

Corruption in Investment Projects: The Standard of Proof and the Consequences for Investment Arbitration *

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 (WAU) session focused on the complexities of corruption in investment arbitration, particularly regarding the standard of proof and the implications for investment disputes. The session was held on Africa Day, with notable participants including Rainbow Willard, Colleen Malala, Gladys K. M. O'Connell, Athena Fouchard Papa, and Pedro Soto.

Rainbow Willard introduced the session, highlighting the importance of understanding corruption in investment arbitration. Colleen Malala provided an overview of recent developments, discussing two main issues: the standard of proof for corruption claims and the concept of French exceptionalism in arbitration. She noted two schools of thought regarding the standard of proof: one advocating for a uniform standard applicable to all claims, and the other suggesting a heightened standard due to the seriousness of corruption allegations. Malala emphasized that tribunals are increasingly considering circumstantial evidence and the necessity of establishing a causal link between corrupt actions and the outcomes of agreements.

Gladys O'Connell elaborated on the public policy implications of corruption in international treaties, noting the challenges faced when corruption allegations arise post-investment. He highlighted the importance of distinguishing between initial legality at the time of investment and subsequent corrupt actions that may affect jurisdiction and admissibility. O'Connell also discussed the complexities surrounding states' counterclaims based on corruption and the potential for investors to claim breaches of fair and equitable treatment standards.

Athena Fouchard Papa emphasized the evolving definitions and standards of corruption, urging arbitrators to remain vigilant and informed about red flags that may indicate corrupt practices. She pointed out the necessity for arbitrators to balance the adversarial and inquisitorial approaches in investigating corruption claims.

Pedro Soto shared insights from his experience in white-collar crime, particularly regarding

how evidence is gathered in corruption cases. He noted the challenges faced by claimants when alleging state corruption, especially when states have access to investigative tools that claimants do not. Soto stressed the importance of cooperation between parties and the need for arbitrators to actively connect the dots when faced with corruption allegations.

The panel concluded with discussions on the need for arbitrators to maintain an active role in investigating corruption claims, especially when evidence suggests potential wrongdoing, even if neither party raises the issue. The session underscored the complexities and evolving nature of corruption in investment arbitration, highlighting the need for ongoing dialogue and examination of best practices in the field.

Authors

Rainbow Willard, Pedro Soto, Caline Mouawad, Guled Yusuf, David Khachvani, Athina Fouchard Papaefstratiou

Topics

Investment Arbitration, Corruption, Standard of Proof, Corruption Consequences, Investment Projects, Case-sensitive Standard

Category

WAU

Full Transcript

00:00:17

Welcome, this is World arbitration

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update. This is our third

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day of a Six-Day experience

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and during the first two

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days. We had an emphasis

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in the Americas and we

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had the eight we actually

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had eight panels stations in

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person from Mexico City. And

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today is Africa day and

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we are addressing various topics

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and today's panel a war

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or the panel. Now, it's

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called corruption in investment products

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the standard of proof and

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the consequences for investment arbitration.

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As one of the features

00:01:00

of a world of attrition

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update. We follow the schedule

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of the region that were

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focusing on. So for those

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of you who are in

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the US are session started

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at 7 a.m. Because we're

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following Africa schedule not being

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said it is my pleasure

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to introduce rainbow Willard who

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is counsel an arbitrator and

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who has that for more

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than 10 years at work

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on complex International commercial and

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investment treaty arbitrations under all

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of the major International rules,

00:01:42

including the ICC on to

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draw it exit at cetera

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rainbow has particular experience in

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energy oil and gas and

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Mining dispute involving parties from

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Latin America South Asia Europe

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and the Middle East prior

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to forming her own practice

00:02:00

rainbow with counsel at leading

00:02:02

international District Boutique at Chaifetz

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Lindsay in York and was

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a senior associate in the

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international arbitration group of Allen

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& overy. Practicing in London

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and New York at both

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firms rainbow LED team in

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significant International commercial disputes and

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represented States and investors in

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case has governed by investment

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treaties or trade agreements Rainbow

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Dash Rainbow has extensive oral

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and written advocacy experience in

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English and Spanish and is

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equally comfortable at arbitrator and

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Council in both languages so

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I could say way way

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more but I don't think

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that she will she would

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appreciate it. So rainbow you

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have to store it and

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it's a pleasure to have

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each one of you here,

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so welcome to Wildwood out.

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Thank you so much Jose

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Antonio and thank you Ian.

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Also I'm so pleased to

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be able to take this

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virtual trip around the world

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with the world arbitration update

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and we're very grateful to

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the organizers for what is

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a really great initiative and

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for inviting me and all

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of these Stellar panelist to

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be a part of We

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have a group of really

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incredible practitioners and experts here

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today who put a lot

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of work into preparing but

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I think is going to

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be an extremely engaging and

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informative panel and I'm going

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to introduce them. I'm going

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to go by first name

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alphabetical order just to mix

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things up a bit. So

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first we have Athena fouchard

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Papa who is an arbitrator

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based in Paris. She has

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significant experience in arbitrations involving

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States and state entities as

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well as an arbitration with

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a link to the African

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continent before establishing her own

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practice last year. Athena worked

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an international arbitration Departments of

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Major law firms for more

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than 15 years. She is

00:03:58

a member of the ICC

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arbitration commission and a founding

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member of Africa carb. Athena

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is a Greek national and

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she handles arbitrations in English

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French and Greek next. We

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have Colleen Malala. Who is

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a partner at Chavis Lindsay

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LLP in New York where

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she represents clients in international

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commercial arbitration and an investment

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disputes telling counsels clients and

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an array of multi jurisdictional

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disputes that spanned the globe

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and concern such sectors as

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oil and gas mining consumer

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goods and Telecommunications Cullen has

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acted as counsel in arbitration

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is conducted in English and

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French and administered by all

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major arbitral institutions Helene serves

00:04:42

as vice-chair of the steering

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committee of the ICC Commission

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on arbitration and a tiara

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and she is the steering

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committee liaison to the ICC

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task force on addressing corruption

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issues Killeen also serves as

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co-chair of the IBA investment

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arbitration subcommittee and is a

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member of the IBA arbitration

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committee has passports on privilege

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tell he was recently awarded

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the 12th annual Schmitt lowenfeld

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prize for an article. She

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published along with Jessica be

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some croston on the illegality

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of Action and investor-state arbitration

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so she is an expert

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not just on corruption and

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investment arbitration, but on the

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illegal act ugly gallatly objection

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writ large and the many

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reasons that it can be

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asserted next coming from London.

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I believe you're in London

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today glad is that right?

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Okay don't have a good

00:05:33
lad. You're still yourself who

00:05:34
is a partner and Alan

00:05:36
and ovaries International arbitration group

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and a member of the

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ICC International Court of arbitration

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and the ICC Africa commission.

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He was also appointed to

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the exit panel of conciliators

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by the federal republic of

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Somalia glad has significant experience

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representing companies governments and international

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organizations and institutional and ad

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hoc arbitral proceedings including arbitrations

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under the ICC lcia exit

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and unseat real rules. And

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finally last but not least.

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We have Pedro Soto who

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is of counsel here in

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Washington DC at Gibson Dunn

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& Crutcher Pedro is a

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member of the white-collar criminal

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defense and investigations group and

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his practice focuses on anti-corruption

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cases brought by us authorities

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and other enforcement agencies around

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the world. He has experience

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and anti-corruption matters and more

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than two. Two dozen countries

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with a particular focus on

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Latin America Pedro also has

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acted as counsel to States

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and private claimants and more

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than 10 arbitrations under the

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exit to exit additional facility

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and the ICC rules. Finally.

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I know that we had

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published that David Koch Vani

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who is counsel at Levi

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Kaufman polar and Geneva was

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going to join us today.

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Unfortunately, he got a last-minute

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personal issue that made his

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participation and impossible and we're

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very sorry that he's unable

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to be here today. Now

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for those of you who

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have never joined a world

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arbitration update session before I'm

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going to tell you a

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little bit about the structure

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before we get started first.

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We're going to hear from

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Colleen who's going to give

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us an update on the

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key developments from tribunal's and

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courts on the issue of

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corruption and investment arbitration over

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the last year after that.

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Each of our panelists is

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going to address specific legal

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and practical topics that have

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Arisen when corruption claims are

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asserted and investment arbitration and

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there will then be some

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discussion on each of these

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points with Arco panelist. Everyone

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who's attending we are so

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happy you are here today

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and we are here really

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for you. So you are

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welcome to submit questions throughout

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the session in the chat

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and we will save time

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at the end to address

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your questions. If we don't

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have time to address every

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question that we receive in

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the chat. There will be

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a breakout session at the

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end with networking and you

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will have the opportunity to

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meet and ask questions of

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at least one of the

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panelists and your breakout room.

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So without further ado I

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would like to turn it

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over to Colleen to give

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us some updates on what's

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been going on in the

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world of corruption and investment

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arbitration over the last year.

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Thank you rainbow for your

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warm. Welcome. Thank you again

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until 10 Tony other organizers

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for inviting me to join

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you today. I'm very much

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looking forward to our panel

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discussion and your questions. So

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as rainbow said my task

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today is to give you

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an update on corruption related

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developments and investment arbitration in

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the past year and to

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do so in age of

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10 minutes. So I will

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focus my remarks on two

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main issues on the first

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is the standard of proof

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of corruption and the second

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is French exceptionalism. So starting

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with the standard of proof

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of corruption there two schools

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of thought in that regard

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first is that the same

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standard of proof that applies

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to all other claims should

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also apply to corruption and

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the second school of thought

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is that there should be

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a height and standard and

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if we look back at

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the case in the past

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year, we have examples of

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each one. So let's start

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with the school of thought

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that says that there should

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be the same standard of

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proof of corruption as there

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is for other claims and

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the basis for that for

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that position is that corruption

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is very hard to prove

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and by its very nature

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and so it would be

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unfair to impose on a

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party a hiding burden of

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proof and having a standard

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person to me to meet

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at 2 to make out

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corruption and this sound proof

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takes his formulation. Sometimes it's

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talked about as the balance

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of probabilities reasonable certainty personal

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conviction preponderance of the evidence

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are various ways to say

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the same thing, but essentially

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it's that it's more likely

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than The crash happened and

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that is sort of the

00:09:52
same standard of proof to

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prove other claims and we

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see this and any case

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which technically is not a

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treaty case but it is

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it does involve estate and

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there's an exit arbitration and

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I think it's it's quite

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helpful to illustrate this point

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in that case. The claimants

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had argued that their Mining

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rights had been revoked unlawfully

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because they refused to participate

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in a bribe and they

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were supposed to make a

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bribe payments. And in fact,

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he argued that these rights

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were precisely because there was

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overwhelming evidence that the Mining

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rights were obtained through corruption

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and bribery of public officials

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including the president's the then

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president fourth wife. The tribunal

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concluded that the claims were

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inadmissible because of corruption and

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his meddling in the acquisition

00:10:44

of the claimants Mining rights

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and getting so here are

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a few take away from

00:10:49

that case first the tribunal

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look to international law and

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the practice of international tribunals

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to determine the applicable standard

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of proof second. It recognized

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that there are two schools

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of thought and then before

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it actually done rejected the

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height and standard of proof

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for corruption allegations precisely because

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corruption itself is difficult to

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prove I'd reasonable certainty and

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personal conviction and looks and

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also stated that corruption can

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be proven by circumstantial evidence

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or red flags interesting tidbits

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the tribunal dealt with this

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as an objection to admissibility

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without discussion actually, which is

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interesting since typically corruption in

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the making of the investment

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is usually treated as a

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jurist. No question, and I

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think that is probably going

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to dress up in a

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bit. So I won't I

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won't say much more than

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that at this point. So

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that's the first rule of

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thoughts of thought height and

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standard and the idea behind.

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Is there's a due to

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the gravity of the charge

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and the gravity of the

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consequences. Basically the clan gets

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gets dismissed. There should be

00:11:59

a height and standard of

00:12:01

proof and oftentimes tribunal to

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adopt this philosophy of this

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approach will quote judge Higgins

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separate opinion in the oil

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platforms that case where she

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said that the grave of

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the charge the more confidence

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must there be in the

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evidence for light on. So

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it's this idea. That's because

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it's so such a such

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a grave accusation with very

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serious consequences. It should be

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demonstrated to a height and

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standard there is again also

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there is formulations from tribunals.

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You'll hear clear and convincing

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evidence to the most rigorous

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level of proof of high

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threshold need for solid and

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persuasive. These are different ways

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of saying the same thing

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in terms of it requires

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a height and standard and

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one of the cases where

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there were allegations that LOL

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have procured and you benefits

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by bribing the van Croatian

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Prime Minister incidentally was subsequently

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convicted on charges for accepting

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bribes. The corruption allegation was

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rejected and hear interesting to

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BSG resources before the tribunal

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didn't acknowledge that there were

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two schools of thoughts with

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respect to the standard of

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proof instead it refer to

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the cases that adopted a

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high level of proof and

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then characterize this standard as

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having quote wide-ranging unanimity of

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approach. So it it seemed

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to think that you would

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always apply a higher height

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and standard to corruption. Allegations

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and then and the way

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that a phrase it was

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like Russia must be established

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quote to an appreciably higher

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standard than a mere balance

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of probabilities. One interesting tidbit

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about that case in addition

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goes beyond the Senate approve

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it also how to prove

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it and the tribunal said

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that it would rely primarily

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on for the provable fact

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that it was open to

00:14:02

resorting to inferences to fill

00:14:04

any evidentiary jobs. Only if

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the Gap was unavoidable and

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the inference was compelling. So

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again kind of reiterates this

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height and standard that we

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want to be able to

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prove corruption to the extent

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we can't we'll do inferences

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but only if we have

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to and only if the

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inference is compelling another point

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that the tribunal was very

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keen on was a causal

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link between the corrupt activities

00:14:28

and the contractual agreements that

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issue. So it's not enough

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that there's evidence of some

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kind of bribery. It also

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needs to have been to

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have in Juice the outcome

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of getting the contract. So

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there has to be a

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link from the corrupt act

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to the agreement a tissue.

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So she takeaways from these

00:14:48

cases for the past year.

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I would say they're 21

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is the applicable standard of

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proof of corruption remains an

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open issue despite what the

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tribunal seem to say? And

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I think it's it's still

00:15:00

open whether it's a regular

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standard of proof for the

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standard and then the second

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point would be that the

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tribunals will look at circumstantial

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evidence and red flags when

00:15:14
there is no direct evidence

00:15:15
of corruption, but they'll insist

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on this causal link between

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the crop top and the

00:15:20
contracts that issue. So that

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was my first point second

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point is I'm running out

00:15:25
of time French exceptionalism. And

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this is in the context

00:15:29
of Court decisions on corruption

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and set aside proceeding. I

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will I know we're going

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to Tina's going to touch

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on this at the end.

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So I'm just going to

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put down a marker for

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now and just give you

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the highlights on the key

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takeaways. The cases are referring

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to here are mainly Bella

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Congress is Kyrgyzstan Central vs

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Gabon and score like versus

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Libya and which are all

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set aside cases. I also

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drop a footnote to abl

00:15:56
versus alstom that Saga which

00:15:58
there was a recent about

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much and 1/8 in March

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of this year, but that

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was in the important contacts,

00:16:03
but I think bottom line

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is the underlying premise is

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that a French court has

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to assess the effect that

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upholding or enforcing in the

00:16:13
ward may have on the

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French public order and international

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public policy. And if we

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if it would be contrary

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to French public policy than

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the award should not be

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upheld or For static equilibrium

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and so given this directive

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the French judge. It needs

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of the French touch can

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do the following. It can

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make its own his or

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her own this assessment of

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the correction evidence that was

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presented to the tribunal the

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front stretch can reach different

00:16:40

conclusions from the tribunal. So

00:16:42

it's a de novo review

00:16:42

of the corruption evidence that

00:16:45

was presented in the arbitration

00:16:46

and Beyond. Actually the French

00:16:49

touch can also consider poster

00:16:51

board evidence and making his

00:16:53

or her assessment. So I've

00:16:54

been as I was never

00:16:55

presented to the tribunal, so

00:16:58

that's a I'll leave it

00:17:00

at that. I'll just add

00:17:00

one foot notes about the

00:17:02

court of cassation confirming that

00:17:03
the applicable standard is the

00:17:06
evidence has to be serious

00:17:07
precise and consistent for corruption

00:17:10
to be found and I'll

00:17:12
stop there and leave you

00:17:13
hanging so we can resume

00:17:14
the conversation. When is he

00:17:16
not text Mike? Thank you

00:17:17
very much. Thank you so

00:17:20
much Killeen for meeting and

00:17:23
exceeding what seems like it

00:17:25
was going to be an

00:17:26
impossible challenge of giving us

00:17:28

a very informative and comprehensive

00:17:31

update of what has gone

00:17:32

on over the past year.

00:17:33

It seems like tribunal's have

00:17:35

really struggled with what to

00:17:37

do with corruption claims in

00:17:39

this context and then boards

00:17:41

have struggled with how to

00:17:42

address what you're doing and

00:17:45

to give us some more

00:17:46

information about some of the

00:17:48

legal aspects of corruption claims

00:17:49

that tribunal is have struggled

00:17:52

with and have addressed. We're

00:17:53

going to go to Google

00:17:54

and so glad I'll turn

00:17:56

it over to you. Thank

00:17:58

you very much. Rainbow. And

00:17:59

thank you very much is

00:18:01

2 to the organized as

00:18:02

well and truly a pleasure

00:18:03

to be here with my

00:18:04

co panelist just by way

00:18:07

of overview. I'm corruption all

00:18:09

this is explained raises complex

00:18:12

issues of public policy and

00:18:15

specific in the context of

00:18:16

investment treaty claims jurisdiction admissibility

00:18:18

not the least because by

00:18:20

definition an additional Nexus between

00:18:22

the investor in the state

00:18:24

name of the state's participation

00:18:25

is implicit in the very

00:18:27

nature of corruption. So generally

00:18:29

the focus and investment treaty

00:18:30

claims don't corrupt acts perpetrated

00:18:32

by the investor. It's important

00:18:34

to be cognizant of the

00:18:35

complicity of station in the

00:18:36

alleged acts of corruption there

00:18:38

also competing values of play

00:18:40

here on the one hand

00:18:41

the desirability of giving effect

00:18:42

to the public policy against

00:18:44

enforcement of crap transactions on

00:18:47

the other the public policy

00:18:48

of sustaining International arbitration agreement

00:18:50

contain with an investment treaties

00:18:52

and ensuring the states are

00:18:53

not able to profit from

00:18:55

their own misconduct. Clear that

00:18:58

transactions involving the corruption of

00:18:59

public officials are violation of

00:19:01

international public policy International Community

00:19:04

has a direct interest in

00:19:05

combating corruption at all levels

00:19:06

the Seminole State and of

00:19:08

this principle was made by

00:19:10

judge lagergren in a 1963

00:19:13

ICC case in which your

00:19:15

marker that's Corrections and international

00:19:16

legal. It's contrary to good

00:19:18

morals and to International public

00:19:19

policy, the community of Nations.

00:19:22

So turning to one of

00:19:24

the key questions that I'll

00:19:26

be covering today. What are

00:19:27
the consequences for the arbitration

00:19:29
of the alleged corrupt acts

00:19:30
taking place in the outside

00:19:32
investment or when the investment

00:19:34
was already operating so I

00:19:36
can get that background we

00:19:37
can move to consider the

00:19:39
specific consequences as I mentioned

00:19:41
are too interconnected issues to

00:19:43
Grapple with hear the first

00:19:44
of the temporal one. We

00:19:46
need to address at one

00:19:47
point in time. The alleged

00:19:48
corruption contaminates the investment. The

00:19:50
second issue is an interpretive

00:19:52
one relating to the specific

00:19:53
language of the treating question

00:19:54
on whether there's a requirement

00:19:55
that the investment is made

00:19:57
in accordance with the laws

00:19:58
of the host. So the

00:20:00
first situation that falls to

00:20:02
be considered is where the

00:20:03
relevant investment treaties specifies as

00:20:06
many do that. The investment

00:20:07
should have been made in

00:20:08

accordance with the laws and

00:20:09

regulations that hosted an alleged

00:20:11

corruption took place at the

00:20:12

outset or establishments of the

00:20:16

investment this obviously creates jurisdictional

00:20:18

difficulties for investors. As big

00:20:20

as acts of corruption will

00:20:21

almost always be Malaysia post

00:20:23

States laws investment tribunal certificate

00:20:27

we interpreted such requirements to

00:20:28

be an issue of jurisdiction

00:20:29

in Selene Morocco the tribunal

00:20:32

State at the relevant Claus

00:20:34

in Italy Morocco b i

00:20:35

it sought to prevent the

00:20:36

treaty from protecting Investments that

00:20:38

should not be protected because

00:20:40

they would be legal a

00:20:41

similar approach was taken in

00:20:43

front of Philippines where it

00:20:45

was found that investment apply

00:20:46

the laws of the host

00:20:47

State at the time it's

00:20:48

made in order to get

00:20:49

40 protection. However, the distinction

00:20:53

between a legality of the

00:20:54

outset or the time of

00:20:55

Investments and supervening legality occurring

00:20:58

when the investment had already

00:20:59

been made remarkable for the

00:21:01

time of initiation of investment.

