



Business and Human Rights in International Commercial and Investment Arbitration: How to Make it Right? *

Summary

*** Please note that this summary of the panel was AI-generated and therefore has not been fully vetted for accuracy.**

The panel discussion at Washington Arbitration Week focused on the intersection of business and human rights within the context of international arbitration. The session, held at Arnold & Porter, highlighted the importance of integrating human rights considerations into both commercial and investment arbitration practices. Key participants included Katia Smol, who emphasized the evolving responsibilities of companies to mitigate human rights impacts, and various experts who brought diverse perspectives, including Carlos Bernal, Doug Cassel, and Janet Whitaker.

The panel addressed how human rights issues are increasingly being incorporated into commercial contracts, particularly through Environmental, Social, and Governance (ESG) provisions. It was noted that arbitration clauses are beginning to reflect these considerations, as businesses face growing obligations to conduct human rights due diligence in their operations and supply chains.

In investment arbitration, human rights claims can arise in various contexts, such as when investors allege violations by host states or when states counterclaim based on human rights issues. The discussion acknowledged that while some arbitral tribunals have recognized the relevance of international law and human rights, there remains a significant gap in consistently addressing these issues in decisions.

The panelists identified several challenges, including the lack of expertise in human rights law among arbitrators, the need for education in this area, and the structural limitations within the current arbitration system that often exclude affected communities from participation.

Participants also discussed emerging tools and mechanisms, such as the principle of systemic integration, which allows tribunals to consider human rights obligations alongside investment treaty obligations. The potential for new generation investment treaties to incorporate binding human rights responsibilities for investors was highlighted as a key



area for future development.

Overall, the panel concluded that as the landscape of international arbitration evolves, human rights considerations will likely become more prominent, necessitating a shift in how arbitrators, practitioners, and states approach these complex issues.

Authors

Katia Yannaca-Small, Cherine Foty, Carlos Bernal, Janet Withttaker, Douglas Cassel

Topics

WAW

Category

WAW

Full Transcript

00:00:03

so, Welcome to our. Dial

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4th panel off of Friday.

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The 6th of December. This

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is this is one of

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our, our, our key. So

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we can sort of speak

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a tractions in terms of

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panels that we we, I,



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I personally have been looking

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forward to this panel for

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so many reasons. The first

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one is that it is

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taking place at Arnold &

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Porter to, which we are

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immensely grateful. It is one

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of our sponsors, but also

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close to my heart because

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I was an ass. I

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know, for that stuff for

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an associate at the beginning,

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then an associate, then I



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seen your associate here at

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4. So it is very,

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very, very important. And I'm

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close to my heart to

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be here. And I know

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with this, snow former colleagues

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and, and, and, and be

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in these premises, as I

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know. So to speak was

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educated here, my own Law

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Firm, big Law Firm. So

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thank you for no, for

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what? I've contributed in in,



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in my upbringing and in

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so many ways and especially

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investor-state arbitration drafting are oral

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skills at Tetra and business.

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Well, now, the other reason

00:01:28

is, is this, this is

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a panel that Rings Two,

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Worlds together, the world of

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business and human rights and

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the the world of international

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arbitration. And and when we

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refer to business and human

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rights. Now there's, there's many



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experts, there is even a

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world as a situation of

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which strategy or Law Firm

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is part of and and

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the and that that focuses

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on on me, I would

00:02:01
say no business and human

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rights from a very corporate

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perspective, not necessarily dispute settlement

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offer Disputes that involve human

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rights or even International arbitration

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ladders and then the other

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world is international commercial arbitration



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and investor arbitration. How, how

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can this to be brought

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together is, is, is the

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question Washington arbitration week and

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its history event. The world

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arbitration update, which happens in

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May every year in embarrassed

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jurisdictions. Has always included a

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panel on business and human

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rights and international arbitration. That

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that's one of our Hallmarks

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because we believe that those

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two world's need to be



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brought together and a few

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will perhaps a year ago

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we started to talk with

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with the cat you are

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not small and and parts

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of the question was was

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how how to make this

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right? How to bring this

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Two Worlds together where International

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Investment arbitration on International commercial

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arbitration understand the world of

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business and human rights and

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take that into account. I



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want to steal anybody's Thunder,

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but there have been no

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very, very minor minor. And

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shall I attempt to bring

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them together in in some

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industrial arbitration decisions but are

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our belief Law Firm is

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that there should be more.

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There should be more because

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at the end of the

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day, Some of the applicable

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law for investor arbitration specialty,

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arbitration is international law and



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a some tribunals have said

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it. Well, if international law

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is, is the applicable law

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and the Heart of international

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law is human rights. Well,

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perhaps some investment treaty tribunals

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may have jurisdiction to hear

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some of those cases. So

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I'll leave it at that.

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And now would would like

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to introduce. Katia very shortly.

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Got you a small small

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brings three decades of experience



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in major public International organizations

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and the private sector spending

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public international law. International Investment

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policy law at arbitration commercial

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arbitration and the corruption is

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GM business and human rights.

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She has experience advising States

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and states and cities in

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the negotiation of major International

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agreements. Finding common ground and

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Solutions in representing them in

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high stake disputes before Private

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Practice Miss yonaka. Small had



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a long and distinguished career

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in major International organizations in

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particular at the oecd, has

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she found it and let

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its analytical work on International

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Investment agreement and arbitration. Since

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the early 2028 to a

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dialogue among oecd, annoy City,

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governments practitioners academics and civil

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society, that led to comment,

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understanding on a concrete improvements

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in the investors State, this

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retirement system are the results



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of her work. Published by

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the oecd have been widely

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cited as Pioneer work in

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this field. She was a

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leading expert in the groundbreaking

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what she did work and

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then take corruption and let

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this work up to negotiation

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of the oecd anti-bribery convention.

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Most importantly for our panel.

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I think that she she

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she is someone that brings

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experience to reach those two



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World, International arbitration and the

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world of Human Rights and

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business. So with with that

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got you and welcome and

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you have the floor. Thank

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you. Jose Antonio, and thank

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you all for being here.

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I would like to welcome

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you to and then Porter.

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We are happy to be

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among the sponsors of the

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Washington arbitration week and would

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like to thank the organizers



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for including us. And also,

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congratulate them for a very

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successful Week. Full of excellent

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thought provoking events. We have

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the privilege to be closing

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this. Week was two panels,

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the one now on business

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and human rights and Commercial,

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and investment arbitration, and the

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cycling following this one on

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arbitration, and climate change. A

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cocktail will follow to reward

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you after the full week,



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full week of events, and

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also, for being so brave

00:06:51
to stay with us on

00:06:53
a Friday afternoon. All this

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panel. I'm honored to be

00:06:57
surrounded by esteemed colleagues and

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Friends Janet where the character

00:07:02
sharing 40. Cassell and Carlos

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Bernard dog and Carlos. What

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is John. Cena's remotely. Now,

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this is a human rights.

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For those were not familiar

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with the field, concerned the



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obligations on companies, out of

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quest for corporate accountability to

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mitigate or prevent the adverse

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impacts of business activities on

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individuals and communities, although the

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man responsibility or duty to

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respect human rights lies with

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the state which legislates and

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enforces relevant laws, since the

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adoption of the UN guiding

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principles on business and human

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rights in 2011, there is

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a responsibility emerging for businesses



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to have policies and processes

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in place to identify. Impact

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and mitigate them other instruments

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such as the oecd guidelines

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for Multinational. Enterprises follow this

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approach, this soft slow approach

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has been hard, finding the

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last few years with national

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laws being adopted and they

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recently adopted EU directive know

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what we'll explore on. This

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panel is how big does

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a human rights related issues



00:08:21
arise and international arbitration both

00:08:24
commercial and investment will be

00:08:27
looking to the current challenges

00:08:29
faced by participants in arbitration

00:08:32
in addressing human rights issues.

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How have arbitral tribunal has

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dealt with these issues? What

00:08:39
are the tools that can

00:08:41
be used to enhance the

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consideration of Human Rights and

00:08:44
international arbitration will also discuss

00:08:48
the new generation investment agreements

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and merging with relevant language?



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I said of arbitration rules

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that hag rules and business

00:08:57

of Human Rights specifically designed

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to deal with this issue.

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The role of other forms

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of disputes that humans, such

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as mediation of the oecd

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national contact points, for instance,

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and we conclude with some

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ideas for the future. There

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will be no formal presentations,

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but we have our discussions,

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a discussion, any questions you



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may have, you can address

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them twice at the end

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of the session, but before

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we start, I will briefly

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introduce my panelist Opana. Let's

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do you alphabetical get Carlos

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Bernal who is joining us?

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Remotely is a professional professor

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of constitutional law and tours

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at the University of Dayton

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in Ohio. He was previously

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a sitting judge Justice on

00:09:41

the Colombian constitutional Court in



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2021. He was elected as

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an inter American human rights,

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commissioner for the term 2022

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to 2026. Professor Bernard also

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holds the fractional appointment, as

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professor of law at the

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University of La Cabana in

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Bogota. And he has previously

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held academic positions, and my

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career Law School in Sydney,

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Australia and the faculty of

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law of the universe takes

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another of Columbia. His work



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has been published and prominent

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journalist, as well as books

00:10:14
and edited collections in several

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languages. The cell was also

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joining us remotely is a

00:10:22
globally recognized expert on business

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and human rights, rights in

00:10:26
criminal law and public international

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law advisors to represent corporate

00:10:31
governmental and non-governmental Appliance in

00:10:34
mother's before the inter-american commission

00:10:36
and Court of Human Rights

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United Nations, human rights bodies,



00:10:41
international criminal Court Nashua. Contact

00:10:44
points on the lilies, CD

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guidelines, National courts, International arbitration,

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dicj International truck. You know,

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for the law of the

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sea and an international treaty

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negotiations, his concert with King

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& Spalding and co-chairs the

00:11:00
business and human rights Lawyers

00:11:02
Association. He has, was it

00:11:04
tenured full Professor Notre Dame,

00:11:06
law school and Head Start

00:11:08
in several schools around the



00:11:10
world and published extensively? Cherie

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Cody was here with us

00:11:15
is an associate with Covington

00:11:17
in Washington. D.c. she advises

00:11:20
clients on a broad array

00:11:21
of complex International commercial anniversary

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State, arbitrations and non-judicial disputes

00:11:28
related to issues of USG

00:11:30
business and human rights and

00:11:32
corporate social responsibility. She's a

00:11:34
dually probably five common law

00:11:36
and civil lawyer. Serene is

00:11:39
an Adjunct professor of international



00:11:40
arbitration and the George Washington

00:11:42
University, law school, and previously

00:11:45
taught at the sorbonne and

00:11:47
us as law schools in

00:11:48
Paris. Jonathan Whitaker is a

00:11:52
senior console with Clifford chance

00:11:54
in Washington DC, specializing in

00:11:57
complex, International arbitration and litigation.

00:11:59
She has handled International commercial

00:12:02
investment, treaty arbitrations held under

00:12:05
the auspices of several arbitral

00:12:07
institutions on a broad range

00:12:08
of Industries. Janet has an



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active pro bono practice. Representing

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clients in matters involving international

00:12:16

human rights law, including business,

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a human rights previously, Janet

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was legal counsel, addicted hazbin,

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electoral International arbitration is Stanford

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law school and talk to

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European Lourdes University College, London.

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She also sees as an

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arbitrator So, I will. To

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start our session know when

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we start with the stage

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setting. So we understand what



00:12:48

this interaction between Brazil and

00:12:50

more rights and international arbitration

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is and I will address

00:12:57

the question to Sharon and

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Janet how do human rights

00:13:04

related issues are presented in

00:13:07

international Patrician? If we sectors,

00:13:09

we see a great number

00:13:10

of disputes involving these issues.

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I will turn to sharine

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to give us a case

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scenarios and answer this question

00:13:20

related to commercial arbitration. Thank



00:13:24

you so much and thank

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you for having us here

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today. I'll be very brief

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on this first one just

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to do a bit of

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stage setting commercial contracts are

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increasingly operating elements of ESG

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into their provision. So as

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he is she is becoming

00:13:41

increasingly prevalent. We're seeing that

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you know spilled over into

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the commercial world through them

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Corporation of various contractual Provisions



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related to ESG. So increasing

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ESG plazas, increasing ESG. Obligations

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on the parts of different

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parties involved in special relationships,

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and such Clauses can include

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Provisions such as setting Net

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Zero targets as as those

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become increasingly relevant to various

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Industries, protecting human rights labor

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rights or the environments in.

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You know, in Supply chains

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or in business relationships incorporating

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governance requirements, such as anti-bribery.



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Corruption and money-laundering which sometimes

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can touch upon issues of

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Human Rights and mandating the

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use of specific types of

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Princeton's, packaging shipping or labor

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requirements in the production of

00:14:37
goods, and service companies are

00:14:40
faced with the obligation to

00:14:41
increasingly our conduct human rights,

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due diligence in their operations.

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And in their supply chains

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were seeing those obligation simultaneously

00:14:53
be incorporated into contracts as



00:14:56
commercial entities seek to mitigate

00:14:58
as much as possible. Or

00:15:00
I mean I'll pass off

00:15:01
risk and ends, you know,

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Define the risk that the

00:15:06
outside and try to consider

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where risk should lie in

00:15:10
their commercial relationships, were seeing

00:15:13
that appear increasingly and commercial

00:15:15
contracts, and do some further

00:15:17
examples, of course, with arbitration

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Provisions. As we have a

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closet. Some of these contracts,



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the substance of ESC Provisions

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than become relevant. Thank you.

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Thank you. Sharon know, I

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would come to China to

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give us the case and

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Iris and investment arbitration. Thanks

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kaca 7 human rights have

00:15:46

always been part of the

00:15:48

international legal landscape in which

00:15:50

investors in Statesville parade so

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that the new bad fellows

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and I'll give you a

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few examples of four examples



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of the ways in which

00:15:59

human rights have played tool

00:16:01

being presented in investor-state claims.

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I'm the first one is

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where you have a claim

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by investors against the hosts

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days. For either a human

00:16:11

rights violation as part of

00:16:14

a breach of the sound

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of treatment under a treaty

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or as a separate human

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rights. If we all think

00:16:22

about a little bit, human



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rights are actually in here

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ends in Sutton investment protections.

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I think the they're in

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here and whether because of

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Harrington something like expropriation, you're

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taking somebody's property rights away

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or under customers. And as

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soon as I hear is

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denial of justice. That the

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concept of forms part of

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farron, actual treatment. I'm not

00:16:48

attached and found in most

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investment. She sees I'm not



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particular protection can Encompass human

00:16:56
rights such as the right

00:16:58
to a fair trial, the

00:16:59
right to equal treatment rights

00:17:01
because my hair is the

00:17:03
low in case, which many

00:17:05
of you will be involved

00:17:06
in all of Justice on

00:17:09
the chapter 11 not case

00:17:11
and investor. I bought a

00:17:13
claim following for manifesting out

00:17:17
of Justice following a massive

00:17:19
judgment made against that entity



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in state court in the

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United States after jury trial.

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And the investor was unable

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to appeal that decision I'm

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sorry I'm fat because of

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this exorbitant phone requirement and

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the claim that was a

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breach not of justice. That

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in here, lie in that

00:17:40

there is as a lack

00:17:42

of an access without trial.

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That sounds Line application with

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the underlined claim. The second



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situation where we seen human

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rights being raised in ists

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is why are you have

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hosted the fences to investigate

00:17:58

claims about message in pipe

00:18:01

to an investment? Essentially, what

00:18:07

is happening States, the saying

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that he was the reason

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I took this right here

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is actually based on these

00:18:15

public interest around human rights.

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As a good example here

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is, is your expense Argentina.



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In that case, the claimant

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claim, the Argentina had interferes

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with the Tariff regime that

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was applicable to do the

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payment investment in session in

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Argentina and it came that

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the state's failure to increase

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Terrace with an indirect option

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and a breach of other

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obligations under the tree and

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Argentina actually races at the

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fence that it is her.

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She taking these messages based



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on the right to water.

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So essentially the terrorists because

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of the right to water

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and this would have been

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impeded how to raise the

00:19:00
terrorists. So what we see

00:19:02
that there is as complex

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and inside, Argentina racism, cific

00:19:05
lie between the Public human

00:19:08
rights and the private ride

00:19:09
to the investor and not

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Casey, try being that she

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found that. It wasn't a



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human rights consideration. That has

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led to the failure to

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increase the power of but

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I was more difficult as

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insensitive who State's offense by

00:19:24
a state that the investor

00:19:27
itself, violated human rights protections

00:19:31
and we'll get into this

00:19:32
a little bit more detail

00:19:33
later. But the best in

00:19:38
this area is again a

00:19:41
case of also involves an

00:19:43
investor to bring your claim



00:19:44

against Argentina in relation to

00:19:45

a water and sewerage Concession.

00:19:47

And it's in that case

00:19:49

Argentina and she specifically counterclaims

00:19:52

against that insensitive has failed

00:19:56

to respect the right to

00:19:58

Water by not investing sufficiently

00:20:00

in the infrastructure to ensure

00:20:02

that its operations that successful.

00:20:04

And it's an important case

00:20:06

that is it free the

00:20:07

first taste by the tribunal

00:20:09

decided that it was competent



00:20:10
to watch to determine the

00:20:13
time to pay my time

00:20:14
not on the basis that

00:20:15
it was sufficiently connect to

00:20:17
see online playing on the

00:20:19
human rights front. What the

00:20:20
tribunal said is that ISS

00:20:23
is not only for the

00:20:24
benefit of private investors but

00:20:26
actually that human rights are

00:20:29
valid ones to both invested

00:20:31
and the states until Terry

00:20:34
our obligations on old parties,



00:20:38

public and private, not to

00:20:39

engage in activities that infringe

00:20:41

on human rights. And then

00:20:43

refreeze of foolscap place where

00:20:45

we've seen human rights coming

00:20:48

up. And I see ass

00:20:49

is in amicus curiae briefs

00:20:51

and so in many, many

00:20:54

ways to many cases we've

00:20:55

seen Amicus Curie. I r

00:20:58

a m a. I r

00:20:59

e lying on human rights

00:21:00

including the right to the



00:21:02

right to health labor rights

00:21:05

in order. To accept their

00:21:07

argument. Some weasel chasing, the

00:21:09

limitation of these arguments, I

00:21:11

think that we seen limitations,

00:21:13

especially in cases, where they're

00:21:15

grounded and human rights specifically

00:21:17

than on the investment. Treaty

00:21:21

itself an old. So you

00:21:23

have limitations where the Amici

00:21:25

curiae I are raising human

00:21:28

rights argument in cases where

00:21:31

the parties themselves and not



00:21:33

raising those all given. So

00:21:35

yeah, I know that one

00:21:37

of the human rights of

00:21:43

presents and investment agreement. Yeah,

00:21:50

actually we will get into

00:21:52

this a bit later. Now

00:21:55

what I would like to

00:21:57

ask is what are the

00:22:02

current challenges that are faced

00:22:04

by participants in arbitration address

00:22:07

human rights issues. I'll have

00:22:10

dealt with these issues that

00:22:12

they don't do, they do



00:22:14

enough to address them, and

00:22:16

I will turn to Doug

00:22:18

to give us his first

00:22:19

take on this. And you

00:22:28

got you, the short answer

00:22:31

is the arbitral tribunals by

00:22:35

and large have not in

00:22:36

my judgment taken adequate account

00:22:40

of human rights in their

00:22:42

arbitral decisions. Either from the

00:22:46

perspective of Human Rights or

00:22:50

from the perspective of what

00:22:51

would be possible under international



00:22:54

law, there are a few

00:22:56

decisions, particularly the Tulip, real

00:22:59

estate, a moment decision of

00:23:01

2015 and they were Bossard

00:23:04

decision to Janet mentioned, a

00:23:06

moment ago of 2016 where

00:23:09

the tribunals have recognized that

00:23:12

International Investment law is not

00:23:15

a world unto itself. It

00:23:17

is part of international law

00:23:19

and should be considered in

00:23:21

the context of other International

00:23:23

treaties and principles to which



00:23:26
states. Parties to investment treaties,

00:23:31
are are bound and so

00:23:35
the two should be read

00:23:36
together. That can be done,

00:23:37
it has been has been

00:23:39
done, but only in a

00:23:41
handful of instances, has it

00:23:45
been decisive? Is there been

00:23:48
many mentions of human rights

00:23:50
in all the categories? The

00:23:52
Janet just mentioned but usually,

00:23:54
they are mentioned that lead

00:23:58
nowhere. So there's a lot



00:24:00

of room for improvement in

00:24:02

this area. And in part,

00:24:04

I think it's frankly reflects

00:24:06

the reality that most members

00:24:09

of arbitral tribunals come from

00:24:11

a commercial law background. They're

00:24:13

experts in commercial law and

00:24:16

related issues, but very few

00:24:19

of them are experts or

00:24:21

have strong backgrounds and international

00:24:24

human rights law. You can

00:24:26

see that particularly by contrasting,

00:24:30

some of the opinions of



00:24:31

Philippe, Sam's, who sits as

00:24:33

an arbitrator but is also

00:24:35

a human rights expert with

00:24:37

the opinions of others, on

00:24:38

the tribunals work, where he

00:24:40

has been a member and

00:24:42

on other tribunals where he

00:24:43

was not a member. That's

00:24:45

so partly. What we need

00:24:47

I think is education and

00:24:50

if we don't get there,

00:24:53

It may be a disservice

00:24:56

not only to the people



00:24:58

who are affected by International

00:25:01

Investment sometimes adversely. But also

00:25:04

to the whole International, the

00:25:06

isds investor-state dispute settlement regime,

00:25:10

which Peach frankly in the

00:25:13

middle years of the 20

00:25:15

teams, roughly from 2013 to

00:25:18

2017. We averaged something like

00:25:23

eighty to ninety new investment.

