted in-person hearings, innovative paralegals and legal assistants have been at the forefront of operating the technologies best suited to move hearings to the virtual world and developing the best practices for doing so. Currently, as the world slowly begins to transition into a post-COVID-19 environment, relying on hybrid models with the use of video technology and in-person meetings, the role of the arbitration paralegals and legal assistants appears to be even more critical considering lessons learned during the pandemic and what will be maintained after the transition and a return to normalcy.

EVENT PROGRAM
DAY 1

12:00pm - 1:30pm
Monday, November 29

How to Run a Seamless, Efficient and Innovative International Arbitration: The Essential Role of Arbitration Specialists, Paralegals and Legal Assistants in International Arbitration

Our panel will discuss a number of the key functions of a paralegal and the essential roles they play in making any arbitration run efficiently, including on preparation of filings, organizing and managing document production, setting up and coordinating all the logistical and IT aspects of the hearing, as well as anticipating or trouble shooting any incidental hurdle presented along the way.

Moderator:

- **Ashley Riveira** - Crowell & Moring LLP

Panelists:

- **Staci Gellman** - Crowell & Moring LLP
- **Kelby Ballena** - Allen & Overy LLP
- **Christine Falcicchio** – Sopra Legal

EVENT PROGRAM
DAY 1

4:00pm - 5:30pm
Monday, November 29

Evidence in International Arbitration: The Latest Developments.

In a diverse environment of legal cultures and practice, ranging from the discovery intensive experience of US practitioners to the more document focused productions of the civil law systems, international arbitration bridges these differences and continues to advance and evolve. The latest evolution of the IBA Rules on the Taking of Evidence in International Arbitration was published in late 2020 and reinforces the evolving practices in international arbitration. At the same time the introduction of the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration offered an alternative proposal to deal with evidentiary matters.

This panel will highlight these new developments, as well as providing an introduction to new practitioners to better understand the differences between US-style discovery and international arbitration practices. The panel will also address some of the practical aspects of the management of the evidence gathering process in both commercial and investment arbitrations. The essential role of witness and expert evidence, including that provided by damages experts, will offer a focus for this part of the discussion.

EVENT PROGRAM
DAY 1

4:00pm - 5:30pm
Monday, November 29

Evidence in International Arbitration: The Latest Developments.

The 2020 IBA Rules have touched upon critical issues that have emerged in recent years such as cybersecurity and data protection and remote hearings, the latter of which has become particularly significant in light of Covid. Article 9(3) of the IBA Rules provides that a tribunal "may" exclude evidence obtained illegally. The scope of this clause is subject to debate and will be explored in the panel.

Moderator:

- **Dr. Kabir Duggal -** Columbia University

Panelists

- **Gaela Gehring Flores -** Allen & Overy
- **Lucinda Low** - Steptoe & Johnson LLP
- **Isabel Kunsman -** AlixPartners
- **Robert Davidson** - JAMS

EVENT PROGRAM
DAY 2

9:00am - 10:30am
Tuesday, November 30

COVID Impact on Infrastructure Projects and International Disputes: Update

When COVID struck in March 2020, the international arbitration community expected a potential growth of disputes. With the pandemic continuing to linger on all over the world, our panel will address the questions: where is the "wave" of anticipated disputes 21 months from the start of the pandemic? What types of claims have been arising with respect to major projects? Have dispute reduction efforts been effective? What role has force majeure actually played in COVID-related disputes? Has the state of necessity as a circumstance precluding wrongfulness been invoked and if so, how effectively? The panel will examine some of the serious challenges in separating the causal strands of delays and cost overruns as between COVID impacts and non-COVID impacts and events.

Moderator:

- **Meagan Bachman -** Crowell & Moring

Panelists:

- **Don Harvey** - Secretariat
- **Philip L. Bruner -** JAMS
- **Elise Salerno** - Exponent

EVENT PROGRAM
DAY 2

12:00pm - 1:30pm
Tuesday, November 30

Concrete ISDS Reform Options: Investor-State Adjudication: A Court or an Appeals Mechanism?

The pace of ISDS reform continues to steadily move forward. Since 2007, new generations of ISDS provisions negotiated in International Investment Agreements have come to fruition, as well as efforts by the major institutions, such as ICSID and UNCITRAL, to reform their rules. After releasing its first Working Paper on proposals for amending the ICSID Rules in August 2018, reform efforts at ICSID have continued with the recent release of Working Paper #5 in June 2021. This newest working paper includes the proposal for amendment of the ICSID Rules featuring the updated rules and regulations for ICSID Convention and ICSID Additional Facility arbitration and conciliation, as well as new rules for fact-finding and mediation.

