

Incorporating Obligations of Investors in BITs *

Summary

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

The Washington Arbitration Update (WAU) panel featured discussions on investment arbitration, focusing on the incorporation of investor obligations into bilateral investment treaties (BITs). Chester Brown moderated the session, introducing the panelists from diverse backgrounds, including Dr. Clara, Jose Antonio Rivas, and Rob Houston.

Dr. Clara highlighted the historical asymmetry in investment treaties, which typically impose obligations solely on host states while granting rights to investors. She noted that recent developments in international investment law have begun to address this imbalance by incorporating provisions that impose obligations on investors, such as adherence to international standards of corporate social responsibility and compliance with domestic laws.

Jose Antonio Rivas discussed the practical challenges of creating treaties that effectively incorporate investor obligations while respecting the principle of consent. He emphasized the need for clear treaty language that allows for state counterclaims against investors, suggesting that treaties should explicitly outline investor obligations to enhance balance and fairness in investment arbitration.

Rob Houston introduced the concept of a new treaty model, the Sustainable Investment Facilitation and Cooperation Agreement (SIFCA), which aims to merge investment protection with business and human rights principles. He explained that SIFCA would include pre-arbitral requirements such as investor declarations of compliance with human rights obligations, thereby providing a framework for accountability and enhancing the legitimacy of investment treaties.

The panel concluded with a discussion on the necessity of incorporating investor obligations into BITs to promote sustainable practices and ensure that foreign investments do not undermine human rights or environmental standards. The conversation underscored the evolving nature of international investment law and the ongoing efforts to reform the system to address the complexities of modern investment relationships.

Authors

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Topics

Obligations of Investors

Category

WAU

Full Transcript

00:00:04

World arbitration update and what

00:00:08

I meant to say is

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that I'm here. Here in

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Washington, but all of our

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panelists are from various corners

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of the world. I know

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Chester Brown who's our moderator

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is in Australia and others

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are in Europe and and

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in North America. So we're

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going to have a very

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interesting panel on one of

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the topics that we've been

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looking at over the past

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five days of the world

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arbitration update and that concerns

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issues related to investment arbitration.

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We've also had topics commercial

00:00:46

arbitration and yesterday on the

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WTO and really this panel

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is a great example of

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what we've been trying to

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do at wow to address

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diverse topics to address topics

00:01:03

that are becoming very topical

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and ones that people are

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looking for updates hence the

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topic of the conference. Um,

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and it really reflects the

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diverse nature of international arbitration

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itself over the last 20

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30 years International arbitration has

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really moved from the centers

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of arbitration in the typical

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locations to all over the

00:01:29

world and we see practitioners

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and Arbitrage Traders and our

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users from every corner of

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the planet and we we

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when I say we I

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mean Dr. Jose Antonio Rivas

00:01:40

and myself and the team

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at X strategy, we we

00:01:45

really wanted to create a

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conference that reflected the highly

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diverse and widespread nature of

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international arbitration today, and we

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hope you'll enjoy this session.

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There's a couple more sessions

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this morning and this afternoon

00:02:00

we recommend those to you,

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but let me first before

00:02:03

we kick off introduce a

00:02:06

professor Chester Brown. He's our

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moderator this morning. He's a

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professor of international law and

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international arbitration in at the

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University of Sydney law school.

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And he's also the law

00:02:24

school's director of global engagement.

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He's a barrister as well.

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He's at the seven Wentworth

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selborne Chambers in Sydney. And

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he's also an overseas member

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of Essex Court Chambers in

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London, his fields of focus

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are international law dispute settlement

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arbitration investment law, of course

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and private international law. So

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he's really well suited to

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today's topic. He's also up

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being a practitioner and Dean

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before numerous courts, including the

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icj the Iran us claims

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tribunal as well as invest

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your state tribunal. So we're

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really looking forward to getting

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a professor the Browns perspective

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on this issue and All

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now pass over the microphone

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to Chester Chester looking forward

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to the panel. Right. Thank

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you very much for that

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kind introduction in it's wonderful

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to be with you all

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here for this iteration of

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world arbitration update the first

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the first the first time

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that world arbitration update has

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been held but this is

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one of the one of

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several panels obviously that's been

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held this week with morning

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to you all without having

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an early start in the

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United States and good afternoon

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to you in Europe and

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good evening to those of

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you who may be joining

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from the similar part of

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the world as me. Now,

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we've got an excellent panel

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this evening, but I'll just

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give a short introduction to

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the topic just a very

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brief introduction to the topic

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and it's just a note

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that in 2011 the United

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Nations guiding principles on business

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and human rights for adopted

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by the United Nations Human

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Rights Council. These guiding principles

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had been developed by the

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United Nations secretary generals special

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representative on business and human

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rights who was professor John

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ruggie who was professor of

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Human Rights and Affairs at

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Harvard University's Kennedy School of

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government and the guiding principles

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really could be distilled into

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into a short catchphrase of

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three words and they are

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protect respect and remedy. And

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the United Nations guiding principles

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have become a very important

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framework for countries to implement

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in their domestic legislation, and

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also for corporations to take

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into account in implementing their

00:04:45
corporate social responsibility policies, and

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that is no more important,

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of course than when they

00:04:51
are engaged in operations overseas

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now sadly for us Professor

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rugby passed away. Just a

00:04:57
number of weeks ago in

00:04:58
September 2021, but he's left

00:05:01
a very important lasting Legacy,

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and we did hope to

00:05:04
have with us on the

00:05:04
panel this evening one of

00:05:06
his research assistants who worked

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with him throughout that process

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of developing the UN gardening

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principles on business and human

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rights and refiner whose name

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you may have seen in

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the program, but sadly due

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to a family bereavement. She

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can't be with us with

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us today, but we do

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have an excellent panel and

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I'm going to introduce our

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panels to us now. We're

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going to begin with Dr.

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Clara. Who's an assistant professor

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at the University of Nottingham

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in the United Kingdom? She

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specializes in International Investment law

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and international dispute settlement her

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research involves transformations of international

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law with respect to Collective

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non-state entities, the international legal

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regulation of global coordination problems

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and international law in domestic

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courts. She completed her PhD

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at The Graduate Institute of

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International Development studies in Geneva

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in Switzerland and also holds

00:06:01

an illm from the University

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of Michigan and Masters and

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nationalist degrees from marasik University

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in a Czech Republic and

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she's also been a visiting

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fellow at the Laos Center

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for international law in Cambridge

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at the British Institute for

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international and comparative law and

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also Queen Mary and she

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also served as a Judicial

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assistant at the international court

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of justice to judge Sir,

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Christopher, Greenwood. Our second speaker

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is Jose Antonio Rivas who

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is of course one of

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the organizers of world arbitration

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update this week and he

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is a founding partner of

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exstrategy LLP a boutique Law

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Firm. For international arbitration based

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in Washington DC and Bogota

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in Colombia. He has 18

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years of experience in International

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Investment law is had a

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number of different roles his

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workers Council for Sovereign clients

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and investors in arbitration proceedings.

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He sat and cities arbitrator

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and domestic and international arbitrations

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and he's a former lead

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negotiator for the government of

00:07:01

Colombia of it's International Investment

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treaties over a number of

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years and on top of

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all that he's also worked

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as excited as one of

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the legal council in that

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institution. He also serves an

00:07:12

adjunct professor at Georgetown University

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in Washington DC and he's

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a member of the exit

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panel of arbitrators and conciliators

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last but not least. We

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have Rob Houston joining us

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from Singapore. He is a

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senior associate at kennel Gates

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Straits law in Singapore. Who

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works in the international arbitration

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team there he has acted

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for and against States and

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state-owned entities major corporates and

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other clients in complex cross-border

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matters with high value disputes,

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including investment treaty and Commercial

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arbitrations under various institutional rules.

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And Robert has also the

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pro bono coordinator of the

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Singapore office of K&L Gates

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and he's a founding member

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in executive director of the

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global pro bono Bar Association

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and the leader in the

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firm-wide anti-human trafficking trafficking initiative

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in which he is coordinated

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a number of multi jurisdictional

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pro bono projects involving multiple

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Kane El Gates officers and

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other collaborating firms around the

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world Robert holes at Juris

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doctor degree from George Town

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in Washington DC and a

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master of Economics degree from

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seal in Paris. So much

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for our introductions. I'm sure

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you'll agree. We have an

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excellent panel, and I'll ask

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Clara to take the floor

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and ask her to give

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you a presentation. Thank you.

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Thank you very much. And

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thank you for being invitation

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to join the world arbitration

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update and and this particular

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panel. I have some slides

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and I believe Maria will

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kind of help me with.

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with them I have been

00:08:48

invited to I suppose set

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out the player state of

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play in relation the question

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of incorporating obligations of investors

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in the it and I

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am compelled to say that

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Professor Brown's introduction which focused

00:09:06

on the UN guiding principles

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on business and human rights

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sort of sounded as if

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Investment treaties at the moment

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have very little to say

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about the conduct of investors

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and possibly investors obligations. And

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and this is why we

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need the unguiding principles. Now,

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I suppose the disabled the

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main disadvantage. So to speak

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of or maybe advantage of

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the UN guiding principles is

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that they have left the

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question of the legal nature

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of The requirements on businesses

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open, so it is not

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quite clear whether it is

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to stipulate simply some normal

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expectation of there's something more

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anyway. I would like to

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talk about investment treaties in

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my in my 15 minutes.

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Investment treaties have been known

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and more recently also criticized

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for their normal symmetry. So

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for the fact that they

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in principle impose only obligations

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on host States while conferring

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only rights or benefits on

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investors. And investment treaties have

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indeed focused on the conduct

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of the whole state and

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the impact of the whole

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states. conduct on the protective

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investment leaving the conduct of

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investors generally out of the

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picture except possibly for The

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Limited aspect when the definition

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of investment the definition of

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protected investment would set out

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a requirement for the investment

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to comply either in its

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establishment or possible also in

00:10:44

the operation with the domestic

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law of the whole state.

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Um, however is the experience

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with the application of investment

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treaties in investor State arbitration

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grew and it became apparent

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that most tribunals adopt an

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essentially strict textualist approach in

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the interpretation of these treaties

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and will therefore not be

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prepared to take regard of

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investor conduct in the absence

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of any specific treaty language.

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For many I suppose. the

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normative asymmetry of investment treaties

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and there are lack of

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attention to investor conduct. Has

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been one of the elements

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putting the legitimacy of the

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whole investment treaty framework into

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question. Especially given the often

00:11:32

demonstrably detrimental impact of foreign

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corporations in the whole state

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on its population or the

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environment The absurd Leverage investors

00:11:42

often have over host governments.

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And the limit its ability

00:11:48

of some states to effectively

00:11:50

regulate investor conduct in their

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territory. Now with the availability

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of isds. It's this normative

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asymmetry and it's affects became

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even more apparent. and this

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idea that investment really should

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incorporate also Provisions dealing with

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investor conduct. Has become part

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of the ongoing processes of

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Reform of International Investment law

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is such a spare-headed by

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angstadt. And we have seen

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Provisions dealing with investor conduct

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to emerge in newly concluded

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investment treaties. now What is

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it that we can see

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if I can ask for

00:12:38

my next slide? So this

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Provisions dealing with investor conduct

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would it's time to take

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shape of sort of a

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very familiar normative solution. They

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may simply ask each party

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to encourage. Enterprises to do

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something such as in incorporate

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voluntarily incorporate International recognized standards

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of corporate social responsibility and

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I have given you the

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example of the Canada survey

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of the it. in some

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treaties the formulations we would

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see would actually directly address.

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The the foreign investor or

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or the local corporate vehicle

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in the language of these

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Provisions the investment and they

00:13:22

would say such as the

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2015 Slovakia Iran vit that

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investors and Investments should apply

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National and international accepted standards

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of corporate governance. Or the

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in other treaties such as

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Argentina Qatar bid. They may

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say that investors should make

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efforts to voluntarily incorporate recognize

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standards, or we could also

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see Provisions such as in

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setup in the comprehensive economic

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trade agreement between the EU

00:13:58

and Canada. which would prevent

00:14:04

the investor to bring a

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claim in investors that arbitration

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if the investment was made

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through fraudulent visitor presentation corruption

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Etc. however The practice has

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gone beyond. The evidently soft

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losses or this procedural rule

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of preventing access. to to

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something more I would argue

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and contrary to General perception

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that as a matter of

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positive law. There are no

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formal industrial obligations under investment

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treaties some treaties in particular

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some of the recent treaties

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and including treaties in force.

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Can they Provisions which prescribe

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at least on their face

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obligations for foreign investors or

00:14:55

the local corporate vehicle the

00:14:57

investment? So if I could

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ask for my next slide

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to just give you a

00:15:02

general impression Um, I can

00:15:06

imagine that many of you

00:15:07

cannot read really what is

00:15:08

on this slide and my

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my intention here was just

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a Conway the message that

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there are multiple instruments with

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such provisions and even this

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latest by no means exhaustive.

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So let's zoom on zoom

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in onto a couple of

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the causes on the next

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slide to have a closer

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look with these Provisions say

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so I've chosen just two

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examples here at the Empire

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Qatar investors and investment shall

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come play with the labor

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and investment loss Etc or

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the Morocco Nigeria investors and

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their Investments shall not offer

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promise or give any Angie

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Peking your oral Advantage Etc

00:15:46

and on the corruption provision.

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In fact many contemporary model

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bilateral investment treaties articulate these

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kinds of Provisions as well.

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If we look at the

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model B IDs, which were

00:16:01

adopted since 2015 among the

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public available once more than

00:16:06

half contains this kind of

00:16:08

Provisions including the Netherlands model

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vit Belgium Luxembourg economic Union

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Nigeria model vit or India

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model vit Etc. So the

00:16:22

question naturally arises what are

00:16:25

these provisions? Can and do

00:16:27

they actually really create formal

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obligations for investors? Now some

00:16:32

commentators dislike dislike the proposition

00:16:35

that investment treaties should create

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International legal obligations for investors

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viewing such development perhapses and

00:16:44

unwelcome expansion of personal scope

00:16:46

of international law something that

00:16:49

is odds with the main

00:16:51

doctrines of international law. Um

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such as the doctrine of

00:16:57

sources or the law on

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International responsibility. Others May focus

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more on the fact that

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treaties are Interstate instruments and

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investors are not parties to

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be treated to these treaties

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and therefore they cannot and

00:17:13

do not consent do any

00:17:15

such property obligations. Let me

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take these concerns in turn

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just just to. Set out

00:17:26

the the main features of

00:17:27

the debate. I suppose the

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objections which are essentially objections

00:17:32

to the possibility the legal

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possibility that investment treaties set

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out or impulse obligations investors

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the first two dealing with

00:17:40

the doctrine of subjects and

00:17:42

and law of international responsibility.

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They will go along the

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lines of only States being

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the proper subjects of international

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law and therefore they should

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they should be the only

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ones. Relate who can who

00:18:02

can be addresses of an

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obligation in under International treaties.

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Now this seems less of

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a compelling point in the

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sense that the whole doctrine

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of subjects of international has

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Kind of arguable lost its

00:18:20
capacity to describe what is

00:18:22
going on International. There are

00:18:23
multiple formulations of what the

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doctor ancestor doesn't say Notions

00:18:28
such as those of partial

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subjects of international. I have

00:18:33
been introduced that's it there.

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In fact, the one common

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thing to all these approaches

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is that they look at

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whether or not the entity

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in question is another sea

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of Rights or obligation in

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under international law. So it

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sort of a circular problem

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we could say then that's

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it's easily dispelled by simply

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pointing out. Well if we

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have the problem if there

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are rules of international which

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address these and these well

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that that could make them

00:19:01

subject themselves in some way

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if you insist on using

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their Doctrine at all. the

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same with with a lot

00:19:08

of international responsibility the the

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ioc Articles make it quite

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clear that they are in

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no way exhaustive statement of

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all on International responsibility and

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and it actually seems a

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wide accepted principle that a

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violation of an international legal

00:19:24

rule will engage International responsibility

00:19:26

regardless of what regardless of

00:19:29

who the other sea of

00:19:30

the obligation is presumably those

00:19:34
the more interesting objection is

00:19:36
the one based on a

00:19:38
lack of consent and here

00:19:40
I would ask for my

00:19:41
next slide, please. Um, which

00:19:43
from the perspective of sorry

00:19:46
that yeah, that's right, which

00:19:48
from the perspective of three

00:19:50
little would be the fact

00:19:52
that there's rule that treaties

00:19:54
cannot bind their known party

00:19:56
is and typically what we

00:19:58
hear is reference to the

00:19:59

Vienna convention and on the

00:20:01

lot of treaties and the

00:20:02

an article 30 for 35,

00:20:05

which expressed this principle. um,

00:20:08

but as you can see

00:20:10

this Provisions explicitly speak about

00:20:14

third States So strictly speaking.

00:20:17

They are not applicable to

00:20:19

to the situation before us

00:20:20

and therefore they do not

00:20:23

really resolve the fact that

00:20:25

there's problem of whether investment

00:20:27

treaty scan or cannot mine

00:20:29

investors. Let's have a look.

00:20:34

Again, at one of the

00:20:35

examples of this provisions and

00:20:39

consider than what these treaties

00:20:41

seek to do. Can we

00:20:43

can we have the next

00:20:44

slide, please? so this is

00:20:47

an excerpt from the 2008

00:20:51

echoes supplementary output on investment,

00:20:53

which is Which is a

00:20:55

treaty enforce among the member

00:20:59

states of ecowas and this.

00:21:03

treaty actually contains a whole

00:21:05

chapter entitled obligations and duties

00:21:07
of investors and Investments, which

00:21:10
said I'll really wide ranging.

00:21:15
requirements on the invent on

00:21:17
on these entities such as

00:21:21
to conduct environmental and social

00:21:24
impact assessment when making the

00:21:25
investment to Apply precautionary principle

00:21:32
when dealing with the results

00:21:33
of this assessments. I have

00:21:35
underlined some of these requirements

00:21:38
just to bring the specific

00:21:40
sections to your attention, but

00:21:43
they are that there's an

00:21:44
undecorruption provision. So say saying

00:21:49
that investors and Investments shall

00:21:51
not engage in corruption, but

00:21:53
also Provisions such as in

00:21:55
article 14:2 that investors show

00:21:57
uphold human rights or that

00:21:59
in paragraph four that they

00:22:02
shall act in accordance with

00:22:03
fundamental liver standards as stipulated

00:22:06
in the ILO Declaration on

00:22:07
fundamental principles and rights of

00:22:09
work. Now you can see

00:22:12
that these Provisions are formulated

00:22:14

in a language of legal

00:22:16

obligation. So stating that an

00:22:19

investor or an investment the

00:22:21

local corporate vehicle shell or

00:22:23

shall not engage in particular

00:22:24

conduct. And anyone who has

00:22:28

ever observed. International negotiations will

00:22:33

know that that states are

00:22:34

quite aware that the language

00:22:36

shell is one that designates

00:22:38

creation of legal obligation. So

00:22:40

they will be careful not

00:22:41

to use it in case

00:22:42

they do not intend normative.

00:22:46

affect awkward so I suppose

00:22:51

it would seem that this

00:22:53

mandatory investor address Shell language

00:22:57

expresses the state parties invention

00:23:00

to impose legal obligations on

00:23:02

foreign investors. The language is

00:23:05

clearly distinct from Provisions that

00:23:07

address investors but use the

00:23:09

hortatory Expression shoot at sit

00:23:12

there. um And the invention

00:23:17

to create legal obligations for

00:23:18

investors has also been confirmed

00:23:21

through statements of Representatives of

00:23:23

states in on occasion in

00:23:26

in various International forum. so

00:23:30

I suppose my point here

00:23:32

is that international law has

00:23:39

been built on or is

00:23:42

built on I suppose a

00:23:44

number of principles, but the

00:23:45

one that's that really seems

00:23:46

to be foundational is this

00:23:50

idea that state practice is

00:23:52

normative. So that it would

00:23:54

be in fact within the

00:23:56

competence of states to use

00:23:58

treaties as effectively alone making

00:24:01

instrument. So the same way

00:24:02

as they will domestically legislate

00:24:05

for private parties, they could

00:24:08

use treaties as well-making instrument

00:24:14

at the international level and

00:24:15

indeed if we look across

00:24:16

the landscape of international law.

00:24:18

This would not be the

00:24:19

only instance when treaties have

00:24:21

been used to impose obligations

00:24:24

on non-state entities. So we

00:24:27

and we see that both

00:24:28

in relation to individuals and

00:24:29

in relation to Collective entities,

00:24:31

for example in the longer

00:24:34

sea or monetarian a lot

00:24:36

of treaties. so I suppose.

00:24:45

Let's move to my next

00:24:46

slide. I thought I should

00:24:54

give just an overview what

00:24:57

are the types of obligations

00:24:58

the type of content that

00:24:59

we may see in in

00:25:00

this treaties and they will

00:25:05

include obligations to comply with

00:25:08

the whole State's law reporting

00:25:10
obligations anti corruption obligations, but

00:25:15
also investor reliability for harm,

00:25:17
which is interesting and I

00:25:19
expect that one of the

00:25:21
other panel is still talk

00:25:22
about this problem, obviously a

00:25:25
provision or an obligation an

00:25:28
obligation and investment really May

00:25:31
in certain circumstances if serve

00:25:34
as a basis for a

00:25:35
claim by the whole states

00:25:37
against the investor, but it

00:25:38
is it will not serve

00:25:40

as a as a vehicle

00:25:41

on its own. for for

00:25:45

victims of any injury by

00:25:48

the foreign investor and so

00:25:51

some of these treaties in

00:25:54

fact contain a provision which

00:25:56

set out the possibility for

00:25:59

such claimed by private parties.

00:26:03

Perhaps the last thing I

00:26:04

would like to tell you

00:26:04

about if I may ask

00:26:06

for the next slide. would

00:26:11

be a Because we as

00:26:15

you know practicing laws will

00:26:17

always say, okay. Well, we'll

00:26:18

do the cases say And

00:26:20

there is a arguably there

00:26:23

is very little and I

00:26:25

as far as I'm aware

00:26:27

of and in fact, there's

00:26:28

only one case that I'm

00:26:30

aware of that has dealt

00:26:33

with a provision of the

00:26:35

sort of an investor shell.

