



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

Summary

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

The Washington Arbitration Week (WAW) session focused on the evolving landscape of investor-state dispute settlement (ISDS), particularly discussing reform proposals. The session featured prominent speakers, including Marin, the moderator, and various experts from international law and arbitration, such as Anna Joubin-Bret, Colin Brown, Margie Lee Simi, Chiara Giorgetti, and Karen Kaiser.

Key topics included the significant number of international investment agreements (over 2,600 currently in force) and the ongoing discussions regarding the establishment of an appellate mechanism or a permanent investment court. The panel emphasized that the ISDS system is maturing and requires reassessment by stakeholders, including states, investors, and civil society, to determine its effectiveness and necessary reforms.

Anna Joubin-Bret provided an update on the progress of UNCITRAL's Working Group III, highlighting advancements in developing investor-state mediation and the establishment of an advisory center to support mediation efforts. Colin Brown argued for a permanent investment court, suggesting it would enhance consistency and predictability in decision-making, while Margie Lee Simi compared the appellate mechanism to the investment court, emphasizing the importance of party appointments and the impact on dispute resolution costs.

Chiara Giorgetti discussed the proposed code of conduct for adjudicators, which aims to address issues of independence and impartiality, as well as the need for transparency in disclosures. Karen Kaiser highlighted additional reform proposals, including mechanisms to address frivolous claims and enhance treaty party involvement in disputes.

The session concluded with a consensus on the importance of ongoing discussions and the need for concrete proposals to address the challenges within the ISDS framework, indicating a commitment to further progress in the coming year. Participants were encouraged to engage in breakout sessions for deeper discussions on these critical issues.



Authors

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Topics

ISDS Reform

Category

WAW

Full Transcript

00:00:03

and tsc rules among others

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and she has represented clients

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in the US litigation with

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International ramifications before the United

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States Supreme Court and various

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courts of Appeals. Marines representations

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include various various various matters

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importantly at least for for

00:00:25

those that are in Latin

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America and Colombia. She recently

00:00:29

won an award on behalf

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of Colombia in an electricity

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related matters. And of course

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folks of the black country

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are ecstatic about that and

00:00:41

many other winds most importantly

00:00:44

Marin. is one of our

00:00:47

steamed advisory committee members at

00:00:51

wow, and she has been

00:00:52

incredibly supportive both with her

00:00:55

ideas and initiatives. So I

00:00:58

would like to give a

00:01:00



big thank to Marine and

00:01:02

and now going to the

00:01:05

panel I would like to

00:01:06

say that investor state arbitration

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and isds is of course

00:01:14

a very hot topic and

00:01:16

we're seeing the evolution that

00:01:17

has started for for many

00:01:20

years. Now, one of the

00:01:23

topics that that is in

00:01:25

everyone's mind is whether it

00:01:27

will be an appeals for

00:01:28

appeals mechanism or whether we'll

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be a court and this

00:01:33

is part of the subject

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matter today. So I hope

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that you're very attentive. I

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hope that you pay a

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lot of attention because this

00:01:42

is a an incredible panel

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and I'm lucky to be

00:01:46

just announcing it. So with

00:01:48

that Marine the floor is

00:01:51

totally yours. Thank you so

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much as Antonio for the

00:01:55

lovely introductions and welcome everyone

00:01:57



to what I think is

00:01:58
going to be a really

00:01:59
interesting discussion on what is

00:02:01
indeed the hot topic of

00:02:02
the day in international arbitration

00:02:05
and that is concrete proposals

00:02:07
for reform of the investors

00:02:09
State dispute settlement system. Um,

00:02:13
you know, the the uncut

00:02:15
database is tell us that

00:02:16
we have something like 2600

00:02:18
International Investment agreements in force,

00:02:21
whether that's it's bilateral investment

00:02:24



treaties or other treaties that

00:02:26

contain investment protections. There are

00:02:29

actually more than 3,200 that

00:02:31

have been negotiated but with

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but only 26 of those

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are currently operative 2,600 of

00:02:36

those are operative and that

00:02:37

we have something like 1100

00:02:39

known cases under those instruments

00:02:41

740 of which approximately have

00:02:44

been concluded and all of

00:02:47

that has come in about

00:02:48

15 to 20 years of

00:02:50



real activity. That is this.

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This is you know, in

00:02:53

a way a new legal

00:02:54

system that we are watching

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of all before our eyes

00:02:57

we can't say at this

00:02:59

stage that it's in its

00:03:00

infancy, but I think of

00:03:01

it as kind of being

00:03:01

a teenager and sometimes like

00:03:04

teenagers they act out a

00:03:05

little bit they might miss

00:03:07

behave they might they might

00:03:09



get a bit unruly and

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that has prompted the stake.

00:03:12

others in the system to

00:03:14

assess the system. Is it

00:03:16

working the way they wanted

00:03:17

it to that? They intended

00:03:18

it to that anybody thought

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it was going to and

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those stakeholders most obviously are

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the states who created the

00:03:26

treaties and created the instruments

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but there are also the

00:03:29

the users of the system

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the investors the institutions that

00:03:33

are involved in the in

00:03:36

the proceedings and stakeholders brought

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civil society and citizens who

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watch the system unfold and

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all of those stakeholders are

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assessing they're reconsidering do they

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need to calibrate do they

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need to renovate do they

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need to reform or do

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they need to throw the

00:03:51

whole system out with the

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bathwater? And that has been

00:03:55



the discussion that has has

00:03:57

really come to life in

00:03:59

the in the past few

00:04:00

years and that we're going

00:04:02

to talk about today and

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we're going to be you

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know, that that discussion has

00:04:06

taken place in many forums

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whether that's on Central's working

00:04:10

group three, whether that's its

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reform of its arbitration rules.

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Various initiatives of the IBA

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and vedika and other for

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as well. We're going to

00:04:20

try to focus most specifically

00:04:21

on the concrete proposals that

00:04:23

are currently under discussion in

00:04:25

many different formats and that

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the we're taking the liberty

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of going beyond the title

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of our program because we

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will talk about the proposals

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for an investment court for

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an appellate mechanism, but we'll

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also talk about other initiatives

00:04:37

that are that are under

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discussion as well. Um, let

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me start out by doing

00:04:42

some brief introductions of our

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wonderful panel and I will

00:04:46

try to keep them brief

00:04:47

just in the interest of

00:04:48

time because if I actually

00:04:49

gave Folsom introductions of everybody

00:04:51

we could be here for

00:04:52

quite some time. But in

00:04:54

approximately the order that will

00:04:56

will be speaking. So we

00:04:58

begin with anaju bumper who's

00:05:00



the Secretary of ancitral and

00:05:03

the director of the division

00:05:04

of international trade law of

00:05:05

the United Nations office of

00:05:07

legal Affairs. She previously also

00:05:10

worked in the investor State

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an investment dispute Forum as

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Council as arbitrator and as

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mediator and also spent I

00:05:20

believe a little bit more

00:05:21

than 15 years at uncad

00:05:23

in the senior legal advisor

00:05:25

in the research program. Overseeing

00:05:27



the research program on International

00:05:29

Investment agreements. Then we have

00:05:33

Colin Brown who's from the

00:05:35

European commission BG trade. He's

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the head of unit of

00:05:38

legal Affairs and dispute settlement

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was focused on trade sustainable

00:05:42

development and investment in addition

00:05:44

to serving in various capacities

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of the visiting professor. And

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I think if Colin is

00:05:48

the person who has who

00:05:49

has since the most time

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explaining the the investment Court

00:05:52

proposal to the world in

00:05:54

forums like this one. We've

00:05:56

had pleasure of being on

00:05:57

some other panels together as

00:05:58

well. Then we're joined by

00:06:01

Margie Lee Simi from the

00:06:03

Republic of Panama who's advisor

00:06:05

and chief of the office

00:06:06

of compliance and liabilities in

00:06:08

the ministry of economy and

00:06:09

finance for the Republic of

00:06:11

Panama prior to her previous

00:06:12



position or perhaps concurrently. I'm

00:06:15

not sure she's also a

00:06:16

professor of law at the

00:06:18

University of Panama and has

00:06:19

worked in private practice and

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then had a previous Life

00:06:22

as a trade negotiator for

00:06:23

public for Panama as well

00:06:24

at the ministry of trade

00:06:25

and Industry. Um, then we

00:06:27

have the caregiver Georgetta georgetti

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who's the professor at the

00:06:31

University of Richmond School of

00:06:32



Law where she teaches public

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international law international arbitration International

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courts and tribunal and is

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very active in in all

00:06:41

of the professional associations surrounding

00:06:43

international law and international arbitration

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including the American Society of

00:06:47

international law, the international law

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association The Institute on transnational

00:06:51

arbitration and also had a

00:06:54

prior practice a prior life

00:06:56

and private practice practicing and

00:06:58

international arbitration in both Washington

00:07:00



and Geneva and has been

00:07:02

especially active in in formatting

00:07:05

the discussion about codes of

00:07:06

conduct and codes of ethics

00:07:08

for the participants in this

00:07:10

system. Um and last but

00:07:12

certainly not least we're joined

00:07:13

by Karen Kaiser who's an

00:07:15

attorney advisor at the US

00:07:16

Department of State currently in

00:07:17

the office on private investment

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law private international law in

00:07:21

which capacity. She's representing the

00:07:23



United States at the uncertral

00:07:25

working group three discussions at

00:07:26

the Hague conference on private

00:07:27

international law and this unit

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was well and previously also

00:07:31

at the state department she

00:07:33

advised on the negotiation and

00:07:34

implementation of bilateral investment treaties

00:07:37

and also serve distance as

00:07:39

counsel in those cases at

00:07:42

LLC I of course should

00:07:45

start off with the caveat

00:07:46

that every single one of

00:07:47



our speakers at speaking in

00:07:49

their individual and personal capacity.

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Nothing they say is for

00:07:51

attribution to their employers or

00:07:54

anyone else that they might

00:07:54

be affiliated with but we

00:07:58

want because we want this

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to be really full some

00:08:00

discussion. The way that we'll

00:08:03

proceed is we'll ask Anna

00:08:05

to sort of set the

00:08:06

stage for really kind of

00:08:08

a background of what's actually

00:08:10



actively happen in the reform

00:08:13

discussions surrounding isds. And then

00:08:16

we'll start picking up some

00:08:17

of the individual proposals. So

00:08:19

we'll ask Colin to give

00:08:20

us some background and bring

00:08:21

us up to speed on

00:08:22

the proposal for an investment

00:08:24

court marginally has done some

00:08:26

thinking about the ultra what's

00:08:28

been presented as an alternative

00:08:29

to that as an appellate

00:08:30

mechanism. So we'll ask her

00:08:32



to talk about that. Chiara

00:08:33

will will help us frame

00:08:35

the discussion on the code

00:08:36

of conduct that's been presented

00:08:39

as a full draft code

00:08:40

of conduct and Karen's going

00:08:42

to fill us in on

00:08:43

some of the other reform

00:08:44

initiatives and proposals that are

00:08:46

also active at this time.

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Even if they're not grabbing

00:08:49

as many headlines as some

00:08:51

of the other initiatives with

00:08:53



each of those we'll ask

00:08:54

that Anna will set the

00:08:56

stage for us for five

00:08:58

or 10 minutes and then

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as we go into the

00:09:00

individual subject Areas will have

00:09:02

one of our speakers kind

00:09:04

of give a three or

00:09:05

five minute explanation of the

00:09:07

current state of play. But

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then we really want to

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invite all of our other

00:09:11

panelists to chime in and

00:09:12



comment on what's happening in

00:09:14

that space and where they

00:09:16

see the discussion going. So

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the idea is sort of

00:09:19

you know, brief presentation comments

00:09:21

brief presentation comments and so

00:09:22

on and so forth. We'll

00:09:25

be keeping an eye on

00:09:28

the chat for questions from

00:09:30

the audience. We might try

00:09:32

to take some of those

00:09:32

as we go on the

00:09:33

different topics or we may

00:09:35



save some of them up

00:09:36
for the end so bear

00:09:38
with us as we proceed

00:09:40
fluidly through this process, but

00:09:41
we want it to be

00:09:42
as dynamic as possible. So

00:09:43
I have done more than

00:09:44
enough talking and I'm going

00:09:46
to turn the stage over

00:09:47
to honestly to help us

00:09:48
with a bit of background

00:09:50
and understanding what's happening in

00:09:52
the reform discussion. Thank you

00:09:55



very much. Thank you Marin.

00:09:58

Thank you, Jose Antonio Maria

00:10:00

Lucia and all of the

00:10:02

organizers for having me. I

00:10:05

was with you last year

00:10:07

and I'm very glad to

00:10:09

see that this very valuable

00:10:10

initiative is continuing to grow

00:10:14

and always very pleased to

00:10:17

join to join in and

00:10:19

give you an update of

00:10:20

what we're doing currently in

00:10:22

answer travel in answer trust

00:10:24



working group three. So what

00:10:26

I'd like to just start

00:10:28

is it's sort of an

00:10:30

update for you because I

00:10:31

already mentioned a number of

00:10:33

these different elements of Reform

00:10:35

last year, but I'm very

00:10:39

pleased to say that a

00:10:40

lot has happened in spite

00:10:42

of having to scramble with

00:10:45

difficult meeting conditions at very

00:10:48

odd hours across the globe

00:10:51

and with with limited Reference

00:10:54



time the working group managed

00:10:57

to move along quite a

00:11:01

number of of these reform

00:11:03

elements and it did so

00:11:05

and we are on these

00:11:07

different reform elements in different

00:11:09

stages. So you might have

00:11:11

seen last year already this

00:11:13

little house that I like

00:11:15

to show because I think

00:11:17

it gives you an impression

00:11:19

of coherence in what we're

00:11:21

doing and I hope that

00:11:24



will convey that it's a

00:11:26

coherent effort that all the

00:11:29

the member states the The

00:11:32

Observer States the ngos the

00:11:34

igo's the academic Forum the

00:11:37

practitioners group contributing to in

00:11:41

the answer to our context.

00:11:42

So when I'm saying where

00:11:45

we are we are working

00:11:47

on building a number of

00:11:49

the building blocks of the

00:11:51

little house and we have

00:11:52

for example Quite a lot

00:11:55



on the the first the

00:11:59

first little piece of building

00:12:03

on the left, which is

00:12:04

the development of investor State

00:12:08

mediation to strengthen access to

00:12:11

mediation to make it a

00:12:13

more conducive possibility for for

00:12:18

disputing parties for the time

00:12:20

being. The treaties are almost

00:12:23

a majority of the treaties

00:12:25

is silent about the possibility

00:12:27

to go for mediation the

00:12:29

ones that are proposing mediation

00:12:32



do so in Very limited

00:12:36

in a very limited time

00:12:37

frame for example in only

00:12:39

during the cooling off period

00:12:41

and it's only with very

00:12:43

recent treaties that we've seen

00:12:45

mediation taking its actual role

00:12:49

in as a credible alternative.

00:12:51

So this is being this

00:12:53

is Advanced quite a lot.

00:12:54

We had an intercessional meeting

00:12:56

hosted by China by the

00:12:58

Hong Kong Saar only. I

00:13:02



think three weeks ago and

00:13:04

during this session we managed

00:13:06

to have a very good

00:13:07

discussion about the different ways

00:13:09

of fostering more mediation in

00:13:13

invest the state dispute settlement

00:13:15

another area where we have

00:13:17

also Advanced quite a lot

00:13:19

is on the development of

00:13:20

an advisory Center patterned along

00:13:24

the lines of the advisory

00:13:26

Center that has been working

00:13:27

quite effectively in the WTO

00:13:30



and there we have already

00:13:33

had several. Meetings of the

00:13:36

working group discussing the advisory

00:13:38

Center and we're now at

00:13:40

the stage of discussing text

00:13:42

which would focus The Advisory

00:13:47

Center on its scope on

00:13:49

its membership on how to

00:13:51

finance it. We have also

00:13:53

a very comprehensive study of

00:13:55

the various Ways and Means

00:13:57

to to set up such

00:13:59

an advisory Center. So where

00:14:02



we have also Advanced is

00:14:04

on the discussions of what

00:14:08

I call the second floor

00:14:10

of the little house, which

00:14:12

is the Appellate mechanism and

00:14:15

here you will hear more

00:14:16

from Margie about where we

00:14:20

stand currently and here again,

00:14:22

we have started drafting. Thanks

00:14:29

for additions working group. There's

00:14:32

still a lot to be

00:14:33

done. But we're going to

00:14:48

be losing Anna's connection, but

00:14:51



I'm gonna hope that she

00:14:52

comes back because I want

00:14:52

to hear what it goes

00:14:53

on top of the house.

00:15:26

All right, we're gonna hope

00:15:27

that Anna returns with us

00:15:28

quickly. But in the interest

00:15:33

of not losing any time.

00:15:35

Maybe we should move on.

00:15:39

Colin why don't you wanting

00:15:41

to pick up And and

00:15:43

share with us sort of

00:15:44

the third building block from

00:15:46



the left the use proposal

00:15:48

for the investment court and

00:15:50

how that's going to potentially

00:15:51

build up to the second

00:15:52

story of the house. Yeah,

00:15:55

and thank you. I'm happy

00:15:56

to take that this up

00:15:58

and I keep on going

00:15:59

as long as situated we

00:16:01

can see when banana and

00:16:03

comes back. So let me

00:16:05

also start by by and

00:16:07

thanking and the organizers for

00:16:09



having me here with much

00:16:13

prefer to be physically in

00:16:14

Washington meeting you all but

00:16:15

we have to do it

00:16:17

with with things and as

00:16:19

they are and And yeah,

00:16:24

and it just takes me

00:16:27

and said she's having a

00:16:28

problem reconnecting. Well, we will

00:16:32

try to get in Forge

00:16:34

ahead and then we can

00:16:35

Circle back. Okay, that's to

00:16:38

share. So I so and

00:16:41



I feel a bit like

00:16:41

I feel a rather awkward

00:16:43

here because I'm coming to

00:16:46

Washington arbitration week. And the

00:16:51

main point that I want

00:16:52

to make is that arbitration

00:16:53

is not a very good

00:16:54

idea for investment dispute settlement.

00:16:56

And so you can throw

00:16:58

virtual rotten vegetables at me.

00:17:01

And if you want in

00:17:03

that sense is probably safer

00:17:04

to do this virtually rather

00:17:05



than and and But I

00:17:09

think I think it's important

00:17:10

to start with that point

00:17:14

because I think what we're

00:17:16

seeing and you can see

00:17:16

it on on on the

00:17:18

screen with with Anna slide

00:17:21

is is we are thinking

00:17:22

about how the system should

00:17:24

be designed for for the

00:17:28

future and I think Marion

00:17:29

you put it very well

00:17:30

that it's it's maybe in

00:17:32



his teenage years not quite

00:17:33

sure where it's going the

00:17:35

direction it wants to take

00:17:36

and it and it's it's

00:17:37

a it's a moment of

00:17:38

thinking and consolidation. and I

00:17:41

think it's it's important. to

00:17:44

look back in that context

00:17:47

and think about how the

00:17:48

system was created in many

00:17:51

senses. The birth of the

00:17:54

system is an old birth.

00:17:56

In the sense that the

00:17:58



the dispute settlement system was

00:18:02

developed principally through the exit

00:18:04

convention historically through the executive

00:18:06

convention. And without a clear

00:18:08

idea of the nature of

00:18:12

the regime to which it

00:18:13

would apply. It was foreseen,

00:18:15

of course a little bit

00:18:16

apply to investment contracts investment

00:18:18

laws investment treaties, but I

00:18:20

don't think anybody in the

00:18:22

1960s when it was developed

00:18:24

in visaged that it could

00:18:26



be applying to 3,000 audit

00:18:30

and treaties. So I think

00:18:33

one of the things that

00:18:33

we have to think about

00:18:34

and this is one of

00:18:35

the points that the European

00:18:37

unionist member states make in

00:18:39

in central is you know,

00:18:42

if when we look at

00:18:42

the system today as a

00:18:45

maturing system and would we

00:18:47

still choose this system of

00:18:49

dispute settlement? and we think

00:18:53



that the answer to that

00:18:56

should be should be normal

00:18:57

and because we think the

00:19:00

system is inherently one, which

00:19:02

is if you want a

00:19:04

public law one or a

00:19:05

constitutional law and system because

00:19:08

it is and judging public

00:19:11

actions So in each case

00:19:13

it is a public action,

00:19:14

which is subject and to

00:19:16

dispute it is the dispute

00:19:19

serve to fix a line

00:19:21



between the what the state

00:19:23

can do and what requires

00:19:25

compensation to a particular individual.

