

## **Controversial Investment Awards Against States in South Asia: Claims of Corruption, Abusive Treaty Interpretation and Novel Damages Calculations \***

### **Summary**

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

The Washington Arbitration Update panel focused on controversial investment awards in South Asia, featuring key discussions on corruption, treaty interpretation, and damage calculations in investment arbitration. The session was moderated by Dr. Kabir Dugal, a prominent attorney and academic specializing in international arbitration. He introduced the panelists, including Professor Romana Islam from Bangladesh, Dr. Rishab Gupta from India, and Fatima Islam from Pakistan, each bringing unique insights into their respective countries' experiences with investment arbitration.

The panel highlighted the significant impact of corruption allegations on investment disputes, noting that while corruption is often easy to allege, it is difficult to prove in arbitration settings. The discussion also examined the challenges of interpreting treaties, particularly in the context of poorly drafted agreements that can lead to inconsistent rulings. The speakers shared case studies, including Bangladesh's experiences with Saipem and Niko, and India's challenges with the Vodafone and Devas cases, illustrating the complexities of navigating investment arbitration in developing countries.

Key themes included the need for developing countries to improve their negotiation strategies in bilateral investment treaties (BITs) and the importance of considering a state's ability to pay damages in arbitration awards. The panel concluded with a call for continued evolution in the investment arbitration landscape, emphasizing the necessity for reforms to better protect both investor rights and state interests. The session engaged participants through polls and discussions, fostering a collaborative dialogue on the future of investment arbitration in South Asia.

### **Authors**

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### **Topics**

South East Asia

## Category

WAU

## Full Transcript

00:00:04

Pakistan for those in Asia

00:00:10

in Pakistan Bangladesh Sri, Lanka

00:00:13

and India, we are extremely

00:00:17

extremely happy about this panel

00:00:21

and good evening. Also to

00:00:24

those that are in the

00:00:26

east coast of the US

00:00:28

and no perhaps good afternoon,

00:00:31

depending on on where you

00:00:33

may be in the world.

00:00:34

This is a the panel

00:00:37

on controversial investment Awards in

00:00:41

South Asia and it is

00:00:44

a my pleasure to share

00:00:49

with you a few words

00:00:50

about the world arbitration update,

00:00:52

but before that it is

00:00:54

my pleasure to introduce the

00:00:58

moderator for this panel Kabir

00:01:02

Dr. Kabir Dugal Who is

00:01:05

in addition to a incredible

00:01:09

supporter of world arbitration updates

00:01:12

also a very strong attorney

00:01:15

arbitrator and academic? Kabir focuses

00:01:21

his practice on International Investment

00:01:24

arbitration International commercial arbitration and

00:01:28

public international law matters. Serving

00:01:31

both as Council and as

00:01:33

arbitrator. He is a professor

00:01:38

of Columbia Law School and

00:01:40

also a international attorney in

00:01:44

Arnold and Porter. Dr. Dugal's

00:01:49

experience includes complex disputes under

00:01:52

numerous bilateral multilateral investment treaties

00:01:55

and contracts in South Asia

00:01:58

Latin America Central Asia middle

00:02:02

east Europe and Africa, he's

00:02:05

experienced flows from his triple

00:02:07  
training in international law. common  
00:02:10  
law and civil law traditions  
00:02:14  
He has served as an  
00:02:16  
arbitrator in over 40 disputes  
00:02:19  
involving parties from all over  
00:02:21  
the world and across several  
00:02:23  
different Industries. Dr. Dugo has  
00:02:26  
been ranked as among top  
00:02:29  
10. Arbitrators for the Asia  
00:02:32  
Pacific region by the Valley  
00:02:34  
International arbitration and mediation Center  
00:02:36  
and received the 2019 equality  
00:02:40  
and diversity award in discrete  
00:02:42  
resolution by Prime dispute in  
00:02:44  
2020 in 2021, Dr. Dogo  
00:02:48  
was awarded the 2020 dispute  
00:02:52  
resolution partitioner of the year  
00:02:54  
for the Americas and and  
00:02:57  
most importantly Dr. Dugal is  
00:03:01  
also I guess the lecture

00:03:05

In Georgetown University Law Center

00:03:07

to my course on investment

00:03:11

treaty arbitration public international law

00:03:14

and icj judgment Kabir has

00:03:18

helped build that course, especially

00:03:22

concerning the session on expropriation

00:03:26

and has been has done

00:03:29

supporter of world arbitration update

00:03:31

by connecting real. Which also

00:03:35

promotes diversity? And the world

00:03:38

arbitration update we are very

00:03:40

pleased to have him as

00:03:41

the moderator and without further

00:03:44

Ado Kabir you have a

00:03:46

floor. Thank you very much.

00:03:48

Jose. Best \$20 ever spent

00:03:52

in my life. Let me

00:03:54

just start off by saying

00:03:56

what a delighted is to

00:03:58

be here. My role is

00:04:02

actually very easy because we

00:04:05

have and absolutely spectacular phenomenal

00:04:10

panel in front of you.

00:04:13

These are truly just you

00:04:16

know, I will introduce them

00:04:17

very briefly, but these are

00:04:20

real Stalworths their real people

00:04:25

making a difference in South

00:04:27

Asia, but in arbitration more

00:04:31

generally. And it's real Delight

00:04:34

to be able to get

00:04:35

such amazing people together. Obviously

00:04:38

we are going to be

00:04:39

talking about a very simple

00:04:41

and easy topic. It's corruption

00:04:43

abusive treaty interpretation and novel

00:04:47

damages calculation. That's our agenda

00:04:50

for today. I was kidding

00:04:52

in case that wasn't a

00:04:54

parent. We are looking at

00:04:55

very meaty issues, but we

00:04:57

have this amazing panel that's

00:04:59

going to share the thoughts

00:05:00

and insights so stay tuned.

00:05:02

Join in the conversation. Let

00:05:05

me just set the stage

00:05:07

for what's going to come

00:05:09

and then we're talking about

00:05:10

corruption. Right if we just

00:05:14

look at some estimates a

00:05:16

big part of the word

00:05:17

GDP gets lost in corruption.

00:05:21

If you look at Monetary

00:05:22

amounts, it's huge. 2.6 trillion

00:05:27

dollars that zeros I cannot

00:05:29

even imagine and then you

00:05:31

see what the World Bank

00:05:33

tells us corruption robs schools

00:05:37

and rots institutions. I put

00:05:40

that here mainly because I

00:05:41  
felt the word Robin wrought  
00:05:43  
Ryan. What is the implication  
00:05:48  
for us when we're talking  
00:05:50  
about this topic? nutrition corruption  
00:05:56  
very unique Dimension because corruption  
00:06:00  
can be especially in the  
00:06:02  
investment context. a sport and  
00:06:05  
a shield State can invoke  
00:06:08  
it as a defense the  
00:06:10  
state can you know? Affirmatively  
00:06:14  
try to point to corruption  
00:06:16  
by the investor. You see  
00:06:18  
it happening both ways. You  
00:06:20  
can see the investor invoking  
00:06:22  
it both ways. Just to  
00:06:26  
notice that while it's our  
00:06:28  
focus is investment arbitration. You  
00:06:31  
are seeing this coming up  
00:06:32  
in commercial arbitration as well.  
00:06:36  
Corruption easy to allege difficult

00:06:39

to prove we will be

00:06:40

probably looking at some of

00:06:42

the cases in South Asia

00:06:45

where this is become a

00:06:46

very critical issue. But the

00:06:50

tribunal is not a court.

00:06:52

Right. It doesn't have police

00:06:54

Powers. It cannot actually make

00:06:57

investigations of findings. And therefore

00:07:00

if you see publicly known

00:07:03

cases that have made findings

00:07:06

and Corruption. It's few and

00:07:08

far between The other thing

00:07:12

they're going to talk about

00:07:13

is what impact does damages

00:07:17

have and this is where

00:07:19

we talk about the mega

00:07:21

award, right? I think for

00:07:23

God you have to be

00:07:25

over a threshold and I

00:07:28

think the threshold is 500

00:07:29

million to even be classified

00:07:31

as a case. damages Can

00:07:36

sometimes be super large? I

00:07:38

think the example that I

00:07:38

always find well fascinating. is

00:07:42

that if you add up

00:07:44

and this is a few

00:07:45

years ago, but if you

00:07:46

added up the total amount

00:07:48

alleged against the Czech Republic.

00:07:53

That amount was larger than

00:07:55

the annual budget for the

00:07:56

check Ministry of Health. So

00:07:59

we're talking about cases that

00:08:01

can have potentially very very

00:08:04

large reaches. This is again

00:08:08

damages. This is valuation. There's

00:08:12

so many approaches and valuation.

00:08:15

different valuations leading to different

00:08:17  
outcomes Let's take a little  
00:08:20  
bit of a look into  
00:08:21  
that. And let's come to  
00:08:24  
the regional Focus that we're  
00:08:26  
looking at. We're talking about  
00:08:28  
South Asia. Now, let's put  
00:08:32  
Cricket aside and let's put  
00:08:34  
delicious food aside, but we're  
00:08:37  
talking about. The region that  
00:08:39  
is about a quarter of  
00:08:41  
the global world population. Key,  
00:08:46  
this is the region that  
00:08:47  
we cannot ignore. We're talking  
00:08:50  
about countries that are rapidly  
00:08:53  
growing. But this often corruption  
00:08:56  
lurking in the background. And  
00:08:59  
then for our purposes specifically  
00:09:02  
we're seeing each of the  
00:09:05  
three countries. playing active roles  
00:09:09  
as respondents in investment arbitration

00:09:15  
with some potentially large and  
00:09:18  
controversial Awards coming out in  
00:09:20  
each of the three countries.  
00:09:23  
Now for countries that are  
00:09:25  
developing for countries that have  
00:09:27  
issues on poverty for countries  
00:09:30  
that are thinking about infrastructure.  
00:09:34  
You may have to make  
00:09:36  
tough decisions when it comes  
00:09:38  
to larger words. What implications  
00:09:41  
will will that have on  
00:09:43  
your growth agenda? That's something  
00:09:46  
this awesome panel is going  
00:09:48  
to tease out for us.  
00:09:49  
But before we do that,  
00:09:51  
we'd like to invite you  
00:09:53  
especially those joining very early  
00:09:55  
or Like Us in New  
00:09:57  
York and Boston. Or DC  
00:10:00  
quite late. We'd like you

00:10:02  
to join us in some  
00:10:04  
polay Maria Lucia. Can we  
00:10:06  
have the first poll question  
00:10:08  
presented? And that's the proposition  
00:10:13  
you see in front of  
00:10:14  
you. Okay, folks. We invite  
00:10:22  
you all to share your  
00:10:23  
views. Go ahead take it  
00:10:25  
away. 57% have participated 60.  
00:10:41  
Let's try to make it  
00:10:42  
100% participation. Let us know  
00:10:45  
what you think that'll give  
00:10:47  
up panel something something to  
00:10:49  
think about the proposition investment  
00:10:52  
trade unions are likely the  
00:10:55  
only neutral body to address  
00:10:57  
serious allegations of corruption in  
00:11:00  
South Asia. Still at 62  
00:11:08  
will give it another 10  
00:11:10  
15 seconds and then we'll

00:11:12

close the pole. Let us

00:11:14

know what you think. We're

00:11:16

having an interesting mix here.

00:11:20

I disagree with the slightly

00:11:23

higher percentage than the I

00:11:25

agree, but we have about

00:11:28

20% of people that are

00:11:30

unsure where to come out

00:11:32

and a panel maybe successful

00:11:35

in helping you move one

00:11:37

way or the other. Okay,

00:11:41

I think this is a

00:11:42

good time to close the

00:11:44

poll. And you can see

00:11:50

the results. And with that

00:11:53

we get the poll out.

00:11:58

Okay. Now let me present

00:12:00

the second polling question. Investment

00:12:04

arbitration should consider a state's

00:12:07

ability to pay when it

00:12:09

comes to damages. These are

00:12:11

the choices you have. I

00:12:13

agree. I disagree or I

00:12:15

am undecided. We invite you

00:12:18

to give us your initial

00:12:19

reactions. Okay, we seem to

00:12:41

be having a slight majority

00:12:43

here. And that's interesting. Let's

00:12:48

give it another few seconds.

00:12:59

Okay. we clearly see here

00:13:02

a preferred approach in support

00:13:05

of the fact that tribunals

00:13:08

should think about States ability

00:13:14

to pay there has been

00:13:16

some recent scholarship talking about

00:13:18

what is termed as crippling

00:13:20

compensation? Clearly this spinal or

00:13:25

the representatives here feel strongly

00:13:27

in support of all I

00:13:29

shouldn't say yeah 63% Yeah.

00:13:33

Okay, now what's going to

00:13:36

happen very soon We're going

00:13:40

to have Rekha. rangachari the

00:13:44

executive director of the New

00:13:46

York International arbitration Center Somebody

00:13:50

I think who needs no

00:13:52

introduction and somebody. Who I'm

00:13:56

pretty sure more than half

00:13:58

of you get emails from

00:14:00

right around the week. I'm

00:14:04

not going to spend too

00:14:05

much time introducing the panelists

00:14:07

because we're going to be

00:14:08

here all day. Look them

00:14:11

up and connect with them

00:14:12

on LinkedIn. I mean, I

00:14:14

think that's a bigger gender

00:14:15

of what we're trying to

00:14:17

accomplish with. Wow. That is

00:14:19

to make people get together

00:14:21

and know each other. patrika

00:14:24

will set the stage of

00:14:25

what's happening globally when it

00:14:27

comes to corruption interpretation and

00:14:30

when it comes to damages,

00:14:33

let me just tell what's

00:14:34

going to happen because our

00:14:36

speakers will speak in succession

00:14:37

and then we will have

00:14:39

dialogue we're going to have

00:14:42

the three big South Asian

00:14:44

countries with speakers from each

00:14:48

of these countries tell us

00:14:50

what's happening in that country.

00:14:53

We begin with Bangladesh. We

00:14:57

have Professor Romana Islam. a

00:15:01

true leader probably one of

00:15:03

the youngest people to be

00:15:05

nominated to exits panel by

00:15:08

Bangladesh and it true expert

00:15:12

so we are very privileged

00:15:14

to hear and Authority in

00:15:16

Bangladesh telling us what's happening

00:15:18

in Bangladesh. We are then

00:15:21

going to move on to

00:15:22

Dr. Russia Gupta probably the

00:15:25

most famous arbitration lawyer in

00:15:28

India. After having spent considerable

00:15:32

time practicing both in New

00:15:34

York and in London. And

00:15:37

then we're going to hear

00:15:38

from our own Fatima Islam.

00:15:42

She she was in Houston

00:15:44

just moved back to Lahore

00:15:46

a week ago to be

00:15:47

with family somebody who has

00:15:51

been very active with research

00:15:53

in Pakistan. Looking at arbitration

00:15:56

in Pakistan. Although like all

00:16:00

our speakers studied in the

00:16:02

UK the US really does

00:16:04

give us a very International

00:16:06

perspective. She's going to tell

00:16:08

us what's happening in Pakistan.

00:16:10

Where are we headed spoiler

00:16:13

alert some very interesting developments

00:16:16

in Pakistan, very relevant to

00:16:19

what we're talking about. So

00:16:21

with that. Stay tuned. Each

00:16:23

of our four speakers is

00:16:25

going to speak to us

00:16:26

for 10 12 minutes within

00:16:29

going to have a bit

00:16:30

of a dialogue stay tuned

00:16:31

for that. But Reka, why

00:16:34

don't you take it away?

00:16:36

Thanks so much Kabir a

00:16:38

big thank to the world

00:16:39

arbitration update organizing committee on

00:16:41

this inaugural week. It takes

00:16:43

Great Gusto to create these

00:16:45

sorts of thoughtful Progressive substantive

00:16:48

events to Jose Antonio Rivas

00:16:50

Mario Lucia Casas. AR quayo

00:16:52

and many many others and

00:16:55

the sincere pleasure to share

00:16:57

the zoom stage with all

00:16:59

of those on the screen

00:17:00

Kabir Fatima rashab and Professor

00:17:03

Islam. So I've been tasked

00:17:06

with giving a global overview

00:17:08

on this topic of controversial

00:17:09

Awards. And so I'm going

00:17:11

to address it in two

00:17:13

phases the first the conundrum

00:17:15

of endemic corruption internationally and

00:17:19

next this conversation on Mega

00:17:21

claims and mega Awards to

00:17:23

set it up then for

00:17:24

the jurisdictional spotlights that the

00:17:26

rest of the speakers will

00:17:27

take and turn So we

00:17:30

begin with this idea allegations

00:17:32

of Fraud and Corruption. They're

00:17:34

often encountered in international arbitration

00:17:36

and Scholars have said that

00:17:38

we must take these allegations

00:17:39

seriously and treat carefully, but

00:17:43

what does that mean? And

00:17:45

it's for you the audience

00:17:46

to think about and chew

00:17:47

on as we go through

00:17:48

this session. Indeed corruption is

00:17:52

a powerful defense, but this

00:17:55

could be already foreshadowed. It

00:17:57

doesn't work. Well why? Of

00:18:00

course, I'm borrowing here from

00:18:03

one of my favorite comedians

00:18:05

who lays out this of

00:18:06

course, but maybe scenario. Of

00:18:08

course, there is strong public

00:18:10

policy against allowing such actions

00:18:13

of corruption. Fraud really legality

00:18:16

in the proceedings, but maybe

00:18:18

there is this issue of

00:18:20

variety and language under a

00:18:22

variety of sources International conventions

00:18:25

arbitral case law domestic Law

00:18:27

Public international law transnational law.

00:18:32

Transnational public policy can be

00:18:34

esoteric in meaning Global fundamental

00:18:37

values of justice and morality

00:18:40

incorporating general principles guiding principles

00:18:43

that can be vague and

00:18:45

hard to Define concretely case

00:18:47

to case. Of course, there

00:18:51

is an inherent risk allowing

00:18:52

improprieties to go on punished.

00:18:56

Attributional can make adverse inferences

00:18:58

where a party fails to

00:18:59

produce requested evidence. This is

00:19:02

the most rare they can

00:19:04

take formal note or they

00:19:06

can treat evidence with skepticism.

00:19:07

They may even address it

00:19:09

in the costs phase of

00:19:11

the proceedings. But maybe it

00:19:14

is difficult to obtain direct

00:19:16

evidence indeed senior officials actively

00:19:19

engaged in corruption are often

00:19:21

in a position to impede

00:19:22

investigations and destroy our conceal

00:19:25

evidence. consider also there are

00:19:29

many Pathways involving fraud bribery

00:19:32

and Corruption or a tribunal

00:19:34

Finance does not have jurisdiction.

00:19:37

Where bad acts exist in

00:19:38

relation to the investment nullifying

00:19:40

access to arbitration through the

00:19:42

treaties. The limitation of the

00:19:44  
investment treaty to Investments being  
00:19:46  
made in accordance with the  
00:19:48  
law. They're with it fails  
00:19:50  
on objection to get access  
00:19:51  
to arbitration. Or the tribunal  
00:19:54  
determines claimant cannot rely on  
00:19:55  
substantive legal protection contained in  
00:19:58  
the investment treaty. So towards  
00:20:00  
that question that could be  
00:20:01  
opposed. The tribunal as the  
00:20:03  
only neutral body indeed the  
00:20:06  
tribunal often finds. It doesn't  
00:20:08  
have jurisdiction to make these  
00:20:09  
determinations and even wear it  
00:20:12  
does this could be a  
00:20:13  
positive. What is its police  
00:20:15  
power? Allegations by States and  
00:20:19  
against States as to corruption  
00:20:22  
are only increasing and so  
00:20:24  
let's take a quick snapshot

00:20:26

at a case that exists

00:20:27

that you all probably know.

00:20:29

Well, it has brought up

00:20:30

often the world duty free

00:20:32

versus Kenya case to take

00:20:34

a look at this this

00:20:35

notion of transnational public policy

00:20:38

as an international consensus Universal

00:20:41

standards and accepted Norms of

00:20:43

conduct that must be applied

00:20:45

in all four. That is

00:20:47

what this case stands for.

00:20:50

In humor the case also

00:20:51

stands for the most expensive

00:20:52

corn money given in a

00:20:54

suitcase corn returned in that

00:20:56

suitcase. So quick overview for

00:20:58

those that don't know it

00:20:58

1989 and investor concludes an

00:21:01

agreement for a construction and

00:21:03

operation of a duty-free complex

00:21:05

over a 10 years and

00:21:07

renewable for an additional 10.

00:21:09

The investor alleges that is

00:21:11

part of the president's re-election

00:21:12

Campaign World duty free was

00:21:14

used as a vehicle to

00:21:15

obtain funds illegally without its

00:21:18

knowledge. There's no relevant bit

00:21:20

at application here the investment

00:21:22

contract selected Kenyan and English

00:21:24

law and to ensure the

00:21:27

destruction of all evidence for

00:21:29

the prosecution of fraud. The

00:21:30

companies were taken over allegedly

00:21:33

based on fraudulent documents. So

00:21:35

there's all of this fraud

00:21:36

conversation happening. Zeroing in on

00:21:39

the alleged bribe at that

00:21:41

at the time of entering

00:21:42  
into the contract and this  
00:21:44  
is important temporally the investor  
00:21:46  
was asked to make a  
00:21:47  
personal donation of two million  
00:21:48  
in cash to the president  
00:21:50  
as this was payment for  
00:21:51  
doing business with the government  
00:21:52  
of Kenya common practice alleged.  
00:21:56  
The investor said this practice  
00:21:57  
had cultural roots and was  
00:21:59  
buttressed by the harembe system  
00:22:01  
mobilized resources through private donations  
00:22:04  
for public purpose. Ultimately, we  
00:22:07  
emerge with a reinforced standard  
00:22:09  
bribery. Excuse me bribery is  
00:22:12  
contrary to transnational public policy.  
00:22:15  
Rejecting claims subject to the  
00:22:17  
corruption that ensued. An objective  
00:22:20  
view of transnational public policy  
00:22:22  
surveying many aspects that come

00:22:24

into play the international conventions

00:22:26

the Declarations National Court decisions.

00:22:29

Answering to this notion of

00:22:31

culpability an objective minimum standards

00:22:34

of conduct for the investor.

00:22:36

Even where a host state

00:22:38

may not comply investor obligations

00:22:41

take the spotlight corruption is

00:22:43

a jurisdictional barrier to gain

00:22:46

entry to the arbitral process.