00:26:38

In this case the Bound

00:26:39

by the loss and regulations

00:26:41

enforce. and shall not shall

00:26:45

refrain from all acts that

00:26:46

may disturb public order or

00:26:48

morals or that may be

00:26:49

presidential to the public interest,

00:26:51

which is article 9 from

00:26:53

The organization of Islamic conference

00:26:56

investment agreement and in alvarak

00:26:59

Indonesia case the arbitral tribunal

00:27:02

took the view that this

00:27:03

is really a direct obligation

00:27:04

on the investor. In fact,

00:27:06

the investor themselves agreed that

00:27:09

this was an obligation that

00:27:11

the treaty imposed on them.

00:27:13

And what the type and

00:27:15

and the tribunal found that

00:27:17

the claimant the investor actually

00:27:20

breached this obligation and by

00:27:22

virtue of that bridge was

00:27:23

prevented from pursuing a claim

00:27:26

for a violation of the

00:27:28

standards of protection of their

00:27:29

investment. So even though the

00:27:32

tribunal took the view that

00:27:33

the claimant did not receive

00:27:35

fair connect with the treatment,

00:27:36

they could not claim and

00:27:37

they cannot request they could

00:27:39

not request compensation. um in

00:27:43

that case the the whole

00:27:44

state actually tried to go

00:27:45

a bit further and file

00:27:47

also filed a counterclaim essentially

00:27:50

seeking damages for the breach

00:27:54

of the article of the

00:27:57

obligation and there it didn't

00:28:00

succeed. So so the award

00:28:03

is quite brief on this

00:28:04

point. It seems that they

00:28:05

simply did not really care

00:28:07

the evidentiary burden and and

00:28:09

explain what specific injury was

00:28:12

attributable or what specific damage

00:28:14

was attributable to the investor

00:28:16

in the arbitration. and so

00:28:24

I suppose my conclusion would

00:28:25

be that. one of the

00:28:30

questions is if it is

00:28:31

possible for bids to impose

00:28:33

obligations of investors and I

00:28:35

gave you some ideas as

00:28:38

to whether or not this

00:28:40

may be the case, but

00:28:41

even if it is the

00:28:42
question is is it a

00:28:44
good idea to do so

00:28:46
And if it is a

00:28:47
good idea then what should

00:28:48
be the content of this

00:28:50
obligations and what would be

00:28:51
their effects and with that

00:28:53
I will stop because I

00:28:54
expect that this is what

00:28:55
my colleagues will be talking

00:28:56
about. Thank you very much.

00:29:00
Great. Thank you very much

00:29:02
Clara for that excellent introduction

00:29:05

and overview of the state

00:29:07

of play with respect to

00:29:08

City treaty practice and attempt

00:29:11

to incorporate obligations on investors

00:29:14

into into bilateral investment treaties.

00:29:17

I'll hand the floor over

00:29:18

now to Jose Antonio. Who's

00:29:21

going to take the conversation

00:29:22

forward? Thank you, Jose Antonio.

00:29:26

Thank you Chester. And thank

00:29:28

you Clara for for your

00:29:30

you know, Wonderful presentation. It

00:29:33

actually helps me quite a

00:29:34

bit because you covered some

00:29:36

of the things that that

00:29:37

I was afraid. I would

00:29:39

not be covering. So it

00:29:41

needs very very well into

00:29:43

what I will be sharing

00:29:44

with with everyone so Let

00:29:49

me share my slides. Can

00:30:09

you all see it? We're

00:30:12

not yet. Yes, excellent. Okay,

00:30:17

so So I will address.

00:30:30

the investment treaty architecture Incorporating

00:30:36

investor obligations and and what

00:30:38

what this means is

00:30:40

how to create a treaty

00:30:42

that would be practical. And

00:30:45

that would ultimately, if relied

00:30:52

upon by a state for

00:30:56

certain breaches of the investor

00:31:01

would pass the several tests.

00:31:06

jurisdictional tests as well as

00:31:08

merits test that an investor

00:31:12

State Tribunal would would actually

00:31:16

do when analyzing a case

00:31:19

of a breach of certain

00:31:22

invest investor obligations in investor

00:31:28

State arbitration. There are a

00:31:30

couple of questions that that

00:31:33

Are obvious here and I

00:31:35

would like to briefly address.

00:31:36

Some of them one is

00:31:38

why investor obligations in investment

00:31:41

treaties. Is it balanced nowadays?

00:31:45

There's a there's a whole

00:31:46

discussion in on Central about

00:31:48

reform and it has been

00:31:51

said as as indicated by

00:31:54

Clara that that this trees

00:31:55

are asymmetric because they mainly

00:31:58

include obligations of investor of

00:32:01

States but not obligations of

00:32:03

investors. So one one reason

00:32:06

would be balanced and if

00:32:10

anything in my mind Even

00:32:14

beyond the court where I'm

00:32:16

beyond a number. I'm referring

00:32:18

to the investment multilateral court

00:32:21

that is being proposed in

00:32:22

unstrual group 3 and and

00:32:25

Beyond a number of reforms

00:32:27

are being proposed one. One

00:32:29

question in my mind is

00:32:30

is what could bring balance

00:32:33

to the system in a

00:32:35

system that has three thousand

00:32:38

and three hundred treaties and

00:32:41

most of them most of

00:32:42

them. I would say I

00:32:43

would say that less person

00:32:44

less than 1% of those

00:32:46

treaties have investors obligations. There's

00:32:49

there's something of innate a

00:32:54

symmetry and imbalance in in

00:32:56

a system such as as

00:32:57

the one that we have.

00:32:58

So seriously looking at bringing

00:33:02

some balance to the table

00:33:03
the issue of investor obligations

00:33:06
should be addressed. So that's

00:33:09
that simply to say in

00:33:10
what camp am I when

00:33:11
we think about investor obligations

00:33:14
then the next the next

00:33:17
the next question is is

00:33:21
If you include certain investor

00:33:23
obligations in an investment treaty

00:33:26
arbitration or an investment treaty,

00:33:28
how do you still respect

00:33:30
the principle of consent as

00:33:32
as Clara Wells said, well,

00:33:35

the treaty is really an

00:33:37

instrument that is agreed upon

00:33:41

by two. Subjects of public

00:33:44

international law the states and

00:33:46

the investor is not party

00:33:49

to that treaty. So one

00:33:52

would say if one is

00:33:54

respectful of the principle of

00:33:56

consent that the the treaty

00:33:59

is unable to impose obligations

00:34:02

on the investor. except if

00:34:06

the investor consents so that's

00:34:10

a big if and then

00:34:13

then comes a question of

00:34:15

practicality how do you create

00:34:18

an architecture that that would

00:34:21

include that consent and that

00:34:23

when analyzed by a tribunal

00:34:27

would be affirmatively upheld in

00:34:35

terms of jurisdiction and in

00:34:37

terms of Merit. So those

00:34:39

are the questions now. based

00:34:43

on on those questions What

00:34:46

we have here is a

00:34:47

roadmap of two parts one

00:34:50

the obligations of investors, which

00:34:52

may give rise to direct

00:34:54

State claims or counterclaims. and

00:34:57

the second part is the

00:35:00

architecture itself, which is the

00:35:02

main subject of my presentation.

00:35:05

I'm really thankful to to

00:35:07

Clara because the first part

00:35:08

was was incredibly well addressed.

00:35:10

So that gives me a

00:35:12

little bit more time but

00:35:14

before going there. I would

00:35:16

like to. emphasize two problems

00:35:20

that that arise in in

00:35:23

that in that question of

00:35:24

how to create a treaty

00:35:26

that would would pass the

00:35:29

test of a tribunal and

00:35:33

and let's let's see on

00:35:35

the jurisdictional front a recent

00:35:37

case the nitrogeny electric Caribe

00:35:40

versus Colombia case in that

00:35:43

case. the Republic of Colombia

00:35:47

submitted a counterclaim and the

00:35:52

case relates to energy in

00:35:56

the coast of the Caribbean

00:35:58

coast of Colombia and and

00:36:00

Colombia argued that that Nature's

00:36:02

mismanagement of electrical eBay forced

00:36:06

it to channel funds into

00:36:07

the company to maintain its

00:36:09

operations during the intervention and

00:36:12

produced a negative impact in

00:36:15

Regional development in the whole

00:36:17

coast of Colombia. the the

00:36:19

tribunal basically assessed under the

00:36:24

test provided by article 46

00:36:27

of the exit convention. It

00:36:31

assessed whether there was a

00:36:33

consent. to bringing a counterclaim

00:36:38

and it concluded that under

00:36:42

the applicable article of the

00:36:43

pit between Spain and Colombia.

00:36:49

The scope of consent was

00:36:51

to narrow us to include

00:36:52

counterclaims. It also it also

00:36:57

analyzed the counterclaim and it

00:37:01

concluded that. The case on

00:37:06

counterclaims was not sufficiently linked

00:37:08

to the original claim. So

00:37:09

those those are two elements

00:37:11

of article 46 of the

00:37:13

exit convention and and you

00:37:16

can see here that there

00:37:18

was no consent by the

00:37:20

investor to bring a counterclaim.

00:37:21

So part of of this

00:37:23

is the scope of This

00:37:27

the scope within the treaty

00:37:29

the applicable treaty to allow

00:37:31

for the counterclaim or the

00:37:33

direct Claim by the state

00:37:34

to be brought. So it

00:37:36

has to be sufficiently broad

00:37:38

as to include counterclaims either

00:37:42

because they're specifically spelled out

00:37:44

in the treaty or because

00:37:46

the treaty says that you

00:37:48

know, any disputes can be

00:37:51

brought by either party for

00:37:52

instance that kind of language

00:37:54

would allow counterclaim to to

00:37:56

be brought. So beyond that

00:37:58

we've looked at a more

00:38:00

jurisdictional question beyond that. Let's

00:38:04

say that let's say that

00:38:05

the scope of the provision

00:38:08

on investors State arbitration within

00:38:10

the applicable treaty. Has a

00:38:13

sufficiently broad. Language that would

00:38:17

include counterclaims that's only one

00:38:20

part of the problem. The

00:38:22

other part of the problem

00:38:23

and and just to see

00:38:25

within this slide. You have

00:38:27

a number of Decisions that

00:38:32

have most of them have

00:38:33

been dismissed on jurisdictional grounds.

00:38:38

The ones that have made

00:38:40

it on on both jurisdictional

00:38:44

and merits grounds. Are counterclaims

00:38:48

that have been based on?

00:38:51

a contract Claim not on

00:38:54

a treaty claim. The only

00:38:57

one that has made it.

00:39:01

based solely on a treaty

00:39:09

Claim has has made it

00:39:11

pasteurization at the end of

00:39:12

the day. They didn't make

00:39:13

it on the marriage, but

00:39:16

they they made it past

00:39:17

jurisdiction. Is for Bossier versus

00:39:21

Argentina, there's there's another there's

00:39:24

a couple of cases against

00:39:25

Tech whether we're where there

00:39:26

were both contract claims and

00:39:28

and and treaty claims. But

00:39:30

but those ones were all

00:39:32

So based on contracts not

00:39:33

only on treaty claims, but

00:39:35

the one that has made

00:39:36

it solely on the basis

00:39:37

of of a treaty pasteurization

00:39:41

is were Bossier. So let

00:39:43

let's look at Uber. We

00:39:46

have Argentina brought up counterclaim

00:39:49

arguing that Uber's failure to

00:39:52

provide the necessary investment caused

00:39:54

a violation of fundamental right

00:39:56

for access to water. Which

00:39:58

was the very purpose of

00:40:00

the investment agreed? Then the

00:40:02

tribunal declared that it had

00:40:04

jurisdiction over the counterclaim considering

00:40:06

that the principal claim and

00:40:09

the claim opposed to it

00:40:10

are based on the same

00:40:12

investment or the alleged lack

00:40:14

of sufficient investment in relation

00:40:16

to the same concession. So

00:40:17

so far so good, but

00:40:19

then when it analyzed the

00:40:21

actual substantive claim the Tribunal

00:40:28

concluded or dismissed the case

00:40:31

on the Merit because none

00:40:33

of the provisions of the

00:40:34

bit had the effect of

00:40:36

transferring the concession to the

00:40:39

concessionaire and obligation to perform

00:40:40

Services complying with the residents

00:40:44

human rights to access to

00:40:47

water and sewage so This

00:40:51

is a tricky bit of

00:40:53

most bits. So with that

00:40:56

it extremely important that if

00:41:01

a treaty is to be

00:41:02

is to make it past

00:41:04

jurisdiction there be some obligations.

00:41:08

Of investors that they have

00:41:10

to comply with and and

00:41:12

Clara already provided, you know,

00:41:15

a very precise number of

00:41:17

treaties that have shall the

00:41:19

shall do or shall language.

00:41:22

I'm just going to give

00:41:24

you one punctual example, which

00:41:29

I believe is a very

00:41:29

strong language the Moroccan Nigeria

00:41:31

beat in progress two to

00:41:35

four. It's quite evident that

00:41:38

this would be International obligations

00:41:43

and not only domestic obligations

00:41:46

Incorporated by reference. This would

00:41:48

be International obligations that that

00:41:50

the state the the investor

00:41:53

has to comply with. So

00:41:54

for instance paragraph two investors

00:41:57

and investment shall uphold human

00:41:59

rights in the whole state

00:42:00

or three investors and investment

00:42:03

shall act in accordance with

00:42:05

core labor standards as required

00:42:07

by the ILO declaration or

00:42:09

investors and investment shall not

00:42:11

manage or operate the invest

00:42:13

in a manner that circumvents

00:42:15

International environmental labor and human

00:42:17

rights obligations. So as to

00:42:19

the content, you can actually

00:42:22

look at the at the

00:42:26

content basically by referring to

00:42:29

a number of ILO conventions,

00:42:32

which I will I will

00:42:33

not deal into that because

00:42:34

because of time the presentation

00:42:36

will will be made available

00:42:37

other parts of other contents

00:42:41

that would be of importance.

00:42:42

I believe the precautionary principle

00:42:44

in in in Environmental international

00:42:50

law. So once you have

00:42:51

the obligations, where do you

00:42:53

go? We still don't have

00:42:54

consent and this is this

00:42:57

is where The the architecture

00:43:01

becomes important this slide shows

00:43:04

a very similar language to

00:43:06

the Nigeria Morocco bit so

00:43:10

I won't go into it.

00:43:12

And this is the slide

00:43:14

that really makes a proposal

00:43:16

concerning the architecture and the

00:43:18

proposal. I'll explain it is

00:43:20

a very straightforward. which is

00:43:25

You could. As a state

00:43:28

you could. gather the investors

00:43:32

consent by making an explicit

00:43:42

confirmation by the investor that

00:43:44

it will comply with the

00:43:49

investors obligations before the request

00:43:54

for arbitration is submitted or

00:43:57

at the time that the

00:43:59

request of arbitration is submitted.

00:44:00

So I'd like to sort

00:44:02

of explain how this would

00:44:03

work in in NAFTA treaties

00:44:06

or in the arcafe treaties

00:44:09

or or us Colombia treaties

00:44:11

there there are requirements. of

00:44:14

consent if the investor does

00:44:18

not comply with those requirements

00:44:20

then consent to arbitration by

00:44:24

the state is not given

00:44:27

so what you what what

00:44:28

a state may create is

00:44:30

an Annex which would include

00:44:35

a specific condition that the

00:44:38

investor would have to fulfill.

00:44:41

for the tribunal to understand

00:44:43

that There has been consent

00:44:48

by the state. for the

00:44:50

submission of the request for

00:44:52

arbitration if that Annex is

00:44:57

not signed as a confirmation.

00:45:01

by the investor then That

00:45:06

dispute would not be within

00:45:08

the scope of the Tribunal.

00:45:10

just like I wave a

00:45:12

number of waivers are required

00:45:15

in in NAFTA like treaties,

00:45:17

so and and I'll try

00:45:21

to repeat it because there

00:45:24

would be an Annex and

00:45:26

within that Annex there would

00:45:29

be a requirement that the

00:45:32

investor acknowledges. That those obligations

00:45:36

exist, but also that those

00:45:39

obligations bind the investor. And

00:45:45

the content of that Annex

00:45:47

or proposed. Annex is provided

00:45:49

here. So it reads. You

00:45:54

know. or the other reference

00:45:57

to that annexes provide here

00:45:58

so it would be Included

00:46:02

within the articles on conditions

00:46:04

precedent to submission of a

00:46:06

claim to consolation or arbitration.

00:46:09

And paragraph one would read

00:46:11

a disputing investor. It may

00:46:13

submit a claim to conciliation

00:46:15

or arbitration only if the

00:46:19

disputing investors submits the completed

00:46:21

form of consent to counterclaim

00:46:24

of arbitration and thereby confirms

00:46:27

its consent to be bound

00:46:29

by those obligations included under

00:46:31

article X wherever the behavior

00:46:34

of investors is in the

00:46:35

treaty. And consent to International

00:46:38

arbitration in the event that

00:46:40

the disputing party submits a

00:46:42

counterclaim. Arising directly out of

00:46:46

the subject matter of the

00:46:48

dispute. In the same arbitration

00:46:51

forum, and before the same

00:46:52

arbitration tribunal hearing the dispute

00:46:56

submitted by the disputing investor.

00:47:02

That in my view would

00:47:05

solve the issue of consent

00:47:07

because unless they let's investor

00:47:12

science the form. There there

00:47:16

would be no. jurisdiction for

00:47:19
the tribunal to hear any

00:47:23
part of the case neither

00:47:24
the the investors claim nor

00:47:27
the the state's claim and

00:47:28
with that I would like

00:47:30
to to conclude my remarks.

00:47:31
Thank you very much. Thanks

00:47:36
very much, Jose Antonio. Some

00:47:39
very interesting 3D practice there

00:47:41
without any further Ado. I'll

00:47:43
pass over to Rome. Thank

00:47:45
you Rob. Here. Okay. So

00:48:15
let me ask to confirm

00:48:16

could you see the slides

00:48:18

as I put them here?

00:48:20

There we are. Are we

00:48:21

able to see the slides?

00:48:22

Great. Okay. Thanks very much

00:48:24

Chester. So I'm delighted to

00:48:26

be here and to just

00:48:28

speak with you about such

00:48:29

an exciting such an interesting

00:48:30

topic incorporating obligations of investors

00:48:32

in bilateral investment treaties. Great

00:48:35

presentations have come before me

00:48:36

and I'm delighted to hear

00:48:38

the comments that have been

00:48:40

made because they remind me

00:48:42

of some of the recent

00:48:42

practice that we've been engaged

00:48:44

in and I'm happy to

00:48:44

talk about that. And so

00:48:46

first I'm based here in

00:48:48

Singapore I've acted for sovereign

00:48:49

states in a number of

00:48:50

contexts. I've also actually investment

00:48:52

tree commercial just skates and

00:48:54

I have experience with a

00:48:56

range of garbage for rules.

00:48:57

I'm here first to say

00:48:59

thank you to the wow

00:49:01

conference organizers and to my

00:49:03

fellow panelists. What I'm here

00:49:04

to say is it's not

00:49:05

offered as legal advice. However,

00:49:06

and I want to make

00:49:08

sure that I mention that

00:49:09

I'm appearing in my personal

00:49:10

capacity and my opinions reviews

00:49:12

expressed here our mind alone

00:49:14

and do not necessarily reflect

00:49:16

the opinions reviews. So my

00:49:17

Law Firm or any other

00:49:18
interview or individual So right.

00:49:21
Yeah before you go on

00:49:23
I've just noticed that as

00:49:24
you got off the first

00:49:25
or second Slide, the slides

00:49:26
are not quite aligned as

00:49:28
lines and I'm seeing them.

00:49:29
I don't know if others

00:49:30
are having the same problem.

00:49:31
I think somebody else was

00:49:32
in the chat. Oh, it

00:49:34
is a good way that

00:49:35
they that that's good question.

00:49:38

Let me ask. Um Maria

00:49:40

Lucia. Are you able to

00:49:41

maybe a few share them?

00:49:42

Maybe that'll fix the problem.

00:49:46

I guess the format may

00:49:47

be off. We have a

00:49:51

quick look. Oh, there we

00:49:58

go. I think that's better

00:50:00

already. Yeah. Yes indeed. Thanks

00:50:03

very much. Okay, then we'll

00:50:04

just saying excellent. Thanks very

00:50:05

much next. Okay, great. So

00:50:10

we've said this next slide.

00:50:14

Okay, great. So we'll talk

00:50:14

about four things first. We'll

00:50:17

talk about Confluence in just

00:50:18

a moment of a couple

00:50:19

of regimes in public international

00:50:20

law, then we'll move on

00:50:21

to treaty modeling essentially moving

00:50:23

those those two regimes and

00:50:26

public international law together. And

00:50:28

then the Hague girls speak

00:50:30

about that briefly and then

00:50:31

we'll finally conclude with future

00:50:32

practice next slide, please. So

00:50:36

Confluence, I will have it

00:50:38

just the next slide, please.

00:50:40

So we're talking here today

00:50:42

about the Confluence of two

00:50:43

regimes of public international law.