00:19:30

It's unidirectional in the sense

00:19:32

that it is typically always

00:19:34

a an investor an individual

00:19:37

bringing action against the state

00:19:40

and it has a repeat

00:19:42

function in the sense that

00:19:43

the treaties are established. They're

00:19:45

in principle in place for

00:19:46

considerable period of time and

00:19:49

because there can be repeated

00:19:52



litigation the questions of consistency

00:19:55

in predictability, which come up

00:19:57

frequently in the working group

00:19:58

and are extremely important. I

00:20:01

think one of the points

00:20:02

that you're being member states

00:20:04

and make another supporters of

00:20:06

government making some make is

00:20:08

that When you look around

00:20:10

the world at comparable types

00:20:13

of systems. And judging and

00:20:18

public lawmakers public judging constitutional

00:20:20

law matters, you see that

00:20:22



Societies or systems or consistently

00:20:26

revert to permanent bodies. We

00:20:29

can see that in our

00:20:29

domestic courts or domestic administrative

00:20:32

constitutional Public Law Courts, and

00:20:34

we can see that in

00:20:35

international Regional course the deal

00:20:38

with for example and human

00:20:40

rights and matters. And we

00:20:43

think there are there are

00:20:44

powerful reasons and for that

00:20:47

and we think the primary

00:20:50

one is that permanent bodies

00:20:54



deliver consistency and predictability. and

00:20:59

I think a good example

00:21:01

of this currently not in

00:21:04

a particularly good shape, but

00:21:05

a good example of this

00:21:06

is the WTO pellet body

00:21:09

where there was a lot

00:21:10

of criticism of the WTO

00:21:12

in the 1980s in the

00:21:13

1990s about the weather is

00:21:17

getting the balance right in

00:21:18

that moment in time that's

00:21:19

between free trade and protection

00:21:21



of the environment. And the

00:21:23

the creators of the WTO

00:21:27

did not change the substantive

00:21:30

law. What they did is

00:21:31

they changed the adjudicatory system

00:21:35

created a permanent mechanism in

00:21:37

any available body and these

00:21:40

concerns and have over time

00:21:42

and dissipated because the Appellate

00:21:45

body has developed a particular

00:21:48

approach or and on the

00:21:51

balance between for example and

00:21:53

trade and environmental concern. and

00:21:56



so in our view this

00:21:59

move to create a permanent

00:22:03

Court brings about that consistency

00:22:04

predictability with all due respect

00:22:08

the Margie's position. It doesn't

00:22:09

in our review and appellate

00:22:10

mechanism is a helpful part

00:22:12

of that, but it's not

00:22:12

enough in and of itself

00:22:14

to bring about that consistency

00:22:16

and predictability, but we think

00:22:19

it also has the advantage

00:22:20

that it reduces costs, which

00:22:21



is another one of the

00:22:22

big issues that comes up

00:22:23

in the working group because

00:22:27

of the consistency ability. So

00:22:29

actors are better able to

00:22:31

decide whether to bring a

00:22:32

case. And respondents are better

00:22:35

able to decide whether to

00:22:36

litigate something out or whether

00:22:38

to and settle. And we

00:22:41

think it also has an

00:22:43

advantage that it is a

00:22:45

more effective. Provides more effective

00:22:48



resolution of some of the

00:22:49

ethical issues which come up

00:22:51

in which which Cara I'm

00:22:53

sure we'll talk about in

00:22:56

a few minutes. Now, how

00:22:58

do we see this? What

00:23:00

are the concrete building blocks?

00:23:01

These are being and put

00:23:03

in place as we speak

00:23:04

there is The next meeting

00:23:08

of the working group in

00:23:10

February is slated to discuss

00:23:14

these matters and their texts

00:23:16



which are and available and

00:23:19

looking into these measures. From

00:23:22

our perspective a permanent mechanism

00:23:26

Court. We need to have

00:23:28

and a full-time educators. There

00:23:32

are appointed on long-term non-renewable

00:23:35

basis to ensure and they

00:23:38

are independent. For us it's

00:23:41

extremely important that there be

00:23:43

a mechanism to screen the

00:23:46

suitability of candidates to be

00:23:47

appointed to the parent mechanism

00:23:49

and there's text. On that

00:23:52



particular matter, which is before

00:23:54

the working group. And we

00:23:59

we think that it's also

00:24:00

important that they're being appeal

00:24:03

mechanism. So one and Anna's

00:24:05

presentation, which is still on

00:24:07

on the screen and we

00:24:09

think the two parts go

00:24:11

together permanent court and and

00:24:13

then appeal and for us

00:24:15

this also extremely important and

00:24:17

I think this is also

00:24:18

a big part of the

00:24:19



agenda and that we have

00:24:23

mechanisms that can ensure that

00:24:25

these reforms permits the application

00:24:28

their application to all and

00:24:30

existing treaties and we we

00:24:33

foresee and we envisage and

00:24:36

often approach that allow the

00:24:38

application to existing treaties. So

00:24:40

that's what I wanted to

00:24:41

see. I don't know how

00:24:42

concrete that was and but

00:24:44

I think and given the

00:24:49

The kind of issues before

00:24:51



I think it's useful at

00:24:52

least for me to start

00:24:52

by coming in and explaining.

00:24:55

What is the impetus behind

00:24:57

what we think is it

00:24:58

would be an important shift

00:24:59

from one system of disability

00:25:01

immune system and one system

00:25:02

of disputes elements to to

00:25:04

another, you know, stop there

00:25:06

and happy to engage in

00:25:07

the discussion as we go

00:25:08

forward. Thank you. Thanks so

00:25:11



much for setting the stage

00:25:12

their Colin and I did

00:25:13

just want to say thank

00:25:14

you so much. I think

00:25:16

procedurally will will Forge ahead

00:25:18

and and spend some time

00:25:20

talking about the investment court

00:25:21

and the Appellate mechanism and

00:25:22

then the code of conduct

00:25:23

and then we'll come back

00:25:24

and ask on a sort

00:25:25

of finish out some of

00:25:26

her thinking about the overall

00:25:27



reform program and that's and

00:25:31

then Karen will weigh in

00:25:31

as well on some of

00:25:33

those big picture issues. So

00:25:34

let's pick up this issue

00:25:35

the investment court and and

00:25:38

Colin I was I think

00:25:39

it's admirable if challenging to

00:25:42

to say that you're modeling

00:25:43

it on the WTO dispute

00:25:45

resolution system, which is a

00:25:46

system that's currently more of

00:25:47

them. So is there a

00:25:50



danger in a state created

00:25:51

system of State breakdown? I'm

00:25:54

doing do do we run

00:25:56

those same kinds of risks

00:25:57

that we see in the

00:25:58

WTO system right now, or

00:26:00

are you already thinking about

00:26:01

the preventive mechanisms? Just to

00:26:06

be clear. We don't we

00:26:07

don't model it as such

00:26:08

understood but you invoked it.

00:26:10

So I'm gonna I'm gonna

00:26:11

hold you to that. That's

00:26:12



fair enough and We don't

00:26:16

we don't model on it

00:26:17

and model it precisely on

00:26:18

on in part because precisely

00:26:22

as you see and we

00:26:24

have collectively learned lessons about

00:26:27

how International judicatory body should

00:26:30

should function. I think one

00:26:32

of the advantages that working

00:26:34

group three has and the

00:26:36

academic forum and particular contribute

00:26:39

to this is We have

00:26:40

had a slate of international

00:26:43



courts in operations since what

00:26:46

the early mid 1990s. And

00:26:50

we know a lot of

00:26:51

things that work. I mean

00:26:54

who also lots of things

00:26:54

that don't work? And and

00:26:58

I won't get into the

00:26:59

specifics of all of those

00:27:01

different things, but I think

00:27:02

one of the things that's

00:27:03

incumbent on the working group

00:27:04

is to actually precisely look

00:27:05

and see well, what are

00:27:07



the practices that we would

00:27:10

want to take up that

00:27:11

are effective and that are

00:27:13

useful. So one if you

00:27:15

look at the papers we've

00:27:16

submitted one thing is that

00:27:18

we would not want to

00:27:21

have and United voting and

00:27:25

for your appointment all adjudicators.

00:27:29

At the same time, I

00:27:30

think something that we also

00:27:31

think is has gone wrong.

00:27:33

The WTO is there has

00:27:36



not been as an effective

00:27:37

and communication or exchange between

00:27:42

the adjudicators and the legislators.

00:27:46

If you want people that

00:27:47

negotiators the states that have

00:27:50

created the treaties and we

00:27:52

think that are good ideas

00:27:53

on the table that start

00:27:55

to address that but I

00:27:57

think one of the things

00:27:57

that's coming up into trial

00:27:59

discussions is precisely you start

00:28:00

to see some of these

00:28:01



different things beginning to and

00:28:03

mail this too to positive

00:28:06

and too strong award at

00:28:07

this moment in time, but

00:28:08

you begin to start to

00:28:09

see some of these ideas

00:28:10

and fusing and coming together.

00:28:13

So and we you know,

00:28:16

there are lessons to be

00:28:18

learned not just from the

00:28:20

WTO, but from a number

00:28:21

of international organizations that and

00:28:26

That we can use when

00:28:27



we talk about how to

00:28:28

structure and apparently mechanism. Karen

00:28:31

do you want to chime

00:28:32

in there? Yes, thanks Marin.

00:28:36

And again, I'll just quickly

00:28:38

Echo that my thanks to

00:28:39

the organizers for inviting me

00:28:40

to the to the session

00:28:42

and I really appreciate the

00:28:43

opportunity to participate and in

00:28:45

addition to your general disclaimer

00:28:47

about these being my personal

00:28:48

remarks. I should also note

00:28:49



that the Biden Harris Administration

00:28:51

is still formulating its positions

00:28:53

in many International Economic Policy

00:28:55

areas. So my comments should

00:28:57

be are certainly without prejudice

00:29:00

to any policy development. So

00:29:01

they are genuinely personal observations.

00:29:04

Now that said I think

00:29:06

you know is Colin has

00:29:08

laid out sort of the

00:29:10

case for a permanent institution.

00:29:11

I think as we step

00:29:13

back and look at where

00:29:14



or I think it's important

00:29:16

for those who are participating

00:29:17

and working group three to

00:29:19

ask themselves. Really whether the

00:29:21

case for a new permanent

00:29:22

institution has been Justified and

00:29:24

and to date weird, you

00:29:27

know, it's not as clear

00:29:28

that it has I think

00:29:30

it's important to keep in

00:29:31

mind that when looking to

00:29:32

establish a new institution. It's

00:29:34

not Game place in a

00:29:36



vacuum. It will come in

00:29:37

as you pointed out, you

00:29:38

know to a framework or

00:29:41

a landscape if you will

00:29:43

where over 2,600 investment agreements

00:29:47

have been interpreted and we

00:29:49

have three decades of practice

00:29:50

and it's important to sort

00:29:52

of look at what's useful

00:29:53

from that practice and what

00:29:54

isn't as opposed to completely

00:29:56

just a Doing away with

00:29:59

that practice, you know, I

00:30:01



think two there are there

00:30:03

may be certain, you know

00:30:04

advantages about a permanent court,

00:30:07

but at this point those

00:30:08

seem to be pretty much

00:30:09

on paper in the investment

00:30:10

context. We don't know how

00:30:12

interpreting a variety of different

00:30:14

agreements which is not the

00:30:16

situation that we have in

00:30:17

the WTO context. I don't

00:30:18

want to get into debating

00:30:19

the WTO at this stage.

00:30:22



So that's the last time

00:30:24

I will I'll refer to

00:30:25

use those three letters and

00:30:28

I think we have to

00:30:29

keep in mind that there

00:30:30

are certain advantages to the

00:30:32

arbitration process, which is not

00:30:34

something that states don't research

00:30:36

resort to a time as

00:30:38

well. And I think there

00:30:39

you have certain efficiencies of

00:30:42

not having a standing body

00:30:43

to have to upkeep you

00:30:45



have party autonomy and flexibility

00:30:47

in terms of being able

00:30:48

to establish tribunals when they're

00:30:51

necessary because I think it's

00:30:53

important to keep in mind

00:30:54

that not all states are

00:30:55

going to be sued on

00:30:57

or are going to be

00:30:58

involved. Involved in dispute settlement

00:31:00

on a regular basis at

00:31:02

the same basis and as

00:31:03

we can see, you know

00:31:04

certain states have over time

00:31:06



had more involvement in the

00:31:08

in this in in the

00:31:09

process than others and I

00:31:12

think two, you know, it's

00:31:13

important to also keep in

00:31:14

mind that these are very

00:31:15

different types of instruments from

00:31:17

the type of instruments that

00:31:18

owns a trial typically looks

00:31:19

at so the working group

00:31:20

is really kind of having

00:31:21

to approach this in a

00:31:23

different way and think about

00:31:24



what it's role is in

00:31:26

terms of establishing something that

00:31:27

would be permanent and how

00:31:29

how the delegations would then

00:31:31

perhaps stay engaged in a

00:31:34

process were something to be

00:31:35

included and I think that

00:31:36

raises some some genuine concerns

00:31:38

and while Colin mentioned that

00:31:40

there could there needs to

00:31:41

be better relationship between the

00:31:43

legislators and the and the

00:31:45

tribunals. I think some of

00:31:46



the rules that are being

00:31:47

set up now may that

00:31:50

we're looking at don't don't

00:31:52

go in the direction of

00:31:53

supporting greater involvement that they

00:31:56

seem to be disassoc. Dating

00:31:58

the relationship between the treaty

00:32:00

parties and the decision makers

00:32:01

and not May perhaps taking

00:32:03

as great a providing for

00:32:05

greater involvement, which one can

00:32:07

do on a more targeted

00:32:08

approach and then I think

00:32:10



finally, you know, it's important

00:32:11
to that that for a

00:32:13
structural reform. I think one

00:32:14
of the questions that still

00:32:15
needs to be asked is

00:32:16
How widely how wide participation

00:32:19
would need to be for

00:32:21
it to be successful? I

00:32:23
think something that ends up

00:32:24
being more Regional may not

00:32:27
actually be viewed in as

00:32:30
having being legitimate as a

00:32:32
multilateral approach and we have

00:32:35



to be cognizant of the

00:32:36

fact that this Spirit of

00:32:37

junction in investor State dispute

00:32:40

settlement where states are as

00:32:42

you mentioned recalibrating reassessing their

00:32:45

their roles and making Sovereign

00:32:47

decisions in their own capacity

00:32:48

on when and how investors

00:32:51

States settlement should be included

00:32:53

and I think you know,

00:32:54

the United States recent practice

00:32:57

in the usmca and chapter

00:32:59

14 is a good example

00:33:00



of that. We're even within

00:33:01

a particular agreement. You may

00:33:02

have more discrete and differentiated

00:33:06

approaches to how how you

00:33:07

address that so I think

00:33:08

ultimately it's important that while

00:33:10

we may have a concrete

00:33:11

proposal that those proposals still

00:33:14

need to be justified as

00:33:15

we go forward in terms

00:33:16

of Of thinking about reform.

00:33:18

Thanks. Thanks again Kiara. Did

00:33:21

you on time in there?

00:33:23



Yes, thank you. Thank you

00:33:24

very much. It is thank

00:33:26

you all for inviting me.

00:33:27

I think it's really it

00:33:28

is really a pleasure to

00:33:29

be here. I would like

00:33:31

to just give some comments

00:33:32

a little bit of a

00:33:33

follow-up to both kind and

00:33:35

calling but I think it's

00:33:36

a little to my point

00:33:37

a little premature to really

00:33:39

think about like say Pro

00:33:40



or corn because we're really

00:33:41

at the very early stage

00:33:42

still and so what I

00:33:44

would like to offer is

00:33:45

more comments General comments what

00:33:48

I find quite interesting about

00:33:49

this idea of the permanent

00:33:50

courage, is that of all

00:33:53

the reform proposal. This is

00:33:54

probably the most far-reaching reaching

00:33:57

one in the sense that

00:33:58

he provide a very systemic

00:34:00

reform that will change is

00:34:02



yes system really rather radically,

00:34:06
and he also has the

00:34:07
benefits of addressing a lot

00:34:09
of the concerns that we're

00:34:12
identified as problematic when I

00:34:14
SDS so not only the

00:34:16
issue of the selection and

00:34:17
appointment of a Traders at

00:34:18
adjudicators, but also consistency predictability

00:34:21
of decisions And time and

00:34:24
cost so it is really

00:34:25
a measure that has that

00:34:27
has a far-reaching aim and

00:34:29



what I think this is

00:34:32

my two comments are what

00:34:33

I think is very helpful

00:34:34

to think about when I

00:34:36

think about the court is

00:34:38

that it is. Yes you

00:34:39

think about the court but

00:34:41

it's not a kind of

00:34:42

model on the international court

00:34:44

of justice court and I

00:34:47

think this is quite helpful.

00:34:48

So it's a permanent court

00:34:49

but I think for those

00:34:51



of us who are familiar

00:34:52

with ISD. Yes, it's really

00:34:53

something that is much more

00:34:54

familiar as possibly I don't

00:34:57

want to talk about every

00:34:58

Tio also because it has

00:34:59

been already addressed. But if

00:35:01

you think about the US

00:35:02

Iran tribunal model, I think

00:35:04

that would be quite interesting

00:35:05

because there we already know

00:35:06

some basics of what we're

00:35:07

looking for. So what they

00:35:09



you and others who want

00:35:11

to think about the court

00:35:12

and looking for so thinking

00:35:14

about it two tiered models,

00:35:15

so we have two instances,

00:35:17

which I think are helpful

00:35:18

and address a lot of

00:35:19

the issues. We think about

00:35:20

permanent judges also and And

00:35:23

very specific jurisdiction both personal

00:35:25

and subject matter and I

00:35:26

think thinking about the possible

00:35:29

Court as in these familiar

00:35:31



terms for SDS is kind

00:35:33

of more helpful. And also

00:35:35

I think it's what interesting

00:35:36

thinking to the about the

00:35:38

building that Anna presented is

00:35:41

is part of a bigger.

00:35:46

Of a bigger project. So

00:35:47

it's part of a it

00:35:49

doesn't need to be endorsed

00:35:51

or adopted as a global

00:35:52

as a global court. It's

00:35:54

more. I think my understanding

00:35:56

is more of an opt-in

00:35:57



and in that way. It's

00:35:59

kind of kind of all

00:36:00

International majority systems you obtain,

00:36:03

you know, but I think

00:36:04

it's interesting to think about

00:36:06

that. Also that is one

00:36:07

of the different systems that

00:36:09

are offered as an ISS

00:36:11

reform. Thank you. I know

00:36:15

I'll give you the floor

00:36:16

and then and then turn

00:36:17

over to Margie because I'm

00:36:18

hoping that Margie can take

00:36:19



her comments and then move

00:36:20

us on to talking about

00:36:21

the Appellate mechanism. So I

00:36:25

something there. Thank you very

00:36:27

much and and apologies for

00:36:29

having been kicked out. It

00:36:31

took me a bit of

00:36:31

time to re-emerge and so

00:36:34

I just wanted to say

00:36:35

that when when I was

00:36:37

presenting these different entry doors

00:36:40

for investors and also the

00:36:43

thanks for putting it up.

00:36:44



Again, the two things that

00:36:47

I would like to to

00:36:48

flag. First of all on

00:36:50

top of the building is

00:36:52

the state control and that

00:36:54

is something that I think

00:36:55

is very broadly accepted in

00:36:58

the working group that what

00:37:00

the states at least want

00:37:02

to do is to regain

00:37:03

control over their treaties and

00:37:05

over this system that they

00:37:07

have established. They are looking

00:37:09



at it with different priorities

00:37:12

with different approaches, but they

00:37:14

really want to regain the

00:37:17

control over the treaties of

00:37:19

which they are the Masters

00:37:20

whether we like it or

00:37:21

not and they have farmed

00:37:24

out dispute set. They have

00:37:27

farmed out interpretation and all

00:37:31

of this is now coming

00:37:32

back on the table as

00:37:34

we form elements to ensure

00:37:36

that the states are not

00:37:37



completely left out of the

00:37:40

interpretation of that treaties and

00:37:42

that they have ways of

00:37:43

correcting course when that is

00:37:45

necessary. And the second point.