UNCITRAL Working Group III has also been busy since its 2017 broad mandate from the Commission to explore ISDS reform, as the Working Group is now in the phase of discussing “concrete reform options”, notably Multilateral and Appellate court mechanisms, with questions remaining with respect to articulation and compatibility with existing mechanisms. Pragmatically, the reform is going forward as the 40th session tabled a Work Plan and workable Roadmap extending to 2025. Other topics such as the April 2021 second version of the draft Code of Conduct are being addressed by ICSID and UNCITRAL.

EVENT PROGRAM
DAY 2

12:00pm - 1:30pm
Tuesday, November 30

Concrete ISDS Reform Options: Investor-State Adjudication: A Court or an Appeals Mechanism?

The panel will address:

- The viability of a Multilateral Investment Court (MIC)
- The compatibility of the appellate mechanism with existing ISDS mechanisms
- Version 2 of the Draft Code of Conduct discussed at the November 2021 UNCITRAL Session

Moderator:

- **Marinn Carlson** – Sidley Austin LLP

Panelists:

- **Margie-Lys Jaime** - Republic of Panama
- **Chiara Giorgetti -** University of Richmond School of Law
- **Anna Joubin-Bret -** UNCITRAL Representative ICSID panelist
- **Colin Brown** - Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, European Commission
- **Karin Kizer** - Attorney-Adviser in the Office of Private International Law in the Office of the Legal Adviser of the Department of State

EVENT PROGRAM
DAY 2

3:00pm - 4:30pm
Tuesday, November 30

Pairs of Mentor-Mentee - Affecting the Pipeline and Paving the Way (Hybrid Event)
Panel in Collaboration with ArbitralWomen.

Washington Arbitration Week (WAW) 2021, in collaboration with ArbitralWomen, this panel will hear from three pairs of practitioners - a senior and established leader who has worked closely with and paved the way for an up-and-coming rising star in the field. The panel will begin with a brief examination of the state of diversity in international arbitration, commenting upon diversity statistics of institutions, collection of data on diverse arbitrators, and inclusive and intersectional diversity initiatives encompassing gender, racial, age, and regional representation. The pairs of panelists will then be asked to share their personal experiences of affecting change in the pipeline of diverse representation in practice and paving the way for a new generation of practitioners. The established leaders will comment upon their experiences promoting and supporting excellent individuals of the younger generation, and the difficulties they encountered in doing so. The younger practitioners will comment upon the importance of the leaders' support and discuss the specific creation of opportunities in paving the way for career progression. The pairs will also discuss how they have dealt with diversity on arbitral panels, within their firm structures, and how clients have increasingly responded to calls for greater diversity.

Moderator:

- **Cherine Foty** - ArbitralWomen Board Member

Panelists:

- **Marney Cheek & Clovis Trevino -** Covington & Burling LLP
- **James Boykin & Shayda Vance -** Hughes, Hubbard & Reed
- **Rachael Kent & Danielle Morris -** Wilmer Hale

EVENT PROGRAM
DAY 3

9:30am - 11:00am
Wednesday, December 1

Investment Treaty Arbitration in the Digital Era: Using BITs to protect Cryptocurrency Investments?

WAW's panel on Investment Treaty Arbitration in the Digital Era: Using BITs to protect cryptocurrency investments will address today's economy becoming a digital economy and how it could impact BITs initially designed for physical investments. This panel will focus on the following issues:

- Could BITs apply to these new digital assets? Could cryptocurrencies be qualified as "covered investments" under BITs? Are they only digital currencies or investments?
- Is the ISDS system capable of tackling dispute for digital assets? And if so, how will crypto investments impact damages valuation?
- If a dispute ensues between the creator of the cryptocurrency and those who have purchased the assets, would it be limited to a private dispute? But what if the State has adopted a cryptocurrency as its official or alternative currency?
- What is the new political risk of such economy and what could be the responsibility of the State if foreign investors decide to use cryptocurrency for investment purposes?

EVENT PROGRAM
DAY 3

9:30am - 11:00am
Wednesday, December 1

Investment Treaty Arbitration in the Digital Era: Using BITs to protect Cryptocurrency Investments?