00:50:44

This is already been discussed

00:50:46

by the panelists today. I'm

00:50:48

on the one hand. We

00:50:49

have investment protection on the

00:50:51

other hand. We have business

00:50:52

in human rights and many

00:50:53

people have seen in the

00:50:55

center of the opportunity the

00:50:56

potential of bringing those two

00:50:57

regimes together into the Next

00:50:59

Generation investment treaty models. Next

00:51:01

life is We're here to

00:51:07

talk about how to do

00:51:08

that. Now. The entire conference

00:51:09

is about the investment protection

00:51:12

and promotion. You know the

00:51:15

side of things so we'll

00:51:16

talk just a bit about

00:51:17

the business of Human Rights

00:51:18

regime. It's already been mentioned

00:51:20

the UN guiding principles on

00:51:21

business and human rights three

00:51:22

pillars to it the state

00:51:23

duty to protect human rights

00:51:24

the corporate responsibility to respect

00:51:26

human rights. And then finally

00:51:27

the access to remedy I

00:51:29

would just point out that

00:51:29

pillars 1 and 3. Those

00:51:31

are applying to States pillars

00:51:34

2 and 3 apply to

00:51:35

corporates. So pillar three is

00:51:37

the one that shared Next

00:51:39

slide please. So we have

00:51:41

objectives stated in the guiding

00:51:43

principles. And this is in

00:51:44
the general principle section. It

00:51:46
says enhancing standards and practices

00:51:48
with regard to business and

00:51:49
human rights. So as to

00:51:51
achieve tangible results for affected

00:51:53
individuals and communities real-life folks

00:51:55
real people and thereby also

00:51:58
contributing to a socially sustainable

00:51:59
globalization interesting to me here

00:52:02
is the fact that we're

00:52:03
talking about an in-game of

00:52:05
globalization and it's also the

00:52:07
case that a lot of

00:52:08

people might say anyway that

00:52:10

the investment protection regime has

00:52:12

has the benefit of increasing

00:52:15

globalization and some respects or

00:52:17

at least cross-border investment in

00:52:18

some ways interesting to see

00:52:19

that there is some overlap

00:52:20

even in terms of the

00:52:21

objectives even guiding principles are

00:52:23

organized into foundational principles and

00:52:25

operational principles. I mentioned that

00:52:27

because the foundational principles are

00:52:29

a little more broadly more

00:52:30

General operational principles. They start

00:52:33
to to be a little

00:52:34
more specific next slide. So

00:52:37
what does it mean to

00:52:38
as a corporate as a

00:52:40
private sector entity that's business

00:52:44
and human rights obligation should

00:52:45
apply to you regarding principle.

00:52:47
11 says that business enterprises

00:52:49
should respect human rights. This

00:52:51
means that they should avoid

00:52:52
infringing on the human rights

00:52:53
of others and also they

00:52:55
should address adverse human rights

00:52:56

impacts with which they are

00:52:58

involved. Now that's once again

00:53:00

General language and some people

00:53:01

might say well, what does

00:53:02

that mean? It's so General.

00:53:03

Let's take a look then

00:53:04

at the next slide. Guiding

00:53:07

principle 15 still in in

00:53:09

the foundational type of principle

00:53:11

but drilling down just a

00:53:13

little bit here. We have

00:53:13

something that becomes a little

00:53:14

more specific. We have a

00:53:16

policy commitment. We have a

00:53:18

human rights due diligence process

00:53:19

that must be in place.

00:53:20

We also have processes to

00:53:21

enable the remediation and this

00:53:23

this guiding principle 15 is

00:53:25

followed by even more specific

00:53:27

principles as well. And so

00:53:29

it's not just that this

00:53:32

is aspirational language. It's

00:53:34

not just that the guiding

00:53:36

principles are there to provide

00:53:37

kind of General guidance, but

00:53:40

nothing specific. There are specific

00:53:41
obligations on I'm on corporate

00:53:44
entities that are listed and

00:53:46
understood under you and principles

00:53:49
next slightly. So how do

00:53:55
you take those un guiding

00:53:57
principles and put them to

00:53:58
work into investment treaties? That's

00:54:01
the question that's been discussed

00:54:02
here, especially with respect to

00:54:03
the topic of consent. And

00:54:05
that's what I'm delighted to

00:54:06
talk about today because that's

00:54:07
some of the work that

00:54:08

we've been doing recently is

00:54:08

on this very topic next

00:54:10

slide, please. So recently we

00:54:14

have seen the same picture

00:54:15

investment protection on the one

00:54:17

hand business and human rights

00:54:18

on the other in the

00:54:19

center potential what we've seen

00:54:21

there in particular. However is

00:54:23

a new treaty model that

00:54:25

we have developed that we

00:54:26

think is a Next Generation

00:54:27

treaty model called the sustainable

00:54:29

investment facilitation and cooperation agreement

00:54:31

or sifca next slide, please.

00:54:35

Now the sifca came from

00:54:38

a you know, a client

00:54:41

need like most things that

00:54:42

come in the private practice

00:54:44

of law. There was a

00:54:46

a need by a lease

00:54:49

developed country for the development

00:54:51

of a model bilateral investment

00:54:53

treaty a bit. And so

00:54:54

that's how we developed. This

00:54:56

was for the specific concerns

00:54:58

of a particular at least

00:54:59
developed country. That's the perspective

00:55:01
of the kind of inception

00:55:03
that we brought to this

00:55:04
this discussion. Now it starts

00:55:08
with the Baseline limitation of

00:55:09
the scope of State obligations.

00:55:11
That's kind of the Baseline

00:55:12
expectation within the sifb and

00:55:14
I will talk about that

00:55:14
today so much because many

00:55:15
people do talk about limiting

00:55:17
State obligations the idea being

00:55:19
that you don't want to

00:55:20

make the promise, you know

00:55:21

to investors up front of

00:55:23

a certain broad scope, like

00:55:25

for example, some of the

00:55:25

bits that have been written

00:55:27

and put into place back

00:55:29

into the 90s. I'm very

00:55:31

broad scope of substantial obligations.

00:55:33

You may not want that

00:55:33

these days as treaty practice

00:55:36

evolves, but we've gone a

00:55:39

little farther than that next

00:55:40

slide. In the zipper framework,

00:55:42

we're looking not just to

00:55:45

limit the scope of the

00:55:46

substantial obligations that states take

00:55:49

on but also to introduce

00:55:51

Investors Business in human rights

00:55:53

obligations as a shield for

00:55:54

hosting. So that's one thing

00:55:56

right the conversation so far.

00:55:58

We've been talking about how

00:55:59

to in, you know kind

00:56:00

of apply business and human

00:56:02

rights obligations to investors for

00:56:03

their unsafe and that's definitely

00:56:04

valuable conversation, but here just

00:56:07

to start out using business

00:56:08

and human rights obligations as

00:56:10

a shield for host States

00:56:11

in International Investment agreements secondly

00:56:13

to reduce power and balances

00:56:14

and investor State dispute settlement

00:56:16

between developing States and wealthundered

00:56:19

investors and also to promote

00:56:21

more equal sharing of risks

00:56:22

and benefits in modern investment

00:56:24

treaty practice next slide, please

00:56:27

So pre-arbitral requirements under the

00:56:29

Pacifica. This will look very

00:56:30
familiar to many practitioners the

00:56:32
exertion of local remedies. It's

00:56:34
a common thing and the

00:56:35
notice of Mitchell disputes some

00:56:36
sort of notice requirement at

00:56:38
six month period for consultation

00:56:39
and negotiation. These things are

00:56:41
all in a number of

00:56:42
treaties and they exist in

00:56:43
the circular framework as well.

00:56:45
Moving on beyond that step

00:56:46
though beyond that that level

00:56:48
of evolution let's say and

00:56:49

we all sort of require

00:56:50

a further advanced notice with

00:56:52

an investor declaration of compliance

00:56:53

both with the terms of

00:56:54

the Citgo model itself, the

00:56:56

instant tree and the UN

00:56:58

guiding principles. So an investor

00:56:59

declaration saying in specific terms

00:57:01

that the investor has complied

00:57:03

next slide. Now what do

00:57:06

we do with that? Arbitration

00:57:08

is available under not just

00:57:10

the exit rules, but also

00:57:11

interestingly and we'll talk about

00:57:13

this in the next section

00:57:13

under the Hague rules on

00:57:15

business and human rights arbitration

00:57:16

the Hague rules with some

00:57:18

amendments now, that's something that

00:57:20

that may take some folks

00:57:22

by surprise aren't those rules

00:57:24

for that are specific to

00:57:25

business of Human Rights arbitration.

00:57:26

We'll talk about that in

00:57:27

the next section deposits are

00:57:29

paid by the investor. That's

00:57:30

another way that the cific

00:57:32

builds in certain protections for

00:57:34

those competition and opportunities dependent

00:57:37

upon compliance with the unbank

00:57:38

principles. So even if there

00:57:40

is an award at the

00:57:41

end of some amount of

00:57:43

compensation that's due to the

00:57:45

investor then that amount must

00:57:47

be decided in accordance with

00:57:49

the compliance record of the

00:57:50

investor. Next slide please. Other

00:57:54

key features, the tribunal shall

00:57:56

exclude claims is inadmissible. If

00:57:59

the investors declaration is untruthful

00:58:01

or if more than five

00:58:02

years have passed since the

00:58:03

claim arose or there was

00:58:04

knowledge of the loss or

00:58:05

damage. So the idea of

00:58:06

being here that there is

00:58:08

the first gate. A declaration

00:58:10

must be made in order

00:58:11

for the host state to

00:58:13

provide its consent to jurisdiction

00:58:14

for attribunal. And then the

00:58:16

second date for claims that

00:58:18

if that decoration was untruthful.

00:58:21

In some respect then the

00:58:22

claims themselves are indivisible against

00:58:24

the host state next slide.

00:58:28

Other key features and and

00:58:30

this has been addressed here

00:58:31

just a moment ago with

00:58:33

some some excellent comments that

00:58:34

have been made by the

00:58:35

last speaker talking about consent

00:58:36

and how investors can consent

00:58:38

specific terms and how that

00:58:39

might look in convincing arbitration

00:58:41

under the sofa model investors

00:58:42

consent to recognizing human rights

00:58:44

Environmental Protection sustainability and investment

00:58:46

protection as interrelated and arising

00:58:48

directly from an investment that

00:58:49

last language arising directly from

00:58:51

an investment, of course speaking

00:58:53

to exit arbitration and jurisdiction

00:58:55

under the convention and generally

00:58:58

speaking. This language is going

00:59:00

to address one of the

00:59:01

two major concerns that was

00:59:03

cited just a moment ago,

00:59:05

as you know barriers that

00:59:07

need to be overcome in

00:59:08

order for this for treaties

00:59:10

to contain investor obligations essentially

00:59:13

recognizing that For a long

00:59:15

time we have said well

00:59:16

in Investments investment with some

00:59:18

sort of expectation in our

00:59:19

minds, even if the definition

00:59:21

doesn't necessarily exist within the

00:59:22

language of the treaty itself.

00:59:24

Well, you know what a

00:59:26

an investment looks like when

00:59:27

we see it. Maybe that's

00:59:28

the idea. Here investors can

00:59:31
sense specifically when they undertake

00:59:33
investor State arbitration against this

00:59:35
host state that has the

00:59:36
Civil model in place that

00:59:38
they will recognize that it's

00:59:40
not just the instant investment

00:59:41
itself, but it's also the

00:59:42
broader context and specifically these

00:59:44
facets of the context. Also

00:59:46
tribunal jurisdiction over any third-party

00:59:48
claims asserted against the investor

00:59:49
and there's language included that

00:59:51
specifically mentions class and mass

00:59:52

claims as well. All of

00:59:53

those are our subject to

00:59:54

the consent of the investor

00:59:55

that that are required. By

00:59:58

those state in order to

00:59:59

give its own consent to

01:00:01

arbitration in the first place

01:00:01

next slide, please. So broadly

01:00:06

and obviously this is an

01:00:07

oversimplification that's been illustrated by

01:00:09

the excellent presentations that came

01:00:11

before but here's the simplification

01:00:13

many people think that traditional

01:00:15

IAS primarily focused on investment

01:00:17

protection. They primarily have key

01:00:19

beneficiaries that are foreign investors

01:00:20

and that the risks may

01:00:22

be disproportionately born by host

01:00:23

States. That's a common common

01:00:25

criticism and it's behind much

01:00:26

of the criticisms that have

01:00:27

led to the current discussions

01:00:29

of Reform and the Investor's

01:00:31

State context under the significant

01:00:33

framework. The purpose is to

01:00:36

integrate both of those two

01:00:37

regimes investment protection on the

01:00:39

one hand in business and

01:00:41

human rights on the other

01:00:41

to reduce power imbalances and

01:00:43

to promote sustainable and villain

01:00:45

development next slide. So now

01:00:49

coming to the Hague rules

01:00:50

for just a moment before

01:00:51

we move on. next slide

01:00:55

if you're not familiar with

01:00:57

the Hague rules, they're based

01:00:58

on the 2013 on Central

01:00:59

arbitral rules arbitration rules, which

01:01:01

are often used to investors

01:01:02

stay open attrition, including some

01:01:04

of the key facets of

01:01:05

the transparency rules. The stated

01:01:07

purpose of the Hague rules

01:01:09

is to provide a set

01:01:10

of rules for the arbitration

01:01:11

of business and human rights

01:01:12

disputes. So once again, why

01:01:13

are we talking about this

01:01:14

in the context of investors

01:01:17

State arbitration next slide, please?

01:01:20

The primary focus is on

01:01:22

upholding responsibilities and reviewing guiding

01:01:24

principles. So once again one

01:01:26

in three for States pillars

01:01:28

2 and free for businesses,

01:01:29

but interestingly. we have also

01:01:34

an unlimited scope As with

01:01:37

the answers for rules, the

01:01:38

scope of the Hague rules

01:01:39

is not limited by the

01:01:40

type of claimants or respondents

01:01:41

or the subject matter of

01:01:42

the dispute. Okay, and it

01:01:44

also mentions State specifically it's

01:01:45

going from the introductory note

01:01:46

of the the Hague rules.

01:01:48

So the Hague rules were

01:01:50

made. Yes with this particular

01:01:51

purpose in mind, but also

01:01:54

leaving the door open for

01:01:55

its scope to be broader

01:01:57

than that. And in fact,

01:01:58

if you think about the

01:02:00

purpose of the hate rules

01:02:01

where they're intended to address

01:02:02

situations where there is anticipated

01:02:04

to be a power imbalance

01:02:06

between people who claim to

01:02:08

to have have violations of

01:02:10
their International recognize human rights

01:02:12
on the one hand and

01:02:13
private sector industry with with,

01:02:16
you know, some resources on

01:02:17
the other you might expect

01:02:18
that the sort of approach

01:02:20
to developing the rules might

01:02:22
be the sort of approach

01:02:23
that many people would like

01:02:24
to see developed and investors

01:02:25
state arbitrations today where it's

01:02:27
often the case that people

01:02:28
say well there are maybe

01:02:30

well funded investors on one

01:02:32

hand and then on the

01:02:33

other hand you may have

01:02:33

developing countries. Interestingly that the

01:02:36

Hague rules have had this

01:02:37

sort of thinking in place

01:02:39

for the the arbitration of

01:02:42

business and human rights disputes

01:02:43

and that a lot of

01:02:44

that also applies to our

01:02:45

conversations today. So if we

01:02:47

could let's see, I think

01:02:49

we skip back to the

01:02:49

beginning. Looks like we're there

01:02:52

were just a couple more

01:02:52

slides for the end. Oh.

01:03:12

Are we able to pull

01:03:14

them a second so and

01:03:14

if we can go back

01:03:15

just a little bit. These

01:03:17

slides almost there just a

01:03:19

little more. Okay, and okay

01:03:23

if we can go back

01:03:24

just a bit. Just a

01:03:27

little bit more. Okay good.

01:03:30

So now I'm great. So

01:03:32

you have this interesting situation

01:03:34

where the Hague rules have

01:03:35

been targeted and intended for

01:03:36

human rights disputes at the

01:03:38

same time business anymore rights

01:03:39

to speed at the same

01:03:40

time as some of the

01:03:41

same concerns might be seen

01:03:42

to be applicable in the

01:03:44

conversations over a form of

01:03:45

ists next slide, please. So

01:03:48

features unique to the Hague

01:03:50

rules inequality of arms cultural

01:03:52

appropriateness and rights compatibility Awards

01:03:55

required to be rights compatible

01:03:56

next slide. Promotion of mediation

01:04:00

public interest considerations for transparency

01:04:02

expedited arbitration and early dismissal.

01:04:06

Just keep these words in

01:04:06

mind just for a moment

01:04:07

realizing these are or some

01:04:09

of the features that have

01:04:10

been put into behavioral to

01:04:11

address what has been seen

01:04:13

to be an imbalance of

01:04:14

power between parties next slide.

01:04:21

So also features for controlling

01:04:23

costs and here it's possible

01:04:26
to have a review of

01:04:27
fees and expenses for the

01:04:28
arbitration from the appointing authority.

01:04:30
For example, also awards are

01:04:32
supposed to be reasonable in

01:04:34
a kind of cost burden

01:04:35
on parties departure from the

01:04:36
loser pays principle next slide.

01:04:41
Now turn into future practice.

01:04:42
And this is I think

01:04:43
the important part and where

01:04:44
we'll finish next slide. so

01:04:49
This interestingly May relate like

01:04:51

I said to the ongoing

01:04:52

conversation about possible reform of

01:04:54

isds. Let's have a quick

01:04:56

look at what was said

01:04:57

back in 2017 when the

01:04:59

working group was just getting

01:05:00

you know underway. They said

01:05:03

some of the concerns and

01:05:04

obviously this is not to

01:05:05

say these are the only

01:05:05

concerns but some of the

01:05:07

concerns that they cited back

01:05:08

in 2017 where lengthy duration

01:05:10

and extensive cost of isds.

01:05:12

These are concerns that might

01:05:13

bring you to think that

01:05:14

reform is a good idea.

01:05:16

Lack of transparency in the

01:05:18

proceedings early dismissal mechanism lack

01:05:20

of a mechanism to address

01:05:22

counterclaims virus respondent States now

01:05:25

in the cifca, we have

01:05:26

specifically addressed the extensive cost

01:05:29

of isds to the extent

01:05:31

that you've seen some of

01:05:31

the invention of cost measures

01:05:34

of deposits being required of

01:05:35

investors up front that the

01:05:36

Hague rules also address this

01:05:37

in the event that those

01:05:38

are applicable as opposed to

01:05:39

the exticals and also the

01:05:41

lack of a mechanism to

01:05:42

address counterclints. We've spoken specifically

01:05:44

to third party plans even

01:05:45

certainly within the treaty that

01:05:47

can be built in as

01:05:48

well. Why because once you

01:05:49

have an investor State arbitration

01:05:51

the tribunal has jurisdiction, why

01:05:53

does it mean I'll have

01:05:54

jurisdiction because of the consent

01:05:55

of the parties and as

01:05:56

it's been said here at

01:05:57

the stage of drafting a

01:05:58

treaty you may not have

01:05:59

the consent of a third

01:06:01

party. It's not sitting at

01:06:02

the table. But once that

01:06:04

third party says, I accept

01:06:05

the standing offer to arbitrate

01:06:07

and starts arbitration, then the

01:06:09

tribunal has jurisdiction because of

01:06:11

that consent and that consent

01:06:12

contains the terms that we're

01:06:13

consented too namely the terms

01:06:15

of the tree. If you

01:06:16

see here the red extents

01:06:18

across like a transparency lack

01:06:20

of immigrants and those are

01:06:21

specifically addressed. I would also

01:06:22

note that the lengthy duration

01:06:24

and early dismissal mechanisms. Those

01:06:26

are also some of the

01:06:27

things we do we know

01:06:27

just a moment ago in

01:06:28

the context of the Hague

01:06:30

rules and how that if

01:06:31

they are applicable than those

01:06:32

also might be addressed. It's

01:06:33

interesting just to know that

01:06:35

this might be something that

01:06:37

that could enter into this

01:06:38

important discussion next slide. Okay,

01:06:44

and so I'll leave you

01:06:44

with this question. Essentially. This

01:06:46

is innovative incorporation of investor

01:06:49

obligations the future of isds.

01:06:51

If the Sif can provide

01:06:52

a more balanced investment treaty

01:06:54

practice and increased public legitimacy

01:06:56

of ists. Thank you. Well,

01:07:03

thank you very much. to

01:07:04

all of our panelists that's

01:07:06

been a really interesting tours

01:07:09

through the different issues beginning

01:07:11

with the the age-old problem

01:07:13

that Clara took us through

01:07:15

of investment treaties being asymmetrical

01:07:18

and the obligations really being

01:07:20

all on the states and

01:07:22

and not on the investors

01:07:24

and the investors having the

01:07:26

rights and Clara introduces to

01:07:28

the efforts in some treaty

01:07:30

practice to put obligations on

01:07:32

investors, which then lift the

01:07:35

leaves the problem of how

01:07:36

those enforced Jose Antonio took

01:07:39

us through some interesting practice

01:07:41

and some arbitrations cases where

01:07:44

counterclaims have been made by

01:07:45

States but there's a bit

01:07:46

of a I guess a

01:07:48

bit of a sorry record

01:07:48

with claims are made by

01:07:50

states where those kind of

01:07:51

claims are based on. The

01:07:53

bilateral investment treaty itself, maybe

01:07:56

not so much where there's

01:07:57

a contract also an issue

01:07:58

where County claims have had

01:08:00

more success, but in most

01:08:01

of the treaty cases the

01:08:03

tribunals have even found not

01:08:05

even found on very many

01:08:06

occasions or only one occasionally

01:08:08

all of us a case

01:08:09

that was even within within

01:08:11

jurisdiction. And Rob's taking us

01:08:14

through some very very recent

01:08:17

hot off the press. work

01:08:21

has been done for a

01:08:22

for a client state in

01:08:24

developing a model investment treaty

01:08:26

not only to Make it

01:08:29

clearer. What obligations are on

01:08:31

investors, but also seeking to

01:08:33

provide methods for host States

01:08:35

and not only hosts but

01:08:36

also third parties. To enforce

01:08:39

those obligations those human rights

01:08:41

obligations on investors we had

01:08:43

about I think 10 minutes

01:08:45

for some questions. So if

01:08:47

anybody would like to drop

01:08:48

a question into the into

01:08:50

the chat box, I know

01:08:51

there's been a very active

01:08:52

chat box over the last

01:08:55

over the last little over

01:08:57

the last of 20 minutes

01:08:58

or so. I might begin.

