

Community Consultations, Environmental Protection and Investment Projects in International Arbitration *

Summary

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

The session at the Washington Arbitration Update focused on the principle of participation in investment projects and international arbitration, particularly regarding the necessity for consultations with affected communities. The discussion highlighted the concept of "social license to operate," which refers to the informal acceptance of a project by local communities and stakeholders, emphasizing its intangible nature and the challenges in enforcing it legally.

Key participants included Justice Natalia and Justice Anaya, who addressed the constitutional perspective on participation in Colombia, particularly regarding indigenous consultations. They noted that Colombia's Constitution recognizes the rights of ethnic communities, mandating prior consultation for projects affecting them. This legal framework has led to a significant number of court cases where the rights of communities have been upheld.

Professor Andrea Jorgensen provided insights into the complexities of the social license concept, raising questions about who constitutes the community, the timing of when support should be achieved, and the intersections with investment law. She emphasized that while the social license is important, it should not replace the formal legal obligations of investors and states to consult with affected communities.

The panel also discussed recent arbitration cases, including *Copa America vs. Ecuador* and *South American Silver vs. Bolivia*, which illustrate the growing recognition of community engagement in investment arbitration. The discussions underscored the evolving nature of legal standards regarding consultations and the importance of integrating human rights considerations into investment practices.

Overall, the session highlighted the need for ongoing dialogue about the balance between investment interests and community rights, advocating for clearer frameworks that ensure both investor accountability and community involvement in decision-making processes.

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Topics

community consultations, environment, investment project, SLO, social license to operate

Category

WAU

Full Transcript

00:00:02

By indicating that, this kind

00:00:05

of has been a a

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work of so open list.

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And the and ideas topic

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here is a consultations and

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initially we thought of calling

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it, The principle of participation

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in investment projects and international

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arbitration. The whole, the whole

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idea was to Start the

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conversation which has already started

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because some of the planets

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have already talked about this

00:00:39

topic, in, in there, a

00:00:41

workshops and other know there

00:00:43

for. But the idea was

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to continue and even start

00:00:47

a strawberry conversation on the

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consultations that sometimes are demanded

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in certain jurisdictions to with.

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And by those people who

00:00:59

are actually involved and could

00:01:01

be affected by certain things

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not to have a certain

00:01:04

foreign investment project or domestic

00:01:07

project. And recently, we have

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had a number of decisions,

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exit Awards and investors day

00:01:16

towards that have touched upon

00:01:20

that topic. And you see

00:01:22

the issue rise, Whenever there

00:01:25

is a mining concession, or

00:01:27

there's a hydroelectric Project that

00:01:31

may affect individuals or simply

00:01:33

projects that may touch upon

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communities that live in the

00:01:38

area or somehow would be

00:01:39
affected by investment project. So

00:01:41
that is at hand and

00:01:44
the we. We we have

00:01:46
an incredible panel and I

00:01:48
can stretch more how incredible

00:01:51
is because the Wait, we're

00:01:56
going to take you from

00:01:57
a perspective of constitutional domestic

00:02:02
law. Concerning one specific jurisdiction

00:02:06
cologne to then inter-american human

00:02:13
rights, courts. And then up

00:02:16
to public international law and

00:02:19
the principle of specificity. get

00:02:30

to the idea of consultations

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in investment arbitration and and

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that pass that I have

00:02:38

just laid out is in

00:02:40

front of your screen. I

00:02:42

need some of you in

00:02:43

front of your face. We

00:02:48

have a With us, Justice.

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Natalia and Justice. And he

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has agreed to come to

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the floor and speak specifically.

00:03:02

And only about two issues

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related to the participation principal

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under the Colombian Constitution and

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I have the moderator have

00:03:13

the task of making sure

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that she does not get

00:03:16

any hypotheticals or any socks

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because his reasons. That would

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know her work at which

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we don't want. Of course,

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then we have Professor, Andrea

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Jorgenson and Professor Johnson is

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a full professor at Is

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38 chair International patient and

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international commercial law at McGill

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University. Faculty of law is

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a freaking expert. An arbitrator

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investor-state arbitration disputes and Court

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proceedings related to them. She's

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many more things. I don't

00:04:01

want to embarrass anyone but

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really the pound that we

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have here is an incredible

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team Anaya is over James

00:04:09

Anaya is an international recognize

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color and altar in years

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of international human rights. I

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need shoes concerning indigenous peoples,

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he served as the UN

00:04:19
special rapporteur on the rights

00:04:21
of indigenous peoples from 2008

00:04:24
to 2014 and is teaching

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and scholarship. He has also

00:04:31
lead to get this major

00:04:32
cases involving human rights of

00:04:35
indigenous peoples in domestic and

00:04:37
international tribunal. He has also

00:04:39
appeared in As an arbitrator

00:04:42
at the kitchen and he

00:04:45
has written a book, which

00:04:49
I read about 20 or

00:04:51
20 or 30 years ago

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on the rights of indigenous.

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But, the interesting thing is

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that even even even 30

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or 20 years ago, when

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I had already research, the

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work of many constitutional Court

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including the Columbia Station, Who

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is a professor of public

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international law at the University,

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and Rene has appeared before

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the Constitutional Court to talk

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about matters. Also expropriation among

00:05:52

other things, and he has

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a doctorate as well. And

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that he's here with us

00:05:59

to address the issues of

00:06:01

the inter-american court of Human

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Rights issue consultation. Last but

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not least, we have a

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animal who is an international

00:06:12

car legal at 6 to

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have intergenerational panels where we

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have extremely recognized and solid.

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attorneys in Lawrence but we

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we like the conversation amongst

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the Piers on non peers.

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And that is why on

00:06:37

a nice here? She will

00:06:38

take it on to make

00:06:43

a presentation on the status

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or the update of the

00:06:48

social, or the The consultations

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on social Licence to operate

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first and then to give

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a sense of what are

00:07:01

the cases invested arbitration that

00:07:03

are relevant to the discussion.

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A student of economics and

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law and the technical word

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that you will see throughout

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the week is thanks to

00:07:19

her, but she has been

00:07:21

spent spending endless night and

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I'm making sure this is

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this go smoothly, including drink

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the whole weekend and I

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can attest to that with

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that. I would like to

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welcome you. And let's, let's

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start first that with what

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has been happening in investor

00:07:42

arbitration. And what what is

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the notion of social Licence

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to operate? Okay, thank you

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very much. I was Antonio

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for the introduction. It is

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truly a pleasure for me

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to be here today, among

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these amazing panelist. So, for

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the following minutes, I will

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try to keep a very

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brief crash course, on the

00:08:01

concept of the social Licence

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to operate and the development

00:08:04

of the concert with in

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International Investment arbitration. Now, to

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begin, let's answer the question

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of what exactly is the

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social Licence to operate? No,

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please keep in mind that

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this is a fairly new

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concept and represents the acceptance

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of approval given by local

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communities, or stakeholders towards. I

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am the store project now

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is relevant today to discuss

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this topic, because there is

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clearly an increase in the

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regulations surrounding. Social actors and

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communities involved in or affected

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by such projects. Don't keep

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in mind that this concert

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being fairly new. I know

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the very similar, it's not

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the same as the right

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to community consultations. It is

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not generally, Recognized within domestic

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legislation. And for this reason,

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it is very difficult for

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it to be recognized as

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a requirement was in an

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investment process. Now we can

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stay four main characteristics of

00:09:01

the social Licence to operate.

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The first one being that

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it cannot be obtained by

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simply request, and it from

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a governmental Authority, or by

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simply paying a fee for,

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for a required. Part much

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more than money. And for

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this reason is there, no

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pretty find Paris that a

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company must follow. And this

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goes in contrast to say

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with the legal license to

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operate which company can just

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follow us there. Instead of

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steps, I don't seen it.

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So this concept could be

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said to be very abstract

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I have not one instance

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I can apply to everybody.

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Now, the second characteristic being

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that it is intangible and

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informal and what this means

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is that is given by

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the affected Community or by

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Civil Society at large, but

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they're one being that it

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is constant a specific. Now

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this means that the company

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must take into account a

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special characteristics and pick the

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areas of its communities in

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the process of obtaining the

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license and even though we

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cannot say there's a one-size-fits-all

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approach for this and there

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definitely isn't, there are still

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several commendations are set to

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be followed for a company

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to obtain it. And an

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example of this could be,

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for example, all the Talisman

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of appropriate communication live within

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the company. Now, this is

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done with the support of

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the local government. Before some

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Lobster, a serious look, is

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that even though it is

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intangible and informal, it could

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still be said to be

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enforceable from the economic and

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legal perspective. And the reason

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for this realize that the

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upfront costs associated with gaming

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social acceptability, I agree with

00:10:38

you is this? OSHA license

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is inside the keep now

00:10:42

to give examples have charity

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with what the kids. Let's

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say, from the acknowledged enforcement

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respected. This is not me

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specifically that a government sanctions

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or impose a penalty, which

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was accompanied by her brother

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that civil society and achieve

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this. And a classic example

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for this is true consumer

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boycotts. And from the legal

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enforcement perspective is that they're

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appropriate regulatory measures such as

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adoption of the gestation good

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at the center of the

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discussion, the social Licence to

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operate, and a good example

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for the be, when a

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government prior to obtain a

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legal license requires that, a

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company of pain. Social licence

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who makes you a department

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of the legalizes are not

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start included with his legislation.

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Not with his with his

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mind. If we say that

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is an intangible, it would

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say that it is given

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by a community. I'm not

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by our government do. What

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exactly will be the consequences

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of not feeding a soldier

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license to operate. Please keep

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in mind that there is

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no specific legal penalties, imposed,

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and that in principle, because,

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of course, they're to be

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certain exceptions. The social Licence

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to operate, does not entail

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a breach of an Investor's

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obligations under International Investment. Nevertheless,

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there are great consequences for

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a company for not updating

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to socialise and swap rates.

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And this is mainly, because

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they could be processed or

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blocking attends made of the

00:12:08

community. Because I said before,

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there could be consumer boycott

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or let's say, even if

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a company has a chain

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is permitted years ago and

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he has not everything listed

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with approval of the government

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because of the previous examples

00:12:23

of consumer boycotts and process

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their to be legal challenges.

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It poses. Read that could

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help the development process or

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that could even maybe key

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that it is, it is

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born. Now National investment arbitration.

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This matters are usually not

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discussed within it. What happens

00:12:45
is that sustainable development responsible

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business practices or reference of

00:12:49
human rights? Are generally not

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part of the reason of

00:12:53
eating International Investment, tribunal's. And

00:12:57
if we use the letter

00:12:57
investment treaties, as an example,

00:12:59
we can see the text

00:13:01
of them. Usually do not

00:13:02
contain specific languages that reference

00:13:06
Corporate social responsibility or his

00:13:08
Social Development. And the reason

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for this lies behind the

00:13:12

idea of relationship between the

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bus here and the government

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being a symmetrical in nation,

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a teenager. So, what this

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means is that while the

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VIP might impose obligations upon

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the states in America, Write

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to the investor. So, with

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his mother has been very

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few cases that have shed

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a light on this topic

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and given the time constraints,

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we can only discuss today

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tree of this. The first

00:13:40
one will be in Copa

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America versus Ecuador and do

00:13:43
keep in mind that in

00:13:44
this to express example, that

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I'm going to pretend there

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is actually no specific mention

00:13:49
of the socialise and swap

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rate in the text, but

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nevertheless, it is considered to

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develop the concept, you want

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indirect matter. So for example,

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in Cooper, mess up, what

00:13:59
happened was the tribunal analyzing,

00:14:02

these are the concepts throughout

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the prism of contributory negligence

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and if found that in

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the end he had among

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other things and impact in

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the quantum, accusation of the

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case So what happened was

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that the tribunal did take

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into account the contributions other

00:14:21

companies, towards the social conflict

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that occurred around the investment

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project and actions did contribute

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to it. After that recent

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a reducing compensation and go

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to the claim, I'd buy

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a 30%. Now, a similar

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case will be in South

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American, silver versus Bolivia and

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once again Fabio did not

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use the concept of the

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social licence actually, but it's

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still as acid to the

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actions that the company had

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done that contributed to the

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situation, not once again for

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Mezza. This should we not

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looked at the actions of

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claimant? Look at the effect

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that he had on his

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books of conflict and found

00:15:01

in this case. Because of

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believe actions in the process

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of extrication of house, American

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Steel grey time because there

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was no compensation in the

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end. The amount of compensation

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02 play man was Indian

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Indian. Now the last time

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to my opinion, the most

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interesting case is broke my

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new braces glue and I

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say that because this was

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the first investment be traced

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in case that actually gave

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an in this analysis of

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the concept and in here

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once again as the previous

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cases the tribunal to look

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into the actions of of

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cream. And look at the

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consequences of his actions had

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on the social conflict. That

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was surrounding the project and

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concluded that it could have

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taken a greater effort to

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end. Its consultation process, any

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community outreach. Never Last, I

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found that during the years

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of the project was undergoing

00:15:57

the previous government had apparently

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gave. It gave it to

00:16:01

all three station and approval

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of it and never directly.

00:16:04

Once again stated or said,

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or shown that if you

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do not agree with the

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situation or how the community

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consultation process was undergoing a

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this the tribunal consider that

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the actions of the blue,

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Government constituted as an approval

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and that is your reasonable

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expectations for a man in

00:16:23

the situation. Now, is very

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interesting thing about this is

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that they sent an opinion

00:16:29

of the Phoenix. And I'm

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out once us the tribunal

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did X consider that the

00:16:37

claimant, it contributed to the

00:16:39

social unrest and that his

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actions could have been better.

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But differs from the tribunal

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in that, I can see

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that the ILO convention 169

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in his reasoning and it

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said that the Hybrid battery

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is feel she should hold

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significant legal value within this

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concert. And then he brings

00:17:01

into question Article 15 of

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the Isle of convention. And

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what he Ark is in

00:17:07
the end of the sort

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of his sexual words, is

00:17:09
that you may be the

00:17:10
function of the states. Provide

00:17:12
a stable legal framework that

00:17:15
is yours at the consultation

00:17:16
process occurs and that the

00:17:17
app. Are consistent with a

00:17:19
convention but nevertheless it is

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not the state functions to

00:17:23
holding back your hand and

00:17:25
the liver of socializing out

00:17:27
of this process. And for

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this reason, he argued that

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the FDA and any or

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the sort of a letter,

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this might really should not

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be used as a possum

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insurance policy for the best

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fails to undergo a community

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consultation process. And this is

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a great and interesting contrast

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between the two decisions. Because

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in the end, where the

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tribunal says is that it

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is your vacation August 8th

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to monitor closely, the effort

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conducted by the best year

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and for the to think

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of different indigenous communities and

00:18:01

that the state must boys

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is concerned throughout the whole

00:18:05

process. And for this reason

00:18:06

because you had no voices

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to certain during the process

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of three years, he concluded

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that it could not be

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reduced and responsibilities mainly on

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the Peruvian government. Contrast, what

00:18:18

tense argue is that obtained

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in the social Licence to

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operate, is the responsibility of

00:18:24

the investor and that a

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failure to secure security license.

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She would have been taken

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into account by the tribunal

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wants to talk to you

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later the damages and the

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compensation to be awarded that

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we didn't mind. This concept

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is very interesting, and hopefully,

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we can have a great

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discussion and what remains of

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the panel, since it presented

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itself to socialise, and swap

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rate, percentage self as an

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opportunity to shop on investors

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and government that ensured that

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Community, right? Or not only

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heard but also respected throughout

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the whole process. Thank you

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very much. And I mean,

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Nana and we got in

00:19:08

mind you with with the,

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a greater share of sense

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of of clarity as to

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what a social Licence to

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operate means. And hopefully also

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a greater sense of clarity.

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As to the recent cases,

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there are more cases and

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some of them will be

00:19:27
addressed by by some of

00:19:30
our, our panelists. And I

00:19:32
would like to invite Justice

00:19:35
Natalia and him to take

00:19:38
the floor. And I specifically

00:19:40
address the question of you

00:19:43
from Sons of perspective, or

00:19:45
from the perspective of law

00:19:49
and the issue of the

00:19:52
principal participation specifically specifically at

00:19:56
with regard to the right,

00:19:58
if any of consultations of

00:20:00
off and two communities. So

00:20:02
just I wish I could

00:20:16
speak English and I don't

00:20:18
speak fluently but I will

00:20:20
do my best in my

00:20:22
7 minutes that I have

00:20:23
here. I thought I've been

00:20:24
asked to talk about participation

00:20:26
but as I said to

00:20:27

a Jose participation is a

00:20:30

very broad Concept in the

00:20:32

Constitution. And there are several

00:20:33

manifestations of participation. So I'm

00:20:36

going to concentrate into at

00:20:38

which is the Constitutional jurisprudence

00:20:41

on indigenous consultations. And and

00:20:44

if I have time on

00:20:47

something that was kind of

00:20:49

on the discussion in 2017-2018,

00:20:55

that was popular consultation, concerning

00:20:59

mining project in Columbus. It's

00:21:04

so so this would be

00:21:06

the focus of my presentations.

00:21:07

Those two topics after I

00:21:10

imagine that not everybody is

00:21:12

familiar with how cases reach

00:21:14

the Constitutional Court, very briefly.

00:21:17

There two types of actions

00:21:18

or public action. When is

00:21:22

public action of unconstitutional law

00:21:24

unconstitutional and he's Peterson in

00:21:28

Columbia. Can challenge a law

00:21:30

unconstitutional crap so that's one

00:21:33

of the reasons why that

00:21:34

we have. A lot of

00:21:35

cases challenging, the law is

00:21:38

unconstitutional and the other is

00:21:40

the Tutela action and most

00:21:42

of the cases of indigenous

00:21:44

consultations and consultations in general,

00:21:47

come with it within the

00:21:48

action. That is a read

00:21:51

seeking immediate protection of a

00:21:53

fundamental, right? That any citizen

00:21:55

may bring before a judge.

00:21:57

So we have very Broad

00:22:00

and easy way to approach.

00:22:03

The courts in Columbus. And

00:22:07

so basically we had a

00:22:08

very, very large trees, prevent

00:22:10

on the right to Prior

00:22:12

and informed consultation of ethnic

00:22:15

and tribal communities in Columbia,

00:22:18

Demonata. As as one said,

00:22:20

documented at least they need

00:22:23

shelter, decisions of the Colombian

00:22:28

court. And this is basically,

00:22:29

because our constitution recognized that

00:22:32

Colombia is a multi-ethnic and

00:22:35

Multicultural state are made up

00:22:37

of considerable number of ethnically

00:22:40

different different communities. And the

00:22:45

Constitution regards these communities, as

00:22:48
subject of special constitutional protection.

00:22:52
I'm told there are the

00:22:54
beneficiaries of serious about your

00:22:56
actions with the objective of

00:22:58
achieving material are. There's also

00:23:02
a Numerus, clausus in the

00:23:05
Constitution that makes up for

00:23:07
that protection. We have as

00:23:10
well. We called constitutional block,

00:23:12
which is a part of

00:23:13
the Constitution, of course the

00:23:15
convention, 169 of the International

00:23:18
Labour organisation. And we have

00:23:21

several several Clauses in the

00:23:25

Constitution that talks about participation

00:23:27

as our first article says

00:23:30

Columbia social state democratic party

00:23:33

for Tory. And pluralistic article

00:23:35

to basically says that it

00:23:38

is mandatory for the tape

00:23:40

to facilitate participation by everyone

00:23:42

article. 7 recognize and protects

00:23:45

the ethnic and cultural diversity

00:23:47

of the combination article, 40.

00:23:50

And I'm just reading what

00:23:52

some it says that any

00:23:54

citizen has the right to

00:23:55

participate in the formation exercise

00:23:58

and control of political power

00:24:00

and article 330 says that

00:24:03

ended Shall be governed by

00:24:05

consoles for an unregulated, according

00:24:08

to the uses and customs

00:24:10

of their communities. And these

00:24:11

are only some of the

00:24:12

articles that talk about participation

00:24:15

in the Colombian Constitution because

00:24:18

it was kind of a

00:24:19

core principle of of the

00:24:23

Constitutional Convention. And so it

00:24:26

is not surprising that we

00:24:27

have such a very easy

00:24:29

access to court and we

00:24:31

have a a a articles

00:24:34

in the Constitution that Express

00:24:35

we talked about participation and

00:24:38

consultation that the Constitutional Court

00:24:41

in this 30 years of

00:24:43

of a b work has

00:24:47

advised basically has a very,

00:24:49

very large Judy. I'm I'm

00:24:53

using this data from basically

00:24:55

a study that Professor Rainier

00:24:59

will publish a very soon

00:25:01

so I didn't do Is

00:25:04

there a ride with me?