Moderator:

- **Cristen Bauer** - U.S. Department of Commerce; Georgetown University Law Center

Panelists:

- **David L. Attanasio** - Dechert LLP
- **Thomas W. Walsh** - Freshfields Bruckhaus Deringer LLP
- **Ana Fernanda Maiguashca** - Private Competitiveness Council; Former Member of the Board of the Central Bank in Colombia
- **Sophie Nappert** - 3VB
- **Santiago Rodríguez** - Uria Menendez

EVENT PROGRAM
DAY 3

12:00pm - 1:30pm
Wednesday, December 1

Ethics and International Arbitration: Is it Time for an International Code of Ethics?

While there is no international body regulating the conduct of arbitrators and counsel in international arbitration, ethical conduct is of paramount importance for the continued confidence and legitimacy of the arbitral process. Is it time for the formation of an international regulatory body and set of rules to apply in international arbitration, or is a soft law approach more appropriate?

Although practitioners will conduct themselves to the highest standards of their home bar, the panel will also address the current practical question as to what ethical rules and what body is to implement them for arbitrators, counsel and experts in international arbitration. In arbitrations under the ICC Rules, Article 14.3 provides for the ICC's Arbitration Court to "decide on the admissibility and, at the same time, if necessary, on the merits of a challenge" within 30 days within the notification of appointment or information receipt of the basis for the challenge. This rule most notably delineates the procedure and authority to decide on ethical challenges for arbitrators, with uncertainties surrounding counsel and experts remaining.

EVENT PROGRAM
DAY 3

12:00pm - 1:30pm
Wednesday, December 1

Ethics and International Arbitration: Is it Time for an International Code of Ethics?

The 2013 IBA Guidelines on Party Representation in International Arbitration are worth mentioning, with Guidelines 5 and 6 providing for counsel's lack of independence and the arbitral tribunal's consideration to exclude counsel from the proceedings. In view of the scarce doctrine and regulation, this Panel will also address developments concerning the appropriate standards (e.g., in Universal Compression) for challenges of counsel and experts (e.g., in Chevron v. Ecuador).

Moderator:

- **Ben Love -** Boies Schiller Flexner

Panelists:

- **Ignacio Torterola -** GST LLP
- **Daniel Muller -** FAR Avocats
- **Todd Weiler** - Independent International Arbitrator
- **Rose Rameau -** Rameau International Law

EVENT PROGRAM
DAY 3

4:00pm - 5:30pm
Wednesday, December 1

Role of the 1982 World Bank Guidelines on the Treatment of Foreign Direct Investment in the Valuation of Going Concerns and Non-Going Concerns

What is a “going concern”? And why is answering this question important to a valuation under a bilateral investment treaty? What method of valuation should be applied when an investment is or is not a going concern?

As investment treaties do not often prescribe the method of calculating compensation and determining the fair market value of an investment, arbitral tribunals frequently utilize the income approach by applying the discounted cash flow (DCF) methodology —as well as the market approach by relying on a comparable public company or a comparable transaction. DCF calculations entail determining the anticipated cash flows that an investment would have produced but-for the State’s breaches, at a discount rate reflecting the project’s future risks and costs of capital. Such methodology, according to the 1982 World Bank Guidelines on the Treatment of Foreign Direct Investment (“Guidelines”), is applicable for “a going concern with a proven record of profitability”.

Where the entity in which the Claimant invested is not a “going concern” as of the valuation date, some tribunals have determined the market value of the investment that was affected by applying notions provided the Guidelines, including the liquidation value when there is lack of profitability, and the replacement or book value for other assets.

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DAY 3

4:00pm - 5:30pm
Wednesday, December 1

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EVENT PROGRAM
DAY 3

4:00pm - 5:30pm
Wednesday, December 1

Role of the 1982 World Bank Guidelines on the Treatment of Foreign Direct Investment in the Valuation of Going Concerns and Non-Going Concerns

As almost four decades have passed since the Guidelines were published, some tribunals that have analyzed investments that were not a going concern have considered alternative methodologies to those in the Guidelines, in order to determine their market value.

As practice may have seen how well these Guidelines approaching their 40th birthday work, this panel will consider common practices and challenges posed in the calculation of damages, and potential or recommended updates to the Guidelines.

