



Foreign Investment Laws – A Renewed Basis for Consent to International Investment Arbitration? A Look at Recent Developments *

Summary

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

The session at Washington Arbitration Week, moderated by Lee Kaplan, focused on foreign investment laws and their implications for investor-state arbitration. Kaplan highlighted the under-discussed nature of foreign investment laws, noting the existence of 72 such laws that often provide similar protections as the more commonly analyzed investment treaties. The discussion included a distinguished panel featuring Uche Anwamegbu, Jose Antonio Rivas, Jeremy Sharp, and Deanna, each bringing a wealth of experience in international arbitration and investment law.

Uche provided an overview of trends in foreign investment laws, noting their prevalence in developing countries, where they often aim to attract foreign investment and include provisions for investor-state arbitration. He emphasized the need for more attention to these laws, as many of them contain consent to arbitration clauses, which are crucial for resolving disputes.

Jose Antonio then discussed the concept of foreign investment laws as unilateral acts under public international law, explaining that such laws create binding obligations based on good faith. He raised important issues regarding the interpretation of these laws and the potential limitations on a state's ability to withdraw consent to arbitration.

Jeremy highlighted the lack of consistency in how tribunals interpret foreign investment laws, identifying various approaches that tribunals take, from relying solely on domestic law to incorporating international law principles. He underscored the challenges that vague or ambiguous language in these laws poses for both states and investors.

Deanna examined the applicable law under foreign investment laws, discussing how the choice of law provisions can impact arbitration outcomes. She noted that the incorporation of international law into domestic legal frameworks is critical for ensuring that investors receive the protections intended by foreign investment laws.



The conversation emphasized the need for states to carefully draft their foreign investment laws to provide clear consent to arbitration and to consider the implications of these laws on their obligations under international law. The panel concluded with a call for further exploration and reform of foreign investment laws, recognizing their potential utility in the broader context of international arbitration. A Q&A session was planned for breakout discussions following the main session.

Authors

Lee Caplan, Jose Antonio Rivas, christina Houreas, Jeremy Sharpe, Ucheora Onwuamaegby

Topics

Foreign Investment Laws

Category

WAW

Full Transcript

00:03:00

so hello everybody and welcome

00:03:03

to the First event of

00:03:05

our last day of this

00:03:07

incredible week. My name is

00:03:09

Maria Lucia Casas. And I'm

00:03:11

part of the executive and

00:03:12

editorial team of the Washington

00:03:13



arbitration week. Today, I have

00:03:16

the great pleasure to introduce

00:03:17

the moderator for this incredible

00:03:19

panel, which is Lee Kaplan.

00:03:22

Decaplan is a partner of

00:03:24

the international arbitration and dispute

00:03:26

resolution practice in the Washington

00:03:28

DC office of Aaron Fox

00:03:30

Leah as console of privatans

00:03:34

or in clients in a

00:03:35

wide range of matters, involving

00:03:37

International dispute resolution public international

00:03:40

law and International Investment law

00:03:43



and policy. Prior to joining

00:03:45

iron Fox Lee worked as

00:03:47

a senior attorney advisor at

00:03:49

the US state Department's Office

00:03:50

of the legal advisor where

00:03:52

he successfully defend the United

00:03:54

States in various arbitrations. And

00:03:56

with that I leave you

00:03:58

with Lee you have the

00:03:59

floor. Thank you. Very Alicia

00:04:02

for that introduction and good

00:04:04

morning to everyone and I

00:04:06

just second the welcome to

00:04:07



the to the final day

00:04:08

of Washington arbitration week and

00:04:10

would like to start by

00:04:11

commending Jose Antonio and Ian

00:04:13

on a truly excellent second

00:04:15

annual conference. I know we've

00:04:17

all thoroughly enjoyed this week's

00:04:19

panel presentation and we all

00:04:21

thank you both very much

00:04:22

for your truly Herculean efforts

00:04:24

to make this conference a

00:04:26

success so our topic for

00:04:29

discussion today. Is foreign investment

00:04:31



laws and what will be

00:04:33

talking about are the domestic

00:04:35

laws and regulations of a

00:04:37

host state that among other

00:04:39

things regulate and often protect

00:04:41

foreign investment many of these

00:04:43

not all but many of

00:04:44

these also contain Provisions providing

00:04:46

for investor State arbitration. So

00:04:50

I think it's fair to

00:04:52

say that foreign investment laws

00:04:54

are the neglected stepchild of

00:04:56

investor State arbitration. We all

00:04:59



know we talk and write

00:05:00

obsessively about the more than

00:05:02

3,000 investment treaties out there.

00:05:04

But only rarely about the

00:05:06

72 foreign investment laws many

00:05:09

of which provide very similar

00:05:10

substantive protections as investment treaties

00:05:13

and about 40 of which

00:05:15

also contain investor State arbitration

00:05:18

provisions. And we know that

00:05:20

we analyze every nook and

00:05:21

cranny of the hundreds of

00:05:22

treaty-based investor State arbitrations and

00:05:25



decisions. But there really is

00:05:27

precious precious little commentary on

00:05:29

the at least 70 arbitrations

00:05:32

arising under foreign investment laws.

00:05:35

So today the neglected stepchild

00:05:38

finally gets its moment in

00:05:39

the spotlight and we've dedicated

00:05:41

the next hour and a

00:05:43

half to around table discussion

00:05:44

solely on all things far

00:05:47

and investment laws. And we

00:05:49

have with us today. I

00:05:50

truly exceptional group of panelists

00:05:52



to guide our discussion. It

00:05:54

is my real pleasure to

00:05:55

introduce first. Uchea anwamegbu uchei

00:05:59

is an international attorney at

00:06:01

Aaron Fox. It's now Aaron

00:06:03

Fox Schiff after the merger

00:06:04

yesterday. He's an active arbitrator

00:06:07

and arbitration practitioner previously Uche

00:06:10

worked as senior counsel and

00:06:12

team leader at ixid managing

00:06:13

over 70 cases in various

00:06:15

economic sectors, and he's also

00:06:18

served as legal counsel at

00:06:19



the United Nations compensation Commission.

00:06:22

Um, we have Jose Antonio

00:06:24

Rivas. We need some introduction.

00:06:25

He's a course co-founder of

00:06:27

Washington arbitration week, but also

00:06:29

founding partner of exstrategy based

00:06:31

in DC and Bogota and

00:06:33

chair of exstrategies arbitration and

00:06:36

international law practice. He works

00:06:38

in international as an international

00:06:40

Council and investment dispute serves

00:06:42

as arbitrator provides advice and

00:06:44

public international law and investment

00:06:46



law Sovereign clients state-owned companies

00:06:48

and investors and he's also

00:06:50

a former exit Council and

00:06:52

foreign investment director of the

00:06:54

ministry of trade of Columbia.

00:06:56

We also have With Us

00:06:57

Jeremy sharp. Jeremy is an

00:06:59

independent arbitrator and practitioner based

00:07:02

in Ottawa Canada. He was

00:07:03

previously a partner in Sherman

00:07:05

and Sterling's International arbitration and

00:07:07

public international law practices in

00:07:09

London in Paris, and he

00:07:11



has served as chief of

00:07:13

investment arbitration in the office

00:07:15

of the legal advisor at

00:07:16

the US Department of State.

00:07:17

He's also a private delegate

00:07:19

on the US delegation to

00:07:21

uncert Charles working group 3

00:07:23

where he advises on a

00:07:25

wide range of investor State

00:07:26

arbitration reforms also welcome Deanna.

00:07:30

She's counsel and Foley hoag's

00:07:33

International litigation and arbitration Department

00:07:36

based in DC. She's dual

00:07:38



qualified US French International dispute

00:07:42

resolution attorney with extensive experience

00:07:44

in complex International Investment arbitration

00:07:47

matters. Um public International all

00:07:51

matters and international commercial arbitration

00:07:53

Diana regularly represents States state-owned

00:07:57

and private entities and individuals

00:07:58

in international disputes, including investor

00:08:02

State arbitration and Maritime and

00:08:04

land boundary disputes. She advises

00:08:06

States on a wide range

00:08:07

of public international law issues

00:08:09

as well. So welcome to

00:08:11



to all of our esteemed

00:08:13

panelists now before we get

00:08:15

started I did want to

00:08:16

provide one a note of

00:08:18

explanation. We have expanded the

00:08:21

scope of our discussion considerably

00:08:22

when we began preparing for

00:08:25

the discussion today's discussion. We

00:08:27

realize there's simply too much

00:08:28

to talk about. So we've

00:08:30

added a few topics. We're

00:08:32

still going to provide a

00:08:33

fresh look on consent to

00:08:34



arbitration under foreign investment laws

00:08:36

as advertised. That's a fascinating

00:08:39

topic, but we're also going

00:08:41

to explore Trends in foreign

00:08:43

investment law and practice and

00:08:44

dispute resolution under foreign investment

00:08:46

laws. And will consider also

00:08:48

the various challenges of textual

00:08:51

interpretation under foreign investment laws

00:08:53

and finally delve into some

00:08:55

very interesting questions of applicable

00:08:57

law under foreign investment laws

00:09:00

after our discussion will have

00:09:02



a 15 minute question and

00:09:05

answer session. So I encourage

00:09:06

everyone to send their their

00:09:08

questions to the chat function

00:09:10

as we progress through the

00:09:13

the discussion and and then

00:09:16

I understand we'll be automatically

00:09:17

diverted into breakout rooms at

00:09:20

the very end. So with

00:09:22

that I will give the

00:09:24

floor to Uche to start

00:09:25

our discussion about Trends in

00:09:27

foreign investment law practice. Thank

00:09:31



you very much Lee. It's

00:09:33

it real on on a

00:09:36

pleasure, of course to be

00:09:37

on the panel with such

00:09:39

a distinguished group my task

00:09:43

in the next few minutes

00:09:44

is to provide an overview

00:09:47

on the basis of which

00:09:48

the more detailed discussions will

00:09:52

follow and to do that.

00:09:53

I'm going to touch on

00:09:55

three men areas one is

00:09:57

the the way these laws

00:10:01



relate in the context of

00:10:05

industrialized nations and countries in

00:10:08

the in the other stages

00:10:11

of industrialization. The second is

00:10:13

for an investment laws and

00:10:15

investors data arbitration, and then

00:10:17

thirdly they look at the

00:10:19

cases or the numbers of

00:10:21

such cases. Turning first to

00:10:25

find investment laws in countries

00:10:28

in different stages of industrialization.

00:10:30

The first thing to note

00:10:32

is that such laws are

00:10:34



the existence of such laws

00:10:37

cuts across high medium and

00:10:39

low income countries, but they're

00:10:43

more prevalent in income low

00:10:45

income. countries now there are

00:10:50

101.85 such laws listed on

00:10:54

the altered database and only

00:10:57

18 of them. laws enacted

00:11:02

by industrialized countries Now there's

00:11:06

also a regulation by the

00:11:09

European Union establishing a framework

00:11:12

for the screening of foreign

00:11:14

direct investment into the Union.

00:11:16



And this kind of sets

00:11:18

the states for the next

00:11:19

topic which is the fact

00:11:21

that although there's such a

00:11:24

proliferation across the board in

00:11:26

different countries. The huge difference

00:11:29

is that with the industrialized

00:11:33

countries. The focus is on

00:11:34

screening of foreign investments while

00:11:37

the laws in the law

00:11:39

and middle income countries are

00:11:41

focus more on our attracting

00:11:43

and promoting Investments. And in

00:11:46



that regard, they offer incentives

00:11:50

of the types that we

00:11:51

are used to seeing in

00:11:52

investment treaties including access or

00:11:57

consent to investors State arbitration.

00:12:00

And that takes us to

00:12:02

the second point which is

00:12:04

invest for an investment laws

00:12:06

and investor State arbitration. Now

00:12:10

again from the publicly available

00:12:14

information about 74 of the

00:12:17

national laws that we looked

00:12:20

at. Reference investor State arbitration

00:12:25



and out of that number

00:12:28

42 of them actually provide

00:12:30

consent. So the other ones

00:12:32

refer to it without providing

00:12:34

consent. Looking at publicly available

00:12:38

information again, all of the

00:12:40

laws that provide consent to

00:12:42

invest the state arbitration laws

00:12:46

of Law and medium income

00:12:49

countries. And some Scholars have

00:12:53

been digging into this to

00:12:54

figure out why that is

00:12:55

the case and some have

00:12:58



suggested that developing countries are

00:13:03

significantly more likely to consent

00:13:05

to arbitration in their National

00:13:07

laws after they receive advice

00:13:10

from the world Banks foreign

00:13:13

investment advisory service. the unit

00:13:17

now the figures that were

00:13:20

cranked suggests that such advice

00:13:24

actually increases by 650 percent

00:13:29

that chances of a developing

00:13:33

country including consent to investor

00:13:37

State arbitration in its domestic

00:13:39

law. The same research also

00:13:43



found that governments with more

00:13:45

experience either having faced investors

00:13:47

data arbitration in the past

00:13:48

or or the ones that

00:13:51

have ratified a lot of

00:13:52

investment treaties are less likely

00:13:54

to have consent to investors

00:13:58

databrition in their National laws

00:14:00

and a number of countries

00:14:02

are so now with the

00:14:05

experience mending their laws to

00:14:07

remove such consent. So looking

00:14:11

at the cases themselves. The

00:14:15



data out there suggests that

00:14:17

cases founded and fun investment

00:14:20

laws reveal a career pattern.

00:14:25

Most of these cases had

00:14:28

a failed on jurisdiction or

00:14:30

where settled or discontinued looking

00:14:34

at the exit website alone.

00:14:36

Just the exit website. They're

00:14:37

about 60 roughly roughly 70

00:14:41

something between 68 and 70

00:14:43

cases that are ledge it

00:14:45

reach up investment law, but

00:14:48

it should also be noted

00:14:49



that these cases involve some

00:14:51

of them involve allegation of

00:14:53

breaches. Although they instruments such

00:14:55

as contracts or treaties. They'll

00:14:58

have 31 countries involved in

00:15:00

those cases one is a

00:15:02

constellation case and for the

00:15:04

under the additional facility rules.

00:15:07

About 5355 of them have

00:15:11

been concluded. and looking at

00:15:15

the ones on which information

00:15:16

is available. And for this

00:15:17

we had to turn to

00:15:19



the it law website. 14

00:15:22

of them failed on jurisdictional

00:15:24

grounds seven were settled or

00:15:27

discontinued and this is from

00:15:30

a population of 29 cases

00:15:32

two were dismissed on the

00:15:34

Merit for succeeded and two

00:15:36

still pending. These figures would

00:15:39

suggest therefore that it is

00:15:41

more difficult to prove investment

00:15:44

and investor status on the

00:15:46

foreign investment laws than on

00:15:49

the investment treaties because there's

00:15:51



quite a big disconnect here

00:15:53

when we look at the

00:15:53

the figures coming up investment

00:15:56

treaties. And so to conclude

00:15:58

this very quick overview. It's

00:16:02

safe to say that while

00:16:03

consent to arbitration and investment

00:16:05

laws, maybe a popular feature

00:16:09

or more popular feature in

00:16:11

the laws of developing countries

00:16:13

in lower income countries. It's

00:16:19

up here. Is that those

00:16:20

governments All they have included

00:16:23



those Provisions may not have

00:16:25

actually fed that badly. Based

00:16:28

on the information that publicly

00:16:29

available and hopefully my core

00:16:34

panelists from their presentations will

00:16:36

be able to throw more

00:16:37

light on why that is

00:16:39

the case. Thank you. Thanks

00:16:47

very much. Let's turn it

00:16:48

over to Jose Antonio for

00:16:49

some comments and reactions. Thank

00:16:52

you. Thank you very much.

00:16:53

Oh Jay, what I've been

00:16:56



taxed to do is to

00:16:57

take a step backward and

00:17:00

and try to analyze the

00:17:04

the background under Republic international

00:17:06

law of one of the

00:17:08

Notions that underlies investment laws.

00:17:11

And that is that they

00:17:12

are unilateral act. So for

00:17:15

a very quick overview, I'll

00:17:17

just put up a few

00:17:19

slides and share them with

00:17:20

you. Jose Antonio just one

00:17:23

moment. We're just gonna take

00:17:24



some reactions first to to

00:17:26

chase presentation. And then if

00:17:28

if you if you have

00:17:29

some feel free. If not,

00:17:31

we can move to Jeremy.

00:17:34

Okay. No, I I do

00:17:35

I do have one one

00:17:38

reaction which is whether any

00:17:42

of the I mean and

00:17:44

that's a question more to

00:17:45

which whether he has a

00:17:47

notion of whether the the

00:17:52

Lesser number of investment laws

00:17:55



being a basis for consenting

00:17:58

investment arbitration is somehow connected

00:18:01

also to an issue of

00:18:03

language in the in the

00:18:06

in the actual Provisions that

00:18:09

are included in the investment

00:18:12

laws. Sorry, I didn't I

00:18:19

didn't quite get that the

00:18:20

the language and the you

00:18:23

know, whether it's it's a

00:18:24

you know, it is it

00:18:26

is it simply that is

00:18:27

it your perception that the

00:18:29



the issue is more of

00:18:31

a higher standard for investment

00:18:33

laws, or is it more

00:18:34

an issue of them? Not

00:18:37

necessarily or most of them

00:18:38

not necessarily being drafted as

00:18:40

to really give in consent

00:18:42

to arbitration. Well, like I

00:18:44

said, it's only in about

00:18:48

half of the of the

00:18:50

70 odd legislations in which

00:18:55

which arbitration is mentioned at

00:18:58

all is that clearly consent

00:19:01



the rest of them? It's

00:19:03

it's either non-existent or it's

00:19:05

oh, it's unclear but But

00:19:10

quite and I at least

00:19:12

a good number of them

00:19:13

do contain the relevant Provisions,

00:19:17

what would I think what

00:19:19

would be interesting to find

00:19:21

out is where where the

00:19:25

provisions are that clear? How

00:19:29

come the chances of the

00:19:31

Investor's success is still not

00:19:35

that high. compared to The

00:19:39



numbers we see out of

00:19:40

investment treaty cases. And can

00:19:46

I ask one one more

00:19:47

question when you say success

00:19:48

you mean success that the

00:19:50

tribunal will declare that has

00:19:52

jurisdiction, correct? A success is

00:19:55

relative. That's At the end

00:20:00

of the day, it's a

00:20:01

question of who goes with

00:20:02

a check in their pockets.

00:20:03

It's it's a low it's

00:20:06

a low bar. Okay. Okay.

00:20:09



Thank you Jeremy anything that

00:20:15

thanks Lee. I do have

00:20:17

a question. That's somewhat stemming

00:20:19

from Jose Antonio's Point Uche,

00:20:21

which is is are these

00:20:25

figures somehow masking the real

00:20:27

risk? Because as you mentioned

00:20:28

often you see in these

00:20:30

cases a foreign investment law

00:20:32

and another instrument that might

00:20:36

provide consent to jurisdiction for

00:20:38

instance a contract or a

00:20:40

International Investment agreement. And is

00:20:43



it possible that we're seeing

00:20:45

tribunals relying on the instrument

00:20:47

perhaps that they know that

00:20:49

are drafted more clearly to

00:20:50

provide consent. And so we

00:20:52

haven't seen as much attention

00:20:53

to the foreign investment law,

00:20:55

but now that we're seeing

00:20:57

States. Perhaps tightening up their

00:20:59

phone investment contracts or revisiting

00:21:03

their International Investment agreements, perhaps

00:21:05

adding more conditions to consent

00:21:08

or even eliminating some of

00:21:09



the substantive obligations will see

00:21:12

more attention pay to these

00:21:14

foreign investment laws. And that

00:21:15

actually will find that there

00:21:17

was this inherent or latent

00:21:19

risk all along. It's just

00:21:21

that we didn't see it

00:21:21

manifested in these cases because

00:21:24

there was an alternative route

00:21:25

for the tribunal perhaps to

00:21:27

find jurisdiction or to rule

00:21:28

for a party on the

00:21:29

merits. you'll see right Jeremy

00:21:32



it and it's it's difficult

00:21:34

to to tell it's difficult

00:21:36

to kind of tease our

00:21:38

totally all the different permutations

00:21:42

that this could take but

00:21:45

it's also interesting that that

00:21:50

some of these cases do

00:21:53

not end up being a

00:21:55

result. A lot of them.

00:21:57

A lot of them are

00:21:59

settled or discontinued. It's It's

00:22:05

also it could also be

00:22:07

the fact that here you're

00:22:09



dealing with an instrument. That

00:22:12

is put out the by

00:22:15

the by the other side

00:22:19

alone in the dispute as

00:22:23

opposed to where you are

00:22:24

dealing with instruments that have

00:22:26

been negotiated on by at

00:22:30

least two parties or multiple

00:22:31

parties and I think who

00:22:33

San Antonio might be saying

00:22:34

a little bit more on

00:22:35

that whole thing about being

00:22:37

in lateral consent, but but

00:22:38



there's no doubt that it

00:22:40

gives the the author incredible

00:22:43

power as to you what

00:22:44

they are able to be

00:22:47

able to put out and

00:22:48

at least one would hope

00:22:50

that by the time anybody

00:22:51

sits down to drop these

00:22:52

laws on and put them

00:22:54

out there that they thought

00:22:55

carefully about what they exposing

00:22:58

themselves to. Great. Thanks. Very

00:23:05

good. Thank you. All Deanna

00:23:06



any reactions or comments to

00:23:08

that. I hello everyone. Yes,

00:23:11

perhaps an observation Uche. So

00:23:15

I I think that what

00:23:17

we've been seeing is that

00:23:18

the states are revising the

00:23:21

investment laws, maybe not at

00:23:23

the same rate as that,

00:23:25

they're trying to revise their

00:23:26

International treaties and we've seen

00:23:30

kind of like a range

00:23:32

of different approaches in the

00:23:34

years ago South Africa switch

00:23:36



to mediation in its investment

00:23:38

law. And in terms of

00:23:40

more recent revised investment laws,

00:23:44

we've seen States again being

00:23:46

careful about open the doors

00:23:48

to in in CS and

00:23:50

instead saying, okay, we may

00:23:52

agree to it either through

00:23:54

direct agreement or through another

00:23:57

treaty. So certainly the states

00:23:59

are being cautious about just

00:24:01

opening the door immediately, but

00:24:03

the point about you know,

00:24:04



getting advice on from the

00:24:06

world being Agency on the

00:24:08

best. Is quite interesting and

00:24:11

I query with whether the

00:24:14

fact that they're using 2010

00:24:16

investment law reform handbook is

00:24:19

also potentially an issue. It

00:24:22

needs to be Revisited since

00:24:23

we're now in 2021. Good

00:24:27

point it was I think

00:24:28

interesting to some of us

00:24:29

looking at at the the

00:24:31

data there were some studies

00:24:32



in 2018 that had a

00:24:35

much lower number of arbitration

00:24:38

cases arising in our foreign

00:24:39

investment laws. Then then today

00:24:41

the numbers of almost double.