00:22:49

Does it encourage corruption in

00:22:50

a host State? How do

00:22:52

you deal with proof? These

00:22:53

are questions. We're going to

00:22:54

continue to tease out. It

00:22:57

comes back to this idea

00:22:58

that bribery clearly violated International

00:23:01

public policy as well as

00:23:03

Kenyan and English law both

00:23:05

applicable in this case. The

00:23:07

implications for the investor is

00:23:09

that it's not legally entitled

00:23:10

to maintain any of its

00:23:11

head claims. And it comes

00:23:14

back to this should we

00:23:15

make a distinction between governments

00:23:18

asking for a bribe versus

00:23:20

a person that investor asking

00:23:22

for a ride. Where where

00:23:24

does the issue of bribery

00:23:25

fall? What is the temporal

00:23:27

relevance? The next tranche I'll

00:23:30

get into is this Mega

00:23:31

claims Mega Awards. So this

00:23:34

idea of serious implications of

00:23:36

cases becoming bigger and bigger

00:23:39

the claims becoming bigger the

00:23:41

awards rendered. Equally big and

00:23:44

in particular this conversations and

00:23:46

the fixating on this wild

00:23:47  
wild west that we call  
00:23:49  
the investor State dispute but  
00:23:51  
investors say dispute settlement system  
00:23:54  
the regime and astronomical damages.  
00:23:58  
So why is there this  
00:23:59  
trend let's map what Scholars  
00:24:00  
have said? So Scholars and  
00:24:02  
considering this have looked to  
00:24:04  
the fact that there are  
00:24:05  
few rules to curb the  
00:24:07  
natural tendency to engage in  
00:24:08  
strategic claim exaggeration. After rigorous  
00:24:12  
dialogues of jurisdiction and liability  
00:24:13  
phases. This comes out the  
00:24:16  
mega claims or buttressed by  
00:24:18  
Mega reports. There's varying perhaps  
00:24:21  
lawyer Comfort dealing and damages  
00:24:23  
in Quantum and lack of  
00:24:25  
sufficient checks and balances. So  
00:24:27  
evaluate those and see where

00:24:29

you fall in the same

00:24:30

way. We took these poles

00:24:32

Ultimately, the takeaway is States

00:24:34

cannot pay. So how do

00:24:36

you address that and it

00:24:37

goes back to that polling

00:24:38

question number two, is it

00:24:40

relevant a state's ability to

00:24:42

pay this group found 63%

00:24:45

in favor. Don't punish the

00:24:48

taxpayer, right? And so this

00:24:52

notion of possible trend of

00:24:53

investors exaggerating claims of compensation

00:24:56

for lost future profits building

00:24:58

momentum year after year decade

00:25:00

after decade and so let's

00:25:01

take the really quick snapshot.

00:25:03

We're taking the case of

00:25:05

tepn versus Pakistan this case

00:25:07

in conjunction with World Bank

00:25:09  
that is put out a  
00:25:10  
report on foreign directed investment  
00:25:11  
and its treatment talking also  
00:25:14  
about discounted cash flow. And  
00:25:16  
how it doesn't account well  
00:25:17  
for risk. So in this  
00:25:19  
case the tribunal created a  
00:25:21  
new discount cash flow. There's  
00:25:22  
a mine. It hasn't become  
00:25:24  
commercial operation. So there's no  
00:25:26  
tracks record. And so out  
00:25:28  
of this case we get  
00:25:29  
this notion of modern DCF  
00:25:31  
method to incorporate all project  
00:25:33  
risks into the cash flow  
00:25:34  
the tribunal you utilize that  
00:25:37  
method which can be speculative  
00:25:39  
which is where it's criticism  
00:25:40  
comes in to look at  
00:25:41  
long-term cash flow projection. Look

00:25:45  
in a track record of  
00:25:46  
profitability even where one may  
00:25:48  
not exist. discount the rate  
00:25:50  
applied to arrive at the  
00:25:51  
present cash flow value and  
00:25:53  
then Assess what the risks  
00:25:56  
are and so it's this  
00:25:58  
notion of there can be  
00:25:59  
when you use the DCF  
00:26:00  
method a roller coaster of  
00:26:03  
emerging values as you're trying  
00:26:05  
to predict cash flow over  
00:26:06  
a period. Is it reliable  
00:26:09  
in this case? As I  
00:26:11  
said the new interpretation emerges  
00:26:12  
so you don't need a  
00:26:13  
track record of performance and  
00:26:15  
yet an aborted issued right?  
00:26:16  
As I said, the mind  
00:26:18  
is not operational. 4 billion

00:26:20  
dollars are awarded before any  
00:26:23  
interest right? This is an  
00:26:24  
astronomical amount but consider also  
00:26:26  
with this. Pakistan is made  
00:26:29  
to pay claimants costs of  
00:26:31  
the case. We're looking at  
00:26:32  
some 60 million dollars in  
00:26:33  
addition. and of note Pakistan  
00:26:37  
had just recently gotten alone  
00:26:39  
to near these amounts. So  
00:26:40  
whatever it had been able  
00:26:42  
to recoup it's having to  
00:26:43  
pay forward in an award  
00:26:44  
and costs. It begs. The  
00:26:47  
question on the state's ability  
00:26:48  
to pay the benefit of  
00:26:49  
expropriation of an investment for  
00:26:52  
greater investor gain through our  
00:26:54  
betration is the system being  
00:26:56  
used in an opportune way

00:26:58

in a cataclysmic way even

00:27:00

based on the numbers being

00:27:01

put forward and so ultimately

00:27:03

and I'll close with this

00:27:04

we have to ask ourselves.

00:27:06

What happens when the project

00:27:07

is never built what happens

00:27:09

when the mind never realizes

00:27:11

a revenue stream? What if

00:27:12

there's no conceivable trajectory to

00:27:14

assess the return on investment.

00:27:16

And then how do we

00:27:17

apply a discount rate to

00:27:19

bring cash flow to present

00:27:21

in a realistic way? What

00:27:23

happens then is we tethered

00:27:25

between procured by bribery contracts

00:27:27

or tainted by fraud that

00:27:29

has been covered up? What

00:27:31

of expropriation of that for

00:27:33  
the Investor's best return and  
00:27:35  
how can we ascertain a  
00:27:36  
possible changing landscape of the  
00:27:38  
investor State dispute resolution system  
00:27:40  
of Reform that's being hotly  
00:27:43  
discussed right now at the  
00:27:44  
unsetrol's working group 3 what  
00:27:47  
will reform mean for this  
00:27:48  
process to better it to  
00:27:50  
change it and then we'll  
00:27:51  
have to wait and see.  
00:27:53  
Think also as bits and  
00:27:54  
myths are undergoing a period  
00:27:56  
of evolution. States may wish  
00:27:59  
to secure reliable effective access  
00:28:02  
to a corruption defense, and  
00:28:03  
they're with modify the language  
00:28:05  
within their myth. That's and  
00:28:07  
mids using preferred language. So  
00:28:10  
stay tuned more to come

00:28:11

more stories to be shared

00:28:12

by our Elite panel as

00:28:13

we travel next to Bangladesh

00:28:15

and then to India and

00:28:17

Pakistan Kabir back to you.

00:28:19

Thanks so much. Thank you

00:28:21

Rick. I think you've teased

00:28:22

out the issues nicely set

00:28:24

the stage. Let's look and

00:28:27

see what's happening in South

00:28:28

Asia. What's happening in each

00:28:31

of these countries? Where are

00:28:33

we going? Professor Islam tell

00:28:36

us what's happening in Bangladesh.

00:28:38

Let's fix investment arbitration and

00:28:41

Bangladesh and move this forward

00:28:44

Professor. The floor is yours.

00:28:47

Thank you, Kevin. I hope

00:28:49

I'm Audible. Okay, a very

00:28:54

good morning to all of

00:28:55

you from here from Bangladesh

00:28:56

and thanks to Kabir for

00:28:58

that very nice and enthusiastic

00:29:00

interaction. If I move into

00:29:02

the controversial average to be

00:29:06

honest Bangladesh has faced in

00:29:08

terms of income president to

00:29:10

India and Pakistan quite a

00:29:12

few isps cases. Let me

00:29:16

just give you and a

00:29:18

very brief overview about legal

00:29:21

regime of protection of FDI.

00:29:23

And then I move into

00:29:24

the ISD yes cases so

00:29:27

far experienced by Bangladesh. So

00:29:29

just before the pandemic Bangladesh

00:29:32

actually enjoyed quite a Stevie

00:29:33

GDP growth and there was

00:29:35

a big flow of FBI

00:29:37

according to the aunt jet

00:29:39  
report, but obviously got a  
00:29:41  
very big setback due to  
00:29:44  
the pandemic and as a  
00:29:46  
consequence the Panama the predictability  
00:29:50  
economic crisis due to the  
00:29:51  
family current. Do we get  
00:29:53  
it is estimated that the  
00:29:54  
flow of FDI is going  
00:29:56  
to reduce significantly but in  
00:29:59  
saying so one positive thing  
00:30:01  
is that the government the  
00:30:03  
current government one of the  
00:30:04  
prior focus of the government  
00:30:07  
is to attract the FDI.  
00:30:09  
And actually they have done  
00:30:10  
all kind of things how  
00:30:12  
to do that in terms  
00:30:15  
of legal region Bangladesh has  
00:30:18  
the foreign private investment promotion  
00:30:21  
and protection act 1980, which

00:30:22  
is a very short piece  
00:30:24  
of legislation, but recently Bangladesh  
00:30:27  
in acted the Bangladesh investment  
00:30:29  
Development Authority bija 2016, and  
00:30:32  
since then actually this whole  
00:30:34  
a landscape of flow of  
00:30:36  
FDI in Bangladesh has significantly  
00:30:38  
change quite a lot and  
00:30:41  
because it took the soleim  
00:30:42  
of Bedell was to encourage  
00:30:44  
private investment in private sector  
00:30:46  
and for that they should  
00:30:47  
different kind of initiatives including  
00:30:49  
one stop Services Center as  
00:30:52  
well. Less for specialist economic  
00:30:55  
zones for particular investors like  
00:30:58  
Chinese investors Japanese investors and  
00:31:00  
recently for as well as  
00:31:02  
the Indian investors, right? when  
00:31:05  
we talk about that at

00:31:07  
the end, that's the national  
00:31:08  
piece of legislation at the  
00:31:11  
international level Bangladesh is signature  
00:31:13  
to the exit convention New  
00:31:14  
York Convention as well as  
00:31:16  
Bangladesh has its arbitration Act  
00:31:18  
of 2001 which exclusively provides  
00:31:21  
for in Enforcement of foreign  
00:31:25  
orbital level. So in terms  
00:31:26  
of having a good legal  
00:31:28  
region Bangladesh is all set  
00:31:29  
for foreign investors now coming  
00:31:32  
to isds experience. We just  
00:31:36  
if we want to be  
00:31:38  
very brief about the bilateral  
00:31:40  
investment treaties in Bangladesh. In  
00:31:42  
fact Bangladesh, how many be  
00:31:45  
it is the are there  
00:31:46  
in Bangladesh Bangladesh signed there  
00:31:48  
are different different opinions because

00:31:51

the official body the bidas

00:31:54

states that Bangladesh is that

00:31:56

one beer it is whereas

00:31:57

untouched investment policy says the

00:32:00

country has signed to be

00:32:02

it with 28 countries again,

00:32:04

if you look into the

00:32:05

ministry of investors website, it's

00:32:07

it says that it has

00:32:08

signed 33 bias and among

00:32:11

this bi just at least

00:32:12

four bias are invisible invisible

00:32:15

in a sense that the

00:32:16

text is actually found nowhere

00:32:18

and there are also bias

00:32:20

which are mentioned in the

00:32:21

official website. It does not

00:32:24

correspond to other information. So

00:32:26

I found that we have

00:32:27

Atlas for invisible bias in

00:32:30

that way that it's a

00:32:32

it's it's in the official

00:32:33

website, but we cannot find

00:32:34

it anywhere in the world.

00:32:35

For example, the text of

00:32:37

Bangladesh Cambodia bid or Bangladesh

00:32:39

Pakistan bid. It could not

00:32:41

be found anywhere now coming

00:32:43

back to our main discussion

00:32:45

about the hours that has

00:32:47

been so far renders against

00:32:50

Bangladesh in comparison to our

00:32:52

neighbors India or Pakistan Bangladesh.

00:32:55

Yes, brother less number of

00:32:57

viets as well as in

00:33:00

terms of exit experience Bangladesh

00:33:03

so far had Faith seven

00:33:05

claims, but initiated against Bangladesh

00:33:07

by the foreign investor and

00:33:09

among this seven two are

00:33:11  
still pending the ones related  
00:33:13  
with Michael resources at Canadian  
00:33:15  
company, but the all the  
00:33:18  
best fiber already concluded and  
00:33:21  
between the concluded cases again,  
00:33:24  
the ones do which has  
00:33:26  
actually rendered damages against Bangladesh  
00:33:31  
in easy and Niko the  
00:33:34  
full text of the awards  
00:33:35  
are yet to be publicly  
00:33:36  
available. So unfortunately, I cannot  
00:33:39  
make clear comments on that  
00:33:41  
but in and again one  
00:33:44  
interesting point, is that all  
00:33:45  
of these cases Are related  
00:33:47  
with energy sector all the  
00:33:50  
seven cases that has been  
00:33:51  
initiated by the foreign investors  
00:33:53  
relates with the energy sector.  
00:33:55  
So I will just pick

00:33:57

up two very controversial effort

00:33:59

against Bangladesh one is saipem.

00:34:01

And another is Niko in

00:34:03

terms of corruption and inside

00:34:06

them commenting on writing on

00:34:08

Cypress somewhere. I just started

00:34:10

it when the investor gives

00:34:12

you a lemon. So second

00:34:13

was a case where Bangladesh

00:34:15

really had a very tough

00:34:16

experience and it was a

00:34:18

case in 2007. That was

00:34:21

a time. It was in

00:34:22

fact Bangladesh did not have

00:34:24

the expertise or the experience

00:34:27

how to deal with this

00:34:28

kind of because investment State

00:34:31

arbitration is coming something completely

00:34:33

what different from a commercial

00:34:35

arbitration or other international disputes.

00:34:38

So there was this was

00:34:40

the first experience that Bangladesh

00:34:42

really had a very bad

00:34:43

taste. So Simon was the

00:34:46

reason For it being controversial

00:34:48

is that it found that

00:34:50

the Act Dance by the

00:34:53

local courts was amounting to

00:34:55

judicial expropriation. So the finding

00:34:58

of the HC tribunal in

00:35:00

subject inside them is open

00:35:02

to different criticism. First of

00:35:04

all, the tribunal found a

00:35:07

different aspects and it does

00:35:08

not even go into exceeds

00:35:10

own standard of what is

00:35:11

called judicial expropriation private also

00:35:13

rejected Bangladesh claim that the

00:35:15

foreign investors need to exhaust

00:35:17

local remedies for challenging judicial

00:35:19  
investment arbitration in case of  
00:35:23  
denial of Justice or not  
00:35:24  
in the case, involving judicial  
00:35:26  
exploration. And also at the  
00:35:29  
same time the assertion of  
00:35:31  
expropriation by the hostage Judiciary  
00:35:34  
should be that enable the  
00:35:36  
foreign investor to discussion denial  
00:35:39  
of Justice League, and there's  
00:35:41  
avoid the application of local  
00:35:42  
remedy school and the tribals  
00:35:44  
adoption of the legality. In  
00:35:46  
addition to or in substitute  
00:35:48  
to or the solo effect  
00:35:50  
blockchain that has served the  
00:35:52  
method of establishing expropriation. It's  
00:35:55  
also open to a criticism  
00:35:57  
and also the same time  
00:35:58  
sopen does also give a  
00:36:00  
kind of a note of

00:36:01

warning or caution to all

00:36:03

national courts exercising their supervisory

00:36:06

jurisdiction over national International arbitration

00:36:08

since the ellage anju interface

00:36:11

by the national Court. It

00:36:12

made also give rise to

00:36:13

State liability and very international

00:36:15

law as it was in

00:36:17

the case of saipem and

00:36:19

this very Loosely articulated definition

00:36:22

of what is cultured judicial

00:36:24

exploration that the tribunal finally

00:36:27

concluded inside them. This is

00:36:29

likely to also catch most

00:36:30

intervention in arbitral process despite

00:36:34

the local codes. Do you

00:36:36

exercise of supervisory power for

00:36:38

very genuine reason and the

00:36:39

third thing that which I

00:36:41

find problematic is that one

00:36:43

thing which is often a

00:36:46

Note one issue that that

00:36:49

cipm case the side from

00:36:51

the whole project of saipem.

00:36:53

It was an Italian investor

00:36:56

and it was in fact

00:36:57

the first case File under

00:36:59

a beat Bangladesh Italy bi

00:37:01

team and cyprus was a

00:37:03

World Bank project and the

00:37:04

award in favor of Saturn

00:37:06

was finally decided by sin,

00:37:08

which is an institution and

00:37:09

integral part of the World

00:37:11

Bank. So there is an

00:37:12

element of structural bias that

00:37:14

women's quite undiscussed while treating

00:37:17

the local courts action second

00:37:20

case that I would like

00:37:22

to highlight Nico and Nico.

00:37:24

In fact initiated at least

00:37:25

four cases against Bangladesh to

00:37:28

are still pending one is

00:37:30

finally concluded, but the final

00:37:32

hour is yet to be

00:37:33

publicly available. I want to

00:37:35

just focus on one of

00:37:38

the award on corruption and

00:37:42

again with Nike I have

00:37:43

written some word experience of

00:37:45

Bangladesh has been Ugly the

00:37:47

bad and finally some good

00:37:48

because Bangladesh, in fact Lost

00:37:51

In the initial some of

00:37:53

the findings by the Tribunal.

00:37:56

And then it also lost

00:37:58

in proving the allegations against

00:38:01

Nikon corruption and finally Bangladesh

00:38:04

owned its compensation claims that

00:38:09

was into 2020 February I

00:38:11  
think and finally when it  
00:38:14  
came to the compensation against  
00:38:16  
Bangladesh damage history microphone, so  
00:38:19  
it's a mixed experience. But  
00:38:21  
in terms of corruption allegation,  
00:38:23  
it was a very highly  
00:38:25  
very politically hyped case because  
00:38:27  
since that allegation of corruption  
00:38:29  
in about high level officials  
00:38:31  
public official of Bangladesh, including  
00:38:34  
the buffets official and then  
00:38:36  
the state Minister for energy  
00:38:38  
and then the Prime Minister  
00:38:39  
as well. So the corruption  
00:38:41  
allegation was based on the  
00:38:43  
fact that actually this Canadian  
00:38:46  
parent company like resources and  
00:38:48  
they provided benefits to the  
00:38:50  
then State minister of energy  
00:38:52  
and minerals. So this which

00:38:53

included a Toyota Land Cruiser

00:38:55

and Travel expenses of 5,000

00:38:58

Canadian dollars for non-business related

00:39:01

travels to attend a conference

00:39:02

in Calgary as a guest

00:39:04

of Nike Canada and this

00:39:06

allegation of corruption when it

00:39:09

was revealed. It was in

00:39:10

fact investigated by the Canadian

00:39:12

investigation agency Royal Canadian Mounted

00:39:16

Police and the US Federal

00:39:17

group of Investigation FBI. And

00:39:19

in fact the Canadian Court

00:39:22

found that like a worse

00:39:24

guilty any it was convicted

00:39:26

by the Canadian food based

00:39:27

on the statements of the

00:39:29

fact signed by the officials

00:39:31

of the Nico Canada and

00:39:32

the elbow to court of

00:39:34  
Queensbridge on this issue of  
00:39:36  
bribing a foreign official by  
00:39:38  
a Canadian company. It took  
00:39:40  
that this was a serious  
00:39:42  
matter and the course finding  
00:39:43  
was that it was an  
00:39:45  
embarrassment for all the Canadians.  
00:39:47  
We just Prejudice Canada Surfers  
00:39:50  
to Foster and promote effective  
00:39:52  
governmental and Commercial relations and  
00:39:54  
the coach even for Way  
00:39:56  
to say that the penalty  
00:39:58  
impose must be sufficient to  
00:39:59  
show that the course denunciation  
00:40:02  
of the search contract. This  
00:40:04  
is a not only an  
00:40:05  
embarrassment but microconduct was a  
00:40:07  
dark stain on Calgary is  
00:40:09  
proud reputation as the energy  
00:40:11  
capital of Canada. That was

00:40:12  
the finding by Justice squadbroker  
00:40:14  
in that case in Canada.  
00:40:18  
The keys the corruption case  
00:40:21  
of Nico in Bangladesh is  
00:40:23  
still going on. It's still  
00:40:25  
pending of the final findings  
00:40:26  
that to be decided yet.  
00:40:28  
But when it came to  
00:40:30  
exit arbitration finally after examining  
00:40:35  
everything and when Bangladesh made  
00:40:38  
it argument based on good  
00:40:41  
Faith International public policy as  
00:40:43  
a device in World beautified  
00:40:46  
actually nicely very nasty explained  
00:40:49  
and that kind of but  
00:40:51  
I could do not bring  
00:40:51  
it's claim on based on  
00:40:52  
clean hand principles while challenging  
00:40:55  
the jurisdiction. Rounds of work  
00:40:57  
corruption, but finally the tribunal

00:41:00

actually found the it applied

00:41:02

the principle recognition of stopper

00:41:04

and it actually did not

00:41:06

find any casual connection between

00:41:08

the LH corruption and the

00:41:09

contract and finally it decided

00:41:12

that the contractor that there

00:41:14

was no core option. That

00:41:15

was their final finding but

00:41:17

what is problematic here is

00:41:20

that and this observations actually

00:41:23

gives a kind of a

00:41:25

chilling effect and also a

00:41:27

lack of regulatory freedom and

00:41:28

public pair of policy Bangladesh

00:41:30

as a respondent state and

00:41:32

also at the same time

00:41:34

we have to acknowledge that

00:41:36

in terms of Nico at

00:41:39

least on the decision on

00:41:40

payment job to realize it's

00:41:41

area real and gas from

00:41:43

Petro Bangla This is highly

00:41:46

criticized because of lack of

00:41:48

prompt response and you performance

00:41:50

of the Bangladesh function and

00:41:52

particularly buffets because it did

00:41:55

not It couldn't represent the

00:41:58

country in The Illustrated gaps.

00:42:00

And there was inadequacy of

00:42:02

properly are going the competing

00:42:04

interests of Bangladesh as a

00:42:06

respondent state. So this was

00:42:08

I think as also and

00:42:10

example how actually developing countries

00:42:13

learn in terms of capacity

00:42:15

building in terms of their

00:42:16

Council cream all this issue.

00:42:19

So many thing that YouTube

00:42:21

Pro representation of the country's

00:42:23

interest Bangladesh actually lost a

00:42:25

distinctively wenable case and what

00:42:28

are the position of developing

00:42:30

countries. There is a book

00:42:32

by Paulson on bounded rationality

00:42:34

and economic diplomacy the politics

00:42:37

of investment treaties in developing

00:42:38

country, which actually explains very

00:42:41

nice just before I conclude

00:42:44

there were two four questions

00:42:45

just to respond one was

00:42:47

whether the arbitral private and

00:42:49

neutral forum. And then I

00:42:50

see that people say disagree

00:42:53

on that point so that

00:42:54

gives any impress The majority

00:42:56

of these are great and

00:42:58

on the second question whether

00:43:00

the capacity I think of

00:43:03

the country whose country should

00:43:05

be taken into account and

00:43:06

mostly agreed with that and

00:43:08

I'm happy to see that

00:43:09

because in my book the

00:43:12

book is on if Effigy,

00:43:14

but the whole argument is

00:43:16

that while judging calculating damages

00:43:18

the tribunals needs to take

00:43:21

into account the capability of

00:43:23

the country, especially when it

00:43:25

comes to the host developing

00:43:26

countries, and then I have

00:43:28

a good whole chapter on

00:43:29

stating different facts in every

00:43:33

way. Even if you look

00:43:34

into AMT versus Jerry, if

00:43:36

you look into the separate

00:43:37

opinion, it does talk about

00:43:39

taking into consideration the all

00:43:42

the capabilities whether the country's

00:43:43  
are capable enough to pay  
00:43:46  
those damages in the ISD  
00:43:48  
as a meeting against the  
00:43:49  
foreign invested. So with this  
00:43:51  
and if we want to  
00:43:53  
look forward bangladeship, Since it's  
00:43:56  
getting so many of fdis  
00:43:58  
and with the current scenario  
00:44:01  
of pandemic Bangladeshi again had  
00:44:03  
to take many regulatory measures  
00:44:05  
to address the pandemic and  
00:44:07  
like many other countries Bangladesh  
00:44:09  
is also fearing of getting  
00:44:11  
some of the claims on  
00:44:12  
the foreign investors and the  
00:44:14  
bilaterally investment resume that we  
00:44:16  
have currently actually mainly represents  
00:44:19  
the first generation of bias  
00:44:21  
where we do not have  
00:44:23  
enough protection like regulatory images

00:44:26

not precluded Mages General exceptions.