00:25:05

But we have 70 from

00:25:08

1992 until 2021 that we

00:25:14

are not including two cases

00:25:16

of this year. We have

00:25:18

77 cases of unconstitutional public

00:25:22

action and 143, two pillowcases

00:25:26

addressing specifically consultation the right

00:25:30

to Prior consultation and informed

00:25:32

when cases of unconstitutional when

00:25:43

people challenge shallow for on

00:25:45

constitutional grounds and there are

00:25:47

some cases in which the

00:25:49

court has declared the law

00:25:51

unconstitutional that is, in the

00:25:53

12% of those cases. The

00:25:55

court, declared those the law

00:25:57

unconstitutional, and in 99-percent, partially

00:26:01

unconstitutional, The large number, if

00:26:05

you challenge a law, I

00:26:07

am by saying that basically

00:26:09

the legislator didn't do the

00:26:11

executive didn't do a prior

00:26:13

consultation before enacting a law

00:26:15

is it is kind of

00:26:17

a large number, but definitely,

00:26:19

what is very large, is

00:26:21

the Tutela actions. Because in

00:26:22

76% of the cases, the

00:26:25

court determined that there had

00:26:27

been no violation of the

00:26:28

right to Prior consultation and

00:26:31

order the protection. That means

00:26:33

that most of the day

00:26:34

of the Tutela cases that

00:26:36

the course revised concerning the

00:26:41

right to fire any form,

00:26:42

cuz a consultation the court

00:26:45

will basically decide in favor

00:26:48

of communities. And so that

00:26:50

is a message to do

00:26:51

the kayak reservation because it's

00:26:53

almost for sure that if

00:26:57

you don't you will lose

00:26:59

her and I'm just Bring

00:27:03

because I only have seven

00:27:05

minutes. This is unconstitutional public

00:27:09

action. And I'm bringing this

00:27:10

up because it was one

00:27:12

of the first decision in

00:27:14

which the court declared unconstitutional

00:27:16

in a law enacted by

00:27:20

Congress and what year was

00:27:22

the law 1021 in 2006,

00:27:26

which was the General for

00:27:28

his blog and so I'm

00:27:30

just calling it. What, what

00:27:32

the court says it is

00:27:33

not less true that a

00:27:34

project of this size complexity

00:27:36

and implications of the one

00:27:38

that intends to regulate forestry

00:27:40

matters. In an integral matter

00:27:42

required that as a condition

00:27:44

prior to its approval in

00:27:46

Congress. The government carry out

00:27:49

a specific exercise of consultation

00:27:51

with indigenous and tribal communities

00:27:54

and the court mandate stays

00:27:56

in several decisions. So for

00:27:57

example, when the Congress is

00:28:01

ratifying An international treaty, if

00:28:05

it affects communities. There's a

00:28:09

mandatory that prior consultation takes

00:28:13

place before, so when we

00:28:17

see, and then days again.

00:28:18

So, there's two examples of

00:28:25

a unconstitutional decisions are always

00:28:28

putting to tell action is

00:28:30

interesting, the cases that the

00:28:32

court can see it in

00:28:33

certain there are macro cases

00:28:36

and micro cases, but I'm

00:28:38

just approaching the the data

00:28:40

from the macro keys in

00:28:42

33% of the cases concern

00:28:45

infrastructure projects, meaning roads, damn

00:28:48

Sports. And again most of

00:28:51

these cases, the Court decide

00:28:53

in favor of communities, at

00:28:56

20%, at 28% concerned extractive

00:29:00

Industries, such as mining oil

00:29:03

And 12% are other type

00:29:07

of cases of her example

00:29:08

and no education and others.

00:29:10

But that means that abuses

00:29:13

in the infrastructure projects an

00:29:15

extractive Industries will most of

00:29:17

these cases are most of

00:29:19

these two pillow cases, and

00:29:21

most of the time, they

00:29:22

are decided in favor of

00:29:24

the community. And so I'm

00:29:26

just typing hear some rather

00:29:28

live on there are more

00:29:32
than a hundred and forty

00:29:33
three cases of to tell

00:29:35
action, but if they ask

00:29:37
you, who is that the

00:29:40
name s u means that

00:29:41
the court is, is this

00:29:43
decisions are decided by the

00:29:45
9th of justice. And are

00:29:47
they try to unify the

00:29:49
rules of of up to

00:29:52
Taylor action? So this, that

00:29:54
I mentioned in here, the

00:29:55
ones that that is as

00:29:56

you are pretty relevant. If

00:29:59

you want to, to have

00:30:02

an idea of how And

00:30:05

so I'm just going to

00:30:06

bring a very quickly some

00:30:08

of the of the actual

00:30:11

standards for private consultations in

00:30:13

Columbia. So first of all

00:30:15

for the court-packing he's up

00:30:16

on the right taken it

00:30:19

is mandatory in the event

00:30:21

that an administrative measures has

00:30:25

the potential to directly impact

00:30:28

ethnic communities. So these ideas

00:30:31

directly impact, ethnic communities is

00:30:35

very important and had to

00:30:37

decide what impacts directly. A

00:30:40

community is a matter. He

00:30:43

has two are the voice

00:30:44

of the communities as well

00:30:46

as not that operate. A,

00:30:47

a company says that that

00:30:49

might direct or not, direct

00:30:52

directly impact ethnic communities, but

00:30:55

it has to have the

00:30:57

input of the community. And

00:30:59

another rule is that adverse

00:31:01

or confrontational positions are not

00:31:03

How during the prior consultation

00:31:04

processes, it is a dialogue

00:31:07

between equals in the midst

00:31:08

of different procedures that do

00:31:11

not meet the essential requirements

00:31:13

of Prior consultation process. I'm

00:31:16

not admitted that he's at

00:31:18

simulating prior consultation to marry

00:31:20

administrative procedures information meetings or

00:31:24

related actions. It is necessary

00:31:27

to establish effective communication relationship

00:31:30

based on the principle of

00:31:32

good faith. It is mandatory

00:31:34

to define the procedures to

00:31:36

be followed in its prior

00:31:37

consultation process, in particular, to

00:31:40

a free consultation, and Opus

00:31:43

consultation process to be carried

00:31:46

out in common agreement with

00:31:48

the affected community. And this

00:31:49

is very important before the

00:31:52

prior consultation occurs. There has

00:31:54

to be a private consultation

00:31:55

that we basically agree on

00:31:58

how the consultation will take

00:32:00

place. Tomorrow at single-term should

00:32:05

not be set to materialize

00:32:06

the consultation process and search

00:32:09

for consent and this issue

00:32:11

of timing is very congested

00:32:13

and don't form any development

00:32:16

company said there's but the

00:32:18

timing is different and the

00:32:19

timing is different among communities

00:32:21

about the court has been

00:32:23

very clear and saying that

00:32:24

there should not be a

00:32:26

set a timer for a

00:32:28

set standard, but rather you

00:32:30

have to take into account

00:32:30

the community that process it

00:32:33

said and it is mandatory

00:32:36

to guarantee that the benefits

00:32:38

of the exact execution of

00:32:40

the word. For this, expedition

00:32:42

of the resort is I

00:32:43

shared equitably as well as

00:32:46

compliance with mitigation and compensation

00:32:49

measures for the damage cost.

00:32:51

Again if you want some

00:32:53

of these standards are very

00:32:56

complex. But for example, su123

00:33:00

2000. I think is a

00:33:02

very it gives you a

00:33:04

very broad picture of the

00:33:05

standard that the court has.

00:33:08

So this is with respect

00:33:10

to indigenous consultation by the

00:33:13

court has also address other

00:33:15

types of consultation that as

00:33:18

I mentioned we're in discussions

00:33:20

especially in 2018 October at

00:33:25

the Constitution recognize a mechanism

00:33:27

that is called Popular consultation

00:33:30

at that is a mechanism.

00:33:31

For citizen participation is not

00:33:34

about indigenous consultation is for

00:33:36

any citizen participation and that

00:33:39

allows government and governors to

00:33:43

consult local communities about issues

00:33:46

of the municipality, or the

00:33:48

prop from 2013 until 2018,

00:33:54

several municipalities promoted, popular consultation

00:33:58

regarding mining party and they're

00:34:01

almost 11 from 2008 from

00:34:04

2013 and 2018. I have

00:34:08

them all, but I'll

00:34:09

have time to show it

00:34:09

to you, but I just

00:34:11

quoted one. That the the

00:34:13

question that was asked, was

00:34:14

basically do you agree? Yes.

00:34:17

Or no. On this is

00:34:18

an example that Mining and

00:34:19

oil exploitation exploration, and exploitation,

00:34:23

activities, be carried out in

00:34:26

their jurisdictions of the municipalities

00:34:28

in. This example was not

00:34:34

surprisingly population said, no, we

00:34:37

don't want the money project

00:34:38

to be carried out. So

00:34:40

that really relate to your

00:34:42

social participation comes after the

00:34:45

court of the Constitutional Court

00:34:47

was confronted with the issue.

00:34:50

If those consultations were mandatory.

00:34:54

And if the government should

00:34:57

Springs Community project, it was

00:35:02

mandatory to stop the project

00:35:04

because the concept of consultation

00:35:08

test Is mandatory to basically

00:35:11

it, except for the people

00:35:13

until there's one at the

00:35:16

station where the court says,

00:35:18

no, you will not be

00:35:20

mandatory and basically the cord

00:35:23

was discussed, was the issue

00:35:26

of the autonomy of municipalities

00:35:28

Visa be the decision of

00:35:31

the national government to do

00:35:33

in Columbia, we are at

00:35:35

Central State, not federal state.

00:35:38

And so, the court basically

00:35:40

address those those tensions between

00:35:45

the nation and the municipalities

00:35:47

and with these, I will

00:35:49

finish saying that popular consultation

00:35:51

is not the ideal mechanism

00:35:54

to apply the principle for

00:35:56

control of coordination between the

00:35:58

nation, and the territories within

00:36:00

the framework of the postulates

00:36:02

of the unitary state. And

00:36:04

territorial Altona, me things, as

00:36:06

a mechanism of citizen participation,

00:36:08

Cannot be used to define

00:36:10

weather in the territory activities

00:36:13

of expiration of exploitation of

00:36:16

the subsoil for natural. Resources

00:36:17

are carried out the confidence.

00:36:22

In this matter, does not

00:36:23

like absolutely in the head

00:36:25
of the municipalities and therefore

00:36:27
exceeds their fact. I must

00:36:31
stress that I've I've read

00:36:33
a lot of academic articles

00:36:35
criticizing this decision. So I

00:36:37
will say that this is

00:36:38
not a closed matter but

00:36:40
still contest it and I

00:36:42
think it really relate to

00:36:44
these idea of Toto's hotel

00:36:48
association as you mentioned because

00:36:50
even if the court says

00:36:51
that these does does not

00:36:53

have a hole that what

00:36:54

this kind of consultation was

00:36:56

a way of people going

00:36:58

missing or airing their voice

00:37:00

opposing to project at. So

00:37:03

that's something that must not

00:37:04

be disregard and do with

00:37:07

this. I will fit thank

00:37:11

you very much, Justice on

00:37:14

him, I think that we

00:37:18

were should have going to

00:37:20

initially the social Licence to

00:37:24

operate now into the principles

00:37:29

are two patients specifically in

00:37:33

In in consultation matters at

00:37:36

specifically, in in Columbia and

00:37:38

what I know, two from

00:37:40

both of the remarkable presentations.

00:37:43

Is that there is a

00:37:46

sense of evolution that that

00:37:48

we will see in in

00:37:51

this specific topic. And when

00:37:52

you mentioned that that there's

00:37:54

there's quite a bit of

00:37:55

criticism concerning the last the

00:37:57

last ruling that that your

00:38:01

red and and that is

00:38:03

not unusual. That may also

00:38:05

be the case in investor

00:38:07

arbitration. We already have an

00:38:09

important case of the the

00:38:10

Bear Creek Nature, which itself

00:38:14

has a criticism by by,

00:38:17

by one of the Year

00:38:19

by one of the arbitrator.

00:38:21

So evolution is part of

00:38:22

investor arbitration constitutional law and

00:38:26

public international law and and

00:38:28

with that I would like

00:38:28

to ask a professor and

00:38:32

thank you for the Research

00:38:33

that that we, we are

00:38:35

getting fresh out of the

00:38:37

oven or even in the

00:38:38

in the oven for house.

00:38:39

I would like to ask

00:38:41

you. How is the notion

00:38:44

of consultations understood within the

00:38:48

human rights context? And even,

00:38:53

even even contest of of

00:38:54

of, of Or some other

00:38:58

nations in the world and

00:39:00

specifically in Latin America. If

00:39:01

you have any of that,

00:39:04

thanks isn't Daniel. So I'm

00:39:05

going Wonderful. Thank you very

00:39:15

much and thanks for the

00:39:16

invitation. So I know what's

00:39:28

up with you. I had

00:39:36

an Italian after so many

00:39:38

panels and Justice of the

00:39:49

Constitutional court and being part

00:39:50

of our community. So the

00:40:00

Constitutional Court's and deterrent system

00:40:03

interact with an International Investment

00:40:06

regime, And a part of

00:40:13

a wider project, that we're

00:40:14

developing with the Max Planck

00:40:16

Institute on international law. That

00:40:18

looks at the interaction between

00:40:20

transformative constitutionalism and international. So

00:40:24

I see some of the

00:40:25

authority that project is almost

00:40:27

here and some others who

00:40:28

are online who have been

00:40:29

working on this as well.

00:40:30

So how does transform of

00:40:33

the Constitution is Latin America

00:40:34

interact with International economic loss.

00:40:37

We have a case that

00:40:38

you we have studies on

00:40:39

monetary policy taxable in labor

00:40:42

law. And here, I'm going

00:40:44

to talk about it. What

00:40:48

what is it that I

00:40:49

that I want to discuss

00:40:50

here so they be a

00:40:51

here, you can see the

00:40:53

exit. So, what's the talent

00:40:55

that ultimately what we have

00:40:59

is that internationally in investment

00:41:06

State Hospital What is very

00:41:13

complex? This place and make

00:41:15

them basically a conflict between

00:41:16

an investor and a state

00:41:18

where I was at. We

00:41:19

know investment is a multi

00:41:22

actor, issue. That, in this

00:41:24

case, there is that problem

00:41:27

and we frame it by

00:41:35

integrating domestic constitutional review on

00:41:39

the basis of the free

00:41:40

prior and informed Transportation standard

00:41:42

that acronym dare speak or

00:41:46

consultation is standard to buy.

00:41:48

Combinator domestic review with the

00:41:51

consultation is standard. Then that

00:41:53

becomes a platform to add

00:41:55

complexity, to the ways in

00:41:57

which investment arbitration and domestic

00:42:00

court's supposed to do with

00:42:03

this lack of boys and

00:42:04

by doing so that injects

00:42:06

both resiliency to divestment regime.

00:42:10

And also ultimately Because it's

00:42:14

open. It is open to

00:42:16

your voice that ultimately is

00:42:18

a way to resist the

00:42:20

Jewish back. Like they were

00:42:21

saying again and how it

00:42:24

would this work. So basically

00:42:26

what I'm going to do

00:42:26

with the next couple of

00:42:28

minutes but also contend in

00:42:37

the context of Latin America

00:42:38

first and then I'm going

00:42:40

to see how that concerns

00:42:42

a consultation and consent standard

00:42:45

might be injected into investment

00:42:49

of the situation through domestic

00:42:51

constitutional review of International Investment

00:42:54

that small Azalea. This is

00:43:00

something that is not marginal

00:43:02

as we know 80% of

00:43:04
the population in America. And

00:43:12
importantly, so if we look

00:43:13
at this from a Latin

00:43:14
American perspective of the 22

00:43:17
states that are close to

00:43:18
the ILO convention today, when

00:43:24
we talked about that, we're

00:43:25
really talking about Latin America,

00:43:26
most of them. All states

00:43:32
in the region, have approved

00:43:33
the 2017, un Declaration of

00:43:35
the rights of indigenous population

00:43:37
live in Columbia that at

00:43:38

the moment. When, when it

00:43:40

was loaded abstain then later

00:43:43

they accept I'm in most

00:43:56

constitutional system in Latin America.

00:43:58

Except of course, it has

00:44:08

a bit, has a constitutional

00:44:11

status, but this means head

00:44:14

is really part of the

00:44:15

public, so this is something

00:44:18

that is not a segment

00:44:22

of the population that International

00:44:30

Domestic system is the standard

00:44:33

but also domestic institutions include

00:44:36

some of them explicit references

00:44:38

to the consultation with explicit

00:44:43

references in the Constitution Colombia

00:44:46

versus Peru Guatemala Guatemala and

00:45:00

it was referring to, they

00:45:02

have the right under the

00:45:03

domestic system through. And then,

00:45:07

finally, what, where we don't

00:45:08

find that, right? If you

00:45:09

show me, Chile and Costa

00:45:11

Rica a common law of

00:45:20

the reason and I'll turn

00:45:22

this, that you have prior

00:45:25

consultation content has been developed

00:45:27

by the American system. Enterprise,

00:45:31

particularly, as the 2017, if

00:45:43

you have impact unit consultation,

00:45:46

you do have large Still

00:45:47

project with hiring packed unique

00:45:49

concept. And that idea was

00:45:52

confirmed 2012. Where did court

00:45:56

visiting jamerican Court of Human

00:45:58

Rights explicitly says, look nowadays,

00:46:00

this is the common law

00:46:03

of Latin America. This is

00:46:05

the view from the case

00:46:08

to carry out special and

00:46:10

different. So both bottom up

00:46:22

top down. We have a

00:46:24

very specific obligations and diverse

00:46:27

applications. Because it is developed

00:46:32

by the American system. That

00:46:33

means that domestic judges in

00:46:36

Latin America have to apply

00:46:39

that standard as it has

00:46:41

been developed after 2012 as

00:46:44

part of what the German

00:46:45

Court of Human Rights called

00:46:47

the doctrine of conventionality control,

00:46:50

meaning that not applying that

00:46:52

standard entails International legal responsibility.

00:47:00

The standard of cars has

00:47:02

to be applied been turned

00:47:04

into American Standard intern has

00:47:06

to be applied by domestic

00:47:08

when the Constitution has a

00:47:12

doctrine of constitutional. So that

00:47:16

means that they are engaging

00:47:23

International Library. So if that

00:47:33

is the case, then so

00:47:36

how does this place up

00:47:37

in the context of investment

00:47:39

to refresh? So we have

00:47:41

that, we have the right

00:47:43

and do the course of

00:47:44

a consent first and their

00:47:48

duties, both International and domestic.

00:47:52

How does this play out

00:47:53

in the context of investment

00:47:54

arbitration? That's the first Peter.

00:47:58

What's the second Peter domestic

00:48:00

constitutional courts in Latin America

00:48:02

are increasingly engaging with International

00:48:07

Investment. Know how important moments

00:48:12

in particular bitchslut of realities.

00:48:25

There are increased issues of

00:48:29

concurrent jurisdiction between a constitutional

00:48:33

Court's investment arbitration Domestic Court.

00:48:46

How to review state or

00:48:48

private actions to comply with

00:48:50

best of interaction between constitutional

00:48:57

Court. I don't have to

00:49:01

apply the standards as defined

00:49:05

by the journey is not

00:49:08

engage both International and domestic.

00:49:15

Most of the action up

00:49:17

to now, has a court

00:49:18

in Latin America, in the

00:49:20

first two months, but there's

00:49:21

nothing to tell us that

00:49:23

the action is not going

00:49:24

to move forward with your

00:49:28

review of action. 18 Clemente

00:49:30

award in the first part.

00:49:33

And in the first moments

00:49:34

of constitutional review of be,

00:49:36

so we have several examples

00:49:39

in, Costa Rica, declared unconstitutional

00:49:48

from 2010 to 2014 because

00:49:51

it had to review whether

00:49:53

like whether these were in

00:49:55

Conformity with the new constitution

00:49:57

of 2008 and they done.

00:50:00

And the court said, no.

00:50:01

They are unconstitutional because they

00:50:03

had an article that basically

00:50:09

prohibits is Gears. And then,

00:50:12

of course, the court declared

00:50:14

that case law are we

00:50:22

doing and cheese and then,

00:50:27

and the most recent one

00:50:28

was 2019, E250 250, 2019.