00:24:42

I don't know if that's

00:24:43

a there's a lot more

00:24:45

activity going on under these

00:24:47

laws or we're just now

00:24:48

compiling the data and a

00:24:51

better more comprehensive way, but

00:24:52

it's an interesting Trend to

00:24:54

watch. Okay, thank you all

00:24:56



for that. We're going to

00:24:57

move to our next round

00:24:57

of discussion. And now Jose

00:24:59

Antonio, we're going to begin

00:25:01

our discussion with you about

00:25:03

consent to arbitration under foreign

00:25:06

investment laws. Actually and thank

00:25:10

you for for the comments

00:25:11

of which and everyone one

00:25:13

of the one of the

00:25:15

motivations for for proposing this

00:25:19

panel. Is that in in

00:25:21

practice? It's it's quite usual

00:25:25



that the investment arbitration lawyer

00:25:28
as a part of the

00:25:30
due diligence that they do

00:25:31
whenever they meet an investor.

00:25:33
They they ask, you know,

00:25:36
the obvious questions is there

00:25:38
are contract right? Is there

00:25:39
an investment contract and then

00:25:42
the next question of course,

00:25:44
is there a vit but

00:25:46
sometimes in that due diligence

00:25:48
process? It is it is

00:25:51
seldom done or thought of

00:25:53



that. They will necessarily go

00:25:55

into a run of analyzing

00:25:59

or searching the national laws

00:26:01

and see whether whether there

00:26:03

is a consent to arbitration

00:26:05

in our investment law and

00:26:07

I've been surprised in the

00:26:09

sense that some countries do

00:26:10

have investment loss and and

00:26:12

some of them do have

00:26:13

investment arbitration consenting there. So

00:26:17

that that was one of

00:26:18

the motivations to to move

00:26:20



forward with with this topic.

00:26:21

I'll my task here is

00:26:24

a to take a step

00:26:26

back and and put in

00:26:29

terms that Lee introduce them

00:26:31

investors arbitration is sort of

00:26:33

the child of public international

00:26:35

law. And therefore there is

00:26:37

something to be said in

00:26:38

terms of of where investment

00:26:41

laws come when we put

00:26:44

the framework of public international

00:26:46

law and sign it. in

00:26:49



investment laws So I'll share

00:26:52

them our presentation here. Just

00:26:55

give me one second. Is

00:26:57

it showing? Yes. excellent, so

00:27:02

No, the the very basic.

00:27:07

Perspective will be one of

00:27:08

public international law and there

00:27:11

we ask the questions what

00:27:13

what are unilateral acts and

00:27:15

and this has been in

00:27:19

part defined by institutes and

00:27:22

and by The Guiding principles

00:27:23

of applicable to unilateral declarations

00:27:26



by the ilc in 2006

00:27:29

one can say that they

00:27:31

are a formal declaration formulated

00:27:34

by a state with the

00:27:36

intent to produce obligations under

00:27:37

international law. So there is

00:27:39

a formal declaration if you

00:27:40

compare that to investment laws

00:27:42

clearly what more formal than

00:27:46

an act of Congress or

00:27:49

or of the legislative then

00:27:52

Here The Guiding principles provide

00:27:55

that the Declarations publicly made

00:27:57



and manifesting the will to

00:27:59

be bound may have the

00:28:00

effect of creating legal obligations

00:28:02

when the conditions for this

00:28:05

are met The Binding character

00:28:07

of such declarations is based

00:28:08

on good faith. Interested States

00:28:11

May then take them into

00:28:13

consideration and rely on them.

00:28:14

So we have we have

00:28:15

several elements here to unpack

00:28:17

one is that there must

00:28:21

be an intent to create

00:28:22



a legal obligation? And then

00:28:24

the the ultimate principle here

00:28:28

is which is also a

00:28:30

general principle of law under

00:28:32

article 38 of the icj

00:28:34

statute is the principle of

00:28:37

good faith then then we

00:28:41

what was it, you know

00:28:43

was the I'll see that

00:28:44

that that creative. No. No,

00:28:46

it was not in 1974

00:28:48

the the main thematic case

00:28:53

in in terms of unilateral

00:28:56



Acts. The ICS stated on

00:28:59

in paragraph 49 of the

00:29:02

nuclear test cases New Zealand

00:29:06

and Australia versus France one

00:29:08

of the basic principles governing

00:29:10

the creation and performance of

00:29:12

legal obligations. Whatever their source

00:29:15

is the principle of good

00:29:16

faith, then it goes on

00:29:17

and and it emphasizes that

00:29:20

just as the very rule

00:29:22

of pasta swimanda in the

00:29:24

law of trees based on

00:29:26



good faith. So also is

00:29:27

The Binding character of an

00:29:29

international obligation as soon by

00:29:31

unilateral declaration. What's what's so

00:29:33

interesting about, you know lateral

00:29:35

declarations is that when you

00:29:36

look into the article 38

00:29:37

of the ICD statute you

00:29:40

have treaties you have custom

00:29:41

you have the general principles

00:29:43

of law as a subsidiary

00:29:45

Source you have also statements

00:29:48

by the, you know, publicist

00:29:51



and and international judicial decisions,

00:29:55

but you don't have a

00:29:56

reference to any declarations, however

00:30:01

Considering that it is based

00:30:03

on good faith. You can

00:30:04

we can we can then

00:30:05

conclude that it is also

00:30:07

it can also be a

00:30:08

source of international law now

00:30:09

or at least I can.

00:30:13

One one but but the

00:30:16

the nuclear test cases were

00:30:18

not the first ones that

00:30:20



refer to unilateral declarations. And

00:30:22

there's there's a very interesting

00:30:23

and doing doing a little

00:30:25

bit of research here. There's

00:30:27

a very interesting case which

00:30:29

is the Eastern Greenland case

00:30:31

in which Norway had set

00:30:34

for for many many years

00:30:36

that it would it did

00:30:39

not consider Eastern Greenland part

00:30:41

of its territory and then

00:30:43

some states it started occupying

00:30:45

it and and of course

00:30:46



and I'm a bit of

00:30:48

I am I am being

00:30:50

a little bit last with

00:30:51

the facts. But but in

00:30:52

any event that that's the

00:30:53

gist of it so basically

00:30:54

Denmark say, well you you

00:30:56

made this declarations that you

00:30:58

wouldn't be claiming that it's

00:31:00

your territory. So what's now

00:31:02

and and the court basically

00:31:03

at the time the pcija

00:31:06

not the icj said that

00:31:09



it considered beyond all these

00:31:11

people that are reply of

00:31:12

this nature basically. Declaration of

00:31:14

the Minister of Norway by

00:31:17

the minister for foreign affairs

00:31:20

on behalf of his government

00:31:21

in response to our request

00:31:23

by The Diplomatic the representative

00:31:25

of a foreign power regarding

00:31:27

a question following within his

00:31:29

provision province is binding upon

00:31:33

the country to which the

00:31:34

minister belongs. So there there

00:31:37



are some there are there

00:31:38

are some earlier cases that

00:31:40

would ultimately help to constitute.

00:31:43

This has as a general

00:31:45

principle of law or even

00:31:47

a customer rule of international

00:31:48

law. Now, what are the

00:31:52

requirements for those unilateral acts

00:31:54

to be valid? You know

00:31:55

first there must be capacity

00:31:57

of the state of persons

00:31:58

authorized informally the unilateral from

00:32:00

declaration second. There should be

00:32:02



a form of for that

00:32:04

so declaration, but that form

00:32:06

in itself need not to

00:32:09

be necessarily in written form.

00:32:11

Hence when we're In terms

00:32:13

of investment laws the fact

00:32:15

that they're written the fact

00:32:16

that they have been enacted

00:32:18

by Congress or the the

00:32:21

legislative. Give it more Force.

00:32:23

And and who was it

00:32:25

addressed to of course, if

00:32:26

it may be said that

00:32:28



it is addressed to the

00:32:30

to to the citizens of

00:32:32

the state, but of course,

00:32:33

it is a clear signal

00:32:35

and it's publicly made and

00:32:37

it can be of course

00:32:39

relied upon by Foreign investors

00:32:41

as well. Now, how do

00:32:45

you interpret those which is

00:32:46

the the most difficult element

00:32:49

here. They're much has been

00:32:51

said about the interpretation and

00:32:55

part of the interpretation under

00:32:56



public international law is based

00:32:59

on what the the court

00:33:04

has said with respect to

00:33:06

declarations with regard to reservations

00:33:09

to treaties some of those

00:33:11

can be taken into account

00:33:12

and much of the case

00:33:16

law of the icj comes

00:33:17

from from there, but not

00:33:18

all so when we look

00:33:21

into the guiding principles. One

00:33:24

of the elements that has

00:33:25

to be interpret is is

00:33:26



the content and the factual

00:33:29

circumstances in which they were

00:33:31

made and and of course

00:33:33

the reactions to those statements.

00:33:37

So when you think in

00:33:38

terms of investment laws one

00:33:40

has to think well did

00:33:42

they relied upon it was

00:33:43

it in place still was

00:33:46

the request for arbitration made

00:33:48

while the law was was

00:33:51

a enforce or was it

00:33:54

withdrawn just a few days

00:33:56



before the request of arbitration

00:33:58

was was submitted. um, then

00:34:03

I will I will only

00:34:06

say with regard to interpretation

00:34:09

that that it is important

00:34:15

at least under. Icjlo that.

00:34:20

The Declaration must be intended

00:34:22

to produce certain effects. and

00:34:27

those affects must be in

00:34:28

line with existing law And

00:34:33

that comes really from from

00:34:35

the the case and passage

00:34:37

over Indian Territory. now one

00:34:41



one central question here is

00:34:44

when can the unilateral act

00:34:47

be considered null and void?

00:34:49

And what is the duration

00:34:52

of the unilateral act? When

00:34:54

can it be withdrawn? And

00:34:58

and this is a key

00:34:59

question because of course as

00:35:00

a unilateral act or an

00:35:03

investment loan may be any

00:35:04

natural Act Congress can can

00:35:06

simply withdraw and and modify

00:35:09

it. So. Here certain elements

00:35:14



must be taken into account

00:35:15

one the any specific terms

00:35:18

of the Declaration relating to

00:35:20

revocation. So if the law

00:35:21

has any duration to the

00:35:24

extent to which those to

00:35:26

whom the obligations are owed

00:35:28

have relied on such obligations.

00:35:31

three the extent to which

00:35:33

there has been a fundamental

00:35:35

change in the circumstances, you

00:35:37

know Revolution was the principle

00:35:40

those Those elements and certainly

00:35:43



the first two ones are

00:35:45

very important who relied upon

00:35:48

the Declaration who acted based

00:35:51

on those declarations. And in

00:35:53

our case on the under

00:35:55

the investment laws importantly one

00:35:59

case, which may be one

00:36:00

of the most familiar ICA

00:36:02

cases the military and paramilitary

00:36:04

activities in and against the

00:36:05

caraga in the jurisdictional decision

00:36:08

the court basically explained how

00:36:17

The principle of good faith

00:36:19



and relying upon the Declaration

00:36:21

and in our case. or

00:36:25

in the case of this

00:36:26

session in the investment law

00:36:28

relying upon that creates certain

00:36:33

obligations on of longevity with

00:36:37

respect to the effects of

00:36:38

the Declaration. So the the

00:36:40

state that has even the

00:36:43

Declaration or the investment line

00:36:44

in our case. Would not

00:36:47

be simply entitled to withdraw

00:36:50

that declaration at any time

00:36:51



paragraph. 59 provides that the

00:36:56

unilateral nature of Declaration does

00:36:58

not signify that the state

00:37:00

making the Declaration is free

00:37:01

to amend their scope and

00:37:03

contents of its solid commitment

00:37:05

as it pleases. So there's

00:37:06

no complete reign as to

00:37:10

when to withdraw the Declaration

00:37:11

because they have provided in

00:37:14

good faith and expectation to

00:37:16

the other states and members

00:37:19

of the International Community in

00:37:21



our case the investors now

00:37:22

in paragraph 63 The court

00:37:25

says the right of immediate

00:37:27

termination of declarations with indefinite

00:37:30

duration is far from established.

00:37:32

So it's not it's not

00:37:33

forever. It appears from the

00:37:35

requirements of good faith that

00:37:37

they should be treated by

00:37:39

analogy according to the law

00:37:41

of treaties which requires a

00:37:43

reasonable time for withdrawal from

00:37:46

termination of treaties that contain

00:37:49



no provision regarding the duration

00:37:51

of their validity. So here

00:37:53

the analysis is is a

00:37:55

is is somehow more subjective

00:37:57

in terms of Did it

00:38:00

acted in good faith after

00:38:02

giving the Declaration and that

00:38:05

would be at least in

00:38:06

my view an extremely factual

00:38:09

analysis. I think that that

00:38:12

I I have more more

00:38:14

to say Lee but I

00:38:16

think that the main objective

00:38:19



of of my remarks was

00:38:21

to provide a background on

00:38:23

public international law. I do

00:38:25

have some statements to to

00:38:27

make with respect to investment

00:38:28

laws and and some that

00:38:30

have been declared by investment

00:38:33

tribunals to be in fact

00:38:35

reflective of consent and some

00:38:38

that have have not but

00:38:39

I will leave that for

00:38:41

for later. Thank you. And

00:38:45

thank you very much Jose

00:38:46



Antonio. I'm very comprehensive and

00:38:48

interesting over now to Jeremy

00:38:50

for any reactions. I thank

00:38:54

you Lee and thank you

00:38:54

Jose Antonio. It's very interesting

00:38:57

what you said if we

00:38:58

if we think about the

00:39:00

foreign an investment law as

00:39:01

a unilateral act under public

00:39:03

international law. If a Tribunal

00:39:06

for instance in looking at

00:39:07

termination of the ACT might

00:39:10

look to all circumstances including

00:39:13



potentially any Reliance by Foreign

00:39:16

investor because foreign investment laws

00:39:18

as I understand, it weren't

00:39:19

weren't considered expressly by the

00:39:21

ilc. It opens up. A

00:39:23

lot of questions including is

00:39:25

every foreign investor that invests

00:39:27

in a state in which

00:39:28

there is a foreign investment

00:39:30

law relying on that foreign

00:39:33

investment laws dispute settlement Provisions

00:39:35

such that if the estate

00:39:38

were to terminate that law

00:39:40



there could be some detrimental

00:39:42

Reliance that could be relied

00:39:43

on for instance. Imagine a

00:39:45

notice of intent to bring

00:39:47

a claim being submitted under

00:39:49

foreign investment law and then

00:39:50

the state terminating the foreign

00:39:53

investment. Off before the investor

00:39:54

actually accepts any unilateral offer

00:39:57

to bring a claim. So

00:39:59

practitioners might then invoke the

00:40:02

foreign investment law in its

00:40:04

notice of intent as having

00:40:05



relied on it and making

00:40:07

the investment and bringing the

00:40:08

claim. So two questions any

00:40:10

advice for practitioners and second

00:40:12

do you think states are

00:40:13

aware of this when they're

00:40:15

drafting for an investment laws

00:40:16

that there may be limitations

00:40:18

on the ability of the

00:40:20

state to terminate this after

00:40:21

excuse me? Sorry the state

00:40:28

aware of this and take

00:40:35

understanding the risks of adopting

00:40:37



a foreign investment law. Given

00:40:40

that they may bind their

00:40:42

ability to terminate the law

00:40:43

at any time given that

00:40:45

in the normal course the

00:40:46

legislature or the relevant authorities

00:40:48

may think that they're able

00:40:49

to terminate any law after

00:40:51

it's outlived its utility. Thank

00:40:53

you. Thank you. Thank you

00:40:56

Jeremy for that for that.

00:40:57

I love the question because

00:41:00

it it's a very similar

00:41:02



to to a few cases

00:41:06

that have taken place of

00:41:08

the icj including the the

00:41:13

the Nicaragua quick case in

00:41:15

which consent to to the

00:41:20

icj jurisdiction was was withdrawn

00:41:24

a few days before the

00:41:25

claim was was submitted but

00:41:28

also in other cases that

00:41:29

has taken place well to

00:41:32

your question. I I seriously

00:41:35

don't think that this the

00:41:37

states that draft. This laws

00:41:39



are necessarily aware of the

00:41:42

public International lovely mutations that

00:41:46

that if consider unit natural

00:41:49

acts under Republican National Law,

00:41:51

they would have simply to

00:41:53

withdrawn but but I have

00:41:54

to make a caveat on

00:41:56

that. I believe that it

00:41:59

may be easier for our

00:42:00

government for instance to withdraw

00:42:02

the consent to the icj.

00:42:08

jurisdiction that that he may

00:42:10

be for a state simply

00:42:12



to to amend a law

00:42:14

or to determinate a law

00:42:19

and because there's also well

00:42:20

I would say it depends

00:42:23

on the on the state

00:42:24

but but in in both

00:42:27

a republican democracy or or

00:42:30

in in in a parliamentary

00:42:35

democracy, there are procedures to

00:42:38

withdraw laws and and it's

00:42:40

not that easy at least

00:42:42

TimeWise. It may be very

00:42:43

easy in terms of will

00:42:46



but there are procedures that

00:42:47

need to be followed. So

00:42:48

it's not it cannot happen

00:42:50

just from one day to

00:42:51

the other. There therefore the

00:42:56

investors should be aware of

00:43:00

what is going on in

00:43:01

Congress or in parliament in

00:43:04

order to be able to

00:43:07

submit their request for arbitration

00:43:09

in a timely fashion. Yeah

00:43:12

that that sort of my

00:43:14

view, but I don't think

00:43:15



that That most of congresses

00:43:20

or Parliament when enacting this

00:43:22

laws are are aware of

00:43:25

the icg jurisprudence and and

00:43:29

the case law. I don't

00:43:30

think that that's the case.

00:43:34

Thank you. Thank you guys.

00:43:35

So now over over to

00:43:38

Diana and then and then

00:43:39

to Uche for for follow-up

00:43:41

comments. I sure perhaps one

00:43:44

comment and and a question

00:43:46

for practitioners to consider. Is

00:43:49



what are the sort of

00:43:50

the implications of the you

00:43:53

know, good faith interpretation. We've

00:43:55

seen this approach, of course

00:43:56

with tribunals interpreting. The the

00:44:00

arbitration Clause is in the

00:44:04

treaties themselves where they say

00:44:05

the interpretations from the objective

00:44:08

standpoint in good faith as

00:44:10

opposed to restrictive which a

00:44:13

lot of times States argue

00:44:14

that consent is such an

00:44:16

extraordinary step for the states

00:44:19



that restrictive interpretation as appropriate.

00:44:22

So I I query to

00:44:24

which extend practically speaking the

00:44:27

approach that you've laid out

00:44:29

sort of similar in in

00:44:32

how we approach in general

00:44:34

interpreting arbitration clauses in investment

00:44:37

arbitration. Thank you, Deanna. Also,

00:44:43

thank you for that question

00:44:45

because that it allows me

00:44:46

to explain something that I

00:44:48

did not I think that

00:44:49

he if anything, investment laws

00:44:54



as an instrument or as

00:44:59

a basis for consent. Can

00:45:01

be very much compared to

00:45:03

vits or to investment chapters

00:45:07

in free trade agreements. They

00:45:10

are somehow dissimilar for from

00:45:12

contracts in a contract you

00:45:13

have in the same instrument.

00:45:15

You have the expression of

00:45:19

the will of both parties

00:45:21

in the same instrument. So

00:45:23

that's not where we are,

00:45:24

you know vit you have

00:45:26



the offer from the state

00:45:28

on the one hand. to

00:45:31

the investors and then in

00:45:33

the request for arbitration you

00:45:35

have the acceptance of that

00:45:37

offer and those those two

00:45:43

wheels meet. And that's what

00:45:47

what crystallizes the consent of

00:45:49

the parties to investment arbitration

00:45:51

similarly in the investment law.

00:45:54

You can have the offer

00:45:56

of investment arbitration, but at

00:45:58

that stage we have not

00:45:59



identified who is the investor

00:46:03

who will accept that offer

00:46:05

and then at a later

00:46:06

stage in the request for

00:46:08

arbitration, you have the investor

00:46:10

accepting that offer which is

00:46:13

important provided in the investment

00:46:15

law and and then those

00:46:17

two wheels meet and that

00:46:18

crystallizes the consent to arbitration

00:46:22

by both parties. mmm Yeah,

00:46:28

just to to that. Oh,

00:46:31

so Antonio, I guess my

00:46:34



question. I've got two questions.

00:46:36

I'm perhaps they could be

00:46:37

comments as well. The first

00:46:39

is you know, it seems

00:46:42

to me that a lot

00:46:42

of what's been described. So

00:46:44

if I can apply to

00:46:45

different types of legislations, it's

00:46:48

you know, not necessarily to

00:46:49

to front investment laws and

00:46:54

Loan unless I missed a

00:46:57

Nuance there. and then secondly,

00:46:59

I'm more generally do you

00:47:03



consider that there is any

00:47:06

difference in for lack of

00:47:09

a better word the quality

00:47:11

of Rights and obligations arising

00:47:14

out of these laws as

00:47:20

compared to the ones that

00:47:22

we typically would see in

00:47:24

bilateral. or multilateral instruments Thank

00:47:29

you. So I think that

00:47:31

you have you made two

00:47:32

questions there so one. The

00:47:38

first one or statement that

00:47:40

that this may not may

00:47:43



also apply Beyond investment laws.

00:47:45

And and I think that

00:47:46

that's that's absolutely right unilateral

00:47:49

act on Republic International. They

00:47:52

can even even be declarations

00:47:55

by by state officials by

00:47:57

the head of state by

00:47:59

the president by the foreign

00:48:00

minister by the minister of

00:48:01

economy and so on. I

00:48:05

don't think that that the

00:48:07

limitation is is of it

00:48:11

being a natural Act is

00:48:13



provided by public international law.

00:48:14

In fact, you know, the

00:48:16

requirements were there and there's

00:48:17

there's no there's no limitation

00:48:19

as to eat having to

00:48:20

be an investment law itself.

00:48:21

There were the what What

00:48:24

determines the limitations are in

00:48:27

our case the the exit

00:48:31

convention the exit convention? requires

00:48:35

that consent be provided in

00:48:37

writing it requires that there

00:48:41

be at least in exit

00:48:44



case law a reference to

00:48:46

exit so So the limitations

00:48:49

are really provided by the

00:48:50

applicable rules of arbitration or

00:48:53

by the bits themselves. Sorry

00:48:55

not by the vits. But

00:48:56

by the the applicable rules

00:48:58

of arbitration because in this

00:48:59

world, we're not we're not

00:49:01

under Vitas now to the

00:49:04

second question. Is there a

00:49:06

difference in quality when we

00:49:09

compare investment laws and and

00:49:11



investment treaties. I the answer

00:49:15

to that question would require

00:49:16

doing a specific analysis of

00:49:19

the laws. I've seen investment

00:49:21

laws that are almost word

00:49:26

by word exactly exactly drafted

00:49:32

as as an investment treaty.