Moderator:

- **George Ruttinger** - Crowell & Moring

Panelists:

- **Jose Alberro** - Cornerstone Research
- **Manuel Abdala** - Compass Lexecon
- **Stu Dekker** - Secretariat
- **Leonardo Giacchino** - Solutions Economics

EVENT PROGRAM
DAY 4

8:30am - 10:00am
Thursday, December 2

Is the EU a Recalcitrant Entity? The Case of Domestic and Regional Judicial Decisions Non-Compliant with Investment Awards

As put forth by the late Professor Emmanuel Gaillard “the ICSID founders’ prognosis that compliance with investment awards would be a non-issue—framed, as it was, in such sweeping terms—has not held true”. A comparative and retrospective outlook in investment arbitration demonstrates that enforcement challenges existed long before the Achmea, Komstroy and Micula sagas.

Non-compliance arose with the Argentinian crisis and Venezuelan cases, and most particularly with Ecuador’s judicial decision of its Constitutional Court. Ecuador’s highest judiciary organ issued from 2010-2014 17 decisions declaring ISDS provisions contrary to Art. 244 of the Constitution, and BITs to be terminated. Nowadays, an analogous resistance to ISDS appears on the other side of the Atlantic.

The preliminary rulings of the European Union Court of Justice (ECJ) include the most recent PL Holdings, which expands the holding of Achmea by excluding ad-hoc arbitration agreements, and Komstroy, which excludes intra-EU investment disputes under the Energy Charter Treaty (ECT) from investor-State arbitration and proclaims the ECJ as the highest interpretative authority of the ECT, although such treaty does not provide any supporting language.

EVENT PROGRAM
DAY 4

8:30am - 10:00am
Thursday, December 2

Is the EU a Recalcitrant Entity? The Case of Domestic and Regional Judicial Decisions Non-Compliant with Investment Awards

Might the European Union be considered a recalcitrant entity failing to respect the international rule of law?

What are investors left with in the face of refusals to comply with i-S arbitration awards in Europe, given their interest to enforce them? In Commisa v Mexico, the Mexican Supreme Court vacated the arbitral award. Contrary to such decision of the court of the seat, the U.S. Court of Appeal reaffirmed its willingness to enforce an award in circumstances where the court judgment setting aside the award offends US public policy, such as the set-aside Mexican judgment being based on a retroactive law.

By contrast, in Thai-Lao Lignite, the Court of Appeal affirmed the District Court's decision to vacate its earlier judgment noting that the "Malaysian judgment annulling the Award 'did not leave Petitioners...without a remedy' and acknowledged that the dispute would be re-arbitrated before a different panel of arbitrators".

EVENT PROGRAM
DAY 4

8:30am - 10:00am
Thursday, December 2

Is the EU a Recalcitrant Entity? The Case of Domestic and Regional Judicial Decisions Non-Compliant with Investment Awards

When award holders attempt to enforce favorable intra-EU investment awards in the U.S., how will the U.S. courts analyse the issue? Relying on Commisa or on Thai-Lao?

Moderator:

- **Gene Burd** - Fisher Broyles

Panelists:

- **Guido Carducci** - Independent Arbitrator and Law Professor
- **Alvaro Galindo** - Carmigniani Pérez Abogados
- **Jose Antonio Rivas** - Xtrategy LLP
- **Prof. Dr. Nikos Lavranos** - Secretary General of EFILA

EVENT PROGRAM
DAY 4

11:00am - 12:30am
Thursday, December 2

What Can Corporate Social Responsibility and Human Rights Assessments Teach to International Arbitration?

The ways in which corporations may be held liable for human rights violations and how this topic should be regulated remains a spirited debate. As reflected in the UN Guiding Principles on Business and Human Rights, States still hold the primary responsibility to protect human rights, while business enterprises should avoid infringing human rights and should address adverse human rights impacts with which they are involved. Although many transnational corporations have adopted Corporate Social Responsibility (CSR) policies, these might have been inspired by corporate reputational concerns, leaving certain human rights unprotected by those policies. One question is whether human rights assessments may be more thorough and protective than CSR assessments performed by companies in the host State, and thus more convenient.

In any event, to tackle their concern for the protection of minimum labor, environmental and human rights standards, some States have introduced CSR clauses into trade and investment agreements, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Canada–Colombia FTA, the EU-Vietnam FTA, and the Regional Trade Agreement entered into between the European Union, the United Kingdom, and the Southern Common Market (MERCOSUR).

EVENT PROGRAM
DAY 4

11:30am - 1:00pm
Thursday, December 2

What Can Corporate Social Responsibility and Human Rights Assessments Teach to International Arbitration?