00:25:27

Arbitrations initiated each year in

00:25:30

the last 2 years that's

00:25:31

dropped by about a third.

00:25:32

You can see similar numbers



00:25:35

in the statistics for the

00:25:37

number of New International Investment

00:25:40

treaties, being adopted those two

00:25:43

peaked in 2019 and have

00:25:46

fallen considerably since then go

00:25:49

for it. If the Ists

00:25:52

regime is to continue serving

00:25:54

its purpose its purposes. I

00:25:56

should say many of which

00:25:58

are important more attention in

00:26:01

my judgment needs to be

00:26:03

paid to the context of

00:26:05

these treaties in broader international



00:26:07

law, including human rights. And

00:26:10

of course, that also includes

00:26:12

looking ahead to your next

00:26:13

battle, the human right to

00:26:15

re clean healthy and sustainable

00:26:17

environment. Thank you. I think

00:26:24

Janet might have some comments

00:26:27

as well, and I think

00:26:29

it's really important to you.

00:26:35

It is before the full

00:26:36

headed to the broader context.

00:26:38

I think the dog is

00:26:40

mentioning which is this tension



00:26:42
will be deceived tension between

00:26:44
public considerations. So considerations Ron,

00:26:48
human rights are on climate

00:26:49
change, how we actually accommodate

00:26:51
some of these really important

00:26:53
topic for August has in

00:26:56
a world of. That is

00:26:58
really in the way privately,

00:27:00
or historically has been Jesus

00:27:02
privately, send senses and I

00:27:05
think that we both felt

00:27:07
that you had fully agree

00:27:08
with what is that? We



00:27:11

will continue to see these

00:27:13

tensions. I think probably we

00:27:15

see a lot more push

00:27:16

back and we'll continue picking

00:27:18

in this country to see

00:27:19

push back over the coming

00:27:20

years on various grounds against

00:27:22

investment arbitration. But it also

00:27:24

I think makes it very

00:27:27

important to the arbitration Community.

00:27:28

Eat some things about the

00:27:30

things that are being made

00:27:32

to buy, yics is in



00:27:35

2 OZ. Arbitration generally is

00:27:36

incompatible with all of these

00:27:39

other really important for August

00:27:41

has and not just think

00:27:43

about how they actually sit

00:27:45

comfortably. But how can we

00:27:47

help them comfortably, together, Tuesday,

00:27:50

to ensure that these other

00:27:52

developments are being reflected in

00:27:55

this area prices. Wait, what

00:27:59

Doug said, Does anybody else

00:28:05

Serene or Carlos? Have any

00:28:08

comments on this? I'm very



00:28:11

briefly, I just say that

00:28:12

it is. Increasingly becoming not

00:28:18

an option to ignore human

00:28:19

rights issues. So to the

00:28:21

extent they're being implemented, especially

00:28:24

at the regional level in

00:28:25

Europe and also in various

00:28:27

jurisdictions or other jurisdictions and

00:28:34

human rights or ESG. Focus

00:28:42

regulation companies it's at this

00:28:45

is no longer a kind

00:28:46

of an aspirational, a corporate

00:28:49

social responsibility type obligation that



00:28:51

companies should strive to achieve

00:28:53

to try to achieve and

00:28:55

then it's now becoming increasingly

00:28:58

finding and then he needs

00:29:03

to follow suits and be

00:29:05

familiar with these mechanisms of

00:29:07

these Frameworks in order to

00:29:09

be able to address. The

00:29:10

pressing commercial issues of today

00:29:12

and then the reality of

00:29:13

that is that companies are

00:29:14

come from What is a?

00:29:15

She has a daily and



00:29:17

they need to completely adopt

00:29:19

their their Frameworks in order

00:29:21

to come to the extent

00:29:22

that they're in school. That's

00:29:26

your following up on that.

00:29:28

I mentioned. I was speaking

00:29:30

earlier of investor-state arbitration Greensburg

00:29:34

previously about commercial arbitration and

00:29:38

has just added a point

00:29:39

there. I think relevant to

00:29:40

that is that under any

00:29:42

of these new emerging hard

00:29:44

Norms companies are required to



00:29:47

engage in human rights to

00:29:50

diligence, with respect to their

00:29:51

supply chains and to take

00:29:53

actions to try to promote

00:29:54

human rights in their supply

00:29:56

chains, including by contractual provisions,

00:30:00

and the American Bar Association

00:30:02

as a set of model

00:30:03

contract, Provisions for business and

00:30:08

human rights, which would mean,

00:30:10

which would include Provisions for

00:30:13

international arbitration, commercial arbitration between

00:30:18

a company and its suppliers



00:30:20

in the events of disputes

00:30:23

and there's a delay. Open

00:30:25

set of model, contract revisions

00:30:27

being developed by group of

00:30:29

people in the European Union

00:30:31

as well that likewise will

00:30:34

have Provisions. Or at least

00:30:35

currently has Provisions for international

00:30:38

arbitration, for dispute resolution. So

00:30:41

I think we're going to

00:30:41

see more and more of

00:30:42

that, in the, in the

00:30:44

future, in the field of



00:30:45
commercial arbitration as well. That

00:30:49
would be. Yes, thank you

00:30:52
so much. And I would

00:30:54
like to say hello to

00:30:56
my listen to everyone there

00:30:59
in Washington. D.c. Also, thank

00:31:01
you to Jose, Antonio for

00:31:03
the kind invitation to participating

00:31:04
in this time. I just

00:31:06
want you to say three

00:31:09
points. The first one is

00:31:10
that I totally agree to

00:31:11
the dog and then add



00:31:13

and trained. In the sense

00:31:17

that if people in the

00:31:20

arbitrator's, they need to take

00:31:22

into account deeply, the matter,

00:31:24

concerns your rights by taking

00:31:28

points, are being a human

00:31:30

rights. Commissioner, I can tell

00:31:33

you with no lease about

00:31:34

that. That holds two people

00:31:37

working in the area of

00:31:38

your rights. Need to be

00:31:40

aware of the implications, of

00:31:43

all the cases, concerning the



00:31:45

protection of embarrassed of the

00:31:47

rise of investors. Just had

00:31:49

the commission I've been pushing,

00:31:51

is it true? They're hosting

00:31:55

of a hearing concerning this.

00:31:57

This breach between investors protection

00:32:00

as your rides. Soles of

00:32:02

my colleagues can get these

00:32:04

out of her decision concerning

00:32:06

what to expect in terms

00:32:08

of protecting the rights of

00:32:09

investors. And you are a

00:32:12

house note to be an



00:32:13
absolute No-No to be absolutely

00:32:15
used in the sentence that

00:32:17
only Human Rights matter. So

00:32:19
I celebrate this planet because

00:32:21
you just can't lie. I

00:32:23
see that. We are creating

00:32:25
a bridge between two worlds

00:32:26
that are there is really

00:32:28
separated also informs and jurisdictions.

00:32:32
And then my final point

00:32:34
is that the reality is

00:32:37
that many of the day

00:32:38
of the best swords that



00:32:40

are over 18 in many

00:32:42

countries and then let me

00:32:43

use a couple of examples

00:32:44

from Latin America. They, they

00:32:47

operate in a mug. He's

00:32:49

heavily regulated, Amy Schumer rights,

00:32:53

and also in the form

00:32:55

of constitution rights, they belong

00:32:59

to that regulation and the

00:33:01

indecent. The state has other

00:33:05

duties concerning the respect of

00:33:07

those human and Constitution, right?

00:33:09

And also domestic competitors. They



00:33:13

are underdogs duties, so they

00:33:16

investors and should be treated

00:33:20

equally to the domestic investors

00:33:24

any. We have to create

00:33:26

that equality. Also they foreign

00:33:28

investors they they need to

00:33:30

comply to the human rights

00:33:32

obligations in the same way

00:33:34

as well as a domestic

00:33:35

companies that you did. So

00:33:38

on the basis of their

00:33:40

brain, full of equality is

00:33:42

awesomeness her to stab you



00:33:44
that connection between a protection

00:33:46
of investors on the one

00:33:48
hand. Human rights from t.i.

00:33:50
Thank you so much. Thank

00:33:53
you, Carlos. Janet you have.

00:33:55
You want to watch something

00:33:56
or we move on so

00:34:01
much. Will this cost me

00:34:06
the new investment agreements with

00:34:09
language that includes issues of

00:34:16
Human Rights. Respect a few

00:34:17
more rides Etc at which

00:34:19
will develop a little later.



00:34:21

But I would like to

00:34:24

touch up on is today.

00:34:27

What are the two we

00:34:29

have today without this with

00:34:30

the old generation of it?

00:34:32

Babe, A lot of Fame

00:34:33

Batman agreements that do not

00:34:35

include specific language. And we

00:34:38

are faced with issues related

00:34:40

to Human Rights. What are

00:34:41

the tools that exist today

00:34:45

to take action in this

00:34:49

field? So I turned to



00:34:51

give us Some Reflections on

00:34:55

the Odyssey issue, in the

00:34:57

context of investment arbitration, the

00:35:04

applicable issues around to pick

00:35:07

up a lord. I hit

00:35:08

one of the really difficult

00:35:09

issues to take me a

00:35:11

nasty ass is too want

00:35:13

to greet arbitral tribunals can

00:35:17

take into account Estates human

00:35:19

rights obligations as they consider

00:35:23

claims and you know that

00:35:25

we've had cases tribunals have



00:35:29

taken the approach of not

00:35:32

considering individual human rights claims

00:35:34

that she done incorporating human

00:35:37

rights considerations in the same

00:35:39

case into a claim under

00:35:41

the treaty but it's a

00:35:44

really important question and it's

00:35:47

inevitable. I think one of

00:35:48

the rare thing to see

00:35:50

very different approaches of cross.

00:35:53

Different cases depending on the

00:35:55

terms of the applicable legal

00:35:57

provision in the underlined treaties.



00:36:00

And also potentially the times

00:36:03

that the human rights treaties

00:36:05

to which the relevant state

00:36:07

of his head. So, if

00:36:08

you have a provision, that's

00:36:11

very probable that says, you

00:36:13

take into account, the international

00:36:15

obligations party subscribe, while some

00:36:18

states, I'll take the UN

00:36:20

convention on the rights of

00:36:21

a child. For example, the

00:36:22

US, it is ratified that

00:36:25

treaty. So that's what that



00:36:26

treaty is not relevant in

00:36:28

the USL to gation but

00:36:30

yes, it's older. Kids relevance

00:36:32

in the context of Human

00:36:33

Rights obligations to almost every

00:36:35

out the states on the

00:36:38

planet. So they will be

00:36:40

different. When is it the

00:36:42

things I wanted to mention

00:36:43

here is that there's a

00:36:44

real potential for this to

00:36:46

generate criticism about inconsistent treatment

00:36:50

of Human Rights. So, but



00:36:51

one of the tools I'm

00:36:52

going to just met Ricci.

00:36:54

Which many people here will

00:36:55

know about is the Dutch

00:36:58

term to use by tribunals

00:37:00

to resolve. This issue is

00:37:02

the principal of systemic integration.

00:37:05

So it's not invest in

00:37:08

the back. You multiple areas

00:37:14

of international touch on its

00:37:17

investment. Little bit also investment

00:37:19

disputes in the one that

00:37:20

we're talking about today is



00:37:21

obviously human rights. You and

00:37:23

one of the questions that

00:37:25

arises is how the tribunals

00:37:27

that are constituted an investment

00:37:29

treaties and their subjects, the

00:37:31

boundaries and policies can sense

00:37:33

how they actually accommodate and

00:37:36

address claims that ring in

00:37:39

different fields of public international

00:37:42

law and the principal that's

00:37:44

being employed here, is this

00:37:46

principle of systemic integration? And

00:37:47

it sounded like to receive



00:37:53

Those are cheetahs and its

00:37:56

meaning of rule of treaty

00:37:57

interpretation and looked at provision

00:37:59

sizes that should be taken

00:38:01

into account together with the

00:38:03

contact. Any relevant rules of

00:38:05

international law applicable in the

00:38:07

relations between the parties. This

00:38:10

principle does is it tells

00:38:14

tribunals when you are interpreting

00:38:16

treaty, you're not limited to

00:38:19

express tons of those treaties.

00:38:20

But you have to place



00:38:22

them in the context of

00:38:23

other relevant rules of international

00:38:25

law, that are applicable in

00:38:27

the relations between the relevant

00:38:29

State parties. And presumably these

00:38:31

rules include international human rights

00:38:33

law. So it's really a

00:38:35

mechanism and it allows both

00:38:39

International and tribunals to accommodate

00:38:41

these competing priorities. And so

00:38:44

in a case involving human

00:38:46

rights and potentially enables a

00:38:48

tribunal to take into account



00:38:49

human rights obligations. When it's

00:38:52

assessing I think the heater

00:38:56

we can have an entire

00:38:57

session talkin about systemic integration

00:38:59

than the intersection of different

00:39:01

parts of international including little

00:39:04

relation to climb in with

00:39:06

exhaust investment. Louisville, I leave

00:39:07

it there. But I think

00:39:09

there is still, the sandwich

00:39:10

integration is potentially really useful

00:39:12

to, but I do think

00:39:15

it necessarily answers. The question



00:39:18

when planes are raised that

00:39:20

fool outside the terms of

00:39:22

the Treaty of time. So

00:39:23

it doesn't necessarily help us

00:39:26

to resolve pure human rights

00:39:28

paid made in the context

00:39:31

of an investigation. So just

00:39:32

putting it out there. It's

00:39:33

a very helpful. I'm interested

00:39:36

mechanism. It will doubtless become

00:39:39

more important. I think across

00:39:41

the whole field of international

00:39:42

law. As we navigate, he's



00:39:45
competing priorities but that will

00:39:48
still be a lot of

00:39:48
questions out there about how

00:39:51
it applies and Can the

00:39:54
investment treaty contacts? We are

00:39:55
relying on the treaty when

00:39:57
something. Totally outside of that

00:39:59
treaty is Boar's. Head trip,

00:40:01
ticket dispute. Challenge Janet. Because

00:40:07
it requires the arbitrator and

00:40:11
the lawyers to know something

00:40:12
about both fields of Law

00:40:13
and often they're experts in



00:40:17

one, but not the other.

00:40:18

So it's it's difficult than

00:40:20

it did. Suggest to all

00:40:22

of us that we need

00:40:23

to learn a lot about

00:40:24

international law and not just

00:40:26

stay in our particular wheelhouse

00:40:30

is a of Specialties and

00:40:32

the second thing is that

00:40:33

as as As you correctly

00:40:38

stated, it's not really a

00:40:41

ruling on a treaty outside.

00:40:43

The treaty that the arbitrators



00:40:46

have jurisdiction to interpret, its

00:40:49

interpreting the treaty over which

00:40:50

they have jurisdiction. It's a

00:40:52

recognized interpretive tool. So it

00:40:55

is by no means an

00:40:56

illegitimate bringing into the arbitration

00:41:00

that treaty that doesn't belong

00:41:02

there. It's simply one that

00:41:03

is an interpretive tool of

00:41:06

the treaty that is at

00:41:06

the Centre of the dispute.

00:41:11

Also, something about it that

00:41:14

the whole point or the



00:41:17
main political uncertainties, this systematic

00:41:21
interpretation is at the end

00:41:22
of collisions and sometimes arbitrators,

00:41:27
they, they don't have a

00:41:29
key or mythology and how

00:41:30
to solve those collisions in

00:41:34
some cases, Sid related to

00:41:36
Columbia in which even the

00:41:39
Constitutional Court, had many issues

00:41:41
trying to solve collisions between

00:41:43
the right of the investors

00:41:47
and it rides of the

00:41:49
companies that invest in the



00:41:52
project in a wealthy Wetlands.

00:41:54
They invest like a 800

00:41:57
billion dollars in the project

00:41:59
I've been silently they discovered

00:42:02
that these was polluting the

00:42:04
water that a whole city

00:42:06
was using as a primary

00:42:09
source. So the point is

00:42:10
is The state has two

00:42:13
kinds of obligations and they

00:42:15
want to have their obligation

00:42:16
to honor their protection of

00:42:19
the investors. But on the



00:42:21

other hand, the birthday dear

00:42:23

legation to respect the right

00:42:26

to water to the people

00:42:29

show, did the Corporal and

00:42:31

open. Systematic interpretation is, is

00:42:34

houses all that sometimes you

00:42:36

just don't care. So, it

00:42:37

is, I just don't agree

00:42:39

with you. That is a

00:42:41

systematic interpretation is in the,

00:42:43

in the sentence we should

00:42:46

take into account all the

00:42:50

factors, but at the end,



00:42:52

what we have is a

00:42:53

big collisions and arbitrators, they

00:42:56

need to navigate that that

00:42:58

occur. Thank you. Sharon, I

00:43:06

mean there is another way

00:43:08

another tool. Would you like

00:43:12

to talk to us about

00:43:13

it? The incorporation of Human

00:43:18

Rights mechanisms into existing treaties

00:43:23

by reference. So well, ESG.

00:43:27

As a term or human

00:43:29

rights, not be expressly reference

00:43:32

all the time. You may



00:43:33

have instances in which certain

00:43:35

mechanisms are incorporated into treaties

00:43:40

by reference weather, that's in

00:43:41

the Preamble and substance of

00:43:43

Provisions or other defenses that

00:43:47

that are raised in treaties.

00:43:49

So you see this increasingly

00:43:52

and some of the newer

00:43:53

generation bilateral investment treaties or

00:43:57

multilateral investment treaties which are

00:43:59

reporting to seek a balance

00:44:02

between on the one hand

00:44:03

promote An encouraging investment. And



00:44:06

on the other hand, ensuring

00:44:08

that such investment is responsible

00:44:11

and contribute contribute to sustainable

00:44:14

Economic Development, so they, these

00:44:18

Provisions can provide for the

00:44:20

promotion of investment, but in

00:44:23

a manner that it doesn't

00:44:25

come at the expense of

00:44:27

the traction or diminishment of

00:44:29

Human Rights or, you know,

00:44:31

and so they establish the

00:44:37

promotion of these International standards

00:44:40

that state parties and in



00:44:42
some instances investors, depending on

00:44:44
how they're dressed, it should

00:44:46
strive to comply with, but

00:44:48
they also, deliberately exclude certain

00:44:50
Investments, which contravene. Those objectives,

00:44:54
for example, they can provide

00:44:56
heart valves for things like

00:44:59
human rights, violations, they can

00:45:02
protect legitimate public insurance, But

00:45:04
the right of the states

00:45:05
regulate around Schumann rights issues

00:45:08
and some of those policy

00:45:10
objectives that you might see



00:45:11
increasingly in this new generation.

00:45:13
I think it's like Corporate

00:45:15
social responsibility that that terminology

00:45:17
but which is now you

00:45:19
know, increasingly broadens and gardening

00:45:21
and nature preventing human rights

00:45:24
violations, protecting labor rights, by

00:45:26
protecting laborer, striving for gender

00:45:30
equality. And so there's three

00:45:35
main ways in which the

00:45:36
first you see, this incorporation

00:45:40
by reference to other multilateral

00:45:42
instruments on human, right? So



00:45:44

you might see a reference

00:45:46

to the oecd guidelines on

00:45:49

responsible business conduct that were

00:45:50

mentioned earlier. You might see

00:45:52

a reference to the UN

00:45:53

guiding principles on business and

00:45:55

human rights for the sustainable

00:45:57

development principles. In relation not

00:46:00

to give me nice. But

00:46:01

the climate change might see

00:46:02

references to the Paris agreement,

00:46:04

for instance, and, you know,

00:46:07

many, many, many Provisions are



00:46:11

actually Incorporated in the Preamble

00:46:13

in language in a manner that

00:46:16

makes reference to internationally recognized

00:46:19

standards, including and then listing,

00:46:21

you know, the relevant mechanism.

00:46:25

I'm so, just by way

00:46:26

of example, for example, that

00:46:28

the Canada model B, I

00:46:29

T of 2021 refers to

00:46:33

internationally recognized, standards guidelines and

00:46:36

principles of responsible, business conduct.

00:46:38

And then it lists, for

00:46:39

example, the oecd guidelines and



00:46:41

it lists the UN guiding

00:46:42

principles on business and human

00:46:44

rights. Other treaties incorporate different

00:46:48

provisions and operate as well.

00:46:51

So that's one way. And

00:46:54

then secondly you have these

00:46:56

Express, human rights-related, Provisions substances,

00:47:01

You have provisions on Corporate

00:47:03

social responsibility. So obligations for

00:47:05

example of investors to comply

00:47:07

with Jose State domestic Lawrence

00:47:09

human rights acknowledgement of encouraging.

00:47:13

Incorporation of internationally recognized standards



00:47:17

on on human rights and

00:47:20

in some limited cases such

00:47:22

as in the case of

00:47:22

the Dutch Dutch model. T,

00:47:26

i t you have even

00:47:27

potential liability as civil liability

00:47:30

right investors in their home

00:47:32

state for acts and decisions

00:47:35

which could lead to significant

00:47:37

damage, personal injury or loss

00:47:39

of life in the whole

00:47:40

state. So, of course, could

00:47:42

Encompass a question. And then,



00:47:46

lastly, I mentioned at the

00:47:48

outset to specific sets a

00:47:50

carve-out. So denial of benefits,

00:47:52

right? So failure to extend

00:47:56

benefits of protection of the,

00:47:58

of the human rights of

00:47:59

DM. Westmont a mechanisms of

00:48:02

the treaty mechanism Clauses, then

00:48:07

I'll benefit Clauses and then

00:48:08

secondly, legitimate public interest, which

00:48:11

expressly allows states to regulate

00:48:13

around questions of Human Rights.