00:44:28

So these are the matters

00:44:30

that Bangladesh needs to take

00:44:31

into account and I think

00:44:33

one point Rica had highlighted

00:44:35

already that before you leave

00:44:37

to get please legislate. So

00:44:39

unless we have a very

00:44:40

good protection in the bilateral

00:44:41

investment pretty regimes. It's becomes

00:44:44

quite difficult when you go

00:44:45

in the international tribunal which

00:44:47

is which in my opinion

00:44:49

is quite inherently a pro

00:44:51

investor oriented, it becomes very

00:44:53

difficult for the developing country.

00:44:56

Bangladesh to get the case

00:44:58

in their favor, so that

00:45:00

was all from me and

00:45:01

thanks one again. Once again

00:45:03

for the wonderful love to

00:45:05

all the panelists wonderful panel,

00:45:07

and I also look forward

00:45:07

to for the discussion. Thank

00:45:09

you. Thank you professor. Dr.

00:45:13

Gupta tell us what's happening

00:45:15

in India is India similar

00:45:17

to Bangladesh. Thanks Kabir. Thanks

00:45:21

Professor Islam and thanks to

00:45:22

World arbitration update for this

00:45:24

what I thought I'll do

00:45:27

is that. Survey quickly walk

00:45:30

you through what I think

00:45:32

are sort of the key

00:45:33

points in terms of the

00:45:35

historical landscape. As far as

00:45:38

Indian bit regime is concerned

00:45:39

and I wanted to sort

00:45:41

of briefly meet Five Points

00:45:42

that and after that I'll

00:45:44  
spend probably 60 seconds or  
00:45:47  
so talking about monkeys and  
00:45:49  
only just one case the  
00:45:50  
us because I suspect some  
00:45:53  
of this would be picked  
00:45:54  
up in the discussion that  
00:45:56  
we have once the presentations  
00:45:57  
are done. So in terms  
00:46:00  
of historical update first point,  
00:46:03  
you know purely as a  
00:46:06  
matter of fact the first  
00:46:07  
Indian vit dates back to  
00:46:09  
1994 not surprisingly that was  
00:46:12  
with the United Kingdom for  
00:46:13  
cultural economic reasons important feeling  
00:46:16  
partner Etc between 1994 and  
00:46:20  
2010 nearly 80 more investment  
00:46:23  
agreements both pits as well  
00:46:25  
as free trade agreements, which  
00:46:26  
have investment chapters get signed

00:46:28

a couple of years ago.

00:46:30

I did a small empirical

00:46:31

study for the Ministry of

00:46:33

Finance to look into the

00:46:35

Advent of these bi teams.

00:46:36

And in that context. I

00:46:37

got quite a few officials

00:46:40

who were actually involved in

00:46:41

these negotiations and not surprising

00:46:44

and this is not specific

00:46:46

to India not surprisingly. Most

00:46:48

of them had very little

00:46:50

idea of precisely what they

00:46:51

would do. These were boilerplate

00:46:53

treaties, perhaps developed by certain

00:46:56

jurisdictions and then copy paste

00:46:58

it over. But that I

00:47:00

don't mean in any significant

00:47:02

criticism because to be honest

00:47:05

that that's how it was

00:47:06  
not just among developing countries,  
00:47:08  
but even amongst most developed  
00:47:10  
countries at the time. So  
00:47:12  
that's Point number one just  
00:47:14  
in terms of the historical.  
00:47:16  
Development of the regime Point  
00:47:19  
number two, you know, most  
00:47:20  
of you would know about  
00:47:21  
is white Industries that's important  
00:47:23  
not because of the kind  
00:47:25  
of things we're talking about  
00:47:26  
today. It didn't involve a  
00:47:29  
large claim. It didn't involve  
00:47:30  
any allegations corruption. No multiple  
00:47:33  
disputes, really? Yes such but  
00:47:35  
it was an important event  
00:47:36  
for two reasons one. I  
00:47:38  
think that's trees just purely  
00:47:40  
by way of background involved  
00:47:42  
effectively a commercial award and

00:47:43  
ICC commercial award. That was  
00:47:46  
one by the investor against  
00:47:47  
an Indian State don't come  
00:47:48  
so not against the government  
00:47:50  
itself, but the enforcement of  
00:47:52  
that arbitration of what in  
00:47:53  
India took a very long  
00:47:54  
time not necessarily because of  
00:47:57  
Any overt intervention by the  
00:48:00  
government, but just because of  
00:48:01  
the way the Jewish students  
00:48:03  
was developing at the time.  
00:48:06  
In any event, India lost  
00:48:08  
that treaty arbitration. They were  
00:48:10  
findings about how perhaps the  
00:48:12  
delay in the judicial system  
00:48:14  
will responsible for the invested  
00:48:16  
not receiving its effective means  
00:48:18  
to or effective remedies under  
00:48:20  
the treaty and that was

00:48:21  
taken quite badly by the  
00:48:23  
government for a couple of  
00:48:24  
reasons one of course didn't  
00:48:25  
like the fact that judicial  
00:48:28  
release which everyone in India  
00:48:30  
suffers from could somehow become  
00:48:32  
a reason for an invested  
00:48:34  
arbitration and second just to  
00:48:36  
realization that of course despite  
00:48:38  
the arbitration award. There was  
00:48:41  
a smallest four million dollars.  
00:48:42  
It was speed up. I  
00:48:43  
think almost immediately after it  
00:48:45  
was given so that wasn't  
00:48:46  
really the issue. It was  
00:48:47  
more a principle issue for  
00:48:49  
the government. Now the third  
00:48:51  
Point very often people say  
00:48:53  
that that opened up the  
00:48:55  
floodgates to other investors State

00:48:56

claims. I I sort of

00:48:58

disagree with that. There was

00:49:00

no flood gate as such

00:49:01

but what really happened is

00:49:02

that they were a series

00:49:04

of events which occurred which

00:49:05

led to a large variety

00:49:07

of teams both in domestic

00:49:08

ports as well as an

00:49:09

international trappiness one was cancellation

00:49:12

of about 110 Telecom license,

00:49:14

the cancellation have been primarily

00:49:17

because they were allocations of

00:49:19

corruption and failure to follow

00:49:22

procedures as far as allocation

00:49:24

of spectrum Wisconsin. Now that

00:49:26

led to a large number

00:49:27

of teams in Indian courts

00:49:28

also led to Industry themes.

00:49:30

They were similar cancellation of

00:49:33  
whole block allocations, which also  
00:49:35  
like to things and then  
00:49:36  
perhaps most notoriously they were  
00:49:38  
retrospective women to the Indian  
00:49:40  
Income Tax Act, which led  
00:49:42  
to a variety of themes  
00:49:43  
both in Indian Sports and  
00:49:44  
outside, you know, quite recently  
00:49:47  
Vodafone Etc have been in  
00:49:49  
the news all of Have  
00:49:51  
been arbitration Awards coming out  
00:49:53  
of those retrospective amendments meet  
00:49:55  
back in 2011. Now I'll  
00:49:57  
just pause there for a  
00:49:58  
second. I've always spent that.  
00:50:02  
India the way it is  
00:50:04  
structured is perhaps most vulnerable  
00:50:08  
to invest a statements and  
00:50:10  
I don't mean it in  
00:50:11  
any form of criticism, but

00:50:13  
that's the way India is  
00:50:14  
up and you know, some  
00:50:16  
of the points that I  
00:50:17  
like to meet there are  
00:50:18  
first very large upon me  
00:50:20  
for the size of the  
00:50:22  
economy. These number of teams  
00:50:23  
is no surprise. I mean,  
00:50:24  
they're smaller economies elsewhere in  
00:50:27  
the world, which have far  
00:50:29  
greater number of claims. If  
00:50:30  
you do sort of a  
00:50:31  
prolita proportionate analysis so often  
00:50:34  
people say oh team claims  
00:50:36  
20 claims 25 teams for  
00:50:38  
the size of the economy.  
00:50:39  
That's not very large in  
00:50:41  
mind. But but there's a  
00:50:43  
second and a third point  
00:50:44  
which is more important. India

00:50:46  
is a very strong fedrine  
00:50:48  
structure with a very strong  
00:50:50  
central government. Yeah. So what  
00:50:53  
that basically means is that  
00:50:55  
because from a public International  
00:50:56  
perspective you look at States  
00:50:57  
Central District governments all as  
00:51:00  
part of one unit decision-making.  
00:51:02  
However is happening at each  
00:51:04  
of those lessons and at  
00:51:06  
each of those levels is  
00:51:07  
substantial autonomy central government of  
00:51:10  
course has a significant control  
00:51:11  
to play but there's substantial  
00:51:12  
autonomy. So it's not like  
00:51:13  
for example in the UK  
00:51:15  
where perhaps you know, some  
00:51:16  
counties somewhere can make some  
00:51:18  
decisions But ultimately everything comes  
00:51:20  
back to the white wall.

00:51:21

It's not like that in

00:51:22

India. You have a central

00:51:24

Parliament, but you have very

00:51:26

strong autonomy given to respective

00:51:29

States much like the US

00:51:30

to us would be a

00:51:31

slightly stronger Federal structure that

00:51:33

sense. Now what that really

00:51:35

means is that even if

00:51:36

there is understanding of what

00:51:37

the treaty obligations might be

00:51:39

at the central you won't

00:51:40

have that. Understanding at the

00:51:42

state of the district level

00:51:43

it would never happen. So

00:51:45

one has to be slightly

00:51:47

conscious of that fact that

00:51:48

every level it one has

00:51:49

to be conscious of it

00:51:50

at the government level and

00:51:51  
one has to be conscious  
00:51:52  
of it at the invested.  
00:51:53  
And if you look at  
00:51:54  
some of the more recent  
00:51:55  
themes that have come up  
00:51:56  
Nissan in relation to the  
00:52:00  
vat refunds a couple of  
00:52:02  
cases and I'm doing at  
00:52:03  
the moment against sort of  
00:52:05  
in relation to gas allocation  
00:52:07  
where the underlying events happened  
00:52:09  
in Maharashtra. Those are nothing  
00:52:11  
whatsoever to do with the  
00:52:12  
central government. Those are not  
00:52:13  
like your Vodafone Keen kind  
00:52:15  
of cases where someone sitting  
00:52:16  
in the legislature India is  
00:52:18  
making decisions that let let's  
00:52:20  
change this retrospectively. Those are  
00:52:22  
decisions being made in what

00:52:25

I genuinely believe in a

00:52:26

good faith form by, you

00:52:30

know, state governments sitting in

00:52:32

different parts of the country

00:52:33

not thinking about what those

00:52:35

vit protections might be one

00:52:37

with the other. So that's

00:52:38

the second point the third

00:52:40

is that we have a

00:52:41

Activist judicially, so if you

00:52:43

look at large proportion of

00:52:45

the claims that are there

00:52:47

against India, they have very

00:52:48

little to do with legislative

00:52:49

or executive actions. There are

00:52:51

examples of those but majority

00:52:54

of them actually come out

00:52:56

of judicial actions. So cancellation

00:52:59

of 2G licenses in that

00:53:00

sense had nothing whatsoever to

00:53:01  
do with legislative or executive  
00:53:03  
actions. They were all traditional  
00:53:04  
actions and you know, you  
00:53:06  
often talk about US Supreme  
00:53:08  
Court for example, being very  
00:53:09  
powerful being activist and at  
00:53:11  
times it's nothing like what  
00:53:13  
the Indian Supreme Court is  
00:53:14  
because the amount of involvement  
00:53:17  
that the Indian Supreme Court  
00:53:18  
has in daily lives of  
00:53:20  
each one of us is  
00:53:21  
far greater than any common  
00:53:23  
logical section anywhere in the  
00:53:24  
world you pick up the  
00:53:25  
economic Times the Indian equivalent  
00:53:27  
of Ft, or the walls  
00:53:29  
feature and every day on  
00:53:30  
the front page, they'll be  
00:53:31  
at least two Indian Supreme

00:53:33

Court judgments highlighted, why would

00:53:35

a business daily have two

00:53:36

Supreme Court judgments every day

00:53:38

on the front page. That's

00:53:39

because it affects Daily Business

00:53:40

life. If it affects Daily

00:53:42

Business life, it will become

00:53:44

a reason for investor stadiums

00:53:46

and the judges sitting in

00:53:48

the Supreme Court are not

00:53:49

thinking that oh, well, if

00:53:51

you take this decision this

00:53:52

would lead to a bi-t

00:53:53

team. They're not thinking like

00:53:54

that and no one is

00:53:55

making those representations before that

00:53:57

matter. So that's my sort

00:53:59

of third point that there

00:54:01

has been a flatly they

00:54:03

have been a lot of

00:54:04  
things but neither do I  
00:54:05  
find in numbers that large  
00:54:07  
given the size of the  
00:54:08  
economy not to I find  
00:54:10  
them that surprising given how  
00:54:12  
India structure both in terms  
00:54:14  
of a strong Federal structure  
00:54:16  
as well as an extremely  
00:54:17  
activist tradition. Um now that's  
00:54:21  
the third point. The fourth  
00:54:24  
point is that of course,  
00:54:24  
you know while I may  
00:54:26  
say here that none of  
00:54:27  
this should be that discomfoting  
00:54:30  
for anyone it was obviously  
00:54:32  
discomfoting for the government and  
00:54:34  
that led in 2016 to  
00:54:37  
the sort of creation of  
00:54:40  
the model vit and in  
00:54:41  
2017 of termination of a

00:54:43

large number of again, my

00:54:46

personal view is that none

00:54:47

of it was genuinely problematic

00:54:49

in a way the model

00:54:50

B. I T was a

00:54:51

nice initiative but has a

00:54:53

20 step too far in

00:54:54

the sense that what it

00:54:55

effectively tried to do is

00:54:56

to look at each and

00:54:58

every instance of a claim

00:54:59

against the government and try

00:55:01

to patch phones and in

00:55:03

doing so they created a

00:55:04

document which is largely in

00:55:05

co-headed but as an initiative,

00:55:08

it wasn't bad at all

00:55:09

and I do think that

00:55:11

in some respects every country

00:55:13

in the world goes through

00:55:15  
that initiative, you know, every  
00:55:16  
developed country whether it's the  
00:55:18  
United States UK Germany, they've  
00:55:20  
all had their own modern  
00:55:21  
pics which would become the  
00:55:23  
sort of effectively the template  
00:55:25  
for future negotiations. You need  
00:55:27  
differences that India perhaps went  
00:55:28  
step too far in terms  
00:55:30  
of creating a document which  
00:55:31  
was very one side and  
00:55:32  
therefore hasn't really been picked  
00:55:34  
up by other states in  
00:55:35  
their respective negotiations within there  
00:55:37  
what followed with that is  
00:55:39  
also termination of a large  
00:55:41  
number of viets again as  
00:55:43  
a concept there is nothing  
00:55:44  
problematic. About it. Each state  
00:55:46  
has the ability to terminate

00:55:47  
these bits. India has never  
00:55:49  
said that because of termination  
00:55:51  
the sunset cross would not  
00:55:52  
be protected now whether or  
00:55:55  
not as a matter of  
00:55:56  
policy, that was the right  
00:55:57  
decision we can debate that  
00:55:59  
I often think that perhaps  
00:56:02  
what was most myopic about  
00:56:04  
that decision is that today?  
00:56:05  
India is not just a  
00:56:08  
large recipient of foreign direct  
00:56:09  
investment. It's a large exporter  
00:56:10  
of One Direction investment as  
00:56:12  
well. There are large number  
00:56:13  
of Indian businesses for making  
00:56:15  
massive Investments outside of India  
00:56:17  
often in jurisdictions, which are  
00:56:19  
more politically risky than South  
00:56:21  
Asian countries. And you require

00:56:24  
perhaps these kinds of Protections  
00:56:26  
in those countries and I  
00:56:28  
see that every day in  
00:56:29  
my practice right clients that  
00:56:30  
I have people who are  
00:56:32  
investing outside of India do  
00:56:34  
often talk about protections at  
00:56:36  
media available to them in  
00:56:37  
those jurisdictions and often feel  
00:56:40  
and comfort they believe those  
00:56:41  
protections and limited to what  
00:56:42  
either the domestic Club provides  
00:56:44  
or what contraction mechanism might  
00:56:46  
provide form So I think  
00:56:48  
somewhere that termination decision was  
00:56:50  
rather myopic from that perspective,  
00:56:52  
but otherwise, I don't doubt  
00:56:54  
that the state has the  
00:56:55  
ability to do it and  
00:56:56  
perhaps should be doing it

00:56:58  
in circumstances where it feels  
00:56:59  
that the existing regime doesn't  
00:57:01  
really work for it. The  
00:57:03  
final point and that's connected  
00:57:05  
to what I said earlier.  
00:57:06  
Is that going forward? I  
00:57:10  
suspect you continue to see  
00:57:12  
a large number of investing  
00:57:14  
teams against India that wouldn't  
00:57:15  
stop it wouldn't stop because  
00:57:18  
the economy would continue to  
00:57:19  
grow therefore. They'll be more  
00:57:21  
and more Investments coming into  
00:57:22  
India. It wouldn't stop because  
00:57:24  
the Supreme Court and the  
00:57:26  
high courts in India would  
00:57:27  
remain as involved in business  
00:57:28  
slides in the economy as  
00:57:31  
they are today and it  
00:57:32  
wouldn't stop because you continue

00:57:35  
to have a very strong  
00:57:36  
Federal structure but decisions would  
00:57:38  
be me that every level  
00:57:39  
of the government which theoretically  
00:57:41  
could be challenged in the  
00:57:42  
arbitrations. So those were my  
00:57:46  
sort of quick Five Points  
00:57:47  
about why I think we  
00:57:50  
are where we are and  
00:57:51  
why I personally have never  
00:57:52  
found any of this that  
00:57:54  
problematic. And in fact, I  
00:57:56  
suspect this would continue the  
00:57:57  
only new trend. I think  
00:57:59  
you'll see more and more  
00:58:00  
of our invested State claims  
00:58:02  
brought by Indian companies against  
00:58:03  
foreign governments. So that's on  
00:58:07  
sort of the general overview.  
00:58:09  
I know I've just 60

00:58:11  
seconds left. So I'll quickly  
00:58:13  
mention the one case that  
00:58:16  
I wanted to talk about  
00:58:16  
and we can pick this  
00:58:18  
up later. It's the Divas  
00:58:20  
Saga because it's not just  
00:58:22  
one hour vitration. They're multiple  
00:58:24  
of those I picked that  
00:58:25  
up because obviously there are  
00:58:27  
lots of other teams which  
00:58:28  
are in the fast Vodafone  
00:58:30  
Etc. Devas is perhaps slightly  
00:58:32  
less popular compared to those  
00:58:33  
but it still is an  
00:58:36  
importantly lustration. I think of  
00:58:38  
all the concepts that make  
00:58:40  
her you were talking about  
00:58:40  
which is are there instances  
00:58:45  
where the arbitration awards are  
00:58:47  
just too large in terms

00:58:48

of size are there instances

00:58:50

where you have multiple treaty

00:58:52

disputes or multiple disputes arising

00:58:54

out at the same event

00:58:55

are there instances where there

00:58:58

are corruption and fraud allegations

00:59:00

at the at the heart

00:59:01

of what is effectively and

00:59:03

so on and so forth.

00:59:06

So what was Divas very

00:59:07

shortly or very briefly in

00:59:10

2005 Investments were made by

00:59:13

a company called Divas, which

00:59:15

is Incorporated in India, but

00:59:17

has investors based in Mauritius.

00:59:19

Mostly that investment was in

00:59:22

relation to a contract with

00:59:24

the Indian space research organization,

00:59:25

which Perhaps is equivalent of

00:59:28

NASA and Indian context to

00:59:30

build certain satellites now. In

00:59:34

2011 that contract was terminated.

00:59:37

I'm sort of skipping. Obviously

00:59:39

what happened between 2005 and

00:59:41

11 but five is the

00:59:42

contract 11 is when that

00:59:44

is terminated that leads to

00:59:46

a contractual arbitration. So the

00:59:48

contract between Devas and the

00:59:51

Indian space research organization provided

00:59:53

for arbitration under ICC rules,

00:59:55

I think but seated in

00:59:57

India that leads to a

01:00:00

fairly large arbitration of water

01:00:02

for about 560 million dollars,

01:00:03

which today along with interest

01:00:06

is about 1.4 billion dollars.

01:00:07

I understand. So that's one

01:00:10

part of it that what

01:00:11

hasn't been enforced. There are

01:00:13  
multiple proceedings on foot in  
01:00:14  
India in relation to setting  
01:00:17  
aside of the arbitration award  
01:00:19  
and so on and so  
01:00:20  
forth. Simultaneously while all of  
01:00:23  
this is happening. The investors  
01:00:25  
in Davis commenced their own  
01:00:27  
invested State arbitrations against India  
01:00:29  
under the uncertain rules.  
01:00:30  
They too are successful in  
01:00:32  
the app in those arbitrations  
01:00:34  
of the arbitration award amount  
01:00:35  
of substantially smaller. I think  
01:00:36  
around 100 million dollars or  
01:00:38  
so. and finally while all  
01:00:40  
of this is going on  
01:00:41  
very recently earlier this year  
01:00:44  
and at the end of  
01:00:44  
last year the the government  
01:00:47  
tries to do things, which

01:00:48

genuinely I feel Were done

01:00:53

in bad feed for for

01:00:54

lack of a better word,

01:00:55

but effectively what they do

01:00:57

is they try and liquidate

01:00:59

the company itself the award

01:01:02

Predator divas and the way

01:01:04

they do it is by

01:01:05

having the award. Predator and

01:01:09

sorry, they are what data

01:01:10

Anthrax make an application to

01:01:12

the company code in India

01:01:14

for the appointment of Liquidator.