00:21:03

There is in compliance with

00:21:04

the law of those State

00:21:05

allegations by the hosted violations

00:21:08

of its law on the

00:21:08

course of the investment as

00:21:10

a justification for state auction

00:21:12

with respect to the investment

00:21:13

might be a defense to

00:21:15

claim substantive violations ebit, but

00:21:17

could not deprive a tribunal

00:21:19

acting under the authority of

00:21:20

the vit B jurisdiction in

00:21:23

some cases. This has been

00:21:24

taken Further Supply in circumstances

00:21:27

where there is no specific

00:21:28

language in the investment treaty

00:21:30

to this effect. So for

00:21:31

example in Hollister Ghana, which

00:21:33

where it was found that

00:21:34

investment will not be protected.

00:21:36

If it has been created

00:21:37

in violation of national International

00:21:38

principles of good faith by

00:21:40
with corruption fraud or deceitful

00:21:43
conduct and that there are

00:21:44
general principles that exist independently

00:21:47
of specific language to this

00:21:48
effect in the treaty. So

00:21:51
the second situation is going

00:21:53
contemplated in front porch Philippines

00:21:55
case where the investment has

00:21:56
been made loftily, but supervening

00:21:58
corruption is subsequently occurred in

00:22:00
yukos Russia, when considering allegations

00:22:03
of bad face and illegal

00:22:04
conduct against the investor the

00:22:06

tribunal found that there was

00:22:07

no compelling reason to deny

00:22:09

all together the right to

00:22:10

invoke the treats and investor

00:22:12

was breached the wall the

00:22:13

host state. Following the Investments

00:22:17

being made its investor act.

00:22:19

Illegally the hosted can in

00:22:21

the words of the tribunal

00:22:22

requested to correct Its Behavior

00:22:24

and impose upon its sanctions

00:22:26

available under domestic law, but

00:22:28

it would undermine the purpose

00:22:29

and objectivity CT the Define

00:22:31

to deny the investor the

00:22:33

right to make his case

00:22:34

for an arbitral tribunal based

00:22:36

on the same alleged violations

00:22:37

the existence of which the

00:22:39

investor seeks to dispute on

00:22:40

the Merritt. So in this

00:22:42

situation there for the corruption

00:22:44

effects of lovely establishment vestment,

00:22:46

it would seem that the

00:22:47

tribunal needed less have jurisdiction

00:22:48

of the claim and the

00:22:50

consequences of corruption are to

00:22:51
be dealt with at the

00:22:52
merits face. Sawasdee approach that

00:22:55
I've just discussed. I have

00:22:56
been adopted by investment tribunals

00:22:58
based on some of a

00:23:00
strict interpretation quite often the

00:23:02
relevant investment treaty treating corruption

00:23:04
exclusively as an issue of

00:23:05
jurisdiction has raised concerns among

00:23:07
some commentators for the following

00:23:09
reasons first, the question of

00:23:11
a tribunal stress fiction is

00:23:12
so they concerned with the

00:23:14

adjudicative power that 5, you

00:23:15

know, this assessment seems unsuited

00:23:17

for international policy such as

00:23:20

corruption second corruption that has

00:23:22

occurred between an investor in

00:23:24

a state does not automatically

00:23:25

invalidate the state's consents arbitrate

00:23:27

under the relevant investment treaty

00:23:29

due to the doctrine of

00:23:30

separate bility. Some cases such

00:23:32

as flammable Gary support this

00:23:34

approach. So regardless of jurisdiction

00:23:41

or ability it almost always

00:23:43

operates as an opposite bar

00:23:45

to the proceedings. It's an

00:23:47

investment is Tainted by corruption

00:23:48

tribunal to be very unwilling

00:23:50

to entertain the claims of

00:23:51

investors on the merits of

00:23:53

the case. Regardless, so I'm

00:23:55

not briefly turn to how

00:23:57

investors in State's approach the

00:23:58

issue of corruption differently in

00:23:59

framing their respective arguments in

00:24:02

practice. It's generally the advantageous

00:24:04

for states to start that

00:24:06

investor is engaged in Corrupt

00:24:07

Practices for jurisdictional reasons, but

00:24:10

I've already outlined seeing an

00:24:12

example of this in the

00:24:13

enforcement proceedings at the moment

00:24:15

between p&id Nigeria in that

00:24:19

case Nigeria alleges that the

00:24:20

investor obtain the underlined contract

00:24:22

by bribing Nigerian officials. Not

00:24:25

just that but that the

00:24:26

investor also subsequently bribe Niger

00:24:28

as legal counsel to ensure

00:24:29

that the country would not

00:24:30

contest the arbitration vigorously the

00:24:33

award rendered amounted to approximately

00:24:34

10 billion US Dollars and

00:24:37

if he's corruption allegations are

00:24:38

substantiated the challenge the award

00:24:40

will likely succeed the shows

00:24:42

the significant incentives for states

00:24:44

to substantiate corruption allegations against

00:24:46

investors. Unclean hands or as

00:24:55

we just discussed things investment

00:24:57

was made by the investor

00:24:58

was not made according to

00:25:00

the laws of the whole

00:25:00

state alternatively. This claim is

00:25:04

inadmissible because it is founded

00:25:05

on corruption and therefore contrary

00:25:07

to International public policy and

00:25:10

finally States me also attempt

00:25:11

to bring counterclaims based on

00:25:13

corruption against investors of these

00:25:15

are Franklin likely to succeed

00:25:16

for counterclaim to be brought

00:25:18

the claim must be within

00:25:19

the jurisdiction of the tribunal

00:25:21

or orbital Center. Let's stay

00:25:23

in the case of excited

00:25:24

and I must arise directly

00:25:25

out of the subject matter

00:25:26

of the dispute. However, it's

00:25:28

unlikely the founding jurisdiction for

00:25:30

corruption based on counterclaim will

00:25:32

run on the same issues

00:25:33

as the primary claim brought

00:25:34

by the investor. The investment

00:25:36

has been maybe legally there

00:25:37

will be no investment and

00:25:39

the tribunal will therefore have

00:25:40

no jurisdiction to hear the

00:25:41

counter as was the case

00:25:43

in the metal test was

00:25:44

as we discussed in Metal

00:25:45

Tech. The final in circumstances

00:25:48

where state is engaged in

00:25:49

corruption investors may claim a

00:25:51

breach of the fac standard

00:25:53

by Me by Example particularly

00:25:54

if they come to the

00:25:55

tribunal with clean hands, so

00:25:56

to speak not engaged in

00:25:58

the crop practice. So interesting

00:26:00

in EDF Romanian the tribunal

00:26:02

agreed to a request for

00:26:03

a bride by state agencies

00:26:04

in violation of the fvt

00:26:05

standard in circumstances where the

00:26:07

investor who refused to pay

00:26:09

a bribe your contract extension

00:26:10

soap, just to keep up

00:26:13

with coming to get practice

00:26:14

of sticking to our time

00:26:16

constraint. I'll briefly conclude here

00:26:18

which is simply to say

00:26:19

that I said at the

00:26:20

outset the real difficulty with

00:26:22

corruption investment treaty claims that

00:26:23

the state's participation is implicit

00:26:25

in the very nature of

00:26:26

corruption is the policy dilemma

00:26:28
at the heart of it

00:26:29
and frankly also quite often

00:26:31
the evidentiary one, which will

00:26:32
be discussed by Mike O'Connell.

00:26:35
Thank you so much. Glad

00:26:37
that was extremely helpful. And

00:26:39
I know her Russian is

00:26:40
such a big topic and

00:26:42
each of us is challenged

00:26:44
to address any aspect of

00:26:47
it in this very short

00:26:48
amount of time. So thank

00:26:49
you so much for doing

00:26:50

such an incredible job of

00:26:51

addressing those aspects. I think

00:26:54

I'd like to hear from

00:26:54

you and what your thoughts

00:26:56

are on the legal aspects

00:26:58

that who ledge address. And

00:27:07

I think I think you're

00:27:07

still on mute. Sorry, I

00:27:11

was thinking to myself what

00:27:12

a time and didn't ask

00:27:13

because Julian has stopped the

00:27:14

pain that everything. I have.

00:27:16

So that can be said

00:27:18

which means I could focus

00:27:20

on the points of Discord.

00:27:22

I'm so full of discussion

00:27:23

between a practitioners and and

00:27:26

Scholars and there is a

00:27:27

general understanding that when an

00:27:31

investment and is procured by

00:27:33

corruption. We we end up

00:27:36

with the tribes, you know,

00:27:37

not exercising a jurisdiction. I'll

00:27:39

give you this can be

00:27:41

by application of the legality

00:27:44

closer to be 80 in

00:27:45

the picture because there would

00:27:48

be no investment to protect

00:27:49

that investment or certain drivers

00:27:53

have found in the in

00:27:54

the absence of the claim

00:27:59

will not be admissible because

00:28:01

of the principal of public

00:28:04

international law. Is that like

00:28:06

memo detour or Clean Hands

00:28:09

Doctrine? or something else. Breezy

00:28:13

Oak View middle schoolers. Zachary

00:28:17

Douglas is one of them

00:28:18

saying that they legality closing

00:28:20

closing vit was not aimed

00:28:23

at precluding situation, whereby an

00:28:26

investment. I have procured by

00:28:28

corruption. The clothes simply said

00:28:30

says to me deals with

00:28:32

the Purcell guide of investment

00:28:34

for example, and if the

00:28:36

national law does not allow

00:28:38

an investment in a specific

00:28:40

industry because of not like

00:28:42

Colton to be days or

00:28:43

something like that. This investment

00:28:45

is not protected by the

00:28:46

bit it snow

00:28:48

every kind of significant legality

00:28:51

or no significant, the guy

00:28:52

leads to a jurisdictional obstacle

00:28:56

and the other elements that

00:29:03

option. Which has taken place

00:29:14

at some point in the

00:29:16

life of the investment and

00:29:17

notes at the beginnings are

00:29:19

all the stages of there

00:29:26

is no clear Trend that

00:29:28

different commercial knows different different

00:29:30

National laws deal with the

00:29:33

effects of corruption in different

00:29:35

ways that are not under

00:29:38

which the contract would be

00:29:40

considered as a Benicio invalid

00:29:43

and a four parties would

00:29:46

be asked to remember the

00:29:48

other of everything that they

00:29:49

have received the contracts and

00:29:53

laws that just give the

00:29:54

option to the victim of

00:29:56

the legality of the correct

00:29:58

option to decide whether to

00:29:59

execute the contract or enforce

00:30:01

it or two to seek

00:30:03

an annulment that off at

00:30:05

cetera. And it's not certain

00:30:09

that we have an international

00:30:10

standard because if we can

00:30:13

follow last number we applying

00:30:14

us know when the dispute

00:30:17

against the state or I'd

00:30:18

held up a contract when

00:30:20

it does not matter. I

00:30:21

just out of a b

00:30:22

a t it is a

00:30:23

big discussion as to what

00:30:24

should the driving I do

00:30:26

should we focus on contributory

00:30:28

and iPhones and reduce damage

00:30:30

is to become seed there

00:30:31

than at the contractual relationship

00:30:35

is a relationship and therefore

00:30:38

sea or the restitution that

00:30:41

is actually very difficult in

00:30:44

practice in such situations. And

00:30:46

the last point I wanted

00:30:49

to make it we can

00:30:50

discuss further and is this

00:30:52

is me the exact point

00:30:59

raised by the ABS against

00:31:01

Romania tribunal said that In

00:31:07

order to base a claim

00:31:10

against the estate on the

00:31:12

request of corruption by the

00:31:14

state and its states seeking

00:31:15

to be paid bribery. The

00:31:19

investor has also proved that

00:31:21

the state so the bribery

00:31:24

acting as some sort of

00:31:25

official capacity, said they weren't

00:31:32

against the same thing. And

00:31:36

and and this is a

00:31:40

general it is it's an

00:31:44

awfully difficult standards to apply

00:31:46

the States official capacity is

00:31:51

no corruption and if it

00:31:53

does not equal to the

00:31:55

stage, which I kind of

00:31:58

money invested between a rock

00:32:00

and a hard place and

00:32:02

just so as to say

00:32:04

that this kind of condition.

00:32:06

Articles on the responsibility of

00:32:09

states for international wrongful act.

00:32:12

Thank you so much are

00:32:20

Tina and I think so

00:32:21

much of what we see

00:32:22

is that there is such

00:32:24

a difficulty in proving corruption.

00:32:27

And and so so many

00:32:28

of these questions arise out

00:32:30

of the fact that the

00:32:31

evidence is difficult to find

00:32:33

and and then and difficult

00:32:35

to present in the arbitration

00:32:37

contact. So I'd like to

00:32:38

go to Pedro now because

00:32:40

Pedro it has a great

00:32:42

benefit of being a cross

00:32:45

practice practitioner. He does both

00:32:48

White Collar work on corruption

00:32:50

investigations and international arbitration and

00:32:53

Pedro is going to talk

00:32:54

to us a bit about

00:32:55

how states do substantiate their

00:32:57

corruption allegations in the criminal

00:32:59

context. And especially when those

00:33:03

investigations are running in parallel

00:33:05

to International Airport. What are

00:33:08

some of the aspects of

00:33:09

the states actions Maybe? Thank

00:33:13

thank you rainbow and and

00:33:14

get good morning. Good afternoon.

00:33:15

Everybody first night my deep

00:33:18

appreciation of the organizers for

00:33:20

the invitation. It really is

00:33:22

a pleasure to be here

00:33:23

with these panels housekeeping and

00:33:27

I are supposed to go

00:33:28

without saying but you know,

00:33:30

I'm a lawyer. I'll say

00:33:30

it. Anyway, I'm joining you

00:33:33

guys today and speak for

00:33:39

Gibson Dunn at B. Printing

00:33:40

client gets them done, but

00:33:43

I did want to share

00:33:43

some thoughts on a based

00:33:45

on experience of different matters

00:33:47

that that I've seen over

00:33:48

the years. My my perspective

00:33:52

is as rainbow was saying

00:33:54

an incoming into this I

00:33:55

worked on International arbitration probably

00:33:58

ten or twelve of them

00:33:59

over the years best cases

00:34:01

both on behalf of claimant

00:34:03

and on behalf of sovereign

00:34:05

states and also commercial arbitration

00:34:07

cases, but I think the

00:34:09

more relevant part of my

00:34:11

perspective is That is certainly

00:34:14

your last I cannot really

00:34:15

focused on White Collar criminal

00:34:19

defense and that is primarily

00:34:21

corruption cases in in a

00:34:24

couple of dozen countries around

00:34:27

the world. So I I'm

00:34:28

kind of high team the

00:34:29

scheme's I've seen the enforcement

00:34:31

actions by different governments and

00:34:34

how you actually get to

00:34:35

prove those cases of the

00:34:38

pit of my perspective on

00:34:40

staying in it. It may

00:34:41

sound funny to say it

00:34:43

is I think Russian is

00:34:45

very easy to prove you

00:34:46

just need the right tools

00:34:48

for it. And I think

00:34:49

the challenges does international arbitration

00:34:52

have those tools available in

00:34:55

quite the same way that

00:34:57

that the cases that I

00:34:58

see on the other side

00:34:59

of the Ledger right criminal

00:35:00

enforcement have them. I'm taking

00:35:05

a step back of the

00:35:06

modern practice that we see

00:35:08

in the white collar bar.

00:35:10

In terms of corruption cases.

00:35:12

It has been tremendously Effective

00:35:14

Government. Didn't you all have

00:35:17

seen the headlines are our

00:35:19

regularly racking up. He'll hundreds

00:35:22

of millions. If not billions

00:35:24

plus dollar penalties in settling

00:35:27

corruption cases around the world

00:35:29

challenges that that a lot

00:35:33

of the things that work

00:35:34

in that context are not

00:35:36

available here. Right and I

00:35:38

wanted to share some of

00:35:39

those things that I did.

00:35:40

I think it worked. The

00:35:42

first is it if you

00:35:43

take the top 10 enforcement

00:35:44

matters for corruption around the

00:35:46

world and I say this

00:35:49

again from the perspective of

00:35:50

the US while you're so

00:35:50

focused primarily on actions by

00:35:52

the US Department of Justice

00:35:54

of the US Securities and

00:35:56

Exchange Commission those cases go

00:35:58

from like \$759 to 3

00:36:01

+ billion dollars in pounds.

00:36:03

Every single one of those

00:36:05

cases again talking about the

00:36:06

top 10 every single one

00:36:07

of those cases has one

00:36:08

thing in common, which is

00:36:10

the person that use the

00:36:11

end of the accused of

00:36:12

corruption has come in and

00:36:13

cooperate voluntarily. So I'm getting

00:36:17

all interior stays a bit

00:36:18

of a funny turn right

00:36:19

now come in and self-disclose

00:36:22

the contact but when they've

00:36:23

been approached by the government,

00:36:24

they've all cooperated and cooperation

00:36:26

mean you are normally when

00:36:29

some of these cases You

00:36:30

are conducting their own investigation

00:36:32

your training over your giving

00:36:34

the government presentations of that

00:36:35

investigation you're off in producing

00:36:37

hundreds of thousands of pages

00:36:39

of documents to the government

00:36:40

showing the corruption you are

00:36:43

sharing a train work product

00:36:45

you are engaging forensic accountants

00:36:49

that will analyze transaction and

00:36:52

then sharing the results of

00:36:53

that with the government. So

00:36:54

the government is touting all

00:36:55

these cases that it that

00:36:56

is able to resolve but

00:36:57

really it's not just unsure

00:36:59

investigative power you have the

00:37:01

number one incentive is Otherwise

00:37:03

defendants are coming in and

00:37:05

providing the information. Obviously that's

00:37:07

not available in the context

00:37:09

of international arbitration another huge

00:37:12

tool that isn't available in

00:37:13

the show the example the

00:37:18

US Securities and Exchange Commission

00:37:20

will pay between 10 and

00:37:21

30% of the amount that

00:37:23

whistleblower of the scheme that

00:37:25

whistle blower blow the whistle

00:37:26

on the largest awarded is

00:37:29

over a quarter billion dollars

00:37:31

that has been given to

00:37:32

a whistleblower who came and

00:37:33

reported back to the incentives.

00:37:35

There are very very different.

00:37:38

I would also note that

00:37:39

is it in the context

00:37:41

of arbitration tribunals. A lot

00:37:44

of the criminal tools that

00:37:45

you would have again setting

00:37:47

aside cooperation setting aside The

00:37:49

Whistleblower just start out right

00:37:51

whether it's a wiretap, whether

00:37:55

it's a mutual legal assistance

00:37:57

request, right so-called emblems, whether

00:38:00

it's subpoena write an arbitration

00:38:01

tribunal isn't doing any of

00:38:03

those things because I can't

00:38:04

and so that is a

00:38:05

huge challenge to how evidence

00:38:07

can be gathered. But I

00:38:10

wanted to touch on one

00:38:11

wrinkle that I think is

00:38:12

even more interesting which is

00:38:14

why we often talked about

00:38:15

the claimants engaged in corrupt,

00:38:18

right? If you bribe someone

00:38:20

to get that can bribe

00:38:21

someone to get that license

00:38:23

or to get that deal.