00:48:16

So you can see it



00:48:17

is and some newer model

00:48:19

treaties. For example, the Colombian

00:48:21

model B I T has

00:48:23

a very expensive denial of

00:48:24

that which includes committing serious

00:48:29

human rights violations, not benefit

00:48:38

It's also things like causing

00:48:41

serious environmental damage or participating

00:48:44

in Terrorist activity or violating

00:48:46

the labor law and then

00:48:49

lastly legitimate public interest. You

00:48:51

can see many of the

00:48:53

new generation model B. I



00:48:55

T is allowing states to

00:48:57

regulate within their territories with

00:48:59

respect human rights. So you

00:49:01

see for instance in in

00:49:04

the Dutch model b i

00:49:05

t u c a reference

00:49:07

to starting up the Colombian

00:49:11

model b. I t a

00:49:11

reference to legitimate policy objectives

00:49:14

of Human Rights help public

00:49:16

order labor rights, the environment,

00:49:18

Etc. Oh, thank you, Sharon

00:49:24

dogs are also some other



00:49:28

issues, other ways of dealing

00:49:32

with those issues. For instance,

00:49:35

in terms of contributory for

00:49:38

the reduction of Damages, you

00:49:42

have something to say on

00:49:43

this human rights almost without

00:49:49

using the word and without

00:49:51

using any of the techniques

00:49:52

we've mentioned. So, so far,

00:49:54

so pretty sample in Copper

00:49:55

Mesa versus Ecuador, which I

00:49:58

think was the 2014 award

00:50:00

if I recall correctly. In



00:50:02

that case, the Canadian company

00:50:05

investor was accused of having

00:50:10

committed unlawful acts of violence,

00:50:12

against the villagers, who themselves

00:50:15

had perhaps committed, some unlawful

00:50:17

acts, but the company had

00:50:19

committed unlawful acts of violence

00:50:21

in the course of How

00:50:23

to clear the way for

00:50:24

its its mining project and

00:50:27

the tribunal without importing any

00:50:31

human rights treaties or or

00:50:32

using systemic integration adopted or



00:50:37
employed the doctrine of contributory

00:50:40
negligence and said that the

00:50:42
company was at least negligent

00:50:45
the tribunal preferred to treat

00:50:47
it as a case of

00:50:48
negligence rather than intentional a

00:50:52
commission of wrong. But at

00:50:53
least by the Canadian headquarters

00:50:55
and as a result that

00:50:56
found the climate was responsible

00:50:59
for 30% of the damage

00:51:01
that would, would otherwise have

00:51:05
been awarded and reduce the



00:51:07
damages accordingly a similar. But

00:51:10
different approach was taken by

00:51:12
the tribunal in Bear Creek

00:51:14
versus Peru. Where the majority

00:51:17
of the tribunal held at

00:51:19
the consultation that had been

00:51:22
done. Done with local stakeholders

00:51:25
indigenous groups was not sufficient,

00:51:28
but rather than rule that

00:51:30
that was a violation of

00:51:32
human rights, which could have

00:51:34
been its ruling. Instead, it

00:51:37
took the view that regardless



00:51:38

of any action taken by

00:51:40

the state, the company's failure

00:51:42

to ensure adequate consultation with

00:51:46

the local community, where were

00:51:49

the state's failure to do

00:51:50

so meant that there was

00:51:52

never going to be social

00:51:53

licence for the plant or

00:51:55

are skewed me for the

00:51:56

mine. And as a result,

00:51:58

the company could not get

00:52:01

recovery of its claim for

00:52:04

the future stream of profits.



00:52:06

That would have been generated

00:52:07

by the mine and the

00:52:09

company was instead of Ward

00:52:10

and only you'd sunk costs

00:52:12

for the money's spent up

00:52:14

to that point. And the

00:52:16

end result of that was

00:52:17

a huge reduction in the

00:52:19

amount of the damages claim

00:52:21

compared to the damage. Actually

00:52:23

warded. And there are other

00:52:25

examples, but these are two

00:52:26

examples of how tribunals without



00:52:29
expressly invoking human rights. Treaties

00:52:32
have taken human rights into

00:52:34
account at the phase of

00:52:36
intersect damages. But this is

00:52:40
likely to happen or to

00:52:41
be done only in really

00:52:42
egregious cases and both of

00:52:45
those were pretty egregious on

00:52:47
the facts. Thank you. Doug.

00:52:50
And another tool we mention

00:52:53
it, mention this in the

00:52:55
the beginning of briefly is

00:52:58
the county claims. Would you



00:53:01

like to just elaborate a

00:53:02

little more on this to?

00:53:04

I think I mentioned earlier

00:53:05

that human rights come up

00:53:07

and multiple contacts including West

00:53:11

State that she use human

00:53:13

rights obligations. But it's in

00:53:15

the context of Defense has

00:53:16

been came to vote against

00:53:17

them but also to bring

00:53:19

counterclaims. Just a couple of

00:53:21

things about that sitting on

00:53:23

the counter claim from number



00:53:25

one. Using defend human rights

00:53:28

in a defensible. Can entertain

00:53:30

capacity that are trashed still

00:53:31

so it's not a tool

00:53:34

that is yet very developed

00:53:35

a potential but just we

00:53:38

should keep in mind, it

00:53:39

doesn't and hasn't happened. Very

00:53:41

often, there is a question

00:53:43

around counterclaims different schools of

00:53:46

thought about weather and what's

00:53:48

a consultant. Says they cannot

00:53:50

chibi progressed. I'm here. But



00:53:54

there's at least some procedural

00:53:56

questions around counterpane. I think

00:53:59

one of the interesting points

00:54:01

that we have to keep

00:54:01

in mind, both in relation

00:54:03

to the fences and contains

00:54:05

is that it can be

00:54:06

against Estates and trusts As

00:54:09

a consultant to raise human

00:54:11

rights issues because States themselves

00:54:13

can be held liable for

00:54:15

human rights violations. I'm releasing

00:54:18

to invest. So the address



00:54:19

to new case against Nicaragua,

00:54:22

where there was a Logan

00:54:23

concession in the state itself

00:54:24

was held responsible of the

00:54:26

inter-american court of Human Rights

00:54:27

allowing that concession to move

00:54:31

forward. I'm to United States.

00:54:34

Sometimes we'll have to conduct

00:54:36

to really delicate Balancing Act

00:54:38

to decide whether it really

00:54:40

is in their interest to

00:54:42

raise human rights. When there

00:54:44

was this factor of planes



00:54:46

against the state in another

00:54:47

context, by the domestically, will

00:54:49

perhaps in a Regional Human

00:54:50

Rights. Quote, for those caves

00:54:52

to come back and that

00:54:53

she and packed it in

00:54:54

another context. Do you like

00:54:58

to comment on that? That

00:55:00

is true, that, that, that

00:55:02

tension arises in many cases,

00:55:05

but not all. There are

00:55:07

certainly some cases where states

00:55:08

have Clean Hands in in,



00:55:10
in regard to Human Rights,

00:55:12
but a claimant might not.

00:55:18
Carlos since you are you

00:55:21
know we have the privilege

00:55:23
of having you here with

00:55:24
the experience, you had as

00:55:26
a member of the Constitutional

00:55:28
Court, what is the role

00:55:31
of constitutional Court's regional chords

00:55:33
to Commissions in reviewing human

00:55:36
rights issues and treaties were

00:55:39
talking about three days including

00:55:41
language on how to draw



00:55:42

human rights. If you can

00:55:45

give us your bring us

00:55:46

your You're experiencing this, I

00:55:52

will be very brief it

00:55:53

for the sake of time.

00:55:55

Is it at first? I

00:55:57

think course, they are playing

00:55:58

an important role when they

00:56:02

have to do it. When

00:56:04

they have a say in

00:56:05

the process of ratification of

00:56:07

international produces a any particular

00:56:10

abitanti. Princess one of the



00:56:14
job that I did when

00:56:16
I was there. I just

00:56:17
had a Columbia Constitution Court

00:56:19
to work to draft decision,

00:56:22
252 red 2019, which is

00:56:27
how he said live. In

00:56:28
case we had the privilege

00:56:31
to have Antonio as one

00:56:34
of her expertise in the

00:56:35
in the hearing over time

00:56:38
and one of the things

00:56:40
that the gordita the time

00:56:42
was to make sure that



00:56:44

the treaty that that wasn't

00:56:47

3D between Colombia and Peru.

00:56:48

Dead. Sweetie comply with the

00:56:52

Constitution and when we talk

00:56:55

about the Constitution is not

00:56:56

only about the organic part

00:56:59

of the Constitution, that is

00:57:01

a, the powers of the

00:57:02

president etcetera but also constitution

00:57:05

rights issue with our human

00:57:06

rights and phone. So that

00:57:09

is one point that is

00:57:10

becoming more popular in particular



00:57:13

in Latin America, to try

00:57:20

to address this issue. Is

00:57:22

when they receive a petitioners

00:57:26

like in the form of

00:57:27

constitution, complains that. So call

00:57:30

Amparo to tell you or

00:57:32

The Jeffersons, West, Verde Inn

00:57:35

in Germany, in which a

00:57:39

people claimed that their constitutional

00:57:41

rights have been violated a

00:57:43

paella party, which is usually

00:57:45

accompanied and Dad come Use

00:57:49

protected by Umberto's, right, show,



00:57:52

my my point here is

00:57:54

that was a constant Rain

00:57:55

chords. They should be educated

00:57:58

in international invest in low.

00:58:00

So they take that into

00:58:03

equation that not only from

00:58:05

his point of view of

00:58:06

constitution rights but also from

00:58:09

the point of view of

00:58:09

the respect of the rights

00:58:11

of the investor and then

00:58:13

the other point which is

00:58:14

complicity friends. He's considering the



00:58:17
regional a commissions of Human

00:58:21
Rights and also the codes

00:58:23
are mentioned before I am

00:58:26
a commission since January 2022,

00:58:29
and every session of hearings

00:58:32
I push for a hearing

00:58:34
or at least had a

00:58:35
Pioneer with experts concerning the

00:58:39
protection of investors. Why is

00:58:41
that? Because of what I

00:58:41
see is he's too many

00:58:44
really good people that claim

00:58:46
we don't care about them.



00:58:48

What was the only thing

00:58:50

we carry the environment or

00:58:52

the rights of indigenous peoples,

00:58:54

or just for being mine

00:58:58

in the whole country, something

00:59:00

like that and I bet

00:59:02

you forget that it without

00:59:05

investment, it is impossible to

00:59:07

have a welfare state public

00:59:09

education, Public Health in some

00:59:13

of the countries in Latin

00:59:14

America. So that's that's what

00:59:16

must call me the future



00:59:18

years is that decisions like

00:59:21

like the inter-american Human Rights

00:59:24

Commission or the African Human

00:59:26

Rights Commission, they opened their

00:59:28

ears to the protection of

00:59:31

the investors are always with

00:59:33

this week, with the Saviour,

00:59:35

with the aim of a

00:59:37

strike, a balance over strike,

00:59:38

a balance of taking into

00:59:40

account, all the points of

00:59:41

view, I'm trying to make

00:59:43

a commitment in the middle.



00:59:45

Thank you so much. Thank

00:59:48

you, Carlos. Basically, we just

00:59:51

need to get out of

00:59:52

our Silas and try to

00:59:55

breach different. The, you know,

00:59:58

feels together. There are some

01:00:03

tools that we that we

01:00:07

have today in the, in

01:00:09

the field of commercial arbitration.

01:00:10

And also there are other

01:00:14

mechanisms outside the arbitration that

01:00:19

give access conditional access the

01:00:21

protections of Human Rights compliance.



01:00:24

If you could just save

01:00:25

you a few words about

01:00:27

this earlier, question of commercial

01:00:35

contracts. And in particular model

01:00:38

Clauses, which deal with human

01:00:41

rights or ESG issues, more

01:00:42

generally, a supreme example, the

01:00:44

American Bar Association has a

01:00:46

in model. Set of contract

01:00:48

Clauses which provide for us

01:00:52

to be incorporated into a

01:00:53

commercial contract. A clause which

01:00:55

imposes Mutual obligations on buyers



01:00:59

and sellers at the spot

01:01:01

kind of commercial relationship. With

01:01:02

respect to combating certain abusive

01:01:05

practices in Supply chains or

01:01:08

another business relationships through human

01:01:11

rights. You the mechanism for

01:01:14

Princeton's, I'll just read you

01:01:15

at one of these causes

01:01:17

take out of flavor of

01:01:18

what? What I were talking

01:01:19

about here. So this is

01:01:21

the APA model contract +

01:01:24

2.0. + number one point



01:01:27

one is a which states

01:01:28

that buyer and seller has

01:01:30

a buyer and supplier. Each

01:01:32

covenants to establish and maintain

01:01:34

a human rights due diligence

01:01:37

process, there were talking about,

01:01:39

you know, the internal processes

01:01:41

of companies to establish human

01:01:44

rights. Due diligence risk, identification.

01:01:48

Appropriate to its size. So

01:01:52

there were talking about it

01:01:53

on the scale of these,

01:01:54

internal internal mechanisms and circumstances



01:02:00

to identify prevent mitigate an

01:02:03

account or how each a

01:02:05

buyer and supplier addresses the

01:02:07

impact of its assessment of

01:02:10

its activities. Sorry. On the

01:02:12

human rights of individuals directly

01:02:15

or indirectly, affected by their

01:02:17

supply chains. Consistent with the

01:02:20

UN guiding principles on business

01:02:22

and Human Rights Commission. By

01:02:25

reference of the framework of

01:02:26

the UN GPS. You aren't

01:02:28

getting principles on business and



01:02:30

human rights and we have

01:02:31

the reference to that. You

01:02:32

diligence framework, maybe some of

01:02:34

the audience members might be,

01:02:35

might not be familiar with

01:02:37

it, but kind of the

01:02:38

three prong mechanism whereby companies

01:02:44

are obligated to identify mitigate

01:02:47

and Buy prevent and mitigate

01:02:50

human rights impacts within their

01:02:55

supply chains or now, kind

01:02:56

of even extended further to

01:02:57

their business relationships and there's



01:03:00

something big going on as

01:03:02

the weather that incorporates Financial

01:03:05

investors. For instance are other

01:03:06

types of kind of business.

01:03:08

Actors, Beyond simply the supply

01:03:09

chain relationships, and I'll just

01:03:12

finish that the rest of

01:03:13

the the clause, which states

01:03:15

that such human rights due

01:03:16

diligence, shall be consistent with

01:03:18

guidance from the oecd for

01:03:22

the applicable party sector. Or

01:03:25

if no such sector-specific guidance



01:03:27

is this, it should be

01:03:28

consistent with the oecd due.

01:03:30

Diligence guidance for responsible business

01:03:32

conduct those are mechanisms that

01:03:35

provide some sort of interpretation

01:03:39

as to how the oecd

01:03:41

guidelines should be interpreted and

01:03:43

applied to particular Industries. So

01:03:45

there's one for instance, for

01:03:46

Footwear and apparel. There's another

01:03:49

one for mining. Which each

01:03:53

kind of major industry has

01:03:56

license a each but many



01:03:58
of the major industries have

01:03:59
at this guidance to show

01:04:01
how precisely they should take

01:04:03
these discussions as I can.

01:04:04
So you don't closets like

01:04:06
this can be quite useful

01:04:08
in bringing commercial parties attention

01:04:10
to these issues if they've

01:04:12
not already been exposed to

01:04:13
them and they may also

01:04:16
a risk to the extent

01:04:19
that is, you know, part

01:04:21
of the negotiation. And then



01:04:22

the companies seek to do

01:04:24

that I'll just on judicial

01:04:41

dispute, resolution mechanism than one

01:04:44

of those. And we're very

01:04:45

fortunate to have Cuts your

01:04:47

hair, who participated in creating

01:04:49

these mechanisms. CD National contact,

01:04:55

Point framework. And essentially, each

01:04:58

always, CD member has a

01:05:00

national contact point, which evaluates

01:05:02

complaints that are brought against

01:05:05

companies with respect to their

01:05:08

compliance with the oecd guidelines.



01:05:09

And of course, this incorporates

01:05:12

some aspects of Human Rights

01:05:14

due diligence but it also

01:05:16

has brought her in that,

01:05:18

as it has environmental claims,

01:05:19

labor. Clean other other possible

01:05:21

client is an initial admissibility

01:05:23

face to determine whether something,

01:05:26

but their complaint is appropriately.

01:05:27

Situated on Saxon, there's appropriate

01:05:31

standing on the issue and

01:05:33

then the party is can

01:05:35

seek some sort of amicable



01:05:38
resolution often times through mediation

01:05:40
as a way of finding,

01:05:44
some sort of remedy to

01:05:46
address the relevant situation and

01:05:48
the remedies are are wide-ranging.

01:05:50
You may have requests for

01:05:51
compensation, but you I have

01:05:53
something completely different such as

01:05:54
a request to modify a

01:05:56
process or procedure internally or

01:05:59
request, to issue a public

01:06:01
statement or recognize some sort

01:06:05
of past harm that there's



01:06:06
a fight. They can be

01:06:07
quite creative. And of course,

01:06:09
reputational risks is going to

01:06:10
be a real component of

01:06:12
relevance to companies assessment as

01:06:15
to whether they participate in

01:06:17
this non-binding mechanism or whether

01:06:21
they, you know, you view

01:06:23
it as something less impactful

01:06:25
upon their business relationships. And

01:06:27
unless I just mentioned in

01:06:29
the oecd framework has one,

01:06:30
but there are many other



01:06:31
complaints Frameworks non-judicial compliance framework

01:06:34
such as through the various

01:06:36
un special rapporteur zand and

01:06:38
working groups as well as

01:06:40
National human rights. Institutions institutions

01:06:45
that can also hear hear

01:06:47
claims and European regulatory framework.

01:06:52
Incorporates or touches. Thank you.

01:06:59
I need anybody has anything

01:07:01
to our do? They always

01:07:02
City procedures Studies have indicated.

01:07:13
That they are buying large

01:07:16
ineffective. They have produced very



01:07:18

few concrete results on the

01:07:20

ground. If you compare them

01:07:22

to International arbitration Awards which

01:07:26

are enforceable under the New

01:07:27

York convention, the reality of

01:07:30

the NCP process is is

01:07:33

incomparably smaller than what we're

01:07:36

talkin about. When we deal

01:07:37

with International arbitration where if

01:07:40

a human rights issue was

01:07:41

raised whether it's a counterclaim

01:07:43

or a defense or or

01:07:46

a a reduction of Damages



01:07:51

it can result in in

01:07:53

real meaningful impact whereas the

01:07:57

NCP process While well-intended because

01:08:03

of the lack of political

01:08:04

will by oecd member states.

01:08:06

They were not willing to

01:08:08

give it enough teeth to

01:08:10

make it work in practice.

01:08:12

So it's it's a good

01:08:13

thing to be there in

01:08:15

my experience, many companies, when

01:08:17

I explain what it is

01:08:18

say. Well, we're just going



01:08:20
to boycott it. There's no

01:08:21
point in playing ball with

01:08:22
that process. So sorry to

01:08:25
be the skunk at the

01:08:27
Garden Party on that one.

01:08:29
I just wondered, if I

01:08:31
would argue that, you know,

01:08:33
perhaps there is no, there

01:08:35
are no binding kind of

01:08:36
cheeses, you know, but I

01:08:38
would argue that there can

01:08:40
be a significant impact of

01:08:41
these types of cases upon



01:08:43
company internal processes, especially with

01:08:46
this kind of creativity of

01:08:47
remedies that. That might be

01:08:49
available. And I think the

01:08:52
reputational factor is not one

01:08:53
to be discounted, especially nowadays,

01:08:55
where companies are increasingly adopting

01:08:58
kind of commitment towards making

01:09:00
progress on many of these

01:09:02
issues including human rights, especially

01:09:06
that you know the very

01:09:06
forward-looking industry leaders do not

01:09:09
want to be associated with



01:09:11

a complaint that says that

01:09:13

they're engaged and, you know,

01:09:14

some somewhere in their supply

01:09:15

chain there and get you

01:09:16

and human rights violations. I

01:09:17

would argue that although, it's

01:09:19

not decisive and and not

01:09:20

finding, it can have a

01:09:22

significant reputational risk. Perhaps, when

01:09:25

when paired with all of

01:09:26

the other mechanism, The sting

01:09:29

at the international and Regional

01:09:31

level to exert, pressure to



01:09:34
for companies to conduct their

01:09:36
Industries in binding, as that

01:09:42
it has not achieved results.

01:09:46
So there's a lot to

01:09:48
be done to strengthen them

01:09:50
strength of the mechanism. I

01:09:52
think because it's a very

01:09:54
has very good basis and

01:09:55
it just needs to be

01:09:57
strengthened taken more seriously and

01:09:59
actually advertised more broadly. That

01:10:08
is a, that is an

01:10:09
issue. And now we are



01:10:12

running out of time. I

01:10:14

think we're close to her.

01:10:15

But I would like to

01:10:16

just briefly mentioned the specific

01:10:22

set of rules actually that

01:10:24

has been created the doctors

01:10:26

for this particular issues. They

01:10:31

hate rules and business and

01:10:33

human rights, which are arbitration

01:10:35

rules. So any I just

01:10:37

briefly Why they have not

01:10:40

been used. So you're taking

01:10:43

this before, we conclude single-use



01:10:51

of them, some of us

01:10:53

during the comment period argued

01:10:55

to the drafters. They were

01:10:57

unlikely to be used and

01:10:59

the reasons why they were

01:11:00

unlikely to be used. I

01:11:01

think of the reasons they

01:11:02

have not been used their,

01:11:05

their number reasons, but just

01:11:06

to mention to what is

01:11:08

the incentive for either party

01:11:10

to use those rules, there

01:11:12

are disadvantages to both parties



01:11:14

number to who's going to

01:11:17

cover. And how are they

01:11:18

going to cover the costs

01:11:20

of arbitration? Which can be

01:11:22

quite significant for the for

01:11:27

the poor communities? Assuming that

01:11:29

it is a poor Community

01:11:30

or individuals. Who who is

01:11:32

human rights? Have allegedly been

01:11:34

been harmed by now. Maybe,

01:11:38

with some of these Stream

01:11:40

mentioned earlier, we may actually

01:11:43

see some used to these



01:11:44
rules particularly in a business-to-business

01:11:46
context. That's probably the the

01:11:50
most likely or alternatively. If

01:11:52
the state requires by regulation

01:11:55
that the rules be used.