01:01:15

I mean that's just unheard

01:01:17

of it would never happen

01:01:17

to normal. Scheme of things

01:01:20

and that not surprisingly needs

01:01:22

to the threat of another

01:01:24

bit arbitration. I've seen the

01:01:26

trigulated that I moved the

01:01:28  
arbitrations actually commenced. So what  
01:01:30  
you have there and we  
01:01:31  
can take this app meter  
01:01:32  
is effectively one contract the  
01:01:35  
contract for building satellites giving  
01:01:37  
rise to ICC arbitration commercial  
01:01:41  
arbitration giving rise to multiple  
01:01:43  
investors Data Solutions. You have  
01:01:45  
fairly large investment video awards,  
01:01:48  
you have the Indian government  
01:01:50  
saying that the company which  
01:01:52  
is actually lost the arbitration  
01:01:54  
should be liquidated because it  
01:01:56  
has been involved in a  
01:01:58  
fraud because the underlying contract  
01:02:00  
was obtained through corruption and  
01:02:01  
that's sort of an after  
01:02:03  
thought because that allegation was  
01:02:04  
never made originally in the  
01:02:06  
arbitrations and fourth just causing

01:02:09  
there for a second is  
01:02:11  
what I think is the  
01:02:12  
next Trend which perhaps is  
01:02:15  
relevant to you know, the  
01:02:16  
cases that profess Islam you  
01:02:18  
and Fatima you would talk  
01:02:19  
about Is just purely efforts  
01:02:21  
to collect on that applic.  
01:02:22  
Aton, because I think you  
01:02:24  
know if you really think  
01:02:25  
of how the government mentality  
01:02:27  
has worked in this you  
01:02:28  
signed on to the bi  
01:02:29  
TS, you didn't realize that  
01:02:30  
it would need to claims.  
01:02:31  
Then it leads to claims  
01:02:33  
you lose arbitration Awards. You  
01:02:35  
spend a lot of money  
01:02:36  
defending yourself. Even then you  
01:02:40  
don't realize what happens when

01:02:41  
the investors actually try to  
01:02:42  
collect on that and then  
01:02:43  
the third phase is that  
01:02:44  
now they're trying to collect  
01:02:45  
on it and that puts  
01:02:46  
you even in Greater pain  
01:02:48  
because that opens up the  
01:02:49  
possibility of execution against State  
01:02:51  
assets. And that's what sort  
01:02:54  
of India is now going  
01:02:55  
through as far as Diva  
01:02:57  
systems in other cases get  
01:02:58  
settled so we can pick  
01:02:59  
that up as well in  
01:03:00  
the discussion, but I'll pause  
01:03:02  
that that's all I want  
01:03:03  
to sort of saying this  
01:03:04  
much time. Thank you very  
01:03:07  
much Russia that you did  
01:03:10  
Cover a lot of territory

01:03:12

very quickly. So kudos to

01:03:15

that. Let's look at Pakistan.

01:03:18

Very interesting very key developments

01:03:21

happening there. Tell us Fatima.

01:03:23

What is what is happening

01:03:24

in Pakistan? Where are we

01:03:26

headed? Thank you Kabir and

01:03:28

really glad to be on

01:03:30

this panel. I'm gonna keep

01:03:32

this brief in the interest

01:03:33

of times we can get

01:03:34

to our discussion as quickly

01:03:36

as possible. Um, but I

01:03:37

think in the case of

01:03:39

Pakistan, it's important to give

01:03:41

a historical review to kind

01:03:42

of figure out, you know

01:03:43

to kind of understand why

01:03:44

Pakistan is doing what it

01:03:47

is doing today. So just

01:03:50

getting straight into it Pakistan

01:03:52

was obviously signed the first

01:03:53

bi team the world with

01:03:54

West Germany in 1959 understanding

01:03:57

Pakistan's frame of head at

01:03:59

that time Pakistan and obviously

01:04:01

recently become independent from India

01:04:04

was looking to grow and

01:04:05

attract for and investment and

01:04:08

signing VIPs was You know

01:04:10

at that time a very

01:04:11

fashionable of getting foreign investment.

01:04:13

So what we see is,

01:04:14

you know. 60s and 70s

01:04:17

a bit of cautious approach

01:04:19

but between 1988 and 2001

01:04:21

Pakistan signed around 35 B,

01:04:24

its you know with well

01:04:26

being signed alone in 1995.

01:04:28

So this is you know

01:04:29  
in stock contrast to India,  
01:04:31  
of course, you know, they  
01:04:32  
kind of took on signing  
01:04:34  
bits very slowly but you  
01:04:35  
Pakistan in span of decade  
01:04:36  
accumulated a portfolio of you  
01:04:38  
know over 35 vits. And  
01:04:43  
of course then in 2001  
01:04:45  
Pakistan faced, you know, it's  
01:04:47  
first major bit came in  
01:04:49  
the SGS case, which was  
01:04:50  
kind of like a huge  
01:04:52  
Awakening for everybody who had  
01:04:54  
been on this Rampage of  
01:04:55  
signing the pits and if  
01:04:57  
we look at, you know  
01:04:58  
interviews of the former Attorney  
01:05:00  
General at that time Ali  
01:05:02  
Khan. He's obviously made it  
01:05:03  
very clear that you know,

01:05:04  
when Park son was informed  
01:05:06  
of this claim people in  
01:05:08  
the government had to literally  
01:05:10  
Google the world exit and  
01:05:12  
arbitration to understand. You know,  
01:05:13  
what they've been up to  
01:05:14  
for the last two decades.  
01:05:16  
So this was kind of  
01:05:18  
And the weakening call for  
01:05:20  
Pakistan. So what happened was  
01:05:22  
that was that Pakistan slowed  
01:05:24  
down the signing of bits?  
01:05:25  
So what we see is  
01:05:26  
instead of signing 10 to  
01:05:27  
12 bits in a single  
01:05:29  
year you'd see, you know,  
01:05:30  
long gaps six to seven  
01:05:32  
years one vit sign in  
01:05:34  
2002 1 2003 and then,  
01:05:36  
you know huge gaps in

01:05:38  
between so generally there was  
01:05:39  
a Cautious approach taken there,  
01:05:42  
but between 2001 the SGS  
01:05:47  
claim and you know looking  
01:05:48  
into 2015, although there was  
01:05:51  
a cautious approach. They were  
01:05:52  
slow actions taken. So, you  
01:05:54  
know, they weren't the viets  
01:05:56  
that were terminated or renegotiated  
01:05:58  
overall the mindset of the  
01:06:00  
Pakistani government and you know  
01:06:02  
get it signing into Vitas  
01:06:04  
was that we need to  
01:06:05  
be cautious about what we're  
01:06:06  
getting into but they want  
01:06:08  
major reforms undertaken then. but  
01:06:11  
of course that all changed  
01:06:13  
very recently with the TCC  
01:06:16  
versus Pakistan also most famously  
01:06:18  
known as the recode case,

01:06:19

you know kind of that

01:06:22

is one case that kind

01:06:24

of Pakistan accelerated the reform

01:06:27

the ISD has reform in

01:06:28

Pakistan and we've seen in

01:06:29

the last, you know year

01:06:31

and a half two years

01:06:31

a major major shifts happening

01:06:34

in terms of the investment

01:06:35

arbitration landscape. Um in Pakistan,

01:06:38

so of course recall really

01:06:41

spoke about this, but I'll

01:06:42

just highlight if you points

01:06:44

that I think are important

01:06:45

in regards to this case

01:06:46

so we could take is

01:06:47

essentially the name of the

01:06:49

area in the state of

01:06:51

the province of Balochistan in

01:06:53

Pakistan in this is It's

01:06:55  
considered the world's allegedly considered

01:06:58  
world's fifth largest gold mine

01:06:59  
and in 1993 joint venture

01:07:03  
agreement was signed between the

01:07:04  
government of Balochistan and BHP,

01:07:07  
which of course was regarding

01:07:09  
the exploration of this this

01:07:11  
mining area. um and later

01:07:13  
on BHP sold the rights

01:07:16  
of reproduct to TCC when

01:07:18  
TCC submitted the mining lease

01:07:20  
application. It was rejected by

01:07:21  
the Balochistan government, which of

01:07:24  
course then the TCC to

01:07:25  
file an appeal. in the

01:07:28  
Supreme Court of Pakistan and

01:07:30  
then finally arbitration claim in

01:07:32  
exit as well. And the

01:07:35  
Supreme Court of Pakistan declared

01:07:37  
that the 1993 the joint

01:07:40  
venture agreement was contrary to  
01:07:41  
law and public policy and  
01:07:43  
was there for void and  
01:07:45  
so then we see a  
01:07:46  
lot of focus TCC focused  
01:07:49  
a lot and they said  
01:07:50  
arbitration. and so of course  
01:07:52  
in 2019, July 2019 is  
01:07:55  
six billion, you know dollar  
01:07:57  
award including interest was issued  
01:07:59  
against Pakistan and There's a  
01:08:03  
huge criticism regarding this award  
01:08:05  
that you know how such  
01:08:06  
an extravagant award is issued  
01:08:08  
against a country. You know,  
01:08:09  
it's there's a lot of  
01:08:10  
question mark on its ability  
01:08:11  
to pay on an investment  
01:08:14  
of let's say 200 million  
01:08:16  
dollars a fine of six

01:08:17  
billion probably reflects poorly on  
01:08:20  
the, you know, potential and  
01:08:23  
neutrality of the ETC, you  
01:08:25  
know, the penalty was equivalent  
01:08:27  
to about 2% of Pakistan  
01:08:28  
GDP, and obviously as we  
01:08:31  
come mentioned equivalent almost equivalent  
01:08:33  
to the bailout package at  
01:08:34  
Pakistan had received from the  
01:08:37  
IMF that same year. So  
01:08:39  
really really putting a question  
01:08:40  
mark and how the tribunal  
01:08:42  
could reach this number and  
01:08:44  
how they and if they  
01:08:45  
even considered Pakistan's ability to  
01:08:47  
pay for this. um, and  
01:08:49  
when we look at you  
01:08:51  
know how the tribunal kind  
01:08:52  
of got into this number  
01:08:53  
in the first place. They

01:08:55  
opted to use a formula  
01:08:56  
for calculating the damages based  
01:09:00  
on the soon profits of  
01:09:01  
the of TCC which they  
01:09:04  
might have earned over a  
01:09:05  
period period of 56 years,  
01:09:06  
right? And obviously there's experts  
01:09:08  
have argue that there's no  
01:09:09  
sure way to calculate the  
01:09:11  
future price of a mineral  
01:09:12  
and expected profits are also  
01:09:15  
subject to political uncertainty and  
01:09:17  
a lot of factors such  
01:09:18  
as environmental impacts are hard  
01:09:20  
to predict and obviously by  
01:09:22  
the time this award had  
01:09:23  
been issued recorded Karen produced  
01:09:25  
a single answer gold or  
01:09:26  
copper and it was years  
01:09:28  
away from becoming operation. So

01:09:30

how do you predict how

01:09:32

a particular business is going

01:09:33

to do in 20 years?

01:09:34

so these are obviously criticisms

01:09:37

that this award received there

01:09:40

is also the question of

01:09:41

you know, whether arbitrators were

01:09:42

mostly lawyers are well versed

01:09:43

in making such complex Financial

01:09:46

projections because you know, ultimately

01:09:49

they're the ones who make

01:09:50

final decisions and also in

01:09:52

regards to this case there

01:09:53

was also allegations of a

01:09:56

parent corruption in the process

01:09:57

of securing the investment so

01:09:59

improper payments made to obtain

01:10:03

Visa approvals subsequently after this

01:10:06

decision was This penalty was

01:10:09

given we saw that the

01:10:11  
below Justine Development Authority chairman  
01:10:13  
was imprisoned by the Pakistani  
01:10:14  
authorities for having assets beyond  
01:10:17  
their means and also being  
01:10:19  
involved in approving The recordic  
01:10:22  
Venture agreement. So obviously this  
01:10:25  
on a local level these  
01:10:26  
investigations have continued to remain  
01:10:29  
and as recall so highlighted  
01:10:31  
there's a huge question mark  
01:10:33  
on the ability of the  
01:10:34  
panel, you know to do  
01:10:35  
such high level investigative work  
01:10:37  
to kind of You know  
01:10:39  
a final through the allegations  
01:10:42  
of corruption in in these  
01:10:44  
regions. So what we've seen  
01:10:45  
now in response to this  
01:10:48  
case obviously Pakistan is Very  
01:10:51  
since imranthan our current prime

01:10:53

minister has come into power

01:10:54

we are he has been

01:10:56

very adamant of attracting more

01:10:57

foreign investment. We've obviously seen

01:10:59

China as you know, one

01:11:00

of the main Largest foreign

01:11:02

investor in Pakistan even just

01:11:04

first half of this year

01:11:06

China invested around 400 million

01:11:07

dollars followed by you know

01:11:10

Hong Kong and Netherlands. So

01:11:11

we're obviously Pakistan is their

01:11:13

headspace now is to attract

01:11:14

huge amounts of foreign investment,

01:11:17

but also not be penalized

01:11:19

for issues that they've obviously

01:11:21

dealt with in the past.

01:11:22

So in recent times Imran

01:11:26

Khan has obviously formed a

01:11:27

working group, you know combination

01:11:29  
of 15 to 20 people  
01:11:30  
former State officials lawyers that  
01:11:32  
are coming up with suggestions  
01:11:35  
of what What kind of  
01:11:37  
reforms that we need? There's  
01:11:40  
also talks. The board of  
01:11:42  
investment is also proposed. That  
01:11:44  
Pakistan, you know, not that  
01:11:49  
initially consider terminating bits that  
01:11:54  
do not favor it and  
01:11:55  
you pursue strategies to create  
01:11:57  
opportunities for you know around  
01:11:58  
50 billion dollars that they're  
01:12:00  
looking. To get into Pakistan  
01:12:02  
the next five years and  
01:12:04  
obviously in terms of recorded.  
01:12:06  
We've also seen very recently  
01:12:07  
Pakistan's assets being attached overseas  
01:12:10  
and you know the whole  
01:12:14  
Um situation that's been going

01:12:16

on with that. So, I

01:12:17

mean there's a lot more

01:12:18

that can be said with

01:12:19

that, but I know we're

01:12:19

short on time. So we

01:12:20

should probably get straight into

01:12:22

the discussion. Fantastic Fatima. Thank

01:12:26

you. Let me just start

01:12:28

off and I got into

01:12:29

this panel. Right. I was

01:12:32

going to make the grand

01:12:34

statement. The old Southeast Asian

01:12:37

countries are essentially the same

01:12:39

facing similar outcomes, but during

01:12:42

each of you speak. They're

01:12:45

actually seemed to be very

01:12:46

unique determining factors impacting how

01:12:49

each of these countries look

01:12:52

at arbitration. I know we're

01:12:55

we're I'm being told that

01:12:58

we should end soon for

01:13:00

networking. But I do want

01:13:02

to have a little bit

01:13:03

of dialogue between this amazing

01:13:05

panel. It is a South

01:13:08

Asian panel. Let's perhaps invite

01:13:12

every panelist. to speak in

01:13:15

one to two sentences. This

01:13:18

is the most difficult thing

01:13:19

for lawyers but one to

01:13:22

two sentences if each of

01:13:24

us speakers can tell us

01:13:26

their reactions to a statement

01:13:29

I am going to present.

01:13:32

So my statement for your

01:13:35

expert opinion counselors. Investment arbitration

01:13:41

is not an appropriate tool

01:13:44

for resolution of disputes in

01:13:47

South Asian countries. Investment arbitration

01:13:51

is not an appropriate tool

01:13:54  
for resolution of disputes in  
01:13:56  
South Asian countries. Do you  
01:13:58  
agree disagree? What do you  
01:14:01  
think? Let's go in the  
01:14:02  
reverse order. So Fatima Russia  
01:14:06  
Ramana and then Rekha? Fatima  
01:14:10  
take it away. I mean,  
01:14:12  
I would just say that  
01:14:13  
in, you know investment arbitration.  
01:14:15  
Although there are many things  
01:14:16  
wrong with the system and  
01:14:18  
you know a lot of  
01:14:19  
reforms that can be made  
01:14:20  
I think. In in the  
01:14:23  
case of Pakistan, this is  
01:14:25  
the system that one should  
01:14:27  
accept as it is, but  
01:14:28  
consider working to improve it  
01:14:30  
instead of until I think  
01:14:32  
this is the best system

01:14:33  
that we've developed to resolve  
01:14:34  
issues as complex. As you  
01:14:36  
know, we are facing today  
01:14:37  
of course improvements can be  
01:14:40  
made but I think yeah,  
01:14:42  
I think we should work  
01:14:43  
on improving it but until  
01:14:45  
unless we've develop a better  
01:14:47  
alternative form. I think this  
01:14:48  
is this works so far.  
01:14:51  
It works so far. Okay.  
01:14:53  
What's the Vista Bishop? I  
01:14:57  
think it's an appropriate mechanism  
01:14:59  
for resolving disputes involving foreign  
01:15:01  
investors. So of course as  
01:15:04  
Fatima said improvements could be  
01:15:06  
made from the perspective of  
01:15:07  
both the investors as well  
01:15:09  
as States. Thank you. You  
01:15:13  
actually kept it to two

01:15:14  
sentences. That's always the challenge  
01:15:16  
with these things Professor Islam.  
01:15:19  
Thank you in tune with  
01:15:21  
Fatima. I would also like  
01:15:22  
to say like it's like  
01:15:23  
democracy. You don't have any  
01:15:25  
better option for this solving  
01:15:27  
investor status just made to  
01:15:31  
make it try to be  
01:15:32  
better. And as I said  
01:15:33  
have legislation and lead a  
01:15:36  
little before you liter to  
01:15:38  
get legislate. So as long  
01:15:39  
as you have good protection  
01:15:40  
in your investment rate is  
01:15:42  
regime, it should be fine  
01:15:43  
and obviously develop as a  
01:15:45  
developing countries that they are  
01:15:47  
learning. I think the situation  
01:15:49  
will change in next three

01:15:51  
to five years in terms  
01:15:52  
of developing expert counsels at  
01:15:57  
least for Bangladesh that I  
01:15:59  
can say. So as long  
01:16:00  
as that is taken care  
01:16:01  
of things might be slightly  
01:16:03  
different but obviously time will  
01:16:06  
only say that how far  
01:16:07  
it's working. Time will say  
01:16:09  
indeed. Thank you Rekha. I  
01:16:12  
think I'm gonna Echo at  
01:16:13  
the panelist said absolutes. I've  
01:16:14  
never won. This is the  
01:16:15  
very good. I've never Once  
01:16:19  
or two, we make all  
01:16:20  
sorts of disclaimers at the  
01:16:21  
start of panels and papers  
01:16:22  
to that effect. So but  
01:16:25  
not withstanding, you know, there's  
01:16:26  
an inherent asymmetry in the

01:16:27

bits in the midst system

01:16:29

is the better system available

01:16:31

in the fora now, but

01:16:33

certainly we're going through a

01:16:35

major evolution of model treaties

01:16:38

and it'll be very interesting

01:16:39

to see to borrow from

01:16:40

rashab's comment the patchwork that

01:16:43

is being made in the

01:16:45

evolution. awesome Let me present

01:16:49

another statement to get your

01:16:51

reactions, right because I think

01:16:53

something we spoke about was

01:16:56

tribunal stepping and tribunals interpreting

01:17:00

tribunals. You know looking at

01:17:03

obligation stated in treaties. Position

01:17:11

it's a little cheeky but

01:17:14

treaty interpretation. Is the necessary

01:17:19

consequence of poor drafting of

01:17:22

treaties? particularly in South Asian

01:17:26  
countries Do you agree with  
01:17:28  
this statement? Recap, perhaps. We  
01:17:33  
now go the other order.  
01:17:36  
the disclaimer would make is  
01:17:37  
without actively engaging in these  
01:17:39  
treaties every many treaties start  
01:17:43  
out with bad drafting as  
01:17:44  
do many arbitral clauses. And  
01:17:47  
you're stuck with them and  
01:17:49  
so to speak for a  
01:17:50  
period of time until you  
01:17:51  
learn better and then implementation  
01:17:53  
takes over and then add  
01:17:55  
another decade. So it is  
01:17:57  
an evolutionary process. But you  
01:17:59  
know, inherently you have to  
01:18:00  
start somewhere is what I  
01:18:02  
would argue. Thank you Professor  
01:18:05  
Islam. Thing I already said  
01:18:09  
like before we really to

01:18:10

get legislates so as and

01:18:12

as rich as say that

01:18:14

it's an evolutionary process. So

01:18:15

we had first Generations second

01:18:18

generation. Third generation of Viet

01:18:20

is maybe in future we

01:18:21

will be having a fourth

01:18:22

generation of bisces. So we

01:18:24

should always have that space

01:18:25

in the vit that we

01:18:26

can adopt that in quotes

01:18:28

of Time how to with

01:18:29

the changing circumstances because this

01:18:31

whole pandemic Health could us

01:18:33

into many situation which we

01:18:35

could not even imagine when

01:18:37

we had all this bi

01:18:39

it is so this would

01:18:40

be again something I am

01:18:41

sure would be addressed in

01:18:43  
the coming viets about all  
01:18:46  
this kind of that challenges  
01:18:48  
that this pandemic has imposed  
01:18:50  
and exposed. Thank you. Rishab  
01:18:53  
Gupta. I would disagree with  
01:18:56  
that statement. I don't think  
01:18:57  
the treaties were badly drafted  
01:19:01  
in the sense that they  
01:19:02  
weren't riddled with errors or  
01:19:05  
they won't inherently inconsistent. They  
01:19:08  
just didn't reflect perhaps what  
01:19:10  
state parties today would want  
01:19:12  
from those treats equally, I  
01:19:15  
don't think there was anything  
01:19:16  
specific in those treaties which  
01:19:18  
you can point to as  
01:19:20  
far as South Asians because  
01:19:22  
the first generation vit used  
01:19:24  
to fairly identical across the  
01:19:25  
board, whichever jurisdiction United. Um

01:19:28

evolutionary process of course, but

01:19:31

that's true for any instrument

01:19:34

which receives continuous interpretation application

01:19:38

through judicial bodies or arbitration

01:19:41

travels. So that process wouldn't

01:19:42

stop. So yeah. Thank you

01:19:47

Fatima Islam. Now I would

01:19:51

say that more than for

01:19:54

treaty drafting like as your

01:19:56

sub mentioned at least in

01:19:57

the case of Pakistan. I

01:19:58

would say the South Asian

01:20:00

countries can definitely be better

01:20:01

at negotiating the treaties and

01:20:04

making sure that their interest

01:20:05

is reflected accurately in the

01:20:07

words because I guess as

01:20:08

lawyers, we all know how

01:20:09

much words matter so definitely

01:20:12

making sure that you're interested

01:20:13  
is reflected well in because  
01:20:16  
historically in the case of  
01:20:17  
Pakistan, we've always, you know  
01:20:19  
got in a rude awakening  
01:20:21  
called much later on what  
01:20:23  
we assigned. So we want  
01:20:24  
to make sure that going  
01:20:25  
forward we are able to  
01:20:26  
kind of negotiate in an  
01:20:29  
equal. space well folks you've  
01:20:32  
heard it from the experts  
01:20:34  
right here. I invite everyone  
01:20:36  
to give a virtual. Round  
01:20:39  
of Applause to this amazing  
01:20:41  
panel We have covered probably  
01:20:44  
one of the most pivotal  
01:20:46  
and significant regions that is  
01:20:49  
playing very important role in  
01:20:51  
ists. So thank you panelist.  
01:20:55  
I definitely feel I have

01:20:56

learned a lot. With that,

01:20:59

let me invite. Jose Antonio

01:21:02

Rivas to tell us what's

01:21:04

going to happen next but

01:21:06

let me Echo once more

01:21:09

everyone Round of Applause to

01:21:11

this amazing panel right here.

01:21:16

wonderful Kabir thank you so

01:21:20

much for moderating this in.