01:09:01

By asking a panelists and

01:09:03

maybe it's a it's a

01:09:04

broad question. Is there what

01:09:08

sort of difficulties are there

01:09:09
in some of the obligations

01:09:11
and we can begin with

01:09:12
Clara because some of the

01:09:13
treaty standards Provisions that you

01:09:15
referred to Simply referred to

01:09:18
obligations on investors to comply

01:09:20
with. With human rights and

01:09:22
what is a tribunal to

01:09:24
understand what that refers to

01:09:25
because human rights could be.

01:09:29
maybe the content of the

01:09:30
universal Declaration on human rights

01:09:32
or it could be the

01:09:33

content of Any number of

01:09:35

a dozen or more International

01:09:36

treaties and this is the

01:09:39

tribunal to only to be

01:09:40

able to apply those human

01:09:41

rights, which are reflect customers

01:09:43

international law. Does it have

01:09:45

to review the treaty practice

01:09:47

of the relevant host State

01:09:48

as to what human rights

01:09:49

treaties have may have agreed

01:09:51

to be to be bound

01:09:52

by how would try Google's

01:09:55

address that particularly issue. Maybe

01:09:57

I can begin with you

01:09:57

Clara. Um, yes, that's a

01:10:04

hard. I mean the the

01:10:05

example of the human rights

01:10:08

is the most difficult one

01:10:09

because I suppose the standard

01:10:11

view in international human rights

01:10:12

law would be that there

01:10:13

are no Um human rights

01:10:16

obligations of business and that

01:10:18

was the problem that the

01:10:20

UN guiding principles are trying

01:10:21

to bridge by saying. Okay.

01:10:22

Well we are not going

01:10:23

to go there that we

01:10:24

will introduce this idea of

01:10:25

responsibilities. I already mentioned that

01:10:27

so I suppose some of

01:10:30

the potentially human rights Provisions

01:10:32

such as the references to

01:10:34

the aisle declaration that those

01:10:37

may make it a bit

01:10:38

easier because they provide a

01:10:40

specific reference to to more

01:10:45

developed standards if it's just

01:10:46

a clause which says well

01:10:49

businesses will uphold human rights

01:10:52

then obviously this Opens up

01:10:55

the question what that means

01:10:56

and I would I I

01:10:58

guess I'm not offended by

01:10:59

that language given that this

01:11:01

whole field has developed on

01:11:02

treaty language such as you

01:11:05

know State party will provide

01:11:06

fair negatable treatment to the

01:11:08

investor. I would expect that

01:11:09

would tribunal would do would

01:11:11

would in fact be to

01:11:13

look at the relatively developed

01:11:15

analysis within the business and

01:11:17

human right context and I

01:11:18

think here Robert and his

01:11:20

firmware right to kind of

01:11:21

try to merge these two

01:11:22

because they're the question would

01:11:25

be in what way do

01:11:27

or can businesses investors. I

01:11:33

suppose detrimentally impact the enjoyment

01:11:37

of Human Rights. And thank

01:11:42

you, Jose Antonio or Rob.

01:11:46

Would you like to chime

01:11:47

in there? certainly I I

01:11:55

concur with Clara that that

01:11:58

it would be very difficult

01:11:59

to to include language. That

01:12:02

would be too broad with

01:12:04

respect to Human Rights and

01:12:06

starting with the fact that

01:12:08

that the the one primary

01:12:12

subject. That is a Given

01:12:15

the responsibility to uphold human

01:12:18

rights is a state in

01:12:21

within its own jurisdictions. So

01:12:22

so that that's the way

01:12:26

human rights are constructed that

01:12:28

that being said. There there

01:12:31

may be some narrow language

01:12:33

that would give that would

01:12:38

make sense for instance the

01:12:39

reference of fundamental human rights

01:12:41

or even the reference to

01:12:43

to a certain minimum or

01:12:49

minimal International. Law standards related

01:12:54

to the environment or or

01:12:57

labor. And and this is

01:12:59

a question that I have

01:13:00

grappled with if one could

01:13:03

find basically the you know,

01:13:08

those International minimal standard concerning

01:13:11

labor and and there was

01:13:14

a slide in my presentation

01:13:15

which made a reference to

01:13:16

ILO conventions Etc it It

01:13:22

seems to me that in

01:13:22

concerning labor. It might be

01:13:24

a little bit clearer concerning

01:13:26

environment. Except for the precautionary

01:13:30

principle, it may be more

01:13:34

difficult, but I'm not an

01:13:35

environmental law expert. You may

01:13:37

be a little bit more

01:13:37

difficult to to Conclude which

01:13:42
obligations or principles may be

01:13:44
customary. So I don't I

01:13:47
don't think that thing that

01:13:48
that the obligations should be

01:13:50
broad. They should be specific

01:13:52
and they should be related

01:13:55
to this notion that that

01:13:56
investors should at least respect

01:13:59
certain obligations that may already

01:14:02
be there and that may

01:14:04
already be customary the the

01:14:06
problem with that with with

01:14:08
with not including Those obligations

01:14:12
in a treaty is that

01:14:13
they may very well exist

01:14:15
in the public international law

01:14:18
system. However, if you do

01:14:20
not include them the the

01:14:22
tribunal would not necessarily have

01:14:25
jurisdiction over them. I mean

01:14:26
depends on the tribunal but

01:14:27
I would I would say

01:14:28
well it's not clear that

01:14:30
that even though they exist

01:14:32
the tribunal would be able

01:14:34
to rely upon those obligations

01:14:37

to bring or to to

01:14:42

To create some action ability.

01:14:48

Before the tribunal so that

01:14:51

that sort of a question

01:14:52

that that's why I believe

01:14:54

that it's important to include

01:14:55

them in a treaty. There

01:14:58

are things that you don't

01:14:58

need to include in a

01:14:59

tree like general principles of

01:15:00

law the the principle of

01:15:03

good faith whether you include

01:15:05

it or not. Most tribunals

01:15:06

have said well if you

01:15:07

act in a corrupt manner

01:15:09

like in in In World

01:15:14

duty free versus versus Kenya

01:15:16

or or if you commit

01:15:18

fraud like in in say

01:15:20

sat versus El Salvador, you're

01:15:22

breaching a general principle of

01:15:23

law, which you don't do

01:15:25

not necessarily have to have

01:15:26

in a treaty but for

01:15:28

certain specific obligations you may

01:15:30

have to to do that.

01:15:35

Thanks, Jose Antonio. I might

01:15:37

I might just ask Robert

01:15:38

a question one of the

01:15:40

questions which is counting the

01:15:41

chat and and that is

01:15:42

whether there are any states

01:15:44

that have yet signed and

01:15:46

ratified a sifca type treaty.

01:15:48

And secondly, is there any

01:15:52

anything now that the impact

01:15:55

would be on a state

01:15:57

having a sifter time treaty

01:15:58

and the relationship or impact

01:16:01

on foreign investment flows into

01:16:03

that country? Do we know

01:16:06

anything about those issues Rob?

01:16:08

30 so this is as

01:16:10

you mentioned part of the

01:16:11

process. So this is a

01:16:13

sifca model is what was

01:16:15

developed for a specific context

01:16:17

in very recent months and

01:16:19

it was just for the

01:16:20

particular use of one state

01:16:22

as a model by lateral

01:16:24

investment tree hasn't had the

01:16:25

opportunity to be circulated yet.

01:16:27

It doesn't have the opportunity

01:16:28

to to be considered regionally,

01:16:31

but it very well may

01:16:32

be because the idea is

01:16:33

is this here if you

01:16:34

accept as a host state

01:16:36

if you accept the terms

01:16:37

of a sifca treaty what

01:16:38

you're effectively saying is that

01:16:39

it's not enough the standard

01:16:42

traditional old-fashioned bit from the

01:16:44

1990s or from before. It's

01:16:46

not enough. Because we want

01:16:48

to not just have the

01:16:49

the inflow of investment. We

01:16:51

also want to have protection

01:16:52

we want to have perhaps

01:16:54

environmental production. We want to

01:16:55

have a human rights protection.

01:16:56

We want to have a

01:16:58

responsibility not just State responsibility

01:17:00

under public international law. We

01:17:01

want to also have some

01:17:02

responsibility from the investor. And

01:17:04

so if the if a

01:17:06

host State puts that in

01:17:07

place, there's essentially you're essentially

01:17:09

putting in as the host

01:17:10

State first a jurisdictional barrier

01:17:12

that you know, the investor

01:17:14

must make a declaration first

01:17:15

after that declaration is made

01:17:17

that if that Declaration was

01:17:18

not true with respect to

01:17:20

the solid human rights record,

01:17:21

you must have in order

01:17:22

for the state to consent

01:17:24

to invest your standard arbitration

01:17:25

at all. Well, then you

01:17:26

would have concerns with with

01:17:29

an investibility of the claims

01:17:31

and then moving on the

01:17:33

consent to third party planes.

01:17:35

Now, what would this mean

01:17:36

for for investors with investors

01:17:38

be encouraged to invest it

01:17:41

depends on how you look

01:17:42

at. It depends on the

01:17:42

context, you know, you might

01:17:44

think well gosh, that's a

01:17:45

lot to take on the

01:17:46

investors the investors. They take

01:17:47

that on obviously in the

01:17:49

event that they specifically accept

01:17:50
the standing offer under a

01:17:53
bit to arbitrate. That's the

01:17:55
only that's the only time

01:17:56
to go offer consent that

01:17:57
and so it's it's always

01:17:58
just a facet. It's a

01:17:59
feature of investor-state arbitration with

01:18:02
a state that has a

01:18:04
model bit of a sifca,

01:18:05
you know Style. And so

01:18:07
with that being the case,

01:18:08
I think also investors will

01:18:10
see and you know look

01:18:12

especially if you're talking about

01:18:13

developing countries developing countries have

01:18:15

concerns that are not only

01:18:17

related to inflow of investment

01:18:20

and they may very well

01:18:22

see this as a positive

01:18:23

step toward supporting increased rule

01:18:26

of law and the establishment

01:18:29

of higher standards. So it

01:18:31

depends on how you look

01:18:31

at it as an investor

01:18:32

and as a whole state

01:18:34

There's there's not you know

01:18:36

by comparison to the standard

01:18:38
bit model. There's there's a

01:18:41
lot to be gained by

01:18:42
having these additional protections from

01:18:44
from disputes. Yeah, thank you.

01:18:48
I might um one question

01:18:50
taking taking several steps back

01:18:52
from this topic and that

01:18:53
is that I suppose we

01:18:55
began with the the asymmetrical

01:18:59
nature of bilateral investment treaties

01:19:00
at the obligations are on

01:19:01
the states and the investors

01:19:02
have the right some of

01:19:03

this traditional model that that

01:19:05

we use to in it

01:19:07

and it's it's made possible

01:19:08

for states to make counterclaims

01:19:09

in certain circumstances, but I

01:19:12

suppose there's a and and

01:19:14

now there's maybe we should

01:19:15

be putting in obligations on

01:19:17

investors and we've heard lots

01:19:18

of good reasons for that

01:19:19

but And on another views

01:19:22

and not the case that

01:19:23

obligations on investors as private

01:19:25

entities. Their obligations should come

01:19:29

through domestic law and all

01:19:31

investment treaties. Either have an

01:19:33

Express or an implied. requirement

01:19:36

that the investor will comply

01:19:38

with the with the law

01:19:39

of the host State at

01:19:40

least in making the investment

01:19:41

and then if they don't

01:19:41

comply with the law of

01:19:42

the whole state in the

01:19:43

operation of their investment that

01:19:44

may May affect the admissibility

01:19:47

of the claim or the

01:19:48
merits of the claim or

01:19:49
or any award of compensation

01:19:50
that might ultimately may be

01:19:52
made to them if they've

01:19:53
carried on their investment in

01:19:54
some kind of unlawful way.

01:19:55
Even if it was made

01:19:56
in accordance with those state

01:19:58
law at the beginning. and

01:20:00
so I suppose my broader

01:20:02
question here is is this

01:20:03
not really all a question

01:20:05
of law enforcement and the

01:20:07

content of the domestic law

01:20:09

of the host State and

01:20:10

if the host state of

01:20:11

the investment chooses to implement

01:20:14

certain obligations concerning respect for

01:20:16

human rights on companies that

01:20:18

operate Within as a matter

01:20:22

for the whole state and

01:20:23

then there's going to be

01:20:25

a requirement for the any

01:20:26

foreign investor coming into that

01:20:28

state to do business there

01:20:29

to comply with local law

01:20:31

and I suppose I'm being

01:20:32

Devil's Advocate a little bit

01:20:33

here. But the question is

01:20:34

why can't we leave all

01:20:36

of this to the domestic

01:20:37

law of the host State?

01:20:38

Why do we have to

01:20:39

try to overcomplicate a bilateral

01:20:42

investment Treaty by seeking to

01:20:43

make them balancing the sense

01:20:45

of not only host states potentially

01:20:48

able to make claims against

01:20:49

investors, but even third parties,

01:20:51

so can we not just

01:20:52

leave things with the As

01:20:55

a matter of law enforcement

01:20:57

within the host State many

01:20:59

Clara I'll go to you

01:21:00

first and and then maybe

01:21:02

to the others it's a

01:21:03

large question. Now it's a

01:21:05

very easy one. The reason

01:21:07

is because where the money

01:21:08

is. so the thing this

01:21:12

is not that discussed in

01:21:13

the environment in the investment

01:21:15

local community. That's very much

01:21:17
discussed in the business and

01:21:17
human rights area, which is

01:21:19
the money is with the

01:21:22
parent company. So that's an

01:21:25
entity which is outside of

01:21:26
the control of the host

01:21:28
state. So the whole state

01:21:29
may have some control over

01:21:30
the local subsidiary what will

01:21:33
in principle not be able

01:21:34
to reach the parent company.

01:21:36
There's been some very recent

01:21:38
cases in in the UK

01:21:39

and in the Netherlands where

01:21:40

it has been possible for

01:21:42

but these were private claims

01:21:45

those are not claims Broadway

01:21:46

estate where the victims were

01:21:48

able to sort of bring

01:21:50

a claim towards against a

01:21:53

against the parent company, but

01:21:56

the estimator is also in

01:21:59

in this in this level,

01:22:02

right? So investment treaties will

01:22:04

allow the investor including what

01:22:06

it the subsidiary and the

01:22:08

parent company to suit typically

01:22:09

the shareholder in our language

01:22:11

and in the innocent area,

01:22:12

but that is not the

01:22:13

case the other way around.

01:22:16

Right. Thank you, Jose Antonio

01:22:18

and Robert maybe go to

01:22:19

each of you for ones

01:22:20

of last comment before we

01:22:22

have unfortunately wrap up our

01:22:24

panel, but maybe Jose Antonio

01:22:26

just to in a minute

01:22:28

or so. Yes, definitely. my

01:22:32

answer I agree with with

01:22:34

Clara with my answer is

01:22:36

because it hasn't worked that

01:22:38

that's really it hasn't worked

01:22:40

and and there are There

01:22:44

are still so many imbalances

01:22:46

in in the system. And

01:22:49

and we had a discussion

01:22:51

in another panel as to

01:22:53

the concerns of host States

01:22:57

and and developed host States

01:22:58

or develop exporting states to

01:23:02

host states that perhaps if

01:23:05

the standards are increased in

01:23:07

investment treaties, then we will

01:23:10

affect investment and and and

01:23:12

the view sometimes of some

01:23:16

businesses is not necessarily that

01:23:18

they're afraid that the standards

01:23:19

will will will will increase

01:23:21

but they are afraid of

01:23:23

uncertainty to the extent that

01:23:25

the standards are are. Are

01:23:28

clear even if they're higher

01:23:31

I think that their investment

01:23:34

will keep on flowing and

01:23:36

and I I see it

01:23:39

more as a discussion that

01:23:41

is sometimes put on the

01:23:44

table. By by Council of

01:23:49

investors. So so, you know

01:23:51

the frame of mind that

01:23:53

that things that well you

01:23:55

already have the domestic law,

01:23:57

so why don't you apply

01:23:59

it is a and I'm

01:24:01

not saying that I'm not

01:24:02

I'm not saying that that

01:24:03

about the question. I know

01:24:05

I'm not saying that about

01:24:06

your question, but I've heard

01:24:08

the argument that it should

01:24:11

be kept in domestic law

01:24:12

by many Council for investors

01:24:15

that say, well you already

01:24:17

have the whole domestic law,

01:24:19

but it hasn't worked and

01:24:20

what is wrong with with

01:24:22

creating? International obligations that businesses

01:24:29

will also have to comply

01:24:30

with and these are very

01:24:32

basic obligations. We're not talking

01:24:34

about about covering the whole

01:24:36

human rights, but these are

01:24:38

very very basic obligations about

01:24:39

about you know, child labor

01:24:42

about gender equality in the

01:24:47

in the workforce. These are

01:24:48

very very basic obligations that

01:24:50

they should comply with and

01:24:51

sometimes they're not complying with

01:24:53

so if they if they

01:24:56

were all to comply I

01:24:57

think that that the system

01:24:59

would be more balanced overall.

01:25:02

Thank you rope. Thanks very

01:25:05

much. If you can manage

01:25:06

in a minute, you know,

01:25:07

yeah, I think I can

01:25:09

I think again, you know,

01:25:10

it's it's interesting to me

01:25:12

to see you know, my

01:25:13

esteemed co-panelists here saying things

01:25:16

that are not academic they're

01:25:17

very practical, you know, it's

01:25:19

the money right or it

01:25:21

just hasn't worked right? I

01:25:23

think it's interesting for us

01:25:24

to note that the whole

01:25:25

question of why don't we

01:25:26

just leave this to domestic

01:25:27

law enforcement kind of has

01:25:29

that assumption that there will

01:25:31

be that domestic law and

01:25:32

enforcement uniformly around the world

01:25:34

if human rights are supposed

01:25:36

to be universally applicable. Well,

01:25:38

then bringing them even closer

01:25:40

into Universal applicability through incorporation

01:25:43

and invest your state and

01:25:45

you know just settlement context

01:25:47

and IAS probably make some

01:25:49

sense. It also probably promotes

01:25:51

the rule of a lot

01:25:51

more broadly probably help strapped

01:25:53

states that yes their heart

01:25:55

is there and putting in

01:25:56

the legislation or the regulation

01:25:57

but gosh, we're the resources.

01:25:59

How are you going to

01:26:01

have the resources necess? To

01:26:03

make it in actuality on

01:26:04

the ground. This just helps.

01:26:05

That's all. Right. Look, thank

01:26:09

you very much it everybody.

01:26:11

We've unfortunately run out of

01:26:13

time for this panel session.

01:26:14

I think the the panelists

01:26:16
and I are going to

01:26:17
go into a breakout room

01:26:18
to debrief but for all

01:26:21
the participants and we've had

01:26:23
a very good number of

01:26:23
participants and what is a

01:26:26
very early hour. For those

01:26:27
of you on the east

01:26:29
coast of the United States.

01:26:30
If you're on the west

01:26:30
coast of the United States

01:26:31
is very early and for

01:26:33
those of us in other

01:26:34

parts of the world, it's

01:26:35

it's getting kind of late

01:26:36

as well. Can I can

01:26:38

I think Clara for an

01:26:40

excellent opening presentation and Jose

01:26:42

Antonio and Rob for their

01:26:44

their remarks as well. It's

01:26:46

been a very stimulating discussion

01:26:47

and a conversation which I

01:26:49

think is going to be

01:26:50

going to continue in the

01:26:52

coming years as more and

01:26:54

more people become engaged and

01:26:55

more and more States becoming

01:26:56

engaged with these issues and

01:26:58

possibly seeing a fresh way

01:26:59

to look at incorporating investor

01:27:02

obligations into bilateral investment treaties.

01:27:04

So thank you very much

01:27:06

and I wish You all

01:27:08

the best those of you

01:27:09

who are continuing with other

01:27:10

panels for the world arbitration

01:27:12

update. There are two more

01:27:13

panels today is in LED

01:27:15

set at the outset. Thank

01:27:17

you very much. Everybody. I'm

01:27:18

Jose Antonio Clara and Robert.

01:27:20

Look forward to seeing you

01:27:20

in a breakout room in

01:27:21

a second. Thank you. Thank

01:27:23

you. World arbitration update and

00:00:07

what I meant to say

00:00:09

is that I'm here. Here

00:00:12

in Washington, but all of

00:00:15

our panelists are from various

00:00:18

corners of the world. I

00:00:20

know Chester Brown who's our

00:00:21

moderator is in Australia and

00:00:23

others are in Europe and

00:00:24

and in North America. So

00:00:26

we're going to have a

00:00:29

very interesting panel on one

00:00:32

of the topics that we've

00:00:34

been looking at over the

00:00:35

past five days of the

00:00:36

world arbitration update and that

00:00:40

concerns issues related to investment

00:00:43

arbitration. We've also had topics

00:00:46

commercial arbitration and yesterday on

00:00:48

the WTO and really this

00:00:52

panel is a great example

00:00:53

of what we've been trying

00:00:54

to do at wow to

00:00:58

address diverse topics to address

00:01:03

topics that are becoming very

00:01:06

topical and ones that people

00:01:08

are looking for updates hence

00:01:10

the topic of the conference.

00:01:13

Um, and it really reflects

00:01:15

the diverse nature of international

00:01:17

arbitration itself over the last

00:01:20

20 30 years International arbitration

00:01:23

has really moved from the

00:01:25

centers of arbitration in the

00:01:27

typical locations to all over

00:01:29

the world and we see

00:01:30
practitioners and Arbitrage Traders and

00:01:33
our users from every corner

00:01:35
of the planet and we

00:01:36
we when I say we

00:01:38
I mean Dr. Jose Antonio

00:01:39
Rivas and myself and the

00:01:41
team at X strategy, we

00:01:45
we really wanted to create

00:01:47
a conference that reflected the

00:01:48
highly diverse and widespread nature

00:01:51
of international arbitration today, and

00:01:54
we hope you'll enjoy this

00:01:56
session. There's a couple more

00:01:57

sessions this morning and this

00:02:00

afternoon we recommend those to

00:02:02

you, but let me first

00:02:03

before we kick off introduce

00:02:05

a professor Chester Brown. He's

00:02:10

our moderator this morning. He's

00:02:14

a professor of international law

00:02:16

and international arbitration in at

00:02:20

the University of Sydney law

00:02:21

school. And he's also the

00:02:23

law school's director of global

00:02:24

engagement. He's a barrister as

00:02:27

well. He's at the seven

00:02:29

Wentworth selborne Chambers in Sydney.