01:11:56
That's, that's possible in the

01:11:58
future, but it hasn't happened

01:12:00
yet. Any quick, to this,

01:12:03
I just, obviously the lack

01:12:08
of experience makes it difficult

01:12:09
to tell that to Doug's

01:12:10
point. I think it's very

01:12:12
old oak procedural, Innovations of



01:12:15
taking place in relation to

01:12:17
the hate rules. It's still

01:12:18
very unclear, whether it's walkable

01:12:20
to the populations, who would

01:12:22
Mason in a victim to

01:12:24
business dispute. Whether it actually

01:12:26
is accessible at Rule and

01:12:29
whether is because of the

01:12:31
other people who were most

01:12:32
poorly equipped to actually use

01:12:34
all the Traditions lack of

01:12:36
awareness, whether it's still workable,

01:12:40
but if they're all business-to-business



01:12:42

disease, it is possible that

01:12:45

the victims will actually benefit

01:12:48

side effects of these will

01:12:51

be the victims benefit because

01:12:52

one of the purposes of

01:12:55

the rules General note that

01:12:56

the arbitration rules, but the

01:12:58

underlying principles on this isn't

01:13:00

human rights. That the priority

01:13:03

should be to remedy those

01:13:05

who have stuff at the

01:13:06

office human rights and pack.

01:13:08

So I think the hope



01:13:09
is that even in the

01:13:11
context of business-to-business to feed,

01:13:13
Sarah, positive effects for individuals

01:13:15
and communities who have been

01:13:17
impacted No, wrapping up. I

01:13:23
would like you to. I

01:13:25
would like each of you

01:13:26
to give me like to

01:13:29
give us in like 30

01:13:32
seconds or as briefly as

01:13:36
possible, you're taking looking forward.

01:13:40
What is your expectation about

01:13:42
a whether human rights issue



01:13:44

will feature more frequently or

01:13:47

more prominently in international arbitration?

01:13:49

And what does it mean

01:13:51

in practice for international situation,

01:13:53

practitioners party Representatives experts and

01:13:56

arbitration arbitrators for instance? I

01:14:00

can jump in and I

01:14:01

think it's inevitable that human

01:14:03

rights considerations are going to

01:14:04

become more relevant post is

01:14:07

a rebalancing of this new

01:14:08

generation of investment treaties. I

01:14:10

think must continue to see



01:14:12

that. Grow as more General

01:14:15

recognition, that business activities, give

01:14:19

rise to Human Rights and

01:14:20

packs. The fact that Sutton

01:14:23

sedate responsibilities under the UN

01:14:26

GPR. Now in some jurisdictions

01:14:27

being translated into actual applications..

01:14:32

Is pushing towards human rights

01:14:34

becoming more relevant business operations.

01:14:38

Also with climate change, it's

01:14:41

a human rights are actually

01:14:43

the main instrument through which

01:14:44

climate change names are prosecuted.



01:14:49

And we will see Clarity

01:14:53

around the interaction of different

01:14:55

areas, of little, perhaps more

01:14:56

investment little, but sadly human

01:14:58

rights law. Generally International climate,

01:15:02

the international climate raging and

01:15:04

session. Is he coming out

01:15:07

of the inter-american court of

01:15:09

Human Rights? Those find those

01:15:12

to The Advisory opinions will.

01:15:14

I think provide more substance

01:15:18

the parties to rely on

01:15:20

in these in an investment



01:15:23

case says. So I think

01:15:25

we'll also see investors knowing

01:15:28

more at the stage of

01:15:29

investment and being and being

01:15:31

seen to know. So there's

01:15:33

going to be an obligation

01:15:34

or investors to take into

01:15:36

account things like climate of

01:15:37

the gation I think States

01:15:41

will ultimately play more freedom

01:15:44

to regulate on human rights

01:15:46

in particular, climate G. But

01:15:48

I still think that the



01:15:49

system has a long way

01:15:50

to go before. It's really

01:15:52

calibrated handle these claims in

01:15:55

a way that really takes

01:15:56

into account. The human rights

01:15:58

considerations because ultimately is An

01:16:00

investment regime. I just own

01:16:02

the Practical side of this.

01:16:03

Only if that's decide there

01:16:06

is an opportunity for everyone

01:16:08

to learn about these other

01:16:11

areas of law, become more

01:16:13

relevant and take care of



01:16:14

the rest of State cases

01:16:15

and climate-related cases. But we're

01:16:18

going to need to know

01:16:18

about human rights and just

01:16:20

on the commercial side. I

01:16:21

think that when we do

01:16:24

see business-to-business disputes that come

01:16:28

out of supply chain issues,

01:16:29

the weather. Both business and

01:16:31

pies because of activity in

01:16:33

the supply chain that it's

01:16:35

going to be really challenging

01:16:36

for Aubrey traitors because rules



01:16:40

like the European directive. The

01:16:42

corporate sustainability. Director said there's

01:16:48

no, you wouldn't simply Beyonce,

01:16:50

you breach the dispute that

01:16:51

for his compensation. There are

01:16:53

all kinds of steps. I

01:16:55

have to happen so you'll

01:16:57

really thinking about impacts on.

01:17:00

People that the two are

01:17:01

adversely impacted, how you actually,

01:17:04

trying help the supply chain

01:17:06

survive and I think that

01:17:07

that will be a challenge



01:17:09
for all of us, but

01:17:10
it will say that an

01:17:11
opportunity to look at things

01:17:12
through a different lens. Thank

01:17:14
you, Janet Carlos. Very short,

01:17:20
First International arbitration panel's and

01:17:24
international commercial Partners must take

01:17:27
into account the human rights

01:17:28
obligations by state. The investors

01:17:33
have such must take into

01:17:35
account human rights standards domestic

01:17:39
Regional and International. I'm third,

01:17:43
third domestic court and to



01:17:47

take into account. International arbitration

01:17:50

Publications over the states and

01:17:53

finally is reinsurance. Your rights

01:17:56

bodies must take into account

01:17:58

to also the fact of

01:18:01

the states have in the

01:18:03

House, International obligations concert in

01:18:07

the protection of the rights

01:18:09

of English. Thank you so

01:18:11

much. I would agree with

01:18:17

everything that's been said that's

01:18:18

far. I would just add

01:18:19

a couple of points. Number



01:18:21

one, they're going to be

01:18:22

as we're seeing currently in

01:18:24

the United States, conflicting versions,

01:18:26

where here you're having a

01:18:28

n s. I e s

01:18:29

g sentiment followed by regulation

01:18:33

and four examples, State Attorney

01:18:35

General's, and financial controllers action

01:18:37

against a company is for

01:18:40

their. Their efforts around sustainability

01:18:43

and, you know, we can

01:18:45

envisage a big topic, as

01:18:48

well. We, that would contrast



01:18:52
very expressly with what's happening

01:18:54
in Europe and other jurisdictions.

01:18:57
I think that fragmentation and

01:18:59
that the danger and ending

01:19:01
of the companies needing to

01:19:03
follow suit and have you

01:19:04
no regions specific strategies for

01:19:08
addressing. Those is going to

01:19:09
be really Central to Howard.

01:19:11
Seeing that arise in a,

01:19:13
in in the disputes contacts.

01:19:16
I would also say that

01:19:17
as states are obliged to



01:19:20

come into compliance with regulatory

01:19:22

instruments with Regional International and

01:19:25

domestic. There's going to be

01:19:27

an increasing tension between the

01:19:29

right to regulate and the

01:19:31

respect of investor rights under

01:19:35

the tree framework, so that

01:19:37

the framework needs to adopt

01:19:39

in a way that is

01:19:40

going to be able to

01:19:42

reconcile. Those two sets of

01:19:44

Rights in a manner that

01:19:45

allows states to comply, for



01:19:47

example, with the Paris agreement,

01:19:48

or with the inability to

01:19:53

teligence directive, but in a

01:19:55

way that's all so protective

01:19:57

of investor rights, I think

01:19:58

those tensions are really going

01:19:59

to be what is inherent

01:20:00

in the next phase but

01:20:02

it's inevitable that we need

01:20:05

to take into account human

01:20:06

rights in that assessment. Thank

01:20:09

you, Sharon Ducks, the final

01:20:10

word. Before we take some



01:20:11

questions a structural defect of

01:20:19

Silo Silo ISM. If I

01:20:21

can call it that both

01:20:23

in the investment regime and

01:20:25

in the Regional Human Rights

01:20:27

regime and the Regional Human

01:20:29

Rights regime. The inter-american court

01:20:31

has recently decided, where is

01:20:33

about to decide cases the

01:20:35

impact, very severely, the rights

01:20:38

of companies of the investment

01:20:40

rates are company, certainly their

01:20:41

interest. And yet those companies



01:20:43

have no party standing either

01:20:45

before the inter-american commission, or

01:20:48

the inter-american court. The most

01:20:50

they can do is file.

01:20:51

Amicus briefs likewise in investment

01:20:54

arbitrations these days affected communities,

01:20:59

whose human rights may be

01:21:00

adversely affected have no party

01:21:02

standing. They have to rely

01:21:04

on some sort of third-party

01:21:06

benefits. As a corollary is

01:21:09

Janet said from a business-to-business

01:21:12

or a business to State



01:21:13

dispute. In my view, both

01:21:17

of those situations are structural

01:21:20

defects in mechanisms of international

01:21:23

law. The real parties and

01:21:25

interest are at least three

01:21:28

fold in each of those

01:21:29

situations. And yet the actual

01:21:31

formal parties with procedural rights

01:21:34

are only two in the

01:21:36

long run, it seems to

01:21:38

me, we need to address

01:21:39

both of those problems and

01:21:41

I'm encouraged to hear that.



01:21:43

Commissioner Bernal is Raising it

01:21:45

in the inter-american context and

01:21:47

I hope some of his

01:21:49

fellow Commissioners, pay attention. Thank

01:21:52

you. Doug now I would

01:21:53

like to ask you if

01:21:55

any of you has any

01:21:56

questions. Yes. It was an

01:22:03

issue with a Microsoft for.

01:22:04

Yes, there is. Can you

01:22:13

hear me? As you can?

01:22:14

Thank you. Here's one. Or

01:22:20

this one. Now you can



01:22:39

hear me. Oh yes. Thank

01:22:41

you, Katia very much for

01:22:43

for your uniform, moderating this

01:22:46

I have and thank you,

01:22:48

dog, for it. That your

01:22:49

last comment because we we

01:22:51

now have the topic for

01:22:53

it. Next year's. Human rights

01:22:57

and business and an international

01:23:00

arbitration panel which will be,

01:23:02

I can announce it already

01:23:04

know, the lack of standing

01:23:06

of companies before the inter-american



01:23:08
human rights system versus the

01:23:12
lack of standing of certain

01:23:14
communities before investment tribunals. I

01:23:17
think that that that is

01:23:18
a key topic and and

01:23:19
happy to announce it. But

01:23:22
beyond that, what I would

01:23:24
like to to ask which,

01:23:26
which is the one of

01:23:29
our Battle horses in in

01:23:33
the human rights and an

01:23:34
international reputation are are your

01:23:37
views. And I know we



01:23:39
discussed this before dog. You

01:23:42
might not be embracing that

01:23:43
the following but I would

01:23:45
like to hear know the

01:23:47
opinions of of specially Janet

01:23:49
and the others on trying

01:23:55
to make the best arbitration

01:23:58
system, a more balanced one

01:24:01
it with regard to especially

01:24:03
in those communities that could

01:24:04
be affected by investment projects

01:24:07
and by some of the

01:24:08
Investments that take place in



01:24:10
in the territories of States.

01:24:12
Part of the, at least,

01:24:14
might be part of the

01:24:14
issue of the reason why

01:24:16
that wrecked claims by States

01:24:19
and also counterclaims by by

01:24:22
state. If anything might might

01:24:27
be heard by tribunals in

01:24:32
terms of violations of human

01:24:34
rights but I might just

01:24:38
go that far but but

01:24:41
not make it to the

01:24:42
marriage in a Victoria's way



01:24:45

is because when you read

01:24:46

the I would say a

01:24:48

word. They're saying it 98%

01:24:50

of the investment treaties. There

01:24:53

are no obligations for investors

01:24:56

concerning human rights. There are

01:24:57

there are soft applications like

01:25:01

in the Canada Columbia, Ave

01:25:04

ta their horses, Horry Provisions,

01:25:08

but there are no heart

01:25:11

l'obligation simos trees. There's, there's

01:25:12

a handful of trees that

01:25:14

do that. But most most



01:25:16
of they don't. So, some

01:25:18
of the proposals that we

01:25:19
have put together, including for

01:25:21
some Parliament sin in Latin

01:25:23
America from Paramore, 410 practice.

01:25:26
Attic strategy is to provide.

01:25:31
Provisions were Model Provisions where

01:25:34
to buy states. Were treated

01:25:37
would include binding obligations or

01:25:41
investors within the treaty not.

01:25:44
You cannot include the whole,

01:25:46
the whole local law at,

01:25:49
within a trini. And neither



01:25:51
directly nor by reference, but

01:25:53
something to the effect of

01:25:55
certain minimum, customary standard related,

01:25:59
to labor environment and human

01:26:04
rights. So I would like

01:26:06
to hear your your, your

01:26:08
views on that type of

01:26:10
of, of proposals, when you

01:26:14
asked Council in investor arbitration,

01:26:16
who most represent the investors,

01:26:18
they say, well. That's what

01:26:20
local laws for but then

01:26:24
If if there are violations



01:26:26

to that extent and it

01:26:28

seemed best to leave the

01:26:29

country or good luck. Trying

01:26:31

to enforce any arbitration award

01:26:33

against the against the investor.

01:26:35

So I know that it's

01:26:38

that, it's complex, but I

01:26:41

would love to hear your

01:26:42

views. I can you own

01:26:46

the point about bringing bringing

01:26:48

these considerations and interests into

01:26:52

investment arbitration, you identified, the

01:26:55

issue, which is that very



01:26:57

few treaties Pacific. He referenced

01:27:00

them and obviously the movie

01:27:01

that's being made towards incorporating

01:27:04

human rights and brought corporate

01:27:06

social responsibility considerations into a

01:27:09

long way towards addressing that

01:27:12

specifically. I think they're both.

01:27:14

So being important assets by

01:27:16

institutions and rules to increase

01:27:21

transparency to allow third-parties to

01:27:25

participate or at least to

01:27:27

be able to understand what's

01:27:28

happening in proceedings and and



01:27:31

to make their voices heard.

01:27:32

Whether a seatings are outside

01:27:34

of those, which I think

01:27:35

gives them more legitimacy of

01:27:37

this will be Slow-moving will

01:27:41

have the shift in the

01:27:42

treaties. They'll be the procedural

01:27:46

Avenues at least presenting positions

01:27:50

and then tools like systemic

01:27:53

interpretation will become more relevant.

01:27:56

But I think when we

01:27:58

think about the existing tools

01:28:02

like a systemic interpolation, one



01:28:03

thing I would say, that's

01:28:04

really important is that Decisions

01:28:06

by tribunals on these issues

01:28:08

are principled. They, they need

01:28:11

to be really robust. They

01:28:13

need to be full full,

01:28:14

well, sort through and take

01:28:16

into account and to understand

01:28:20

the intersecting applications, including human

01:28:22

rights, which are, intuitive to

01:28:24

everyone, who does arbitration. It's

01:28:27

a, it's a new feel.

01:28:28

So there really is. I



01:28:29

think I come back to

01:28:30

this opportunity to really understand

01:28:33

these areas of law that

01:28:35

are going to butt heads

01:28:37

and cross increasing. But it

01:28:40

will be a slow and

01:28:42

piecemeal process. While we are

01:28:44

moving towards an entirely new

01:28:47

generation of treaties. If that

01:28:49

happens, I don't think it

01:28:50

will happen because there's either

01:28:53

knows every state will want

01:28:55

to do that, but they



01:28:56
will at least be a

01:28:57
push by some states to

01:28:59
incorporate these principles. So I

01:29:02
didn't have any solutions, but

01:29:04
I, I do feel as

01:29:07
though things will happen. And

01:29:09
one of the really important

01:29:10
things is that it's done

01:29:12
in a very principled Way

01:29:13
by people who understand the

01:29:15
issue. If I met on

01:29:19
this the negotiation of new

01:29:22
investment treaties that include include



01:29:25
obligations of investors. I mean

01:29:28
that is a long-term that's

01:29:32
a solution and let's not

01:29:33
forget the treaties as the

01:29:37
purpose, these treaties have the

01:29:39
protection of investors. So we

01:29:41
have to find something different

01:29:42
type of treaties in order

01:29:45
to include all this this

01:29:48
responsibilities. But investors do have

01:29:51
responsibilities and they do they

01:29:53
are existing instruments today that

01:29:57
are soft law that you,



01:29:58

Angie be so is he

01:29:59

the guidelines? They're soft, they're

01:30:01

the hardening there, more and

01:30:04

more companies that have to

01:30:07

undergo due diligence. I have

01:30:09

to adapt to adult due

01:30:12

diligence mechanisms and it's very

01:30:15

hard to say. Now for

01:30:16

it, He didn't know anything

01:30:21

about it and he was

01:30:22

not supposed to be responsible.

01:30:23

So I think there may

01:30:25

be ways of dealing with



01:30:28

these issues when they arise

01:30:32

and investment arbitration, in addition

01:30:34

to system integration is that

01:30:38

could be used by your

01:30:40

tribunal by knowledgeable tribunal today,

01:30:43

before we look into how

01:30:46

a new investment treaty in

01:30:48

like 10 years, will take

01:30:51

care of it. So in

01:30:53

a more practical way, that's

01:30:55

a just my who's obligation

01:31:07

was its engagement in the

01:31:08

community consultation process, right and



01:31:11

ends with it. You know,

01:31:12

the state that had to

01:31:13

set up the mechanisms for

01:31:15

the protection of that, you

01:31:16

know, it stop. Trinidad or

01:31:18

is it was its investors

01:31:19

obligation. And so I think

01:31:21

many of these issues before

01:31:23

we get to, you know,

01:31:24

that there was no danger

01:31:25

to the actual implementation of

01:31:26

these new generation. We may

01:31:30

see them start to play



01:31:31

out. And in these types

01:31:32

of disputes of attribution of

01:31:34

responsibility, for secular establish applications.

01:31:43

Maybe if I can say

01:31:46

something, is that it looks

01:31:48

year, did your the point

01:31:50

is a fragmentation how how

01:31:51

to bridge again, there the

01:31:54

gap between these two regions

01:31:56

are there is of course

01:31:58

all of you have to

01:32:01

just named to incorporate you

01:32:04

right through this in the



01:32:06
framework of embarrassing. Is that

01:32:13
look in the recent company

01:32:15
that is violating human rights

01:32:17
in the country. Country. For

01:32:21
instance you shade happens to

01:32:22
the countries that belongs to

01:32:25
the American system and that

01:32:28
country request a hearing in

01:32:31
which the whole purpose is

01:32:32
to announce those violations. I

01:32:34
can tell you that this

01:32:37
is going to be more

01:32:39
info. Impactful that count? Flame



01:32:43
from the state in the,

01:32:45
in the sense that how

01:32:48
much is going to be

01:32:50
the value of a stock

01:32:51
of a company that has

01:32:54
been publicly accuse with evidence

01:32:57
in a hearing of the

01:32:58
inter-american Human Rights Commission has

01:33:00
company that has violated human

01:33:02
rights. So there are many

01:33:04
angles it to these and

01:33:07
of course, they can also

01:33:08
be abused on the side



01:33:10
of your right, but a

01:33:12
changing the treaty. She's not

01:33:14
the only possible ways to

01:33:16
to, to breach the two

01:33:17
words. Thank you so much.

01:33:23
Thank you. Any other questions?

01:33:28
Okay, I would like to

01:33:29
thank our panel but this

01:33:32
very rich conversation of this

01:33:35
issue. And thank you all

01:33:37
for staying with us. Okay,

01:33:29
I would like to thank

01:33:30
our panel but this very



01:33:33
rich conversation of this issue.

01:33:35
And thank you all for

01:33:37
staying with us. so, Welcome

00:00:05
to our. Dial 4th panel

00:00:09
off of Friday. The 6th

00:00:12
of December. This is this

00:00:15
is one of our, our,

00:00:16
our key. So we can

00:00:18
sort of speak a tractions

00:00:20
in terms of panels that

00:00:22
we we, I, I personally

00:00:24
have been looking forward to

00:00:25
this panel for so many



00:00:26

reasons. The first one is

00:00:28

that it is taking place

00:00:30

at Arnold & Porter to,

00:00:33

which we are immensely grateful.

00:00:34

It is one of our

00:00:36

sponsors, but also close to

00:00:40

my heart because I was

00:00:41

an ass. I know, for

00:00:43

that stuff for an associate

00:00:44

at the beginning, then an

00:00:45

associate, then I seen your

00:00:46

associate here at 4. So

00:00:48

it is very, very, very



00:00:51
important. And I'm close to

00:00:52
my heart to be here.