01:21:24

I say this truly in

01:21:27

Unique Style in unique. Absolutely

01:21:30

Unique Style. I don't think

01:21:31

that that anybody would be

01:21:35

able to do it as

01:21:36

you do it, which is

01:21:38

really wonderful. Thank you so

01:21:39

much. And in the order

01:21:41

that you appear Fatima very

01:21:45

glad to see you and

01:21:47

and listen to you making

01:21:50  
the statements and and and  
01:21:52  
sharing your thoughts especially concerning  
01:21:57  
investment arbitration in Pakistan Recker  
01:22:02  
has been a pleasure. Thank  
01:22:04  
you so much it. You  
01:22:06  
know, sometimes you speak and  
01:22:07  
it sounds like poetry so  
01:22:10  
so really, yeah, it's it's  
01:22:12  
wonderful. Rishab when the very  
01:22:17  
nice to meet you and  
01:22:17  
and I really like the  
01:22:20  
the definitive voice in which  
01:22:23  
you answer many many of  
01:22:24  
the of the questions. So  
01:22:26  
so wonderful and Professor Islam  
01:22:29  
as as always as I  
01:22:32  
said at the beginning it's  
01:22:33  
a pleasure to meet you  
01:22:34  
and and to have you  
01:22:35  
here and and share your

01:22:37  
perspective concerning Bangladesh and and  
01:22:41  
investment arbitration. Now, I would  
01:22:44  
like to this is a  
01:22:47  
panel to to see many  
01:22:48  
times more. I'm glad that  
01:22:50  
will have it on video  
01:22:52  
and that will have many  
01:22:54  
of the sources available for  
01:22:57  
people to update themselves, especially  
01:22:59  
concerning South Asia. Now, we  
01:23:03  
would like to welcome everyone  
01:23:05  
to the breakout rooms. We're  
01:23:07  
gonna have perhaps at the  
01:23:09  
most two or three breakout  
01:23:11  
rooms, and we're glad that  
01:23:14  
The you know, it's now  
01:23:16  
not that early in South  
01:23:19  
Asia and I'm getting a  
01:23:22  
little bit late here in  
01:23:25  
Eastern Standard time, but, you

01:23:27

know still very exciting. So

01:23:29

with that thank you to

01:23:31

all of you and let's

01:23:33

move on to the breakout

01:23:35

rooms. Pakistan for those in

00:00:09

Asia in Pakistan Bangladesh Sri,

00:00:13

Lanka and India, we are

00:00:16

extremely extremely happy about this

00:00:20

panel and good evening. Also

00:00:23

to those that are in

00:00:25

the east coast of the

00:00:27

US and no perhaps good

00:00:31

afternoon, depending on on where

00:00:33

you may be in the

00:00:34

world. This is a the

00:00:37

panel on controversial investment Awards

00:00:41

in South Asia and it

00:00:44

is a my pleasure to

00:00:49

share with you a few

00:00:50

words about the world arbitration

00:00:52

update, but before that it

00:00:54

is my pleasure to introduce

00:00:58

the moderator for this panel

00:01:01

Kabir Dr. Kabir Dugal Who

00:01:05

is in addition to a

00:01:08

incredible supporter of world arbitration

00:01:12

updates also a very strong

00:01:14

attorney arbitrator and academic? Kabir

00:01:20

focuses his practice on International

00:01:23

Investment arbitration International commercial arbitration

00:01:28

and public international law matters.

00:01:30

Serving both as Council and

00:01:33

as arbitrator. He is a

00:01:36

professor of Columbia Law School

00:01:39

and also a international attorney

00:01:44

in Arnold and Porter. Dr.

00:01:48

Dugal's experience includes complex disputes

00:01:51

under numerous bilateral multilateral investment

00:01:55

treaties and contracts in South

00:01:57

Asia Latin America Central Asia

00:02:01  
middle east Europe and Africa,  
00:02:04  
he's experienced flows from his  
00:02:06  
triple training in international law.  
00:02:10  
common law and civil law  
00:02:12  
traditions He has served as  
00:02:16  
an arbitrator in over 40  
00:02:18  
disputes involving parties from all  
00:02:20  
over the world and across  
00:02:22  
several different Industries. Dr. Dugo  
00:02:26  
has been ranked as among  
00:02:29  
top 10. Arbitrators for the  
00:02:31  
Asia Pacific region by the  
00:02:33  
Valley International arbitration and mediation  
00:02:36  
Center and received the 2019  
00:02:39  
equality and diversity award in  
00:02:41  
discrete resolution by Prime dispute  
00:02:44  
in 2020 in 2021, Dr.  
00:02:48  
Dogo was awarded the 2020  
00:02:51  
dispute resolution partitioner of the  
00:02:54  
year for the Americas and

00:02:56

and most importantly Dr. Dugal

00:03:00

is also I guess the

00:03:03

lecture In Georgetown University Law

00:03:07

Center to my course on

00:03:10

investment treaty arbitration public international

00:03:13

law and icj judgment Kabir

00:03:18

has helped build that course,

00:03:21

especially concerning the session on

00:03:25

expropriation and has been has

00:03:28

done supporter of world arbitration

00:03:31

update by connecting real. Which

00:03:34

also promotes diversity? And the

00:03:38

world arbitration update we are

00:03:39

very pleased to have him

00:03:41

as the moderator and without

00:03:43

further Ado Kabir you have

00:03:46

a floor. Thank you very

00:03:48

much. Jose. Best \$20 ever

00:03:51

spent in my life. Let

00:03:54

me just start off by

00:03:56

saying what a delighted is

00:03:58

to be here. My role

00:04:02

is actually very easy because

00:04:04

we have and absolutely spectacular

00:04:09

phenomenal panel in front of

00:04:12

you. These are truly just

00:04:15

you know, I will introduce

00:04:17

them very briefly, but these

00:04:19

are real Stalworths their real

00:04:25

people making a difference in

00:04:27

South Asia, but in arbitration

00:04:30

more generally. And it's real

00:04:33

Delight to be able to

00:04:34

get such amazing people together.

00:04:38

Obviously we are going to

00:04:39

be talking about a very

00:04:40

simple and easy topic. It's

00:04:42

corruption abusive treaty interpretation and

00:04:46

novel damages calculation. That's our

00:04:49

agenda for today. I was

00:04:52

kidding in case that wasn't

00:04:53

a parent. We are looking

00:04:55

at very meaty issues, but

00:04:56

we have this amazing panel

00:04:58

that's going to share the

00:05:00

thoughts and insights so stay

00:05:02

tuned. Join in the conversation.

00:05:05

Let me just set the

00:05:07

stage for what's going to

00:05:08

come and then we're talking

00:05:10

about corruption. Right if we

00:05:13

just look at some estimates

00:05:15

a big part of the

00:05:17

word GDP gets lost in

00:05:19

corruption. If you look at

00:05:21

Monetary amounts, it's huge. 2.6

00:05:26

trillion dollars that zeros I

00:05:29

cannot even imagine and then

00:05:31

you see what the World

00:05:32

Bank tells us corruption robs

00:05:36

schools and rots institutions. I

00:05:39

put that here mainly because

00:05:41

I felt the word Robin

00:05:42

wrought Ryan. What is the

00:05:47

implication for us when we're

00:05:49

talking about this topic? nutrition

00:05:54

corruption very unique Dimension because

00:05:59

corruption can be especially in

00:06:02

the investment context. a sport

00:06:05

and a shield State can

00:06:07

invoke it as a defense

00:06:09

the state can you know?

00:06:13

Affirmatively try to point to

00:06:15

corruption by the investor. You

00:06:18

see it happening both ways.

00:06:19

You can see the investor

00:06:22

invoking it both ways. Just

00:06:25

to notice that while it's

00:06:27

our focus is investment arbitration.

00:06:30

You are seeing this coming

00:06:32  
up in commercial arbitration as  
00:06:34  
well. Corruption easy to allege  
00:06:38  
difficult to prove we will  
00:06:40  
be probably looking at some  
00:06:42  
of the cases in South  
00:06:45  
Asia where this is become  
00:06:46  
a very critical issue. But  
00:06:49  
the tribunal is not a  
00:06:51  
court. Right. It doesn't have  
00:06:54  
police Powers. It cannot actually  
00:06:56  
make investigations of findings. And  
00:07:00  
therefore if you see publicly  
00:07:03  
known cases that have made  
00:07:05  
findings and Corruption. It's few  
00:07:08  
and far between The other  
00:07:12  
thing they're going to talk  
00:07:13  
about is what impact does  
00:07:16  
damages have and this is  
00:07:19  
where we talk about the  
00:07:20  
mega award, right? I think

00:07:23

for God you have to

00:07:25

be over a threshold and

00:07:28

I think the threshold is

00:07:29

500 million to even be

00:07:31

classified as a case. damages

00:07:35

Can sometimes be super large?

00:07:37

I think the example that

00:07:38

I always find well fascinating.

00:07:41

is that if you add

00:07:44

up and this is a

00:07:45

few years ago, but if

00:07:46

you added up the total

00:07:48

amount alleged against the Czech

00:07:51

Republic. That amount was larger

00:07:55

than the annual budget for

00:07:56

the check Ministry of Health.

00:07:59

So we're talking about cases

00:08:01

that can have potentially very

00:08:03

very large reaches. This is

00:08:07

again damages. This is valuation.

00:08:10

There's so many approaches and

00:08:13

valuation. different valuations leading to

00:08:17

different outcomes Let's take a

00:08:19

little bit of a look

00:08:21

into that. And let's come

00:08:24

to the regional Focus that

00:08:25

we're looking at. We're talking

00:08:28

about South Asia. Now, let's

00:08:32

put Cricket aside and let's

00:08:34

put delicious food aside, but

00:08:36

we're talking about. The region

00:08:39

that is about a quarter

00:08:41

of the global world population.

00:08:46

Key, this is the region

00:08:47

that we cannot ignore. We're

00:08:50

talking about countries that are

00:08:51

rapidly growing. But this often

00:08:55

corruption lurking in the background.

00:08:59

And then for our purposes

00:09:02

specifically we're seeing each of

00:09:04

the three countries. playing active

00:09:09

roles as respondents in investment

00:09:11

arbitration with some potentially large

00:09:17

and controversial Awards coming out

00:09:20

in each of the three

00:09:21

countries. Now for countries that

00:09:25

are developing for countries that

00:09:27

have issues on poverty for

00:09:30

countries that are thinking about

00:09:31

infrastructure. You may have to

00:09:35

make tough decisions when it

00:09:38

comes to larger words. What

00:09:40

implications will will that have

00:09:42

on your growth agenda? That's

00:09:46

something this awesome panel is

00:09:48

going to tease out for

00:09:49

us. But before we do

00:09:51

that, we'd like to invite

00:09:53

you especially those joining very

00:09:55

early or Like Us in

00:09:56

New York and Boston. Or

00:09:59

DC quite late. We'd like

00:10:02

you to join us in

00:10:03

some polay Maria Lucia. Can

00:10:06

we have the first poll

00:10:07

question presented? And that's the

00:10:12

proposition you see in front

00:10:14

of you. Okay, folks. We

00:10:22

invite you all to share

00:10:23

your views. Go ahead take

00:10:24

it away. 57% have participated

00:10:40

60. Let's try to make

00:10:42

it 100% participation. Let us

00:10:45

know what you think that'll

00:10:47

give up panel something something

00:10:49

to think about the proposition

00:10:51

investment trade unions are likely

00:10:54

the only neutral body to

00:10:57

address serious allegations of corruption

00:11:00

in South Asia. Still at

00:11:08

62 will give it another

00:11:09

10 15 seconds and then

00:11:12

we'll close the pole. Let

00:11:14

us know what you think.

00:11:15

We're having an interesting mix

00:11:18

here. I disagree with the

00:11:22

slightly higher percentage than the

00:11:25

I agree, but we have

00:11:27

about 20% of people that

00:11:30

are unsure where to come

00:11:32

out and a panel maybe

00:11:34

successful in helping you move

00:11:37

one way or the other.

00:11:40

Okay, I think this is

00:11:42

a good time to close

00:11:43

the poll. And you can

00:11:49

see the results. And with

00:11:53

that we get the poll

00:11:54

out. Okay. Now let me

00:12:00

present the second polling question.

00:12:03

Investment arbitration should consider a

00:12:06

state's ability to pay when

00:12:09

it comes to damages. These

00:12:11

are the choices you have.

00:12:12

I agree. I disagree or

00:12:15

I am undecided. We invite

00:12:17

you to give us your

00:12:18

initial reactions. Okay, we seem

00:12:41

to be having a slight

00:12:42

majority here. And that's interesting.

00:12:48

Let's give it another few

00:12:49

seconds. Okay. we clearly see

00:13:02

here a preferred approach in

00:13:04

support of the fact that

00:13:06

tribunals should think about States

00:13:14

ability to pay there has

00:13:15

been some recent scholarship talking

00:13:17

about what is termed as

00:13:20

crippling compensation? Clearly this spinal

00:13:24

or the representatives here feel

00:13:27

strongly in support of all

00:13:29

I shouldn't say yeah 63%

00:13:31

Yeah. Okay, now what's going

00:13:36

to happen very soon We're

00:13:40

going to have Rekha. rangachari

00:13:43

the executive director of the

00:13:46

New York International arbitration Center

00:13:50

Somebody I think who needs

00:13:52

no introduction and somebody. Who

00:13:55

I'm pretty sure more than

00:13:58

half of you get emails

00:14:00

from right around the week.

00:14:03

I'm not going to spend

00:14:04

too much time introducing the

00:14:06

panelists because we're going to

00:14:08

be here all day. Look

00:14:11

them up and connect with

00:14:12

them on LinkedIn. I mean,

00:14:13

I think that's a bigger

00:14:15

gender of what we're trying

00:14:17  
to accomplish with. Wow. That  
00:14:19  
is to make people get  
00:14:20  
together and know each other.  
00:14:23  
patrika will set the stage  
00:14:25  
of what's happening globally when  
00:14:27  
it comes to corruption interpretation  
00:14:30  
and when it comes to  
00:14:31  
damages, let me just tell  
00:14:34  
what's going to happen because  
00:14:35  
our speakers will speak in  
00:14:37  
succession and then we will  
00:14:39  
have dialogue we're going to  
00:14:41  
have the three big South  
00:14:44  
Asian countries with speakers from  
00:14:47  
each of these countries tell  
00:14:50  
us what's happening in that  
00:14:53  
country. We begin with Bangladesh.  
00:14:57  
We have Professor Romana Islam.  
00:15:00  
a true leader probably one  
00:15:03  
of the youngest people to

00:15:05

be nominated to exits panel

00:15:08

by Bangladesh and it true

00:15:10

expert so we are very

00:15:13

privileged to hear and Authority

00:15:15

in Bangladesh telling us what's

00:15:18

happening in Bangladesh. We are

00:15:21

then going to move on

00:15:21

to Dr. Russia Gupta probably

00:15:25

the most famous arbitration lawyer

00:15:28

in India. After having spent

00:15:31

considerable time practicing both in

00:15:34

New York and in London.

00:15:37

And then we're going to

00:15:38

hear from our own Fatima

00:15:40

Islam. She she was in

00:15:43

Houston just moved back to

00:15:45

Lahore a week ago to

00:15:47

be with family somebody who

00:15:50

has been very active with

00:15:52

research in Pakistan. Looking at

00:15:55

arbitration in Pakistan. Although like

00:16:00

all our speakers studied in

00:16:02

the UK the US really

00:16:04

does give us a very

00:16:05

International perspective. She's going to

00:16:08

tell us what's happening in

00:16:10

Pakistan. Where are we headed

00:16:12

spoiler alert some very interesting

00:16:15

developments in Pakistan, very relevant

00:16:18

to what we're talking about.

00:16:21

So with that. Stay tuned.

00:16:23

Each of our four speakers

00:16:25

is going to speak to

00:16:26

us for 10 12 minutes

00:16:28

within going to have a

00:16:30

bit of a dialogue stay

00:16:31

tuned for that. But Reka,

00:16:33

why don't you take it

00:16:34

away? Thanks so much Kabir

00:16:37

a big thanks to the

00:16:39  
world arbitration update organizing committee  
00:16:41  
on this inaugural week. It  
00:16:43  
takes Great Gusto to create  
00:16:45  
these sorts of thoughtful Progressive  
00:16:47  
substantive events to Jose Antonio  
00:16:50  
Rivas Mario Lucia Casas. AR  
00:16:52  
quayo and many many others  
00:16:54  
and the sincere pleasure to  
00:16:57  
share the zoom stage with  
00:16:58  
all of those on the  
00:17:00  
screen Kabir Fatima rashab and  
00:17:03  
Professor Islam. So I've been  
00:17:05  
tasked with giving a global  
00:17:07  
overview on this topic of  
00:17:09  
controversial Awards. And so I'm  
00:17:11  
going to address it in  
00:17:13  
two phases the first the  
00:17:14  
conundrum of endemic corruption internationally  
00:17:18  
and next this conversation on  
00:17:20  
Mega claims and mega Awards

00:17:22

to set it up then

00:17:24

for the jurisdictional spotlights that

00:17:26

the rest of the speakers

00:17:27

will take and turn So

00:17:29

we begin with this idea

00:17:31

allegations of Fraud and Corruption.

00:17:33

They're often encountered in international

00:17:35

arbitration and Scholars have said

00:17:38

that we must take these

00:17:39

allegations seriously and treat carefully,

00:17:43

but what does that mean?

00:17:44

And it's for you the

00:17:45

audience to think about and

00:17:47

chew on as we go

00:17:48

through this session. Indeed corruption

00:17:52

is a powerful defense, but

00:17:54

this could be already foreshadowed.

00:17:56

It doesn't work. Well why?

00:18:00

Of course, I'm borrowing here

00:18:03

from one of my favorite

00:18:04  
comedians who lays out this  
00:18:05  
of course, but maybe scenario.  
00:18:07  
Of course, there is strong  
00:18:09  
public policy against allowing such  
00:18:12  
actions of corruption. Fraud really  
00:18:16  
legality in the proceedings, but  
00:18:18  
maybe there is this issue  
00:18:20  
of variety and language under  
00:18:21  
a variety of sources International  
00:18:24  
conventions arbitral case law domestic  
00:18:27  
Law Public international law transnational  
00:18:30  
law. Transnational public policy can  
00:18:34  
be esoteric in meaning Global  
00:18:37  
fundamental values of justice and  
00:18:39  
morality incorporating general principles guiding  
00:18:42  
principles that can be vague  
00:18:44  
and hard to Define concretely  
00:18:46  
case to case. Of course,  
00:18:50  
there is an inherent risk  
00:18:52  
allowing improprieties to go on

00:18:54  
punished. Attributional can make adverse  
00:18:58  
inferences where a party fails  
00:18:59  
to produce requested evidence. This  
00:19:02  
is the most rare they  
00:19:03  
can take formal note or  
00:19:05  
they can treat evidence with  
00:19:06  
skepticism. They may even address  
00:19:09  
it in the costs phase  
00:19:11  
of the proceedings. But maybe  
00:19:13  
it is difficult to obtain  
00:19:16  
direct evidence indeed senior officials  
00:19:19  
actively engaged in corruption are  
00:19:21  
often in a position to  
00:19:22  
impede investigations and destroy our  
00:19:25  
conceal evidence. consider also there  
00:19:29  
are many Pathways involving fraud  
00:19:31  
bribery and Corruption or a  
00:19:33  
tribunal Finance does not have  
00:19:35  
jurisdiction. Where bad acts exist  
00:19:38  
in relation to the investment

00:19:39  
nullifying access to arbitration through  
00:19:42  
the treaties. The limitation of  
00:19:44  
the investment treaty to Investments  
00:19:46  
being made in accordance with  
00:19:48  
the law. They're with it  
00:19:50  
fails on objection to get  
00:19:51  
access to arbitration. Or the  
00:19:53  
tribunal determines claimant cannot rely  
00:19:55  
on substantive legal protection contained  
00:19:57  
in the investment treaty. So  
00:19:59  
towards that question that could  
00:20:01  
be opposed. The tribunal as  
00:20:03  
the only neutral body indeed  
00:20:05  
the tribunal often finds. It  
00:20:07  
doesn't have jurisdiction to make  
00:20:09  
these determinations and even wear  
00:20:11  
it does this could be  
00:20:13  
a positive. What is its  
00:20:15  
police power? Allegations by States  
00:20:19  
and against States as to

00:20:21

corruption are only increasing and

00:20:24

so let's take a quick

00:20:25

snapshot at a case that

00:20:27

exists that you all probably

00:20:29

know. Well, it has brought

00:20:30

up often the world duty

00:20:32

free versus Kenya case to

00:20:34

take a look at this

00:20:35

this notion of transnational public

00:20:37

policy as an international consensus

00:20:40

Universal standards and accepted Norms

00:20:43

of conduct that must be

00:20:45

applied in all four. That

00:20:47

is what this case stands

00:20:48

for. In humor the case

00:20:51

also stands for the most

00:20:52

expensive corn money given in

00:20:54

a suitcase corn returned in

00:20:56

that suitcase. So quick overview

00:20:57

for those that don't know

00:20:58

it 1989 and investor concludes

00:21:01

an agreement for a construction

00:21:02

and operation of a duty-free

00:21:04

complex over a 10 years

00:21:06

and renewable for an additional

00:21:08

10. The investor alleges that

00:21:11

is part of the president's

00:21:12

re-election Campaign World duty free

00:21:14

was used as a vehicle

00:21:15

to obtain funds illegally without

00:21:18

its knowledge. There's no relevant

00:21:20

bit at application here the

00:21:22

investment contract selected Kenyan and

00:21:24

English law and to ensure

00:21:26

the destruction of all evidence

00:21:28

for the prosecution of fraud.

00:21:30

The companies were taken over

00:21:32

allegedly based on fraudulent documents.

00:21:34

So there's all of this

00:21:35

fraud conversation happening. Zeroing in

00:21:39  
on the alleged bribe at  
00:21:41  
that at the time of  
00:21:42  
entering into the contract and  
00:21:43  
this is important temporally the  
00:21:46  
investor was asked to make  
00:21:47  
a personal donation of two  
00:21:48  
million in cash to the  
00:21:49  
president as this was payment  
00:21:51  
for doing business with the  
00:21:52  
government of Kenya common practice  
00:21:54  
alleged. The investor said this  
00:21:57  
practice had cultural roots and  
00:21:58  
was buttressed by the harembe  
00:22:00  
system mobilized resources through private  
00:22:03  
donations for public purpose. Ultimately,  
00:22:07  
we emerge with a reinforced  
00:22:09  
standard bribery. Excuse me bribery  
00:22:11  
is contrary to transnational public  
00:22:14  
policy. Rejecting claims subject to  
00:22:17  
the corruption that ensued. An

00:22:20

objective view of transnational public

00:22:21

policy surveying many aspects that

00:22:24

come into play the international

00:22:25

conventions the Declarations National Court

00:22:28

decisions. Answering to this notion

00:22:31

of culpability an objective minimum

00:22:33

standards of conduct for the

00:22:35

investor. Even where a host

00:22:37

state may not comply investor

00:22:40

obligations take the spotlight corruption

00:22:43

is a jurisdictional barrier to

00:22:45

gain entry to the arbitral

00:22:47

process. Does it encourage corruption

00:22:50

in a host State? How

00:22:52

do you deal with proof?

00:22:53

These are questions. We're going

00:22:54

to continue to tease out.

00:22:56

It comes back to this

00:22:58

idea that bribery clearly violated

00:23:00

International public policy as well

00:23:03

as Kenyan and English law

00:23:05

both applicable in this case.

00:23:07

The implications for the investor

00:23:09

is that it's not legally

00:23:10

entitled to maintain any of

00:23:11

its head claims. And it

00:23:14

comes back to this should

00:23:15

we make a distinction between

00:23:17

governments asking for a bribe

00:23:19

versus a person that investor

00:23:21

asking for a ride. Where

00:23:23

where does the issue of

00:23:24

bribery fall? What is the

00:23:26

temporal relevance? The next tranche

00:23:30

I'll get into is this

00:23:31

Mega claims Mega Awards. So

00:23:33

this idea of serious implications

00:23:36

of cases becoming bigger and

00:23:38

bigger the claims becoming bigger

00:23:40

the awards rendered. Equally big

00:23:43

and in particular this conversations

00:23:46

and the fixating on this

00:23:47

wild wild west that we

00:23:49

call the investor State dispute

00:23:51

but investors say dispute settlement

00:23:53

system the regime and astronomical

00:23:56

damages. So why is there

00:23:59

this trend let's map what

00:24:00

Scholars have said? So Scholars

00:24:02

and considering this have looked

00:24:03

to the fact that there

00:24:05

are few rules to curb

00:24:06

the natural tendency to engage

00:24:08

in strategic claim exaggeration. After

00:24:11

rigorous dialogues of jurisdiction and

00:24:13

liability phases. This comes out

00:24:15

the mega claims or buttressed

00:24:18

by Mega reports. There's varying

00:24:21

perhaps lawyer Comfort dealing and

00:24:23

damages in Quantum and lack

00:24:25

of sufficient checks and balances.