00:37:47

I wanted to make in

00:37:48

this regard is that indeed

00:37:50

we and that's why I

00:37:51

started with the the two

00:37:53

wings of the building is

00:37:55

that we are at different

00:37:57

stages of development and the

00:38:00

multilateral investment Court proposal is

00:38:03



a is it because it's

00:38:06

it's a complex reform element

00:38:09

because it touches upon many

00:38:11

others because it has a

00:38:13

strong of course link to

00:38:15

this appellate mechanism. That is

00:38:18

also favored by a number

00:38:20

of states it is we

00:38:23

are really beginning as Cara

00:38:26

was Learning to look into

00:38:28

it in depth and that's

00:38:30

exactly what we're going to

00:38:31

do in the coming sessions

00:38:32



of the working group including

00:38:34

the next informal session that

00:38:37

takes place in one week

00:38:39

on our next week. Actually

00:38:41

where we're going to look

00:38:42

into also the design aspects

00:38:46

and we will be discussing

00:38:48

more on costs of establishing

00:38:51

such a body on text

00:38:54

for establishing it on linkages

00:38:58

between the the designation selection

00:39:03

of of a judicators and

00:39:06

and the the mechanism themselves.

00:39:10



So we are really getting

00:39:12

into the hard core of

00:39:14

the of one of the

00:39:16

the strong and difficult elements

00:39:19

of Reform when we're looking

00:39:21

into this court and into

00:39:23

the Appellate mechanism. So I'm

00:39:24

glad that you selected them

00:39:26

for A more in-depth discussion

00:39:30

at that panel. Thank you.

00:39:32

Great. Margie I held you

00:39:34

off because as I said,

00:39:35

I wanted to get your

00:39:36



comments on the on the

00:39:38

permanent Court idea, but then

00:39:39

also you can take us

00:39:40

into the the Appellate mechanism,

00:39:42

which is sometimes presented as

00:39:43

an alternative. Sometimes as Colin

00:39:46

mentioned. It's sort of part

00:39:46

of the of the investment

00:39:48

Court discussion. And so I

00:39:51

hope you'll take us there.

00:39:53

Thank you Maureen and well

00:39:54

before before starting with the

00:39:57

discussion, so I would like

00:39:58



to thank the the organizers

00:40:00

especially Houston Rivas for the

00:40:03

can invitation and putting together

00:40:04

these. Connell and of course

00:40:07

A View Marine for for

00:40:08

the moderation and for mentioning

00:40:11

at the beginning that all

00:40:12

our comments are in our

00:40:15

personal capacity So I would

00:40:19

like just to start. So

00:40:21

when with what Colin was

00:40:24

mentioned it at the beginning

00:40:25

and and the thing is

00:40:26



that when the system was

00:40:28

created, of course, it was

00:40:30

not created for the Myriad

00:40:32

of investment agreements that we

00:40:34

have right now went the

00:40:36

exit was a salvage. So

00:40:38

there was just a few

00:40:39

investment agreements and it was

00:40:42

created for contract all these

00:40:44

Foods more than for investment

00:40:46

dispute. So the enormous that

00:40:49

we have right now it

00:40:50

was good for that system

00:40:53



that it when it was

00:40:55

created. But right now the

00:40:58

reality is that it doesn't

00:41:00

adjust to the reality that

00:41:03

we have right now with

00:41:05

almost 3,000 of investment agreements

00:41:08

in force. So that is

00:41:10

you know, my first general

00:41:12

comment second. I would like

00:41:15

to just refer to few

00:41:17

issues and compare the Appellate

00:41:21

mechanism with the multilateral investment

00:41:23

in court because Colinas also

00:41:26



mentioned that the Appellate mechanism

00:41:29

will not solve everything and

00:41:31

that and because of that

00:41:34

the standard body will be

00:41:36

preferable than just having an

00:41:39

appealing mechanism. But first I

00:41:43

was I I would suggest

00:41:45

that the establishment of an

00:41:49

appeal mechanism does not raise

00:41:51

these same concerns as the

00:41:53

permanent investment Port will do

00:41:55

regarding the selection and the

00:41:58

appointment of the decision makers

00:42:00



as parties to the dispute

00:42:02

may continue to appoint the

00:42:04

decision makers of the first

00:42:05

inside Trevino and and in

00:42:08

fact police do not make

00:42:09

appointments at the review level,

00:42:11

right? So In these set

00:42:15

aside of arbitrary tribunals of

00:42:17

arbitra awards. Sorry is decided

00:42:19

by judges at the seed

00:42:21

of the arbitration and likewise

00:42:23

members of the adhood Committees

00:42:25

under the exit system. It

00:42:27



are appointed from a Roser

00:42:29

of arbitrators by the chairman

00:42:31

of the administrative Council. So

00:42:33

that will make a big

00:42:37

difference because in the if

00:42:40

we have only an appellate

00:42:43

mechanism then parties will continue

00:42:45

to have the right to

00:42:47

a point the decision makers

00:42:49

at the first instance. Second

00:42:52

it's have been said that

00:42:54

it could be problematic to

00:42:56

operate remand because the ad-hoc

00:42:59



first intervenos they will end

00:43:03

to exist. However, unlike like

00:43:06

in domestic contexts where they

00:43:09

remount of the issue to

00:43:10

lower instance is the rule

00:43:13

and appeal tribunal in their

00:43:14

retention contests should be able

00:43:16

to modify, um, or reverse

00:43:19

illegal findings and conclusions of

00:43:21

the first time, you know

00:43:22

without any needs to remind

00:43:23

the issue to the interview.

00:43:25

so we could argue that

00:43:28



that problem could be solved

00:43:30

with having just an appeal

00:43:33

mechanism and not So with

00:43:38

that it won't make a

00:43:39

big difference if we have

00:43:40

you know, the whole first

00:43:43

instance and second tribunal as

00:43:45

a permanent standing, buddy. so,

00:43:48

um in that sense an

00:43:52

atomic is more will avoid

00:43:53

different submissions of these people

00:43:55

to a new trip, you

00:43:56

know, whenever the tribunal a

00:43:58



word has been set aside,

00:43:59

or I know. And and

00:44:01

appeal mechanism as I mentioned

00:44:04

it would allow the parties

00:44:06

to continue selecting the decision

00:44:07

makers at the first level

00:44:09

and at the same time

00:44:10

it will set a higher

00:44:14

level of continuity in the

00:44:16

composition of adjudicators as a

00:44:18

second level. Which is in

00:44:20

our view he element to

00:44:23

achieve consistency and predictability because

00:44:26



the Appel mechanism is conceived

00:44:29

to create coherence and consistency

00:44:31

in the issue. So this

00:44:36

is a clear advantage of

00:44:38

an hybrid procedure with an

00:44:41

unhapp first instance tribunal preserving.

00:44:44

The party appointed me appointment

00:44:46

principle and an appeal mechanism

00:44:48

for 3D base arbitration regardless

00:44:51

of the institution or arbitration

00:44:54

rules under which their rotation

00:44:56

is conducted. And third and

00:45:00

I'm glad that Anna mentioned

00:45:02



the cost of the proceedings

00:45:05

because this is also another

00:45:06

element that is of concerns

00:45:09

of a state police. So

00:45:11

how much it would cost

00:45:12

right? So an appeal mechanism

00:45:16

with understanding of assistant everybody

00:45:18

who also present several advantage

00:45:21

in our view compared to

00:45:22

a multilateral investment court regarding

00:45:26

because of the procedures in

00:45:28

the case of a permanent

00:45:29

investment Court. It is uncertain

00:45:31



how dispute settlements we funded

00:45:34

and maintain over time. Well,

00:45:37

it is true that financing

00:45:39

contributions could be made by

00:45:40

contriving parties in accordance with

00:45:42

the perspective levels of development.

00:45:44

You could present a heavy

00:45:46

burden on public finances for

00:45:48

some developing countries. So do

00:45:52

have not only these salaries

00:45:54

of the adjudicators, but also

00:45:56

you have to think on

00:45:58

how to fund so to

00:46:02



have a Secretariat and the

00:46:04

other the other problem with

00:46:06

that is how can you

00:46:08

match this system with the

00:46:10

currency system with the exit

00:46:12

or the other? The the

00:46:15

other let's say under the

00:46:18

the under the UNC trouble

00:46:22

arbitration rules. So that in

00:46:26

our view who presents several

00:46:28

inconvenience from because purpose perspective.

00:46:32

So, I don't know the

00:46:34

other thing is we'll have

00:46:36



to think in how long

00:46:37

or how long would we

00:46:39

period of those adjudicators? Right?

00:46:42

And if we think that

00:46:45

we could think also on

00:46:47

the pool of arbitrators of

00:46:49

who have because it turns

00:46:51

depend on so Perhaps we

00:46:55

will be closing too much

00:46:56

the the pool of arbitrators

00:46:58

to decide the cases. So

00:47:01

with that I I think

00:47:02

I would finish my initial

00:47:04



comments and I'm looking forward

00:47:06

to hear from from others.

00:47:08

Thank you. Thank you, Margie.

00:47:10

Thank you so much Colin.

00:47:12

I gave you the unfair

00:47:13

setup of letting you explain

00:47:15

the permanent investment court and

00:47:17

then have to sit there

00:47:17

while everyone else commented on

00:47:18

it. I'll give you first

00:47:19

dibs on on responding on

00:47:22

the Appellate mechanism. And of

00:47:24

course, you can pick up

00:47:25



any of the fire discussion

00:47:26
as well and I will

00:47:28
say that Colin was the

00:47:29
one who warned me when

00:47:31
we were planning. This session

00:47:32
that the hard part is

00:47:33
going to be keeping us

00:47:33
moving along so we may

00:47:35
not have time to let

00:47:36
everybody comment on every proposal

00:47:38
but I'll get i'll let

00:47:39
you at least start us

00:47:40
off. Yeah, and thank you

00:47:45



very much Marin, and I

00:47:46

will try to be briefing

00:47:48

either. I think we could

00:47:49

talk about this until the

00:47:50

cows come home as as

00:47:51

the as they see and

00:47:54

I think maybe just a

00:47:56

couple of comments on the

00:47:59

Appellate body and idea and

00:48:03

and then maybe a couple

00:48:06

more General comments and picking

00:48:08

up also a couple of

00:48:09

points through meet and in

00:48:11



the chat, so As I've

00:48:14

said, we view an appeal

00:48:16

body as being something which

00:48:17

is important because it provides

00:48:20

a consistency provides Clarity provides

00:48:24

continuity and it provides a

00:48:27

finality and which we think

00:48:29

is is extremely and important

00:48:33

I think. We would be

00:48:36

concerned that a non-permanent first

00:48:41

instance. and Would would kind

00:48:45

of lead to continued and

00:48:46

complications? because you still have

00:48:50



the problems of Ethics the

00:48:54

problem of double-hearing that we

00:48:56

were struggling with in the

00:48:57

working group a couple of

00:48:58

weeks ago would remain an

00:49:02

important issue. You still would

00:49:05

have problems of cost? And

00:49:10

there's a recommendous frequently. There's

00:49:14

a very good video of

00:49:15

from Professor Philip Sands. Which

00:49:19

is available at Columbia and

00:49:21

Center for sustainable investment law.

00:49:24

I think and talking about

00:49:26



his experiences as an arbitrator

00:49:29

and he explains the impacts

00:49:31

on costs. and and I

00:49:34

think the other thing that

00:49:35

we see is that and

00:49:38

I think the experience is

00:49:40

clear that there are issues

00:49:43

and that cannot be we're

00:49:45

reminded is necessary. They can't

00:49:47

issues that cannot be completed

00:49:48

and on appeal and reminding

00:49:51

evidently in existing system is

00:49:55

is complicated. so but we

00:49:57



also think a bit more

00:49:58

fundamentally that there will be

00:50:01

issues if you create an

00:50:03

appellate body, there will be

00:50:05

issues of continuation of the

00:50:10

ad hoc system, whether they

00:50:11

adopt dripping will follow or

00:50:13

not what the Appellate body

00:50:15

has said and that we

00:50:16

think is likely to actually

00:50:17

lead to more of the

00:50:19

issue more cost than if

00:50:21

you have a permanent first

00:50:23



instance relating directly to an

00:50:26

appeal making And and I

00:50:29

think maybe and this I

00:50:31

would say a bit more

00:50:32

generally and you know, we

00:50:35

do have to of course

00:50:37

think about the system as

00:50:38

it as it stands today.

00:50:41

And we have to be

00:50:42

careful in terms of the

00:50:44

advantages and the disadvantages but

00:50:47

we also have to think

00:50:48

and I think this is

00:50:49



really the challenge for the

00:50:50

work. I think we all

00:50:51

have to think about how

00:50:53

do we deal with this

00:50:54

system in a long term?

00:50:59

If we are teenagers preparing

00:51:01

for or looking at it

00:51:03

as a teenager preparing for

00:51:04

adult life and a Karen

00:51:07

and I have teenagers about

00:51:09

almost the same age and

00:51:11

thinking about these things then

00:51:13

and you really are trying

00:51:15



to think of what is

00:51:16

the base that allows this.

00:51:20

System to grow into a

00:51:22

stable and and adult that

00:51:26

can can make sure that

00:51:28

that functions well. And and

00:51:32

we are not convinced and

00:51:34

I think this is really

00:51:34

the problem. We are not

00:51:35

convinced that. You know the

00:51:38

the areas which were identified

00:51:41

as being problematic in the

00:51:42

working group can be solved

00:51:44



without moving to a permanent

00:51:48

body because you still have

00:51:49

the ethics concerned. You still

00:51:51

have the And you still

00:51:56

have the consistency predictability concerns.

00:51:58

You still have the time

00:51:59

and cost and concerns and

00:52:01

there's only really by making

00:52:02

this change that you move

00:52:04

across now, like every new

00:52:06

system it will take time.

00:52:08

Like every new system is

00:52:10

easy to see what we

00:52:11



don't know what it looks

00:52:12

like yet and caress better

00:52:14

be right. We need to

00:52:15

start to look at what

00:52:16

it looks like before working

00:52:17

can make and judgmental, but

00:52:20

I wanted to also specifically

00:52:21

to pick up the point

00:52:22

of both can has and

00:52:25

made and Elsa and friend

00:52:30

of mine in the chat

00:52:31

about the existence of you

00:52:33

know, they're being many treaties.

00:52:35



Compared to the WTO where

00:52:37

there is there's one treaty

00:52:38

and now we think that

00:52:40

that problem is one that

00:52:43

is exaggerated. And because we

00:52:47

if you look at the

00:52:48

treaties these treaties have a

00:52:50

great deal of commonality across

00:52:52

them. So knowing how an

00:52:55

mfn Clause is going to

00:52:57

be interpreted having an a

00:53:00

permanent mechanism and an appeal

00:53:01

mechanism developing a consistent interpretation,

00:53:04



for example, mfn or national

00:53:05

treatment or for an equal

00:53:07

treatments and will provide guidance

00:53:10

for a large number and

00:53:13

of kitties. And it is

00:53:16

also something which is quite

00:53:17

common that and think about

00:53:19

this from a domestic systems.

00:53:21

Think about this even in

00:53:21

arbitration that we accept that

00:53:24

a judicators deal with different

00:53:27

sources of Law and can

00:53:29

make distinctions and construe them

00:53:31



in a way that the

00:53:33
negotiators intended. And so, you

00:53:36
know, I think from from

00:53:39
our perspective the fact that

00:53:41
there are large number of

00:53:42
treaties rather than being an

00:53:45
argument against a multilateral mechanisms

00:53:47
version argument in favor of

00:53:49
it because there is such

00:53:50
a similarity often identity and

00:53:54
across the treaties. But I'll

00:53:58
stop there and because we're

00:54:00
already as I want we're

00:54:02



already thinking about it. No,

00:54:04

but thank you for that

00:54:05

column. I think that's really

00:54:06

helpful. Let me let Karen

00:54:08

chime in and Kiara to

00:54:10

come in and pick up

00:54:11

what's been put out there

00:54:14

as one of the possible

00:54:15

solutions for those ethical issues

00:54:16

that the Colin was alluding

00:54:18

to and tell us more

00:54:19

about the code of conduct.

00:54:20

But Karen first, why don't

00:54:21



you take a minute or

00:54:22

two to react? Thanks Marin

00:54:25

and I will be very

00:54:26

brief and I think Marjorie

00:54:27

Margie set out. I think

00:54:29

the key issues that need

00:54:30

to be looked at when

00:54:31

we're looking at an appellate

00:54:32

and I I will leave

00:54:34

many of Collins points unresponded

00:54:36

to only because we have

00:54:37

a lack of time not

00:54:39

because of Any commonality on

00:54:41



some of them but I

00:54:42

think one of the key

00:54:44

issues and I will pick

00:54:45

up on this from Collins

00:54:46

point about many treaties is

00:54:48

that we really have to

00:54:49

Grapple with what do we

00:54:49

mean by consistency and predictability?

00:54:52

I mean, I think correctness

00:54:53

of interpretation is important, but

00:54:56

when we get into the

00:54:57

question of consistency, we don't

00:54:58

want consistent decisions that are

00:55:01



not consistent with the meaning

00:55:02

they understanding of the treaty

00:55:04

parties themselves. And so I

00:55:05

think that's an important safeguard

00:55:07

that we have to have

00:55:08

to work in. I think

00:55:09

we Have to think about

00:55:10

how consistency is going to

00:55:12

would be if that is

00:55:14

truly a goal how that

00:55:15

really works if it doesn't

00:55:17

have precedent and if there

00:55:19

is precedent that seems to

00:55:20



be introduced a very different

00:55:22

approach to international law and

00:55:24

and these types of disputes

00:55:26

and I think there really

00:55:27

still needs to be some

00:55:28

grappling with what are considered

00:55:31

justifiable inconsistencies in decisions that

00:55:36

have been coming out of

00:55:37

out of ad hoc arbitration

00:55:40

arbitration tribunals because even in

00:55:43

domestic law we have courts

00:55:45

that may take a different

00:55:46

gloss on something and that

00:55:47



doesn't necessarily mean that it's

00:55:49

incons that we have inconsistent

00:55:51

outcomes. And so I think

00:55:52

those are those are issues.

00:55:53

I don't have an answer

00:55:54

to it, but I think

00:55:54

that's something that we need

00:55:55

to also take into account

00:55:57

when we're looking at this

00:55:58

issue just to add to

00:56:00

the list of Margie's comprehensive

00:56:02

list of things that we

00:56:03

need to think about as

00:56:04



well. Thanks. Thanks so much

00:56:06

Karen. So Kiara, I'll put

00:56:09

it in your hands. Do

00:56:10

you want to say a

00:56:10

word or two on the

00:56:11

impella mechanism before you take

00:56:12

us into the code of

00:56:13

conduct or would you like

00:56:14

to launch directly? I think

00:56:16

I think a better launch

00:56:18

directly just because you know,

00:56:20

you can stay here. Of

00:56:21

course, you can talk about

00:56:22



the court. We're going to

00:56:23

talk about the appeal forever.

00:56:24

But why don't we switch

00:56:27

on if you have time?

00:56:27

Of course, I can I

00:56:28

can present something because you

00:56:31

give my comments later, but

00:56:32

it would be very happy

00:56:33

to talk today now about

00:56:34

the code because differently from

00:56:36

the presentations that we have

00:56:37

just now this is much

00:56:40

more detailed and more focused

00:56:41



so it's kind of simpler,

00:56:43

but I think it's nonetheless

00:56:45

very significant and will have

00:56:47

a very significant impact on

00:56:48

my SDS both in terms

00:56:49

of the procedure is substance

00:56:51

of it. But also how

00:56:53

isds is perceived? So what

00:56:55

I would like to do

00:56:56

is to quickly give a

00:56:58

very quick review of the

00:57:00

proposed code of conduct and

00:57:01

then give an update of

00:57:02



the recent negotiation. Of course,

00:57:04

then we can discuss more.

00:57:05

We are not a version

00:57:07

three of the draft code.

00:57:08

The first was released in

00:57:10

May 2020. Of course, this

00:57:11

is a common effort between

00:57:12

accident and Central was revised

00:57:15

in April and then in

00:57:17

September 2021 again taking account

00:57:20

of all the comments that

00:57:21

were received the latest iteration

00:57:23

I think is quite interesting

00:57:24



because it gives very specific

00:57:25

choices for delegates, which I

00:57:27

think shows very much that

00:57:29

the negotiation that entered a

00:57:30

new phase and the commitment

00:57:32

to this to this new

00:57:33

code. The code has now

00:57:37

11 articles in one Annex.

00:57:39

It starts very briefly article

00:57:41

one with the definition and

00:57:43

application sections to whom they

00:57:46

could apply the brief answer

00:57:48

is only to our indicators

00:57:50



and possibly somehow candidates an

00:57:52

assistant. It does not apply

00:57:53

to council. Or a moderators,

00:57:56

I'm sorry mediators and what

00:57:59

kind of situation would be

00:58:01

covered all so by investment

00:58:03

arbitration. So what to whom

00:58:05

would be would apply then

00:58:07

it goes to the specific

00:58:09

basic obligation Independence and in

00:58:12

partiality the issue of you

00:58:15

know, the duty of diligence

00:58:16

availability the high standards of

00:58:18



Integrity their adjudicators have to

00:58:20

show fairness competence talks about

00:58:23

the prohibition of or regulates

00:58:25

expired a communication each of

00:58:28

confidentiality and fees and expenses.