00:49:35

Whereas I believe beyond the

00:49:37

beyond the text when it

00:49:39

comes to to the application

00:49:40

when it comes to what's

00:49:41

received on the other side,

00:49:42

would you as as an

00:49:47



investor be yeah, assuming the

00:49:52

even even if the texture

00:49:53

where to be what for

00:49:55

word do you think that

00:49:57

there is a difference in

00:50:01

And the level of protection

00:50:03

or the quality of protection

00:50:04

simply by the fact, that

00:50:06

one comes out of a

00:50:08

unilateral Act and the other

00:50:10

one comes from a bilateral

00:50:12

or multilateral. No, I I

00:50:16

do not. I don't think

00:50:18



that and and and the

00:50:21

basis to say that I

00:50:22

do not really comes from

00:50:26

from from I would say

00:50:27

from General basic public International

00:50:30

order. There's no hierarchy hierarchy

00:50:32

in in the sources of

00:50:34

international law. I mean, there's

00:50:36

no there's no no first

00:50:37

son and second son. I

00:50:39

mean there's there's no there's

00:50:40

no first customer international law

00:50:43

and then treaty law there

00:50:45



there equally situated if some

00:50:49

rights are provided by an

00:50:52

investment law and and those

00:50:54

rights were born out of

00:50:57

the consent of two parties

00:50:59

internationally. The state has to

00:51:02

respect them. if that's the

00:51:04

case, why is it relevant

00:51:06

then if one is if

00:51:08

one is a unilateral Act

00:51:10

and the other one is

00:51:11

is born out of a

00:51:15

multilateral or bilateral actions Oh,

00:51:18



why doesn't the inquiry stop

00:51:20

right at the point where

00:51:22

we established that that right

00:51:25

obligations have a reason. Oh,

00:51:28

I think that it's relevant

00:51:30

for for practical reasons. I

00:51:31

mean as as Council, of

00:51:35

course you when you have

00:51:36

submitted claims relying on on

00:51:39

investment laws, you have to

00:51:41

tell your tribute, you know

00:51:44

where those obligations come from.

00:51:46

So otherwise when they ask

00:51:48



your Source, they won't believe

00:51:50

you but for purely practical

00:51:52

reasons, but I don't I

00:51:54

don't think that there's a

00:51:54

hierarchy between the rights of

00:51:56

obligations born out of one

00:51:57

or the other. Thank you

00:52:01

guys. We're gonna move on

00:52:02

to our our third topic

00:52:04

our third round. This is

00:52:07

a deals with the sometimes

00:52:09

vaccine issue of interpretation under

00:52:12

foreign investment laws and will

00:52:14



give the floor to Jeremy

00:52:15

to start our discussion. Great.

00:52:18

Thank you Lee. Of course.

00:52:21

One of the criticisms of

00:52:24

the current Vester State dispute

00:52:26

settlement is a lack of

00:52:27

consistency, but one area in

00:52:29

which there's perhaps perfect consistency

00:52:32

is the rules of interpretation

00:52:34

for International Investment agreements. You'll

00:52:37

see every tribunal apply or

00:52:39

at least purport to apply

00:52:41

the relevant provisions of the

00:52:43



Vienna convention on the law

00:52:45

of treaties whether or not

00:52:46

the treaty Ally applies as

00:52:48

between the two states parties

00:52:50

including as a matter of

00:52:51

customer law. But the situation

00:52:54

is different with foreign investment

00:52:56

laws and there's no consistency

00:52:59

that I can see in

00:53:01

the way that tribunals approach

00:53:04

the interpretation of foreign investment

00:53:05

laws. You can see at

00:53:07

least four approaches in some

00:53:09



of the cases first is

00:53:10

silence some tribunals do not

00:53:13

appear to give any indication

00:53:15

about how their approaching the

00:53:17

interpretation of the text of

00:53:19

the foreign investment law and

00:53:21

that may just be because

00:53:22

it's very clear for instance

00:53:25

in the trade X case

00:53:26

and the tribunal suggested that

00:53:28

it was unambiguously clear that

00:53:31

Albania had had consented to

00:53:33

to jurisdiction in that case

00:53:35



and perhaps felt there was

00:53:36

no need to provide greater

00:53:38

and indication of the interpretive

00:53:41

rules. It was it was

00:53:42

using and by the same

00:53:44

token. If you look at

00:53:45

the incisive versus El Salvador

00:53:47

case for some of the

00:53:49

laws invoke by the claimants

00:53:51

the tribunal said it was

00:53:53

Obvious that these did not

00:53:54

provide consent and it was

00:53:56

equally obvious that the foreign

00:53:57



investment law of El Salvador

00:53:58

did provide consent so perhaps

00:54:00

in those cases and there

00:54:03

was no need to say

00:54:04

anything further. You do see

00:54:07

at least what appears to

00:54:08

be one case where tribunal

00:54:10

has relied exclusively on domestic

00:54:12

law and that's in petrobart

00:54:14

versus Kyrgyzstan. But even there

00:54:16

the tribunal says well as

00:54:18

pointed out by the parties

00:54:19

the kyrgyzen Constitution incorporates principles

00:54:23



of international law, which may

00:54:25

have influenced the Tribunal. The

00:54:28

third you could imagine international

00:54:30

law applying exclusively to the

00:54:32

interpretation. And you see at

00:54:34

least one reference in csob

00:54:36

versus the Slovak Republic where

00:54:39

the tribunal was interpreting a

00:54:42

notice published by the MFA

00:54:44

not a foreign investment law

00:54:45

but a unilateral Act and

00:54:47

the tribunal said the question

00:54:49

whether the parties have effectively

00:54:51



expressed their consent exit. Our

00:54:53

jurisdiction is not to be

00:54:55

answered by reference to national

00:54:56

law. It is governed by

00:54:58

international law. And then the

00:55:01

fourth and I think perhaps

00:55:02

the most common approach is

00:55:04

a reference to domestic law

00:55:06

and international law and you

00:55:09

see variations in the in

00:55:11

the awards or decisions on

00:55:12

this point. For instance in

00:55:14

spp versus Egypt the tribunal

00:55:16



applied general principles of statutory

00:55:19

interpretation taking into account relevant

00:55:22

rules of treaty interpretation under

00:55:24

the Vienna convention and principles

00:55:26

of international law applicable to

00:55:29

unilateral declarations. So this suggests

00:55:32

that the general principles of

00:55:33

statutory interpretation were perhaps the

00:55:36

primary means and that they

00:55:37

could be supplemented by applicable

00:55:39

international law. Now if you

00:55:42

contrast that with *gianwali* versus

00:55:43

Georgia, the tribunal said that

00:55:45



if the national law of

00:55:47

Georgia addressed the question of

00:55:49

consent than the tribunal must

00:55:51

follow the national law guidance,

00:55:52

but always subject to the

00:55:53

ultimate governance of international law

00:55:56

which suggests that somehow international

00:55:59

law might trump domestic law.

00:56:01

so the question is does

00:56:03

this really matter in practice

00:56:05

if the tribunals provide a

00:56:07

rule of interpretation or how

00:56:08

they go about it and

00:56:10



it's the award suggest, you

00:56:12

know, not that much at

00:56:13

least from what you can

00:56:14

glean from the awards and

00:56:17

perhaps there are several reasons

00:56:18

for this as the mobile

00:56:20

tribunal observed even when an

00:56:23

arbitral Tribunal Indicates the interpretive

00:56:26

approach. It's using it very

00:56:28

often focuses on the text

00:56:30

the actual language of the

00:56:32

foreign investment law and doesn't

00:56:34

go much beyond that often

00:56:36



times a second reason is

00:56:38

is David Karen pointed out

00:56:40

is that tribunal is often

00:56:41

have a somewhat liberal interpretation

00:56:44

of instruments of consent in

00:56:46

these foreign investment laws. So

00:56:48

whichever approach is used might

00:56:50

lead them to the same

00:56:52

the same outcome. a third

00:56:55

is that you know, the

00:56:57

text itself is going to

00:56:59

be the the guiding principle,

00:57:04

but it's often difficult to

00:57:06



figure out which and approach

00:57:09

is being used. Even if

00:57:10

the tribunal indicates that they're

00:57:12

applying domestic law and international

00:57:13

law. It's difficult to say

00:57:15

to say how this interpreted

00:57:17

the how this influence the

00:57:19

interpretation. So the problem is

00:57:25

we know that tribunals often

00:57:26

rely on the text. But

00:57:29

the text in many of

00:57:30

these foreign investment laws is

00:57:32

deemed to be vague and

00:57:34



ambiguous even contradictory. In the

00:57:37

investment law itself or with

00:57:39

other instruments of other authorities

00:57:42

under the under the state's

00:57:44

laws. Why is that? I

00:57:48

think I suppose there are

00:57:48

a few different explanations first.

00:57:50

These foreign investment laws were

00:57:52

often drafted on the basis

00:57:53

of models or templates as

00:57:56

Uche was suggesting at the

00:57:57

beginning World Bank is provided

00:57:59

some some guidance and the

00:58:01



World Bank used to have

00:58:02

a dispute resolution provision a

00:58:05

model dispute resolution provision for

00:58:07

foreign investment laws, but it's

00:58:09

a it's easy to imagine

00:58:10

that some of these Provisions

00:58:11

could get garbled in the

00:58:14

legislative process, even if they

00:58:16

were clear from the outset.

00:58:19

The second point which was

00:58:20

already touched on is that

00:58:21

states didn't have a lot

00:58:23

of experience with investor State

00:58:25



dispute settlement, perhaps at the

00:58:27

time when they were drafting

00:58:28

these foreign investment laws. And

00:58:30

so they might not have

00:58:31

been as attentive or even

00:58:33

if they were attentive. They

00:58:34

might not have understood all

00:58:36

the nuances or ramifications of

00:58:37

some of the language that

00:58:39

was was used. And then

00:58:41

a third point which was

00:58:42

touched on as well is

00:58:44

that International arbitral tribunals may

00:58:47



not be in a very

00:58:48

good position to understand legislative

00:58:51

Nuance in some of these

00:58:52

laws or there may be

00:58:54

problems of translation that make

00:58:56

it very difficult for a

00:58:56

tribunal to to interpret it

00:58:59

in the way that the

00:59:00

legislators thought. They were drafting

00:59:02

the text. And you can

00:59:04

see this lack of clarity

00:59:07

manifest itself in the cases

00:59:09

in a few different ways

00:59:10



the first obviously in the

00:59:12

scope of consent what also

00:59:14

in the temporal scope and

00:59:15

in this relationship between the

00:59:17

instrument the foreign investment law

00:59:19

and other authorities within the

00:59:22

state. So as noted many

00:59:24

of these laws are quite

00:59:25

clear on their face consent

00:59:28

is provided or consent is

00:59:29

not provided to to investment

00:59:31

arbitration. But as Michaela testerved

00:59:35

in an article what he

00:59:36



surveyed all these laws, there's

00:59:38

this vast gray area where

00:59:39

it's simply not clear from

00:59:41

the face of the text

00:59:42

itself whether the state has

00:59:44

consented or has not consented

00:59:47

to investment arbitration in here.

00:59:49

You really see tribunal struggling

00:59:51

to make sense of some

00:59:52

of these laws. For instance

00:59:55

an example is the penwell

00:59:56

versus the caregiversary public decision

00:59:59

just came out a couple

01:00:01



of months ago that 2003

01:00:03

caregas investment act provided that

01:00:05

investment disputes shall be settled

01:00:08

by courts and less one

01:00:09

of the parties asks or

01:00:11

requests the dispute to be

01:00:13

considered in accordance with Exodus

01:00:15

Charles rules. And the the

01:00:18

state said well, if we

01:00:18

have to if the investor

01:00:20

has to ask that implies

01:00:21

consent and consent is not

01:00:24

given in advance and the

01:00:25



tribunal said no, it's they

01:00:28

looked at the text. They

01:00:29

looked at the context and

01:00:30

they concluded that further consent

01:00:33

was not required. But this

01:00:35

just goes to show that

01:00:35

the Keurig is Republic may

01:00:37

have had one expectation about

01:00:39

the application of its law.

01:00:40

And in fact said we

01:00:41

amended our previous law which

01:00:43

we felt or was deemed

01:00:45

to be not clear in

01:00:46



order to make consent and

01:00:48

not provided in advance and

01:00:50

still whatever their efforts say.

01:00:52

We're not deemed Successful by

01:00:53

this particular. You know. the

01:00:56

second example is the temporal

01:00:59

scope and you can see

01:01:00

this again in a very

01:01:01

recent case the June 2021

01:01:03

award in oh, oh manolium

01:01:07

processing versus Belarus and the

01:01:09

claimant had initiated in uncitrol

01:01:11

arbitration under the states 2014

01:01:15



investment law and a question

01:01:18

was whether that law applied

01:01:21

to Investments made or even

01:01:23

disputes are rising before the

01:01:25

law came into a into

01:01:27

Force very interestingly. In this

01:01:29

case at least for my

01:01:31

experience and having reviewed these

01:01:32

Awards is that the tribunal

01:01:35

did defer to the state

01:01:37

reasonable interpretation of the state's

01:01:39

own law, which we don't

01:01:41

often see at least not

01:01:43



expressly stated in an award

01:01:45

or decision. The tribunal looked

01:01:49

the purpose of the act

01:01:50

in the Preamble a kind

01:01:51

of vcl type analysis saying

01:01:53

that the purpose included attracting

01:01:56

Investments, which did not seem

01:01:58

to include the protection of

01:02:00

pre-existing Investments or pre-existing disputes

01:02:03

and then the tribunal look

01:02:05

to the definition of investment

01:02:06

which referred to Property being

01:02:09

invested in the home state

01:02:12



or in the the state

01:02:14

of Belarus. So in the

01:02:16

end the tribunal concluded that

01:02:18

this fell outside the temporal

01:02:20

scope and there was no

01:02:21

jurisdiction. You can imagine from

01:02:23

the investors' perspective. This was

01:02:24

was not very satisfactory the

01:02:27

other authors in the literature

01:02:30

that had looked at this

01:02:30

law had deemed that there

01:02:32

had been consent given in

01:02:34

advance. And so it just

01:02:35



goes to suggest that you

01:02:37

know, the lack of clarity

01:02:38

has creates risks and problems

01:02:41

first for States and investors

01:02:43

as well. The third example

01:02:46

I'll give is the ambiguity

01:02:48

that arises in the relationship

01:02:49

between the foreign investment law

01:02:52

itself and the other legal

01:02:54

authorities of the state and

01:02:55

one example we can look

01:02:57

to is the society Resort

01:02:59

company versus Ivory Coast at

01:03:01



2017 decision where the ivory

01:03:06

investment law provided for exit

01:03:08

arbitration, but it required the

01:03:10

claimant to express the consent

01:03:12

to exit arbitration in its

01:03:14

initial application for approval of

01:03:16

the investment. That's the way

01:03:18

the Ivory Coast indicate interpreted

01:03:21

their own investment law, but

01:03:24

the climate said that there

01:03:25

did not need to be

01:03:26

a acceptance of the consent

01:03:29

and initial application that this

01:03:31



could be made in the

01:03:32

notice of request. And here

01:03:34

the tribunal in part look

01:03:38

to the Ivory Coast's own

01:03:41

model application for investment and

01:03:44

noted that there was no

01:03:44

provision in there about dispute

01:03:46

resolution or accepting exit consent

01:03:48

and seemed to use this

01:03:49

against the state to find.

01:03:53

Jurisdiction, in this case, which

01:03:55

suggests to immediately at least

01:03:56

that not only is there

01:03:57



the problem of vagueness in

01:03:59

determinacy or lack of precision

01:04:01

in the foreign investment law

01:04:02

itself that can give rise

01:04:03

to problems for foreign investors

01:04:05

and States but also a

01:04:07

lack of consistency perhaps across

01:04:09

the legal regime or the

01:04:11

other legal instruments of that

01:04:13

state that a State might

01:04:14

need to to look at

01:04:15

to ensure that it's foreign

01:04:17

investment law operates the way

01:04:19



that it intended when it

01:04:21

was adopted. So for me

01:04:23

just to conclude the bottom

01:04:24

line for the states is

01:04:25

that you know, these foreign

01:04:28

investment laws often are they're

01:04:30

vague imprecise or even contradictory

01:04:33

and states are engaged in

01:04:35

this process now of looking

01:04:37

at the investor State dispute

01:04:38

settlement regime more holistically, you

01:04:41

know Central work group three,

01:04:42

it's mostly focused on investment

01:04:44



treaties. This is a very

01:04:46

good opportunity for states to

01:04:48

step back evaluate the priorities

01:04:50

for investor State dispute settlement.

01:04:52

Protection and promotion of foreign

01:04:54

investment and look to see

01:04:55

if their foreign investment laws

01:04:57

actually reflect those priorities and

01:04:59

are drafted in a way

01:05:00

that gives Clarity to investors

01:05:02

and to Future tribunals. Thanks

01:05:05

Lee. Thank you very much.

01:05:07

Jeremy. We'll go to Deanna

01:05:10



Uche and Jose Antonio for

01:05:11

comments in that order. Sure.

01:05:14

Thank you Lee and thank

01:05:16

you. Jeremy one sort of

01:05:18

maybe elaboration on the canons

01:05:21

of interpretation that you talked

01:05:22

about is we've seen particularly

01:05:26

the exit tribunals alluding to

01:05:28

the 2006. I'll see guiding

01:05:31

principles. And particularly what's interesting

01:05:35

about those guiding principles is

01:05:37

that they address the situation

01:05:39

of ambiguity and the provision

01:05:42



there is that, you know,

01:05:44

there's a rule of interpretation

01:05:46

and the event that there

01:05:47

is a doubt as to

01:05:49

these scope of the obligations

01:05:51

resulting from a unilateral declaration.

01:05:53

It must be interpreted in

01:05:55

a restrictive manner but exit

01:05:58

tribunals have found that this

01:05:59

restrictive approach is not join

01:06:01

to exit arbitration particularly because

01:06:04

they found the knowledge and

01:06:07

follow the approach of the

01:06:10



icj in relation to interpretation

01:06:14

of unilateral declarations in particular

01:06:17

optional Declarations of compulsory jurisdiction

01:06:20

of the icg and what

01:06:24

that means is that either

01:06:26

is no restrictive approach and

01:06:28

that the offer in the

01:06:31

investment law. The offer to

01:06:32

arbitrate must be interpreted as

01:06:34

it stands having regard to

01:06:36

the words actually used and

01:06:39

that do consideration should be

01:06:40

paid to the intention of

01:06:42



the state having formulated such

01:06:45

acts and that can be

01:06:47

deduced from the as you

01:06:49

alluded to context the circumstances

01:06:51

of the preparation of the

01:06:53

law and the purposes intended

01:06:55

to be served and one

01:06:57

issue there. Of course is

01:06:58

we don't always have trouble

01:07:01

preparatoa for those investment laws

01:07:04

and perhaps one of the

01:07:06

things for the states to

01:07:07

consider is documenting exactly what

01:07:10



they intention is behind the

01:07:13

investment law particularly if if

01:07:15

the wording is is is

01:07:19

not so clear and there

01:07:21

is some doubt as to

01:07:22

the scope of the offer

01:07:24

meat. And so we I

01:07:28

I wanted to highlight that

01:07:30

this really raises also, A

01:07:33

strategic issue for counsel and

01:07:36

how to approach this because

01:07:37

Under The ilc Guiding principles

01:07:40

there is a way to

01:07:41



argue for restrictive approach in

01:07:43

the interpretation. But then under

01:07:46

the good faith approach it

01:07:48

is arguable that the tribunals

01:07:50

must examine whether foreign investors

01:07:52

have formed any reasonable and

01:07:54

legitimate expectations is to availability

01:07:58

of exit remedies pursuant to

01:08:01

domestic law. So that is

01:08:03

something that we've seen being

01:08:05

debated in those cases. Yeah,

01:08:09

thank you. There does seem

01:08:11

to be a bit of

01:08:11



attention. I understand that the

01:08:13

ilc didn't address for an

01:08:14

investment laws as such and

01:08:16

drafting their guidelines. But as

01:08:18

you suggest, there's this restrictive

01:08:20

principle reflected, which tribunals routinely

01:08:24

dismissed from far back as

01:08:26

Emco Asia. You don't look

01:08:27

expansively or restrictively but look

01:08:29

at it into the terms

01:08:31

of Vienna convention and so

01:08:32

forth. So there could be

01:08:33

this this tension where tribunals

01:08:35



might rely on the ilc

01:08:36

guidelines in certain parts and

01:08:39

ignore them and others as

01:08:40

suggest Thank you Jeremy. Um,

01:08:43

I'm just gonna make the

01:08:45

next comments optional just given

01:08:47

given looking at the time

01:08:48

but UJ if you have

01:08:50

something yeah, just just a

01:08:52

very quick one Jeremy, you

01:08:54

know, you took about lack

01:08:55

of clarity of text and

01:08:57

then lack of consistency in

01:08:59



the approach to interpretation by

01:09:01

the by the tribunals the

01:09:04

lack of a broad approach.

01:09:06

Is that something that you

01:09:09

believe has been harmful to

01:09:12

the system as well to

01:09:15

the to the parties in

01:09:17

general and are you both

01:09:22

are both issues what you

01:09:24

consider should be Should be

01:09:28

addressed by the oil in

01:09:31

the context of the of

01:09:33

the reforms currently being discussed.

01:09:36



Yes, just very briefly. I

01:09:38

do think all parties the

01:09:40

states and the investors should

01:09:41

know in advance. What are

01:09:43

the interpretive rules that will

01:09:44

be applied to these instruments

01:09:46

so that they can draft

01:09:48

these instruments with some idea

01:09:49

about how they'll be better

01:09:50

interpreted. If tribunals are seen

01:09:53

to be picking and choosing

01:09:54

different aspects of the law

01:09:55

to rely on to reach

01:09:57



result. It may be a

01:09:59

fair result in the end,

01:10:00

but it may leave one

01:10:01

or the other parties very

01:10:03

dissatisfied about this approach for

01:10:05

instance. Looking to the Preamble

01:10:07

in one case looking to

01:10:08

another a totally unrelated an

01:10:11

instrument outside of the foreign

01:10:13

investment law in another case.

01:10:14

There should be some better

01:10:15

understanding of all the users

01:10:18

of this system about the

01:10:20



means for interpretation and how

01:10:22

these are going to be

01:10:23

applied in any particular case.