00:24:27

So evaluate those and see

00:24:29

where you fall in the

00:24:30

same way. We took these

00:24:31

poles Ultimately, the takeaway is

00:24:34

States cannot pay. So how

00:24:36

do you address that and

00:24:37

it goes back to that

00:24:38

polling question number two, is

00:24:40

it relevant a state's ability

00:24:42

to pay this group found

00:24:44

63% in favor. Don't punish

00:24:48

the taxpayer, right? And so

00:24:51

this notion of possible trend

00:24:53

of investors exaggerating claims of

00:24:55

compensation for lost future profits

00:24:57

building momentum year after year

00:24:59

decade after decade and so

00:25:01

let's take the really quick

00:25:02

snapshot. We're taking the case

00:25:04  
of tepn versus Pakistan this  
00:25:07  
case in conjunction with World  
00:25:09  
Bank that is put out  
00:25:10  
a report on foreign directed  
00:25:11  
investment and its treatment talking  
00:25:13  
also about discounted cash flow.  
00:25:16  
And how it doesn't account  
00:25:17  
well for risk. So in  
00:25:19  
this case the tribunal created  
00:25:21  
a new discount cash flow.  
00:25:22  
There's a mine. It hasn't  
00:25:24  
become commercial operation. So there's  
00:25:26  
no tracks record. And so  
00:25:27  
out of this case we  
00:25:28  
get this notion of modern  
00:25:30  
DCF method to incorporate all  
00:25:32  
project risks into the cash  
00:25:34  
flow the tribunal you utilize  
00:25:37  
that method which can be  
00:25:38  
speculative which is where it's

00:25:40

criticism comes in to look

00:25:41

at long-term cash flow projection.

00:25:44

Look in a track record

00:25:46

of profitability even where one

00:25:47

may not exist. discount the

00:25:50

rate applied to arrive at

00:25:51

the present cash flow value

00:25:52

and then Assess what the

00:25:55

risks are and so it's

00:25:57

this notion of there can

00:25:59

be when you use the

00:26:00

DCF method a roller coaster

00:26:02

of emerging values as you're

00:26:05

trying to predict cash flow

00:26:06

over a period. Is it

00:26:08

reliable in this case? As

00:26:10

I said the new interpretation

00:26:12

emerges so you don't need

00:26:13

a track record of performance

00:26:14

and yet an aborted issued

00:26:16  
right? As I said, the  
00:26:17  
mind is not operational. 4  
00:26:20  
billion dollars are awarded before  
00:26:22  
any interest right? This is  
00:26:24  
an astronomical amount but consider  
00:26:26  
also with this. Pakistan is  
00:26:29  
made to pay claimants costs  
00:26:30  
of the case. We're looking  
00:26:32  
at some 60 million dollars  
00:26:33  
in addition. and of note  
00:26:37  
Pakistan had just recently gotten  
00:26:38  
alone to near these amounts.  
00:26:40  
So whatever it had been  
00:26:41  
able to recoup it's having  
00:26:43  
to pay forward in an  
00:26:44  
award and costs. It begs.  
00:26:47  
The question on the state's  
00:26:48  
ability to pay the benefit  
00:26:49  
of expropriation of an investment  
00:26:51  
for greater investor gain through

00:26:54  
our betration is the system  
00:26:56  
being used in an opportune  
00:26:58  
way in a cataclysmic way  
00:26:59  
even based on the numbers  
00:27:01  
being put forward and so  
00:27:03  
ultimately and I'll close with  
00:27:04  
this we have to ask  
00:27:05  
ourselves. What happens when the  
00:27:07  
project is never built what  
00:27:09  
happens when the mind never  
00:27:10  
realizes a revenue stream? What  
00:27:12  
if there's no conceivable trajectory  
00:27:14  
to assess the return on  
00:27:16  
investment. And then how do  
00:27:17  
we apply a discount rate  
00:27:18  
to bring cash flow to  
00:27:20  
present in a realistic way?  
00:27:23  
What happens then is we  
00:27:24  
tethered between procured by bribery  
00:27:26  
contracts or tainted by fraud

00:27:29

that has been covered up?

00:27:31

What of expropriation of that

00:27:32

for the Investor's best return

00:27:34

and how can we ascertain

00:27:36

a possible changing landscape of

00:27:38

the investor State dispute resolution

00:27:40

system of Reform that's being

00:27:43

hotly discussed right now at

00:27:44

the unct's working group 3

00:27:46

what will reform mean for

00:27:48

this process to better it

00:27:49

to change it and then

00:27:51

we'll have to wait and

00:27:52

see. Think also as bits

00:27:54

and myths are undergoing a

00:27:56

period of evolution. States may

00:27:59

wish to secure reliable effective

00:28:01

access to a corruption defense,

00:28:03

and they're with modify the

00:28:05

language within their myth. That's

00:28:06

and mids using preferred language.

00:28:09

So stay tuned more to

00:28:11

come more stories to be

00:28:12

shared by our Elite panel

00:28:13

as we travel next to

00:28:15

Bangladesh and then to India

00:28:17

and Pakistan Kabir back to

00:28:19

you. Thanks so much. Thank

00:28:21

you Rick. I think you've

00:28:22

teased out the issues nicely

00:28:24

set the stage. Let's look

00:28:26

and see what's happening in

00:28:28

South Asia. What's happening in

00:28:30

each of these countries? Where

00:28:33

are we going? Professor Islam

00:28:36

tell us what's happening in

00:28:37

Bangladesh. Let's fix investment arbitration

00:28:41

and Bangladesh and move this

00:28:44

forward Professor. The floor is

00:28:46

yours. Thank you, Kevin. I

00:28:49  
hope I'm Audible. Okay, a  
00:28:54  
very good morning to all  
00:28:55  
of you from here from  
00:28:56  
Bangladesh and thanks to Kabir  
00:28:58  
for that very nice and  
00:28:59  
enthusiastic interaction. If I move  
00:29:02  
into the controversial average to  
00:29:06  
be honest Bangladesh has faced  
00:29:08  
in terms of income president  
00:29:10  
to India and Pakistan quite  
00:29:12  
a few isps cases. Let  
00:29:16  
me just give you and  
00:29:17  
a very brief overview about  
00:29:19  
legal regime of protection of  
00:29:22  
FDI. And then I move  
00:29:24  
into the ISD yes cases  
00:29:27  
so far experienced by Bangladesh.  
00:29:28  
So just before the pandemic  
00:29:31  
Bangladesh actually enjoyed quite a  
00:29:33  
Stevie GDP growth and there

00:29:35

was a big flow of

00:29:36

FBI according to the aunt

00:29:39

jet report, but obviously got

00:29:41

a very big setback due

00:29:44

to the pandemic and as

00:29:46

a consequence the Panama the

00:29:49

predictability economic crisis due to

00:29:51

the family current. Do we

00:29:53

get it is estimated that

00:29:54

the flow of FBI is

00:29:56

going to reduce significantly but

00:29:59

in saying so one positive

00:30:01

thing is that the government

00:30:02

the current government one of

00:30:04

the prior focus of the

00:30:07

government is to attract the

00:30:08

FDA. And actually they have

00:30:10

done all kind of things

00:30:11

how to do that in

00:30:14

terms of legal region Bangladesh

00:30:17  
has the foreign private investment  
00:30:20  
promotion and protection act 1980,  
00:30:22  
which is a very short  
00:30:23  
piece of legislation, but recently  
00:30:26  
Bangladesh in acted the Bangladesh  
00:30:28  
investment Development Authority bija 2016,  
00:30:32  
and since then actually this  
00:30:34  
whole a landscape of flow  
00:30:36  
of FDI in Bangladesh has  
00:30:37  
significantly change quite a lot  
00:30:40  
and because it took the  
00:30:42  
soleim of Bedell was to  
00:30:44  
encourage private investment in private  
00:30:46  
sector and for that they  
00:30:47  
should different kind of initiatives  
00:30:49  
including one stop Services Center  
00:30:51  
as well. Less for specialist  
00:30:54  
economic zones for particular investors  
00:30:57  
like Chinese investors Japanese investors  
00:31:00  
and recently for as well

00:31:02  
as the Indian investors, right?  
00:31:04  
when we talk about that  
00:31:07  
at the end, that's the  
00:31:08  
national piece of legislation at  
00:31:11  
the international level Bangladesh is  
00:31:13  
signature to the exit convention  
00:31:14  
New York Convention as well  
00:31:16  
as Bangladesh has its arbitration  
00:31:18  
Act of 2001 which exclusively  
00:31:20  
provides for in Enforcement of  
00:31:24  
foreign orbital level. So in  
00:31:26  
terms of having a good  
00:31:27  
legal region Bangladesh is all  
00:31:29  
set for foreign investors now  
00:31:32  
coming to isds experience. We  
00:31:35  
just if we want to  
00:31:37  
be very brief about the  
00:31:39  
bilateral investment treaties in Bangladesh.  
00:31:42  
In fact Bangladesh, how many  
00:31:44  
be it is the are

00:31:46

there in Bangladesh Bangladesh signed

00:31:48

there are different different opinions

00:31:50

because the official body the

00:31:53

bidas states that Bangladesh is

00:31:55

that one beer it is

00:31:57

whereas untouched investment policy says

00:32:00

the country has signed to

00:32:02

be it with 28 countries

00:32:03

again, if you look into

00:32:05

the ministry of investors website,

00:32:07

it's it says that it

00:32:08

has signed 33 bias and

00:32:11

among this bi just at

00:32:12

least four bias are invisible

00:32:14

invisible in a sense that

00:32:16

the text is actually found

00:32:17

nowhere and there are also

00:32:20

bias which are mentioned in

00:32:21

the official website. It does

00:32:24

not correspond to other information.

00:32:26

So I found that we

00:32:27

have Atlas for invisible bias

00:32:30

in that way that it's

00:32:31

a it's it's in the

00:32:32

official website, but we cannot

00:32:34

find it anywhere in the

00:32:35

world. For example, the text

00:32:37

of Bangladesh Cambodia bid or

00:32:39

Bangladesh Pakistan bid. It could

00:32:41

not be found anywhere now

00:32:43

coming back to our main

00:32:44

discussion about the hours that

00:32:47

has been so far renders

00:32:49

against Bangladesh in comparison to

00:32:52

our neighbors India or Pakistan

00:32:55

Bangladesh. Yes, brother less number

00:32:57

of viets as well as

00:32:59

in terms of exit experience

00:33:02

Bangladesh so far had Faith

00:33:04

seven claims, but initiated against

00:33:07  
Bangladesh by the foreign investor  
00:33:09  
and among this seven two  
00:33:11  
are still pending the ones  
00:33:13  
related with Michael resources at  
00:33:15  
Canadian company, but the all  
00:33:18  
the best fiber already concluded  
00:33:20  
and between the concluded cases  
00:33:23  
again, the ones do which  
00:33:26  
has actually rendered damages against  
00:33:31  
Bangladesh in easy and Niko  
00:33:33  
the full text of the  
00:33:35  
awards are yet to be  
00:33:36  
publicly available. So unfortunately, I  
00:33:39  
cannot make clear comments on  
00:33:41  
that but in and again  
00:33:43  
one interesting point, is that  
00:33:45  
all of these cases Are  
00:33:47  
related with energy sector all  
00:33:49  
the seven cases that has  
00:33:51  
been initiated by the foreign

00:33:52

investors relates with the energy

00:33:54

sector. So I will just

00:33:56

pick up two very controversial

00:33:58

effort against Bangladesh one is

00:34:00

saipem. And another is Niko

00:34:03

in terms of corruption and

00:34:05

inside them commenting on writing

00:34:08

on Cypress somewhere. I just

00:34:10

started it when the investor

00:34:11

gives you a lemon. So

00:34:12

second was a case where

00:34:14

Bangladesh really had a very

00:34:16

tough experience and it was

00:34:18

a case in 2007. That

00:34:21

was a time. It was

00:34:22

in fact Bangladesh did not

00:34:24

have the expertise or the

00:34:26

experience how to deal with

00:34:27

this kind of because investment

00:34:30

State arbitration is coming something

00:34:32  
completely what different from a  
00:34:34  
commercial arbitration or other international

00:34:37  
disputes. So there was this

00:34:40  
was the first experience that

00:34:41  
Bangladesh really had a very

00:34:43  
bad taste. So Simon was

00:34:46  
the reason For it being

00:34:47  
controversial is that it found

00:34:49  
that the Act Dance by

00:34:53  
the local courts was amounting

00:34:55  
to judicial expropriation. So the

00:34:58  
finding of the HC tribunal

00:35:00  
in subject inside them is

00:35:02  
open to different criticism. First

00:35:03  
of all, the tribunal fund

00:35:06  
a different aspects and it

00:35:08  
does not even go into

00:35:09  
exceeds own standard of what

00:35:11  
is called judicial expropriation private

00:35:13  
also rejected Bangladesh claim that

00:35:15  
the foreign investors need to  
00:35:16  
exhaust local remedies for challenging  
00:35:19  
judicial investment arbitration in case  
00:35:23  
of denial of Justice or  
00:35:24  
not in the case, involving  
00:35:26  
judicial exploration. And also at  
00:35:29  
the same time the assertion  
00:35:31  
of expropriation by the hostage  
00:35:33  
Judiciary should be that enable  
00:35:36  
the foreign investor to discussion  
00:35:38  
denial of Justice League, and  
00:35:40  
there's avoid the application of  
00:35:42  
local remedy school and the  
00:35:44  
tribals adoption of the legality.  
00:35:46  
In addition to or in  
00:35:48  
substitute to or the solo  
00:35:50  
effect blockchain that has served  
00:35:51  
the method of establishing expropriation.  
00:35:54  
It's also open to a  
00:35:56  
criticism and also the same

00:35:58

time saipem does also give

00:36:00

a kind of a note

00:36:01

of warning or caution to

00:36:03

all national courts exercising their

00:36:05

supervisory jurisdiction over national International

00:36:07

arbitration since the ellage anju

00:36:10

interface by the national Court.

00:36:11

It made also give rise

00:36:13

to State liability and very

00:36:15

international law as it was

00:36:17

in the case of saipem

00:36:19

and this very Loosely articulated

00:36:21

definition of what is cultured

00:36:23

judicial exploration that the tribunal

00:36:27

finally concluded inside them. This

00:36:29

is likely to also catch

00:36:30

most intervention in arbitral process

00:36:33

despite the local codes. Do

00:36:36

you exercise of supervisory power

00:36:37

for very genuine reason and

00:36:39

the third thing that which

00:36:41

I find problematic is that

00:36:43

one thing which is often

00:36:45

a Note one issue that

00:36:48

that cipm case the side

00:36:51

from the whole project of

00:36:52

saipem. It was an Italian

00:36:55

investor and it was in

00:36:57

fact the first case File

00:36:59

under a beat Bangladesh Italy

00:37:01

bi team and cyprum was

00:37:03

a World Bank project and

00:37:04

the award in favor of

00:37:05

Saturn was finally decided by

00:37:07

sin, which is an institution

00:37:09

and integral part of the

00:37:10

World Bank. So there is

00:37:12

an element of structural bias

00:37:14

that women's quite undiscussed while

00:37:16

treating the local courts action

00:37:19

second case that I would

00:37:21

like to highlight Nico and

00:37:23

Nico. In fact initiated at

00:37:25

least four cases against Bangladesh

00:37:28

to are still pending one

00:37:30

is finally concluded, but the

00:37:31

final hour is yet to

00:37:33

be publicly available. I want

00:37:35

to just focus on one

00:37:37

of the award on corruption

00:37:41

and again with Nike I

00:37:43

have written some word experience

00:37:45

of Bangladesh has been Ugly

00:37:46

the bad and finally some

00:37:48

good because Bangladesh, in fact

00:37:50

Lost In the initial some

00:37:53

of the findings by the

00:37:55

Tribunal. And then it also

00:37:58

lost in proving the allegations

00:38:01

against Nikon corruption and finally

00:38:03

Bangladesh owned its compensation claims

00:38:07

that was into 2020 February

00:38:11

I think and finally when

00:38:13

it came to the compensation

00:38:15

against Bangladesh damage history microphone,

00:38:19

so it's a mixed experience.

00:38:20

But in terms of corruption

00:38:23

allegation, it was a very

00:38:24

highly very politically hyped case

00:38:27

because since that allegation of

00:38:28

corruption in about high level

00:38:30

officials public official of Bangladesh,

00:38:33

including the buffets official and

00:38:36

then the state Minister for

00:38:37

energy and then the Prime

00:38:39

Minister as well. So the

00:38:40

corruption allegation was based on

00:38:43

the fact that actually this

00:38:45

Canadian parent company like resources

00:38:48

and they provided benefits to

00:38:50  
the then State minister of  
00:38:51  
energy and minerals. So this  
00:38:53  
which included a Toyota Land  
00:38:55  
Cruiser and Travel expenses of  
00:38:57  
5,000 Canadian dollars for non-business  
00:39:00  
related travels to attend a  
00:39:02  
conference in Calgary as a  
00:39:04  
guest of Nike Canada and  
00:39:06  
this allegation of corruption when  
00:39:08  
it was revealed. It was  
00:39:10  
in fact investigated by the  
00:39:12  
Canadian investigation agency Royal Canadian  
00:39:15  
Mounted Police and the US  
00:39:16  
Federal group of Investigation FBI.  
00:39:19  
And in fact the Canadian  
00:39:22  
Court found that like a  
00:39:23  
worse guilty any it was  
00:39:25  
convicted by the Canadian food  
00:39:27  
based on the statements of  
00:39:29  
the fact signed by the

00:39:30  
officials of the Nico Canada  
00:39:32  
and the elbow to court  
00:39:34  
of Queensbridge on this issue  
00:39:36  
of bribing a foreign official  
00:39:38  
by a Canadian company. It  
00:39:40  
took that this was a  
00:39:41  
serious matter and the course  
00:39:43  
finding was that it was  
00:39:45  
an embarrassment for all the  
00:39:46  
Canadians. We just Prejudice Canada  
00:39:49  
Surfers to Foster and promote  
00:39:51  
effective governmental and Commercial relations  
00:39:54  
and the coach even for  
00:39:56  
Way to say that the  
00:39:57  
penalty impose must be sufficient  
00:39:59  
to show that the course  
00:40:01  
denunciation of the search contract.  
00:40:03  
This is a not only  
00:40:04  
an embarrassment but microconduct was  
00:40:07  
a dark stain on Calgary

00:40:09

is proud reputation as the

00:40:10

energy capital of Canada. That

00:40:12

was the finding by Justice

00:40:13

squadbroker in that case in

00:40:17

Canada. The keys the corruption

00:40:21

case of Nico in Bangladesh

00:40:23

is still going on. It's

00:40:24

still pending of the final

00:40:26

findings that to be decided

00:40:28

yet. But when it came

00:40:30

to exit arbitration finally after

00:40:34

examining everything and when Bangladesh

00:40:37

made it argument based on

00:40:40

good Faith International public policy

00:40:43

as a device in World

00:40:44

beautified actually nicely very nasty

00:40:48

explained and that kind of

00:40:50

but I could do not

00:40:51

bring it's claim on based

00:40:52

on clean hand principles while

00:40:55  
challenging the jurisdiction. Rounds of  
00:40:56  
work corruption, but finally the  
00:40:59  
tribunal actually found the it  
00:41:01  
applied the principle recognition of  
00:41:04  
stopper and it actually did  
00:41:06  
not find any casual connection  
00:41:07  
between the LH corruption and  
00:41:09  
the contract and finally it  
00:41:12  
decided that the contractor that  
00:41:14  
there was no core option.  
00:41:15  
That was their final finding  
00:41:17  
but what is problematic here  
00:41:19  
is that and this observations  
00:41:21  
actually gives a kind of  
00:41:24  
a chilling effect and also  
00:41:26  
a lack of regulatory freedom  
00:41:28  
and public pair of policy  
00:41:29  
Bangladesh as a respondent state  
00:41:32  
and also at the same  
00:41:34  
time we have to acknowledge

00:41:35  
that in terms of Nico  
00:41:38  
at least on the decision  
00:41:39  
on payment job to realize  
00:41:41  
it's area real and gas  
00:41:43  
from Petro Bangla This is  
00:41:45  
highly criticized because of lack  
00:41:48  
of prompt response and you  
00:41:49  
performance of the Bangladesh function  
00:41:51  
and particularly buffets because it  
00:41:54  
did not It couldn't represent  
00:41:57  
the country in The Illustrated  
00:42:00  
gaps. And there was inadequacy  
00:42:02  
of properly are going the  
00:42:04  
competing interests of Bangladesh as  
00:42:06  
a respondent state. So this  
00:42:08  
was I think as also  
00:42:10  
and example how actually developing  
00:42:13  
countries learn in terms of  
00:42:15  
capacity building in terms of  
00:42:16  
their Council cream all this

00:42:19

issue. So many thing that

00:42:21

YouTube Pro representation of the

00:42:23

country's interest Bangladesh actually lost

00:42:25

a distinctively wenable case and

00:42:27

what are the position of

00:42:29

developing countries. There is a

00:42:32

book by Paulson on bounded

00:42:34

rationality and economic diplomacy the

00:42:36

politics of investment treaties in

00:42:38

developing country, which actually explains

00:42:40

very nicely just before I

00:42:43

conclude there were two four

00:42:45

questions just to respond one

00:42:47

was whether the arbitral private

00:42:49

and neutral forum. And then

00:42:50

I see that people say

00:42:52

disagree on that point so

00:42:54

that gives any impress The

00:42:56

majority of these are great

00:42:57

and on the second question

00:42:59

whether the capacity I think

00:43:02

of the country whose country

00:43:04

should be taken into account

00:43:06

and mostly agreed with that

00:43:07

and I'm happy to see

00:43:08

that because in my book

00:43:11

the book is on if

00:43:13

Effigy, but the whole argument

00:43:16

is that while judging calculating

00:43:17

damages the tribunals needs to

00:43:21

take into account the capability

00:43:22

of the country, especially when

00:43:25

it comes to the host

00:43:26

developing countries, and then I

00:43:27

have a good whole chapter

00:43:29

on stating different facts in

00:43:33

every way. Even if you

00:43:34

look into AMT versus Jerry,

00:43:36

if you look into the

00:43:37

separate opinion, it does talk

00:43:39  
about taking into consideration the  
00:43:41  
all the capabilities whether the  
00:43:43  
country's are capable enough to  
00:43:45  
pay those damages in the  
00:43:47  
ISD as a meeting against  
00:43:49  
the foreign invested. So with  
00:43:51  
this and if we want  
00:43:53  
to look forward bangladeship, Since  
00:43:56  
it's getting so many of  
00:43:57  
fdis and with the current  
00:44:00  
scenario of pandemic Bangladeshi again  
00:44:03  
had to take many regulatory  
00:44:05  
measures to address the pandemic  
00:44:06  
and like many other countries  
00:44:08  
Bangladesh is also fearing of  
00:44:11  
getting some of the claims  
00:44:12  
on the foreign investors and  
00:44:14  
the bilaterally investment resume that  
00:44:16  
we have currently actually mainly  
00:44:19  
represents the first generation of

00:44:21

bias where we do not

00:44:23

have enough protection like regulatory

00:44:25

images not precluded Mages General

00:44:28

exceptions. So these are the

00:44:30

matters that Bangladesh needs to

00:44:31

take into account and I

00:44:33

think one point Rica had

00:44:35

highlighted already that before you

00:44:37

leave to get please legislate.