00:50:33

Where as a some of

00:50:35

you may know the adopted

00:50:37

very white ring, your interpretations

00:50:39

that control or limit the

00:50:41

ability of the Colombian government

00:50:43
to ratify. The I did

00:50:46
this decision was of course,

00:50:48
controversial as to whom you

00:50:49
have made a decision that

00:50:54
match, but this is to

00:50:55
underscore that this is really

00:50:58
a psychic on the station

00:50:59
about investment research. Domestic institutions

00:51:02
do when that happens to

00:51:05
the first point. The first

00:51:06
moment is, how does consultation

00:51:09
concerned about how does a

00:51:12
consultation on a standard look

00:51:15

like? Well, might decide that

00:51:22

the Lord, that a problem

00:51:23

that approved. So Daddy's there's

00:51:27

no consultation that vintage 3D

00:51:29

the law between. We must

00:51:35

mention consultation, if not, then

00:51:40

the three types of the

00:51:46

debate, team must include special

00:51:48

rules of indigenous participation in

00:51:51

original Pro Series. Otherwise it

00:51:54

would, it would undermine the

00:51:56

right to Fair compensation in

00:51:58

the car. So different than

00:52:00

we've seen suggests. The second

00:52:08

woman. And I'm going through

00:52:10

these very fast if you

00:52:12

keep ahead of time, but

00:52:13

let me know if you

00:52:13

answer any questions regarding the

00:52:15

second taking Joseph home, current

00:52:23

Jersey concurrent jurisdiction is domestic

00:52:26

exercise jurisdiction over the same

00:52:30

conflict as an International Investment,

00:52:32

International real estate investment, arbitration

00:52:36

panel. So the first one

00:52:39

is the domestic, court's decision

00:52:43

on concentration can be rather

00:52:45

than I love Justice and

00:52:47

therefore, it can trigger International

00:52:49

response. So when the Court

00:52:52

decides that are searching product

00:52:54

and that because it and

00:52:58

if we can go ahead

00:52:59

because it wasn't among other

00:53:03

arguments. Through this recession Dakotas

00:53:10

in case you needed that

00:53:11

in denial of justice and

00:53:12

therefore engaging in their International

00:53:15

responsibility of the whole state

00:53:17

because of the decision of

00:53:19

the Constitutional court regarding competition

00:53:21

and 2nd. And this is

00:53:24

this is something that we

00:53:25

are starting to see more

00:53:26

Americans that are given project

00:53:30

Consultants consultant or something, you

00:53:35

can send Ethan conflict with

00:53:37

a given project that is

00:53:39

intern protected by an investment

00:53:41

treaty are in your fridge.

00:53:44

So, that's the other, the

00:53:45

review of domestic Awards of

00:53:56

domestic Awards by domestic and

00:53:59

international investment has happened with

00:54:04

none existed Awards and this

00:54:07

occurs in the context of

00:54:08

The New York convention rules

00:54:15

may say that lack of

00:54:19

regulation of a public policy,

00:54:23

which is a few, no

00:54:26

ground either to a Sarah

00:54:29

seidner, Ensenada still at work

00:54:30

or the possibility of refusal

00:54:33

to enforce. And this is

00:54:35

crazy because, remember that if

00:54:37

we're talking about, we're not

00:54:40

just talking about, but also

00:54:44

to basically, seek compensation in

00:54:47

other states that are not

00:54:49

necessarily the state, where they

00:54:50

arbitration and then, finally, finally

00:54:56

content in review of our

00:54:58

implementation. They do you sleep

00:55:00

in a quart? Particularly domestic

00:55:03

constitutional Court. Review both lost

00:55:09

and regulations that have to

00:55:11

be adopted domestically to implement

00:55:14

a given award investment of

00:55:17

work or domestic public, or

00:55:19

private action, that has to

00:55:20

be implemented to implement a

00:55:22

particular order to comply with.

00:55:24

And then you have also

00:55:32

responsibilities of Camp, I think,

00:55:45

due to issues of time.

00:55:46

And I apologize for this

00:55:48

week, we're going to move

00:55:50

to professor at your colon

00:55:53

and and, and I'm sorry

00:55:54

apology to Professor Anaya asking,

00:55:58

you know, asking him how

00:56:01

we know how International law

00:56:07

and the question of the

00:56:13

power consultations plays out in

00:56:15
the weather. It is or

00:56:18
not. A rule that that

00:56:22
must be upheld under public

00:56:25
international law, both under treaty

00:56:27
Law, and Order customer international

00:56:30
law and really eager to

00:56:34
to hear your perspective on

00:56:36
this. Thank you for saying,

00:56:39
thanks for the opportunity to

00:56:41
participate in in in this

00:56:43
panel and has covered a

00:56:46
good bit of the, the

00:56:48
basics of public international law

00:56:50

with regard to the duty

00:56:52

of states, to consult them

00:56:53

with indigenous peoples in particular.

00:56:55

And of course, I elope

00:56:56

convention 169, which is been

00:56:58

ratified by the the vast

00:57:00

majority of of Latin American

00:57:02

countries. Unfortunately North America is

00:57:05

lagging behind in that regard

00:57:08

but the convention 169 is

00:57:15

is that the only International

00:57:16

sweetie that's relevant is as

00:57:18

implied by Renee, also the

00:57:22

in America, the American instruments

00:57:23

as adjudicated by the in

00:57:27

American Court of human rights

00:57:28

in particular, the American convention

00:57:29

on human rights and the

00:57:32

American Declaration of Rights. And

00:57:34

duties of man have have

00:57:37

been interpreted As Rowdy duty

00:57:40

of states to consult with

00:57:42

indigenous peoples. And of course,

00:57:43

there's the UN Declaration on

00:57:45

the rights of indigenous, peoples

00:57:46

of 2007 while. But not

00:57:48

a treaty represent the standard.

00:57:51

That the vast majority of

00:57:53

states of the world have

00:57:56

agreed to, to work cords.

00:57:59

At least and many will

00:58:01

argue has have I that

00:58:02

essential parts of the UN

00:58:04

Declaration of our parts of

00:58:06

customary International Argento and Ashley

00:58:09

one particular be provisions on

00:58:10

on consultation and I'm not

00:58:12

alone in that opinion, but

00:58:15

maybe I was 20 years

00:58:16

ago. But now we have

00:58:18
entities like the International Association

00:58:21
committee on the rights. And

00:58:22
I want to focus on

00:58:29
particular aspects of the video

00:58:31
consultation that distinguishes it from

00:58:33
this General notion of a

00:58:34
AAA license social life. I

00:58:39
ordered from the general, right?

00:58:41
Participation are there is a

00:58:43
general right of everybody to

00:58:45
participate in public affairs or

00:58:47
in government for matters? And

00:58:48
that, is that right? Is

00:58:49

affirmed prominently, most firmly, perhaps

00:58:52

some of the international Covenant

00:58:54

on civil and political rights,

00:58:56

which is why they ratified

00:58:58

by All American Latin American

00:59:00

countries and also thought it

00:59:02

was 23 of the American

00:59:04

convention on human rights. And

00:59:08

that is all right. That

00:59:08

everybody has to participate in

00:59:10

public affairs or matters of

00:59:14

governance that I got a

00:59:16

fact, the man that right

00:59:17

is related to democratic governance

00:59:19

and good. Good social governance

00:59:25

has not forced in public.

00:59:34

International law can see it

00:59:36

as connected with with certain

00:59:38

policy prescriptions that we find

00:59:40

an international documents. Perhaps most

00:59:43

notably the the UN guiding

00:59:48

principles in business human rights

00:59:50

all over the guiding principles

00:59:51

speaks specifically of the responsibilities

00:59:55

of a, of a business

00:59:58

enterprises to respect human rights

01:00:00

and not so much. In

01:00:02

terms of social license is

01:00:03

focus. A very bright focused

01:00:05

document And to distinguish this

01:00:11

of the duty of a

01:00:13

consultation. First of all it

01:00:16

it's it's important understand that

01:00:18

the character of this Duty

01:00:19

and that characters is is

01:00:22

that it is a safeguard,

01:00:23

it's not so much a

01:00:24

free-standing right among the catalog

01:00:26

of Human Rights but it

01:00:27

has been expressed in the

01:00:29

documents. I mention. I looked

01:00:31

in my kitchen, 169, the

01:00:32

UN declaration and in the

01:00:33

jurisprudence of the American Court

01:00:35

as a safeguard for specific

01:00:37

rights. That indigenous peoples are

01:00:39

understood to have including the

01:00:41

rights of our lands and

01:00:43

resources. The rights to Sacred

01:00:45

places their cultural rights more

01:00:47

broadly. The duty of consultation

01:00:50

is triggered when there's going

01:00:53

to be a government decision,

01:00:55

that might affect these rights

01:00:57
and that is how the

01:01:00
UN Declaration on the rights

01:01:01
of indigenous. Peoples frames this

01:01:03
Duty in Article, 19 and

01:01:05
various articles in connection with

01:01:06
specific rights such as rights

01:01:07
in Lansing. Natural resources. That

01:01:09
is how I look convention

01:01:11
169 frames to duty. It

01:01:13
speaks of government decisions. That

01:01:15
might affect indigenous peoples in

01:01:17
the right Article 15, speak

01:01:18
specifically to the natural resources

01:01:21
of the interest and Bryson

01:01:23
and natural resources. That indigenous,

01:01:24
peoples have when those might

01:01:26
have to be affected by

01:01:27
the government has the duty

01:01:28
to to consult. And so

01:01:32
often, we, we, we speak

01:01:34
of it and and notably

01:01:37
the Constitution, constitutional court and

01:01:41
now even the inter-american court

01:01:43
of human rights of a

01:01:44
circulated, a right to consult

01:01:46
consultation and yes we can

01:01:50

speak of it that way

01:01:51

because it implies a certain

01:01:52

set of entitlements on the

01:01:54

part of indigenous peoples better

01:01:55

to rise as initially both

01:01:57

in the jurisprudence of the

01:01:58

court. And in these texts,

01:01:59

these Foundation tax out of

01:02:01

169 and the Declaration as

01:02:05

a duty of States as

01:02:07

a safeguard for Specific race

01:02:09

that indigenous peoples have that

01:02:10

others don't necessarily have like

01:02:12

such as rights in the

01:02:13

lands and resources are going

01:02:14

to be affected by an

01:02:15

investment project. Those are not

01:02:17

right that pertain to the

01:02:18

general population those are right.

01:02:19

That is specific to indigenous

01:02:21

peoples and that's a specific

01:02:22

duty of consultation arises and

01:02:25

another feature of the duty

01:02:26

and alluded to by Renee

01:02:27

is the objective of those

01:02:30

consultations and the objective is

01:02:31

to achieve in the words

01:02:34
of Iowa convention, 19 agreement

01:02:37
or concept. The UN declaration

01:02:39
also speaks of the duty

01:02:41
to consult in order to

01:02:43
obtain consent and the inter-american

01:02:45
court as Renee, at has

01:02:47
indicated that has emphasized. That

01:02:50
consent is required when there

01:02:52
is going to be a

01:02:53
substantial impact on them as

01:02:55
peoples and I would emphasize

01:02:56
a substantial impact on that

01:02:58
rice. And there's a logic

01:02:59

here. If indigenous peoples or

01:03:01

any other people's rights are

01:03:02

going to be compromised, or

01:03:04

going to be somehow materially

01:03:06

affected will, of course, It's

01:03:08

natural that there needs to

01:03:09

be an agreement to that

01:03:10

effect. That would be the

01:03:12

same with a private landowner

01:03:13

with it with a private

01:03:14

counterpart in a business venture.

01:03:16

If the vet counterparts rights

01:03:19

that their rights are going

01:03:20

to be expected. There needs

01:03:20
to be some kind of

01:03:21
agreement logic behind that the

01:03:24
consent again, going back to

01:03:25
the Safeguard a characteristic that

01:03:27
there's going to be an

01:03:28
affectation of substantial. If a

01:03:30
company is going to go

01:03:31
in at the governor's, going

01:03:33
to allow a company to

01:03:34
go and material affected, the

01:03:35
enjoyment of specific rights of

01:03:37
indigenous, peoples of the land

01:03:38
and resources. There needs to

01:03:40

be some kind of agreement

01:03:40

and let me know if

01:03:41

it's not a simple yes-or-no

01:03:43

as the as many authorities

01:03:48

and tribunals have indicated their

01:03:50

needs to be safeguards it

01:03:52

included in any pain stabbed

01:03:54

and begin to record a

01:03:55

specified that there needs to

01:03:56

be a mitigation measures and

01:03:58

all benefits sharing and so

01:04:01

forth. So I can feel

01:04:05

a lot more but I

01:04:06

want to be conscious of

01:04:07

time and we want to

01:04:09

eat out here from Andrea

01:04:10

but let me just down

01:04:12

there a sizing, these fundamental

01:04:14

characteristics of of the duty

01:04:17

of consultation which is that

01:04:18

it is a safeguard for

01:04:20

the specific rights of indigenous

01:04:21

peoples, its distinguished itself in

01:04:23

the general, right approach to

01:04:24

the patient or socialize system

01:04:26

that way, I am. That

01:04:28

a particular features that is

01:04:31

the need to obtain consent

01:04:32

with material material. Interests of

01:04:35

indigenous peoples, might be affected.

01:04:41

Thank you very much for

01:04:43

best friend, Diana. And I

01:04:45

think that he has to

01:04:46

like summarized very specifically what

01:04:52

may be the standards under

01:04:53

under public international law? Specifically,

01:04:55

I would like to leave

01:05:00

you with a question or

01:05:01

four or or after Professor

01:05:04

Jerkins shares weather in the

01:05:09

weather in. I think that

01:05:11

you have answered but just

01:05:12

to have some idea whether

01:05:13

the actual Results of the

01:05:18

consultation is is is binding

01:05:21

under international law for the

01:05:25

state during which it which

01:05:26

is a key question. I

01:05:27

will leave it to you

01:05:28

to think about it a

01:05:31

little bit. And now I

01:05:33

have a pleasure to to

01:05:34

introduce Andrea who has been

01:05:37

here, patiently waiting, and she

01:05:40

will walk us through some

01:05:43

of the issues in relationship

01:05:45

to investors that arbitration. Thank

01:05:50

you. Thank you very much,

01:05:51

Jose. Antonio and thank you,

01:05:53

and Ian, for the invitation

01:05:55

to be here with you

01:05:56

today. So, it's a challenge

01:05:59

always to, to be last

01:06:00

on a great panel. But

01:06:03

I I'm going to try

01:06:05

to broaden things out a

01:06:06

little bit from what Jim

01:06:07

talked about, in terms of

01:06:08

talking about us official license,

01:06:10

which, you know, as and

01:06:13

Lena explained, is really seems

01:06:16

to be trying to encapsulate

01:06:17

a relatively broad notion about

01:06:20

whether or not there's a

01:06:21

cheetah T support for a

01:06:23

project. You extend beyond consultations,

01:06:28

and formal process is to

01:06:30

Encompass, you have a broader

01:06:32

support within a community attempting

01:06:35

to formalize and a more

01:06:37

does concept and assigning a

01:06:41

legal term license to. It

01:06:44

also seems to be an

01:06:47

attempt to, to formalize. Formalize

01:06:50

the idea. But I am

01:06:52

going to ask three questions

01:06:54

or talk about three different

01:06:57

topics as some of them

01:06:58

are questions to which I

01:06:59

confess. I don't really have

01:07:01

a a bit just to

01:07:03

say that I think there

01:07:03

are some some questions and

01:07:06

difficulties and implementation because I

01:07:09

think generally the idea of

01:07:11

a social Licence to operate

01:07:12

seems to say appealing. It

01:07:15

seems as if something that

01:07:16

one wants it seems like

01:07:18

a good thing but it

01:07:20

in fact I think there

01:07:22

are sometimes difficulties in implementing

01:07:23

that are not always so

01:07:25

clear. The first question is

01:07:28

who comprises the community The

01:07:32

second is a related to

01:07:35

the time. When support, let's

01:07:38

be achieved. And then the

01:07:40

third issue, all addresses some

01:07:42

of the just a few

01:07:44

of observations about intersections with

01:07:46

investment law and arbitration. But

01:07:51

first who comprises the community,

01:07:54

I think an animal has

01:07:55

an introduction. She talks about

01:07:57

the local community and other

01:07:59

stakeholders. And, of course, that

01:08:01

really is the question, who

01:08:03

will, Who is local community,

01:08:05

and who are those other

01:08:08

stakeholders in one sense, especially

01:08:11

if you're talking about an

01:08:13

environmentally impactful project, you think

01:08:17

you're talkin about those who

01:08:19

live in the vicinity of

01:08:20

the project. But what if

01:08:23

they are split? What if

01:08:25

they don't agree about the

01:08:27

project? When could have went?

01:08:29

What does, what effect does

01:08:30

that have on? Social licence

01:08:32

and we have some men,

01:08:34

there are certainly examples of

01:08:36

this. There was a there

01:08:37

is a proposed, liquefied natural

01:08:40

gas pipeline in western Canada.

01:08:43

That would go across tribal

01:08:44

lands that are either owned

01:08:49

or controlled by or very

01:08:52

important to the, what's the

01:08:53

weight of a native of

01:08:57

native peoples. But in that

01:09:01

particular case, the band Council

01:09:03

support, the project, whereas other

01:09:06

representatives of more traditional legal

01:09:10

at an indigenous government structures

01:09:12

are opposed. So, how do

01:09:14

you reconcile a split within

01:09:16

the community? Second question maybe

01:09:21

is, is it? The country

01:09:24

will as a whole or

01:09:27

is it? Significant local interest

01:09:33

groups? And their I can

01:09:35

as an example I think

01:09:38

you mentioned was antoniou, Gabriel

01:09:40

resources versus Romania. We are

01:09:43

have a decision in that

01:09:44

case yet but the the

01:09:45

pleadings are available on IC

01:09:50

a law. But there you

01:09:52

have a situation where it

01:09:54

says that in large respected,

01:09:57

local communities is about a

01:09:59

gold mine. The local community

01:10:01

would like to have the

01:10:02

gold mine in the local

01:10:03

community wants to have the

01:10:05

economic development of the economic

01:10:08

benefits. That will ensue but

01:10:10

environmental activists who are not

01:10:14

local but who are Romanian

01:10:16

are very much opposed to

01:10:18

the gold. So you might

01:10:20

say how do you reconcile

01:10:21

that splits in a community

01:10:24

and certainly if we're thinking

01:10:25

about environmental impacts you know

01:10:30

the community might be much

01:10:32

broader than just that those

01:10:34

who live nearby even if

01:10:35

they are bearing the brunt

01:10:36

of any damaged. We know

01:10:39

as you know hurricane Fiona

01:10:43

just slept through Eastern out

01:10:44

of that. That's a global

01:10:47

climate change and global warming

01:10:49

has an effect on all

01:10:51

of us. But you know

01:10:52

similar similar issues, arise in

01:10:54

different places do in. Well

01:10:57

in Congo, in the Democratic

01:11:00

Republic of Congo you have

01:11:01

some questions about your questions

01:11:03

about tree cutting we're under

01:11:06

pressure from the International Community.

01:11:08

The government has not issued

01:11:10

new Timber cutting licenses for

01:11:12

20 years but there is

01:11:14

clearly unlawful cutting going on.

01:11:19

Buy Often by Foreign companies.

01:11:20

There's Community Support to mobilize

01:11:24

against that action but what

01:11:26

the community wants to do

01:11:27

is to cut the trees

01:11:28

themselves and get the benefit

01:11:30

themselves. So that said I

01:11:31

mean it in any way

01:11:33

these are these are just

01:11:35

complex matters but but I

01:11:37

guess I didn't want to

01:11:38

raise the question about who

01:11:40

is the community how do

01:11:41

we how do we assess

01:11:43

which Community is at who

01:11:46
has the? If he will

01:11:47
be a sortie to issue

01:11:49
the social licence or two

01:11:51
to withhold the social licence

01:11:53
if that's what it's being

01:11:54
discussed? Second question, I wanted

01:11:57
to discuss a time at

01:11:59
which support must be achieved.

01:12:01
It's more. It's simplest. I

01:12:04
supposed to talk about at

01:12:07
the time of Licensing, right?

01:12:09
Before a licenses, let's say

01:12:12
some kind of licensure or

01:12:14

formal license. Some kind of

01:12:16

confession and permit is And

01:12:20

that's usually where we think

01:12:20

the consultations come in and

01:12:23

that those men inform the

01:12:25

government processes. But you know,

01:12:29

if that social do consultations

01:12:32

with me, the social licence

01:12:34

is broader than just consultations.

01:12:36

But if consultations have been

01:12:38

held and have proved largely

01:12:40

positive, is that sufficient is

01:12:43

the social licence broader? How

01:12:45

do we know when it

01:12:46

comes time if there is

01:12:48

formal approval of a project

01:12:50

but then the company loses

01:12:54

the social licence right? As

01:12:56

if he'd been a long.

01:12:58

Of time in terms of

01:12:59

operating a gold miner, operating

01:13:01

another natural resource extraction project

01:13:04

then what what what is

01:13:07

the company's obligation to? Maintain

01:13:09

the social license. How how

01:13:13

if the company does everything

01:13:17

the company promised? The social

01:13:19

license is still withdrawn, does

01:13:22

that matter, should that matter?

01:13:23

How does that matter? And

01:13:28

you know this so that

01:13:30

leads me into my third

01:13:32

discussion point which is the

01:13:34

end of the real intersection

01:13:36

with investment law. You know,

01:13:41

if the project was lawful

01:13:44

and this I think it's

01:13:44

where we see this and

01:13:46

it was tension in the

01:13:47

cases that we've had today.

01:13:48

If the investment was lawful

01:13:52

in terms of formal structures,

01:13:54

where does this social licence

01:13:58

fall within that structure? It

01:14:01

seems that before the any

01:14:03

approval is granted. Then it's

01:14:06

been the lack of a

01:14:07

of consultations lack of a

01:14:09

social license. Should be grounds

01:14:11

for not approving the project.