00:00:54
And I know with this,

00:00:56
snow former colleagues and, and,

00:00:58
and, and be in these

00:01:00
premises, as I know. So

00:01:02
to speak was educated here,

00:01:04
my own Law Firm, big

00:01:07
Law Firm. So thank you

00:01:09
for no, for what? I've

00:01:12
contributed in in, in my

00:01:14
upbringing and in so many

00:01:17
ways and especially investor-state arbitration



00:01:19

drafting are oral skills at

00:01:22

Tetra and business. Well, now,

00:01:26

the other reason is, is

00:01:28

this, this is a panel

00:01:30

that Rings Two, Worlds together,

00:01:35

the world of business and

00:01:37

human rights and the the

00:01:39

world of international arbitration. And

00:01:43

and when we refer to

00:01:44

business and human rights. Now

00:01:46

there's, there's many experts, there

00:01:47

is even a world as

00:01:49

a situation of which strategy



00:01:51
or Law Firm is part

00:01:52
of and and the and

00:01:55
that that focuses on on

00:01:58
me, I would say no

00:02:02
business and human rights from

00:02:03
a very corporate perspective, not

00:02:06
necessarily dispute settlement offer Disputes

00:02:11
that involve human rights or

00:02:14
even International arbitration ladders and

00:02:17
then the other world is

00:02:18
international commercial arbitration and investor

00:02:20
arbitration. How, how can this

00:02:24
to be brought together is,



00:02:26

is, is the question Washington

00:02:29

arbitration week and its history

00:02:31

event. The world arbitration update,

00:02:33

which happens in May every

00:02:34

year in embarrassed jurisdictions. Has

00:02:37

always included a panel on

00:02:41

business and human rights and

00:02:43

international arbitration. That that's one

00:02:46

of our Hallmarks because we

00:02:48

believe that those two world's

00:02:51

need to be brought together

00:02:52

and a few will perhaps

00:02:55

a year ago we started



00:02:56

to talk with with the

00:02:58

cat you are not small

00:03:01

and and parts of the

00:03:04

question was was how how

00:03:05

to make this right? How

00:03:07

to bring this Two Worlds

00:03:08

together where International Investment arbitration

00:03:12

on International commercial arbitration understand

00:03:14

the world of business and

00:03:17

human rights and take that

00:03:18

into account. I want to

00:03:20

steal anybody's Thunder, but there

00:03:23

have been no very, very



00:03:24

minor minor. And shall I

00:03:27

attempt to bring them together

00:03:31

in in some industrial arbitration

00:03:33

decisions but are our belief

00:03:38

Law Firm is that there

00:03:40

should be more. There should

00:03:41

be more because at the

00:03:45

end of the day, Some

00:03:47

of the applicable law for

00:03:49

investor arbitration specialty, arbitration is

00:03:52

international law and a some

00:03:53

tribunals have said it. Well,

00:03:55

if international law is, is



00:03:57

the applicable law and the

00:03:59

Heart of international law is

00:04:01

human rights. Well, perhaps some

00:04:04

investment treaty tribunals may have

00:04:07

jurisdiction to hear some of

00:04:08

those cases. So I'll leave

00:04:11

it at that. And now

00:04:13

would would like to introduce.

00:04:14

Katia very shortly. Got you

00:04:18

a small small brings three

00:04:21

decades of experience in major

00:04:23

public International organizations and the

00:04:26

private sector spending public international



00:04:28

law. International Investment policy law

00:04:31

at arbitration commercial arbitration and

00:04:34

the corruption is GM business

00:04:36

and human rights. She has

00:04:37

experience advising States and states

00:04:40

and cities in the negotiation

00:04:41

of major International agreements. Finding

00:04:44

common ground and Solutions in

00:04:45

representing them in high stake

00:04:48

disputes before Private Practice Miss

00:04:52

yonaka. Small had a long

00:04:54

and distinguished career in major

00:04:55

International organizations in particular at



00:04:58

the oecd, has she found

00:05:00

it and let its analytical

00:05:02

work on International Investment agreement

00:05:04

and arbitration. Since the early

00:05:06

2028 to a dialogue among

00:05:10

oecd, annoy City, governments practitioners

00:05:13

academics and civil society, that

00:05:15

led to comment, understanding on

00:05:17

a concrete improvements in the

00:05:19

investors State, this retirement system

00:05:21

are the results of her

00:05:23

work. Published by the oecd

00:05:25

have been widely cited as



00:05:28

Pioneer work in this field.

00:05:29

She was a leading expert

00:05:31

in the groundbreaking what she

00:05:33

did work and then take

00:05:34

corruption and let this work

00:05:36

up to negotiation of the

00:05:38

oecd anti-bribery convention. Most importantly

00:05:41

for our panel. I think

00:05:43

that she she she is

00:05:44

someone that brings experience to

00:05:48

reach those two World, International

00:05:50

arbitration and the world of

00:05:53

Human Rights and business. So



00:05:55

with with that got you

00:05:57

and welcome and you have

00:05:58

the floor. Thank you. Jose

00:06:05

Antonio, and thank you all

00:06:08

for being here. I would

00:06:10

like to welcome you to

00:06:12

and then Porter. We are

00:06:14

happy to be among the

00:06:16

sponsors of the Washington arbitration

00:06:18

week and would like to

00:06:20

thank the organizers for including

00:06:22

us. And also, congratulate them

00:06:23

for a very successful Week.



00:06:25

Full of excellent thought provoking

00:06:28

events. We have the privilege

00:06:31

to be closing this. Week

00:06:32

was two panels, the one

00:06:34

now on business and human

00:06:36

rights and Commercial, and investment

00:06:37

arbitration, and the cycling following

00:06:40

this one on arbitration, and

00:06:42

climate change. A cocktail will

00:06:44

follow to reward you after

00:06:47

the full week, full week

00:06:49

of events, and also, for

00:06:51

being so brave to stay



00:06:52
with us on a Friday

00:06:54
afternoon. All this panel. I'm

00:06:56
honored to be surrounded by

00:06:58
esteemed colleagues and Friends Janet

00:07:01
where the character sharing 40.

00:07:03
Cassell and Carlos Bernard dog

00:07:06
and Carlos. What is John.

00:07:07
Cena's remotely. Now, this is

00:07:12
a human rights. For those

00:07:14
were not familiar with the

00:07:16
field, concerned the obligations on

00:07:19
companies, out of quest for

00:07:20
corporate accountability to mitigate or



00:07:24

prevent the adverse impacts of

00:07:27

business activities on individuals and

00:07:30

communities, although the man responsibility

00:07:33

or duty to respect human

00:07:35

rights lies with the state

00:07:37

which legislates and enforces relevant

00:07:40

laws, since the adoption of

00:07:42

the UN guiding principles on

00:07:45

business and human rights in

00:07:46

2011, there is a responsibility

00:07:48

emerging for businesses to have

00:07:51

policies and processes in place

00:07:53

to identify. Impact and mitigate



00:07:56

them other instruments such as

00:07:59

the oecd guidelines for Multinational.

00:08:01

Enterprises follow this approach, this

00:08:04

soft slow approach has been

00:08:06

hard, finding the last few

00:08:07

years with national laws being

00:08:09

adopted and they recently adopted

00:08:11

EU directive know what we'll

00:08:15

explore on. This panel is

00:08:18

how big does a human

00:08:19

rights related issues arise and

00:08:22

international arbitration both commercial and

00:08:25

investment will be looking to



00:08:28
the current challenges faced by

00:08:30
participants in arbitration in addressing

00:08:33
human rights issues. How have

00:08:35
arbitral tribunal has dealt with

00:08:38
these issues? What are the

00:08:40
tools that can be used

00:08:42
to enhance the consideration of

00:08:43
Human Rights and international arbitration

00:08:45
will also discuss the new

00:08:48
generation investment agreements and merging

00:08:51
with relevant language? I said

00:08:54
of arbitration rules that hag

00:08:56
rules and business of Human



00:08:57
Rights specifically designed to deal

00:08:59
with this issue. The role

00:09:01
of other forms of disputes

00:09:03
that humans, such as mediation

00:09:05
of the oecd national contact

00:09:07
points, for instance, and we

00:09:09
conclude with some ideas for

00:09:11
the future. There will be

00:09:13
no formal presentations, but we

00:09:15
have our discussions, a discussion,

00:09:17
any questions you may have,

00:09:18
you can address them twice

00:09:20
at the end of the



00:09:21

session, but before we start,

00:09:23

I will briefly introduce my

00:09:25

panelist Opana. Let's do you

00:09:27

alphabetical get Carlos Bernal who

00:09:30

is joining us? Remotely is

00:09:32

a professional professor of constitutional

00:09:34

law and tours at the

00:09:36

University of Dayton in Ohio.

00:09:38

He was previously a sitting

00:09:40

judge Justice on the Colombian

00:09:42

constitutional Court in 2021. He

00:09:45

was elected as an inter

00:09:46

American human rights, commissioner for



00:09:49

the term 2022 to 2026.

00:09:52

Professor Bernard also holds the

00:09:54

fractional appointment, as professor of

00:09:56

law at the University of

00:09:58

La Cabana in Bogota. And

00:10:00

he has previously held academic

00:10:02

positions, and my career Law

00:10:03

School in Sydney, Australia and

00:10:06

the faculty of law of

00:10:07

the universe takes another of

00:10:09

Columbia. His work has been

00:10:11

published and prominent journalist, as

00:10:13

well as books and edited



00:10:14
collections in several languages. The

00:10:18
cell was also joining us

00:10:20
remotely is a globally recognized

00:10:23
expert on business and human

00:10:24
rights, rights in criminal law

00:10:26
and public international law advisors

00:10:29
to represent corporate governmental and

00:10:32
non-governmental Appliance in mother's before

00:10:35
the inter-american commission and Court

00:10:38
of Human Rights United Nations,

00:10:40
human rights bodies, international criminal

00:10:42
Court Nashua. Contact points on

00:10:45
the lilies, CD guidelines, National



00:10:47
courts, International arbitration, dicj International

00:10:52
truck. You know, for the

00:10:53
law of the sea and

00:10:54
an international treaty negotiations, his

00:10:57
concert with King & Spalding

00:10:58
and co-chairs the business and

00:11:01
human rights Lawyers Association. He

00:11:04
has, was it tenured full

00:11:05
Professor Notre Dame, law school

00:11:07
and Head Start in several

00:11:09
schools around the world and

00:11:11
published extensively? Cherie Cody was

00:11:15
here with us is an



00:11:16

associate with Covington in Washington.

00:11:18

D.c. she advises clients on

00:11:21

a broad array of complex

00:11:22

International commercial anniversary State, arbitrations

00:11:26

and non-judicial disputes related to

00:11:29

issues of USG business and

00:11:31

human rights and corporate social

00:11:33

responsibility. She's a dually probably

00:11:35

five common law and civil

00:11:37

lawyer. Serene is an Adjunct

00:11:39

professor of international arbitration and

00:11:42

the George Washington University, law

00:11:44

school, and previously taught at



00:11:46

the sorbonne and us as

00:11:47

law schools in Paris. Jonathan

00:11:51

Whitaker is a senior console

00:11:53

with Clifford chance in Washington

00:11:55

DC, specializing in complex, International

00:11:58

arbitration and litigation. She has

00:12:00

handled International commercial investment, treaty

00:12:03

arbitrations held under the auspices

00:12:05

of several arbitral institutions on

00:12:08

a broad range of Industries.

00:12:09

Janet has an active pro

00:12:12

bono practice. Representing clients in

00:12:14

matters involving international human rights



00:12:17

law, including business, a human

00:12:19

rights previously, Janet was legal

00:12:22

counsel, addicted hazbin, electoral International

00:12:25

arbitration is Stanford law school

00:12:27

and talk to European Lourdes

00:12:29

University College, London. She also

00:12:31

sees as an arbitrator So,

00:12:35

I will. To start our

00:12:41

session know when we start

00:12:45

with the stage setting. So

00:12:47

we understand what this interaction

00:12:49

between Brazil and more rights

00:12:51

and international arbitration is and



00:12:56

I will address the question

00:12:58

to Sharon and Janet how

00:13:01

do human rights related issues

00:13:05

are presented in international Patrician?

00:13:08

If we sectors, we see

00:13:10

a great number of disputes

00:13:11

involving these issues. I will

00:13:15

turn to sharine to give

00:13:16

us a case scenarios and

00:13:19

answer this question related to

00:13:22

commercial arbitration. Thank you so

00:13:25

much and thank you for

00:13:27

having us here today. I'll



00:13:29

be very brief on this

00:13:30

first one just to do

00:13:31

a bit of stage setting

00:13:32

commercial contracts are increasingly operating

00:13:36

elements of ESG into their

00:13:39

provision. So as he is

00:13:41

she is becoming increasingly prevalent.

00:13:43

We're seeing that you know

00:13:45

spilled over into the commercial

00:13:47

world through them Corporation of

00:13:49

various contractual Provisions related to

00:13:51

ESG. So increasing ESG plazas,

00:13:55

increasing ESG. Obligations on the



00:13:57

parts of different parties involved

00:14:00

in special relationships, and such

00:14:02

Clauses can include Provisions such

00:14:05

as setting Net Zero targets

00:14:07

as as those become increasingly

00:14:09

relevant to various Industries, protecting

00:14:13

human rights labor rights or

00:14:15

the environments in. You know,

00:14:17

in Supply chains or in

00:14:18

business relationships incorporating governance requirements,

00:14:22

such as anti-bribery. Corruption and

00:14:25

money-laundering which sometimes can touch

00:14:26

upon issues of Human Rights



00:14:28

and mandating the use of

00:14:30

specific types of Princeton's, packaging

00:14:34

shipping or labor requirements in

00:14:36

the production of goods, and

00:14:38

service companies are faced with

00:14:40

the obligation to increasingly our

00:14:43

conduct human rights, due diligence

00:14:46

in their operations. And in

00:14:49

their supply chains were seeing

00:14:51

those obligation simultaneously be incorporated

00:14:54

into contracts as commercial entities

00:14:57

seek to mitigate as much

00:14:59

as possible. Or I mean



00:15:00

I'll pass off risk and

00:15:02

ends, you know, Define the

00:15:05

risk that the outside and

00:15:06

try to consider where risk

00:15:10

should lie in their commercial

00:15:11

relationships, were seeing that appear

00:15:13

increasingly and commercial contracts, and

00:15:15

do some further examples, of

00:15:17

course, with arbitration Provisions. As

00:15:21

we have a closet. Some

00:15:24

of these contracts, the substance

00:15:26

of ESC Provisions than become

00:15:28

relevant. Thank you. Thank you.



00:15:33

Sharon know, I would come

00:15:35

to China to give us

00:15:37

the case and Iris and

00:15:40

investment arbitration. Thanks kaca 7

00:15:45

human rights have always been

00:15:47

part of the international legal

00:15:49

landscape in which investors in

00:15:51

Statesville parade so that the

00:15:52

new bad fellows and I'll

00:15:55

give you a few examples

00:15:56

of four examples of the

00:15:58

ways in which human rights

00:16:00

have played tool being presented



00:16:02
in investor-state claims. I'm the

00:16:05
first one is where you

00:16:06
have a claim by investors

00:16:08
against the hosts days. For

00:16:10
either a human rights violation

00:16:12
as part of a breach

00:16:14
of the sound of treatment

00:16:16
under a treaty or as

00:16:18
a separate human rights. If

00:16:21
we all think about a

00:16:22
little bit, human rights are

00:16:23
actually in here ends in

00:16:25
Sutton investment protections. I think



00:16:27

the they're in here and

00:16:30

whether because of Harrington something

00:16:33

like expropriation, you're taking somebody's

00:16:35

property rights away or under

00:16:38

customers. And as soon as

00:16:39

I hear is denial of

00:16:41

justice. That the concept of

00:16:44

forms part of farron, actual

00:16:47

treatment. I'm not attached and

00:16:49

found in most investment. She

00:16:51

sees I'm not particular protection

00:16:53

can Encompass human rights such

00:16:56

as the right to a



00:16:58

fair trial, the right to

00:16:59

equal treatment rights because my

00:17:02

hair is the low in

00:17:03

case, which many of you

00:17:05

will be involved in all

00:17:08

of Justice on the chapter

00:17:09

11 not case and investor.

00:17:12

I bought a claim following

00:17:15

for manifesting out of Justice

00:17:17

following a massive judgment made

00:17:21

against that entity in state

00:17:25

court in the United States

00:17:26

after jury trial. And the



00:17:28

investor was unable to appeal

00:17:30

that decision I'm sorry I'm

00:17:32

fat because of this exorbitant

00:17:34

phone requirement and the claim

00:17:36

that was a breach not

00:17:38

of justice. That in here,

00:17:40

lie in that there is

00:17:41

as a lack of an

00:17:42

access without trial. That sounds

00:17:44

Line application with the underlined

00:17:47

claim. The second situation where

00:17:49

we seen human rights being

00:17:53

raised in ists is why



00:17:55

are you have hosted the

00:17:56

fences to investigate claims about

00:18:00

message in pipe to an

00:18:01

investment? Essentially, what is happening

00:18:08

States, the saying that he

00:18:11

was the reason I took

00:18:12

this right here is actually

00:18:14

based on these public interest

00:18:16

around human rights. As a

00:18:18

good example here is, is

00:18:20

your expense Argentina. In that

00:18:22

case, the claimant claim, the

00:18:24

Argentina had interferes with the



00:18:27

Tariff regime that was applicable

00:18:29

to do the payment investment

00:18:31

in session in Argentina and

00:18:35

it came that the state's

00:18:36

failure to increase Terrace with

00:18:38

an indirect option and a

00:18:41

breach of other obligations under

00:18:42

the tree and Argentina actually

00:18:44

paces at the fence that

00:18:46

it is her. She taking

00:18:49

these messages based on the

00:18:51

right to water. So essentially

00:18:53

the terrorists because of the



00:18:56

right to water and this

00:18:58

would have been impeded how

00:18:59

to raise the terrorists. So

00:19:01

what we see that there

00:19:02

is as complex and inside,

00:19:04

Argentina racism, cific lie between

00:19:06

the Public human rights and

00:19:08

the private ride to the

00:19:09

investor and not Casey, try

00:19:11

being that she found that.

00:19:12

It wasn't a human rights

00:19:14

consideration. That has led to

00:19:16

the failure to increase the



00:19:17
power of but I was

00:19:18
more difficult as insensitive who

00:19:22
State's offense by a state

00:19:26
that the investor itself, violated

00:19:29
human rights protections and we'll

00:19:31
get into this a little

00:19:32
bit more detail later. But

00:19:35
the best in this area

00:19:39
is again a case of

00:19:41
also involves an investor to

00:19:43
bring your claim against Argentina

00:19:44
in relation to a water

00:19:46
and sewerage Concession. And it's



00:19:47

in that case Argentina and

00:19:50

she specifically counterclaims against that

00:19:55

insensitive has failed to respect

00:19:57

the right to Water by

00:19:59

not investing sufficiently in the

00:20:01

infrastructure to ensure that its

00:20:03

operations that successful. And it's

00:20:05

an important case that is

00:20:07

it free the first taste

00:20:08

by the tribunal decided that

00:20:09

it was competent to watch

00:20:11

to determine the time to

00:20:13

pay my time not on



00:20:15
the basis that it was

00:20:15
sufficiently connect to see online

00:20:17
playing on the human rights

00:20:20
front. What the tribunal said

00:20:21
is that ISS is not

00:20:24
only for the benefit of

00:20:25
private investors but actually that

00:20:28
human rights are valid ones

00:20:29
to both invested and the

00:20:32
states until Terry our obligations

00:20:36
on old parties, public and

00:20:38
private, not to engage in

00:20:40
activities that infringe on human



00:20:41
rights. And then refreeze of

00:20:44
foolscap place where we've seen

00:20:46
human rights coming up. And

00:20:49
I see ass is in

00:20:50
amicus curiae briefs and so

00:20:52
in many, many ways to

00:20:54
many cases we've seen Amicus

00:20:57
Curie. I r a m

00:20:58
a. I r e lying

00:20:59
on human rights including the

00:21:01
right to the right to

00:21:02
health labor rights in order.

00:21:06
To accept their argument. Some



00:21:08

weasel chasing, the limitation of

00:21:10

these arguments, I think that

00:21:12

we seen limitations, especially in

00:21:14

cases, where they're grounded and

00:21:16

human rights specifically than on

00:21:19

the investment. Treaty itself an

00:21:22

old. So you have limitations

00:21:24

where the Amici curiae I

00:21:26

are raising human rights argument

00:21:29

in cases where the parties

00:21:32

themselves and not raising those

00:21:34

all given. So yeah, I

00:21:36

know that one of the



00:21:37

human rights of presents and

00:21:43

investment agreement. Yeah, actually we

00:21:51

will get into this a

00:21:53

bit later. Now what I

00:21:56

would like to ask is

00:22:00

what are the current challenges

00:22:02

that are faced by participants

00:22:05

in arbitration address human rights

00:22:08

issues. I'll have dealt with

00:22:11

these issues that they don't

00:22:13

do, they do enough to

00:22:15

address them, and I will

00:22:16

turn to Doug to give



00:22:18

us his first take on

00:22:21

this. And you got you,

00:22:29

the short answer is the

00:22:32

arbitral tribunals by and large

00:22:35

have not in my judgment

00:22:37

taken adequate account of human

00:22:41

rights in their arbitral decisions.

00:22:44

Either from the perspective of

00:22:47

Human Rights or from the

00:22:50

perspective of what would be

00:22:52

possible under international law, there

00:22:55

are a few decisions, particularly

00:22:58

the Tulip, real estate, a



00:23:00

moment decision of 2015 and

00:23:04

they were Bossard decision to

00:23:05

Janet mentioned, a moment ago

00:23:06

of 2016 where the tribunals

00:23:10

have recognized that International Investment

00:23:14

law is not a world

00:23:16

unto itself. It is part

00:23:18

of international law and should

00:23:19

be considered in the context

00:23:22

of other International treaties and

00:23:24

principles to which states. Parties

00:23:28

to investment treaties, are are

00:23:32

bound and so the two



00:23:35
should be read together. That

00:23:37
can be done, it has

00:23:39
been has been done, but

00:23:40
only in a handful of

00:23:42
instances, has it been decisive?

00:23:46
Is there been many mentions

00:23:49
of human rights in all

00:23:50
the categories? The Janet just

00:23:52
mentioned but usually, they are

00:23:54
mentioned that lead nowhere. So

00:23:59
there's a lot of room

00:24:00
for improvement in this area.