00:44:39

So unless we have a

00:44:40

very good protection in the

00:44:41

bilateral investment pretty regimes. It's

00:44:43

becomes quite difficult when you

00:44:44

go in the international tribunal

00:44:47

which is which in my

00:44:49

opinion is quite inherently a

00:44:51

pro investor oriented, it becomes

00:44:52

very difficult for the developing

00:44:55

country. Bangladesh to get the

00:44:58

case in their favor, so

00:44:59  
that was all from me  
00:45:01  
and thanks one again. Once  
00:45:03  
again for the wonderful love  
00:45:04  
to all the panelists wonderful  
00:45:06  
panel, and I also look  
00:45:07  
forward to for the discussion.  
00:45:09  
Thank you. Thank you professor.  
00:45:12  
Dr. Gupta tell us what's  
00:45:14  
happening in India is India  
00:45:16  
similar to Bangladesh. Thanks Kabir.  
00:45:20  
Thanks Professor Islam and thanks  
00:45:22  
to World arbitration update for  
00:45:24  
this what I thought I'll  
00:45:27  
do is that. Survey quickly  
00:45:30  
walk you through what I  
00:45:31  
think are sort of the  
00:45:33  
key points in terms of  
00:45:34  
the historical landscape. As far  
00:45:37  
as Indian bit regime is  
00:45:39  
concerned and I wanted to

00:45:41  
sort of briefly meet Five  
00:45:42  
Points that and after that  
00:45:44  
I'll spend probably 60 seconds  
00:45:46  
or so talking about monkeys  
00:45:49  
and only just one case  
00:45:50  
the us because I suspect  
00:45:52  
some of this would be  
00:45:53  
picked up in the discussion  
00:45:55  
that we have once the  
00:45:57  
presentations are done. So in  
00:46:00  
terms of historical update first  
00:46:02  
point, you know purely as  
00:46:06  
a matter of fact the  
00:46:07  
first Indian vit dates back  
00:46:09  
to 1994 not surprisingly that  
00:46:11  
was with the United Kingdom  
00:46:13  
for cultural economic reasons important  
00:46:16  
feeling partner Etc between 1994  
00:46:20  
and 2010 nearly 80 more  
00:46:22  
investment agreements both pits as

00:46:24

well as free trade agreements,

00:46:26

which have investment chapters get

00:46:28

signed a couple of years

00:46:30

ago. I did a small

00:46:31

empirical study for the Ministry

00:46:33

of Finance to look into

00:46:34

the Advent of these bi

00:46:36

teams. And in that context.

00:46:37

I got quite a few

00:46:39

officials who were actually involved

00:46:41

in these negotiations and not

00:46:44

surprising and this is not

00:46:45

specific to India not surprisingly.

00:46:47

Most of them had very

00:46:50

little idea of precisely what

00:46:51

they would do. These were

00:46:53

boilerplate treaties, perhaps developed by

00:46:56

certain jurisdictions and then copy

00:46:58

paste it over. But that

00:47:00

I don't mean in any

00:47:01

significant criticism because to be

00:47:04

honest that that's how it

00:47:06

was not just among developing

00:47:08

countries, but even amongst most

00:47:09

developed countries at the time.

00:47:11

So that's Point number one

00:47:13

just in terms of the

00:47:14

historical. Development of the regime

00:47:18

Point number two, you know,

00:47:20

most of you would know

00:47:21

about is white Industries that's

00:47:23

important not because of the

00:47:25

kind of things we're talking

00:47:26

about today. It didn't involve

00:47:28

a large claim. It didn't

00:47:30

involve any allegations corruption. No

00:47:32

multiple disputes, really? Yes such

00:47:34

but it was an important

00:47:36

event for two reasons one.

00:47:37

I think that's trees just

00:47:39  
purely by way of background  
00:47:41  
involved effectively a commercial award  
00:47:43  
and ICC commercial award. That  
00:47:45  
was one by the investor  
00:47:47  
against an Indian State don't  
00:47:48  
come so not against the  
00:47:49  
government itself, but the enforcement  
00:47:52  
of that arbitration of what  
00:47:53  
in India took a very  
00:47:54  
long time not necessarily because  
00:47:57  
of Any overt intervention by  
00:48:00  
the government, but just because  
00:48:01  
of the way the Jewish  
00:48:03  
students was developing at the  
00:48:04  
time. In any event, India  
00:48:08  
lost that treaty arbitration. They  
00:48:10  
were findings about how perhaps  
00:48:12  
the delay in the judicial  
00:48:13  
system will responsible for the  
00:48:15  
invested not receiving its effective

00:48:17  
means to or effective remedies  
00:48:20  
under the treaty and that  
00:48:21  
was taken quite badly by  
00:48:23  
the government for a couple  
00:48:24  
of reasons one of course  
00:48:25  
didn't like the fact that  
00:48:26  
judicial release which everyone in  
00:48:29  
India suffers from could somehow  
00:48:32  
become a reason for an  
00:48:33  
invested arbitration and second just  
00:48:36  
to realization that of course  
00:48:37  
despite the arbitration award. There  
00:48:41  
was a smallest four million  
00:48:42  
dollars. It was speed up.  
00:48:43  
I think almost immediately after  
00:48:45  
it was given so that  
00:48:46  
wasn't really the issue. It  
00:48:47  
was more a principle issue  
00:48:49  
for the government. Now the  
00:48:51  
third Point very often people

00:48:53

say that that opened up

00:48:54

the floodgates to other investors

00:48:56

State claims. I I sort

00:48:58

of disagree with that. There

00:48:59

was no flood gate as

00:49:01

such but what really happened

00:49:02

is that they were a

00:49:04

series of events which occurred

00:49:05

which led to a large

00:49:06

variety of teams both in

00:49:08

domestic ports as well as

00:49:09

an international trappiness one was

00:49:11

cancellation of about 110 Telecom

00:49:14

license, the cancellation have been

00:49:16

primarily because they were allocations

00:49:19

of corruption and failure to

00:49:22

follow procedures as far as

00:49:23

allocation of spectrum Wisconsin. Now

00:49:26

that led to a large

00:49:27

number of teams in Indian

00:49:28

courts also led to Industry

00:49:29

themes. They were similar cancellation

00:49:32

of whole block allocations, which

00:49:35

also like to things and

00:49:36

then perhaps most notoriously they

00:49:38

were retrospective women to the

00:49:40

Indian Income Tax Act, which

00:49:42

led to a variety of

00:49:43

themes both in Indian Sports

00:49:44

and outside, you know, quite

00:49:47

recently Vodafone Etc have been

00:49:49

in the news all of

00:49:51

Have been arbitration Awards coming

00:49:53

out of those retrospective amendments

00:49:54

meet back in 2011. Now

00:49:57

I'll just pause there for

00:49:58

a second. I've always spent

00:50:00

that. India the way it

00:50:04

is structured is perhaps most

00:50:07

vulnerable to invest a statements

00:50:09  
and I don't mean it  
00:50:11  
in any form of criticism,  
00:50:12  
but that's the way India  
00:50:14  
is up and you know,  
00:50:16  
some of the points that  
00:50:17  
I like to meet there  
00:50:18  
are first very large upon  
00:50:20  
me for the size of  
00:50:21  
the economy. These number of  
00:50:23  
teams is no surprise. I  
00:50:24  
mean, they're smaller economies elsewhere  
00:50:27  
in the world, which have  
00:50:28  
far greater number of claims.  
00:50:30  
If you do sort of  
00:50:31  
a prolita proportionate analysis so  
00:50:34  
often people say oh team  
00:50:36  
claims 20 claims 25 teams  
00:50:38  
for the size of the  
00:50:39  
economy. That's not very large  
00:50:40  
in mind. But but there's

00:50:43

a second and a third

00:50:44

point which is more important.

00:50:45

India is a very strong

00:50:47

fedrine structure with a very

00:50:50

strong central government. Yeah. So

00:50:53

what that basically means is

00:50:54

that because from a public

00:50:55

International perspective you look at

00:50:57

States Central District governments all

00:50:59

as part of one unit

00:51:01

decision-making. However is happening at

00:51:04

each of those lessons and

00:51:05

at each of those levels

00:51:06

is substantial autonomy central government

00:51:09

of course has a significant

00:51:10

control to play but there's

00:51:12

substantial autonomy. So it's not

00:51:13

like for example in the

00:51:14

UK where perhaps you know,

00:51:16

some counties somewhere can make

00:51:18  
some decisions But ultimately everything

00:51:20  
comes back to the white

00:51:21  
wall. It's not like that

00:51:22  
in India. You have a

00:51:24  
central Parliament, but you have

00:51:25  
very strong autonomy given to

00:51:28  
respective States much like the

00:51:30  
US to us would be

00:51:31  
a slightly stronger Federal structure

00:51:33  
that sense. Now what that

00:51:34  
really means is that even

00:51:36  
if there is understanding of

00:51:37  
what the treaty obligations might

00:51:39  
be at the central you

00:51:40  
won't have that. Understanding at

00:51:42  
the state of the district

00:51:43  
level it would never happen.

00:51:45  
So one has to be

00:51:46  
slightly conscious of that fact

00:51:48  
that every level it one

00:51:49

has to be conscious of

00:51:50

it at the government level

00:51:51

and one has to be

00:51:51

conscious of it at the

00:51:52

invested. And if you look

00:51:54

at some of the more

00:51:55

recent themes that have come

00:51:56

up Nissan in relation to

00:51:58

the vat refunds a couple

00:52:02

of cases and I'm doing

00:52:03

at the moment against sort

00:52:05

of in relation to gas

00:52:06

allocation where the underlying events

00:52:09

happened in Maharashtra. Those are

00:52:11

nothing whatsoever to do with

00:52:12

the central government. Those are

00:52:13

not like your Vodafone Keen

00:52:15

kind of cases where someone

00:52:16

sitting in the legislature India

00:52:18

is making decisions that let

00:52:20

let's change this retrospectively. Those

00:52:22

are decisions being made in

00:52:24

what I genuinely believe in

00:52:26

a good faith form by,

00:52:28

you know, state governments sitting

00:52:32

in different parts of the

00:52:33

country not thinking about what

00:52:35

those vit protections might be

00:52:37

one with the other. So

00:52:38

that's the second point the

00:52:40

third is that we have

00:52:41

a Activist judicially, so if

00:52:43

you look at large proportion

00:52:45

of the claims that are

00:52:46

there against India, they have

00:52:48

very little to do with

00:52:48

legislative or executive actions. There

00:52:51

are examples of those but

00:52:53

majority of them actually come

00:52:56

out of judicial actions. So

00:52:58  
cancellation of 2G licenses in  
00:53:00  
that sense had nothing whatsoever  
00:53:01  
to do with legislative or  
00:53:02  
executive actions. They were all  
00:53:04  
traditional actions and you know,  
00:53:06  
you often talk about US  
00:53:07  
Supreme Court for example, being  
00:53:08  
very powerful being activist and  
00:53:10  
at times it's nothing like  
00:53:12  
what the Indian Supreme Court  
00:53:14  
is because the amount of  
00:53:16  
involvement that the Indian Supreme  
00:53:18  
Court has in daily lives  
00:53:20  
of each one of us  
00:53:21  
is far greater than any  
00:53:23  
common logical section anywhere in  
00:53:24  
the world you pick up  
00:53:25  
the economic Times the Indian  
00:53:27  
equivalent of Ft, or the  
00:53:28  
walls feature and every day

00:53:30  
on the front page, they'll  
00:53:31  
be at least two Indian  
00:53:32  
Supreme Court judgments highlighted, why  
00:53:35  
would a business daily have  
00:53:36  
two Supreme Court judgments every  
00:53:38  
day on the front page.  
00:53:38  
That's because it affects Daily  
00:53:40  
Business life. If it affects  
00:53:42  
Daily Business life, it will  
00:53:44  
become a reason for investor  
00:53:45  
stadiums and the judges sitting  
00:53:48  
in the Supreme Court are  
00:53:49  
not thinking that oh, well,  
00:53:50  
if you take this decision  
00:53:51  
this would lead to a  
00:53:53  
bi-t team. They're not thinking  
00:53:54  
like that and no one  
00:53:55  
is making those representations before  
00:53:56  
that matter. So that's my  
00:53:59  
sort of third point that

00:54:00  
there has been a flatly  
00:54:02  
they have been a lot  
00:54:04  
of things but neither do  
00:54:05  
I find in numbers that  
00:54:07  
large given the size of  
00:54:08  
the economy not to I  
00:54:10  
find them that surprising given  
00:54:12  
how India structure both in  
00:54:14  
terms of a strong Federal  
00:54:16  
structure as well as an  
00:54:17  
extremely activist tradition. Um now  
00:54:21  
that's the third point. The  
00:54:23  
fourth point is that of  
00:54:24  
course, you know while I  
00:54:26  
may say here that none  
00:54:27  
of this should be that  
00:54:29  
discomforting for anyone it was  
00:54:32  
obviously discomforting for the government  
00:54:34  
and that led in 2016  
00:54:36  
to the sort of creation

00:54:40  
of the model vit and  
00:54:41  
in 2017 of termination of  
00:54:43  
a large number of again,  
00:54:45  
my personal view is that  
00:54:47  
none of it was genuinely  
00:54:48  
problematic in a way the  
00:54:50  
model B. I T was  
00:54:51  
a nice initiative but has  
00:54:52  
a 20 step too far  
00:54:54  
in the sense that what  
00:54:55  
it effectively tried to do  
00:54:56  
is to look at each  
00:54:58  
and every instance of a  
00:54:59  
claim against the government and  
00:55:00  
try to patch phones and  
00:55:02  
in doing so they created  
00:55:04  
a document which is largely  
00:55:05  
in co-headed but as an  
00:55:06  
initiative, it wasn't bad at  
00:55:09  
all and I do think

00:55:10

that in some respects every

00:55:13

country in the world goes

00:55:15

through that initiative, you know,

00:55:16

every developed country whether it's

00:55:18

the United States UK Germany,

00:55:20

they've all had their own

00:55:20

modern pics which would become

00:55:23

the sort of effectively the

00:55:24

template for future negotiations. You

00:55:26

need differences that India perhaps

00:55:28

went step too far in

00:55:29

terms of creating a document

00:55:31

which was very one side

00:55:32

and therefore hasn't really been

00:55:33

picked up by other states

00:55:35

in their respective negotiations within

00:55:37

there what followed with that

00:55:39

is also termination of a

00:55:41

large number of viets again

00:55:42

as a concept there is

00:55:44  
nothing problematic. About it. Each  
00:55:46  
state has the ability to  
00:55:47  
terminate these bits. India has  
00:55:49  
never said that because of  
00:55:51  
termination the sunset cross would  
00:55:52  
not be protected now whether  
00:55:55  
or not as a matter  
00:55:56  
of policy, that was the  
00:55:57  
right decision we can debate  
00:55:59  
that I often think that  
00:56:02  
perhaps what was most myopic  
00:56:04  
about that decision is that  
00:56:05  
today? India is not just  
00:56:07  
a large recipient of foreign  
00:56:09  
direct investment. It's a large  
00:56:10  
exporter of One Direction investment  
00:56:11  
as well. There are large  
00:56:13  
number of Indian businesses for  
00:56:15  
making massive Investments outside of  
00:56:16  
India often in jurisdictions, which

00:56:19  
are more politically risky than  
00:56:21  
South Asian countries. And you  
00:56:23  
require perhaps these kinds of  
00:56:26  
Protections in those countries and  
00:56:28  
I see that every day  
00:56:28  
in my practice right clients  
00:56:30  
that I have people who  
00:56:32  
are investing outside of India  
00:56:33  
do often talk about protections  
00:56:35  
at media available to them  
00:56:36  
in those jurisdictions and often  
00:56:39  
feel and comfort they believe  
00:56:41  
those protections and limited to  
00:56:42  
what either the domestic Club  
00:56:44  
provides or what contraction mechanism  
00:56:46  
might provide form So I  
00:56:48  
think somewhere that termination decision  
00:56:50  
was rather myopic from that  
00:56:51  
perspective, but otherwise, I don't  
00:56:53  
doubt that the state has

00:56:55

the ability to do it

00:56:56

and perhaps should be doing

00:56:57

it in circumstances where it

00:56:59

feels that the existing regime

00:57:00

doesn't really work for it.

00:57:03

The final point and that's

00:57:05

connected to what I said

00:57:06

earlier. Is that going forward?

00:57:09

I suspect you continue to

00:57:12

see a large number of

00:57:13

investing teams against India that

00:57:15

wouldn't stop it wouldn't stop

00:57:17

because the economy would continue

00:57:19

to grow therefore. They'll be

00:57:21

more and more Investments coming

00:57:22

into India. It wouldn't stop

00:57:24

because the Supreme Court and

00:57:26

the high courts in India

00:57:26

would remain as involved in

00:57:28

business slides in the economy

00:57:30  
as they are today and  
00:57:32  
it wouldn't stop because you  
00:57:34  
continue to have a very  
00:57:35  
strong Federal structure but decisions  
00:57:38  
would be me that every  
00:57:39  
level of the government which  
00:57:40  
theoretically could be challenged in  
00:57:42  
the arbitrations. So those were  
00:57:46  
my sort of quick Five  
00:57:47  
Points about why I think  
00:57:49  
we are where we are  
00:57:51  
and why I personally have  
00:57:52  
never found any of this  
00:57:53  
that problematic. And in fact,  
00:57:55  
I suspect this would continue  
00:57:57  
the only new trend. I  
00:57:59  
think you'll see more and  
00:58:00  
more of our invested State  
00:58:01  
claims brought by Indian companies  
00:58:03  
against foreign governments. So that's

00:58:07  
on sort of the general  
00:58:09  
overview. I know I've just  
00:58:10  
60 seconds left. So I'll  
00:58:13  
quickly mention the one case  
00:58:15  
that I wanted to talk  
00:58:16  
about and we can pick  
00:58:17  
this up later. It's the  
00:58:19  
Divas Saga because it's not  
00:58:22  
just one hour vitration. They're  
00:58:23  
multiple of those I picked  
00:58:25  
that up because obviously there  
00:58:26  
are lots of other teams  
00:58:28  
which are in the fast  
00:58:29  
Vodafone Etc. Devas is perhaps  
00:58:31  
slightly less popular compared to  
00:58:33  
those but it still is  
00:58:35  
an importantly lustration. I think  
00:58:37  
of all the concepts that  
00:58:39  
make her you were talking  
00:58:40  
about which is are there

00:58:44

instances where the arbitration awards

00:58:47

are just too large in

00:58:48

terms of size are there

00:58:50

instances where you have multiple

00:58:51

treaty disputes or multiple disputes

00:58:54

arising out at the same

00:58:55

event are there instances where

00:58:57

there are corruption and fraud

00:58:59

allegations at the at the

00:59:01

heart of what is effectively

00:59:02

and so on and so

00:59:05

forth. So what was Divas

00:59:07

very shortly or very briefly

00:59:09

in 2005 Investments were made

00:59:12

by a company called Divas,

00:59:15

which is Incorporated in India,

00:59:17

but has investors based in

00:59:18

Mauritius. Mostly that investment was

00:59:22

in relation to a contract

00:59:23

with the Indian space research

00:59:25

organization, which Perhaps is equivalent

00:59:28

of NASA and Indian context

00:59:29

to build certain satellites now.

00:59:33

In 2011 that contract was

00:59:36

terminated. I'm sort of skipping.

00:59:39

Obviously what happened between 2005

00:59:41

and 11 but five is

00:59:42

the contract 11 is when

00:59:43

that is terminated that leads

00:59:46

to a contractual arbitration. So

00:59:48

the contract between Devas and

00:59:51

the Indian space research organization

00:59:52

provided for arbitration under ICC

00:59:55

rules, I think but seated

00:59:57

in India that leads to

00:59:59

a fairly large arbitration of

01:00:02

water for about 560 million

01:00:03

dollars, which today along with

01:00:05

interest is about 1.4 billion

01:00:07

dollars. I understand. So that's

01:00:10  
one part of it that  
01:00:11  
what hasn't been enforced. There  
01:00:12  
are multiple proceedings on foot  
01:00:14  
in India in relation to  
01:00:16  
setting aside of the arbitration  
01:00:19  
award and so on and  
01:00:19  
so forth. Simultaneously while all  
01:00:23  
of this is happening. The  
01:00:24  
investors in Davis commenced their  
01:00:26  
own invested State arbitrations against  
01:00:28  
India under the uncert trial  
01:00:30  
rules. They too are successful  
01:00:32  
in the app in those  
01:00:33  
arbitrations of the arbitration award  
01:00:35  
amount of substantially smaller. I  
01:00:36  
think around 100 million dollars  
01:00:37  
or so. and finally while  
01:00:40  
all of this is going  
01:00:41  
on very recently earlier this  
01:00:43  
year and at the end

01:00:44  
of last year the the  
01:00:46  
government tries to do things,  
01:00:48  
which genuinely I feel Were  
01:00:52  
done in bad feed for  
01:00:54  
for lack of a better  
01:00:55  
word, but effectively what they  
01:00:57  
do is they try and  
01:00:58  
liquidate the company itself the  
01:01:02  
award Predator divas and the  
01:01:04  
way they do it is  
01:01:04  
by having the award. Predator  
01:01:08  
and sorry, they are what  
01:01:10  
data Anthrax make an application  
01:01:12  
to the company code in  
01:01:14  
India for the appointment of  
01:01:15  
Liquidator. I mean that's just  
01:01:16  
unheard of it would never  
01:01:17  
happen to normal. Scheme of  
01:01:20  
things and that not surprisingly  
01:01:21  
needs to the threat of

01:01:24  
another bit arbitration. I've seen  
01:01:26  
the trigulated that I moved  
01:01:28  
the arbitrations actually commenced. So  
01:01:30  
what you have there and  
01:01:31  
we can take this app  
01:01:32  
meter is effectvely one contract  
01:01:34  
the contract for building satellites  
01:01:37  
giving rise to ICC arbitration  
01:01:40  
commercial arbitration giving rise to  
01:01:42  
multiple investors Data Solutions. You  
01:01:45  
have fairly large investment video  
01:01:47  
awards, you have the Indian  
01:01:50  
government saying that the company  
01:01:52  
which is actually lost the  
01:01:53  
arbitration should be liquidated because  
01:01:55  
it has been involved in  
01:01:57  
a fraud because the underlying  
01:01:59  
contract was obtained through corruption  
01:02:01  
and that's sort of an  
01:02:03  
after thought because that allegation

01:02:04  
was never made originally in  
01:02:06  
the arbitraries and fourth just  
01:02:08  
causing there for a second  
01:02:10  
is what I think is  
01:02:12  
the next Trend which perhaps  
01:02:14  
is relevant to you know,  
01:02:16  
the cases that profess Islam  
01:02:18  
you and Fatima you would  
01:02:19  
talk about Is just purely  
01:02:20  
efforts to collect on that  
01:02:21  
applic. Ation, because I think  
01:02:24  
you know if you really  
01:02:25  
think of how the government  
01:02:26  
mentality has worked in this  
01:02:27  
you signed on to the  
01:02:29  
bi TS, you didn't realize  
01:02:30  
that it would need to  
01:02:31  
claims. Then it leads to  
01:02:32  
claims you lose arbitration Awards.  
01:02:35  
You spend a lot of