01:14:13

Although even there we have

01:14:15

some tension and here, I

01:14:16

think about the bill Converses,

01:14:18

Canada case, In which one

01:14:20

of the grounds for the

01:14:22

environmental review, panel's refusal to

01:14:25

Grant a license was that

01:14:26

it was not consistent with

01:14:28

Community core values which the

01:14:32

investment Tribune, All Over The

01:14:34

Descent of dawn, the krays

01:14:35

dad was not really part

01:14:36

of the governing law but

01:14:37

I think that was another

01:14:38

example of this notion of

01:14:40

a social licence of the

01:14:42

winter. The community was buying

01:14:44

into the project or not

01:14:46

yet with investment law. Looking

01:14:49

perhaps press two for ballistically.

01:14:51

But looking for holistic, Lee

01:14:53

out, whether these formal procedures

01:14:55

were abided by in the

01:14:57

in the in the country's

01:14:59

laws, then it seems that

01:15:01

the social Licence to operate.

01:15:03

It has limited limited ability

01:15:06

to make a, to make

01:15:09

it impact. It could be,

01:15:11

you know, it's not a

01:15:13

formal obligation on the investor,

01:15:15

but perhaps the failure, Buster

01:15:19

to maintain a social licence.

01:15:21

Particularly if there are requirements

01:15:24

that seemed more more evidence

01:15:28

than others might might be

01:15:30

grounds to excuse a fair

01:15:31

and Equitable treatment violation. It

01:15:33

we see that reluctance in

01:15:34

Bear Creek, Mining versus Peru,

01:15:36

you can see where it

01:15:38

fits in the grounds of

01:15:39

legitimate expectations. Does the investor

01:15:42
legitimately expect. It must maintain

01:15:44
a social licence. I'm here

01:15:46
again. Need the amorphous of

01:15:48
the concept is a little

01:15:50
bit hard to two outfits

01:15:53
in other or you could

01:15:54
it could go either way

01:15:56
but argue that even as

01:15:58
long ago as metal clad

01:16:00
versus Mexico, one of metal

01:16:02
clad problems with it and

01:16:03
it did not develop a

01:16:04
social license even though that

01:16:06

case, whether I think, before

01:16:08

that vocabulary had been developed

01:16:11

or at least, I've never

01:16:12

heard of it, Spoken up

01:16:15

at that time. I'm at

01:16:17

been over all of this

01:16:18

is my last observation. It

01:16:21

seems to me that the

01:16:22

a lot of what we

01:16:23

talked about is that the

01:16:28

social licence idea really highlights

01:16:30

potential government deficits in the

01:16:33

host stage, is their formal

01:16:37

approval of the projects, notwithstanding

01:16:39
significant Community opposition is their

01:16:42
formal approval of a project,

01:16:44
notwithstanding the inability of certain

01:16:47
communities, and Indigenous communities. In

01:16:49
particular, to really have a

01:16:51
meaningful voice in the government.

01:16:54
And we see this, I

01:16:56
thought Injustice combos at discussion

01:16:58
that you know, the concerned

01:17:01
about lack of indigenous, voices,

01:17:02
and representation is true and

01:17:04
domestic projects as well as

01:17:06
in international projects. So, I'm

01:17:12

all he'll leave you with,

01:17:14

with just that thought that

01:17:16

perhaps that perhaps encompassing a

01:17:22

social Licence to operate within

01:17:24

more formal structures would be

01:17:25

desirable. I think about the

01:17:27

Bear Creek, Mining decision and

01:17:31

the majority versus The Descent

01:17:32

and asked whether it really

01:17:34

should be an either-or. I'm,

01:17:37

in other words, it seems

01:17:38

to me that the investor

01:17:40

only the investor has the

01:17:42

ability to do some things

01:17:43

to maintain a social Licence

01:17:45

to achieve and or maintain

01:17:48

a social Licence to operate

01:17:49

yet. It is perhaps incumbent

01:17:52

on the state to explain

01:17:54

more formally what that is,

01:17:56

and what that means. So,

01:17:57

the investor can follow those

01:18:00

guidelines and achieved, this is

01:18:01

a license to operate. Thank

01:18:04

you. Aren't you? Thank you

01:18:07

Andrea. New. Now there's there's

01:18:12

lots of questions that, that

01:18:13
that are in my mind.

01:18:14
I would like to you

01:18:17
leave. You leave you with

01:18:18
one particular question, which word

01:18:20
comes to my mind? Now

01:18:24
I'm making them some out

01:18:36
more balanced by including and

01:18:39
terrifying that. Don't know, only

01:18:41
state and under the basic

01:18:52
Notions of respecting good faith,

01:18:57
which is a general principle

01:18:59
of Law and materializes through

01:19:02
To the abbreviation, not to

01:19:04

admit Investments are through corruption

01:19:07

or Investments, through fraudulent acts,

01:19:11

and there's really there's really

01:19:13

no, no, no fear in

01:19:15

most of the treaties for

01:19:17

investors. So, The ones that

01:19:21

come to mind, this is

01:19:22

your vacation to respect human

01:19:24

rights. At least a certain

01:19:27

minimum international human rights by

01:19:29

the investor and also comply

01:19:32

with the corporate social responsibility.

01:19:34

But the one thought that

01:19:38

that now comes to my

01:19:39

mind is whether that's not

01:19:41

sufficient the weather. Whether there's

01:19:44

a handful of that include

01:19:46

some some of those obligations.

01:19:50

concerning treaties of some Cheese's

01:19:55

Nigeria and some trees of

01:19:57

the question is whether it

01:20:02

would be useful to think

01:20:04

about finding finding, Obligations by

01:20:10

the investor to carry on

01:20:12

consultations when the project requires.

01:20:14

It mean to him. I

01:20:23

haven't seen it. But but

01:20:26
out of this conversation, that

01:20:28
idea comes to mind and

01:20:30
I would like to leave

01:20:32
you without question. I have

01:20:33
already left the profession area

01:20:36
with a question. I would

01:20:37
like to give the floor

01:20:39
to to Renee to ask

01:20:41
a question to Justice and

01:20:44
Injustice a couple to do

01:20:46
the same with with him.

01:20:47
So if if you will

01:20:51
and if not I'm, I'm

01:20:52

happy to ask you a

01:20:53

question but but please go

01:20:54

ahead. Chilling on locations of

01:21:11

the insurance out of the

01:21:13

cord for the for that,

01:21:15

the more wiser ideal investment

01:21:19

and the relation between domestic

01:21:21

court's and so the way

01:21:24

we should interact. I mean

01:21:28

I cannot say much but

01:21:29

definitely International law plays the

01:21:32

role in the decisions of

01:21:33

the Court, especially the decisions

01:21:35

of the inter-american court. And

01:21:39

so they're always consider as

01:21:42

as a source of of

01:21:44

our decisions. So basically what

01:21:47

you're saying is relevant and

01:21:50

how that place, it's, it

01:21:52

actually works both ways because

01:21:55

there has been a lot

01:21:57

of words that basically duck

01:22:00

him until the inter-american court

01:22:01

also received from the mistake

01:22:04

of jurisprudence. And it makes

01:22:06

decision also influenced by domestic

01:22:10

jurisdiction of the Court, until

01:22:20

I have to talk to

01:22:21

your cousin that you were

01:22:26

mentioning the case. Colombian transfer,

01:22:30

bilateral International agreement, and you

01:22:34

were very critical of at

01:22:36

some point of that decision,

01:22:37

especially regarding participation. So perhaps

01:22:41

if you could just elaborate

01:22:42

on that a little bit

01:22:44

and you mentioned it in

01:22:46

your presentation, so that's going

01:22:52

to order right away. And

01:23:00

this is, this is kind

01:23:01

of a Super Rocket. Kind

01:23:04

of pasta, dating type of

01:23:10

questions and answer because we

01:23:12

are running out of time.

01:23:15

At the most wonderful of

01:23:27

you but it was of

01:23:28

court and I am, of

01:23:29

course, pretty cool. And I'm

01:23:30

reading about this and that,

01:23:32

the court didn't address, the

01:23:34

issue of participation and democracy

01:23:37

as part of a reviewing

01:23:40

abhs, so focused on their

01:23:45

more substantive investment issues as

01:23:46

it should have. But my

01:23:49

position is that we should

01:23:50

have gone further to consider

01:23:52

the right of participation and

01:23:54

and the Democratic principle when

01:23:56

reviewing the tree Thank you.

01:24:04

Thank you. Rene professor and

01:24:06

I am Yeah, thanks for

01:24:13

the question. You gave me

01:24:14

earlier consultations are our request

01:24:19

required, not since the duty

01:24:21

of consultation is binding on

01:24:22

it states, they have to

01:24:25

do it. And I guess

01:24:26

the question that really arises

01:24:27

are are the outcome is

01:24:29

the outcome of the consultations.

01:24:30

If there is not a

01:24:31

consent or communities oppose a

01:24:35

project, you have is a

01:24:38

mention, this is Renee mention

01:24:39

the jurisprudence of the American

01:24:41

Court in that regard and

01:24:42

I've tried to give a

01:24:43

rationale behind it. You know,

01:24:44

if there is a substantial

01:24:45
material effect on rights of

01:24:47
indigenous peoples, like their lands.

01:24:49
If you know their lands

01:24:50
are going to be used

01:24:51
or affected, you know the

01:24:52
cultural resources. Oh yeah there

01:24:54
has to be an agreement.

01:24:55
Just like with any other

01:24:56
right holder. It's not necessarily

01:25:00
accept us to the rights

01:25:03
concerned. I mean if another

01:25:04
person who owns property in

01:25:06
an investor is going to

01:25:07

go into that property that

01:25:08

has to be in agreement.

01:25:09

And so that thing concept,

01:25:10

you know, I apply People's

01:25:13

except I want to make

01:25:21

another point that is I

01:25:23

agree with Andrea at this

01:25:24

idea of socializing and as

01:25:27

I said earlier, it's not

01:25:28

well-sourced and I don't think

01:25:29

it's, I don't know if

01:25:30

it's the right route for

01:25:31

investment at 4 before Jason

01:25:35

Pannell to go in. If

01:25:37

they're interested in Huber Heights,

01:25:39

our rights of communities and

01:25:41

we have much stronger tools.

01:25:43

There are the you know

01:25:44

this concept of business business

01:25:48

responsibly to disrespect, right? That's

01:25:50

much more developed as much

01:25:51

more concrete. And also it's

01:25:54

you know, if there's this

01:25:55

danger and I'm seeing it

01:25:56

manifested in a sort of

01:25:59

conflating indigenous peoples their right

01:26:01

of consultation of the dirtiest

01:26:02

states to consult with his

01:26:04

notion of social license with

01:26:06

a social licence. You know,

01:26:07

it's all these questions but

01:26:10

the duty to consult Are

01:26:12

very specific requirements that are

01:26:15

in international law and that

01:26:16

are that are also grounded

01:26:18

in the Constitutional law of

01:26:20

almost all countries in Latin

01:26:22

America and are part of

01:26:23

the Constitution of blocking or

01:26:25

Frameworks of of increasing numbers

01:26:28

of countries in Latin America,

01:26:29

Columbia Mexico, and others. Of

01:26:31

course, we don't want to

01:26:33

appreciate what what the professor

01:26:35

Sands was doing and using

01:26:37

the concept of social licence

01:26:39

than talk about Isla 169

01:26:40

and rights of indigenous peoples.

01:26:42

But I find it somewhat,

01:26:44

you know, to talk about

01:26:49

the beauty of consultation the

01:26:51

space that with regard to

01:26:52

we're going to talk about

01:26:53

a social licence aside. Let's

01:26:56

talk about this duty to

01:26:58

consult and there are very

01:27:00

specific guidelines including with regard

01:27:03

to representation in the consultations

01:27:10

have to occur. A referendum

01:27:14

on going house-to-house and try

01:27:16

to figure out what people

01:27:17

want to do or or

01:27:19

walk around, you know, the

01:27:20

town or have public meetings

01:27:22

or anybody can show up

01:27:24

now, it's doing business people's

01:27:25

Representatives. Sometimes there are questions

01:27:29

about what those institutions are.

01:27:30

Those need to be worked

01:27:31

out just like there can

01:27:32

be with a country sometimes

01:27:34

right countries and their schools.

01:27:37

There are the questions about

01:27:38

human beings like everybody else

01:27:51

and those things have to

01:27:52

be worked out, but it

01:27:53

has to be that it

01:27:55

prints of the principle is

01:27:56

through their representative institutions. So

01:27:59

anyway, I'm not a big

01:28:02

fan of social licenses. And

01:28:03

so I mean I think

01:28:05

it's a it's a it's

01:28:05

a generally a nice concept

01:28:07

but it's it's got a

01:28:08

lot of a lot to

01:28:10

be worked out as Andrea

01:28:12

pointed out and I don't

01:28:13

want to see indigenous peoples

01:28:14

rights, get mucked up it

01:28:17

in that disgusting. Focus on

01:28:20

specific rides from International domestic

01:28:24

laws and they have there's

01:28:25

a specific duty of consult

01:28:27

consultation that the firm international

01:28:28

law. IQ IQ gym and

01:28:33

then thank you for being

01:28:34

so, so precise and, and

01:28:36

distribute with with the woodworking

01:28:39

terms of describing social Licence

01:28:43

to operate as as as

01:28:44

an amorphous concert which which

01:28:46

link up so late. And

01:28:49

last, but not least, I

01:28:58

agree with Jim and I

01:29:01

would even come out. And

01:29:03

even from a slightly, different

01:29:04

angle or just add a

01:29:06

few more observations, which is

01:29:07

that, and I'll try to

01:29:09

answer your question to Jose

01:29:10

Antonio B one. But with

01:29:12

respect to investor obligations, I

01:29:15

don't know, but it hurts

01:29:16

to have investor obligations to

01:29:19

consult in a treaty or

01:29:21

other obligations, but I don't

01:29:24

think that should be there

01:29:25

by the state's obligation. So,

01:29:26

one of my concern, when

01:29:28

you start talking about him,

01:29:29

who's the Obligation Bond investors.

01:29:31

We see this in Bear

01:29:31

Creek, a little bit, is

01:29:33

in my Christian in Bear

01:29:34

Creek is where was Peru,

01:29:36

right? If the company is,

01:29:39

is firing on protesters, I

01:29:42

mean, of course, that's horrible.

01:29:44

That's terrible. That is a

01:29:45

violation of Human Rights. The

01:29:46

company should be sentient. But

01:29:48

where's Peru? Why is Peru

01:29:49

not protecting people like that?

01:29:51

That's that's like we should

01:29:53

not excuse Peru even as

01:29:55

we impose obligations or penalize,

01:29:58

the investor that, that's my

01:29:59

bae. So I think of

01:30:01

that too is respect with

01:30:03

respect to you having obligations,

01:30:04

on investors to consult. I'm

01:30:07

sure that might might be

01:30:08

a good thing, but that

01:30:09

doesn't excuse the state from

01:30:11

its its international human rights

01:30:13

obligations to consult. And so

01:30:15

I think that that is

01:30:16

something to Guardian Games and

01:30:18

just on on that note,

01:30:20

with respect to imposing obligations

01:30:22

in treaties, Concern in the

01:30:30

Morocco, Nigeria bed, and in

01:30:33

the sadc model is that

01:30:35

there's this obligation on the

01:30:36

investor to do an environmental

01:30:38

impact assessment, but there is

01:30:41

no mechanism to do that.

01:30:43

So is the investor going

01:30:45

to, I mean, yes, the

01:30:47

investor has an obligation of

01:30:48

good faith. But one question

01:30:51

is, who is doing the

01:30:52

environmental impact assessment? There is

01:30:54

no International agency. That does

01:30:56

environmental impact assessments. Normally it's

01:30:58

the domestic right as the

01:31:00

domestic. It's the domestic, you

01:31:02

know, environmental department. So that

01:31:05

that's just a little bit

01:31:07

of it should have been

01:31:08

an issue. And my concern

01:31:10

also is when it's too

01:31:11

late like in in Renee's,

01:31:13
a presentation in his timeline,

01:31:16
one of the things that

01:31:17
I never said anything about

01:31:18
arbitration more, but one of

01:31:20
the things I found missing

01:31:22
was challenging, the state's decision

01:31:24
to offer a concession contract

01:31:26
in the absence of having

01:31:28
engaged. In the proper consultation

01:31:30
right in the absence and

01:31:33
that strikes me is that

01:31:34
when you want something to

01:31:35
happen by the time your

01:31:37

investment arbitration, it's too late.

01:31:39

So I feel like that's

01:31:40

a little bit that case

01:31:41

with imposing obligations in treaties.

01:31:44

When those obligations are not

01:31:45

really going to come up

01:31:46

until there's an investment arbitration

01:31:49

which means something has happened.

01:31:51

Something has gone wrong, probably

01:31:52

there's damage and really, I

01:31:54

think we want to avoid

01:31:55

that and not say at

01:31:57

the back end. O it

01:31:58

turns out, you can't bring

01:31:59

your investment arbitration case because

01:32:02

you didn't do the consultations.

01:32:03

I mean. Okay, still we

01:32:06

want to avoid that damage.

01:32:07

Not not, you know, try

01:32:10

to penalize the investor, not

01:32:12

just feel as the investor

01:32:13

after the fact for not

01:32:14

having a bite by their

01:32:15

obligations. Thank you Andrea and

01:32:20

I realize that we're just

01:32:21

one minute, we work work,

01:32:24

we're done we didn't send

01:32:25

it the 4/16 12:46 panel

01:32:41

and the strongest at the

01:32:45

beginning. I would dismiss this

01:32:48

kind of wood would walk

01:32:49

you through constitutional inter-american, human

01:32:52

rights law going to last

01:32:54

so long, as well as

01:32:56

investor be tracing. The topic

01:32:58

is evolving. The presentation will

01:33:02

be will be posted, h

01:33:06

i a engine that will

01:33:14

be good for Will soon

01:33:19

be up and running. And

01:33:22

with that, I would like

01:33:24

to thank everyone. There's and

01:33:25

I know that some of

01:33:26

our panelists professor Dirkson at

01:33:30

me. He's right away. So

01:33:31

so please please do so

01:33:34

Andrea and that were really,

01:33:35

really ordered. Best right now.

01:33:38

Yeah, Professor from now on

01:33:48

we're we're good. We're good.

01:33:51

Thank you very much. I

01:33:53

have one one. Last question,

01:33:55

I don't want to leave

01:33:56

one question of the table

01:33:58

or Justice. Theoretical question, which

01:34:12

one would be a provocation?

01:34:19

Judiciary. Answer that question. I

01:34:23

have somebody in mind. That's

01:34:31

it for now. And and

01:34:37

everyone is very much welcome

01:34:40

and invited to our next

01:34:41

battle will be. Then I

01:34:46

will help me to tell

01:34:47

me when the next battle

01:34:48

will be one hour at

01:34:52

11:30, a.m. eastern standard time

01:34:55

in the Caribbean and institutional

01:35:03
at arbitration development in the

01:35:05
Caribbean today as you know,

01:35:06
is the day of the

01:35:08
America. So we're going from

01:35:09
from South America to the

01:35:11
Caribbean and ending up in

01:35:13
North America. So thank you

01:35:16
all have a beautiful day

01:35:17
and I hope that we

01:35:19
can keep discussing this because

01:35:21
I feel that we have

01:35:22
everything is bye-bye. By indicating

00:00:04
that, this kind of has

00:00:06

been a a work of

00:00:10

so open list. And the

00:00:12

and ideas topic here is

00:00:14

a consultations and initially we

00:00:20

thought of calling it, The

00:00:22

principle of participation in investment

00:00:26

projects and international arbitration. The

00:00:28

whole, the whole idea was

00:00:30

to Start the conversation which

00:00:35

has already started because some

00:00:37

of the planets have already

00:00:38

talked about this topic, in,

00:00:40

in there, a workshops and

00:00:41

other know there for. But

00:00:44

the idea was to continue

00:00:46

and even start a strawberry

00:00:48

conversation on the consultations that

00:00:51

sometimes are demanded in certain

00:00:53

jurisdictions to with. And by

00:00:58

those people who are actually

00:00:59

involved and could be affected

00:01:02

by certain things not to

00:01:03

have a certain foreign investment

00:01:06

project or domestic project. And

00:01:09

recently, we have had a

00:01:12

number of decisions, exit Awards

00:01:15

and investors day towards that

00:01:17

have touched upon that topic.

00:01:21

And you see the issue

00:01:22

rise, Whenever there is a

00:01:25

mining concession, or there's a

00:01:28

hydroelectric Project that may affect

00:01:32

individuals or simply projects that

00:01:34

may touch upon communities that

00:01:37

live in the area or

00:01:38

somehow would be affected by

00:01:40

investment project. So that is

00:01:42

at hand and the we.

00:01:44

We we have an incredible

00:01:47

panel and I can stretch

00:01:49

more how incredible is because

00:01:52

the Wait, we're going to

00:01:56

take you from a perspective

00:01:59

of constitutional domestic law. Concerning

00:02:03

one specific jurisdiction cologne to

00:02:08

then inter-american human rights, courts.