00:24:03
And in part, I think



00:24:04

it's frankly reflects the reality

00:24:06

that most members of arbitral

00:24:10

tribunals come from a commercial

00:24:12

law background. They're experts in

00:24:14

commercial law and related issues,

00:24:17

but very few of them

00:24:19

are experts or have strong

00:24:22

backgrounds and international human rights

00:24:24

law. You can see that

00:24:27

particularly by contrasting, some of

00:24:30

the opinions of Philippe, Sam's,

00:24:32

who sits as an arbitrator

00:24:34

but is also a human



00:24:35
rights expert with the opinions

00:24:38
of others, on the tribunals

00:24:39
work, where he has been

00:24:41
a member and on other

00:24:42
tribunals where he was not

00:24:44
a member. That's so partly.

00:24:46
What we need I think

00:24:47
is education and if we

00:24:51
don't get there, It may

00:24:54
be a disservice not only

00:24:58
to the people who are

00:24:59
affected by International Investment sometimes

00:25:02
adversely. But also to the



00:25:04

whole International, the isds investor-state

00:25:08

dispute settlement regime, which Peach

00:25:12

frankly in the middle years

00:25:14

of the 20 teams, roughly

00:25:16

from 2013 to 2017. We

00:25:20

averaged something like eighty to

00:25:23

ninety new investment. Arbitrations initiated

00:25:28

each year in the last

00:25:30

2 years that's dropped by

00:25:32

about a third. You can

00:25:34

see similar numbers in the

00:25:36

statistics for the number of

00:25:38

New International Investment treaties, being



00:25:41

adopted those two peaked in

00:25:44

2019 and have fallen considerably

00:25:47

since then go for it.

00:25:50

If the Ists regime is

00:25:53

to continue serving its purpose

00:25:55

its purposes. I should say

00:25:57

many of which are important

00:25:59

more attention in my judgment

00:26:02

needs to be paid to

00:26:04

the context of these treaties

00:26:05

in broader international law, including

00:26:08

human rights. And of course,

00:26:10

that also includes looking ahead



00:26:13

to your next battle, the

00:26:15

human right to re clean

00:26:16

healthy and sustainable environment. Thank

00:26:22

you. I think Janet might

00:26:26

have some comments as well,

00:26:28

and I think it's really

00:26:32

important to you. It is

00:26:36

before the full headed to

00:26:37

the broader context. I think

00:26:39

the dog is mentioning which

00:26:40

is this tension will be

00:26:43

deceived tension between public considerations.

00:26:47

So considerations Ron, human rights



00:26:49

are on climate change, how

00:26:50

we actually accommodate some of

00:26:51

these really important topic for

00:26:54

August has in a world

00:26:57

of. That is really in

00:26:59

the way privately, or historically

00:27:01

has been Jesus privately, send

00:27:04

senses and I think that

00:27:06

we both felt that you

00:27:08

had fully agree with what

00:27:09

is that? We will continue

00:27:12

to see these tensions. I

00:27:14

think probably we see a



00:27:16

lot more push back and

00:27:17

we'll continue picking in this

00:27:18

country to see push back

00:27:19

over the coming years on

00:27:21

various grounds against investment arbitration.

00:27:24

But it also I think

00:27:25

makes it very important to

00:27:27

the arbitration Community. Eat some

00:27:29

things about the things that

00:27:32

are being made to buy,

00:27:33

yics is in 2 OZ.

00:27:35

Arbitration generally is incompatible with

00:27:38

all of these other really



00:27:40

important for August has and

00:27:42

not just think about how

00:27:44

they actually sit comfortably. But

00:27:46

how can we help them

00:27:47

comfortably, together, Tuesday, to ensure

00:27:51

that these other developments are

00:27:54

being reflected in this area

00:27:56

prices. Wait, what Doug said,

00:28:04

Does anybody else Serene or

00:28:07

Carlos? Have any comments on

00:28:09

this? I'm very briefly, I

00:28:12

just say that it is.

00:28:15

Increasingly becoming not an option



00:28:19

to ignore human rights issues.

00:28:20

So to the extent they're

00:28:21

being implemented, especially at the

00:28:24

regional level in Europe and

00:28:26

also in various jurisdictions or

00:28:32

other jurisdictions and human rights

00:28:40

or USG. Focus regulation companies

00:28:45

it's at this is no

00:28:46

longer a kind of an

00:28:47

aspirational, a corporate social responsibility

00:28:49

type obligation that companies should

00:28:52

strive to achieve to try

00:28:54

to achieve and then it's



00:28:57

now becoming increasingly finding and

00:28:59

then he needs to follow

00:29:04

suits and be familiar with

00:29:06

these mechanisms of these Frameworks

00:29:08

in order to be able

00:29:09

to address. The pressing commercial

00:29:11

issues of today and then

00:29:12

the reality of that is

00:29:14

that companies are come from

00:29:15

What is a? She has

00:29:16

a daily and they need

00:29:18

to completely adopt their their

00:29:20

Frameworks in order to come



00:29:21

to the extent that they're

00:29:23

in school. That's your following

00:29:27

up on that. I mentioned.

00:29:29

I was speaking earlier of

00:29:31

investor-state arbitration Greensburg previously about

00:29:35

commercial arbitration and has just

00:29:38

added a point there. I

00:29:40

think relevant to that is

00:29:41

that under any of these

00:29:43

new emerging hard Norms companies

00:29:46

are required to engage in

00:29:49

human rights to diligence, with

00:29:50

respect to their supply chains



00:29:52

and to take actions to

00:29:54

try to promote human rights

00:29:56

in their supply chains, including

00:29:58

by contractual provisions, and the

00:30:01

American Bar Association as a

00:30:03

set of model contract, Provisions

00:30:05

for business and human rights,

00:30:08

which would mean, which would

00:30:11

include Provisions for international arbitration,

00:30:15

commercial arbitration between a company

00:30:19

and its suppliers in the

00:30:21

events of disputes and there's

00:30:24

a delay. Open set of



00:30:26

model, contract revisions being developed

00:30:28

by group of people in

00:30:30

the European Union as well

00:30:31

that likewise will have Provisions.

00:30:35

Or at least currently has

00:30:36

Provisions for international arbitration, for

00:30:39

dispute resolution. So I think

00:30:41

we're going to see more

00:30:42

and more of that, in

00:30:44

the, in the future, in

00:30:45

the field of commercial arbitration

00:30:46

as well. That would be.

00:30:50

Yes, thank you so much.



00:30:52

And I would like to

00:30:54

say hello to my listen

00:30:58

to everyone there in Washington.

00:31:00

D.c. Also, thank you to

00:31:02

Jose, Antonio for the kind

00:31:03

invitation to participating in this

00:31:05

time. I just want you

00:31:08

to say three points. The

00:31:09

first one is that I

00:31:10

totally agree to the dog

00:31:12

and then add and trained.

00:31:16

In the sense that if

00:31:19

people in the arbitrator's, they



00:31:21

need to take into account

00:31:23

deeply, the matter, concerns your

00:31:25

rights by taking points, are

00:31:30

being a human rights. Commissioner,

00:31:32

I can tell you with

00:31:34

no lease about that. That

00:31:36

holds two people working in

00:31:38

the area of your rights.

00:31:39

Need to be aware of

00:31:41

the implications, of all the

00:31:43

cases, concerning the protection of

00:31:45

embarrassed of the rise of

00:31:47

investors. Just had the commission



00:31:50

I've been pushing, is it

00:31:52

true? They're hosting of a

00:31:55

hearing concerning this. This breach

00:31:58

between investors protection as your

00:32:01

rides. Soles of my colleagues

00:32:03

can get these out of

00:32:04

her decision concerning what to

00:32:07

expect in terms of protecting

00:32:09

the rights of investors. And

00:32:11

you are a house note

00:32:12

to be an absolute No-No

00:32:14

to be absolutely used in

00:32:16

the sentence that only Human



00:32:18

Rights matter. So I celebrate

00:32:21

this planet because you just

00:32:22

can't lie. I see that.

00:32:23

We are creating a bridge

00:32:25

between two worlds that are

00:32:27

there is really separated also

00:32:30

informs and jurisdictions. And then

00:32:34

my final point is that

00:32:35

the reality is that many

00:32:38

of the day of the

00:32:39

best swords that are over

00:32:40

18 in many countries and

00:32:43

then let me use a



00:32:44

couple of examples from Latin

00:32:45

America. They, they operate in

00:32:48

a mug. He's heavily regulated,

00:32:50

Amy Schumer rights, and also

00:32:55

in the form of constitution

00:32:57

rights, they belong to that

00:32:59

regulation and the indecent. The

00:33:03

state has other duties concerning

00:33:06

the respect of those human

00:33:08

and Constitution, right? And also

00:33:10

domestic competitors. They are underdogs

00:33:15

duties, so they investors and

00:33:19

should be treated equally to



00:33:21

the domestic investors any. We

00:33:25

have to create that equality.

00:33:27

Also they foreign investors they

00:33:29

they need to comply to

00:33:31

the human rights obligations in

00:33:33

the same way as well

00:33:34

as a domestic companies that

00:33:36

you did. So on the

00:33:39

basis of their brain, full

00:33:40

of equality is awesomeness her

00:33:43

to stab you that connection

00:33:44

between a protection of investors

00:33:47

on the one hand. Human



00:33:49

rights from t.i. Thank you

00:33:51

so much. Thank you, Carlos.

00:33:53

Janet you have. You want

00:33:55

to watch something or we

00:33:56

move on so much. Will

00:34:05

this cost me the new

00:34:07

investment agreements with language that

00:34:12

includes issues of Human Rights.

00:34:16

Respect a few more rides

00:34:17

Etc at which will develop

00:34:20

a little later. But I

00:34:22

would like to touch up

00:34:25

on is today. What are



00:34:28

the two we have today

00:34:29

without this with the old

00:34:31

generation of it? Babe, A

00:34:32

lot of Fame Batman agreements

00:34:34

that do not include specific

00:34:36

language. And we are faced

00:34:38

with issues related to Human

00:34:40

Rights. What are the tools

00:34:42

that exist today to take

00:34:49

action in this field? So

00:34:50

I turned to give us

00:34:52

Some Reflections on the Odyssey

00:34:56

issue, in the context of



00:34:58

investment arbitration, the applicable issues

00:35:06

around to pick up a

00:35:07

lord. I hit one of

00:35:08

the really difficult issues to

00:35:10

take me a nasty ass

00:35:11

is too want to greet

00:35:14

arbitral tribunals can take into

00:35:18

account Estates human rights obligations

00:35:19

as they consider claims and

00:35:24

you know that we've had

00:35:26

cases tribunals have taken the

00:35:30

approach of not considering individual

00:35:33

human rights claims that she



00:35:34
done incorporating human rights considerations

00:35:38
in the same case into

00:35:41
a claim under the treaty

00:35:42
but it's a really important

00:35:45
question and it's inevitable. I

00:35:48
think one of the rare

00:35:49
thing to see very different

00:35:51
approaches of cross. Different cases

00:35:54
depending on the terms of

00:35:56
the applicable legal provision in

00:35:59
the underlined treaties. And also

00:36:01
potentially the times that the

00:36:04
human rights treaties to which



00:36:06

the relevant state of his

00:36:08

head. So, if you have

00:36:09

a provision, that's very probable

00:36:11

that says, you take into

00:36:14

account, the international obligations party

00:36:17

subscribe, while some states, I'll

00:36:19

take the UN convention on

00:36:21

the rights of a child.

00:36:21

For example, the US, it

00:36:23

is ratified that treaty. So

00:36:26

that's what that treaty is

00:36:27

not relevant in the USL

00:36:29

to gation but yes, it's



00:36:31

older. Kids relevance in the

00:36:32

context of Human Rights obligations

00:36:34

to almost every out the

00:36:35

states on the planet. So

00:36:38

they will be different. When

00:36:41

is it the things I

00:36:42

wanted to mention here is

00:36:43

that there's a real potential

00:36:45

for this to generate criticism

00:36:48

about inconsistent treatment of Human

00:36:50

Rights. So, but one of

00:36:51

the tools I'm going to

00:36:52

just met Ricci. Which many



00:36:54
people here will know about

00:36:55
is the Dutch term to

00:36:59
use by tribunals to resolve.

00:37:02
This issue is the principal

00:37:03
of systemic integration. So it's

00:37:08
not invest in the back.

00:37:11
You multiple areas of international

00:37:15
touch on its investment. Little

00:37:18
bit also investment disputes in

00:37:20
the one that we're talking

00:37:20
about today is obviously human

00:37:22
rights. You and one of

00:37:24
the questions that arises is



00:37:26

how the tribunals that are

00:37:27

constituted an investment treaties and

00:37:30

their subjects, the boundaries and

00:37:32

policies can sense how they

00:37:34

actually accommodate and address claims

00:37:38

that ring in different fields

00:37:40

of public international law and

00:37:43

the principal that's being employed

00:37:45

here, is this principle of

00:37:46

systemic integration? And it sounded

00:37:48

like to receive Those are

00:37:55

cheetahs and its meaning of

00:37:56

rule of treaty interpretation and



00:37:58

looked at provision sizes that

00:38:00

should be taken into account

00:38:01

together with the contract. Any

00:38:04

relevant rules of international law

00:38:06

applicable in the relations between

00:38:08

the parties. This principle does

00:38:12

is it tells tribunals when

00:38:15

you are interpreting treaty, you're

00:38:18

not limited to express terms

00:38:20

of those treaties. But you

00:38:21

have to place them in

00:38:22

the context of other relevant

00:38:24

rules of international law, that



00:38:26

are applicable in the relations

00:38:28

between the relevant State parties.

00:38:30

And presumably these rules include

00:38:32

international human rights law. So

00:38:34

it's really a mechanism and

00:38:37

it allows both International and

00:38:39

tribunals to accommodate these competing

00:38:42

priorities. And so in a

00:38:45

case involving human rights and

00:38:47

potentially enables a tribunal to

00:38:49

take into account human rights

00:38:51

obligations. When it's assessing I

00:38:54

think the heater we can



00:38:56

have an entire session talkin

00:38:58

about systemic integration than the

00:39:00

intersection of different parts of

00:39:02

international including little relation to

00:39:04

climb in with exhaust investment.

00:39:07

Louisville, I leave it there.

00:39:07

But I think there is

00:39:09

still, the sandwich integration is

00:39:11

potentially really useful to, but

00:39:14

I do think it necessarily

00:39:16

answers. The question when planes

00:39:19

are raised that fool outside

00:39:20

the terms of the Treaty



00:39:22
of time. So it doesn't

00:39:24
necessarily help us to resolve

00:39:26
pure human rights paid made

00:39:29
in the context of an

00:39:31
investigation. So just putting it

00:39:33
out there. It's a very

00:39:34
helpful. I'm interested mechanism. It

00:39:37
will doubtless become more important.

00:39:39
I think across the whole

00:39:42
field of international law. As

00:39:43
we navigate, he's competing priorities

00:39:45
but that will still be

00:39:48
a lot of questions out



00:39:50

there about how it applies

00:39:52

and Can the investment treaty

00:39:55

contacts? We are relying on

00:39:56

the treaty when something. Totally

00:39:58

outside of that treaty is

00:39:59

Boar's. Head trip, ticket dispute.

00:40:04

Challenge Janet. Because it requires

00:40:08

the arbitrator and the lawyers

00:40:12

to know something about both

00:40:13

fields of Law and often

00:40:15

they're experts in one, but

00:40:17

not the other. So it's

00:40:19

it's difficult than it did.



00:40:21

Suggest to all of us

00:40:22

that we need to learn

00:40:23

a lot about international law

00:40:25

and not just stay in

00:40:27

our particular wheelhouse is a

00:40:30

of Specialties and the second

00:40:33

thing is that as as

00:40:37

As you correctly stated, it's

00:40:39

not really a ruling on

00:40:42

a treaty outside. The treaty

00:40:44

that the arbitrators have jurisdiction

00:40:47

to interpret, its interpreting the

00:40:49

treaty over which they have



00:40:51
jurisdiction. It's a recognized interpretive

00:40:54
tool. So it is by

00:40:56
no means an illegitimate bringing

00:40:59
into the arbitration that treaty

00:41:00
that doesn't belong there. It's

00:41:03
simply one that is an

00:41:04
interpretive tool of the treaty

00:41:06
that is at the Centre

00:41:07
of the dispute. Also, something

00:41:14
about it that the whole

00:41:16
point or the main political

00:41:18
uncertainties, this systematic interpretation is

00:41:21
at the end of collisions



00:41:24

and sometimes arbitrators, they, they

00:41:27

don't have a key or

00:41:29

mythology and how to solve

00:41:31

those collisions in some cases,

00:41:35

Sid related to Columbia in

00:41:38

which even the Constitutional Court,

00:41:40

had many issues trying to

00:41:42

solve collisions between the right

00:41:46

of the investors and it

00:41:48

rides of the companies that

00:41:50

invest in the project in

00:41:53

a wealthy Wetlands. They invest

00:41:56

like a 800 billion dollars



00:41:58

in the project I've been

00:42:00

silently they discovered that these

00:42:03

was polluting the water that

00:42:05

a whole city was using

00:42:08

as a primary source. So

00:42:10

the point is is The

00:42:11

state has two kinds of

00:42:14

obligations and they want to

00:42:15

have their obligation to honor

00:42:17

their protection of the investors.

00:42:20

But on the other hand,

00:42:21

the birthday dear legation to

00:42:23

respect the right to water



00:42:26

to the people show, did

00:42:30

the Corporal and open. Systematic

00:42:32

interpretation is, is houses all

00:42:34

that sometimes you just don't

00:42:36

care. So, it is, I

00:42:38

just don't agree with you.

00:42:39

That is a systematic interpretation

00:42:43

is in the, in the

00:42:45

sentence we should take into

00:42:49

account all the factors, but

00:42:51

at the end, what we

00:42:52

have is a big collisions

00:42:54

and arbitrators, they need to



00:42:56

navigate that that occur. Thank

00:43:00

you. Sharon, I mean there

00:43:07

is another way another tool.

00:43:09

Would you like to talk

00:43:12

to us about it? The

00:43:16

incorporation of Human Rights mechanisms

00:43:19

into existing treaties by reference.

00:43:24

So well, ESG. As a

00:43:28

term or human rights, not

00:43:31

be expressly reference all the

00:43:33

time. You may have instances

00:43:34

in which certain mechanisms are

00:43:37

incorporated into treaties by reference



00:43:41

weather, that's in the Preamble

00:43:42

and substance of Provisions or

00:43:45

other defenses that that are

00:43:47

raised in treaties. So you

00:43:51

see this increasingly and some

00:43:53

of the newer generation bilateral

00:43:55

investment treaties or multilateral investment

00:43:58

treaties which are reporting to

00:44:01

seek a balance between on

00:44:03

the one hand promote An

00:44:04

encouraging investment. And on the

00:44:06

other hand, ensuring that such

00:44:08

investment is responsible and contribute



00:44:12
contribute to sustainable Economic Development,

00:44:15
so they, these Provisions can

00:44:19
provide for the promotion of

00:44:21
investment, but in a manner

00:44:23
that it doesn't come at

00:44:26
the expense of the traction

00:44:28
or diminishment of Human Rights

00:44:30
or, you know, and so

00:44:36
they establish the promotion of

00:44:38
these International standards that state

00:44:41
parties and in some instances

00:44:42
investors, depending on how they're

00:44:44
dressed, it should strive to



00:44:47

comply with, but they also,

00:44:49

deliberately exclude certain Investments, which

00:44:52

contravene. Those objectives, for example,

00:44:55

they can provide heart valves

00:44:57

for things like human rights,

00:44:59

violations, they can protect legitimate

00:45:03

public insurance, But the right

00:45:04

of the states regulate around

00:45:06

Schumann rights issues and some

00:45:09

of those policy objectives that

00:45:11

you might see increasingly in

00:45:12

this new generation. I think

00:45:13

it's like Corporate social responsibility



00:45:16

that that terminology but which

00:45:18

is now you know, increasingly

00:45:19

broadens and gardening and nature

00:45:22

preventing human rights violations, protecting

00:45:25

labor rights, by protecting laborer,

00:45:27

striving for gender equality. And

00:45:35

so there's three main ways

00:45:36

in which the first you

00:45:38

see, this incorporation by reference

00:45:40

to other multilateral instruments on

00:45:44

human, right? So you might

00:45:45

see a reference to the

00:45:46

oecd guidelines on responsible business



00:45:50
conduct that were mentioned earlier.

00:45:51
You might see a reference

00:45:52
to the UN guiding principles

00:45:54
on business and human rights

00:45:55
for the sustainable development principles.

00:45:58
In relation not to give

00:46:00
me nice. But the climate

00:46:01
change might see references to

00:46:03
the Paris agreement, for instance,

00:46:05
and, you know, many, many,

00:46:09
many Provisions are actually Incorporated

00:46:12
in the Preamble irlanguage in

00:46:15
a manner that makes reference



00:46:17
to internationally recognized standards, including

00:46:20
and then listing, you know,

00:46:22
the relevant mechanism. I'm so,

00:46:25
just by way of example,

00:46:26
for example, that the Canada

00:46:29
model B, I T of

00:46:31
2021 refers to internationally recognized,

00:46:34
standards guidelines and principles of

00:46:37
responsible, business conduct. And then

00:46:38
it lists, for example, the

00:46:40
oecd guidelines and it lists

00:46:42
the UN guiding principles on

00:46:43
business and human rights. Other



00:46:45

treaties incorporate different provisions and

00:46:49

operate as well. So that's

00:46:53

one way. And then secondly

00:46:55

you have these Express, human

00:46:57

rights-related, Provisions substances, You have

00:47:01

provisions on Corporate social responsibility.