Exceptionally, the 2016 Nigeria–Morocco BIT added several provisions related to human rights protection, labor, environment, and corruption while maintaining CSR standards. Several of those provisions are hard law. In parallel, other States have adopted national laws towards the full realization of their human rights obligations. In that regard, Article 5 of the Chinese Company act requires enterprises to "undertake social responsibility", whilst France's 2017 duty of vigilance law mandates large French companies to prevent severe human rights violations and environmental damage.

This panel will address several related issues:

- Whether international arbitration has something to learn from due diligence CSR assessments, human rights assessments and the underlying instruments that may make those assessments obligatory?
- What are the qualitative differences between CSR and human rights assessments? Should either be favored and why?
- Could failure to comply with CSR and human rights assessments contained in domestic law raise an issue of legality of the investment for future arbitral tribunals?

Are obligatory CSR and human rights assessment desirable to promote foreign direct investment in the host State?

EVENT PROGRAM
DAY 4

11:30am - 1:00pm
Thursday, December 2

What Can Corporate Social Responsibility and Human Rights Assessments Teach to International Arbitration?

- While reports on this topic have concluded that CSR requirements have a positive effect on attracting investment, would human rights assessments have a same effect?
- Should States and treaty negotiators aiming to attract investments reject requesting that due diligence CSR and human rights assessments be performed by companies and foreign investors?

Moderator:

- **Jose Antonio Rivas** - Xtrategy LLP

Panelists:

- **Motoko Aizawa** - Observatory for Sustainable Infrastructure
- **Rafael Benke** - Proactiva
- **Douglass Cassel** - King & Spalding
- **Ursula Kriebaum** - University of Vienna

EVENT PROGRAM
DAY 4

1:30pm - 3:00pm
Thursday, December 2

Land and Seabed Mining in International Commercial and Investment Arbitration

As noted by UNCTAD's 2020 World Investment Report "[m]ining is the most international industry, as more than half of all projects are sponsored by foreign companies". The capital-intensive mining sector equally comports a cluster of risks, from political risk to social and environmental concerns, prompting miners and host States to resort to international arbitration as a regular means of dispute resolution. International arbitration in mining disputes has seen an exponential growth, as 29% of new ICSID cases predominantly involved the oil, gas and mining industry, and 14% are related to electric power and other energy sources. The mining sector spans into the above-mentioned renewable energy sector, as its infrastructure (i.e., solar panels) requires mineral extraction.

Mining disputes have also been subject to a number of recent setbacks, with States limiting the arbitrability scope of mining disputes, such as the 2018 Tanzanian Public-Private Partnership (Amendment) Act enacted in 2018 prohibiting international arbitration with respect to PPP agreements, particularly those projects relating to natural resources or South Africa's Protection of Investment Act of 2015.

EVENT PROGRAM
DAY 4

1:30pm - 3:00pm
Thursday, December 2

Land and Seabed Mining in International Commercial and Investment Arbitration

Whilst most mining projects are land-based, new sources of metal supplies are being explored due to the decline of land-based deposits. With new developments in the horizon, this panel will explore:

- The predominance of the mining sector in international arbitration and landmark disputes involving human rights, and environment and community implications
- The challenges posed to adjudicating mining disputes in view of resource protective legislations
- The recent trends pertaining to sea-based mining, including the discovery of oceanic hydrocarbons in the Exclusive Economic Zone and potential commercialization of minerals in the Deep Seabed under the jurisdiction of the International Seabed Authority (ISA).

Moderator:

- **Munia El Harti Alonso** - Xtrategy LLP

Panelists:

- **Jonathan Drimmer -** Paul Hasting
- **Antolín Fernández Antuña** - Antuña & Partners
- **Tim Hart** - Credibility
- **Patricia Cruz Trabanino** - Jenner & Block

EVENT PROGRAM
DAY 4

4:00pm - 5:00pm
Thursday, December 2

Match Making: How to Find Your Third-Party Funder in International Commercial Arbitration? – TPF Across Industries, Types of Funders, Big and Small Claims, and Means to Fund Them