00:02:15

And then up to public

00:02:18

international law and the principle

00:02:20

of specificity. get to the

00:02:31

idea of consultations in investment

00:02:34

arbitration and and that pass

00:02:37

that I have just laid

00:02:38

out is in front of

00:02:40

your screen. I need some

00:02:43
of you in front of

00:02:43
your face. We have a

00:02:49
With us, Justice. Natalia and

00:02:52
Justice. And he has agreed

00:02:58
to come to the floor

00:03:00
and speak specifically. And only

00:03:03
about two issues related to

00:03:06
the participation principal under the

00:03:09
Colombian Constitution and I have

00:03:12
the moderator have the task

00:03:13
of making sure that she

00:03:15
does not get any hypotheticals

00:03:17
or any socks because his

00:03:19

reasons. That would know her

00:03:23

work at which we don't

00:03:26

want. Of course, then we

00:03:30

have Professor, Andrea Jorgenson and

00:03:35

Professor Johnson is a full

00:03:38

professor at Is 38 chair

00:03:43

International patient and international commercial

00:03:46

law at McGill University. Faculty

00:03:49

of law is a freaking

00:03:52

expert. An arbitrator investor-state arbitration

00:03:55

disputes and Court proceedings related

00:03:58

to them. She's many more

00:03:59

things. I don't want to

00:04:01

embarrass anyone but really the

00:04:03

pound that we have here

00:04:03

is an incredible team Anaya

00:04:07

is over James Anaya is

00:04:10

an international recognize color and

00:04:12

altar in years of international

00:04:14

human rights. I need shoes

00:04:16

concerning indigenous peoples, he served

00:04:18

as the UN special rapporteur

00:04:20

on the rights of indigenous

00:04:21

peoples from 2008 to 2014

00:04:25

and is teaching and scholarship.

00:04:29

He has also lead to

00:04:31

get this major cases involving

00:04:33

human rights of indigenous peoples

00:04:35

in domestic and international tribunal.

00:04:37

He has also appeared in

00:04:41

As an arbitrator at the

00:04:43

kitchen and he has written

00:04:46

a book, which I read

00:04:50

about 20 or 20 or

00:04:52

30 years ago on the

00:04:55

rights of indigenous. But, the

00:05:05

interesting thing is that even

00:05:07

even even 30 or 20

00:05:09

years ago, when I had

00:05:12

already research, the work of

00:05:18
many constitutional Court including the

00:05:20
Columbia Station, Who is a

00:05:39
professor of public international law

00:05:41
at the University, and Rene

00:05:43
has appeared before the Constitutional

00:05:47
Court to talk about matters.

00:05:49
Also expropriation among other things,

00:05:52
and he has a doctorate

00:05:57
as well. And that he's

00:05:59
here with us to address

00:06:01
the issues of the inter-american

00:06:02
court of Human Rights issue

00:06:04
consultation. Last but not least,

00:06:07

we have a animal who

00:06:11

is an international car legal

00:06:12

at 6 to have intergenerational

00:06:21

panels where we have extremely

00:06:23

recognized and solid. attorneys in

00:06:28

Lawrence but we we like

00:06:30

the conversation amongst the Piers

00:06:34

on non peers. And that

00:06:36

is why on a nice

00:06:38

here? She will take it

00:06:39

on to make a presentation

00:06:43

on the status or the

00:06:46

update of the social, or

00:06:50

the The consultations on social

00:06:54

Licence to operate first and

00:06:57

then to give a sense

00:06:59

of what are the cases

00:07:01

invested arbitration that are relevant

00:07:03

to the discussion. A student

00:07:09

of economics and law and

00:07:14

the technical word that you

00:07:16

will see throughout the week

00:07:18

is thanks to her, but

00:07:20

she has been spent spending

00:07:22

endless night and I'm making

00:07:25

sure this is this go

00:07:26

smoothly, including drink the whole

00:07:29

weekend and I can attest

00:07:30

to that with that. I

00:07:32

would like to welcome you.

00:07:33

And let's, let's start first

00:07:36

that with what has been

00:07:41

happening in investor arbitration. And

00:07:44

what what is the notion

00:07:46

of social Licence to operate?

00:07:48

Okay, thank you very much.

00:07:50

I was Antonio for the

00:07:51

introduction. It is truly a

00:07:53

pleasure for me to be

00:07:54

here today, among these amazing

00:07:56

panelist. So, for the following

00:07:58

minutes, I will try to

00:07:59

keep a very brief crash

00:08:00

course, on the concept of

00:08:02

the social Licence to operate

00:08:03

and the development of the

00:08:05

concert with in International Investment

00:08:07

arbitration. Now, to begin, let's

00:08:09

answer the question of what

00:08:11

exactly is the social Licence

00:08:12

to operate? No, please keep

00:08:14

in mind that this is

00:08:15

a fairly new concept and

00:08:17

represents the acceptance of approval

00:08:19

given by local communities, or

00:08:21

stakeholders towards. I am the

00:08:23

store project now is relevant

00:08:25

today to discuss this topic,

00:08:27

because there is clearly an

00:08:28

increase in the regulations surrounding.

00:08:32

Social actors and communities involved

00:08:34

in or affected by such

00:08:37

projects. Don't keep in mind

00:08:39

that this concert being fairly

00:08:41

new. I know the very

00:08:42

similar, it's not the same

00:08:44

as the right to community

00:08:45
consultations. It is not generally,

00:08:48
Recognized within domestic legislation. And

00:08:51
for this reason, it is

00:08:52
very difficult for it to

00:08:54
be recognized as a requirement

00:08:55
was in an investment process.

00:08:57
Now we can stay four

00:09:00
main characteristics of the social

00:09:02
Licence to operate. The first

00:09:04
one being that it cannot

00:09:05
be obtained by simply request,

00:09:07
and it from a governmental

00:09:08
Authority, or by simply paying

00:09:10
a fee for, for a

00:09:12
required. Part much more than

00:09:14
money. And for this reason

00:09:15
is there, no pretty find

00:09:17
Paris that a company must

00:09:19
follow. And this goes in

00:09:21
contrast to say with the

00:09:22
legal license to operate which

00:09:24
company can just follow us

00:09:25
there. Instead of steps, I

00:09:26
don't seen it. So this

00:09:28
concept could be said to

00:09:29
be very abstract I have

00:09:30

not one instance I can

00:09:32

apply to everybody. Now, the

00:09:34

second characteristic being that it

00:09:36

is intangible and informal and

00:09:38

what this means is that

00:09:39

is given by the affected

00:09:40

Community or by Civil Society

00:09:42

at large, but they're one

00:09:44

being that it is constant

00:09:45

a specific. Now this means

00:09:47

that the company must take

00:09:49

into account a special characteristics

00:09:51

and pick the areas of

00:09:52

its communities in the process

00:09:54
of obtaining the license and

00:09:56
even though we cannot say

00:09:58
there's a one-size-fits-all approach for

00:10:00
this and there definitely isn't,

00:10:02
there are still several commendations

00:10:04
are set to be followed

00:10:06
for a company to obtain

00:10:07
it. And an example of

00:10:08
this could be, for example,

00:10:10
all the Talisman of appropriate

00:10:12
communication live within the company.

00:10:15
Now, this is done with

00:10:18
the support of the local

00:10:18

government. Before some Lobster, a

00:10:21

serious look, is that even

00:10:23

though it is intangible and

00:10:25

informal, it could still be

00:10:26

said to be enforceable from

00:10:28

the economic and legal perspective.

00:10:29

And the reason for this

00:10:31

realize that the upfront costs

00:10:34

associated with gaming social acceptability,

00:10:37

I agree with you is

00:10:39

this? OSHA license is inside

00:10:41

the keep now to give

00:10:43

examples have charity with what

00:10:45

the kids. Let's say, from

00:10:46

the acknowledged enforcement respected. This

00:10:49

is not me specifically that

00:10:50

a government sanctions or impose

00:10:52

a penalty, which was accompanied

00:10:54

by her brother that civil

00:10:55

society and achieve this. And

00:10:57

a classic example for this

00:10:59

is true consumer boycotts. And

00:11:02

from the legal enforcement perspective

00:11:03

is that they're appropriate regulatory

00:11:05

measures such as adoption of

00:11:07

the gestation good at the

00:11:09

center of the discussion, the

00:11:11
social Licence to operate, and

00:11:12
a good example for the

00:11:13
be, when a government prior

00:11:16
to obtain a legal license

00:11:18
requires that, a company of

00:11:19
pain. Social licence who makes

00:11:22
you a department of the

00:11:23
legalizes are not start included

00:11:25
with his legislation. Not with

00:11:28
his with his mind. If

00:11:29
we say that is an

00:11:30
intangible, it would say that

00:11:32
it is given by a

00:11:33

community. I'm not by our

00:11:34

government do. What exactly will

00:11:36

be the consequences of not

00:11:37

feeding a soldier license to

00:11:39

operate. Please keep in mind

00:11:41

that there is no specific

00:11:42

legal penalties, imposed, and that

00:11:46

in principle, because, of course,

00:11:48

they're to be certain exceptions.

00:11:49

The social Licence to operate,

00:11:51

does not entail a breach

00:11:53

of an Investor's obligations under

00:11:55

International Investment. Nevertheless, there are

00:11:58

great consequences for a company

00:12:01

for not updating to socialise

00:12:02

and swap rates. And this

00:12:04

is mainly, because they could

00:12:06

be processed or blocking attends

00:12:08

made of the community. Because

00:12:09

I said before, there could

00:12:11

be consumer boycott or let's

00:12:13

say, even if a company

00:12:15

has a chain is permitted

00:12:16

years ago and he has

00:12:18

not everything listed with approval

00:12:20

of the government because of

00:12:22

the previous examples of consumer

00:12:24

boycotts and process their to

00:12:25

be legal challenges. It poses.

00:12:27

Read that could help the

00:12:29

development process or that could

00:12:32

even maybe key that it

00:12:34

is, it is born. Now

00:12:37

National investment arbitration. This matters

00:12:42

are usually not discussed within

00:12:44

it. What happens is that

00:12:45

sustainable development responsible business practices

00:12:48

or reference of human rights?

00:12:50

Are generally not part of

00:12:52

the reason of eating International

00:12:55

Investment, tribunal's. And if we

00:12:57

use the letter investment treaties,

00:12:58

as an example, we can

00:13:00

see the text of them.

00:13:02

Usually do not contain specific

00:13:03

languages that reference Corporate social

00:13:07

responsibility or his Social Development.

00:13:10

And the reason for this

00:13:11

lies behind the idea of

00:13:13

relationship between the bus here

00:13:16

and the government being a

00:13:17

symmetrical in nation, a teenager.

00:13:20

So, what this means is

00:13:21

that while the VIP might

00:13:23

impose obligations upon the states

00:13:26

in America, Write to the

00:13:29

investor. So, with his mother

00:13:32

has been very few cases

00:13:33

that have shed a light

00:13:35

on this topic and given

00:13:36

the time constraints, we can

00:13:37

only discuss today tree of

00:13:39

this. The first one will

00:13:40

be in Copa America versus

00:13:42

Ecuador and do keep in

00:13:43

mind that in this to

00:13:44

express example, that I'm going

00:13:46

to pretend there is actually

00:13:48

no specific mention of the

00:13:50

socialise and swap rate in

00:13:52

the text, but nevertheless, it

00:13:53

is considered to develop the

00:13:55

concept, you want indirect matter.

00:13:57

So for example, in Cooper,

00:13:58

mess up, what happened was

00:14:00

the tribunal analyzing, these are

00:14:03

the concepts throughout the prism

00:14:05

of contributory negligence and if

00:14:09

found that in the end

00:14:10

he had among other things

00:14:11

and impact in the quantum,

00:14:13

accusation of the case So

00:14:16

what happened was that the

00:14:18

tribunal did take into account

00:14:19

the contributions other companies, towards

00:14:22

the social conflict that occurred

00:14:24

around the investment project and

00:14:26

actions did contribute to it.

00:14:29

After that recent a reducing

00:14:31

compensation and go to the

00:14:34

claim, I'd buy a 30%.

00:14:36

Now, a similar case will

00:14:38

be in South American, silver

00:14:39

versus Bolivia and once again

00:14:41

Fabio did not use the

00:14:43

concept of the social licence

00:14:44

actually, but it's still as

00:14:46

acid to the actions that

00:14:49

the company had done that

00:14:50

contributed to the situation, not

00:14:53

once again for Mezza. This

00:14:55

should we not looked at

00:14:56

the actions of claimant? Look

00:14:58

at the effect that he

00:14:58

had on his books of

00:14:59

conflict and found in this

00:15:01

case. Because of believe actions

00:15:04

in the process of extrication

00:15:06

of house, American Steel grey

00:15:08

time because there was no

00:15:09

compensation in the end. The

00:15:11

amount of compensation O2 play

00:15:13

man was Indian Indian. Now

00:15:18

the last time to my

00:15:19

opinion, the most interesting case

00:15:20

is broke my new braces

00:15:21

glue and I say that

00:15:23

because this was the first

00:15:24

investment be traced in case

00:15:26

that actually gave an in

00:15:28

this analysis of the concept

00:15:31

and in here once again

00:15:32

as the previous cases the

00:15:34

tribunal to look into the

00:15:35

actions of of cream. And

00:15:38

look at the consequences of

00:15:39

his actions had on the

00:15:41

social conflict. That was surrounding

00:15:43

the project and concluded that

00:15:46

it could have taken a

00:15:47

greater effort to end. Its

00:15:49

consultation process, any community outreach.

00:15:51

Never Last, I found that

00:15:53

during the years of the

00:15:56

project was undergoing the previous

00:15:59

government had apparently gave. It

00:16:00

gave it to all three

00:16:01

station and approval of it

00:16:03

and never directly. Once again

00:16:05

stated or said, or shown

00:16:08

that if you do not

00:16:09

agree with the situation or

00:16:10

how the community consultation process

00:16:12

was undergoing a this the

00:16:15

tribunal consider that the actions

00:16:16

of the blue, Government constituted

00:16:19

as an approval and that

00:16:20
is your reasonable expectations for

00:16:22
a man in the situation.

00:16:23
Now, is very interesting thing

00:16:27
about this is that they

00:16:28
sent an opinion of the

00:16:29
Phoenix. And I'm out once

00:16:32
us the tribunal did X

00:16:35
consider that the claimant, it

00:16:38
contributed to the social unrest

00:16:40
and that his actions could

00:16:41
have been better. But differs

00:16:43
from the tribunal in that,

00:16:44
I can see that the

00:16:45

ILO convention 169 in his

00:16:47

reasoning and it said that

00:16:49

the Hybrid battery is feel

00:16:55

she should hold significant legal

00:16:57

value within this concert. And

00:17:00

then he brings into question

00:17:01

Article 15 of the Isle

00:17:04

of convention. And what he

00:17:06

Ark is in the end

00:17:07

of the sort of his

00:17:08

sexual words, is that you

00:17:10

may be the function of

00:17:11

the states. Provide a stable

00:17:13

legal framework that is yours

00:17:15

at the consultation process occurs

00:17:17

and that the app. Are

00:17:18

consistent with a convention but

00:17:20

nevertheless it is not the

00:17:22

state functions to holding back

00:17:24

your hand and the liver

00:17:25

of socializing out of this

00:17:28

process. And for this reason,

00:17:29

he argued that the FDA

00:17:31

and any or the sort

00:17:33

of a letter, this might

00:17:34

really should not be used

00:17:35

as a possum insurance policy

00:17:37
for the best fails to

00:17:40
undergo a community consultation process.

00:17:44
And this is a great

00:17:46
and interesting contrast between the

00:17:48
two decisions. Because in the

00:17:49
end, where the tribunal says

00:17:51
is that it is your

00:17:53
vacation August 8th to monitor

00:17:55
closely, the effort conducted by

00:17:57
the best year and for

00:17:58
the to think of different

00:17:59
indigenous communities and that the

00:18:02
state must boys is concerned

00:18:04
throughout the whole process. And

00:18:06
for this reason because you

00:18:07
had no voices to certain

00:18:09
during the process of three

00:18:10
years, he concluded that it

00:18:12
could not be reduced and

00:18:14
responsibilities mainly on the Peruvian

00:18:16
government. Contrast, what tense argue

00:18:19
is that obtained in the

00:18:21
social Licence to operate, is

00:18:23
the responsibility of the investor

00:18:25
and that a failure to

00:18:26
secure security license. She would

00:18:28

have been taken into account

00:18:29

by the tribunal wants to

00:18:31

talk to you later the

00:18:32

damages and the compensation to

00:18:33

be awarded that we didn't

00:18:36

mind. This concept is very

00:18:38

interesting, and hopefully, we can

00:18:39

have a great discussion and

00:18:41

what remains of the panel,

00:18:43

since it presented itself to

00:18:46

socialise, and swap rate, percentage

00:18:48

self as an opportunity to

00:18:50

shop on investors and government

00:18:55

that ensured that Community, right?

00:18:57

Or not only heard but

00:18:59

also respected throughout the whole

00:19:00

process. Thank you very much.

00:19:04

And I mean, Nana and

00:19:07

we got in mind you

00:19:08

with with the, a greater

00:19:10

share of sense of of

00:19:11

clarity as to what a

00:19:14

social Licence to operate means.

00:19:17

And hopefully also a greater

00:19:20

sense of clarity. As to

00:19:22

the recent cases, there are

00:19:25

more cases and some of

00:19:27

them will be addressed by

00:19:29

by some of our, our

00:19:31

panelists. And I would like

00:19:32

to invite Justice Natalia and

00:19:36

him to take the floor.

00:19:38

And I specifically address the

00:19:41

question of you from Sons

00:19:44

of perspective, or from the

00:19:45

perspective of law and the

00:19:51

issue of the principal participation

00:19:54

specifically specifically at with regard

00:19:57

to the right, if any

00:19:58

of consultations of off and

00:20:01

two communities. So just I

00:20:15

wish I could speak English

00:20:17

and I don't speak fluently

00:20:19

but I will do my

00:20:21

best in my 7 minutes

00:20:22

that I have here. I

00:20:24

thought I've been asked to

00:20:25

talk about participation but as

00:20:27

I said to a Jose

00:20:29

participation is a very broad

00:20:31

Concept in the Constitution. And

00:20:33

there are several manifestations of

00:20:35

participation. So I'm going to

00:20:37

concentrate into at which is

00:20:39
the Constitutional jurisprudence on indigenous

00:20:43
consultations. And and if I

00:20:46
have time on something that

00:20:48
was kind of on the

00:20:52
discussion in 2017-2018, that was

00:20:56
popular consultation, concerning mining project

00:21:00
in Columbus. It's so so

00:21:05
this would be the focus

00:21:06
of my presentations. Those two

00:21:08
topics after I imagine that

00:21:11
not everybody is familiar with

00:21:12
how cases reach the Constitutional

00:21:15
Court, very briefly. There two

00:21:17

types of actions or public

00:21:19

action. When is public action

00:21:23

of unconstitutional law unconstitutional and

00:21:27

he's Peterson in Columbia. Can

00:21:29

challenge a law unconstitutional crap

00:21:32

so that's one of the

00:21:33

reasons why that we have.

00:21:35

A lot of cases challenging,

00:21:37

the law is unconstitutional and

00:21:40

the other is the Tutela

00:21:41

action and most of the

00:21:42

cases of indigenous consultations and

00:21:45

consultations in general, come with

00:21:48

it within the action. That

00:21:50

is a read seeking immediate

00:21:52

protection of a fundamental, right?

00:21:54

That any citizen may bring

00:21:56

before a judge. So we

00:21:58

have very Broad and easy

00:22:00

way to approach. The courts

00:22:04

in Columbus. And so basically

00:22:08

we had a very, very

00:22:09

large trees, prevent on the

00:22:10

right to Prior and informed

00:22:13

consultation of ethnic and tribal

00:22:16

communities in Columbia, Demonata. As

00:22:19

as one said, documented at

00:22:22

least they need shelter, decisions

00:22:27

of the Colombian court. And

00:22:29

this is basically, because our

00:22:30

constitution recognized that Colombia is

00:22:33

a multi-ethnic and Multicultural state

00:22:36

are made up of considerable

00:22:38

number of ethnically different different

00:22:42

communities. And the Constitution regards

00:22:47

these communities, as subject of

00:22:49

special constitutional protection. I'm told

00:22:54

there are the beneficiaries of

00:22:55

serious about your actions with

00:22:57

the objective of achieving material

00:23:00

are. There's also a Numerus,

00:23:04

clausus in the Constitution that

00:23:07

makes up for that protection.

00:23:08

We have as well. We

00:23:10

called constitutional block, which is

00:23:12

a part of the Constitution,

00:23:13

of course the convention, 169

00:23:18

of the International Labour organisation.

00:23:19

And we have several several

00:23:22

Clauses in the Constitution that

00:23:25

talks about participation as our

00:23:28

first article says Columbia social

00:23:31

state democratic party for Tory.