00:38:24

I think the image there

00:38:27

is is relatively clear for

00:38:28
all of us and our

00:38:29
heads but I think a

00:38:31
a more difficult scenario is

00:38:33
perspective is what happens when

00:38:35
the claimant is alleging that

00:38:36
the state has acted wrong

00:38:38
because they're obviously the state

00:38:40
the state has some tools

00:38:42
and can rely on his

00:38:43
law enforcement a attitude and

00:38:45
wire tap phones if and

00:38:47
pull account records at 10

00:38:48
go to bank to get

00:38:49

that information least domestically Clements

00:38:52
don't have it. So I

00:38:53
think a a a a

00:38:54
a huge challenge is what

00:38:58
happens in a situation tonight.

00:38:59
I seen it in some

00:39:00
of my manners we are

00:39:01
the private claimant is affirming

00:39:03
that the state has tried

00:39:05
to extort them in some

00:39:07
way in the claimant has

00:39:07
refused right to vote. Bribery

00:39:09
that the state has tried

00:39:11
to extort him in some

00:39:12

way and the challenges, you

00:39:14

know, the claimant makes bile

00:39:16

a local request for an

00:39:17

investigation with the local authorities,

00:39:19

but there is a perverse

00:39:21

incentive for States not to

00:39:23

act on those investigations not

00:39:24

to find the wrongful conduct

00:39:26

because if it did it

00:39:27

would severely hurt his chances

00:39:29

in an arbitration proceeding. There

00:39:39

are other challenges when it

00:39:40

comes to evidence that in

00:39:42

the start of the criminal

00:39:43

enforcement world. We see the

00:39:45

first is that over 90%

00:39:48

of the criminal actions that

00:39:50

have been resolved in the

00:39:51

US under the foreign bribery

00:39:53

laws have involved misconduct by

00:39:55

Third parties. In other words

00:39:57

was in the company necessarily

00:39:58

but they hired a consultant

00:40:00

that went out and did

00:40:01

the did the deed if

00:40:02

you will that is obviously

00:40:04

it's quite funny challenging position

00:40:06
for a tribunal to be

00:40:08
in because it's not even

00:40:09
the parties in front of

00:40:11
it that are necessarily going

00:40:12
to have all the evidence

00:40:13
and documentation. But rather you're

00:40:15
getting into the world of

00:40:16
of third parties and I

00:40:17
think frankly tribunals have a

00:40:19
very difficult and there because

00:40:22
it did was very limited

00:40:23
in what they can. The

00:40:26
other, and I'll make it

00:40:27

again in the spirit of

00:40:28

of of a wrapping things

00:40:30

up here with with time

00:40:31

is there are countries were

00:40:33

this is a lot harder

00:40:34

to write. So even if

00:40:36

you have international legal cooperation,

00:40:38

and by the way, this

00:40:39

happens all the time that

00:40:41

UK cooperate tremendously with the

00:40:43

US the French authorities a

00:40:45

German authorities the Brazilian authorities

00:40:46

are all very good. I

00:40:48

just want to investigate these

00:40:49

matters. Even. If you have

00:40:52

that cooperation, your other countries

00:40:54

that are just hard right

00:40:55

Switzerland famously refused for for

00:40:58

forever to provide banking records

00:41:00

on account of privacy won't

00:41:02

go get it the kind

00:41:03

of thing that makes finding

00:41:04

corruption a lot harder for

00:41:07

chicorelli. If you're an international

00:41:08

tribunal, it doesn't have these

00:41:09

tool. The final point I'll

00:41:12

make Injustice 2 in the

00:41:13

spirit of a thought discussion

00:41:15

hearing. What do you do

00:41:16

in a case in which?

00:41:19

8A state with access to

00:41:21

its resources without access to

00:41:23

wiretap in Pinos and bank

00:41:25

records and everything at least

00:41:26

within its own jurisdiction claims

00:41:28

that its found that it

00:41:29

has corruption and sound corruption

00:41:31

by the claimant and then

00:41:33

swings and misses and I'm

00:41:35

thinking of a matter of

00:41:36

where estate presented, you know

00:41:38

of wiretap records and the

00:41:41

wire kept records in the

00:41:42

oven. Should that move the

00:41:44

tribunal to say look if

00:41:46

if you come in and

00:41:48

you will let corruption and

00:41:50

you swing and you miss

00:41:51

does that should that itself

00:41:53

a kind of move the

00:41:55

needle from your perspective really

00:41:57

believe that option. That did

00:41:59

or didn't happen without I

00:42:01

apologize. Thank you so much

00:42:09

Pedro that was super interesting

00:42:11

and I think extremely helpful

00:42:14

to our audience because we

00:42:16

don't get the opportunity to

00:42:17

hear from people who are

00:42:18

saying this from the criminal

00:42:20

and Regulatory enforcement side are

00:42:22

very regular basis. I'm glad

00:42:24

I'd like to turn to

00:42:25

you to hear what you

00:42:26

have to say about Pedro's

00:42:28

thoughts from the international arbitration

00:42:30

perspective. Thank you, a thank-you

00:42:33

Pedro I get to to

00:42:35

Fox come to mind having

00:42:36

one of them as Pedro

00:42:38

very clearly showed explored save

00:42:40

the tools that are available

00:42:41

in investigations are proceeding domestically

00:42:44

in the US Senate in

00:42:45

particular and for me what

00:42:47

sort of stood out I

00:42:48

guess is some of the

00:42:50

authorities or government bodies that

00:42:52

he referred to other estate

00:42:53

deal J or the SEC

00:42:54

in this earth police powers

00:42:56

that are available to them

00:42:56

for the purpose of Investigation

00:42:58

or collecting evidence and the

00:43:00

fact that voluntary cooperation accursed

00:43:03

out off Matthew speaks to

00:43:05

those Powers, which can easily

00:43:06

be replicated by International tribunals.

00:43:10

The other point, which I

00:43:12

think is wrong for throwing

00:43:13

some attention to sort of

00:43:14

the game player threshold issue

00:43:15

around corruption allegations, which is

00:43:18

whether or not a state

00:43:19

for example, bring the defense

00:43:21

it all before we even

00:43:22

get the topic of evidence.

00:43:23

Right and that it question

00:43:25

itself is a very complicated

00:43:26

woman. What if it's the

00:43:28

the same Administration that that

00:43:31

accepted the bribe Bring it

00:43:33

up as a defense. What

00:43:34

if it's a different sort

00:43:36

of government bodies 12 actually

00:43:38

defend the states in the

00:43:39

relevant proceedings. And another one

00:43:41

that was involved involved in

00:43:42

the exception of the investment

00:43:44

itself. And so a lot

00:43:46

of these questions do come

00:43:47

up in in the early

00:43:49

stages and I'm sure there

00:43:50

are perhaps more instances and

00:43:52

investment for the arbitration where

00:43:53

corruption could be raised as

00:43:55

a valid defense wear for

00:43:57

one reason or another out

00:43:58

of expediency. It's decided not

00:43:59

to actually instead of decisions

00:44:02

made to bring other jurisdiction

00:44:03

objections were objections based on

00:44:05

on the Merritt. So I

00:44:06

thought I'd find that. It's

00:44:07

often complicated Gateway Worship with

00:44:09

her not to bring up

00:44:10

the defense or even bring

00:44:12

for the evidence SS bigger

00:44:14

mentioned. There are certain interested

00:44:16

parties that might affect the

00:44:18

state's ability to bring that

00:44:19

forward. Thank you so much

00:44:26

for let that sit. It's

00:44:28
all very interesting and Athena.

00:44:29
I'm going to go to

00:44:30
you now. We have touched

00:44:31
on so many different aspects

00:44:34
of corruption claims today from

00:44:37
the differing standards of proof

00:44:39
that have been applied to

00:44:41
weather depending on the evidence

00:44:44
and when the corrupt acts

00:44:46
occurred whether it is impact

00:44:48
jurisdiction or the merits and

00:44:51
so I'd like to hear

00:44:52
from you on the types

00:44:55

of takeaways that we have.

00:44:58

What are the best practices

00:44:59

that an arbitral tribunal can

00:45:01

apply when they are addressing

00:45:04

corruption claims? Thank you. Thank

00:45:11

you very much rainbow for

00:45:12

the question. And again that

00:45:16

are many aspects of the

00:45:24

arbitration. We look at what

00:45:27

is certain is that arbitrators

00:45:30

have to have corruption somewhere

00:45:32

in the back of their

00:45:33

minds and to be aware

00:45:36

of the evolving standard as

00:45:38

to what is corruption, of

00:45:40

course correction today. He's a

00:45:45

14 in every place globally

00:45:48

to the difference between Indio

00:45:59

be in influence and low

00:46:01

beam which is relevant for

00:46:03

arbitrators to to to know

00:46:05

just just remind him to

00:46:07

give her that we are

00:46:08

discussing about we haven't African

00:46:10

Focus today that the Africans

00:46:13

Union convention on preventing and

00:46:15

combating Corruption. It has been

00:46:18

ratified by practically. I have

00:46:21

a totality of African States.

00:46:26

Another another point that tribunal

00:46:32

should I take into account

00:46:34

is not there is a

00:46:36

shape of their their their

00:46:38

their RB convention. But also

00:46:43

there are my checklist by

00:46:45

several institutions to ask the

00:46:48

red flags as to what

00:46:49

they drive. You know, what

00:46:50

what foods raise the eyebrows

00:46:54

overdrive. You know what I

00:46:55

should bring their bathing suits

00:46:57

is there to the fact

00:46:58

that there may be some

00:47:00

photo of some sort of

00:47:01

Corruption of troll times in

00:47:03

the case and there are

00:47:08

very few checklists corruption. There

00:47:16

is a very famous Lord

00:47:18

rules for a report on

00:47:20

business ethics and the base

00:47:22

that used to choose on

00:47:23

Governors have also provided a

00:47:25

cute turkey for You traitors

00:47:27

with such a red flag

00:47:28

list and Barbie at the

00:47:31

same time count that red

00:47:35

flags have being developed in

00:47:38

the account and do the

00:47:41

regions and and processes that

00:47:43

Enterprises in action in order

00:47:48

to combat corruption. They they

00:47:50

do not necessarily to burden

00:47:58

of proof and proven corruption

00:47:59

and and there's something that

00:48:01

is not worth cuz I

00:48:02

wanted to race with you

00:48:03

is that regards to something

00:48:07
that is a red flag

00:48:08
a decision of a state

00:48:09
to ground a conversation with

00:48:11
outside proceeding through a rebuilding

00:48:13
process. We have no thingy

00:48:19
that has a red flag,

00:48:20
but deciding differently in the

00:48:23
Bowl against turn to low

00:48:24
2022. Decision in the court

00:48:29
of appeal of Paris used

00:48:31
it as a red flag

00:48:32
supporting the timing of corruption

00:48:34
in the Congo against the

00:48:38

cast of Psych on site

00:48:39
on CJ's or in the

00:48:41
guinea against global voice. Okay,

00:48:43
so it's a red flag,

00:48:45
but it's not a proof

00:48:47
on its own and in

00:48:49
another point, but it is

00:48:50
very relevant. Is that sometimes

00:48:52
we see used in arbitration

00:48:55
as a red flag the

00:48:57
fact that the accounting equation

00:48:59
has every option index. And

00:49:04
again, this is fine as

00:49:05
a red flag. When what

00:49:07
is at stake is the

00:49:08
process that the Enterprise would

00:49:09
put forwards to do to

00:49:11
fight corruption. But when an

00:49:14
arbitrator uses it as a

00:49:16
red flag for corruption the

00:49:18
line between using a red

00:49:20
flag and just being biased

00:49:22
is everything in my mind

00:49:27
if we have time the

00:49:35
question as to whether the

00:49:38
Tribune is under a beauty

00:49:39
to investigate corruption and whether

00:49:42

the tribunal has the means

00:49:43

to investigate corruption will allow

00:49:46

me a couple of minutes

00:49:47

to to deal with with

00:49:49

me to draw the basic

00:49:53

Airlines of discussion because again,

00:49:54

there's a lot to be

00:49:55

said, but as we already

00:49:57

discussed in this panel The

00:50:00

duty to fight corruption is

00:50:02

considered to be part of

00:50:03

public policy today and also

00:50:08

form part of the arbitrator's

00:50:09

duty to ensure the enforceability

00:50:12

of the award. But what

00:50:15

can I do to do

00:50:16

and what can an arbitrator

00:50:17

don't in order to investigate

00:50:18

corruption is a big discussion

00:50:20

and and of course Pedro

00:50:21

has already passed upon and

00:50:25

but it is to think

00:50:30

in terms of the two

00:50:32

main a diverging approaches also

00:50:36

to the tribunal has ruled

00:50:38

in contacting the proceedings and

00:50:41

there is no inquisitorial approach

00:50:43

and the adversarial approach. We've

00:50:48

been crazy toriel approach that

00:50:50

we seen very many civil

00:50:51

law system. For example of

00:50:53

the arbitrator is very actively

00:50:56

involved in investigating. The facts

00:51:00

of the case and therefore

00:51:02

investigate factual elements on their

00:51:07

own initiative. All the other

00:51:12

hands made me come on

00:51:13

low countries mostly adversarial approach

00:51:19

which focuses on the party

00:51:22

autonomy and According to which

00:51:25

the parties are the players

00:51:27

who should bring their in

00:51:30

the necessary evidence. What's a

00:51:33

dragon I can do or

00:51:34

cannot do is also a

00:51:35

matter of who we be

00:51:38

the jobs controlling the decision

00:51:39

of the tribunal if the

00:51:41

controlling jobs for nose anniversary

00:51:43

approach. The tribunal has some

00:51:47

possibility to investigate corruption at

00:51:50

least one party has a

00:51:52

large states and enter for

00:51:54

the RAV4 and see if

00:51:57

I can take play with

00:52:02

the evidential burden of proof

00:52:05

Etc is the inquisitorial approach.

00:52:16

Is there any way that

00:52:17

the arbitrator has is much

00:52:20

wider is a 30-ton on

00:52:23

their own account but raised

00:52:26

questions of corruption and ask

00:52:28

the parties to discuss days

00:52:30

in the proceedings and possibly

00:52:32

as a steak on the

00:52:33

stove and enclosing and following

00:52:41

up on what Calum has

00:52:42

eyes of the very beginning.

00:52:43

Today what the french judge

00:52:45

asks from the arbitrator's is

00:52:48

exactly to take such a

00:52:49

very active approach when I

00:52:51

went to see the obituaries

00:52:52

in France. And when the

00:52:54

French John will be the

00:52:56

control judge of the arbitration

00:52:58

award. Thank you so much.

00:53:02

I think I think those

00:53:03

are those are very good

00:53:05

pointers for arbitrators and also

00:53:07
some very tricky questions that

00:53:10
we are all struggling with

00:53:12
that as we look at

00:53:14
issues of corruption. Tell him

00:53:15
I'd like to go to

00:53:16
you because you started out

00:53:17
by introducing us to some

00:53:19
of what has happened in

00:53:20
the French courts over the

00:53:21
past year and I'd like

00:53:23
to hear what you think

00:53:24
about what Athena has just

00:53:26
talked about in terms of

00:53:27

you know, what weather going

00:53:29

to control court is going

00:53:31

to end how control courts

00:53:33

have acted in particular for

00:53:35

arbitration seated in France and

00:53:37

how that may impact our

00:53:39

virtual practice. I mean, I

00:53:43

agree with what I have

00:53:45

to say. I've been thinking

00:53:47

about the different standards that

00:53:50

you would apply depending on

00:53:51

your feet. Right and if

00:53:52

you were lucky enough, but

00:53:55

I'm going to have a

00:53:56

seat seated in Paris. You

00:53:58

have more power inquisitorius Powers

00:54:00

available to you. Even if

00:54:01

you come from a coma

00:54:02

background versus if you were

00:54:04

you asked where you were

00:54:06

so it makes me a

00:54:17

bit nervous. I don't disagree

00:54:19

but I bet it has

00:54:20

that it's part of the

00:54:21

calculus and we have to

00:54:22

be we have to know

00:54:23

what's happening in France was

00:54:24

interesting the French ports frame

00:54:25

it as a matter of

00:54:27

not not reviewing the merits

00:54:30

of the underlying award. But

00:54:32

but just reviewing the Conformity

00:54:34

of the Year Award with

00:54:35

fresh public policy and international

00:54:37

principles, so it's not that

00:54:40

there's no essential at that

00:54:42

it's not really about the

00:54:43

merits but it's about conforming

00:54:45

to the public policy principles

00:54:47

of the system in which

00:54:48

that award exist, but are

00:55:04

what's happening in that jurisdiction

00:55:06

where you sit just a

00:55:09

logical conclusion makes me a

00:55:10

bit nervous or there wouldn't

00:55:11

be uniform standard and perhaps

00:55:12

that's part of what the

00:55:13

recommendation of approach for tracking

00:55:18

knows that transcends Civil War

00:55:21

on, you know, whether any

00:55:34

of this has to Review

00:55:41

corruption evidence particularly post-award corruption

00:55:44

evidence. So I'll leave it

00:55:47

at that. I would just

00:55:47

make one quick, It's on

00:55:49

the right side is evolving

00:55:53

in the context of that

00:55:55

was something that we we

00:55:56

found interesting and in writing

00:55:58

this paper on the illegality

00:55:59

of which was everything short

00:56:01

of corruption where you you

00:56:03

see there are cases where

00:56:05

the due diligence standard to

00:56:08

which the investor is held

00:56:09

very spry. There's a strict

00:56:11

liability kind of standard to

00:56:12
use your help to you.

00:56:15
You were supposed to have

00:56:16
done your due diligence and

00:56:17
somehow you were also due

00:56:19
to make any investment. Well,

00:56:20
that's too bad. You're you're

00:56:21
strictly liable anyway, and then

00:56:22
and others will have a

00:56:27
very quiet and we'll kind

00:56:30
of way it and besides

00:56:31
well, you know, you didn't

00:56:33
know if you didn't do

00:56:33
enough, you know, you saw

00:56:35

this one was you didn't

00:56:36

see this and then some

00:56:40

Cases that says it doesn't

00:56:42

even look at it. Just

00:56:54

come back in the context

00:56:56

of the effects of the

00:57:06

French the very recent friend

00:57:10

should approach the court the

00:57:13

court of appeal to hear

00:57:17

for the first time allegations

00:57:19

of corruption and and and

00:57:20

the investigate these allegations for

00:57:23

the first time allegations that

00:57:24

have not been heard from

00:57:25

the tribunal I taste of

00:57:29

Killeen mentioned is highly criticized.

00:57:40

Alex has been her usual.