00:47:03

So obligations for example of

00:47:05

investors to comply with Jose

00:47:08

State domestic Lawrence human rights

00:47:10

acknowledgement of encouraging. Incorporation of

00:47:14

internationally recognized standards on on

00:47:17

human rights and in some

00:47:20

limited cases such as in



00:47:22

the case of the Dutch

00:47:23

Dutch model. T, i t

00:47:26

you have even potential liability

00:47:29

as civil liability right investors

00:47:31

in their home state for

00:47:33

acts and decisions which could

00:47:35

lead to significant damage, personal

00:47:38

injury or loss of life

00:47:39

in the whole state. So,

00:47:41

of course, could Encompass a

00:47:44

question. And then, lastly, I

00:47:48

mentioned at the outset to

00:47:49

specific sets a carve-out. So



00:47:51

denial of benefits, right? So

00:47:53

failure to extend benefits of

00:47:57

protection of the, of the

00:47:58

human rights of DM. Westmont

00:48:01

a mechanisms of the treaty

00:48:03

mechanism Clauses, then I'll benefit

00:48:07

Clauses and then secondly, legitimate

00:48:10

public interest, which expressly allows

00:48:13

states to regulate around questions

00:48:15

of Human Rights. So you

00:48:16

can see it is and

00:48:17

some newer model treaties. For

00:48:20

example, the Colombian model B



00:48:22

I T has a very

00:48:23

expensive denial of that which

00:48:26

includes committing serious human rights

00:48:29

violations, not benefit It's also

00:48:40

things like causing serious environmental

00:48:41

damage or participating in Terrorist

00:48:45

activity or violating the labor

00:48:48

law and then lastly legitimate

00:48:50

public interest. You can see

00:48:52

many of the new generation

00:48:54

model B. I T is

00:48:56

allowing states to regulate within

00:48:58

their territories with respect human



00:49:00

rights. So you see for

00:49:02

instance in in the Dutch

00:49:05

model b i t u

00:49:06

c a reference to starting

00:49:09

up the Colombian model b.

00:49:11

I t a reference to

00:49:12

legitimate policy objectives of Human

00:49:14

Rights help public order labor

00:49:17

rights, the environment, Etc. Oh,

00:49:23

thank you, Sharon dogs are

00:49:27

also some other issues, other

00:49:30

ways of dealing with those

00:49:33

issues. For instance, in terms



00:49:36

of contributory for the reduction

00:49:41

of Damages, you have something

00:49:42

to say on this human

00:49:47

rights almost without using the

00:49:49

word and without using any

00:49:51

of the techniques we've mentioned.

00:49:53

So, so far, so pretty

00:49:54

sample in Copper Mesa versus

00:49:56

Ecuador, which I think was

00:49:58

the 2014 award if I

00:50:00

recall correctly. In that case,

00:50:03

the Canadian company investor was

00:50:07

accused of having committed unlawful



00:50:12

acts of violence, against the

00:50:14

villagers, who themselves had perhaps

00:50:16

committed, some unlawful acts, but

00:50:18

the company had committed unlawful

00:50:20

acts of violence in the

00:50:22

course of How to clear

00:50:23

the way for its its

00:50:26

mining project and the tribunal

00:50:28

without importing any human rights

00:50:31

treaties or or using systemic

00:50:34

integration adopted or employed the

00:50:38

doctrine of contributory negligence and

00:50:42

said that the company was



00:50:43

at least negligent the tribunal

00:50:46

preferred to treat it as

00:50:48

a case of negligence rather

00:50:50

than intentional a commission of

00:50:53

wrong. But at least by

00:50:54

the Canadian headquarters and as

00:50:56

a result that found the

00:50:57

climate was responsible for 30%

00:51:00

of the damage that would,

00:51:04

would otherwise have been awarded

00:51:06

and reduce the damages accordingly

00:51:08

a similar. But different approach

00:51:11

was taken by the tribunal



00:51:12
in Bear Creek versus Peru.

00:51:15
Where the majority of the

00:51:17
tribunal held at the consultation

00:51:22
that had been done. Done

00:51:23
with local stakeholders indigenous groups

00:51:26
was not sufficient, but rather

00:51:30
than rule that that was

00:51:31
a violation of human rights,

00:51:33
which could have been its

00:51:34
ruling. Instead, it took the

00:51:37
view that regardless of any

00:51:39
action taken by the state,

00:51:40
the company's failure to ensure



00:51:44
adequate consultation with the local

00:51:47
community, where were the state's

00:51:49
failure to do so meant

00:51:51
that there was never going

00:51:52
to be social licence for

00:51:54
the plant or are skewed

00:51:56
me for the mine. And

00:51:57
as a result, the company

00:52:00
could not get recovery of

00:52:03
its claim for the future

00:52:04
stream of profits. That would

00:52:07
have been generated by the

00:52:08
mine and the company was



00:52:09

instead of Ward and only

00:52:11

you'd sunk costs for the

00:52:13

money's spent up to that

00:52:15

point. And the end result

00:52:16

of that was a huge

00:52:17

reduction in the amount of

00:52:20

the damages claim compared to

00:52:22

the damage. Actually awarded. And

00:52:24

there are other examples, but

00:52:25

these are two examples of

00:52:27

how tribunals without expressly invoking

00:52:31

human rights. Treaties have taken

00:52:32

human rights into account at



00:52:35
the phase of intersect damages.

00:52:38
But this is likely to

00:52:40
happen or to be done

00:52:42
only in really egregious cases

00:52:43
and both of those were

00:52:45
pretty egregious on the facts.

00:52:49
Thank you. Doug. And another

00:52:52
tool we mention it, mention

00:52:55
this in the the beginning

00:52:56
of briefly is the county

00:52:59
claims. Would you like to

00:53:01
just elaborate a little more

00:53:03
on this to? I think



00:53:04

I mentioned earlier that human

00:53:06

rights come up and multiple

00:53:10

contacts including West State that

00:53:12

she use human rights obligations.

00:53:13

But it's in the context

00:53:15

of Defense has been came

00:53:17

to vote against them but

00:53:18

also to bring counterclaims. Just

00:53:21

a couple of things about

00:53:22

that sitting on the counter

00:53:23

claim from number one. Using

00:53:27

defend human rights in a

00:53:28

defensible. Can entertain capacity that



00:53:30

are trashed still so it's

00:53:32

not a tool that is

00:53:34

yet very developed a potential

00:53:37

but just we should keep

00:53:38

in mind, it doesn't and

00:53:39

hasn't happened. Very often, there

00:53:43

is a question around counterclaims

00:53:45

different schools of thought about

00:53:47

weather and what's a consultant.

00:53:49

Says they cannot chibi progressed.

00:53:51

I'm here. But there's at

00:53:55

least some procedural questions around

00:53:57

counterpane. I think one of



00:53:59

the interesting points that we

00:54:01

have to keep in mind,

00:54:02

both in relation to the

00:54:03

fences and contains is that

00:54:05

it can be against Estates

00:54:07

and trusts As a consultant

00:54:09

to raise human rights issues

00:54:12

because States themselves can be

00:54:14

held liable for human rights

00:54:15

violations. I'm releasing to invest.

00:54:18

So the address to new

00:54:20

case against Nicaragua, where there

00:54:22

was a Logan concession in



00:54:23

the state itself was held

00:54:25

responsible of the inter-american court

00:54:27

of Human Rights allowing that

00:54:29

concession to move forward. I'm

00:54:32

to United States. Sometimes we'll

00:54:36

have to conduct to really

00:54:37

delicate Balancing Act to decide

00:54:40

whether it really is in

00:54:41

their interest to raise human

00:54:42

rights. When there was this

00:54:44

factor of planes against the

00:54:46

state in another context, by

00:54:48

the domestically, will perhaps in



00:54:50

a Regional Human Rights. Quote,

00:54:51

for those caves to come

00:54:52

back and that she and

00:54:53

packed it in another context.

00:54:58

Do you like to comment

00:54:59

on that? That is true,

00:55:01

that, that, that tension arises

00:55:04

in many cases, but not

00:55:06

all. There are certainly some

00:55:07

cases where states have Clean

00:55:10

Hands in in, in regard

00:55:11

to Human Rights, but a

00:55:13

claimant might not. Carlos since



00:55:20

you are you know we

00:55:22

have the privilege of having

00:55:23

you here with the experience,

00:55:25

you had as a member

00:55:26

of the Constitutional Court, what

00:55:30

is the role of constitutional

00:55:32

Court's regional chords to Commissions

00:55:34

in reviewing human rights issues

00:55:37

and treaties were talking about

00:55:40

three days including language on

00:55:42

how to draw human rights.

00:55:43

If you can give us

00:55:45

your bring us your You're



00:55:49
experiencing this, I will be

00:55:52
very brief it for the

00:55:54
sake of time. Is it

00:55:55
at first? I think course,

00:55:58
they are playing an important

00:55:59
role when they have to

00:56:03
do it. When they have

00:56:04
a say in the process

00:56:06
of ratification of international produces

00:56:09
a any particular abitanti. Princess

00:56:14
one of the job that

00:56:15
I did when I was

00:56:16
there. I just had a



00:56:18

Columbia Constitution Court to work

00:56:20

to draft decision, 252 red

00:56:25

2019, which is how he

00:56:27

said live. In case we

00:56:30

had the privilege to have

00:56:31

Antonio as one of her

00:56:34

expertise in the in the

00:56:35

hearing over time and one

00:56:39

of the things that the

00:56:40

gordita the time was to

00:56:42

make sure that the treaty

00:56:45

that that wasn't 3D between

00:56:47

Colombia and Peru. Dead. Sweetie



00:56:51
comply with the Constitution and

00:56:54
when we talk about the

00:56:55
Constitution is not only about

00:56:57
the organic part of the

00:57:00
Constitution, that is a, the

00:57:01
powers of the president etcetera

00:57:03
but also constitution rights issue

00:57:06
with our human rights and

00:57:07
phone. So that is one

00:57:09
point that is becoming more

00:57:11
popular in particular in Latin

00:57:13
America, to try to address

00:57:21
this issue. Is when they



00:57:23

receive a petitioners like in

00:57:26

the form of constitution, complains

00:57:29

that. So call Amparo to

00:57:31

tell you or The Jeffersons,

00:57:34

West, Verde Inn in Germany,

00:57:36

in which a people claimed

00:57:40

that their constitutional rights have

00:57:42

been violated a paella party,

00:57:44

which is usually accompanied and

00:57:47

Dad come Use protected by

00:57:49

Umberto's, right, show, my my

00:57:53

point here is that was

00:57:55

a constant Rain chords. They



00:57:56
should be educated in international

00:57:59
invest in low. So they

00:58:02
take that into equation that

00:58:04
not only from his point

00:58:05
of view of constitution rights

00:58:07
but also from the point

00:58:09
of view of the respect

00:58:10
of the rights of the

00:58:11
investor and then the other

00:58:13
point which is complicity friends.

00:58:16
He's considering the regional a

00:58:20
commissions of Human Rights and

00:58:22
also the codes are mentioned



00:58:24
before I am a commission

00:58:27
since January 2022, and every

00:58:31
session of hearings I push

00:58:33
for a hearing or at

00:58:35
least had a Pioneer with

00:58:37
experts concerning the protection of

00:58:39
investors. Why is that? Because

00:58:41
of what I see is

00:58:43
he's too many really good

00:58:44
people that claim we don't

00:58:47
care about them. What was

00:58:49
the only thing we carry

00:58:51
the environment or the rights



00:58:53

of indigenous peoples, or just

00:58:56

for being mine in the

00:58:58

whole country, something like that

00:59:00

and I bet you forget

00:59:03

that it without investment, it

00:59:06

is impossible to have a

00:59:08

welfare state public education, Public

00:59:11

Health in some of the

00:59:13

countries in Latin America. So

00:59:14

that's that's what must call

00:59:18

me the future years is

00:59:20

that decisions like like the

00:59:22

inter-american Human Rights Commission or



00:59:25
the African Human Rights Commission,

00:59:27
they opened their ears to

00:59:29
the protection of the investors

00:59:32
are always with this week,

00:59:34
with the Saviour, with the

00:59:36
aim of a strike, a

00:59:37
balance over strike, a balance

00:59:39
of taking into account, all

00:59:41
the points of view, I'm

00:59:42
trying to make a commitment

00:59:44
in the middle. Thank you

00:59:46
so much. Thank you, Carlos.

00:59:49
Basically, we just need to



00:59:52
get out of our Silas

00:59:53
and try to breach different.

00:59:57
The, you know, feels together.

01:00:01
There are some tools that

01:00:04
we that we have today

01:00:08
in the, in the field

01:00:10
of commercial arbitration. And also

01:00:12
there are other mechanisms outside

01:00:17
the arbitration that give access

01:00:20
conditional access the protections of

01:00:22
Human Rights compliance. If you

01:00:24
could just save you a

01:00:26
few words about this earlier,



01:00:32
question of commercial contracts. And

01:00:37
in particular model Clauses, which

01:00:39
deal with human rights or

01:00:41
ESG issues, more generally, a

01:00:43
supreme example, the American Bar

01:00:45
Association has a in model.

01:00:47
Set of contract Clauses which

01:00:49
provide for us to be

01:00:52
incorporated into a commercial contract.

01:00:54
A clause which imposes Mutual

01:00:57
obligations on buyers and sellers

01:01:00
at the spot kind of

01:01:01
commercial relationship. With respect to



01:01:03
combating certain abusive practices in

01:01:07
Supply chains or another business

01:01:09
relationships through human rights. You

01:01:11
the mechanism for Princeton's, I'll

01:01:15
just read you at one

01:01:16
of these causes take out

01:01:17
of flavor of what? What

01:01:18
I were talking about here.

01:01:20
So this is the APA

01:01:22
model contract + 2.0. +

01:01:25
number one point one is

01:01:27
a which states that buyer

01:01:29
and seller has a buyer



01:01:31
and supplier. Each covenants to

01:01:33
establish and maintain a human

01:01:36
rights due diligence process, there

01:01:38
were talking about, you know,

01:01:39
the internal processes of companies

01:01:42
to establish human rights. Due

01:01:44
diligence risk, identification. Appropriate to

01:01:50
its size. So there were

01:01:52
talking about it on the

01:01:53
scale of these, internal internal

01:01:57
mechanisms and circumstances to identify

01:02:01
prevent mitigate an account or

01:02:04
how each a buyer and



01:02:06

supplier addresses the impact of

01:02:09

its assessment of its activities.

01:02:11

Sorry. On the human rights

01:02:13

of individuals directly or indirectly,

01:02:16

affected by their supply chains.

01:02:18

Consistent with the UN guiding

01:02:21

principles on business and Human

01:02:22

Rights Commission. By reference of

01:02:26

the framework of the UN

01:02:27

GPS. You aren't getting principles

01:02:29

on business and human rights

01:02:30

and we have the reference

01:02:32

to that. You diligence framework,



01:02:33

maybe some of the audience

01:02:34

members might be, might not

01:02:36

be familiar with it, but

01:02:38

kind of the three prong

01:02:39

mechanism whereby companies are obligated

01:02:45

to identify mitigate and Buy

01:02:49

prevent and mitigate human rights

01:02:52

impacts within their supply chains

01:02:55

or now, kind of even

01:02:56

extended further to their business

01:02:58

relationships and there's something big

01:03:01

going on as the weather

01:03:02

that incorporates Financial investors. For



01:03:05

instance are other types of

01:03:07

kind of business. Actors, Beyond

01:03:09

simply the supply chain relationships,

01:03:11

and I'll just finish that

01:03:12

the rest of the the

01:03:14

clause, which states that such

01:03:15

human rights due diligence, shall

01:03:17

be consistent with guidance from

01:03:20

the oecd for the applicable

01:03:22

party sector. Or if no

01:03:25

such sector-specific guidance is this,

01:03:27

it should be consistent with

01:03:29

the oecd due. Diligence guidance



01:03:31
for responsible business conduct those

01:03:33
are mechanisms that provide some

01:03:37
sort of interpretation as to

01:03:39
how the oecd guidelines should

01:03:42
be interpreted and applied to

01:03:44
particular Industries. So there's one

01:03:46
for instance, for Footwear and

01:03:48
apparel. There's another one for

01:03:50
mining. Which each kind of

01:03:54
major industry has license a

01:03:57
each but many of the

01:03:58
major industries have at this

01:04:00
guidance to show how precisely



01:04:02
they should take these discussions

01:04:04
as I can. So you

01:04:05
don't closets like this can

01:04:07
be quite useful in bringing

01:04:09
commercial parties attention to these

01:04:11
issues if they've not already

01:04:12
been exposed to them and

01:04:15
they may also a risk

01:04:18
to the extent that is,

01:04:20
you know, part of the

01:04:21
negotiation. And then the companies

01:04:23
seek to do that I'll

01:04:25
just on judicial dispute, resolution



01:04:43
mechanism than one of those.

01:04:44
And we're very fortunate to

01:04:46
have Cuts your hair, who

01:04:47
participated in creating these mechanisms.

01:04:52
CD National contact, Point framework.

01:04:56
And essentially, each always, CD

01:04:59
member has a national contact

01:05:01
point, which evaluates complaints that

01:05:04
are brought against companies with

01:05:07
respect to their compliance with

01:05:09
the oecd guidelines. And of

01:05:11
course, this incorporates some aspects

01:05:13
of Human Rights due diligence



01:05:15

but it also has brought

01:05:17

her in that, as it

01:05:18

has environmental claims, labor. Clean

01:05:20

other other possible client is

01:05:22

an initial admissibility face to

01:05:24

determine whether something, but their

01:05:26

complaint is appropriately. Situated on

01:05:29

Saxon, there's appropriate standing on

01:05:31

the issue and then the

01:05:34

party is can seek some

01:05:37

sort of amicable resolution often

01:05:39

times through mediation as a

01:05:43

way of finding, some sort



01:05:45
of remedy to address the

01:05:47
relevant situation and the remedies

01:05:49
are are wide-ranging. You may

01:05:50
have requests for compensation, but

01:05:52
you I have something completely

01:05:53
different such as a request

01:05:56
to modify a process or

01:05:57
procedure internally or request, to

01:05:59
issue a public statement or

01:06:03
recognize some sort of past

01:06:05
harm that there's a fight.

01:06:07
They can be quite creative.

01:06:08
And of course, reputational risks



01:06:10
is going to be a

01:06:11
real component of relevance to

01:06:14
companies assessment as to whether

01:06:16
they participate in this non-binding

01:06:18
mechanism or whether they, you

01:06:22
know, you view it as

01:06:24
something less impactful upon their

01:06:25
business relationships. And unless I

01:06:28
just mentioned in the oecd

01:06:29
framework has one, but there

01:06:30
are many other complaints Frameworks

01:06:33
non-judicial compliance framework such as

01:06:34
through the various un special



01:06:37

rapporteur zand and working groups

01:06:39

as well as National human

01:06:41

rights. Institutions institutions that can

01:06:46

also hear hear claims and

01:06:48

European regulatory framework. Incorporates or

01:06:53

touches. Thank you. I need

01:06:59

anybody has anything to our

01:07:02

do? They always City procedures

01:07:04

Studies have indicated. That they

01:07:14

are buying large ineffective. They

01:07:17

have produced very few concrete

01:07:19

results on the ground. If

01:07:22

you compare them to International



01:07:24
arbitration Awards which are enforceable

01:07:26
under the New York convention,

01:07:28
the reality of the NCP

01:07:31
process is incomparably smaller

01:07:35
than what we're talkin about.

01:07:37
When we deal with International

01:07:38
arbitration where if a human

01:07:40
rights issue was raised whether

01:07:42
it's a counterclaim or a

01:07:44
defense or or a a

01:07:46
reduction of Damages it can

01:07:52
result in in real meaningful

01:07:54
impact whereas the NCP process



01:07:59

While well-intended because of the

01:08:03

lack of political will by

01:08:04

oecd member states. They were

01:08:07

not willing to give it

01:08:08

enough teeth to make it

01:08:10

work in practice. So it's

01:08:12

it's a good thing to

01:08:13

be there in my experience,

01:08:15

many companies, when I explain

01:08:17

what it is say. Well,

01:08:19

we're just going to boycott

01:08:20

it. There's no point in

01:08:21

playing ball with that process.



01:08:24

So sorry to be the

01:08:26

skunk at the Garden Party

01:08:27

on that one. I just

01:08:30

wondered, if, I would argue

01:08:32

that, you know, perhaps there

01:08:35

is no, there are no

01:08:35

binding kind of cheeses, you

01:08:37

know, but I would argue

01:08:39

that there can be a

01:08:40

significant impact of these types

01:08:42

of cases upon company internal

01:08:45

processes, especially with this kind

01:08:46

of creativity of remedies that.



01:08:49

That might be available. And

01:08:51

I think the reputational factor

01:08:53

is not one to be

01:08:53

discounted, especially nowadays, where companies

01:08:56

are increasingly adopting kind of

01:08:59

commitment towards making progress on

01:09:01

many of these issues including

01:09:03

human rights, especially that you

01:09:06

know the very forward-looking industry

01:09:08

leaders do not want to

01:09:10

be associated with a complaint

01:09:12

that says that they're engaged

01:09:13

and, you know, some somewhere



01:09:15

in their supply chain there

01:09:16

and get you and human

01:09:16

rights violations. I would argue

01:09:18

that although, it's not decisive

01:09:20

and and not finding, it

01:09:21

can have a significant reputational

01:09:23

risk. Perhaps, when when paired

01:09:26

with all of the other

01:09:27

mechanism, The sting at the

01:09:30

international and Regional level to

01:09:32

exert, pressure to for companies

01:09:35

to conduct their Industries in

01:09:37

binding, as that it has



01:09:43

not achieved results. So there's

01:09:48

a lot to be done

01:09:49

to strengthen them strength of

01:09:51

the mechanism. I think because

01:09:53

it's a very has very

01:09:54

good basis and it just

01:09:56

needs to be strengthened taken

01:09:58

more seriously and actually advertised

01:10:05

more broadly. That is a,

01:10:08

that is an issue. And

01:10:11

now we are running out

01:10:13

of time. I think we're

01:10:14

close to her. But I



01:10:16

would like to just briefly

01:10:18

mentioned the specific set of

01:10:22

rules actually that has been

01:10:24

created the doctors for this

01:10:27

particular issues. They hate rules

01:10:32

and business and human rights,

01:10:33

which are arbitration rules. So

01:10:36

any I just briefly Why

01:10:40

they have not been used.