00:02:31

And he's also an overseas

00:02:33

member of Essex Court Chambers

00:02:35

in London, his fields of

00:02:37

focus are international law dispute

00:02:40

settlement arbitration investment law, of

00:02:43

course and private international law.

00:02:45

So he's really well suited

00:02:47

to today's topic. He's also

00:02:49

up being a practitioner and

00:02:53

Dean before numerous courts, including

00:02:55

the icj the Iran us

00:02:57

claims tribunal as well as

00:02:59

invest your state tribunal. So

00:03:01

we're really looking forward to

00:03:02

getting a professor the Browns

00:03:08

perspective on this issue and

00:03:10

All now pass over the

00:03:12

microphone to Chester Chester looking

00:03:15

forward to the panel. Right.

00:03:17

Thank you very much for

00:03:19

that kind introduction in it's

00:03:20

wonderful to be with you

00:03:21

all here for this iteration

00:03:25

of world arbitration update the

00:03:27

first the first the first

00:03:29

time that world arbitration update

00:03:30

has been held but this

00:03:31

is one of the one

00:03:31

of several panels obviously that's

00:03:33

been held this week with

00:03:34

morning to you all without

00:03:36

having an early start in

00:03:37

the United States and good

00:03:38

afternoon to you in Europe

00:03:40

and good evening to those

00:03:41

of you who may be

00:03:42

joining from the similar part

00:03:43

of the world as me.

00:03:44

Now, we've got an excellent

00:03:46

panel this evening, but I'll

00:03:48

just give a short introduction

00:03:50

to the topic just a

00:03:51

very brief introduction to the

00:03:53

topic and it's just a

00:03:54

note that in 2011 the

00:03:57

United Nations guiding principles on

00:03:59

business and human rights for

00:04:00

adopted by the United Nations

00:04:02

Human Rights Council. These guiding

00:04:06

principles had been developed by

00:04:07

the United Nations secretary generals

00:04:09

special representative on business and

00:04:11

human rights who was professor

00:04:13

John Ruggie who was professor

00:04:15

of Human Rights and Affairs

00:04:18

at Harvard University's Kennedy School

00:04:20

of government and the guiding

00:04:23

principles really could be distilled

00:04:25

into into a short catchphrase

00:04:27

of three words and they

00:04:29

are protect respect and remedy.

00:04:33

And the United Nations guiding

00:04:35

principles have become a very

00:04:36

important framework for countries to

00:04:38

implement in their domestic legislation,

00:04:40

and also for corporations to

00:04:43

take into account in implementing

00:04:45

their corporate social responsibility policies,

00:04:48

and that is no more

00:04:49

important, of course than when

00:04:51

they are engaged in operations

00:04:52

overseas now sadly for us

00:04:54

Professor rugby passed away. Just

00:04:57

a number of weeks ago

00:04:58

in September 2021, but he's

00:05:01

left a very important lasting

00:05:02

Legacy, and we did hope

00:05:03

to have with us on

00:05:04

the panel this evening one

00:05:06

of his research assistants who

00:05:08

worked with him throughout that

00:05:09

process of developing the UN

00:05:11

gardening principles on business and

00:05:13

human rights and refiner whose

00:05:15

name you may have seen

00:05:16

in the program, but sadly

00:05:17

due to a family bereavement.

00:05:20

She can't be with us

00:05:21

with us today, but we

00:05:23

do have an excellent panel

00:05:24

and I'm going to introduce

00:05:27

our panels to us now.

00:05:28

We're going to begin with

00:05:29

Dr. Clara. Who's an assistant

00:05:34

professor at the University of

00:05:35

Nottingham in the United Kingdom?

00:05:37

She specializes in International Investment

00:05:39

law and international dispute settlement

00:05:41

her research involves transformations of

00:05:44

international law with respect to

00:05:46

Collective non-state entities, the international

00:05:48

legal regulation of global coordination

00:05:50

problems and international law in

00:05:53

domestic courts. She completed her

00:05:55

PhD at The Graduate Institute

00:05:57

of International Development studies in

00:05:58

Geneva in Switzerland and also

00:06:01

holds an illm from the

00:06:02

University of Michigan and Masters

00:06:04

and nationalist degrees from marasik

00:06:06

University in a Czech Republic

00:06:07

and she's also been a

00:06:09

visiting fellow at the Laos

00:06:10

Center for international law in

00:06:12

Cambridge at the British Institute

00:06:14

for international and comparative law

00:06:15

and also Queen Mary and

00:06:17

she also served as a

00:06:18

Judicial assistant at the international

00:06:20

court of justice to judge

00:06:22

Sir, Christopher, Greenwood. Our second

00:06:24

speaker is Jose Antonio Rivas

00:06:27

who is of course one

00:06:28

of the organizers of world

00:06:30

arbitration update this week and

00:06:32

he is a founding partner

00:06:33

of exstrategy LLP a boutique

00:06:36

Law Firm. For international arbitration

00:06:38

based in Washington DC and

00:06:40

Bogota in Colombia. He has

00:06:42

18 years of experience in

00:06:44

International Investment law is had

00:06:46

a number of different roles

00:06:47

his workers Council for Sovereign

00:06:49

clients and investors in arbitration

00:06:52

proceedings. He sat and cities

00:06:54

arbitrator and domestic and international

00:06:57

arbitrations and he's a former

00:06:59

lead negotiator for the government

00:07:00

of Colombia of it's International

00:07:03

Investment treaties over a number

00:07:04

of years and on top

00:07:05

of all that he's also

00:07:06

worked as excited as one

00:07:09

of the legal council in

00:07:10

that institution. He also serves

00:07:12

an adjunct professor at Georgetown

00:07:14

University in Washington DC and

00:07:16

he's a member of the

00:07:17

exit panel of arbitrators and

00:07:19

conciliators last but not least.

00:07:21

We have Rob Houston joining

00:07:23

us from Singapore. He is

00:07:25

a senior associate at kennel

00:07:27

Gates Straits law in Singapore.

00:07:30

Who works in the international

00:07:31

arbitration team there he has

00:07:33

acted for and against States

00:07:35

and state-owned entities major corporates

00:07:38

and other clients in complex

00:07:39

cross-border matters with high value

00:07:42

disputes, including investment treaty and

00:07:45

Commercial arbitrations under various institutional

00:07:48

rules. And Robert has also

00:07:50

the pro bono coordinator of

00:07:51

the Singapore office of K&L

00:07:53

Gates and he's a founding

00:07:55

member in executive director of

00:07:56

the global pro bono Bar

00:07:58

Association and the leader in

00:08:00

the firm-wide anti-human trafficking trafficking

00:08:03

initiative in which he is

00:08:04

coordinated a number of multi

00:08:06

jurisdictional pro bono projects involving

00:08:09

multiple Kane El Gates officers

00:08:10

and other collaborating firms around

00:08:12

the world Robert holes at

00:08:15

Juris doctor degree from George

00:08:16

Town in Washington DC and

00:08:18

a master of Economics degree

00:08:19

from seal in Paris. So

00:08:23

much for our introductions. I'm

00:08:24

sure you'll agree. We have

00:08:25

an excellent panel, and I'll

00:08:27

ask Clara to take the

00:08:29

floor and ask her to

00:08:30

give you a presentation. Thank

00:08:31

you. Thank you very much.

00:08:33

And thank you for being

00:08:35

invitation to join the world

00:08:37

arbitration update and and this

00:08:39

particular panel. I have some

00:08:41

slides and I believe Maria

00:08:43

will kind of help me

00:08:44

with. with them I have

00:08:48

been invited to I suppose

00:08:50

set out the player state

00:08:53

of play in relation the

00:08:55

question of incorporating obligations of

00:08:59

investors in the it and

00:09:01

I am compelled to say

00:09:03

that Professor Brown's introduction which

00:09:06

focused on the UN guiding

00:09:07

principles on business and human

00:09:09

rights sort of sounded as

00:09:12

if Investment treaties at the

00:09:15

moment have very little to

00:09:16

say about the conduct of

00:09:19

investors and possibly investors obligations.

00:09:22

And and this is why

00:09:23

we need the unguiding principles.

00:09:25

Now, I suppose the disabled

00:09:27

the main disadvantage. So to

00:09:28

speaking of or maybe advantage

00:09:31

of the UN guiding principles

00:09:32

is that they have left

00:09:34

the question of the legal

00:09:35

nature of The requirements on

00:09:41

businesses open, so it is

00:09:44

not quite clear whether it

00:09:45

is to stipulate simply some

00:09:47

normal expectation of there's something

00:09:49

more anyway. I would like

00:09:52

to talk about investment treaties

00:09:55

in my in my 15

00:09:56

minutes. Investment treaties have been

00:09:59

known and more recently also

00:10:01

criticized for their normal symmetry.

00:10:03

So for the fact that

00:10:04

they in principle impose only

00:10:06

obligations on host States while

00:10:09

conferring only rights or benefits

00:10:11

on investors. And investment treaties

00:10:15

have indeed focused on the

00:10:17

conduct of the whole state

00:10:19

and the impact of the

00:10:20

whole states. conduct on the

00:10:23

protective investment leaving the conduct

00:10:25

of investors generally out of

00:10:27

the picture except possibly for

00:10:30

The Limited aspect when the

00:10:33

definition of investment the definition

00:10:35

of protected investment would set

00:10:38

out a requirement for the

00:10:39

investment to comply either in

00:10:42

its establishment or possible also

00:10:44

in the operation with the

00:10:46

domestic law of the whole

00:10:48

state. Um, however is the

00:10:52

experience with the application of

00:10:54

investment treaties in investor State

00:10:56

arbitration grew and it became

00:10:58

apparent that most tribunals adopt

00:11:01

an essentially strict textualist approach

00:11:03

in the interpretation of these

00:11:05

treaties and will therefore not

00:11:07

be prepared to take regard

00:11:10

of investor conduct in the

00:11:11

absence of any specific treaty

00:11:14

language. For many I suppose.

00:11:17

the normative asymmetry of investment

00:11:20

treaties and there are lack

00:11:21

of attention to investor conduct.

00:11:23

Has been one of the

00:11:25

elements putting the legitimacy of

00:11:27

the whole investment treaty framework

00:11:29

into question. Especially given the

00:11:32

often demonstrably detrimental impact of

00:11:34

foreign corporations in the whole

00:11:37

state on its population or

00:11:38

the environment The absurd Leverage

00:11:42

investors often have over host

00:11:45

governments. And the limit its

00:11:48

ability of some states to

00:11:49

effectively regulate investor conduct in

00:11:52

their territory. Now with the

00:11:55

availability of isds. It's this

00:11:59

normative asymmetry and it's affects

00:12:01

became even more apparent. and

00:12:06

this idea that investment really

00:12:08

should incorporate also Provisions dealing

00:12:12

with investor conduct. Has become

00:12:15

part of the ongoing processes

00:12:17

of Reform of International Investment

00:12:20

law is such a spare-headed

00:12:22

by angstadt. And we have

00:12:24

seen Provisions dealing with investor

00:12:27

conduct to emerge in newly

00:12:30

concluded investment treaties. now What

00:12:35

is it that we can

00:12:36

see if I can ask

00:12:37

for my next slide? So

00:12:39

this Provisions dealing with investor

00:12:43

conduct would it's time to

00:12:44

take shape of sort of

00:12:46

a very familiar normative solution.

00:12:49

They may simply ask each

00:12:52

party to encourage. Enterprises to

00:12:56

do something such as in

00:12:58

incorporate voluntarily incorporate International recognized

00:13:02

standards of corporate social responsibility

00:13:04

and I have given you

00:13:05

the example of the Canada

00:13:07

survey of the it. in

00:13:09

some treaties the formulations we

00:13:12

would see would actually directly

00:13:14

address. The the foreign investor

00:13:16

or or the local corporate

00:13:19

vehicle in the language of

00:13:20

these Provisions the investment and

00:13:22

they would say such as

00:13:23

the 2015 Slovakia Iran vit

00:13:26

that investors and Investments should

00:13:29

apply National and international accepted

00:13:35

standards of corporate governance. Or

00:13:40

the in other treaties such

00:13:42

as Argentina Qatar bid. They

00:13:44

may say that investors should

00:13:47

make efforts to voluntarily incorporate

00:13:49

recognize standards, or we could

00:13:53

also see Provisions such as

00:13:54

in setup in the comprehensive

00:13:57

economic trade agreement between the

00:13:58

EU and Canada. which would

00:14:04

prevent the investor to bring

00:14:06

a claim in investors that

00:14:08

arbitration if the investment was

00:14:12

made through fraudulent visitor presentation

00:14:15

corruption Etc. however The practice

00:14:20

has gone beyond. The evidently

00:14:24

soft losses or this procedural

00:14:29

rule of preventing access. to

00:14:33

to something more I would

00:14:35

argue and contrary to General

00:14:37

perception that as a matter

00:14:38

of positive law. There are

00:14:39

no formal industrial obligations under

00:14:41

investment treaties some treaties in

00:14:44

particular some of the recent

00:14:45

treaties and including treaties in

00:14:48

force. Can they Provisions which

00:14:50

prescribe at least on their

00:14:52

face obligations for foreign investors

00:14:55

or the local corporate vehicle

00:14:57

the investment? So if I

00:14:59

could ask for my next

00:14:59

slide to just give you

00:15:01

a general impression Um, I

00:15:06

can imagine that many of

00:15:07

you cannot read really what

00:15:08

is on this slide and

00:15:09

my my intention here was

00:15:10

just a Conway the message

00:15:12

that there are multiple instruments

00:15:13

with such provisions and even

00:15:15

this latest by no means

00:15:17

exhaustive. So let's zoom on

00:15:19

zoom in onto a couple

00:15:21

of the causes on the

00:15:22

next slide to have a

00:15:23

closer look with these Provisions

00:15:25

say so I've chosen just

00:15:28

two examples here at the

00:15:31

Empire Qatar investors and investment

00:15:33

shall come play with the

00:15:34

labor and investment loss Etc

00:15:37

or the Morocco Nigeria investors

00:15:39

and their Investments shall not

00:15:41

offer promise or give any

00:15:43

Angie Peking your oral Advantage

00:15:46

Etc and on the corruption

00:15:47

provision. In fact many contemporary

00:15:53

model bilateral investment treaties articulate

00:15:56

these kinds of Provisions as

00:15:57

well. If we look at

00:15:58

the model B IDs, which

00:16:00

were adopted since 2015 among

00:16:04

the public available once more

00:16:06

than half contains this kind

00:16:08

of Provisions including the Netherlands

00:16:11

model vit Belgium Luxembourg economic

00:16:14

Union Nigeria model vit or

00:16:19

India model vit Etc. So

00:16:22

the question naturally arises what

00:16:24

are these provisions? Can and

00:16:27

do they actually really create

00:16:28

formal obligations for investors? Now

00:16:31

some commentators dislike dislike the

00:16:34

proposition that investment treaties should

00:16:38

create International legal obligations for

00:16:40

investors viewing such development perhaps

00:16:43

and unwelcome expansion of personal

00:16:46

scope of international law something

00:16:48

that is odds with the

00:16:51

main doctrines of international law.

00:16:55

Um such as the doctrine

00:16:57

of sources or the law

00:16:59

on International responsibility. Others May

00:17:02

focus more on the fact

00:17:03

that treaties are Interstate instruments

00:17:06

and investors are not parties

00:17:09

to be treated to these

00:17:10

treaties and therefore they cannot

00:17:13

and do not consent do

00:17:15

any such property obligations. Let

00:17:20

me take these concerns in

00:17:22

turn just just to. Set

00:17:25

out the the main features

00:17:27

of the debate. I suppose

00:17:29

the objections which are essentially

00:17:31

objections to the possibility the

00:17:33

legal possibility that investment treaties

00:17:35

set out or impulse obligations

00:17:38

investors the first two dealing

00:17:40

with the doctrine of subjects

00:17:42

and and law of international

00:17:44

responsibility. They will go along

00:17:48

the lines of only States

00:17:50

being the proper subjects of

00:17:52

international law and therefore they

00:17:55

should they should be the

00:17:57

only ones. Relate who can

00:18:02

who can be addresses of

00:18:03

an obligation in under International

00:18:07

treaties. Now this seems less

00:18:10

of a compelling point in

00:18:12

the sense that the whole

00:18:14

doctrine of subjects of international

00:18:15

has Kind of arguable lost

00:18:20

its capacity to describe what

00:18:21

is going on International. There

00:18:23

are multiple formulations of what

00:18:26

the doctor ancestor doesn't say

00:18:27

Notions such as those of

00:18:29

partial subjects of international. I

00:18:33

have been introduced that's it

00:18:34

there. In fact, the one

00:18:35

common thing to all these

00:18:37

approaches is that they look

00:18:39

at whether or not the

00:18:42

entity in question is another

00:18:43

sea of Rights or obligation

00:18:45

in under international law. So

00:18:47

it sort of a circular

00:18:50

problem we could say then

00:18:51

that's it's easily dispelled by

00:18:54

simply pointing out. Well if

00:18:55

we have the problem if

00:18:56

there are rules of international

00:18:58

which address these and these

00:18:59

well that that could make

00:19:01

them subject themselves in some

00:19:02

way if you insist on

00:19:03

using their Doctrine at all.

00:19:06

the same with with a

00:19:08

lot of international responsibility the

00:19:09

the ioc Articles make it

00:19:11

quite clear that they are

00:19:13

in no way exhaustive statement

00:19:15

of all on International responsibility

00:19:17

and and it actually seems

00:19:20

a wide accepted principle that

00:19:21

a violation of an international

00:19:24

legal rule will engage International

00:19:26

responsibility regardless of what regardless

00:19:29

of who the other sea

00:19:30
of the obligation is presumably

00:19:33
those the more interesting objection

00:19:36
is the one based on

00:19:37
a lack of consent and

00:19:39
here I would ask for

00:19:40
my next slide, please. Um,

00:19:42
which from the perspective of

00:19:45
sorry that yeah, that's right,

00:19:47
which from the perspective of

00:19:49
three little would be the

00:19:52
fact that there's rule that

00:19:53
treaties cannot bind their known

00:19:55
party is and typically what

00:19:58

we hear is reference to

00:19:59

the Vienna convention and on

00:20:00

the lot of treaties and

00:20:02

the an article 30 for

00:20:05

35, which expressed this principle.

00:20:08

um, but as you can

00:20:10

see this Provisions explicitly speak

00:20:13

about third States So strictly

00:20:16

speaking. They are not applicable

00:20:17

to to the situation before

00:20:20

us and therefore they do

00:20:23

not really resolve the fact

00:20:25

that there's problem of whether

00:20:27

investment treaty scan or cannot

00:20:29

mine investors. Let's have a

00:20:33

look. Again, at one of

00:20:35

the examples of this provisions

00:20:38

and consider than what these

00:20:41

treaties seek to do. Can

00:20:42

we can we have the

00:20:44

next slide, please? so this

00:20:47

is an excerpt from the

00:20:49

2008 echoes supplementary output on

00:20:53

investment, which is Which is

00:20:54

a treaty enforce among the

00:20:58

member states of ecowas and

00:21:01

this. treaty actually contains a

00:21:05
whole chapter entitled obligations and

00:21:06
duties of investors and Investments,

00:21:08
which said I'll really wide

00:21:13
ranging. requirements on the invent

00:21:17
on on these entities such

00:21:21
as to conduct environmental and

00:21:23
social impact assessment when making

00:21:25
the investment to Apply precautionary

00:21:31
principle when dealing with the

00:21:33
results of this assessments. I

00:21:35
have underlined some of these

00:21:36
requirements just to bring the

00:21:40
specific sections to your attention,

00:21:42

but they are that there's

00:21:44

an undecorruption provision. So say

00:21:48

saying that investors and Investments

00:21:51

shall not engage in corruption,

00:21:53

but also Provisions such as

00:21:55

in article 14:2 that investors

00:21:57

show uphold human rights or

00:21:59

that in paragraph four that

00:22:01

they shall act in accordance

00:22:03

with fundamental liver standards as

00:22:05

stipulated in the ILO Declaration

00:22:07

on fundamental principles and rights

00:22:09

of work. Now you can

00:22:12

see that these Provisions are

00:22:13

formulated in a language of

00:22:15

legal obligation. So stating that

00:22:18

an investor or an investment

00:22:20

the local corporate vehicle shell

00:22:22

or shall not engage in

00:22:24

particular conduct. And anyone who

00:22:27

has ever observed. International negotiations

00:22:32

will know that that states

00:22:34

are quite aware that the

00:22:36

language shell is one that

00:22:37

designates creation of legal obligation.

00:22:40

So they will be careful

00:22:41

not to use it in

00:22:42

case they do not intend

00:22:44

normative. affect awkward so I

00:22:50

suppose it would seem that

00:22:53

this mandatory investor address Shell

00:22:57

language expresses the state parties

00:22:59

invention to impose legal obligations

00:23:01

on foreign investors. The language

00:23:05

is clearly distinct from Provisions

00:23:07

that address investors but use

00:23:09

the hortatory Expression shoot at

00:23:12

sit there. um And the

00:23:16

invention to create legal obligations

00:23:18

for investors has also been

00:23:20

confirmed through statements of Representatives

00:23:23

of states in on occasion

00:23:25

in in various International forum.