00:23:34

And pluralistic article to basically

00:23:37

says that it is mandatory

00:23:38

for the tape to facilitate

00:23:40

participation by everyone article. 7

00:23:43

recognize and protects the ethnic

00:23:46

and cultural diversity of the

00:23:48

combination article, 40. And I'm

00:23:50

just reading what some it

00:23:53

says that any citizen has

00:23:54

the right to participate in

00:23:56

the formation exercise and control

00:23:59

of political power and article

00:24:01

330 says that ended Shall

00:24:05

be governed by consoles for

00:24:06

an unregulated, according to the

00:24:08

uses and customs of their

00:24:10

communities. And these are only

00:24:12

some of the articles that

00:24:13

talk about participation in the

00:24:16

Colombian Constitution because it was

00:24:19

kind of a core principle

00:24:21

of of the Constitutional Convention.

00:24:24

And so it is not

00:24:26

surprising that we have such

00:24:28

a very easy access to

00:24:30

court and we have a

00:24:32

a a articles in the

00:24:34

Constitution that Express we talked

00:24:36

about participation and consultation that

00:24:39

the Constitutional Court in this

00:24:41

30 years of of a

00:24:44

b work has advised basically

00:24:49

has a very, very large

00:24:50

Judy. I'm I'm using this

00:24:54

data from basically a study

00:24:57

that Professor Rainier will publish

00:24:59

a very soon so I

00:25:01

didn't do Is there a

00:25:04

ride with me? But we

00:25:06

have 70 from 1992 until

00:25:12

2021 that we are not

00:25:15

including two cases of this

00:25:17

year. We have 77 cases

00:25:20

of unconstitutional public action and

00:25:23

143, two pillowcases addressing specifically

00:25:28

consultation the right to Prior

00:25:31

consultation and informed when cases

00:25:41

of unconstitutional when people challenge

00:25:44

shallow for on constitutional grounds

00:25:46

and there are some cases

00:25:48

in which the court has

00:25:49

declared the law unconstitutional that

00:25:53

is, in the 12% of

00:25:54

those cases. The court, declared

00:25:56

those the law unconstitutional, and

00:25:59

in 99-percent, partially unconstitutional, The

00:26:03

large number, if you challenge

00:26:06

a low, I am by

00:26:07

saying that basically the legislator

00:26:10

didn't do the executive didn't

00:26:12

do a prior consultation before

00:26:15

enacting a law is it

00:26:16

is kind of a large

00:26:17

number, but definitely, what is

00:26:20

very large, is the Tutela

00:26:21

actions. Because in 76% of

00:26:24

the cases, the court determined

00:26:26

that there had been no

00:26:27

violation of the right to

00:26:29

Prior consultation and order the

00:26:31

protection. That means that most

00:26:33

of the day of the

00:26:34

Tutela cases that the course

00:26:36

revised concerning the right to

00:26:41

fire any form, cuz a

00:26:43

consultation the court will basically

00:26:46

decide in favor of communities.

00:26:49

And so that is a

00:26:50

message to do the kayak

00:26:52

reservation because it's almost for

00:26:56

sure that if you don't

00:26:58

you will lose her and

00:27:01

I'm just Bring because I

00:27:04

only have seven minutes. This

00:27:06

is unconstitutional public action. And

00:27:10

I'm bringing this up because

00:27:11

it was one of the

00:27:12

first decision in which the

00:27:15

court declared unconstitutional in a

00:27:18

law enacted by Congress and

00:27:21

what year was the law

00:27:23

1021 in 2006, which was

00:27:27

the General for his blog

00:27:28

and so I'm just calling

00:27:30

it. What, what the court

00:27:32

says it is not less

00:27:33

true that a project of

00:27:35

this size complexity and implications

00:27:37

of the one that intends

00:27:39

to regulate forestry matters. In

00:27:41

an integral matter required that

00:27:43

as a condition prior to

00:27:45

its approval in Congress. The

00:27:47

government carry out a specific

00:27:49

exercise of consultation with indigenous

00:27:52

and tribal communities and the

00:27:54

court mandate stays in several

00:27:57

decisions. So for example, when

00:27:59

the Congress is ratifying An

00:28:03

international treaty, if it affects

00:28:06

communities. There's a mandatory that

00:28:11

prior consultation takes place before,

00:28:13

so when we see, and

00:28:17

then days again. So, there's

00:28:23

two examples of a unconstitutional

00:28:26

decisions are always putting to

00:28:28

tell action is interesting, the

00:28:30

cases that the court can

00:28:33

see it in certain there

00:28:35

are macro cases and micro

00:28:37

cases, but I'm just approaching

00:28:39

the the data from the

00:28:41

macro keys in 33% of

00:28:43

the cases concern infrastructure projects,

00:28:47

meaning roads, damn Sports. And

00:28:49

again most of these cases,

00:28:51

the Court decide in favor

00:28:54

of communities, at 20%, at

00:28:58

28% concerned extractive Industries, such

00:29:01

as mining oil And 12%

00:29:06

are other type of cases

00:29:07

of her example and no

00:29:09

education and others. But that

00:29:12

means that abuses in the

00:29:13
infrastructure projects an extractive Industries

00:29:16
will most of these cases

00:29:18
are most of these two

00:29:19
pillow cases, and most of

00:29:21
the time, they are decided

00:29:23
in favor of the community.

00:29:25
And so I'm just typing

00:29:27
hear some rather live on

00:29:29
there are more than a

00:29:32
hundred and forty three cases

00:29:34
of to tell action, but

00:29:37
if they ask you, who

00:29:39
is that the name s

00:29:40

u means that the court

00:29:42

is, is this decisions are

00:29:44

decided by the 9th of

00:29:45

justice. And are they try

00:29:48

to unify the rules of

00:29:50

of up to Taylor action?

00:29:53

So this, that I mentioned

00:29:54

in here, the ones that

00:29:55

that is as you are

00:29:57

pretty relevant. If you want

00:30:00

to, to have an idea

00:30:03

of how And so I'm

00:30:05

just going to bring a

00:30:07

very quickly some of the

00:30:08

of the actual standards for

00:30:12

private consultations in Columbia. So

00:30:14

first of all for the

00:30:15

court-packing he's up on the

00:30:17

right taken it is mandatory

00:30:20

in the event that an

00:30:23

administrative measures has the potential

00:30:26

to directly impact ethnic communities.

00:30:30

So these ideas directly impact,

00:30:33

ethnic communities is very important

00:30:35

and had to decide what

00:30:38

impacts directly. A community is

00:30:41

a matter. He has two

00:30:43
are the voice of the

00:30:45
communities as well as not

00:30:46
that operate. A, a company

00:30:48
says that that might direct

00:30:50
or not, direct directly impact

00:30:54
ethnic communities, but it has

00:30:56
to have the input of

00:30:57
the community. And another rule

00:31:00
is that adverse or confrontational

00:31:02
positions are not How during

00:31:03
the prior consultation processes, it

00:31:06
is a dialogue between equals

00:31:08
in the midst of different

00:31:09

procedures that do not meet

00:31:12

the essential requirements of Prior

00:31:13

consultation process. I'm not admitted

00:31:16

that he's at simulating prior

00:31:19

consultation to marry administrative procedures

00:31:22

information meetings or related actions.

00:31:25

It is necessary to establish

00:31:28

effective communication relationship based on

00:31:31

the principle of good faith.

00:31:32

It is mandatory to define

00:31:35

the procedures to be followed

00:31:36

in its prior consultation process,

00:31:39

in particular, to a free

00:31:41

consultation, and Opus consultation process

00:31:44
to be carried out in

00:31:46
common agreement with the affected

00:31:48
community. And this is very

00:31:50
important before the prior consultation

00:31:52
occurs. There has to be

00:31:55
a private consultation that we

00:31:57
basically agree on how the

00:31:59
consultation will take place. Tomorrow

00:32:04
at single-term should not be

00:32:05
set to materialize the consultation

00:32:07
process and search for consent

00:32:10
and this issue of timing

00:32:12
is very congested and don't

00:32:15
form any development company said

00:32:17
there's but the timing is

00:32:18
different and the timing is

00:32:20
different among communities about the

00:32:22
court has been very clear

00:32:23
and saying that there should

00:32:25
not be a set a

00:32:27
timer for a set standard,

00:32:29
but rather you have to

00:32:30
take into account the community

00:32:32
that process it said and

00:32:35
it is mandatory to guarantee

00:32:37
that the benefits of the

00:32:39

exact execution of the word.

00:32:41

For this, expedition of the

00:32:42

resort is I shared equitably

00:32:44

as well as compliance with

00:32:47

mitigation and compensation measures for

00:32:50

the damage cost. Again if

00:32:52

you want some of these

00:32:56

standards are very complex. But

00:32:57

for example, su123 2000. I

00:33:01

think is a very it

00:33:03

gives you a very broad

00:33:04

picture of the standard that

00:33:06

the court has. So this

00:33:09

is with respect to indigenous

00:33:11

consultation by the court has

00:33:13

also address other types of

00:33:15

consultation that as I mentioned

00:33:18

we're in discussions especially in

00:33:21

2018 October at the Constitution

00:33:26

recognize a mechanism that is

00:33:28

called Popular consultation at that

00:33:31

is a mechanism. For citizen

00:33:33

participation is not about indigenous

00:33:35

consultation is for any citizen

00:33:37

participation and that allows government

00:33:41

and governors to consult local

00:33:44

communities about issues of the

00:33:46

municipality, or the prop from

00:33:50

2013 until 2018, several municipalities

00:33:55

promoted, popular consultation regarding mining

00:33:59

party and they're almost 11

00:34:02

from 2008 from 2013 and

00:34:06

2018. I have them all,

00:34:08

but I'll have time

00:34:09

to show it to you,

00:34:10

but I just quoted one.

00:34:12

That the the question that

00:34:14

was asked, was basically do

00:34:16

you agree? Yes. Or no.

00:34:17

On this is an example

00:34:18

that Mining and oil exploitation

00:34:20

exploration, and exploitation, activities, be

00:34:25

carried out in their jurisdictions

00:34:27

of the municipalities in. This

00:34:29

example was not surprisingly population

00:34:36

said, no, we don't want

00:34:37

the money project to be

00:34:39

carried out. So that really

00:34:41

relate to your social participation

00:34:43

comes after the court of

00:34:46

the Constitutional Court was confronted

00:34:49

with the issue. If those

00:34:51

consultations were mandatory. And if

00:34:56

the government should Springs Community

00:34:58

project, it was mandatory to

00:35:04

stop the project because the

00:35:06

concept of consultation test Is

00:35:09

mandatory to basically it, except

00:35:12

for the people until there's

00:35:15

one at the station where

00:35:17

the court says, no, you

00:35:19

will not be mandatory and

00:35:22

basically the cord was discussed,

00:35:23

was the issue of the

00:35:27

autonomy of municipalities Visa be

00:35:29

the decision of the national

00:35:31

government to do in Columbia,

00:35:34

we are at Central State,

00:35:36

not federal state. And so,

00:35:39

the court basically address those

00:35:42

those tensions between the nation

00:35:46

and the municipalities and with

00:35:48

these, I will finish saying

00:35:50

that popular consultation is not

00:35:52

the ideal mechanism to apply

00:35:54

the principle for control of

00:35:56

coordination between the nation, and

00:35:58

the territories within the framework

00:36:01

of the postulates of the

00:36:02

unitary state. And territorial Altona,

00:36:05

me things, as a mechanism

00:36:06

of citizen participation, Cannot be

00:36:09

used to define weather in

00:36:11

the territory activities of expiration

00:36:14

of exploitation of the subsoil

00:36:16

for natural. Resources are carried

00:36:19

out the confidence. In this

00:36:23

matter, does not like absolutely

00:36:24

in the head of the

00:36:25

municipalities and therefore exceeds their

00:36:28

fact. I must stress that

00:36:32

I've I've read a lot

00:36:33

of academic articles criticizing this

00:36:36

decision. So I will say

00:36:38
that this is not a

00:36:39
closed matter but still contest

00:36:41
it and I think it

00:36:43
really relate to these idea

00:36:45
of Toto's hotel association as

00:36:48
you mentioned because even if

00:36:51
the court says that these

00:36:52
does does not have a

00:36:53
hole that what this kind

00:36:55
of consultation was a way

00:36:56
of people going missing or

00:36:59
airing their voice opposing to

00:37:01
project at. So that's something

00:37:04

that must not be disregard

00:37:05

and do with this. I

00:37:07

will fit thank you very

00:37:11

much, Justice on him, I

00:37:16

think that we were should

00:37:19

have going to initially the

00:37:22

social Licence to operate now

00:37:25

into the principles are two

00:37:29

patients specifically in In in

00:37:33

consultation matters at specifically, in

00:37:37

in Columbia and what I

00:37:38

know, two from both of

00:37:40

the remarkable presentations. Is that

00:37:45

there is a sense of

00:37:46

evolution that that we will

00:37:49

see in in this specific

00:37:51

topic. And when you mentioned

00:37:53

that that there's there's quite

00:37:55

a bit of criticism concerning

00:37:57

the last the last ruling

00:38:00

that that your red and

00:38:02

and that is not unusual.

00:38:04

That may also be the

00:38:05

case in investor arbitration. We

00:38:08

already have an important case

00:38:09

of the the Bear Creek

00:38:13

Nature, which itself has a

00:38:16

criticism by by, by one

00:38:18

of the Year by one

00:38:20

of the arbitrator. So evolution

00:38:21

is part of investor arbitration

00:38:25

constitutional law and public international

00:38:26

law and and with that

00:38:28

I would like to ask

00:38:29

a professor and thank you

00:38:32

for the Research that that

00:38:34

we, we are getting fresh

00:38:36

out of the oven or

00:38:37

even in the in the

00:38:38

oven for house. I would

00:38:41

like to ask you. How

00:38:42

is the notion of consultations

00:38:46

understood within the human rights

00:38:52

context? And even, even even

00:38:53

contest of of of, of

00:38:56

Or some other nations in

00:38:59

the world and specifically in

00:39:01

Latin America. If you have

00:39:02

any of that, thanks isn't

00:39:05

Daniel. So I'm going Wonderful.

00:39:13

Thank you very much and

00:39:15

thanks for the invitation. So

00:39:18

I know what's up with

00:39:36

you. I had an Italian

00:39:37

after so many panels and

00:39:38

Justice of the Constitutional court

00:39:50

and being part of our

00:39:50

community. So the Constitutional Court's

00:40:01

and deterrent system interact with

00:40:04

an International Investment regime, And

00:40:12

a part of a wider

00:40:13

project, that we're developing with

00:40:15

the Max Planck Institute on

00:40:17

international law. That looks at

00:40:19

the interaction between transformative constitutionalism

00:40:22

and international. So I see

00:40:24

some of the authority that

00:40:25

project is almost here and

00:40:27

some others who are online

00:40:28

who have been working on

00:40:30

this as well. So how

00:40:31

does transform of the Constitution

00:40:33

is Latin America interact with

00:40:35

International economic loss. We have

00:40:37

a case that you we

00:40:38

have studies on monetary policy

00:40:40

taxable in labor law. And

00:40:43

here, I'm going to talk

00:40:44

about it. What what is

00:40:48

it that I that I

00:40:49

want to discuss here so

00:40:51

they be a here, you

00:40:53

can see the exit. So,

00:40:54

what's the talent that ultimately

00:40:58

what we have is that

00:41:00

internationally in investment State Hospital

00:41:11

What is very complex? This

00:41:14

place and make them basically

00:41:16

a conflict between an investor

00:41:17

and a state where I

00:41:19

was at. We know investment

00:41:21

is a multi actor, issue.

00:41:23

That, in this case, there

00:41:26

is that problem and we

00:41:28

frame it by integrating domestic

00:41:37

constitutional review on the basis

00:41:39

of the free prior and

00:41:41

informed Transportation standard that acronym

00:41:44

dare speak or consultation is

00:41:47

standard to buy. Combinator domestic

00:41:49

review with the consultation is

00:41:52

standard. Then that becomes a

00:41:53

platform to add complexity, to

00:41:56

the ways in which investment

00:41:58

arbitration and domestic court's supposed

00:42:01

to do with this lack

00:42:03

of boys and by doing

00:42:05

so that injects both resiliency

00:42:08

to divestment regime. And also

00:42:10

ultimately Because it's open. It

00:42:15

is open to your voice

00:42:16

that ultimately is a way

00:42:19

to resist the Jewish back.

00:42:21

Like they were saying again

00:42:22

and how it would this

00:42:24

work. So basically what I'm

00:42:26

going to do with the

00:42:27

next couple of minutes but

00:42:29

also contend in the context

00:42:38

of Latin America first and

00:42:40

then I'm going to see

00:42:40

how that concerns a consultation

00:42:43

and consent standard might be

00:42:46

injected into investment of the

00:42:49

situation through domestic constitutional review

00:42:52

of International Investment that small

00:42:55

Azalea. This is something that

00:43:01

is not marginal as we

00:43:02

know 80% of the population

00:43:04

in America. And importantly, so

00:43:13

if we look at this

00:43:14

from a Latin American perspective

00:43:15

of the 22 states that

00:43:17
are close to the ILO

00:43:19
convention today, when we talked

00:43:24
about that, we're really talking

00:43:25
about Latin America, most of

00:43:28
them. All states in the

00:43:32
region, have approved the 2017,

00:43:34
un Declaration of the rights

00:43:36
of indigenous population live in

00:43:37
Columbia that at the moment.

00:43:39
When, when it was loaded

00:43:41
abstain then later they accept

00:43:45
I'm in most constitutional system

00:43:57
in Latin America. Except of

00:44:01

course, it has a bit,

00:44:10

has a constitutional status, but

00:44:13

this means head is really

00:44:14

part of the public, so

00:44:18

this is something that is

00:44:19

not a segment of the

00:44:22

population that International Domestic system

00:44:31

is the standard but also

00:44:33

domestic institutions include some of

00:44:36

them explicit references to the

00:44:38

consultation with explicit references in

00:44:44

the Constitution Colombia versus Peru

00:44:47

Guatemala Guatemala and it was

00:45:01

referring to, they have the

00:45:02

right under the domestic system

00:45:04

through. And then, finally, what,

00:45:07

where we don't find that,

00:45:08

right? If you show me,

00:45:10

Chile and Costa Rica a

00:45:19

common law of the reason

00:45:20

and I'll turn this, that

00:45:24

you have prior consultation content

00:45:26

has been developed by the

00:45:28

American system. Enterprise, particularly, as

00:45:32

the 2017, if you have

00:45:44

impact unit consultation, you do

00:45:46

have large Still project with

00:45:48
hiring packed unique concept. And

00:45:51
that idea was confirmed 2012.

00:45:54
Where did court visiting jamerican

00:45:57
Court of Human Rights explicitly

00:45:59
says, look nowadays, this is

00:46:02
the common law of Latin

00:46:04
America. This is the view

00:46:08
from the case to carry

00:46:09
out special and different. So

00:46:20
both bottom up top down.

00:46:23
We have a very specific

00:46:25
obligations and diverse applications. Because

00:46:31
it is developed by the

00:46:32

American system. That means that

00:46:34

domestic judges in Latin America

00:46:36

have to apply that standard

00:46:40

as it has been developed

00:46:42

after 2012 as part of

00:46:44

what the German Court of

00:46:46

Human Rights called the doctrine

00:46:48

of conventionality control, meaning that

00:46:51

not applying that standard entails

00:46:55

International legal responsibility. The standard

00:47:01

of cars has to be

00:47:03

applied been turned into American

00:47:04

Standard intern has to be

00:47:06

applied by domestic when the

00:47:10

Constitution has a doctrine of

00:47:12

constitutional. So that means that

00:47:17

they are engaging International Library.

00:47:32

So if that is the

00:47:33

case, then so how does

00:47:36

this place up in the

00:47:38

context of investment to refresh?

00:47:39

So we have that, we

00:47:42

have the right and do

00:47:43

the course of a consent

00:47:46

first and their duties, both

00:47:48

International and domestic. How does

00:47:52

this play out in the

00:47:53

context of investment arbitration? That's

00:47:57

the first Peter. What's the

00:47:58

second Peter domestic constitutional courts

00:48:01

in Latin America are increasingly

00:48:04

engaging with International Investment. Know

00:48:07

how important moments in particular

00:48:13

bitchslut of realities. There are

00:48:27

increased issues of concurrent jurisdiction

00:48:30

between a constitutional Court's investment

00:48:36

arbitration Domestic Court. How to

00:48:47

review state or private actions

00:48:49

to comply with best of

00:48:55

interaction between constitutional Court. I

00:48:57

don't have to apply the

00:49:02

standards as defined by the

00:49:06

journey is not engage both

00:49:09

International and domestic. Most of

00:49:16

the action up to now,

00:49:17

has a court in Latin

00:49:19

America, in the first two

00:49:20

months, but there's nothing to

00:49:22

tell us that the action

00:49:24

is not going to move

00:49:24

forward with your review of

00:49:28

action. 18 Clemente award in

00:49:31

the first part. And in

00:49:34

the first moments of constitutional

00:49:35
review of be, so we

00:49:38
have several examples in, Costa

00:49:40
Rica, declared unconstitutional from 2010

00:49:49
to 2014 because it had

00:49:51
to review whether like whether

00:49:53
these were in Conformity with

00:49:56
the new constitution of 2008

00:49:59
and they done. And the

00:50:00
court said, no. They are

00:50:02
unconstitutional because they had an

00:50:06
article that basically prohibits is

00:50:11
Gears. And then, of course,

00:50:13
the court declared that case

00:50:21

law are we doing and

00:50:24

cheese and then, and the

00:50:27

most recent one was 2019,

00:50:29

E250 250, 2019. Where as

00:50:34

a some of you may

00:50:35

know the adopted very white

00:50:38

ring, your interpretations that control

00:50:40

or limit the ability of

00:50:42

the Colombian government to ratify.

