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1ST EDITION

Friday, December 4th

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

The notion that investment arbitration and human rights should be treated separately as two different, self-contained systems is being challenged constantly by international instruments and international awards in various forums. While it is theoretically possible to dissociate international investment standards of treatment that States have to comply with from social corporate responsibility standards that enterprises should respect, multilateral instruments such as the OECD Guidelines for Multinational Enterprises and the 2020 Second UN Draft on Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises further emphasize that foreign investors should comply with human rights in host States, including with international minimum labor and environmental standards.

In parallel, investment arbitration tribunals have recognized the role of human rights in investment disputes. In *Urbaser v Argentina*, the tribunal upheld its own jurisdiction to consider whether a foreign investor had breached the human right to water. The *David Aven v Costa Rica* tribunal, citing the ICJ in *Barcelona Traction*, sustained that obligations related to the protection of the environment are *erga omnes*, and then explained that “there are no substantive reasons to exempt foreign investors of the scope of claims for breaching obligations . . . in the field of environmental law.”

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

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

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

Speakers

Naomi Briercliffe

Counsel at Allen & Overy in London. Naomi represents clients in international commercial and investor-state arbitrations, and has also advised on state-to-state disputes, including before the International Court of Justice and Iran-U.S. Claims Tribunal. Naomi has experience of institutional and ad hoc arbitration proceedings, including arbitrations under the ICC, LCIA, SCC, ICSID and UNCITRAL Rules. She has appeared as counsel and advocate in commercial, investor-state and state-to-state cases.



Douglas Cassel



Counsel at King & Spalding LLP in New York City. Douglass specializes in business and human rights, international human rights law, and international law. As scholar and practitioner, he publishes influential articles, teaches in leading law schools, counsels clients, conducts investigations and negotiations, and litigates before national and international courts. Among other activities, he advises attorneys on developments in the field of business and human rights, assists in human

Speakers

Christian Leathley

Partner at Herbert Smith Freehills in New York City. Christian is the Head of the Latin America Group, as well as the US Head of International Arbitration. He specializes in international commercial and investment arbitration. He acts for corporations and sovereign states across all major industry sectors, and in particular energy (oil & gas, power), technology, construction, engineering, mining, media and telecommunications. He has nearly 20 years' experience of working in all countries throughout Central and South America.



Mariana Reyes M.

Mariana Reyes is a Junior Associate of Xstrategy's Arbitration and International Law practice in Bogota. Before joining Xstrategy, she worked as an intern in the Colombian National Agency for the Defense of the State in the department of International Defense in Investor-State Arbitration and she also worked in the human rights law firm Elementa Consultoría en Derechos, where she worked on the submission of an amicus curiae before the Inter-American Court of Human Rights, and gained experience in women's rights, feminism and intersectionality.



Speakers

Maria Angélica Burgos

María Angélica Burgos is a Senior Associate at Baker McKenzie where she focuses her practice in international arbitration, domestic arbitration and international investment law. María Angélica has more than ten years of experience in these areas. Prior to joining the firm, she worked as an attorney in the Dispute Resolution teams of two other lawfirms, as advisor to the Government of Colombia and as trainee at the International Court of Justice. María Angélica has experience in international institutional and ad hoc arbitrations under ICSID, UNCITRAL and ICC rules, as well as in national arbitration proceedings administered by the Arbitration Center of the Chamber of Commerce of Bogotá. María Angélica has advised companies on the content and application of International Investment Agreements (IIAs). María Angélica is a professor of the Seminar on Business and Human Rights at Pontificia Universidad Javeriana and is currently the Newsletter Officer of the IBA Committee on Business and Human Rights.



Moderator

Clovis Trevino



Clovis Trevino, Special Counsel at the Covington and Burling LLP Office in Washington D.C.. Clovis specializes in public international law and international commercial and investment arbitration and represents private entities and States in high-stakes international commercial, investor-State, and State-to-State proceedings, including under ICSID, ICC, UNCITRAL, and UNCLOS rules, and before the International Court of Justice. Fluent in Spanish, Ms. Trevino regularly handles disputes arising out of Latin America.



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