01:02:36  
money defending yourself. Even then  
01:02:39  
you don't realize what happens  
01:02:41  
when the investors actually try  
01:02:42  
to collect on that and  
01:02:43  
then the third phase is  
01:02:44  
that now they're trying to  
01:02:45  
collect on it and that  
01:02:46  
puts you even in Greater  
01:02:47  
pain because that opens up  
01:02:48  
the possibility of execution against  
01:02:50  
State assets. And that's what  
01:02:54  
sort of India is now  
01:02:55  
going through as far as  
01:02:56  
Diva systems in other cases  
01:02:58  
get settled so we can  
01:02:59  
pick that up as well  
01:03:00  
in the discussion, but I'll  
01:03:01  
pause that that's all I  
01:03:03  
want to sort of saying  
01:03:04  
this much time. Thank you

01:03:06

very much Russia that you

01:03:09

did Cover a lot of

01:03:11

territory very quickly. So kudos

01:03:14

to that. Let's look at

01:03:16

Pakistan. Very interesting very key

01:03:20

developments happening there. Tell us

01:03:23

Fatima. What is what is

01:03:24

happening in Pakistan? Where are

01:03:26

we headed? Thank you Kabir

01:03:28

and really glad to be

01:03:30

on this panel. I'm gonna

01:03:31

keep this brief in the

01:03:33

interest of times we can

01:03:34

get to our discussion as

01:03:35

quickly as possible. Um, but

01:03:37

I think in the case

01:03:39

of Pakistan, it's important to

01:03:40

give a historical review to

01:03:42

kind of figure out, you

01:03:43

know to kind of understand

01:03:44

why Pakistan is doing what

01:03:47

it is doing today. So

01:03:49

just getting straight into it

01:03:51

Pakistan was obviously signed the

01:03:53

first bi team the world

01:03:54

with West Germany in 1959

01:03:56

understanding Pakistan's frame of head

01:03:59

at that time Pakistan and

01:04:00

obviously recently become independent from

01:04:03

India was looking to grow

01:04:05

and attract for and investment

01:04:07

and signing VIPs was You

01:04:10

know at that time a

01:04:11

very fashionable of getting foreign

01:04:13

investment. So what we see

01:04:14

is, you know. 60s and

01:04:17

70s a bit of cautious

01:04:19

approach but between 1988 and

01:04:21

2001 Pakistan signed around 35

01:04:23

B, its you know with

01:04:25  
well being signed alone in  
01:04:27  
1995. So this is you  
01:04:29  
know in stock contrast to  
01:04:30  
India, of course, you know,  
01:04:32  
they kind of took on  
01:04:33  
signing bits very slowly but  
01:04:35  
you Pakistan in span of  
01:04:36  
decade accumulated a portfolio of  
01:04:38  
you know over 35 vits.  
01:04:43  
And of course then in  
01:04:44  
2001 Pakistan faced, you know,  
01:04:47  
it's first major bit came  
01:04:48  
in the SGS case, which  
01:04:50  
was kind of like a  
01:04:51  
huge Awakening for everybody who  
01:04:54  
had been on this Rampage  
01:04:55  
of signing the pits and  
01:04:57  
if we look at, you  
01:04:58  
know interviews of the former  
01:04:59  
Attorney General at that time

01:05:01

Ali Khan. He's obviously made

01:05:03

it very clear that you

01:05:04

know, when Park son was

01:05:05

informed of this claim people

01:05:08

in the government had to

01:05:09

literally Google the world exit

01:05:11

and arbitration to understand. You

01:05:13

know, what they've been up

01:05:14

to for the last two

01:05:15

decades. So this was kind

01:05:17

of And the weakening call

01:05:20

for Pakistan. So what happened

01:05:21

was that was that Pakistan

01:05:23

slowed down the signing of

01:05:24

bits? So what we see

01:05:26

is instead of signing 10

01:05:27

to 12 bits in a

01:05:29

single year you'd see, you

01:05:30

know, long gaps six to

01:05:32

seven years one vit sign

01:05:34  
in 2002 1 2003 and  
01:05:36  
then, you know huge gaps  
01:05:38  
in between so generally there  
01:05:39  
was a Cautious approach taken  
01:05:42  
there, but between 2001 the  
01:05:46  
SGS claim and you know  
01:05:47  
looking into 2015, although there  
01:05:51  
was a cautious approach. They  
01:05:52  
were slow actions taken. So,  
01:05:54  
you know, they weren't the  
01:05:56  
viets that were terminated or  
01:05:57  
renegotiated overall the mindset of  
01:06:00  
the Pakistani government and you  
01:06:02  
know get it signing into  
01:06:04  
Vitas was that we need  
01:06:05  
to be cautious about what  
01:06:06  
we're getting into but they  
01:06:08  
want major reforms undertaken then.  
01:06:11  
but of course that all  
01:06:13  
changed very recently with the

01:06:15

TCC versus Pakistan also most

01:06:17

famously known as the recode

01:06:19

case, you know kind of

01:06:21

that is one case that

01:06:24

kind of Pakistan accelerated the

01:06:26

reform the ISD has reform

01:06:28

in Pakistan and we've seen

01:06:29

in the last, you know

01:06:30

year and a half two

01:06:31

years a major major shifts

01:06:34

happening in terms of the

01:06:35

investment arbitration landscape. Um in

01:06:38

Pakistan, so of course recall

01:06:40

really spoke about this, but

01:06:42

I'll just highlight if you

01:06:43

points that I think are

01:06:44

important in regards to this

01:06:46

case so we could take

01:06:47

is essentially the name of

01:06:49

the area in the state

01:06:51  
of the province of Balochistan  
01:06:52  
in Pakistan in this is  
01:06:55  
It's considered the world's allegedly  
01:06:57  
considered world's fifth largest gold  
01:06:59  
mine and in 1993 joint  
01:07:02  
venture agreement was signed between  
01:07:04  
the government of Balochistan and  
01:07:06  
BHP, which of course was  
01:07:08  
regarding the exploration of this  
01:07:10  
this mining area. um and  
01:07:13  
later on BHP sold the  
01:07:16  
rights of reproduct to TCC  
01:07:17  
when TCC submitted the mining  
01:07:19  
lease application. It was rejected  
01:07:21  
by the Balochistan government, which  
01:07:23  
of course then the TCC  
01:07:25  
to file an appeal. in  
01:07:27  
the Supreme Court of Pakistan  
01:07:29  
and then finally arbitration claim  
01:07:32  
in exit as well. And

01:07:35  
the Supreme Court of Pakistan  
01:07:36  
declared that the 1993 the  
01:07:39  
joint venture agreement was contrary  
01:07:41  
to law and public policy  
01:07:42  
and was there for void  
01:07:44  
and so then we see  
01:07:45  
a lot of focus TCC  
01:07:48  
focused a lot and they  
01:07:49  
said arbitration. and so of  
01:07:52  
course in 2019, July 2019  
01:07:55  
is six billion, you know  
01:07:56  
dollar award including interest was  
01:07:59  
issued against Pakistan and There's  
01:08:02  
a huge criticism regarding this  
01:08:05  
award that you know how  
01:08:06  
such an extravagant award is  
01:08:07  
issued against a country. You  
01:08:09  
know, it's there's a lot  
01:08:10  
of question mark on its  
01:08:11  
ability to pay on an

01:08:14  
investment of let's say 200  
01:08:16  
million dollars a fine of  
01:08:17  
six billion probably reflects poorly  
01:08:20  
on the, you know, potential  
01:08:23  
and neutrality of the ETC,  
01:08:24  
you know, the penalty was  
01:08:26  
equivalent to about 2% of  
01:08:28  
Pakistan GDP, and obviously as  
01:08:31  
we come mentioned equivalent almost  
01:08:33  
equivalent to the bailout package  
01:08:34  
at Pakistan had received from  
01:08:35  
the IMF that same year.  
01:08:38  
So really really putting a  
01:08:40  
question mark and how the  
01:08:41  
tribunal could reach this number  
01:08:43  
and how they and if  
01:08:45  
they even considered Pakistan's ability  
01:08:47  
to pay for this. um,  
01:08:49  
and when we look at  
01:08:51  
you know how the tribunal

01:08:52

kind of got into this

01:08:53

number in the first place.

01:08:54

They opted to use a

01:08:56

formula for calculating the damages

01:08:58

based on the soon profits

01:09:01

of the of TCC which

01:09:03

they might have earned over

01:09:04

a period period of 56

01:09:06

years, right? And obviously there's

01:09:07

experts have argue that there's

01:09:09

no sure way to calculate

01:09:10

the future price of a

01:09:12

mineral and expected profits are

01:09:15

also subject to political uncertainty

01:09:17

and a lot of factors

01:09:18

such as environmental impacts are

01:09:19

hard to predict and obviously

01:09:22

by the time this award

01:09:23

had been issued recorded Karen

01:09:25

produced a single answer gold

01:09:26

or copper and it was

01:09:27

years away from becoming operation.

01:09:30

So how do you predict

01:09:32

how a particular business is

01:09:33

going to do in 20

01:09:34

years? so these are obviously

01:09:35

criticisms that this award received

01:09:38

there is also the question

01:09:40

of you know, whether arbitrators

01:09:42

were mostly lawyers are well

01:09:43

versed in making such complex

01:09:45

Financial projections because you know,

01:09:48

ultimately they're the ones who

01:09:50

make final decisions and also

01:09:52

in regards to this case

01:09:53

there was also allegations of

01:09:56

a parent corruption in the

01:09:57

process of securing the investment

01:09:58

so improper payments made to

01:10:02

obtain Visa approvals subsequently after

01:10:06

this decision was This penalty

01:10:09

was given we saw that

01:10:11

the below Justine Development Authority

01:10:12

chairman was imprisoned by the

01:10:14

Pakistani authorities for having assets

01:10:17

beyond their means and also

01:10:18

being involved in approving The

01:10:20

recordic Venture agreement. So obviously

01:10:25

this on a local level

01:10:26

these investigations have continued to

01:10:28

remain and as recall so

01:10:31

highlighted there's a huge question

01:10:32

mark on the ability of

01:10:34

the panel, you know to

01:10:35

do such high level investigative

01:10:37

work to kind of You

01:10:39

know a final through the

01:10:40

allegations of corruption in in

01:10:43

these regions. So what we've

01:10:45

seen now in response to

01:10:48

this case obviously Pakistan is

01:10:50

Very since imranthan our current

01:10:53

prime minister has come into

01:10:54

power we are he has

01:10:55

been very adamant of attracting

01:10:57

more foreign investment. We've obviously

01:10:59

seen China as you know,

01:11:00

one of the main Largest

01:11:02

foreign investor in Pakistan even

01:11:04

just first half of this

01:11:05

year China invested around 400

01:11:07

million dollars followed by you

01:11:10

know Hong Kong and Netherlands.

01:11:11

So we're obviously Pakistan is

01:11:13

their headspace now is to

01:11:14

attract huge amounts of foreign

01:11:17

investment, but also not be

01:11:18

penalized for issues that they've

01:11:21

obviously dealt with in the

01:11:22

past. So in recent times

01:11:24

Imran Khan has obviously formed

01:11:27

a working group, you know

01:11:28

combination of 15 to 20

01:11:30

people former State officials lawyers

01:11:32

that are coming up with

01:11:34

suggestions of what What kind

01:11:37

of reforms that we need?

01:11:38

There's also talks. The board

01:11:41

of investment is also proposed.

01:11:44

That Pakistan, you know, not

01:11:47

that initially consider terminating bits

01:11:52

that do not favor it

01:11:54

and you pursue strategies to

01:11:57

create opportunities for you know

01:11:58

around 50 billion dollars that

01:11:59

they're looking. To get into

01:12:01

Pakistan the next five years

01:12:02

and obviously in terms of

01:12:05

recorded. We've also seen very

01:12:07

recently Pakistan's assets being attached

01:12:09  
overseas and you know the  
01:12:12  
whole Um situation that's been  
01:12:16  
going on with that. So,  
01:12:17  
I mean there's a lot  
01:12:18  
more that can be said  
01:12:18  
with that, but I know  
01:12:19  
we're short on time. So  
01:12:20  
we should probably get straight  
01:12:21  
into the discussion. Fantastic Fatima.  
01:12:26  
Thank you. Let me just  
01:12:27  
start off and I got  
01:12:29  
into this panel. Right. I  
01:12:32  
was going to make the  
01:12:33  
grand statement. The old Southeast  
01:12:37  
Asian countries are essentially the  
01:12:39  
same facing similar outcomes, but  
01:12:42  
during each of you speak.  
01:12:43  
They're actually seemed to be  
01:12:45  
very unique determining factors impacting  
01:12:49  
how each of these countries

01:12:51

look at arbitration. I know

01:12:55

we're we're I'm being told

01:12:58

that we should end soon

01:13:00

for networking. But I do

01:13:02

want to have a little

01:13:03

bit of dialogue between this

01:13:05

amazing panel. It is a

01:13:07

South Asian panel. Let's perhaps

01:13:11

invite every panelist. to speak

01:13:15

in one to two sentences.

01:13:17

This is the most difficult

01:13:19

thing for lawyers but one

01:13:21

to two sentences if each

01:13:24

of us speakers can tell

01:13:26

us their reactions to a

01:13:29

statement I am going to

01:13:30

present. So my statement for

01:13:34

your expert opinion counselors. Investment

01:13:40

arbitration is not an appropriate

01:13:43

tool for resolution of disputes

01:13:47  
in South Asian countries. Investment  
01:13:50  
arbitration is not an appropriate  
01:13:53  
tool for resolution of disputes  
01:13:56  
in South Asian countries. Do  
01:13:58  
you agree disagree? What do  
01:14:01  
you think? Let's go in  
01:14:02  
the reverse order. So Fatima  
01:14:05  
Russia Ramana and then Rekha?  
01:14:09  
Fatima take it away. I  
01:14:12  
mean, I would just say  
01:14:12  
that in, you know investment  
01:14:14  
arbitration. Although there are many  
01:14:16  
things wrong with the system  
01:14:18  
and you know a lot  
01:14:19  
of reforms that can be  
01:14:20  
made I think. In in  
01:14:22  
the case of Pakistan, this  
01:14:25  
is the system that one  
01:14:27  
should accept as it is,  
01:14:28  
but consider working to improve

01:14:30

it instead of until I

01:14:32

think this is the best

01:14:33

system that we've developed to

01:14:34

resolve issues as complex. As

01:14:36

you know, we are facing

01:14:37

today of course improvements can

01:14:40

be made but I think

01:14:41

yeah, I think we should

01:14:43

work on improving it but

01:14:44

until unless we've develop a

01:14:47

better alternative form. I think

01:14:48

this is this works so

01:14:50

far. It works so far.

01:14:53

Okay. What's the Vista Bishop?

01:14:57

I think it's an appropriate

01:14:58

mechanism for resolving disputes involving

01:15:01

foreign investors. So of course

01:15:02

as Fatima said improvements could

01:15:06

be made from the perspective

01:15:07

of both the investors as

01:15:08

well as States. Thank you.

01:15:13

You actually kept it to

01:15:14

two sentences. That's always the

01:15:16

challenge with these things Professor

01:15:18

Islam. Thank you in tune

01:15:21

with Fatima. I would also

01:15:22

like to say like it's

01:15:23

like democracy. You don't have

01:15:25

any better option for this

01:15:27

solving investor status just made

01:15:30

to make it try to

01:15:32

be better. And as I

01:15:33

said have legislation and lead

01:15:36

a little before you liter

01:15:37

to get legislate. So as

01:15:39

long as you have good

01:15:39

protection in your investment rate

01:15:42

is regime, it should be

01:15:43

fine and obviously develop as

01:15:45

a developing countries that they

01:15:47

are learning. I think the

01:15:49

situation will change in next

01:15:50

three to five years in

01:15:52

terms of developing expert counsels

01:15:57

at least for Bangladesh that

01:15:59

I can say. So as

01:16:00

long as that is taken

01:16:01

care of things might be

01:16:03

slightly different but obviously time

01:16:05

will only say that how

01:16:07

far it's working. Time will

01:16:09

say indeed. Thank you Rekha.

01:16:11

I think I'm gonna Echo

01:16:12

at the panelist said absolutes.

01:16:14

I've never won. This is

01:16:15

the very good. I've never

01:16:19

Once or two, we make

01:16:20

all sorts of disclaimers at

01:16:21

the start of panels and

01:16:22

papers to that effect. So

01:16:24

but not withstanding, you know,

01:16:26

there's an inherent asymmetry in

01:16:27

the bits in the midst

01:16:29

system is the better system

01:16:31

available in the fora now,

01:16:32

but certainly we're going through

01:16:35

a major evolution of model

01:16:37

treaties and it'll be very

01:16:39

interesting to see to borrow

01:16:40

from rashab's comment the patchwork

01:16:42

that is being made in

01:16:45

the evolution. awesome Let me

01:16:48

present another statement to get

01:16:51

your reactions, right because I

01:16:53

think something we spoke about

01:16:55

was tribunal stepping and tribunals

01:16:59

interpreting tribunals. You know looking

01:17:03

at obligation stated in treaties.

01:17:11

Position it's a little cheeky

01:17:13

but treaty interpretation. Is the

01:17:18

necessary consequence of poor drafting

01:17:22

of treaties? particularly in South

01:17:25

Asian countries Do you agree

01:17:28

with this statement? Recap, perhaps.

01:17:33

We now go the other

01:17:34

order. the disclaimer would make

01:17:37

is without actively engaging in

01:17:39

these treaties every many treaties

01:17:42

start out with bad drafting

01:17:44

as do many arbitral clauses.

01:17:47

And you're stuck with them

01:17:48

and so to speak for

01:17:50

a period of time until

01:17:51

you learn better and then

01:17:52

implementation takes over and then

01:17:54

add another decade. So it

01:17:57

is an evolutionary process. But

01:17:59

you know, inherently you have

01:18:00

to start somewhere is what

01:18:02

I would argue. Thank you

01:18:04

Professor Islam. Thing I already

01:18:08

said like before we really

01:18:10

to get legislates so as

01:18:12

and as rich as say

01:18:14

that it's an evolutionary process.

01:18:15

So we had first Generations

01:18:18

second generation. Third generation of

01:18:19

Viet is maybe in future

01:18:21

we will be having a

01:18:22

fourth generation of bisces. So

01:18:24

we should always have that

01:18:25

space in the vit that

01:18:26

we can adopt that in

01:18:28

quotes of Time how to

01:18:29

with the changing circumstances because

01:18:31

this whole pandemic Health could

01:18:33

us into many situation which

01:18:35

we could not even imagine

01:18:36

when we had all this

01:18:39

bi it is so this

01:18:40

would be again something I

01:18:41

am sure would be addressed

01:18:43

in the coming viets about

01:18:45

all this kind of that

01:18:47

challenges that this pandemic has

01:18:49

imposed and exposed. Thank you.

01:18:52

Rishab Gupta. I would disagree

01:18:56

with that statement. I don't

01:18:57

think the treaties were badly

01:19:01

drafted in the sense that

01:19:02

they weren't riddled with errors

01:19:05

or they won't inherently inconsistent.

01:19:07

They just didn't reflect perhaps

01:19:10

what state parties today would

01:19:12

want from those treats equally,

01:19:15

I don't think there was

01:19:15

anything specific in those treaties

01:19:18

which you can point to

01:19:20

as far as South Asians

01:19:21

because the first generation vit

01:19:23

used to fairly identical across

01:19:25

the board, whichever jurisdiction United.

01:19:28

Um evolutionary process of course,

01:19:31

but that's true for any

01:19:33

instrument which receives continuous interpretation

01:19:37

application through judicial bodies or

01:19:40

arbitration travels. So that process

01:19:42

wouldn't stop. So yeah. Thank

01:19:47

you Fatima Islam. Now I

01:19:51

would say that more than

01:19:53

for treaty drafting like as

01:19:55

your sub mentioned at least

01:19:57

in the case of Pakistan.

01:19:58

I would say the South

01:19:59

Asian countries can definitely be

01:20:01

better at negotiating the treaties

01:20:03

and making sure that their

01:20:05

interest is reflected accurately in

01:20:07

the words because I guess

01:20:07

as lawyers, we all know

01:20:09

how much words matter so

01:20:11

definitely making sure that you're

01:20:13

interested is reflected well in

01:20:15

because historically in the case

01:20:17

of Pakistan, we've always, you

01:20:19

know got in a rude

01:20:21

awakening called much later on

01:20:22

what we assigned. So we

01:20:24

want to make sure that

01:20:25

going forward we are able

01:20:26

to kind of negotiate in

01:20:29

an equal. space well folks

01:20:32

you've heard it from the

01:20:33

experts right here. I invite

01:20:36

everyone to give a virtual.

01:20:38

Round of Applause to this

01:20:40

amazing panel We have covered

01:20:43

probably one of the most

01:20:45

pivotal and significant regions that

01:20:49

is playing very important role

01:20:51  
in ists. So thank you  
01:20:54  
panelist. I definitely feel I  
01:20:56  
have learned a lot. With  
01:20:59  
that, let me invite. Jose  
01:21:01  
Antonio Rivas to tell us  
01:21:04  
what's going to happen next  
01:21:05  
but let me Echo once  
01:21:08  
more everyone Round of Applause  
01:21:11  
to this amazing panel right  
01:21:12  
here. wonderful Kabir thank you  
01:21:19  
so much for moderating this  
01:21:22  
in. I say this truly  
01:21:26  
in Unique Style in unique.  
01:21:29  
Absolutely Unique Style. I don't  
01:21:31  
think that that anybody would  
01:21:35  
be able to do it  
01:21:36  
as you do it, which  
01:21:38  
is really wonderful. Thank you  
01:21:39  
so much. And in the  
01:21:41  
order that you appear Fatima

01:21:43

very glad to see you

01:21:46

and and listen to you

01:21:48

making the statements and and

01:21:52

and sharing your thoughts especially

01:21:56

concerning investment arbitration in Pakistan

01:22:00

Recker has been a pleasure.

01:22:03

Thank you so much it.

01:22:05

You know, sometimes you speak

01:22:07

and it sounds like poetry

01:22:10

so so really, yeah, it's

01:22:12

it's wonderful. Rishab when the

01:22:17

very nice to meet you

01:22:17

and and I really like

01:22:20

the the definitive voice in

01:22:22

which you answer many many

01:22:24

of the of the questions.

01:22:26

So so wonderful and Professor

01:22:28

Islam as as always as

01:22:32

I said at the beginning

01:22:32

it's a pleasure to meet

01:22:34

you and and to have

01:22:35

you here and and share

01:22:37

your perspective concerning Bangladesh and

01:22:40

and investment arbitration. Now, I

01:22:44

would like to this is

01:22:47

a panel to to see

01:22:48

many times more. I'm glad

01:22:50

that will have it on

01:22:52

video and that will have

01:22:54

many of the sources available

01:22:56

for people to update themselves,

01:22:59

especially concerning South Asia. Now,

01:23:02

we would like to welcome

01:23:04

everyone to the breakout rooms.

01:23:07

We're gonna have perhaps at

01:23:09

the most two or three

01:23:11

breakout rooms, and we're glad

01:23:14

that The you know, it's

01:23:15

now not that early in

01:23:19

South Asia and I'm getting



01:23:22

a little bit late here

01:23:24

in Eastern Standard time, but,

01:23:26

you know still very exciting.

01:23:28

So with that thank you

01:23:30

to all of you and

01:23:33

let's move on to the

01:23:34

breakout rooms.