00:50:44

The I did this decision

00:50:47

was of course, controversial as

00:50:49

to whom you have made

00:50:50

a decision that match, but

00:50:55

this is to underscore that

00:50:57

this is really a psychic

00:50:58

on the station about investment

00:51:00

research. Domestic institutions do when

00:51:03

that happens to the first

00:51:05

point. The first moment is,

00:51:06

how does consultation concerned about

00:51:11

how does a consultation on

00:51:12

a standard look like? Well,

00:51:18

might decide that the Lord,

00:51:23

that a problem that approved.

00:51:26

So Daddy's there's no consultation

00:51:28

that vintage 3D the law

00:51:30

between. We must mention consultation,

00:51:36

if not, then the three

00:51:40

types of the debate, team

00:51:46

must include special rules of

00:51:49

indigenous participation in original Pro

00:51:51

Series. Otherwise it would, it

00:51:55

would undermine the right to

00:51:57

Fair compensation in the car.

00:51:59

So different than we've seen

00:52:01

suggests. The second woman. And

00:52:10

I'm going through these very

00:52:11

fast if you keep ahead

00:52:12

of time, but let me

00:52:13

know if you answer any

00:52:15

questions regarding the second taking

00:52:22

Joseph home, current Jersey concurrent

00:52:24

jurisdiction is domestic exercise jurisdiction

00:52:29

over the same conflict as

00:52:30

an International Investment, International real

00:52:34

estate investment, arbitration panel. So

00:52:37

the first one is the

00:52:41

domestic, court's decision on concentration

00:52:44

can be rather than I

00:52:46

love Justice and therefore, it

00:52:48

can trigger International response. So

00:52:51

when the Court decides that

00:52:53

are searching product and that

00:52:56

because it and if we

00:52:58

can go ahead because it

00:53:00

wasn't among other arguments. Through

00:53:09

this recession Dakotas in case

00:53:10

you needed that in denial

00:53:11

of justice and therefore engaging

00:53:14

in their International responsibility of

00:53:16

the whole state because of

00:53:17

the decision of the Constitutional

00:53:19

court regarding competition and 2nd.

00:53:23

And this is this is

00:53:24

something that we are starting

00:53:26

to see more Americans that

00:53:29

are given project Consultants consultant

00:53:33

or something, you can send

00:53:35

Ethan conflict with a given

00:53:37

project that is intern protected

00:53:40

by an investment treaty are

00:53:43

in your fridge. So, that's

00:53:44

the other, the review of

00:53:52

domestic Awards of domestic Awards

00:53:57

by domestic and international investment

00:54:01

has happened with none existed

00:54:05

Awards and this occurs in

00:54:07

the context of The New

00:54:08

York convention rules may say

00:54:18

that lack of regulation of

00:54:22

a public policy, which is

00:54:24

a few, no ground either

00:54:27

to a Sarah seidner, Ensenada

00:54:30

still at work or the

00:54:31

possibility of refusal to enforce.

00:54:34

And this is crazy because,

00:54:35

remember that if we're talking

00:54:37

about, we're not just talking

00:54:40

about, but also to basically,

00:54:45

seek compensation in other states

00:54:48

that are not necessarily the

00:54:49

state, where they arbitration and

00:54:52

then, finally, finally content in

00:54:57

review of our implementation. They

00:54:59

do you sleep in a

00:55:00

quart? Particularly domestic constitutional Court.

00:55:06

Review both lost and regulations

00:55:11

that have to be adopted

00:55:12

domestically to implement a given

00:55:15

award investment of work or

00:55:17

domestic public, or private action,

00:55:20

that has to be implemented

00:55:20

to implement a particular order

00:55:23

to comply with. And then

00:55:26

you have also responsibilities of

00:55:33

Camp, I think, due to

00:55:45

issues of time. And I

00:55:47

apologize for this week, we're

00:55:49

going to move to professor

00:55:51

at your colon and and,

00:55:53

and I'm sorry apology to

00:55:56

Professor Anaya asking, you know,

00:55:59

asking him how we know

00:56:03

how International law and the

00:56:10

question of the power consultations

00:56:14

plays out in the weather.

00:56:16

It is or not. A

00:56:21

rule that that must be

00:56:23

upheld under public international law,

00:56:25

both under treaty Law, and

00:56:28

Order customer international law and

00:56:31

really eager to to hear

00:56:34

your perspective on this. Thank

00:56:39

you for saying, thanks for

00:56:40

the opportunity to participate in

00:56:42

in in this panel and

00:56:44

has covered a good bit

00:56:47

of the, the basics of

00:56:49

public international law with regard

00:56:51

to the duty of states,

00:56:52

to consult them with indigenous

00:56:54

peoples in particular. And of

00:56:56

course, I elope convention 169,

00:56:58

which is been ratified by

00:56:59

the the vast majority of

00:57:01

of Latin American countries. Unfortunately

00:57:04

North America is lagging behind

00:57:06

in that regard but the

00:57:11

convention 169 is is that

00:57:15

the only International sweetie that's

00:57:17

relevant is as implied by

00:57:20

Renee, also the in America,

00:57:22

the American instruments as adjudicated

00:57:25

by the in American Court

00:57:27

of human rights in particular,

00:57:29

the American convention on human

00:57:30

rights and the American Declaration

00:57:34
of Rights. And duties of

00:57:35
man have have been interpreted

00:57:38
As Rowdy duty of states

00:57:41
to consult with indigenous peoples.

00:57:42
And of course, there's the

00:57:44
UN Declaration on the rights

00:57:45
of indigenous, peoples of 2007

00:57:47
while. But not a treaty

00:57:49
represent the standard. That the

00:57:52
vast majority of states of

00:57:54
the world have agreed to,

00:57:57
to work cords. At least

00:58:00
and many will argue has

00:58:01

have I that essential parts

00:58:03

of the UN Declaration of

00:58:05

our parts of customary International

00:58:07

Argento and Ashley one particular

00:58:09

be provisions on on consultation

00:58:11

and I'm not alone in

00:58:13

that opinion, but maybe I

00:58:15

was 20 years ago. But

00:58:17

now we have entities like

00:58:19

the International Association committee on

00:58:22

the rights. And I want

00:58:28

to focus on particular aspects

00:58:31

of the video consultation that

00:58:32

distinguishes it from this General

00:58:33

notion of a AAA license

00:58:36

social life. I ordered from

00:58:40

the general, right? Participation are

00:58:42

there is a general right

00:58:43

of everybody to participate in

00:58:45

public affairs or in government

00:58:47

for matters? And that, is

00:58:48

that right? Is affirmed prominently,

00:58:51

most firmly, perhaps some of

00:58:52

the international Covenant on civil

00:58:55

and political rights, which is

00:58:57

why they ratified by All

00:58:59

American Latin American countries and

00:59:02

also thought it was 23

00:59:03

of the American convention on

00:59:06

human rights. And that is

00:59:08

all right. That everybody has

00:59:09

to participate in public affairs

00:59:12

or matters of governance that

00:59:15

I got a fact, the

00:59:16

man that right is related

00:59:18

to democratic governance and good.

00:59:24

Good social governance has not

00:59:32

forced in public. International law

00:59:35

can see it as connected

00:59:37

with with certain policy prescriptions

00:59:39

that we find an international

00:59:40

documents. Perhaps most notably the

00:59:44

the UN guiding principles in

00:59:49

business human rights all over

00:59:50

the guiding principles speaks specifically

00:59:53

of the responsibilities of a,

00:59:56

of a business enterprises to

00:59:59

respect human rights and not

01:00:01

so much. In terms of

01:00:02

social license is focus. A

01:00:04

very bright focused document And

01:00:08

to distinguish this of the

01:00:12

duty of a consultation. First

01:00:15

of all it it's it's

01:00:16

important understand that the character

01:00:19

of this Duty and that

01:00:21

characters is is that it

01:00:22

is a safeguard, it's not

01:00:24

so much a free-standing right

01:00:25

among the catalog of Human

01:00:27

Rights but it has been

01:00:28

expressed in the documents. I

01:00:29

mention. I looked in my

01:00:31

kitchen, 169, the UN declaration

01:00:32

and in the jurisprudence of

01:00:34

the American Court as a

01:00:35

safeguard for specific rights. That

01:00:38
indigenous peoples are understood to

01:00:40
have including the rights of

01:00:42
our lands and resources. The

01:00:44
rights to Sacred places their

01:00:46
cultural rights more broadly. The

01:00:49
duty of consultation is triggered

01:00:52
when there's going to be

01:00:53
a government decision, that might

01:00:56
affect these rights and that

01:00:59
is how the UN Declaration

01:01:01
on the rights of indigenous.

01:01:01
Peoples frames this Duty in

01:01:04
Article, 19 and various articles

01:01:05

in connection with specific rights

01:01:07

such as rights in Lansing.

01:01:08

Natural resources. That is how

01:01:10

I look convention 169 frames

01:01:12

to duty. It speaks of

01:01:13

government decisions. That might affect

01:01:16

indigenous peoples in the right

01:01:17

Article 15, speak specifically to

01:01:19

the natural resources of the

01:01:22

interest and Bryson and natural

01:01:23

resources. That indigenous, peoples have

01:01:25

when those might have to

01:01:26

be affected by the government

01:01:27

has the duty to to

01:01:30

consult. And so often, we,

01:01:33

we, we speak of it

01:01:34

and and notably the Constitution,

01:01:39

constitutional court and now even

01:01:41

the inter-american court of human

01:01:43

rights of a circulated, a

01:01:45

right to consult consultation and

01:01:49

yes we can speak of

01:01:51

it that way because it

01:01:52

implies a certain set of

01:01:53

entitlements on the part of

01:01:54

indigenous peoples better to rise

01:01:56

as initially both in the

01:01:57

jurisprudence of the court. And

01:01:58

in these texts, these Foundation

01:02:00

tax out of 169 and

01:02:03

the Declaration as a duty

01:02:05

of States as a safeguard

01:02:07

for Specific race that indigenous

01:02:09

peoples have that others don't

01:02:11

necessarily have like such as

01:02:12

rights in the lands and

01:02:13

resources are going to be

01:02:15

affected by an investment project.

01:02:16

Those are not right that

01:02:17

pertain to the general population

01:02:18

those are right. That is

01:02:20

specific to indigenous peoples and

01:02:21

that's a specific duty of

01:02:23

consultation arises and another feature

01:02:26

of the duty and alluded

01:02:27

to by Renee is the

01:02:28

objective of those consultations and

01:02:31

the objective is to achieve

01:02:32

in the words of Iowa

01:02:34

convention, 19 agreement or concept.

01:02:37

The UN declaration also speaks

01:02:40

of the duty to consult

01:02:42

in order to obtain consent

01:02:44

and the inter-american court as

01:02:46

Renee, at has indicated that

01:02:48

has emphasized. That consent is

01:02:50

required when there is going

01:02:52

to be a substantial impact

01:02:54

on them as peoples and

01:02:55

I would emphasize a substantial

01:02:57

impact on that rice. And

01:02:58

there's a logic here. If

01:03:00

indigenous peoples or any other

01:03:01

people's rights are going to

01:03:03

be compromised, or going to

01:03:04

be somehow materially affected will,

01:03:07

of course, It's natural that

01:03:09
there needs to be an

01:03:09
agreement to that effect. That

01:03:11
would be the same with

01:03:12
a private landowner with it

01:03:14
with a private counterpart in

01:03:16
a business venture. If the

01:03:17
vet counterparts rights that their

01:03:19
rights are going to be

01:03:20
expected. There needs to be

01:03:21
some kind of agreement logic

01:03:22
behind that the consent again,

01:03:25
going back to the Safeguard

01:03:26
a characteristic that there's going

01:03:28

to be an affectation of

01:03:29

substantial. If a company is

01:03:31

going to go in at

01:03:32

the governor's, going to allow

01:03:33

a company to go and

01:03:34

material affected, the enjoyment of

01:03:36

specific rights of indigenous, peoples

01:03:38

of the land and resources.

01:03:39

There needs to be some

01:03:40

kind of agreement and let

01:03:41

me know if it's not

01:03:42

a simple yes-or-no as the

01:03:45

as many authorities and tribunals

01:03:49

have indicated their needs to

01:03:51

be safeguards it included in

01:03:52

any pain stabbed and begin

01:03:54

to record a specified that

01:03:55

there needs to be a

01:03:57

mitigation measures and all benefits

01:03:59

sharing and so forth. So

01:04:03

I can feel a lot

01:04:05

more but I want to

01:04:07

be conscious of time and

01:04:08

we want to eat out

01:04:09

here from Andrea but let

01:04:11

me just down there a

01:04:12

sizing, these fundamental characteristics of

01:04:15
of the duty of consultation

01:04:18
which is that it is

01:04:19
a safeguard for the specific

01:04:21
rights of indigenous peoples, its

01:04:22
distinguished itself in the general,

01:04:24
right approach to the patient

01:04:25
or socialize system that way,

01:04:27
I am. That a particular

01:04:30
features that is the need

01:04:31
to obtain consent with material

01:04:33
material. Interests of indigenous peoples,

01:04:36
might be affected. Thank you

01:04:42
very much for best friend,

01:04:43

Diana. And I think that

01:04:46

he has to like summarized

01:04:48

very specifically what may be

01:04:52

the standards under under public

01:04:54

international law? Specifically, I would

01:04:58

like to leave you with

01:05:00

a question or four or

01:05:02

or after Professor Jerkins shares

01:05:08

weather in the weather in.

01:05:10

I think that you have

01:05:11

answered but just to have

01:05:12

some idea whether the actual

01:05:16

Results of the consultation is

01:05:19

is is binding under international

01:05:23

law for the state during

01:05:25

which it which is a

01:05:26

key question. I will leave

01:05:28

it to you to think

01:05:30

about it a little bit.

01:05:32

And now I have a

01:05:33

pleasure to to introduce Andrea

01:05:36

who has been here, patiently

01:05:37

waiting, and she will walk

01:05:41

us through some of the

01:05:43

issues in relationship to investors

01:05:47

that arbitration. Thank you. Thank

01:05:51

you very much, Jose. Antonio

01:05:52

and thank you, and Ian,

01:05:53

for the invitation to be

01:05:56

here with you today. So,

01:05:58

it's a challenge always to,

01:05:59

to be last on a

01:06:01

great panel. But I I'm

01:06:04

going to try to broaden

01:06:05

things out a little bit

01:06:06

from what Jim talked about,

01:06:08

in terms of talking about

01:06:09

us official license, which, you

01:06:12

know, as and Lena explained,

01:06:15

is really seems to be

01:06:16

trying to encapsulate a relatively

01:06:18

broad notion about whether or

01:06:21

not there's a cheetah T

01:06:22

support for a project. You

01:06:25

extend beyond consultations, and formal

01:06:29

process is to Encompass, you

01:06:31

have a broader support within

01:06:32

a community attempting to formalize

01:06:36

and a more does concept

01:06:38

and assigning a legal term

01:06:42

license to. It also seems

01:06:46

to be an attempt to,

01:06:47

to formalize. Formalize the idea.

01:06:50

But I am going to

01:06:52

ask three questions or talk

01:06:56

about three different topics as

01:06:58

some of them are questions

01:06:59

to which I confess. I

01:07:00

don't really have a a

01:07:02

bit just to say that

01:07:03

I think there are some

01:07:04

some questions and difficulties and

01:07:07

implementation because I think generally

01:07:10

the idea of a social

01:07:11

Licence to operate seems to

01:07:13

say appealing. It seems as

01:07:15

if something that one wants

01:07:17

it seems like a good

01:07:18

thing but it in fact

01:07:21

I think there are sometimes

01:07:22

difficulties in implementing that are

01:07:24

not always so clear. The

01:07:27

first question is who comprises

01:07:29

the community The second is

01:07:34

a related to the time.

01:07:37

When support, let's be achieved.

01:07:39

And then the third issue,

01:07:41

all addresses some of the

01:07:42

just a few of observations

01:07:45

about intersections with investment law

01:07:48
and arbitration. But first who

01:07:52
comprises the community, I think

01:07:54
an animal has an introduction.

01:07:56
She talks about the local

01:07:57
community and other stakeholders. And,

01:08:01
of course, that really is

01:08:02
the question, who will, Who

01:08:04
is local community, and who

01:08:07
are those other stakeholders in

01:08:10
one sense, especially if you're

01:08:12
talking about an environmentally impactful

01:08:15
project, you think you're talkin

01:08:18
about those who live in

01:08:19

the vicinity of the project.

01:08:21

But what if they are

01:08:23

split? What if they don't

01:08:25

agree about the project? When

01:08:28

could have went? What does,

01:08:29

what effect does that have

01:08:30

on? Social licence and we

01:08:33

have some men, there are

01:08:35

certainly examples of this. There

01:08:36

was a there is a

01:08:38

proposed, liquefied natural gas pipeline

01:08:41

in western Canada. That would

01:08:43

go across tribal lands that

01:08:47

are either owned or controlled

01:08:50
by or very important to

01:08:53
the, what's the weight of

01:08:54
a native of native peoples.

01:08:58
But in that particular case,

01:09:02
the band Council support, the

01:09:04
project, whereas other representatives of

01:09:08
more traditional legal at an

01:09:10
indigenous government structures are opposed.

01:09:13
So, how do you reconcile

01:09:15
a split within the community?

01:09:18
Second question maybe is, is

01:09:22
it? The country will as

01:09:26
a whole or is it?

01:09:28

Significant local interest groups? And

01:09:34

their I can as an

01:09:35

example I think you mentioned

01:09:39

was antoniou, Gabriel resources versus

01:09:41

Romania. We are have a

01:09:43

decision in that case yet

01:09:44

but the the pleadings are

01:09:46

available on IC a law.

01:09:51

But there you have a

01:09:53

situation where it says that

01:09:56

in large respected, local communities

01:09:58

is about a gold mine.

01:09:59

The local community would like

01:10:02

to have the gold mine

01:10:03

in the local community wants

01:10:04

to have the economic development

01:10:06

of the economic benefits. That

01:10:08

will ensue but environmental activists

01:10:12

who are not local but

01:10:14

who are Romanian are very

01:10:17

much opposed to the gold.

01:10:19

So you might say how

01:10:20

do you reconcile that splits

01:10:23

in a community and certainly

01:10:25

if we're thinking about environmental

01:10:27

impacts you know the community

01:10:31

might be much broader than

01:10:33

just that those who live

01:10:35

nearby even if they are

01:10:36

bearing the brunt of any

01:10:37

damaged. We know as you

01:10:42

know hurricane Fiona just swept

01:10:43

through Eastern out of that.

01:10:44

That's a global climate change

01:10:48

and global warming has an

01:10:50

effect on all of us.

01:10:51

But you know similar similar

01:10:53

issues, arise in different places

01:10:55

do in. Well in Congo,

01:10:58

in the Democratic Republic of

01:11:00

Congo you have some questions

01:11:01

about your questions about tree

01:11:03

cutting we're under pressure from

01:11:07

the International Community. The government

01:11:09

has not issued new Timber

01:11:11

cutting licenses for 20 years

01:11:13

but there is clearly unlawful

01:11:16

cutting going on. Buy Often

01:11:20

by Foreign companies. There's Community

01:11:22

Support to mobilize against that

01:11:25

action but what the community

01:11:27

wants to do is to

01:11:28

cut the trees themselves and

01:11:29

get the benefit themselves. So

01:11:31
that said I mean it

01:11:33
in any way these are

01:11:34
these are just complex matters

01:11:36
but but I guess I

01:11:38
didn't want to raise the

01:11:39
question about who is the

01:11:40
community how do we how

01:11:42
do we assess which Community

01:11:44
is at who has the?

01:11:47
If he will be a

01:11:47
sortie to issue the social

01:11:50
licence or two to withhold

01:11:52
the social licence if that's

01:11:54

what it's being discussed? Second

01:11:57

question, I wanted to discuss

01:11:58

a time at which support

01:12:00

must be achieved. It's more.

01:12:03

It's simplest. I supposed to

01:12:05

talk about at the time

01:12:07

of Licensing, right? Before a

01:12:10

licenses, let's say some kind

01:12:12

of licensure or formal license.