00:57:47

Pedro what are your thoughts

00:57:48

on these issues from the

00:57:50

world of criminal and Regulatory

00:57:52

enforcement. There was one in

00:58:01

particular that that really recorded

00:58:04

me which is your reference

00:58:05

to print sample. The corruption

00:58:07

perception index has the so-called

00:58:09

CPI than any rate of

00:58:11

deck since it's a very

00:58:12

thoughtful word product from Transparency

00:58:14

International repeated organization. And and

00:58:19

I completely get my the

00:58:20

Hardy right it I think

00:58:22

it provides invaluable context but

00:58:25

it can also become kind

00:58:27

of a ritual of prejudice

00:58:28

or biased you say, well,

00:58:29

you know, I'm lazy to

00:58:32

say well look investment in

00:58:33

country X automatically must be

00:58:36

tainted by Copying setting in

00:58:38

our kind of criminal enforcement

00:58:39

practice. It isn't an important

00:58:41

tool reference. I have sat

00:58:45

across the table from the

00:58:46

justice department on countless occasions

00:58:47

and the discussion is off

00:58:50

and well, you know, hold

00:58:51

on. You said your clients

00:58:52

did this level of diligence

00:58:55

on your third party, but

00:58:57

they're operating in this market,

00:58:58

you know, this Market is

00:58:59

riskier, right? And so there

00:59:01

is a certain element where

00:59:02

I get the popped up

00:59:04

the possibility that its use

00:59:06

them properly or as a

00:59:07

lazy short cord or something,

00:59:08

but it's also a reality

00:59:09

of the world almost feels

00:59:12

like to borrow the US

00:59:14

the legal standard of willful

00:59:16

blindness, right it almost feels

00:59:17

like willfully blind of an

00:59:19

arbitrator not to take into

00:59:21

account that there are certain

00:59:23

markets where unfortunately no corruption

00:59:26

is Joe institutionalized that it

00:59:28

it feels to me like

00:59:29

that. They should take into

00:59:31

account. That is an investment

00:59:33

in X sector in X

00:59:35

country should We get a

00:59:37

closer look as to whether

00:59:39

everything was done a bunk

00:59:40

board or not. I get

00:59:41

that it's a very hard

00:59:43

issue but I think that

00:59:45

you identified as an exceptionally

00:59:48

helpful tool that arbitrators could

00:59:49

use as a as a

00:59:51

reference not a decisive issue,

00:59:53

but a reference the only

00:59:55

other come grab my mobile

01:00:02

device us aggressive lawyer. I

01:00:05

need to be more aggressive

01:00:08

in in asking pointed questions

01:00:11

and connecting the dots. I

01:00:13

think often times it in

01:00:15

my experience and and I'm

01:00:16

I'm know I'm no expert

01:00:18

on arbitration. But in my

01:00:19

experience arbitrators are happy to

01:00:21

be briefed on issues. They

01:00:23

are happy to get the

01:00:24

mission from the parties. They're

01:00:25

very deferential to giving both

01:00:27

parties a chance to be

01:00:28

heard and all that. But

01:00:30

they don't often ask they're

01:00:31

really harder questions of connecting

01:00:33

the dots you no matter

01:00:35

comes to mind where there

01:00:37

are several government officials that

01:00:39

are now under arrest and

01:00:41

they're under arrest in a

01:00:42

fact pattern that is strikingly

01:00:44

similar to what the claimants

01:00:46

have raised and I would

01:00:48

love to see the arbitrator

01:00:49

sit down and and just

01:00:51

say to that particular respondent

01:00:53

help me out here, you

01:00:55

know, you say there's no

01:00:56

corruption. But this person is

01:00:57

under arrest this person is

01:00:58

under arrest as persons under

01:00:59

arrest and it took to

01:01:02

give it my us raise

01:01:03

make it make sense for

01:01:04

me and putting putting parties

01:01:07

whether it's a claimin ora

01:01:08

Ora Ora Ora Ora Ora

01:01:10

explain it I think is

01:01:17

a is a you know,

01:01:19

I think that's a better

01:01:20

approach until I would I

01:01:22

would encourage her to borrow

01:01:25

the old phrase connect the

01:01:26

dots 2210 do that exercise

01:01:28

not just sit back and

01:01:29

wait for some Olivia cross

01:01:31

examination results were they stay

01:01:33

naked make sense? Because I'm

01:01:35

seeing all these red flags

01:01:36
and I want you guys

01:01:37
to answer it directly for

01:01:39
me. Yeah, that's a very

01:01:44
interesting point and we are

01:01:45
at we are doing extremely

01:01:46
well on time. We do

01:01:47
have some questions from the

01:01:49
audience but picking up and

01:01:51
let Pedro just said I'd

01:01:52
like to pose a question

01:01:53
to Google add before I

01:01:54
turn to the questions from

01:01:56
the audience, which is what

01:01:57

do you do when you

01:02:00

have a situation like the

01:02:01

one that Pedro has just

01:02:02

described or the one that

01:02:04

Athena opposed which is neither

01:02:06

party is raising the claim

01:02:09

of corruption, but you have

01:02:11

either a situation where the

01:02:15

the officials involved in the

01:02:17

investment have all been arrested

01:02:19

in another corruption scheme suggesting

01:02:22

that maybe there was corruption

01:02:23

in this investment as well

01:02:25

or you simply have nothing

01:02:27

more than the corruption index

01:02:30

suggesting that corruption could be

01:02:32

present. But neither party is

01:02:34

Raising it they they seem

01:02:35

to want to avoid it

01:02:36

in the arbitration. So glad

01:02:38

what what do you think

01:02:39

is the right thing to

01:02:40

do in that situation? Yeah,

01:02:42

I mean I just one

01:02:44

quick when I get something

01:02:45

on the index itself. I

01:02:46

think Pedro put it well

01:02:47
that it makes sense to

01:02:49
look at it as part

01:02:50
of a multifactorial tester assessment.

01:02:52
And as a Theater award,

01:02:53
it's not it shouldn't be

01:02:55
decisive on on on the

01:02:56
given matter in terms of

01:02:58
how you would proceed in

01:02:59
circumstances where neither party has

01:03:03
raised allegations of corruption. I

01:03:06
think that ultimately will turn

01:03:07
on but on the tribunal

01:03:08
so you don't have to

01:03:10

be satisfied of their own

01:03:11

jurisdiction in proceedings. If they

01:03:14

have good reasons to believe

01:03:15

that there was a risk

01:03:16

of corruption at the time

01:03:18

of investment and therefore they

01:03:20

may not have jurisdiction over

01:03:21

the relevant dispute. They should

01:03:24

have their own initiation look

01:03:25

into the matter and raised

01:03:26

the matter because it's simply

01:03:28

not feasible for me to

01:03:30

turn their eyes away from

01:03:32

the possibility that they don't

01:03:33

have jurisdiction over a given

01:03:34

dispute. I mean, I think

01:03:36

that's that's sort of where

01:03:37

is Pedro mentioned some of

01:03:39

the new courage for a

01:03:42

given treadmill really hasta to

01:03:43

come up and I know

01:03:45

that unfortunately speaking frankly can

01:03:47

be a bit complicated sometimes

01:03:49

where we have a system

01:03:50

that's dependent on repeat appointments.

01:03:53

And so therefore you don't

01:03:54

always, you know, you fine

01:03:55
or betray his maybe in

01:03:56
certain circumstances hesitant to shake

01:03:58
the tree a little bit

01:03:59
you can imagine this is

01:04:01
probably one of the arguments

01:04:01
that people make for more

01:04:03
permanent eye institution to assess

01:04:05
investment treaty claims, but but

01:04:08
I think it's absolutely fundamental

01:04:09
that that's looked into Inception.

01:04:13
Yeah, that's very true. And

01:04:16
I'm going to pose another

01:04:17
question for anyone who wants

01:04:19

to answer it which is

01:04:20

in what do you do

01:04:21

when there is evidence of

01:04:23

corruption that was not at

01:04:25

the outset but let you

01:04:27

know but has arisen during

01:04:28

the course of the investment.

01:04:30

Is that a red flag

01:04:32

that investment that corruption could

01:04:34

have occurred also at the

01:04:35

outset or how how else

01:04:37

might that impact the investment

01:04:39

in an arbitration. And then

01:04:41

also what we have seen

01:04:43

tribunal's like the one in

01:04:45

petrobrangla where they found that

01:04:48

if Brian has been paid

01:04:49

at the outside of the

01:04:50

investment, but that no benefit

01:04:52

had had inured to the

01:04:56

investor and as a result,

01:04:57

they determined that they did

01:04:59

have jurisdiction on so I

01:05:01

guess my question to the

01:05:03

panelists know what what do

01:05:05

you do in those situations

01:05:06

that based on the most

01:05:08
recent developments that we've seen

01:05:09
and in France and otherwise

01:05:15
If I may have just

01:05:16
come in on the last

01:05:17
one because it doesn't Echo

01:05:19
what what we saw and

01:05:20
Emma versus Croatia, which is

01:05:22
this having to link from

01:05:25
you propose to bribe. You

01:05:29
investor bribed ex-official successfully in

01:05:33
order to get in return

01:05:34
a benefit wish you didn't

01:05:35
receive because of the narrative

01:05:38
and so I could see

01:05:41
if you followed that kind

01:05:43
of height and standard and

01:05:45
Analysis saying well, you didn't

01:05:47
actually you're successful and your

01:05:49
bribe. So there is there's

01:05:51
no completion of the other

01:05:54
crap that she followed that

01:05:57
line of thinking and there's

01:06:00
no there's no but I

01:06:04
know that's right. We can

01:06:05
debate that but it certainly

01:06:06
sounded to me a lot

01:06:07

like this heightened causal cause

01:06:10

a causal link chain. If

01:06:16

I can just offer a

01:06:17

brief comments on that one

01:06:18

lawyer happier on but under

01:06:24

us law particular Foreign Corrupt

01:06:26

Practices Act, which is the

01:06:27

law that governs bribery of

01:06:29

non US government officials and

01:06:31

offer or a promise to

01:06:33

pay whether or not he

01:06:34

pain is is considered by

01:06:36

a payment an author of

01:06:38

promise to pay whether or

01:06:39

not you receive what you

01:06:40

bargained for is still write

01:06:42

under us walk. So I

01:06:44

think it is again for

01:06:45

my for my option practitioner

01:06:48

perspective anti-corruption anti-corruption practitioner perspective.

01:06:53

If you go to and

01:06:56

you promised that someone will

01:07:02

approach a public procurement officer

01:07:05

at Ministry of whatever and

01:07:07

say if you get me

01:07:08

this contract, I will get

01:07:09

you X if I'm awarded.

01:07:10

I'll cut your back 10%

01:07:12

Got me a promise or

01:07:14

offer that you will pay

01:07:16

in the event that you're

01:07:17

actually granted that contract is

01:07:19

a bright. So that's different

01:07:22

perhaps and in the arbitration

01:07:24

you were the one on

01:07:26

the US perspective. Comments on

01:07:34

recent case but he's applying

01:07:41

the standard. That's a very

01:07:44

old standard kind of. All

01:07:46

right. Listen to tell me

01:07:46

my we visit very very

01:07:49

high standard for finding corruption.

01:07:51

We no longer receiving. I'm

01:07:56

in the truck now seek

01:07:59

more to to investigate there

01:08:01

the cases and exactly the

01:08:03

other point is that if

01:08:04

we we searched to find

01:08:05

always a causal link between

01:08:06

everything and we just don't

01:08:10

follow the definition of corruption

01:08:12

as it appears today in

01:08:15

international conventions and another instruments.

01:08:21

Yeah, I think that's exactly

01:08:22

right. And this also we

01:08:24

had a question from the

01:08:25

audience about whether non-financial benefits

01:08:30

given to government officials could

01:08:33

constitute corruption and international arbitration

01:08:36

and I think everything we

01:08:37

just discussed really responds to

01:08:39

that. I'm going to go

01:08:40

now to a another question

01:08:42

that we have from the

01:08:43

audience which is if the

01:08:44

corrupt acts has taken place

01:08:46

outside of the host 8eg

01:08:48
payments into offshore accounts. Would

01:08:51
there be any impact on

01:08:52
the applicable law to determine

01:08:53
if corruption occurred and would

01:08:56
host state laws must be

01:08:57
relevant and so maybe pay

01:09:00
through I see if not,

01:09:01
I'm going to go to

01:09:01
you first from the criminal

01:09:03
perspective because I think the

01:09:05
answer is probably similar but

01:09:07
somewhat with 70 wants two

01:09:10
differences between the two areas

01:09:12

of law. Would look at

01:09:21

it more as was it.

01:09:23

Was it a corrupt back

01:09:24

in relation to the investigation

01:09:25

right often times by definition.

01:09:28

It will be an offshore

01:09:29

act because it's moving money

01:09:31

offshore and stuff from a

01:09:32

different perspective frankly are our

01:09:35

friends of the justice department

01:09:36

are quite creative in finding

01:09:38

a way to say that

01:09:39

it was an act that

01:09:40

touch the us whether it

01:09:42

was a transaction into bank

01:09:43

accounts and happened to be

01:09:44

denominated in US dollars or

01:09:46

that went through a server

01:09:47

in the US the jurisdiction

01:09:49

part from a Kronos perspective

01:09:51

almost becomes easier, but I

01:09:55

think it would be is

01:09:58

it or corruption or this

01:09:59

kind of money laundering stores

01:10:01

in rubber case maybe that

01:10:02

is a wedge in relation

01:10:03

to the investment at the

01:10:04
issue. And I think if

01:10:06
if the answer is yes,

01:10:07
then again my own ignorance

01:10:09
Barbra Streisand, I don't I

01:10:11
don't see how that would

01:10:12
necessarily change the count this

01:10:13
much. Yeah, I mean I

01:10:17
just from my perspective I

01:10:19
guess there is there's the

01:10:20
whole state law requirements most

01:10:24
instances. We mention of some

01:10:25
Modern crushin walls will have

01:10:27
some extra territory affect, right?

01:10:30

So for example under the

01:10:32

UK bribery act bribery or

01:10:36

corruption that takes place by

01:10:37

anyone linked to the UK

01:10:39

whether it's a resident or

01:10:39

national and it's against their

01:10:41

foreign officials will be captured

01:10:42

as well because naturally these

01:10:44

schemes are organized and in

01:10:47

very convoluted and Austin extraterritorial

01:10:49

manner, but even let's say

01:10:52

for a moment that the

01:10:54

relevance of local laws and

01:10:55

regulations don't capture such conduct

01:10:58

as I mentioned earlier. It's

01:11:00

not simply in cases where

01:11:02

has been required to comply

01:11:04

with local laws and regulations

01:11:05

that crushes down to deprive

01:11:06

the tribunal of of jurisdiction.

01:11:09

There is also a Reliance

01:11:10

on more general principles of

01:11:12

good faith in otherwise, so

01:11:14

it hasn't always been the

01:11:15

case that has been reliance.

01:11:16

Express treaty language, so that

01:11:19

would certainly cut across it

01:11:20

as well. That makes sense

01:11:26

that we have a comment

01:11:27

about the fact that there's

01:11:29

not a widely accepted definition

01:11:31

of corruption and international treaties.

01:11:33

I think maybe I'd like

01:11:35

to go to you because

01:11:35

you spoke a little bit

01:11:36

about where tribunal's may look

01:11:39

to find both guidance on

01:11:41

the definition of corruption and

01:11:44

on red flags. You know,

01:11:46

what where do you think

01:11:48

tribunal should look for this

01:11:49

definition? And is there is

01:11:51

there a good definition that

01:11:52

works across International arbitration and

01:11:55

in particular across investment arbitration?

01:11:59

You're assuming I hadn't eaten

01:12:01

in the question as to

01:12:08

what no reply to the

01:12:11

existence of notes of corruption.

01:12:16

Is not linked with necessarily

01:12:18

with the whole states l

01:12:20

o i mean that provides

01:12:27

us together as to what

01:12:30

is the corruption and can

01:12:32

you connect to National instruments

01:12:33

instruments be signing corruption themselves,

01:12:45

but also providing assistance to

01:12:49

arbitrators and and and empathy

01:12:54

sand companies with regard to

01:12:56

what kind of practices are

01:12:57

to be considered as Corrupt

01:12:59

Practices. I don't think that

01:13:00

they specifically refer 21 convention

01:13:03

would rather that she or

01:13:06

he would rather look at

01:13:08

more than one instruments in

01:13:10

that regard. Yeah, but I

01:13:14

think that's right. I mean

01:13:15

there isn't it's going to

01:13:17

depend on the treaty that

01:13:18

is governing the dispute as

01:13:20

well as many other factors.

01:13:22

What a tribunal is going

01:13:24

to look at in that

01:13:24

situation and if anyone else

01:13:26

wants to add anything on

01:13:27

that, but otherwise, I think

01:13:28

we have made very good

01:13:30

time here today. So let

01:13:33

me just see the do

01:13:34

any of the coke analysts

01:13:36

have anything they'd like to

01:13:37

add. You're hearing nothing and

01:13:42

seeing No Hands. Thank you

01:13:44

so much to everyone for

01:13:46

your time today and for

01:13:48

joining us. It's been super

01:13:50

interesting and engaging. I think

01:13:51

one of the recurring themes

01:13:53

that we heard throughout this

01:13:55

morning / afternoon slash evening

01:13:58

panel, depending on where you

01:14:00

are is that this is

01:14:01

such a huge topic with

01:14:03
so many different aspects to

01:14:05
be discussed and with cross

01:14:07
over to other areas of

01:14:08
law and it's very difficult

01:14:10
to address everything comprehensively in

01:14:14
an hour and 15 minutes.

01:14:16
So we are very happy

01:14:17
to be joining all of

01:14:19
our all of the people

01:14:21
who have joined us today

01:14:22
and our breakout rooms for

01:14:24
another short discussion of corruption,

01:14:26
but of course, this is

01:14:29

a discussion that could continue

01:14:30

all day long and for

01:14:32

the rest of the week,

01:14:32

and we still probably would

01:14:34

not have covered it. But

01:14:35

thank you so much and

01:14:36

thank you again to Jose

01:14:38

Antonio and Ian and Tamara.

01:14:40

Lucia who has been very

01:14:41

helpful in collecting all of

01:14:43

the questions and dealing with

01:14:45

all of the technology during

01:14:46

this time. Thank you very

01:14:49

much a rainbow and thank

01:14:51

you very much to Colleen

01:14:52

and Athena Pedro and thank

01:14:57

you so much because this

01:14:59

this this has been sort

01:15:01

of an exemplary panel and

01:15:03

in both the substance and

01:15:04

format and timing show. No

01:15:07

kudos to everyone of you.

01:15:08

I believe that you have

01:15:11

done an incredible job. I

01:15:13

would like to to put

01:15:15

this as an example of

01:15:16

a great panel in terms

01:15:17
of of the presentation initially

01:15:20
Which Wich did an update

01:15:23
of what has been going

01:15:24
on in the past year

01:15:26
and then the various issues

01:15:27
on on corruption the relation

01:15:31
with with the the requirement

01:15:34
to comply with applicable or

01:15:37
than issues with respect to

01:15:39
public policy International public policy

01:15:41
and and and and good

01:15:43
faith Etc. And and then

01:15:45
the standard of proof and

01:15:47

then from a The perspective

01:15:49

that perhaps in a corruption

01:15:51

might need a more active

01:15:55

or or connecting the dots

01:15:56

by the arbitrator's a suggestion.

01:15:59

So thank you so much

01:16:01

now it may be time

01:16:03

to move on to the

01:16:04

breakout rooms. We have time

01:16:07

to do that. We would

01:16:08

love you to stay on

01:16:10

for those that may be

01:16:11

interested and Matt Lucia will

01:16:13

send us to the breakout

01:16:14

rooms, and then there's no

01:16:16

obligation to talk about anything

01:16:19

substantive in the breakout rooms.

01:16:21

We offer that space because

01:16:23

of course we are in

01:16:25

the world and people are

01:16:26

maybe not freaking me being

01:16:27

in the states that maybe

01:16:29

number in the Americas except

01:16:30

Carmen Asia, and I need

01:16:32

to wait to connect with

01:16:33

the with the rest of

01:16:34

the world. So thank you

01:16:35
and let's take it away

01:16:36
from for the for the

01:16:38
breakroom. Thank you. And thank

01:16:52
you Raymond for moderating. It

01:16:53
was up timely tight ship.

01:16:56
Thank you. I didn't mean

01:16:59
to cut anyone off you.

00:00:17
Welcome, this is World arbitration

00:00:22
update. This is our third

00:00:24
day of a Six-Day experience

00:00:28
and during the first two

00:00:29
days. We had an emphasis

00:00:31
in the Americas and we

00:00:33

had the eight we actually

00:00:36

had eight panels stations in

00:00:39

person from Mexico City. And

00:00:41

today is Africa day and

00:00:44

we are addressing various topics

00:00:46

and today's panel a war

00:00:49

or the panel. Now, it's

00:00:51

called corruption in investment products

00:00:54

the standard of proof and

00:00:56

the consequences for investment arbitration.

00:00:59

As one of the features

00:01:00

of a world of attrition

00:01:03

update. We follow the schedule

00:01:06

of the region that were

00:01:09

focusing on. So for those

00:01:11

of you who are in

00:01:13

the US are session started

00:01:16

at 7 a.m. Because we're

00:01:18

following Africa schedule not being

00:01:21

said it is my pleasure

00:01:23

to introduce rainbow Willard who

00:01:26

is counsel an arbitrator and

00:01:30

who has that for more

00:01:32

than 10 years at work

00:01:34

on complex International commercial and

00:01:38

investment treaty arbitrations under all

00:01:40

of the major International rules,

00:01:42

including the ICC on to

00:01:44

draw it exit at cetera

00:01:46

rainbow has particular experience in

00:01:48

energy oil and gas and

00:01:50

Mining dispute involving parties from

00:01:53

Latin America South Asia Europe

00:01:56

and the Middle East prior

00:01:58

to forming her own practice

00:02:00

rainbow with counsel at leading

00:02:02

international District Boutique at Chaifetz

00:02:04

Lindsay in York and was

00:02:06

a senior associate in the

00:02:08

international arbitration group of Allen

00:02:11

& overy. Practicing in London

00:02:13

and New York at both

00:02:15

firms rainbow LED team in

00:02:17

significant International commercial disputes and

00:02:20

represented States and investors in

00:02:22

case has governed by investment

00:02:24

treaties or trade agreements Rainbow

00:02:27

Dash Rainbow has extensive oral

00:02:29

and written advocacy experience in

00:02:30

English and Spanish and is

00:02:32

equally comfortable at arbitrator and

00:02:34

Council in both languages so

00:02:37

I could say way way

00:02:39

more but I don't think

00:02:40

that she will she would

00:02:41

appreciate it. So rainbow you

00:02:44

have to store it and

00:02:45

it's a pleasure to have

00:02:46

each one of you here,

00:02:47

so welcome to Wildwood out.