00:23:29

so I suppose my point

00:23:32

here is that international law

00:23:38

has been built on or

00:23:41

is built on I suppose

00:23:43

a number of principles, but

00:23:45

the one that's that really

00:23:46

seems to be foundational is

00:23:50

this idea that state practice

00:23:51

is normative. So that it

00:23:54

would be in fact within

00:23:55

the competence of states to

00:23:58

use treaties as effectively alone

00:24:01

making instrument. So the same

00:24:02

way as they will domestically

00:24:04

legislate for private parties, they

00:24:08

could use treaties as well-making

00:24:13

instrument at the international level

00:24:14

and indeed if we look

00:24:16

across the landscape of international

00:24:17

law. This would not be

00:24:19

the only instance when treaties

00:24:21

have been used to impose

00:24:24

obligations on non-state entities. So

00:24:27

we and we see that

00:24:28

both in relation to individuals

00:24:29

and in relation to Collective

00:24:30

entities, for example in the

00:24:33

longer sea or monetarian a

00:24:36

lot of treaties. so I

00:24:43

suppose. Let's move to my

00:24:46

next slide. I thought I

00:24:54

should give just an overview

00:24:56

what are the types of

00:24:57

obligations the type of content

00:24:59

that we may see in

00:25:00

in this treaties and they

00:25:05

will include obligations to comply

00:25:08

with the whole State's law

00:25:10

reporting obligations anti corruption obligations,

00:25:15

but also investor reliability for

00:25:16

harm, which is interesting and

00:25:19

I expect that one of

00:25:20

the other panel is still

00:25:22

talk about this problem, obviously

00:25:25

a provision or an obligation

00:25:27

an obligation and investment really

00:25:30

May in certain circumstances if

00:25:33

serve as a basis for

00:25:35

a claim by the whole

00:25:36

states against the investor, but

00:25:38

it is it will not

00:25:39
serve as a as a

00:25:41
vehicle on its own. for

00:25:44
for victims of any injury

00:25:48
by the foreign investor and

00:25:51
so some of these treaties

00:25:53
in fact contain a provision

00:25:55
which set out the possibility

00:25:59
for such claimed by private

00:26:01
parties. Perhaps the last thing

00:26:03
I would like to tell

00:26:04
you about if I may

00:26:06
ask for the next slide.

00:26:10
would be a Because we

00:26:14
as you know practicing laws

00:26:16
will always say, okay. Well,

00:26:17
we'll do the cases say

00:26:20
And there is a arguably

00:26:23
there is very little and

00:26:25
I as far as I'm

00:26:27
aware of and in fact,

00:26:28
there's only one case that

00:26:30
I'm aware of that has

00:26:32
dealt with a provision of

00:26:35
the sort of an investor

00:26:37
shell. In this case the

00:26:39
Bound by the loss and

00:26:40

regulations enforce. and shall not

00:26:44

shall refrain from all acts

00:26:46

that may disturb public order

00:26:47

or morals or that may

00:26:49

be presidential to the public

00:26:51

interest, which is article 9

00:26:52

from The organization of Islamic

00:26:55

conference investment agreement and in

00:26:58

alvarak Indonesia case the arbitral

00:27:01

tribunal took the view that

00:27:02

this is really a direct

00:27:04

obligation on the investor. In

00:27:06

fact, the investor themselves agreed

00:27:08

that this was an obligation

00:27:10

that the treaty imposed on

00:27:12

them. And what the type

00:27:15

and and the tribunal found

00:27:17

that the claimant the investor

00:27:19

actually breached this obligation and

00:27:22

by virtue of that bridge

00:27:23

was prevented from pursuing a

00:27:26

claim for a violation of

00:27:28

the standards of protection of

00:27:29

their investment. So even though

00:27:31

the tribunal took the view

00:27:33

that the claimant did not

00:27:34

receive fair connect with the

00:27:36

treatment, they could not claim

00:27:37

and they cannot request they

00:27:39

could not request compensation. um

00:27:42

in that case the the

00:27:44

whole state actually tried to

00:27:45

go a bit further and

00:27:46

file also filed a counterclaim

00:27:49

essentially seeking damages for the

00:27:53

breach of the article of

00:27:56

the obligation and there it

00:27:59

didn't succeed. So so the

00:28:02

award is quite brief on

00:28:04

this point. It seems that

00:28:05

they simply did not really

00:28:07

care the evidentiary burden and

00:28:08

and explain what specific injury

00:28:12

was attributable or what specific

00:28:13

damage was attributable to the

00:28:16

investor in the arbitration. and

00:28:19

so I suppose my conclusion

00:28:25

would be that. one of

00:28:30

the questions is if it

00:28:31

is possible for bids to

00:28:33

impose obligations of investors and

00:28:35

I gave you some ideas

00:28:36

as to whether or not

00:28:40

this may be the case,

00:28:40
but even if it is

00:28:42
the question is is it

00:28:43
a good idea to do

00:28:45
so And if it is

00:28:46
a good idea then what

00:28:48
should be the content of

00:28:49
this obligations and what would

00:28:51
be their effects and with

00:28:53
that I will stop because

00:28:54
I expect that this is

00:28:55
what my colleagues will be

00:28:56
talking about. Thank you very

00:28:57
much. Great. Thank you very

00:29:02

much Clara for that excellent

00:29:05

introduction and overview of the

00:29:06

state of play with respect

00:29:08

to City treaty practice and

00:29:10

attempt to incorporate obligations on

00:29:14

investors into into bilateral investment

00:29:17

treaties. I'll hand the floor

00:29:18

over now to Jose Antonio.

00:29:20

Who's going to take the

00:29:22

conversation forward? Thank you, Jose

00:29:24

Antonio. Thank you Chester. And

00:29:27

thank you Clara for for

00:29:30

your you know, Wonderful presentation.

00:29:32

It actually helps me quite

00:29:34

a bit because you covered

00:29:35

some of the things that

00:29:36

that I was afraid. I

00:29:38

would not be covering. So

00:29:41

it needs very very well

00:29:42

into what I will be

00:29:44

sharing with with everyone so

00:29:48

Let me share my slides.

00:30:09

Can you all see it?

00:30:12

We're not yet. Yes, excellent.

00:30:16

Okay, so So I will

00:30:28

address. the investment treaty architecture

00:30:35

Incorporating investor obligations and and

00:30:38

what what this means is

00:30:40

is how to create a

00:30:41

treaty that would be practical.

00:30:45

And that would ultimately. if

00:30:52

relied upon by a state

00:30:55

for certain breaches of the

00:30:59

investor would pass the several

00:31:03

tests. jurisdictional tests as well

00:31:08

as merits test that an

00:31:12

investor State Tribunal would would

00:31:16

actually do when analyzing a

00:31:19

case of a breach of

00:31:21

certain invest investor obligations in

00:31:26

investor State arbitration. There are

00:31:29

a couple of questions that

00:31:31

that Are obvious here and

00:31:35

I would like to briefly

00:31:36

address. Some of them one

00:31:38

is why investor obligations in

00:31:40

investment treaties. Is it balanced

00:31:45

nowadays? There's a there's a

00:31:46

whole discussion in on Central

00:31:48

about reform and it has

00:31:51

been said as as indicated

00:31:53

by Clara that that this

00:31:55

trees are asymmetric because they

00:31:57

mainly include obligations of investor

00:32:01

of States but not obligations

00:32:03

of investors. So one one

00:32:06

reason would be balanced and

00:32:08

if anything in my mind

00:32:14

Even beyond the court where

00:32:16

I'm beyond a number. I'm

00:32:18

referring to the investment multilateral

00:32:20

court that is being proposed

00:32:22

in unstrual group 3 and

00:32:24

and Beyond a number of

00:32:26

reforms are being proposed one.

00:32:29

One question in my mind

00:32:30

is is what could bring

00:32:32

balance to the system in

00:32:35

a system that has three

00:32:37

thousand and three hundred treaties

00:32:40

and most of them most

00:32:42

of them. I would say

00:32:43

I would say that less

00:32:44

person less than 1% of

00:32:46

those treaties have investors obligations.

00:32:48

There's there's something of innate

00:32:54

a symmetry and imbalance in

00:32:56

in a system such as

00:32:57

as the one that we

00:32:58

have. So seriously looking at

00:33:01

bringing some balance to the

00:33:03

table the issue of investor

00:33:06

obligations should be addressed. So

00:33:08

that's that simply to say

00:33:10

in what camp am I

00:33:11

when we think about investor

00:33:13

obligations then the next the

00:33:15

next the next question is

00:33:18

is If you include certain

00:33:22

investor obligations in an investment

00:33:25

treaty arbitration or an investment

00:33:28

treaty, how do you still

00:33:30

respect the principle of consent

00:33:32

as as Clara Wells said,

00:33:34

well, the treaty is really

00:33:36

an instrument that is agreed

00:33:40

upon by two. Subjects of

00:33:44

public international law the states

00:33:46

and the investor is not

00:33:48

party to that treaty. So

00:33:51

one would say if one

00:33:54

is respectful of the principle

00:33:55

of consent that the the

00:33:58

treaty is unable to impose

00:34:01

obligations on the investor. except

00:34:06

if the investor consents so

00:34:10

that's a big if and

00:34:12

then then comes a question

00:34:14

of practicality how do you

00:34:17

create an architecture that that

00:34:20

would include that consent and

00:34:23

that when analyzed by a

00:34:26

tribunal would be affirmatively upheld

00:34:34

in terms of jurisdiction and

00:34:37

in terms of Merit. So

00:34:39

those are the questions now.

00:34:42

based on on those questions

00:34:45

What we have here is

00:34:47

a roadmap of two parts

00:34:49

one the obligations of investors,

00:34:52

which may give rise to

00:34:53

direct State claims or counterclaims.

00:34:56

and the second part is

00:35:00

the architecture itself, which is

00:35:01

the main subject of my

00:35:03

presentation. I'm really thankful to

00:35:06

to Clara because the first

00:35:08

part was was incredibly well

00:35:10

addressed. So that gives me

00:35:12

a little bit more time

00:35:12

but before going there. I

00:35:16

would like to. emphasize two

00:35:19

problems that that arise in

00:35:22

in that in that question

00:35:24
of how to create a

00:35:25
treaty that would would pass

00:35:29
the test of a tribunal

00:35:32
and and let's let's see

00:35:34
on the jurisdictional front a

00:35:37
recent case the nitrogeny electric

00:35:39
Caribe versus Colombia case in

00:35:42
that case. the Republic of

00:35:46
Colombia submitted a counterclaim and

00:35:51
the case relates to energy

00:35:55
in the coast of the

00:35:58
Caribbean coast of Colombia and

00:36:00
and Colombia argued that that

00:36:01

Nature's mismanagement of electrical eBay

00:36:05

forced it to channel funds

00:36:07

into the company to maintain

00:36:09

its operations during the intervention

00:36:11

and produced a negative impact

00:36:14

in Regional development in the

00:36:16

whole coast of Colombia. the

00:36:18

the tribunal basically assessed under

00:36:23

the test provided by article

00:36:26

46 of the exit convention.

00:36:31

It assessed whether there was

00:36:33

a consent. to bringing a

00:36:38

counterclaim and it concluded that

00:36:41

under the applicable article of

00:36:43

the pit between Spain and

00:36:45

Colombia. The scope of consent

00:36:50

was to narrow us to

00:36:52

include counterclaims. It also it

00:36:57

also analyzed the counterclaim and

00:37:00

it concluded that. The case

00:37:05

on counterclaims was not sufficiently

00:37:07

linked to the original claim.

00:37:09

So those those are two

00:37:11

elements of article 46 of

00:37:13

the exit convention and and

00:37:16

you can see here that

00:37:17

there was no consent by

00:37:20

the investor to bring a

00:37:21

counterclaim. So part of of

00:37:23

this is the scope of

00:37:27

This the scope within the

00:37:28

treaty the applicable treaty to

00:37:30

allow for the counterclaim or

00:37:33

the direct Claim by the

00:37:34

state to be brought. So

00:37:36

it has to be sufficiently

00:37:37

broad as to include counterclaims

00:37:42

either because they're specifically spelled

00:37:44

out in the treaty or

00:37:46

because the treaty says that

00:37:48

you know, any disputes can

00:37:51

be brought by either party

00:37:52

for instance that kind of

00:37:53

language would allow counterclaim to

00:37:55

to be brought. So beyond

00:37:57

that we've looked at a

00:38:00

more jurisdictional question beyond that.

00:38:04

Let's say that let's say

00:38:05

that the scope of the

00:38:07

provision on investors State arbitration

00:38:10

within the applicable treaty. Has

00:38:13

a sufficiently broad. Language that

00:38:16

would include counterclaims that's only

00:38:19

one part of the problem.

00:38:22

The other part of the

00:38:23

problem and and just to

00:38:24

see within this slide. You

00:38:27

have a number of Decisions

00:38:31

that have most of them

00:38:33

have been dismissed on jurisdictional

00:38:35

grounds. The ones that have

00:38:39

made it on on both

00:38:43

jurisdictional and merits grounds. Are

00:38:47

counterclaims that have been based

00:38:49

on? a contract Claim not

00:38:54

on a treaty claim. The

00:38:56

only one that has made

00:38:59

it. based solely on a

00:39:06

treaty Claim has has made

00:39:11

it pasteurization at the end

00:39:12

of the day. They didn't

00:39:13

make it on the marriage,

00:39:15

but they they made it

00:39:17

past jurisdiction. Is for Bossier

00:39:20

versus Argentina, there's there's another

00:39:23

there's a couple of cases

00:39:24

against Tech whether we're where

00:39:26

there were both contract claims

00:39:28

and and and treaty claims.

00:39:29

But but those ones were

00:39:32

all So based on contracts

00:39:33

not only on treaty claims,

00:39:34

but the one that has

00:39:35

made it solely on the

00:39:36

basis of of a treaty

00:39:39

pasteurization is were Bossier. So

00:39:43

let let's look at Uber.

00:39:44

We have Argentina brought up

00:39:48

counterclaim arguing that Uber's failure

00:39:52

to provide the necessary investment

00:39:53

caused a violation of fundamental

00:39:55

right for access to water.

00:39:58

Which was the very purpose

00:39:59

of the investment agreed? Then

00:40:02

the tribunal declared that it

00:40:03

had jurisdiction over the counterclaim

00:40:06

considering that the principal claim

00:40:08

and the claim opposed to

00:40:10

it are based on the

00:40:11

same investment or the alleged

00:40:14

lack of sufficient investment in

00:40:15

relation to the same concession.

00:40:17

So so far so good,

00:40:18

but then when it analyzed

00:40:20

the actual substantive claim the

00:40:25

Tribunal concluded or dismissed the

00:40:31

case on the Merit because

00:40:32

none of the provisions of

00:40:34

the bit had the effect

00:40:36

of transferring the concession to

00:40:38

the concessionaire and obligation to

00:40:40

perform Services complying with the

00:40:43

residents human rights to access

00:40:46

to water and sewage so

00:40:50

This is a tricky bit

00:40:52

of most bits. So with

00:40:56

that it extremely important that

00:41:00

if a treaty is to

00:41:02

be is to make it

00:41:03

past jurisdiction there be some

00:41:06
obligations. Of investors that they

00:41:09
have to comply with and

00:41:11
and Clara already provided, you

00:41:15
know, a very precise number

00:41:17
of treaties that have shall

00:41:19
the shall do or shall

00:41:22
language. I'm just going to

00:41:24
give you one punctual example,

00:41:28
which I believe is a

00:41:29
very strong language the Moroccan

00:41:31
Nigeria beat in progress two

00:41:35
to four. It's quite evident

00:41:38
that this would be International

00:41:42
obligations and not only domestic

00:41:45
obligations Incorporated by reference. This

00:41:48
would be International obligations that

00:41:49
that the state the the

00:41:52
investor has to comply with.

00:41:54
So for instance paragraph two

00:41:56
investors and investment shall uphold

00:41:59
human rights in the whole

00:42:00
state or three investors and

00:42:03
investment shall act in accordance

00:42:04
with core labor standards as

00:42:06
required by the ILO declaration

00:42:08
or investors and investment shall

00:42:11

not manage or operate the

00:42:13

invest in a manner that

00:42:14

circumvents International environmental labor and

00:42:17

human rights obligations. So as

00:42:19

to the content, you can

00:42:21

actually look at the at

00:42:25

the content basically by referring

00:42:29

to a number of ILO

00:42:31

conventions, which I will I

00:42:33

will not deal into that

00:42:34

because because of time the

00:42:35

presentation will will be made

00:42:37

available other parts of other

00:42:40

contents that would be of

00:42:41

importance. I believe the precautionary

00:42:43

principle in in in Environmental

00:42:49

international law. So once you

00:42:51

have the obligations, where do

00:42:53

you go? We still don't

00:42:54

have consent and this is

00:42:56

this is where The the

00:43:01

architecture becomes important this slide

00:43:04

shows a very similar language

00:43:06

to the Nigeria Morocco bit

00:43:09

so I won't go into

00:43:11

it. And this is the

00:43:14

slide that really makes a

00:43:15
proposal concerning the architecture and

00:43:18
the proposal. I'll explain it

00:43:20
is a very straightforward. which

00:43:23
is You could. As a

00:43:28
state you could. gather the

00:43:32
investors consent by making an

00:43:38
explicit confirmation by the investor

00:43:43
that it will comply with

00:43:49
the investors obligations before the

00:43:54
request for arbitration is submitted

00:43:57
or at the time that

00:43:58
the request of arbitration is

00:43:59
submitted. So I'd like to

00:44:02

sort of explain how this

00:44:03

would work in in NAFTA

00:44:06

treaties or in the arcafe

00:44:09

treaties or or us Colombia

00:44:11

treaties there there are requirements.

00:44:14

of consent if the investor

00:44:18

does not comply with those

00:44:20

requirements then consent to arbitration

00:44:23

by the state is not

00:44:25

given so what you what

00:44:28

what a state may create

00:44:30

is an Annex which would

00:44:34

include a specific condition that

00:44:38

the investor would have to

00:44:40

fulfill. for the tribunal to

00:44:43

understand that There has been

00:44:47

consent by the state. for

00:44:50

the submission of the request

00:44:52

for arbitration if that Annex

00:44:57

is not signed as a

00:44:59

confirmation. by the investor then

00:45:06

That dispute would not be

00:45:07

within the scope of the

00:45:08

Tribunal. just like I wave

00:45:12

a number of waivers are

00:45:14

required in in NAFTA like

00:45:17

treaties, so and and I'll

00:45:21

try to repeat it because

00:45:24

there would be an Annex

00:45:25

and within that Annex there

00:45:28

would be a requirement that

00:45:31

the investor acknowledges. That those

00:45:36

obligations exist, but also that

00:45:39

those obligations bind the investor.

00:45:45

And the content of that

00:45:46

Annex or proposed. Annex is

00:45:49

provided here. So it reads.

00:45:54

You know. or the other

00:45:56

reference to that annexes provide

00:45:58

here so it would be

00:46:01

Included within the articles on

00:46:04
conditions precedent to submission of

00:46:06
a claim to consulation or

00:46:08
arbitration. And paragraph one would

00:46:11
read a disputing investor. It

00:46:13
may submit a claim to

00:46:15
conciliation or arbitration only if

00:46:18
the disputing investors submits the

00:46:21
completed form of consent to

00:46:23
counterclaim of arbitration and thereby

00:46:27
confirms its consent to be

00:46:28
bound by those obligations included

00:46:31
under article X wherever the

00:46:33
behavior of investors is in

00:46:35
the treaty. And consent to

00:46:38
International arbitration in the event

00:46:39
that the disputing party submits

00:46:42
a counterclaim. Arising directly out

00:46:46
of the subject matter of

00:46:48
the dispute. In the same

00:46:50
arbitration forum, and before the

00:46:52
same arbitration tribunal hearing the

00:46:55
dispute submitted by the disputing

00:46:58
investor. That in my view

00:47:04
would solve the issue of

00:47:07
consent because unless they let's

00:47:11
investor science the form. There

00:47:15
there would be no. jurisdiction

00:47:19
for the tribunal to hear

00:47:23
any part of the case

00:47:24
neither the the investors claim

00:47:26
nor the the state's claim

00:47:28
and with that I would

00:47:30
like to to conclude my

00:47:31
remarks. Thank you very much.

00:47:36
Thanks very much, Jose Antonio.

00:47:38
Some very interesting 3D practice

00:47:40
there without any further Ado.

00:47:43
I'll pass over to Rome.

00:47:44
Thank you Rob. Here. Okay.

00:48:15

So let me ask to

00:48:16

confirm could you see the

00:48:17

slides as I put them

00:48:20

here? There we are. Are

00:48:21

we able to see the

00:48:21

slides? Great. Okay. Thanks very

00:48:24

much Chester. So I'm delighted

00:48:26

to be here and to

00:48:28

just speak with you about

00:48:28

such an exciting such an

00:48:30

interesting topic incorporating obligations of

00:48:32

investors in bilateral investment treaties.

00:48:35

Great presentations have come before

00:48:36

me and I'm delighted to

00:48:38

hear the comments that have

00:48:40

been made because they remind

00:48:41

me of some of the

00:48:42

recent practice that we've been

00:48:43

engaged in and I'm happy

00:48:44

to talk about that. And

00:48:46

so first I'm based here

00:48:48

in Singapore I've acted for

00:48:49

sovereign states in a number

00:48:50

of contexts. I've also actually

00:48:51

investment tree commercial just skates

00:48:54

and I have experience with

00:48:55

a range of garbage for

00:48:57

rules. I'm here first to

00:48:59

say thank you to the

00:49:00

wow conference organizers and to

00:49:03

my fellow panelists. What I'm

00:49:04

here to say is it's

00:49:05

not offered as legal advice.

00:49:06

However, and I want to

00:49:08

make sure that I mention

00:49:09

that I'm appearing in my

00:49:10

personal capacity and my opinions

00:49:12

reviews expressed here our mind

00:49:14

alone and do not necessarily

00:49:15

reflect the opinions reviews. So

00:49:17

my Law Firm or any

00:49:18

other interview or individual So

00:49:20

right. Yeah before you go

00:49:22

on I've just noticed that

00:49:23

as you got off the

00:49:24

first or second Slide, the

00:49:26

slides are not quite aligned

00:49:27

as lines and I'm seeing

00:49:29

them. I don't know if

00:49:30

others are having the same

00:49:31

problem. I think somebody else

00:49:32

was in the chat. Oh,

00:49:33

it is a good way

00:49:34

that they that that's good

00:49:37

question. Let me ask. Um

00:49:39

Maria Lucia. Are you able

00:49:41

to maybe a few share

00:49:42

them? Maybe that'll fix the

00:49:43

problem. I guess the format

00:49:46

may be off. We have

00:49:51

a quick look. Oh, there

00:49:58

we go. I think that's

00:50:00

better already. Yeah. Yes indeed.