00:58:30

And then to Highlights article

00:58:32

for addresses the issue of

00:58:33

double editing actually and article

00:58:37

10 disclosure. I think I

00:58:39

would like to spend it

00:58:40

very very briefly just about

00:58:41

disclosure because disclosure is very

00:58:43

much of the basic framework

00:58:45



frame of the code. The

00:58:47

code requires a broad disclosure

00:58:50

to enhance transparency and determine

00:58:52

if a confidence exists article

00:58:55

10 Is first broad Disclosure

00:58:57

by adjudicators of all issues

00:58:59

that may rise doubt as

00:59:02

the independence of impartiality of

00:59:03

the Educators in the eyes

00:59:05

of the parties, which I

00:59:06

think is very important as

00:59:07

judicators must make reasonable effort

00:59:09

to become aware of such

00:59:11



interest relations and matter and

00:59:13

the obligation of disclosure is

00:59:15

continues article 10 too. Then

00:59:17

gives an example of necessary

00:59:19

disclosures, for example, Financial business

00:59:21

or professional relations that exists

00:59:24

with certain participants in the

00:59:25

process also cases in which

00:59:28

the candidate origin States or

00:59:30

has set going back a

00:59:32

and yet and specify a

00:59:34

number of years and to

00:59:35

include also their role as

00:59:37



Council or or expert Um,

00:59:41

the I think this is

00:59:43

quite issue. It's quite interesting

00:59:45

the issue of disclosure because

00:59:46

it's tended to be is

00:59:48

intended to be very very

00:59:49

Broad and incorporate also issues

00:59:51

that were required of the

00:59:52

code like a like repeat

00:59:56

appointments. For example article 11,

00:59:58

then looks at compliance enforcement

01:00:00

and implementation included. So adjudicators

01:00:03

mask themselves comply with with

01:00:05



the code and disqualification and

01:00:07

removal procedures in the applicable

01:00:09

applicable rules and treaties of

01:00:11

applied to adjudicators in the

01:00:14

code. The questions are what

01:00:16

are possible alternative or additional

01:00:18

functions either Financial or other

01:00:21

kind of sanctions and how

01:00:22

to implement the the code

01:00:25

should be by treaty or

01:00:26

should we be by agreement

01:00:27

of the parties or by

01:00:29

agreement of their judicators. So

01:00:31



how to apply the code

01:00:32

some of these issues are

01:00:34

actually addressed in the negotiation

01:00:36

that occur just before Thanksgiving

01:00:38

the answer to delegates Or

01:00:41

one week and negotiators were

01:00:42

able to discuss some of

01:00:43

the important issues. But in

01:00:45

fact not all namely so

01:00:47

the issues of the definition

01:00:48

of disclosure the extent of

01:00:50

disclosure and the issue of

01:00:51

compliance were not discussed. The

01:00:54



preliminary issues to actually a

01:00:57

long time and I think

01:00:58

is actually a testament to

01:01:00

how involved the parties are

01:01:02

to make sure that the

01:01:04

code is is applied. So

01:01:06

the some of the issues

01:01:08

were really preliminary and very

01:01:11

important issues. So for example,

01:01:12

I would like to talk

01:01:13

about three one is we

01:01:15

spend quite a bit of

01:01:16

time talking about the scope

01:01:17



of the application of the

01:01:19

code and the definition of

01:01:20

International Investment dispute in terms

01:01:23

of the school. What is

01:01:24

the role of the assistant?

01:01:26

What is the role of

01:01:27

candidates but also the relevance

01:01:29

of the provisions of the

01:01:30

code to permanent judges and

01:01:32

so there wasn't discussions about

01:01:33

whether we should have one

01:01:34

or two codes. I think

01:01:35

the agreement was that we

01:01:36



should have one code but

01:01:38

with the specific Provisions that

01:01:40

app To permanent judges will

01:01:42

be significantly highlighted similarly the

01:01:45

original in terms of the

01:01:47

definition of IID International Investment

01:01:50

dispute. Originally the code had

01:01:52

was going to apply to

01:01:54

all investment cases including 3D

01:01:56

contract and laws that change

01:01:58

in the second and third

01:01:59

draft. I think that was

01:02:01

another point of discussion. I

01:02:02



think now there was an

01:02:04

agreement that we should apply

01:02:05

to as kind of as

01:02:07

much as possible including treaties

01:02:09

contracts and domestic laws. If

01:02:13

your number if your discussion

01:02:15

also on article 3 Independence

01:02:16

in impartiality and especially on

01:02:19

the issue of the the

01:02:22

discussion on the issue of

01:02:23

kind of appearance of bias.

01:02:25

So adjudicators are required to

01:02:27

be independent and impartial and

01:02:29



a lot of discussions about

01:02:30

how to build on these

01:02:31

and whether and how appearance

01:02:33

of buyers should be included

01:02:34

a fair amount of discussion

01:02:36

in this will be my

01:02:37

last point was also we

01:02:41

also was also kind of

01:02:42

had on the issue of

01:02:43

double heading article four require

01:02:46

provides for regulate double hatching

01:02:50

as concurrent roles that adjudicator

01:02:54

is may or may not

01:02:55



play it's quite interesting because

01:02:57

article for provided for three

01:02:58

different options if full prohibition

01:03:01

Where the adjudicators could not

01:03:04

concurrently act as cancer or

01:03:07

expert in another ID case

01:03:09

it modified prohibition. So whether

01:03:11

adjudicator cannot concurrently act as

01:03:14

Council or expert in similar

01:03:16

cases, possibly with the same

01:03:18

measures simply gal issues in

01:03:19

parties and treaties, you know

01:03:21

to be defined and then

01:03:23



a third a third option

01:03:26

would be the full disclosure

01:03:27

requiring adjudicators to disclose or

01:03:31

overlapping roles with options for

01:03:32

challenges for lack of Independence

01:03:34

selling partiality. I think this

01:03:36

was probably one of the

01:03:37

most significant debates and there

01:03:40

was always in these three

01:03:42

options. There was always an

01:03:43

option for parties to agree

01:03:44

that Educators can serve anyhow,

01:03:47

So and most significant debate

01:03:49



a lot of discussions about

01:03:51

this my understanding from the

01:03:54

comments and the discussion is

01:03:56

the most takes a lot

01:03:58

of States won't prohibition. Not

01:04:00

all but they are concerns

01:04:02

if any significant concern especially

01:04:04

by practitioner that a provision

01:04:06

quite complete prohibition maybe overboard.

01:04:08

I think that we there

01:04:09

was an understanding that possible

01:04:11

this option two of a

01:04:12

modified provision might be the

01:04:15



way forward requiring however full

01:04:17

disclosure by adjudicators of all

01:04:20

of their possible different different

01:04:23

hats that were they were

01:04:24

wearing so I think the

01:04:26

negotiations really push forward and

01:04:28

put forward a lot of

01:04:29

the over the understanding of

01:04:32

the code a huge advancement.

01:04:35

I think on the code

01:04:36

itself and making it much

01:04:37

closer. I think the code

01:04:39

is one of the options

01:04:40



that that might be for

01:04:44

presentation really for presentation to

01:04:46

for appro. In 2022, and

01:04:49

I think it's possible to

01:04:50

have that I'll stop here.

01:04:51

Of course we can talk

01:04:52

about this for a long

01:04:53

time, but look forward to

01:04:54

having discussion with others. Thank

01:04:56

you. Great. Thank you Kiera.

01:04:59

Um before we sort of

01:05:01

dive into Using a few

01:05:03

minutes to respond or to

01:05:06



talk about the code. Let

01:05:08

me actually turn to Karen

01:05:09

and just invite her to

01:05:11

remind us of some of

01:05:12

the other perform proposals and

01:05:14

initiatives that are out there

01:05:15

circulating as well. And then

01:05:17

maybe we can all comment

01:05:18

on on them collectively or

01:05:20

some of the different ones

01:05:21

out there, but we've focused

01:05:23

very much on the you

01:05:24

know, permanent permanent Court option

01:05:27



the Appellate mechanism the code

01:05:29

of conduct but there are

01:05:30

other initiatives in play as

01:05:31

well. So Karen, do you

01:05:33

want to say a few

01:05:33

words about that? Sure, thanks

01:05:34

maren. And I think just

01:05:36

you know, in terms of

01:05:37

concrete proposals. I think the

01:05:39

code is an excellent example

01:05:40

of where we have concrete

01:05:41

texts. We have a concrete

01:05:42

proposal the work between exit

01:05:44



and unsatural has really been

01:05:46

been quite excellent and turn

01:05:48

and I think seeing how

01:05:49

the working group has grappled

01:05:50

with that because this is

01:05:51

a topic where there's been

01:05:52

a lot of thought there's

01:05:53

been a lot of work

01:05:54

and we're able to kind

01:05:55

of come come to work

01:05:56

on that making, you know

01:05:58

a conclusion of the code,

01:06:00

you know a real reality

01:06:02



real. Ability by probability I

01:06:04
should say by the end

01:06:05
of by the Commission in

01:06:07
2022. And I think that

01:06:08
there are other proposals out

01:06:10
there that are elements where

01:06:13
they are sort of ready

01:06:14
made. If you will from

01:06:15
existing agreements for example proposals

01:06:19
to address concerns about frivolous

01:06:22
claims or unmeritorious claims. There

01:06:25
are provisions on trying to

01:06:27
address security for costs where

01:06:29



states have been concerned about

01:06:30

I'm not being able to

01:06:32

recover their costs provisions on

01:06:34

regulating third-party funding. We have

01:06:38

Provisions that encourage greater involvement

01:06:42

by the treaty parties, for

01:06:44

example, when a treaty party

01:06:45

is a non-disputing treaty party

01:06:47

to a dispute and can

01:06:50

share its views on how

01:06:52

the interpretation of a particular

01:06:54

provision should should be should

01:06:56

be or how particular provision

01:06:58



should be interpreted and similarly

01:07:00

joint commissions, which of Course

01:07:03

are you know both of

01:07:05

those measures have been very

01:07:06

actively used by the three

01:07:08

and aft parties it's those

01:07:10

are reincorporated in the usmca

01:07:12

and in many agreements that

01:07:15

the United States has been

01:07:16

a party to such as

01:07:17

the US Panama investment chapter

01:07:20

in the in the US

01:07:21

panama-free trade agreement and many

01:07:23



others, you know, really important

01:07:25

tools for interpreting for for

01:07:29

framing interpretations and and guiding

01:07:32

that so that you can

01:07:32

avoid some of the concerns

01:07:34

about consistency that have been

01:07:36

have been flagged, you know,

01:07:38

and I I flagged those

01:07:40

Anna already mentioned the alternative

01:07:42

dispute resolution and advisory Center.

01:07:44

Those are obviously going a

01:07:46

matter or forms that are

01:07:48

being looked at but I

01:07:48



think all of these can

01:07:50

be looked at as concrete

01:07:52

ways to address particular concerns

01:07:54

more discreetly than trying to

01:07:56

sort of think about having

01:07:58

an entirely new system. And

01:07:59

in fact, there are a

01:08:00

lot of commonalities between What

01:08:03

has been proposed as a

01:08:05

permanent International court and what

01:08:08

could be very specific reforms

01:08:10

for the existing ad hoc

01:08:12

system to where we might

01:08:13



look at these differences as

01:08:15

really ones that go to

01:08:16

how adjudicators are appointed as

01:08:19

opposed to the mechanics of

01:08:20

how the proceeding should go

01:08:22

forward. So I think all

01:08:23

of those types of proceedings

01:08:25

are all those types of

01:08:26

Provisions that I listed that

01:08:27

are that we can draw

01:08:29

from lots of examples in

01:08:30

existing agreements and really can

01:08:32

help remedy where I think

01:08:34



a lot of the problems

01:08:35

that we are currently dealing

01:08:36

with have Arisen and that's

01:08:38

been in First so-called first

01:08:40

generation older investment agreements that

01:08:42

do not have a lot

01:08:44

of the safeguards and have

01:08:46

not been able to benefit

01:08:47

from the evolution of you

01:08:49

know, experience and practice. And

01:08:51

so I think one of

01:08:51

the things that the working

01:08:52

group of course will all

01:08:53



still be looking at is

01:08:54

is a practical way to

01:08:56

implement the types of reforms

01:08:58

and I think implementation, you

01:09:01

know is itself a very

01:09:02

large topic but I would

01:09:03

simply say that there are

01:09:04

multiple ways to do that

01:09:05

and I think that I

01:09:07

said rules amendment process is

01:09:08

one way to show how

01:09:10

the arbitration rules themselves can

01:09:12

be adjusted to address to

01:09:14



get capture many of the

01:09:15
concerns that have been identified

01:09:17
as well. So I think

01:09:19
we've got a lot of

01:09:20
concreting examples that don't that

01:09:22
are not necessarily structural or

01:09:25
systemic but are very important

01:09:26
and targeted to get at

01:09:28
the problems that that are

01:09:30
being identified by the working

01:09:31
group. And you know again,

01:09:33
I think the the code

01:09:34
of conduct is is an

01:09:35



excellent example of how we

01:09:36

can address concerns about X

01:09:39

vary in a more discreet

01:09:42

way and improve upon the

01:09:44

the rules that we have

01:09:45

out there right now and

01:09:47

building on the best practices

01:09:48

from say the IBA guidelines

01:09:50

are or other other tools

01:09:52

that we have and I

01:09:53

will stop there because I

01:09:54

think you're probably what one

01:09:55

minute until we have to

01:09:57



move on to the breakout.

01:09:58

So I mean, I'm gonna

01:10:00

thank you so much Karen,

01:10:01

I'm gonna give out of

01:10:02

the the privilege since she

01:10:04

was starting us off and

01:10:05

since the technology deprived her

01:10:06

of the floor. I'm gonna

01:10:08

give her back the floor

01:10:09

for maybe I know you

01:10:11

could share with us if

01:10:12

you comments about where where

01:10:13

you see this process going

01:10:14



forward and and how it's

01:10:16

going to progress in addition.

01:10:18

If you wanted to responded

01:10:19

to any of the the

01:10:20

prior interventions, but I'll give

01:10:22

you the the privilege of

01:10:23

closing us out before we

01:10:25

head off into our breakout

01:10:26

sessions and just a word

01:10:28

for all of our participants.

01:10:28

Please stay around for the

01:10:30

breakout session. It's a great

01:10:31

time to continue the conversation

01:10:32



to get to know other

01:10:33

people who are interested in

01:10:34

these same issues and to

01:10:36

really engage and I think

01:10:37

everybody enjoys them, so, The

01:10:39

police stick around for that

01:10:40

as well. But so Anna

01:10:42

take us away. Thank you

01:10:43

very much. Yeah, I just

01:10:45

would like to to dovetail

01:10:47

on what Karen just mentioned

01:10:50

which is the delivery mechanism

01:10:52

for all this reform these

01:10:56



different reform elements. And this

01:10:59

is what we are also

01:11:00

going to start looking into

01:11:02

we had a number of

01:11:04

very solid proposals that we're

01:11:07

put forward to of course

01:11:09

use the mechanism that ANSI

01:11:12

trial has used in the

01:11:14

transparency convention, but you can

01:11:17

also think about some precedence

01:11:20

that the oecd has given

01:11:22

in the context of the

01:11:23

bepts the double tax treaty

01:11:26



Network. And so this is

01:11:29

next on our agenda for

01:11:33

the informal sessions that will

01:11:36

take place next week where

01:11:38

we will have two full

01:11:39

days devoted to the delivery

01:11:41

mechanism, which is according to

01:11:45

a number of proposals going

01:11:46

to be a multilateral convention

01:11:48

with lots of flexibility inbuilt

01:11:52

and with the possibility of

01:11:53

including different elements, some of

01:11:58

them being sort of core

01:11:59



elements that will apply to

01:12:00

everybody and others that will

01:12:02

be more optional. And another

01:12:05

thing I wanted to to

01:12:06

allude to is that from

01:12:08

the beginning it was very

01:12:09

clear that we didn't have

01:12:11

a closed list of Reform

01:12:13

options. Now that we are

01:12:16

reaching the elements that we

01:12:18

are now working on on

01:12:20

delivering they are still issues

01:12:23

that are actually options stage

01:12:26



and there we have been

01:12:27

reminded quite strongly by developing

01:12:30

countries particularly from Africa that

01:12:32

there is a need to

01:12:33

look into calculation of Damages,

01:12:36

which is a big issue

01:12:38

according to a number of

01:12:40

the states in the room.

01:12:43

And they are also another

01:12:45

set of what they call

01:12:47

the cross-cutting issues that also

01:12:49

need to be looked at

01:12:51

more in detail. We we're

01:12:54



getting more and more as

01:12:57

we are advancing, but you

01:13:00

can you can rest assured

01:13:02

that next year when we

01:13:03

come back if we are

01:13:04

reinvited and if I don't

01:13:06

get kicked out before joining,

01:13:09

we will have more to

01:13:11

report and and good progress

01:13:13

because they're working group is

01:13:14

extremely committed as most of

01:13:16

the speakers have said and

01:13:18

we're getting we're making good

01:13:20



progress It's slow because it

01:13:22

involves States and states. The

01:13:24

time of states is slow,

01:13:26

but it's steady and that

01:13:28

that is very heartening. Thank

01:13:30

you very much. Thank you

01:13:32

Anna. I think that I

01:13:34

think that's a nice place

01:13:36

to to wrap us up

01:13:37

as we look ahead to

01:13:38

what will be hopefully discussing

01:13:39

next year. I do know

01:13:41

that there's so much more

01:13:42



that we could all say

01:13:43

about all these different issues

01:13:44

because they're just as the

01:13:48

states like to talk to

01:13:49

them. So talk about them

01:13:50

all so do we all

01:13:52

as as the participants and

01:13:54

stakeholders in the system like

01:13:55

to talk about these issues

01:13:56

at length and I'm sure

01:13:58

that there are many drinks

01:13:59

conversations to be had as

01:14:00

well. So But but in

01:14:04



the interest of sticking with

01:14:06

the with the Washington arbitration

01:14:07

week ethos of letting everybody

01:14:10

participate and get to know

01:14:11

each other as well. I

01:14:12

don't want to lose out

01:14:13

on the on the breakout

01:14:14

sessions also, so I'm turning

01:14:16

it back then to Jose

01:14:17

Antonio to to direct the

01:14:19

supporting with thank you marine

01:14:21

and in the order that

01:14:23

I see you on my

01:14:24



screen. Thank you, Karen Giada

01:14:27

Margie calling and and as

01:14:30

Uber and bread and and

01:14:33

of course you will be

01:14:34

invited next year no matter

01:14:36

what capacity you are that

01:14:38

that is that goes without

01:14:40

saying to you and to

01:14:42

every member of of this

01:14:44

panel. It was an amazing

01:14:46

panel. I still have questions

01:14:48

many, you know on the

01:14:52

on the sort of more

01:14:55



avant garde the themes like

01:14:58

like investors rights and and

01:15:03

Direct claims by by states

01:15:06

to investors. Those themes are

01:15:08

of course much expected by

01:15:10

the International Community and hopefully

01:15:12

the discussions would would move

01:15:15

forward on that given that

01:15:18

many of the topics that

01:15:20

that are being discussed now

01:15:22

have been despite, you know.

01:15:27

despite news have been There

01:15:31

for for I would say

01:15:34



for decades so, you know,

01:15:36

the appeals mechanism was something

01:15:38

that was discussed at Exit

01:15:40

when I was counsel there

01:15:41

in 2006. So so talking

01:15:43

about a court on an

01:15:45

appeals mechanisms, although in appearance

01:15:50

revolutionary it's not that revolutionary

01:15:52

but but in any event,

01:15:54

I will not go into

01:15:56

it because that it's not

01:15:58

it's not my place to

01:15:59

to hold my opinions down,

01:16:01



but I would welcome everyone

01:16:03

to our our breakout rooms

01:16:08

the mechanics of the breakout

01:16:11

rooms. I shall say is

01:16:12

that you will should be

01:16:14

receiving an invitation to join

01:16:16

the breakout room. If you

01:16:17

do not accept that you

01:16:19

will remain on the main

01:16:20

room. So I I urge

01:16:23

you to accept the invitation

01:16:25

to go into the breakout

01:16:26

room so that you can

01:16:27



see the stars of the

01:16:28

of the panel which are

01:16:30

of course the speakers here.