00:02:49

Thank you so much Jose

00:02:52

Antonio and thank you Ian.

00:02:54

Also I'm so pleased to

00:02:56

be able to take this

00:02:57

virtual trip around the world

00:02:58

with the world arbitration update

00:03:01

and we're very grateful to

00:03:03

the organizers for what is

00:03:05

a really great initiative and

00:03:07

for inviting me and all

00:03:09

of these Stellar panelist to

00:03:11

be a part of We

00:03:13

have a group of really

00:03:15

incredible practitioners and experts here

00:03:17

today who put a lot

00:03:19

of work into preparing but

00:03:21

I think is going to

00:03:22

be an extremely engaging and

00:03:24

informative panel and I'm going

00:03:26

to introduce them. I'm going

00:03:27

to go by first name

00:03:29

alphabetical order just to mix

00:03:32

things up a bit. So

00:03:33

first we have Athena fouchard

00:03:36

Papa who is an arbitrator

00:03:39

based in Paris. She has

00:03:41

significant experience in arbitrations involving

00:03:43

States and state entities as

00:03:45

well as an arbitration with

00:03:46

a link to the African

00:03:47

continent before establishing her own

00:03:50

practice last year. Athena worked

00:03:53

an international arbitration Departments of

00:03:55

Major law firms for more

00:03:56

than 15 years. She is

00:03:58

a member of the ICC

00:03:59

arbitration commission and a founding

00:04:02

member of Africa carb. Athena

00:04:05

is a Greek national and

00:04:06

she handles arbitrations in English

00:04:08

French and Greek next. We

00:04:11

have Colleen Malala. Who is

00:04:13

a partner at Chavis Lindsay

00:04:14

LLP in New York where

00:04:16

she represents clients in international

00:04:18

commercial arbitration and an investment

00:04:21

disputes telling counsels clients and

00:04:23

an array of multi jurisdictional

00:04:25

disputes that spanned the globe

00:04:27

and concern such sectors as

00:04:29

oil and gas mining consumer

00:04:31

goods and Telecommunications Cullen has

00:04:34

acted as counsel in arbitration

00:04:35

is conducted in English and

00:04:37

French and administered by all

00:04:39

major arbitral institutions Helene serves

00:04:42

as vice-chair of the steering

00:04:44

committee of the ICC Commission

00:04:46

on arbitration and a tiara

00:04:47

and she is the steering

00:04:49

committee liaison to the ICC

00:04:50

task force on addressing corruption

00:04:53

issues Killeen also serves as

00:04:55

co-chair of the IBA investment

00:04:57

arbitration subcommittee and is a

00:04:59

member of the IBA arbitration

00:05:00

committee has passports on privilege

00:05:02

tell he was recently awarded

00:05:04

the 12th annual Schmitt lowenfeld

00:05:06

prize for an article. She

00:05:08

published along with Jessica be

00:05:09

some croston on the illegality

00:05:12

of Action and investor-state arbitration

00:05:14

so she is an expert

00:05:16

not just on corruption and

00:05:17

investment arbitration, but on the

00:05:19

illegal act ugly gally objection

00:05:21

writ large and the many

00:05:23

reasons that it can be

00:05:24

asserted next coming from London.

00:05:28

I believe you're in London

00:05:28

today glad is that right?

00:05:31

Okay don't have a good

00:05:33

lad. You're still yourself who

00:05:34

is a partner and Alan

00:05:36

and ovaries International arbitration group

00:05:38

and a member of the

00:05:39

ICC International Court of arbitration

00:05:41

and the ICC Africa commission.

00:05:44

He was also appointed to

00:05:46

the exit panel of conciliators

00:05:48

by the federal republic of

00:05:49

Somalia glad has significant experience

00:05:52

representing companies governments and international

00:05:55

organizations and institutional and ad

00:05:59

hoc arbitral proceedings including arbitrations

00:06:02

under the ICC Icia exit

00:06:05

and unseat real rules. And

00:06:08

finally last but not least.

00:06:09

We have Pedro Soto who

00:06:11

is of counsel here in

00:06:12

Washington DC at Gibson Dunn

00:06:15

& Crutcher Pedro is a

00:06:16

member of the white-collar criminal

00:06:18

defense and investigations group and

00:06:21

his practice focuses on anti-corruption

00:06:23

cases brought by us authorities

00:06:25

and other enforcement agencies around

00:06:27

the world. He has experience

00:06:29

and anti-corruption matters and more

00:06:31

than two. Two dozen countries

00:06:32

with a particular focus on

00:06:34

Latin America Pedro also has

00:06:37

acted as counsel to States

00:06:39

and private claimants and more

00:06:40

than 10 arbitrations under the

00:06:42

exit to exit additional facility

00:06:44

and the ICC rules. Finally.

00:06:47

I know that we had

00:06:48

published that David Koch Vani

00:06:50

who is counsel at Levi

00:06:51

Kaufman polar and Geneva was

00:06:53

going to join us today.

00:06:54

Unfortunately, he got a last-minute

00:06:56

personal issue that made his

00:06:57

participation and impossible and we're

00:07:00

very sorry that he's unable

00:07:01

to be here today. Now

00:07:04

for those of you who

00:07:05

have never joined a world

00:07:06

arbitration update session before I'm

00:07:09

going to tell you a

00:07:09

little bit about the structure

00:07:11

before we get started first.

00:07:13

We're going to hear from

00:07:14

Colleen who's going to give

00:07:15

us an update on the

00:07:16

key developments from tribunal's and

00:07:18

courts on the issue of

00:07:19

corruption and investment arbitration over

00:07:22

the last year after that.

00:07:24

Each of our panelists is

00:07:25

going to address specific legal

00:07:27

and practical topics that have

00:07:29

Arisen when corruption claims are

00:07:30

asserted and investment arbitration and

00:07:33

there will then be some

00:07:34

discussion on each of these

00:07:36

points with Arco panelist. Everyone

00:07:39

who's attending we are so

00:07:40

happy you are here today

00:07:41

and we are here really

00:07:42

for you. So you are

00:07:43

welcome to submit questions throughout

00:07:46

the session in the chat

00:07:47

and we will save time

00:07:49

at the end to address

00:07:50

your questions. If we don't

00:07:52

have time to address every

00:07:53

question that we receive in

00:07:54

the chat. There will be

00:07:56

a breakout session at the

00:07:57

end with networking and you

00:07:58

will have the opportunity to

00:08:00

meet and ask questions of

00:08:02

at least one of the

00:08:03

panelists and your breakout room.

00:08:05

So without further ado I

00:08:08

would like to turn it

00:08:09

over to Colleen to give

00:08:10

us some updates on what's

00:08:11

been going on in the

00:08:12

world of corruption and investment

00:08:14

arbitration over the last year.

00:08:17

Thank you rainbow for your

00:08:19

warm. Welcome. Thank you again

00:08:20

until 10 Tony other organizers

00:08:22

for inviting me to join

00:08:23

you today. I'm very much

00:08:25

looking forward to our panel

00:08:27

discussion and your questions. So

00:08:29

as rainbow said my task

00:08:31

today is to give you

00:08:32

an update on corruption related

00:08:34

developments and investment arbitration in

00:08:35

the past year and to

00:08:37

do so in age of

00:08:38

10 minutes. So I will

00:08:41

focus my remarks on two

00:08:43

main issues on the first

00:08:45

is the standard of proof

00:08:46

of corruption and the second

00:08:48

is French exceptionalism. So starting

00:08:51

with the standard of proof

00:08:52

of corruption there two schools

00:08:54

of thought in that regard

00:08:56

first is that the same

00:08:58

standard of proof that applies

00:08:59

to all other claims should

00:09:00

also apply to corruption and

00:09:02

the second school of thought

00:09:03

is that there should be

00:09:04

a height and standard and

00:09:06

if we look back at

00:09:07

the case in the past

00:09:07

year, we have examples of

00:09:09

each one. So let's start

00:09:10

with the school of thought

00:09:13

that says that there should

00:09:13

be the same standard of

00:09:14

proof of corruption as there

00:09:16

is for other claims and

00:09:17

the basis for that for

00:09:19

that position is that corruption

00:09:21

is very hard to prove

00:09:23

and by its very nature

00:09:24

and so it would be

00:09:26

unfair to impose on a

00:09:27

party a hiding burden of

00:09:29

proof and having a standard

00:09:30

person to me to meet

00:09:32

at 2 to make out

00:09:33

corruption and this sound proof

00:09:36

takes his formulation. Sometimes it's

00:09:39

talked about as the balance

00:09:39

of probabilities reasonable certainty personal

00:09:43

conviction preponderance of the evidence

00:09:45

are various ways to say

00:09:47

the same thing, but essentially

00:09:48

it's that it's more likely

00:09:50

than The crash happened and

00:09:51

that is sort of the

00:09:52

same standard of proof to

00:09:54

prove other claims and we

00:09:57

see this and any case

00:10:02

which technically is not a

00:10:04

treaty case but it is

00:10:06

it does involve estate and

00:10:07

there's an exit arbitration and

00:10:08

I think it's it's quite

00:10:10

helpful to illustrate this point

00:10:11

in that case. The claimants

00:10:14

had argued that their Mining

00:10:15

rights had been revoked unlawfully

00:10:17

because they refused to participate

00:10:18

in a bribe and they

00:10:21

were supposed to make a

00:10:21

bribe payments. And in fact,

00:10:24

he argued that these rights

00:10:25

were precisely because there was

00:10:27

overwhelming evidence that the Mining

00:10:29

rights were obtained through corruption

00:10:31

and bribery of public officials

00:10:32

including the president's the then

00:10:35

president fourth wife. The tribunal

00:10:38

concluded that the claims were

00:10:40

inadmissible because of corruption and

00:10:42

his meddling in the acquisition

00:10:44

of the claimants Mining rights

00:10:46

and getting so here are

00:10:47

a few take away from

00:10:49

that case first the tribunal

00:10:51

look to international law and

00:10:52

the practice of international tribunals

00:10:54

to determine the applicable standard

00:10:56

of proof second. It recognized

00:11:00

that there are two schools

00:11:01

of thought and then before

00:11:03

it actually done rejected the

00:11:05

height and standard of proof

00:11:06

for corruption allegations precisely because

00:11:08

corruption itself is difficult to

00:11:10

prove I'd reasonable certainty and

00:11:14

personal conviction and looks and

00:11:18

also stated that corruption can

00:11:20

be proven by circumstantial evidence

00:11:22

or red flags interesting tidbits

00:11:25

the tribunal dealt with this

00:11:26

as an objection to admissibility

00:11:28

without discussion actually, which is

00:11:31

interesting since typically corruption in

00:11:34

the making of the investment

00:11:35

is usually treated as a

00:11:37

jurist. No question, and I

00:11:38

think that is probably going

00:11:39

to dress up in a

00:11:40

bit. So I won't I

00:11:42
won't say much more than

00:11:42
that at this point. So

00:11:44
that's the first rule of

00:11:46
thoughts of thought height and

00:11:48
standard and the idea behind.

00:11:51
Is there's a due to

00:11:52
the gravity of the charge

00:11:54
and the gravity of the

00:11:54
consequences. Basically the clan gets

00:11:56
gets dismissed. There should be

00:11:59
a height and standard of

00:12:01
proof and oftentimes tribunal to

00:12:03
adopt this philosophy of this

00:12:05

approach will quote judge Higgins

00:12:06

separate opinion in the oil

00:12:08

platforms that case where she

00:12:10

said that the grave of

00:12:11

the charge the more confidence

00:12:12

must there be in the

00:12:13

evidence for light on. So

00:12:15

it's this idea. That's because

00:12:17

it's so such a such

00:12:19

a grave accusation with very

00:12:22

serious consequences. It should be

00:12:24

demonstrated to a height and

00:12:25

standard there is again also

00:12:27

there is formulations from tribunals.

00:12:29

You'll hear clear and convincing

00:12:30

evidence to the most rigorous

00:12:32

level of proof of high

00:12:34

threshold need for solid and

00:12:37

persuasive. These are different ways

00:12:39

of saying the same thing

00:12:40

in terms of it requires

00:12:42

a height and standard and

00:12:44

one of the cases where

00:12:51

there were allegations that LOL

00:12:52

have procured and you benefits

00:12:54

by bribing the van Croatian

00:12:57

Prime Minister incidentally was subsequently

00:13:00

convicted on charges for accepting

00:13:02

bribes. The corruption allegation was

00:13:05

rejected and hear interesting to

00:13:09

BSG resources before the tribunal

00:13:14

didn't acknowledge that there were

00:13:16

two schools of thoughts with

00:13:17

respect to the standard of

00:13:19

proof instead it refer to

00:13:21

the cases that adopted a

00:13:23

high level of proof and

00:13:25

then characterize this standard as

00:13:27

having quote wide-ranging unanimity of

00:13:30

approach. So it it seemed

00:13:32

to think that you would

00:13:33

always apply a higher height

00:13:36

and standard to corruption. Allegations

00:13:38

and then and the way

00:13:41

that a phrase it was

00:13:41

like Russia must be established

00:13:42

quote to an appreciably higher

00:13:45

standard than a mere balance

00:13:46

of probabilities. One interesting tidbit

00:13:51

about that case in addition

00:13:52

goes beyond the Senate approve

00:13:54

it also how to prove

00:13:55

it and the tribunal said

00:13:56

that it would rely primarily

00:13:58

on for the provable fact

00:14:00

that it was open to

00:14:02

resorting to inferences to fill

00:14:04

any evidentiary jobs. Only if

00:14:06

the Gap was unavoidable and

00:14:08

the inference was compelling. So

00:14:10

again kind of reiterates this

00:14:12

height and standard that we

00:14:14

want to be able to

00:14:15

prove corruption to the extent

00:14:16

we can't we'll do inferences

00:14:18

but only if we have

00:14:19

to and only if the

00:14:20

inference is compelling another point

00:14:23

that the tribunal was very

00:14:25

keen on was a causal

00:14:26

link between the corrupt activities

00:14:28

and the contractual agreements that

00:14:30

issue. So it's not enough

00:14:31

that there's evidence of some

00:14:33

kind of bribery. It also

00:14:34

needs to have been to

00:14:37

have in Juice the outcome

00:14:38

of getting the contract. So

00:14:40

there has to be a

00:14:41

link from the corrupt act

00:14:43

to the agreement a tissue.

00:14:45

So she takeaways from these

00:14:48

cases for the past year.

00:14:50

I would say they're 21

00:14:52

is the applicable standard of

00:14:54

proof of corruption remains an

00:14:55

open issue despite what the

00:14:57

tribunal seem to say? And

00:14:59

I think it's it's still

00:15:00

open whether it's a regular

00:15:03

standard of proof for the

00:15:04

standard and then the second

00:15:10

point would be that the

00:15:11

tribunals will look at circumstantial

00:15:13

evidence and red flags when

00:15:14

there is no direct evidence

00:15:15

of corruption, but they'll insist

00:15:18

on this causal link between

00:15:19

the crop top and the

00:15:20

contracts that issue. So that

00:15:24

was my first point second

00:15:25

point is I'm running out

00:15:25

of time French exceptionalism. And

00:15:28

this is in the context

00:15:29

of Court decisions on corruption

00:15:31

and set aside proceeding. I

00:15:33

will I know we're going

00:15:34
to Tina's going to touch

00:15:36
on this at the end.

00:15:36
So I'm just going to

00:15:37
put down a marker for

00:15:38
now and just give you

00:15:41
the highlights on the key

00:15:42
takeaways. The cases are referring

00:15:44
to here are mainly Bella

00:15:46
Congress is Kyrgyzstan Central vs

00:15:49
Gabon and score like versus

00:15:50
Libya and which are all

00:15:52
set aside cases. I also

00:15:54
drop a footnote to abl

00:15:56

versus alstom that Saga which

00:15:58

there was a recent about

00:15:59

much and 1/8 in March

00:16:00

of this year, but that

00:16:02

was in the important contacts,

00:16:03

but I think bottom line

00:16:05

is the underlying premise is

00:16:08

that a French court has

00:16:10

to assess the effect that

00:16:11

upholding or enforcing in the

00:16:13

ward may have on the

00:16:14

French public order and international

00:16:16

public policy. And if we

00:16:18

if it would be contrary

00:16:19

to French public policy than

00:16:20

the award should not be

00:16:21

upheld or For static equilibrium

00:16:23

and so given this directive

00:16:27

the French judge. It needs

00:16:29

of the French touch can

00:16:30

do the following. It can

00:16:32

make its own his or

00:16:34

her own this assessment of

00:16:35

the correction evidence that was

00:16:37

presented to the tribunal the

00:16:39

front stretch can reach different

00:16:40

conclusions from the tribunal. So

00:16:42

it's a de novo review

00:16:42

of the corruption evidence that

00:16:45

was presented in the arbitration

00:16:46

and Beyond. Actually the French

00:16:49

touch can also consider poster

00:16:51

board evidence and making his

00:16:53

or her assessment. So I've

00:16:54

been as I was never

00:16:55

presented to the tribunal, so

00:16:58

that's a I'll leave it

00:17:00

at that. I'll just add

00:17:00

one foot notes about the

00:17:02

court of cassation confirming that

00:17:03

the applicable standard is the

00:17:06

evidence has to be serious

00:17:07

precise and consistent for corruption

00:17:10

to be found and I'll

00:17:12

stop there and leave you

00:17:13

hanging so we can resume

00:17:14

the conversation. When is he

00:17:16

not text Mike? Thank you

00:17:17

very much. Thank you so

00:17:20

much Killeen for meeting and

00:17:23

exceeding what seems like it

00:17:25

was going to be an

00:17:26

impossible challenge of giving us

00:17:28

a very informative and comprehensive

00:17:31

update of what has gone

00:17:32

on over the past year.

00:17:33

It seems like tribunal's have

00:17:35

really struggled with what to

00:17:37

do with corruption claims in

00:17:39

this context and then boards

00:17:41

have struggled with how to

00:17:42

address what you're doing and

00:17:45

to give us some more

00:17:46

information about some of the

00:17:48

legal aspects of corruption claims

00:17:49

that tribunal is have struggled

00:17:52

with and have addressed. We're

00:17:53

going to go to Google

00:17:54

and so glad I'll turn

00:17:56

it over to you. Thank

00:17:58

you very much. Rainbow. And

00:17:59

thank you very much is

00:18:01

2 to the organized as

00:18:02

well and truly a pleasure

00:18:03

to be here with my

00:18:04

co panelist just by way

00:18:07

of overview. I'm corruption all

00:18:09

this is explained raises complex

00:18:12

issues of public policy and

00:18:15

specific in the context of

00:18:16

investment treaty claims jurisdiction admissibility

00:18:18

not the least because by

00:18:20

definition an additional Nexus between

00:18:22

the investor in the state

00:18:24

name of the state's participation

00:18:25

is implicit in the very

00:18:27

nature of corruption. So generally

00:18:29

the focus and investment treaty

00:18:30

claims don't corrupt acts perpetrated

00:18:32

by the investor. It's important

00:18:34

to be cognizant of the

00:18:35

complicity of station in the

00:18:36

alleged acts of corruption there

00:18:38

also competing values of play

00:18:40

here on the one hand

00:18:41

the desirability of giving effect

00:18:42

to the public policy against

00:18:44

enforcement of crap transactions on

00:18:47

the other the public policy

00:18:48

of sustaining International arbitration agreement

00:18:50

contain with an investment treaties

00:18:52

and ensuring the states are

00:18:53

not able to profit from

00:18:55

their own misconduct. Clear that

00:18:58

transactions involving the corruption of

00:18:59

public officials are violation of

00:19:01

international public policy International Community

00:19:04

has a direct interest in

00:19:05

combating corruption at all levels

00:19:06

the Seminole State and of

00:19:08

this principle was made by

00:19:10

judge lagergren in a 1963

00:19:13

ICC case in which your

00:19:15

marker that's Corrections and international

00:19:16

legal. It's contrary to good

00:19:18

morals and to International public

00:19:19

policy, the community of Nations.