01:10:26

Otherwise, I think we're just

01:10:27

setting ourselves up for a

01:10:28

lot of dissatisfies. So that's

01:10:31

so far. The issue is

01:10:32

not that there that there's

01:10:34

been massive instances of Injustice

01:10:39

happening just that. The the

01:10:41

uncertainty is not good for

01:10:43

the system. Well in many

01:10:45

cases the State loses on

01:10:47



this question. The state is

01:10:48

interpreting its own law. Let's

01:10:50

say the state is acting

01:10:51

in good faith. That means

01:10:52

the tribunal is interpreting the

01:10:53

law in a way the

01:10:54

state had not intended. It's

01:10:56

not like a bilateral investment

01:10:57

treaty. This is the state's

01:10:59

own unilateral act in a

01:11:00

tribunal saying no you're interpretation

01:11:02

of your law is wrong.

01:11:03

That's a problem for the

01:11:04



system. If the states are

01:11:06

acting a good faith. We

01:11:07

should expect the states are

01:11:09

putting forth and interpretation that's

01:11:10

consistent with how the law

01:11:12

would be interpreted by courts

01:11:14

of that state in in

01:11:16

the main now in any

01:11:18

particular case, you may say

01:11:19

they reached a reasonable result,

01:11:21

but I would think we

01:11:22

would want a state a

01:11:24

result that satisfactory for both

01:11:26



parties having looked at this

01:11:28

issue in advance rather than

01:11:29

In the Heat of an

01:11:31

arbitration case. Oh, yeah. Thank

01:11:39

you. I was Antonio. Yeah

01:11:41

quickly. Yeah very quickly. I

01:11:45

I want to I want

01:11:47

to sort of contest a

01:11:49

little bit the notion that

01:11:50

the good faith. Let's call

01:11:55

it the good faith Doctrine

01:11:56

based on on on public

01:11:58

international law would necessarily. Lead

01:12:02



to a more liberal interpretation

01:12:07

or or less restrictive one

01:12:09

in particular the nuclear test

01:12:11

cases indicate in paragraphs 47

01:12:14

the following and I quote

01:12:16

when states make statements by

01:12:18

which their freedom of action

01:12:20

is to be limited a

01:12:22

restrictive interpretation is called for

01:12:25

so so it's it is

01:12:27

not necessarily quite quite quite

01:12:29

correct that that if we

01:12:31

follow a unilateral Act under

01:12:35



the basis of public international

01:12:37

law and I see jurisprudence

01:12:39

would lead would end up

01:12:42

saying that that the interpretation

01:12:45

must be non-restrictive and and

01:12:47

then just a question and

01:12:49

I believe that Diana May

01:12:52

touch upon in her remarks

01:12:54

later on on that. Why

01:12:57

do we mean by by

01:12:58

a restrictive interpretation because in

01:13:01

my world? If we apply.

01:13:06

The inner convention on the

01:13:08



law of treaties article 31

01:13:09

and if we are if

01:13:11

we applied the four means

01:13:12

of interpretation. the meaning of

01:13:16

the terms and then the

01:13:18

context and and and and

01:13:20

the purpose all of them

01:13:22

interpreting good faith. Then then

01:13:24

we we end up in

01:13:26

what I would say is

01:13:27

is a restrictive enough interpretation

01:13:31

if we extend that and

01:13:34

and we say that those

01:13:35



are customer means of interpretation

01:13:37

regardless of whether we're talking

01:13:39

about treaties or or unilateral

01:13:41

acts that applied to the

01:13:42

text of the investment law

01:13:44

should lead us to a

01:13:47

restrictive enough interpretation. So I

01:13:48

want to ask what no,

01:13:52

What do we mean by

01:13:53

that and I and I

01:13:55

and I embrace all the

01:13:56

comments made by Jeremy in

01:13:58

the sense that yes, we

01:13:59



have to understand what context

01:14:01

was it given but also

01:14:03

we have to look into

01:14:05

the words that are included

01:14:07

in in the text a

01:14:10

good example of this and

01:14:11

you might touch upon this

01:14:12

in your remarks. Diana is

01:14:14

is what is the the

01:14:17

whole discussion about the investment

01:14:19

law in Venezuela that that

01:14:21

that's a good example because

01:14:23

there were several several commentators

01:14:26



that for many years opine

01:14:30

in Ultimate that this gave

01:14:32

consent and at the end

01:14:34

of it, you know, three

01:14:35

cases investment arbitration tribunal said,

01:14:37

no, I mean it's not

01:14:38

clear. So I think that

01:14:40

the bar is not that

01:14:41

low. There needs to be

01:14:43

clear. consent by the state

01:14:46

based on the words, but

01:14:47

I'll stop there and perhaps

01:14:50

Jeremy or might have some

01:14:54



some remarks. Lady perhaps we

01:14:57

could just go to tight

01:14:59

Diana and then we could

01:14:59

come back to it at

01:15:00

the end if we have

01:15:01

times. Yeah, that would be

01:15:02

great. So we're gonna move

01:15:04

to our fourth topic of

01:15:05

discussion. We told you we

01:15:06

had a lot to talk

01:15:07

about we're gonna move to

01:15:09

the really interesting and sometimes

01:15:11

equally vaccine issue of applicable

01:15:13



law under foreign investment laws.

01:15:15

And what we'll do just

01:15:16

to make sure we have

01:15:17

enough time for this segment.

01:15:19

We'll go all the way

01:15:20

to 10:30 and then we'll

01:15:21

we'll deal with Q&A probably

01:15:23

in the chat rooms. So

01:15:25

Deanna take it away. So

01:15:27

thank you Lee and yeah,

01:15:30

I will touch upon the

01:15:31

restrictive interpretation later. But before

01:15:33

this I will indeed segue

01:15:35



into the subtopic of applicable

01:15:38

law as it relates to

01:15:39

the sort of substance of

01:15:40

the claims. So where the

01:15:42

investment protections invoke line investor

01:15:45

based on foreign investment law.

01:15:47

The applicable law in principle

01:15:51

is the includes at least

01:15:53

the terms of that law

01:15:54

and relevant domestic legal regime

01:15:58

and some of the investment

01:16:01

laws state that International also

01:16:04

applies as a relevant source

01:16:06



of law, but in most

01:16:08

cases what law applies and

01:16:11

what is the precise content

01:16:13

of that law has been

01:16:14

disputed by the parties often

01:16:16

using experts on both sides

01:16:19

to address that so taking

01:16:22

into account that the two

01:16:23

main regimes for investment arbitrations

01:16:27

the exit convention on the

01:16:28

one hand and the answer

01:16:29

travels. It's helpful to frame

01:16:32

the discussion in terms of

01:16:34



the applicable rules under those

01:16:36

two regimes. So under the

01:16:40

exit convention the starting point

01:16:42

the locus of the rule

01:16:43

is of course article 42:1

01:16:45

which requires an exit tribunal

01:16:49

first to see if there's

01:16:50

an agreement between the parties

01:16:53

asked for the applicable law

01:16:54

and we refer to it

01:16:56

as a choice of law

01:16:57

provision. In the absence of

01:17:00

such an agreement the tribunal

01:17:01



must apply the domestic law

01:17:04

and this is by the

01:17:06

wording of article 40 to

01:17:08

0.1 and but in addition

01:17:11

to the domestic law of

01:17:13

the whole state, the tribunal

01:17:15

must apply such rules of

01:17:17

international law is maybe applicable

01:17:19

to the party's dispute. So

01:17:21

giving tribunal some discretion on

01:17:24

what rules deems to be

01:17:26

applicable to particular dispute. So

01:17:30

recent exit tribunals have applied

01:17:33



this rule with some consistency

01:17:35

and in several on those

01:17:37

cases the respondent state use

01:17:40

the applicable law to limit

01:17:42

or even eliminate some of

01:17:45

the claims that were brought

01:17:47

by investors. And just to

01:17:49

highlight a few of those

01:17:51

cases. I want to talk

01:17:53

about Puck cream versus El

01:17:56

Salvador and this decision came

01:17:58

out in 2016 the tribunal

01:18:01

found that the Salvadoran Lord

01:18:03



is she did not contain

01:18:04

a choice of law provision

01:18:06

and so in the absence

01:18:08

of such a choice of

01:18:09

law it held that it

01:18:10

must apply Salvadoran law as

01:18:12

well as the rules of

01:18:14

international law as maybe applicable

01:18:17

and based on that the

01:18:19

tribunal rejected the respondent state

01:18:22

clean that certain that the

01:18:26

Trevino did not have jurisdiction

01:18:28

over some of the claims

01:18:29



brought by investor specifically relying

01:18:32

on principles of international law

01:18:34

and customer international law and

01:18:37

the tribunal also emphasize the

01:18:40

corrective function of international law

01:18:42

in relation to domestic role

01:18:44

and in particular it accepted

01:18:47

looking back at the older.

01:18:49

Are cases it accepted the

01:18:51

insasa tribunals holding that in

01:18:54

order to invoke the arbitration

01:18:56

jurisdiction provided in the investment

01:18:59

law. There must be a

01:19:00



claim with substantive grounds in

01:19:03

that law, but such an

01:19:05

approach cannot exclude applicables of

01:19:08

international law in the absence

01:19:09

of a choice of War.

01:19:10

So again very much adhering

01:19:13

to article 42.1 of the

01:19:16

exit convention and more recently

01:19:19

in the interim versus Nigeria.

01:19:23

I hope I'm pronouncing the

01:19:24

Investor's name correctly from 2020

01:19:28

which resulted in a victory

01:19:30

for Nigeria, but only issue

01:19:32



of Sort of like which

01:19:35

law applies to the substance

01:19:37

of the claims the respondent

01:19:39

States sought to dismiss the

01:19:41

claim based on indirect expropriation

01:19:43

arguing that it's a claim

01:19:45

under customary international law and

01:19:48

not under the Nigerian investment

01:19:50

law the tribunal rejected this

01:19:53

contention that an indirect expropriation

01:19:56

and protection afforded under customer

01:19:59

international law are excluded from

01:20:03

the protection offered in the

01:20:04



Nigerian investment law. It rejected

01:20:07

the argument that the tribunal

01:20:09

acts jurisdiction based on customer

01:20:12

international law because it found

01:20:13

that and this is important

01:20:15

that the language in the

01:20:17

Nigerian investment law was drafted

01:20:21

broadly and included claims on

01:20:24

their customer international law it

01:20:26

also highlighted that customer international

01:20:30

law is part of the

01:20:31

English common law and that

01:20:33

common law Has been incorporated

01:20:35



into the Nigerian law. So

01:20:37

I think that's an important

01:20:37

inquiry for tribunals to to

01:20:41

go into in order to

01:20:42

justify admitting claims that go

01:20:46

beyond domestic law and so

01:20:48

because the customer International became

01:20:50

part of Nigerian law, it

01:20:53

was found to be applicable

01:20:55

to the dispute. Under the

01:20:58

trial rules in a moving

01:21:00

now to a slightly different

01:21:01

procedural framework our article 33

01:21:05



of the 1976 version of

01:21:09

the answer travels and the

01:21:12

revised 2020-20 2013 rules have

01:21:16

a similar provision. Um in

01:21:18

any way it differs slightly

01:21:20

from the exit rule in

01:21:22

that the parties can designate

01:21:23

the entire legal system as

01:21:25

the law governing the dispute.

01:21:27

It provides that the arbitral

01:21:30

tribunal shall apply the law

01:21:32

designated by the parties as

01:21:34

applicable to the substance of

01:21:36



the dispute, but failing such

01:21:39

designation the arbitral tribunal shall

01:21:41

apply the law determined by

01:21:44

the conflicts of laws that

01:21:45

it can't that that it

01:21:46

considers to be applicable. So

01:21:49

arguably this gives more discretion

01:21:52

to answer trial tribunals. In

01:21:57

in terms of how this

01:21:58

played out most more recently

01:22:00

since we're also focusing on

01:22:02

recent developments. I'll refer to

01:22:06

the case that Jeremy you

01:22:08



mentioned penwell versus caregis republic

01:22:11

which addressed the 2003 investment

01:22:15

law of the Republic of

01:22:17

the Curious Republic and you

01:22:19

know the starting point of

01:22:20

course was the provision of

01:22:22

the caregis law itself, which

01:22:26

did not refer to international

01:22:30

law explicitly and the provision

01:22:33

stated that the legislation that

01:22:36

governs. The the regime is

01:22:39

the constitution of the care

01:22:43

of curious Republic the investment

01:22:45



War itself and other normative

01:22:47

acts of of the Republic.

01:22:50

so the tribunal considered that

01:22:52

to the extent that some

01:22:54

International or principles that protect

01:22:56

foreign investors are formed constituent

01:22:59

part of the kyugus legal

01:23:02

system that would be relevant

01:23:03

for the resolution of the

01:23:05

dispute that the tribunal actually

01:23:07

had the duty to apply

01:23:08

them and independently of how

01:23:11

Kirk is courts would have

01:23:14



approached this and I found

01:23:16

that very interesting because what

01:23:18

the caregiver's Republic demonstrated through

01:23:23

use of experts is how

01:23:26

These issues would be approached

01:23:28

by caregis courts with clearly

01:23:30

the tribunal found that that

01:23:32

was not controlling and it

01:23:35

held that while international law

01:23:38

per se has no rule

01:23:40

to play in the present

01:23:41

arbitration. The universally recognized principles

01:23:45

and Norms of international would

01:23:47



be applicable and so and

01:23:50

precisely because it found that

01:23:51

they form part of the

01:23:53

caregis legal system. And so

01:23:56

so that's how it played

01:23:58

out in the recent answer

01:23:59

trial case. So to summarize

01:24:02

and sort of open the

01:24:03

floor for the comments from

01:24:05

my co-panelists based on the

01:24:08

caseload to date in its

01:24:11

what's emerging is that in

01:24:13

deciding what way to give

01:24:15



to international law the parties

01:24:17

should bear in mind that

01:24:18

tribunals will take into account

01:24:20

factors which include first whether

01:24:23

the tribunal is constituted under

01:24:26

the exit convention. and there

01:24:28

we have to take into

01:24:32

account article 42 which makes

01:24:34

specific reference to international law

01:24:36

or is it governed by

01:24:38

another regime for example, the

01:24:40

institrawal law and ultimately I

01:24:43

think in practice the arguments

01:24:45



are similar another factor is

01:24:48

whether the investment law contains

01:24:50

the choice of flow provision

01:24:51

to the exclusion of any

01:24:53

other laws, that would be

01:24:55

obviously relevant for an exit

01:24:58

arbitration whether the investor or

01:25:01

investment should be considered foreign

01:25:03

and that is basically based

01:25:05

on the terms of the

01:25:06

law itself and absent in

01:25:10

guidance provided in the Lord

01:25:11

itself based on the tribunal's

01:25:14



analysis of the ownership structure

01:25:16

of the investment the identity

01:25:18

of the owners of the

01:25:19

investment source of investment capital

01:25:22

and whether they invest their

01:25:25

or the investment were recognized

01:25:27

as foreign by It and

01:25:29

that's just to list a

01:25:30

few of those factors and

01:25:33

finally how international law is

01:25:36

reflected or incorporated into the

01:25:38

legal framework of the host

01:25:40

state is going to be

01:25:41



very important as I alluded

01:25:44

to a number of cases

01:25:45

now that focused on that

01:25:48

very much. So with this

01:25:50

I invite my co-panelists to

01:25:53

provide for their observations on

01:25:55

the applicable law and perhaps

01:25:57

your experience dealing with this

01:26:00

issue in cases. Thank you

01:26:03

very much Gianna. We'll turn

01:26:06

to Uche Jose Antonio and

01:26:08

then Jeremy for comments in

01:26:09

that order if any comments.

01:26:13



Okay. I hope the mic

01:26:14
a lot already. So I'll

01:26:15
see my time to to

01:26:16
the others and come back

01:26:18
at the end if there's

01:26:19
still time. Yeah, and and

01:26:21
same for me. I'll see

01:26:22
how I'll give my time

01:26:24
to Jeremy if he has

01:26:25
questions. Thank you Diana for

01:26:30
that very interesting presentation. I

01:26:33
was just as you were

01:26:35
speaking. I was thinking props.

01:26:36



This is another area where

01:26:37

it really behooves states to

01:26:40

look at their foreign investment

01:26:41

laws in light of the

01:26:42

applicable law the flexibility reflected

01:26:45

an article three of the

01:26:46

ancestral rules as well as

01:26:48

an article 42:1 of the

01:26:50

exit convention and perhaps, you

01:26:52

know, whether there's a trend

01:26:53

toward reflecting the applicable law

01:26:55

in the foreign investment laws,

01:26:57

but it is a minimum.

01:26:58



I think yet another issue

01:26:59

that state should focus on

01:27:01

when they're turning an eye

01:27:02

to their foreign investment laws

01:27:04

in the context of broader

01:27:06

reform efforts of the system.

01:27:10

Now Jeremy, I couldn't agree

01:27:12

more and I think that

01:27:15

and and I find just

01:27:18

as I was reviewing the

01:27:18

cases what the importance of

01:27:22

experts in these debates and

01:27:24

explaining, you know, how the

01:27:26



legal system of a particular

01:27:27

State functions and of course

01:27:29

the state knows it's law

01:27:31

and should take that into

01:27:33

account when implementing foreign investment

01:27:36

laws. Thank you. Thank you.

01:27:44

Any any other comments chair

01:27:48

Jose Antonio got? three minutes

01:27:52

Lee I could just maybe

01:27:54

briefly come back to the

01:27:56

restrictive approach which was I

01:28:01

suppose it's something that would

01:28:03

also be relevant to the

01:28:04



sort of interpreting the scope

01:28:06

of legal obligations and the

01:28:08

substance of those investment laws

01:28:10

as well. I think the

01:28:11

way Jose Antonio I see

01:28:13

as being relevant, you know

01:28:15

in practice is when we're

01:28:17

dealing with ambiguous language and

01:28:20

whether there's actually an offer

01:28:23

me by the state to

01:28:24

arbitrate I think that from

01:28:28

the perspective of the states

01:28:29

and I I will start

01:28:31



with that and I will

01:28:31

address another perspective from the

01:28:33

perspective of the states can

01:28:35

send to arbitration as an

01:28:37

extraordinary concession. So, you know

01:28:39

that approach that in the

01:28:42

in the case of an

01:28:44

ambiguous text if there's an

01:28:46

offer somehow it should be

01:28:48

in favor of investor. If

01:28:50

especially the investor can Demonstrate

01:28:52

legitimate expectations can be problematic

01:28:55

in that it expands what

01:28:59



the states they offering and

01:29:02

so in that sense restrictive

01:29:04

approach would go against liberal

01:29:06

interpretation and and prevent sort

01:29:09

of construing that text as

01:29:11

indeed offering consent to arbitration

01:29:14

from the investors perspective. You

01:29:18

know that is something that

01:29:19

they would have to argue

01:29:21

right and see if they

01:29:23

can establish clearly legitimate expectations

01:29:26

whether the state itself intended

01:29:28

to offer to arbitrate and

01:29:31



I think a lot of

01:29:31

these issues play out through

01:29:33

Artful advocacy of experts and

01:29:37

and counsel. Thank you Matt.

01:29:41

I not I'm raising my

01:29:46

hand not in response to

01:29:47

the other. I I agree

01:29:48

with everything that she said.

01:29:51

one of the one of

01:29:54

the reasons why why I

01:29:57

sort of kind of intimately

01:30:02

react to the notion of

01:30:03

restrictive in interpretation. Is that

01:30:05



is that at least psychologically

01:30:07

in me? It creates this

01:30:09

idea that that it's it's

01:30:12

overly restricted, but but I

01:30:15

don't think that that there's

01:30:19

there's also this notion that

01:30:22

legitimate expectations would would create

01:30:26

some expectations. regardless of the

01:30:31

language of either the treaty

01:30:34

or the investment law and

01:30:35

and at least in my

01:30:37

world the expectations are only

01:30:40

legitimate and reasonable when when

01:30:42



they really rely on what

01:30:45

has been offered. So if

01:30:47

what has been offered is

01:30:48

not absolutely clear that it

01:30:51

really provides an offer to

01:30:53

investors that arbitration. The expectations

01:30:56

are not reasonable. And they're

01:30:58

not legitimate. So so I

01:31:00

I think that the notion

01:31:02

of legitimate expectations has has

01:31:03

been inflated to the extent

01:31:07

that the investor can ask

01:31:09

for whatever they want regardless

01:31:11



of the language of the

01:31:12

treaty or or the investment,

01:31:14

which is not true when

01:31:15

I want to make one

01:31:17

last comment, which I think

01:31:18

it may be important to

01:31:20

share with with everyone listening

01:31:21

here and we had this

01:31:23

this conversation during our Preparatory.

01:31:29

Meeting what one of the

01:31:32

areas that has perhaps not

01:31:33

been explored by States when

01:31:35

when they draft the investment

01:31:37



laws is that yes, there's

01:31:39

this risk that taking an

01:31:43

investment law from a model

01:31:45

might be very risky as

01:31:47

we have seen and and

01:31:48

and my co-pilots have had

01:31:49

indicated but at the same

01:31:51

time if states were really

01:31:55

informed about what they could

01:31:57

include in those laws. That

01:32:00

might be something interesting to

01:32:01

explore because they could include

01:32:03

in those laws whatever requirements

01:32:06



they wish to include. and

01:32:10

without which consent to arbitration

01:32:13

would not operate so they

01:32:15

could include statutes of limitations.

01:32:18

They could include a waiver

01:32:21

requirements. They could include consent

01:32:24

to certain investors obligations and

01:32:26

that area. At least to

01:32:29

my knowledge is on unexplored

01:32:33

territory. So so on the

01:32:36

one hand, yes, they have

01:32:37

to be careful what they

01:32:38

they can include in those

01:32:39



laws, but on the other

01:32:40

hand, I have not seen

01:32:42

a state really. Taking on

01:32:46

the job of creating a

01:32:47

law that would be specifically.

01:32:53

high in the requirements that

01:32:56

an investor would have to

01:32:57

meet in order to bring

01:32:59

in an investment arbitration claim

01:33:02

and you know that that's

01:33:03

food for thought. Thank you.

01:33:06

Thank you everyone. Well, it's

01:33:08

it's a little bit after

01:33:09



10:30. This has been an

01:33:11

incredible conversation and clearly we

01:33:15

could go on for another

01:33:16

hour and a half or

01:33:17

more. We'll have to save

01:33:18

some of these topics for

01:33:19

the third annual Washington arbitration

01:33:22

week. It's not sooner but

01:33:23

it is interesting to to

01:33:26

see foreign investment laws as

01:33:28

perhaps still the neglected stepchild

01:33:31

but but a really interesting

01:33:33

and Rich area certainly fraught

01:33:35



with complication and and problems

01:33:37

but also with potentially a

01:33:40

tremendous utility as as a

01:33:43

reform tool and we'll have

01:33:45

to we'll have to talk

01:33:46

about that in the breakout

01:33:47

rooms and that's conversations. There

01:33:51

have been a few questions

01:33:53

and answers. What I propose

01:33:55

is I will circulate them

01:33:56

to the panelists right now.