This WAW panel will explore how third-party funding (TPF) has developed and has been growing in international commercial arbitration, the factors that are contributing to its development, and the status and use of TPF, especially by the Washington DC and its related arbitration community. Funding may come in as many sizes and forms as a creative financial and legal mind can think of. Some funders may promote themselves as funding claims that require lawyers' fees and arbitration costs above USD 5 or 7 million, while others may focus on claims below USD 2 million. Some funders may fund cases in particular industries, i.e., financial services, mining, energy, real estate, and others may explicitly stay away from certain areas, e.g. patents. This panel will provide an outlook of the vast waters of TPF, including who can fund, e.g., institutional funders, hedge funds, and perhaps counsel themselves, how the process is run on a funder-by-funder basis, and how can clients and counsel explore such environment and find a funder that could be the right fit for them and their claims. The panelists, including counsel who have used TPF funding in the past, clients, and funders, will explain the TPF process to achieve funding in international commercial arbitration, and any common standard procedures that counsel may follow to maximize the possibility of receiving an offer of financing in an efficient manner and from the best possible funder that the market may provide.

EVENT PROGRAM
DAY 4

4:00pm - 5:00pm
Thursday, December 2

Match Making: How to Find Your Third-Party Funder in International Commercial Arbitration? – TPF Across Industries, Types of Funders, Big and Small Claims, and Means to Fund Them

The panel will address the following questions:
What factors have led to the growth of TPF in international commercial arbitration?

- What are the market expectations of funders in international commercial arbitration, including those cases with seat in Washington DC or led by DC based counsel?
- What types of funders are out there for client's and counsel needs? Their size, industry focus, approach to influencing the case, transparency issues, and disclosure.
- How to find the right match to fund a specific international commercial arbitration dispute?
- What information and documentation should a client and counsel present to the funder to run a smooth and efficient process leading to a decision to fund or not to fund?

Moderator:

- **Michael Kelley** - Parker Poe

Panelists:

- **Stewart H. Ackerly** - Statera Capital
- **William Marra** - Validity
- **Maria Lucia Casas** - Xtrategy LLP
- **Timothy J. Feighery** - Arent Fox

EVENT PROGRAM
DAY 5

9:00am - 10:30am
Friday, December 3

Foreign Investment Laws – A Renewed Basis for Consent to International Investment Arbitration? A Look at Recent Developments

Foreign Investment Law (FILs) are an alternative means for States to assume obligations over and above those assumed in treaties, through informal conduct, and transactions involving unilateral expressions of will. Article 38(1) of the Statute of the International Court of Justice enumerates the sources of international law: International conventions, international custom, and general principles of law (known as primary sources); and judicial decisions and teachings of the most highly qualified publicists as subsidiary sources. Whereas Article 38(1) is the paradigmatic reference to identify sources of international law, unilateral acts are not mentioned in such provision. Yet, since the 1974 *Nuclear Tests* and the 1986 *Frontier Dispute* cases, unilateral acts, which rely on the principle of good faith, have emerged as another source of international law and have been crystalized in the 2006 ILC *Guiding Principles applicable to Unilateral Declarations of States*.

Unilateral acts are a particular form of manifestation of the will of a State, apt to produce legal effects in the same way as any other conduct of a State. In international investment arbitration, Art. 25(1) of the ICSID Convention provides for "consent in writing to submit to the Centre", and thus opens the possibility for domestic law as an offer to submit disputes to ICSID arbitration.

EVENT PROGRAM
DAY 5

9:00am - 10:30am
Friday, December 3

Foreign Investment Laws – A Renewed Basis for Consent to International Investment Arbitration? A Look at Recent Developments

Notwithstanding this possibility, non-treaty and non-contract cases are still a rarity in the investment arbitration realm: Only 8% of cases registered under the ICSID Convention and Additional Facility Rules rely on the investment law of the Host State. Yet, the resort to investment laws to file investment disputes may be explored by investors, as was seen in the recent cases Andro-Adriatic v. Albania and Interocean v. Nigeria where the tribunals relied on the investment laws of the host States to determine whether they would uphold their jurisdiction to hear the claims.

This panel will discuss:

- The most recent developments regarding investment laws as bases for consent to international investment arbitration
- How the language of the relevant law may provide for ICSID arbitration
- Whether and under what conditions the Host State may withdraw its consent, given through a domestic law, to ICSID arbitration.