00:50:03

Thanks very much. Okay, then

00:50:04

we'll just saying excellent. Thanks

00:50:05

very much next. Okay, great.

00:50:10

So we've said this next

00:50:11

slide. Okay, great. So we'll

00:50:14

talk about four things first.

00:50:16

We'll talk about Confluence in

00:50:18

just a moment of a

00:50:19

couple of regimes in public

00:50:20

international law, then we'll move

00:50:21

on to treaty modeling essentially

00:50:23

moving those those two regimes

00:50:26

and public international law together.

00:50:27

And then the Hague girls

00:50:29

speak about that briefly and

00:50:31

then we'll finally conclude with

00:50:32

future practice next slide, please.

00:50:36

So Confluence, I will have

00:50:38

it just the next slide,

00:50:39

please. So we're talking here

00:50:42

today about the Confluence of

00:50:43

two regimes of public international

00:50:44

law. This is already been

00:50:45

discussed by the panelists today.

00:50:48

I'm on the one hand.

00:50:49

We have investment protection on

00:50:51

the other hand. We have

00:50:51

business in human rights and

00:50:53

many people have seen in

00:50:54

the center of the opportunity

00:50:56

the potential of bringing those

00:50:57

two regimes together into the

00:50:59

Next Generation investment treaty models.

00:51:01

Next life is We're here

00:51:07

to talk about how to

00:51:08

do that. Now. The entire

00:51:09

conference is about the investment

00:51:11

protection and promotion. You know

00:51:14

the side of things so

00:51:16

we'll talk just a bit

00:51:16

about the business of Human

00:51:18

Rights regime. It's already been

00:51:20

mentioned the UN guiding principles

00:51:21

on business and human rights

00:51:22

three pillars to it the

00:51:23

state duty to protect human

00:51:24

rights the corporate responsibility to

00:51:26

respect human rights. And then

00:51:27

finally the access to remedy

00:51:28

I would just point out

00:51:29

that pillars 1 and 3.

00:51:30

Those are applying to States

00:51:33

pillars 2 and 3 apply

00:51:35

to corporates. So pillar three

00:51:37

is the one that shared

00:51:38

Next slide please. So we

00:51:41

have objectives stated in the

00:51:42

guiding principles. And this is

00:51:44

in the general principle section.

00:51:45

It says enhancing standards and

00:51:48

practices with regard to business

00:51:49

and human rights. So as

00:51:50

to achieve tangible results for

00:51:52

affected individuals and communities real-life

00:51:55

folks real people and thereby

00:51:57

also contributing to a socially

00:51:59

sustainable globalization interesting to me

00:52:01

here is the fact that

00:52:03

we're talking about an in-game

00:52:05

of globalization and it's also

00:52:07

the case that a lot

00:52:08

of people might say anyway

00:52:09

that the investment protection regime

00:52:12

has has the benefit of

00:52:14

increasing globalization and some respects

00:52:17

or at least cross-border investment

00:52:18

in some ways interesting to

00:52:19

see that there is some

00:52:20

overlap even in terms of

00:52:21

the objectives even guiding principles

00:52:23

are organized into foundational principles

00:52:25

and operational principles. I mentioned

00:52:26

that because the foundational principles

00:52:28

are a little more broadly

00:52:30

more General operational principles. They

00:52:32

start to to be a

00:52:34

little more specific next slide.

00:52:37

So what does it mean

00:52:38

to as a corporate as

00:52:40

a private sector entity that's

00:52:43

business and human rights obligation

00:52:45

should apply to you regarding

00:52:47

principle. 11 says that business

00:52:49

enterprises should respect human rights.

00:52:50

This means that they should

00:52:52

avoid infringing on the human

00:52:53

rights of others and also

00:52:54

they should address adverse human

00:52:56

rights impacts with which they

00:52:58

are involved. Now that's once

00:52:59

again General language and some

00:53:01

people might say well, what

00:53:02

does that mean? It's so

00:53:03

General. Let's take a look

00:53:04

then at the next slide.

00:53:06

Guiding principle 15 still in

00:53:08

in the foundational type of

00:53:11

principle but drilling down just

00:53:12

a little bit here. We

00:53:13

have something that becomes a

00:53:14

little more specific. We have

00:53:15

a policy commitment. We have

00:53:17

a human rights due diligence

00:53:19

process that must be in

00:53:20

place. We also have processes

00:53:21

to enable the remediation and

00:53:23

this this guiding principle 15

00:53:25

is followed by even more

00:53:27

specific principles as well. And

00:53:29

so it's not just that

00:53:31

this is aspirational language.

00:53:34

It's not just that the

00:53:36

guiding principles are there to

00:53:37

provide kind of General guidance,

00:53:39

but nothing specific. There are

00:53:41

specific obligations on I'm on

00:53:44

corporate entities that are listed

00:53:46

and understood under you and

00:53:49

principles next slightly. So how

00:53:55

do you take those un

00:53:57

guiding principles and put them

00:53:58

to work into investment treaties?

00:54:00

That's the question that's been

00:54:02

discussed here, especially with respect

00:54:03

to the topic of consent.

00:54:04

And that's what I'm delighted

00:54:06

to talk about today because

00:54:07

that's some of the work

00:54:07

that we've been doing recently

00:54:08

is on this very topic

00:54:09

next slide, please. So recently

00:54:13

we have seen the same

00:54:14

picture investment protection on the

00:54:16

one hand business and human

00:54:18

rights on the other in

00:54:19

the center potential what we've

00:54:21

seen there in particular. However

00:54:23

is a new treaty model

00:54:25

that we have developed that

00:54:26

we think is a Next

00:54:27

Generation treaty model called the

00:54:28
sustainable investment facilitation and cooperation

00:54:30
agreement or sifca next slide,

00:54:34
please. Now the sifca came

00:54:37
from a you know, a

00:54:40
client need like most things

00:54:42
that come in the private

00:54:44
practice of law. There was

00:54:46
a a need by a

00:54:49
lease developed country for the

00:54:51
development of a model bilateral

00:54:52
investment treaty a bit. And

00:54:54
so that's how we developed.

00:54:55
This was for the specific

00:54:57

concerns of a particular at

00:54:59

least developed country. That's the

00:55:01

perspective of the kind of

00:55:02

inception that we brought to

00:55:04

this this discussion. Now it

00:55:08

starts with the Baseline limitation

00:55:09

of the scope of State

00:55:10

obligations. That's kind of the

00:55:12

Baseline expectation within the sifb

00:55:13

and I will talk about

00:55:14

that today so much because

00:55:15

many people do talk about

00:55:16

limiting State obligations the idea

00:55:18

being that you don't want

00:55:20

to make the promise, you

00:55:21

know to investors up front

00:55:23

of a certain broad scope,

00:55:24

like for example, some of

00:55:25

the bits that have been

00:55:27

written and put into place

00:55:29

back into the 90s. I'm

00:55:31

very broad scope of substantial

00:55:32

obligations. You may not want

00:55:33

that these days as treaty

00:55:36

practice evolves, but we've gone

00:55:38

a little farther than that

00:55:39

next slide. In the zipper

00:55:42
framework, we're looking not just

00:55:44
to limit the scope of

00:55:46
the substantial obligations that states

00:55:49
take on but also to

00:55:51
introduce Investors Business in human

00:55:53
rights obligations as a shield

00:55:54
for hosting. So that's one

00:55:55
thing right the conversation so

00:55:58
far. We've been talking about

00:55:59
how to in, you know

00:56:00
kind of apply business and

00:56:02
human rights obligations to investors

00:56:03
for their unsafe and that's

00:56:04

definitely valuable conversation, but here

00:56:06

just to start out using

00:56:08

business and human rights obligations

00:56:10

as a shield for host

00:56:11

States in International Investment agreements

00:56:12

secondly to reduce power and

00:56:14

balances and investor State dispute

00:56:16

settlement between developing States and

00:56:18

wealthundered investors and also to

00:56:20

promote more equal sharing of

00:56:22

risks and benefits in modern

00:56:23

investment treaty practice next slide,

00:56:25

please So pre-arbitral requirements under

00:56:29

the Pacifica. This will look

00:56:30

very familiar to many practitioners

00:56:32

the exertion of local remedies.

00:56:33

It's a common thing and

00:56:35

the notice of Mitchell disputes

00:56:36

some sort of notice requirement

00:56:37

at six month period for

00:56:39

consultation and negotiation. These things

00:56:40

are all in a number

00:56:42

of treaties and they exist

00:56:43

in the circular framework as

00:56:44

well. Moving on beyond that

00:56:46

step though beyond that that

00:56:47

level of evolution let's say

00:56:48
and we all sort of

00:56:50
require a further advanced notice

00:56:51
with an investor declaration of

00:56:53
compliance both with the terms

00:56:54
of the Citgo model itself,

00:56:55
the instant tree and the

00:56:57
UN guiding principles. So an

00:56:59
investor declaration saying in specific

00:57:01
terms that the investor has

00:57:03
complied next slide. Now what

00:57:06
do we do with that?

00:57:07
Arbitration is available under not

00:57:10
just the exit rules, but

00:57:11

also interestingly and we'll talk

00:57:12

about this in the next

00:57:13

section under the Hague rules

00:57:15

on business and human rights

00:57:16

arbitration the Hague rules with

00:57:18

some amendments now, that's something

00:57:19

that that may take some

00:57:21

folks by surprise aren't those

00:57:23

rules for that are specific

00:57:25

to business of Human Rights

00:57:26

arbitration. We'll talk about that

00:57:27

in the next section deposits

00:57:29

are paid by the investor.

00:57:30

That's another way that the

00:57:32

cific builds in certain protections

00:57:34

for those competition and opportunities

00:57:36

dependent upon compliance with the

00:57:38

unbank principles. So even if

00:57:40

there is an award at

00:57:41

the end of some amount

00:57:42

of compensation that's due to

00:57:45

the investor then that amount

00:57:46

must be decided in accordance

00:57:48

with the compliance record of

00:57:50

the investor. Next slide please.

00:57:54

Other key features, the tribunal

00:57:56

shall exclude claims is inadmissible.

00:57:58

If the investors declaration is

00:58:00

untruthful or if more than

00:58:02

five years have passed since

00:58:03

the claim arose or there

00:58:04

was knowledge of the loss

00:58:05

or damage. So the idea

00:58:06

of being here that there

00:58:08

is the first gate. A

00:58:10

declaration must be made in

00:58:11

order for the host state

00:58:12

to provide its consent to

00:58:14

jurisdiction for attribunal. And then

00:58:16

the second date for claims

00:58:17

that if that decoration was

00:58:19

untruthful. In some respect then

00:58:22

the claims themselves are indivisible

00:58:24

against the host state next

00:58:25

slide. Other key features and

00:58:30

and this has been addressed

00:58:31

here just a moment ago

00:58:32

with some some excellent comments

00:58:34

that have been made by

00:58:35

the last speaker talking about

00:58:36

consent and how investors can

00:58:37

consent specific terms and how

00:58:39

that might look in convincing

00:58:40

arbitration under the sofa model

00:58:42

investors consent to recognizing human

00:58:43

rights Environmental Protection sustainability and

00:58:46

investment protection as interrelated and

00:58:48

arising directly from an investment

00:58:49

that last language arising directly

00:58:51

from an investment, of course

00:58:52

speaking to exit arbitration and

00:58:54

jurisdiction under the convention and

00:58:57

generally speaking. This language is

00:59:00

going to address one of

00:59:01

the two major concerns that

00:59:03

was cited just a moment

00:59:04

ago, as you know barriers

00:59:07

that need to be overcome

00:59:08

in order for this for

00:59:09

treaties to contain investor obligations

00:59:12

essentially recognizing that For a

00:59:15

long time we have said

00:59:16

well in Investments investment with

00:59:17

some sort of expectation in

00:59:19

our minds, even if the

00:59:20

definition doesn't necessarily exist within

00:59:22

the language of the treaty

00:59:23

itself. Well, you know what

00:59:25

a an investment looks like

00:59:26

when we see it. Maybe

00:59:28

that's the idea. Here investors

00:59:31

can sense specifically when they

00:59:32

undertake investor State arbitration against

00:59:34

this host state that has

00:59:36

the Civil model in place

00:59:37

that they will recognize that

00:59:39

it's not just the instant

00:59:41

investment itself, but it's also

00:59:42

the broader context and specifically

00:59:44

these facets of the context.

00:59:46

Also tribunal jurisdiction over any

00:59:47

third-party claims asserted against the

00:59:49

investor and there's language included

00:59:51

that specifically mentions class and

00:59:52

mass claims as well. All

00:59:53

of those are our subject

00:59:54

to the consent of the

00:59:55

investor that that are required.

00:59:58

By those state in order

00:59:59

to give its own consent

01:00:00

to arbitration in the first

01:00:01

place next slide, please. So

01:00:05

broadly and obviously this is

01:00:07

an oversimplification that's been illustrated

01:00:09

by the excellent presentations that

01:00:11

came before but here's the

01:00:12

simplification many people think that

01:00:14
traditional IAS primarily focused on

01:00:16
investment protection. They primarily have

01:00:18
key beneficiaries that are foreign

01:00:20
investors and that the risks

01:00:21
may be disproportionately born by

01:00:23
host States. That's a common

01:00:24
common criticism and it's behind

01:00:26
much of the criticisms that

01:00:27
have led to the current

01:00:29
discussions of Reform and the

01:00:30
Investor's State context under the

01:00:32
significant framework. The purpose is

01:00:36
to integrate both of those

01:00:37
two regimes investment protection on

01:00:39
the one hand in business

01:00:40
and human rights on the

01:00:41
other to reduce power imbalances

01:00:43
and to promote sustainable and

01:00:45
villain development next slide. So

01:00:49
now coming to the Hague

01:00:50
rules for just a moment

01:00:51
before we move on. next

01:00:53
slide if you're not familiar

01:00:56
with the Hague rules, they're

01:00:58
based on the 2013 on

01:00:59
Central arbitral rules arbitration rules,

01:01:01

which are often used to

01:01:02

investors stay open attrition, including

01:01:03

some of the key facets

01:01:05

of the transparency rules. The

01:01:07

stated purpose of the Hague

01:01:08

rules is to provide a

01:01:09

set of rules for the

01:01:10

arbitration of business and human

01:01:12

rights disputes. So once again,

01:01:13

why are we talking about

01:01:14

this in the context of

01:01:16

investors State arbitration next slide,

01:01:18

please? The primary focus is

01:01:22

on upholding responsibilities and reviewing

01:01:24

guiding principles. So once again

01:01:25

one in three for States

01:01:27

pillars 2 and free for

01:01:29

businesses, but interestingly. we have

01:01:34

also an unlimited scope As

01:01:36

with the answers for rules,

01:01:37

the scope of the Hague

01:01:39

rules is not limited by

01:01:39

the type of claimants or

01:01:41

respondents or the subject matter

01:01:42

of the dispute. Okay, and

01:01:44

it also mentions State specifically

01:01:45

it's going from the introductory

01:01:46

note of the the Hague

01:01:48

rules. So the Hague rules

01:01:50

were made. Yes with this

01:01:51

particular purpose in mind, but

01:01:53

also leaving the door open

01:01:55

for its scope to be

01:01:56

broader than that. And in

01:01:58

fact, if you think about

01:01:59

the purpose of the hate

01:02:01

rules where they're intended to

01:02:02

address situations where there is

01:02:04

anticipated to be a power

01:02:05

imbalance between people who claim

01:02:07

to to have have violations

01:02:10

of their International recognize human

01:02:12

rights on the one hand

01:02:12

and private sector industry with

01:02:15

with, you know, some resources

01:02:17

on the other you might

01:02:18

expect that the sort of

01:02:19

approach to developing the rules

01:02:21

might be the sort of

01:02:23

approach that many people would

01:02:24

like to see developed and

01:02:25

investors state arbitrations today where

01:02:27

it's often the case that

01:02:28

people say well there are

01:02:30

maybe well funded investors on

01:02:31

one hand and then on

01:02:32

the other hand you may

01:02:33

have developing countries. Interestingly that

01:02:36

the Hague rules have had

01:02:37

this sort of thinking in

01:02:39

place for the the arbitration

01:02:42

of business and human rights

01:02:43

disputes and that a lot

01:02:44

of that also applies to

01:02:45

our conversations today. So if

01:02:47

we could let's see, I

01:02:49

think we skip back to

01:02:49

the beginning. Looks like we're

01:02:51

there were just a couple

01:02:52

more slides for the end.

01:03:01

Oh. Are we able to

01:03:13

pull them a second so

01:03:14

and if we can go

01:03:15

back just a little bit.

01:03:17

These slides almost there just

01:03:19

a little more. Okay, and

01:03:22

okay if we can go

01:03:23

back just a bit. Just

01:03:26

a little bit more. Okay

01:03:29

good. So now I'm great.

01:03:31

So you have this interesting

01:03:33

situation where the Hague rules

01:03:35

have been targeted and intended

01:03:36

for human rights disputes at

01:03:37

the same time business anymore

01:03:39

rights to speed at the

01:03:40

same time as some of

01:03:40

the same concerns might be

01:03:42

seen to be applicable in

01:03:43

the conversations over a form

01:03:45

of ists next slide, please.

01:03:48

So features unique to the

01:03:49

Hague rules inequality of arms

01:03:51

cultural appropriateness and rights compatibility

01:03:53

Awards required to be rights

01:03:55

compatible next slide. Promotion of

01:03:59

mediation public interest considerations for

01:04:02

transparency expedited arbitration and early

01:04:04

dismissal. Just keep these words

01:04:06

in mind just for a

01:04:07

moment realizing these are or

01:04:08

some of the features that

01:04:10

have been put into behaviorals

01:04:11

to address what has been

01:04:12

seen to be an imbalance

01:04:14

of power between parties next

01:04:17

slide. So also features for

01:04:23

controlling costs and here it's

01:04:25

possible to have a review

01:04:27

of fees and expenses for

01:04:28

the arbitration from the appointing

01:04:29

authority. For example, also awards

01:04:32

are supposed to be reasonable

01:04:33

in a kind of cost

01:04:34

burden on parties departure from

01:04:36

the loser pays principle next

01:04:37

slide. Now turn into future

01:04:42

practice. And this is I

01:04:43

think the important part and

01:04:44

where we'll finish next slide.

01:04:48

so This interestingly May relate

01:04:51
like I said to the

01:04:52
ongoing conversation about possible reform

01:04:54
of isds. Let's have a

01:04:55
quick look at what was

01:04:56
said back in 2017 when

01:04:58
the working group was just

01:04:59
getting you know underway. They

01:05:02
said some of the concerns

01:05:04
and obviously this is not

01:05:05
to say these are the

01:05:05
only concerns but some of

01:05:07
the concerns that they cited

01:05:08
back in 2017 where lengthy

01:05:10
duration and extensive cost of

01:05:12
isds. These are concerns that

01:05:13
might bring you to think

01:05:14
that reform is a good

01:05:15
idea. Lack of transparency in

01:05:18
the proceedings early dismissal mechanism

01:05:19
lack of a mechanism to

01:05:22
address counterclaims versus respondent States

01:05:24
now in the cifca, we

01:05:26
have specifically addressed the extensive

01:05:29
cost of isds to the

01:05:30
extent that you've seen some

01:05:31
of the invention of cost

01:05:33
measures of deposits being required

01:05:35
of investors up front that

01:05:36
the Hague rules also address

01:05:37
this in the event that

01:05:38
those are applicable as opposed

01:05:39
to the exticals and also

01:05:41
the lack of a mechanism

01:05:42
to address counterclints. We've spoken

01:05:43
specifically to third party plans

01:05:45
even certainly within the treaty

01:05:46
that can be built in

01:05:47
as well. Why because once

01:05:49
you have an investor State

01:05:51

arbitration the tribunal has jurisdiction,

01:05:52

why does it mean I'll

01:05:53

have jurisdiction because of the

01:05:55

consent of the parties and

01:05:56

as it's been said here

01:05:57

at the stage of drafting

01:05:58

a treaty you may not

01:05:59

have the consent of a

01:06:01

third party. It's not sitting

01:06:02

at the table. But once

01:06:03

that third party says, I

01:06:04

accept the standing offer to

01:06:06

arbitrate and starts arbitration, then

01:06:09

the tribunal has jurisdiction because

01:06:10
of that consent and that

01:06:12
consent contains the terms that

01:06:13
we're consented too namely the

01:06:15
terms of the tree. If

01:06:16
you see here the red

01:06:17
extends across like a transparency

01:06:19
lack of immigrants and those

01:06:21
are specifically addressed. I would

01:06:22
also note that the lengthy

01:06:23
duration and early dismissal mechanisms.

01:06:25
Those are also some of

01:06:26
the things we do we

01:06:27
know just a moment ago

01:06:28

in the context of the

01:06:29

Hague rules and how that

01:06:30

if they are applicable than

01:06:32

those also might be addressed.

01:06:33

It's interesting just to know

01:06:34

that this might be something

01:06:36

that that could enter into

01:06:38

this important discussion next slide.

01:06:43

Okay, and so I'll leave

01:06:44

you with this question. Essentially.

01:06:46

This is innovative incorporation of

01:06:48

investor obligations the future of

01:06:50

isds. If the Sif can

01:06:52

provide a more balanced investment

01:06:54

treaty practice and increased public

01:06:56

legitimacy of ists. Thank you.

01:07:02

Well, thank you very much.