01:33:57

And if you get lucky

01:33:59

enough to be matched with

01:34:00



the person asking the question

01:34:02

in the breakout room, please

01:34:04

take up the conversation. Or

01:34:06

through other some other means

01:34:08

but I guess we'll just

01:34:11

end it there and thank

01:34:12

everyone. I give a virtual

01:34:14

Round of Applause for our

01:34:15

panelists who get a wonderful

01:34:16

job and we'll see you

01:34:18

in the breakout rooms. Thank

01:34:19

you Lee. Thank you everyone.

01:34:22

Thank you Lee now. I'll

01:34:24



be moving everybody to break

01:34:25

room. So please stay. so

00:03:01

hello everybody and welcome to

00:03:03

the First event of our

00:03:06

last day of this incredible

00:03:07

week. My name is Maria

00:03:09

Lucia Casas. And I'm part

00:03:11

of the executive and editorial

00:03:12

team of the Washington arbitration

00:03:14

week. Today, I have the

00:03:16

great pleasure to introduce the

00:03:18

moderator for this incredible panel,

00:03:20

which is Lee Kaplan. Decaplan

00:03:23



is a partner of the

00:03:24

international arbitration and dispute resolution

00:03:27

practice in the Washington DC

00:03:29

office of Aaron Fox Leah

00:03:31

as console of privatans or

00:03:34

in clients in a wide

00:03:35

range of matters, involving International

00:03:37

dispute resolution public international law

00:03:40

and International Investment law and

00:03:43

policy. Prior to joining iron

00:03:45

Fox Lee worked as a

00:03:47

senior attorney advisor at the

00:03:49

US state Department's Office of

00:03:51



the legal advisor where he

00:03:52

successfully defend the United States

00:03:54

in various arbitrations. And with

00:03:56

that I leave you with

00:03:58

Lee you have the floor.

00:04:01

Thank you. Very Alicia for

00:04:02

that introduction and good morning

00:04:04

to everyone and I just

00:04:06

second the welcome to the

00:04:07

to the final day of

00:04:08

Washington arbitration week and would

00:04:11

like to start by commending

00:04:12

Jose Antonio and Ian on

00:04:14



a truly excellent second annual

00:04:16

conference. I know we've all

00:04:17

thoroughly enjoyed this week's panel

00:04:20

presentation and we all thank

00:04:21

you both very much for

00:04:22

your truly Herculean efforts to

00:04:25

make this conference a success

00:04:26

so our topic for discussion

00:04:29

today. Is foreign investment laws

00:04:32

and what will be talking

00:04:33

about are the domestic laws

00:04:36

and regulations of a host

00:04:37

state that among other things

00:04:39



regulate and often protect foreign

00:04:42

investment many of these not

00:04:43

all but many of these

00:04:44

also contain Provisions providing for

00:04:46

investor State arbitration. So I

00:04:50

think it's fair to say

00:04:52

that foreign investment laws are

00:04:54

the neglected stepchild of investor

00:04:57

State arbitration. We all know

00:04:59

we talk and write obsessively

00:05:01

about the more than 3,000

00:05:03

investment treaties out there. But

00:05:05

only rarely about the 72

00:05:07



foreign investment laws many of

00:05:09

which provide very similar substantive

00:05:11

protections as investment treaties and

00:05:14

about 40 of which also

00:05:15

contain investor State arbitration provisions.

00:05:19

And we know that we

00:05:20

analyze every nook and cranny

00:05:21

of the hundreds of treaty-based

00:05:23

investor State arbitrations and decisions.

00:05:26

But there really is precious

00:05:27

precious little commentary on the

00:05:30

at least 70 arbitrations arising

00:05:33

under foreign investment laws. So

00:05:35



today the neglected stepchild finally

00:05:38

gets its moment in the

00:05:39

spotlight and we've dedicated the

00:05:42

next hour and a half

00:05:43

to around table discussion solely

00:05:45

on all things far and

00:05:47

investment laws. And we have

00:05:49

with us today. I truly

00:05:51

exceptional group of panelists to

00:05:52

guide our discussion. It is

00:05:54

my real pleasure to introduce

00:05:56

first. Uchea anwamegbu uchei is

00:05:59

an international attorney at Aaron

00:06:01



Fox. It's now Aaron Fox

00:06:03

Schiff after the merger yesterday.

00:06:04

He's an active arbitrator and

00:06:08

arbitration practitioner previously Uche worked

00:06:10

as senior counsel and team

00:06:12

leader at ixid managing over

00:06:14

70 cases in various economic

00:06:16

sectors, and he's also served

00:06:18

as legal counsel at the

00:06:19

United Nations compensation Commission. Um,

00:06:22

we have Jose Antonio Rivas.

00:06:24

We need some introduction. He's

00:06:26

a course co-founder of Washington

00:06:27



arbitration week, but also founding

00:06:30

partner of exstrategy based in

00:06:31

DC and Bogota and chair

00:06:34

of exstrategies arbitration and international

00:06:36

law practice. He works in

00:06:38

international as an international Council

00:06:41

and investment dispute serves as

00:06:42

arbitrator provides advice and public

00:06:44

international law and investment law

00:06:46

Sovereign clients state-owned companies and

00:06:48

investors and he's also a

00:06:50

former exit Council and foreign

00:06:53

investment director of the ministry

00:06:54



of trade of Columbia. We

00:06:57

also have With Us Jeremy

00:06:58

sharp. Jeremy is an independent

00:07:00

arbitrator and practitioner based in

00:07:02

Ottawa Canada. He was previously

00:07:04

a partner in Sherman and

00:07:05

Sterling's International arbitration and public

00:07:08

international law practices in London

00:07:10

in Paris, and he has

00:07:12

served as chief of investment

00:07:13

arbitration in the office of

00:07:15

the legal advisor at the

00:07:16

US Department of State. He's

00:07:18



also a private delegate on

00:07:19

the US delegation to uncert

00:07:21

Charles working group 3 where

00:07:23

he advises on a wide

00:07:25

range of investor State arbitration

00:07:27

reforms also welcome Deanna. She's

00:07:32

counsel and Foley hoag's International

00:07:34

litigation and arbitration Department based

00:07:37

in DC. She's dual qualified

00:07:39

US French International dispute resolution

00:07:42

attorney with extensive experience in

00:07:45

complex International Investment arbitration matters.

00:07:49

Um public International all matters

00:07:51



and international commercial arbitration Diana

00:07:54

regularly represents States state-owned and

00:07:57

private entities and individuals in

00:07:59

international disputes, including investor State

00:08:02

arbitration and Maritime and land

00:08:04

boundary disputes. She advises States

00:08:06

on a wide range of

00:08:07

public international law issues as

00:08:09

well. So welcome to to

00:08:11

all of our esteemed panelists

00:08:13

now before we get started

00:08:15

I did want to provide

00:08:17

one a note of explanation.

00:08:18



We have expanded the scope

00:08:21

of our discussion considerably when

00:08:23

we began preparing for the

00:08:25

discussion today's discussion. We realize

00:08:27

there's simply too much to

00:08:29

talk about. So we've added

00:08:30

a few topics. We're still

00:08:32

going to provide a fresh

00:08:33

look on consent to arbitration

00:08:35

under foreign investment laws as

00:08:37

advertised. That's a fascinating topic,

00:08:39

but we're also going to

00:08:41

explore Trends in foreign investment

00:08:43



law and practice and dispute

00:08:44

resolution under foreign investment laws.

00:08:47

And will consider also the

00:08:49

various challenges of textual interpretation

00:08:51

under foreign investment laws and

00:08:54

finally delve into some very

00:08:56

interesting questions of applicable law

00:08:58

under foreign investment laws after

00:09:01

our discussion will have a

00:09:02

15 minute question and answer

00:09:05

session. So I encourage everyone

00:09:07

to send their their questions

00:09:09

to the chat function as

00:09:11



we progress through the the

00:09:13

discussion and and then I

00:09:16

understand we'll be automatically diverted

00:09:19

into breakout rooms at the

00:09:20

very end. So with that

00:09:23

I will give the floor

00:09:24

to Uche to start our

00:09:26

discussion about Trends in foreign

00:09:28

investment law practice. Thank you

00:09:32

very much Lee. It's it

00:09:34

real on on a pleasure,

00:09:36

of course to be on

00:09:38

the panel with such a

00:09:40



distinguished group my task in

00:09:44

the next few minutes is

00:09:45

to provide an overview on

00:09:47

the basis of which the

00:09:48

more detailed discussions will follow

00:09:52

and to do that. I'm

00:09:54

going to touch on three

00:09:55

men areas one is the

00:09:59

the way these laws relate

00:10:03

in the context of industrialized

00:10:06

nations and countries in the

00:10:08

in the other stages of

00:10:11

industrialization. The second is for

00:10:14



an investment laws and investors

00:10:16

data arbitration, and then thirdly

00:10:18

they look at the cases

00:10:19

or the numbers of such

00:10:22

cases. Turning first to find

00:10:26

investment laws in countries in

00:10:28

different stages of industrialization. The

00:10:31

first thing to note is

00:10:32

that such laws are the

00:10:35

existence of such laws cuts

00:10:37

across high medium and low

00:10:39

income countries, but they're more

00:10:43

prevalent in income low income.

00:10:47



countries now there are 101.85

00:10:52

such laws listed on the

00:10:54

altered database and only 18

00:10:58

of them. laws enacted by

00:11:02

industrialized countries Now there's also

00:11:07

a regulation by the European

00:11:10

Union establishing a framework for

00:11:12

the screening of foreign direct

00:11:14

investment into the Union. And

00:11:16

this kind of sets the

00:11:19

states for the next topic

00:11:20

which is the fact that

00:11:21

although there's such a proliferation

00:11:24



across the board in different

00:11:27

countries. The huge difference is

00:11:30

that with the industrialized countries.

00:11:33

The focus is on screening

00:11:35

of foreign investments while the

00:11:38

laws in the law and

00:11:39

middle income countries are focus

00:11:42

more on our attracting and

00:11:43

promoting Investments. And in that

00:11:47

regard, they offer incentives of

00:11:50

the types that we are

00:11:51

used to seeing in investment

00:11:53

treaties including access or consent

00:11:57



to investors State arbitration. And

00:12:01

that takes us to the

00:12:02

second point which is invest

00:12:05

for an investment laws and

00:12:06

investor State arbitration. Now again

00:12:12

from the publicly available information

00:12:15

about 74 of the national

00:12:18

laws that we looked at.

00:12:22

Reference investor State arbitration and

00:12:26

out of that number 42

00:12:29

of them actually provide consent.

00:12:32

So the other ones refer

00:12:33

to it without providing consent.

00:12:37



Looking at publicly available information

00:12:38

again, all of the laws

00:12:41

that provide consent to invest

00:12:43

the state arbitration laws of

00:12:46

Law and medium income countries.

00:12:51

And some Scholars have been

00:12:53

digging into this to figure

00:12:54

out why that is the

00:12:55

case and some have suggested

00:12:59

that developing countries are significantly

00:13:03

more likely to consent to

00:13:05

arbitration in their National laws

00:13:08

after they receive advice from

00:13:11



the world Banks foreign investment

00:13:13

advisory service. the unit now

00:13:17

the figures that were cranked

00:13:21

suggests that such advice actually

00:13:25

increases by 650 percent that

00:13:31

chances of a developing country

00:13:34

including consent to investor State

00:13:37

arbitration in its domestic law.

00:13:41

The same research also found

00:13:43

that governments with more experience

00:13:46

either having faced investors data

00:13:48

arbitration in the past or

00:13:49

or the ones that have

00:13:51



ratified a lot of investment

00:13:53

treaties are less likely to

00:13:55

have consent to investors databrition

00:13:59

in their National laws and

00:14:01

a number of countries are

00:14:02

so now with the experience

00:14:05

mending their laws to remove

00:14:08

such consent. So looking at

00:14:11

the cases themselves. The data

00:14:16

out there suggests that cases

00:14:18

founded and fun investment laws

00:14:21

reveal a career pattern. Most

00:14:26

of these cases had a

00:14:28



failed on jurisdiction or where

00:14:31

settled or discontinued looking at

00:14:34

the exit website alone. Just

00:14:36

the exit website. They're about

00:14:37

60 roughly roughly 70 something

00:14:41

between 68 and 70 cases

00:14:43

that are ledge it reach

00:14:45

up investment law, but it

00:14:48

should also be noted that

00:14:49

these cases involve some of

00:14:51

them involve allegation of breaches.

00:14:53

Although they instruments such as

00:14:55

contracts or treaties. They'll have

00:14:58



31 countries involved in those

00:15:00

cases one is a constellation

00:15:03

case and for the under

00:15:05

the additional facility rules. About

00:15:08

5355 of them have been

00:15:11

concluded. and looking at the

00:15:15

ones on which information is

00:15:16

available. And for this we

00:15:18

had to turn to the

00:15:19

it law website. 14 of

00:15:23

them failed on jurisdictional grounds

00:15:25

seven were settled or discontinued

00:15:28

and this is from a

00:15:30



population of 29 cases two

00:15:32

were dismissed on the Merit

00:15:34

for succeeded and two still

00:15:36

pending. These figures would suggest

00:15:40

therefore that it is more

00:15:41

difficult to prove investment and

00:15:45

investor status on the foreign

00:15:47

investment laws than on the

00:15:49

investment treaties because there's quite

00:15:51

a big disconnect here when

00:15:53

we look at the the

00:15:54

figures coming up investment treaties.

00:15:56

And so to conclude this

00:15:59



very quick overview. It's safe

00:16:02

to say that while consent

00:16:04

to arbitration and investment laws,

00:16:06

maybe a popular feature or

00:16:10

more popular feature in the

00:16:11

laws of developing countries in

00:16:16

lower income countries. It's up

00:16:19

here. Is that those governments

00:16:22

All they have included those

00:16:23

Provisions may not have actually

00:16:25

fed that badly. Based on

00:16:28

the information that publicly available

00:16:30

and hopefully my core panelists

00:16:35



from their presentations will be

00:16:37

able to throw more light

00:16:38

on why that is the

00:16:40

case. Thank you. Thanks very

00:16:47

much. Let's turn it over

00:16:48

to Jose Antonio for some

00:16:49

comments and reactions. Thank you.

00:16:52

Thank you very much. Oh

00:16:53

Jay, what I've been taxed

00:16:56

to do is to take

00:16:58

a step backward and and

00:17:01

try to analyze the the

00:17:04

background under Republic international law

00:17:07



of one of the Notions

00:17:09

that underlies investment laws. And

00:17:11

that is that they are

00:17:12

unilateral act. So for a

00:17:16

very quick overview, I'll just

00:17:17

put up a few slides

00:17:19

and share them with you.

00:17:22

Jose Antonio just one moment.

00:17:23

We're just gonna take some

00:17:24

reactions first to to chase

00:17:27

presentation. And then if if

00:17:28

you if you have some

00:17:29

feel free. If not, we

00:17:31



can move to Jeremy. Okay.

00:17:34
No, I I do I

00:17:36
do have one one reaction

00:17:38
which is whether any of

00:17:42
the I mean and that's

00:17:44
a question more to which

00:17:45
whether he has a notion

00:17:47
of whether the the Lesser

00:17:53
number of investment laws being

00:17:56
a basis for consenting investment

00:17:58
arbitration is somehow connected also

00:18:01
to an issue of language

00:18:04
in the in the in

00:18:06



the actual Provisions that are

00:18:10

included in the investment laws.

00:18:17

Sorry, I didn't I didn't

00:18:20

quite get that the the

00:18:21

language and the you know,

00:18:23

whether it's it's a you

00:18:25

know, it is it is

00:18:26

it simply that is it

00:18:28

your perception that the the

00:18:30

issue is more of a

00:18:32

higher standard for investment laws,

00:18:33

or is it more an

00:18:35

issue of them? Not necessarily

00:18:38



or most of them not

00:18:39

necessarily being drafted as to

00:18:41

really give in consent to

00:18:42

arbitration. Well, like I said,

00:18:44

it's only in about half

00:18:49

of the of the 70

00:18:51

odd legislations in which which

00:18:56

arbitration is mentioned at all

00:18:58

is that clearly consent the

00:19:02

rest of them? It's it's

00:19:03

either non-existent or it's oh,

00:19:06

it's unclear but But quite

00:19:10

and I at least a

00:19:12



good number of them do

00:19:15

contain the relevant Provisions, what

00:19:18

would I think what would

00:19:20

be interesting to find out

00:19:21

is where where the provisions

00:19:26

are that clear? How come

00:19:29

the chances of the Investor's

00:19:32

success is still not that

00:19:36

high. compared to The numbers

00:19:39

we see out of investment

00:19:41

treaty cases. And can I

00:19:46

ask one one more question

00:19:47

when you say success you

00:19:48



mean success that the tribunal

00:19:51

will declare that has jurisdiction,

00:19:53

correct? A success is relative.

00:19:55

That's At the end of

00:20:00

the day, it's a question

00:20:01

of who goes with a

00:20:02

check in their pockets. It's

00:20:04

it's a low it's a

00:20:06

low bar. Okay. Okay. Thank

00:20:11

you Jeremy anything that thanks

00:20:16

Lee. I do have a

00:20:17

question. That's somewhat stemming from

00:20:19

Jose Antonio's Point Uche, which

00:20:21



is is are these figures

00:20:25

somehow masking the real risk?

00:20:27

Because as you mentioned often

00:20:29

you see in these cases

00:20:30

a foreign investment law and

00:20:33

another instrument that might provide

00:20:36

consent to jurisdiction for instance

00:20:38

a contract or a International

00:20:41

Investment agreement. And is it

00:20:44

possible that we're seeing tribunals

00:20:46

relying on the instrument perhaps

00:20:48

that they know that are

00:20:49

drafted more clearly to provide

00:20:51



consent. And so we haven't

00:20:52

seen as much attention to

00:20:54

the foreign investment law, but

00:20:55

now that we're seeing States.

00:20:58

Perhaps tightening up their phone

00:21:00

investment contracts or revisiting their

00:21:03

International Investment agreements, perhaps adding

00:21:06

more conditions to consent or

00:21:08

even eliminating some of the

00:21:09

substantive obligations will see more

00:21:12

attention pay to these foreign

00:21:14

investment laws. And that actually

00:21:16

will find that there was

00:21:17



this inherent or latent risk

00:21:19

all along. It's just that

00:21:21

we didn't see it manifested

00:21:23

in these cases because there

00:21:24

was an alternative route for

00:21:25

the tribunal perhaps to find

00:21:27

jurisdiction or to rule for

00:21:29

a party on the merits.

00:21:30

you'll see right Jeremy it

00:21:32

and it's it's difficult to

00:21:35

to tell it's difficult to

00:21:37

kind of tease our totally

00:21:38

all the different permutations that

00:21:42



this could take but it's

00:21:46

also interesting that that some

00:21:50

of these cases do not

00:21:53

end up being a result.

00:21:56

A lot of them. A

00:21:59

lot of them are settled

00:22:00

or discontinued. It's It's also

00:22:05

it could also be the

00:22:08

fact that here you're dealing

00:22:09

with an instrument. That is

00:22:12

put out the by the

00:22:18

by the other side alone

00:22:20

in the dispute as opposed

00:22:23



to where you are dealing

00:22:25

with instruments that have been

00:22:26

negotiated on by at least

00:22:30

two parties or multiple parties

00:22:32

and I think who San

00:22:33

Antonio might be saying a

00:22:34

little bit more on that

00:22:35

whole thing about being in

00:22:37

lateral consent, but but there's

00:22:39

no doubt that it gives

00:22:40

the the author incredible power

00:22:43

as to you what they

00:22:45

are able to be able

00:22:47



to put out and at

00:22:49

least one would hope that

00:22:50

by the time anybody sits

00:22:51

down to drop these laws

00:22:52

on and put them out

00:22:54

there that they thought carefully

00:22:56

about what they exposing themselves

00:22:58

to. Great. Thanks. Very good.

00:23:05

Thank you. All Deanna any

00:23:07

reactions or comments to that.

00:23:09

I hello everyone. Yes, perhaps

00:23:12

an observation Uche. So I

00:23:15

I think that what we've

00:23:17



been seeing is that the

00:23:19

states are revising the investment

00:23:22

laws, maybe not at the

00:23:23

same rate as that, they're

00:23:25

trying to revise their International

00:23:27

treaties and we've seen kind

00:23:31

of like a range of

00:23:32

different approaches in the years

00:23:34

ago South Africa switch to

00:23:36

mediation in its investment law.

00:23:38

And in terms of more

00:23:41

recent revised investment laws, we've

00:23:44

seen States again being careful

00:23:46



about open the doors to

00:23:48

in in CS and instead

00:23:50

saying, okay, we may agree

00:23:53

to it either through direct

00:23:55

agreement or through another treaty.

00:23:58

So certainly the states are

00:23:59

being cautious about just opening

00:24:01

the door immediately, but the

00:24:03

point about you know, getting

00:24:04

advice on from the world

00:24:07

being Agency on the best.

00:24:09

Is quite interesting and I

00:24:12

query with whether the fact

00:24:14



that they're using 2010 investment

00:24:17

law reform handbook is also

00:24:20

potentially an issue. It needs

00:24:22

to be Revisited since we're

00:24:24

now in 2021. Good point

00:24:27

it was I think interesting

00:24:29

to some of us looking

00:24:30

at at the the data

00:24:31

there were some studies in

00:24:33

2018 that had a much

00:24:35

lower number of arbitration cases

00:24:38

arising in our foreign investment

00:24:39

laws. Then then today the

00:24:41



numbers of almost double. I

00:24:43

don't know if that's a

00:24:43

there's a lot more activity

00:24:46

going on under these laws

00:24:47

or we're just now compiling

00:24:49

the data and a better

00:24:51

more comprehensive way, but it's

00:24:52

an interesting Trend to watch.

00:24:54

Okay, thank you all for

00:24:56

that. We're going to move

00:24:57

to our next round of

00:24:58

discussion. And now Jose Antonio,

00:25:00

we're going to begin our

00:25:02



discussion with you about consent

00:25:04

to arbitration under foreign investment

00:25:06

laws. Actually and thank you

00:25:10

for for the comments of

00:25:12

which and everyone one of

00:25:14

the one of the motivations

00:25:16

for for proposing this panel.

00:25:19

Is that in in practice?