01:10:41

So you're taking this before,

01:10:45

we conclude single-use of them,

01:10:52

some of us during the

01:10:53

comment period argued to the



01:10:55
drafters. They were unlikely to

01:10:57
be used and the reasons

01:10:59
why they were unlikely to

01:11:01
be used. I think of

01:11:02
the reasons they have not

01:11:03
been used their, their number

01:11:05
reasons, but just to mention

01:11:07
to what is the incentive

01:11:09
for either party to use

01:11:11
those rules, there are disadvantages

01:11:13
to both parties number to

01:11:15
who's going to cover. And

01:11:18
how are they going to



01:11:19

cover the costs of arbitration?

01:11:21

Which can be quite significant

01:11:23

for the for the poor

01:11:27

communities? Assuming that it is

01:11:29

a poor Community or individuals.

01:11:31

Who who is human rights?

01:11:33

Have allegedly been been harmed

01:11:36

by now. Maybe, with some

01:11:38

of these Stream mentioned earlier,

01:11:42

we may actually see some

01:11:44

used to these rules particularly

01:11:46

in a business-to-business context. That's

01:11:48

probably the the most likely



01:11:51

or alternatively. If the state

01:11:53

requires by regulation that the

01:11:55

rules be used. That's, that's

01:11:57

possible in the future, but

01:11:59

it hasn't happened yet. Any

01:12:02

quick, to this, I just,

01:12:05

obviously the lack of experience

01:12:08

makes it difficult to tell

01:12:09

that to Doug's point. I

01:12:11

think it's very old oak

01:12:13

procedural, Innovations of taking place

01:12:15

in relation to the hate

01:12:17

rules. It's still very unclear,



01:12:19

whether it's walkable to the

01:12:21

populations, who would Mason in

01:12:23

a victim to business dispute.

01:12:25

Whether it actually is accessible

01:12:27

at Rule and whether is

01:12:30

because of the other people

01:12:31

who were most poorly equipped

01:12:32

to actually use all the

01:12:34

Traditions lack of awareness, whether

01:12:39

it's still workable, but if

01:12:41

they're all business-to-business disease, it

01:12:44

is possible that the victims

01:12:46

will actually benefit side effects



01:12:50
of these will be the

01:12:51
victims benefit because one of

01:12:53
the purposes of the rules

01:12:55
General note that the arbitration

01:12:57
rules, but the underlying principles

01:12:59
on this isn't human rights.

01:13:02
That the priority should be

01:13:04
to remedy those who have

01:13:06
stuff at the office human

01:13:07
rights and pack. So I

01:13:09
think the hope is that

01:13:10
even in the context of

01:13:12
business-to-business to feed, Sarah, positive



01:13:14
effects for individuals and communities

01:13:16
who have been impacted No,

01:13:22
wrapping up. I would like

01:13:24
you to. I would like

01:13:26
each of you to give

01:13:27
me like to give us

01:13:29
in like 30 seconds or

01:13:32
as briefly as possible, you're

01:13:38
taking looking forward. What is

01:13:41
your expectation about a whether

01:13:43
human rights issue will feature

01:13:45
more frequently or more prominently

01:13:48
in international arbitration? And what



01:13:50

does it mean in practice

01:13:52

for international situation, practitioners party

01:13:55

Representatives experts and arbitration arbitrators

01:13:58

for instance? I can jump

01:14:01

in and I think it's

01:14:02

inevitable that human rights considerations

01:14:04

are going to become more

01:14:05

relevant post is a rebalancing

01:14:07

of this new generation of

01:14:09

investment treaties. I think must

01:14:11

continue to see that. Grow

01:14:12

as more General recognition, that

01:14:17

business activities, give rise to



01:14:20

Human Rights and packs. The

01:14:21

fact that Sutton sedate responsibilities

01:14:25

under the UN GPR. Now

01:14:26

in some jurisdictions being translated

01:14:28

into actual applications.. Is pushing

01:14:33

towards human rights becoming more

01:14:35

relevant business operations. Also with

01:14:39

climate change, it's a human

01:14:42

rights are actually the main

01:14:43

instrument through which climate change

01:14:47

names are prosecuted. And we

01:14:51

will see Clarity around the

01:14:53

interaction of different areas, of



01:14:55

little, perhaps more investment little,

01:14:56

but sadly human rights law.

01:15:00

Generally International climate, the international

01:15:03

climate raging and session. Is

01:15:06

he coming out of the

01:15:09

inter-american court of Human Rights?

01:15:10

Those find those to The

01:15:13

Advisory opinions will. I think

01:15:15

provide more substance the parties

01:15:20

to rely on in these

01:15:22

in an investment case says.

01:15:24

So I think we'll also

01:15:26

see investors knowing more at



01:15:28
the stage of investment and

01:15:30
being and being seen to

01:15:32
know. So there's going to

01:15:33
be an obligation or investors

01:15:35
to take into account things

01:15:37
like climate of the gation

01:15:38
I think States will ultimately

01:15:41
play more freedom to regulate

01:15:45
on human rights in particular,

01:15:46
climate G. But I still

01:15:48
think that the system has

01:15:50
a long way to go

01:15:51
before. It's really calibrated handle



01:15:54
these claims in a way

01:15:55
that really takes into account.

01:15:57
The human rights considerations because

01:15:59
ultimately is An investment regime.

01:16:01
I just own the Practical

01:16:03
side of this. Only if

01:16:05
that's decide there is an

01:16:07
opportunity for everyone to learn

01:16:09
about these other areas of

01:16:11
law, become more relevant and

01:16:13
take care of the rest

01:16:14
of State cases and climate-related

01:16:16
cases. But we're going to



01:16:18

need to know about human

01:16:19

rights and just on the

01:16:20

commercial side. I think that

01:16:22

when we do see business-to-business

01:16:25

disputes that come out of

01:16:28

supply chain issues, the weather.

01:16:30

Both business and pies because

01:16:31

of activity in the supply

01:16:33

chain that it's going to

01:16:35

be really challenging for Aubrey

01:16:37

traitors because rules like the

01:16:40

European directive. The corporate sustainability.

01:16:43

Director said there's no, you



01:16:49
wouldn't simply Beyonce, you breach

01:16:50
the dispute that for his

01:16:52
compensation. There are all kinds

01:16:54
of steps. I have to

01:16:55
happen so you'll really thinking

01:16:58
about impacts on. People that

01:17:00
the two are adversely impacted,

01:17:03
how you actually, trying help

01:17:05
the supply chain survive and

01:17:07
I think that that will

01:17:08
be a challenge for all

01:17:09
of us, but it will

01:17:10
say that an opportunity to



01:17:11

look at things through a

01:17:13

different lens. Thank you, Janet

01:17:15

Carlos. Very short, First International

01:17:23

arbitration panel's and international commercial

01:17:25

Partners must take into account

01:17:27

the human rights obligations by

01:17:29

state. The investors have such

01:17:33

must take into account human

01:17:36

rights standards domestic Regional and

01:17:40

International. I'm third, third domestic

01:17:45

court and to take into

01:17:48

account. International arbitration Publications over

01:17:52

the states and finally is



01:17:55
reinsurance. Your rights bodies must

01:17:57
take into account to also

01:17:59
the fact of the states

01:18:02
have in the House, International

01:18:05
obligations concert in the protection

01:18:09
of the rights of English.

01:18:10
Thank you so much. I

01:18:16
would agree with everything that's

01:18:17
been said that's far. I

01:18:18
would just add a couple

01:18:20
of points. Number one, they're

01:18:21
going to be as we're

01:18:23
seeing currently in the United



01:18:24

States, conflicting versions, where here

01:18:27

you're having a n s.

01:18:29

I e s g sentiment

01:18:31

followed by regulation and four

01:18:33

examples, State Attorney General's, and

01:18:36

financial controllers action against a

01:18:39

company is for their. Their

01:18:41

efforts around sustainability and, you

01:18:44

know, we can envisage a

01:18:47

big topic, as well. We,

01:18:49

that would contrast very expressly

01:18:53

with what's happening in Europe

01:18:55

and other jurisdictions. I think



01:18:57

that fragmentation and that the

01:18:59

danger and ending of the

01:19:01

companies needing to follow suit

01:19:04

and have you no regions

01:19:06

specific strategies for addressing. Those

01:19:08

is going to be really

01:19:10

Central to Howard. Seeing that

01:19:12

arise in a, in in

01:19:14

the disputes contacts. I would

01:19:16

also say that as states

01:19:19

are obliged to come into

01:19:21

compliance with regulatory instruments with

01:19:23

Regional International and domestic. There's



01:19:27

going to be an increasing

01:19:28

tension between the right to

01:19:29

regulate and the respect of

01:19:31

investor rights under the tree

01:19:35

framework, so that the framework

01:19:38

needs to adopt in a

01:19:39

way that is going to

01:19:41

be able to reconcile. Those

01:19:43

two sets of Rights in

01:19:44

a manner that allows states

01:19:47

to comply, for example, with

01:19:48

the Paris agreement, or with

01:19:49

the inability to teligence directive,



01:19:54

but in a way that's

01:19:56

all so protective of investor

01:19:57

rights, I think those tensions

01:19:58

are really going to be

01:19:59

what is inherent in the

01:20:01

next phase but it's inevitable

01:20:04

that we need to take

01:20:05

into account human rights in

01:20:07

that assessment. Thank you, Sharon

01:20:09

Ducks, the final word. Before

01:20:11

we take some questions a

01:20:17

structural defect of Silo Silo

01:20:21

ISM. If I can call



01:20:22

it that both in the

01:20:23

investment regime and in the

01:20:25

Regional Human Rights regime and

01:20:28

the Regional Human Rights regime.

01:20:29

The inter-american court has recently

01:20:32

decided, where is about to

01:20:33

decide cases the impact, very

01:20:36

severely, the rights of companies

01:20:39

of the investment rates are

01:20:40

company, certainly their interest. And

01:20:42

yet those companies have no

01:20:44

party standing either before the

01:20:46

inter-american commission, or the inter-american



01:20:49

court. The most they can

01:20:50

do is file. Amicus briefs

01:20:52

likewise in investment arbitrations these

01:20:56

days affected communities, whose human

01:20:59

rights may be adversely affected

01:21:01

have no party standing. They

01:21:04

have to rely on some

01:21:05

sort of third-party benefits. As

01:21:08

a corollary is Janet said

01:21:10

from a business-to-business or a

01:21:13

business to State dispute. In

01:21:16

my view, both of those

01:21:18

situations are structural defects in



01:21:22
mechanisms of international law. The

01:21:24
real parties and interest are

01:21:27
at least three fold in

01:21:28
each of those situations. And

01:21:30
yet the actual formal parties

01:21:32
with procedural rights are only

01:21:35
two in the long run,

01:21:37
it seems to me, we

01:21:38
need to address both of

01:21:40
those problems and I'm encouraged

01:21:42
to hear that. Commissioner Bernal

01:21:44
is Raising it in the

01:21:46
inter-american context and I hope



01:21:48
some of his fellow Commissioners,

01:21:49
pay attention. Thank you. Doug

01:21:52
now I would like to

01:21:54
ask you if any of

01:21:55
you has any questions. Yes.

01:22:01
It was an issue with

01:22:03
a Microsoft for. Yes, there

01:22:06
is. Can you hear me?

01:22:13
As you can? Thank you.

01:22:16
Here's one. Or this one.

01:22:39
Now you can hear me.

01:22:40
Oh yes. Thank you, Katia

01:22:42
very much for for your



01:22:44
uniform, moderating this I have

01:22:47
and thank you, dog, for

01:22:49
it. That your last comment

01:22:50
because we we now have

01:22:52
the topic for it. Next

01:22:54
year's. Human rights and business

01:22:58
and an international arbitration panel

01:23:02
which will be, I can

01:23:03
announce it already know, the

01:23:05
lack of standing of companies

01:23:07
before the inter-american human rights

01:23:10
system versus the lack of

01:23:13
standing of certain communities before



01:23:16
investment tribunals. I think that

01:23:17
that that is a key

01:23:19
topic and and happy to

01:23:21
announce it. But beyond that,

01:23:23
what I would like to

01:23:24
to ask which, which is

01:23:27
the one of our Battle

01:23:31
horses in in the human

01:23:34
rights and an international reputation

01:23:35
are are your views. And

01:23:38
I know we discussed this

01:23:40
before dog. You might not

01:23:42
be embracing that the following



01:23:44

but I would like to

01:23:45

hear know the opinions of

01:23:48

of specially Janet and the

01:23:50

others on trying to make

01:23:55

the best arbitration system, a

01:24:00

more balanced one it with

01:24:02

regard to especially in those

01:24:04

communities that could be affected

01:24:05

by investment projects and by

01:24:08

some of the Investments that

01:24:09

take place in in the

01:24:10

territories of States. Part of

01:24:13

the, at least, might be



01:24:14
part of the issue of

01:24:15
the reason why that wrecked

01:24:17
claims by States and also

01:24:20
counterclaims by by state. If

01:24:26
anything might might be heard

01:24:29
by tribunals in terms of

01:24:33
violations of human rights but

01:24:35
I might just go that

01:24:39
far but but not make

01:24:41
it to the marriage in

01:24:44
a Victoria's way is because

01:24:45
when you read the I

01:24:47
would say a word. They're



01:24:48
saying it 98% of the

01:24:50
investment treaties. There are no

01:24:53
obligations for investors concerning human

01:24:57
rights. There are there are

01:24:58
soft applications like in the

01:25:02
Canada Columbia, Ave ta their

01:25:06
horses, Horry Provisions, but there

01:25:09
are no heart l'obligation simos

01:25:12
trees. There's, there's a handful

01:25:13
of trees that do that.

01:25:14
But most most of they

01:25:16
don't. So, some of the

01:25:18
proposals that we have put



01:25:20
together, including for some Parliament

01:25:23
sin in Latin America from

01:25:25
Paramore, 410 practice. Attic strategy

01:25:27
is to provide. Provisions were

01:25:32
Model Provisions where to buy

01:25:34
states. Were treated would include

01:25:37
binding obligations or investors within

01:25:42
the treaty not. You cannot

01:25:45
include the whole, the whole

01:25:47
local law at, within a

01:25:49
trini. And neither directly nor

01:25:51
by reference, but something to

01:25:54
the effect of certain minimum,



01:25:56
customary standard related, to labor

01:26:00
environment and human rights. So

01:26:05
I would like to hear

01:26:06
your your, your views on

01:26:09
that type of of, of

01:26:11
proposals, when you asked Council

01:26:15
in investor arbitration, who most

01:26:17
represent the investors, they say,

01:26:19
well. That's what local laws

01:26:21
for but then If if

01:26:26
there are violations to that

01:26:27
extent and it seemed best

01:26:29
to leave the country or



01:26:30

good luck. Trying to enforce

01:26:32

any arbitration award against the

01:26:34

against the investor. So I

01:26:38

know that it's that, it's

01:26:39

complex, but I would love

01:26:41

to hear your views. I

01:26:45

can you own the point

01:26:47

about bringing bringing these considerations

01:26:51

and interests into investment arbitration,

01:26:53

you identified, the issue, which

01:26:56

is that very few treaties

01:26:59

Pacific. He referenced them and

01:27:00

obviously the movie that's being



01:27:02

made towards incorporating human rights

01:27:04

and brought corporate social responsibility

01:27:07

considerations into a long way

01:27:10

towards addressing that specifically. I

01:27:13

think they're both. So being

01:27:15

important assets by institutions and

01:27:17

rules to increase transparency to

01:27:22

allow third-parties to participate or

01:27:27

at least to be able

01:27:28

to understand what's happening in

01:27:30

proceedings and and to make

01:27:31

their voices heard. Whether a

01:27:33

seatings are outside of those,



01:27:34

which I think gives them

01:27:36

more legitimacy of this will

01:27:38

be Slow-moving will have the

01:27:41

shift in the treaties. They'll

01:27:44

be the procedural Avenues at

01:27:48

least presenting positions and then

01:27:51

tools like systemic interpretation will

01:27:55

become more relevant. But I

01:27:57

think when we think about

01:27:58

the existing tools like a

01:28:02

systemic interpolation, one thing I

01:28:03

would say, that's really important

01:28:05

is that Decisions by tribunals



01:28:07

on these issues are principled.

01:28:09

They, they need to be

01:28:11

really robust. They need to

01:28:13

be full full, well, sort

01:28:15

through and take into account

01:28:17

and to understand the intersecting

01:28:21

applications, including human rights, which

01:28:23

aunt, intuitive to everyone, who

01:28:24

does arbitration. It's a, it's

01:28:28

a new feel. So there

01:28:29

really is. I think I

01:28:30

come back to this opportunity

01:28:31

to really understand these areas



01:28:35
of low that are going

01:28:36
to butt heads and cross

01:28:38
increasing. But it will be

01:28:41
a slow and piecemeal process.

01:28:43
While we are moving towards

01:28:46
an entirely new generation of

01:28:48
treaties. If that happens, I

01:28:49
don't think it will happen

01:28:50
because there's either knows every

01:28:55
state will want to do

01:28:56
that, but they will at

01:28:57
least be a push by

01:28:58
some states to incorporate these



01:29:00
principles. So I didn't have

01:29:02
any solutions, but I, I

01:29:04
do feel as though things

01:29:08
will happen. And one of

01:29:10
the really important things is

01:29:11
that it's done in a

01:29:12
very principled Way by people

01:29:14
who understand the issue. If

01:29:18
I met on this the

01:29:20
negotiation of new investment treaties

01:29:23
that include include obligations of

01:29:26
investors. I mean that is

01:29:28
a long-term that's a solution



01:29:32

and let's not forget the

01:29:34

treaties as the purpose, these

01:29:38

treaties have the protection of

01:29:39

investors. So we have to

01:29:41

find something different type of

01:29:43

treaties in order to include

01:29:46

all this this responsibilities. But

01:29:49

investors do have responsibilities and

01:29:52

they do they are existing

01:29:55

instruments today that are soft

01:29:57

law that you, Angie be

01:29:58

so is he the guidelines?

01:30:00

They're soft, they're the hardening



01:30:02

there, more and more companies

01:30:04

that have to undergo due

01:30:08

diligence. I have to adapt

01:30:10

to adult due diligence mechanisms

01:30:13

and it's very hard to

01:30:15

say. Now for it, He

01:30:20

didn't know anything about it

01:30:21

and he was not supposed

01:30:22

to be responsible. So I

01:30:24

think there may be ways

01:30:25

of dealing with these issues

01:30:31

when they arise and investment

01:30:32

arbitration, in addition to system



01:30:34
integration is that could be

01:30:38
used by your tribunal by

01:30:40
knowledgeable tribunal today, before we

01:30:44
look into how a new

01:30:46
investment treaty in like 10

01:30:48
years, will take care of

01:30:52
it. So in a more

01:30:53
practical way, that's a just

01:30:55
my who's obligation was its

01:31:07
engagement in the community consultation

01:31:09
process, right and ends with

01:31:12
it. You know, the state

01:31:13
that had to set up



01:31:13
the mechanisms for the protection

01:31:15
of that, you know, it

01:31:17
stop. Trinidad or is it

01:31:18
was its investors obligation. And

01:31:20
so I think many of

01:31:22
these issues before we get

01:31:23
to, you know, that there

01:31:24
was no danger to the

01:31:25
actual implementation of these new

01:31:27
generation. We may see them

01:31:30
start to play out. And

01:31:31
in these types of disputes

01:31:33
of attribution of responsibility, for



01:31:35
secular establish applications. Maybe if

01:31:45
I can say something, is

01:31:47
that it looks year, did

01:31:49
your the point is a

01:31:50
fragmentation how how to bridge

01:31:53
again, there the gap between

01:31:55
these two regions are there

01:31:57
is of course all of

01:32:00
you have to just named

01:32:02
to incorporate you right through

01:32:04
this in the framework of

01:32:06
embarrassing. Is that look in

01:32:14
the recent company that is



01:32:15

violating human rights in the

01:32:18

country. Country. For instance you

01:32:21

shade happens to the countries

01:32:24

that belongs to the American

01:32:26

system and that country request

01:32:29

a hearing in which the

01:32:31

whole purpose is to announce

01:32:33

those violations. I can tell

01:32:35

you that this is going

01:32:38

to be more info. Impactful

01:32:40

that count? Flame from the

01:32:44

state in the, in the

01:32:45

sense that how much is



01:32:49
going to be the value

01:32:51
of a stock of a

01:32:53
company that has been publicly

01:32:55
accuse with evidence in a

01:32:57
hearing of the inter-american Human

01:32:59
Rights Commission has company that

01:33:01
has violated human rights. So

01:33:03
there are many angles it

01:33:06
to these and of course,

01:33:07
they can also be abused

01:33:09
on the side of your

01:33:10
right, but a changing the

01:33:13
treaty. She's not the only



01:33:14

possible ways to to, to

01:33:16

breach the two words. Thank

01:33:18

you so much. Thank you.

01:33:23

Any other questions? Okay, I

01:33:29

would like to thank our

01:33:30

panel but this very rich

01:33:34

conversation of this issue. And

01:33:36

thank you all for staying

01:33:38

with us. Okay, I would

01:33:29

like to thank our panel

01:33:31

but this very rich conversation

01:33:35

of this issue. And thank

01:33:36

you all for staying with



01:33:38

us.