00:19:22

So turning to one of

00:19:24

the key questions that I'll

00:19:26

be covering today. What are

00:19:27
the consequences for the arbitration

00:19:29
of the alleged corrupt acts

00:19:30
taking place in the outside

00:19:32
investment or when the investment

00:19:34
was already operating so I

00:19:36
can get that background we

00:19:37
can move to consider the

00:19:39
specific consequences as I mentioned

00:19:41
are too interconnected issues to

00:19:43
Grapple with hear the first

00:19:44
of the temporal one. We

00:19:46
need to address at one

00:19:47
point in time. The alleged

00:19:48

corruption contaminates the investment. The

00:19:50

second issue is an interpretive

00:19:52

one relating to the specific

00:19:53

language of the treating question

00:19:54

on whether there's a requirement

00:19:55

that the investment is made

00:19:57

in accordance with the laws

00:19:58

of the host. So the

00:20:00

first situation that falls to

00:20:02

be considered is where the

00:20:03

relevant investment treaties specifies as

00:20:06

many do that. The investment

00:20:07

should have been made in

00:20:08

accordance with the laws and

00:20:09
regulations that hosted an alleged

00:20:11
corruption took place at the

00:20:12
outset or establishments of the

00:20:16
investment this obviously creates jurisdictional

00:20:18
difficulties for investors. As big

00:20:20
as acts of corruption will

00:20:21
almost always be Malaysia post

00:20:23
States laws investment tribunal certificate

00:20:27
we interpreted such requirements to

00:20:28
be an issue of jurisdiction

00:20:29
in Selene Morocco the tribunal

00:20:32
State at the relevant Claus

00:20:34
in Italy Morocco b i

00:20:35

t sought to prevent the

00:20:36

treaty from protecting Investments that

00:20:38

should not be protected because

00:20:40

they would be legal a

00:20:41

similar approach was taken in

00:20:43

front of Philippines where it

00:20:45

was found that investment apply

00:20:46

the laws of the host

00:20:47

State at the time it's

00:20:48

made in order to get

00:20:49

40 protection. However, the distinction

00:20:53

between a legality of the

00:20:54

outset or the time of

00:20:55

Investments and supervening legality occurring

00:20:58

when the investment had already

00:20:59

been made remarkable for the

00:21:01

time of initiation of investment.

00:21:03

There is in compliance with

00:21:04

the law of those State

00:21:05

allegations by the hosted violations

00:21:08

of its law on the

00:21:08

course of the investment as

00:21:10

a justification for state auction

00:21:12

with respect to the investment

00:21:13

might be a defense to

00:21:15

claim substantive violations ebit, but

00:21:17

could not deprive a tribunal

00:21:19

acting under the authority of

00:21:20

the vit B jurisdiction in

00:21:23

some cases. This has been

00:21:24

taken Further Supply in circumstances

00:21:27

where there is no specific

00:21:28

language in the investment treaty

00:21:30

to this effect. So for

00:21:31

example in Hollister Ghana, which

00:21:33

where it was found that

00:21:34

investment will not be protected.

00:21:36

If it has been created

00:21:37

in violation of national International

00:21:38

principles of good faith by

00:21:40

with corruption fraud or deceitful

00:21:43

conduct and that there are

00:21:44

general principles that exist independently

00:21:47

of specific language to this

00:21:48

effect in the treaty. So

00:21:51

the second situation is going

00:21:53

contemplated in front porch Philippines

00:21:55

case where the investment has

00:21:56

been made loftily, but supervening

00:21:58

corruption is subsequently occurred in

00:22:00

yukos Russia, when considering allegations

00:22:03

of bad face and illegal

00:22:04

conduct against the investor the

00:22:06

tribunal found that there was

00:22:07

no compelling reason to deny

00:22:09

all together the right to

00:22:10

invoke the treats and investor

00:22:12

was breached the wall the

00:22:13

host state. Following the Investments

00:22:17

being made its investor act.

00:22:19

Illegally the hosted can in

00:22:21

the words of the tribunal

00:22:22

requested to correct Its Behavior

00:22:24

and impose upon its sanctions

00:22:26

available under domestic law, but

00:22:28

it would undermine the purpose

00:22:29

and objectivity CT the Define

00:22:31

to deny the investor the

00:22:33

right to make his case

00:22:34

for an arbitral tribunal based

00:22:36

on the same alleged violations

00:22:37

the existence of which the

00:22:39

investor seeks to dispute on

00:22:40

the Merritt. So in this

00:22:42

situation there for the corruption

00:22:44

effects of lovely establishment vestment,

00:22:46

it would seem that the

00:22:47

tribunal needed less have jurisdiction

00:22:48

of the claim and the

00:22:50

consequences of corruption are to

00:22:51
be dealt with at the

00:22:52
merits face. Sawasdee approach that

00:22:55
I've just discussed. I have

00:22:56
been adopted by investment tribunals

00:22:58
based on some of a

00:23:00
strict interpretation quite often the

00:23:02
relevant investment treaty treating corruption

00:23:04
exclusively as an issue of

00:23:05
jurisdiction has raised concerns among

00:23:07
some commentators for the following

00:23:09
reasons first, the question of

00:23:11
a tribunal stress fiction is

00:23:12
so they concerned with the

00:23:14

adjudicative power that 5, you

00:23:15

know, this assessment seems unsuited

00:23:17

for international policy such as

00:23:20

corruption second corruption that has

00:23:22

occurred between an investor in

00:23:24

a state does not automatically

00:23:25

invalidate the state's consents arbitrate

00:23:27

under the relevant investment treaty

00:23:29

due to the doctrine of

00:23:30

separate bility. Some cases such

00:23:32

as flammable Gary support this

00:23:34

approach. So regardless of jurisdiction

00:23:41

or ability it almost always

00:23:43

operates as an opposite bar

00:23:45
to the proceedings. It's an

00:23:47
investment is Tainted by corruption

00:23:48
tribunal to be very unwilling

00:23:50
to entertain the claims of

00:23:51
investors on the merits of

00:23:53
the case. Regardless, so I'm

00:23:55
not briefly turn to how

00:23:57
investors in State's approach the

00:23:58
issue of corruption differently in

00:23:59
framing their respective arguments in

00:24:02
practice. It's generally the advantageous

00:24:04
for states to start that

00:24:06
investor is engaged in Corrupt

00:24:07

Practices for jurisdictional reasons, but

00:24:10

I've already outlined seeing an

00:24:12

example of this in the

00:24:13

enforcement proceedings at the moment

00:24:15

between p&id Nigeria in that

00:24:19

case Nigeria alleges that the

00:24:20

investor obtain the underlined contract

00:24:22

by bribing Nigerian officials. Not

00:24:25

just that but that the

00:24:26

investor also subsequently bribe Niger

00:24:28

as legal counsel to ensure

00:24:29

that the country would not

00:24:30

contest the arbitration vigorously the

00:24:33

award rendered amounted to approximately

00:24:34

10 billion US Dollars and

00:24:37

if he's corruption allegations are

00:24:38

substantiated the challenge the award

00:24:40

will likely succeed the shows

00:24:42

the significant incentives for states

00:24:44

to substantiate corruption allegations against

00:24:46

investors. Unclean hands or as

00:24:55

we just discussed things investment

00:24:57

was made by the investor

00:24:58

was not made according to

00:25:00

the laws of the whole

00:25:00

state alternatively. This claim is

00:25:04

inadmissible because it is founded

00:25:05

on corruption and therefore contrary

00:25:07

to International public policy and

00:25:10

finally States me also attempt

00:25:11

to bring counterclaims based on

00:25:13

corruption against investors of these

00:25:15

are Franklin likely to succeed

00:25:16

for counterclaim to be brought

00:25:18

the claim must be within

00:25:19

the jurisdiction of the tribunal

00:25:21

or orbital Center. Let's stay

00:25:23

in the case of excited

00:25:24

and I must arise directly

00:25:25

out of the subject matter

00:25:26

of the dispute. However, it's

00:25:28

unlikely the founding jurisdiction for

00:25:30

corruption based on counterclaim will

00:25:32

run on the same issues

00:25:33

as the primary claim brought

00:25:34

by the investor. The investment

00:25:36

has been maybe legally there

00:25:37

will be no investment and

00:25:39

the tribunal will therefore have

00:25:40

no jurisdiction to hear the

00:25:41

counter as was the case

00:25:43

in the metal test was

00:25:44

as we discussed in Metal

00:25:45

Tech. The final in circumstances

00:25:48

where state is engaged in

00:25:49

corruption investors may claim a

00:25:51

breach of the fac standard

00:25:53

by Me by Example particularly

00:25:54

if they come to the

00:25:55

tribunal with clean hands, so

00:25:56

to speak not engaged in

00:25:58

the crop practice. So interesting

00:26:00

in EDF Romanian the tribunal

00:26:02

agreed to a request for

00:26:03

a bride by state agencies

00:26:04

in violation of the fvt

00:26:05

standard in circumstances where the

00:26:07

investor who refused to pay

00:26:09

a bribe your contract extension

00:26:10

soap, just to keep up

00:26:13

with coming to get practice

00:26:14

of sticking to our time

00:26:16

constraint. I'll briefly conclude here

00:26:18

which is simply to say

00:26:19

that I said at the

00:26:20

outset the real difficulty with

00:26:22

corruption investment treaty claims that

00:26:23

the state's participation is implicit

00:26:25

in the very nature of

00:26:26

corruption is the policy dilemma

00:26:28
at the heart of it

00:26:29
and frankly also quite often

00:26:31
the evidentiary one, which will

00:26:32
be discussed by Mike O'Connell.

00:26:35
Thank you so much. Glad

00:26:37
that was extremely helpful. And

00:26:39
I know her Russian is

00:26:40
such a big topic and

00:26:42
each of us is challenged

00:26:44
to address any aspect of

00:26:47
it in this very short

00:26:48
amount of time. So thank

00:26:49
you so much for doing

00:26:50

such an incredible job of

00:26:51

addressing those aspects. I think

00:26:54

I'd like to hear from

00:26:54

you and what your thoughts

00:26:56

are on the legal aspects

00:26:58

that who ledge address. And

00:27:07

I think I think you're

00:27:07

still on mute. Sorry, I

00:27:11

was thinking to myself what

00:27:12

a time and didn't ask

00:27:13

because Julian has stopped the

00:27:14

pain that everything. I have.

00:27:16

So that can be said

00:27:18

which means I could focus

00:27:20

on the points of Discord.

00:27:22

I'm so full of discussion

00:27:23

between a practitioners and and

00:27:26

Scholars and there is a

00:27:27

general understanding that when an

00:27:31

investment and is procured by

00:27:33

corruption. We we end up

00:27:36

with the tribes, you know,

00:27:37

not exercising a jurisdiction. I'll

00:27:39

give you this can be

00:27:41

by application of the legality

00:27:44

closer to be 80 in

00:27:45

the picture because there would

00:27:48

be no investment to protect

00:27:49

that investment or certain drivers

00:27:53

have found in the in

00:27:54

the absence of the claim

00:27:59

will not be admissible because

00:28:01

of the principal of public

00:28:04

international law. Is that like

00:28:06

memo detour or Clean Hands

00:28:09

Doctrine? or something else. Breezy

00:28:13

Oak View middle schoolers. Zachary

00:28:17

Douglas is one of them

00:28:18

saying that they legality closing

00:28:20

closing vit was not aimed

00:28:23

at precluding situation, whereby an

00:28:26

investment. I have procured by

00:28:28

corruption. The clothes simply said

00:28:30

says to me deals with

00:28:32

the Purcell guide of investment

00:28:34

for example, and if the

00:28:36

national law does not allow

00:28:38

an investment in a specific

00:28:40

industry because of not like

00:28:42

Colton to be days or

00:28:43

something like that. This investment

00:28:45

is not protected by the

00:28:46

bit it snow

00:28:48

every kind of significant legality

00:28:51

or no significant, the guy

00:28:52

leads to a jurisdictional obstacle

00:28:56

and the other elements that

00:29:03

option. Which has taken place

00:29:14

at some point in the

00:29:16

life of the investment and

00:29:17

notes at the beginnings are

00:29:19

all the stages of there

00:29:26

is no clear Trend that

00:29:28

different commercial knows different different

00:29:30

National laws deal with the

00:29:33

effects of corruption in different

00:29:35

ways that are not under

00:29:38

which the contract would be

00:29:40

considered as a Benicio invalid

00:29:43

and a four parties would

00:29:46

be asked to remember the

00:29:48

other of everything that they

00:29:49

have received the contracts and

00:29:53

laws that just give the

00:29:54

option to the victim of

00:29:56

the legality of the correct

00:29:58

option to decide whether to

00:29:59

execute the contract or enforce

00:30:01

it or two to seek

00:30:03

an annulment that off at

00:30:05

cetera. And it's not certain

00:30:09

that we have an international

00:30:10

standard because if we can

00:30:13

follow last number we applying

00:30:14

us know when the dispute

00:30:17

against the state or I'd

00:30:18

held up a contract when

00:30:20

it does not matter. I

00:30:21

just out of a b

00:30:22

a t it is a

00:30:23

big discussion as to what

00:30:24

should the driving I do

00:30:26

should we focus on contributory

00:30:28

and iPhones and reduce damage

00:30:30

is to become seed there

00:30:31

than at the contractual relationship

00:30:35

is a relationship and therefore

00:30:38

sea or the restitution that

00:30:41

is actually very difficult in

00:30:44

practice in such situations. And

00:30:46

the last point I wanted

00:30:49

to make it we can

00:30:50

discuss further and is this

00:30:52

is me the exact point

00:30:59

raised by the ABS against

00:31:01

Romania tribunal said that In

00:31:07

order to base a claim

00:31:10

against the estate on the

00:31:12

request of corruption by the

00:31:14

state and its states seeking

00:31:15

to be paid bribery. The

00:31:19

investor has also proved that

00:31:21

the state so the bribery

00:31:24

acting as some sort of

00:31:25

official capacity, said they weren't

00:31:32

against the same thing. And

00:31:36

and and this is a

00:31:40

general it is it's an

00:31:44

awfully difficult standards to apply

00:31:46

the States official capacity is

00:31:51

no corruption and if it

00:31:53

does not equal to the

00:31:55

stage, which I kind of

00:31:58

money invested between a rock

00:32:00

and a hard place and

00:32:02

just so as to say

00:32:04

that this kind of condition.

00:32:06

Articles on the responsibility of

00:32:09

states for international wrongful act.

00:32:12

Thank you so much are

00:32:20

Tina and I think so

00:32:21

much of what we see

00:32:22

is that there is such

00:32:24

a difficulty in proving corruption.

00:32:27

And and so so many

00:32:28

of these questions arise out

00:32:30

of the fact that the

00:32:31

evidence is difficult to find

00:32:33

and and then and difficult

00:32:35

to present in the arbitration

00:32:37

contact. So I'd like to

00:32:38

go to Pedro now because

00:32:40

Pedro it has a great

00:32:42

benefit of being a cross

00:32:45

practice practitioner. He does both

00:32:48

White Collar work on corruption

00:32:50

investigations and international arbitration and

00:32:53

Pedro is going to talk

00:32:54

to us a bit about

00:32:55

how states do substantiate their

00:32:57

corruption allegations in the criminal

00:32:59

context. And especially when those

00:33:03

investigations are running in parallel

00:33:05

to International Airport. What are

00:33:08

some of the aspects of

00:33:09

the states actions Maybe? Thank

00:33:13

thank you rainbow and and

00:33:14

get good morning. Good afternoon.

00:33:15

Everybody first night my deep

00:33:18

appreciation of the organizers for

00:33:20

the invitation. It really is

00:33:22

a pleasure to be here

00:33:23

with these panels housekeeping and

00:33:27

I are supposed to go

00:33:28

without saying but you know,

00:33:30

I'm a lawyer. I'll say

00:33:30

it. Anyway, I'm joining you

00:33:33

guys today and speak for

00:33:39

Gibson Dunn at B. Printing

00:33:40

client gets them done, but

00:33:43

I did want to share

00:33:43

some thoughts on a based

00:33:45

on experience of different matters

00:33:47

that that I've seen over

00:33:48
the years. My my perspective

00:33:52
is as rainbow was saying

00:33:54
an incoming into this I

00:33:55
worked on International arbitration probably

00:33:58
ten or twelve of them

00:33:59
over the years best cases

00:34:01
both on behalf of claimant

00:34:03
and on behalf of sovereign

00:34:05
states and also commercial arbitration

00:34:07
cases, but I think the

00:34:09
more relevant part of my

00:34:11
perspective is That is certainly

00:34:14
your last I cannot really

00:34:15

focused on White Collar criminal

00:34:19

defense and that is primarily

00:34:21

corruption cases in in a

00:34:24

couple of dozen countries around

00:34:27

the world. So I I'm

00:34:28

kind of high team the

00:34:29

scheme's I've seen the enforcement

00:34:31

actions by different governments and

00:34:34

how you actually get to

00:34:35

prove those cases of the

00:34:38

pit of my perspective on

00:34:40

staying in it. It may

00:34:41

sound funny to say it

00:34:43

is I think Russian is

00:34:45

very easy to prove you

00:34:46

just need the right tools

00:34:48

for it. And I think

00:34:49

the challenges does international arbitration

00:34:52

have those tools available in

00:34:55

quite the same way that

00:34:57

that the cases that I

00:34:58

see on the other side

00:34:59

of the Ledger right criminal

00:35:00

enforcement have them. I'm taking

00:35:05

a step back of the

00:35:06

modern practice that we see

00:35:08

in the white collar bar.

00:35:10

In terms of corruption cases.

00:35:12

It has been tremendously Effective

00:35:14

Government. Didn't you all have

00:35:17

seen the headlines are our

00:35:19

regularly racking up. He'll hundreds

00:35:22

of millions. If not billions

00:35:24

plus dollar penalties in settling

00:35:27

corruption cases around the world

00:35:29

challenges that that a lot

00:35:33

of the things that work

00:35:34

in that context are not

00:35:36

available here. Right and I

00:35:38

wanted to share some of

00:35:39

those things that I did.

00:35:40

I think it worked. The

00:35:42

first is it if you

00:35:43

take the top 10 enforcement

00:35:44

matters for corruption around the

00:35:46

world and I say this

00:35:49

again from the perspective of

00:35:50

the US while you're so

00:35:50

focused primarily on actions by

00:35:52

the US Department of Justice

00:35:54

of the US Securities and

00:35:56

Exchange Commission those cases go

00:35:58

from like \$759 to 3

00:36:01

+ billion dollars in pounds.

00:36:03

Every single one of those

00:36:05

cases again talking about the

00:36:06

top 10 every single one

00:36:07

of those cases has one

00:36:08

thing in common, which is

00:36:10

the person that use the

00:36:11

end of the accused of

00:36:12

corruption has come in and

00:36:13

cooperate voluntarily. So I'm getting

00:36:17

all interior stays a bit

00:36:18

of a funny turn right

00:36:19

now come in and self-disclose

00:36:22

the contact but when they've

00:36:23

been approached by the government,

00:36:24

they've all cooperated and cooperation

00:36:26

mean you are normally when

00:36:29

some of these cases You

00:36:30

are conducting their own investigation

00:36:32

your training over your giving

00:36:34

the government presentations of that

00:36:35

investigation you're off in producing

00:36:37

hundreds of thousands of pages

00:36:39

of documents to the government

00:36:40

showing the corruption you are

00:36:43

sharing a train work product

00:36:45

you are engaging forensic accountants

00:36:49

that will analyze transaction and

00:36:52

then sharing the results of

00:36:53

that with the government. So

00:36:54

the government is touting all

00:36:55

these cases that it that

00:36:56

is able to resolve but

00:36:57

really it's not just unsure

00:36:59

investigative power you have the

00:37:01

number one incentive is Otherwise

00:37:03

defendants are coming in and

00:37:05

providing the information. Obviously that's

00:37:07

not available in the context

00:37:09

of international arbitration another huge

00:37:12

tool that isn't available in

00:37:13

the show the example the

00:37:18

US Securities and Exchange Commission

00:37:20

will pay between 10 and

00:37:21

30% of the amount that

00:37:23

whistleblower of the scheme that

00:37:25

whistle blower blow the whistle

00:37:26

on the largest awarded is

00:37:29

over a quarter billion dollars

00:37:31

that has been given to

00:37:32

a whistleblower who came and

00:37:33

reported back to the incentives.