00:25:23

It's it's quite usual that

00:25:26

the investment arbitration lawyer as

00:25:29

a part of the due

00:25:30

diligence that they do whenever

00:25:32

they meet an investor. They

00:25:34



they ask, you know, the

00:25:36

obvious questions is there are

00:25:38

contract right? Is there an

00:25:39

investment contract and then the

00:25:43

next question of course, is

00:25:45

there a vit but sometimes

00:25:47

in that due diligence process?

00:25:49

It is it is seldom

00:25:51

done or thought of that.

00:25:53

They will necessarily go into

00:25:55

a run of analyzing or

00:25:59

searching the national laws and

00:26:02

see whether whether there is

00:26:03



a consent to arbitration in

00:26:06

our investment law and I've

00:26:07

been surprised in the sense

00:26:09

that some countries do have

00:26:11

investment loss and and some

00:26:12

of them do have investment

00:26:15

arbitration consenting there. So that

00:26:18

that was one of the

00:26:18

motivations to to move forward

00:26:20

with with this topic. I'll

00:26:22

my task here is a

00:26:24

to take a step back

00:26:26

and and put in terms

00:26:30



that Lee introduce them investors

00:26:32

arbitration is sort of the

00:26:34

child of public international law.

00:26:35

And therefore there is something

00:26:38

to be said in terms

00:26:38

of of where investment laws

00:26:42

come when we put the

00:26:44

framework of public international law

00:26:47

and sign it. in investment

00:26:50

laws So I'll share them

00:26:52

our presentation here. Just give

00:26:55

me one second. Is it

00:26:57

showing? Yes. excellent, so No,

00:27:02



the the very basic. Perspective

00:27:07

will be one of public

00:27:09

international law and there we

00:27:12

ask the questions what what

00:27:14

are unilateral acts and and

00:27:15

this has been in part

00:27:20

defined by institutes and and

00:27:22

by The Guiding principles of

00:27:23

applicable to unilateral declarations by

00:27:27

the ilc in 2006 one

00:27:30

can say that they are

00:27:32

a formal declaration formulated by

00:27:34

a state with the intent

00:27:36



to produce obligations under international

00:27:37

law. So there is a

00:27:39

formal declaration if you compare

00:27:41

that to investment laws clearly

00:27:42

what more formal than an

00:27:46

act of Congress or or

00:27:49

of the legislative then Here

00:27:53

The Guiding principles provide that

00:27:56

the Declarations publicly made and

00:27:58

manifesting the will to be

00:27:59

bound may have the effect

00:28:01

of creating legal obligations when

00:28:03

the conditions for this are

00:28:05



met The Binding character of

00:28:07

such declarations is based on

00:28:08

good faith. Interested States May

00:28:11

then take them into consideration

00:28:13

and rely on them. So

00:28:14

we have we have several

00:28:16

elements here to unpack one

00:28:18

is that there must be

00:28:21

an intent to create a

00:28:22

legal obligation? And then the

00:28:25

the ultimate principle here is

00:28:28

which is also a general

00:28:30

principle of law under article

00:28:32



38 of the icj statute

00:28:34

is the principle of good

00:28:37

faith then then we what

00:28:42

was it, you know was

00:28:43

the I'll see that that

00:28:44

that creative. No. No, it

00:28:46

was not in 1974 the

00:28:48

the main thematic case in

00:28:54

in terms of unilateral Acts.

00:28:57

The ICS stated on in

00:28:59

paragraph 49 of the nuclear

00:29:04

test cases New Zealand and

00:29:06

Australia versus France one of

00:29:08



the basic principles governing the

00:29:10

creation and performance of legal

00:29:12

obligations. Whatever their source is

00:29:15

the principle of good faith,

00:29:16

then it goes on and

00:29:18

and it emphasizes that just

00:29:21

as the very rule of

00:29:22

pasta swimanda in the law

00:29:25

of trees based on good

00:29:26

faith. So also is The

00:29:28

Binding character of an international

00:29:30

obligation as soon by unilateral

00:29:32

declaration. What's what's so interesting

00:29:34



about, you know lateral declarations

00:29:35

is that when you look

00:29:36

into the article 38 of

00:29:38

the ICD statute you have

00:29:40

treaties you have custom you

00:29:42

have the general principles of

00:29:43

law as a subsidiary Source

00:29:45

you have also statements by

00:29:48

the, you know, publicist and

00:29:51

and international judicial decisions, but

00:29:55

you don't have a reference

00:29:57

to any declarations, however Considering

00:30:01

that it is based on

00:30:03



good faith. You can we

00:30:04

can we can then conclude

00:30:06

that it is also it

00:30:07

can also be a source

00:30:08

of international law now or

00:30:10

at least I can. One

00:30:13

one but but the the

00:30:17

nuclear test cases were not

00:30:19

the first ones that refer

00:30:21

to unilateral declarations. And there's

00:30:22

there's a very interesting and

00:30:24

doing doing a little bit

00:30:25

of research here. There's a

00:30:27



very interesting case which is

00:30:29

the Eastern Greenland case in

00:30:31

which Norway had set for

00:30:35

for many many years that

00:30:36

it would it did not

00:30:39

consider Eastern Greenland part of

00:30:41

its territory and then some

00:30:43

states it started occupying it

00:30:45

and and of course and

00:30:47

I'm a bit of I

00:30:49

am I am being a

00:30:50

little bit last with the

00:30:51

facts. But but in any

00:30:52



event that that's the gist

00:30:53

of it so basically Denmark

00:30:55

say, well you you made

00:30:56

this declarations that you wouldn't

00:30:58

be claiming that it's your

00:31:00

territory. So what's now and

00:31:02

and the court basically at

00:31:04

the time the pcija not

00:31:06

the icj said that it

00:31:09

considered beyond all these people

00:31:11

that are reply of this

00:31:12

nature basically. Declaration of the

00:31:14

Minister of Norway by the

00:31:17



minister for foreign affairs on

00:31:20

behalf of his government in

00:31:21

response to our request by

00:31:23

The Diplomatic the representative of

00:31:25

a foreign power regarding a

00:31:27

question following within his provision

00:31:30

province is binding upon the

00:31:33

country to which the minister

00:31:35

belongs. So there there are

00:31:37

some there are there are

00:31:38

some earlier cases that would

00:31:42

ultimately help to constitute. This

00:31:44

has as a general principle

00:31:46



of law or even a

00:31:47

customer rule of international law.

00:31:48

Now, what are the requirements

00:31:52

for those unilateral acts to

00:31:54

be valid? You know first

00:31:56

there must be capacity of

00:31:57

the state of persons authorized

00:31:59

informally the unilateral from declaration

00:32:01

second. There should be a

00:32:03

form of for that so

00:32:05

declaration, but that form in

00:32:07

itself need not to be

00:32:09

necessarily in written form. Hence

00:32:12



when we're In terms of

00:32:13

investment laws the fact that

00:32:15

they're written the fact that

00:32:16

they have been enacted by

00:32:19

Congress or the the legislative.

00:32:21

Give it more Force. And

00:32:24

and who was it addressed

00:32:25

to of course, if it

00:32:27

may be said that it

00:32:28

is addressed to the to

00:32:31

to the citizens of the

00:32:32

state, but of course, it

00:32:34

is a clear signal and

00:32:35



it's publicly made and it

00:32:37

can be of course relied

00:32:40

upon by Foreign investors as

00:32:41

well. Now, how do you

00:32:45

interpret those which is the

00:32:47

the most difficult element here.

00:32:49

They're much has been said

00:32:51

about the interpretation and part

00:32:55

of the interpretation under public

00:32:57

international law is based on

00:32:59

what the the court has

00:33:05

said with respect to declarations

00:33:07

with regard to reservations to

00:33:09



treaties some of those can

00:33:11

be taken into account and

00:33:13

much of the case law

00:33:16

of the icj comes from

00:33:17

from there, but not all

00:33:18

so when we look into

00:33:21

the guiding principles. One of

00:33:24

the elements that has to

00:33:26

be interpret is is the

00:33:27

content and the factual circumstances

00:33:30

in which they were made

00:33:31

and and of course the

00:33:34

reactions to those statements. So

00:33:37



when you think in terms

00:33:38

of investment laws one has

00:33:40

to think well did they

00:33:42

relied upon it was it

00:33:43

in place still was the

00:33:46

request for arbitration made while

00:33:48

the law was was a

00:33:52

enforce or was it withdrawn

00:33:55

just a few days before

00:33:56

the request of arbitration was

00:33:59

was submitted. um, then I

00:34:05

will I will only say

00:34:06

with regard to interpretation that

00:34:12



that it is important at

00:34:16

least under. Icjlo that. The

00:34:20

Declaration must be intended to

00:34:22

produce certain effects. and those

00:34:27

affects must be in line

00:34:29

with existing law And that

00:34:34

comes really from from the

00:34:35

the case and passage over

00:34:37

Indian Territory. now one one

00:34:42

central question here is when

00:34:46

can the unilateral act be

00:34:47

considered null and void? And

00:34:50

what is the duration of

00:34:52



the unilateral act? When can

00:34:55

it be withdrawn? And and

00:34:58

this is a key question

00:34:59

because of course as a

00:35:00

unilateral act or an investment

00:35:03

loan may be any natural

00:35:05

Act Congress can can simply

00:35:06

withdraw and and modify it.

00:35:09

So. Here certain elements must

00:35:14

be taken into account one

00:35:16

the any specific terms of

00:35:19

the Declaration relating to revocation.

00:35:20

So if the law has

00:35:22



any duration to the extent

00:35:25

to which those to whom

00:35:27

the obligations are owed have

00:35:28

relied on such obligations. three

00:35:31

the extent to which there

00:35:33

has been a fundamental change

00:35:35

in the circumstances, you know

00:35:37

Revolution was the principle those

00:35:42

Those elements and certainly the

00:35:44

first two ones are very

00:35:45

important who relied upon the

00:35:48

Declaration who acted based on

00:35:51

those declarations. And in our

00:35:53



case on the under the

00:35:55

investment laws importantly one case,

00:35:59

which may be one of

00:36:00

the most familiar ICA cases

00:36:02

the military and paramilitary activities

00:36:04

in and against the caraga

00:36:06

in the jurisdictional decision the

00:36:09

court basically explained how The

00:36:17

principle of good faith and

00:36:19

relying upon the Declaration and

00:36:22

in our case. or in

00:36:25

the case of this session

00:36:26

in the investment law relying

00:36:29



upon that creates certain obligations

00:36:33

on of longevity with respect

00:36:37

to the effects of the

00:36:38

Declaration. So the the state

00:36:41

that has even the Declaration

00:36:43

or the investment line in

00:36:45

our case. Would not be

00:36:47

simply entitled to withdraw that

00:36:50

declaration at any time paragraph.

00:36:54

59 provides that the unilateral

00:36:57

nature of Declaration does not

00:36:58

signify that the state making

00:37:00

the Declaration is free to

00:37:02



amend their scope and contents

00:37:03

of its solid commitment as

00:37:05

it pleases. So there's no

00:37:06

complete reign as to when

00:37:10

to withdraw the Declaration because

00:37:12

they have provided in good

00:37:15

faith and expectation to the

00:37:17

other states and members of

00:37:19

the International Community in our

00:37:21

case the investors now in

00:37:23

paragraph 63 The court says

00:37:26

the right of immediate termination

00:37:28

of declarations with indefinite duration

00:37:30



is far from established. So

00:37:32

it's not it's not forever.

00:37:34

It appears from the requirements

00:37:36

of good faith that they

00:37:37

should be treated by analogy

00:37:40

according to the law of

00:37:41

treaties which requires a reasonable

00:37:44

time for withdrawal from termination

00:37:47

of treaties that contain no

00:37:49

provision regarding the duration of

00:37:51

their validity. So here the

00:37:53

analysis is is a is

00:37:56

is somehow more subjective in

00:37:58



terms of Did it acted

00:38:00

in good faith after giving

00:38:03

the Declaration and that would

00:38:05

be at least in my

00:38:07

view an extremely factual analysis.

00:38:09

I think that that I

00:38:13

I have more more to

00:38:16

say Lee but I think

00:38:16

that the main objective of

00:38:19

of my remarks was to

00:38:21

provide a background on public

00:38:23

international law. I do have

00:38:25

some statements to to make

00:38:27



with respect to investment laws

00:38:29

and and some that have

00:38:30

been declared by investment tribunals

00:38:33

to be in fact reflective

00:38:36

of consent and some that

00:38:38

have have not but I

00:38:40

will leave that for for

00:38:41

later. Thank you. And thank

00:38:45

you very much Jose Antonio.

00:38:46

I'm very comprehensive and interesting

00:38:48

over now to Jeremy for

00:38:50

any reactions. I thank you

00:38:54

Lee and thank you Jose

00:38:55



Antonio. It's very interesting what

00:38:57
you said if we if

00:38:59
we think about the foreign

00:39:00
an investment law as a

00:39:01
unilateral act under public international

00:39:04
law. If a Tribunal for

00:39:06
instance in looking at termination

00:39:08
of the ACT might look

00:39:10
to all circumstances including potentially

00:39:14
any Reliance by Foreign investor

00:39:16
because foreign investment laws as

00:39:19
I understand, it weren't weren't

00:39:20
considered expressly by the ilc.

00:39:22



It opens up. A lot

00:39:23

of questions including is every

00:39:26

foreign investor that invests in

00:39:27

a state in which there

00:39:29

is a foreign investment law

00:39:30

relying on that foreign investment

00:39:33

laws dispute settlement Provisions such

00:39:36

that if the estate were

00:39:38

to terminate that law there

00:39:40

could be some detrimental Reliance

00:39:42

that could be relied on

00:39:43

for instance. Imagine a notice

00:39:46

of intent to bring a

00:39:47



claim being submitted under foreign

00:39:49

investment law and then the

00:39:51

state terminating the foreign investment.

00:39:53

Off before the investor actually

00:39:55

accepts any unilateral offer to

00:39:57

bring a claim. So practitioners

00:40:00

might then invoke the foreign

00:40:03

investment law in its notice

00:40:04

of intent as having relied

00:40:06

on it and making the

00:40:07

investment and bringing the claim.

00:40:09

So two questions any advice

00:40:10

for practitioners and second do

00:40:12



you think states are aware

00:40:13

of this when they're drafting

00:40:15

for an investment laws that

00:40:17

there may be limitations on

00:40:18

the ability of the state

00:40:20

to terminate this after excuse

00:40:22

me? Sorry the state aware

00:40:29

of this and take understanding

00:40:35

the risks of adopting a

00:40:37

foreign investment law. Given that

00:40:40

they may bind their ability

00:40:42

to terminate the law at

00:40:43

any time given that in

00:40:46



the normal course the legislature

00:40:47

or the relevant authorities may

00:40:48

think that they're able to

00:40:49

terminate any law after it's

00:40:51

outlived its utility. Thank you.

00:40:55

Thank you. Thank you Jeremy

00:40:56

for that for that. I

00:40:59

love the question because it

00:41:00

it's a very similar to

00:41:05

to a few cases that

00:41:06

have taken place of the

00:41:08

icj including the the the

00:41:13

Nicaragua quick case in which

00:41:16



consent to to the icj

00:41:21

jurisdiction was was withdrawn a

00:41:24

few days before the claim

00:41:26

was was submitted but also

00:41:28

in other cases that has

00:41:29

taken place well to your

00:41:32

question. I I seriously don't

00:41:35

think that this the states

00:41:38

that draft. This laws are

00:41:40

necessarily aware of the public

00:41:43

International lovely mutations that that

00:41:48

if consider unit natural acts

00:41:49

under Republican National Law, they

00:41:52



would have simply to withdraw

00:41:54
but but I have to

00:41:55
make a caveat on that.

00:41:56
I believe that it may

00:41:59
be easier for our government

00:42:00
for instance to withdraw the

00:42:02
consent to the icj. jurisdiction

00:42:09
that that he may be

00:42:10
for a state simply to

00:42:12
to amend a law or

00:42:15
to determinate a law and

00:42:19
because there's also well I

00:42:21
would say it depends on

00:42:23



the on the state but

00:42:25

but in in both a

00:42:27

republican democracy or or in

00:42:31

in in a parliamentary democracy,

00:42:36

there are procedures to withdraw

00:42:39

laws and and it's not

00:42:40

that easy at least TimeWise.

00:42:43

It may be very easy

00:42:43

in terms of will but

00:42:46

there are procedures that need

00:42:48

to be followed. So it's

00:42:49

not it cannot happen just

00:42:50

from one day to the

00:42:52



other. There therefore the investors

00:42:56

should be aware of what

00:43:01

is going on in Congress

00:43:02

or in parliament in order

00:43:04

to be able to submit

00:43:08

their request for arbitration in

00:43:09

a timely fashion. Yeah that

00:43:13

that sort of my view,

00:43:14

but I don't think that

00:43:17

That most of congresses or

00:43:20

Parliament when enacting this laws

00:43:23

are are aware of the

00:43:26

icg jurisprudence and and the

00:43:30



case law. I don't think

00:43:30

that that's the case. Thank

00:43:35

you. Thank you guys. So

00:43:37

now over over to Diana

00:43:38

and then and then to

00:43:39

Uche for for follow-up comments.

00:43:43

I sure perhaps one comment

00:43:45

and and a question for

00:43:46

practitioners to consider. Is what

00:43:49

are the sort of the

00:43:50

implications of the you know,

00:43:53

good faith interpretation. We've seen

00:43:56

this approach, of course with

00:43:57



tribunals interpreting. The the arbitration

00:44:03

Clause is in the treaties

00:44:04

themselves where they say the

00:44:06

interpretations from the objective standpoint

00:44:09

in good faith as opposed

00:44:11

to restrictive which a lot

00:44:13

of times States argue that

00:44:14

consent is such an extraordinary

00:44:17

step for the states that

00:44:19

restrictive interpretation as appropriate. So

00:44:22

I I query to which

00:44:24

extend practically speaking the approach

00:44:27

that you've laid out sort

00:44:30



of similar in in how

00:44:32

we approach in general interpreting

00:44:35

arbitration clauses in investment arbitration.

00:44:39

Thank you, Deanna. Also, thank

00:44:44

you for that question because

00:44:45

that it allows me to

00:44:46

explain something that I did

00:44:48

not I think that he

00:44:50

if anything. investment laws as

00:44:56

an instrument or as a

00:44:59

basis for consent. Can be

00:45:02

very much compared to vits

00:45:05

or to investment chapters in

00:45:08



free trade agreements. They are

00:45:10

somehow dissimilar for from contracts

00:45:13

in a contract you have

00:45:14

in the same instrument. You

00:45:16

have the expression of the

00:45:19

will of both parties in

00:45:21

the same instrument. So that's

00:45:23

not where we are, you

00:45:25

know vit you have the

00:45:27

offer from the state on

00:45:29

the one hand. to the

00:45:32

investors and then in the

00:45:33

request for arbitration you have

00:45:35



the acceptance of that offer

00:45:38

and those those two wheels

00:45:43

meet. And that's what what

00:45:47

crystallizes the consent of the

00:45:49

parties to investment arbitration similarly

00:45:51

in the investment law. You

00:45:54

can have the offer of

00:45:57

investment arbitration, but at that

00:45:58

stage we have not identified

00:46:00

who is the investor who

00:46:03

will accept that offer and

00:46:05

then at a later stage

00:46:07

in the request for arbitration,

00:46:08



you have the investor accepting

00:46:11

that offer which is important

00:46:14

provided in the investment law

00:46:15

and and then those two

00:46:17

wheels meet and that crystallizes

00:46:19

the consent to arbitration by

00:46:22

both parties. mmm Yeah, just

00:46:28

to to that. Oh, so

00:46:31

Antonio, I guess my question.

00:46:34

I've got two questions. I'm

00:46:36

perhaps they could be comments

00:46:38

as well. The first is

00:46:39

you know, it seems to

00:46:42



me that a lot of

00:46:43

what's been described. So if

00:46:44

I can apply to different

00:46:47

types of legislations, it's you

00:46:48

know, not necessarily to to

00:46:53

front investment laws and Loan

00:46:55

unless I missed a Nuance

00:46:57

there. and then secondly, I'm

00:47:01

more generally do you consider

00:47:05

that there is any difference

00:47:07

in for lack of a

00:47:09

better word the quality of

00:47:11

Rights and obligations arising out

00:47:14



of these laws as compared

00:47:20

to the ones that we

00:47:23

typically would see in bilateral.

00:47:26

or multilateral instruments Thank you.

00:47:29

So I think that you

00:47:31

have you made two questions

00:47:32

there so one. The first

00:47:39

one or statement that that

00:47:40

this may not may also

00:47:43

apply Beyond investment laws. And

00:47:46

and I think that that's

00:47:47

that's absolutely right unilateral act

00:47:50

on Republic International. They can

00:47:52



even even be declarations by

00:47:55

by state officials by the

00:47:58

head of state by the

00:47:59

president by the foreign minister

00:48:00

by the minister of economy

00:48:03

and so on. I don't

00:48:05

think that that the limitation

00:48:07

is is of it being

00:48:11

a natural Act is provided

00:48:13

by public international law. In

00:48:15

fact, you know, the requirements

00:48:16

were there and there's there's

00:48:17

no there's no limitation as

00:48:19



to eat having to be

00:48:20

an investment law itself. There

00:48:22

were the what What determines

00:48:25

the limitations are in our

00:48:28

case the the exit convention

00:48:31

the exit convention? requires that

00:48:35

consent be provided in writing

00:48:38

it requires that there be

00:48:41

at least in exit case

00:48:45

law a reference to exit

00:48:46

so So the limitations are

00:48:49

really provided by the applicable

00:48:51

rules of arbitration or by

00:48:53



the bits themselves. Sorry not

00:48:55

by the vits. But by

00:48:56

the the applicable rules of

00:48:58

arbitration because in this world,

00:49:00

we're not we're not under

00:49:01

Vitas now to the second

00:49:04

question. Is there a difference

00:49:07

in quality when we compare

00:49:09

investment laws and and investment

00:49:12

treaties. I the answer to

00:49:15

that question would require doing

00:49:17

a specific analysis of the

00:49:19

laws. I've seen investment laws

00:49:22



that are almost word by

00:49:26

word exactly exactly drafted as

00:49:32

as an investment treaty. Whereas

00:49:36

I believe beyond the beyond

00:49:37

the text when it comes

00:49:39

to to the application when

00:49:40

it comes to what's received

00:49:42

on the other side, would

00:49:44

you as as an investor

00:49:47

be yeah, assuming the even

00:49:52

even if the texture where

00:49:54

to be what for word

00:49:55

do you think that there

00:49:58



is a difference in And

00:50:01

the level of protection or

00:50:03

the quality of protection simply

00:50:06

by the fact, that one

00:50:07

comes out of a unilateral

00:50:09

Act and the other one

00:50:10

comes from a bilateral or

00:50:13

multilateral. No, I I do

00:50:17

not. I don't think that

00:50:19

and and and the basis

00:50:21

to say that I do

00:50:22

not really comes from from

00:50:26

from I would say from

00:50:27



General basic public International order.