01:16:31

So take it away matter

01:16:34

Lucia so that we can

01:16:35

go into the breakout rooms

01:16:36

and and Marine thank you

01:16:37

for for juggling. Yeah a

01:16:40

Hot Topic with with amazing

01:16:44

loves. This has been a

01:16:47

pleasure in many thanks to

01:16:48

all so. see you in

01:16:51

the and tsc rules among

00:00:06



others and she has represented

00:00:08

clients in the US litigation

00:00:10

with International ramifications before the

00:00:13

United States Supreme Court and

00:00:14

various courts of Appeals. Marines

00:00:18

representations include various various various

00:00:20

matters importantly at least for

00:00:25

for those that are in

00:00:27

Latin America and Colombia. She

00:00:28

recently won an award on

00:00:33

behalf of Colombia in an

00:00:35

electricity related matters. And of

00:00:36

course folks of the black

00:00:38



country are ecstatic about that

00:00:41

and many other winds most

00:00:43

importantly Marin. is one of

00:00:47

our steamed advisory committee members

00:00:50

at wow, and she has

00:00:52

been incredibly supportive both with

00:00:55

her ideas and initiatives. So

00:00:58

I would like to give

00:00:59

a big thank to Marine

00:01:02

and and now going to

00:01:05

the panel I would like

00:01:06

to say that investor state

00:01:10

arbitration and isds is of

00:01:14



course a very hot topic

00:01:16

and we're seeing the evolution

00:01:17

that has started for for

00:01:20

many years. Now, one of

00:01:22

the topics that that is

00:01:24

in everyone's mind is whether

00:01:27

it will be an appeals

00:01:28

for appeals mechanism or whether

00:01:30

we'll be a court and

00:01:32

this is part of the

00:01:34

subject matter today. So I

00:01:37

hope that you're very attentive.

00:01:39

I hope that you pay

00:01:40



a lot of attention because

00:01:41

this is a an incredible

00:01:44

panel and I'm lucky to

00:01:46

be just announcing it. So

00:01:48

with that Marine the floor

00:01:51

is totally yours. Thank you

00:01:54

so much as Antonio for

00:01:55

the lovely introductions and welcome

00:01:57

everyone to what I think

00:01:58

is going to be a

00:01:59

really interesting discussion on what

00:02:01

is indeed the hot topic

00:02:02

of the day in international

00:02:04



arbitration and that is concrete

00:02:06

proposals for reform of the

00:02:09

investors State dispute settlement system.

00:02:13

Um, you know, the the

00:02:14

uncut database is tell us

00:02:16

that we have something like

00:02:17

2600 International Investment agreements in

00:02:20

force, whether that's it's bilateral

00:02:23

investment treaties or other treaties

00:02:26

that contain investment protections. There

00:02:29

are actually more than 3,200

00:02:31

that have been negotiated but

00:02:32

with but only 26 of

00:02:33



those are currently operative 2,600

00:02:36

of those are operative and

00:02:37

that we have something like

00:02:38

1100 known cases under those

00:02:41

instruments 740 of which approximately

00:02:44

have been concluded and all

00:02:47

of that has come in

00:02:48

about 15 to 20 years

00:02:49

of real activity. That is

00:02:51

this. This is you know,

00:02:53

in a way a new

00:02:54

legal system that we are

00:02:55

watching of all before our

00:02:57



eyes we can't say at

00:02:59

this stage that it's in

00:02:59

its infancy, but I think

00:03:00

of it as kind of

00:03:01

being a teenager and sometimes

00:03:04

like teenagers they act out

00:03:05

a little bit they might

00:03:07

miss behave they might they

00:03:09

might get a bit unruly

00:03:10

and that has prompted the

00:03:12

stake. others in the system

00:03:14

to assess the system. Is

00:03:16

it working the way they

00:03:17



wanted it to that? They

00:03:18

intended it to that anybody

00:03:20

thought it was going to

00:03:20

and those stakeholders most obviously

00:03:23

are the states who created

00:03:25

the treaties and created the

00:03:27

instruments but there are also

00:03:29

the the users of the

00:03:30

system the investors the institutions

00:03:33

that are involved in the

00:03:35

in the proceedings and stakeholders

00:03:38

brought civil society and citizens

00:03:41

who watch the system unfold

00:03:43



and all of those stakeholders

00:03:45

are assessing they're reconsidering do

00:03:47

they need to calibrate do

00:03:49

they need to renovate do

00:03:50

they need to reform or

00:03:51

do they need to throw

00:03:51

the whole system out with

00:03:53

the bathwater? And that has

00:03:55

been the discussion that has

00:03:56

has really come to life

00:03:59

in the in the past

00:04:00

few years and that we're

00:04:02

going to talk about today

00:04:03



and we're going to be

00:04:03

you know, that that discussion

00:04:06

has taken place in many

00:04:07

forums whether that's on Central's

00:04:10

working group three, whether that's

00:04:11

its reform of its arbitration

00:04:13

rules. Various initiatives of the

00:04:16

IBA and vedika and other

00:04:17

for as well. We're going

00:04:20

to try to focus most

00:04:20

specifically on the concrete proposals

00:04:22

that are currently under discussion

00:04:24

in many different formats and

00:04:26



that the we're taking the

00:04:28

liberty of going beyond the

00:04:30

title of our program because

00:04:32

we will talk about the

00:04:33

proposals for an investment court

00:04:34

for an appellate mechanism, but

00:04:35

we'll also talk about other

00:04:36

initiatives that are that are

00:04:38

under discussion as well. Um,

00:04:40

let me start out by

00:04:41

doing some brief introductions of

00:04:43

our wonderful panel and I

00:04:46

will try to keep them

00:04:47



brief just in the interest

00:04:48
of time because if I

00:04:49
actually gave Folsom introductions of

00:04:51
everybody we could be here

00:04:52
for quite some time. But

00:04:54
in approximately the order that

00:04:56
will will be speaking. So

00:04:58
we begin with anaju bumper

00:05:00
who's the Secretary of ancitral

00:05:02
and the director of the

00:05:03
division of international trade law

00:05:05
of the United Nations office

00:05:06
of legal Affairs. She previously

00:05:09



also worked in the investor

00:05:12

State an investment dispute Forum

00:05:15

as Council as arbitrator and

00:05:17

as mediator and also spent

00:05:19

I believe a little bit

00:05:21

more than 15 years at

00:05:22

uncad in the senior legal

00:05:25

advisor in the research program.

00:05:27

Overseeing the research program on

00:05:29

International Investment agreements. Then we

00:05:33

have Colin Brown who's from

00:05:35

the European commission BG trade.

00:05:37

He's the head of unit

00:05:38



of legal Affairs and dispute

00:05:40

settlement was focused on trade

00:05:41

sustainable development and investment in

00:05:43

addition to serving in various

00:05:45

capacities of the visiting professor.

00:05:46

And I think if Colin

00:05:48

is the person who has

00:05:48

who has since the most

00:05:50

time explaining the the investment

00:05:52

Court proposal to the world

00:05:53

in forums like this one.

00:05:55

We've had pleasure of being

00:05:57

on some other panels together

00:05:58



as well. Then we're joined

00:06:01

by Margie Lee Simi from

00:06:03

the Republic of Panama who's

00:06:04

advisor and chief of the

00:06:06

office of compliance and liabilities

00:06:07

in the ministry of economy

00:06:09

and finance for the Republic

00:06:10

of Panama prior to her

00:06:12

previous position or perhaps concurrently.

00:06:15

I'm not sure she's also

00:06:16

a professor of law at

00:06:18

the University of Panama and

00:06:19

has worked in private practice

00:06:20



and then had a previous

00:06:21

Life as a trade negotiator

00:06:23

for public for Panama as

00:06:24

well at the ministry of

00:06:25

trade and Industry. Um, then

00:06:27

we have the caregiver Georgetta

00:06:29

georgetti who's the professor at

00:06:31

the University of Richmond School

00:06:32

of Law where she teaches

00:06:34

public international law international arbitration

00:06:36

International courts and tribunal and

00:06:39

is very active in in

00:06:41

all of the professional associations

00:06:43



surrounding international law and international

00:06:45

arbitration including the American Society

00:06:47

of international law, the international

00:06:49

law association The Institute on

00:06:51

transnational arbitration and also had

00:06:53

a prior practice a prior

00:06:56

life and private practice practicing

00:06:58

and international arbitration in both

00:06:59

Washington and Geneva and has

00:07:02

been especially active in in

00:07:03

formatting the discussion about codes

00:07:06

of conduct and codes of

00:07:07

ethics for the participants in

00:07:09



this system. Um and last

00:07:12

but certainly not least we're

00:07:13

joined by Karen Kaiser who's

00:07:14

an attorney advisor at the

00:07:15

US Department of State currently

00:07:17

in the office on private

00:07:18

investment law private international law

00:07:20

in which capacity. She's representing

00:07:22

the United States at the

00:07:24

uncentral working group three discussions

00:07:26

at the Hague conference on

00:07:27

private international law and this

00:07:29

unit was well and previously

00:07:31



also at the state department

00:07:32

she advised on the negotiation

00:07:34

and implementation of bilateral investment

00:07:36

treaties and also serve distance

00:07:39

as counsel in those cases

00:07:41

at LLC I of course

00:07:44

should start off with the

00:07:46

caveat that every single one

00:07:47

of our speakers at speaking

00:07:48

in their individual and personal

00:07:50

capacity. Nothing they say is

00:07:51

for attribution to their employers

00:07:53

or anyone else that they

00:07:54



might be affiliated with but

00:07:57

we want because we want

00:07:59

this to be really full

00:08:00

some discussion. The way that

00:08:02

we'll proceed is we'll ask

00:08:04

Anna to sort of set

00:08:05

the stage for really kind

00:08:08

of a background of what's

00:08:10

actually actively happen in the

00:08:13

reform discussions surrounding isds. And

00:08:16

then we'll start picking up

00:08:17

some of the individual proposals.

00:08:19

So we'll ask Colin to

00:08:20



give us some background and

00:08:21

bring us up to speed

00:08:22

on the proposal for an

00:08:24

investment court marginally has done

00:08:26

some thinking about the ultra

00:08:27

what's been presented as an

00:08:29

alternative to that as an

00:08:30

appellate mechanism. So we'll ask

00:08:31

her to talk about that.

00:08:32

Chiara will will help us

00:08:34

frame the discussion on the

00:08:36

code of conduct that's been

00:08:38

presented as a full draft

00:08:40



code of conduct and Karen's

00:08:42
going to fill us in

00:08:43
on some of the other

00:08:43
reform initiatives and proposals that

00:08:46
are also active at this

00:08:47
time. Even if they're not

00:08:49
grabbing as many headlines as

00:08:51
some of the other initiatives

00:08:51
with each of those we'll

00:08:54
ask that Anna will set

00:08:56
the stage for us for

00:08:57
five or 10 minutes and

00:08:59
then as we go into

00:08:59



the individual subject Areas will

00:09:02

have one of our speakers

00:09:04

kind of give a three

00:09:05

or five minute explanation of

00:09:07

the current state of play.

00:09:08

But then we really want

00:09:10

to invite all of our

00:09:11

other panelists to chime in

00:09:12

and comment on what's happening

00:09:14

in that space and where

00:09:15

they see the discussion going.

00:09:17

So the idea is sort

00:09:19

of you know, brief presentation

00:09:20



comments brief presentation comments and

00:09:22

so on and so forth.

00:09:23

We'll be keeping an eye

00:09:28

on the chat for questions

00:09:30

from the audience. We might

00:09:31

try to take some of

00:09:32

those as we go on

00:09:33

the different topics or we

00:09:35

may save some of them

00:09:36

up for the end so

00:09:37

bear with us as we

00:09:39

proceed fluidly through this process,

00:09:41

but we want it to

00:09:42



be as dynamic as possible.

00:09:43

So I have done more

00:09:44

than enough talking and I'm

00:09:46

going to turn the stage

00:09:46

over to honestly to help

00:09:48

us with a bit of

00:09:50

background and understanding what's happening

00:09:51

in the reform discussion. Thank

00:09:55

you very much. Thank you

00:09:57

Marin. Thank you, Jose Antonio

00:10:00

Maria Lucia and all of

00:10:02

the organizers for having me.

00:10:04

I was with you last

00:10:07



year and I'm very glad

00:10:09

to see that this very

00:10:10

valuable initiative is continuing to

00:10:13

grow and always very pleased

00:10:17

to join to join in

00:10:18

and give you an update

00:10:20

of what we're doing currently

00:10:21

in answer travel in answer

00:10:24

trust working group three. So

00:10:26

what I'd like to just

00:10:27

start is it's sort of

00:10:29

an update for you because

00:10:31

I already mentioned a number

00:10:33



of these different elements of

00:10:35

Reform last year, but I'm

00:10:38

very pleased to say that

00:10:40

a lot has happened in

00:10:41

spite of having to scramble

00:10:44

with difficult meeting conditions at

00:10:47

very odd hours across the

00:10:50

globe and with with limited

00:10:54

Reference time the working group

00:10:56

managed to move along quite

00:10:59

a number of of these

00:11:02

reform elements and it did

00:11:05

so and we are on

00:11:07



these different reform elements in

00:11:08

different stages. So you might

00:11:10

have seen last year already

00:11:12

this little house that I

00:11:14

like to show because I

00:11:17

think it gives you an

00:11:18

impression of coherence in what

00:11:21

we're doing and I hope

00:11:24

that will convey that it's

00:11:25

a coherent effort that all

00:11:29

the the member states the

00:11:31

The Observer States the ngos

00:11:34

the igo's the academic Forum

00:11:37



the practitioners group contributing to

00:11:40

in the answer to our

00:11:42

context. So when I'm saying

00:11:44

where we are we are

00:11:46

working on building a number

00:11:49

of the building blocks of

00:11:51

the little house and we

00:11:52

have for example Quite a

00:11:54

lot on the the first

00:11:57

the first little piece of

00:12:03

building on the left, which

00:12:04

is the development of investor

00:12:08

State mediation to strengthen access

00:12:11



to mediation to make it

00:12:13

a more conducive possibility for

00:12:18

for disputing parties for the

00:12:20

time being. The treaties are

00:12:22

almost a majority of the

00:12:24

treaties is silent about the

00:12:26

possibility to go for mediation

00:12:28

the ones that are proposing

00:12:32

mediation do so in Very

00:12:35

limited in a very limited

00:12:37

time frame for example in

00:12:39

only during the cooling off

00:12:40

period and it's only with

00:12:42



very recent treaties that we've

00:12:45

seen mediation taking its actual

00:12:48

role in as a credible

00:12:50

alternative. So this is being

00:12:52

this is Advanced quite a

00:12:54

lot. We had an intercessional

00:12:55

meeting hosted by China by

00:12:58

the Hong Kong Saar only.

00:13:02

I think three weeks ago

00:13:03

and during this session we

00:13:05

managed to have a very

00:13:07

good discussion about the different

00:13:09

ways of fostering more mediation

00:13:13



in invest the state dispute

00:13:14

settlement another area where we

00:13:17

have also Advanced quite a

00:13:19

lot is on the development

00:13:20

of an advisory Center patterned

00:13:23

along the lines of the

00:13:25

advisory Center that has been

00:13:27

working quite effectively in the

00:13:29

WTO and there we have

00:13:32

already had several. Meetings of

00:13:35

the working group discussing the

00:13:37

advisory Center and we're now

00:13:39

at the stage of discussing

00:13:41



text which would focus The

00:13:45

Advisory Center on its scope

00:13:49

on its membership on how

00:13:51

to finance it. We have

00:13:52

also a very comprehensive study

00:13:55

of the various Ways and

00:13:57

Means to to set up

00:13:59

such an advisory Center. So

00:14:01

where we have also Advanced

00:14:04

is on the discussions of

00:14:08

what I call the second

00:14:10

floor of the little house,

00:14:11

which is the Appellate mechanism

00:14:14



and here you will hear

00:14:16

more from Margie about where

00:14:20

we stand currently and here

00:14:22

again, we have started drafting.

00:14:28

Thanks for additions working group.

00:14:31

There's still a lot to

00:14:33

be done. But we're going

00:14:48

to be losing Anna's connection,

00:14:51

but I'm gonna hope that

00:14:52

she comes back because I

00:14:52

want to hear what it

00:14:53

goes on top of the

00:14:54

house. All right, we're gonna

00:15:27



hope that Anna returns with

00:15:28

us quickly. But in the

00:15:32

interest of not losing any

00:15:34

time. Maybe we should move

00:15:36

on. Colin why don't you

00:15:40

wanting to pick up And

00:15:43

and share with us sort

00:15:44

of the third building block

00:15:45

from the left the use

00:15:48

proposal for the investment court

00:15:49

and how that's going to

00:15:51

potentially build up to the

00:15:52

second story of the house.

00:15:55



Yeah, and thank you. I'm

00:15:56

happy to take that this

00:15:58

up and I keep on

00:15:59

going as long as situated

00:16:01

we can see when banana

00:16:02

and comes back. So let

00:16:05

me also start by by

00:16:06

and thanking and the organizers

00:16:09

for having me here with

00:16:13

much prefer to be physically

00:16:13

in Washington meeting you all

00:16:15

but we have to do

00:16:17

it with with things and

00:16:19



as they are and And

00:16:23

yeah, and it just takes

00:16:27

me and said she's having

00:16:28

a problem reconnecting. Well, we

00:16:32

will try to get in

00:16:33

Forge ahead and then we

00:16:35

can Circle back. Okay, that's

00:16:38

to share. So I so

00:16:40

and I feel a bit

00:16:41

like I feel a rather

00:16:43

awkward here because I'm coming

00:16:46

to Washington arbitration week. And

00:16:50

the main point that I

00:16:51



want to make is that

00:16:52

arbitration is not a very

00:16:54

good idea for investment dispute

00:16:56

settlement. And so you can

00:16:58

throw virtual rotten vegetables at

00:17:01

me. And if you want

00:17:02

in that sense is probably

00:17:03

safer to do this virtually

00:17:05

rather than and and But

00:17:09

I think I think it's

00:17:10

important to start with that

00:17:14

point because I think what

00:17:16

we're seeing and you can

00:17:16



see it on on on

00:17:17

the screen with with Anna

00:17:21

slide is is we are

00:17:21

thinking about how the system

00:17:24

should be designed for for

00:17:28

the future and I think

00:17:29

Marion you put it very

00:17:30

well that it's it's maybe

00:17:31

in his teenage years not

00:17:33

quite sure where it's going

00:17:34

the direction it wants to

00:17:36

take and it and it's

00:17:37

it's a it's a moment

00:17:38



of thinking and consolidation. and

00:17:41

I think it's it's important.

00:17:44

to look back in that

00:17:47

context and think about how

00:17:48

the system was created in

00:17:50

many senses. The birth of

00:17:53

the system is an old

00:17:55

birth. In the sense that

00:17:57

the the dispute settlement system

00:18:01

was developed principally through the

00:18:03

exit convention historically through the

00:18:06

executive convention. And without a

00:18:08

clear idea of the nature

00:18:12



of the regime to which

00:18:13

it would apply. It was

00:18:15

foreseen, of course a little

00:18:16

bit apply to investment contracts

00:18:18

investment laws investment treaties, but

00:18:20

I don't think anybody in

00:18:22

the 1960s when it was

00:18:24

developed in visaged that it

00:18:25

could be applying to 3,000

00:18:29

audit and treaties. So I

00:18:33

think one of the things

00:18:33

that we have to think

00:18:34

about and this is one

00:18:35



of the points that the

00:18:36

European unionist member states make

00:18:39

in in central is you

00:18:42

know, if when we look

00:18:42

at the system today as

00:18:44

a maturing system and would

00:18:46

we still choose this system

00:18:48

of dispute settlement? and we

00:18:53

think that the answer to

00:18:56

that should be should be

00:18:57

normal and because we think

00:19:00

the system is inherently one,

00:19:01

which is if you want

00:19:04



a public law one or

00:19:05

a constitutional law and system

00:19:08

because it is and judging

00:19:10

public actions So in each

00:19:13

case it is a public

00:19:14

action, which is subject and

00:19:16

to dispute it is the

00:19:19

dispute serve to fix a

00:19:20

line between the what the

00:19:23

state can do and what

00:19:24

requires compensation to a particular

00:19:28

individual. It's unidirectional in the

00:19:32

sense that it is typically

00:19:34



always a an investor an

00:19:37

individual bringing action against the

00:19:39

state and it has a

00:19:41

repeat function in the sense

00:19:43

that the treaties are established.

00:19:44

They're in principle in place

00:19:46

for considerable period of time

00:19:48

and because there can be

00:19:52

repeated litigation the questions of

00:19:55

consistency in predictability, which come

00:19:57

up frequently in the working

00:19:58

group and are extremely important.