Moderator:

- **Lee Caplan** - Arent Fox

Panelists:

- **Jose Antonio Rivas** - Xtrategy LLP
- **Diana Tsutieva**- Foley Hoag
- **Jeremy Sharpe** - Independent Arbitrator
- **Ucheora Onwuamaegby** - Arent Fox

EVENT PROGRAM
DAY 5

12:00pm - 1:30pm
Friday, December 3

Washington, DC as a Leader in Educating Our Next Generation of Arbitration Practitioners

Is a JD enough to practice international arbitration? When looking at the stream of foreign attorneys attending DC's law schools to receive certificates and LLMs on US and international law topics, those who vote with their feet and check book have given a resounding "yes" to this question. A significant part of this phenomenon in Washington, DC's law schools relates to the fact that they are known as leading centers for the study of international law and arbitration. With the recent growth of LLM programs around the world, and here in DC, our panelists will critically address whether this is a positive development for the practice of international law and arbitration, and set out the advantages of our top law schools and programs. Currently, programs on international arbitration, courses, short courses, certificates, and workshops are being offered in almost every major city and continent in-person and virtually. The supply of those programs—both in international commercial and investor-State arbitration are a plus for the legal education and capacity building reflecting a general perception that international arbitration is an innovative form of dispute resolution. But regardless of how intellectually seductive and practically interesting international arbitration may be, is there sufficient demand for lawyers specializing in that field?

EVENT PROGRAM
DAY 5

12:00pm - 1:30pm
Friday, December 3

Washington, DC as a Leader in Educating Our Next Generation of Arbitration Practitioners

What advantages Washington, DC offers from a substantive and practical perspective that would be instrumental to train international arbitration practitioners and connect them with international arbitration firms, centers, and key stakeholders in international arbitration as potential options for work? Why not opting for a comparably reputable and more secluded academic experience away from international organizations, adjunct professors who teach what they practice as arbitrators, legal counsel at ICSID and other international organizations, counsel for private and sovereign clients, and think tanks?

As part of this discussion, our panel will also examine the benefits of advanced degrees in the practice of international arbitration and the key role that our programs play in building expertise, reinforcing the increasing international nature of commerce and cross-cultural awareness. This panel will be particularly useful for young attorney's looking to expand their experience and attend one of DC's leading law schools.

Moderator:

- **Dr. Borzu Sabahi** - Curtis

Panelists:

- **Anais Leray** - Xtrategy LLP
- **Anne Marie Whitesell** - Georgetown University.
- **Kiran Gore** – Law offices of Charles H. Camp, George Washington University
- **Bjorn Arp** - Washington College of Law

EVENT PROGRAM
DAY 5

3:00pm - 4:30pm
Friday, December 3

High Political Risk in Investment Arbitration: The Case Study of Venezuela

Although there has been much discussion over the past few years of statesitral withdrawing from ICSID, such as Venezuela and Ecuador, there continues to be an active interest (particularly in Latin America) in maintaining the international treaties with investment protections and related instruments (such as the ICSID Convention) in the region. Venezuela is a particularly instructive case study and provides continuing lessons for the development and reform of ISDS. Soon after the U.S. and over 50 other countries recognized Juan Guaidó as the legitimate Interim President of Venezuela in January 2019,clashes among investment arbitration counsel began to surface in investment arbitrations forcing arbitral tribunals to address Venezuela's representation as a question of international law. However, the pandemic and complex opposition unity have taken a political toll on the Guaidó administration and helped the Maduro regime regain space as the de facto government of Venezuela, raising the question of whether the country is moving towards a new geopolitical status. With the Venezuela external public debt hitting record numbers, a significant portion of BIT claims against Venezuela still remain before ICSID, ad hoc tribunals and foreign courts in annulment and enforcement proceedings.

EVENT PROGRAM
DAY 5

3:00pm - 4:30pm
Friday, December 3

High Political Risk in Investment Arbitration: The Case Study of Venezuela

The difficulties in arbitration go beyond the choice of forum as a significant number of ICSID and UNCITRAL claims favorable to foreign investors against Venezuela have not been enforced and may still be influenced by the parallel existing government. Our panel will provide an overview of recent developments in Venezuela and discuss what options are left for foreign investors facing such legal, political and financial hurdles, including arbitration, means to enforce favorable awards, the choice of means different to arbitration for investors, as well as financing options for foreign investors through third party funding, if at all available.

Moderator:

- **Eduardo Mathison** - Crowell & Moring

Panelists:

- **José Ignacio Hernández** - Former Special Attorney under Juan Guaidó Administration
- **Maria Isabel Pradilla** - Jones Day
- **Thomas Norgaard** - Managing Director and Director of Latin American Investment Development, Gramercy