00:37:35

There are very very different.

00:37:38

I would also note that

00:37:39
is it in the context

00:37:41
of arbitration tribunals. A lot

00:37:44
of the criminal tools that

00:37:45
you would have again setting

00:37:47
aside cooperation setting aside The

00:37:49
Whistleblower just start out right

00:37:51
whether it's a wiretap, whether

00:37:55
it's a mutual legal assistance

00:37:57
request, right so-called emblems, whether

00:38:00
it's subpoena write an arbitration

00:38:01
tribunal isn't doing any of

00:38:03
those things because I can't

00:38:04
and so that is a

00:38:05

huge challenge to how evidence

00:38:07

can be gathered. But I

00:38:10

wanted to touch on one

00:38:11

wrinkle that I think is

00:38:12

even more interesting which is

00:38:14

why we often talked about

00:38:15

the claimants engaged in corrupt,

00:38:18

right? If you bribe someone

00:38:20

to get that can bribe

00:38:21

someone to get that license

00:38:23

or to get that deal.

00:38:24

I think the image there

00:38:27

is is relatively clear for

00:38:28

all of us and our

00:38:29
heads but I think a

00:38:31
a more difficult scenario is

00:38:33
perspective is what happens when

00:38:35
the claimant is alleging that

00:38:36
the state has acted wrong

00:38:38
because they're obviously the state

00:38:40
the state has some tools

00:38:42
and can rely on his

00:38:43
law enforcement a attitude and

00:38:45
wire tap phones if and

00:38:47
pull account records at 10

00:38:48
go to bank to get

00:38:49
that information least domestically Clements

00:38:52
don't have it. So I

00:38:53
think a a a a

00:38:54
a huge challenge is what

00:38:58
happens in a situation tonight.

00:38:59
I seen it in some

00:39:00
of my manners we are

00:39:01
the private claimant is affirming

00:39:03
that the state has tried

00:39:05
to extort them in some

00:39:07
way in the claimant has

00:39:07
refused right to vote. Bribery

00:39:09
that the state has tried

00:39:11
to extort him in some

00:39:12

way and the challenges, you

00:39:14

know, the claimant makes bile

00:39:16

a local request for an

00:39:17

investigation with the local authorities,

00:39:19

but there is a perverse

00:39:21

incentive for States not to

00:39:23

act on those investigations not

00:39:24

to find the wrongful conduct

00:39:26

because if it did it

00:39:27

would severely hurt his chances

00:39:29

in an arbitration proceeding. There

00:39:39

are other challenges when it

00:39:40

comes to evidence that in

00:39:42

the start of the criminal

00:39:43

enforcement world. We see the

00:39:45

first is that over 90%

00:39:48

of the criminal actions that

00:39:50

have been resolved in the

00:39:51

US under the foreign bribery

00:39:53

laws have involved misconduct by

00:39:55

Third parties. In other words

00:39:57

was in the company necessarily

00:39:58

but they hired a consultant

00:40:00

that went out and did

00:40:01

the did the deed if

00:40:02

you will that is obviously

00:40:04

it's quite funny challenging position

00:40:06
for a tribunal to be

00:40:08
in because it's not even

00:40:09
the parties in front of

00:40:11
it that are necessarily going

00:40:12
to have all the evidence

00:40:13
and documentation. But rather you're

00:40:15
getting into the world of

00:40:16
of third parties and I

00:40:17
think frankly tribunals have a

00:40:19
very difficult and there because

00:40:22
it did was very limited

00:40:23
in what they can. The

00:40:26
other, and I'll make it

00:40:27

again in the spirit of

00:40:28

of of a wrapping things

00:40:30

up here with with time

00:40:31

is there are countries were

00:40:33

this is a lot harder

00:40:34

to write. So even if

00:40:36

you have international legal cooperation,

00:40:38

and by the way, this

00:40:39

happens all the time that

00:40:41

UK cooperate tremendously with the

00:40:43

US the French authorities a

00:40:45

German authorities the Brazilian authorities

00:40:46

are all very good. I

00:40:48

just want to investigate these

00:40:49

matters. Even. If you have

00:40:52

that cooperation, your other countries

00:40:54

that are just hard right

00:40:55

Switzerland famously refused for for

00:40:58

forever to provide banking records

00:41:00

on account of privacy won't

00:41:02

go get it the kind

00:41:03

of thing that makes finding

00:41:04

corruption a lot harder for

00:41:07

chicorelli. If you're an international

00:41:08

tribunal, it doesn't have these

00:41:09

tool. The final point I'll

00:41:12

make Injustice 2 in the

00:41:13

spirit of a thought discussion

00:41:15

hearing. What do you do

00:41:16

in a case in which?

00:41:19

8A state with access to

00:41:21

its resources without access to

00:41:23

wiretap in Pinos and bank

00:41:25

records and everything at least

00:41:26

within its own jurisdiction claims

00:41:28

that its found that it

00:41:29

has corruption and sound corruption

00:41:31

by the claimant and then

00:41:33

swings and misses and I'm

00:41:35

thinking of a matter of

00:41:36

where estate presented, you know

00:41:38

of wiretap records and the

00:41:41

wire kept records in the

00:41:42

oven. Should that move the

00:41:44

tribunal to say look if

00:41:46

if you come in and

00:41:48

you will let corruption and

00:41:50

you swing and you miss

00:41:51

does that should that itself

00:41:53

a kind of move the

00:41:55

needle from your perspective really

00:41:57

believe that option. That did

00:41:59

or didn't happen without I

00:42:01

apologize. Thank you so much

00:42:09

Pedro that was super interesting

00:42:11

and I think extremely helpful

00:42:14

to our audience because we

00:42:16

don't get the opportunity to

00:42:17

hear from people who are

00:42:18

saying this from the criminal

00:42:20

and Regulatory enforcement side are

00:42:22

very regular basis. I'm glad

00:42:24

I'd like to turn to

00:42:25

you to hear what you

00:42:26

have to say about Pedro's

00:42:28

thoughts from the international arbitration

00:42:30

perspective. Thank you, a thank-you

00:42:33

Pedro I get to to

00:42:35

Fox come to mind having

00:42:36

one of them as Pedro

00:42:38

very clearly showed explored save

00:42:40

the tools that are available

00:42:41

in investigations are proceeding domestically

00:42:44

in the US Senate in

00:42:45

particular and for me what

00:42:47

sort of stood out I

00:42:48

guess is some of the

00:42:50

authorities or government bodies that

00:42:52

he referred to other estate

00:42:53

deal J or the SEC

00:42:54

in this earth police powers

00:42:56

that are available to them

00:42:56

for the purpose of Investigation

00:42:58

or collecting evidence and the

00:43:00

fact that voluntary cooperation accursed

00:43:03

out off Matthew speaks to

00:43:05

those Powers, which can easily

00:43:06

be replicated by International tribunals.

00:43:10

The other point, which I

00:43:12

think is wrong for throwing

00:43:13

some attention to sort of

00:43:14

the game player threshold issue

00:43:15

around corruption allegations, which is

00:43:18

whether or not a state

00:43:19

for example, bring the defense

00:43:21

it all before we even

00:43:22

get the topic of evidence.

00:43:23

Right and that it question

00:43:25

itself is a very complicated

00:43:26

woman. What if it's the

00:43:28

the same Administration that that

00:43:31

accepted the bribe Bring it

00:43:33

up as a defense. What

00:43:34

if it's a different sort

00:43:36

of government bodies 12 actually

00:43:38

defend the states in the

00:43:39

relevant proceedings. And another one

00:43:41

that was involved involved in

00:43:42

the exception of the investment

00:43:44

itself. And so a lot

00:43:46

of these questions do come

00:43:47

up in in the early

00:43:49

stages and I'm sure there

00:43:50

are perhaps more instances and

00:43:52

investment for the arbitration where

00:43:53

corruption could be raised as

00:43:55

a valid defense wear for

00:43:57

one reason or another out

00:43:58

of expediency. It's decided not

00:43:59

to actually instead of decisions

00:44:02

made to bring other jurisdiction

00:44:03

objections were objections based on

00:44:05

on the Merritt. So I

00:44:06

thought I'd find that. It's

00:44:07

often complicated Gateway Worship with

00:44:09

her not to bring up

00:44:10

the defense or even bring

00:44:12

for the evidence SS bigger

00:44:14

mentioned. There are certain interested

00:44:16

parties that might affect the

00:44:18

state's ability to bring that

00:44:19

forward. Thank you so much

00:44:26

for let that sit. It's

00:44:28

all very interesting and Athena.

00:44:29

I'm going to go to

00:44:30

you now. We have touched

00:44:31

on so many different aspects

00:44:34

of corruption claims today from

00:44:37

the differing standards of proof

00:44:39

that have been applied to

00:44:41

weather depending on the evidence

00:44:44

and when the corrupt acts

00:44:46

occurred whether it is impact

00:44:48

jurisdiction or the merits and

00:44:51

so I'd like to hear

00:44:52

from you on the types

00:44:55

of takeaways that we have.

00:44:58

What are the best practices

00:44:59

that an arbitral tribunal can

00:45:01

apply when they are addressing

00:45:04

corruption claims? Thank you. Thank

00:45:11

you very much rainbow for

00:45:12

the question. And again that

00:45:16

are many aspects of the

00:45:24

arbitration. We look at what

00:45:27

is certain is that arbitrators

00:45:30

have to have corruption somewhere

00:45:32

in the back of their

00:45:33

minds and to be aware

00:45:36

of the evolving standard as

00:45:38

to what is corruption, of

00:45:40

course correction today. He's a

00:45:45

14 in every place globally

00:45:48

to the difference between Indio

00:45:59

be in influence and low

00:46:01

beam which is relevant for

00:46:03

arbitrators to to to know

00:46:05

just just remind him to

00:46:07

give her that we are

00:46:08

discussing about we haven't African

00:46:10

Focus today that the Africans

00:46:13

Union convention on preventing and

00:46:15

combating Corruption. It has been

00:46:18

ratified by practically. I have

00:46:21

a totality of African States.

00:46:26

Another another point that tribunal

00:46:32

should I take into account

00:46:34

is not there is a

00:46:36

shape of their their their

00:46:38

their RB convention. But also

00:46:43

there are my checklist by

00:46:45

several institutions to ask the

00:46:48

red flags as to what

00:46:49

they drive. You know, what

00:46:50

what foods raise the eyebrows

00:46:54

overdrive. You know what I

00:46:55

should bring their bathing suits

00:46:57

is there to the fact

00:46:58

that there may be some

00:47:00

photo of some sort of

00:47:01

Corruption of troll times in

00:47:03

the case and there are

00:47:08

very few checklists corruption. There

00:47:16

is a very famous Lord

00:47:18

rules for a report on

00:47:20

business ethics and the base

00:47:22

that used to choose on

00:47:23

Governors have also provided a

00:47:25

cute turkey for You traitors

00:47:27

with such a red flag

00:47:28

list and Barbie at the

00:47:31

same time count that red

00:47:35

flags have being developed in

00:47:38

the account and do the

00:47:41

regions and and processes that

00:47:43

Enterprises in action in order

00:47:48

to combat corruption. They they

00:47:50

do not necessarily to burden

00:47:58

of proof and proven corruption

00:47:59

and and there's something that

00:48:01

is not worth cuz I

00:48:02

wanted to race with you

00:48:03

is that regards to something

00:48:07

that is a red flag

00:48:08

a decision of a state

00:48:09

to ground a conversation with

00:48:11

outside proceeding through a rebuilding

00:48:13

process. We have no thingy

00:48:19

that has a red flag,

00:48:20

but deciding differently in the

00:48:23

Bowl against turn to low

00:48:24

2022. Decision in the court

00:48:29

of appeal of Paris used

00:48:31

it as a red flag

00:48:32

supporting the timing of corruption

00:48:34

in the Congo against the

00:48:38

cast of Psych on site

00:48:39
on CJ's or in the

00:48:41
guinea against global voice. Okay,

00:48:43
so it's a red flag,

00:48:45
but it's not a proof

00:48:47
on its own and in

00:48:49
another point, but it is

00:48:50
very relevant. Is that sometimes

00:48:52
we see used in arbitration

00:48:55
as a red flag the

00:48:57
fact that the accounting equation

00:48:59
has every option index. And

00:49:04
again, this is fine as

00:49:05
a red flag. When what

00:49:07
is at stake is the

00:49:08
process that the Enterprise would

00:49:09
put forwards to do to

00:49:11
fight corruption. But when an

00:49:14
arbitrator uses it as a

00:49:16
red flag for corruption the

00:49:18
line between using a red

00:49:20
flag and just being biased

00:49:22
is everything in my mind

00:49:27
if we have time the

00:49:35
question as to whether the

00:49:38
Tribune is under a beauty

00:49:39
to investigate corruption and whether

00:49:42

the tribunal has the means

00:49:43

to investigate corruption will allow

00:49:46

me a couple of minutes

00:49:47

to to deal with with

00:49:49

me to draw the basic

00:49:53

Airlines of discussion because again,

00:49:54

there's a lot to be

00:49:55

said, but as we already

00:49:57

discussed in this panel The

00:50:00

duty to fight corruption is

00:50:02

considered to be part of

00:50:03

public policy today and also

00:50:08

form part of the arbitrator's

00:50:09

duty to ensure the enforceability

00:50:12
of the award. But what

00:50:15
can I do to do

00:50:16
and what can an arbitrator

00:50:17
don't in order to investigate

00:50:18
corruption is a big discussion

00:50:20
and and of course Pedro

00:50:21
has already passed upon and

00:50:25
but it is to think

00:50:30
in terms of the two

00:50:32
main a diverging approaches also

00:50:36
to the tribunal has ruled

00:50:38
in contacting the proceedings and

00:50:41
there is no inquisitorial approach

00:50:43

and the adversarial approach. We've

00:50:48

been crazy toriel approach that

00:50:50

we seen very many civil

00:50:51

law system. For example of

00:50:53

the arbitrator is very actively

00:50:56

involved in investigating. The facts

00:51:00

of the case and therefore

00:51:02

investigate factual elements on their

00:51:07

own initiative. All the other

00:51:12

hands made me come on

00:51:13

low countries mostly adversarial approach

00:51:19

which focuses on the party

00:51:22

autonomy and According to which

00:51:25

the parties are the players

00:51:27

who should bring their in

00:51:30

the necessary evidence. What's a

00:51:33

dragon I can do or

00:51:34

cannot do is also a

00:51:35

matter of who we be

00:51:38

the jobs controlling the decision

00:51:39

of the tribunal if the

00:51:41

controlling jobs for nose anniversary

00:51:43

approach. The tribunal has some

00:51:47

possibility to investigate corruption at

00:51:50

least one party has a

00:51:52

large states and enter for

00:51:54

the RAV4 and see if

00:51:57

I can take play with

00:52:02

the evidential burden of proof

00:52:05

Etc is the inquisitorial approach.

00:52:16

Is there any way that

00:52:17

the arbitrator has is much

00:52:20

wider is a 30-ton on

00:52:23

their own account but raised

00:52:26

questions of corruption and ask

00:52:28

the parties to discuss days

00:52:30

in the proceedings and possibly

00:52:32

as a steak on the

00:52:33

stove and enclosing and following

00:52:41

up on what Calum has

00:52:42

eyes of the very beginning.

00:52:43

Today what the french judge

00:52:45

asks from the arbitrator's is

00:52:48

exactly to take such a

00:52:49

very active approach when I

00:52:51

went to see the obituaries

00:52:52

in France. And when the

00:52:54

French John will be the

00:52:56

control judge of the arbitration

00:52:58

award. Thank you so much.

00:53:02

I think I think those

00:53:03

are those are very good

00:53:05

pointers for arbitrators and also

00:53:07

some very tricky questions that

00:53:10

we are all struggling with

00:53:12

that as we look at

00:53:14

issues of corruption. Tell him

00:53:15

I'd like to go to

00:53:16

you because you started out

00:53:17

by introducing us to some

00:53:19

of what has happened in

00:53:20

the French courts over the

00:53:21

past year and I'd like

00:53:23

to hear what you think

00:53:24

about what Athena has just

00:53:26

talked about in terms of

00:53:27

you know, what weather going

00:53:29

to control court is going

00:53:31

to end how control courts

00:53:33

have acted in particular for

00:53:35

arbitration seated in France and

00:53:37

how that may impact our

00:53:39

virtual practice. I mean, I

00:53:43

agree with what I have

00:53:45

to say. I've been thinking

00:53:47

about the different standards that

00:53:50

you would apply depending on

00:53:51

your feet. Right and if

00:53:52

you were lucky enough, but

00:53:55

I'm going to have a

00:53:56

seat seated in Paris. You

00:53:58

have more power inquisitorius Powers

00:54:00

available to you. Even if

00:54:01

you come from a coma

00:54:02

background versus if you were

00:54:04

you asked where you were

00:54:06

so it makes me a

00:54:17

bit nervous. I don't disagree

00:54:19

but I bet it has

00:54:20

that it's part of the

00:54:21

calculus and we have to

00:54:22

be we have to know

00:54:23

what's happening in France was

00:54:24

interesting the French ports frame

00:54:25

it as a matter of

00:54:27

not not reviewing the merits

00:54:30

of the underlying award. But

00:54:32

but just reviewing the Conformity

00:54:34

of the Year Award with

00:54:35

fresh public policy and international

00:54:37

principles, so it's not that

00:54:40

there's no essential at that

00:54:42

it's not really about the

00:54:43

merits but it's about conforming

00:54:45

to the public policy principles

00:54:47

of the system in which

00:54:48

that award exist, but are

00:55:04

what's happening in that jurisdiction

00:55:06

where you sit just a

00:55:09

logical conclusion makes me a

00:55:10

bit nervous or there wouldn't

00:55:11

be uniform standard and perhaps

00:55:12

that's part of what the

00:55:13

recommendation of approach for tracking

00:55:18

knows that transcends Civil War

00:55:21

on, you know, whether any

00:55:34

of this has to Review

00:55:41

corruption evidence particularly post-award corruption

00:55:44

evidence. So I'll leave it

00:55:47

at that. I would just

00:55:47

make one quick, It's on

00:55:49

the right side is evolving

00:55:53

in the context of that

00:55:55

was something that we we

00:55:56

found interesting and in writing

00:55:58

this paper on the illegality

00:55:59

of which was everything short

00:56:01

of corruption where you you

00:56:03

see there are cases where

00:56:05

the due diligence standard to

00:56:08

which the investor is held

00:56:09

very spry. There's a strict

00:56:11

liability kind of standard to

00:56:12

use your help to you.

00:56:15

You were supposed to have

00:56:16

done your due diligence and

00:56:17

somehow you were also due

00:56:19

to make any investment. Well,

00:56:20

that's too bad. You're you're

00:56:21

strictly liable anyway, and then

00:56:22

and others will have a

00:56:27

very quiet and we'll kind

00:56:30

of way it and besides

00:56:31

well, you know, you didn't

00:56:33

know if you didn't do

00:56:33

enough, you know, you saw

00:56:35

this one was you didn't

00:56:36

see this and then some

00:56:40

Cases that says it doesn't

00:56:42

even look at it. Just

00:56:54

come back in the context

00:56:56

of the effects of the

00:57:06

French the very recent friend

00:57:10

should approach the court the

00:57:13

court of appeal to hear

00:57:17

for the first time allegations

00:57:19

of corruption and and and

00:57:20

the investigate these allegations for

00:57:23

the first time allegations that

00:57:24

have not been heard from

00:57:25

the tribunal I taste of

00:57:29

Killeen mentioned is highly criticized.

00:57:40

Alex has been her usual.