00:20:00

I think one of the

00:20:01



points that you're being member

00:20:04

states and make another supporters

00:20:06

of government making some make

00:20:08

is that When you look

00:20:10

around the world at comparable

00:20:12

types of systems. And judging

00:20:17

and public lawmakers public judging

00:20:20

constitutional law matters, you see

00:20:22

that Societies or systems or

00:20:25

consistently revert to permanent bodies.

00:20:28

We can see that in

00:20:29

our domestic courts or domestic

00:20:31

administrative constitutional Public Law Courts,

00:20:34



and we can see that

00:20:35

in international Regional course the

00:20:38

deal with for example and

00:20:39

human rights and matters. And

00:20:42

we think there are there

00:20:44

are powerful reasons and for

00:20:47

that and we think the

00:20:49

primary one is that permanent

00:20:53

bodies deliver consistency and predictability.

00:20:58

and I think a good

00:21:00

example of this currently not

00:21:04

in a particularly good shape,

00:21:05

but a good example of

00:21:06



this is the WTO pellet

00:21:09

body where there was a

00:21:10

lot of criticism of the

00:21:12

WTO in the 1980s in

00:21:13

the 1990s about the weather

00:21:16

is getting the balance right

00:21:17

in that moment in time

00:21:19

that's between free trade and

00:21:20

protection of the environment. And

00:21:23

the the creators of the

00:21:26

WTO did not change the

00:21:28

substantive law. What they did

00:21:31

is they changed the adjudicatory

00:21:35



system created a permanent mechanism

00:21:36

in any available body and

00:21:40

these concerns and have over

00:21:42

time and dissipated because the

00:21:45

Appellate body has developed a

00:21:47

particular approach or and on

00:21:51

the balance between for example

00:21:52

and trade and environmental concern.

00:21:56

and so in our view

00:21:59

this move to create a

00:22:02

permanent Court brings about that

00:22:03

consistency predictability with all due

00:22:07

respect the Margie's position. It

00:22:09



doesn't in our review and

00:22:10

appellate mechanism is a helpful

00:22:11

part of that, but it's

00:22:12

not enough in and of

00:22:14

itself to bring about that

00:22:15

consistency and predictability, but we

00:22:19

think it also has the

00:22:19

advantage that it reduces costs,

00:22:21

which is another one of

00:22:22

the big issues that comes

00:22:23

up in the working group

00:22:26

because of the consistency ability.

00:22:29

So actors are better able

00:22:30



to decide whether to bring

00:22:32

a case. And respondents are

00:22:35

better able to decide whether

00:22:36

to litigate something out or

00:22:38

whether to and settle. And

00:22:41

we think it also has

00:22:42

an advantage that it is

00:22:44

a more effective. Provides more

00:22:47

effective resolution of some of

00:22:49

the ethical issues which come

00:22:51

up in which which Cara

00:22:53

I'm sure we'll talk about

00:22:54

in a few minutes. Now,

00:22:58



how do we see this?

00:22:59

What are the concrete building

00:23:00

blocks? These are being and

00:23:02

put in place as we

00:23:04

speaking there is The next

00:23:07

meeting of the working group

00:23:10

in February is slated to

00:23:13

discuss these matters and their

00:23:16

texts which are and available

00:23:19

and looking into these measures.

00:23:22

From our perspective a permanent

00:23:25

mechanism Court. We need to

00:23:28

have and a full-time educators.

00:23:31



There are appointed on long-term

00:23:34

non-renewable basis to ensure and

00:23:37

they are independent. For us

00:23:41

it's extremely important that there

00:23:43

be a mechanism to screen

00:23:45

the suitability of candidates to

00:23:47

be appointed to the parent

00:23:49

mechanism and there's text. On

00:23:51

that particular matter, which is

00:23:54

before the working group. And

00:23:59

we we think that it's

00:24:00

also important that they're being

00:24:03

appeal mechanism. So one and

00:24:04



Anna's presentation, which is still

00:24:06

on on the screen and

00:24:09

we think the two parts

00:24:10

go together permanent court and

00:24:12

and then appeal and for

00:24:15

us this also extremely important

00:24:17

and I think this is

00:24:17

also a big part of

00:24:18

the agenda and that we

00:24:23

have mechanisms that can ensure

00:24:25

that these reforms permits the

00:24:28

application their application to all

00:24:30

and existing treaties and we

00:24:33



we foresee and we envisage

00:24:35

and often approach that allow

00:24:37

the application to existing treaties.

00:24:39

So that's what I wanted

00:24:41

to see. I don't know

00:24:42

how concrete that was and

00:24:43

but I think and given

00:24:46

the The kind of issues

00:24:51

before I think it's useful

00:24:52

at least for me to

00:24:52

start by coming in and

00:24:54

explaining. What is the impetus

00:24:56

behind what we think is

00:24:58



it would be an important

00:24:59

shift from one system of

00:25:01

disability immune system and one

00:25:02

system of disputes elements to

00:25:04

to another, you know, stop

00:25:06

there and happy to engage

00:25:07

in the discussion as we

00:25:08

go forward. Thank you. Thanks

00:25:11

so much for setting the

00:25:12

stage their Colin and I

00:25:13

did just want to say

00:25:14

thank you so much. I

00:25:16

think procedurally will will Forge

00:25:18



ahead and and spend some

00:25:19

time talking about the investment

00:25:20

court and the Appellate mechanism

00:25:22

and then the code of

00:25:23

conduct and then we'll come

00:25:24

back and ask on a

00:25:25

sort of finish out some

00:25:26

of her thinking about the

00:25:27

overall reform program and that's

00:25:30

and then Karen will weigh

00:25:31

in as well on some

00:25:33

of those big picture issues.

00:25:34

So let's pick up this

00:25:35



issue the investment court and

00:25:37
and Colin I was I

00:25:39
think it's admirable if challenging

00:25:41
to to say that you're

00:25:43
modeling it on the WTO

00:25:45
dispute resolution system, which is

00:25:46
a system that's currently more

00:25:47
of them. So is there

00:25:49
a danger in a state

00:25:50
created system of State breakdown?

00:25:54
I'm doing do do we

00:25:56
run those same kinds of

00:25:57
risks that we see in

00:25:58



the WTO system right now,

00:25:59

or are you already thinking

00:26:01

about the preventive mechanisms? Just

00:26:06

to be clear. We don't

00:26:06

we don't model it as

00:26:07

such understood but you invoked

00:26:10

it. So I'm gonna I'm

00:26:11

gonna hold you to that.

00:26:12

That's fair enough and We

00:26:16

don't we don't model on

00:26:17

it and model it precisely

00:26:18

on on in part because

00:26:21

precisely as you see and

00:26:23



we have collectively learned lessons

00:26:26

about how International judicatory body

00:26:30

should should function. I think

00:26:31

one of the advantages that

00:26:33

working group three has and

00:26:36

the academic forum and particular

00:26:38

contribute to this is We

00:26:40

have had a slate of

00:26:43

international courts in operations since

00:26:46

what the early mid 1990s.

00:26:50

And we know a lot

00:26:51

of things that work. I

00:26:54

mean who also lots of

00:26:54



things that don't work? And

00:26:57

and I won't get into

00:26:59

the specifics of all of

00:27:00

those different things, but I

00:27:02

think one of the things

00:27:02

that's incumbent on the working

00:27:04

group is to actually precisely

00:27:05

look and see well, what

00:27:07

are the practices that we

00:27:09

would want to take up

00:27:11

that are effective and that

00:27:13

are useful. So one if

00:27:15

you look at the papers

00:27:16



we've submitted one thing is

00:27:18

that we would not want

00:27:21

to have and United voting

00:27:25

and for your appointment all

00:27:27

adjudicators. At the same time,

00:27:30

I think something that we

00:27:31

also think is has gone

00:27:33

wrong. The WTO is there

00:27:35

has not been as an

00:27:37

effective and communication or exchange

00:27:41

between the adjudicators and the

00:27:45

legislators. If you want people

00:27:47

that negotiators the states that

00:27:49



have created the treaties and

00:27:52

we think that are good

00:27:53

ideas on the table that

00:27:54

start to address that but

00:27:57

I think one of the

00:27:57

things that's coming up into

00:27:59

trial discussions is precisely you

00:28:00

start to see some of

00:28:01

these different things beginning to

00:28:02

and mail this too to

00:28:05

positive and too strong award

00:28:07

at this moment in time,

00:28:08

but you begin to start

00:28:09



to see some of these

00:28:10

ideas and fusing and coming

00:28:13

together. So and we you

00:28:16

know, there are lessons to

00:28:18

be learned not just from

00:28:19

the WTO, but from a

00:28:21

number of international organizations that

00:28:22

and That we can use

00:28:27

when we talk about how

00:28:28

to structure and apparently mechanism.

00:28:31

Karen do you want to

00:28:32

chime in there? Yes, thanks

00:28:35

Marin. And again, I'll just

00:28:37



quickly Echo that my thanks

00:28:39

to the organizers for inviting

00:28:40

me to the to the

00:28:41

session and I really appreciate

00:28:42

the opportunity to participate and

00:28:45

in addition to your general

00:28:46

disclaimer about these being my

00:28:48

personal remarks. I should also

00:28:49

note that the Biden Harris

00:28:51

Administration is still formulating its

00:28:53

positions in many International Economic

00:28:55

Policy areas. So my comments

00:28:57

should be are certainly without

00:28:59



prejudice to any policy development.

00:29:01

So they are genuinely personal

00:29:03

observations. Now that said I

00:29:06

think you know is Colin

00:29:08

has laid out sort of

00:29:09

the case for a permanent

00:29:11

institution. I think as we

00:29:13

step back and look at

00:29:14

where or I think it's

00:29:15

important for those who are

00:29:17

participating and working group three

00:29:18

to ask themselves. Really whether

00:29:20

the case for a new

00:29:22



permanent institution has been Justified

00:29:24

and and to date weird,

00:29:26

you know, it's not as

00:29:27

clear that it has I

00:29:30

think it's important to keep

00:29:31

in mind that when looking

00:29:32

to establish a new institution.

00:29:34

It's not Game place in

00:29:35

a vacuum. It will come

00:29:37

in as you pointed out,

00:29:38

you know to a framework

00:29:41

or a landscape if you

00:29:43

will where over 2,600 investment

00:29:46



agreements have been interpreted and

00:29:49

we have three decades of

00:29:50

practice and it's important to

00:29:52

sort of look at what's

00:29:53

useful from that practice and

00:29:54

what isn't as opposed to

00:29:55

completely just a Doing away

00:29:59

with that practice, you know,

00:30:01

I think two there are

00:30:03

there may be certain, you

00:30:04

know advantages about a permanent

00:30:06

court, but at this point

00:30:08

those seem to be pretty

00:30:09



much on paper in the

00:30:10

investment context. We don't know

00:30:11

how interpreting a variety of

00:30:13

different agreements which is not

00:30:15

the situation that we have

00:30:16

in the WTO context. I

00:30:18

don't want to get into

00:30:19

debating the WTO at this

00:30:21

stage. So that's the last

00:30:24

time I will I'll refer

00:30:25

to use those three letters

00:30:27

and I think we have

00:30:29

to keep in mind that

00:30:30



there are certain advantages to

00:30:31

the arbitration process, which is

00:30:33

not something that states don't

00:30:36

research resort to a time

00:30:37

as well. And I think

00:30:39

there you have certain efficiencies

00:30:42

of not having a standing

00:30:43

body to have to upkeep

00:30:44

you have party autonomy and

00:30:46

flexibility in terms of being

00:30:48

able to establish tribunals when

00:30:51

they're necessary because I think

00:30:53

it's important to keep in

00:30:54



mind that not all states

00:30:55

are going to be sued

00:30:57

on or are going to

00:30:57

be involved. Involved in dispute

00:31:00

settlement on a regular basis

00:31:01

at the same basis and

00:31:02

as we can see, you

00:31:04

know certain states have over

00:31:06

time had more involvement in

00:31:08

the in this in in

00:31:09

the process than others and

00:31:11

I think two, you know,

00:31:13

it's important to also keep

00:31:14



in mind that these are

00:31:14

very different types of instruments

00:31:16

from the type of instruments

00:31:18

that owns a trial typically

00:31:19

looks at so the working

00:31:20

group is really kind of

00:31:21

having to approach this in

00:31:23

a different way and think

00:31:24

about what it's role is

00:31:25

in terms of establishing something

00:31:27

that would be permanent and

00:31:29

how how the delegations would

00:31:31

then perhaps stay engaged in

00:31:33



a process were something to

00:31:35

be included and I think

00:31:36

that raises some some genuine

00:31:37

concerns and while Colin mentioned

00:31:40

that there could there needs

00:31:41

to be better relationship between

00:31:43

the legislators and the and

00:31:45

the tribunals. I think some

00:31:46

of the rules that are

00:31:47

being set up now may

00:31:49

that we're looking at don't

00:31:51

don't go in the direction

00:31:53

of supporting greater involvement that

00:31:56



they seem to be disassoc.

00:31:58

Dating the relationship between the

00:31:59

treaty parties and the decision

00:32:01

makers and not May perhaps

00:32:03

taking as great a providing

00:32:05

for greater involvement, which one

00:32:07

can do on a more

00:32:08

targeted approach and then I

00:32:10

think finally, you know, it's

00:32:11

important to that that for

00:32:12

a structural reform. I think

00:32:14

one of the questions that

00:32:15

still needs to be asked

00:32:15



is How widely how wide

00:32:18

participation would need to be

00:32:20

for it to be successful?

00:32:22

I think something that ends

00:32:24

up being more Regional may

00:32:27

not actually be viewed in

00:32:29

as having being legitimate as

00:32:31

a multilateral approach and we

00:32:35

have to be cognizant of

00:32:36

the fact that this Spirit

00:32:37

of juncture in investor State

00:32:40

dispute settlement where states are

00:32:41

as you mentioned recalibrating reassessing

00:32:44



their their roles and making

00:32:46

Sovereign decisions in their own

00:32:48

capacity on when and how

00:32:50

investors States settlement should be

00:32:52

included and I think you

00:32:54

know, the United States recent

00:32:56

practice in the usmca and

00:32:58

chapter 14 is a good

00:32:59

example of that. We're even

00:33:00

within a particular agreement. You

00:33:02

may have more discrete and

00:33:05

differentiated approaches to how how

00:33:07

you address that so I

00:33:08



think ultimately it's important that

00:33:10

while we may have a

00:33:11

concrete proposal that those proposals

00:33:14

still need to be justified

00:33:15

as we go forward in

00:33:16

terms of Of thinking about

00:33:17

reform. Thanks. Thanks again Kiara.

00:33:21

Did you on time in

00:33:22

there? Yes, thank you. Thank

00:33:24

you very much. It is

00:33:25

thank you all for inviting

00:33:27

me. I think it's really

00:33:28

it is really a pleasure

00:33:29



to be here. I would

00:33:31

like to just give some

00:33:32

comments a little bit of

00:33:33

a follow-up to both kind

00:33:35

and calling but I think

00:33:36

it's a little to my

00:33:37

point a little premature to

00:33:39

really think about like say

00:33:40

Pro or corn because we're

00:33:41

really at the very early

00:33:42

stage still and so what

00:33:44

I would like to offer

00:33:45

is more comments General comments

00:33:47



what I find quite interesting

00:33:49

about this idea of the

00:33:50

permanent courage, is that of

00:33:52

all the reform proposal. This

00:33:54

is probably the most far-reaching

00:33:56

reaching one in the sense

00:33:58

that he provide a very

00:33:59

systemic reform that will change

00:34:01

is yes system really rather

00:34:05

radically, and he also has

00:34:07

the benefits of addressing a

00:34:09

lot of the concerns that

00:34:12

we're identified as problematic when

00:34:14



I SDS so not only

00:34:15

the issue of the selection

00:34:17

and appointment of a Traders

00:34:18

at adjudicators, but also consistency

00:34:20

predictability of decisions And time

00:34:24

and cost so it is

00:34:25

really a measure that has

00:34:26

that has a far-reaching aim

00:34:29

and what I think this

00:34:31

is my two comments are

00:34:32

what I think is very

00:34:34

helpful to think about when

00:34:36

I think about the court

00:34:37



is that it is. Yes

00:34:39

you think about the court

00:34:40

but it's not a kind

00:34:42

of model on the international

00:34:44

court of justice court and

00:34:47

I think this is quite

00:34:47

helpful. So it's a permanent

00:34:49

court but I think for

00:34:50

those of us who are

00:34:52

familiar with ISD. Yes, it's

00:34:53

really something that is much

00:34:54

more familiar as possibly I

00:34:56

don't want to talk about

00:34:57



every Tio also because it

00:34:59

has been already addressed. But

00:35:00

if you think about the

00:35:01

US Iran tribunal model, I

00:35:04

think that would be quite

00:35:04

interesting because there we already

00:35:06

know some basics of what

00:35:07

we're looking for. So what

00:35:09

they you and others who

00:35:10

want to think about the

00:35:12

court and looking for so

00:35:13

thinking about it two tiered

00:35:15

models, so we have two

00:35:16



instances, which I think are

00:35:18

helpful and address a lot

00:35:19

of the issues. We think

00:35:20

about permanent judges also and

00:35:22

And very specific jurisdiction both

00:35:25

personal and subject matter and

00:35:26

I think thinking about the

00:35:28

possible Court as in these

00:35:31

familiar terms for SDS is

00:35:32

kind of more helpful. And

00:35:35

also I think it's what

00:35:36

interesting thinking to the about

00:35:38

the building that Anna presented

00:35:41



is is part of a

00:35:44

bigger. Of a bigger project.

00:35:47

So it's part of a

00:35:48

it doesn't need to be

00:35:49

endorsed or adopted as a

00:35:52

global as a global court.

00:35:54

It's more. I think my

00:35:55

understanding is more of an

00:35:57

opt-in and in that way.

00:35:59

It's kind of kind of

00:36:00

all International majority systems you

00:36:02

obtain, you know, but I

00:36:04

think it's interesting to think

00:36:05



about that. Also that is

00:36:07

one of the different systems

00:36:09

that are offered as an

00:36:10

ISS reform. Thank you. I

00:36:15

know I'll give you the

00:36:16

floor and then and then

00:36:17

turn over to Margie because

00:36:18

I'm hoping that Margie can

00:36:19

take her comments and then

00:36:20

move us on to talking

00:36:21

about the Appellate mechanism. So

00:36:23

I something there. Thank you

00:36:27

very much and and apologies

00:36:29



for having been kicked out.

00:36:30

It took me a bit

00:36:31

of time to re-emerge and

00:36:34

so I just wanted to

00:36:35

say that when when I

00:36:37

was presenting these different entry

00:36:40

doors for investors and also

00:36:43

the thanks for putting it

00:36:44

up. Again, the two things

00:36:47

that I would like to

00:36:48

to flag. First of all

00:36:49

on top of the building

00:36:51

is the state control and

00:36:54



that is something that I

00:36:55

think is very broadly accepted

00:36:58

in the working group that

00:37:00

what the states at least

00:37:01

want to do is to

00:37:02

regain control over their treaties

00:37:05

and over this system that

00:37:07

they have established. They are

00:37:09

looking at it with different

00:37:10

priorities with different approaches, but

00:37:14

they really want to regain

00:37:16

the control over the treaties

00:37:18

of which they are the

00:37:19



Masters whether we like it

00:37:21

or not and they have

00:37:23

farmed out dispute set. They

00:37:27

have farmed out interpretation and

00:37:30

all of this is now

00:37:31

coming back on the table

00:37:33

as we form elements to

00:37:35

ensure that the states are

00:37:37

not completely left out of

00:37:40

the interpretation of that treaties

00:37:42

and that they have ways

00:37:43

of correcting course when that

00:37:45

is necessary. And the second

00:37:46



point. I wanted to make

00:37:48

in this regard is that

00:37:49

indeed we and that's why

00:37:51

I started with the the

00:37:53

two wings of the building

00:37:54

is that we are at

00:37:57

different stages of development and

00:37:59

the multilateral investment Court proposal

00:38:03

is a is it because

00:38:06

it's it's a complex reform

00:38:08

element because it touches upon

00:38:11

many others because it has

00:38:13

a strong of course link

00:38:15



to this appellate mechanism. That

00:38:17
is also favored by a

00:38:20
number of states it is

00:38:22
we are really beginning as

00:38:25
Cara was Learning to look

00:38:27
into it in depth and

00:38:29
that's exactly what we're going

00:38:31
to do in the coming

00:38:32
sessions of the working group

00:38:33
including the next informal session

00:38:37
that takes place in one

00:38:39
week on our next week.