01:12:15

Some kind of confession and

01:12:17

permit is And that's usually

01:12:20

where we think the consultations

01:12:22

come in and that those

01:12:24
men inform the government processes.

01:12:26
But you know, if that

01:12:30
social do consultations with me,

01:12:34
the social licence is broader

01:12:35
than just consultations. But if

01:12:37
consultations have been held and

01:12:39
have proved largely positive, is

01:12:41
that sufficient is the social

01:12:43
licence broader? How do we

01:12:45
know when it comes time

01:12:47
if there is formal approval

01:12:49
of a project but then

01:12:52
the company loses the social

01:12:55

licence right? As if he'd

01:12:57

been a long. Of time

01:12:58

in terms of operating a

01:12:59

gold miner, operating another natural

01:13:02

resource extraction project then what

01:13:06

what what is the company's

01:13:08

obligation to? Maintain the social

01:13:10

license. How how if the

01:13:15

company does everything the company

01:13:17

promised? The social license is

01:13:20

still withdrawn, does that matter,

01:13:23

should that matter? How does

01:13:24

that matter? And you know

01:13:29

this so that leads me

01:13:31
into my third discussion point

01:13:34
which is the end of

01:13:35
the real intersection with investment

01:13:38
law. You know, if the

01:13:42
project was lawful and this

01:13:44
I think it's where we

01:13:45
see this and it was

01:13:46
tension in the cases that

01:13:48
we've had today. If the

01:13:50
investment was lawful in terms

01:13:52
of formal structures, where does

01:13:57
this social licence fall within

01:13:59
that structure? It seems that

01:14:02

before the any approval is

01:14:04

granted. Then it's been the

01:14:07

lack of a of consultations

01:14:09

lack of a social license.

01:14:10

Should be grounds for not

01:14:12

approving the project. Although even

01:14:14

there we have some tension

01:14:16

and here, I think about

01:14:17

the bill Converse, Canada case,

01:14:19

In which one of the

01:14:20

grounds for the environmental review,

01:14:24

panel's refusal to Grant a

01:14:25

license was that it was

01:14:27

not consistent with Community core

01:14:30

values which the investment Tribune,

01:14:33

All Over The Descent of

01:14:34

dawn, the krays dad was

01:14:35

not really part of the

01:14:36

governing law but I think

01:14:38

that was another example of

01:14:40

this notion of a social

01:14:41

licence of the winter. The

01:14:42

community was buying into the

01:14:45

project or not yet with

01:14:47

investment law. Looking perhaps press

01:14:50

two for ballistically. But looking

01:14:52

for holistic, Lee out, whether

01:14:53
these formal procedures were abided

01:14:56
by in the in the

01:14:58
in the country's laws, then

01:15:01
it seems that the social

01:15:03
Licence to operate. It has

01:15:04
limited limited ability to make

01:15:08
a, to make it impact.

01:15:10
It could be, you know,

01:15:12
it's not a formal obligation

01:15:14
on the investor, but perhaps

01:15:16
the failure, Buster to maintain

01:15:20
a social licence. Particularly if

01:15:23
there are requirements that seemed

01:15:25

more more evidence than others

01:15:28

might might be grounds to

01:15:30

excuse a fair and Equitable

01:15:31

treatment violation. It we see

01:15:33

that reluctance in Bear Creek,

01:15:35

Mining versus Peru, you can

01:15:37

see where it fits in

01:15:38

the grounds of legitimate expectations.

01:15:40

Does the investor legitimately expect.

01:15:43

It must maintain a social

01:15:45

licence. I'm here again. Need

01:15:47

the amorphous of the concept

01:15:49

is a little bit hard

01:15:51

to two outfits in other

01:15:54

or you could it could

01:15:55

go either way but argue

01:15:58

that even as long ago

01:15:59

as metal clad versus Mexico,

01:16:01

one of metal clad problems

01:16:02

with it and it did

01:16:03

not develop a social license

01:16:06

even though that case, whether

01:16:07

I think, before that vocabulary

01:16:09

had been developed or at

01:16:11

least, I've never heard of

01:16:13

it, Spoken up at that

01:16:16

time. I'm at been over

01:16:18
all of this is my

01:16:19
last observation. It seems to

01:16:21
me that the a lot

01:16:23
of what we talked about

01:16:24
is that the social licence

01:16:28
idea really highlights potential government

01:16:31
deficits in the host stage,

01:16:34
is their formal approval of

01:16:38
the projects, notwithstanding significant Community

01:16:40
opposition is their formal approval

01:16:43
of a project, notwithstanding the

01:16:45
inability of certain communities, and

01:16:48
Indigenous communities. In particular, to

01:16:50

really have a meaningful voice

01:16:52

in the government. And we

01:16:56

see this, I thought Injustice

01:16:57

combos at discussion that you

01:17:00

know, the concerned about lack

01:17:01

of indigenous, voices, and representation

01:17:03

is true and domestic projects

01:17:05

as well as in international

01:17:08

projects. So, I'm all he'll

01:17:13

leave you with, with just

01:17:15

that thought that perhaps that

01:17:20

perhaps encompassing a social Licence

01:17:23

to operate within more formal

01:17:24

structures would be desirable. I

01:17:27

think about the Bear Creek,

01:17:28

Mining decision and the majority

01:17:31

versus The Descent and asked

01:17:33

whether it really should be

01:17:35

an either-or. I'm, in other

01:17:37

words, it seems to me

01:17:38

that the investor only the

01:17:41

investor has the ability to

01:17:42

do some things to maintain

01:17:44

a social Licence to achieve

01:17:46

and or maintain a social

01:17:48

Licence to operate yet. It

01:17:51

is perhaps incumbent on the

01:17:52

state to explain more formally

01:17:54

what that is, and what

01:17:56

that means. So, the investor

01:17:58

can follow those guidelines and

01:18:01

achieved, this is a license

01:18:02

to operate. Thank you. Aren't

01:18:06

you? Thank you Andrea. New.

01:18:09

Now there's there's lots of

01:18:12

questions that, that that are

01:18:13

in my mind. I would

01:18:14

like to you leave. You

01:18:17

leave you with one particular

01:18:18

question, which word comes to

01:18:21

my mind? Now I'm making

01:18:35

them some out more balanced

01:18:38

by including and terrifying that.

01:18:41

Don't know, only state and

01:18:47

under the basic Notions of

01:18:55

respecting good faith, which is

01:18:58

a general principle of Law

01:18:59

and materializes through To the

01:19:03

abbreviation, not to admit Investments

01:19:06

are through corruption or Investments,

01:19:09

through fraudulent acts, and there's

01:19:12

really there's really no, no,

01:19:13

no fear in most of

01:19:15

the treaties for investors. So,

01:19:20

The ones that come to

01:19:21

mind, this is your vacation

01:19:23

to respect human rights. At

01:19:25

least a certain minimum international

01:19:28

human rights by the investor

01:19:30

and also comply with the

01:19:32

corporate social responsibility. But the

01:19:36

one thought that that now

01:19:39

comes to my mind is

01:19:40

whether that's not sufficient the

01:19:42

weather. Whether there's a handful

01:19:44

of that include some some

01:19:48

of those obligations. concerning treaties

01:19:52
of some Cheese's Nigeria and

01:19:57
some trees of the question

01:20:01
is whether it would be

01:20:02
useful to think about finding

01:20:06
finding, Obligations by the investor

01:20:11
to carry on consultations when

01:20:13
the project requires. It mean

01:20:21
to him. I haven't seen

01:20:25
it. But but out of

01:20:27
this conversation, that idea comes

01:20:29
to mind and I would

01:20:31
like to leave you without

01:20:32
question. I have already left

01:20:34
the profession area with a

01:20:36
question. I would like to

01:20:37
give the floor to to

01:20:40
Renee to ask a question

01:20:41
to Justice and Injustice a

01:20:46
couple to do the same

01:20:47
with with him. So if

01:20:50
if you will and if

01:20:51
not I'm, I'm happy to

01:20:53
ask you a question but

01:20:53
but please go ahead. Chilling

01:21:00
on locations of the insurance

01:21:12
out of the cord for

01:21:14

the for that, the more

01:21:16

wiser ideal investment and the

01:21:19

relation between domestic court's and

01:21:22

so the way we should

01:21:24

interact. I mean I cannot

01:21:28

say much but definitely International

01:21:31

low plays the role in

01:21:32

the decisions of the Court,

01:21:34

especially the decisions of the

01:21:35

inter-american court. And so they're

01:21:39

always consider as as a

01:21:43

source of of our decisions.

01:21:45

So basically what you're saying

01:21:48

is relevant and how that

01:21:51

place, it's, it actually works

01:21:53

both ways because there has

01:21:56

been a lot of words

01:21:58

that basically duck him until

01:22:00

the inter-american court also received

01:22:03

from the mistake of jurisprudence.

01:22:05

And it makes decision also

01:22:08

influenced by domestic jurisdiction of

01:22:11

the Court, until I have

01:22:21

to talk to your cousin

01:22:22

that you were mentioning the

01:22:27

case. Colombian transfer, bilateral International

01:22:31

agreement, and you were very

01:22:34
critical of at some point

01:22:36
of that decision, especially regarding

01:22:39
participation. So perhaps if you

01:22:41
could just elaborate on that

01:22:43
a little bit and you

01:22:45
mentioned it in your presentation,

01:22:46
so that's going to order

01:22:52
right away. And this is,

01:23:00
this is kind of a

01:23:02
Super Rocket. Kind of pasta,

01:23:08
dating type of questions and

01:23:11
answer because we are running

01:23:13
out of time. At the

01:23:15

most wonderful of you but

01:23:28

it was of court and

01:23:28

I am, of course, pretty

01:23:29

cool. And I'm reading about

01:23:31

this and that, the court

01:23:33

didn't address, the issue of

01:23:34

participation and democracy as part

01:23:38

of a reviewing abhs, so

01:23:42

focused on their more substantive

01:23:45

investment issues as it should

01:23:47

have. But my position is

01:23:49

that we should have gone

01:23:50

further to consider the right

01:23:52

of participation and and the

01:23:55

Democratic principle when reviewing the

01:23:57

tree Thank you. Thank you.

01:24:04

Rene professor and I am

01:24:12

Yeah, thanks for the question.

01:24:14

You gave me earlier consultations

01:24:18

are our request required, not

01:24:20

since the duty of consultation

01:24:22

is binding on it states,

01:24:24

they have to do it.

01:24:25

And I guess the question

01:24:26

that really arises are are

01:24:28

the outcome is the outcome

01:24:29

of the consultations. If there

01:24:30

is not a consent or

01:24:32

communities oppose a project, you

01:24:36

have is a mention, this

01:24:38

is Renee mention the jurisprudence

01:24:40

of the American Court in

01:24:41

that regard and I've tried

01:24:42

to give a rationale behind

01:24:43

it. You know, if there

01:24:44

is a substantial material effect

01:24:46

on rights of indigenous peoples,

01:24:48

like their lands. If you

01:24:49

know their lands are going

01:24:50

to be used or affected,

01:24:52

you know the cultural resources.

01:24:53

Oh yeah there has to

01:24:54

be an agreement. Just like

01:24:55

with any other right holder.

01:24:57

It's not necessarily accept us

01:25:02

to the rights concerned. I

01:25:04

mean if another person who

01:25:05

owns property in an investor

01:25:07

is going to go into

01:25:07

that property that has to

01:25:08

be in agreement. And so

01:25:09

that thing concept, you know,

01:25:11

I apply People's except I

01:25:20

want to make another point

01:25:21
that is I agree with

01:25:24
Andrea at this idea of

01:25:25
socializing and as I said

01:25:27
earlier, it's not well-sourced and

01:25:29
I don't think it's, I

01:25:30
don't know if it's the

01:25:30
right route for investment at

01:25:32
4 before Jason Pannell to

01:25:37
go in. If they're interested

01:25:38
in Huber Heights, our rights

01:25:40
of communities and we have

01:25:42
much stronger tools. There are

01:25:44
the you know this concept

01:25:46
of business business responsibly to

01:25:48
disrespect, right? That's much more

01:25:51
developed as much more concrete.

01:25:52
And also it's you know,

01:25:54
if there's this danger and

01:25:55
I'm seeing it manifested in

01:25:57
a sort of conflating indigenous

01:26:00
peoples their right of consultation

01:26:01
of the dirtiest states to

01:26:03
consult with his notion of

01:26:04
social license with a social

01:26:06
licence. You know, it's all

01:26:09
these questions but the duty

01:26:11

to consult Are very specific

01:26:12

requirements that are in international

01:26:15

law and that are that

01:26:17

are also grounded in the

01:26:19

Constitutional law of almost all

01:26:21

countries in Latin America and

01:26:23

are part of the Constitution

01:26:24

of blocking or Frameworks of

01:26:26

of increasing numbers of countries

01:26:28

in Latin America, Columbia Mexico,

01:26:30

and others. Of course, we

01:26:33

don't want to appreciate what

01:26:34

what the professor Sands was

01:26:36

doing and using the concept

01:26:38

of social licence than talk

01:26:39

about Isla 169 and rights

01:26:41

of indigenous peoples. But I

01:26:42

find it somewhat, you know,

01:26:44

to talk about the beauty

01:26:50

of consultation the space that

01:26:52

with regard to we're going

01:26:52

to talk about a social

01:26:55

licence aside. Let's talk about

01:26:57

this duty to consult and

01:26:59

there are very specific guidelines

01:27:01

including with regard to representation

01:27:06

in the consultations have to

01:27:10

occur. A referendum on going

01:27:14

house-to-house and try to figure

01:27:16

out what people want to

01:27:18

do or or walk around,

01:27:19

you know, the town or

01:27:21

have public meetings or anybody

01:27:23

can show up now, it's

01:27:24

doing business people's Representatives. Sometimes

01:27:28

there are questions about what

01:27:29

those institutions are. Those need

01:27:31

to be worked out just

01:27:32

like there can be with

01:27:33

a country sometimes right countries

01:27:34

and their schools. There are

01:27:37

the questions about human beings

01:27:49

like everybody else and those

01:27:52

things have to be worked

01:27:53

out, but it has to

01:27:54

be that it prints of

01:27:55

the principle is through their

01:27:56

representative institutions. So anyway, I'm

01:28:00

not a big fan of

01:28:02

social licenses. And so I

01:28:04

mean I think it's a

01:28:05

it's a it's a generally

01:28:06

a nice concept but it's

01:28:08

it's got a lot of

01:28:09

a lot to be worked

01:28:11

out as Andrea pointed out

01:28:12

and I don't want to

01:28:13

see indigenous peoples rights, get

01:28:15

mucked up it in that

01:28:17

disgusting. Focus on specific rides

01:28:22

from International domestic laws and

01:28:25

they have there's a specific

01:28:26

duty of consult consultation that

01:28:28

the firm international law. IQ

01:28:31

IQ gym and then thank

01:28:34

you for being so, so

01:28:35

precise and, and distribute with

01:28:37

with the woodworking terms of

01:28:39

describing social Licence to operate

01:28:43

as as as an amorphous

01:28:45

concert which which link up

01:28:47

so late. And last, but

01:28:55

not least, I agree with

01:29:00

Jim and I would even

01:29:02

come out. And even from

01:29:04

a slightly, different angle or

01:29:05

just add a few more

01:29:06

observations, which is that, and

01:29:09

I'll try to answer your

01:29:09

question to Jose Antonio B

01:29:11

one. But with respect to

01:29:13

investor obligations, I don't know,

01:29:15

but it hurts to have

01:29:17

investor obligations to consult in

01:29:20

a treaty or other obligations,

01:29:22

but I don't think that

01:29:24

should be there by the

01:29:25

state's obligation. So, one of

01:29:27

my concern, when you start

01:29:28

talking about him, who's the

01:29:29

Obligation Bond investors. We see

01:29:31

this in Bear Creek, a

01:29:32

little bit, is in my

01:29:34

Christian in Bear Creek is

01:29:35

where was Peru, right? If

01:29:37

the company is, is firing

01:29:40

on protesters, I mean, of

01:29:43

course, that's horrible. That's terrible.

01:29:44

That is a violation of

01:29:46

Human Rights. The company should

01:29:47

be sentient. But where's Peru?

01:29:49

Why is Peru not protecting

01:29:50

people like that? That's that's

01:29:52

like we should not excuse

01:29:53

Peru even as we impose

01:29:56

obligations or penalize, the investor

01:29:58

that, that's my bae. So

01:30:01

I think of that too

01:30:02

is respect with respect to

01:30:03

you having obligations, on investors

01:30:05

to consult. I'm sure that

01:30:07

might might be a good

01:30:09

thing, but that doesn't excuse

01:30:10

the state from its its

01:30:12

international human rights obligations to

01:30:14

consult. And so I think

01:30:16

that that is something to

01:30:17

Guardian Games and just on

01:30:19

on that note, with respect

01:30:21

to imposing obligations in treaties,

01:30:29

Concern in the Morocco, Nigeria

01:30:32

bed, and in the sadc

01:30:33

model is that there's this

01:30:36

obligation on the investor to

01:30:37

do an environmental impact assessment,

01:30:39

but there is no mechanism

01:30:42

to do that. So is

01:30:44

the investor going to, I

01:30:46

mean, yes, the investor has

01:30:47

an obligation of good faith.

01:30:48

But one question is, who

01:30:52

is doing the environmental impact

01:30:53

assessment? There is no International

01:30:54

agency. That does environmental impact

01:30:57
assessments. Normally it's the domestic

01:30:59
right as the domestic. It's

01:31:01
the domestic, you know, environmental

01:31:03
department. So that that's just

01:31:07
a little bit of it

01:31:08
should have been an issue.

01:31:09
And my concern also is

01:31:11
when it's too late like

01:31:12
in in Renee's, a presentation

01:31:14
in his timeline, one of

01:31:16
the things that I never

01:31:18
said anything about arbitration more,

01:31:19
but one of the things

01:31:21

I found missing was challenging,

01:31:23

the state's decision to offer

01:31:25

a concession contract in the

01:31:27

absence of having engaged. In

01:31:29

the proper consultation right in

01:31:31

the absence and that strikes

01:31:34

me is that when you

01:31:35

want something to happen by

01:31:36

the time your investment arbitration,

01:31:38

it's too late. So I

01:31:39

feel like that's a little

01:31:40

bit that case with imposing

01:31:42

obligations in treaties. When those

01:31:44

obligations are not really going

01:31:46

to come up until there's

01:31:48

an investment arbitration which means

01:31:49

something has happened. Something has

01:31:51

gone wrong, probably there's damage

01:31:53

and really, I think we

01:31:54

want to avoid that and

01:31:56

not say at the back

01:31:57

end. O it turns out,

01:31:59

you can't bring your investment

01:32:00

arbitration case because you didn't

01:32:02

do the consultations. I mean.

01:32:04

Okay, still we want to

01:32:06

avoid that damage. Not not,

01:32:09

you know, try to penalize

01:32:10

the investor, not just feel

01:32:12

as the investor after the

01:32:13

fact for not having a

01:32:15

bited by their obligations. Thank

01:32:18

you Andrea and I realize

01:32:20

that we're just one minute,

01:32:22

we work work, we're done

01:32:24

we didn't send it the

01:32:25

4/16 12:46 panel and the

01:32:43

strongest at the beginning. I

01:32:46

would dismiss this kind of

01:32:48

wood would walk you through

01:32:49

constitutional inter-american, human rights law

01:32:53

going to last so long,

01:32:54

as well as investor be

01:32:56

tracing. The topic is evolving.

01:32:59

The presentation will be will

01:33:03

be posted, h i a

01:33:06

engine that will be good

01:33:15

for Will soon be up

01:33:20

and running. And with that,

01:33:23

I would like to thank

01:33:24

everyone. There's and I know

01:33:26

that some of our panelists

01:33:27

professor Dirkson at me. He's

01:33:31

right away. So so please

01:33:33

please do so Andrea and

01:33:34

that were really, really ordered.

01:33:37

Best right now. Yeah, Professor

01:33:39

from now on we're we're

01:33:50

good. We're good. Thank you

01:33:52

very much. I have one

01:33:54

one. Last question, I don't

01:33:55

want to leave one question

01:33:57

of the table or Justice.

01:34:09

Theoretical question, which one would

01:34:18

be a provocation? Judiciary. Answer

01:34:22

that question. I have somebody

01:34:23

in mind. That's it for

01:34:34
now. And and everyone is

01:34:38
very much welcome and invited

01:34:40
to our next battle will

01:34:43
be. Then I will help

01:34:46
me to tell me when

01:34:47
the next battle will be

01:34:48
one hour at 11:30, a.m.

01:34:53
eastern standard time in the

01:34:59
Caribbean and institutional at arbitration

01:35:03
development in the Caribbean today

01:35:06
as you know, is the

01:35:07
day of the America. So

01:35:08
we're going from from South

01:35:10
America to the Caribbean and

01:35:12
ending up in North America.

01:35:14
So thank you all have

01:35:17
a beautiful day and I

01:35:18
hope that we can keep

01:35:20
discussing this because I feel

01:35:22
that we have everything is

01:35:24
bye-bye.