00:57:47

Pedro what are your thoughts

00:57:48

on these issues from the

00:57:50

world of criminal and Regulatory

00:57:52

enforcement. There was one in

00:58:01

particular that that really recorded

00:58:04

me which is your reference

00:58:05

to print sample. The corruption

00:58:07

perception index has the so-called

00:58:09

CPI than any rate of

00:58:11

deck since it's a very

00:58:12

thoughtful word product from Transparency

00:58:14

International repeated organization. And and

00:58:19

I completely get my the

00:58:20

Hardy right it I think

00:58:22

it provides invaluable context but

00:58:25

it can also become kind

00:58:27

of a ritual of prejudice

00:58:28

or biased you say, well,

00:58:29

you know, I'm lazy to

00:58:32

say well look investment in

00:58:33

country X automatically must be

00:58:36

tainted by Copying setting in

00:58:38

our kind of criminal enforcement

00:58:39

practice. It isn't an important

00:58:41
tool reference. I have sat

00:58:45
across the table from the

00:58:46
justice department on countless occasions

00:58:47
and the discussion is off

00:58:50
and well, you know, hold

00:58:51
on. You said your clients

00:58:52
did this level of diligence

00:58:55
on your third party, but

00:58:57
they're operating in this market,

00:58:58
you know, this Market is

00:58:59
riskier, right? And so there

00:59:01
is a certain element where

00:59:02
I get the popped up

00:59:04

the possibility that its use

00:59:06

them properly or as a

00:59:07

lazy short cord or something,

00:59:08

but it's also a reality

00:59:09

of the world almost feels

00:59:12

like to borrow the US

00:59:14

the legal standard of willful

00:59:16

blindness, right it almost feels

00:59:17

like willfully blind of an

00:59:19

arbitrator not to take into

00:59:21

account that there are certain

00:59:23

markets where unfortunately no corruption

00:59:26

is Joe institutionalized that it

00:59:28

it feels to me like

00:59:29

that. They should take into

00:59:31

account. That is an investment

00:59:33

in X sector in X

00:59:35

country should We get a

00:59:37

closer look as to whether

00:59:39

everything was done a bunk

00:59:40

board or not. I get

00:59:41

that it's a very hard

00:59:43

issue but I think that

00:59:45

you identified as an exceptionally

00:59:48

helpful tool that arbitrators could

00:59:49

use as a as a

00:59:51

reference not a decisive issue,

00:59:53

but a reference the only

00:59:55

other come grab my mobile

01:00:02

device us aggressive lawyer. I

01:00:05

need to be more aggressive

01:00:08

in in asking pointed questions

01:00:11

and connecting the dots. I

01:00:13

think often times it in

01:00:15

my experience and and I'm

01:00:16

I'm know I'm no expert

01:00:18

on arbitration. But in my

01:00:19

experience arbitrators are happy to

01:00:21

be briefed on issues. They

01:00:23

are happy to get the

01:00:24

mission from the parties. They're

01:00:25

very deferential to giving both

01:00:27

parties a chance to be

01:00:28

heard and all that. But

01:00:30

they don't often ask they're

01:00:31

really harder questions of connecting

01:00:33

the dots you no matter

01:00:35

comes to mind where there

01:00:37

are several government officials that

01:00:39

are now under arrest and

01:00:41

they're under arrest in a

01:00:42

fact pattern that is strikingly

01:00:44

similar to what the claimants

01:00:46

have raised and I would

01:00:48

love to see the arbitrator

01:00:49

sit down and and just

01:00:51

say to that particular respondent

01:00:53

help me out here, you

01:00:55

know, you say there's no

01:00:56

corruption. But this person is

01:00:57

under arrest this person is

01:00:58

under arrest as persons under

01:00:59

arrest and it took to

01:01:02

give it my us raise

01:01:03

make it make sense for

01:01:04

me and putting putting parties

01:01:07

whether it's a claimin ora

01:01:08

Ora Ora Ora Ora Ora

01:01:10

explain it I think is

01:01:17

a is a you know,

01:01:19

I think that's a better

01:01:20

approach until I would I

01:01:22

would encourage her to borrow

01:01:25

the old phrase connect the

01:01:26

dots 2210 do that exercise

01:01:28

not just sit back and

01:01:29

wait for some Olivia cross

01:01:31

examination results were they stay

01:01:33

naked make sense? Because I'm

01:01:35

seeing all these red flags

01:01:36

and I want you guys

01:01:37

to answer it directly for

01:01:39

me. Yeah, that's a very

01:01:44

interesting point and we are

01:01:45

at we are doing extremely

01:01:46

well on time. We do

01:01:47

have some questions from the

01:01:49

audience but picking up and

01:01:51

let Pedro just said I'd

01:01:52

like to pose a question

01:01:53

to Google add before I

01:01:54

turn to the questions from

01:01:56

the audience, which is what

01:01:57

do you do when you

01:02:00

have a situation like the

01:02:01

one that Pedro has just

01:02:02

described or the one that

01:02:04

Athena opposed which is neither

01:02:06

party is raising the claim

01:02:09

of corruption, but you have

01:02:11

either a situation where the

01:02:15

the officials involved in the

01:02:17

investment have all been arrested

01:02:19

in another corruption scheme suggesting

01:02:22

that maybe there was corruption

01:02:23

in this investment as well

01:02:25

or you simply have nothing

01:02:27

more than the corruption index

01:02:30

suggesting that corruption could be

01:02:32

present. But neither party is

01:02:34

Raising it they they seem

01:02:35

to want to avoid it

01:02:36

in the arbitration. So glad

01:02:38

what what do you think

01:02:39

is the right thing to

01:02:40

do in that situation? Yeah,

01:02:42

I mean I just one

01:02:44

quick when I get something

01:02:45

on the index itself. I

01:02:46

think Pedro put it well

01:02:47

that it makes sense to

01:02:49

look at it as part

01:02:50

of a multifactorial tester assessment.

01:02:52

And as a Theater award,

01:02:53

it's not it shouldn't be

01:02:55

decisive on on on the

01:02:56

given matter in terms of

01:02:58

how you would proceed in

01:02:59

circumstances where neither party has

01:03:03

raised allegations of corruption. I

01:03:06

think that ultimately will turn

01:03:07

on but on the tribunal

01:03:08

so you don't have to

01:03:10

be satisfied of their own

01:03:11

jurisdiction in proceedings. If they

01:03:14

have good reasons to believe

01:03:15

that there was a risk

01:03:16

of corruption at the time

01:03:18

of investment and therefore they

01:03:20

may not have jurisdiction over

01:03:21

the relevant dispute. They should

01:03:24

have their own initiation look

01:03:25

into the matter and raised

01:03:26

the matter because it's simply

01:03:28

not feasible for me to

01:03:30

turn their eyes away from

01:03:32

the possibility that they don't

01:03:33
have jurisdiction over a given

01:03:34
dispute. I mean, I think

01:03:36
that's that's sort of where

01:03:37
is Pedro mentioned some of

01:03:39
the new courage for a

01:03:42
given treadmill really hasta to

01:03:43
come up and I know

01:03:45
that unfortunately speaking frankly can

01:03:47
be a bit complicated sometimes

01:03:49
where we have a system

01:03:50
that's dependent on repeat appointments.

01:03:53
And so therefore you don't

01:03:54
always, you know, you fine

01:03:55

or betray his maybe in

01:03:56

certain circumstances hesitant to shake

01:03:58

the tree a little bit

01:03:59

you can imagine this is

01:04:01

probably one of the arguments

01:04:01

that people make for more

01:04:03

permanent eye institution to assess

01:04:05

investment treaty claims, but but

01:04:08

I think it's absolutely fundamental

01:04:09

that that's looked into Inception.

01:04:13

Yeah, that's very true. And

01:04:16

I'm going to pose another

01:04:17

question for anyone who wants

01:04:19

to answer it which is

01:04:20

in what do you do

01:04:21

when there is evidence of

01:04:23

corruption that was not at

01:04:25

the outset but let you

01:04:27

know but has arisen during

01:04:28

the course of the investment.

01:04:30

Is that a red flag

01:04:32

that investment that corruption could

01:04:34

have occurred also at the

01:04:35

outset or how how else

01:04:37

might that impact the investment

01:04:39

in an arbitration. And then

01:04:41

also what we have seen

01:04:43

tribunal's like the one in

01:04:45

petrobangla where they found that

01:04:48

if Brian has been paid

01:04:49

at the outside of the

01:04:50

investment, but that no benefit

01:04:52

had had inured to the

01:04:56

investor and as a result,

01:04:57

they determined that they did

01:04:59

have jurisdiction on so I

01:05:01

guess my question to the

01:05:03

panelists know what what do

01:05:05

you do in those situations

01:05:06

that based on the most

01:05:08

recent developments that we've seen

01:05:09

and in France and otherwise

01:05:15

If I may have just

01:05:16

come in on the last

01:05:17

one because it doesn't Echo

01:05:19

what what we saw and

01:05:20

Emma versus Croatia, which is

01:05:22

this having to link from

01:05:25

you propose to bribe. You

01:05:29

investor bribed ex-official successfully in

01:05:33

order to get in return

01:05:34

a benefit wish you didn't

01:05:35

receive because of the narrative

01:05:38

and so I could see

01:05:41

if you followed that kind

01:05:43

of height and standard and

01:05:45

Analysis saying well, you didn't

01:05:47

actually you're successful and your

01:05:49

bribe. So there is there's

01:05:51

no completion of the other

01:05:54

crap that she followed that

01:05:57

line of thinking and there's

01:06:00

no there's no but I

01:06:04

know that's right. We can

01:06:05

debate that but it certainly

01:06:06

sounded to me a lot

01:06:07

like this heightened causal cause

01:06:10

a causal link chain. If

01:06:16

I can just offer a

01:06:17

brief comments on that one

01:06:18

lawyer happier on but under

01:06:24

us law particular Foreign Corrupt

01:06:26

Practices Act, which is the

01:06:27

law that governs bribery of

01:06:29

non US government officials and

01:06:31

offer or a promise to

01:06:33

pay whether or not he

01:06:34

pain is is considered by

01:06:36

a payment an author of

01:06:38

promise to pay whether or

01:06:39

not you receive what you

01:06:40

bargained for is still write

01:06:42

under us walk. So I

01:06:44

think it is again for

01:06:45

my for my option practitioner

01:06:48

perspective anti-corruption anti-corruption practitioner perspective.

01:06:53

If you go to and

01:06:56

you promised that someone will

01:07:02

approach a public procurement officer

01:07:05

at Ministry of whatever and

01:07:07

say if you get me

01:07:08

this contract, I will get

01:07:09

you X if I'm awarded.

01:07:10

I'll cut your back 10%

01:07:12

Got me a promise or

01:07:14

offer that you will pay

01:07:16

in the event that you're

01:07:17

actually granted that contract is

01:07:19

a bright. So that's different

01:07:22

perhaps and in the arbitration

01:07:24

you were the one on

01:07:26

the US perspective. Comments on

01:07:34

recent case but he's applying

01:07:41

the standard. That's a very

01:07:44

old standard kind of. All

01:07:46

right. Listen to tell me

01:07:46

my we visit very very

01:07:49

high standard for finding corruption.

01:07:51

We no longer receiving. I'm

01:07:56

in the truck now seek

01:07:59

more to to investigate there

01:08:01

the cases and exactly the

01:08:03

other point is that if

01:08:04

we we searched to find

01:08:05

always a causal link between

01:08:06

everything and we just don't

01:08:10

follow the definition of corruption

01:08:12

as it appears today in

01:08:15

international conventions and another instruments.

01:08:21

Yeah, I think that's exactly

01:08:22

right. And this also we

01:08:24

had a question from the

01:08:25

audience about whether non-financial benefits

01:08:30

given to government officials could

01:08:33

constitute corruption and international arbitration

01:08:36

and I think everything we

01:08:37

just discussed really responds to

01:08:39

that. I'm going to go

01:08:40

now to a another question

01:08:42

that we have from the

01:08:43

audience which is if the

01:08:44

corrupt acts has taken place

01:08:46

outside of the host 8eg

01:08:48

payments into offshore accounts. Would

01:08:51

there be any impact on

01:08:52

the applicable law to determine

01:08:53

if corruption occurred and would

01:08:56

host state laws must be

01:08:57

relevant and so maybe pay

01:09:00

through I see if not,

01:09:01

I'm going to go to

01:09:01

you first from the criminal

01:09:03

perspective because I think the

01:09:05

answer is probably similar but

01:09:07

somewhat with 70 wants two

01:09:10

differences between the two areas

01:09:12

of law. Would look at

01:09:21

it more as was it.

01:09:23

Was it a corrupt back

01:09:24

in relation to the investigation

01:09:25

right often times by definition.

01:09:28

It will be an offshore

01:09:29

act because it's moving money

01:09:31

offshore and stuff from a

01:09:32

different perspective frankly are our

01:09:35

friends of the justice department

01:09:36

are quite creative in finding

01:09:38

a way to say that

01:09:39

it was an act that

01:09:40

touch the us whether it

01:09:42

was a transaction into bank

01:09:43

accounts and happened to be

01:09:44

denominated in US dollars or

01:09:46

that went through a server

01:09:47

in the US the jurisdiction

01:09:49

part from a Kronos perspective

01:09:51

almost becomes easier, but I

01:09:55

think it would be is

01:09:58

it or corruption or this

01:09:59

kind of money laundering stores

01:10:01

in rubber case maybe that

01:10:02

is a wedge in relation

01:10:03

to the investment at the

01:10:04

issue. And I think if

01:10:06

if the answer is yes,

01:10:07

then again my own ignorance

01:10:09

Barbra Streisand, I don't I

01:10:11

don't see how that would

01:10:12

necessarily change the count this

01:10:13

much. Yeah, I mean I

01:10:17

just from my perspective I

01:10:19

guess there is there's the

01:10:20

whole state law requirements most

01:10:24

instances. We mention of some

01:10:25

Modern crushin walls will have

01:10:27

some extra territory affect, right?

01:10:30

So for example under the

01:10:32

UK bribery act bribery or

01:10:36

corruption that takes place by

01:10:37

anyone linked to the UK

01:10:39

whether it's a resident or

01:10:39

national and it's against their

01:10:41

foreign officials will be captured

01:10:42

as well because naturally these

01:10:44

schemes are organized and in

01:10:47

very convoluted and Austin extraterritorial

01:10:49

manner, but even let's say

01:10:52

for a moment that the

01:10:54

relevance of local laws and

01:10:55

regulations don't capture such conduct

01:10:58

as I mentioned earlier. It's

01:11:00

not simply in cases where

01:11:02

has been required to comply

01:11:04

with local laws and regulations

01:11:05

that crushes down to deprive

01:11:06

the tribunal of of jurisdiction.

01:11:09

There is also a Reliance

01:11:10

on more general principles of

01:11:12

good faith in otherwise, so

01:11:14

it hasn't always been the

01:11:15

case that has been reliance.

01:11:16

Express treaty language, so that

01:11:19

would certainly cut across it

01:11:20

as well. That makes sense

01:11:26

that we have a comment

01:11:27

about the fact that there's

01:11:29

not a widely accepted definition

01:11:31

of corruption and international treaties.

01:11:33

I think maybe I'd like

01:11:35

to go to you because

01:11:35

you spoke a little bit

01:11:36

about where tribunal's may look

01:11:39

to find both guidance on

01:11:41

the definition of corruption and

01:11:44

on red flags. You know,

01:11:46

what where do you think

01:11:48

tribunal should look for this

01:11:49
definition? And is there is

01:11:51
there a good definition that

01:11:52
works across International arbitration and

01:11:55
in particular across investment arbitration?

01:11:59
You're assuming I hadn't eaten

01:12:01
in the question as to

01:12:08
what no reply to the

01:12:11
existence of notes of corruption.

01:12:16
Is not linked with necessarily

01:12:18
with the whole states l

01:12:20
o i mean that provides

01:12:27
us together as to what

01:12:30
is the corruption and can

01:12:32

you connect to National instruments

01:12:33

instruments be signing corruption themselves,

01:12:45

but also providing assistance to

01:12:49

arbitrators and and and empathy

01:12:54

sand companies with regard to

01:12:56

what kind of practices are

01:12:57

to be considered as Corrupt

01:12:59

Practices. I don't think that

01:13:00

they specifically refer 21 convention

01:13:03

would rather that she or

01:13:06

he would rather look at

01:13:08

more than one instruments in

01:13:10

that regard. Yeah, but I

01:13:14

think that's right. I mean

01:13:15

there isn't it's going to

01:13:17

depend on the treaty that

01:13:18

is governing the dispute as

01:13:20

well as many other factors.

01:13:22

What a tribunal is going

01:13:24

to look at in that

01:13:24

situation and if anyone else

01:13:26

wants to add anything on

01:13:27

that, but otherwise, I think

01:13:28

we have made very good

01:13:30

time here today. So let

01:13:33

me just see the do

01:13:34

any of the coke analysts

01:13:36
have anything they'd like to

01:13:37
add. You're hearing nothing and

01:13:42
seeing No Hands. Thank you

01:13:44
so much to everyone for

01:13:46
your time today and for

01:13:48
joining us. It's been super

01:13:50
interesting and engaging. I think

01:13:51
one of the recurring themes

01:13:53
that we heard throughout this

01:13:55
morning / afternoon slash evening

01:13:58
panel, depending on where you

01:14:00
are is that this is

01:14:01
such a huge topic with

01:14:03

so many different aspects to

01:14:05

be discussed and with cross

01:14:07

over to other areas of

01:14:08

law and it's very difficult

01:14:10

to address everything comprehensively in

01:14:14

an hour and 15 minutes.

01:14:16

So we are very happy

01:14:17

to be joining all of

01:14:19

our all of the people

01:14:21

who have joined us today

01:14:22

and our breakout rooms for

01:14:24

another short discussion of corruption,

01:14:26

but of course, this is

01:14:29

a discussion that could continue

01:14:30
all day long and for

01:14:32
the rest of the week,

01:14:32
and we still probably would

01:14:34
not have covered it. But

01:14:35
thank you so much and

01:14:36
thank you again to Jose

01:14:38
Antonio and Ian and Tamara.

01:14:40
Lucia who has been very

01:14:41
helpful in collecting all of

01:14:43
the questions and dealing with

01:14:45
all of the technology during

01:14:46
this time. Thank you very

01:14:49
much a rainbow and thank

01:14:51

you very much to Colleen

01:14:52

and Athena Pedro and thank

01:14:57

you so much because this

01:14:59

this this has been sort

01:15:01

of an exemplary panel and

01:15:03

in both the substance and

01:15:04

format and timing show. No

01:15:07

kudos to everyone of you.

01:15:08

I believe that you have

01:15:11

done an incredible job. I

01:15:13

would like to to put

01:15:15

this as an example of

01:15:16

a great panel in terms

01:15:17

of of the presentation initially

01:15:20

Which Wich did an update

01:15:23

of what has been going

01:15:24

on in the past year

01:15:26

and then the various issues

01:15:27

on on corruption the relation

01:15:31

with with the the requirement

01:15:34

to comply with applicable or

01:15:37

than issues with respect to

01:15:39

public policy International public policy

01:15:41

and and and and good

01:15:43

faith Etc. And and then

01:15:45

the standard of proof and

01:15:47

then from a The perspective

01:15:49

that perhaps in a corruption

01:15:51

might need a more active

01:15:55

or or connecting the dots

01:15:56

by the arbitrator's a suggestion.

01:15:59

So thank you so much

01:16:01

now it may be time

01:16:03

to move on to the

01:16:04

breakout rooms. We have time

01:16:07

to do that. We would

01:16:08

love you to stay on

01:16:10

for those that may be

01:16:11

interested and Matt Lucia will

01:16:13

send us to the breakout

01:16:14

rooms, and then there's no

01:16:16

obligation to talk about anything

01:16:19

substantive in the breakout rooms.

01:16:21

We offer that space because

01:16:23

of course we are in

01:16:25

the world and people are

01:16:26

maybe not freaking me being

01:16:27

in the states that maybe

01:16:29

number in the Americas except

01:16:30

Carmen Asia, and I need

01:16:32

to wait to connect with

01:16:33

the with the rest of

01:16:34

the world. So thank you

01:16:35
and let's take it away

01:16:36
from for the for the

01:16:38
breakroom. Thank you. And thank

01:16:52
you Raymond for moderating. It

01:16:53
was up timely tight ship.

01:16:56
Thank you. I didn't mean

01:16:59
to cut anyone off you.