00:38:40
Actually where we're going to

00:38:42



look into also the design

00:38:44

aspects and we will be

00:38:47

discussing more on costs of

00:38:50

establishing such a body on

00:38:53

text for establishing it on

00:38:56

linkages between the the designation

00:39:02

selection of of a judicators

00:39:06

and and the the mechanism

00:39:10

themselves. So we are really

00:39:12

getting into the hard core

00:39:13

of the of one of

00:39:15

the the strong and difficult

00:39:18

elements of Reform when we're

00:39:21



looking into this court and

00:39:22

into the Appellate mechanism. So

00:39:24

I'm glad that you selected

00:39:25

them for A more in-depth

00:39:29

discussion at that panel. Thank

00:39:31

you. Great. Margie I held

00:39:34

you off because as I

00:39:35

said, I wanted to get

00:39:36

your comments on the on

00:39:37

the permanent Court idea, but

00:39:39

then also you can take

00:39:40

us into the the Appellate

00:39:42

mechanism, which is sometimes presented

00:39:43



as an alternative. Sometimes as

00:39:45

Colin mentioned. It's sort of

00:39:46

part of the of the

00:39:48

investment Court discussion. And so

00:39:50

I hope you'll take us

00:39:51

there. Thank you Maureen and

00:39:54

well before before starting with

00:39:57

the discussion, so I would

00:39:58

like to thank the the

00:39:59

organizers especially Houston Rivas for

00:40:03

the can invitation and putting

00:40:04

together these. Connell and of

00:40:07

course A View Marine for

00:40:08



for the moderation and for

00:40:10

mentioning at the beginning that

00:40:11

all our comments are in

00:40:14

our personal capacity So I

00:40:18

would like just to start.

00:40:21

So when with what Colin

00:40:24

was mentioned it at the

00:40:25

beginning and and the thing

00:40:26

is that when the system

00:40:27

was created, of course, it

00:40:30

was not created for the

00:40:31

Myriad of investment agreements that

00:40:34

we have right now went

00:40:35



the exit was a salvage.

00:40:37

So there was just a

00:40:39

few investment agreements and it

00:40:42

was created for contract all

00:40:44

these Foods more than for

00:40:45

investment dispute. So the enormous

00:40:48

that we have right now

00:40:50

it was good for that

00:40:52

system that it when it

00:40:55

was created. But right now

00:40:58

the reality is that it

00:41:00

doesn't adjust to the reality

00:41:03

that we have right now

00:41:04



with almost 3,000 of investment

00:41:07

agreements in force. So that

00:41:10

is you know, my first

00:41:12

general comment second. I would

00:41:15

like to just refer to

00:41:16

few issues and compare the

00:41:21

Appellate mechanism with the multilateral

00:41:23

investment in court because Colinas

00:41:25

also mentioned that the Appellate

00:41:29

mechanism will not solve everything

00:41:30

and that and because of

00:41:34

that the standard body will

00:41:36

be preferable than just having

00:41:38



an appealing mechanism. But first

00:41:42

I was I I would

00:41:44

suggest that the establishment of

00:41:48

an appeal mechanism does not

00:41:51

raise these same concerns as

00:41:53

the permanent investment Port will

00:41:55

do regarding the selection and

00:41:57

the appointment of the decision

00:41:59

makers as parties to the

00:42:01

dispute may continue to appoint

00:42:03

the decision makers of the

00:42:05

first inside Trevino and and

00:42:07

in fact police do not

00:42:09



make appointments at the review

00:42:11

level, right? So In these

00:42:14

set aside of arbitrary tribunals

00:42:17

of arbitra awards. Sorry is

00:42:19

decided by judges at the

00:42:20

seed of the arbitration and

00:42:23

likewise members of the adhood

00:42:25

Committees under the exit system.

00:42:27

It are appointed from a

00:42:29

Roser of arbitrators by the

00:42:31

chairman of the administrative Council.

00:42:33

So that will make a

00:42:37

big difference because in the

00:42:39



if we have only an

00:42:42

appellate mechanism then parties will

00:42:45

continue to have the right

00:42:47

to a point the decision

00:42:49

makers at the first instance.

00:42:51

Second it's have been said

00:42:54

that it could be problematic

00:42:56

to operate remand because the

00:42:58

ad-hoc first intervenos they will

00:43:02

end to exist. However, unlike

00:43:06

like in domestic contexts where

00:43:08

they remount of the issue

00:43:10

to lower instance is the

00:43:12



rule and appeal tribunal in

00:43:14

their retention contests should be

00:43:16

able to modify, um, or

00:43:19

reverse illegal findings and conclusions

00:43:20

of the first time, you

00:43:22

know without any needs to

00:43:23

remind the issue to the

00:43:25

interview. so we could argue

00:43:28

that that problem could be

00:43:30

solved with having just an

00:43:32

appeal mechanism and not So

00:43:36

with that it won't make

00:43:39

a big difference if we

00:43:40



have you know, the whole

00:43:42

first instance and second tribunal

00:43:45

as a permanent standing, buddy.

00:43:47

so, um in that sense

00:43:51

an atomic is more will

00:43:53

avoid different submissions of these

00:43:55

people to a new trip,

00:43:56

you know, whenever the tribunal

00:43:58

a word has been set

00:43:59

aside, or I know. And

00:44:01

and appeal mechanism as I

00:44:03

mentioned it would allow the

00:44:05

parties to continue selecting the

00:44:07



decision makers at the first

00:44:08

level and at the same

00:44:10

time it will set a

00:44:14

higher level of continuity in

00:44:15

the composition of adjudicators as

00:44:17

a second level. Which is

00:44:19

in our view the element

00:44:23

to achieve consistency and predictability

00:44:26

because the Appel mechanism is

00:44:28

conceived to create coherence and

00:44:31

consistency in the issue. So

00:44:36

this is a clear advantage

00:44:38

of an hybrid procedure with

00:44:41



an unhapp first instance tribunal

00:44:44

preserving. The party appointed me

00:44:45

appointment principle and an appeal

00:44:48

mechanism for 3D base arbitration

00:44:50

regardless of the institution or

00:44:53

arbitration rules under which their

00:44:56

rotation is conducted. And third

00:44:59

and I'm glad that Anna

00:45:01

mentioned the cost of the

00:45:04

proceeders because this is also

00:45:06

another element that is of

00:45:08

concerns of a state police.

00:45:11

So how much it would

00:45:12



cost right? So an appeal

00:45:16

mechanism with understanding of assistant

00:45:18

everybody who also present several

00:45:20

advantage in our view compared

00:45:22

to a multilateral investment court

00:45:24

regarding because of the procedures

00:45:27

in the case of a

00:45:29

permanent investment Court. It is

00:45:31

uncertain how dispute settlements we

00:45:34

funded and maintain over time.

00:45:36

Well, it is true that

00:45:38

financing contributions could be made

00:45:40

by contriving parties in accordance

00:45:42



with the perspective levels of

00:45:44

development. You could present a

00:45:46

heavy burden on public finances

00:45:48

for some developing countries. So

00:45:51

do have not only these

00:45:54

salaries of the adjudicators, but

00:45:56

also you have to think

00:45:58

on how to fund so

00:46:02

to have a Secretariat and

00:46:04

the other the other problem

00:46:06

with that is how can

00:46:08

you match this system with

00:46:10

the currency system with the

00:46:12



exit or the other? The

00:46:15

the other let's say under

00:46:18

the the under the UNC

00:46:22

trouble arbitration rules. So that

00:46:25

in our view who presents

00:46:28

several inconvenience from because purpose

00:46:31

perspective. So, I don't know

00:46:33

the other thing is we'll

00:46:35

have to think in how

00:46:36

long or how long would

00:46:39

we period of those adjudicators?

00:46:41

Right? And if we think

00:46:44

that we could think also

00:46:46



on the pool of arbitrators

00:46:49

of who have because it

00:46:50

turns depend on so Perhaps

00:46:54

we will be closing too

00:46:56

much the the pool of

00:46:57

arbitrators to decide the cases.

00:47:00

So with that I I

00:47:02

think I would finish my

00:47:04

initial comments and I'm looking

00:47:06

forward to hear from from

00:47:07

others. Thank you. Thank you,

00:47:09

Margie. Thank you so much

00:47:10

Colin. I gave you the

00:47:13



unfair setup of letting you

00:47:15

explain the permanent investment court

00:47:16

and then have to sit

00:47:17

there while everyone else commented

00:47:18

on it. I'll give you

00:47:19

first dibs on on responding

00:47:21

on the Appellate mechanism. And

00:47:23

of course, you can pick

00:47:25

up any of the fire

00:47:26

discussion as well and I

00:47:28

will say that Colin was

00:47:29

the one who warned me

00:47:30

when we were planning. This

00:47:32



session that the hard part

00:47:33

is going to be keeping

00:47:33

us moving along so we

00:47:35

may not have time to

00:47:36

let everybody comment on every

00:47:37

proposal but I'll get i'll

00:47:39

let you at least start

00:47:40

us off. Yeah, and thank

00:47:44

you very much Marin, and

00:47:46

I will try to be

00:47:47

briefing either. I think we

00:47:48

could talk about this until

00:47:50

the cows come home as

00:47:51



as the as they see

00:47:53

and I think maybe just

00:47:56

a couple of comments on

00:47:58

the Appellate body and idea

00:48:02

and and then maybe a

00:48:06

couple more General comments and

00:48:07

picking up also a couple

00:48:08

of points through meet and

00:48:10

in the chat, so As

00:48:13

I've said, we view an

00:48:15

appeal body as being something

00:48:17

which is important because it

00:48:19

provides a consistency provides Clarity

00:48:23



provides continuity and it provides

00:48:26

a finality and which we

00:48:29

think is is extremely and

00:48:33

important I think. We would

00:48:36

be concerned that a non-permanent

00:48:40

first instance. and Would would

00:48:45

kind of lead to continued

00:48:46

and complications? because you still

00:48:49

have the problems of Ethics

00:48:53

the problem of double-hearting that

00:48:56

we were struggling with in

00:48:57

the working group a couple

00:48:58

of weeks ago would remain

00:49:01



an important issue. You still

00:49:05

would have problems of cost?

00:49:09

And there's a recommendous frequently.

00:49:13

There's a very good video

00:49:14

of from Professor Philip Sands.

00:49:18

Which is available at Columbia

00:49:20

and Center for sustainable investment

00:49:23

law. I think and talking

00:49:25

about his experiences as an

00:49:28

arbitrator and he explains the

00:49:31

impacts on costs. and and

00:49:34

I think the other thing

00:49:35

that we see is that

00:49:38



and I think the experience

00:49:40

is clear that there are

00:49:42

issues and that cannot be

00:49:44

we're reminded is necessary. They

00:49:47

can't issues that cannot be

00:49:48

completed and on appeal and

00:49:51

reminding evidently in existing system

00:49:53

is is complicated. so but

00:49:57

we also think a bit

00:49:58

more fundamentally that there will

00:50:01

be issues if you create

00:50:03

an appellate body, there will

00:50:05

be issues of continuation of

00:50:10



the ad hoc system, whether

00:50:11

they adopt dripping will follow

00:50:13

or not what the Appellate

00:50:15

body has said and that

00:50:16

we think is likely to

00:50:17

actually lead to more of

00:50:18

the issue more cost than

00:50:21

if you have a permanent

00:50:22

first instance relating directly to

00:50:25

an appeal making And and

00:50:29

I think maybe and this

00:50:30

I would say a bit

00:50:32

more generally and you know,

00:50:34



we do have to of

00:50:37

course think about the system

00:50:38

as it as it stands

00:50:39

today. And we have to

00:50:41

be careful in terms of

00:50:43

the advantages and the disadvantages

00:50:46

but we also have to

00:50:48

think and I think this

00:50:49

is really the challenge for

00:50:50

the work. I think we

00:50:51

all have to think about

00:50:52

how do we deal with

00:50:54

this system in a long

00:50:58



term? If we are teenagers

00:51:00

preparing for or looking at

00:51:03

it as a teenager preparing

00:51:04

for adult life and a

00:51:07

Karen and I have teenagers

00:51:09

about almost the same age

00:51:10

and thinking about these things

00:51:12

then and you really are

00:51:15

trying to think of what

00:51:16

is the base that allows

00:51:18

this. System to grow into

00:51:21

a stable and and adult

00:51:26

that can can make sure

00:51:28



that that functions well. And

00:51:32

and we are not convinced

00:51:33

and I think this is

00:51:34

really the problem. We are

00:51:35

not convinced that. You know

00:51:38

the the areas which were

00:51:40

identified as being problematic in

00:51:42

the working group can be

00:51:44

solved without moving to a

00:51:47

permanent body because you still

00:51:49

have the ethics concerned. You

00:51:50

still have the And you

00:51:56

still have the consistency predictability

00:51:57



concerns. You still have the

00:51:59

time and cost and concerns

00:52:01

and there's only really by

00:52:02

making this change that you

00:52:04

move across now, like every

00:52:06

new system it will take

00:52:08

time. Like every new system

00:52:10

is easy to see what

00:52:11

we don't know what it

00:52:12

looks like yet and caress

00:52:14

better be right. We need

00:52:14

to start to look at

00:52:15

what it looks like before

00:52:17



working can make and judgmental,

00:52:19

but I wanted to also

00:52:21

specifically to pick up the

00:52:22

point of both can has

00:52:25

and made and Elsa and

00:52:29

friend of mine in the

00:52:31

chat about the existence of

00:52:32

you know, they're being many

00:52:34

treaties. Compared to the WTO

00:52:37

where there is there's one

00:52:38

treaty and now we think

00:52:40

that that problem is one

00:52:42

that is exaggerated. And because

00:52:46



we if you look at

00:52:48

the treaties these treaties have

00:52:50

a great deal of commonality

00:52:52

across them. So knowing how

00:52:54

an mfn Clause is going

00:52:57

to be interpreted having an

00:52:59

a permanent mechanism and an

00:53:01

appeal mechanism developing a consistent

00:53:03

interpretation, for example, mfn or

00:53:05

national treatment or for an

00:53:07

equal treatments and will provide

00:53:09

guidance for a large number

00:53:12

and of kitties. And it

00:53:16



is also something which is

00:53:17

quite common that and think

00:53:19

about this from a domestic

00:53:20

systems. Think about this even

00:53:21

in arbitration that we accept

00:53:23

that a judicators deal with

00:53:26

different sources of Law and

00:53:29

can make distinctions and construe

00:53:31

them in a way that

00:53:33

the negotiators intended. And so,

00:53:36

you know, I think from

00:53:38

from our perspective the fact

00:53:40

that there are large number

00:53:42



of treaties rather than being

00:53:44

an argument against a multilateral

00:53:47

mechanisms version argument in favor

00:53:48

of it because there is

00:53:50

such a similarity often identity

00:53:53

and across the treaties. But

00:53:58

I'll stop there and because

00:54:00

we're already as I want

00:54:02

we're already thinking about it.

00:54:03

No, but thank you for

00:54:05

that column. I think that's

00:54:06

really helpful. Let me let

00:54:07

Karen chime in and Kiara

00:54:10



to come in and pick

00:54:11

up what's been put out

00:54:14

there as one of the

00:54:14

possible solutions for those ethical

00:54:16

issues that the Colin was

00:54:17

alluding to and tell us

00:54:19

more about the code of

00:54:19

conduct. But Karen first, why

00:54:21

don't you take a minute

00:54:22

or two to react? Thanks

00:54:25

Marin and I will be

00:54:25

very brief and I think

00:54:27

Marjorie Margie set out. I

00:54:29



think the key issues that

00:54:30

need to be looked at

00:54:31

when we're looking at an

00:54:32

appellate and I I will

00:54:34

leave many of Collins points

00:54:35

unresponded to only because we

00:54:37

have a lack of time

00:54:38

not because of Any commonality

00:54:41

on some of them but

00:54:42

I think one of the

00:54:43

key issues and I will

00:54:45

pick up on this from

00:54:45

Collins point about many treaties

00:54:48



is that we really have

00:54:49

to Grapple with what do

00:54:49

we mean by consistency and

00:54:52

predictability? I mean, I think

00:54:53

correctness of interpretation is important,

00:54:54

but when we get into

00:54:57

the question of consistency, we

00:54:58

don't want consistent decisions that

00:55:01

are not consistent with the

00:55:02

meaning they understanding of the

00:55:04

treaty parties themselves. And so

00:55:05

I think that's an important

00:55:06

safeguard that we have to

00:55:08



have to work in. I

00:55:09

think we Have to think

00:55:10

about how consistency is going

00:55:12

to would be if that

00:55:14

is truly a goal how

00:55:15

that really works if it

00:55:17

doesn't have precedent and if

00:55:19

there is precedent that seems

00:55:20

to be introduced a very

00:55:21

different approach to international law

00:55:24

and and these types of

00:55:25

disputes and I think there

00:55:27

really still needs to be

00:55:28



some grappling with what are

00:55:30

considered justifiable inconsistencies in decisions

00:55:35

that have been coming out

00:55:37

of out of ad hoc

00:55:39

arbitration arbitration tribunals because even

00:55:42

in domestic law we have

00:55:44

courts that may take a

00:55:45

different gloss on something and

00:55:47

that doesn't necessarily mean that

00:55:48

it's incons that we have

00:55:50

inconsistent outcomes. And so I

00:55:52

think those are those are

00:55:53

issues. I don't have an

00:55:54



answer to it, but I

00:55:54

think that's something that we

00:55:55

need to also take into

00:55:56

account when we're looking at

00:55:58

this issue just to add

00:56:00

to the list of Margie's

00:56:01

comprehensive list of things that

00:56:03

we need to think about

00:56:03

as well. Thanks. Thanks so

00:56:06

much Karen. So Kiara, I'll

00:56:09

put it in your hands.

00:56:10

Do you want to say

00:56:10

a word or two on

00:56:11



the impella mechanism before you

00:56:12

take us into the code

00:56:13

of conduct or would you

00:56:14

like to launch directly? I

00:56:16

think I think a better

00:56:17

launch directly just because you

00:56:20

know, you can stay here.

00:56:21

Of course, you can talk

00:56:22

about the court. We're going

00:56:23

to talk about the appeal

00:56:24

forever. But why don't we

00:56:27

switch on if you have

00:56:27

time? Of course, I can

00:56:28



I can present something because

00:56:30

you give my comments later,

00:56:31

but it would be very

00:56:33

happy to talk today now

00:56:34

about the code because differently

00:56:36

from the presentations that we

00:56:37

have just now this is

00:56:39

much more detailed and more

00:56:41

focused so it's kind of

00:56:43

simpler, but I think it's

00:56:44

nonetheless very significant and will

00:56:46

have a very significant impact

00:56:48

on my SDS both in

00:56:49



terms of the procedure is

00:56:51

substance of it. But also

00:56:52

how isds is perceived? So

00:56:55

what I would like to

00:56:56

do is to quickly give

00:56:58

a very quick review of

00:56:59

the proposed code of conduct

00:57:01

and then give an update

00:57:02

of the recent negotiation. Of

00:57:04

course, then we can discuss

00:57:05

more. We are not a

00:57:06

version three of the draft

00:57:08

code. The first was released

00:57:09



in May 2020. Of course,

00:57:11

this is a common effort

00:57:12

between accident and Central was

00:57:14

revised in April and then

00:57:16

in September 2021 again taking

00:57:19

account of all the comments

00:57:20

that were received the latest

00:57:22

iteration I think is quite

00:57:24

interesting because it gives very

00:57:25

specific choices for delegates, which

00:57:27

I think shows very much

00:57:29

that the negotiation that entered

00:57:30

a new phase and the

00:57:32



commitment to this to this

00:57:33

new code. The code has

00:57:36

now 11 articles in one

00:57:38

Annex. It starts very briefly

00:57:41

article one with the definition

00:57:43

and application sections to whom

00:57:45

they could apply the brief

00:57:47

answer is only to our

00:57:49

judicators and possibly somehow candidates

00:57:52

an assistant. It does not

00:57:53

apply to council. Or a

00:57:56

moderators, I'm sorry mediators and

00:57:58

what kind of situation would

00:58:00



be covered all so by

00:58:02

investment arbitration. So what to

00:58:04

whom would be would apply

00:58:06

then it goes to the

00:58:08

specific basic obligation Independence and

00:58:12

in partiality the issue of

00:58:14

you know, the duty of

00:58:16

diligence availability the high standards

00:58:18

of Integrity their adjudicators have

00:58:20

to show fairness competence talks

00:58:23

about the prohibition of or

00:58:25

regulates expired a communication each

00:58:27

of confidentiality and fees and

00:58:29



expenses. And then to Highlights

00:58:32

article for addresses the issue

00:58:33

of double editing actually and

00:58:36

article 10 disclosure. I think

00:58:39

I would like to spend

00:58:39

it very very briefly just

00:58:41

about disclosure because disclosure is

00:58:43

very much of the basic

00:58:44

framework frame of the code.