01:07:04

to all of our panelists

01:07:05

that's been a really interesting

01:07:07

tours through the different issues

01:07:11

beginning with the the age-old

01:07:13

problem that Clara took us

01:07:15

through of investment treaties being

01:07:18

asymmetrical and the obligations really

01:07:20

being all on the states

01:07:21

and and not on the

01:07:24

investors and the investors having

01:07:25
the rights and Clara introduces

01:07:28
to the efforts in some

01:07:30
treaty practice to put obligations

01:07:31
on investors, which then lift

01:07:35
the leaves the problem of

01:07:36
how those enforced Jose Antonio

01:07:38
took us through some interesting

01:07:40
practice and some arbitrations cases

01:07:43
where counterclaims have been made

01:07:45
by States but there's a

01:07:46
bit of a I guess

01:07:48
a bit of a sorry

01:07:48
record with claims are made

01:07:50

by states where those kind

01:07:51

of claims are based on.

01:07:53

The bilateral investment treaty itself,

01:07:55

maybe not so much where

01:07:56

there's a contract also an

01:07:58

issue where County claims have

01:07:59

had more success, but in

01:08:01

most of the treaty cases

01:08:02

the tribunals have even found

01:08:05

not even found on very

01:08:06

many occasions or only one

01:08:07

occasionally all of us a

01:08:09

case that was even within

01:08:10

within jurisdiction. And Rob's taking

01:08:14

us through some very very

01:08:17

recent hot off the press.

01:08:20

work has been done for

01:08:22

a for a client state

01:08:23

in developing a model investment

01:08:25

treaty not only to Make

01:08:29

it clearer. What obligations are

01:08:30

on investors, but also seeking

01:08:33

to provide methods for host

01:08:35

States and not only hosts

01:08:36

but also third parties. To

01:08:38

enforce those obligations those human

01:08:41

rights obligations on investors we

01:08:43
had about I think 10

01:08:45
minutes for some questions. So

01:08:46
if anybody would like to

01:08:47
drop a question into the

01:08:49
into the chat box, I

01:08:51
know there's been a very

01:08:51
active chat box over the

01:08:53
last over the last little

01:08:56
over the last of 20

01:08:58
minutes or so. I might

01:08:59
begin. By asking a panelists

01:09:03
and maybe it's a it's

01:09:04
a broad question. Is there

01:09:07

what sort of difficulties are

01:09:09

there in some of the

01:09:11

obligations and we can begin

01:09:12

with Clara because some of

01:09:13

the treaty standards Provisions that

01:09:15

you referred to Simply referred

01:09:18

to obligations on investors to

01:09:19

comply with. With human rights

01:09:21

and what is a tribunal

01:09:24

to understand what that refers

01:09:25

to because human rights could

01:09:28

be. maybe the content of

01:09:30

the universal Declaration on human

01:09:32

rights or it could be

01:09:33

the content of Any number

01:09:35

of a dozen or more

01:09:36

International treaties and this is

01:09:39

the tribunal to only to

01:09:40

be able to apply those

01:09:41

human rights, which are reflect

01:09:43

customers international law. Does it

01:09:45

have to review the treaty

01:09:46

practice of the relevant host

01:09:48

State as to what human

01:09:48

rights treaties have may have

01:09:50

agreed to be to be

01:09:52

bound by how would try

01:09:54

Google's address that particularly issue.

01:09:56

Maybe I can begin with

01:09:57

you Clara. Um, yes, that's

01:10:04

a hard. I mean the

01:10:05

the example of the human

01:10:07

rights is the most difficult

01:10:09

one because I suppose the

01:10:10

standard view in international human

01:10:12

rights law would be that

01:10:13

there are no Um human

01:10:15

rights obligations of business and

01:10:18

that was the problem that

01:10:19

the UN guiding principles are

01:10:21

trying to bridge by saying.

01:10:22

Okay. Well we are not

01:10:23

going to go there that

01:10:24

we will introduce this idea

01:10:25

of responsibilities. I already mentioned

01:10:27

that so I suppose some

01:10:30

of the potentially human rights

01:10:32

Provisions such as the references

01:10:33

to the aisle declaration that

01:10:36

those may make it a

01:10:38

bit easier because they provide

01:10:39

a specific reference to to

01:10:44

more developed standards if it's

01:10:46

just a clause which says

01:10:48

well businesses will uphold human

01:10:52

rights then obviously this Opens

01:10:55

up the question what that

01:10:56

means and I would I

01:10:58

I guess I'm not offended

01:10:59

by that language given that

01:11:00

this whole field has developed

01:11:02

on treaty language such as

01:11:03

you know State party will

01:11:06

provide fair negatable treatment to

01:11:07

the investor. I would expect

01:11:09

that would tribunal would do

01:11:11

would would in fact be

01:11:12

to look at the relatively

01:11:15

developed analysis within the business

01:11:17

and human right context and

01:11:18

I think here Robert and

01:11:20

his firmware right to kind

01:11:21

of try to merge these

01:11:22

two because they're the question

01:11:24

would be in what way

01:11:26

do or can businesses investors.

01:11:31

I suppose detrimentally impact the

01:11:37

enjoyment of Human Rights. And

01:11:41

thank you, Jose Antonio or

01:11:45

Rob. Would you like to

01:11:46

chime in there? certainly I

01:11:55

I concur with Clara that

01:11:57

that it would be very

01:11:59

difficult to to include language.

01:12:02

That would be too broad

01:12:04

with respect to Human Rights

01:12:06

and starting with the fact

01:12:08

that that the the one

01:12:11

primary subject. That is a

01:12:15

Given the responsibility to uphold

01:12:18

human rights is a state

01:12:19

in within its own jurisdictions.

01:12:22

So so that that's the

01:12:26

way human rights are constructed

01:12:27

that that being said. There

01:12:31

there may be some narrow

01:12:33

language that would give that

01:12:37

would make sense for instance

01:12:39

the reference of fundamental human

01:12:40

rights or even the reference

01:12:43

to to a certain minimum

01:12:47

or minimal International. Law standards

01:12:53

related to the environment or

01:12:56

or labor. And and this

01:12:59

is a question that I

01:13:00

have grappled with if one

01:13:03

could find basically the you

01:13:08

know, those International minimal standard

01:13:11

concerning labor and and there

01:13:14

was a slide in my

01:13:14

presentation which made a reference

01:13:16

to ILO conventions Etc it

01:13:21

It seems to me that

01:13:22

in concerning labor. It might

01:13:24

be a little bit clearer

01:13:24

concerning environment. Except for the

01:13:29

precautionary principle, it may be

01:13:32

more difficult, but I'm not

01:13:35

an environmental law expert. You

01:13:37

may be a little bit

01:13:37

more difficult to to Conclude

01:13:41

which obligations or principles may

01:13:44

be customary. So I don't

01:13:46

I don't think that thing

01:13:48

that that the obligations should

01:13:49

be broad. They should be

01:13:51

specific and they should be

01:13:53

related to this notion that

01:13:56

that investors should at least

01:13:57

respect certain obligations that may

01:14:02

already be there and that

01:14:04

may already be customary the

01:14:06

the problem with that with

01:14:08

with with not including Those

01:14:11

obligations in a treaty is

01:14:13

that they may very well

01:14:15

exist in the public international

01:14:17

law system. However, if you

01:14:19

do not include them the

01:14:22

the tribunal would not necessarily

01:14:24

have jurisdiction over them. I

01:14:26

mean depends on the tribunal

01:14:27

but I would I would

01:14:28

say well it's not clear

01:14:30

that that even though they

01:14:32

exist the tribunal would be

01:14:34

able to rely upon those

01:14:36
obligations to bring or to

01:14:41
to To create some action

01:14:46
ability. Before the tribunal so

01:14:51
that that sort of a

01:14:52
question that that's why I

01:14:53
believe that it's important to

01:14:55
include them in a treaty.

01:14:56
There are things that you

01:14:58
don't need to include in

01:14:59
a tree like general principles

01:15:00
of law the the principle

01:15:03
of good faith whether you

01:15:05
include it or not. Most

01:15:06

tribunals have said well if

01:15:07

you act in a corrupt

01:15:09

manner like in in In

01:15:14

World duty free versus versus

01:15:15

Kenya or or if you

01:15:17

commit fraud like in in

01:15:20

say sat versus El Salvador,

01:15:22

you're breaching a general principle

01:15:23

of law, which you don't

01:15:24

do not necessarily have to

01:15:25

have in a treaty but

01:15:27

for certain specific obligations you

01:15:29

may have to to do

01:15:31

that. Thanks, Jose Antonio. I

01:15:37

might I might just ask

01:15:38

Robert a question one of

01:15:39

the questions which is counting

01:15:41

the chat and and that

01:15:42

is whether there are any

01:15:44

states that have yet signed

01:15:46

and ratified a sifca type

01:15:47

treaty. And secondly, is there

01:15:52

any anything now that the

01:15:55

impact would be on a

01:15:57

state having a sifter time

01:15:58

treaty and the relationship or

01:16:00

impact on foreign investment flows

01:16:03

into that country? Do we

01:16:06

know anything about those issues

01:16:07

Rob? 30 so this is

01:16:09

as you mentioned part of

01:16:11

the process. So this is

01:16:12

a sifca model is what

01:16:14

was developed for a specific

01:16:16

context in very recent months

01:16:18

and it was just for

01:16:20

the particular use of one

01:16:22

state as a model by

01:16:23

lateral investment tree hasn't had

01:16:25

the opportunity to be circulated

01:16:27

yet. It doesn't have the

01:16:28

opportunity to to be considered

01:16:30

regionally, but it very well

01:16:32

may be because the idea

01:16:33

is is this here if

01:16:34

you accept as a host

01:16:35

state if you accept the

01:16:37

terms of a sifca treaty

01:16:38

what you're effectively saying is

01:16:39

that it's not enough the

01:16:41

standard traditional old-fashioned bit from

01:16:44

the 1990s or from before.

01:16:46

It's not enough. Because we

01:16:48

want to not just have

01:16:49

the the inflow of investment.

01:16:51

We also want to have

01:16:52

protection we want to have

01:16:53

perhaps environmental production. We want

01:16:55

to have a human rights

01:16:56

protection. We want to have

01:16:57

a responsibility not just State

01:16:59

responsibility under public international law.

01:17:01

We want to also have

01:17:02

some responsibility from the investor.

01:17:03

And so if the if

01:17:05

a host State puts that

01:17:06

in place, there's essentially you're

01:17:09
essentially putting in as the

01:17:10
host State first a jurisdictional

01:17:12
barrier that you know, the

01:17:13
investor must make a declaration

01:17:15
first after that declaration is

01:17:16
made that if that Declaration

01:17:18
was not true with respect

01:17:19
to the solid human rights

01:17:21
record, you must have in

01:17:22
order for the state to

01:17:23
consent to invest your standard

01:17:25
arbitration at all. Well, then

01:17:26
you would have concerns with

01:17:28

with an investibility of the

01:17:31

claims and then moving on

01:17:32

the consent to third party

01:17:34

planes. Now, what would this

01:17:36

mean for for investors with

01:17:38

investors be encouraged to invest

01:17:40

it depends on how you

01:17:42

look at. It depends on

01:17:42

the context, you know, you

01:17:43

might think well gosh, that's

01:17:45

a lot to take on

01:17:45

the investors the investors. They

01:17:47

take that on obviously in

01:17:49

the event that they specifically

01:17:50

accept the standing offer under

01:17:53

a bit to arbitrate. That's

01:17:54

the only that's the only

01:17:55

time to go offer consent

01:17:57

that and so it's it's

01:17:58

always just a facet. It's

01:17:59

a feature of investor-state arbitration

01:18:01

with a state that has

01:18:03

a model bit of a

01:18:05

sifca, you know Style. And

01:18:07

so with that being the

01:18:08

case, I think also investors

01:18:09

will see and you know

01:18:11

look especially if you're talking

01:18:13

about developing countries developing countries

01:18:15

have concerns that are not

01:18:17

only related to inflow of

01:18:19

investment and they may very

01:18:22

well see this as a

01:18:23

positive step toward supporting increased

01:18:26

rule of law and the

01:18:27

establishment of higher standards. So

01:18:30

it depends on how you

01:18:31

look at it as an

01:18:32

investor and as a whole

01:18:33

state There's there's not you

01:18:36

know by comparison to the

01:18:38

standard bit model. There's there's

01:18:41

a lot to be gained

01:18:42

by having these additional protections

01:18:43

from from disputes. Yeah, thank

01:18:48

you. I might um one

01:18:50

question taking taking several steps

01:18:52

back from this topic and

01:18:53

that is that I suppose

01:18:55

we began with the the

01:18:57

asymmetrical nature of bilateral investment

01:19:00

treaties at the obligations are

01:19:01

on the states and the

01:19:02

investors have the right some

01:19:03

of this traditional model that

01:19:05

that we use to in

01:19:06

it and it's it's made

01:19:08

possible for states to make

01:19:09

counterclaims in certain circumstances, but

01:19:11

I suppose there's a and

01:19:14

and now there's maybe we

01:19:15

should be putting in obligations

01:19:16

on investors and we've heard

01:19:18

lots of good reasons for

01:19:19

that but And on another

01:19:21

views and not the case

01:19:22

that obligations on investors as

01:19:24
private entities. Their obligations should

01:19:28
come through domestic law and

01:19:31
all investment treaties. Either have

01:19:33
an Express or an implied.

01:19:35
requirement that the investor will

01:19:37
comply with the with the

01:19:39
law of the host State

01:19:40
at least in making the

01:19:40
investment and then if they

01:19:41
don't comply with the law

01:19:42
of the whole state in

01:19:43
the operation of their investment

01:19:44
that may May affect the

01:19:46
admissibility of the claim or

01:19:48
the merits of the claim

01:19:48
or or any award of

01:19:50
compensation that might ultimately may

01:19:52
be made to them if

01:19:52
they've carried on their investment

01:19:53
in some kind of unlawful

01:19:55
way. Even if it was

01:19:56
made in accordance with those

01:19:58
state law at the beginning.

01:20:00
and so I suppose my

01:20:01
broader question here is is

01:20:03
this not really all a

01:20:05

question of law enforcement and

01:20:07

the content of the domestic

01:20:08

law of the host State

01:20:09

and if the host state

01:20:11

of the investment chooses to

01:20:13

implement certain obligations concerning respect

01:20:16

for human rights on companies

01:20:17

that operate Within as a

01:20:22

matter for the whole state

01:20:22

and then there's going to

01:20:24

be a requirement for the

01:20:26

any foreign investor coming into

01:20:27

that state to do business

01:20:28

there to comply with local

01:20:30

law and I suppose I'm

01:20:32

being Devil's Advocate a little

01:20:33

bit here. But the question

01:20:34

is why can't we leave

01:20:36

all of this to the

01:20:37

domestic law of the host

01:20:38

State? Why do we have

01:20:39

to try to overcomplicate a

01:20:41

bilateral investment Treaty by seeking

01:20:43

to make them balancing the

01:20:45

sense of not only host states

01:20:47

potentially able to make claims

01:20:49

against investors, but even third

01:20:50

parties, so can we not

01:20:52

just leave things with the

01:20:54

As a matter of law

01:20:57

enforcement within the host State

01:20:58

many Clara I'll go to

01:21:00

you first and and then

01:21:01

maybe to the others it's

01:21:03

a large question. Now it's

01:21:05

a very easy one. The

01:21:06

reason is because where the

01:21:08

money is. so the thing

01:21:11

this is not that discussed

01:21:13

in the environment in the

01:21:14

investment local community. That's very

01:21:16

much discussed in the business

01:21:17

and human rights area, which

01:21:19

is the money is with

01:21:21

the parent company. So that's

01:21:24

an entity which is outside

01:21:26

of the control of the

01:21:27

host state. So the whole

01:21:29

state may have some control

01:21:30

over the local subsidiary what

01:21:33

will in principle not be

01:21:34

able to reach the parent

01:21:35

company. There's been some very

01:21:37

recent cases in in the

01:21:39

UK and in the Netherlands

01:21:40

where it has been possible

01:21:42

for but these were private

01:21:45

claims those are not claims

01:21:46

Broadway estate where the victims

01:21:48

were able to sort of

01:21:49

bring a claim towards against

01:21:52

a against the parent company,

01:21:55

but the estimator is also

01:21:58

in in this in this

01:22:02

level, right? So investment treaties

01:22:04

will allow the investor including

01:22:06

what it the subsidiary and

01:22:08

the parent company to suit

01:22:09

typically the shareholder in our

01:22:10

language and in the innocent

01:22:12

area, but that is not

01:22:13

the case the other way

01:22:14

around. Right. Thank you, Jose

01:22:18

Antonio and Robert maybe go

01:22:19

to each of you for

01:22:20

ones of last comment before

01:22:21

we have unfortunately wrap up

01:22:24

our panel, but maybe Jose

01:22:25

Antonio just to in a

01:22:28

minute or so. Yes, definitely.

01:22:31

my answer I agree with

01:22:33

with Clara with my answer

01:22:35

is because it hasn't worked

01:22:37

that that's really it hasn't

01:22:39

worked and and there are

01:22:44

There are still so many

01:22:45

imbalances in in the system.

01:22:48

And and we had a

01:22:51

discussion in another panel as

01:22:53

to the concerns of host

01:22:56

States and and developed host

01:22:58

States or develop exporting states

01:23:01

to host states that perhaps

01:23:04

if the standards are increased

01:23:07

in investment treaties, then we

01:23:09

will affect investment and and

01:23:12

and the view sometimes of

01:23:15

some businesses is not necessarily

01:23:17

that they're afraid that the

01:23:19

standards will will will will

01:23:21

increase but they are afraid

01:23:23

of uncertainty to the extent

01:23:25

that the standards are are.

01:23:27

Are clear even if they're

01:23:30

higher I think that their

01:23:33

investment will keep on flowing

01:23:35

and and I I see

01:23:39

it more as a discussion

01:23:41

that is sometimes put on

01:23:44

the table. By by Council

01:23:48

of investors. So so, you

01:23:51

know the frame of mind

01:23:53

that that things that well

01:23:55

you already have the domestic

01:23:56

law, so why don't you

01:23:59

apply it is a and

01:24:01

I'm not saying that I'm

01:24:02

not I'm not saying that

01:24:03

that about the question. I

01:24:04

know I'm not saying that

01:24:06

about your question, but I've

01:24:08

heard the argument that it

01:24:11

should be kept in domestic

01:24:12

law by many Council for

01:24:15

investors that say, well you

01:24:17

already have the whole domestic

01:24:18

law, but it hasn't worked

01:24:20

and what is wrong with

01:24:22

with creating? International obligations that

01:24:28

businesses will also have to

01:24:30

comply with and these are

01:24:32

very basic obligations. We're not

01:24:34

talking about about covering the

01:24:36

whole human rights, but these

01:24:38

are very very basic obligations

01:24:39

about about you know, child

01:24:42

labor about gender equality in

01:24:47

the in the workforce. These

01:24:48

are very very basic obligations

01:24:50

that they should comply with

01:24:51

and sometimes they're not complying

01:24:52

with so if they if

01:24:56

they were all to comply

01:24:57

I think that that the

01:24:58

system would be more balanced

01:25:00

overall. Thank you rope. Thanks

01:25:05

very much. If you can

01:25:06

manage in a minute, you

01:25:07

know, yeah, I think I

01:25:09

can I think again, you

01:25:10

know, it's it's interesting to

01:25:11

me to see you know,

01:25:13

my esteemed co-panelists here saying

01:25:16

things that are not academic

01:25:17

they're very practical, you know,

01:25:18

it's the money right or

01:25:21

it just hasn't worked right?

01:25:22

I think it's interesting for

01:25:24

us to note that the

01:25:25

whole question of why don't

01:25:26

we just leave this to

01:25:27

domestic law enforcement kind of

01:25:29

has that assumption that there

01:25:31

will be that domestic law

01:25:32

and enforcement uniformly around the

01:25:34

world if human rights are

01:25:36

supposed to be universally applicable.

01:25:37

Well, then bringing them even

01:25:40

closer into Universal applicability through

01:25:42

incorporation and invest your state

01:25:44

and you know just settlement

01:25:47

context and IAS probably make

01:25:49

some sense. It also probably

01:25:50

promotes the rule of a

01:25:51

lot more broadly probably help

01:25:52

strapped states that yes their

01:25:55

heart is there and putting

01:25:56

in the legislation or the

01:25:57

regulation but gosh, we're the

01:25:59

resources. How are you going

01:26:00

to have the resources necess?

01:26:02

To make it in actuality

01:26:04

on the ground. This just

01:26:05

helps. That's all. Right. Look,

01:26:09

thank you very much it

01:26:10

everybody. We've unfortunately run out

01:26:13

of time for this panel

01:26:14

session. I think the the

01:26:15

panelists and I are going

01:26:16

to go into a breakout

01:26:18

room to debrief but for

01:26:21

all the participants and we've

01:26:23

had a very good number

01:26:23

of participants and what is

01:26:26

a very early hour. For

01:26:27

those of you on the

01:26:28

east coast of the United

01:26:29

States. If you're on the

01:26:30

west coast of the United

01:26:31

States is very early and

01:26:33

for those of us in

01:26:34

other parts of the world,

01:26:34

it's it's getting kind of

01:26:35

late as well. Can I

01:26:38

can I think Clara for

01:26:40

an excellent opening presentation and

01:26:42

Jose Antonio and Rob for

01:26:43

their their remarks as well.

01:26:45

It's been a very stimulating

01:26:47

discussion and a conversation which

01:26:49

I think is going to

01:26:49

be going to continue in

01:26:52

the coming years as more

01:26:53

and more people become engaged

01:26:55
and more and more States

01:26:55
becoming engaged with these issues

01:26:57
and possibly seeing a fresh

01:26:59
way to look at incorporating

01:27:02
investor obligations into bilateral investment

01:27:04
treaties. So thank you very

01:27:06
much and I wish You

01:27:08
all the best those of

01:27:09
you who are continuing with

01:27:10
other panels for the world

01:27:11
arbitration update. There are two

01:27:13
more panels today is in

01:27:14
LED set at the outset.



01:27:16

Thank you very much. Everybody.

01:27:17

I'm Jose Antonio Clara and

01:27:20

Robert. Look forward to seeing

01:27:20

you in a breakout room

01:27:21

in a second. Thank you.

01:27:23

Thank you.