00:50:31

There's no hierarchy hierarchy in

00:50:32

in the sources of international

00:50:35

law. I mean, there's no

00:50:36

there's no no first son

00:50:38

and second son. I mean

00:50:39

there's there's no there's no

00:50:41

first customer international law and

00:50:44

then treaty law there there

00:50:46

equally situated if some rights

00:50:50

are provided by an investment

00:50:52

law and and those rights

00:50:54

were born out of the

00:50:57



consent of two parties internationally.

00:51:00

The state has to respect

00:51:02

them. if that's the case,

00:51:04

why is it relevant then

00:51:06

if one is if one

00:51:08

is a unilateral Act and

00:51:11

the other one is is

00:51:12

born out of a multilateral

00:51:16

or bilateral actions Oh, why

00:51:19

doesn't the inquiry stop right

00:51:21

at the point where we

00:51:22

established that that right obligations

00:51:26

have a reason. Oh, I

00:51:29



think that it's relevant for

00:51:30

for practical reasons. I mean

00:51:31

as as Council, of course

00:51:35

you when you have submitted

00:51:36

claims relying on on investment

00:51:41

laws, you have to tell

00:51:42

your tribute, you know where

00:51:45

those obligations come from. So

00:51:46

otherwise when they ask your

00:51:49

Source, they won't believe you

00:51:50

but for purely practical reasons,

00:51:53

but I don't I don't

00:51:54

think that there's a hierarchy

00:51:55



between the rights of obligations

00:51:56
born out of one or

00:51:58
the other. Thank you guys.

00:52:01
We're gonna move on to

00:52:02
our our third topic our

00:52:04
third round. This is a

00:52:07
deals with the sometimes vaccine

00:52:10
issue of interpretation under foreign

00:52:12
investment laws and will give

00:52:14
the floor to Jeremy to

00:52:15
start our discussion. Great. Thank

00:52:19
you Lee. Of course. One

00:52:22
of the criticisms of the

00:52:24



current Vester State dispute settlement

00:52:26

is a lack of consistency,

00:52:27

but one area in which

00:52:29

there's perhaps perfect consistency is

00:52:33

the rules of interpretation for

00:52:35

International Investment agreements. You'll see

00:52:37

every tribunal apply or at

00:52:39

least purport to apply the

00:52:41

relevant provisions of the Vienna

00:52:43

convention on the law of

00:52:45

treaties whether or not the

00:52:46

treaty Ally applies as between

00:52:49

the two states parties including

00:52:51



as a matter of customer

00:52:51

law. But the situation is

00:52:54

different with foreign investment laws

00:52:57

and there's no consistency that

00:53:00

I can see in the

00:53:01

way that tribunals approach the

00:53:04

interpretation of foreign investment laws.

00:53:06

You can see at least

00:53:07

four approaches in some of

00:53:09

the cases first is silence

00:53:11

some tribunals do not appear

00:53:14

to give any indication about

00:53:15

how their approaching the interpretation

00:53:18



of the text of the

00:53:19

foreign investment law and that

00:53:21

may just be because it's

00:53:23

very clear for instance in

00:53:25

the trade X case and

00:53:27

the tribunal suggested that it

00:53:29

was unambiguously clear that Albania

00:53:31

had had consented to to

00:53:34

jurisdiction in that case and

00:53:35

perhaps felt there was no

00:53:36

need to provide greater and

00:53:39

indication of the interpretive rules.

00:53:41

It was it was using

00:53:42



and by the same token.

00:53:45

If you look at the

00:53:45

incisive versus El Salvador case

00:53:47

for some of the laws

00:53:49

invoke by the claimants the

00:53:52

tribunal said it was Obvious

00:53:53

that these did not provide

00:53:54

consent and it was equally

00:53:56

obvious that the foreign investment

00:53:57

law of El Salvador did

00:53:59

provide consent so perhaps in

00:54:01

those cases and there was

00:54:03

no need to say anything

00:54:04



further. You do see at

00:54:07

least what appears to be

00:54:08

one case where tribunal has

00:54:10

relied exclusively on domestic law

00:54:12

and that's in petrobart versus

00:54:14

Kyrgyzstan. But even there the

00:54:16

tribunal says well as pointed

00:54:18

out by the parties the

00:54:19

kyrgyzen Constitution incorporates principles of

00:54:23

international law, which may have

00:54:25

influenced the Tribunal. The third

00:54:28

you could imagine international law

00:54:30

applying exclusively to the interpretation.

00:54:33



And you see at least

00:54:34

one reference in csob versus

00:54:37

the Slovak Republic where the

00:54:40

tribunal was interpreting a notice

00:54:42

published by the MFA not

00:54:44

a foreign investment law but

00:54:45

a unilateral Act and the

00:54:48

tribunal said the question whether

00:54:49

the parties have effectively expressed

00:54:51

their consent exit. Our jurisdiction

00:54:53

is not to be answered

00:54:55

by reference to national law.

00:54:57

It is governed by international

00:54:58



law. And then the fourth

00:55:01

and I think perhaps the

00:55:02

most common approach is a

00:55:05

reference to domestic law and

00:55:07

international law and you see

00:55:09

variations in the in the

00:55:12

awards or decisions on this

00:55:13

point. For instance in spp

00:55:14

versus Egypt the tribunal applied

00:55:17

general principles of statutory interpretation

00:55:19

taking into account relevant rules

00:55:22

of treaty interpretation under the

00:55:24

Vienna convention and principles of

00:55:26



international law applicable to unilateral

00:55:29

declarations. So this suggests that

00:55:32

the general principles of statutory

00:55:34

interpretation were perhaps the primary

00:55:36

means and that they could

00:55:37

be supplemented by applicable international

00:55:39

law. Now if you contrast

00:55:42

that with *gianwali* versus Georgia,

00:55:44

the tribunal said that if

00:55:46

the national law of Georgia

00:55:48

addressed the question of consent

00:55:49

than the tribunal must follow

00:55:51

the national law guidance, but

00:55:53



always subject to the ultimate

00:55:54

governance of international law which

00:55:57

suggests that somehow international law

00:55:59

might Trump domestic law. so

00:56:02

the question is does this

00:56:03

really matter in practice if

00:56:05

the tribunals provide a rule

00:56:07

of interpretation or how they

00:56:08

go about it and it's

00:56:10

the award suggest, you know,

00:56:12

not that much at least

00:56:13

from what you can glean

00:56:15

from the awards and perhaps

00:56:18



there are several reasons for

00:56:19

this as the mobile tribunal

00:56:21

observed even when an arbitral

00:56:23

Tribunal Indicates the interpretive approach.

00:56:27

It's using it very often

00:56:28

focuses on the text the

00:56:30

actual language of the foreign

00:56:32

investment law and doesn't go

00:56:34

much beyond that often times

00:56:36

a second reason is is

00:56:39

David Karen pointed out is

00:56:40

that tribunal is often have

00:56:42

a somewhat liberal interpretation of

00:56:44



instruments of consent in these

00:56:46

foreign investment laws. So whichever

00:56:48

approach is used might lead

00:56:50

them to the same the

00:56:53

same outcome. a third is

00:56:56

that you know, the text

00:56:57

itself is going to be

00:56:59

the the guiding principle, but

00:57:05

it's often difficult to figure

00:57:06

out which and approach is

00:57:09

being used. Even if the

00:57:10

tribunal indicates that they're applying

00:57:12

domestic law and international law.

00:57:14



It's difficult to say to

00:57:15

say how this interpreted the

00:57:17

how this influence the interpretation.

00:57:23

So the problem is we

00:57:25

know that tribunals often rely

00:57:27

on the text. But the

00:57:29

text in many of these

00:57:31

foreign investment laws is deemed

00:57:32

to be vague and ambiguous

00:57:34

even contradictory. In the investment

00:57:38

law itself or with other

00:57:39

instruments of other authorities under

00:57:43

the under the state's laws.

00:57:45



Why is that? I think

00:57:48

I suppose there are a

00:57:49

few different explanations first. These

00:57:50

foreign investment laws were often

00:57:52

drafted on the basis of

00:57:54

models or templates as Uche

00:57:56

was suggesting at the beginning

00:57:57

World Bank is provided some

00:57:59

some guidance and the World

00:58:01

Bank used to have a

00:58:03

dispute resolution provision a model

00:58:05

dispute resolution provision for foreign

00:58:07

investment laws, but it's a

00:58:09



it's easy to imagine that

00:58:10

some of these Provisions could

00:58:12

get garbled in the legislative

00:58:14

process, even if they were

00:58:16

clear from the outset. The

00:58:19

second point which was already

00:58:20

touched on is that states

00:58:22

didn't have a lot of

00:58:23

experience with investor State dispute

00:58:26

settlement, perhaps at the time

00:58:27

when they were drafting these

00:58:28

foreign investment laws. And so

00:58:30

they might not have been

00:58:31



as attentive or even if

00:58:33

they were attentive. They might

00:58:35

not have understood all the

00:58:36

nuances or ramifications of some

00:58:38

of the language that was

00:58:39

was used. And then a

00:58:42

third point which was touched

00:58:43

on as well is that

00:58:44

International arbitral tribunals may not

00:58:47

be in a very good

00:58:48

position to understand legislative Nuance

00:58:52

in some of these laws

00:58:52

or there may be problems

00:58:54



of translation that make it

00:58:56

very difficult for a tribunal

00:58:57

to to interpret it in

00:58:59

the way that the legislators

00:59:01

thought. They were drafting the

00:59:02

text. And you can see

00:59:04

this lack of clarity manifest

00:59:08

itself in the cases in

00:59:09

a few different ways the

00:59:10

first obviously in the scope

00:59:12

of consent what also in

00:59:14

the temporal scope and in

00:59:16

this relationship between the instrument

00:59:18



the foreign investment law and

00:59:19

other authorities within the state.

00:59:23

So as noted many of

00:59:25

these laws are quite clear

00:59:26

on their face consent is

00:59:28

provided or consent is not

00:59:29

provided to to investment arbitration.

00:59:32

But as Michaela testified in

00:59:35

an article what he surveyed

00:59:36

all these laws, there's this

00:59:38

vast gray area where it's

00:59:40

simply not clear from the

00:59:41

face of the text itself

00:59:42



whether the state has consented

00:59:45

or has not consented to

00:59:47

investment arbitration in here. You

00:59:49

really see tribunal struggling to

00:59:51

make sense of some of

00:59:52

these laws. For instance an

00:59:55

example is the penwell versus

00:59:57

the caregiversary public decision just

01:00:00

came out a couple of

01:00:01

months ago that 2003 caregas

01:00:04

investment act provided that investment

01:00:06

disputes shall be settled by

01:00:08

courts and less one of

01:00:09



the parties asks or requests

01:00:12

the dispute to be considered

01:00:13

in accordance with Exodus Charles

01:00:16

rules. And the the state

01:00:18

said well, if we have

01:00:18

to if the investor has

01:00:20

to ask that implies consent

01:00:22

and consent is not given

01:00:24

in advance and the tribunal

01:00:26

said no, it's they looked

01:00:28

at the text. They looked

01:00:29

at the context and they

01:00:31

concluded that further consent was

01:00:33



not required. But this just

01:00:35

goes to show that the

01:00:36

Keurig is Republic may have

01:00:37

had one expectation about the

01:00:39

application of its law. And

01:00:40

in fact said we amended

01:00:42

our previous law which we

01:00:44

felt or was deemed to

01:00:45

be not clear in order

01:00:46

to make consent and not

01:00:48

provided in advance and still

01:00:50

whatever their efforts say. We're

01:00:52

not deemed Successful by this

01:00:53



particular. You know. the second

01:00:57

example is the temporal scope

01:00:59

and you can see this

01:01:00

again in a very recent

01:01:01

case the June 2021 award

01:01:04

in oh, oh manolium processing

01:01:07

versus Belarus and the claimant

01:01:10

had initiated in uncitrol arbitration

01:01:12

under the states 2014 investment

01:01:16

law and a question was

01:01:18

whether that law applied to

01:01:21

Investments made or even disputes

01:01:24

are rising before the law

01:01:25



came into a into Force

01:01:27

very interestingly. In this case

01:01:29

at least for my experience

01:01:31

and having reviewed these Awards

01:01:33

is that the tribunal did

01:01:35

defer to the state reasonable

01:01:38

interpretation of the state's own

01:01:40

law, which we don't often

01:01:42

see at least not expressly

01:01:44

stated in an award or

01:01:45

decision. The tribunal looked the

01:01:49

purpose of the act in

01:01:50

the Preamble a kind of

01:01:51



vcl type analysis saying that

01:01:54

the purpose included attracting Investments,

01:01:57

which did not seem to

01:01:58

include the protection of pre-existing

01:02:00

Investments or pre-existing disputes and

01:02:03

then the tribunal look to

01:02:05

the definition of investment which

01:02:07

referred to Property being invested

01:02:10

in the home state or

01:02:13

in the the state of

01:02:14

Belarus. So in the end

01:02:16

the tribunal concluded that this

01:02:19

fell outside the temporal scope

01:02:20



and there was no jurisdiction.

01:02:21

You can imagine from the

01:02:23

investors' perspective. This was was

01:02:24

not very satisfactory the other

01:02:28

authors in the literature that

01:02:30

had looked at this law

01:02:31

had deemed that there had

01:02:32

been consent given in advance.

01:02:34

And so it just goes

01:02:35

to suggest that you know,

01:02:37

the lack of clarity has

01:02:39

creates risks and problems first

01:02:41

for States and investors as

01:02:43



well. The third example I'll

01:02:47

give is the ambiguity that

01:02:48

arises in the relationship between

01:02:50

the foreign investment law itself

01:02:52

and the other legal authorities

01:02:54

of the state and one

01:02:56

example we can look to

01:02:57

is the society Resort company

01:02:59

versus Ivory Coast at 2017

01:03:02

decision where the ivory investment

01:03:06

law provided for exit arbitration,

01:03:09

but it required the claimant

01:03:11

to express the consent to

01:03:12



exit arbitration in its initial

01:03:15

application for approval of the

01:03:16

investment. That's the way the

01:03:18

Ivory Coast indicate interpreted their

01:03:21

own investment law, but the

01:03:24

climate said that there did

01:03:26

not need to be a

01:03:27

acceptance of the consent and

01:03:30

initial application that this could

01:03:31

be made in the notice

01:03:32

of request. And here the

01:03:35

tribunal in part look to

01:03:39

the Ivory Coast's own model

01:03:42



application for investment and noted

01:03:44

that there was no provision

01:03:45

in there about dispute resolution

01:03:46

or accepting exit consent and

01:03:49

seemed to use this against

01:03:50

the state to find. Jurisdiction,

01:03:53

in this case, which suggests

01:03:55

to immediately at least that

01:03:56

not only is there the

01:03:57

problem of vagueness in determinacy

01:03:59

or lack of precision in

01:04:01

the foreign investment law itself

01:04:02

that can give rise to

01:04:03



problems for foreign investors and

01:04:05

States but also a lack

01:04:08

of consistency perhaps across the

01:04:10

legal regime or the other

01:04:11

legal instruments of that state

01:04:13

that a State might need

01:04:14

to to look at to

01:04:16

ensure that it's foreign investment

01:04:17

law operates the way that

01:04:19

it intended when it was

01:04:21

adopted. So for me just

01:04:23

to conclude the bottom line

01:04:24

for the states is that

01:04:26



you know, these foreign investment

01:04:28

laws often are they're vague

01:04:30

imprecise or even contradictory and

01:04:33

states are engaged in this

01:04:35

process now of looking at

01:04:37

the investor State dispute settlement

01:04:39

regime more holistically, you know

01:04:41

Central work group three, it's

01:04:42

mostly focused on investment treaties.

01:04:45

This is a very good

01:04:46

opportunity for states to step

01:04:48

back evaluate the priorities for

01:04:50

investor State dispute settlement. Protection

01:04:53



and promotion of foreign investment

01:04:54

and look to see if

01:04:56

their foreign investment laws actually

01:04:57

reflect those priorities and are

01:05:00

drafted in a way that

01:05:00

gives Clarity to investors and

01:05:03

to Future tribunals. Thanks Lee.

01:05:06

Thank you very much. Jeremy.

01:05:07

We'll go to Deanna Uche

01:05:10

and Jose Antonio for comments

01:05:12

in that order. Sure. Thank

01:05:15

you Lee and thank you.

01:05:16

Jeremy one sort of maybe

01:05:18



elaboration on the canons of

01:05:21

interpretation that you talked about

01:05:22

is we've seen particularly the

01:05:26

exit tribunals alluding to the

01:05:28

2006. I'll see guiding principles.

01:05:32

And particularly what's interesting about

01:05:35

those guiding principles is that

01:05:37

they address the situation of

01:05:40

ambiguity and the provision there

01:05:42

is that, you know, there's

01:05:44

a rule of interpretation and

01:05:46

the event that there is

01:05:47

a doubt as to these

01:05:49



scope of the obligations resulting

01:05:51

from a unilateral declaration. It

01:05:54

must be interpreted in a

01:05:55

restrictive manner but exit tribunals

01:05:58

have found that this restrictive

01:05:59

approach is not join to

01:06:01

exit arbitration particularly because they

01:06:05

found the knowledge and follow

01:06:09

the approach of the icj

01:06:11

in relation to interpretation of

01:06:14

unilateral declarations in particular optional

01:06:18

Declarations of compulsory jurisdiction of

01:06:21

the icg and what that

01:06:24



means is that either is

01:06:27

no restrictive approach and that

01:06:28

the offer in the investment

01:06:31

law. The offer to arbitrate

01:06:33

must be interpreted as it

01:06:35

stands having regard to the

01:06:37

words actually used and that

01:06:39

do consideration should be paid

01:06:41

to the intention of the

01:06:43

state having formulated such acts

01:06:46

and that can be deduced

01:06:48

from the as you alluded

01:06:49

to context the circumstances of

01:06:52



the preparation of the law

01:06:53

and the purposes intended to

01:06:55

be served and one issue

01:06:57

there. Of course is we

01:07:00

don't always have trouble preparatoa

01:07:02

for those investment laws and

01:07:04

perhaps one of the things

01:07:06

for the states to consider

01:07:08

is documenting exactly what they

01:07:11

intention is behind the investment

01:07:13

law particularly if if the

01:07:16

wording is is is not

01:07:19

so clear and there is

01:07:21



some doubt as to the

01:07:23

scope of the offer meat.

01:07:25

And so we I I

01:07:28

wanted to highlight that this

01:07:30

really raises also, A strategic

01:07:33

issue for counsel and how

01:07:36

to approach this because Under

01:07:38

The ilc Guiding principles there

01:07:41

is a way to argue

01:07:42

for restrictive approach in the

01:07:44

interpretation. But then under the

01:07:46

good faith approach it is

01:07:48

arguable that the tribunals must

01:07:50



examine whether foreign investors have

01:07:53

formed any reasonable and legitimate

01:07:55

expectations is to availability of

01:07:58

exit remedies pursuant to domestic

01:08:01

law. So that is something

01:08:04

that we've seen being debated

01:08:05

in those cases. Yeah, thank

01:08:10

you. There does seem to

01:08:11

be a bit of attention.

01:08:12

I understand that the ilc

01:08:13

didn't address for an investment

01:08:15

laws as such and drafting

01:08:16

their guidelines. But as you

01:08:18



suggest, there's this restrictive principle

01:08:21

reflected, which tribunals routinely dismissed

01:08:25

from far back as Emco

01:08:26

Asia. You don't look expansively

01:08:28

or restrictively but look at

01:08:29

it into the terms of

01:08:31

Vienna convention and so forth.

01:08:32

So there could be this

01:08:33

this tension where tribunals might

01:08:35

rely on the ilc guidelines

01:08:37

in certain parts and ignore

01:08:39

them and others as suggest

01:08:42

Thank you Jeremy. Um, I'm

01:08:44



just gonna make the next

01:08:45

comments optional just given given

01:08:48

looking at the time but

01:08:48

UJ if you have something

01:08:50

yeah, just just a very

01:08:52

quick one Jeremy, you know,

01:08:54

you took about lack of

01:08:55

clarity of text and then

01:08:57

lack of consistency in the

01:09:00

approach to interpretation by the

01:09:01

by the tribunals the luck

01:09:04

of a broad approach. Is

01:09:08

that something that you believe

01:09:09



has been harmful to the

01:09:12

system as well to the

01:09:15

to the parties in general

01:09:17

and are you both are

01:09:22

both issues what you consider

01:09:25

should be Should be addressed

01:09:28

by the oil in the

01:09:31

context of the of the

01:09:33

reforms currently being discussed. Yes,

01:09:37

just very briefly. I do

01:09:38

think all parties the states

01:09:40

and the investors should know

01:09:42

in advance. What are the

01:09:43



interpretive rules that will be

01:09:44

applied to these instruments so

01:09:46

that they can draft these

01:09:48

instruments with some idea about

01:09:49

how they'll be better interpreted.

01:09:51

If tribunals are seen to

01:09:53

be picking and choosing different

01:09:54

aspects of the law to

01:09:56

rely on to reach result.

01:09:58

It may be a fair

01:09:59

result in the end, but

01:10:00

it may leave one or

01:10:01

the other parties very dissatisfied

01:10:03



about this approach for instance.

01:10:06

Looking to the Preamble in

01:10:07

one case looking to another

01:10:08

a totally unrelated an instrument

01:10:11

outside of the foreign investment

01:10:13

law in another case. There

01:10:15

should be some better understanding

01:10:16

of all the users of

01:10:18

this system about the means

01:10:20

for interpretation and how these

01:10:23

are going to be applied

01:10:24

in any particular case. Otherwise,

01:10:26

I think we're just setting

01:10:27



ourselves up for a lot

01:10:28

of dissatisfies. So that's so

01:10:31

far. The issue is not

01:10:32

that there that there's been

01:10:34

massive instances of Injustice happening

01:10:39

just that. The the uncertainty

01:10:42

is not good for the

01:10:43

system. Well in many cases

01:10:45

the State loses on this

01:10:47

question. The state is interpreting

01:10:48

its own law. Let's say

01:10:50

the state is acting in

01:10:51

good faith. That means the

01:10:52



tribunal is interpreting the law

01:10:54
in a way the state

01:10:55
had not intended. It's not

01:10:56
like a bilateral investment treaty.

01:10:57
This is the state's own

01:10:59
unilateral act in a tribunal

01:11:00
saying no you're interpretation of

01:11:02
your law is wrong. That's

01:11:03
a problem for the system.

