Panel 1: Legitimacy issues in arbitrations with sovereigns

This panel will cover the following issues:

- Same arbitrators, new cases – independence and impartiality of the arbitrator(s).
- International arbitration and transparency: the submission of amicus briefs, third-party standing, and the desirability of public submissions and hearings.
- Is there a precedent in investment arbitration?

First, the speakers will address the issues of arbitrator independence and impartiality in the context of investment and commercial arbitration. They will discuss the duty to disclose and the disqualification of arbitrators, considering the peculiarities of the marketplace for investment arbitrators and the representation of sovereigns. For instance, the speakers may address the possibility and desirability of creating a permanent appellate body for arbitration proceedings involving sovereigns and whether investment arbitrators should also be allowed to act as counsels in investment arbitration proceedings.

Second, issues such as human rights, self-determination over natural resources, and environmental protection, which often arise in the context of arbitrations involving sovereigns, will be explored. These considerations create a tension between the necessity to protect investors and the need to ensure democratic accountability. The discussion will focus on transparency, and in particular the submission of amicus briefs, third-party standing, and the desirability of public submissions and hearings.

Finally, the third issue to be addressed will be precedent in investment arbitration, considering the resolution of past disputes and relevant WTO Appellate Body decisions.
**Panel 2: Disputes arising out of, or related to, overlapping contract and treaty obligations: procedural issues**

This panel will cover the following issues:

- “Umbrella clauses,” jurisdiction and double recovery.
- *Lis pendens, res judicata* and issue preclusion.
- State-controlled entity standing before BIT tribunals.

In a number of situations, most notably in the extractive industries and in infrastructure construction projects, a State will be bound by a government contract that also falls under the scope of a BIT it has signed with a foreign country. This panel will seek to address a number of issues to which this situation gives rise.

The first issue will be the so-called "umbrella clauses": their existence, meaning and evolution, and their implications for jurisdiction and double recovery.

Second, and in connection with the previous issue, the following questions may also be addressed: in case of state default, will an investor be entitled to recovery based both on the treaty and the contract, in light of the principles of *lis pendens, res judicata* and issue preclusion? May a BIT tribunal exercise jurisdiction when the contract contains an exclusive forum-selection or arbitration clause designating a different forum for the resolution of contractual disputes?

Finally, the panel will consider whether state-owned entities have standing as plaintiffs before a BIT tribunal. Can a state-owned company enjoy the same benefits and protection as a privately-owned investor? This question is of particular importance in relation to Chinese companies investing in signatory States to an investment treaty with China.

**Panel 3: The enforcement of arbitral awards against sovereigns**

This panel will cover the following issues:

- The failure of a sovereign State to abide with an arbitral award entered against it.
- State immunity from the enforcement and recognition of arbitral awards.
- “Reverse veil-piercing” for purposes of attachment.

The speakers will first explore the situation in which a sovereign party fails to meet its obligations under an adverse arbitral award and resists enforcement. They will address the peculiarities of this situation and their implications in the context of international commercial and investment arbitration. What are possible remedies to this situation? What does this problem imply for the overall legitimacy and viability of the system? A case study of Argentina’s defaults may be used to highlight the main issues raised by this topic.

Second, the panelists will address the recognition and enforcement of arbitral awards against sovereigns, keeping in mind the different issues raised by the enforcement of ICSID awards, on the one hand, and the awards of other arbitration institutions and *ad hoc* proceedings, on the other hand. The speakers will consider the circumstances in which States may claim immunity from enforcement, the other challenges that a party seeking
enforcement against a sovereign may face, and the options available to that party under international and domestic laws.

Finally, the panelists will deal with the attachment of state-owned companies’ assets in enforcement proceedings, touching on the difficulties of attaching property located within the State through its own local courts. The speakers will also consider whether a party may attach assets belonging to a state-controlled or state-owned corporation and, in this context, will address the use of “reverse veil piercing” to reach such assets.

Panel 4: Rebalancing the investment arbitration regime: implications for international commercial arbitration

This panel will cover the following issues:

- Australia and Brazil – no investment arbitration? Withdrawals from ICSID – where to for ICSID?
- The renegotiation of BITs.
- Commercial arbitration as an alternative to investment arbitration: advantages and limits.

Today, countries that were traditionally categorized as capital-importing countries have also become important capital exporters. The current “backlash” against investment arbitration will be explored through the lenses of this remarkable development.

This panel will first address the recent withdrawals from ICSID (for instance, by Bolivia and Ecuador), and reflect on whether these withdrawals are the symptoms of a deeper crisis for the Center or merely incidents inherent to the workings of an international dispute settlement institution. In addition, the recent decision by Australia to give up investment arbitration altogether, along with Brazil’s historical refusal to embrace it, will be discussed in order to draw a clearer picture of the current state of investment arbitration and its prospects in the medium and long term. What accounts for the decisions of this group of countries – which includes “developing,” “emerging,” and “rich” countries – to move away from investment arbitration? What does it say about characterizations of the international investment system as either pro-investor or pro-host State?

Second, the speakers will discuss the efforts of several countries to renegotiate the terms of their BITs and/or depart from their previous practice in negotiating new BITs. The discussion will cover the major recurring themes in the current negotiations, the suggested solutions and their impact on investment arbitration.

Finally, the panelists will talk about the possibility of using commercial arbitration as an alternative to investment arbitration in resolving disputes with sovereigns. They will address the advantages, prospects and limits of using commercial arbitration mechanisms to arbitrate disputes traditionally resolved through investment arbitration.