00:58:47

The code requires a broad

00:58:49

disclosure to enhance transparency and

00:58:52

determine if a confidence exists

00:58:53

article 10 Is first broad

00:58:56



Disclosure by adjudicators of all

00:58:59

issues that may rise doubt

00:59:01

as the independence of impartiality

00:59:03

of the Educators in the

00:59:04

eyes of the parties, which

00:59:06

I think is very important

00:59:06

as adjudicators must make reasonable

00:59:09

effort to become aware of

00:59:11

such interest relations and matter

00:59:12

and the obligation of disclosure

00:59:14

is continues article 10 too.

00:59:17

Then gives an example of

00:59:18

necessary disclosures, for example, Financial

00:59:21



business or professional relations that

00:59:23

exists with certain participants in

00:59:25

the process also cases in

00:59:28

which the candidate origin States

00:59:30

or has set going back

00:59:31

a and yet and specify

00:59:34

a number of years and

00:59:35

to include also their role

00:59:37

as Council or or expert

00:59:41

Um, the I think this

00:59:43

is quite issue. It's quite

00:59:44

interesting the issue of disclosure

00:59:46

because it's tended to be

00:59:47



is intended to be very

00:59:48

very Broad and incorporate also

00:59:50

issues that were required of

00:59:52

the code like a like

00:59:56

repeat appointments. For example article

00:59:58

11, then looks at compliance

00:59:59

enforcement and implementation included. So

01:00:02

adjudicators mask themselves comply with

01:00:05

with the code and disqualification

01:00:07

and removal procedures in the

01:00:09

applicable applicable rules and treaties

01:00:11

of applied to adjudicators in

01:00:14

the code. The questions are

01:00:15



what are possible alternative or

01:00:18

additional functions either Financial or

01:00:21

other kind of sanctions and

01:00:22

how to implement the the

01:00:24

code should be by treaty

01:00:26

or should we be by

01:00:27

agreement of the parties or

01:00:28

by agreement of their judicators.

01:00:31

So how to apply the

01:00:32

code some of these issues

01:00:34

are actually addressed in the

01:00:35

negotiation that occur just before

01:00:37

Thanksgiving the answer to delegates

01:00:40



Or one week and negotiators

01:00:42

were able to discuss some

01:00:43

of the important issues. But

01:00:45

in fact not all namely

01:00:47

so the issues of the

01:00:48

definition of disclosure the extent

01:00:50

of disclosure and the issue

01:00:51

of compliance were not discussed.

01:00:53

The preliminary issues to actually

01:00:56

a long time and I

01:00:58

think is actually a testament

01:00:59

to how involved the parties

01:01:02

are to make sure that

01:01:03



the code is is applied.

01:01:05

So the some of the

01:01:08

issues were really preliminary and

01:01:10

very important issues. So for

01:01:12

example, I would like to

01:01:12

talk about three one is

01:01:15

we spend quite a bit

01:01:16

of time talking about the

01:01:17

scope of the application of

01:01:19

the code and the definition

01:01:20

of International Investment dispute in

01:01:23

terms of the school. What

01:01:24

is the role of the

01:01:25



assistant? What is the role

01:01:27

of candidates but also the

01:01:28

relevance of the provisions of

01:01:30

the code to permanent judges

01:01:32

and so there wasn't discussions

01:01:33

about whether we should have

01:01:34

one or two codes. I

01:01:35

think the agreement was that

01:01:36

we should have one code

01:01:37

but with the specific Provisions

01:01:40

that app To permanent judges

01:01:41

will be significantly highlighted similarly

01:01:45

the original in terms of

01:01:47



the definition of IID International

01:01:49

Investment dispute. Originally the code

01:01:52

had was going to apply

01:01:53

to all investment cases including

01:01:55

3D contract and laws that

01:01:57

change in the second and

01:01:59

third draft. I think that

01:02:01

was another point of discussion.

01:02:02

I think now there was

01:02:03

an agreement that we should

01:02:05

apply to as kind of

01:02:07

as much as possible including

01:02:09

treaties contracts and domestic laws.

01:02:13



If your number if your

01:02:14

discussion also on article 3

01:02:16

Independence in impartiality and especially

01:02:19

on the issue of the

01:02:21

the discussion on the issue

01:02:23

of kind of appearance of

01:02:24

bias. So adjudicators are required

01:02:27

to be independent and impartial

01:02:29

and a lot of discussions

01:02:30

about how to build on

01:02:31

these and whether and how

01:02:32

appearance of buyers should be

01:02:34

included a fair amount of

01:02:36



discussion in this will be

01:02:37

my last point was also

01:02:39

we also was also kind

01:02:42

of had on the issue

01:02:43

of double heading article four

01:02:45

require provides for regulate double

01:02:49

hatching as concurrent roles that

01:02:52

adjudicator is may or may

01:02:55

not play it's quite interesting

01:02:56

because article for provided for

01:02:58

three different options if full

01:03:00

prohibition Where the adjudicators could

01:03:04

not concurrently act as cancer

01:03:06



or expert in another ID

01:03:08

case it modified prohibition. So

01:03:11

whether adjudicator cannot concurrently act

01:03:14

as Council or expert in

01:03:16

similar cases, possibly with the

01:03:18

same measures simply gal issues

01:03:19

in parties and treaties, you

01:03:21

know to be defined and

01:03:22

then a third a third

01:03:26

option would be the full

01:03:27

disclosure requiring adjudicators to disclose

01:03:30

or overlapping roles with options

01:03:32

for challenges for lack of

01:03:34



Independence selling partiality. I think

01:03:36

this was probably one of

01:03:37

the most significant debates and

01:03:39

there was always in these

01:03:42

three options. There was always

01:03:42

an option for parties to

01:03:44

agree that Educators can serve

01:03:46

anyhow, So and most significant

01:03:49

debate a lot of discussions

01:03:51

about this my understanding from

01:03:54

the comments and the discussion

01:03:56

is the most takes a

01:03:58

lot of States won't prohibition.

01:03:59



Not all but they are

01:04:02

concerns if any significant concern

01:04:03

especially by practitioner that a

01:04:05

provision quite complete prohibition maybe

01:04:07

overboard. I think that we

01:04:09

there was an understanding that

01:04:11

possible this option two of

01:04:12

a modified provision might be

01:04:14

the way forward requiring however

01:04:16

full disclosure by adjudicators of

01:04:19

all of their possible different

01:04:22

different hats that were they

01:04:24

were wearing so I think

01:04:25



the negotiations really push forward

01:04:27

and put forward a lot

01:04:29

of the over the understanding

01:04:32

of the code a huge

01:04:35

advancement. I think on the

01:04:36

code itself and making it

01:04:37

much closer. I think the

01:04:39

code is one of the

01:04:39

options that that might be

01:04:43

for presentation really for presentation

01:04:45

to for appro. In 2022,

01:04:49

and I think it's possible

01:04:49

to have that I'll stop

01:04:51



here. Of course we can

01:04:52

talk about this for a

01:04:53

long time, but look forward

01:04:54

to having discussion with others.

01:04:56

Thank you. Great. Thank you

01:04:58

Kiera. Um before we sort

01:05:00

of dive into Using a

01:05:03

few minutes to respond or

01:05:05

to talk about the code.

01:05:07

Let me actually turn to

01:05:08

Karen and just invite her

01:05:11

to remind us of some

01:05:12

of the other perform proposals

01:05:14



and initiatives that are out

01:05:15

there circulating as well. And

01:05:17

then maybe we can all

01:05:18

comment on on them collectively

01:05:20

or some of the different

01:05:21

ones out there, but we've

01:05:23

focused very much on the

01:05:24

you know, permanent permanent Court

01:05:26

option the Appellate mechanism the

01:05:28

code of conduct but there

01:05:30

are other initiatives in play

01:05:31

as well. So Karen, do

01:05:33

you want to say a

01:05:33



few words about that? Sure,

01:05:34

thanks maren. And I think

01:05:36

just you know, in terms

01:05:37

of concrete proposals. I think

01:05:38

the code is an excellent

01:05:39

example of where we have

01:05:40

concrete texts. We have a

01:05:42

concrete proposal the work between

01:05:44

exit and unsatural has really

01:05:45

been been quite excellent and

01:05:48

turn and I think seeing

01:05:49

how the working group has

01:05:50

grappled with that because this

01:05:51



is a topic where there's

01:05:52

been a lot of thought

01:05:53

there's been a lot of

01:05:54

work and we're able to

01:05:55

kind of come come to

01:05:56

work on that making, you

01:05:58

know a conclusion of the

01:06:00

code, you know a real

01:06:01

reality real. Ability by probability

01:06:04

I should say by the

01:06:05

end of by the Commission

01:06:06

in 2022. And I think

01:06:08

that there are other proposals

01:06:09



out there that are elements

01:06:13

where they are sort of

01:06:14

ready made. If you will

01:06:15

from existing agreements for example

01:06:18

proposals to address concerns about

01:06:21

frivolous claims or unmeritorious claims.

01:06:23

There are provisions on trying

01:06:27

to address security for costs

01:06:29

where states have been concerned

01:06:30

about I'm not being able

01:06:31

to recover their costs provisions

01:06:34

on regulating third-party funding. We

01:06:38

have Provisions that encourage greater

01:06:41



involvement by the treaty parties,

01:06:44

for example, when a treaty

01:06:45

party is a non-disputing treaty

01:06:47

party to a dispute and

01:06:49

can share its views on

01:06:51

how the interpretation of a

01:06:53

particular provision should should be

01:06:56

should be or how particular

01:06:58

provision should be interpreted and

01:07:00

similarly joint commissions, which of

01:07:03

Course are you know both

01:07:04

of those measures have been

01:07:06

very actively used by the

01:07:08



three and aft parties it's

01:07:10

those are reincorporated in the

01:07:11

usmca and in many agreements

01:07:14

that the United States has

01:07:16

been a party to such

01:07:17

as the US Panama investment

01:07:19

chapter in the in the

01:07:21

US panama-free trade agreement and

01:07:22

many others, you know, really

01:07:24

important tools for interpreting for

01:07:28

for framing interpretations and and

01:07:31

guiding that so that you

01:07:32

can avoid some of the

01:07:33



concerns about consistency that have

01:07:36

been have been flagged, you

01:07:38

know, and I I flagged

01:07:40

those Anna already mentioned the

01:07:41

alternative dispute resolution and advisory

01:07:43

Center. Those are obviously going

01:07:45

a matter or forms that

01:07:47

are being looked at but

01:07:48

I think all of these

01:07:49

can be looked at as

01:07:51

concrete ways to address particular

01:07:54

concerns more discreetly than trying

01:07:56

to sort of think about

01:07:57



having an entirely new system.

01:07:59

And in fact, there are

01:08:00

a lot of commonalities between

01:08:03

What has been proposed as

01:08:05

a permanent International court and

01:08:07

what could be very specific

01:08:09

reforms for the existing ad

01:08:12

hoc system to where we

01:08:13

might look at these differences

01:08:14

as really ones that go

01:08:16

to how adjudicators are appointed

01:08:19

as opposed to the mechanics

01:08:20

of how the proceeding should

01:08:22



go forward. So I think

01:08:23

all of those types of

01:08:24

proceedings are all those types

01:08:26

of Provisions that I listed

01:08:27

that are that we can

01:08:28

draw from lots of examples

01:08:30

in existing agreements and really

01:08:32

can help remedy where I

01:08:34

think a lot of the

01:08:34

problems that we are currently

01:08:36

dealing with have Arisen and

01:08:37

that's been in First so-called

01:08:40

first generation older investment agreements

01:08:42



that do not have a

01:08:44

lot of the safeguards and

01:08:45

have not been able to

01:08:46

benefit from the evolution of

01:08:48

you know, experience and practice.

01:08:51

And so I think one

01:08:51

of the things that the

01:08:52

working group of course will

01:08:53

all still be looking at

01:08:54

is is a practical way

01:08:56

to implement the types of

01:08:57

reforms and I think implementation,

01:09:00

you know is itself a

01:09:02



very large topic but I

01:09:03

would simply say that there

01:09:04

are multiple ways to do

01:09:05

that and I think that

01:09:07

I said rules amendment process

01:09:08

is one way to show

01:09:09

how the arbitration rules themselves

01:09:12

can be adjusted to address

01:09:13

to get capture many of

01:09:15

the concerns that have been

01:09:16

identified as well. So I

01:09:19

think we've got a lot

01:09:20

of concreting examples that don't

01:09:22



that are not necessarily structural

01:09:24

or systemic but are very

01:09:26

important and targeted to get

01:09:28

at the problems that that

01:09:30

are being identified by the

01:09:31

working group. And you know

01:09:32

again, I think the the

01:09:34

code of conduct is is

01:09:35

an excellent example of how

01:09:36

we can address concerns about

01:09:39

X vary in a more

01:09:42

discreet way and improve upon

01:09:43

the the rules that we

01:09:45



have out there right now

01:09:46

and building on the best

01:09:47

practices from say the IBA

01:09:49

guidelines are or other other

01:09:51

tools that we have and

01:09:53

I will stop there because

01:09:54

I think you're probably what

01:09:55

one minute until we have

01:09:56

to move on to the

01:09:57

breakout. So I mean, I'm

01:10:00

gonna thank you so much

01:10:01

Karen, I'm gonna give out

01:10:02

of the the privilege since

01:10:03



she was starting us off

01:10:05

and since the technology deprived

01:10:06

her of the floor. I'm

01:10:07

gonna give her back the

01:10:09

floor for maybe I know

01:10:11

you could share with us

01:10:12

if you comments about where

01:10:13

where you see this process

01:10:14

going forward and and how

01:10:16

it's going to progress in

01:10:17

addition. If you wanted to

01:10:18

responded to any of the

01:10:20

the prior interventions, but I'll

01:10:22



give you the the privilege

01:10:23

of closing us out before

01:10:25

we head off into our

01:10:26

breakout sessions and just a

01:10:27

word for all of our

01:10:28

participants. Please stay around for

01:10:29

the breakout session. It's a

01:10:31

great time to continue the

01:10:32

conversation to get to know

01:10:33

other people who are interested

01:10:34

in these same issues and

01:10:36

to really engage and I

01:10:37

think everybody enjoys them, so,

01:10:39



The police stick around for

01:10:40
that as well. But so

01:10:41
Anna take us away. Thank

01:10:43
you very much. Yeah, I

01:10:45
just would like to to

01:10:46
dovetail on what Karen just

01:10:49
mentioned which is the delivery

01:10:52
mechanism for all this reform

01:10:55
these different reform elements. And

01:10:58
this is what we are

01:10:59
also going to start looking

01:11:02
into we had a number

01:11:04
of very solid proposals that

01:11:06



we're put forward to of

01:11:09

course use the mechanism that

01:11:11

ANSI trial has used in

01:11:13

the transparency convention, but you

01:11:17

can also think about some

01:11:19

precedence that the oecd has

01:11:22

given in the context of

01:11:23

the beps the double tax

01:11:25

treaty Network. And so this

01:11:29

is next on our agenda

01:11:32

for the informal sessions that

01:11:36

will take place next week

01:11:37

where we will have two

01:11:38



full days devoted to the

01:11:40

delivery mechanism, which is according

01:11:45

to a number of proposals

01:11:46

going to be a multilateral

01:11:48

convention with lots of flexibility

01:11:50

inbuilt and with the possibility

01:11:53

of including different elements, some

01:11:57

of them being sort of

01:11:58

core elements that will apply

01:12:00

to everybody and others that

01:12:02

will be more optional. And

01:12:04

another thing I wanted to

01:12:05

to allude to is that

01:12:07



from the beginning it was

01:12:09

very clear that we didn't

01:12:11

have a closed list of

01:12:12

Reform options. Now that we

01:12:16

are reaching the elements that

01:12:18

we are now working on

01:12:19

on delivering they are still

01:12:22

issues that are actually options

01:12:25

stage and there we have

01:12:27

been reminded quite strongly by

01:12:29

developing countries particularly from Africa

01:12:31

that there is a need

01:12:33

to look into calculation of

01:12:35



Damages, which is a big

01:12:38

issue according to a number

01:12:40

of the states in the

01:12:41

room. And they are also

01:12:44

another set of what they

01:12:46

call the cross-cutting issues that

01:12:49

also need to be looked

01:12:51

at more in detail. We

01:12:53

we're getting more and more

01:12:56

as we are advancing, but

01:12:58

you can you can rest

01:13:01

assured that next year when

01:13:03

we come back if we

01:13:04



are reinvited and if I

01:13:06

don't get kicked out before

01:13:08

joining, we will have more

01:13:11

to report and and good

01:13:12

progress because they're working group

01:13:14

is extremely committed as most

01:13:16

of the speakers have said

01:13:18

and we're getting we're making

01:13:20

good progress It's slow because

01:13:22

it involves States and states.

01:13:24

The time of states is

01:13:25

slow, but it's steady and

01:13:28

that that is very heartening.

01:13:29



Thank you very much. Thank

01:13:32

you Anna. I think that

01:13:34

I think that's a nice

01:13:35

place to to wrap us

01:13:37

up as we look ahead

01:13:38

to what will be hopefully

01:13:39

discussing next year. I do

01:13:41

know that there's so much

01:13:42

more that we could all

01:13:43

say about all these different

01:13:44

issues because they're just as

01:13:48

the states like to talk

01:13:49

to them. So talk about

01:13:50



them all so do we

01:13:52

all as as the participants

01:13:54

and stakeholders in the system

01:13:55

like to talk about these

01:13:56

issues at length and I'm

01:13:58

sure that there are many

01:13:59

drinks conversations to be had

01:14:00

as well. So But but

01:14:03

in the interest of sticking

01:14:06

with the with the Washington

01:14:07

arbitration week ethos of letting

01:14:10

everybody participate and get to

01:14:11

know each other as well.

01:14:12



I don't want to lose

01:14:13

out on the on the

01:14:14

breakout sessions also, so I'm

01:14:16

turning it back then to

01:14:17

Jose Antonio to to direct

01:14:19

the supporting with thank you

01:14:21

marine and in the order

01:14:23

that I see you on

01:14:24

my screen. Thank you, Karen

01:14:26

Giada Margie calling and and

01:14:30

as Uber and bread and

01:14:33

and of course you will

01:14:34

be invited next year no

01:14:36



matter what capacity you are

01:14:38

that that is that goes

01:14:40

without saying to you and

01:14:42

to every member of of

01:14:44

this panel. It was an

01:14:46

amazing panel. I still have

01:14:48

questions many, you know on

01:14:51

the on the sort of

01:14:54

more avant garde the themes

01:14:58

like like investors rights and

01:15:00

and Direct claims by by

01:15:05

states to investors. Those themes

01:15:08

are of course much expected

01:15:09



by the International Community and

01:15:12

hopefully the discussions would would

01:15:14

move forward on that given

01:15:18

that many of the topics

01:15:19

that that are being discussed

01:15:21

now have been despite, you

01:15:25

know. despite news have been

01:15:30

There for for I would

01:15:34

say for decades so, you

01:15:36

know, the appeals mechanism was

01:15:38

something that was discussed at

01:15:39

Exit when I was counsel

01:15:41

there in 2006. So so

01:15:43



talking about a court on

01:15:45

an appeals mechanisms, although in

01:15:49

appearance revolutionary it's not that

01:15:51

revolutionary but but in any

01:15:54

event, I will not go

01:15:56

into it because that it's

01:15:58

not it's not my place

01:15:58

to to hold my opinions

01:16:00

down, but I would welcome

01:16:03

everyone to our our breakout

01:16:07

rooms the mechanics of the

01:16:10

breakout rooms. I shall say

01:16:12

is that you will should

01:16:13



be receiving an invitation to

01:16:16

join the breakout room. If

01:16:17

you do not accept that

01:16:18

you will remain on the

01:16:20

main room. So I I

01:16:22

urge you to accept the

01:16:24

invitation to go into the

01:16:25

breakout room so that you

01:16:27

can see the stars of

01:16:28

the of the panel which

01:16:30

are of course the speakers

01:16:31

here. So take it away

01:16:33

matter Lucia so that we

01:16:35



can go into the breakout

01:16:36

rooms and and Marine thank

01:16:37

you for for juggling. Yeah

01:16:40

a Hot Topic with with

01:16:42

amazing loves. This has been

01:16:47

a pleasure in many thanks

01:16:48

to all so. see you

01:16:50

in the