01:11:05
If the states are acting

01:11:06
a good faith. We should

01:11:07
expect the states are putting

01:11:09
forth and interpretation that's consistent

01:11:11



with how the law would

01:11:13

be interpreted by courts of

01:11:14

that state in in the

01:11:17

main now in any particular

01:11:18

case, you may say they

01:11:20

reached a reasonable result, but

01:11:21

I would think we would

01:11:23

want a state a result

01:11:24

that satisfactory for both parties

01:11:27

having looked at this issue

01:11:28

in advance rather than In

01:11:30

the Heat of an arbitration

01:11:31

case. Oh, yeah. Thank you.

01:11:39



I was Antonio. Yeah quickly.

01:11:42

Yeah very quickly. I I

01:11:45

want to I want to

01:11:47

sort of contest a little

01:11:49

bit the notion that the

01:11:51

good faith. Let's call it

01:11:55

the good faith Doctrine based

01:11:57

on on on public international

01:11:59

law would necessarily. Lead to

01:12:02

a more. liberal interpretation or

01:12:07

or less restrictive one in

01:12:10

particular the nuclear test cases

01:12:12

indicate in paragraphs 47 the

01:12:15



following and I quote when

01:12:17

states make statements by which

01:12:19

their freedom of action is

01:12:20

to be limited a restrictive

01:12:23

interpretation is called for so

01:12:25

so it's it is not

01:12:27

necessarily quite quite quite correct

01:12:30

that that if we follow

01:12:31

a unilateral Act under the

01:12:36

basis of public international law

01:12:38

and I see jurisprudence would

01:12:40

lead would end up saying

01:12:42

that that the interpretation must

01:12:45



be non-restrictive and and then

01:12:48

just a question and I

01:12:49

believe that Diana May touch

01:12:52

upon in her remarks later

01:12:54

on on that. Why do

01:12:57

we mean by by a

01:12:58

restrictive interpretation because in my

01:13:01

world? If we apply. The

01:13:07

inner convention on the law

01:13:08

of treaties article 31 and

01:13:10

if we are if we

01:13:11

applied the four means of

01:13:13

interpretation. the meaning of the

01:13:16



terms and then the context

01:13:19

and and and and the

01:13:21

purpose all of them interpreting

01:13:23

good faith. Then then we

01:13:25

we end up in what

01:13:26

I would say is is

01:13:28

a restrictive enough interpretation if

01:13:32

we extend that and and

01:13:34

we say that those are

01:13:36

customer means of interpretation regardless

01:13:38

of whether we're talking about

01:13:39

treaties or or unilateral acts

01:13:41

that applied to the text

01:13:43



of the investment law should

01:13:45

lead us to a restrictive

01:13:47

enough interpretation. So I want

01:13:49

to ask what no, What

01:13:52

do we mean by that

01:13:53

and I and I and

01:13:56

I embrace all the comments

01:13:57

made by Jeremy in the

01:13:58

sense that yes, we have

01:13:59

to understand what context was

01:14:01

it given but also we

01:14:03

have to look into the

01:14:05

words that are included in

01:14:07



in the text a good

01:14:10

example of this and you

01:14:11

might touch upon this in

01:14:12

your remarks. Diana is is

01:14:14

what is the the whole

01:14:18

discussion about the investment law

01:14:19

in Venezuela that that that's

01:14:22

a good example because there

01:14:23

were several several commentators that

01:14:26

for many years opine in

01:14:30

Ultimate that this gave consent

01:14:33

and at the end of

01:14:34

it, you know, three cases

01:14:35



investment arbitration tribunal said, no,

01:14:37

I mean it's not clear.

01:14:38

So I think that the

01:14:40

bar is not that low.

01:14:42

There needs to be clear.

01:14:44

consent by the state based

01:14:47

on the words, but I'll

01:14:48

stop there and perhaps Jeremy

01:14:51

or might have some some

01:14:54

remarks. Lady perhaps we could

01:14:58

just go to tight Diana

01:14:59

and then we could come

01:15:00

back to it at the

01:15:00



end if we have times.

01:15:01

Yeah, that would be great.

01:15:02

So we're gonna move to

01:15:04

our fourth topic of discussion.

01:15:05

We told you we had

01:15:06

a lot to talk about

01:15:07

we're gonna move to the

01:15:09

really interesting and sometimes equally

01:15:11

vaccine issue of applicable law

01:15:13

under foreign investment laws. And

01:15:16

what we'll do just to

01:15:16

make sure we have enough

01:15:17

time for this segment. We'll

01:15:19



go all the way to

01:15:20

10:30 and then we'll we'll

01:15:21

deal with Q&A probably in

01:15:24

the chat rooms. So Deanna

01:15:26

take it away. So thank

01:15:28

you Lee and yeah, I

01:15:30

will touch upon the restrictive

01:15:31

interpretation later. But before this

01:15:33

I will indeed segue into

01:15:35

the subtopic of applicable law

01:15:38

as it relates to the

01:15:39

sort of substance of the

01:15:40

claims. So where the investment

01:15:43



protections invoke line investor based

01:15:45
on foreign investment law. The

01:15:48
applicable law in principle is

01:15:51
the includes at least the

01:15:53
terms of that law and

01:15:55
relevant domestic legal regime and

01:15:59
some of the investment laws

01:16:01
state that International also applies

01:16:04
as a relevant source of

01:16:06
law, but in most cases

01:16:08
what law applies and what

01:16:11
is the precise content of

01:16:13
that law has been disputed

01:16:15



by the parties often using

01:16:17

experts on both sides to

01:16:19

address that so taking into

01:16:22

account that the two main

01:16:24

regimes for investment arbitrations the

01:16:27

exit convention on the one

01:16:29

hand and the answer travels.

01:16:30

It's helpful to frame the

01:16:33

discussion in terms of the

01:16:35

applicable rules under those two

01:16:36

regimes. So under the exit

01:16:40

convention the starting point the

01:16:42

locus of the rule is

01:16:43



of course article 42:1 which

01:16:47

requires an exit tribunal first

01:16:49

to see if there's an

01:16:50

agreement between the parties asked

01:16:53

for the applicable law and

01:16:55

we refer to it as

01:16:56

a choice of law provision.

01:16:58

In the absence of such

01:17:00

an agreement the tribunal must

01:17:02

apply the domestic law and

01:17:04

this is by the wording

01:17:06

of article 40 to 0.1

01:17:09

and but in addition to

01:17:12



the domestic law of the

01:17:13

whole state, the tribunal must

01:17:15

apply such rules of international

01:17:17

law is maybe applicable to

01:17:20

the party's dispute. So giving

01:17:21

tribunal some discretion on what

01:17:25

rules deems to be applicable

01:17:27

to particular dispute. So recent

01:17:31

exit tribunals have applied this

01:17:33

rule with some consistency and

01:17:36

in several on those cases

01:17:38

the respondent state use the

01:17:40

applicable law to limit or

01:17:43



even eliminate some of the

01:17:45

claims that were brought by

01:17:47

investors. And just to highlight

01:17:50

a few of those cases.

01:17:51

I want to talk about

01:17:53

Puck cream versus El Salvador

01:17:56

and this decision came out

01:17:58

in 2016 the tribunal found

01:18:01

that the Salvadoran Lord is

01:18:04

she did not contain a

01:18:05

choice of law provision and

01:18:07

so in the absence of

01:18:08

such a choice of law

01:18:09



it held that it must

01:18:10

apply Salvadoran law as well

01:18:13

as the rules of international

01:18:14

law as maybe applicable and

01:18:18

based on that the tribunal

01:18:19

rejected the respondent state clean

01:18:23

that certain that the Trevino

01:18:26

did not have jurisdiction over

01:18:28

some of the claims brought

01:18:30

by investor specifically relying on

01:18:32

principles of international law and

01:18:34

customer international law and the

01:18:38

tribunal also emphasize the corrective

01:18:41



function of international law in

01:18:43

relation to domestic role and

01:18:45

in particular it accepted looking

01:18:47

back at the older. Are

01:18:49

cases it accepted the insasa

01:18:52

tribunals holding that in order

01:18:54

to invoke the arbitration jurisdiction

01:18:57

provided in the investment law.

01:18:59

There must be a claim

01:19:01

with substantive grounds in that

01:19:03

law, but such an approach

01:19:06

cannot exclude applicables of international

01:19:08

law in the absence of

01:19:10



a choice of War. So

01:19:11

again very much adhering to

01:19:13

article 42.1 of the exit

01:19:17

convention and more recently in

01:19:19

the interim versus Nigeria. I

01:19:23

hope I'm pronouncing the Investor's

01:19:26

name correctly from 2020 which

01:19:29

resulted in a victory for

01:19:30

Nigeria, but only issue of

01:19:34

Sort of like which law

01:19:36

applies to the substance of

01:19:37

the claims the respondent States

01:19:39

sought to dismiss the claim

01:19:41



based on indirect expropriation arguing

01:19:44

that it's a claim under

01:19:45

customary international law and not

01:19:48

under the Nigerian investment law

01:19:51

the tribunal rejected this contention

01:19:54

that an indirect expropriation and

01:19:56

protection afforded under customer international

01:20:00

law are excluded from the

01:20:03

protection offered in the Nigerian

01:20:05

investment law. It rejected the

01:20:08

argument that the tribunal acts

01:20:10

jurisdiction based on customer international

01:20:12

law because it found that

01:20:14



and this is important that

01:20:16

the language in the Nigerian

01:20:18

investment law was drafted broadly

01:20:22

and included claims on their

01:20:24

customer international law it also

01:20:27

highlighted that customer international law

01:20:30

is part of the English

01:20:31

common law and that common

01:20:33

law Has been incorporated into

01:20:35

the Nigerian law. So I

01:20:37

think that's an important inquiry

01:20:38

for tribunals to to go

01:20:41

into in order to justify

01:20:43



admitting claims that go beyond

01:20:46

domestic law and so because

01:20:48

the customer International became part

01:20:50

of Nigerian law, it was

01:20:53

found to be applicable to

01:20:55

the dispute. Under the trial

01:20:59

rules in a moving now

01:21:00

to a slightly different procedural

01:21:03

framework our article 33 of

01:21:05

the 1976 version of the

01:21:10

answer travels and the revised

01:21:13

2020-20 2013 rules have a

01:21:16

similar provision. Um in any

01:21:19



way it differs slightly from

01:21:20

the exit rule in that

01:21:22

the parties can designate the

01:21:24

entire legal system as the

01:21:26

law governing the dispute. It

01:21:28

provides that the arbitral tribunal

01:21:31

shall apply the law designated

01:21:33

by the parties as applicable

01:21:35

to the substance of the

01:21:36

dispute, but failing such designation

01:21:39

the arbitral tribunal shall apply

01:21:42

the law determined by the

01:21:44

conflicts of laws that it

01:21:45



can't that that it considers

01:21:47

to be applicable. So arguably

01:21:50

this gives more discretion to

01:21:53

answer trial tribunals. In in

01:21:58

terms of how this played

01:21:59

out most more recently since

01:22:01

we're also focusing on recent

01:22:04

developments. I'll refer to the

01:22:07

case that Jeremy you mentioned

01:22:08

penwell versus caregis republic which

01:22:11

addressed the 2003 investment law

01:22:16

of the Republic of the

01:22:17

Curious Republic and you know

01:22:19



the starting point of course

01:22:20

was the provision of the

01:22:23

caregis law itself, which did

01:22:28

not refer to international law

01:22:30

explicitly and the provision stated

01:22:34

that the legislation that governs.

01:22:37

The the regime is the

01:22:39

constitution of the care of

01:22:43

curious Republic the investment War

01:22:45

itself and other normative acts

01:22:48

of of the Republic. so

01:22:51

the tribunal considered that to

01:22:53

the extent that some International

01:22:54



or principles that protect foreign

01:22:57

investors are formed constituent part

01:22:59

of the kyugus legal system

01:23:02

that would be relevant for

01:23:04

the resolution of the dispute

01:23:05

that the tribunal actually had

01:23:07

the duty to apply them

01:23:09

and independently of how Kirk

01:23:13

is courts would have approached

01:23:15

this and I found that

01:23:16

very interesting because what the

01:23:19

caregiver's Republic demonstrated through use

01:23:23

of experts is how These

01:23:26



issues would be approached by

01:23:28

caregis courts with clearly the

01:23:30

tribunal found that that was

01:23:33

not controlling and it held

01:23:36

that while international law per

01:23:38

se has no rule to

01:23:40

play in the present arbitration.

01:23:42

The universally recognized principles and

01:23:45

Norms of international would be

01:23:47

applicable and so and precisely

01:23:50

because it found that they

01:23:51

form part of the caregis

01:23:54

legal system. And so so

01:23:57



that's how it played out

01:23:58

in the recent answer trial

01:24:00

case. So to summarize and

01:24:02

sort of open the floor

01:24:03

for the comments from my

01:24:05

co-panelists based on the caseload

01:24:09

to date in its what's

01:24:12

emerging is that in deciding

01:24:13

what way to give to

01:24:15

international law the parties should

01:24:17

bear in mind that tribunals

01:24:19

will take into account factors

01:24:21

which include first whether the

01:24:24



tribunal is constituted under the

01:24:26

exit convention. and there we

01:24:29

have to take into account

01:24:32

article 42 which makes specific

01:24:35

reference to international law or

01:24:37

is it governed by another

01:24:39

regime for example, the institrawal

01:24:41

law and ultimately I think

01:24:43

in practice the arguments are

01:24:45

similar another factor is whether

01:24:48

the investment law contains the

01:24:50

choice of flow provision to

01:24:51

the exclusion of any other

01:24:53



laws, that would be obviously

01:24:56

relevant for an exit arbitration

01:24:59

whether the investor or investment

01:25:01

should be considered foreign and

01:25:03

that is basically based on

01:25:05

the terms of the law

01:25:07

itself and absent in guidance

01:25:10

provided in the Lord itself

01:25:12

based on the tribunal's analysis

01:25:14

of the ownership structure of

01:25:16

the investment the identity of

01:25:18

the owners of the investment

01:25:20

source of investment capital and

01:25:23



whether they invest their or

01:25:25

the investment were recognized as

01:25:27

foreign by It and that's

01:25:29

just to list a few

01:25:31

of those factors and finally

01:25:33

how international law is reflected

01:25:36

or incorporated into the legal

01:25:38

framework of the host state

01:25:40

is going to be very

01:25:42

important as I alluded to

01:25:44

a number of cases now

01:25:45

that focused on that very

01:25:48

much. So with this I

01:25:51



invite my co-panelists to provide

01:25:53

for their observations on the

01:25:55

applicable law and perhaps your

01:25:57

experience dealing with this issue

01:26:00

in cases. Thank you very

01:26:04

much Gianna. We'll turn to

01:26:07

Uche Jose Antonio and then

01:26:08

Jeremy for comments in that

01:26:10

order if any comments. Okay.

01:26:13

I hope the mic a

01:26:14

lot already. So I'll see

01:26:15

my time to to the

01:26:17

others and come back at

01:26:18



the end if there's still

01:26:19

time. Yeah, and and same

01:26:22

for me. I'll see how

01:26:23

I'll give my time to

01:26:24

Jeremy if he has questions.

01:26:29

Thank you Diana for that

01:26:30

very interesting presentation. I was

01:26:33

just as you were speaking.

01:26:35

I was thinking props. This

01:26:36

is another area where it

01:26:38

really behooves states to look

01:26:40

at their foreign investment laws

01:26:41

in light of the applicable

01:26:43



law the flexibility reflected an

01:26:45

article three of the ancestral

01:26:46

rules as well as an

01:26:48

article 42:1 of the exit

01:26:50

convention and perhaps, you know,

01:26:52

whether there's a trend toward

01:26:54

reflecting the applicable law in

01:26:56

the foreign investment laws, but

01:26:57

it is a minimum. I

01:26:58

think yet another issue that

01:26:59

state should focus on when

01:27:01

they're turning an eye to

01:27:03

their foreign investment laws in

01:27:04



the context of broader reform

01:27:06

efforts of the system. Now

01:27:10

Jeremy, I couldn't agree more

01:27:12

and I think that and

01:27:16

and I find just as

01:27:18

I was reviewing the cases

01:27:19

what the importance of experts

01:27:22

in these debates and explaining,

01:27:24

you know, how the legal

01:27:26

system of a particular State

01:27:28

functions and of course the

01:27:30

state knows it's law and

01:27:32

should take that into account

01:27:33



when implementing foreign investment laws.

01:27:41

Thank you. Thank you. Any

01:27:44

any other comments chair Jose

01:27:48

Antonio got? three minutes Lee

01:27:54

I could just maybe briefly

01:27:55

come back to the restrictive

01:27:57

approach which was I suppose

01:28:01

it's something that would also

01:28:03

be relevant to the sort

01:28:05

of interpreting the scope of

01:28:06

legal obligations and the substance

01:28:09

of those investment laws as

01:28:10

well. I think the way

01:28:11



Jose Antonio I see as

01:28:13

being relevant, you know in

01:28:15

practice is when we're dealing

01:28:17

with ambiguous language and whether

01:28:20

there's actually an offer me

01:28:23

by the state to arbitrate

01:28:25

I think that from the

01:28:28

perspective of the states and

01:28:29

I I will start with

01:28:31

that and I will address

01:28:32

another perspective from the perspective

01:28:34

of the states can send

01:28:35

to arbitration as an extraordinary

01:28:37



concession. So, you know that

01:28:39

approach that in the in

01:28:43

the case of an ambiguous

01:28:44

text if there's an offer

01:28:47

somehow it should be in

01:28:49

favor of investor. If especially

01:28:51

the investor can Demonstrate legitimate

01:28:53

expectations can be problematic in

01:28:56

that it expands what the

01:28:59

states they offering and so

01:29:02

in that sense restrictive approach

01:29:04

would go against liberal interpretation

01:29:07

and and prevent sort of

01:29:09



construing that text as indeed

01:29:12

offering consent to arbitration from

01:29:15

the investors perspective. You know

01:29:18

that is something that they

01:29:20

would have to argue right

01:29:22

and see if they can

01:29:23

establish clearly legitimate expectations whether

01:29:26

the state itself intended to

01:29:29

offer to arbitrate and I

01:29:31

think a lot of these

01:29:31

issues play out through Artful

01:29:35

advocacy of experts and and

01:29:37

counsel. Thank you Matt. I

01:29:42



not I'm raising my hand

01:29:46

not in response to the

01:29:47

other. I I agree with

01:29:48

everything that she said. one

01:29:52

of the one of the

01:29:55

reasons why why I sort

01:29:58

of kind of intimately react

01:30:02

to the notion of restrictive

01:30:03

in interpretation. Is that is

01:30:05

that at least psychologically in

01:30:08

me? It creates this idea

01:30:09

that that it's it's overly

01:30:13

restricted, but but I don't

01:30:15



think that that there's there's

01:30:19

also this notion that legitimate

01:30:23

expectations would would create some

01:30:27

expectations. regardless of the language

01:30:32

of either the treaty or

01:30:34

the investment law and and

01:30:36

at least in my world

01:30:38

the expectations are only legitimate

01:30:41

and reasonable when when they

01:30:43

really rely on what has

01:30:45

been offered. So if what

01:30:47

has been offered is not

01:30:49

absolutely clear that it really

01:30:52



provides an offer to investors

01:30:53

that arbitration. The expectations are

01:30:56

not reasonable. And they're not

01:30:58

legitimate. So so I I

01:31:00

think that the notion of

01:31:02

legitimate expectations has has been

01:31:06

inflated to the extent that

01:31:07

the investor can ask for

01:31:09

whatever they want regardless of

01:31:11

the language of the treaty

01:31:12

or or the investment, which

01:31:14

is not true when I

01:31:16

want to make one last

01:31:17



comment, which I think it

01:31:18

may be important to share

01:31:20

with with everyone listening here

01:31:22

and we had this this

01:31:24

conversation during our Preparatory. Meeting

01:31:29

what one of the areas

01:31:32

that has perhaps not been

01:31:34

explored by States when when

01:31:36

they draft the investment laws

01:31:38

is that yes, there's this

01:31:40

risk that taking an investment

01:31:44

law from a model might

01:31:46

be very risky as we

01:31:47



have seen and and and

01:31:48

my co-pilots have had indicated

01:31:50

but at the same time

01:31:52

if states were really informed

01:31:55

about what they could include

01:31:57

in those laws. That might

01:32:00

be something interesting to explore

01:32:02

because they could include in

01:32:04

those laws whatever requirements they

01:32:06

wish to include. and without

01:32:10

which consent to arbitration would

01:32:13

not operate so they could

01:32:16

include statutes of limitations. They

01:32:18



could include a waiver requirements.

01:32:21

They could include consent to

01:32:25

certain investors obligations and that

01:32:27

area. At least to my

01:32:30

knowledge is on unexplored territory.

01:32:34

So so on the one

01:32:36

hand, yes, they have to

01:32:37

be careful what they they

01:32:38

can include in those laws,

01:32:40

but on the other hand,

01:32:41

I have not seen a

01:32:43

state really. Taking on the

01:32:46

job of creating a law

01:32:47



that would be specifically. high

01:32:53

in the requirements that an

01:32:57

investor would have to meet

01:32:58

in order to bring in

01:33:00

an investment arbitration claim and

01:33:02

you know that that's food

01:33:03

for thought. Thank you. Thank

01:33:07

you everyone. Well, it's it's

01:33:09

a little bit after 10:30.

01:33:10

This has been an incredible

01:33:12

conversation and clearly we could

01:33:16

go on for another hour

01:33:16

and a half or more.

01:33:17



We'll have to save some

01:33:18
of these topics for the

01:33:20
third annual Washington arbitration week.

01:33:22
It's not sooner but it

01:33:24
is interesting to to see

01:33:27
foreign investment laws as perhaps

01:33:29
still the neglected stepchild but

01:33:31
but a really interesting and

01:33:33
Rich area certainly fraught with

01:33:35
complication and and problems but

01:33:38
also with potentially a tremendous

01:33:41
utility as as a reform

01:33:44
tool and we'll have to

01:33:45



we'll have to talk about

01:33:46

that in the breakout rooms

01:33:48

and that's conversations. There have

01:33:51

been a few questions and

01:33:53

answers. What I propose is

01:33:55

I will circulate them to

01:33:56

the panelists right now. And

01:33:58

if you get lucky enough

01:33:59

to be matched with the

01:34:00

person asking the question in

01:34:03

the breakout room, please take

01:34:04

up the conversation. Or through

01:34:07

other some other means but

01:34:09



I guess we'll just end

01:34:11

it there and thank everyone.

01:34:13

I give a virtual Round

01:34:14

of Applause for our panelists

01:34:16

who get a wonderful job

01:34:16

and we'll see you in

01:34:18

the breakout rooms. Thank you

01:34:19

Lee. Thank you everyone. Thank

01:34:23

you Lee now. I'll be

01:34:24

moving everybody to break room.

01:34:26

So please stay.